

REPORT BY THE TASK FORCE ON THE RULE OF LAW**INDEPENDENT INSPECTORS GENERAL ARE ESSENTIAL
FOR A LAWFUL FEDERAL GOVERNMENT:
THE REMOVAL BY PRESIDENT TRUMP OF MICHAEL ATKINSON AND
GLENN FINE FROM THEIR OVERSIGHT ROLES THREATENS THE RULE OF
LAW AND SHOULD BE INVESTIGATED BY CONGRESS****I. BACKGROUND**

The New York City Bar Association (City Bar) has often spoken, through its President and its many committees and task forces, of the essential roles played by the independent judiciary and the legislature in protecting the rule of law in our cities and towns, in our states, in our nation and in the global community.¹ Our federal government also relies upon the Executive Branch to carry out its actions in accordance with law. Indeed, a significant part of the Attorney General's role is to assure the public that Executive Branch departments and agencies comply with applicable laws.

It has long been evident, however, that judicial, Congressional, and Department of Justice (DOJ) oversight are insufficient to oversee the vast array of actions in the many cabinet-level departments and administrative agencies of the Executive Branch. Effective oversight of the Executive Branch requires both a deep knowledge of the work of its agencies and a factual basis that is reliably independent of the natural tendency of bureaucrats to resist close inspection of internal operations and disclosure of unfavorable information.

Recognizing this need, in 1978 Congress enacted the Inspector General Act (IG Act) to create a generally uniform set of Inspector General (IG) offices across a broad spectrum of Executive Branch agencies.² The purpose of the IG Act was both to require Inspectors General to oversee the most important federal agencies and to ensure that they have the qualifications, investigative authority, resources, and independence to investigate, take action, and report their findings to Congress.

¹ The Task Force on the Rule of Law discusses and deliberates on both domestic and international issues, including national security, those related to the U.S. Constitution and treaty obligations, and the question of norms versus laws. For more information on the Task Force and its work, see <https://www.nycbar.org/member-and-career-services/committees/rule-of-law-task-force-on-the->

² 92 Stat. 1101, Pub. L. 95-452.

In 2008, Congress strengthened the independence and capacity of federal Inspectors General by passing the Inspector General Reform Act (Reform Act).³ The Reform Act dictated that IGs should be appointed “without regard to political affiliation and solely on the basis of integrity and demonstrated ability”⁴ The Reform Act also added removal protections, stating that “If an Inspector General is removed from office or is transferred ... the President shall communicate in writing the reasons for any such removal or transfer to both Houses of Congress, not later than 30 days before the removal or transfer.”⁵ Moreover, to assist IGs in carrying out their duties and to encourage a consistent set of principles for IGs across the federal government, the IG Reform Act created a Council of Inspectors General on Integrity and Efficiency (CIGIE). CIGIE is an independent entity designed to enhance the integrity, economy, and effectiveness of the 75 federal IG offices. In 2016, Congress acted again to clarify and strengthen the authority of IGs in the IG Empowerment Act.⁶

In the recently adopted Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Congress provided over \$2 trillion in emergency federal aid to counter the economic effects of the pandemic.⁷ As part of the CARES Act, CIGIE was directed to assemble a Pandemic Response Accountability Committee (PRAC) to oversee the distribution of CARES Act funding to prevent fraud, waste, and abuse. The CARES Act identified nine specific federal IGs to serve on the PRAC, and directed the CIGIE chair to choose an IG to chair the PRAC from among these nine. On March 30, 2020, CIGIE chair Michael Horowitz (DOJ IG) chose Glenn Fine, then the Principal Deputy Inspector General Performing the Duties of the IG for the U.S. Department of Defense (DOD), to act in this role, citing Fine’s unique qualifications overseeing large organizations as the IG of DOJ for 11 years and as the acting DOD IG for four years.⁸

The CARES Act created two other oversight mechanisms for the CARES Act funds in addition to the PRAC: a Congressional Oversight Commission to oversee the Treasury Department and the Federal Reserve in their implementation of the law, and an Office of the Special Inspector General for Pandemic Recovery (SIGPR), to oversee the Treasury Secretary in distributing \$500 billion in pandemic aid.

