INSPECTORS GENERAL AND OVERSIGHT INDEPENDENCE

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President Trump's defiance of basic norms threatens the independent oversight institutions of American democracy. Though attacks on the prosecutorial and investigative independence of DOJ and FBI have been most prominent, a pattern of presidential norm breaking has more broadly compromised oversight independence norms. This Article examines challenges to the independence of Inspectors General (IGs), the internal watchdogs of the Executive Branch that monitor agency operations. The President's recent firing of two IGs and replacement of three acting IGs, ostensibly for their legitimate oversight activities, is a deeply troubling affront to independent oversight. The President's assault on the IG institution calls for Congress to act to reinforce IG independence now and prevent similar threats in the future. This Article examines statutory good cause protection as a limit on the President's removal authority. Despite the Supreme Court's recent decision in Selia Law v. Consumer Financial Protection Bureau invalidating a good cause provision, the Article argues that the nature of the IGs' oversight duties and role provide constitutional grounding for IG good cause protection. In addition, due to the Court's embrace of a broad removal power, the Article considers restructuring the IG institution as a multimember commission, court-appointed officers, or agency appointees to strengthen the constitutional basis for good cause protection. The Article also argues in favor of additional mechanisms to protect IG independence, including restrictions on individuals who can serve as acting IGs, stricter statutory qualifications for the appointment of IGs, and expanded investigative authority. Reinforcement of oversight independence norms against hostile forces can be strengthened by the law, but also requires renewed commitment to fundamental oversight values in the face of deepening polarization.

INTRODUCTION

President Trump's defiance of basic norms has upended American democratic institutions.[1] One of the President's primary targets has been the prosecutorial and investigative independence of federal law enforcement.[2] President Trump's flagrant attacks on the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI)[3] have met widespread opprobrium—

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[1] *See, e.g.*, Dawn Johnsen, *Toward Restoring Rule-of-Law Norms*, 97 TEX. L. REV. 1205, 1207-08 (2018).

[2] *See* Daphna Rehna, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2207-08 (2018) ("Although many understand law enforcement to be a paradigmatic executive function, there is today a set of structural norms that insulate some types of prosecutorial and investigative decision-making from the President.") (footnote omitted)

[3] *See, e.g.*, Eileen Sullivan, *Trump Takes up Call to Barr to 'Clean House' at Justice Dept.*, N.Y. TIMES, Feb. 19, 2020, A14 (reporting on the President's tweet calling on the Attorney General to "clean house" after criticizing line prosecutors' sentencing recommendation in the Roger Stone case); David Shortell, Evan Perez, & Josh Campbell, *FBI Agents Warn of 'Chilling Effect' from Trump and Barr Attacks*, CNN Politics, Dec. 12, 2019, https://www.cnn.com/2019/12/12/politics/fbi-chilling-effect-trump-barr-attacks/index.html (noting the President and Attorney General's critiques of the FBI after reports of deficiencies in their surveillance applications). The Twitter

disrespect for prosecutorial and investigative independence betrays the values of impartiality and fairness that are fundamental to the rule of law.[4] These transgressions are a prominent example of a pattern of presidential norm breaking that more broadly threatens the norms of independent oversight. Significantly, President Trump's assault on oversight independence has embroiled Inspectors General (IGs), internal watchdogs within the Executive Branch. This past spring, he fired two IGs and replaced three acting IGs in short succession for reasons ostensibly related to legitimate oversight activities.[5] The President's subversion of IG independence casts a spotlight on the erosion of institutional oversight norms and the threat to values of integrity, transparency, and accountability that IGs seek to uphold.

This Article considers the breakdown of oversight independence norms and examines changes in the law that could protect IG independence. Although legal scholarship has engaged in important analysis of the President's refusal to be bound by norms of prosecutorial and investigative independence,[6] it has not yet addressed the adverse impact of the President's violation of oversight independence norms on the IG institution. More generally, IGs have received limited attention in legal scholarship on oversight of the Executive Branch, despite their

archive for President Trump's tweets and retweets tracks 372 uses of the term "witch hunt" from May 17 to August 2020, most directed at the Russia investigation. *See* http://www.trumptwitterarchive.com.

[4] *See, e.g.* DOJ Alumni Statement on the Events Surrounding the Sentencing of Roger Stone (Feb. 16, 2020) (statement signed by over 2,000 former DOJ prosecutors and officials condemning the President and Attorney General's intervention in the Stone sentencing and stating that they have "openly and repeatedly flouted th[e] fundamental principle" of "equal justice under the law," noting DOJ policies to make prosecutorial decisions free from political influence).

[5] *See, e.g.* Melissa Quinn, *The Internal Watchdogs Trump has Fired or Replaced*, CBS News, May 19, 2020, https://www.cbsnews.com/news/trump-inspectors-general-internal-watchdogs-fired-list/ (summarizing the President's termination of IGs, replacement of acting IGs, and charges of retaliation for conducting oversight or exposing wrongdoing).

[6] *See, e.g.*, Andrew Kent, *Congress and the Independence of Federal Law Enforcement*, 52 UC DAVIS L. REV. 1927, 1932-42 (2020); Todd David Peterson, *Federal Prosecutorial Independence*, 15 DUKE J. CONST. L. & PUB. POL'Y 219, 220-23, 283-85 (2020); Rebecca Roiphe, *A Typology of Justice Department Lawyers' Roles and Responsibilities*, 98 N.C. L. REV. 1077, 1078-81 (2020).

key role in monitoring the operations of agencies.[7] Examination of IG oversight as an internal check on abuse of executive power is particularly crucial at the present moment in light of IG reviews finding government failures during the Trump administration and the President's attacks on the independence of the institution.[8] Whatever the outcome of the 2020 election, the reinforcement of oversight independence is a critical project for American democracy—it will be necessary to defend the principle against emboldened attacks should the President win a second term or make the necessary repairs to restore the norm after its degradation.

Current law permits the President to remove an IG for any reason as long as notice is provided to Congress 30 days in advance.[9] Despite the absence of any removal restriction in the law, IGs have rarely been removed during a President's term in office, based on a generally accepted consensus across political parties to respect their independent oversight.[10] President Trump shattered this longstanding consensus with the firings of IGs and replacement of acting IGs in April and May 2020. He terminated Michael Atkinson, the IG for the intelligence community, who previously notified Congress about the whistleblower complaint alleging that the President

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[7] Shirin Sinnar has evaluated the effectiveness of IG reviews of national security decisions that infringed individual rights during the George W. Bush administration. Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1031 (2013). Jack Goldsmith offered an account of the Central Intelligence Agency (CIA) IG's review of interrogation practices during the Bush administration. JACK GOLDSMITH, POWER AND CONSTRAINT 99-109 (2012). Michael Bromwich, the former DOJ IG, has explained the oversight practices of IGs and compared them with independent counsel investigations before that law's expiration. Michael R. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 GEO. L.J. 2027, 2029-30 (1998). For public administration scholarship that discusses the history of IGs and their structure, powers, and purposes, *see generally* CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES (2019); PAUL LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY (1993).

[8] "Internal separation of powers" literature, which has discussed the role of institutions within the Executive Branch as a check on abuse of power mainly in the national security context, has acknowledged the potential for IGs to serve as an internal constraint. *See, e.g.*, Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 442–47 (2009); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1562 (2007); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2322, 2342 (2006). However, these discussions have generally not explored the IG institution in much depth. *But see* Sinnar, *supra* note 7, at 1030-31.

[9] 5 U.S.C. § 3(b).

[10] *See, e.g.* JOHNSON & NEWCOMER, *supra note*, at 7.

conditioned foreign aid to Ukraine on the country opening an investigation of Joseph Biden, his chief domestic political rival, which gave rise to impeachment proceedings.[11] He also fired the Steve Linick, the IG for the State Department, at the request of Secretary Michael Pompeo, who was under investigation by the State IG's office at the time for misuse of funds.[12] Moreover, the President replaced three acting IGs, who had issued critical reports or were engaged in sensitive ongoing oversight work, and temporarily replaced them, in some cases, with agency political appointees subject to competing loyalties.[13]

This Article examines a congressional proposal to require the President to have good cause for IG termination. This approach would codify the default norm against IG termination by restricting presidential removal to specific reasons set forth in the law, including but not limited to "inefficiency," "neglect of duty," and "malfeasance."[14] The proposal provides a measure of legal protection against termination and holds symbolic significance in defending independence norms.

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[11] Jeremy Herb, Zachary Cohen, & Jason Hoffman, *Trump Defends Firing Intelligence Community Watchdog*, CNN POLITICS, Apr. 4, 2020, https://www.cnn.com/2020/04/04/politics/trump-michael-atkinson-inspector-general-fired/index.html (noting President's comment on Atkinson's dismissal that he "took a fake report and gave it to Congress").

[12] *See* Nicole Gaouette, Kylie Atwood, Jennifer Hansler, & Zachary Cohen,, *Fired State Department watchdog was conducting 5 probes into potential wrongdoing*, CNN POLITICS, June 10, 2020, https://www.cnn.com/2020/06/10/politics/linick-congress-transcript-state-dept/index.html.

[13] Sam Mintz, *Democrats Blast Removal of Acting DOT Inspector General,* POLITICO, May 19, 2020, https://www.politico.com/news/2020/05/19/democrats-blast-removal-of-acting-dot-inspector-general-268611 (describing replacement of Acting IG for the Department of Transportation, who was purportedly investigating the DOT Secretary's steering of funds to Kentucky to support Mitch McConnell's reelection, and the naming of a political appointee as the new acting IG); Lisa Rein, *Trump Replaces HHS Watchdog who Found 'Severe Shortages' at Hospitals Combating Coronavirus*, WASH. POST, May 2, 2020, *available at* https://www.washingtonpost.com/health/top-hhs-watchdog-being-replaced-by-trump-says-inspectors-general-must-work-free-from-political-intrusion/2020/05/26/5c83f41a-9f49-11ea-9590-1858a893bd59_story.html (replaced Acting IG for the Department of Health and Human Services, not long after she issued a report finding a lack of adequate supplies and protective equipment as the federal government struggled to respond to the pandemic); Charlie Savage & Peter Baker, *Trump Ousts Pandemic Spending Watchdog Known for Independence*, N.Y. TIMES, Apr. 8, 2020, at A1 (replaced acting Department of Defense IG Glenn Fine, which displaced him as the lead IG on a committee tasked with oversight of over $2 trillion in federal COVID-19 stimulus funds);

[14] Inspectors General Independence Act of 2020, S. 3664, 116th Cong. § 2(a-b) (as introduced in S. Comm. On Homeland Security & Governmental Affairs, May 7, 2020) (providing for a seven-year term of office and removal only "for permanent incapacity, inefficiency, neglect of duty, malfeasance, or conviction of a felony or conduct involving moral turpitude"); Inspectors General Independence Act of 2020, H.R. 6668, 116th Cong. § 2(a-b) (as introduced in H. Comm. on Oversight & Reform, May 1, 2020) (same).

