NEBRASKA DEPARTMENT OF JUSTICE

Opinion No. 23-008 — August 16, 2023

OPINION FOR THE CHIEF EXECUTIVE OFFICER OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES AND THE DIRECTOR OF THE DEPARTMENT OF CORRECTIONAL SERVICES

Constitutionality of Inspector General Acts

Summary: The Child Welfare and Correctional Services Inspectors General may not compel the Executive or Judicial Branches to participate in their investigations because their investigatory powers violate Separation of Powers and lack constitutional authority. In addition, the reporting obligations imposed on the Departments of Health and Human Services and Correctional Services are unconstitutional violations of Separation of Powers.

You have asked whether statutes creating inspector general offices within the Legislative Branch (the "Inspector General Acts" or "Acts") for the Departments of Correctional Services and Health and Human Services (collectively, the "Departments") violate the Nebraska Constitution.

The Legislature is a co-equal branch of government charged with making policy for the State of Nebraska. From the imperative of informed lawmaking flows a concomitant power to deploy certain information-gathering tools, including, with restrictions, the power to issue subpoenas. Historically, the Legislature has wielded those tools through a process fully in the control of the body. The legislative rules call for multiple layers of consideration and approval from senators, including approval from its governing board of legislators. These subpoenas are also tied to the life of the Legislature which issued them; one

Legislature (e.g., the 108th) may not unilaterally impose a subpoena it has issued on the succeeding Legislature (e.g., the 109th). The constitutional path for the Legislature's fact-finding powers is well-worn.

It is not a path that the Acts take. Instead, the Acts give officers of the Legislature, who by statute are largely insulated from oversight or control by the body, virtually untrammeled power to impede, control, and access the information of both of its co-equal branches of government. The Inspectors General have breath-taking power: the Inspectors General have on-demand access to computer systems of each branch, the ability to obtain information without the process of a subpoena, the power to impede law enforcement investigations and conscript the resources and information of law enforcement agencies, and the ability to obtain unfettered physical access to the facilities of other branches. And rather than a considered and time-limited process controlled by the legislative body, the Acts are implemented by officers of the Legislature who can exercise these powers at will; the officers are not statutorily obligated to consult with or take direction from the Legislature, and they have stronger removal protections than even members of the Legislature.

The three branches of our government are co-equal, and the constitutional framework places the power of these branches into balance, forcing conflict between them to be resolved through dynamic compromise. Our constitution does not permit officers of one branch unrestrained access into the information of another. Far from creating the conditions for dynamic compromise, the tools within the Acts are designed to set a Legislature on a collision course with a co-equal branch without its express consent or approval.

We conclude that the path of the Acts is not a constitutional one and that the tools and reporting requirements contained therein are unconstitutional.

I.

Upon receiving your letter, we invited the Legislature to provide materials supporting its positions on these issues. The Legislature responded, and we have considered and reviewed its robust research and thoughtful responses.[1]

We begin with background on the relevant authorities. First, we provide background regarding our constitutional structure. Second, we detail the Acts, specifically the investigatory tools and the reporting requirements.

A.

As its preamble explains, the Nebraska Constitution "establish[es] the . . . frame of government" for the State. Governmental power is divided into legislative, executive, and judicial branches. In creating the first of these three branches, the Constitution "vest[s]"

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[1] Your letter requests our opinion on 21 questions involving the Inspectors General and their principal, the Public Counsel. Those questions broadly seek our identification of any constitutional defect involving those officers. Because the Attorney General only has a duty to give his legal opinion with respect to issues "aris[ing] in the discharge of [the requestor's] duties," we address only the questions that your letter connects to your duties. *Follmer v. State*, 94 Neb. 217, 142 N.W. 908, 909 (1913); *see also* Neb. Rev. Stat. § 84-205(4); Op. Att'y Gen. No. 157 (Dec. 20, 1985). We also decline to answer questions that our opinion renders moot, such as whether the Inspector General investigation powers violate the constitutional rights of witnesses.

"[t]he legislative authority of the state" in the Nebraska Legislature. Neb. Const. art. III, § 1. The Legislature legislates through a specific process requiring the "assent of a majority of all members elected" and the presentation of bills to the Governor. *Id.* art. III, § 13; *id.* art. IV, § 15. While the method for legislation is defined, the subjects on which the body may legislate are not. Unlike the U.S. Constitution, which limits Congress to legislating on specific matters, *see* U.S. Const. art. III, § 8, the Nebraska Legislature has "plenary legislative authority," *Lenstrom v. Thone*, 209 Neb. 783, 789, 311 N.W.2d 884, 888 (1981). It may "legislate on any subject not inhibited by the Constitution." *Id.*

For the Legislature to legislate effectively, it must be informed. The Constitution does not give the Legislature an explicit power to demand information, but the body "possesses . . . inherent powers of inquiry, research and investigation as a basis for future legislation." Op. Att'y Gen. No. 188, at *2 (Jan. 4, 1980). This power gives the Legislature the authority to issue subpoenas for documents and testimony and is delegable. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020). For example, we have recognized the validity of rules and resolutions delegating investigation authority to committees. Op. Att'y Gen. No. 188, at *2. However, these delegations automatically expire every two years with seating of a new legislature. *See State ex rel. Peterson v. Ebke*, 303 Neb. 637, 659, 930 N.W.2d 551, 566-67 (2019).

The restriction of investigations "as a basis for future legislation" imposes a significant limitation on legislative inquiries. Op. Att'y Gen. No. 188, at *2. A legislative investigation "must be related to, and in furtherance of, a legitimate task of the [Legislature]." *Watkins v. United States*, 354 U.S. 178, 187 (1957). This limits investigations to "areas in which [the Legislature] may potentially legislate or appropriate." *Barenblatt v.*

United States, 360 U.S. 109, 111 (1959). It also prevents the Legislature from "inquir[ing] into matters which are within the exclusive province of one of the other branches of the Government." *Id.* at 111-12. For example, because "the powers of law enforcement" belong to the Executive and Judicial Branches, legislative investigations imitating law enforcement are impermissible. *Quinn v. United States*, 349 U.S. 155, 161 (1955). But "probes . . . to expose corruption, inefficiency, or waste" in service of future legislation are constitutionally permissible. *Watkins*, 354 U.S. at 187.

These limitations on legislative investigations flow not just from the limited nature of the Legislature's powers but also from the Nebraska Constitution's Separation of Powers Clause, which provides:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and ***no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution***.

Neb. Const. art. II, § 1(1) (emphasis added). This provision prevents one branch from exercising the powers of another. For example, it prevents the Legislature from interfering with the Executive by ordering an executive agency to take certain personnel action. *State ex rel. Shepherd v. Neb. Equal Opportunity Comm'n*, 251 Neb. 517, 524–25, 557 N.W.2d 684, 690–91 (1997). Yet it also protects the Legislature, as it prevents executive agencies from promulgating legislative rules. *Terry Carpenter, Inc. v. Neb. Liquor Control Comm'n*, 175 Neb. 26, 36–37, 120 N.W.2d 374, 380–81 (1963).

