
ARTICLE

GOVERNING BY ASSIGNMENT

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Although expertise is a pillar of public administration and administrative law, the 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

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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.

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 values 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.

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INTRODUCTION

In early 2023, Senator Chuck Grassley launched a “sweeping review” of federal agencies’ use of the Intergovernmental Personnel Act of 1970, a statute that authorizes the temporary assignment of employees from nongovernmental entities into the federal government, among other institutional exchanges.¹ This review was in response to a *Politico* exposé

¹ News Release, Chuck Grassley, Grassley Launches Sweeping Review of Program Allowing Privately Employed Individuals to Serve in Federal Government Roles (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].

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.”² 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.³

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. The 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. A commission authorized by Congress noted in 2020 that only six percent of the federal workforce was under the age of thirty and nearly a *third* would be eligible for retirement by 2025.⁴ Pain points are especially acute in the context of technical talent; for example, one research group observed in 2024 that less than *one percent* of new PhDs specializing in artificial intelligence (AI) enter government rather than academia or the private sector.⁵ These trends question the foundation for legitimate administrative governance: expertise.⁶ The pressure to act despite capacity constraints makes 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.

² Alex Thompson, *Ex-Google Boss Helps Fund Dozens of Jobs in Biden’s Administration*, POLITICO (Dec. 22, 2022, 4:30 AM), <https://www.politico.com/news/2022/12/22/eric-schmidt-joe-biden-administration-00074160> [<https://perma.cc/C496-W4TN>].

³ *Grassley Launches Sweeping Review*, *supra* note 1.

⁴ NAT’L COMM’N ON MIL., NAT’L, & PUB. SERV., INSPIRED TO SERVE 65 (2020) [hereinafter 2020 NCMNPS REPORT], <https://www.volckeralliance.org/sites/default/files/attachments/Final%20Report%20-%20National%20Commission.pdf> [<https://perma.cc/99DS-XCEQ>]; *see also* Elizabeth Byers & Kennedy Teel, *A Profile of the 2023 Federal Workforce*, P’SHIP FOR PUB. SERV., <https://ourpublicservice.org/fed-figures/a-profile-of-the-2023-federal-workforce> [<https://perma.cc/VW8Q-HVFH>] (last visited Aug. 31, 2024) (“Employees under 30 represented just over 7% of the federal workforce while they constituted nearly 20% of the employed U.S. labor force in 2023. Federal employees between the ages of 30 and 49 made up about half of the entire workforce. Over 42% of federal employees were over the age of 50, compared to nearly 33% of the U.S. labor workforce.”).

⁵ NESTOR MASLEJ, LOREDANA FATTORINI, RAYMOND PERRAULT, VANESSA PARLI, ANKA REUEL, ERIK BRYNJOLFSSON, JOHN ETCHEMENDY, KATRINA LIGETT, TERAH LYONS, JAMES MANYIKA, JUAN CARLOS NIEBLES, YOAV SHOHAM, RUSSELL WALD & JACK CLARK, STANFORD INST. FOR HUM.-CENTERED AI, ARTIFICIAL INTELLIGENCE INDEX REPORT 2024 335 (2024), https://aiindex.stanford.edu/wp-content/uploads/2024/05/HAI_AI-Index-Report-2024.pdf [<https://perma.cc/6T9D-KL6R>].

⁶ *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, 152-55 (1997) (explaining the transition from centralized bureaucracy to the agency model); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2261-64 (2001) (describing historical, political, and theoretical justifications for agency independence grounded in expertise); *see generally* Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887) (discussing the need for experience in governing).

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 warranted, but the current focus is also confused. Attention is justified 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 AI is “workforce challenges.”⁷ 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).⁸
- The interim head of the Civil Rights Division in the Department of Justice (DOJ),⁹ the Chief Economist in DOJ’s Antitrust Division,¹⁰ the National AI Director,¹¹ and four of the six division heads of the Securities and Exchange Commission¹² were each, in President Biden’s Administration, individuals on IPA assignments.

⁷ Natalie Alms, *The People Problem Behind the Government’s AI Ambitions*, NEXTGOV/FED. COMPUT. WK. (Nov. 21, 2023), <https://www.nextgov.com/artificial-intelligence/2023/11/people-problem-behind-governments-ai-ambitions/392212> [<https://perma.cc/4BET-UBMX>].

⁸ See *infra* note 78 and accompanying text.

⁹ Memorandum from Lee J. Lofthus, Assistant Att’y Gen. for Admin., U.S. Dep’t of Just., 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), <https://nypost.com/wp-content/uploads/sites/2/2022/07/karlan-IPA.pdf> [<https://perma.cc/UCL2-35AS>].

¹⁰ Cf. Katharine Miller, *Pioneering Tech Economist Susan Athey Joins Federal Antitrust Team*, STAN. GRADUATE 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>].

¹¹ 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-lynn-parker-to-step-down> [<https://perma.cc/VTB3-Z98Q>].

¹² Letter from James Comer, Chairman, House Comm. on Oversight & Accountability, to Gary Gensler, Chairman, Sec. & Exch. Comm’n (Aug. 1, 2023), <https://oversight.house.gov/wp-content/uploads/2023/08/SEC-Intergovernmental-Personnel-Act-Letter.pdf> [<https://perma.cc/J32Z-CREA>].

- Government-wide initiatives, like President Biden's Frontiers of Benefit-Cost Analysis initiative¹³ and agencies' obligations to create learning agendas and evaluation plans under the Evidence Act, will likely continue to rely on IPA assignees.¹⁴

But while current scrutiny of the IPA is understandable, it has been muddled because it lacks conceptual clarity. The IPA has been used for different ends: to staff agencies, to bring in leadership, and to execute discrete special projects. Each raises different policy 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.¹⁵ In doing so, 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 *staff presidential administrations* with assignments into strategic leadership positions. 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

¹³ 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 (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/12/FINAL-SFBCA-Annual-Report-2023.pdf> [https://perma.cc/YUV6-FSPM].

¹⁴ See *infra* notes 117–121 and accompanying text.

¹⁵ Academic law reviews have discussed assignment under the IPA only briefly; 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 n.30, 2343 n.61 (2020) (describing IPA agreements); 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. ENV'T L. REV. 475, 520 (2007) (discussing government collaboration through IPA agreements); Joshua D. Sarnoff, *Government Choices in Innovation Funding (with Reference to Climate Change)*, 62 EMORY L.J. 1087, 1133–34 (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) (explaining changes to the Patent and Trademark Office based on the use of IPA agreements).

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 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 are often 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":¹⁶ neither contractors nor permanent bureaucrats, neither political appointees nor civil servants, neither fully in nor fully out of government. But despite their unique 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

16 Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 842 (2014).

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 as with grantmaking bodies to less troubling as for basic research positions. Finally, on policy grounds, expanded application of the IPA might help combat the technical capacity crisis in the public sector, especially by using academics to help supervise contractors, sending federal bureaucrats to state and local governments, and bringing in individuals with technical expertise residing in the United States on temporary visas.

In evaluating governing by assignment, two framing considerations are worth keeping in mind. First, while many of the examples of contemporary IPA practice we provide are from President Biden's Administration, there is in principle little reason to think that governing by assignment necessarily has a partisan skew. The IPA authorizes assignments from universities but also nonprofit institutions. One of the core uses of the IPA we highlight is in bringing in talent to help agencies fulfill their obligations under the Evidence Act—legislation signed into law by President Trump and sponsored by Speaker Ryan.¹⁷ Expertise in administrative governance, especially in implementing technology policy or other efforts to maintain economic competitiveness, is a good that transcends specific presidential administrations or ideological priorities.

Second, we admit that it is not at all clear that governing by assignment is optimal policy. And governing by assignment will not solve the federal government's tremendous capacity issues, because temporary assignments cannot fundamentally change the composition of the federal workforce. But we do not live in an optimal world. In an era of "insecure majorities,"¹⁸ the bipartisan collaboration necessary to make structural changes to the federal bureaucracy is not forthcoming.¹⁹ Urgent problems still, however, demand solutions. From mitigating and responding to climate change to managing the rapid development of AI to protecting natural security in cyberspace, the federal government needs technical expertise that agencies often cannot obtain from their traditional hiring routes. In some instances, where agencies

¹⁷ Nick Hart & Sandy Davis, *FACT SHEET: Foundations for Evidence-Based Policymaking Act*, BIPARTISAN POL'Y CTR. (Nov. 30, 2017), <https://bipartisanpolicy.org/blog/fact-sheet-foundations-for-evidence-based-policymaking-act> [<https://perma.cc/6MPB-45R8>] (noting sponsorship by Speaker Paul Ryan and Senator Patty Murray).

¹⁸ See generally FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* (2016).

¹⁹ To be sure, some effort has been made. See, e.g., Press Release, White House, *FACT SHEET: OMB and OPM Release Hiring Experience Guidance and Announce Commitments to Improve the Federal Hiring Experience* (Aug. 14, 2024), <https://www.whitehouse.gov/omb/briefing-room/2024/08/14/fact-sheet-omb-and-opm-release-hiring-experience-guidance-and-announce-commitments-to-improve-the-federal-hiring-experience> [<https://perma.cc/CR7Y-637Z>].

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 political 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.

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."²⁰ 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.²¹ The Act listed its first purpose as to "reinforce the federal system by strengthening the personnel resources of State and local governments."²²

20 2 THE PRESIDENT'S REORGANIZATION PROJECT, PERSONNEL MANAGEMENT PROJECT: APPENDICES TO THE FINAL STAFF REPORT app. IX 1 (1977) [hereinafter 1977 TASK FORCE APP'X IX], <https://books.google.com/books?id=c-JYVDj7qOgC> [<https://perma.cc/4VB2-QZGS>].

21 Letter from Norman J. Johnson, President, Nat'l Ass'n of Schs. of Pub. Affs. and Admin., to Dave Durenberger, Chairman, S. Subcomm. on Intergovernmental Rels. (July 10, 1981), in *Amending the Intergovernmental Personnel Act of 1970: Hearing Before the Subcomm. on Intergovernmental Rels. of the S. Comm. on Governmental Affs.*, 97th Cong. 120, 120 (1981) [hereinafter 1981 Congressional Hearing], <https://books.google.com/books?id=4xlNwQEACAAJ> [<https://perma.cc/7KUB-V7GJ>].

22 Intergovernmental Personnel Act of 1970, Pub. L. No. 91-648, § 1, 84 Stat. 1909, 1909 (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

Congress had good reason to worry about state and local governmental capacity.²³ 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 1975.²⁴ 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.”²⁵ 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.”²⁶

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-to-the-ground institutions to address issues, fit well with the IPA's premise.²⁷ The IPA's focus on personnel efficiency meshed with fiscal constraints, including rapid inflation and tighter governmental budgets.²⁸ In addition, the early 1970s came on the heels of the Civil Rights Era, when institutionalizing and operationalizing those gains loomed large. The IPA helped promote meritocracy in state and local

management capability of State and local governments”); Raymond A. Shapek, *The Intergovernmental Personnel Act Program and Management Capacity Development*, PUB. PERS. 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”).

²³ 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).

²⁴ U.S. GEN. ACCT. OFF., FPCD-80-11, AN EVALUATION OF THE INTERGOVERNMENTAL PERSONNEL ACT OF 1970 3 (1979) [hereinafter 1979 GAO REPORT], <https://www.gao.gov/assets/fpcd-80-11.pdf> [<https://perma.cc/3AWT-XK4Y>]. 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, 774 fig.1 (2019) (discussing the stagnation of the civil service).

²⁵ Shapek, *supra* note 22, at 79.

²⁶ 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).

²⁷ 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 22, 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.”).

²⁸ Shapek, *supra* note 22, at 79.

governments,²⁹ and key to that endeavor was implementing equal opportunity and affirmative action policies.³⁰

The IPA tried to meet these many demands. It created an advisory committee;³¹ authorized grants to state and local governments;³² enabled the Civil Service Commission to provide assistance in personnel administration;³³ established provisions for training state and local government employees;³⁴ and permitted federal agencies to assign employees to state and local governments and institutions of higher education and vice versa.³⁵ That last provision—Title IV, the “mobility program”—is what we now refer to as the IPA.³⁶

In the 1970s, equating the IPA with the mobility program would not have made sense. Although the IPA’s grant programs were always small,³⁷ they were lauded for their efficacy.³⁸ 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

²⁹ See, e.g., Conaway, *supra* note 26, 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).

³⁰ See 1979 GAO REPORT, *supra* note 24, at 7; S. REP. NO. 93–1028, at 38–39 (1974); U.S. CIV. SERV. COMM’N, 1976 ANNUAL REPORT 21 (1977) (“Equal employment opportunity is a major emphasis in all IPA technical assistance efforts.”); U.S. CIV. SERV. COMM’N, FISCAL 1977 ANNUAL REPORT 17 (1978) (discussing similar); *Amendments to the Intergovernmental Personnel Act of 1970: Hearings Before the Subcomm. on Emp. Pol. Rts. & Intergovernmental Progs. of the H. Comm. on Post Off. & Civ. Serv.*, 94th Cong. 81 (1975) [hereinafter 1975 *Congressional Hearings*], <https://play.google.com/books/reader?id=wUMqAAAAMAAJ&pg=GBS.PA2&chl=en> [<https://perma.cc/B85M-N3T3>] (statement of Don Benninghoven, Exec. Dir., League of Cal. Cities 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 C.R., 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).

³¹ Intergovernmental Personnel Act §§ 102–103, 84 Stat. at 1910–11.

³² *Id.* §§ 202–203, 84 Stat. at 1911–14.

³³ *Id.* §§ 204–205, 84 Stat. at 1914.

³⁴ *Id.* §§ 302–305, 84 Stat. at 1916–20.

³⁵ *Id.* § 402(a), 84 Stat. at 1920–25.

³⁶ 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.” We discuss specific constraints on these assignments below. See *infra* subsection III.A.

³⁷ See Shapek, *supra* note 22, at 77 tbl.1 (comparing IPA grants to total federal grants).

³⁸ See, e.g., 1979 GAO REPORT, *supra* note 24, 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 26, at 36–37 (discussing similar); U.S. CIV. SERV. COMM’N, FISCAL 1978 ANNUAL REPORT 17 (1979) (discussing similar); 1981 *Congressional Hearing*, *supra* note 21, at 2 (statement of Sen. Durenberger) (discussing similar).

their own personnel.³⁹ 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."⁴⁰ The April effort did not succeed, but the IPA's grants ended later that year through an appropriations provision.⁴¹

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.⁴² 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."⁴³ And Congress once again broadened eligibility in 1994 to include federally funded research and development centers (FFRDCs).⁴⁴

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 staffing*; *crafting a presidential administration*; and *executing discrete projects*. Table 1 summarizes these modalities.

³⁹ 127 CONG. REC. 7769 (1981).

⁴⁰ *Id.*; see also 1981 Congressional Hearing, *supra* note 21, at 2 (statement of Sen. Durenberger) (discussing the same).

⁴¹ S. REP. NO. 97-67, at 366 (1981) ("[N]o funding for IPA shall be provided after June 5, 1981."). When we discuss using IPA assignments for grant management today, see *infra* subsection IV.D.1, those grants are not from the IPA but rather part of agency grantmaking authority. For a helpful analysis of the complexities of federal grant management, see Eloise Pasachoff, *Federal Grant Rules and Realities in the Intergovernmental Administrative State: Compliance, Performance, and Politics*, 37 YALE J. REG. 573 (2020).

⁴² Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, § 105(d), 88 Stat. 2203, 2208-09 (1975) (codified at 42 U.S.C. § 4762).

⁴³ Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 603, 92 Stat. 1111, 1189-91 (1978).

⁴⁴ National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1068, 108 Stat. 2663, 2852-53 (1994).

Table 1: The IPA's Four Modalities

	Modality	Assignment Direction	Motivating Purposes	Archetypal Examples
Origins	Localism	Federal → State, Local, Tribal	<ul style="list-style-type: none"> • Enhancing local public management expertise • Implementing federal mandates • Developing “meritocratic” local government 	<ul style="list-style-type: none"> • Environmental Protection Agency (EPA) intergovernmental partnerships • Tribal takeover of Indian Health Service (IHS) hospitals via 638 contracting
	Staffing	Academic, Non-profit → Federal	<ul style="list-style-type: none"> • Addressing federal workforce constraints • Acquiring temporary expertise 	<ul style="list-style-type: none"> • NSF “rotator” program
Governing by Assignment	Leadership	Academic, Non-profit → Federal	<ul style="list-style-type: none"> • Facilitating presidential administration during transitions 	<ul style="list-style-type: none"> • DOJ Civil Rights Division Principal Deputy Assistant Attorney General (PDAAG) under Biden • Office of Science and Technology Policy (OSTP) Deputy CTO under Biden
	Projects	Academic → Federal	<ul style="list-style-type: none"> • Acquiring technical and scientific expertise on a discrete or consultative basis 	<ul style="list-style-type: none"> • IRS Joint Statistical Research Program

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.”⁴⁵ They created training programs for state

45 Miriam Ershkowitz, *The IPA Mobility Program*, 65 ACADEME 156, 157 (1979).

universities and “areawide human-care-services plan[s].”⁴⁶ And they served as a county’s “first county executive” and as a “State budget officer.”⁴⁷ Federal employees on IPAs were often received 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].”⁴⁸

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.⁴⁹ Around one-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.”⁵⁰

The EPA’s program advanced effective federalism and supported its mission. Assignments not only helped “lend . . . expertise” but also “developed a relationship with States.”⁵¹ An EPA official in 1989 testified that

⁴⁶ 1975 *Congressional Hearings*, *supra* note 30, at 14 (statement of Joseph M. Robertson, Dir., Bureau of Intergovernmental Pers. Programs, U.S. Civ. Serv. Comm’n).

⁴⁷ *Id.*

⁴⁸ *Id.* at 74-75 (statement of Lee Galeotos, Special Assistant, Nat’l Governors’ Conf.).

⁴⁹ U.S. GEN. ACCT. OFF., GAO/GGD-89-95, INTERGOVERNMENTAL PERSONNEL ACT OF 1970: INTERGOVERNMENTAL PURPOSE NO LONGER EMPHASIZED 49 tbl.IV.7 (1989) [hereinafter 1989 GAO REPORT], <https://www.gao.gov/assets/ggd-89-95.pdf> [<https://perma.cc/8TGZ-UMZ4>].

⁵⁰ *Intergovernmental Personnel Act Mobility Program: Hearing Before the Subcomm. on Hum. Res. of the H. Comm. on Post Off. & Civ. Serv.*, 101st Cong. 29 (1989) [hereinafter 1989 *Congressional Hearing*]. (statement of Kenneth F. Dawsey, Dir., Off. of Hum. Res. Mgmt., Env’t Prot. Agency), https://books.google.com/books/about/Intergovernmental_Personnel_Act_Mobility.html?id=ReMXODYuEYC [<https://perma.cc/K8KW-ZG6F>]. This function of IPA assignees, we note, parallels Adam Zimmerman’s discussions of federal agency influence over state lawmaking, but it is unclear to what extent these IPAs actually drafted law in the way that Zimmerman identified. See Adam S. Zimmerman, *Ghostwriting Federalism*, 133 YALE L.J. 1802, 1844-48 (2024) (describing the potential use of IPAs in writing legislation).

⁵¹ See 1989 *Congressional Hearing*, *supra* note 50, at 27-28 (statement of Kenneth F. Dawsey, Dir., Off. of Hum. Res. Mgmt., Env’t Prot. Agency) (discussing the usefulness of IPA contractors); 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, 500 (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) (underscoring the conflict between localism and national federalism); Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism’s Administrative Law*, 132 YALE L.J. 1320, 1333-52 (2023) (describing coordinated rulemaking between federal and state agencies in “Medicaid, the Clean Air Act, public education, highway construction, and national-security surveillance”); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2020 (2014) (describing federal activities undertaken by local governments); Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble*, 81 FORDHAM L. REV. 1749, 1761-65 (2013) (examining this situation in the context of healthcare reform).

enforcement of federal environmental laws requires an “extensive network” of expertise, comprising employees of different levels of government, universities, and nonprofit organizations.⁵² 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.”⁵³

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,⁵⁴ allowed tribes to directly administer federal functions created for Native Americans under so-called “638 contracts.”⁵⁵ For example, tribes took over 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).⁵⁶

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 of outside persons through traditional hiring processes; direct hires of the federal employees; or IPA agreements with the federal employees.⁵⁷ IPA agreements made at the time of the 638 contract are “special purpose assignments”—authorized under a bespoke provision passed in 1983⁵⁸—that “may be extended indefinitely in increments of two years or less.”⁵⁹ The IPA thus smoothed operational transitions, allowing tribes to assume control over a hospital without interrupting employee benefits or needing to make immediate personnel

⁵² 1989 Congressional Hearing, *supra* note 50, at 28 (statement of Kenneth F. Dawsey, Dir., Off. of Hum. Res. Mgmt., Env’t Prot. Agency).