Had a good cause requirement existed when the President fired the intelligence community and State Department IGs, the provision would have prohibited such actions. However, a substantial question exists as to whether the removal for cause provision would withstand constitutional scrutiny under existing case law. Although the Supreme Court has recognized legislative authority to limit presidential removal of officers in prior cases,[15] it determined this past term in *Selia Law LLC v. Consumer Financial Protection Bureau*, by a 5-4 majority, that a provision restricting the President's power to remove the agency's director was unconstitutional based on the separation of powers.[16]

Selia Law represents a significant chapter in the ongoing debate between the unitary executive theory, which argues in its strongest formulations that the President has complete removal power, and proponents of legislative power, who argue that Congress has authority to place reasonable limits on presidential removal.[17] On the one hand, the decision declares the majority's firm endorsement of a broad general rule of the President's removal power, though it left intact prior decisions that permitted some legislative limits on removal of officers, recasting those cases as "exceptions."[18] On the other hand, as captured in the dissent, the decision reflects the Court's further ideological drift away from the legislative power to limit executive power in the removal context, as well as its willingness to depart from precedent and reshape the law without overtly overruling its prior decisions.

Congress must consider this context in crafting a law that would restrict the President's authority to remove IGs. This Article examines the existing proposal before Congress, which

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[15] *See* Morrison v. Olson, 487 U. S. 654, 691-92 (1988); Humphrey's Executor v. United States, 295 U.S. 602, 629-31 (1935).
[16] 140 S. Ct. 2183, 2192 (2020) [hereinafter *Selia Law*].
[17] *Compare* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 596-99 (1994) *with* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1-2, 108-113, 117-18 (1994).
[18] *See Selia Law*, 140 S. Ct. at 2192.

simply inserts good cause protection into the existing IG law, based on *Selia Law* and the Court's removal jurisprudence. The Court's stated exceptions in *Selia Law* permit removal limits when good cause protection applies to (1) multimember commissions with "quasi-legislative" or "quasi-judicial" duties and (2) "inferior officers" with limited duties who lack policymaking authority.[19] Though IGs do not fall in the former exception because they are not part of a commission, this Article outlines a strong argument that IGs satisfy the latter[20] because they are nonpartisan appointees without policymaking authority, make advisory findings and recommendations to agencies, and operate, to some extent, under the "general supervision" of the agency head.[21] This argument supplies a constitutional basis for Congress to implement reasonable restrictions on the President's authority to remove IGs.

Nonetheless, if Congress simply amends the law to add good cause protection without corresponding changes to the IG institutional structure, they might find the new law exposed to a constitutional challenge based on *Selia Law* and the potential further weakening of removal limits. To strengthen the constitutional grounding for IG removal limits, the Article argues that Congress should thus consider three alternative IG structures in framing the protection: (1) independent, multimember commissions; (2) court-appointed officers; and (3) agency appointees. Each of these alternatives adjust the IG institutional framework and appointment authority to more closely situate the removal limit within the Court's stated exceptions and ameliorate potential constitutional objections. As discussed, these new structures are reasonable, albeit imperfect responses to presidential abuse and the Court's departure from the longstanding constitutional principle identified by the *Selia Law* dissent—"Congress could protect from at-will removal the

[19] *Id.* at 2198-2200
[20] *See Morrison*, 487 U.S. at 690-92.
[21] 5 U.S.C. § 3(a).

officials it deemed to need some independence from political pressure," as long as limits did not impede the President's execution of duties.[22]

In addition to good cause protection, this Article also weighs the policy reasons for legislative changes to address IG appointments and authority. Congress has the authority to set qualifications for appointees, including individuals who may hold acting positions.[23] As noted, the President's replacements for removed IGs and acting IGs included political appointees, who had policymaking roles raising dual loyalty concerns. This Article considers a pending legislative proposal to limit temporary acting IG appointments to previously appointed IGs or senior personnel within the particular IG office, arguing that such limits would facilitate the continuation of ongoing IG matters and likely deter arbitrary removals or replacements.[24] Though not pending before Congress, the Article also suggests reevaluation of the current eligibility requirements for IGs to ensure sufficiently strict, objective qualification standards for IG appointments.

Moreover, the Article argues that Congress should remedy any gaps in IG oversight authority to ensure that IGs have the power to review pertinent matters relating to their agencies that warrant objective evaluation for transparency and accountability. An existing bill seeks to close a glaring gap in the DOJ IG's powers essential to its ability to monitor prosecutorial independence.[25] Due to an exception in the law, the DOJ IG cannot investigate professional misconduct by attorneys,[26] which appears to limit DOJ IG review of recent prosecutorial decisions

[22] *Selia Law*, 140 S. Ct. at 2233 (Kagan, J., dissenting).
[23] *See* Myers v. United States, 272 U.S. 52, 128-29 (1926).
[24] Securing Inspector General Independence Act, S. 3994, 116th Cong. § 3(a) (as introduced by S. Comm. on Homeland Security & Governmental Affairs, June 18, 2020) (requiring that the "first assistant" to the IG, including the principal deputy IG or deputy IG if no first assistant has been designated, perform the IG duties in an acting capacity); Accountability for Acting Officials Act, H.R. 6689, 116th Cong. § 2(d) (as introduced by H. Comm. on Oversight & Reform, May 1, 2020) (similar requirement).
[25] Inspector General Access Act of 2019, S. 685, 116th Cong. (as voted out of the Judiciary Committee on June 25, 2020); Inspector General Access Act of 2019, H.R. 202, 116th Cong. (as passed by the House, Jan. 15, 2019).
[26] 5 U.S.C. § 8e(b)(3).

concerning Roger Stone, a former Trump campaign advisor, and Michael Flynn, the President's former national security advisor, in connection with the criminal cases against them. In Stone's case, after line prosecutors recommended a nine-year prison sentence in accord with Sentencing Guidelines for Stone's false statements to the House Intelligence Committee in the Russia investigation, senior DOJ officials overruled the sentencing recommendation of line prosecutors on the Stone case in an amended submission to the court recommending "far less" prison time.[27] In Flynn's case, DOJ took the highly irregular step of seeking dismissal of the Flynn case after he twice pleaded guilty to making false statements to federal agents.[28] The role of the Attorney General, senior DOJ officials, and the White House in these decisions warrant independent IG review, especially in light of pressure from the President.[29] The Article argues that Congress should eliminate this exception and clarify that the DOJ IG has authority to conduct this type of review.

The Article proceeds in three Parts. Part I provides an overview of the IG institution and explains the sources of IG independence. Part II discusses the circumstances surrounding the removal of permanent IGs, the replacement of acting IGs, the temporary designation of acting IGs, and the appointments process for filling vacancies. This Part also describes President Trump's retaliatory removals and replacements of IGs, as well as his designation of existing political

[27] Government's Supplemental and Amended Sentencing Memorandum at 4, United States v. Stone, Crim. No. 19-cr-19-ABJ, at 4 (D.D.C. Feb. 11, 2020).

[28] *See* Government's Motion to Dismiss the Criminal Information Against the Defendant Michael T. Flynn at 1-2, United States v. Flynn, Crim. No. 17-232 (D.D.C. May 7, 2020)**.** This decision came after

[29] In Stone's case, before DOJ submitted its amended sentencing recommendation for Stone, President Trump responded to prosecutors' original sentencing recommendation as follows: "This is a horrible and very unfair situation. The real crimes were on the other side, as nothing happens to them. Cannot allow this miscarriage of justice!" Donald J. Trump (@realDonaldTrump) (Feb. 11, 2020, 1:48 a.m.), https://twitter.com/realDonaldTrump/status/1227122206783811585. In Flynn's case, the decision to drop the charges came after President Trump regularly impugned the prosecution's basis and motives. *See* Brief for Court-Appointed *Amicus Curiae*, *United States v. Flynn*, Case No. 17-cr-232 (EGS) (D.D.C. June 10, 2020) ("[President Trump] has tweeted or retweeted about Flynn at least 100 times from March 2017 to present. This commentary has made clear that the President has been closely following the proceedings, is personally invested in ensuring that Flynn's prosecution ends, and has deep animosity toward those who investigated and prosecuted Flynn." (footnotes omitted)).

appointees as acting IGs in certain cases. Part III turns to analysis of proposals to reinforce IG independence. This Part examines the constitutionality of IG removal for cause provisions in light of the recent *Selia Law* decision and proposes alternative IG institutional structures that can strengthen constitutional grounding for IG removal for cause. This Part also analyzes the policy reasons for eligibility requirements for acting IG positions that draw from the ranks of IG offices, qualification criteria for permanent appointments that ensure appropriate experience for the role, and enhanced IG authority, including the proposal to eliminate restrictions on DOJ IG review of prosecutorial decisions.

I. INSPECTORS GENERAL IN THE FEDERAL SYSTEM

This Part provides a brief overview of how IGs came to be a central oversight institution of the federal government. In addition to historical background, this Part discusses the powers and responsibilities of IGs and past congressional amendments to reaffirm IG independence. As will be discussed, the IG institution draws from a mix of statutory protections, support from Congress and civil society, professional standards and expertise, and Executive Branch compliance for its independence.

A. The Inspector General Act and Amendments

IGs are an established component of the government's oversight infrastructure today, but the expansion of the institution remains a relatively recent phenomenon in American history. During the Revolutionary War, the Continental Congress created an IG for the army after George Washington called for the appointment to review organizational problems in the military.[30] Further expansion of the IG institution was limited until the abuses of the Nixon administration

[30] DAVID A. CLARY & JOSEPH W.A. WHITEHORNE, THE INSPECTORS GENERAL OF THE UNITED STATES ARMY 1777-1903 23-27 (1985). Notable IGs for the Army included Baron Von Steuben, whom some consider one of the most important military figures during the War after Washington, and Alexander Hamilton, who took on the role after Washington returned to lead the military in 1798. *See id.* at 59-60, 75-77.

during the Watergate era ushered in a host of government reforms.[31] During this period, Congress initially took incremental steps toward the expansion of federal IG oversight. In 1976, Congress created an IG for the Department of Health, Education, and Welfare (HEW), which later became the Department of Health and Human Services (HHS),[32] followed in 1977 by an IG for the Department of Energy.[33] These predecessor statutes served as models for the Inspector General Act of 1978 (IG Act).[34]

The stated "purpose" of the IG Act was to create independent units (1) "to conduct and supervise audits and investigations relating to [agency] programs and operations"; (2) "to provide leadership and coordination and recommend policies" to "promote economy, efficiency, and effectiveness" and "detect fraud and abuse" in government programs; and (3) to inform agency heads and Congress about agency deficiencies and the need for "corrective action."[35] The IG Act thereby effectuated a separation between agency investigative and audit functions, which were assigned to the IGs, and operational matters. It established IGs' broad mandate to conduct inquiries of agency operations. Moreover, the IG Act created a dual reporting relationship to facilitate action by agency heads and further congressional oversight in response to IG findings and recommendations.