Under the U.S. Constitution, the separation of powers is implied by the document's creation of three distinct branches in three separate articles. But the constitutions of Nebraska and 39 other states contain explicit provisions reinforcing separation of powers. *See League of Voters of Fla. v. Fla. House of Representatives*, 132 So.3d 135, 144 (Fla. 2013). Because of this provision, the Nebraska Constitution tolerates less "overlapping responsibility" than the U.S. Constitution. *State v. Phillips*, 246 Neb. 610, 614, 521 N.W.2d 913, 916 (1994). In Nebraska, "separation between the legislative and executive branches . . . should be 'kept as distinct and independent as possible.'" *Polikov v. Neth*, 270 Neb. 29, 35, 699 N.W. 802, 807 (2005) (quoting *Shepherd*, 251 Neb. at 532, 557 N.W.2d at 695).

B.

The Inspector General Acts, which are of recent vintage, create two Inspectors General. The first is the Inspector General of Nebraska Child Welfare, originally created in 2012 and codified in Chapter 43 of the Revised Statutes. *See* 2012 Neb. Laws LB 821. The second is the Inspector General of the Nebraska Correctional System, originally created in 2015 and codified in Chapter 47. *See* 2015 Neb. Laws LB 598. While they differ in their subject matter focus, and while the Acts are not identical in all respects, they are substantially identical in nearly all material respects.

The Inspectors General are appointed by the Public Counsel to renewable five-year terms. Neb. Rev. Stat. §§ 43-4317, 47-904. The Public Counsel is responsible for their supervision. *Id.* §§ 43-4317, 47-904, 81-8,244(3). The Public Counsel's appointment of the Child Welfare Inspector General requires the approval of the chairpersons of the Health and Human Services Committee and a management committee of legislators

called the Executive Board of the Legislative Council. *Id.* § 43-4317. If the Public Counsel removes the Child Welfare Inspector General, the same chairpersons must also "approv[e]" that removal. *Id.* The same conditions apply to the appointment and removal of the Correctional System Inspector General except the role of the chairperson of the Health and Human Services Committee is substituted for the chairperson of the Judiciary Committee. *Id.* § 47-904(1). The principal for the Inspectors General, the Public Counsel, is an officer of the Legislature but insulated from that body's supervision. She is appointed to a six-year term by a two-thirds vote of the Legislature and may be removed only by a two-thirds vote of the Legislature determining that she "has become incapacitated or has been guilty of neglect of duty or misconduct." *Id.* §§ 81-8,241, 81-8,243.

Both Inspectors General have a broad investigative mandate. Both investigate "[a]llegations or incidents of possible misconduct, misfeasance, malfeasance, or violations of statutes or of rules or regulations." *Id.* §§ 43-4318(1)(a), 47-905(1)(a). Both also investigate potential crimes, such as assaults, deaths, and serious injuries involving persons in custody. *Id.* §§ 43-4318(1)(b), 47-905(1)(b).

The Inspectors General work together with the Public Counsel to prioritize and select their matters. *Id.* §§ 43-4330, 47-917. However, the Legislature plays no role in selecting, prioritizing, or engaging in the work of the Inspectors General. No individual member of the Legislature, such as the Speaker or committee chairs, nor any committee of the Legislature has authority over the Inspectors General.

The contrast with another officer of the Legislature that has investigatory powers, the Legislative Auditor, is instructive. The Legislative Auditor takes explicit direction from the Legislature's Performance Audit Committee (the

"Audit Committee"). See *id.* §§ 50-1204, 50-1205, 50-1208. Made up of senators, the Audit Committee "review[s] performance audit requests and select[s] . . . agencies or agency programs for performance audit." *Id.* § 50-1205(3); *accord* 50-1208(1). Near the outset of an audit, the Office of the Legislative Auditor must "draft a scope statement" to "identify the specific issues to be addressed in the audit," which must be "adopt[ed], reject[ed], or amended[ed] and adopt[ed]" by the Audit Committee. *Id.* § 50-1208(4). The Legislative Auditor must conduct her audit according to a plan she submits to the Audit Committee at the beginning of each legislative session detailing how her office will comply with applicable auditing standards. *Id.* § 50-1205.01.

The Audit Committee is responsible for "inspect[ing] or approv[ing] the inspection of the premises" or "records and documents of" any agency subject to an audit or preaudit inquiry. *Id.* § 50-1205(6)–(7). After the Office of the Legislative Auditor concludes an audit and prepares a report, the Audit Committee "may amend and shall adopt or reject each recommendation in the report." *Id.* § 50-1211(1). The Audit Committee must also approve the annual report prepared by the Legislative Auditor summarizing recommendations made pursuant to performance audits. *Id.* § 50-1205(13). The Audit Committee also assists the Legislative Auditor in determining the staffing and budgetary needs of the Office of the Legislative Auditor. *Id.* § 50-1205(14). Thus, a committee of the Legislature has authority over which agencies the Legislative Auditor investigates, the scope of such investigations, the tools for such investigations, the standards by which the Legislative Auditor performs audits, the Legislative Auditor's reports and recommendations, and the budget and staffing of the Office of the Legislative Auditor. By contrast, the Acts fail to give the Legislature any authority to direct the work of the Inspectors General.

Both the Executive and Judicial branches of government are subject to the Inspectors General. Specifically, the Child Welfare Inspector General investigates and provides oversight over both the Executive Branch and Judicial Branch. Its jurisdiction includes both the Department of Health and Human Services and the Juvenile Services Division, the latter of which is within the Judicial Branch. *See id.* §§ 29-2249; 43-4307.01; 43-4318(1)(a)(ii), (5). The Correctional System Inspector General exclusively investigates and provides oversight over the Department of Correctional Services, contained wholly within the Executive Branch. *See id.* § 47-905.

1.

The Acts provide the Inspectors General with fact-finding powers (the "Investigatory Tools"). These are as follows:

Both Acts provide that, even if a criminal investigation or prosecution is being undertaken, "all law enforcement agencies and prosecuting attorneys shall . . . immediately upon request by the Inspector General, provide the Inspector General with copies of all law enforcement reports which are relevant to the Inspector General's investigation." Neb. Rev. Stat. §§ 43-4318(7); 47-905(3). In addition, the Acts mandate additional cooperation: "Law enforcement agencies and prosecuting attorneys shall, when requested by the Inspector General, collaborate with the Inspector General regarding all other information relevant to the Inspector General's investigation." *Id.* §§ 43-4318(7); 47-905(3). Both Acts mandate cooperation of a number of entities and individuals, including "[a]ll employees" in the Departments, as well as foster parents (in the case of the Child Welfare Inspector General) and certain third parties

like private agencies. *Id.* §§ 43-4321, 47-908. The Acts state that failure to cooperate may result in disciplinary action or sanctions. *Id.* §§ 43-4322, 47-909.

In addition, the Inspectors General have significant power to obtain information from the Departments. The Inspectors General have the explicit authority to require document productions and witness statements. *Id.* §§ 43-4323, 47-910. They have direct access to the Departments' computer systems, including that of the Juvenile Services Division, and may make unannounced visits to the Department or Division facilities at any time. *Id.* §§ 43-4324(4), 43-4326, 47-911(4), 47-913. Any information, documents, or personnel requested by the Inspectors General must be made available. *Id.* §§ 43-4319, 47-906. Department employees must cooperate with Inspector General requests. *Id.* §§ 43-4321, 47-908. In addition, the Inspectors General can force law enforcement investigators to "collaborate" and "cooperate" and produce copies of law enforcement reports. *Id.* §§ 43-4318(7), 47-905(3). The Acts give legislators no role in decision-making on how the Inspectors General choose to conduct their investigations.