On March 27, 2020, in a signing statement attached to the bill, President Trump asserted that he would not permit the SIGPR to independently notify Congress if any agency unreasonably denies a request for information, as was required by the CARES Act.⁹ If President

³ 122 Stat. 4302, Pub. L. 110-409.

⁴ *Id.* Section 8G(c).

⁵ *Id.* Section 3.

⁶ 130 Stat. 1595, Pub. L. 114-317.

⁷ Pub. L. 116-136.

⁸ Press Release: Glenn A. Fine Appointed Chair of CIGIE’s Pandemic Response Accountability Committee, Council of the Inspectors General on Integrity and Efficiency, March 30, 2020, <https://ignet.gov/sites/default/files/files/PRAC-press-release.pdf> (all websites last visited April 23, 2020).

⁹ Statement by the President, March 27, 2020, <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-38/> (“Section 4018(e)(4)(B) of the Act authorizes the SIGPR to request information from other government agencies and requires the SIGPR to report to the Congress ‘without delay’ any refusal of such a request that ‘in the judgment of the Special Inspector General’ is unreasonable. I do not understand, and my Administration

Trump follows through with this threat, it will greatly diminish the independence of the SIGPR by undercutting the SIGPR's ability to make unobstructed reports to Congress. President Trump also has announced his intention to nominate Brian Miller, a senior associate counsel in the White House Counsel's Office, to be the SIGPR.¹⁰ It is highly unusual to select an IG who worked with the President representing his interests, and as the IG Act dictates, IG appointments should be apolitical. We hope that in Mr. Miller's confirmation hearings, Senators will carefully probe the issue of Mr. Miller's independence from the White House.

II. TERMINATION AND INTIMIDATION OF INSPECTORS GENERAL

In apparent defiance of IGs' legally mandated independence, President Trump has recently taken a number of unilateral actions that undermine IGs' ability to carry on their critical work. Amidst the COVID-19 crisis, he removed two IGs from key positions and suggested that he may soon remove a third.

On Friday evening, April 3, 2020, the White House announced that President Trump had removed Michael Atkinson as the IG for the intelligence community, later stating that Mr. Atkinson had done "a terrible job" in forwarding the Ukraine whistleblower's complaint to Congress.¹¹ As further discussed below, Atkinson had done nothing wrong. Three days later, the President removed Glenn Fine from his position as acting IG of DOD by announcing that the Environmental Protection Agency acting IG would also serve as the acting IG for DOD, thereby rendering Fine ineligible to chair the PRAC and oversee the management of the CARES Act funds.¹² Fine remained as Principal Deputy IG for DOD; the only effect of the President's action was to take Fine out of the role of PRAC chair. Needless to say, because Fine had not yet begun his work as PRAC chair, there cannot be good cause to remove him from this post.

The President did not give advance notice to Congress of the removal of either Atkinson or Fine, despite the requirement of section 3 of the Reform Act for such notice for IGs. In Atkinson's case, the White House sent a cursory letter on April 3 stating that Atkinson would be

will not treat, this provision as permitting the SIGPR to issue reports to the Congress without the presidential supervision required by the Take Care Clause, Article II, section 3").

¹⁰ President Donald J. Trump Announces Intent to Nominate Individuals to Key Administration Posts, April 3, 2020, <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-individuals-key-administration-posts-27/>.