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[31] These reforms included the Ethics in Government Act, Pub. L. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. § 401); Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (codified as amended at 5 U.S.C. app. § 1101); and the Independent Counsel Act, Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867-73 (1978) (repealed 1999). *See generally* LIGHT, *supra* note 7, at 27-35 (1993) (discussing few instances of IGs before Watergate and their expansion after).

[32] Pub. L. 94-505, § 201(a), 90 Stat 242 (1976).

[33] Department of Energy Organization Act, P.L. 95-91, § 208, 91 Stat. 565 (1977).

[34] *See generally* CONG. RES. SERV., STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 1-2 (2019).

[35] *Id.* § 2(1-3).

The original IG Act assigned IGs to 12 federal agencies.[36] The growth to 74 statutory IGs at present indicates the positive response to the institution as a device of good government.[37] Roughly half of IGs are appointed by the President with the Senate's advice and consent, while roughly the other half are appointed directly by the agency head.[38] The Act requires that appointments be made "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations."[39] The Act also requires before removal of an IG that the President or agency head "communicate the reasons" for removal to Congress.[40]

Congress has amended the IG Act on several occasions. In the Inspector General Amendments Act of 1988, Congress created additional IG positions at federal agencies.[41] In the Inspector General Reform Act of 2008, Congress created the Council of Inspectors General on Integrity and Efficiency (CIGIE), an interagency entity designed to enhance coordination and best practices among the various IG offices.[42] CIGIE is required to maintain an Integrity Committee that "shall receive, review, and refer for investigation allegations of wrongdoing" concerning IGs or their staff.[43] It was also a 2008 amendment that required notice of intended removal to Congress be provided 30 days in advance.[44] Finally, in the Inspector General Empowerment Act of 2016,

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[36] Inspector General Act of 1978, P.L. 95-452, 92 Stat. 1101 (1978) (*reprinted as amended* at 5 U.S.C. § app. (2018)).
[37] *See* STATUTORY INSPECTORS GENERAL, *supra* note 29, at 4. The IG Act governs 65 of the 74 statutory IGs in the federal system. The remaining IGs, such as the intelligence community IG, are governed by separate statutes. This figure does not include nonstatutory IGs or IGs for the Army, Navy, and Air Force, which are structured differently than IGs under the IG Act. *See id.*
[38] Inspector General Act of 1978 §3(a) & §8G(c).
[39] Inspector General Act of 1978 § 3(a).
[40] *Id.* § 3(b).
[41] Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515, 2515 (codified as amended at 5 U.S.C. app. § 1).
[42] Inspector General Reform Act of 2008, Pub. L. No. 110-409, § 11(a)(1), 122 Stat. 4302, 4306 (codified as amended at 5 U.S.C. app. § 11). Members of CIGIE include all federal IGs, as well as designees from other agencies. *Id.* § 11(d)(2). CIGIE considers "policies, standards, and approaches" to enhance the "professionalism and effectiveness" of IGs. *Id.* § 11(d)(4)(A).
[43] *Id.* § 11(d)(1).
[44] *Id.* at § 3(a).

Congress responded to disputes between IGs and agencies regarding the lengthy process for review, redaction, and production of records by strengthening IG access to records.[45]

B. Inspector General Independence

A fundamental principle of IG oversight is independence—the commitment to objective review, fact-finding, and reporting based on a sufficient degree of freedom from interference or political pressure. Similar to the concept of prosecutorial independence, the objectivity, impartiality, and legitimacy of oversight is linked to the exercise of independent professional judgment. Yet, oversight independence is a broader concept, one that extends beyond criminal law enforcement to other oversight institutions, including IGs, that seek to promote the good government values of integrity, transparency, and accountability.

The "structural insulation" of IGs from agency operational units and officials subject to review is a key feature of their ability to conduct independent oversight.[46] IGs investigate, audit, and review agency programs, policies, and official decisions for corruption, fraud, waste, abuse, conflicts of interest, and mismanagement. IGs' findings and recommendations sometimes counter an administration's preferred narratives, increase transparency about misconduct or government failures, and promote accountability by offering remedial actions. IGs require sufficient powers to uncover the truth and adequate protection against reprisals to support the performance of this oversight, which can involve contentious confrontation with the Executive Branch.

Statutory provisions give IGs a degree of independence. As noted above, the law intends the selection of IGs to be nonpartisan, based upon "integrity" and a particular set of skills and experience suited to government oversight.[47] IGs report to agencies and Congress on the outcomes

[45] Inspector General Empowerment Act of 2016, Pub. L. No. 114-317, § 6(1)(A), 130 Stat. 1595, 1603 (codified as amended in 5 U.S.C. app. § 6).
[46] *See, e.g.*, Metzger, *supra* note 8, at 444.
[47] 5 U.S.C. § 3(a).

of their inquiries,[48] but have substantial discretion to determine their investigative subjects and methods.[49] The statute provides that an IG shall be under the "general supervision" of the agency head, but bars the agency head from "preventing or prohibiting the IG from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation."[50] IGs have broad investigative powers as they are authorized to access agency records, subpoena records from nongovernmental entities, seek assistance from other agencies, and take testimony under oath.[51] Although IGs lack authority to direct agencies to follow recommended corrective actions, the agency is required to respond and state whether they accept recommendations.[52] IGs are considered a "separate agency" for certain administrative purposes, such as internal recruitment and personnel matters.[53] In addition, agencies must include specific line items for IG funding in their budgets, and IGs may report to Congress if agency budget requests would "substantially inhibit" their work, which aims to prevent agencies from squeezing IG budgets to penalize or neutralize IG oversight.[54]

Though IG powers and protections are set forth in statutory provisions, the law is not the only source of IG independence. Several entities provide informal protection for IG independence. In addition to its lawmaking, Congress supports IGs when, for example, it holds hearings to explore IG findings or oppose inadequate agency responses to IG oversight.[55] Civil society

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[48] *Id.* § 2(1-3).
[49] *Id.* (stating that IGs may initiate reviews "relating to programs and operations of [agency], as are, in the judgment of the Inspector General, necessary and desirable").
[50] *Id.* at § 3(a). *See also* United States Nuclear Regulatory Commission v. Federal Labor Relations Authority, 25 F.3d 229, 235 (4th Cir. 1994) (describing the agency head's "general supervision" authority over IGs as "nominal" after reviewing the legislative history).
[51] *Id.* § 6(a).
[52] *Id.*
[53] *Id.* § 6(e)(1)(A)(i)
[54] *Id.* §§ 6(g) and 8G(g)(1).
[55] *See, e.g.* Testimony of Joseph V. Cuffari, Department of Homeland Security Inspector Gen., Children in CBP Custody: Examining Deaths, Medical Care Procedures, and Improper Spending House Committee on Homeland Security (July 15, 2020) (explaining DHS IG investigations of two child deaths at the border and problematic conditions, including overcrowding, after the expanded immigration detention during the Trump administration); *See*

organizations that follow IG oversight further bolster independence through their focus on the relationships between IGs and the Executive Branch, including any issues that might undermine oversight.[56] Media coverage also defends the IG institution by bringing additional transparency to IG reviews and Executive Branch responses.[57]

Another mechanism that fortifies independent oversight is the CIGIE professional standards that have been designed to guide the investigative, audit, and evaluation work of the IG community. The standards, among other things, link independence to the impartiality of review and identify threats to consider including self-interest, improper judgment, bias, familiarity, and external pressures.[58] IG independence and effectiveness also relies on the Executive Branch's adherence to the insulation of the oversight actors, cooperation with IG requests for information, and willingness to respond in good faith to findings and recommendations.

II. THREATS TO INSPECTOR GENERAL INDEPENDENCE

IGs are thus intended to serve as nonpartisan arbiters of the integrity and effectiveness of government operations. The independence of IGs lends legitimacy and credibility to their findings and recommendations. Although the sources of protection discussed above have afforded a degree of IG independence, the delicate nature of that protection has come into full view during the Trump

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"Methodology, Scope and Findings": Hearing on DOJ OIG FISA Report Before the U.S. S. Comm. on Homeland Sec., 116th Cong. (Dec. 18, 2019) (statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice on the DOJ IG report about the Russia investigation).

[56] *See, e.g.*, Letter from Danielle Brian, Executive Director, Project on Government Oversight, to Senators Chuck Grassley and Claire McCaskill, at 1-2 (Dec. 14, 2015), *available at* https://www.grassley.senate.gov/sites/default/files/judiciary/upload/IG%20Access%2C%2012-14-15%2C%20POGO%20support%20letter.pdf (arguing for the Inspector General Empowerment Act, which later became law, to ensure IG access to agency records after an Office of Legal Counsel opinion concluded that certain restrictions limited access).

[57] For example, a Westlaw search for articles about the DOJ IG report in the three weeks after its release yielded 1,090 articles. *See, e.g.*, David Shortell, et al., *Inspector General: Start of FBI Russia Probe was Justified and Unbiased but Investigation had Significant Errors*, CNN Politics, (Dec. 9, 2019), https://www.cnn.com/2019/12/09/politics/ig-horowitz-report-russia-trump/index.html.

[58] CIGIE, QUALITY STANDARDS FOR FEDERAL INSPECTORS GENERAL 12-13 (2012); CIGIE, QUALITY STANDARDS FOR INSPECTION AND EVALUATION 2 (2012)

administration, as IGs have reviewed executive wrongdoing and dysfunction. IGs have scrutinized matters involving important public interests relating to criminal justice, immigration, public health, science, and the professional civil service. They have often challenged administration positions or exposed improper conduct. Consider these examples:

- the Department of Justice IG determined that the FBI had a reasonable basis for initiation the investigation of whether the Trump campaign coordinated with Russians to interfere with the 2016 presidential election.[59]
- the Department of Health and Human Services (HHS) IG found a lack of preparedness for the COVID-19 pandemic and questions about the federal government's initial response;[60]
- the Department of Homeland Security IG issued reports criticizing "serious" overcrowding at detention facilities for migrant families and children, as well failures to track children that DHS separated them from their parents.[61]
- the Department of State IG's identified instances of political retaliation against civil servants;[62]
- the Environmental Protection Agency IG and HHS IG determined that the agency heads violated travel policies resulting in a waste of government funds.[63]

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[59] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI'S CROSSFIRE HURRICANE INVESTIGATION i-viii (2019) [hereinafter DOJ IG RUSSIA INVESTIGATION REPORT].

[60] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HEALTH AND HUM. SERVS., HOSPITAL EXPERIENCES RESPONDING TO THE COVID-19 PANDEMIC: RESULTS OF A NATIONAL PULSE SURVEY MARCH 23-27 1-9 (2020) [hereinafter HHS IG COVID-19 HOSPITALS REPORT].