Following an investigation, the Inspector General sends a report and recommendations for "systemic reform or case-specific action" to the Public Counsel. *Id.* §§ 43-4327(1), 47-914(1). Recommendations may "includ[e] a recommendation for discharge or discipline of employees" of the Executive or Judicial Branch or sanctions against third parties. *Id.* §§ 43-4327(1), 47-914(1). The Inspector General then presents her report to the head of the investigated department or overseeing entity. *Id.* §§ 43-4327, 47-914. Within 15 days of receiving the report, the department or entity head must determine "whether to accept, reject, or request in writing modification of the recommendations contained in the report." *Id.* §§ 43-4328(1), 47-915(1). The Inspectors General make annual

reports summarizing their investigations and recommendations, which they must submit to the Governor, Clerk of the Legislature, and the chairpersons of the legislative committee having jurisdiction over the department in question. *Id.* §§ 43-4331, 47-918.

2.

The Acts also impose affirmative obligations on the Departments and Juvenile Services Division. To facilitate investigations, the Departments and the Division must report to their respective inspector general "cases of death or serious injury . . . as soon as reasonably possible after . . . learn[ing] of such death or serious injury." *Id.* §§ 43-4318(2), 47-905(1)(b). The Department of Health and Human Services and Juvenile Services Division must also report "allegations of sexual abuse." *Id.* § 43-4318(2). In addition, the Juvenile Services Division must report assaults, escapes, attempted suicides, self-harm, and related conduct. *Id.* § 43-4318(3).

II.

A.

We conclude that many of the Inspector General tools of investigation violate Separation of Powers. As explained, the Nebraska Constitution contains an explicit Separation of Powers Clause providing that the "powers of the government of this state are divided into three distinct departments" and no department "shall exercise any power properly belonging to either of the others." Neb. Const. art. II, § 1(1). The Acts require the Departments' and Division's employees to provide "full access to and production of records and information" and answer any questions asked by the Inspectors General. Neb. Rev. Stat. §§ 43-4321, 47-908. The Inspectors General may visit the Departments' facilities unannounced at any time. *Id.* §§ 43-4324(4), 47-

911(4). And the Inspectors General have "direct computer access" to the Departments' digital systems. *Id.* §§ 43-4326, 47-913. These investigative authorities subject the Departments to divided obligations to the Legislative and Executive Branches and preclude the Executive's assertion of its constitutional interests. The Legislature may make voluntary requests for information and issue subpoenas. But the Acts go well beyond those settled methods of legislative investigation by conscripting the Departments' employees into Inspector General investigations.

The Inspector General investigation tools prevent both the Governor and the Chief Justice of the Nebraska Supreme Court from exercising their authority. The Governor has "constitutional authorit[ies] to control privileged information of the Executive Branch" and "to supervise the Executive Branch's interactions with [the Legislature]." Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context, 43 Op. O.L.C.___at *1 (Nov. 1, 2019) (quoting Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees, 43 Op. O.L.C. ___, *8 (May 23, 2019)); *see* Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 6 Op. O.L.C. 632, 638–39 (1982). But by requiring the Departments' employees to immediately obey Inspector General requests, the Acts significantly impair the Governor's control over the Departments.

This is similarly true for the Supreme Court. "[G]eneral administrative authority" over the Judicial Branch is "vested in the Supreme Court" and "exercised by the Chief Justice." Neb. Const. art. V, § 1. But by requiring the Juvenile Services Division to cooperate with and provide access to records to the Child Welfare Inspector General, the Division becomes responsible to both the Inspector General and the Supreme Court. The Inspector General Acts unlawfully place the Departments' employees

under the simultaneous control of both the Executive and Legislative Branches (in the context of the Inspector General for Corrections and Child Welfare) and both the Judiciary and Legislative Branches (in the context of the Inspector General for Child Welfare's control over the Juvenile Services Division). *See State ex rel. Spire v. Conway*, 238 Neb. 766, 773–74, 472 N.W.2d 403, 408 (1991).

In addition to interfering with the supervisory powers of the Governor and the Chief Justice, the Acts wrongfully block these branches from asserting their constitutional interests in opposition to the Legislature. Legislative investigations into the Executive Branch place the Legislature's constitutional interest in information in conflict with the Executive's constitutional interests in autonomy and confidentiality. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 389 (2004); *Comm. on Judiciary of U.S. House of Reps. v. McGahn*, 968 F.3d 755, 787 (D.C. Cir. 2020) (Griffith, J., dissenting). The same tension is present with respect to the Judiciary. Both branches are entitled to assert their interests in such conflicts. The three branches are "of equal rank." *Shepherd*, 251 Neb. at 529, 557 N.W.2d at 693 (quoting *State ex rel. Sorensen v. State Bank of Minitare*, 123 Neb. 109, 114, 242 N.W. 278, 280–81 (1932)). Thus, in the federal system, conflicts involving congressional demands for Executive Branch information are usually resolved in a "tradition of negotiation and compromise." *Mazars*, 140 S. Ct. at 2031.

However, the Acts eschew negotiation and compromise. They guarantee such conflicts almost always resolve in the Legislature's favor by virtually eliminating from the other branches the opportunity to evaluate Inspector General requests before responding. The Executive and Judiciary cannot assert a privilege if their employees must hand over documents on demand. Nor can

those branches assert a privilege if the Inspector General may visit the Departments' facilities unannounced. In the case of direct computer access, the other branches may not even know about the injury to its autonomy and confidentiality. Any process for a legislative investigation into the Executive Branch or the Judicial Branch must provide an opportunity for the branch to protect its interests. *See* Inspector General Legislation, 1 Op. O.L.C. 16, 18 (1977).

The Legislature relies on its "plenary legislative authority" for support. *State ex rel. Stenberg v. Moore*, 249 Neb. 589, 595, 544 N.W.2d 344, 349 (1996); *see* Enclosure in Letter from John Arch, Speaker of the Legislature, to Mike Hilgers, Attorney General at 10 (March 7, 2023) ("Legislature Letter"). But the Legislature only has plenary authority in enacting legislation, not in conducting investigations. Such an assertion of a general plenary power is irreconcilable with the Constitution's separation of powers. The Legislature also justifies the intrusiveness of its investigation tools as "the most expedient way . . . to gather information." *Id.* at 11. The Legislature explains these authorities allow the Inspectors General to "review a significant number of incidents . . . without making information requests of [the agency] which would likely result in unnecessary and time-consuming efforts by department employees." *Id.* at 11. However, "[c]onvenience and efficiency are not the primary objects—or the hallmarks—of democratic government." *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)). "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Id.* (quoting same). The Acts cannot elevate convenience above the other branches' constitutional interests.

The Legislature also cites the requirements it has imposed on the Executive and Judicial Branches to make certain records publicly available. According to the Legislature's argument, this shows it may force the Executive to make certain records available to the Legislature's investigators. The comparison supports the opposite conclusion. *First*, the Nebraska Supreme Court has subjected the public records law to Separation of Powers principles, recognizing those statutes apply only to the extent they do not "significantly impair" another branch's "performance of its essential functions." *State ex rel. Veskrna v. Steel*, 296 Neb. 581, 598, 894 N.W.2d 788, 800 (2017). *Second*, there is no comparison between the processes that Inspectors General and public records requesters use to access government records. The public records statutes give agencies an opportunity to evaluate a request and their constitutional interests before making documents available. *See* Neb. Rev. Stat. § 84-712(4). By contrast, the Acts prevent the Executive and Judiciary from asserting any privilege at all by giving the Inspectors General immediate access to the Departments' and Division's documents, information, and premises.