¹¹ Natasha Bertrand and Andrew Desiderio, "Trump fires intelligence community watchdog who defied him on whistleblower complaint," Politico, April 3, 2020, <https://www.politico.com/news/2020/04/03/trump-fires-intelligence-community-inspector-general-164287>; and Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing, Delivered April 4, 2020, Issued April 5, 2020, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-19/> ("I thought he did a terrible job. Absolutely terrible. He took a whistleblower report, which turned out to be a fake report — it was fake. It was totally wrong. It was about my conversation with the President of Ukraine. He took a fake report and he brought it to Congress, with an emergency. Okay? Not a big Trump fan — that, I can tell you.").

¹² Ben Kesling, Andrew Restuccia and Dustin Volz, "Trump Removes Watchdog Who Heads Panel Overseeing Pandemic Stimulus Spending," The Wall Street Journal, April 7, 2020, <https://www.wsj.com/articles/trump-removes-acting-defense-department-inspector-general-11586277895>.

removed without providing reasons for that removal; while the letter states that Atkinson would be removed 30 days later, in fact he was relieved of his duties that very day.

On April 8, 2020, a bipartisan group of senators led by Senator Charles Grassley sent a letter to the President concerning the firing of Atkinson.¹³ The Committee demanded a detailed explanation for the reasons for Atkinson's dismissal, noting that a general assertion that the President has lost confidence in the IG is inadequate. The Committee also noted that Atkinson had already been "removed" by being placed on administrative leave, and asked the President to justify having violated the notice provision in the IG Reform Act. To our knowledge, no response from the White House has been issued.

The removal of IG Atkinson was a particular affront to Congress and the purpose of the IG Act. By all indications, Atkinson had performed his statutory duties efficiently and well, including his decision to forward the whistleblower's complaint to Congress. That complaint contained information that the House of Representatives later found, along with other corroborating evidence, to be accurate and sufficient to warrant impeachment of President Trump. That the disclosure of this information to Congress displeased President Trump or that the Senate acquitted him, provides no valid reason for the removal of Atkinson. Indeed, it demonstrates the necessity of genuine political independence and personal integrity as requirements for all IGs, as provided in the IG Act.

The removal of IG Atkinson was significant for another reason. The intelligence community that he oversaw necessarily conducts much of its work in secret, subject to highly restricted Congressional oversight historically conducted on a non-partisan basis. The IG's role in overseeing that work has provided an important measure of assurance that it is being carried out lawfully and with integrity.

The recent removal of IG Fine presents different but equally serious concerns. Fine's designated role under the CARES Act was to lead part of the critical oversight and reporting on the distribution of the enormous sums at the President's disposal as part of that Act's economic recovery program. In removing an IG of non-partisan integrity and unmatched experience who served in that role at two different Executive Branch departments, President Trump made clear that he will try to thwart independent IG oversight over the distribution of those funds, contrary to the clear intent of the CARES Act.

The President also has publicly indicated his displeasure with, and hinted at removing, a third IG, Christi Grimm at the Department of Health and Human Services. Grimm recently issued a report documenting significant supply shortages in some 300 hospitals as well as lengthy testing delays at those facilities.¹⁴ The President used the national televised platform of

¹³ Letter from Senator Charles E. Grassley et al. to President Donald Trump dated April 8, 2020, available at <https://www.grassley.senate.gov/sites/default/files/2020-04-08%20CEG%20et%20al%20to%20POTUS%20%28IC%20IG%20removal%29.pdf>.

¹⁴ Brianna Ehley and Alice Miranda Ollstein. "Trump blasts HHS watchdog for report on hospital shortages," Politico, Updated April 7, 2020, <https://www.politico.com/news/2020/04/06/with-worst-to-come-3-in-4-us-hospitals-now-facing-covid-19-167853>; and Remarks by President Trump, Vice President Pence, and Members of

his coronavirus task force briefing time to attack Grimm, suggesting that she was motivated by politics, but without pointing to anything improper or inaccurate about her reports or her conduct.¹⁵ As Congress has repeatedly acknowledged, the efficacy of the IG system relies upon IGs' independence; IGs must be allowed to do their work without being subject to such attacks in order to maintain that independence.