[61] OFFICE OF THE INSPECTOR GEN., U.S DEP'T OF HOMELAND SECURITY, CBP SEPARATED MORE ASYLUM-SEEKING FAMILIES AT PORTS OF ENTRY THAN REPORTED AND FOR REASONS OTHER THAN THOSE OUTLINED IN PUBLIC STATEMENTS 5-11 (2020) [hereinafter DHS IG FAMILY SEPARATION REPORT]

[62] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF STATE, REVIEW OF ALLEGATIONS OF POLITICIZED AND OTHER IMPROPER PERSONNEL PRACTICES INVOLVING THE OFFICE OF THE SECRETARY 12 (2019) [hereinafter STATE IG PERSONNEL PRACTICES REPORT].

[63] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF ENV'T PROTECTION, ACTIONS NEEDED TO STRENGTHEN CONTROLS OVER THE EPA ADMINISTRATOR'S AND ASSOCIATED STAFF'S TRAVEL 8, 13 (2019) [hereinafter EPA IG ADMINISTRATOR TRAVEL REPORT]; OFFICE OF THE INSPECTOR GEN., U.S DEP'T OF HEALTH AND HUM. SERVS., THE

It is precisely because IGs identify wrongdoing, expose failures, and pursue accountability that reliance on the President and agency heads to voluntarily abide by the expectations of oversight independence norms is inherently fragile. IG oversight invites the wrath of a President who is hostile to scrutiny.

Most seriously, President Trump violated norms of oversight independence when he fired two permanent IGs and replaced three acting IGs in April and May 2020 for the legitimate exercise of oversight responsibilities. The discussion below summarizes the history of IG removals through administrations since the passage of the IG Act, explains how President Trump's adverse actions constitute a significant deviation, and argues that current law – presidential notice to Congress of intentions to remove an IG – has proven inadequate to protect IG independence. In addition, this Part identifies additional challenges relating to appointments, including extended vacancies and the designation of acting personnel, and authority, a problematic gap in the DOJ IG's power to review allegations of attorney misconduct.

A. Removal and Replacement of IGs

Under current law, the President can remove an IG from their position with 30 days advance notice to Congress.[64] Despite the absence of removal protection beyond this notice requirement, past presidents have mostly refrained from removal based on norms against political interference with IG scrutiny of government operations. A longstanding, bipartisan consensus exists that IGs should retain their roles during transitions after elections, despite the fact that most

OFFICE OF THE SECRETARY OF HEALTH AND HUMAN SERVICES DID NOT COMPLY WITH FEDERAL REGULATIONS FOR CHARTERED AIRCRAFT AND OTHER GOVERNMENT TRAVEL RELATED TO FORMER SECRETARY PRICE 7-8 (2018) [hereinafter HHS IG SECRETARY TRAVEL REPORT].

[64] 5 U.S.C. § 3(a).

political appointees leave during changes in administration.[65] Equally important, independence norms have supported the apolitical expectation that the President will not remove an IG for conducting oversight that questions, challenges, or critiques the administration.

This consensus arose, in part, because of the exceptions. When President Reagan informed Congress on his first day in office that he removed sixteen IGs, the response was swift condemnation from members of both political parties.[66] Indeed, no President since Reagan has ordered a blanket dismissal of IGs with a change in administration, though some considered doing so. George H.W. Bush sought to terminate IGs but relented after objections by the IGs and Congress.[67] Presidents Clinton, Obama, and George W. Bush do not appear to have sought to terminate IGs at the beginning of their administrations.[68] The Trump administration similarly backed away from plans to remove IGs after IGs raised concerns.[69]

Individual IG removals outside of changes in administration have also been exceedingly rare. President Obama terminated Gerald Walpin, the IG for the Corporation for National and Community Service, six months after taking office. In his notice to Congress, President Obama simply stated that he "no longer" had "fullest confidence" in Walpin. In subsequent letters and explanations, Obama Administration officials set forth specific reasons for the termination, while

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[65] *See* Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1396 (2017) ("[U]nlike with most other political appointees, new administrations have refrained from asking current IGs to resign."); Bromwich, *supra* note 7, at 2029 (observing that IGs are expected to "survive a change in party control of the White House").

[66] *See* Robert Pear, *Ouster of all Inspectors General by Reagan Called a Political Move*, N.Y. TIMES, Feb. 3, 1981, B14 (discussing objections of Republicans and Democrats, including Representative L.H. Fountain, a chief sponsor of the IG Act, who said that despite the President's removal power, "[i]t was never intended, however, that inspectors general be replaced on a wholesale basis without regard to individual merits whenever there was a change in administration"). Reagan later reappointed five of the removed IGs. *See* Francis Clines, *Reagan Reappoints Five to be Inspectors General*, N.Y. TIMES, Mar. 27, 1981, B8.

[67] *See* JOHNSON & NEWCOMER, *supra note 7*, at 108.

[68] *Id.* at 122.

[69] *See* Steven Mufson and Juliet Eilperin, *Trump Transition Team Reverses Course on Warnings to Oust Inspectors General*, WASH. POST, (Jan. 19, 2017).

members of Congress questioned the sufficiency of the White House's explanations.[70] Nonetheless, the D.C. Circuit Court ruled that the President's notice to Congress was adequate because the "explanation satisfie[d] the minimal statutory mandate" of the IG Act, which "impose[d] no clear duty to explain the reasons in any greater detail."[71] To avoid the publicity and scrutiny that would result from firing an IG, presidential administrations appear to have occasionally opted for alternative methods, such as quietly pressuring an IG or negotiating with them to vacate the position, though these alternatives also appear to have been rare.[72] The bottom line is that no President has systematically used the removal power to oust IGs under circumstances suggesting the move was in retribution for past oversight or to impede ongoing scrutiny.

Nothing compares with President Trump's dismissal of two IGs and replacement of three acting IGs in April and May 2020. A review of the timing and circumstances of these actions indicates retaliation for IGs' discharge of oversight responsibilities or an effort to subvert active matters with the potential to expose wrongdoing within the administration.

On April 3, 2020, President Trump informed Congress that he was terminating Michael Atkinson, the IG for the intelligence community.[73] Atkinson had determined that the Director of National Intelligence must send Congress the anonymous whistleblower complaint alleging that President Trump solicited foreign interference in the 2020 U.S. election by pressuring Ukraine to

[70] *See* Joint Staff Report, 111th Congress, *The Firing of the Inspector General for the Corporation for National and Community Service*, at 23-24, 47-48 (Nov. 20, 2009). As discussed in the report, administration officials cited several issues to support Walpin's termination, including a complaint by an Acting United States Attorney, Walpin's telecommuting work arrangement, and his fitness to serve in office. The report noted that Walpin's office had recently investigated a political ally of the President prior to the termination. *See id.*

[71] Walpin v. Corporation for National and Community Services, 630 F. 3d 184, 187 (D.C. Cir. 2011) (quotation marks omitted).

[72] *See* JOHNSON & NEWCOMER, *supra* note 7, at 128 (noting limited number of IG resignations based on pressure from the White House, agencies, or Congress).

[73] Letter from President Trump to Senator Richard Burr, Chairman of the Senate Select Committee on Intelligence, and Senator Mark R. Warner, Vice Chairman of the Senate Select Committee on Intelligence (Apr. 3, 2020).

investigate Trump's chief domestic political rival.[74] After the disclosure, the House pursued its impeachment investigation and later voted to impeach the President on charges of abuse of power and obstruction of Congress.[75] Following his acquittal by the Senate, the President proceeded to retaliate against individuals who reported information to Congress in connection with the impeachment investigation, including Atkinson.[76]

On April 7, 2020, President Trump displaced Glenn Fine from the position of Acting DOD Inspector General when he appointed the EPA IG to also serve as Acting DOD IG.[77] CIGIE had recently designated Fine to lead the Pandemic Response Accountability Committee (PRAC), which was established in the Coronavirus, Aid, Relief, and Economic Security (CARES) Act to provide oversight of the Act's $2 trillion in emergency federal spending.[78] Because the CARES Act required an IG to hold the post leading the PRAC, the replacement of Fine as Acting DOD IG meant that Fine could no longer lead the committee.[79]

On April 30, 2020, President Trump nominated a new HHS IG, not long after then Acting HHS IG Christi Grimm issued an April 3 report on hospital preparedness to respond to the COVID-19 pandemic.[80] At the time, state and local governments were criticizing the inadequacy of the federal government's response to COVID-19, pleading for the federal government to utilize its authority and resources to coordinate a national response strategy, add hospital capacity, obtain

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[74] *See* Letter from Michael Atkinson, IG for the Intelligence Community, to Joseph Maguire, Acting Director of National Intelligence, at 6 (Aug. 26, 2019) (enclosing the anonymous whistleblower's letter and determining that the allegations constituted an "urgent concern" requiring the Director of National Intelligence to report to the congressional intelligence committees). The letter was released to Congress on September 26, 2019 after Maguire initially refused to do so. *See* Nicholas Fandos, *Complaint in Hand, Democrats Aim for a Fast, Focused, Impeachment Inquiry*, N.Y. TIMES, Sept. 26, 2019.

[75] Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019) (enacted).

[76] Herb, Cohen, & Hoffman, *supra* note 10; Ramsey Touchberry, *Trump's 'Retaliation' Against Impeachment Witnesses Spurs Call to Investigate Amid Fierce Criticism*, NEWSWEEK, Feb. 10, 2020.

[77] Savage & Peter Baker, *supra* note 12, at A1.

[78] CIGIE, Press Release, *Glenn A. Fine Appointed Chair of CIGIE's Pandemic Response Accountability Committee* (Mar. 30, 2020).

[79] Savage & Peter Baker, *supra* note 12, at A1.