Properly conceived, tools of legislative investigation facilitate an accommodation process between the branches. The Constitution presumes that "where conflicts in scope of authority ar[i]se between the coordinate branches, a spirit of dynamic compromise w[ill] promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system." *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). "[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." *Id.* "The accommodation required . . . is an obligation of each branch to make a principled effort to acknowledge, and if possible meet, the legitimate needs of the other

branch." Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1981). The traditional tools of legislative investigations—voluntary requests for information and subpoenas for documents and testimony—allow each branch to protect its interests. The Acts' authorization of immediate access to the Departments' and Division's documents, information, and facilities violates Separation of Powers because it interferes with the Executive's and Judiciary's constitutional responsibilities and interests.

We therefore conclude that the Acts violate the Separation of Powers Clause.

B.

The Acts suffer an additional constitutional defect: The Inspectors General lack constitutional authority for their actions.

The Legislature identifies two possible sources of constitutional power for the Inspectors General: The Legislature's implied power to investigate and the State Institutions Clause. We discuss each in turn.

1.

The Legislature first argues that the Inspectors General investigate under the Legislature's implied investigation authority. We have recognized this power as a necessary companion to the "legislative authority" explicitly "vested" by the Constitution in the Legislature. Neb. Const. art. III, § 1; Op. Att'y Gen. No. 188, at *2. "Without information, [the Legislature] would be shooting in the dark, unable to legislate 'wisely or effectively.'" *Mazars*, 140 S. Ct. at 2031 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927)). The United States Constitution and other states' constitutions imply the same power. *Id.*;

McGrain, 273 U.S. at 165 ("[S]tate courts quite generally have held that the power to legislate carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power, and to employ compulsory process for the purpose."). Applying this power to the Acts, we conclude that the Inspectors General do not conduct valid investigations under this authority for two reasons: The Legislature has not made a valid delegation of power to the Inspectors General, and the Inspectors Generals' investigations are not tied to a legislative purpose under our Constitution.

a.

At the threshold we consider whether the Legislature has lawfully delegated its constitutional investigation authority to the Inspectors General. *See United States v. Rumely*, 345 U.S. 41, 42–43 (1953). The Legislature's investigation authority is delegable to agents "serving as the representatives of the parent assembly in collecting information." *Watkins*, 354 U.S. at 200. No legislator or legislative committee or agency "is free on its or his own to conduct investigations unless authorized." *United States v. Lamont*, 18 F.R.D. 27, 32 (S.D.N.Y. 1955). The default rule is that legislative authorization to investigate "automatically expire[s] upon the completion of the legislative biennium in which the investigation took place." *Ebke*, 303 Neb. at 654, 930 N.W.2d at 564. "[S]tatute[s] or legislative rule[s] providing for the continuing viability" of investigations are a possible exception, but the Nebraska Supreme Court has "not decid[ed] whether such a statute or rule, if it existed, would be an impermissible restriction on future legislatures." *Id.* at 659, 930 N.W.2d at 567. To the extent it exists, we conclude this exception does not embrace the Inspector General Acts. By using a statute to delegate power to an independent agency of the Legislature, the Acts make a continuing delegation to officers free from legislative

supervision. Those two features—the delegation's permanence and grant of authority to an independent agency—persuade us that the Inspectors General lack a valid delegation of the Legislature's constitutional investigation power. One legislature cannot force its successors into uncontrollable future investigations.

The indefiniteness of the Acts' delegation standing alone raises questions about the Acts' lawfulness. Two decisions of the Nebraska Supreme Court invalidated legislative acts that purported to outlive their enacting legislatures. *Ebke* held that a subpoena issued by one legislature's Judiciary Committee expired once that legislature ended. 303 Neb. at 662, 930 N.W.2d at 568. And *Moore*, 249 Neb. at 593–95, 544 N.W.2d at 348–49, held that a statute requiring the Legislature to include cost estimates in certain bills impermissibly restricted future legislatures. *Id.* Both cases recognized the principle that "[t]he authority of a legislature . . . is limited to the period of its own existence." *Ebke*, 303 Neb. at 655, 930 N.W.2d at 564 (quoting *Moore*, 249 Neb. at 594, 544 N.W.2d at 348). "Any current legislative body represents the people who elected it and should have power equal to its predecessor." *Id.* at 654–55, 930 N.W.2d at 564. "[N]o action by one branch of the legislature can bind a subsequent session of the same branch." *Moore*, 249 Neb. at 593, 544 N.W.2d at 348 (quoting 82 C.J.S. Statutes § 9 (1953)).

The Acts appear to violate *Ebke* and *Moore* by imposing a previous legislature's will on the legislature empowered to exercise the State's legislative authority. The Acts obligate the Inspectors General to investigate deaths and serious injuries as well as alleged misconduct and violations of law. Neb. Rev. Stat. §§ 43-4318, 47-905. But the Legislatures that ordered these investigations no longer exist. Just as one legislature may not force its successors to include certain provisions in bills, we doubt that one legislature can force its successors to conduct

certain investigations. The fact that now-expired legislatures decided to enact the Inspector General Acts does not authorize an imposition on future legislatures.[2]

In contrast to the Acts, the incumbent legislature has decided to delegate its investigation authority to entities other than the Inspectors General. Near the beginning of the present session, the Legislature adopted rules delegating investigation power to the Legislature's committees. Rule 3, § 1(a), Rules of the Neb. Unicameral Legislature (108th Legislature, 2023) ("Legislature Rules"). That delegation includes the power to subpoena documents and testimony. *Id.* § 21. And it aligns with our previous conclusion that the Legislature may delegate its investigation authority through the body's adoption of rules and resolutions. Op. Att'y Gen. No. 188, at *2. Each legislature appears to have delegated investigation authority in this manner since 1981. Rule 3, § 1(a), Rules of the Nebraska Unicameral Legislature (87th Legislature, 1981). But the Legislature has not cited, and we are not aware of, any rule or resolution adopted by this Legislature that authorizes the Inspectors General to use the Legislature's constitutional authority for any purpose. The Inspectors General do not act pursuant to any mandate from the incumbent legislature.

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[2] Before *Ebke*, we described some statutes as valid delegations of legislative investigation power. *See, e.g.*, Authority of the Legislature's Performance Audit Committee to Review Confidential Records in Connection with a Performance Audit of A State Agency, Op. Att'y Gen. No. 04022 (Aug. 13, 2004); Authority of Legislative Council Committees to Compel the Testimony of Witnesses, Op. Att'y Gen. No. 180 (Dec. 12, 1979); Op. Att'y Gen. No. 27 (Feb. 16, 1979). We doubt the correctness of these characterizations after *Ebke*. Regardless, the statutes examined in these opinions are distinguishable because they did not delegate legislative investigation power to independent agencies. *See* pp. 20–22, *infra*.