The President undoubtedly would argue that he has unilateral authority to fire IGs as the head of the Executive Branch and that his actions are not subject to review. While a full analysis of the unitary executive theory is beyond the scope of this statement, the IG Act and its progeny - whose constitutionality is not in dispute - gives Congress an important role in acting as a check on presidential abuse of power. Congress should not abandon its longstanding protection of the integrity and independence of IGs.

III. THREATENING INDEPENDENCE OF INSPECTORS GENERAL

The President's message to IGs Atkinson, Fine, Grimm and all other IGs in the Executive Branch is clear. IGs now know that if they wish to keep their jobs, they must not anger or contradict the President. They must not scrutinize or report unfavorably on any Presidential action, or seek to perform their statutory duties — however grave the danger to the nation — if it will annoy the President or cast doubt on the wisdom or legality of his actions. This message, whether delivered by the President directly or by his aides, is one that seeks to muzzle the IGs in their performance of their statutory duties. It is a message that neither Congress nor the public can accept if the essential role of the federal IGs is to be preserved and Executive Branch departments and agencies are to be held accountable for their conduct. As noted above, IGs play critical roles not only in requiring integrity, accountability, and efficiency in governmental operations, but also in enabling Congress to play its constitutionally mandated oversight role.

IV. PROPOSED HEARINGS AND REFORMS

Protecting the professional and non-partisan independence of IGs is critical to our national commitment to a lawful government and long has been a Congressional priority. This administration's pattern of attacks on government watchdogs undermines IGs' ability to do their jobs, and Congress should not stand by while the President eviscerates the independence of IGs through improper and illegal removals. Congress must hold hearings to investigate the President's attacks on and firings of IGs, including, but not limited to, IGs Atkinson, Fine, and Grimm. Integrity and accountability in the Executive Branch are too important to let the administration sweep this under the rug, especially as we embark on the largest and most complicated stimulus project in our nation's history.

the Coronavirus Task Force in Press Briefing, Delivered April 6, 2020, Issued April 7, 2020, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-21/>.

¹⁵ On May 1, 2020, President Trump announced his intent to nominate Jason C. Weida as Inspector General, Health and Human Services, effectively relieving Grimm of that role. See <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-appoint-individuals-key-administration-posts-37/>.

In addition, existing law provides insufficient controls to prevent President Trump from undermining the essential function of IGs. Although the Reform Act requires Senate confirmation of most IGs, it also provides that an IG may be removed or transferred by the President without the involvement of Congress. The Act requires the President to advise Congress in writing of the reasons for that removal or transfer at least 30 days prior to taking that action. But whether a President's failure, as in the firings of IGs Atkinson and Fine, to provide that notice invalidates the removal or transfer is unclear.

Congress should reaffirm its support for IG independence by enacting whatever protections it finds consistent with its authority, including possible reinstatement of IGs Atkinson and Fine. We also urge a specific remedy to the problem identified above in the form of legislation requiring that any Presidential removal or transfer of an IG, including the placement of an IG on administrative leave, shall not take effect until 30 days after the President has notified Congress of his reasons for that action. We also recommend that the IG Act should extend the same protection against removal or transfer to anyone assigned to perform or performing the normal functions of an IG when that office is vacant.

V. CONCLUSION

Our nation is often said to be one of "laws, not men." This has been true, and it remains critically important. However, institutions are staffed by individual human beings, whether they are IGs, judges, foreign service officers or military commanders. Those whose jobs involve oversight are working in difficult and often contentious positions, and are extremely vulnerable to abuse by those who do not necessarily want these jobs done, or who do not want them done with independence and transparency. The President's attacks on IGs are also an attack on the institutions of our government that ensure accountability of our public officials. It is important, therefore, that Congress act promptly both to reform the IG Act in the manner recommended above and to take whatever other actions Congress finds appropriate to protect IG independence.

Task Force on the Rule of Law
Stephen L. Kass, Chair

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