[80] Rein, *supra* note 12.

and distribute supplies, and expand testing, contact tracing, and other mitigation efforts.[81] The HHS IG report qualified that that it "was not a review of HHS response to the COVID-19 pandemic," but rather, sought to illuminate "hospitals' challenges and needs" in response to the pandemic and to assist HHS with its response efforts.[82] The report found a "severe" dearth of testing supplies, identified "widespread" shortages of protective equipment for health workers, and noted hospitals' concerns about federal government assistance and guidance.[83] After release of the report, President Trump stated during a COVID-19 briefing that the report was "wrong" and wrote on Twitter that it was "another Fake Dossier," a reference to a compilation of allegations from the Russia Investigation.[84]

On May 15, 2020, President Trump notified Congress that he was terminating State Department IG Steve Linick.[85] Congress opened an inquiry into the matter after reports, which the President confirmed, that Linick's firing came at the request of Secretary of State Michael Pompeo, who was under investigation by the IG.[86] Linick later testified to Congress that the State Department IG had ongoing matters relating to the Secretary of State's office at the time of his termination, including an investigation of Secretary Pompeo's misuse of government resources and a review of an expedited $8 billion arms sale to Saudi Arabia.[87] As noted above, the State Department IG had also previously investigated and issued reports on substantiated instances of

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[81] *See, e.g.*, Robert Acosta & Aaron Gregg, *Governors and Mayors in Growing Uproar over Trump's Lagging Coronavirus Response*, WASH. POST., Mar. 22, 2020.
[82] HHS IG COVID HOSPITALS REPORT, *supra* note 55, at 1.
[83] *Id.* at 1-9.
[84] Brett Samuels, *Trump decries IG report on hospital shortages as 'another fake dossier'*, The Hill (Apr. 7, 2020) https://thehill.com/homenews/administration/491561-trump-decries-ig-report-on-hospital-shortages-as-another-fake-dossier.
[85] Letter from President Trump to Nancy Pelosi, Speaker of the House of Representatives (May 15, 2020).
[86] *See* Catie Edmondson & Michael D. Shear, *Trump Ousted State Dept. Watchdog at Pompeo's Urging; Democrats Open Inquiry*, N.Y. Times, May 19, 2020.
[87] Tr. of Interview of Steven Linick, House of Representatives, Committee on Foreign Affairs, at 42-43, 56-58 (June 3, 2020), *available at* https://foreignaffairs.house.gov/_cache/files/4/7/47b1f13c-7b02-4b58-a32d-d4cb74ee9291/4260E22C7282CBACBC5D94AA72FAB265.linick-final-redacted.pdf.

officials violating civil service requirements by making personnel decisions based on political factors.[88]

On May 16, 2020, President Trump replaced the Acting IG for the Department of Transportation (DOT), Mitchell Behm. Media reports indicate that the DOT IG office was investigating whether DOT Secretary Elaine Chao, who is married to Senate Majority Leader Mitch McConnell, exercised preferential treatment for Kentucky, possibly to help McConnell's reelection in 2020, by steering DOT funds to the state.[89]

In his letters to Congress regarding terminations of both Atkinson and Linick, President Trump stated that "it is vital that I have the fullest confidence in the appointees serving as Inspectors General," and "[t]hat is no longer the case with this Inspector General."[90] In candid public comments, the President justified the termination of Atkinson because he had sent a "fake report" to Congress.[91] As to the termination of Linick, the President stated that Secretary Pompeo was "not happy with the job he's doing" and suggested that the misuse of funds investigation was not "important."[92]

Members of Congress challenged the President's explanations for the IG removals. A bipartisan group of Senators, including Chuck Grassley, argued that the President's termination notice was "insufficient" under the IG Act "because Congress intended that inspectors general only be removed when there is clear evidence of wrongdoing or failure to perform the duties of

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[88] STATE IG PERSONNEL PRACTICES REPORT, *supra* note 57, at 12. *See also* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF STATE, REVIEW OF ALLEGATIONS OF POLITICIZED AND OTHER IMPROPER PERSONNEL PRACTICES IN THE BUREAU OF INTERNATIONAL ORGANIZATION AFFAIRS 1 (2019).
[89] Mintz, *supra* note 12.
[90] Letter from President Trump Regarding Atkinson Termination, *supra* note 68; Letter from President Trump Regarding Linick Termination, *supra* note 80.
[91] Herb, Cohen, & Hoffman, *supra* note 10.
[92] Aaron Rupar, *Trump's remarks about firing the State Department IG show how he's destroyed the norm of oversight*, VOX, May 19, 2020, https://www.vox.com/2020/5/19/21263508/trump-inspector-general-steve-linick-firing-mike-pompeo-investigation.

the office, and not for reasons unrelated to their performance, to preserve independence."[93] In response, the White House Counsel countered that the President has broad removal power, questioned the constitutionality of the notice requirement, and asserted, nonetheless, that the President provided sufficient notice comparable to President Obama's notice in the Walpin case.[94] Senator Grassley demanded further explanation of the reasons for both the Atkinson and Linick firings, and even briefly held up two nominations. After the White House provided additional explanations, Senator Grassley relented on the nominations, while stating that he disagreed with the reasons for the removals.[95]

The removal of IGs and replacement of acting IGs as punishment for adverse reviews, cover from active investigations, or preemptive shielding from future oversight form part of a consistent pattern of efforts by the Trump Administration to repel, control, or weaken oversight. These actions flout well established principles of independence and noninterference long guarded by proponents of the IG role. It also serves as a deeply troubling warning to IGs about the perils of independent oversight and create unsustainable conditions for IGs to effectively perform their role. As discussed below, the removals and replacements also underscore independence concerns relating to the individuals nominated for permanent IG positions or slated to temporarily fill acting IG roles.

B. IG Vacancies, Permanent Appointments, and Acting Officials

The President's authority to appoint senior executive officials subject to the "advice and consent" of the Senate, as well as to name acting officials during interim periods between

[93] Letter from Senator Charles S. Grassley et al. to President Trump (Apr. 8, 2020) (questioning both the sufficiency of the notice and the placement of Atkinson on administrative leave during the 30-day notice period). *See also* Letter from Senator Charles S. Grassley to President Trump (May 18, 2020) (seeking explanation as to Linick's termination).
[94] Letter from Pat Cippolone, Counsel to the President, to Senator Charles S. Grassley, at 1-2 (May 26, 2020).
[95] Kevin Breuninger, *GOP Senator Lifts Hold on Trump Nominees Despite Disagreeing with Inspector General Firings*, CNBC, June 19, 2020, https://www.cnbc.com/2020/06/19/chuck-grassley-lifts-hold-he-placed-on-trump-nominees-over-ig-firings.html.

appointments, applies to IGs.[96] The appointments process for senior officials is designed, in principle, for the President to select qualified individuals to carry out the government's functions, with the Senate ensuring through its vetting and approval of nominees that appointees have the necessary skills, experience, and judgment to serve the particular role in the public's interest. However, critiques of the appointments process cite unqualified nominees who do not serve the public mission of executive agencies, high numbers of vacancies due to delays in nomination and approval, and extensive use of temporary appointments to key positions.[97]

Vacant IG positions have been a well-documented subset of this dysfunction. Republican and Democratic administrations have both been responsible for languishing IG vacancies, though the pace of nominations and appointments slowed considerably under the Obama administration.[98] According to a General Accountability Office report, the majority of IG positions had vacancies in the period from 2007 to 2016, and the appointment process to fill vacancies ranged from less than a month to over 5 years.[99] Concerns about IG vacancies have persisted during the Trump administration. As of July 2020, thirteen IG positions subject to presidential appointment remained vacant, with 6 pending nominations.[100] The aforementioned GAO report included survey responses, including acting IGs, who reported that acting status did not negatively impact

[96] *See* Vacancies Act, 5 U.S.C. § 3347(a).
[97] *See, e.g.*, 2 BRENNAN CENTER FOR JUSTICE, NAT'L TASK FORCE ON RULE OF LAW AND DEMOCRACY, PROPOSALS FOR REFORM 15-17 (2019).
[98] *See generally* JOHNSON & NEWCOMER, *supra* note 7, at 113 (summarizing data showing the average period of IG vacancies for administrations from President Reagan through President Obama).
[99] GENERAL ACCOUNTABILITY OFFICE, INSPECTORS GENERAL, INFORMATION ON VACANCIES AND IG COMMUNITY VIEWS ON THEIR IMPACT, GAO-18-270, at 11 (March 2018), *available at* https://www.gao.gov/assets/700/690561.pdf (hereinafter "GAO Report").
[100] *See* Oversight.gov, Inspector General Vacancies Tracker, https://www.oversight.gov/ig-vacancies (last visited July 19, 2020). Data indicates a significant number of vacancies among lower-level presidential appointments across the administration. *See generally* Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 654-56 (2020) (reporting that of 301 lower-level appointed, cabinet positions as of April 2019, acting officials occupied approximately 13 percent of the positions, whereas approximately 22 percent of the positions were vacant with no acting official in place).

their ability to fulfill IG duties.[101] CIGIE, by contrast, wrote that "no matter how able or experienced an Acting [IG] may be, a permanent IG has the ability to exercise more authority in setting policies and procedures and, by virtue of the authority provided for in the IG Act, inevitably will be seen as having greater independence."[102]

Appointments for both permanent and acting IG positions warrants consideration of the background of the candidate to ensure sufficient skills, experience, and independence for the role. As noted earlier, the IG Act provides that appointments should be made "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations."[103] Administrations might nonetheless seek to insulate their activities from review by appointing individuals to IG positions based on political loyalties, rather than integrity, relevant experience, and willingness to provide an independent check on the Executive Branch.

President Trump's designation of acting officials in the wake of his removal and replacement of permanent and acting IGs also raised conflict of interest questions. For example, when President Trump fired the State Department IG, he designated Stephen Akard, who held a political appointment as the Director of Foreign Missions, to the acting role. Akard retained the political appointment, which required that he report to Secretary Pompeo's advisor, while serving as acting IG, which required he supervise the investigations relating to the Secretary.[104] Similarly, when President Trump replaced Behm as Acting DOT IG, he named Skip Elliott, administrator of

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[101] GAO Report, *supra* note 94, at 28-41.
[102] Letter from CIGIE to Senator Mitch McConnell and the Honorable Harry Reid, at 2 (November 7, 2016), *available at* https://www.ignet.gov/sites/default/files/files/CIGIE_Senate_Letter_IG_Vacancies_07Nov16%20(1).pdf. *See generally* BIPARTISAN POLICY CENTER, OVERSIGHT MATTERS: WHAT'S NEXT FOR INSPECTORS GENERAL, RECOMMENDATIONS FROM THE BPC TASK FORCE ON OVERSIGHT AND INSPECTORS GENERAL 26-27 (2018).
[103] 5 U.S.C. 3(a).
[104] *See* Deirdre Shesgreen, *'Lapdog' or Watchdog? The State Department's New Inspector General Under Fire for Conflicts of Interest, Inexperience*, USA Today, June 1, 2020.

the Pipeline and Hazardous Materials Safety Administration (PHMSA), an agency within DOT, to serve as Acting DOT IG. This also raised conflict issues due to the dual reporting responsibilities, as well as the fact that the DOT IG reportedly had an open matter relating to Secretary Chao.[105] Senator Grassley implored the President to avoid "obvious conflicts" in acting appointments "that unduly threaten the statutorily required independence of inspectors general."[106] The White House response stated that the acting appointments complied with the Vacancies Act, noted the acting officials' qualifications, and did not address the conflict of interest concerns.[107]

C. Gaps in IG Authority

In addition to the appointment and removal of IGs, the authority of IGs to review potential misconduct or deficiencies, to access relevant information, and to make findings and recommendations is critical to independent oversight. As discussed earlier, the IG Act generally bars an agency head from prohibiting an IG from conducting a particular inquiry.[108] However, a glaring gap in authority exists with respect to the DOJ IG that appears to prevent its review of important matters relating to prosecutorial independence.