⁵³ *Id.*

⁵⁴ See *supra* note 42 and accompanying text (discussing IPA implementation regarding tribal organizations).

⁵⁵ See, e.g., Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 779-81 (2006) (providing historical overview of contracting federal functions for tribal administration in tribal self-determination and governance initiatives).

⁵⁶ 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*] (discussing this phenomenon).

⁵⁷ See, e.g., INDIAN HEALTH SERV., DEP’T OF HEALTH & HUM. SERVS., PERSONNEL ASPECTS OF THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT PUBLIC LAW 93-638 1-2 (1986) [hereinafter 1986 ISDA PERSONNEL MANUAL], <https://books.google.com/books?id=8xCRAAAAMAAJ> [<https://perma.cc/NC2U-4N6W>].

⁵⁸ Pub. L. No. 98-146, 97 Stat. 919, 946 (1983) (examining these options).

⁵⁹ 1986 ISDA PERSONNEL MANUAL, *supra* note 57, at 2-6; see 5 U.S.C. § 3372(a) (authorizing such actions). Such special purpose IPA assignments are not uncommon. See U.S. GEN. ACCT. OFF., GAO-01-1016, NATIONAL SCIENCE FOUNDATION: EXTERNAL ASSIGNMENTS UNDER THE INTERGOVERNMENTAL PERSONNEL ACT MOBILITY PROGRAM 3 & n.3 (2001) [hereinafter 2001 GAO REPORT ON NSF], <https://www.gao.gov/assets/gao-01-1016.pdf> [<https://perma.cc/K2M4-TX33>] (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).

decisions.⁶⁰ 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."⁶¹ Having qualified employees with federal-level compensation supported these contracts.⁶² As a representative of various Alaska Native tribes explained to Congress, "[t]he 638 contracting of major health programs cannot succeed without substantial use of the IPA process."⁶³

Both cases reflect the value of the IPA's flexibility in making assignment agreements and show the importance of assignees retaining their home institution's level of pay. Indeed, retaining that home institution's pay and benefits may be a central benefit of the IPA even when the assignment is not a temporary assignment but effectively long-term employment, as the special carveout for IPA assignees pursuant to 638 contracts reflects; in those contexts, duration limits on an IPA agreement are not desirable. We return to pay and duration issues below.

As a general matter, this localism form of the IPA has largely disappeared.⁶⁴ The EPA had only eighteen IPA assignees between June 1,

⁶⁰ See Washburn, *Tribal Co-Management*, *supra* note 56, at 273 (describing these benefits); see also BUREAU OF INDIAN AFFS., DEP'T OF INTERIOR, HANDBOOK FOR DECISION MAKERS ON TITLE I OF THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT 49 (1976) (allowing for this smooth transition); 1986 ISDA PERSONNEL MANUAL, *supra* note 57, at 1-2 (discussing the same).

⁶¹ See U.S. CONG. OFF. OF TECH. ASSESSMENT, OTA-H-290, INDIAN HEALTH CARE 226 (1986), <https://ota.fas.org/reports/8609.pdf> [<https://perma.cc/R9AZ-YP7N>]; see also *id.* at 34. Even though the ISDA purports to give funding to 638 contractors that is equal to what IHS had to provide the services, tribes have often viewed the funding as inadequate, which has led to cutting support costs and offering noncompetitive salaries. See, e.g., U.S. 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 C.R., A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 45 (2003), <https://www.usccr.gov/files/pubs/nao703/nao204.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).

⁶² *Indian Self-Determination and Education Assistance Act, Public Law 93-638: Hearing Before the S. Select Comm. on Indian Affs.*, 100th Cong. 164-65 (1987) (prepared statement on behalf of Standing Rock Sioux Tribe, N.D. & S.D., et al.); see also *Indian Self-Determination and Education Assistance Act Amendments of 1987: Hearing Before the S. Select Comm. on Indian Affs.*, 100th Cong. 53 (1987) [hereinafter *Sept. 1987 ISDA Amendments Hearing*] (statement of Reid Chambers, Att'y, Alaska Native Health Bd.) (discussing such benefits).

⁶³ *Sept. 1987 ISDA Amendments Hearing*, *supra* note 62, at 45 (statement of Margaret Roberts, Bd. Member, Alaska Native Health Bd.). The National Park Service provides another example, transitioning land management from the NPS to the Grand Portage Band of Minnesota Chippewa. An NPS employee who did not want to lose their job under NPS moved onto an IPA agreement with the Band. See King, *supra* note 15, at 520-21.

⁶⁴ See 1989 GAO REPORT, *supra* note 49, at 3 (noting that in the 1970s, sixty percent of IPA assignments were with state and local governments, but from 1984 to 1988 only twenty percent of assignments were localism agreements). Using the IPA to send federal employees to states and localities presumably ran into budgetary constraints and staffing needs of federal agencies. States and localities also increased their own capacity during this period.

2016, and May 31, 2019.⁶⁵ 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,⁶⁶ contemporary discussions of the IPA largely omit this modality.⁶⁷ The localism modality could, however, make a comeback in an area where the federal government develops a comparative advantage in building expertise, such as with AI.⁶⁸

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.⁶⁹ In short, the point is to bring in outside expertise.⁷⁰ Although IPA staffing is

65 OFF. OF INSPECTOR GEN., U.S. ENV'T PROT. AGENCY, 20-P-0245, EPA NEEDS TO STRENGTHEN CONTROLS OVER REQUIRED DOCUMENTATION AND TRACKING OF INTERGOVERNMENTAL PERSONNEL ACT ASSIGNMENTS 5-6 (2020) [hereinafter 2020 EPA IG REPORT], https://www.epa.gov/sites/default/files/2020-08/documents/_epaig_20200810-20-p-0245.pdf [<https://perma.cc/6KR7-R49F>].

66 See generally 2001 GAO REPORT ON NSF, *supra* note 59.

67 See, e.g., U.S. 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) [hereinafter 2022 GAO REPORT], <https://www.gao.gov/assets/gao-22-104414.pdf> [<https://perma.cc/XXC9-3D2S>] (framing the IPA as a way for federal agencies to “address skills gaps”).

68 The Biden Administration has directed considerable efforts toward AI regulation. See Safe, Secure, and Trustworthy Artificial Intelligence, Exec. Order No. 14,110, 88 Fed. Reg. 210 (Oct. 30, 2023). While California may not need federal expertise in AI, other states may. Some have recently called for federal employees to use the IPA to spend time in nonprofits. Alexander Lopez-Perez, *Why Every Federal Employee Should Consider an Intergovernmental Personnel Act Detail*, P'SHIP FOR PUB. SERV. BLOG (July 2, 2024), <https://ourpublicservice.org/blog/intergovernmental-personnel-act-ipa-detail-cx-roundtable> [<https://perma.cc/98MD-59UF>].

69 There are some assignees from state, local, or tribal governments. Such assignments may promote both 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 Band's relationship 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, 9:24 AM), <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>].

70 1989 *Congressional Hearing*, *supra* note 50, at 49 (statement Jeff M. Fenstermacher, Assistant Dir., Directorate of Admin., Nat'l Sci. Found.). David Lewis pointed out to us an interesting historical parallel to the so-called “dollar-a-year” men—businessmen who served in the federal government primarily in defense and war-production contexts during World Wars I and II and the Korean War. As we discuss below with legal issues that arise in the IPA context, see *infra* subsection III.D, the dollar-a-year men raised substantial concerns about conflicts of interest because they were paid primarily by their private employers while nevertheless serving the government. See generally Michael D. Reagan, *Serving Two Masters: Problems in the Employment of Dollar-a-Year and Without Compensation Personnel* (1960) (Ph.D. Dissertation, Princeton University) (ProQuest) (discussing these concerns).

temporary, the flexibility of the IPA's duration can benefit the agency, and the limited duration (and ability to return full time to the home institution) makes some assignments possible that would not have otherwise occurred.⁷¹ Specifically, an agency might not be able to pull an academic away from "their university security, their seniority system, their benefit programs," but a temporary assignment is often more tenable.⁷² After the Covid-19 pandemic, remote IPA assignments allowed government service without requiring assignees to move their families to Washington, D.C. or some other location.⁷³

The NSF's use of the IPA demonstrates the staffing modality. The NSF relies on the IPA, typically sharing costs with partnering institutions, because it needs researchers at the frontier of science and engineering fields and desires "expertise and skills that are not available in [its] workforce."⁷⁴ In 1989, the NSF had 1,200 employees, of which over four hundred were scientists or engineers; within that, more than one hundred were "rotators"—assignees into NSF from universities, other agencies, or even private firms, including through the IPA.⁷⁵ That year, NSF had fifty-eight IPAs at all levels of its organizational hierarchy.⁷⁶ The NSF's reliance on the IPA has only grown since the late 1980s, tripling between 1990 and 1997.⁷⁷ While the pace of growth has slowed since then, the number of IPAs at NSF has nearly doubled from 1999 to 2023.⁷⁸ By 2022, 12.3% of NSF's full-time equivalent (FTE) staff served under the IPA.

⁷¹ Cf. VA Infrastructure Powers Exceptional Research Act of 2021, H.R. 5721, 117th Cong. (2021) (eliminating time limits on VA use of the IPA in light of VA's research needs).

⁷² 1989 Congressional Hearing, *supra* note 50, at 29 (statement of Thomas S. McFee, Assistant Sec'y for Pers. Admin., Dep't of Health and Hum. Servs.).

⁷³ Interview with anonymous agency official (or former official) #8 (June 3, 2024) (on file with authors); Interview with anonymous agency official (or former official) #9 (June 10, 2024) (on file with authors).

⁷⁴ 1989 Congressional Hearing, *supra* note 50, at 29; U.S. GEN. ACCT. OFFICE, GAO-01-1016, NATIONAL SCIENCE FOUNDATION: EXTERNAL ASSIGNMENTS UNDER THE INTERGOVERNMENTAL PERSONNEL ACT'S MOBILITY PROGRAM 9 (2001) (noting that NSF paid 77.5% of the costs between January 1995 and December 2000).

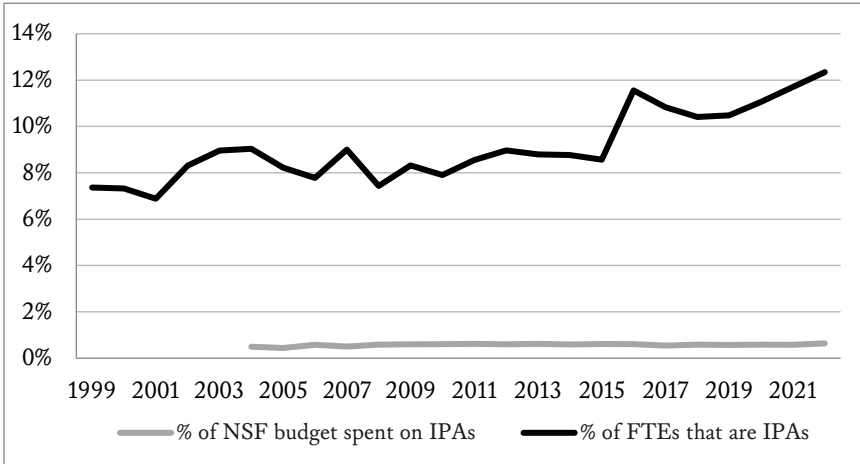
⁷⁵ 1989 Congressional Hearing, *supra* note 50, at 46 (statement of Jeff M. Fenstermacher, Assistant Dir., Directorate of Admin., Nat'l Sci. Found.).

⁷⁶ *Id.* at 47.

⁷⁷ Jeffrey Mervis, *Revolving Door Brings in Scientists—at a Price*, 227 SCI. 1599, 1599 (1997) [hereinafter Mervis, *Revolving Door*], <https://www.science.org/doi/full/10.1126/science.277.5332.1599> [<https://perma.cc/RPU4-2XK9>]. Mervis notes that in that period "some IPAs [were] paid more than their federal counterparts" because "NSF foot[ed] the bill for salaries and benefits at the same level paid by the universities." *Id.*

⁷⁸ NAT'L SCI. FOUND., FY 2024 BUDGET REQUEST TO CONGRESS (2023); *see also Annual Budget Requests to Congress 1999-2022*, NAT'L SCI. FOUND., <https://new.nsf.gov/about/budget> [<https://perma.cc/WSL3-YGLG>] (last visited Oct. 5, 2024).

Figure 1: IPA Assignees in Proportion to NSF's FTE Count and Budget⁷⁹



The OSTP, which advises the President on science and technology policy,⁸⁰ provides another example. OSTP's permanent staff "represent a fraction of those working at OSTP" due to its heavy reliance on alternative staffing mechanisms.⁸¹ For example, while OSTP reported forty-six FTEs in FY 2023, up from thirty-three in FY 2022, a staff list from October 2022 showed a total of 136 employees.⁸² 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.⁸³ In the preceding three Administrations, OSTP consistently had

⁷⁹ See *supra* note 78; *Executive Branch Civilian Employment Since 1940*, U.S. 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/9YZ6-349E>] (last visited Oct. 7, 2024) (federal civilian employment numbers 1970-2014). IPAs were not broken apart from general Program Support until 2004.

⁸⁰ 42 U.S.C. § 6614.

⁸¹ EMILY G. BLEVINS, CONG. RSCH. 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>]. 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, *IDA 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>] (discussing the report).

⁸² See BLEVINS, *supra* note 81, at 10.

⁸³ *Id.*

dozens of temporary employees, comparable to or greater than the number of permanent employees.⁸⁴

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.⁸⁵ Unlike NSF, many of these assignments came from nonprofit organizations or FFRDCs rather than universities.⁸⁶ While we do not know for certain why OSTP has relied heavily on temporary methods of staffing, contributing factors likely include budgetary pressures⁸⁷ 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.⁸⁸

Two other examples of agencies relying on this staffing modality are the Defense Advanced Research Projects Agency (DARPA), where some fifty percent of the staff are rotators through the IPA,⁸⁹ and the Department of Veterans Affairs, which relies heavily on IPA agreements for health research.⁹⁰

A distinct manifestation of the staffing modality involves the use of the IPA to establish 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, which enabled the creation of a new

⁸⁴ 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> [<https://perma.cc/FPX4-EBL2>] (stating that, in 2012, there were ten IPAs out of ninety-three staff, only twenty of whom were careerists, and forty FTEs).

⁸⁵ For a spreadsheet of OSTP’s IPA assignments, see *IPA Mobility Program Agreements*, MUCKROCK, <https://www.muckrock.com/foi/united-states-of-america-10/ipa-mobility-program-agreements-132328> [<https://perma.cc/6MJK-4SH7>] (last updated Aug. 12, 2022) (download “2022.08.12 RELEASE 22-092_Red_PRODUCED”).

⁸⁶ 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).

⁸⁷ BLEVINS, *supra* note 81, 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, 4:30 AM), <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 nonprofit organizations have pooled funds to “support fellowships in the federal government,” including at OSTP).

⁸⁸ See EMILY G. BLEVINS & RACHAEL 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>] (advocating for expert availability).

⁸⁹ 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://perma.cc/ZSE3-A9AT>].

⁹⁰ 1989 *Congressional Hearing*, *supra* note 50, at 43 (statement of Richard Greene, Assistant Chief Med. Dir., Rsch. & Dev., Dep’t of Veterans Affs.).

office before the Administration could secure funding from Congress.⁹¹ Similarly, IPA assignees filled some key early staff positions at the Advanced Research Projects Agency for Health (ARPA-H),⁹² an agency that seeds funding for speculative but high-impact biomedical innovation.⁹³ 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.⁹⁴ 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 positions such as the temporary head of the DOJ's Civil Rights Division,⁹⁵ the DOJ's Antitrust Division's Chief Economist,⁹⁶ the head of the National AI Initiative,⁹⁷ two NSF divisional directors,⁹⁸ four division heads of the SEC,⁹⁹ and various senior advisors.¹⁰⁰ This use of the IPA did not start with the Biden Administration.¹⁰¹

⁹¹ Interview with anonymous agency official (or former official) #4 (Sept. 21, 2023) (on file with authors); *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> [<https://perma.cc/8BRJ-KXMY>] (describing the nudge unit as starting out with “no budget, no mandate, no bona-fide employees”).

⁹² Interview with anonymous agency official (or former official) #2 (Aug. 16, 2023) (on file with authors); *see also* E-mail from anonymous agency official (or former official) #2 to authors (Sept. 27, 2024) (on file with authors).

⁹³ *A Growing Number of Governments Hope to Clone America's DARPA*, ECONOMIST (June 5, 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>].

⁹⁴ Interview with anonymous agency official (or former official) #5 (Sept. 21, 2023) (on file with authors) (noting their only option to establish a new office was bringing in IPA assignees one by one and then, after establishing their value to the agency, presenting a formal proposal for the new office to human resources officials); *see also* E-mail from anonymous agency official (or former official) #5 to authors (Sept. 26, 2024) (on file with authors).

⁹⁵ Memorandum from Lee J. Lofthus, *supra* note 9.

⁹⁶ Miller, *supra* note 10.

⁹⁷ Krishan, *supra* note 11.

⁹⁸ 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).

⁹⁹ Letter from James Comer, *supra* note 12.

¹⁰⁰ *See, e.g., Elizabeth Cisar*, JOYCE FOUND., <https://www.joycefdn.org/staff/elizabeth-cisar> [<https://perma.cc/5QNA-HBUC>] (last visited Sept. 14, 2024) (serving as an advisor).

¹⁰¹ *See, e.g., Rai, supra* note 15, at 2054 (Chief Economist of the Patent and Trademark Office under the George W. Bush Administration); *Purdue University Names Chiang Its Next President*, PURDUE UNIV. (June 10, 2022), <https://www.purdue.edu/newsroom/releases/2022/Q2/purdue>

These IPA assignees have served as important agency leaders. The Attorney General in the Obama Administration tapped an IPA assignee to “quarterback” major civil rights litigation. In the beginning of the Biden Administration, an IPA assignee “led” an office of DOJ normally headed by an Assistant Attorney General “for a few months” as the Administration waited for the Senate to confirm its nominee.¹⁰² The Antitrust Division’s Chief Economist, an IPA assignee, co-led the DOJ’s team working on new draft horizontal merger guidelines.¹⁰³ The Obama Administration employed an IPA at Housing and Urban Development (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.”¹⁰⁴ The Deputy Chief Technology Officer in OSTP, on an IPA agreement, issued recommendations for how to strengthen the nation’s AI research ecosystem and contributed to the National Artificial Intelligence Research and Development Strategic Plan.¹⁰⁵ And the Veterans Affairs Department (VA) hired its inaugural Director of Artificial Intelligence under what appears to be an IPA.¹⁰⁶

Assignees thus run the gamut of agency leadership responsibilities. They have represented their agencies while testifying before Congress.¹⁰⁷ They

university-names-chiang-its-next-president.html [https://perma.cc/Z329-3YTW] (Senior Advisor to Secretary of State under the Trump Administration).

¹⁰² Mike Scarcella, *After DOJ Detail, Stanford’s Karlan Returns to Clinic, Classes*, REUTERS (Sept. 8, 2022, 2:03 PM), <https://www.reuters.com/legal/government/after-doj-detail-stanfords-karlan-returns-clinic-classes-2022-09-08> [https://perma.cc/79PW-WJA4].

¹⁰³ See Ashley Belanger, *FTC Rewrites Rules on Big Tech Mergers with Aim to Ease Monopoly-busting*, ARSTECHNICA (July 19, 2023, 4:13PM), <https://arstechnica.com/tech-policy/2023/07/ftc-rewrites-rules-on-big-tech-mergers-with-aim-to-ease-monopoly-busting/> [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).