The difference between the delegation of authority to legislative committees, on the one hand, and the Inspectors General is stark. The Legislature is limited to subpoenas, issued by standing committees after an affirmative vote of their members, after a subsequent affirmative vote of the Executive Board of the Legislature, and which are subject to court challenge and due process. Legislature Rule 3, § 21(A)(i). In contrast, the Inspectors General can make a voluntary request (that has the power of subpoena) at any time for any reason, accompanied by an unchallengeable right to on-demand access to the computer systems of another branch. While the Legislature's Rules require public disclosure of the subpoenas it issues, *id.* § 21(A)(ii), the Inspectors General have no such restriction. And where statute provides a mechanism by which a new Legislature may revive the subpoena of a previous Legislature, Neb. Rev. Stat. § 50-406.01—which was enacted to overcome the temporal restriction in *Ebke*—the Acts permit the Inspectors General to issue subpoenas at any time during their 5-year term, which necessarily would cover portions of 3 biennial sessions of the Legislature. While not dispositive, the restrictions that the Legislature imposes on its own members' exercise of legislative authority stands in stark contrast to the broad purported delegation in the Acts.

The Acts compound their delegation problem by placing authority in officers within an independent agency of the Legislature, the Office of Public Counsel. *See* Neb. Rev. Stat. §§ 43-4317(1), 47-904(1). The Office of Public Counsel is an independent agency of the Legislature because its head is not subject to at-will employment. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010); *In re Aiken County*, 645 F.3d 428, 439 (D.C. Cir. 2011) (Kavanaugh, J., concurring). The Public Counsel may be removed only by a vote of two-thirds of the Legislature "determining that [she] has become incapacitated or has been guilty of neglect of duty or

misconduct." Neb. Rev. Stat. § 81-8,243. She enjoys greater protection from removal than even legislators, who may be removed by a two-thirds vote of the Legislature for any reason. Neb. Const. art. III, § 10. By contrast, the other continuing officers of the Legislature—the Legislative Fiscal Analyst, Director of Research, Revisor of Statues, and Legislative Auditor—are not independent. They all "serve at the pleasure of the executive board." Neb. Rev. Stat. § 50-401.01(b). Other officers, including the Speaker, Clerk of the Legislature, and Sergeant at Arms, serve two-year terms, standing for election when each new Legislature begins. *See id.* § 50-111; Legislature Rule 1, § 1(a), § 2.

An additional layer of independence separates the Inspectors General from the Public Counsel. Though the Inspectors General are "subject to the control and supervision of the Public Counsel," the Public Counsel's decision to remove an inspector general requires the approval of both the chairpersons of the Executive Board and the committee with jurisdiction over the agency investigated by that inspector general. Neb. Rev. Stat. §§ 43-4317(3), 47-904(3). Nothing in the Acts obligates the Public Counsel or Inspectors General to obey any order of the incumbent Legislature. The Public Counsel and Inspectors General—not legislators—choose which matters to investigate. *Id.* §§ 43-4330, 47-917. And those same officers decide when to force the Executive Branch to make available documents, witnesses, and other information. *Id.* §§ 43-4321, 47-908. Lawmakers play no role in deciding how the Legislature's investigation authority is used.[3]

[3] The Inspectors General must make certain reports to the Legislature, Neb. Rev. Stat. §§ 43-4331, 47-918, but those provisions provide no mechanism for legislative control. For example, the Legislature has no power to direct the contents of these reports. And similar reporting requirements apply to officers within the Executive and Judicial Branches who

Because the Acts prevent the Legislature from directing the Inspectors General, we conclude that the Legislature lacks the requisite level of control over the ultimate exercise of legislative investigation power. "An essential premise" of delegated legislative investigatory power is "that the [Legislature] shall have instructed [its delegates] on what they are to do with the power delegated to them." *Watkins*, 354 U.S. at 201. But the incumbent Legislature never made those instructions, and if they did, the Inspectors General would have little incentive to obey them. The Acts create "a wide gulf between the responsibility for the use of investigative power and the actual exercise of that power." *Id.* at 205. Thus, we conclude that "control of the [Inspectors General] exercised by the [Legislature] is slight or non-existent." *Id.* at 203–04. The Inspectors General are not delegates of the lawmakers empowered by the people to exercise the State's legislative power.

The Inspector General Acts' forced abdication of legislative supervision is especially problematic because the Acts empower the Inspectors General to create interbranch conflicts with the Executive and Judicial Branches in perpetuity. "[A]n 'interbranch conflict' presented by a legislative [information demand] 'implicate[s] weighty concerns regarding the separation of powers.'" *McLaughlin v. Mont. State Legislature*, 493 P.3d 980, 987 (Mont. 2021) (quoting *Mazars*, 140 S. Ct. at 2035). The lack of a role for this legislature in resolving these conflicts at a minimum undermines the capacity of the Inspectors General to assert the Branch's interests against competing Executive Branch and Judicial Branch

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unquestionably act independently of the Legislature. *See, e.g.*, Neb. Rev. Stat. §§ 24-232, 81-1201.11(5).

interests. *Cf. Walker v. Cheney*, 230 F.Supp.2d 51, 68 (D.D.C. 2002).

Similarities between the Public Counsel and the federal Government Accountability Office ("GAO") do not change our conclusion. Like the Office of Public Counsel, the GAO is an independent agency of Congress. *Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 844 (1983). The GAO's head, the Comptroller General of the United States, is appointed by the President to a 15-year term. 31 U.S.C. § 703(a)(1), (b). He may be removed by a joint resolution of Congress or impeachment. *Id.* § 703(e)(1). Removal under the former requires either a majority vote of both houses and the President's approval or a two-thirds majority vote of both houses. *See Synar*, 478 U.S. at 771 (White, J., dissenting).[4] Removal authority, however, is where the relevant similarities end. Unlike the Nebraska Legislature, one house of Congress is a continuing body, meaning the delegations of authority in its rules continue from one Congress to the next. *See Ebke*, 303 Neb. at 656, 930 N.W.2d at 565. And more importantly, unlike the Inspectors General, the Comptroller General has a "legal

[4] *Synar* describes the Comptroller General as "subservient to Congress" in the context of holding that he "may not be entrusted with executive powers." 478 U.S. at 730, 732 (1986). Four Justices disputed the Comptroller General's legislative subservience. *See id.* at 739 (Stevens, J., concurring in the judgment) ("The notion that the removal power at issue here automatically creates some kind of 'here-and-now subservience' of the Comptroller General to Congress is belied by history."); *id.* at 770 (White, J., dissenting) ("These procedural and substantive limitations on the removal power militate strongly against the characterization of the Comptroller as a mere agent of Congress by virtue of the removal authority."); *id.* at 777 (Blackmun, J., dissenting) (agreeing with Justice White). And *Synar* did not decide whether the Comptroller General had sufficient legislative agency to launch interbranch disputes with the Executive on the Legislative Branch's behalf.

duty" "to work with Congress' specific needs." *Synar*, 478 U.S. at 741 (Stevens, J., concurring in the judgment). He must "make an investigation and report ordered by either House of Congress" or certain committees. 31 U.S.C. § 712(4). He also must give certain committees "the help and information the committee[s] request[]." *Id.* § 712(5). The Inspector General Acts contain no similar provisions obligating the Inspectors General to obey lawmakers' instructions.