The DOJ IG generally "may initiate, conduct and supervise such audits and investigations in the Department of Justice as the Inspector General considers appropriate."[109] However, the DOJ IG lacks the authority to investigate or review professional misconduct by DOJ attorneys. Whereas Congress provided that the DOJ IG would have authority to investigate criminal wrongdoing or administrative misconduct, it required that DOJ's Office of Professional Responsibility (OPR)

[105] *See* Mintz, *supra* note 12.
[106] Letter from Senator Grassley, May 18, 2020, *supra* note 88, at 2.
[107] Letter from Pat Cippolone, *supra* note 89, at 3-4.
[108] 5 U.S.C § 3(a).
[109] *Id.* § 8e(b)(1).

handle misconduct allegations against attorneys, "where the allegations relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice."[110] The DOJ IG provisions also permit the Attorney General to restrict the IG's access to "sensitive information."[111]

The attorney misconduct exception was written into the IG Act when Congress amended the law in 1988 to create the DOJ IG.[112] It is an outlier insofar as the DOJ IG is the sole IG office in the federal system which is restricted from conducting investigations of attorney misconduct. Consequently, the DOJ IG itself, among other groups, have proposed that Congress eliminate the restriction, arguing that the DOJ is better suited to conduct independent oversight of attorney misconduct than the OPR director, who reports to and can be removed by the Attorney General, and therefore lacks "the statutory independence" of the DOJ IG.[113]

This restriction on DOJ authority has taken on greater significance in light of President Trump's interference with DOJ matters and Attorney General Barr's recent interventions in cases involving Trump associates, which have been roundly criticized as contravening the rule of law by allowing political considerations to influence prosecutorial judgments.[114] The Attorney General overruled the original sentencing recommendation of line prosecutors in the Stone case and directed the dismissal of the Flynn prosecution after Flynn pleaded guilty. Meanwhile, the President's frequent attacks on the Stone and Flynn prosecutions undermined confidence that these

[110] *Id.* § 8e(b)(3).
[111] *Id.* § 8e(a)).
[112] At the time, DOJ opposed the creation of an IG on the grounds that the IG would usurp the Attorney General's authority, jeopardize investigations, and be required to disclose confidential information.
[113] *See* Letter from Michael Horowitz, DOJ IG, to Elijah Cummings and Trey Gowdy (Nov. 29, 2018). In addition, unlike the DOJ IG, OPR does not generally make public reports on the findings of its investigations. As noted in the DOJ IG letter, during a ten-year period, OPR issued only five public reports, four of which had been joint reviews with the DOJ IG. *See id.*
[114] *See, e.g.*, DOJ Alumni Statement, *supra* note 4.

decisions were independent judgments, rather than political ones.[115] Congress requested that the DOJ IG review political interference in these decisions.[116] Inasmuch as the attorney misconduct exception applies to attorney decisions on prosecutorial matters, it arguably shields the Attorney General's decisions in these cases from IG review, despite the interest in transparency and accountability relating to the reasons for these decisions.

III. PROTECTING OVERSIGHT INDEPENDENCE

President Trump's use of the removal power to punish or prevent effective oversight subverts independence. The designation of compromised acting officials or the failure to fill IG vacancies with qualified personnel deprives IG offices of independent leadership. Omission of relevant subjects of inquiry from an IG's purview causes gaps in oversight. This section examines legal proposals to shore up the independence of IG oversight, including good cause protection for IGs against improper terminations, changes to IG appointments including a restriction on assigning political appointees to acting IG positions, and the elimination of the attorney misconduct exception to DOJ IG review.

A. Good Cause Protection

In response to President Trump's IG terminations, members of the House and Senate offered bills amending the IG statute to allow removal for cause only, along with a seven-year term of office. The proposal would permit removal only for specific reasons set forth in the statute, including "inefficiency," "neglect of duty," and "malfeasance."[117] Historically, Congress has enacted an array of similar removal for cause provisions, also known as good cause or just cause

[115] *See supra* notes 22-24. The President ultimately commuted Stone's sentence. *See* Peter Baker, Maggie Haberman & Sharon LaFraniere, *Trump Commutes Sentence of Roger Stone on 7 Felony Crimes*, N.Y. Times (July 10, 2020).
[116] Letter from Jerry Nadler, Chairman of House Judiciary Committee, to Michael E. Horowitz, DOJ IG (May 8, 2020) (letter from 26 House members requesting review of handling of the Flynn case and interference with the rule of law); Letter from Senator Kamala Harris et al. to Michael E. Horowitz, DOJ IG (Feb. 27, 2020) (Ten Senators requesting IG review of interference in the Stone case).
[117] Inspectors General Independence Act of 2020, S.3664 & H.R. 6668, *supra* note 16, at § 2(a-b).

protection, for members of commissions[118] and individual executive officers, including the Commissioner of Social Security,[119] the Special Counsel,[120] and the now-lapsed Independent Counsel.[121] One IG – the IG for the United States Postal Service – is removable only for cause.[122]

Strong policy reasons exist for Congress to establish a good cause requirement to protect IGs from future abuses of presidential power. Recently though, in its *Selia Law* decision, the Supreme Court invalidated Congress's enactment of a good cause requirement for removal of the CFPB agency director as a violation of the separation of powers. This section examines the constitutionality of an IG removal for cause provision in light of *Selia Law* and considers alternative IG structures as the foundation for good cause protection. It then examines the policy reasons for the amendment and application to potential cases.

1. The Constitutionality of an IG Removal for Cause Provision

In 1977, after introduction of the IG Act, the Office of Legal Counsel opined "that the provisions in this bill, which make the Inspectors General subject to divided and possibly inconsistent obligations to the executive and legislative branches, violate the doctrine of separation of powers and are constitutionally invalid."[123] OLC argued, among other objections, that a provision requiring the President to notify Congress of the reasons for removing an IG was unconstitutional, as "the power to remove a subordinate appointed officer within one of the

[118] *See Selia Law*, 140 S. Ct. at 2232-33 (Kagan, J., dissenting) (noting for-cause protections for members of the Federal Reserve, Federal Trade Commission, and other commissions).
[119] 42 U.S.C. § 902(a)(3) (Commissioner "may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office").
[120] 5 U.S.C. § 1211 (Special Counsel, who reviews prohibited personnel practice involving federal employees, may be removed for "inefficiency, neglect of duty, or malfeasance in office").
[121] 28 U.S.C. § 596(a)(1) (repealed) (no removal of the Independent Counsel except for "good cause, physical or mental disability (if not prohibited by law protecting persons from discrimination on the basis of such a disability), or any other condition that substantially impairs the performance of such independent counsel's duties").
[122] 39 U.S.C. § 202(e)(3) (USPS IG may be removed "may be removed only upon the written concurrence of at least 7 Governors [on the USPS Board], but only for cause")
[123] OLC, Memorandum Opinion for the Attorney General: Inspector General Legislation, at 1 (Feb. 21, 1977).

executive departments is a power reserved to the President acting in his discretion."[124] Nonetheless, Congress enacted the IG Act and included the notice provision.[125]

The Executive Branch also raised separation of powers concerns when Congress previously considered a good cause protection for IGs in connection with the Inspector General Reform Act of 2008. The House voted overwhelmingly for a bill containing an IG removal for cause provision.[126] But the Senate bill, which ultimately became law, omitted the removal for cause provision. Instead, the amendments updated the notice provision to specify that the President must inform Congress 30 days in advance of any IG termination.[127] Notably, the Bush administration had earlier objected to the good cause provision based on "grave constitutional concerns" with restrictions on the President's removal power.[128]

The recently proposed IG good cause protection amendment will likely confront renewed constitutional objections. Whether the provision will be found constitutional implicates a specific iteration of the larger debate surrounding the scope of executive power. On the one hand, objections to good cause restrictions flow from the unitary executive theory and its argument that the text, structure, and history of the Constitution establishes a broad power for the President to control the administrative state.[129] Unitary executive scholars, like Stephen Calabresi and Saikrishna Prakash, have argued that Article II, most specifically the Vesting Clause,[130] supplies

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[124] *Id.* at 3-4.
[125] *See supra* note 39.
[126] H.R. 928 (Oct. 3, 2007). The House passed the bill by a vote of 404 to 11. *See* Congressional Research Service, *Statutory Inspectors General: Legislative Developments and Legal Issues*, at 2 (Nov. 6, 2007). The IG community supported the amendment to include good cause protection. *See* Statement of Phyliss Fong, USDA IG, Committee on House Committee on Oversight and Government Reform (June 20, 2007), https://www.usda.gov/oig/webdocs/TestimonyIG070620.pdf (stating of the bill's removal for cause and fixed term provisions that "[a] majority of the IG community believes that these provisions of H.R. 928, if enacted, would enhance the independence of IG").
[127] *See* Inspector General Reform Act of 2008, P.L. 110-409 (Oct. 14, 2008).
[128] Office of Management and Budget, Statement of Administration Policy H.R. 928 – To Amend the Inspector General Act of 1978 (Oct. 1, 2007).
[129] *See, e.g.*, Calabresi & Prakash, *supra* note 16, at 580-82.
[130] U.S. Const. Art. II, § 1, cl. 3 ("The executive Power shall be vested in a President.")

a broad grant of executive power to the President, and Congress, therefore cannot control executive agencies or restrict the removal power.[131] On the other hand, other scholars, such as Cass Sunstein and Lawrence Lessig, draw constitutional support for good cause restrictions from a distinct reading of the text, structure, and history that recognizes authority for Congress, including under the Necessary and Proper Clause,[132] to regulate executive power. Though these scholars acknowledge a broad space for the President to direct policy execution, they also maintain that Congress has authority to place reasonable restrictions on the removal of certain executive officers.[133] Because the Article focuses on the constitutionality of IG good cause protection based on existing Supreme Court precedents, which it takes as given, the discussion only sketches this debate. But it is worth noting that the Court's precedents in this area reflect the debate in the Justices' divergent views as to scope of the presidential removal power and congressional authority to reign in that power with limitations. This divergence was on display most recently in *Selia Law*.

a. Selia Law and the Court's Presidential Removal Jurisprudence

In *Selia Law*, the Court rejected the good cause limitation on removal of the CFPB director as a violation of the separation of powers.[134] Chief Justice Roberts, writing for the majority, explained that the text of Article II, the history of the First Congress, and the 1928 *Myers v. United States* decision established the President's broad power to remove executive officers.[135] The Court recast its prior case law as declaring a general rule of presidential removal power subject to two

[131] *Id.* at 580-82, 596-99 (quoting U.S. CONST., ART. II, § 1).
[132] U.S. CONST. art. I, § 8 (Congress has the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof").
[133] *See, e.g.*, Lessig & Sunstein, *supra* note 16, at 1-2, 108-113, 117-18. *See also* Kirit Dalat & Richard Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 774 (2013) (arguing that "the President can constitutionally take any action with respect to independent agencies that he could with respect to the executive agencies unless a statutory provision says otherwise").
[134] *Selia Law*, 140 S. Ct. 2192.
[135] *Id.* at 2197-98.