¹⁰⁴ P’SHIP FOR PUB. SERV., IPA CASE STUDY—DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT 1 (2022), <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].

¹⁰⁵ 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] (describing these recommendations); 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].

¹⁰⁶ Gil Alterovitz, PhD, FACMI, FAMIA, ACT-IAC, <https://www.actiac.org/bio/gil-alterovitz-phd-facmi-famia> [https://perma.cc/HT36-QG6L] (last visited Sept. 14, 2024) (stating that Alterovitz “is also a faculty member at Harvard Medical School” while serving as the AI director, suggesting he is in under an IPA); *VA NAI Director Wins 2023 Disruptive Tech Change Agent Award*, 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 Alterovitz, PhD, FACMI, FAMIA, LINKEDIN, <https://www.linkedin.com/in/gilalterovitz> [https://perma.cc/A8VY-C65H] (last visited Aug. 25, 2023) (same).

¹⁰⁷ Samuel Bagenstos, when he was the Deputy Assistant Attorney General of the DOJ’s Civil Rights Division under an IPA agreement, testified before both the Senate and House Judiciary

have issued statements on behalf of their agencies, including warnings to potential opposing parties about compliance with federal law.¹⁰⁸ They have signed consent decrees¹⁰⁹ and settlement agreements.¹¹⁰ In one instance, an IPA assignee was the top DOJ official on a filed complaint.¹¹¹ At times, IPA assignees' duties have overlapped with those traditionally performed by a presidential appointee.¹¹² 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

Committees. See *Human Rights at Home: Mental Illness in U.S. Prisons and Jails: Hearing Before the Subcomm. on Hum. Rts. & the 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., C.R. & 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 that capacity, testified before Congress in 2015 and 2016. See Jeffrey Mervis, *Departing Senior NSF Manager Offers Hopeful Assessment of Agency's Future*, SCI. (Feb. 27, 2017), <https://www.science.org/content/article/departing-senior-nsf-manager-offers-hopeful-assessment-agency-s-future> [<https://perma.cc/QHD9-SV9W>]; *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 (2015); *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).

¹⁰⁸ For example, when Pamela Karlan served as the Principal Deputy Assistant Attorney General at the DOJ 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. Press Release, Dep't of Just., Statement by the Principal Deputy Assistant Attorney General for Civil Rights Leading a Coordinated Civil Rights Response to Coronavirus (COVID-19) (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, Ariz. State S. (May 5, 2021), <https://www.justice.gov/crt/case-document/file/1424586/download> [<https://perma.cc/VD3A-SU5L>].

¹⁰⁹ See, e.g., 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://perma.cc/LCP2-GY6U>].

¹¹⁰ See, e.g., Settlement Agreement, *United States v. Beginning Montessori Academy* (May 17, 2011), https://archive.ada.gov/ventura_ca.htm [<https://perma.cc/2QFM-DDEX>].

¹¹¹ See Complaint at 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> [<https://perma.cc/Y27D-WKPY>] (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).

¹¹² See Interview with anonymous agency official (or former official) #1 (July 27, 2023) (on file with authors) (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 except for a few circumstances specified in agency regulations).

project-based model with IPA assignments from academic institutions.¹¹³ Both sides benefit from structuring certain research initiatives through a flexible, project-based model rather than through full-time hiring.¹¹⁴ Agencies obtain policy insights from teams with high levels of technical expertise who likely would not be willing to leave their full-time jobs, and researchers get access to important data. Such coordinated research work is increasingly being mandated under the Evidence Act,¹¹⁵ which requires agencies to develop multi-year evidence-building “learning agendas” and evaluation plans.¹¹⁶ Those tasks are well suited for academic social science researchers who have built careers evaluating policies and building evidence bases.¹¹⁷

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 its mandates.¹¹⁸ 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.¹¹⁹

¹¹³ 1989 Congressional Hearing, *supra* note 50, at 40 (statement of Joyce Felder, Assoc. Dir. for Pers. Operations, Dep’t of Veterans Affs.).

¹¹⁴ U.S. GEN. SERVS. ADMIN., INTERGOVERNMENTAL PERSONNEL ACT TOOLKIT: INTERNAL GUIDE FOR IPAS 3-4 (2022) [hereinafter GSA IPA TOOLKIT], <https://oes.gsa.gov/assets/files/ipa-toolkit-oes.pdf> [<https://perma.cc/SG5X-SE3U>]; *CEO Intergovernmental Personnel Act (IPA) Fellowship*, U.S. 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>] (last visited Aug. 25, 2023); *VA Ann Arbor Healthcare System Research Services*, U.S. DEP’T OF VETERANS AFFS., <https://www.annarbor.research.va.gov/ipa.asp> [<https://perma.cc/TEP4-XVKQ>] (last visited Sept. 14, 2024).

¹¹⁵ Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. No. 115-435, 132 Stat. 5529 (2019).

¹¹⁶ Memorandum from Russel T. Vought, Acting Dir., Off. of Mgmt. & Budget, to Heads of Exec. Dep’ts & Agencies 5-8 (July 10, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/07/M-19-23.pdf> [<https://perma.cc/NNC5-3FPB>].

¹¹⁷ U.S. GEN. SERVS. ADMIN., EVIDENCE ACT TOOLKIT: A GUIDE TO DEVELOPING YOUR AGENCY’S LEARNING AGENDA 11-12 (2020) [hereinafter GSA EVIDENCE ACT TOOLKIT], https://oes.gsa.gov/assets/toolkits/A_Guide_to_Developing_Your_Agency’s_Learning_Agenda_updated.pdf [<https://perma.cc/N5U8-SGYE>].

¹¹⁸ Gov Innovator Podcast, *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*, (Jan. 8, 2021), <https://govinnovator.com/day-manoli-2021> [<https://perma.cc/8PXP-KBF2>].

¹¹⁹ See, e.g., GSA EVIDENCE ACT TOOLKIT, *supra* note 117, at 12 (recommending the use of IPAs); 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>] (discussing the need for experts in evidence-building work); Press Release, White House, *Fact Sheet: Biden-Harris Administration Launches Year of Evidence for Action to Fortify and Expand Evidence-Based Policymaking* (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>] (emphasizing the use of evidence in policy); Andrew Feldman, *Creating the Foundation for Building an Agency Culture That Values Evidence*, GOV’T EXEC.

The General Services Administration's (GSA) Office of Evaluation Sciences even made an internal guide on how the IPA can support agency evidence needs.¹²⁰ Agencies have begun to develop 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.¹²¹ And, on the other side of the agreement, universities that continue to pay their faculty members understand that those individuals obtain unique experience and access to research opportunities that can yield scholarly publications.

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.¹²² The IRS relied on the IPA to establish an entire Joint Statistical Research Program where outside researchers come in on IPAs to access microdata.¹²³ Other agencies have employed the IPA to fill specific gaps in research capabilities. For example, the U.S. Army Corps of Engineers brought in a professor on an "as-needed basis" to develop camouflage technologies, and DARPA brought a professor in to manage voice recognition technology research.¹²⁴ Back in 1989, a Department of Veterans Affairs official described these IPA assignees as "rather 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."¹²⁵

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 potentially permit working remotely. While the other modalities focus more on the receiving party—the local or state institution, the federal agency, the presidential

(Nov. 19, 2019), <https://govexec.com/management/2019/11/creating-foundation-building-agency-culture-values-evidence/161394> [<https://perma.cc/C6LT-9R49>] (discussing the same).

¹²⁰ GSA IPA TOOLKIT, *supra* note 114.

¹²¹ *CEO Intergovernmental Personnel Act (IPA) Fellowship*, *supra* note 114; *Opportunities to Join the OES Team*, U.S. GEN. SERVS. ADMIN.: OFF. OF EVALUATION SCIS., <https://oes.gsa.gov/opps> [<https://perma.cc/GB3N-588D>] (last visited Sept. 14, 2024) (promoting the OES fellowship).

¹²² U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-519SP, ARTIFICIAL INTELLIGENCE: AN ACCOUNTABILITY FRAMEWORK FOR FEDERAL AGENCIES AND OTHER ENTITIES 51 (2021), <https://www.gao.gov/assets/720/716110.pdf> [<https://perma.cc/3MUF-JW8V>].

¹²³ INTERNAL REVENUE SERV., STATISTICS OF INCOME—JOINT STATISTICAL RESEARCH PROGRAM: CALL FOR PROPOSALS, <https://www.irs.gov/pub/irs-soi/18jsrppapplication.pdf> [<https://perma.cc/87NY-CPJQ>] (last visited Oct. 6, 2024).

¹²⁴ 2022 GAO REPORT, *supra* note 67, at 14-15.

¹²⁵ 1989 *Congressional Hearing*, *supra* note 50, at 43 (statement of Richard Greene, Assistant Chief Med. Dir., Res. & Dev., Dept't of Veterans Affs.).

administration—the projects modality provides more even-handed benefits to the two sides of the agreement.¹²⁶

* * *

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

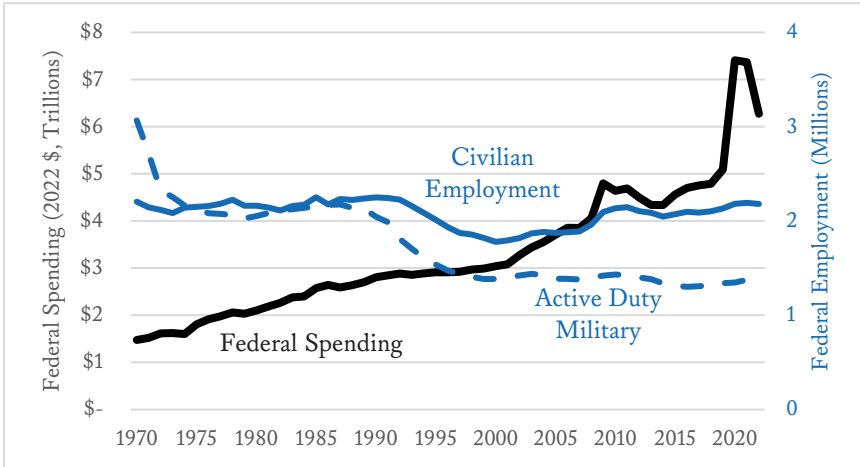
The IPA's original expected application—and its actual practice in its first years of existence—was to build local governmental capacity, what we call the localism modality. Yet, as we document below, under the staffing modality, the IPA began to help boost *federal* governmental capacity within a decade. How did a statute whose original purpose was to strengthen 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 federal intervention in the nation's workplaces and schools through civil rights and public education laws, environmental laws like the Clean Air and Water Acts, and the growth of a domestic-facing national security apparatus in the post-9/11 period. 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.

¹²⁶ See Matt Clancy, Dan Correa, Jordan Dworkin, Paul Niehaus, Caleb Watney & Heidi Williams, *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).

But the number of civilian employees in the federal government has not grown apace. Moreover, getting leaders in place has become more difficult.¹²⁷ Since the IPA was enacted, the administrative state has instead been more associated with stagnant hiring authorities for nonpolitical workers and increasingly cumbersome processes for filling agency leadership positions.

Figure 2: Federal Spending and Employment from 1970-2022¹²⁸



These difficulties flow from deeply rooted ideals in American politics. Given the enduring popularity of “draining the swamp” and growing distrust

127 P'SHIP FOR PUB. SERV., SENATE CONFIRMATION PROCESS SLOWS TO A CRAWL 1 (2020) [hereinafter PPS SENATE CONFIRMATION PROCESS], <https://presidentialtransition.org/wp-content/uploads/sites/6/2020/01/Senate-Confirmations-Issue-Brief.pdf> [<https://perma.cc/DF3-9JCZ>].

128 Budget data is derived from OMB historical tables, adjusted to 2022 dollars using the CPI-U. *Historical Tables, OFF. OF MGMT. & BUDGET*, <https://www.whitehouse.gov/omb/budget/historical-tables> [<https://perma.cc/N9B3-L6C5>] (last visited Sept. 14, 2024) (select “Table 1.1—Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789–2029”). Federal civilian employment excludes Postal Service employment and comes from OPM. *Executive Branch Civilian Employment Since 1940*, U.S. 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>] (last visited Aug. 25, 2023) (data from 1980–2014); *Federal Workforce Data*, U.S. OFF. OF PERS. MGMT., <https://www.fedscope.opm.gov> [<https://perma.cc/CM67-UZ4Z>] (last visited Sept. 14, 2024) (select “Current 5 Year-to-Year,” “Sep 2015 – Sep 2019” and “Sep 2010 – Sep 2014” under “Employment Trend,” using data from 2014 to present). Active duty military data is sourced from the Defense Manpower Data Center. *DoD Personnel, Workforce Reports & Publications*, DEF. MANPOWER DATA CTR., <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports>, [<https://perma.cc/3RTP-UQ7H>] (last visited Sept. 14, 2024).

of government,¹²⁹ 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 personnel caps (known as FTEs).¹³⁰ 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 state¹³¹) as well as the distinctively American reliance on courts as policymaking institutions.¹³²

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 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.¹³³

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.¹³⁴ After 1975, assignment direction flipped, with the predominant use of the IPA becoming academics entering the federal bureaucracy.¹³⁵ By the latter half of the 1980s, nearly nine in ten

¹²⁹ 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/YJ7G-6TAU>] (noting growing distrust in government).

¹³⁰ See Lewis, *supra* note 24, at 775 (describing congressional limitations on spending for personnel).

¹³¹ Cf. PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 5-6 (2007).

¹³² ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 41-45 (2d ed. 2019).

¹³³ 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 could again address intergovernmental capacity building, perhaps for AI-related work. See *infra* subsection IV.C.

¹³⁴ See 1989 GAO REPORT, *supra* note 49, at 22; see also Conaway, *supra* note 26, at 36.

¹³⁵ 1989 GAO REPORT, *supra* note 49, at 23; see also 1979 GAO REPORT, *supra* note 24, at 56.

incoming IPAs were academics.¹³⁶ This shift marked a change from what we call the localism modality to the staffing modality, and it has endured.¹³⁷

The change did not go unnoticed.¹³⁸ And it generated criticism. 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."¹³⁹ Similarly, Inspectors General (IGs) have flagged concerns with high-level IPA assignments for insufficiently following disclosure requirements¹⁴⁰ and creating conflicts of interest when setting policies.¹⁴¹

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 competitive 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 competitive 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 often cannot compete with private industry or academia. While the excepted service, consisting of government positions "excepted" from the competitive service system (and not in the Senior Executive Service (SES)¹⁴²), alleviates some of these burdens, it also

¹³⁶ 1989 GAO REPORT, *supra* note 49, at 28-29, 29 fig.II.1.

¹³⁷ 2001 GAO REPORT ON NSF, *supra* note 59, at 3 (noting eighty-two percent of IPAs in 2000 were incoming); *see also* *IPA Mobility Program Agreements*, MUCKROCK (2022) [hereinafter *MuckRock FOLA Requests*], <https://www.muckrock.com/search/?q=iPA+mobility+program+agreements> [https://perma.cc/RYJ5-EKS5] (compiling over 170 IPA assignments in 2022, mostly from FTC, DOE, OSTP, EPA, and DOJ, the vast majority of which appear to be incoming).

¹³⁸ *See generally* 1989 GAO REPORT, *supra* note 49.

¹³⁹ *See* 1977 TASK FORCE APP'X IX, *supra* note 20, at 11.

¹⁴⁰ OFF. OF INSPECTOR GEN., NAT'L AERONAUTICS & SPACE ADMIN., SEMI-ANNUAL REPORT TO CONGRESS OCTOBER 1, 1999-MARCH 31, 2000 51 (2000), <https://oig.nasa.gov/docs/saro300.pdf> [https://perma.cc/3Q5D-QNAU].

¹⁴¹ *See, e.g., infra* notes 342 and 348 (discussing examples of these conflicts).

¹⁴² The Senior Executive Service, which is filled mostly by career civil servants, is a very small slice of the government workforce, under one percent. U.S. OFF. OF PERS. MGMT., EXCEPTED SERVICE HIRING AUTHORITIES: THEIR USE AND EFFECTIVENESS IN THE EXECUTIVE BRANCH 8 (2018) [hereinafter OPM EXCEPTED SERVICE],

suffers from similar problems of uncompetitive 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.

1. The Competitive 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.¹⁴³ Most of these positions are staffed through the competitive examining system,¹⁴⁴ 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.¹⁴⁵ 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, the Office of Personnel Management (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."¹⁴⁶ While agency use of these authorities is increasing, hitting over one-quarter of hires in 2018, agencies still rely mostly on more traditional mechanisms.¹⁴⁷

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.¹⁴⁸ Notably, employees who perceive they have been hired based

https://chcoc.gov/sites/default/files/OPM%20Special%20Study%20%E2%80%93%20Excepted%20Service%20Hiring%20Authorities_0.pdf [https://perma.cc/BBY8-HDRQ].

¹⁴³ *Id.*

¹⁴⁴ Agencies generally use only 20 of 105 available hiring authorities. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-521, FEDERAL HIRING: OPM NEEDS TO IMPROVE MANAGEMENT AND OVERSIGHT OF HIRING AUTHORITIES 3, 8 (2016) [hereinafter 2016 GAO REPORT], <https://www.gao.gov/assets/gao-16-521.pdf> [https://perma.cc/5NEE-ZABE].

¹⁴⁵ U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-181, FEDERAL WORKFORCE: KEY TALENT MANAGEMENT STRATEGIES FOR AGENCIES TO BETTER MEET THEIR MISSIONS 28 n.63 (2019) [hereinafter 2019 GAO FEDERAL WORKFORCE REPORT], <https://www.gao.gov/assets/gao-19-181.pdf> [https://perma.cc/YCM8-6EEN]; 5 U.S.C. §§ 3304-19; 5 C.F.R. pts. 332, 337.

¹⁴⁶ 2016 GAO REPORT, *supra* note 144, at 6.

¹⁴⁷ U.S. 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_33_04_Usage_and_Outcomes_1803830.pdf [https://perma.cc/JH3R-P9BP] (noting that agencies have steadily increased their reliance on the direct hire authority, reaching 27% of all new competitive hires in 2018). GAO determined that agencies "could make more strategic use of the hiring authorities" and that more evaluation of the authorities was needed. 2016 GAO REPORT, *supra* note 144, at 23.

¹⁴⁸ See, e.g., David E. Terpstra & Elizabeth J. Rozell, *The Relationship of Staffing Practices to Organizational Level Measures of Performance*, 46 PERS. PSYCH. 27, 45 (1993) (finding a positive

on merit principles—specifically, fairness, protection, and stewardship—experience greater satisfaction with their job and produce better work output.¹⁴⁹

There are, however, several drawbacks to this staffing system.¹⁵⁰ To start, the hiring process is long. According to the Partnership for Public Service, it takes the government about 101 days to hire on average, “more than twice the time it takes in the private sector.”¹⁵¹ Many government hiring officers cite the complex competitive examining process as a primary cause.¹⁵² In addition, current assessment methods, such as multiple-choice questions and ratings of competencies, may not match the skills needed for the job¹⁵³ and, when combined with rigid scoring systems (e.g., the strong weight of veterans’ preferences), may inhibit the agency from securing its preferred candidate.¹⁵⁴

relationship in the private sector between organizational performance and hiring practices focused on job-specific competencies). *But see, e.g.,* E.S. Savas & Sigmund G. Ginsburg, *The Civil Service: a Meritless System?*, 32 PUB. INT. 70, 71-73 (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://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).

¹⁴⁹ 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. PERS. ADMIN. 686, 686 (2022); *see also* Eloy Oliveira, Gordon Abner, Shinwoo Lee, Kohei Suzuki, Hyunkang Hur & James L. Perry, *What Does the Evidence Tell Us About Merit Principles and Government Performance?*, 102 PUB. ADMIN. 668 (2024) (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).

¹⁵⁰ *See generally* NAT’L ACAD. OF PUB. ADMIN., NO TIME TO WAIT, PART 2: BUILDING A PUBLIC SERVICE FOR THE 21ST CENTURY 7-8 (2018) [hereinafter NAPA NO TIME TO WAIT PART 2], https://napawash.org/uploads/Academy_Studies/NTTW2_09192018_WebVersion.pdf [<https://perma.cc/NJ8H-CCLR>].