Moreover, the Comptroller General has not succeeded in enforcing its investigatory authority in the context of interbranch conflicts. In holding the Comptroller General lacked standing to enforce a subpoena for the Vice President's records, a district court placed "some importance" on the fact that "the Comptroller General . . . [had] not been expressly authorized by Congress to represent its interests" in seeking Executive Branch records. *Walker*, 230 F.Supp.2d at 68 (quoting *Raines v. Byrd*, 521 U.S. 811, 829 (1997)). Finally, even if the GAO could constitutionally compel the Executive's participation in an investigation, rules for federal and state separation of powers differ. *See* pp. 5–6, *supra*. "[T]he federal [separation of powers] doctrine is not as rigorous as that imposed by the Constitution of this state." *Philipps*, 246 Neb. at 614, 521 N.W.2d at 916. A legislature's attempted compulsion of Executive Branch participation in an investigation involves overlapping power, and the Nebraska Supreme Court has previously rejected the importation of federal precedents involving branches' overlapping authority. *See id.*

We limit our conclusion on this point to the narrow proposition that one legislature may not bind its successors to future investigations while virtually eliminating its successors' supervisory power. This conclusion does not increase or decrease the authority of the Legislative Branch. Instead, it connects the decision to exercise

legislative investigation power to the legislators chosen by the people to exercise that power. "The people do not vote for the [Inspectors General]. They instead look to the [Legislature] to guide" them. *Free Enter. Fund*, 561 U.S. at 497–98 (internal citations and quotation marks omitted). We do not question one legislature's authority to choose to continue an investigation initiated by its predecessor. *See Ebke*, 303 Neb. at 663, 930 N.W.2d at 569 (Miller-Lerman, J., concurring). Nor do we doubt the Legislature's power to investigate between its annual sessions. Op. Att'y Gen. No. 188; *see also* Legislature Rule 3, § 4(g). We also agree with the Legislature that "[s]etting up permanent offices to conduct ongoing oversight is fully within the Legislature's purview." Legislature Letter at 9. We conclude only that permanent and unsupervised delegations of constitutional authority exceed the Legislature's constitutional power.

b.

Even if the Inspectors General exercised validly delegated legislative investigation authority, they do not investigate for a constitutionally permissible purpose. Legislative investigation power is "broad" but "not unlimited." *Mazars*, 940 F.3d at 748 (Rao, J., dissenting). The inquiry "must be related to, and in furtherance of, a legitimate task of the [Legislature]." *Watkins*, 354 U.S. at 187; *see also McLaughlin*, 493 P.3d at 985; Op. Att'y Gen. No. 27, at *2. This limits investigations to "areas in which [the Legislature] may potentially legislate or appropriate." *Barenblatt*, 360 U.S. at 111; *see also* Scope of Congressional Oversight and Investigative Power with Respect to the Executive Branch, 9 Op. O.L.C. 60, 60 (1985) ("Congress may conduct investigations in order to obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws."). It also prevents the Legislature from "inquir[ing] into matters which are within the exclusive province of one of the other branches of the Government." *Barenblatt*, 360 U.S. at 111–112. The

Legislature does not dispute the applicability of this limitation. Legislature Letter at 1.

Two features of the Acts belie a legislative purpose. *First*, the Acts sharply limit the extent to which the Inspectors General can use the confidential information they collect to inform lawmakers. "[T]he power to investigate is inherent in the power to make laws because '[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'" *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) (quoting *McGrain*, 273 U.S. at 175). But the Acts prevent the Inspectors General from giving the Legislature most of the documents and information they obtain from the Executive Branch. Confidential information obtained from the Executive Branch can be shared with only the chairperson of the legislative committee having jurisdiction over the agency in question. And that legislator has no right to such information. Instead, it falls to the Public Counsel to decide when to share confidential information. Neb. Rev. Stat. §§ 43-4325(2), 47-912(2). The Inspectors General make annual reports to certain legislative committees summarizing the preceding year's investigations, but those reports do not contain confidential information. *Id.* §§ 43-4331; 47-918. The Inspectors General do not "act as the eyes and ears of the [Legislature]" if the Legislature cannot view the fruits of their investigations. *Watkins*, 354 U.S. at 200. They do not gather information for the purpose of informing the Legislature.

Second, the Inspector General Acts lack a legislative purpose because they purport to authorize actions that are the domain of the Executive and Judicial Branches. The subjects of the investigations—"misconduct, misfeasance, malfeasance," and especially "violations of statutes or of rules or regulations," Neb. Rev. Stat. §§ 43-4318(1)(a), 47-905(1)(a)—concern law enforcement. The

obligation of the Correctional Services Inspector General to investigate deaths duplicates the requirement that grand juries investigate inmate deaths. *Compare id.* §§ 47-905(1)(b), *with id.* § 29-1401. The Acts even anticipate the duplication of law enforcement investigations by mandating that "all law enforcement agencies and prosecuting attorneys . . . cooperate with any investigation conducted by the Inspector General." *Id.* §§ 43-4318(7), 47-905(3). Inspectors General are entitled to "copies of all law enforcement reports" "upon request." *Id.* §§ 43-4318(7), 47-905(3). They also may force law enforcement officials to "collaborate" with them. *Id.* §§ 43-4318(7), 47-905(3). At the conclusion of investigations, the Inspectors General make recommendations to the Department or overseeing entity heads for agency action—including even the discipline or dismissal of employees and sanction of third parties. *Id.* §§ 43-4327(1), 47-914(1). The Department or entity head is then required to determine "whether to accept, reject, or request in writing modification of the recommendations contained in the report." *Id.* §§ 43-4328(1), 47-915(1). "These are functions of the executive and judicial departments." *Watkins*, 354 U.S. at 187; *accord Mazars*, 140 S. Ct. at 2032. "Enforcement of the law is not a 'legitimate task' of the legislative function." *McLaughlin*, 493 P.3d at 994 (quoting *Watkins*, 354 U.S. at 187).

The Acts also wrongfully insert the Inspectors General into the Judiciary's and Executive's supervision of their Departments. Once the Legislature enacts legislation, "its work is complete and the executive authority takes over to administer [the law]." *State ex rel. Meyer v. State Bd. of Equalization & Assessment*, 185 Neb. 490, 500, 176 N.W.2d 920, 926 (1970); *see also Synar*, 478 U.S. at 733–34 ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."). "[C]ontinuous

oversight of the functioning of executive agencies . . . is not a proper legislative function." Inspector General Legislation, 1 Op. O.L.C. at 17. "[S]uch continuing supervision amounts to an assumption of the Executive's role of administering or executing the laws." *Id.* As Executive Branch agencies, the Departments have the duty to review complaints and incidents, and the Legislature cannot assign that role to itself.[5]

The Acts confirm their non-legislative ends in their purpose sections. *See* Neb. Rev. Stat. §§ 43-4302, 47-902. Both Acts identify their purposes as "increas[ing] accountability and oversight," "[a]ssist[ing] in improving operations," and "[p]rovid[ing] an independent form of inquiry for concerns regarding the actions of individuals and agencies." *Id.* §§ 43-4302(1)(a)–(c), 47-902(1)(a)–(c). Child Welfare Inspector General investigations have the additional purpose of "determin[ing] if individual complaints and issues of investigation and inquiry reveal a problem in the child welfare system . . . that necessitates legislative action for improved policies and restructuring of the child welfare system." *Id.* § 43-4302(1)(d). Correctional System Inspector General investigations also aim to "improve policies and procedures of the correctional system." *Id.* § 47-902(d). Responsibility for "accountability and oversight" falls to the Executive. *Id.* §§ 43-4302(1)(a), 47-902(1)(a). The Executive alone determines how to

[5] To be sure, the Legislature may conduct "probes . . . to expose corruption, inefficiency, or waste." *Watkins*, 354 U.S. at 187. The Legislature notes *McGrain* involved an investigation into wrongdoing at the Department of Justice. Legislature Letter at 1. But that investigation found authority in a Senate resolution authorizing an inquiry into specific allegations, which supported "the presumption" that "legislating . . . was the real object." *McGrain*, 273 U.S. at 152, 178. The Acts' permanent oversight supports the opposite conclusion—an improper purpose to oversee the Governor's and Department heads' implementation of the law.