"exceptions" where restrictions are permissible:[136] (1) multimember agencies that exercise "quasi-legislative" or "quasi-judicial" functions as in the *Humphrey's Executor v. United States*[137] and (2) "inferior officers" with limited duties that do not exercise policymaking or administrative authority as in *Morrison v. Olson*.[138] According to the Court, the CFPB director did not satisfy either exception because the CFPB is not a multimember agency and its director wields significant enforcement authority by administering an array of consumer protection statutes.[139] The Court, therefore, refused to extend good cause protection to the "'new situation'" of the CFPB director on the ground that the provision had no historical antecedent as applied to a single agency director and was incompatible with the separation of powers.[140]

Justice Kagan, writing in dissent, countered that the text, history, and structure of the Constitution "point not to the majority's 'general rule' of 'unrestricted removal power' with two grudgingly applied 'exceptions,' [but] [r]ather, they bestow discretion on the legislature to structure administrative institutions as the times demand, so long as the President retains the ability to carry out his constitutional duties."[141] The dissent explained that the Court historically affirmed congressional enactments creating "zones of administrative independence" by limiting the President's removal power, and that the *Selia Law* majority even recognized its past approval of such limits.[142] According to the dissent, the majority reached its result by misreading history – the majority "writes in rules to the Constitution that the drafters knew well enough not to put there" – and the Court's precedents – "[t]he majority's general rule does not exist," and the "exceptions are

[136] *Id.* at 2198-2200.
[137] 295 U.S. 602 (1935).
[138] 487 U. S. 654 (1988).
[139] *Id.* at 2200.
[140] *Id.* at 2201 (citing *Free Enterprise Fund*, 487 U. S. at 483).
[141] *Id.at* 2225 (Kagan, J. dissenting).
[142] *Id.* at 2224.

made up for the occasion."[143] Justice Kagan declared that *Selia Law* thereby "wipes out" the "measure of independence from political pressure" that Congress intended to provide by enacting good cause protection for the CFPB director.[144]

To understand the nature of the disagreement between the majority and dissent, it is important to explain their varying interpretations of the legal and historical sources underlying the divergent views about presidential removal and congressional limits. This discussion provides helpful context to examine whether an IG removal for cause limitation may pass constitutional scrutiny after *Selia Law*.

The Constitution is silent on the President's removal power, and the Founders did not discuss the issue at the Constitutional Convention.[145] Without an explicit removal clause to rely on, the *Selia Law* majority's textual argument focused on Article II's Vesting Clause and Take Care Clauses. The majority reasoned that removal authority is a corollary to the political accountability encapsulated by the power vested in the President and the responsibility to faithfully execute the law. As the Court said in *Free Enterprise Fund v. the Public Company Accounting Oversight Board*[146] and repeated in *Selia Law*, "'[w]ithout the power, the President could not be held fully accountable for discharging his responsibilities; the buck would stop somewhere

[143] *Id.* at 2226 (Kagan, J. dissenting).
[144] *Id.* (Kagan, J. dissenting).
[145] *Myers*, 272 U.S. at 109-110.
[146] 561 U.S. 477 (2010). In *Free Enterprise Fund*, the Court confronted the "highly unusual" double for-cause protection where members of the accounting board had protection against removal by SEC Commissioners, who were themselves protected against removal by the President. Because these layers of removal restrictions "impair[ed]" the President's executive control over the board, the Court voided the board's good cause protection, while leaving the protection for SEC Commissioners intact. *Id.* at 495-96. Commentary on *Free Enterprise Fund* suggested that the Court's holding should be confined to the idiosyncratic removal arrangement of the Board, not read to portend the illegitimacy of reasonable good cause restrictions in other contexts. *See, e.g.*, Peter Strauss, *Things Left Unsaid, Questions Not Asked*, 164 U. PA. L. REV. ONLINE 293, 298 (2018) ("When the protected tenure of ALJs, Inspectors General, and other tenure-protected "inferior officers" comes before the Court, as perhaps it soon will, the Court should quickly discern that *Free Enterprise Fund* properly turns on the institutional characteristics of the PCAOB, and not, as such, on the characteristics of its individual members.").

else.'"[147] The dissent, however, responded that the Vesting Clause "can't carry all that weight" to support a broad removal power, noting Justice Rehnquist's conclusion in *Morrison* that the Court could not "'extrapolate'" such a broad power from "'general constitutional language.'"[148] The dissent also observed that *Morrison* concluded that removal limits were consistent with the Take Care Clause, as long as the President retained authority to discharge his constitutional duties.[149]

Due to the absence of an express removal clause in the Constitution, the Court has also focused on historical sources for guidance and, particularly, the "Decision of 1789," which refers to the First Congress's enactment of a presidential removal provision for the Secretary for the Department of Foreign Affairs. *Myers* discussed the Decision of 1789 at length in ruling that the Senate could not regulate presidential removal of an executive officer by requiring its own consent.[150] A majority of the Court followed this historical interpretation in *Selia Law*, stating that the question of the presidential removal power was "settled" by the First Congress, and read *Myers* to "confirm" a broad removal power.[151] However, as the dissent explained in *Selia Law*, the First Congress did not definitively settle the extent to which Congress can limit the removal power, stating that the history of the First Congress is "'highly ambiguous and prone to overreading'" on the issue.[152] Some scholars have called the "unitary" history of the Decision of 1789 "a myth."[153] Even some unitary executive theorists have rejected reading the Decision of 1789 as authority for

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[147] *Selia Law*, 140 S. Ct. at 2191 (quoting *Free Enterprise Fund*, 561 U.S. at 514).
[148] *Id.* at 2227-28 (Kagan, J. dissenting) (quoting *Morrison*, 487 U.S. 690 n.29).
[149] *Id.* at 2228.
[150] *See id.* at 111-36, 163-64. The Court said of "the Decision of 1789" that while a congressional enactment does not control determination of the constitutional removal power, the First Congress, which included a number of the Founders, was a "precedent." The Court concluded that Article II grants the President removal power and excludes Congress from the removal process, except with respect to inferior officers. Accordingly, it rejected the law requiring Senate approval to remove a postmaster. *Id.* at 163-64. *See generally* 1 ANNALS OF CONGRESS 473-600 (1789) (debate on the "Decision of 1789").
[151] *Compare Selia Law*, 140 S. Ct. at 2192 (Roberts, J., majority).
[152] *Id.* at 2229-31 (Kagan, J. dissenting) (quoting John Manning, 124 HARV. L. REV. 1965 n.135 (2011).
[153] Jed Handelsman Shugerman, *The Imaginary Unitary Executive*, LAWFARE, July 6, 2020 (offering an account of the Decision of 1789 that identifies "historical errors" in the Court's reading of that history).

prohibition on congressional removal limits.[154] Further, the dissent challenged the majority's reliance on *Myers* when past cases had "confined *Myers* to its facts."[155]

b. The Constitutional Basis for the IG Removal for Cause Amendment

Indeed, *Selia Law* represents a further pivot toward the unitary executive theory of the removal power, but not a complete vindication. The impact is not yet so sweeping because the Court did not overrule *Humphrey's Executor* and *Morrison*, but rather, recast the holdings from those cases as "exceptions" to a general removal rule.[156] Accordingly, the constitutionality of removal limits, including IG good cause protection, appears to now turn on whether the protected position operates within a sufficiently similar structure and performs an analogous set of functions to the officers involved in these cases. The discussion below summarizes these cases, including the Court's reinterpretation of their meaning in *Selia* Law, and then outlines several features about IGs that suggests a constitutional basis for IG good cause protection.

In *Humphrey's Executor*, the Court ruled that Congress had authority to enact a good cause restriction on the removal of Federal Trade Commission members, insofar as they were officers of "quasi-legislative or quasi-judicial agencies" who "must be free from executive control."[157] The Court explained that the constitutionality of good cause restrictions depended on "the character of

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[154] Saikrishna B. Prakash, *New Light on the History of the Decision of 1789*, 91 Cornell L. Rev. 1021, 1073 ("[T]he Decision of 1789 did not endorse the view that Congress lacked authority to modify the Constitution's grant of removal power to the President. While there are sound reasons to doubt that Congress has some generic power to treat constitutional grants of power as grants that Congress can modify or abridge, the Decision of 1789 is not one of them.")

[155] *Selia Law*, 140 S. Ct. at 2233-34 (Kagan, J., dissenting) (referencing the statement in *Humphrey's Executor* that the Court "'disapproved'" anything in *Myers* that was "'out of harmony'" with the *Humphrey's Executor* decision) (quoting *Humphrey's Executor*, 295 U.S. at 626).

[156] *Id.* at 2199-2200 (summarizing the exceptions as "one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority").

[157] 295 U.S. at 629 (italics omitted). The Court contrasted FTC members from "purely executive officers" like the postmaster in *Myers*. *Id.*

the office" and cited the need for "independence."[158] In *Morrison v. Olson*, the Court upheld good cause protection in the independent counsel provisions of the Ethics in Government Act against a constitutional challenge.[159] While recognizing that the independent counsel's prosecutorial and investigative authority extended beyond the quasi-legislative and quasi-judicial functions in *Humphrey's Executor*, the Court explained that those functions, though relevant, were not the sole consideration for evaluating removal restrictions—"the real question" was whether the restriction "impede[d] the President's ability to perform his constitutional duty."[160] *Morrison* declared that the independent counsel's executive functions, which did not include "policymaking or significant administrative authority," did not "unduly interfere" with the President's executive responsibilities and, therefore, did not require that the position be subject to at-will removal authority.[161]

Morrison signified a shift in constitutional analysis of good cause protections from the focus in *Humphrey's Executor* on the character of the office to a functional approach inquiring whether the protection would impair the President's ability to carry out his executive responsibilities.[162] If not, the protection would be permissible. In recasting *Morrison* and *Humphrey's Executor* as "exceptions," the Court has also rewritten the rule. Moreover, the Court's discussion of these cases in *Selia Law* suggests a narrow interpretation of how they would apply to good cause protection for other officers. As to *Humphrey's Executor*, the Court said. As to *Morrison*, . Though the dissent stated _, these "exceptions" are the grounds going forward for Congress to establish a constitutional good cause protection.

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[158] *Id.* at 629, 631. The Court located this principle in *Marbury v. Madison*, 5 U.S. 162 (1803) where, in addition to establishing judicial review, Justice Marshall expressed the view that a justice of the peace for the District of Columbia was not subject to at-will removal by the President. *Id.* at 631.
[159] 487 U. S. at 691-92.
[160] *Id.* at 691-93. *See also Wiener v. United States,* 357 U.S. 349, 356 (1958) (implied a for-cause removal provision, where none existed in the statute, after President Eisenhower fired a member of the War Claims Commission, and the member sued for back pay).
[161] *Id.* at 691-92.
[162] *See* Elena Kagan, *Presidential Administration*, 14 HARV. L. REV. 2245, 2322 (2000).