¹⁵¹ *The Partnership for Public Service’s Vision for a Better Government*, P’SHIP FOR PUB. SERV. (Aug. 15, 2024), <https://ourpublicservice.org/publications/vision-for-a-better-government> [<https://perma.cc/HZXX4-CNRT>]. According to GAO, 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. 2019 GAO FEDERAL WORKFORCE REPORT, *supra* note 145 at 25.

¹⁵² 2019 GAO FEDERAL WORKFORCE REPORT, *supra* note 145, at 28.

¹⁵³ *Id.* at 30.

¹⁵⁴ Interview with anonymous agency official (or former official) #1 (July 27, 2023) (on file with authors) (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 of Federal employment, while also contributing to a lack of diversity at some agencies”).

The application process is also generally not applicant friendly. Over half of all searches for positions involving a competitive exam end without a hire.¹⁵⁵ USAJobs, the federal job board, is notoriously difficult to use.¹⁵⁶ 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 that is 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 \$159,950.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ 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 not be eligible for comparable compensation through the GS-scale due to, say, a lack of a master's degree.¹⁶⁰ A recent OPM rule for pay equity prevents agencies from considering previous salaries in the private sector in setting government pay.¹⁶¹

¹⁵⁵ 2020 NCMNPS REPORT, *supra* note 4, at 64.

¹⁵⁶ See Jeff Neal, *Is It Time to Kill USAJobs?*, FEDSMITH (June 10, 2019, 10:22 AM), <https://www.fedsmith.com/2019/06/10/time-kill-usajobs> [<https://perma.cc/KC6Z-G2V8>].

¹⁵⁷ *Salary Table 2024-GS*, U.S. OFF. OF PERS. MGMT. (Jan. 2024), <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2024/GS.pdf> [<https://perma.cc/EF9J-P4CS>].

¹⁵⁸ 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>].

¹⁵⁹ 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 U.S. 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>].

¹⁶⁰ See NAT'L SEC. COMM'N ON A.I., *FINAL REPORT* 366 (2021) [hereinafter 2021 NSCAI REPORT], <https://www.nscai.gov/wp-content/uploads/2021/03/Full-Report-Digital-1.pdf> [<https://perma.cc/4G8X-VKEQ>] (“[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.”).

¹⁶¹ *Advancing Pay Equity in Governmentwide Pay Systems*, 89 Fed. Reg. 5737 (Jan. 30, 2024).

In sum, well-intentioned principles about merit-based assessment and set pay scales may inhibit the government from acquiring the best candidates.¹⁶² The civil service system, particularly in science and technology, may in fact strain to draw the most meritorious candidates.¹⁶³

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 categories¹⁶⁴ such as Schedule A (covering those who are “impracticable to examine,” such as attorneys, but realistically a catch-all category spanning many novel agencies like 18F, a digital services agency within GSA, and the U.S. Digital Service¹⁶⁵), 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.¹⁶⁶ The excepted service has grown over the past several decades. In 1995, it made up 19.1% of employment in the executive branch; by 2015, the proportion stood

¹⁶² Cf., e.g., NAPA NO TIME TO WAIT PART 2, *supra* note 150, 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).

¹⁶³ On the other hand, removal protections for career workers may serve as a draw for experts. Schedule F was a late-term attempt by President Trump to make policymaking jobs “at will” positions that will presumably be reissued in a future Republican administration, and critics have noted that it will undermine obtaining and maintaining expertise in federal agencies. See Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. 24982 (Apr. 9, 2024) (noting that in order for civil service positions to attract top talent and remain competitive, prospective applicants need to “know that they will be valued for their knowledge, skills, and abilities; evaluated based on merit; and . . . protected from retribution”); Donald Moynihan, *The Risks of Schedule F for Administrative Capacity and Government Accountability*, BROOKINGS INST. (Dec. 12, 2023) <https://www.brookings.edu/articles/the-risks-of-schedule-f-for-administrative-capacity-and-government-accountability> [<https://perma.cc/ZXH6-MUP6>] (arguing Schedule F would undermine government capacity by increasing incentives for exiting government service over staying and building expertise).

¹⁶⁴ OPM EXCEPTED SERVICE, *supra* note 142, at 1.

¹⁶⁵ U.S. 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>].

¹⁶⁶ See USAJOBS, EXCEPTED SERVICE INFORMATION & EMPLOYMENT OPPORTUNITIES (2010), https://www.usajobs.gov/Content/pdfs/excepted_service.pdf [<https://perma.cc/C3JF-EHC4>] (providing these examples); U.S. GOV’T ACCOUNTABILITY OFF., GAO/GGD-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>] (demonstrating the same).

at 29.7%.¹⁶⁷ Many excepted service positions use the GS pay scale, but agencies can also create and use their own pay scale for these positions.¹⁶⁸

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.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹ In some agencies, procurement costs comprise the majority of overall expenses; for example, procurement accounted for seventy-eight percent of NASA's 2020 budget.¹⁷² Prime contracting spending has remained relatively constant over the past several decades, with some increase since 2016.¹⁷³

¹⁶⁷ OPM EXCEPTED SERVICE, *supra* note 142, at 8.

¹⁶⁸ For example, the National Science Foundation has an excepted service pay scale that caps out at \$204,000, well above the GS pay scale. *Compensation and Benefits*, NAT'L SCI. FOUND., <https://new.nsf.gov/careers/working-nsf/compensation-and-benefits> [https://perma.cc/27ED-SA5W] (last updated Jan. 14, 2024).

¹⁶⁹ OPM EXCEPTED SERVICE, *supra* note 142, at i-ii.

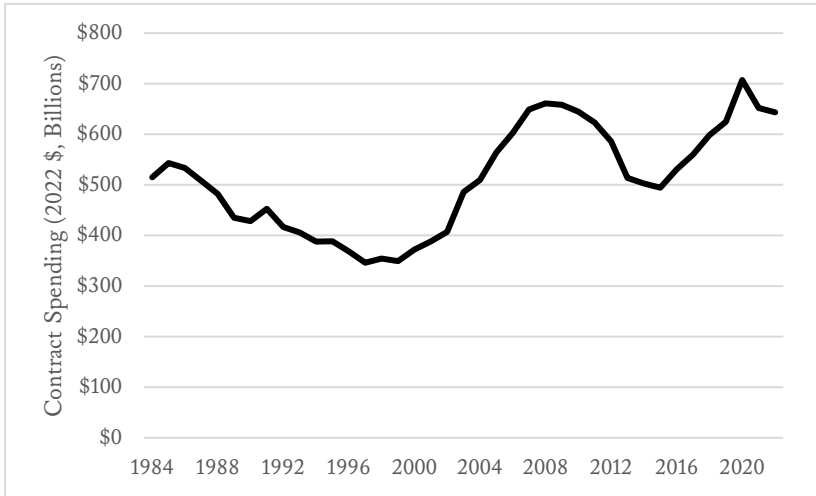
¹⁷⁰ For a recent description of contractors in agency rulemaking, see Bridget C.E. Dooling & Rachel Augustine Potter, *Regulatory Body Shops* 73 DUKE L.J. 1677, 1697-1703 (2024) [hereinafter Dooling & Potter, *Body Shops*] (distinguishing contracting arrangements: ministerial, expertise, and "regulatory body shop").

¹⁷¹ FY 2024 *Spending by Object Class*, USASPENDING, https://www.usaspending.gov/explorer/object_class [https://perma.cc/XB5M-UDNM] (last visited Sept. 14, 2024) (select "FY 2019," then select "Contractual services and supplies").

¹⁷² NAT'L AERONAUTICS & SPACE ADMIN., FY 2020 ANNUAL PROCUREMENT REPORT 4 (2020), <https://www.nasa.gov/wp-content/uploads/2023/09/annual-procurement-report-fy20-1.pdf> [https://perma.cc/NB5Q-NUPN].

¹⁷³ Data from 2008-2020 comes from USASpending. *Spending by Prime Award*, USASPENDING, <https://www.usaspending.gov/search/?hash=ef98b96f7a747de23d8a6513f0626d99> [https://perma.cc/M876-9SEE] (last visited Sept. 15, 2024). 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] (last visited Sept. 15, 2024).

Figure 3: Federal Prime Contract Spending, 1984-2022¹⁷⁴



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).¹⁷⁵ But more than one-third of the federal government’s procurement budget is spent on contracts that are not competitively awarded.¹⁷⁶ And over one-third of IT contracts put up for competition in a recent study received just one bid.¹⁷⁷ Even when there is competition, there are not that many players: Over one-third of defense contracting dollars went to ten vendors in FY 2020.¹⁷⁸

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

¹⁷⁴ See *supra* note 173.

¹⁷⁵ Defense-related contracts are additionally governed by the slightly different, but still similar, Defense Federal Acquisition Regulation Supplement. See Defense Federal Acquisition Regulation Supplement, 48 C.F.R. §§ 201-53 (2020).

¹⁷⁶ U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-244SP, CONTRACTING DATA ANALYSIS: ASSESSMENT OF GOVERNMENT-WIDE TRENDS 10 (2017), <https://www.gao.gov/assets/gao-17-244sp.pdf> [<https://perma.cc/6LBB-HR98>].

¹⁷⁷ Karam Kang & Robert A. Miller, *Winning by Default: Why Is There So Little Competition in Government Procurement?*, 89 REV. ECON. STUDS. 1495, 1499 (2022) (analyzing a sample of roughly 17,000 IT and telecommunications contracts under FAR drawn from the Federal Procurement Data System).

¹⁷⁸ *A Snapshot of Government-Wide Contracting For FY 2020 (infographic)*, U.S. GOV’T ACCOUNTABILITY OFF. (June 22, 2021), <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic> [<https://perma.cc/DVR2-FHCV>].

to serving as figureheads rather than operating officials.”¹⁷⁹ 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.”¹⁸⁰ And there is the revolving door. 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.¹⁸¹ 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 Federal Aviation Administration (FAA) engaged in a \$875-million contract for technical support services without ensuring that the contractor was qualified.¹⁸² These issues are particularly acute in contracts servicing legacy IT systems, which the Government Accountability Office (GAO) considers a high-risk area.¹⁸³

Finally, many contracts are very large and burdensome to negotiate, creating strategic bargaining holdup issues that contribute to high costs as well as the completion of otherwise undesirable contracts.¹⁸⁴ There has,

179 VERKUIL, *supra* note 131, at 24.

180 OFF. OF INSPECTOR GEN., U.S. DEP’T OF DEF., 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 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>].

181 See VERKUIL, *supra* note 131, at 23-46 (discussing these concerns).

182 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., U.S. DEP’T OF TRANSP., AV-2000-127, TECHNICAL SUPPORT SERVICES CONTRACT: BETTER MANAGEMENT OVERSIGHT AND SOUND BUSINESS PRACTICES ARE NEEDED (2000), <https://www.oig.dot.gov/sites/default/files/av2000127.pdf> [<https://perma.cc/4SDY-7JTP>]; see also U.S. GEN. ACCT. 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, GAO found that over half of VA contracting officers said that their “workload was not reasonable.” U.S. 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 the combination of this workload and lack of technical expertise, 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.

183 U.S. 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/F7SM-U9EU>].

184 U.S. 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>] (detailing the particular issues with and prevalence of time-and-materials contracts, which have poor incentives for cost control); Memorandum from Anne E. Rung, Adm’r, Off. of Mgmt. & Budget, to the Chief

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.¹⁸⁵

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.¹⁸⁶ 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.¹⁸⁷ 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 “cannot be met as effectively by existing in-house or contractor resources.”¹⁸⁸ 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

Acquisition Officers & Senior Procurement Execs., *Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Saving* (Dec. 4, 2014), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/procurement/memo/simplifying-federal-procurement-to-improve-performance-drive-innovation-increase-savings.pdf [<https://perma.cc/JMY7-5KSQ>].

¹⁸⁵ 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>].

¹⁸⁶ 48 C.F.R. § 35.017 (2024).

¹⁸⁷ 15 U.S.C. § 3710a(a). For an empirical examination of such agreements, see George A. Krause & Matthew Zarit, *Policy-Specific Expertise and the Importance of Organizational Leadership in Shared Administrative Governance: Evidence from US Federal Cooperative Agreements*, 38 J. L., ECON., & ORG. 272 (2021).

¹⁸⁸ 48 C.F.R. § 35.017(a)(2).

agreement alone, *excluding* any time or money spent negotiating with potential participants or on participants' final legal review.¹⁸⁹ The process for negotiating agreements is inconsistent across agencies.¹⁹⁰ 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?"¹⁹¹ 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.¹⁹² 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.¹⁹³

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

189 Claudia Allen, Terrisca R. Des Jardins, Arvela Heider, Kristin A. Lyman, Lee McWilliams, Alison L. Rein, Abigail A. Schachter, Ranjit Singh, Barbara Sorondo, Joan Topper & Scott A. Turske, *Data Governance and Data Sharing Agreements for Community-Wide Health Information Exchange: Lessons from the Beacon Communities*, EGEMS, Apr. 23, 2014, at 1, 9.

190 DANIEL E. HO, JENNIFER KING, RUSSELL C. WALD & CHRISTOPHER WAN, STANFORD UNIV. HUM.-CENTERED A.I., BUILDING A NATIONAL AI RESEARCH RESOURCE: A BLUEPRINT FOR THE NATIONAL RESEARCH CLOUD 37 (2021), https://hai.stanford.edu/sites/default/files/2022-01/HAL_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).

191 Michelle M. Mello, George Triantis, Robyn Stanton, Erik Blumenkranz & David M. Studdert, *Waiting for Data: Barriers to Executing Data Use Agreements*, 367 SCI. 150, 150 (2020).

192 *Special Sworn Researcher Program*, U.S. DEP'T OF COMM. BUREAU OF ECON. ANALYSIS, <https://www.bea.gov/research/special-sworn-researcher-program> [<https://perma.cc/Q9GC-E3XH>] (last updated Jan. 17, 2023); NAT'L CTR. FOR EDUC. STATS., U.S. DEP'T OF EDUC., RESTRICTED-USE DATA PROCEDURES MANUAL 28-36 (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).

193 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>].

confirmation (PAS) (roughly 1,100 positions in 2020, according to the Plum Book and almost certainly an undercount), presidential appointments without Senate confirmation (PA) (around 300 positions), Senior Executive Service positions filled by noncareer appointment (about 700 positions), and Schedule C roles (nearly 1,600 positions).¹⁹⁴ Political appointees are often paid according to the EX pay scale, which caps out at \$246,400.¹⁹⁵

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, on average, nearly thirty percent of vacant Senate-confirmed agency positions.¹⁹⁶ At the end of December in the first year, compared to the past four Administrations, President Biden had made fewer agency nominations than everyone but President Trump.¹⁹⁷

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.¹⁹⁸ 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 444.¹⁹⁹ There is repetitive and time-consuming background vetting (from the White House and the Senate) that can require private and costly lawyers. Talented individuals may therefore be dissuaded from going through the traditional appointments process.²⁰⁰

¹⁹⁴ H. COMM. ON OVERSIGHT & REFORM, 116TH CONG., POLICY AND SUPPORTING POSITIONS 212 (2020), <https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2020/pdf/GPO-PLUMBOOK-2020.pdf> [<https://perma.cc/TS9W-WPC6>]. The actual number of Senate confirmed positions is somewhat unclear; by one count, the most commonly cited source—the Plum Book—actually misses eighteen 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. 51, 57 (2021); Chris Piper & Paul Hitlin, *Presidential Appointments are Hard to Track—and Growing*, P'SHIP FOR PUB. SERV. BLOG (Sept. 26, 2024), <https://presidentialtransition.org/blog/presidential-appointments-are-hard-to-track-and-growing> [<https://perma.cc/7FP5-P4UM>].

¹⁹⁵ *Salary Table No. 2024-EX*, U.S. OFF. OF PERS. MGMT, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2024/EX.pdf> [<https://perma.cc/K85X-BMH3>] (last visited Sept. 19, 2024).

¹⁹⁶ Lewis & Richardson, *supra* note 194.

¹⁹⁷ 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>].

¹⁹⁸ PPS SENATE CONFIRMATION PROCESS, *supra* note 127.

¹⁹⁹ George E. Condon Jr. & National Journal, *Why The Confirmation Process Is Completely Broken*, THE ATL. (July 18, 2013), <https://www.theatlantic.com/politics/archive/2013/07/why-the-confirmation-process-is-completely-broken/442935> [<https://perma.cc/T9JL-EGX6>].

²⁰⁰ 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),

As Paul Light remarked, “The greatest cost of the current process . . . is in the lingering vacancies that pockmark an administration throughout its term.”²⁰¹ As of September 3, 2024, with under five months to go, for the 817 positions being tracked by the Partnership for Public Service and the Washington Post, the Biden Administration had 568 confirmed leaders (and seventy-two term appointees or holdovers).²⁰² Over eighty nominations were pending in the Senate, and over ninety jobs lacked a formal nominee.²⁰³ The positions with no nominee included the Inspector General of the Social Security Administration, the Comptroller of the Currency, and Chief Financial Officers for a number of agencies (including the Treasury Department).²⁰⁴ These vacancies have led to increased use of “actings” and delegations of authority, which raise a constellation of legal and policy issues.²⁰⁵

D. *The Potential of Governing by Assignment*

Traditional hiring authorities, we argue 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 are (1) ease of application; (2) time to hire; (3) duration of hiring authority; (4) competitiveness of compensation; and (5) public reporting obligations and suggest that the IPA is comparatively advantageous for bringing in talent that an administration or agency needs imminently or cannot acquire on a

<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.

²⁰¹ 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>].

²⁰² *Political Appointee Tracker*, P’SHP FOR PUB. SERV., <https://ourpublicservice.org/performance-measures/political-appointee-tracker> [<https://perma.cc/JR96-7AA9>] (last updated Sept. 3, 2024).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See generally Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613 (2020) (describing these concerns); P’SHP FOR PUB. SERV., THE REPLACEMENTS: WHY AND HOW “ACTING” OFFICIALS ARE MAKING SENATE CONFIRMATION OBSOLETE (2020), <https://ourpublicservice.org/wp-content/uploads/2020/09/The-Replacements-1.pdf> [<https://perma.cc/3JQE-PSNP>] (focusing on the costs of acting officials).

permanent basis. For example, it may be hard to hire an academic away from a university's tenure protections and research capital.²⁰⁶

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). And for the non-leadership modalities, agencies may not want to hire someone for many years into a particular job classification, saving FTEs (with removal protections) for other functions.²⁰⁷

These advantages also align with historical understandings and debates over the use of the IPA. When 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.²⁰⁸ 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" rather than criticized.²⁰⁹ After all, the IPA is an assignment authority;²¹⁰ 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."²¹¹ 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

206 IPAs may also function as a safe trial of government employment for academics before they seek to transition from academia. Interview with anonymous agency official (or former official) #7 (Nov. 21, 2023) (on file with authors).

207 Interview with anonymous agency official (or former official) #9 (June 10, 2024) (on file with authors).

208 1989 *Congressional Hearing*, *supra* note 50, at 17 (statement of Leonard R. Klein, Deputy Assoc. Dir., Career Entry & Emp. Dev. Grp. Dep'y Assoc. Dir.).

209 1977 TASK FORCE APP'X IX, *supra* note 20, at 12.

210 1989 *Congressional Hearing*, *supra* note 50, at 20-21 (statement of Ardrey Harris, Chief, Pers. Mobility Program, Off. of Pers. Mgmt.).

211 *Id.* at 47 (statement of Jeff M. Fenstermacher, Assistant Dir., Directorate of Admin., Nat'l Sci. Found.). To be sure, for some academics on IPAs, the government salary is higher than their university salary. Interview with anonymous agency official (or former official) #9 (June 10, 2024) (on file with authors).