"improv[e] operations," "policies and procedures," and which "concerns regarding the actions of individuals and agencies" merit review. *Id.* §§ 43-4302(1)(b)–(c), 47-902(1)(b)–(d). "[T]he legislature cannot . . . exercise *any* powers properly belonging to[] the executive department." *Shepherd*, 251 Neb. at 532, 557 N.W.2d at 695.[6]

The Child Welfare Inspector General's statutory purpose of "determin[ing] if individual complaints and issues of investigation and inquiry reveal a problem in the child welfare system . . . that necessitates legislative action" is not substantiated by the Acts. Neb. Rev. Stat. § 43-4302(1)(d). The reporting obligations of the Child Welfare Inspector General confirm that she reviews "individual complaints" to make recommendations to the Department for case-specific action like employee discipline. *Id.* § 43-4302(1)(d). And the fact she makes an annual report to the Legislature does not permit her to do a year's worth of fundamentally Executive Branch work. Indulging this statute's incantation of "legislative action" would "place[] form over substance." *Shepherd*, 251 Neb. at 531, 557 N.W.2d at 694.[7]

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[6] The Acts' statutory authority to "publicly release[]" summaries of final reports "to bring awareness to systemic issues" if such disclosures are "in the best interest of the public" also is not a valid legislative purpose. Neb. Rev. Stat. §§ 43-4325(3), 47-912(3). "[T]here is no [legislative] power to expose for the sake of exposure." *Mazars*, 140 S. Ct. at 2032 (quoting *Watkins*, 354 U.S. at 200). "The 'informing function' of [the Legislature] is that of informing itself about subjects susceptible to legislation, not that of informing the public." *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 531 (9th Cir. 1983).

[7] The Acts' stated "intent" to not "interfere with" Executive Branch "investigative responsibilities or prerogatives," Neb. Rev. Stat. §§ 43-4302(2), 47-902(2), does not change our conclusion. First, it is not enough for a legislative investigation to avoid "interfere[nce]" with a law enforcement investigation. *Id.* Such investigations are impermissible legislative functions regardless

The wrongness of placing the Inspectors General in a legislative agency is highlighted by the fact that the federal government and every other state employing inspectors general locate these offices in the Executive Branch. Transcript of Testimony of Julie Rogers, Inspector General of Child Welfare, Health and Human Services Committee, 103rd Neb. Legislature, 1st Sess. at 30–31 (Jan. 30, 2013). As the Child Welfare Inspector General has explained, "[i]n as far as the Association of Inspectors General can find, this office is the only Inspector General's Office that is situated under the legislative branch of government." *Id.* at 30. It is "highly unique" for inspectors general "to be a part of the Legislature." *Id.* at 31. And this innovation is only recent, with the Legislature enacting the first of the Inspector General Acts in 2012. *See* 2012 Neb. Laws LB 821. It also has never been tested by the Nebraska Supreme Court. "Perhaps the most telling indication of the severe constitutional problem with the [legislative Inspectors General] is the lack of historical precedent for this entity." *Free Enter. Fund*, 561 U.S. at 505 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)). "In separation-of-powers cases," "accepted understandings and practice" receive "significant weight." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015).

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of whether an Executive Branch agency has undertaken such an investigation. Second, the Legislature's stated "intent" is irreconcilable with the statute. The statute gives the Public Counsel and Inspectors General—not the law enforcement agency—sole authority to determine when an Inspector General investigation should be "suspend[ed]" because it may interfere with a law enforcement investigation. Neb. Rev. Stat. §§ 43-4318(7), 47-905(3). The statute obviously interferes with law enforcement investigations by attacking the confidentiality of law enforcement investigations and compelling law enforcement cooperation and collaboration with the Inspectors General.

We also note the Legislature's failure to offer any limiting principle for its defense of the broad inquiries authorized by the Acts. If the Legislature can create Inspectors General for two of the most significant agencies under the Governor's control, we see no reason why the Legislature could not create inspectors general for any other entity or agency within the government including the Office of the Governor or Supreme Court. To the extent that the Governor and his aides communicate with the Departments in writing, the Inspectors General may already enjoy access to such documents. Such unbounded access would violate the confidentiality of deliberative communications that is indispensable to informed governmental decision-making and implied by the Constitution. *Cf. Steel*, 296 Neb. at 602, 894 N.W.2d at 802–03.

Nor would there be a limiting principle to similar investigations into other constitutional offices. For example, if the Legislature's position held, then there is no reason why the Legislature could not create an Office of the Inspector General of the Secretary of State, tasked with accessing voter data and files and investigating voter fraud. The Legislature could also create an Office of the Inspector General of the State Auditor, given responsibility for identifying fraud and investigating particular audit subjects.

Our conclusion on this point reaches no judgment on the desirability of the Inspector General investigations. We have no reason to question the Acts' determination that the Departments would benefit from continuing oversight. We do not doubt that the Inspectors General perform a valuable service for the State and the Departments. However, the virtues of a particular statute do not override the Constitution's separation of powers. The Constitution "divides power . . . among branches of government precisely so that we may resist the temptation to

concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). "Valuable and desirable as [they] may be in broad terms," the Inspector General investigations are "not a part of the legislative function." *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979).

In summary, we conclude that the investigations authorized by the Acts lack a legislative purpose for two reasons: *First*, the Acts prevent the Inspectors General from using the confidential information they collect to inform the Legislature, which is the only justification for lawful investigations under the Legislature's investigation power. *Second*, the ends of the investigations authorized by the Acts are not legislative. The Acts license a legislative agency to mimic Executive Branch law enforcement and supervisory reviews. Such inquiries fall outside the scope of legislative investigations.

2.

We also conclude that the State Institutions Clause does not give the Inspectors General constitutional authority for their investigations. The Clause states: "The general management, control and government of all state charitable, mental, reformatory, and penal institutions shall be vested as determined by the Legislature." Neb. Const. art. IV, § 19. Even assuming the investigations in question involve the covered institutions, neither the Inspectors General nor their principal, the Public Counsel, are "vested" with "general management, control [or] government" of a covered institution. *Id.* The Public Counsel and Inspectors General are vested with broad and varying investigatory authority, but outside the investigation context, the Inspectors General can only force the Departments' heads to tell the Inspectors General whether they will accept or reject their recommendations. We have previously described the Public Counsel's

authorities as "purely investigatory and advisory." Op. Att'y Gen. No. 102, at *2 (May 14, 1981). We agree with the Legislature's observation that "[t]he same is true" for the Inspectors General. Legislature Letter at 3. "Any changes made to the execution of the laws is solely within the power and discretion of the executive agency." *Id.* That fact precludes the conclusion that the State Institutions Clause authorizes the Inspector General Acts.