Deputy Director portrayed the IPA as a response to FTE caps despite a growing workload: “we had to work with what we were given.”²¹²

Other constraints pushed administrations to use the IPA in its leadership modality. With an increasingly dysfunctional political appointments system, incoming administrations feel pressure to find alternative methods for staffing top agency jobs, including through acting officials and delegations of authority²¹³ 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. Non- or partially reimbursed IPA agreements functionally contribute money from universities and nonprofits to the federal government. Separately and additionally, 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.²¹⁴ 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.²¹⁵ GSA’s figure accords with government-wide data on research and evaluation contracts, which suggests average costs of at least \$200 per hour.²¹⁶

Beyond cost-savings, the IPA also offers unique access to part-time hires.²¹⁷ Agencies and academics may value the flexibility of such part-time or intermittent assignments, especially for more research- or project-oriented tasks.²¹⁸ From the assignee’s perspective, academic resources at the home institution and settled life might make it difficult to move to Washington,

²¹² Mervis, *Revolving Door*, *supra* note 77, at 1599.

²¹³ See generally O’Connell, *supra* note 205 (assessing the prevalence of acting officials and delegations of authority).

²¹⁴ E-mail from Anonymous GSA Off. of Evaluation Scis. Off. to authors (Nov. 15, 2023) (on file with authors). Hourly calculations assume 2,000 hours per year from 50 weeks worked at 40 hours per week.

²¹⁵ *Id.*

²¹⁶ This number is based on analysis of service contracts mentioning research or evaluation in their requirements with non-zero amounts invoiced as well as more than 10 hours invoiced. See *Service Contract Inventory*, ACQUISITION.GOV, <https://www.acquisition.gov/content/service-contract-inventory> [<https://perma.cc/D52K-MSCE>] (last updated Sept. 9, 2024).

²¹⁷ 1989 *Congressional Hearing*, *supra* note 50, at 43 (statement of Richard Greene, Assistant Chief Med. Dir., Rsch. & Dev., Dep’t of Veterans’ Affs.).

²¹⁸ 2022 GAO REPORT, *supra* note 67, at 14-15.

D.C. for even a two-year assignment.²¹⁹ But because access to administrative data is often a challenge, a remote, part-time IPA assignment enabling access to government data may be very attractive for academics.²²⁰ 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. As with all workarounds, the IPA, as an alternative to traditional hiring processes in some of its modalities, raises important concerns, which we address in the next two Parts.

* * *

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.²²¹ 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.”²²² Changing manifestations of the IPA reveal the wider pressures on the administrative state: Cross-cutting demands for expanding social goods while avoiding “big

²¹⁹ Interview with anonymous agency official (or former official) #8 (June 3, 2024) (on file with authors); Interview with anonymous agency official (or former official) #9 (June 10, 2024) (on file with authors).

²²⁰ Jeffrey Mervis, *How Two Economists Got Direct Access to IRS Tax Records*, SCI. (May 22, 2014), <https://www.science.org/content/article/how-two-economists-got-direct-access-irs-tax-records> [https://perma.cc/2T79-KPRP].

²²¹ We emphasize, as highlighted above, *see supra* subsection II.B.1., that the current civil service staffing system has laudable goals but should not be synonymous with meritocracy.

²²² 1981 *Congressional Hearing*, *supra* note 21, 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).

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 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 government employees alone exercise inherently governmental functions; that IPA assignees exercise problematic kinds of authority in light of how they are selected; 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”²²³ as well as publicly documented practice. We show that legal risk varies based on the modality, 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.

²²³ See generally Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017) (describing the “internal controls” of agencies); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 7 (2012) (urging scholars to study the “internal law” of agencies).

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 qualifying organization (including nonfederal governments, higher education institutions, nonprofit organizations, and FFRDCs) to be “assign[ed]” to the agency.²²⁴ That arrangement occurs through a “written agreement recording the obligations and responsibilities of the parties,” which must be approved by the “Federal agency,” the qualifying organization, and the “assigned employee.”²²⁵ The assignment “may not exceed two years,” but the “head” of the agency (or their designee) may extend the assignment for up to two additional years.²²⁶

The IPA provides for two types of assignments: “appoint[ments]” and “detail[s].”²²⁷ An *appointed* assignment places the employee in a “classified” position (in the sense of civil service classification),²²⁸ which renders them an “employee of the Federal agency for all purposes except” specified retirement-related statutes.²²⁹ 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.²³⁰ (Note that we use the term “employee” more broadly in the Article than in this technical sense.)

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 qualifying

²²⁴ 5 U.S.C. § 3372(a).

²²⁵ 5 C.F.R. § 334.106(a) (2024).

²²⁶ 5 U.S.C. § 3372(a)(2); *see also* 5 C.F.R. § 334.104 (2024) (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.

²²⁷ 5 U.S.C. § 3374(a).

²²⁸ *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) [hereinafter USAID IPA POLICY], <https://www.usaid.gov/sites/default/files/2022-12/437.pdf> [<https://perma.cc/7KG9-2NJV>] (stating 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.” FEDERAL PERSONNEL MANUAL 334-19, subch. 4-2(a) (1983) [hereinafter 1983 FPM], https://www.google.com/books/edition/Federal_Personnel_Manual/t_dZAAAAYAA?hl=en&gbpv=1&pg=RA2-SA334-PA1&printsec=frontcover [<https://perma.cc/ZHN9-FVZW>].

²²⁹ 5 U.S.C. § 3374(b).

²³⁰ *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.”).

organization, and that agreement can include federal “reimbursement” of some (or all) of the detailee’s pay to the qualifying organization (sometimes referred to as the home institution).²³¹ The “President” also has general authority to “prescribe regulations for the administration” of the IPA.²³² While systematic reporting is scarce, there is reason to think that most assignees into the federal government—incoming assignees—are detailees, not appointees.²³³

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.²³⁴ In addition, if the “employer-employee relationship ceases to exist between the assignee or original employer,” then the assignment “automatically” terminates.²³⁵ Furthermore, OPM may “direct Federal agencies to terminate assignments” made in violation of the IPA.²³⁶

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,²³⁷ 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.²³⁸ 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.²³⁹ 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.”²⁴⁰ The IPA also permits reimbursement for specified travel expenses.²⁴¹

The statute and its implementing regulations do not define the scope of authority an IPA assignee can exercise. Unsurprisingly, agencies employing

²³¹ 5 U.S.C. § 3374(c)(3).

²³² *Id.* § 3376.

²³³ See Memorandum from Robert I. Cusick, Dir., Off. of Gov’t Ethics to Designated Agency Ethics Officials, Intergovernmental Personnel Act Summary, DO-06-031 3 (Oct. 19, 2006) [hereinafter 2006 OGE Memo], [https://www.oge.gov/Web/OGE.nsf/o/8A557728B96731E7852585BA005BED04/\\$FILE/do-06-031.pdf](https://www.oge.gov/Web/OGE.nsf/o/8A557728B96731E7852585BA005BED04/$FILE/do-06-031.pdf) [<https://perma.cc/5LPW-F5P5>] (“[O]ur understanding is that IPA assignments to Federal agencies are virtually always accomplished through details.”); see also 2022 GAO REPORT, *supra* note 67, at 4 (noting reviewed agencies only used details under the IPA).

²³⁴ 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.*

²³⁵ *Id.* § 334.107(c).

²³⁶ *Id.* § 334.107(d).

²³⁷ 5 U.S.C. § 3374(b).

²³⁸ *Id.* § 3374(e).

²³⁹ *Id.* § 3374(c)(1).

²⁴⁰ *Id.* § 3374(c)(3).

²⁴¹ 5 U.S.C. § 3375(a).

IPA agreements have inconsistently dealt with the scope of permissible duties under the IPA. For example, agency guidance differs on the question of whether an IPA assignee may supervise federal employees.²⁴² We turn, next, to the criticisms of the IPA.

B. Civil Service Staffing

One important criticism of the IPA is that it circumvents the traditional merit-based systems for hiring staff.²⁴³ We use the term civil service here to include the traditional competitive service but also other forms of merit-based hiring. Forms of this criticism have existed throughout the IPA's history, where the IPA has been accused of enabling a "buddy-buddy" hiring

²⁴² See, e.g., 2022 GAO REPORT, *supra* note 67, at 17-19 (discussing different agency perspectives on allowing detailees to supervise federal employees, including OPM's); *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. SERVS., INSTRUCTION 300-3: DETAIL AND INTERGOVERNMENTAL PERSONNEL ACT (IPA) ASSIGNMENTS § 300-3-70H(1)(c) (2023) [hereinafter HHS IPA POLICY], <https://www.hhs.gov/about/agencies/asa/ohr/hr-library/300-3/index.html> [<https://perma.cc/3KRU-TPGS>] (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. CAP. 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>] (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. CAP. 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 *Intergovernmental Personnel Act (IPA) Mobility Program Guidance*, U.S. GEOLOGICAL SURV. [hereinafter *USGS IPA Policy*], <https://www.usgs.gov/human-capital/intergovernmental-personnel-act-ipa-mobility-program-guidance> [<https://perma.cc/8QMD-XJMM>] (last visited Sept. 12, 2024) ("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 5 (2012), <https://www.usaid.gov/sites/default/files/2022-05/437saa.pdf> [<https://perma.cc/2D2U-CRFH>] (similar), and DEP'T OF VETERANS AFFS., VA HANDBOOK 5005/32, § C(2)(c) (2010) [hereinafter VA IPA POLICY], https://www.research.va.gov/programs/nppo/docs/VA_HANDBOOK_5005.doc [<https://perma.cc/JKD3-JFQ9>] (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 228, ch. 334, at 4-1(b); U.S. OFF. OF PERS. MGMT., FPM SUNSET DOCUMENT 7 (1993) [hereinafter FPM SUNSET], <https://play.google.com/books/reader?id=BC-OCsfN-3EC&pg=GBS.PP1&chl=en> [<https://perma.cc/8HPX-HK5F>] (noting Chapter 334 was abolished).

²⁴³ See, e.g., Press Release, House Comm. on Oversight & Accountability, 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 federal hiring practices").

process or allowing an assignee to earn more than a normal governmental employee.²⁴⁴

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 appear similar to USAJobs postings. But such examples are not typical, and, at its 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.²⁴⁵ The Office of Management and Budget's (OMB) guidance details these functions.²⁴⁶ 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."²⁴⁷ It describes such functions in terms of decisionmaking that involves the "interpretation and execution" of federal law.²⁴⁸ 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."²⁴⁹

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 government before administrative and judicial tribunals."²⁵⁰ When considering a function not on 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

²⁴⁴ See, e.g., 1977 TASK FORCE APP'X IX, *supra* note 20, at 11 (discussing concerns about nepotism and inequality through hiring practices).

²⁴⁵ See U.S. CONST. art. II, § 1, cl. 1; *Carter v. Carter Coal Co.*, 298 U.S. 238, 291-92 (1936) (holding that Congress cannot delegate legislative authority to private entities without running afoul of the nondelegation doctrine).

²⁴⁶ See Off. of Fed. Procurement Pol'y, Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, 56236 (Sept. 12, 2011).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 56237.

²⁵⁰ See *id.* at 56240-41.

discretion to “commit[] the government to a course of action” absent oversight by agency officials.²⁵¹

These are not clear tests. Agencies, unsurprisingly, find it difficult to draw the line for an “inherently governmental function.”²⁵² 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.”²⁵³

In addition to constituting a fuzzy line, there are limited opportunities to contest determinations, and those opportunities fall primarily within the political branches, not the courts. Circular A-76, an OMB memorandum, bars outsourcing of inherently governmental functions,²⁵⁴ and 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 Federal Activities Inventory Reform (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.²⁵⁵ Under the Competition in Contracting Act of 1984,²⁵⁶ GAO can hear federal procurement protests and issue advisory opinions, which has led to a kind of case law in specific contexts.²⁵⁷

But the courts are largely not hearing challenges. OMB’s guidance disclaims the force of law, making it nonfinal under the Administrative

²⁵¹ *Id.* at 56237.

²⁵² See BRIDGET C.E. DOOLING & RACHEL AUGUSTINE POTTER, CONTRACTORS IN RULEMAKING 44 (2022) [hereinafter DOOLING & POTTER, 2022 ACUS REPORT], <https://www.acus.gov/sites/default/files/documents/Contractors%20in%20Rulemaking%20Final%20Report.pdf> [<https://perma.cc/7G67-7AAR>] (describing agency officials as having a “widespread but incomplete awareness of the existence of an inherently governmental function line with respect to rulemaking”).

²⁵³ David Isenberg, *To Be, or Not to Be, Inherent: That is the Question*, HUFFPOST: THE BLOG (May 25, 2011), https://www.huffpost.com/entry/to-be-or-not-to-be-inhere_b_539933 [<https://perma.cc/2KHS-P4QZ>].

²⁵⁴ Thomas J. Laubacher, *Simplifying Inherently Governmental Functions: Creating a Principled Approach from Its Ad Hoc Beginnings*, 46 PUB. CONT. L.J. 791, 799-800 (2017); DOOLING & POTTER, 2022 ACUS REPORT, *supra* note 252, 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 the history and policy debates over A-76).

²⁵⁵ Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, §§ 2-3, 112 Stat. 2382, 2382-83 (1998); *see also* Laubacher, *supra* note 254, at 812. The 2003 revisions to OMB Circular A-76 also provided procedures for challenging agency descriptions. *See* Laubacher, *supra* note 254, at 813 (citing OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES A-4 (2003), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A76/a076.pdf [<https://perma.cc/F68P-MTW7>]).

²⁵⁶ Competition in Contracting Act of 1984, Pub. L. No. 98-369, § 2741(a), 98 Stat. 494, 1199-203 (1984) (codified at 31 U.S.C. § 3552(a)).

²⁵⁷ *See* Laubacher, *supra* note 254, at 815 n.182 (reviewing OMB Circular A-76 case law).

Procedure Act for many courts (and hence unreviewable).²⁵⁸ Standing is a significant bar.²⁵⁹ And courts likely do not want to wade into disputes over what look like core executive branch decisions about administrative organization.²⁶⁰ Plus, there's an asymmetry: Outsourcing functions may be open to challenge, but keeping functions in-house is not. In short, the designation of a function as "inherently governmental" remains within the agency's determination, subject only to GAO—and larger congressional—oversight.²⁶¹

Agencies seem aware of the need to prevent IPA assignees from performing inherently governmental functions.²⁶² 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).²⁶³ 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,²⁶⁴ and a *detailee*, who is treated as an "employee" only for specific purposes (mainly ethics requirements).²⁶⁵ It may make sense to restrict inherently

²⁵⁸ See Off. of Fed. Procurement Pol'y, Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, 56240 (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) ("A general statement of policy . . . does not establish a "binding norm.").

²⁵⁹ See Dooling & Potter, *Body Shops*, supra note 170, at 1694-95 (noting that challenges to contracting out of inherently governmental functions "are typically constrained to bid protests"); Laubacher, supra note 254, at 816 (noting that "the courts turned away many of the plaintiffs challenging . . . outsourcing because they lacked prudential standing"); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 452-54 (2006) [hereinafter Verkuil, *Public Law*] (describing the issue of standing for employees).

²⁶⁰ See Verkuil, *Public Law*, supra note 259, at 451 (explaining courts' deference in a matter contained within a single branch of government).

²⁶¹ 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.

²⁶² E.g., Interview with anonymous agency official (or former official) #7 (Nov. 21, 2023) (on file with authors) (describing NASA's restrictions on placing IPAs on committees in charge of mission selection).

²⁶³ One of our interviewees initially completed personnel reviews until the General Counsel notified them they could not do so. Interview with anonymous agency official (or former official) #9 (June 10, 2024) (on file with authors). Another interviewee hired people and evaluated employees for promotions throughout their IPA assignment. Interview with anonymous agency official (or former official) #1 (July 27, 2023) (on file with authors).

²⁶⁴ 5 U.S.C. § 3374(b).

²⁶⁵ See *id.* § 3374(c); see also 2006 OGE Memo, supra note 233, at 3.

governmental functions to “employees” and, therefore, to IPA appointees but not detailees; some agencies appear to have adopted this line.²⁶⁶

Functionally, IPA assignees exist in a middle ground between contractors and full government 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.”²⁶⁷ On the one hand, like federal employees, assignees must follow government ethics laws. But 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 their continuing home employment, may be less accountable than a permanent federal employee who takes an oath to support the Constitution and (ostensibly) is responsive to the President’s lawful direction of the executive branch. Tenured professors may generate less concern here as their home institution employment is guaranteed.

Overall, we see IPA assignees as closer to government employees than contractors, on both formal 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.²⁶⁸ Notably, the agency responded that that guidance was not intended to apply to IPA assignees.²⁶⁹

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, supervisors should be able to modify or reverse assignees’ decisions. This could mean that assignees make important decisions, but those choices are reviewable and

²⁶⁶ 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 242, § 300–3–70(H)(1)(c). USAID’s regulations are similar. See USAID IPA POLICY, *supra* note 228, § 437.3-3.

²⁶⁷ Off. of Fed. Procurement Pol’y, Policy Letter 11–01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, 56236 (Sept. 12, 2011).

²⁶⁸ OFF. OF THE INSPECTOR GEN., DEP’T OF DEF., 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) [hereinafter 1997 DOD IG REPORT], [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].

²⁶⁹ *Id.* at 18.

subject to change. IPA agreements can impose sufficient limits and supervision. Although a typical IPA agreement is concise and, presumably, nonexhaustive of what assignees end up doing at the agency,²⁷⁰ all IPA agreements require listing an “immediate supervisor”²⁷¹ who can ensure that the assignee does not make unreviewable decisions. If the assignee’s supervisor ratifies decisions recommended by the assignee, or can alter or reverse those decisions, then the prohibition on outsourcing inherently governmental functions should be met. This is how it works in contracting.²⁷² 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 given how they are selected—that there is something improper, the argument goes, with a temporary person employed outside the government playing an important leadership role in an agency²⁷³ or in the White House.²⁷⁴ The Constitution directly addresses the intersection of selection mechanisms and the authority a governmental official may properly exercise.²⁷⁵ Under the Appointments Clause, individuals whose duties and positions make them “officers” must be appointed through specific mechanisms.²⁷⁶ That constraint applies most when the IPA is used to staff a presidential administration under the leadership modality. In other words, this criticism focuses on how IPA assignments are made, given the authority wielded by the assignee, whereas the previous concern focuses on the authority itself.

²⁷⁰ 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. Dooling & Potter, *Body Shops*, *supra* note 170, at 1694. 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.

²⁷¹ See U.S. OFF. OF PERS. MGMT., ASSIGNMENT AGREEMENT OF 69 # (1989), https://www.opm.gov/forms/pdf_fill/of69.pdf [<https://perma.cc/QXK2-X5NN>] (providing template for IPA assignment agreement).

²⁷² Dooling & Potter, *Body Shops*, *supra* note 170, at 1694-95.

²⁷³ See, e.g., Memorandum from the Assistant Inspector Gen. for Inspections, Admin. Investigations, & Assessments, to Chief Fin. Officer, Assoc. Adm’r for Hum. Res. & Educ., Gen. Couns., on Intergovernmental Personnel Act Assignments to NASA, G-99-018, Final Report 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”).

²⁷⁴ See, e.g., Letter from Charles E. Grassley, U.S. Senator, to Arati Prabhakar, Dir., Off. of Sci. & Tech. Pol’y. 1 (Jan. 10, 2023), https://www.grassley.senate.gov/imo/media/doc/grassley_to_office_of_science_and_technology_policy_-_ipa_oversight.pdf [<https://perma.cc/CMP6-HRGF>] (explaining Senator Grassley’s concerns about OSTP staffing through the IPA).

²⁷⁵ 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 335-362 and accompanying text.

²⁷⁶ U.S. CONST. art. II, § 2, cl. 2.

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”²⁷⁷); and second, what method of appointment is called for by the Clause if the assignee is an officer.

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 “exercis[es] significant authority pursuant to the laws of the United States.”²⁷⁸

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” in “research on developing guidance.”²⁷⁹ In both cases, the assignee’s position is “of such a nature that it will terminate ‘by the very fact of performance,’”²⁸⁰ in the Office of Legal Counsel (OLC)’s phrasing. Their 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 in the case.²⁸¹

In addition, an assignee’s position arguably is not “established by Law” as courts have understood that term.²⁸² OLC has explained that “[c]ontracts do not, simply because created or regulated by law, create an office.”²⁸³ Rather, whether an office is established by law comes down to whether sovereign authority and continuity “are present ‘by law.’”²⁸⁴ Like contracts, IPA agreements should not create an office. To be sure, the IPA authorizes certain employment relationships. But the statute creates only authority for assignment agreements. Unless they are detailed to a preexisting position in the bureaucracy, an IPA detailee’s position is formed by the IPA agreement

²⁷⁷ See *Lucia v. SEC*, 585 U.S. 237, 244 (2018) (deciding this question for the SEC’s administrative law judges).

²⁷⁸ *Id.* at 245 (citations omitted).

²⁷⁹ See 2022 GAO REPORT, *supra* note 67, at 15, 17.

²⁸⁰ Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 111 (2007) [hereinafter 2007 OLC Memo].

²⁸¹ *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

²⁸² See 2007 OLC Memo, *supra* note 280, at 117-19.

²⁸³ *Id.* at 118.

²⁸⁴ *Id.* There is ongoing litigation about whether a special counsel qualifies as a position “established by law.” See *United States v. Trump*, No. 23-80101-CR-CANNON, 2024 WL 3404555, at *1 (S.D. Fla. July 15, 2024) (finding that the statutes Attorney General Merrick Garland relied on to appoint Special Counsel Jack Smith did not expressly permit the Attorney General to “appoint” anyone). This decision has been appealed to the Eleventh Circuit. If an IPA assignee occupies a continuing position that is not established by law and wields meaningful authority, that would presumably violate the Appointments Clause.

itself.²⁸⁵ Thus, for example, IPA assignees differ from the 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 the Fifth Circuit in *Braidwood Management v. Becerra*.²⁸⁶ The PSTF was “convene[d],” according to statute, by the Director of the Agency for Healthcare Research and Quality.²⁸⁷ In other words, Congress established the office of the PSTF. Unlike IPA assignees, whose positions may only exist for the duration of an IPA agreement, the PSTF is a continuing body, so long as Congress does not repeal or amend the relevant statute.²⁸⁸ Courts have also viewed agency housekeeping statutes (which allow agency heads to create positions) as qualifying for “established by law.”²⁸⁹

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.²⁹⁰ In contrast, the duties and salary of *Freytag*’s special tax judges were defined by statute.²⁹¹ Finally, while the IPA “specifie[s]” the “means of appointment” of an IPA assignee,²⁹² it does not include any other constraints on who may be appointed.²⁹³ In sum, the IPA tends to create 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*.²⁹⁴

²⁸⁵ 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 2006 OGE Memo, *supra* note 233, at 3.

²⁸⁶ *Braidwood Mgmt. Inc. v. Becerra*, 104 F.4th 930 (5th Cir. 2024). The government petitioned for certiorari on September 19, 2024.

²⁸⁷ See 42 U.S.C. § 299b-4(a)(1).

²⁸⁸ While the Fifth Circuit did not discuss this aspect of the Appointments Clause, as the Government conceded on appeal that PTSTF members were officers, the district court had to evaluate the issue. *Braidwood Mgmt. Inc. v. Becerra*, 627 F. Supp. 3d 624, 642 (N.D. Tex. 2022).

²⁸⁹ *Id.* at 645; 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 them authority to “prescribe regulations for the government of [their] 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); 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).

²⁹⁰ The two-year cap is subject to some exceptions, such as for NASA and outgoing assignments to tribes or tribal organizations. See *supra* note 226.

²⁹¹ See 26 U.S.C. § 7443A(b), (d) (assigning proceedings over which special trial judges may preside and defining their salary); *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

²⁹² *Freytag*, 501 U.S. at 881.

²⁹³ By contrast, the PSTF’s members have “qualifications” as well as “four-year terms,” defined by law (in regulations). *Braidwood*, 627 F. Supp. 3d at 642. Because the government conceded PTSTF members were officers on appeal, the Fifth Circuit did not discuss this issue.

²⁹⁴ See *Lucia v. SEC*, 585 U.S. 237, 247 (2018).

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,”²⁹⁵ particularly in the staffing and leadership modalities. Think, for example, of the NSF’s IPA assignees serving as program officers administering the NSF’s merit review system²⁹⁶ or of the assignee who served as the PDAAG for the Department of Justice’s Civil Rights Division.²⁹⁷

Turning to the second requirement for an “officer” under the Appointments Clause—whether the officer “exercis[es] 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.”²⁹⁸ Applying the doctrine to the IPA requires a specific agreement to analyze. But if the assignee exercises significant discretion without supervision²⁹⁹ or makes binding decisions on the United States or third parties (such as being the top person signing off on a complaint or contract),³⁰⁰ that authority would likely meet the second requirement. The

²⁹⁵ 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 228, ch. 334, at 4-3(a); HHS IPA POLICY, *supra* note 242, § 300-3-70(H)(2)(a); USAID IPA POLICY, *supra* note 228, § 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 228, ch. 334, at 4-2(a); see HHS IPA POLICY, *supra* note 242, § 300-3-70(H)(1)(b)(i)–(ii) (noting that details can have “unclassified duties”); USAID IPA POLICY, *supra* note 228, § 437.3.3 (same). However, our understanding is that most IPA assignees into the federal government are detailees rather than appointees. See 2006 OGE Memo, *supra* note 233 and accompanying text.

²⁹⁶ OFF. OF INSPECTOR GEN., NAT’L SCI. FOUND., OIG 17-2-008, NSF CONTROLS TO MITIGATE IPA CONFLICTS OF INTEREST 1 (2017) [hereinafter 2017 NSF IG REPORT], https://oig.nsf.gov/sites/default/files/reports/2022-01/17-2-008_COI.pdf [<https://perma.cc/EZY7-QMGK>].

²⁹⁷ Former Principal Deputy Assistant Attorney General Pamela S. Karlan, U.S. DEP’T OF JUST. ARCHIVES, <https://www.justice.gov/archives/crt/staff-profile/former-principal-deputy-assistant-attorney-general-pamela-s-karlan> [<https://perma.cc/W6AE-M3V6>] (last updated May 27, 2021). The PDAAG is a “continuing” position. See generally *How is the Civil Rights Division Organized?*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/how-civil-rights-division-organized> [<https://perma.cc/YZ9W-NJFG>] (last updated May 27, 2021).

²⁹⁸ *Lucia*, 585 U.S. at 245, 247.

²⁹⁹ See *id.* at 247 (noting that “exercis[ing] significant discretion” implies the individuals “were officers”) (citation omitted); 2007 OLC Memo, *supra* note 280, 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”).

³⁰⁰ See *Lucia*, 585 U.S. at 247 n.4 (noting final decisionmaking authority is not a “*sine qua non* of officer status”); 2007 OLC Memo, *supra* note 280, at 87 (describing delegated sovereign authority as including “power . . . to bind third parties, or the government itself”); *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 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”).

leadership modality thus raises Appointments Clause concerns if the assignee carries out sufficiently significant duties without being able to be reversed.³⁰¹

Even if an IPA assignee is an “officer,” the next question is whether they are a “principal” or “inferior” officer, and therefore what method of appointment comports with the Appointments Clause.³⁰² The Clause allows “Heads of Departments” to appoint inferior officers.³⁰³ Under the IPA, the “head of a Federal agency may arrange for”³⁰⁴ the assignment, although implementing regulations permit the head’s “designee” to “make” the assignment as well.³⁰⁵ 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 organization chart.

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.”³⁰⁶ But the IPA includes government corporations and independent establishments as well as certain legislative and judicial agencies.³⁰⁷

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),³⁰⁸ seeks an incoming IPA assignment. DOI’s Office of the Secretary has delegated authority to make IPA assignments to the “Bureau directors (or their designee),”³⁰⁹ and USGS

301 Interview with anonymous agency official (or former official) #9 (June 10, 2024) (on file with authors) (describing significant decisionmaking authority but also noting that they served under leaders who could, if desired, undo decisions).

302 U.S. CONST. art. II, § 2.

303 *Id.*

304 5 U.S.C. § 3372(a).

305 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. 23126, 2,126 (Apr. 29, 1997).

306 *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 511 (2010).

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

308 U.S. DEP’T OF THE INTERIOR, 105 DM 2, DEPARTMENTAL MANUAL (2020), <https://www.doi.gov/sites/doi.gov/files/elips/documents/105-dm-2.pdf> [<https://perma.cc/WWR4-4FB6>].

309 U.S. DEP’T OF THE INTERIOR, PERSONNEL BULLETIN NO: 21–05 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/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.” U.S. DEP’T OF THE INTERIOR, 212 DM 15, DEPARTMENTAL MANUAL (2013),

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.”³¹⁰ In this context, the “agency” authorizing the IPA assignment appears to be USGS, but it would be DOI if it retained approval authority.³¹¹ If an IPA assignee to 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.³¹² 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.³¹³ 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 PDAAG 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.

There is a related nonconstitutional issue from administrative law: the so-called *Morgan* principle that the decisionmakers, themselves, must decide (or, as the Court put it, “[t]he one who decides must hear”).³¹⁴ But agency leaders can rely on subordinates, including contractors, for help. In *United Steel Workers of America v. Marshall*, the D.C. Circuit determined that

<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.” U.S. DEP’T OF THE INTERIOR, 112 DM 15, DEPARTMENTAL MANUAL (2019), <https://www.doi.gov/sites/doi.gov/files/elips/documents/112-dm-15.pdf> [https://perma.cc/33EX-BAXR].

³¹⁰ *USGS IPA Policy*, *supra* note 242.

³¹¹ See *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (noting that the SEC did not appoint the administrative law judge because it delegated that power to “SEC staff members”).

³¹² *Edmond v. United States*, 520 U.S. 651, 662-63 (1997).

³¹³ 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”).

³¹⁴ See *Morgan v. United States*, 298 U.S. 468, 481 (1936).

The unsupported allegation that hired consultants might have an incentive to act dishonestly cannot overcome the presumption that agency officials and those who assist them have acted properly . . . [W]e generally see no reason to force agencies to hire enormous regular staffs versed in all conceivable technological issues, rather than use their appropriations to hire specific consultants for specific problems.³¹⁵

If supervised contractors pose no issue to the *Morgan* principle, supervised IPA assignees also do not.

Here, too, solutions for legal concerns are straightforward. As with significant government authority, for Appointments Clause and administrative law concerns, agencies should place IPAs in subordinate positions.

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.”³¹⁶ House Republican Bill Huizenga questioned an academic heading an SEC division on an IPA agreement in a hearing about whether he was paid through his university’s endowment and whether that presented a conflict of interest with one the SEC’s rulemakings.³¹⁷

This criticism implicates at least three potential legal areas, which we turn to below. First, outside entities funding IPA assignees must comport with statutory and constitutional mandates. Until reversed by the Supreme Court this past term, the Fifth Circuit had found the Consumer Financial Protection Bureau (CFPB)’s funding from the Fed violated the Appropriations Clause, suggesting potential issues for IPAs. 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.

³¹⁵ 647 F.2d 1189, 1217 (D.C. Cir. 1980).

³¹⁶ *Grassley Launches Sweeping Review*, *supra* note 1 (capitalization altered).

³¹⁷ U.S. House Financial Services Subcommittee on Capital Markets, *Hearing Entitled: Oversight of the SEC’s Division of Investment Management*, YOUTUBE, at 2:14 (Sept. 19, 2023), <https://www.youtube.com/live/QUyRbst538o?si=FZ3CzQJOWso6mqaS> [<https://perma.cc/R3P8-MHZM>] (discussing the private fund advisory rule).

1. Spending

As a matter of statute, outside funding of IPA assignees is lawful. 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.”³¹⁸ But while section 209 applies to IPA assignees who are paid by their home institution,³¹⁹ 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.³²⁰ In addition, the Antideficiency Act may not preclude individuals on nonreimbursable or pre-funded IPAs from working during government shutdowns.³²¹

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.”³²² With few exceptions, the Appropriations Clause does not limit Congress;³²³ it instead restricts spending money *absent* affirmative acts by Congress. In *Community Financial Services Association (CFSA)*, the Fifth Circuit determined that the funding structure of the CFPB violated the Appropriations Clause³²⁴ because the CFPB’s funding does not come through the appropriations process and because the CFPB’s money is not held in a Treasury account.³²⁵ That position, in theory, could have brought into question the constitutionality of governing by assignment because the formal source of funding for IPAs would have constitutional salience. But the Supreme Court’s repudiation of the Fifth Circuit appears to put governing by assignment on solid constitutional footing.

Consider the perspective most clearly raised by the lower court’s position in *CFSA*: the concern that an external *source* of the agency’s funding could be constitutionally problematic. No such concern exists with cost-sharing

³¹⁸ 18 U.S.C. § 209.

³¹⁹ 5 U.S.C. § 3374(c)(2).

³²⁰ 2006 OGE Memo, *supra* note 233, at 10.

³²¹ 31 U.S.C. §§ 1341–42; U.S. OFF. OF PERS. MGMT., GUIDANCE FOR SHUTDOWN FURLOUGHS 6 (2021), <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf> [<https://perma.cc/FWP8-Y6FV>]; *see also* Interview with anonymous agency official (or former official) #9 (June 10, 2024) (on file with authors) (noting that IPAs were considered pre-funded and not subject to furlough).

³²² *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 Emps., AFL-CIO, Local 1647 v. Fed. Lab. Rels. Auth. (AFGE)*, 388 F.3d 405, 409 (3d Cir. 2004) (reviewing the use of the Appropriations Clause).

³²³ *See, e.g., AFGE*, 388 F.3d at 409 (“Congress itself may choose, however, to loosen its own reins on public expenditure.”).

³²⁴ *Cnty. Fin. Servs. Ass’n of Am. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 638 (5th Cir. 2022), *rev’d*, 601 U.S. 416 (2024).

³²⁵ *Id.* at 638–39.

pursuant to the IPA because the Supreme Court explained that the Appropriations Clause is only triggered when money is “paid out of the Treasury.”³²⁶ Thus, even when external organizations are entirely funding the IPA assignee’s work in the government, as is often the case in the staffing and projects modalities, there’s simply no constitutional concern: The money does not come from the Treasury, and the Appropriations Clause constrains only payments out of the Treasury.

To be sure, we may worry that such funding mechanisms undermine accountability. The Fifth Circuit described the CFPB’s funding from the Fed, which funds itself, as follows: “So the Bureau’s funding is double-insulated on the front end from Congress’s appropriations power.”³²⁷ Interestingly, in the *CFSA* oral argument at the Supreme Court, the Solicitor General conceded that the Constitution would permit the “SEC [to] simply rely on private donations and build up its own endowment.”³²⁸ In some sense, IPA agreements financed by universities and nonprofits do just that.³²⁹

Turn now to the converse issue: If an appropriation is a “law that authorizes expenditures from a specified source of public money for designated purposes,”³³⁰ can an IPA assignment ever violate the Appropriations Clause because the agency’s appropriations are used in contradiction of the appropriation’s “designated purposes”? It can. But the issue reduces to whether a use of the IPA violates extant statutory restrictions. The IPA authorizes reimbursements from an agency’s general appropriations to cover specific costs associated with an assignment.³³¹ It follows that Appropriations Clause concerns only exist when the agency’s appropriations themselves have “designated purposes” that contravene the specific assignment, such as if the IPA assignee’s duties are outside those anticipated by the appropriations. These concerns have been raised by IGs and GAO throughout the years, but they have been framed as statutory concerns: that is, reimbursing a specific IPA violates either the Purpose Statute³³² (because the IPA’s duties go beyond the object of the agency’s appropriation) or the Antideficiency Act³³³ (because the agency obligated the

³²⁶ *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass’n of Am.*, 601 U.S. 416, 425 (2024) (quoting *Cincinnati Soap Co v. United States*, 301 U.S. 308, 321 (1937)).

³²⁷ *Cmty. Fin. Servs. Ass’n of Am.*, 51 F.4th at 639.

³²⁸ Transcript of Oral Argument at 35, *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass’n of Am.*, 601 U.S. 416 (2024) (No. 22-448).

³²⁹ Interview with anonymous agency official (or former official) #5 (Sept. 21, 2023) (on file with authors) (seeing externally funded IPAs as a mechanism through which philanthropists could support the agency’s work); see also E-mail from anonymous agency official (or former official) #5 to authors (Sept. 26, 2024) (on file with authors).

³³⁰ *Cmty. Fin. Servs. Ass’n of Am.*, 601 U.S. at 424.

³³¹ See 5 U.S.C. §§ 3374(c), 3375 (detailing, respectively, pay and contributions to employee benefit systems and travel and relocation).

³³² 31 U.S.C. § 1301(a) (“Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”).

³³³ *Id.* §§ 1341(a)(1)(A)–(B), 1342, 1517(a).

government in excess of an appropriation, perhaps because Congress tried to allocate specific pots of money for different purposes and the agency was trying to get around those restrictions³³⁴). In that sense, the constitutional rule set forth in the CFPB case breaks no new ground for actual IPA practice.

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 their home institution, so their interests may not always align with those of their federal agency; and second, many IPA assignees work in federal grantmaking bodies but come from positions that can apply for those grants. We focus here on conflicts mandates under the Ethics in Government Act. For most ethics rules, the distinction between an IPA “appointee” and “detailer” 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.

a. *Restrictions on Representation*

Ethics laws govern how government 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.”³³⁵ 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

³³⁴ See, e.g., Interpretation of Restrictive Provision Contained in Annual Appropriation Act for the Veterans Administration, B-157790 (Comp. Gen. Oct. 1, 1974), <https://www.gao.gov/products/b-103167%2Cb-157790> [<https://perma.cc/NA3D-VSB6>] (concerning the appropriations provision on VA controls over the IPA, such that an employee of the VA could not be assigned via the IPA to “examine or provide hospital care for persons not entitled to VA benefits under the laws relating to veterans, unless the VA is reimbursed for the full cost of providing these medical services to all non-VA beneficiaries” consistent with the appropriations provision); Memorandum from Gerald R. Kirkland, Regional Inspector Gen. for Audit, U.S. Dep’t of Hous. & Urb. Dev., to Helen Kanovsky, Acting Deputy Sec’y, & David Sidari, Deputy Chief Fin. Officer, 2014-FW-0801, Potential Antideficiency Act Violations: Intergovernmental Personnel Act Agreements 2-4 (May 30, 2014), <https://www.hudoig.gov/sites/default/files/documents/2014-FW-0801.pdf> [<https://perma.cc/A3Z5-NL6D>] (raising Antideficiency Act concern with HUD funding an IPA detailee through a certain spending account that appeared to circumvent an appropriations provision set in place by Congress to “increase the accountability of lead policy makers” at HUD); H.R. REP. NO. 111-564, at 117 (2010), <https://www.congress.gov/congressional-report/111th-congress/house-report/564/1?outputFormat=pdf> [<https://perma.cc/GUM4-QYRU>].

³³⁵ 18 U.S.C. § 203(a).

substantial interest.”³³⁶ Both provisions provide more flexibility for special government employees (SGEs), with extra flexibility for SGEs serving for fewer than 60 days.³³⁷ SGEs are also eligible for certain waivers.³³⁸ An IPA assignee will therefore have similarly fewer constraints if they fall 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.³³⁹ For instance, the Defense Department’s IG identified in 1997 potential conflicts of interest 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.³⁴⁰ 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.³⁴¹ IGs have raised similar concerns over the years.³⁴²

The IPA also raises the converse question: When may an IPA assignee hold themselves out as an employee of the government? Governmental employees (including IPA assignees into the government)³⁴³ are generally restricted from using their public office for private gain. The restriction

³³⁶ *Id.* § 205(a).

³³⁷ *Id.* §§ 203(c)(2) & 205(c)(2); *see also* Memorandum from Stephen D. Potts, Dir., Off. of Gov’t Ethics, to Designated Agency Ethics Officials, Gen. Counsels and Inspectors Gen., OGE 00x1, Regarding Summary of Ethical Requirements Applicable to Special Government Employees 8-11 (Feb. 15, 2000) [hereinafter 2000 OGE Memo on SGEs], [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>] (describing flexibility provided to SGEs); 2006 OGE Memo, *supra* note 233, at 6 n.9 (discussing the same).

³³⁸ 18 U.S.C. §§ 203(e) & 205(f); *see also* 2000 OGE Memo on SGEs, *supra* note 337, at 9 (discussing waivers applicable to SGEs).

³³⁹ 2006 OGE Memo, *supra* note 233, at 5-6.