The Legislature reads the State Institutions Clause to give it total control over the covered entities and infers that control permits it to assign investigation authority to itself. Legislature Letter at 18. The argument finds some support in a plurality opinion of the Nebraska Supreme Court upholding the jurisdiction of the Court of Industrial Relations to order a collective bargaining representative election within an agency and to certify the winner as the agency's exclusive bargaining agent. *Am. Fed. of State, Cnty. & Mun. Emps., AFL-CIO v. Dep't of Pub. Insts. State Hosps.*, 195 Neb. 253, 255, 237 N.W.2d 841, 842 (1976) (plurality opinion) ("*AFSCME*"). The plurality held that "[t]he Legislature has complete authority over the [covered] entities." *Id.* at 257, 237 N.W.2d at 843. It concluded that by delegating "actual day-to-day administration" to an executive department, "the Legislature did not lose its constitutionally mandated [p]ower to control" the institutions. *Id.*

We find the Legislature's citation to *AFSCME* unpersuasive for two reasons. *First*, a majority of the Court declined to join the plurality opinion's reasoning that the State Institutions Clause vested the Legislature with "complete control." *Id.* at 259, 237 N.W.2d at 844 (Newton, J., dissenting). The dissenting justices called the plurality's "complete control" interpretation a "major error." *Id.* They read this provision to "simply give[] the Legislature the right to designate what body shall exercise this authority." *Id.* at 260, 237 N.W.2d at 844. It is difficult to deduce any

controlling rule from the case because the Justices concurring in the result did not explain their reasoning. *Cf. Marks v. United States*, 430 U.S. 188, 193 (1977). *Second*, the *AFSCME* statute is distinct from the Inspector General Acts because the former gave the Court of Industrial Relations authority to facilitate collective bargaining negotiations. But as the Legislature admits, the Inspectors General cannot require the departments they investigate to do anything. Legislature Letter at 3. We cannot include that these "purely investigatory and advisory" officers have been vested with "management, control [or] government." Neb. Const. art. IV, § 19; Op. Att'y Gen. No. 102, at *2 (May 14, 1981). Accordingly, the State Institutions Clause does not apply.

III.

Having concluded that the investigation authorities created by the Inspector General Acts are unconstitutional, we turn to the two reporting requirements that the Acts impose on the Departments' heads. We conclude these reporting duties also violate the Constitution. The first of these obligates the Departments to alert the Inspectors General to specific incidents. Both departments must report "all cases of death or serious injury" involving people in custody "as soon as reasonably possible after . . . learn[ing] of such death or serious injury." Neb. Rev. Stat. §§ 43-4318(2), 47-905(1)(b). The head of the Department of Health and Human Services must also report "all allegations of sexual abuse." *Id.* § 43-4318(2). The second requirement demands that the Departments' heads decide whether to accept or reject an inspector general's recommendations and report that decision within 15 days of receiving the recommendations. *Id.* §§ 43-4328(1), 47-915(1). Both requirements violate the Constitution.

A.

The Departments' duty to report certain incidents to the Inspectors General lacks constitutional authority because the Departments' heads do not make reports to the Legislature. Two authorities empower the Legislature to require reports. The Legislature may require any "expending agenc[y] of the state" to produce an annual report at the start of a legislative session when that report is transmitted through the Governor. Neb. Const. art. IV, § 23. In addition, just as the Legislature's implied authority to meet its informational needs allows it to investigate, it can also require reports under that power.

Neither authority applies. The first is inapplicable because these are not annual reports, and they do not report to the Legislature through the Governor. The second does not apply because the Departments do not report to the Legislature. The Acts require the Departments to report to the Inspectors General. Neb. Rev. Stat. §§ 43-4318(2) ("shall report to the office"), 47-905(1)(b) ("shall report . . . to the Inspector General"). And at most only a fraction of this information is reported to one member of the Legislature. As explained, the Acts prevent the Inspectors General from sharing the confidential information they collect with all legislators except for the chairperson of the committee having jurisdiction over the agency in question. *See* p. 26, *supra*. Thus, we cannot conclude this reporting requirement serves the purpose of informing the Legislature, as is required under the Constitution. Its true purpose is triggering Inspector General investigations, which we have found lack constitutional legitimacy. *See* pp. 25–32, *supra*. The requirement to report certain incidents to the Inspectors General is unconstitutional.

B.

The Departments' duty to decide whether to accept or reject recommendations made by the Inspectors General and report on that decision within 15 days violates the Constitution for different reasons. These also are not annual reports to the Legislature through the Governor under Article IV, Section 23. But unlike the incident reporting requirement, it appears that the substance of this report is conveyed to lawmakers, arguably implicating the Legislature's implied power to inform itself. The investigation summaries that the Inspectors General provide to certain legislative committees include "the status" of Inspector General recommendations, which we presume refers to the Departments' decisions to accept or reject recommendations. Neb. Rev. Stat. §§ 43-4331, 47-918.

We conclude that a statutory requirement that an Executive Branch agency evaluate a legislative agency's recommendations and report to the Legislature on its decision violates Separation of Powers. "[S]eparation between the legislative and executive branches . . . should be 'kept as distinct and independent as possible.'" *Polikov*, 270 Neb. at 34, 699 N.W. at 807 (quoting *Shepherd*, 251 Neb. at 532, 557 N.W.2d at 695). "[T]he principle of separation of powers will be violated where the legislative department tries to control the execution of its enactments directly, instead of indirectly by passing new legislation." *In re Request for Advisory Op. from House of Representatives (Coastal Res. Mgmt. Council)*, 961 A.2d 930, 940 (R.I. 2008). Making recommendations to Executive Branch agencies is not a legitimate legislative purpose. *See* p. 27, *supra*. And just as the Legislature cannot make the Departments' employees immediately comply with information requests, the Legislature cannot make the Departments' heads evaluate a legislative agency's recommendations. *See* pp. 11–16, *supra*. *Shepherd*

held that the Public Counsel's authority to temporarily reinstate Executive Branch employees violated Separation of Powers because it "place[d] the legislative branch in a position to dictate to the executive branch how the latter will treat certain executive branch employees." 251 Neb. at 532, 557 N.W.2d at 695. Forcing an executive agency to consider and decide on a legislative agency's recommendation likewise "encroach[es] upon the executive branch's duties and prerogatives." *Id.* We conclude that both reporting duties assigned by the Acts to the Departments' heads violate the Constitution.[8]

IV.

The Inspector General Acts violate the Nebraska Constitution in multiple respects. Many of the Inspector General methods of investigation authorized by the Acts violate Separation of Powers. In addition, the Inspectors General lack authority for their investigations under both the Legislature's implied authority to investigate and the State Institutions Clause. The Departments' reporting requirements also violate the Constitution. The

[8] Federal agencies receiving recommendations from the GAO face reporting obligations like the Departments' duty to report whether they accept or reject recommendations made by an inspector general. *See* 31 U.S.C. § 720. We discount this similarity for many of the same reasons the GAO is not a valuable precedent on legislative investigative authority. *See* p. 23–24, *supra*. This includes the fact that the federal separation of powers doctrine "is not as rigorous" as the state doctrine. *Philipps*, 246 Neb. at 614, 521 N.W.2d at 916. In addition, the constitutionality of this section is untested. As the U.S. Department of Justice has explained, the U.S. Supreme Court "has not had occasion . . . to opine on the constitutionality of statutory direct reporting requirements." Constitutionality of Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Comm'n Act of 2007, 32 Op. O.L.C. 27, 36 (2008).

Departments' duty to report specific incidents is not supported by the Legislature's constitutional investigation power. The Departments' obligation to make decisions on Inspector General recommendations and report on those decisions violates Separation of Powers.

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