³⁴⁰ 1997 DOD IG REPORT, *supra* note 268, at 10.

³⁴¹ *Id.* at 10-11.

³⁴² *See, e.g.*, AUDIT DIV., OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., AUDIT REP. 09-38, U.S. DEPARTMENT OF JUSTICE AUDIT OF THE NATIONAL INSTITUTE OF JUSTICE’S PRACTICES FOR AWARDED GRANTS AND CONTRACTS IN FISCAL YEARS 2005 THROUGH 2007 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 296 at 4; U.S. 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) [hereinafter 2005 GAO REPORT ON DHS ETHICS], <https://www.gao.gov/assets/gao-06-206.pdf> [<https://perma.cc/8LBR-RSMY>].

³⁴³ 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.*”).

covers activities ranging from explicit inducements that favor family members to actions implying governmental endorsement of a personal activity.³⁴⁴ Every federal employee must navigate the line between acting in their official role and operating in their individual capacity. The academic or nonprofit IPA assignee's obligation is in principle no different, even if slightly more complicated by the mix of their employment in their nongovernmental institution and their 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 their position in their home institution—for example, if the assignment is a part-time research project that the assignee conducts with researchers at the home institution. In those cases, agencies might issue guidance to specify when the assignee's acts count as being in their 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 a presumption that the scientist's actions are taken in official capacity “in [the] absence of a conclusive showing otherwise” because of the nature of those positions.³⁴⁵ 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 in 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” they are “serving as . . . employee” has a “financial interest.”³⁴⁶ IPA assignees raise potential section 208 concerns because they are also employed by their home institutions.³⁴⁷ 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

³⁴⁴ *Id.* § 2635.702.

³⁴⁵ See 09-1 *Ethics Issues Related to USDA Scientists*, U.S. DEP'T OF AGRIC., <https://www.usda.gov/oe/rules-road/ethics-issuances/09-1-ethics-issues-related> [<https://perma.cc/H6WK-UMDX>] (last visited Sept. 15, 2024).

³⁴⁶ 18 U.S.C. § 208(a).

³⁴⁷ 2006 OGE Memo, *supra* note 233, at 6; see also 2005 GAO REPORT ON DHS ETHICS, *supra* note 342, at 4 (raising concern when the agency provided only “the same new employee and annual ethics training” for IPAs as for other agency employees despite IPAs’ “unique situation”); cf. 2000 OGE Memo on SGEs, *supra* note 337, at 14 (“Because SGEs typically have substantial outside employment . . . , issues under section 208 frequently arise.”).

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.”³⁴⁸

Regulations do exempt generally applicable acts done by an employee on a leave of absence from an institution of higher education.³⁴⁹ A full-time IPA assignee, for example, can help write a regulation governing federal grantmaking at the receiving agency even if their home educational institution receives such grants, as in the staffing modality.³⁵⁰ But IPA assignees in part-time positions, common in the projects modality, are not “on leave” within the meaning of the regulatory exemption.³⁵¹ Such part-time IPA agreements may therefore raise potential conflicts concerns.

Other regulations shape how IPA assignees should comply with conflicts 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.”³⁵² Just as section 208 does not implicate “broad policy options that are directed to the interests of a large and diverse group of persons,”³⁵³ much basic research performed by an IPA assignee thus should fall outside of COI restrictions because it does not focus on any specific person’s 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.³⁵⁴ 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 personal interests align with those of the agency does not insulate the assignee from section 208 scrutiny. The question is not whether

348 Memorandum from Gerald R. Kirkland, Regional Inspector Gen. for Audit, 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) [hereinafter 2015 HUD IG REPORT ON COIS], <https://www.hudoig.gov/sites/default/files/documents/2015-FW-0801.pdf> [<https://perma.cc/6C84-KXV8>].

349 5 C.F.R. § 2640.203(b); see also 2006 OGE Memo, *supra* note 233, at 7 (describing academics on a leave of absence).

350 5 C.F.R. § 2640.203(b)(Example 1).

351 2006 OGE Memo, *supra* note 233, at 7 (contrasting an “IPA detailee who continues to serve his home institution part-time” from one on leave).

352 5 C.F.R. § 2635.402(b)(3).

353 *Id.*

354 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”).

the interests actually conflict, but rather whether the assignee has a “financial interest” within the meaning of section 208.

A 1993 OLC opinion addressed some of these issues. It analyzed how section 208 applies to a governmental employee who assigned their retained foreign patent rights to 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.³⁵⁵ OLC noted that the federal government’s “best interest,” in this sort of situation, is often “to allow inventors who hold foreign rights to continue to develop their work”³⁵⁶—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 them from working on research, even though that research would have been pursuant to the CRADA as part of their official government duties.³⁵⁷ (Note that OLC did not determine whether the foreign rights themselves constitute a “financial interest” that would bar the employee from working on the research.³⁵⁸)

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, unlike basic research that many IPA assignees in the projects modality perform.³⁵⁹ 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[]”³⁶⁰ that could be imputed to the employee because of the licensing agreement.³⁶¹ In sum, even though the government, as the original holder of the domestic patent rights, had an interest in the 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 their individual “financial interest.”

As with other legal concerns, IPA arrangements can avoid conflicts pitfalls. Agencies, and particularly their ethics officers, should help individuals on IPAs comply with COI rules by ensuring awareness of the constraints and providing advice on particular issues. In addition, conflicts

³⁵⁵ Ethics Issues Related to the Federal Technology Transfer Act of 1986, 17 Op. O.L.C. 46, 52 (1993).

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 52-53.

³⁵⁸ *Id.* at 53.

³⁵⁹ 5 C.F.R. § 2635.402(b)(3).

³⁶⁰ *Id.* § 2635.403(c)(1).

³⁶¹ *Id.* §§ 2635.402(b)(2)(iii), .403(c)(2).

issues for academics pale in comparison to the revolving door concerns of private sector workers coming into government and then returning.³⁶²

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 federal agencies. While OPM formally has centralized authority under the IPA (through delegation from the White House), 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 (OGE)—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 note IG review of IPAs. 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.³⁶³ The President immediately delegated that power to the Civil Service Commission,³⁶⁴ which promulgated implementing regulations later the year the IPA was enacted.³⁶⁵ The Commission also could require reports from agencies upon request.³⁶⁶

In the latter part of the 1970s, OPM (for our purposes, the successor agency to the Civil Service Commission) pushed agencies to report on their IPA agreements and their efficacy.³⁶⁷ OPM took a more central role in overseeing the IPA through regulations. It required agencies to send it a copy of every IPA agreement.³⁶⁸ It also gave itself the exclusive authority to certify

³⁶² Interview with anonymous agency official (or former official) #9 (June 10, 2024) (on file with authors) (comparing academics and law firm partners, noting the broad impact policy decisions can have on entire lines of business for someone in private practice).

³⁶³ Intergovernmental Personnel Act of 1970, Pub. L. No. 91-648, § 402(a), 84 Stat. 1909, 1925 (1971) (codified at 5 U.S.C. § 3376).

³⁶⁴ Exec. Order No. 11,589, 36 Fed. Reg. 6343 (Apr. 2, 1971).

³⁶⁵ Part 334—Temporary Assignment of Employees Between Executive Agencies and States, Local Governments, and Institutions of Higher Education, 36 Fed. Reg. 6488 (Apr. 6, 1971).

³⁶⁶ *Id.* at 6489 (codified at 5 C.F.R. § 334.106 (1976)).

³⁶⁷ 1979 GAO REPORT, *supra* note 24, 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).

³⁶⁸ Part 334—Temporary Assignment of Employees Between Federal Agencies and State, Local, and Indian Tribal Governments, Institutions of Higher Education, and Other Eligible Organizations, 44 Fed. Reg. 25394, 25395 (May 1, 1979); *see also* 5 C.F.R. § 334.106(c) (1981).

eligibility of “other organizations” and the ability to direct federal agencies to terminate assignments that did not meet the IPA’s requirements.³⁶⁹

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 OPM’s Office of Intergovernmental Personnel programs, an office dedicated to oversight of the IPA.³⁷⁰ In 1989, OPM maintained only two full-time positions dedicated to overseeing the mobility program.³⁷¹ As 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.”³⁷²

OPM also loosened its stringent rules over time to vest oversight responsibility with the agencies.³⁷³ It eliminated in 1993 the Federal Personnel Manual³⁷⁴—and along with it, an entire chapter governing IPA assignments.³⁷⁵ In 1996, it revised its regulations so that individual agencies, rather than OPM, determined “other organization” status.³⁷⁶ Some agencies subsequently developed and formalized their own IPA procedures.³⁷⁷ Agencies also no longer had to send each IPA agreement to OPM.³⁷⁸ In 2022, GAO concluded that OPM “has delegated day-to-day oversight of the mobility program’s use to agencies.”³⁷⁹ But OPM still maintains its power to require agencies to report on their uses of the IPA³⁸⁰ and to order agencies to terminate assignments that violate the IPA’s rules.³⁸¹

Other institutions play a role in supervising agencies’ IPA practices. GAO, through the legal opinions of the Comptroller General, has fleshed out

369 Part 334—Temporary Assignment of Employees Between Federal Agencies and State, Local, and Indian Tribal Governments, Institutions of Higher Education, and Other Eligible Organizations, 45 Fed. Reg. 995 (Jan. 4, 1980) (codified at 5 C.F.R. §§ 334.103, 334.107(d) (1981)).

370 1989 GAO REPORT, *supra* note 49, at 21.

371 *Id.*

372 *Id.* at 10.

373 Intergovernmental Personnel Act Mobility Program, 61 Fed. Reg. 65189, 65189 (Dec. 11, 1996).

374 FPM Sunset, *supra* note 242, at 1.

375 *Id.* at 7.

376 Intergovernmental Personnel Act Mobility Program, 61 Fed. Reg. at 65189. Some agencies also delegated “other organization” certification down their bureaucratic chain of command. See Memorandum from Lawrence Wachs, Acting Dir., Hum. Res. Mgmt., U.S. Dep’t of Agric. to Mission Area Pers. 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/IPADelegationofAuthoritytoMissionAreas.pdf> [<https://perma.cc/D3JG-SLV8>] (delegating certification decision was part of “an effort to eliminate unnecessary layers of review”).

377 See, e.g., OFF. OF ADMIN. & RES. MGMT., U.S. ENV’T PROT. AGENCY, EPA 210-B-97-001, INTERGOVERNMENTAL PERSONNEL ACT POLICY AND PROCEDURES MANUAL (IPA) (1997) <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=2000AN2V.txt> [<https://perma.cc/3DKZ-WNXXN>].

378 Intergovernmental Personnel Act Mobility Program, 61 Fed. Reg. at 65189.

379 2022 GAO REPORT, *supra* note 67, at 27.

380 5 C.F.R. § 334.108 (2022).

381 *Id.* § 334.107(d) (2022).

the meaning of the spending-related provisions of the IPA.³⁸² GSA's oversight of travel regulations³⁸³ and OGE's ethics guidance³⁸⁴ 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."³⁸⁵

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

Some agencies have issued internal agency guidelines and constraints on using 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."³⁸⁶ DOJ requires the Deputy Attorney General to approve any IPA agreements.³⁸⁷ Agencies may require higher levels of review for reauthorizations than for initial IPA agreements,³⁸⁸ and some require heightened signoff for certain

³⁸² See, e.g., Reimbursement by Forest Service of Expenses Under Intergovernmental Personnel Act, B-209132 (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 Expense 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).

³⁸³ 2001 GAO REPORT ON NSF, *supra* note 59, at 16 (noting role of GSA in issuing travel regulations).

³⁸⁴ See, e.g., 2006 OGE Memo, *supra* note 233.

³⁸⁵ *Intergovernment Personnel Act: Provisions*, U.S. OFF. OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/hiring-information/intergovernment-personnel-act/#url=Provisions> [<https://perma.cc/485V-YKNQ>] (last visited Sept. 17, 2024).

³⁸⁶ HHS IPA POLICY, *supra* note 242, § 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); OFF. OF THE SEC'Y, DEP'T OF THE INTERIOR, 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>] (mandating that the Servicing Human Resources Office "review[] all [IPA] agreements for accuracy and compliance with the Act").

³⁸⁷ Memorandum from Jolene Ann Lauria, Acting Assistant Att'y Gen. for Admin., Dep't of Just., 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) [hereinafter 2023 DOJ IPA Policy Revision], <https://www.justice.gov/jmd/page/file/1578516/download> [<https://perma.cc/9QFX-GUM8>].

³⁸⁸ VA IPA POLICY, *supra* note 242, § C(4)(a)(3).

positions.³⁸⁹ IPA regulations sometime specify how the agency can fund an IPA,³⁹⁰ and some include requirements of program evaluation.³⁹¹

IGs, whom Congress has tasked with preventing and identifying waste, fraud, and abuse in their agencies,³⁹² also investigate agency IPA practices and flag concerns.³⁹³

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 107.³⁹⁴ Whether a specific IPA assignee must report depends on the “position, rather than the individual.”³⁹⁵ 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.”³⁹⁶ But under section 101(f)(3), OGE can require public filing based on a determination that the IPA assignee’s

³⁸⁹ See, e.g., OFF. OF ADMIN. & RES. MGMT., *supra* note 377 at 4-3 (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://perma.cc/Y43F-8Y97>] (requiring Administrator signoff for IPA agreements with organizations in the DC area).

³⁹⁰ USAID IPA POLICY, *supra* note 228, § 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”).

³⁹¹ *Id.* § 437.3.9(d) (requiring every IPA to be “evaluated at its conclusion to document the benefit(s) accrued to the participating organizations”).

³⁹² See 5 U.S.C. § 404(a).

³⁹³ See, e.g., OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF ENERGY, DOE/IG-0761, AUDIT REPORT: THE DEPARTMENT OF ENERGY’S MANAGEMENT OF CONTRACTOR INTERGOVERNMENTAL PERSONNEL AND CHANGE OF STATION ASSIGNMENTS (2007), <https://www.energy.gov/sites/prod/files/igprod/documents/IG-0761.pdf> [<https://perma.cc/Z486-PYUU>]; 2015 HUD IG REPORT ON COIS, *supra* note 348; 2020 EPA IG REPORT, *supra* note 65; Memorandum from Admin. to Inspector Gen., Intergovernmental Personnel Act Agreements (July 31, 2003), <https://oigforms.nasa.gov/docs/IPAletter.pdf> [<https://perma.cc/3HEU-NVQN>].

³⁹⁴ 5 U.S.C. app. § § 101, 107.

³⁹⁵ 2006 OGE Memo, *supra* note 233, at 11; see also 2022 GAO REPORT, *supra* note 67, 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 (2023) (clarifying exceptions under section 101(f)(5)); 5 U.S.C. app. § 107(a)(1) (confidential filers); 5 C.F.R. § 2634.904(a) (2023) (same).

³⁹⁶ 2006 OGE Memo, *supra* note 233, at 11 (citing Memorandum from Amy L. Comstock, Dir., Off. of Gov’t Ethics, 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) [hereinafter 2002 OGE Memo], [https://www.oge.gov/web/oge.nsf/News+Releases/73116164416B67F1852585BA005BED56/\\$FILE/d36bda6a75d4a6f9dc993d44c74081e1.pdf](https://www.oge.gov/web/oge.nsf/News+Releases/73116164416B67F1852585BA005BED56/$FILE/d36bda6a75d4a6f9dc993d44c74081e1.pdf) [<https://perma.cc/VR4P-VEX9>]). This form is now known as OGE Form 278, for public filers.

position is of “equal classification” to other covered positions based on various functional factors.³⁹⁷

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.³⁹⁸ Other requests have targeted the Biden Administration. We submitted a FOIA request to OPM for “IPA mobility program assignments across federal agencies since January 1, 1980.” We received approximately 20,000 records of individuals who have filled IPA roles since 1980; however, the data appeared highly incomplete and inconsistent across time and agencies, perhaps due to different record-keeping practices and changes in reporting mandates to OPM.³⁹⁹

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.⁴⁰⁰ 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—are 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 interviews highlighted a division between “political” IPAs and nonpolitical arrangements. The leadership modality easily falls in the former, but some staffing modality IPAs do as well.⁴⁰¹ Promoting nonpolitical uses of

³⁹⁷ 2002 OGE Memo, *supra* note 396, at 3-4.

³⁹⁸ U.S. DEP’T OF TREASURY, FOIA LOG JULY 1 - SEPTEMBER 30, 2020 3 (2020), <https://home.treasury.gov/system/files/236/2020-4th-Quarter-FOIA-Log.pdf> [<https://perma.cc/S32W-C3YG>].

³⁹⁹ For example, the FOIA data only lists 146 IPAs at the NSF over the past four decades, which is a gross underestimate according to the NSF’s yearly budget data. U.S. OFF. OF PERS. MGMT., FOIA 23-0441-F, IPA MOBILITY PROGRAM ASSIGNMENTS ACROSS FEDERAL AGENCIES SINCE JANUARY 1, 1980 (2023) (on file with authors). This undercount presumably derives from NSF not having to send agreements to OPM for much of this period.

⁴⁰⁰ Even OPM has articulated “myths” around the use of the IPA. *Intergovernment Personnel Act Overview*, U.S. OFF. OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/hiring-information/intergovernment-personnel-act/#url=Overview> [<https://perma.cc/W68A-Y7EJ>] (last visited Sept. 17, 2024) (busting “myths” around the use of the IPA).

⁴⁰¹ Interview with anonymous agency official (or former official) #8 (June 3, 2024) (on file with authors); Interview with anonymous agency official (or former official) #9 (June 10, 2024) (on file with authors).

the IPA is an easier lift, and some proponents of the IPA want to downplay its political manifestations.⁴⁰²

Our recommendations focus on reforms of the IPA itself, even if governing by assignment illustrates acute needs to reform the competitive service (or larger merit-based) staffing systems 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.⁴⁰³ 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 scientific and technological needs, and we 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 to rekindle the intergovernmental nature of the IPA and conclude by offering proposals to improve the IPA's effectiveness.

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 (defined here as merit-based hiring that extends beyond the formal competitive service). 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.

⁴⁰² Interview with anonymous agency official (or former official) #4 (Sept. 21, 2023) (on file with authors).

⁴⁰³ Advocates have long called for GS classification reforms. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-677, HUMAN CAPITAL: OPM NEEDS TO IMPROVE THE DESIGN, MANAGEMENT, AND OVERSIGHT OF THE FEDERAL CLASSIFICATION SYSTEM 1 (2014), <https://www.gao.gov/assets/gao-14-677.pdf> [<https://perma.cc/DUZ5-CR5V>] ("Almost since its inception in 1949, questions have been raised about the GS classification system's ability to keep pace with the evolving complexity and nature of federal work."); NAPA NO TIME TO WAIT PART 2, *supra* note 150, at 41-42 (discussing limitations of the General Schedule Position Classification System for both position classification and pay and suggesting potential revisions).

Given that several agencies—OPM, OMB, GSA, and OGE—operate in the IPA space more broadly, centralization requires managing potential turf wars.⁴⁰⁴ Given OPM's statutory and historical role, OPM seems like the most promising coordinator.⁴⁰⁵

First, OPM could issue a regulation ruling out incorrect understandings of the IPA, such as the interpretation held by some agencies that IPAs can't engage with their home organization because doing so would create a financial conflict of interest, that individuals cannot serve on multiple IPA agreements, and that academics cannot work on Department of Education matters. Practically speaking, those first two interpretations prohibit part-time IPAs. While OPM already attempts to clarify "myths" about the IPA on its website,⁴⁰⁶ the information is guidance at best, not a legislative rule with binding force.⁴⁰⁷ OPM has the authority to prescribe IPA-related regulations,⁴⁰⁸ 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.⁴⁰⁹ 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 challenges involving technical expertise.

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 thus 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 human resources

⁴⁰⁴ See generally Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375 (2017) (examining agency conflicts).

⁴⁰⁵ But see Interview with anonymous agency official (or former official) #5 (Sept. 21, 2023) (on file with authors) (positing that there may be variation in the extent to which agencies implement OPM guidance and recommendations); see also E-mail from anonymous agency official (or former official) #5 to authors (Sept. 26, 2024) (on file with authors).

⁴⁰⁶ *Intergovernment Personnel Act Overview*, *supra* note 400.

⁴⁰⁷ 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").

⁴⁰⁸ See 5 U.S.C. § 3376 (giving the President the power to prescribe regulations for the administration of the IPA); Exec. Order No. 11,589, 36 Fed. Reg. 6343 (Apr. 3, 1971) (delegating this power to OPM).

⁴⁰⁹ 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. § 2635.102(h); Standards of Ethical Conduct for Employees of the Executive Branch; Amendments To Clarify the Coverage of Detailees to an Agency Under the Intergovernmental Personnel Act, 71 Fed. Reg. 45735, 45736 (Aug. 10, 2006).

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 to both 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.⁴¹⁰ 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 take on a full-time role but are eager to contribute to well-scoped, part-time projects matching their skillsets.

While consistency across agencies is critical, centralization could also promote consistency across IPA assignees and their home institutions. Our interviews showed that agencies vary in how much they convey to individuals on IPAs on what they can and cannot do in their government roles.⁴¹¹ Universities also have different levels of knowledge about the IPA.⁴¹² OPM, OGE, OMB, and/or GSA could develop more extensive materials for IPAs during their government work, which individual agencies could supplement, and for home institutions about IPA agreements.

⁴¹⁰ See Interview with anonymous agency official (or former official) #4 (Sept. 21, 2023) (on file with authors); U.S. GEN. SERVS. ADMIN., HRM 9110.1, 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 114 (“OES has utilized the IPA Mobility Program in the past to fill highly technical positions in a quick and simple way where there might otherwise be capacity gaps.”).

⁴¹¹ See, e.g., Interview with anonymous agency official (or former official) #8 (June 3, 2024) (on file with authors) (noting they received little guidance).

⁴¹² *Id.* (noting their institution knew little); Interview with anonymous agency official (or former official) #1 (July 27, 2023) (on file with authors) (learning about the IPA from a colleague who had previously served in government under the IPA).

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.⁴¹³ Some positions filled by IPA assignments—such as Deputy Director of the NSF, Director of the Bureau of Economics at the Federal Trade Commission (FTC), and the six Division Directors at the SEC—may, however, be constitutional offices due to the continuing nature of the positions and the duties they carry out.

These few positions qualify, at most, as inferior offices because IPA assignees' work is generally "directed and supervised at some level" by principal officers.⁴¹⁴ The issue would be whether those who appoint such officers are "Heads of Departments."⁴¹⁵ Statutorily, an IPA assignment is "arrange[d]" by the "head of a Federal agency,"⁴¹⁶ 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.⁴¹⁷

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 positions 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.⁴¹⁸

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 case law seems to permit IPA agreements to staff

⁴¹³ See *supra* Section 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 *MuckRock FOIA Requests*, *supra* note 137.

⁴¹⁴ *Edmond v. United States*, 520 U.S. 651, 663 (1997).

⁴¹⁵ U.S. CONST. art. II, § 2, cl. 2.

⁴¹⁶ 5 U.S.C. § 3372(a).

⁴¹⁷ 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 387.

⁴¹⁸ Agency heads have more competing demands on their time than lower-level officials. *But see* Interview with anonymous agency official (or former official) #1 (July 27, 2023) (on file with authors) (noting that agency leaders can sign off quickly because of staff support).

principal offices temporarily.⁴¹⁹ But we are not aware of any IPA assignees staffing principal offices: Even when an IPA assignee served as the PDAAG 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). In addition, regulations limit what such an IPA could authorize, with important decisions surrounding prosecutions requiring Assistant Attorney General signoff—in other words, a PDAAG serving without an Assistant Attorney General couldn't authorize those prosecutions.⁴²⁰ 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. For instance, IPA assignees should not sign off, with no review possible, on inherently government functions such as personnel evaluations.⁴²¹

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. Congress, good governance organizations, and the media, for example, need information to raise concerns.⁴²² 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.⁴²³ What little information exists on IPA

⁴¹⁹ 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”).

⁴²⁰ 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.

⁴²¹ Interview with anonymous agency official (or former official) #9 (June 10, 2024) (on file with authors) (explaining how the agency's General Counsel eventually stopped them from formally signing off on personnel reviews).

⁴²² Without knowledge of fires, they cannot pull fire alarms. See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

⁴²³ See, e.g., 2020 EPA IG REPORT, *supra* note 65, at 9-10 (noting that the EPA does not comply with documentation requirements for IPAs); 2022 GAO REPORT, *supra* note 67, at 27; OFF. OF INSPECTOR GEN., NAT'L SCI. FOUND., OIG 23-2-003, 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]. IPAs themselves have noted that they did not know who other IPAs were at their agency. See Interview with anonymous agency official (or former official) #8 (June 3, 2024) (on file with authors).

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.⁴²⁴ Or mandates could be included as riders in appropriations legislation.⁴²⁵ 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.

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.⁴²⁶ 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.⁴²⁷

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.⁴²⁸ 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 directed \$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.⁴²⁹ Such new funding will likely

⁴²⁴ See *infra* notes I & M and accompanying text.

⁴²⁵ See, e.g., Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 202, 136 Stat. 4459, 4667 (2023) (requiring OMB to disclose apportionments); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 1401, 118 Stat. 2809, 3192 (2005) (mandating GAO to provide annual summaries of Antideficiency Act violations).

⁴²⁶ Cf. 5 U.S.C. app. § 101(f)(3).

⁴²⁷ OPM objected to 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 67, at 29-30.

⁴²⁸ CTR. FOR STATE & LOC. GOV'T 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>]; CTR. FOR STATE & LOC. GOV'T EXCELLENCE, SURVEY FINDINGS: STATE AND LOCAL GOVERNMENT WORKFORCE 2021 10 (2021), <https://slge.org/wp-content/uploads/2021/05/statelocalworkforce2021.pdf> [<https://perma.cc/P53C-K8T3>].

⁴²⁹ Matthew Daly, *EPA Outlines \$27B 'Green Bank' for Clean Energy Projects*, ASSOCIATED PRESS (Feb. 14, 2023, 5:18 PM), <https://apnews.com/article/climate-and-environment-financial->

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 states⁴³⁰ and also the federal government in areas of particular state competence.⁴³¹ While federal agencies have cited their own capacity constraints to justify not participating in the outgoing IPA mobility program,⁴³² 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.⁴³³ For example, Treasury employees with expertise in running (or overseeing) a bank could help states best use new funding opportunities. To be fair, today's hyperpartisanship may make the localism modality less plausible in certain areas.

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.⁴³⁴ In some states, what's needed is only a clarification of existing law. For example, while California has a statute that appears to allow personnel exchanges between universities and state and local

services-us-environmental-protection-agency-business-664750a30b238523bc025663f4a1f002
[<https://perma.cc/DHU6-GB4N>].

⁴³⁰ 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).

⁴³¹ 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/54A4-6E9W>] (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).

⁴³² 2022 GAO REPORT, *supra* note 67, at 16 (noting “[r]eluctance of the home agency/organization to temporarily lose employees” as a limiting factor on agency usage of outgoing IPAs).

⁴³³ See, e.g., 1989 Congressional Hearing, *supra* note 50, at 66-67 (statement of Jeffrey Schiff, Exec. Dir., Nat'l Ass'n of Towns & Twps.) (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).

⁴³⁴ Previous work found that only two states, as of 2023, appeared to have personnel exchange programs that, like the IPA, allow for temporary assignment between government and nonprofit institutions and universities. Roughly a dozen states appear to allow some kind of temporary exchange between public universities and state government. See Daniel E. Ho, Anne Joseph O'Connell & Isaac Cui, *Talent Exchanges for State Governments*, STAN. INST. FOR ECON. POL'Y RSCH. (Sept. 2023), <https://siepr.stanford.edu/publications/policy-brief/talent-exchanges-state-governments> [<https://perma.cc/Z6PU-EFDM>].

governmental agencies,⁴³⁵ the State Personnel Board only recently fixed its regulations to clarify that private universities are eligible institutions.⁴³⁶ The California legislature also considered altering various details of its IPA analogue, but those proposed changes were not adopted.⁴³⁷

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,⁴³⁸ and agencies have sought support from Presidential Innovation Fellows and GSA's 18F as information intermediaries.⁴³⁹ Academic IPAs could serve as effective intermediaries by lending their technical expertise to help the government distinguish science from snake oil.⁴⁴⁰ NASA has taken some steps in this direction by allowing IPA detailees (after checking for conflicts of interest) to serve as contracting officer representatives who help contracting officers assess the technical merits of potential contracts but cannot actually sign or terminate contracts.⁴⁴¹ Agencies handling highly technical contracts, especially in new

⁴³⁵ See CAL. GOV'T CODE § 19050.8.

⁴³⁶ CAL. OFF. OF ADMIN. L., OAL MATTER NO. 2024-0711-01, NOTICE OF FILING AND PRINTING ONLY: IN RE: STATE PERSONNEL BOARD (Aug. 22, 2024), <https://spb.ca.gov/whatsnew/2024-0711-01FP.pdf> [<https://perma.cc/UM5Z-KRLC>] (amending, among other provisions, CAL. CODE REGS. tit. 2, § 438).

⁴³⁷ See S.B. 1070, 2023–24 Leg., Reg. Sess. (Cal. 2024).

⁴³⁸ 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”).

⁴³⁹ For example, GSA announced a new Presidential Innovation Fellow cohort focused exclusively on assisting agencies with their AI efforts earlier this year. Caroline Nihill, *GSA Announces New Presidential Innovation Fellows Focused Broadly on Tech, with a Second AI Cohort Coming Later in 2024*, FEDSCOOP (Mar. 25, 2024), <https://fedscoop.com/gsa-announces-pif-tech-ai-cohort-2024> [<https://perma.cc/9KZA-EZPC>]. For grants, agencies sometimes rely on external committees of experts. IPA agreements could serve a similar function for the awarding and supervision of contracts.

⁴⁴⁰ 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 technology 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 (2019), <https://www.cs.princeton.edu/~arvindn/talks/MIT-STS-AI-snakeoil.pdf> [<https://perma.cc/5UNX-AVLT>].

⁴⁴¹ OFF. OF PROCUREMENT, NAT’L AERONAUTICS & SPACE ADMIN., NASA FAR SUPPLEMENT (2015), <https://www.hq.nasa.gov/office/procurement/regs/NFS.pdf> [<https://perma.cc/92Y9-TJJ4>].

fields like AI,⁴⁴² 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.⁴⁴³

2. Enabling Access to Noncitizen Talent

In a practice dating to the 1940s, Congress has restricted federal agencies from hiring many noncitizens in each annual appropriations bill. Specifically, federal agencies may only “pay the compensation” of any “employee of the Government” if they are 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.”⁴⁴⁴ Some agencies, such as the Department of Defense, have an exemption from these limits.⁴⁴⁵ 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.”⁴⁴⁶

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.⁴⁴⁷ In absolute terms, temporary visa holders received 17,091 of the 45,924 doctoral degrees awarded that year.⁴⁴⁸ The inability to recruit from

442 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>].

443 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 A.I. ADVISORY COMM., YEAR 1 REPORT 17, 24 (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 calling on agencies, where appropriate, to designate AI procurement leaders); 2021 NSCAI REPORT, *supra* note 160, at 137 (similar).

444 Financial Services and General Government Appropriations Act, 2023, Pub. L. No. 117-328, § 704, 136 Stat. 4459, 4705 (2022) (codified at 5 U.S.C. § 3101 notes).

445 Department of Defense Appropriations Act, 2023, Pub. L. No. 117-328, § 8002, 136 Stat. 4459, 4584-85 (2022) (codified at 10 U.S.C. § 1584 notes); *see also* 10 U.S.C. § 1584 (exempting the Department of Defense from the citizenship requirement for employment).

446 Exec. Order No. 11,935, 41 Fed. Reg. 37301 (Sept. 3, 1976) (codified at 5 C.F.R. § 7.3(b)).

447 NAT'L CTR. FOR SCI. & ENG'G STATS., NAT'L SCI. FOUND., NSF 24-300, 2022 DOCTORATE RECIPIENTS FROM U.S. UNIVERSITIES: DATA TABLES AND RESOURCES 181 tbl.8-1 (2023) <https://ncses.nsf.gov/pubs/nsf24300/assets/nsf24300-data-tables-and-resources.pdf> [<https://perma.cc/E4KW-QNP3>].

448 *Id.*; NAT'L CTR. FOR SCI. & ENG'G STATS., NAT'L SCI. FOUND., NSF 24-300, 2022 DOCTORATE RECIPIENTS FROM U.S. UNIVERSITIES 8 (2023), <https://ncses.nsf.gov/pubs/nsf24300/assets/report/nsf24300-report.pdf> [<https://perma.cc/39EC-76VB>].

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."⁴⁴⁹ 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.⁴⁵⁰ 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.

* * *

These possible reforms aim to foster responsible use of the IPA across its modalities. We believe they are realistic and beneficial proposals, though the political feasibility does vary.

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 competitive and excepted service systems (or other traditional hiring authorities) with top-flight talent. High-level government research would be performed in-house or through skilled, supervised contractors.

⁴⁴⁹ 5 U.S.C. § 3374(c)(3).

⁴⁵⁰ HHS IPA POLICY, *supra* note 242, § 300-3-70(H)(3).

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 interest in public sector careers, particularly among younger Americans. These trends threaten the ability to govern in rapidly advancing fields like science and technology. While Congress has flirted, for instance, with regulating AI given the profound questions around catastrophic risk, national security, and misinformation raised by such technology, and the Biden Administration has directed agencies to use existing legal authorities to produce best practices, guidelines, and standards for the use of AI, the empirical record shows that bureaucratic capacity is exceptionally thin to implement even existing directives.⁴⁵¹

In light of such “hollowing out” of government, we have documented important mechanisms that agencies have innovated and adapted through the IPA. While these mechanisms are not without some costs, 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.

⁴⁵¹ 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 PROC. AAAI/ACM CONF. ON AI, ETHICS & SOC’Y 606, 606-07 (describing barriers to achieving effective AI governance); 2021 NSCAI REPORT, *supra* note 160, at 227-29 (noting implementation delays key aspects 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*: Without information about who is filling public positions and what their duties are, as well as who is authorizing certain government decisions, constitutional and other policy issues may be hidden.⁴⁵² Programs are compared in terms of their public reporting on positions and the individuals that fill them.

⁴⁵² 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 S. Comm. on Homeland Sec. & Gov't Affs.*, 116th Cong. 6-7 (2019) (statement of Thomas Berry, Att'y, Pac. Legal Found.), <https://www.govinfo.gov/content/pkg/CHRG-116shrg37457/pdf/CHRG-116shrg37457.pdf> [<https://perma.cc/VR82-DJYG>].

Table 1: Comparison of Hiring Authorities

	Applicant Friendly	Time-to-Hire	Duration	Competitive Compensation	Public Reporting
Civil Service Staffing	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. ^A	There are no official limits on duration.	Many are paid at the GS scale (max: \$159,950). ^B The SES, however, offers higher pay (max: \$221,900). ^C	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. ^D
Excepted Service	Application requirements vary by position: e.g., PMFs must only fill out several forms, similar to paperwork in the private sector. ^E All undergo some level of background investigation.	Hiring timelines vary greatly from position to position (e.g., the PMF application timeline is five months ^F). Background checks and security clearance requirements may add weeks or months to hiring time.	Some excepted service positions may institute their own limits or be tied to political terms (e.g., Schedule C).	Agencies can devise their own pay scales subject to aggregate limitations (max: \$246,400, or if covered by a performance appraisal system, \$284,600—the Vice President’s pay). ^G	It is generally more difficult to identify individuals hired through the excepted service, though some agencies might voluntarily make their employees publicly available, ^H and many excepted service positions are likely subject to disclosure under the new PLUM Act. ^I Positions do not have to be posted on USAJobs.

Applicant Friendly Time-to-Hire Duration Competitive Compensation Public Reporting

	Applicant Friendly	Time-to-Hire	Duration	Competitive Compensation	Public Reporting
Political Appointments	In addition to standard clearance, most candidates fill out a public financial disclosure report (OGE 278e) though some may submit a confidential report. ^J PAS candidates must additionally go through extensive White House and Senate vetting.	The average Senate confirmation takes 115 days (and many are not, requiring multiple nominations). Non-PAS positions may take less time, though administrations are often inundated at the start and candidates must often get security clearance. ^K	Appointees are limited by their appointment term or presidential term.	Appointees are generally not bound by the GS scale and often paid at the EX scale (max: \$246,400). ^L	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. ^M
Contracting	Contractors must fill out a number of forms and engage in a bidding or negotiation process. ^N	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 but not information about individual contractors.
Research Agreements	Requirements vary: e.g., CRADAs may require COI forms, licensing & confidentiality agreements, and more. ^O	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.
IPA	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 SF 278 form. ^P	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 under the IPA and what their role and duties are.

- A. 2019 GAO FEDERAL WORKFORCE REPORT, *supra* note 145, at 25.
- B. OFF. OF PERS. MGMT., SALARY TABLE 2024-GS (2024), <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2024/GS.pdf> [<https://perma.cc/7NV5-EH5H>].
- C. OFF. OF PERS. MGMT., SALARY TABLE 2024-ES (2024), <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2024/ES.pdf> [<https://perma.cc/CQL4-KHPU>].
- D. *See, e.g.*, Wash. Post Co. v. Special Inspector Gen. for Afg. Reconstruction, No. 18-2622, 2021 WL 4502106, at *28 (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).
- E. *See* PRES. MGMT. FELLOWS, OFF. OF PERS. MGMT., PARTICIPANT HANDBOOK 42-77 (2022), <https://www.pmf.gov/media/vumhfhkh/pmf-participant-handbook-draft-04-04-2022.pdf> [<https://perma.cc/6Q89-NQBW>] (listing the required forms for PMFs).
- F. *Become a PMF: 2023 Application*, OFF. OF PERS. MGMT., PRES. MGMT. FELLOWS, <https://www.pmf.gov/become-a-pmf/2023-application> [<https://perma.cc/9NBC-9B4B>] (last updated July 10, 2024).
- G. *See* Memorandum from Kiran A. Ahuja, Director, Off. of Pers. Mgmt., to Heads of Exec. Dep'ts & Agencies 3 (Dec. 21, 2023), <https://chcoc.gov/sites/default/files/January-2024-Pay-Adjustment-Memo-Attachments.pdf> [<https://perma.cc/KYX4-338B>].
- H. The PMF publicly posts its fellows and their placements. *Current Finalists*, OFF. OF PERS. MGMT., PRES. MGMT. FELLOWS, <https://apply.pmf.gov/finalists.aspx> [<https://perma.cc/6UBU-FH54>] (last visited Sept. 10, 2024). 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. OF PERS. MGMT., https://www.fedscope.opm.gov/datadefn/aecri_sdm.asp [<https://perma.cc/CTJ2-H7MY>] (last visited Sept. 10, 2024).
- I. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 5322(a), 136 Stat. 2395, 3255-58 (2022) (codified at 5 U.S.C. § 3330f(a)(5) & (b)) [hereinafter PLUM Act] (requiring disclosure of any position that would be published in the Plum Book, including potentially any position “on any level of the Executive Schedule 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).
- J. *Financial Disclosure and Ethics*, P'SHIP FOR PUB. SERV., <https://presidentialtransition.org/readytoserve/financial-disclosure-and-ethics> [<https://perma.cc/A9Q5-NH7F>] (last visited Sept. 10, 2024).

- K. 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 Hirschhorn, *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/M3RX-ZDM3>].
- L. OFF. OF PERS. MGMT., SALARY TABLE NO. 2024-EX, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2024/EX.pdf> [<https://perma.cc/K85X-BMH3>].
- M. The PLUM Act moves from reporting on political appointees every four years to yearly updates, as well as a modern, online directory. See PLUM Act, *supra* note I, § 3330f(e) & (f)(4).
- N. 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>] (last visited Aug. 30, 2023).
- O. For example, see *Forms, Templates, and Model Agreements*, U.S. DEP'T OF VETERANS AFFS. OFF. OF RSCH. & DEV., https://www.research.va.gov/programs/tech_transfer/model_agreements/default.cfm [<https://perma.cc/5JHK-D93B>] (last visited Sept. 10, 2024).
- P. 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://perma.cc/J8BJ-U6Y7>].