The question is whether either of the exceptions provides a constitutional basis for Congress to protect IGs from removal with good cause protection. The *Humphrey's Executor* exception is unlikely to apply because IGs are not members of commissions. A strong argument exists, however, that IG good cause protection is constitutional under the *Morrison* exception. IGs share several features in common with the structural and functional role of the independent counsel in *Morrison*:

- Congress has expressly stated that IGs are nonpartisan appointments selected "without regard to political affiliation."[163]
- Each IG performs executive investigative and audit functions to detect fraud, waste, and abuse with respect to a particular department or agency.
- They report to both their agency and Congress.[164]
- IGs operate to some extent under the "general supervision" of the agency head.[165]
- The IG Act explicitly states that IGs do not have policymaking authority.[166]
- They make advisory findings and recommendations; IGs lack enforcement authority insofar as the ultimate decisions lie with the agencies or with Congress.

Thus, like the independent counsel in *Morrison*, IGs have limited duties, jurisdiction, and no policymaking authority.[167] In fact, whereas the independent counsel had authority to initiate prosecutions in the matters within its jurisdiction,[168] IGs lack any enforcement authority beyond advising actions based on its findings.

[163] 5 U.S.C. § 3(a).
[164] *Id.* § 2(3).
[165] *Id.* at § 3(a).
[166] *Id.* §§ 9(a), 8G(b) (stating that IGs do not have "program operating responsibilities").
[167] *See Morrison*, 487 U. S. at 691-92.
[168] *See id.*

However, in offering IG good cause protection, Congress must carefully evaluate the *Morrison* exception as specifically articulated in *Selia Law*. The Court described the exception as applying to "*inferior officers* with limited duties and no policymaking or administrative authority."[169] As the *Selia Law* dissent explained, the *Morrison* holding on removal for cause did not depend on its finding that the independent counsel was an inferior officer or express a restriction on Congress's authority to limit removal to inferior officers.[170] Instead, *Morrison* articulated a generally applicable rule to removal questions that runs contrary to the *Selia Law* majority's general removal rule: "removal restrictions are permissible so long as they do not impede the President's performance of his own constitutionally assigned duties."[171] Yet, that is how the *Selia Law* majority appears to read *Morrison*—as limited to removal for cause provisions for "inferior officers." Application of *Selia Law* and its *Morrison* exception to IGs, therefore, depends on a determination that IGs are inferior officers.

The term "inferior officers", as opposed to principal officers, appears in the Appointments Clause, which provides that Congress may "vest" appointment authority of "inferior officers" in "the President alone, Heads of Department, or Courts of Law."[172] The Court in *Morrison* noted that the independent counsel was appointed by a special court. The Court also explained that "[t]he line between inferior and principal officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn."[173] Nonetheless, because independent counsel was

[169] *Selia Law*, 140 S. Ct. at 2200 (emphasis added).
[170] *See id.* at 2235-36 (Kagan, J., dissenting). *Morrison* held that the independent counsel was an inferior officer in an earlier section of the opinion and then noted the determination in the section on good cause. *Morrison*, 487 U.S. at 672, 691.
[171] *Id.* at 2235 (Kagan, J. dissenting).
[172] U.S. CONST. art. II, § 2, cl. 2.
[173] *Morrison*, 487 U.S. at 672.

removable by the Attorney General, who was a higher-level official, and had limited duties, jurisdiction, and authority, the counsel was an "inferior officer."[174]

As noted, IGs are similar to the independent counsel with respect to the limited duties, jurisdiction, and authority. However, unlike the independent counsel in *Morrison*, IGs appointed by the President require the advice and consent of the Senate, and are removable directly by the President. Presidential appointment subject to the Senate's advice and consent applies not only for principal officers, but also, is "the default manner of appointment for inferior officers."[175] In other words, the appointment method does not decide the principal versus inferior officer classification. Rather, as the Court explained in *Edmonds v. United States,* the inferior officer classification is a question of accountability to a higher-level officer:

> Generally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: Whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.[176]

As previously mentioned, IGs have relationships with agency heads appointed by the President, who are superior to them, and operate under the agency head's "general supervision," as stated in the IG statute. Further, they have frequent engagement with agency heads, as well as other senior agency staff, in consulting on the progress of IG

[174] *Id.*
[175] Edmond v. United States, 520 U.S. 651, 660 (1989) (holding that Coast Guard Court of Criminal Appeals judges were inferior officers).
[176] *Id.* at 661-662.

reviews, reporting the findings to agency heads, and making advisory recommendations.[177] IGs' limited duties and reliance on agency heads to make decisions based on their reports should be sufficient to qualify IGs as inferior officers, even if the President, rather than the agency head, holds the removal power. At the same time, however, IGs initiate and conduct reviews independently of agency heads with little direction or supervision in performance of that oversight, factors considered important in *Edmonds*. Whereas IGs have the limited duties, jurisdiction, and authority indicative of an inferior officer, and agency heads have ultimate authority to act in response to IG oversight, IG independence may present a challenge for the argument that they are inferior officers within the Court's stated *Morrison* exception.

c. IG Structural Alternatives for a Constitutional Good Cause Protection

Although the foregoing section outlines a reasonable argument for IGs to receive good cause protection under the framework set forth in *Selia Law*, it also acknowledges the uncertainty as to whether the Court would find them to be inferior officers. *Selia Law* indicates that the Court will be circumspect to extend removal protection to "new situation[s]."[178] Though scholars have observed that the Court has, in the past, appeared to "toggle" between formal rules of broad executive power and functional standards of congressional limits, *Selia Law* suggests that the Court will be less inclined to take a flexible approach to removal limits in future cases.[179] If Congress simply inserts good cause protection into the existing IG institutional structure, it risks

[177] *Id.* at 665 ("What is significant [for the interior officer determination] is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.")
[178] *Id.* at 2200.
[179] *See* Aziz Huq & Jon Michaels, *The Cycles of Separation of Powers Jurisprudence,* 126 YALE L.J. 346, 349, 353 (2016) (explaining that the Court employed an "open textured standard" in *Morrison*, versus a "hard-edged rule" in *Free Enterprise Fund*).

a legal challenge to that provision, which would invite the Court to narrowly read *Morrison* and *Edmonds.* This is not to say that Congress should abandon the approach of inserting good cause protection into the IG Act. Rather, the Article recommends that Congress consider alternative structural arrangements that could provide a stronger constitutional grounding for IG good cause protection. These options include (1) independent, multimember commissions; (2) court-appointed officers; and (3) agency appointees.

First, Congress could form a multimember IG commission for agency oversight consistent with *Humphrey's Executor*.[180] An IG commission would have several members appointed by the President who would be charged on a rotating basis with overall direction and supervision of oversight actions. Subordinate IGs would continue in their assignments to specific agencies, to focus on investigations, audits, and reviews, to engage with agency heads, and to report to Congress. Notably, CIGIE, an independent coordinating entity for IGs in the Executive Branch, provides a framework for such a commission. But, though the multimember structure of the IG commission would model the commission structure from *Humphrey's Executor*, and would share certain "quasi-legislative" functions in reporting to Congress, its oversight of executive agencies, as opposed to private actors, opens the creation of a commission to its own constitutional questions. The *Selia Law* majority described *Humphrey's Executor* as "permit[ing] Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power."[181] Were the Court to confine the *Humphrey's Executor* exception to the facts of that case, as it appears to have done in framing the exception in *Selia Law*, it likely would reject the IG commission as a

[180] *See* Shugerman, *supra* note 132 (suggesting this alternative as a mechanism "to take presidents and precedents seriously, and . . . value the historical evolution of independence within the executive branch").
[181] *Selia Law*, 140 S. Ct. at 2199.

structural foundation for good cause protection, due to IGs' performance of executive investigation and audit functions.

Second, Congress may seek to model the appointment and removal structure after the now-expired independent counsel provisions of the Ethics in Government Act.[182] These provisions gave a special court, upon application by the Attorney General, the authority to appoint the counsel and gave the President, through the Attorney General, the authority to remove for cause.[183] Like the independent counsel provisions, an alternative structure delegating IG appointments to a court would bring an IG removal for cause provision within the ambit of *Morrison*. However, the designation of a court to appoint an independent counsel

Third, Congress could decide to designate agency heads as the appointment and removal authority for all IGs. As noted above, agency heads already appoint roughly half of IGs so this arrangement is a familiar structure and likely the least disruptive of the three options. All else being equal, the provision of appointment and removal authority to agency heads would further support a constitutional determination that IGs are inferior officers. The option may, however, reinforce independence through removal protection, while weakening independence in connection with appointments. Despite its own flaws, one advantage of presidential appointment of IGs, subject to the Senate's advice and consent, at least with respect to the larger cabinet departments as opposed to smaller agencies, is the separation of agency political appointees from the selection of IGs who will provide oversight of their agency. Direct selection of IGs by agency heads risks compromising the selection of independent personnel. Though the President may also prefer

[182] *See* Aziz Huq, *Trump loves to fire his watchdogs. The Supreme Court just made it easier.*, Wash. Post (July 1, 2020) (suggesting IG appointment by the courts as a way to respond to presidential removal in light of *Selia Law*).
[183] *See Morrison*, 487 U. S. at 660-61.

appointment of friendly IG appointees, that risk is mitigated both by the President's broader supervision of departments and the need for Senate approval.

These new structures are reasonable, albeit imperfect options for Congress to consider in response to presidential abuse and the Court's departure from the longstanding constitutional principle identified by the *Selia Law* dissent—"Congress could protect from at-will removal the officials it deemed to need some independence from political pressure," as long as limits did not impede the President's execution of duties.[184] Direct agency head appointment has the strongest constitutional grounding to support good cause requirements. *Morrison* supplies a constitutional framework for making IGs court-appointed officers, though the structure appears more closely aligned to a counsel who will make charging decisions and litigate criminal cases in court. An IG commission has the most to recommend it from an institutional perspective in coordinating the oversight activities of the IG community. However, the Court may reject the commission structure because, unlike the commission members in *Humphrey's Executor*, IG commission members would perform executive functions.

2. IG Removal for Cause Policy and Application

A constitutional IG removal for cause provision also warrants review as a matter of policy and practical application. Good cause protection seeks to prevent arbitrary terminations by requiring an adequate reason for the decision.[185] Proponents of good cause protection argue that such restrictions require employers to have a sound reason for adverse action, deter arbitrary terminations, and provide a means for redress to aggrieved employees.[186] IG good cause

[184] *Selia Law*, 140 S. Ct. at 2233 (Kagan, J., dissenting).
[185] *See* Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 2 (2010).
[186] Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does it Matter?* 77 NYU L. REV. 6, 9–10, 30 (2002) (arguing in favor of good cause protection after exploring evidence that many employees do not realize that their employment is at will).

protection, matched with an enhanced notice provision, bolsters the independence norm that IGs should not be removed from their positions because a President or agency head disagrees with their oversight decisions or determinations. Good cause protection represents a substantive standard and a symbolic statement requiring that IGs only be removed for problematic performance or conduct. It provides the IG with a basis to challenge any termination and uncover the factual circumstances through a lawsuit.[187] It also provides Congress with a standard for assessment of IG terminations by the President. White House interactions with Congress after the firings of Atkinson and Linick demonstrate the inadequacy of the notice provision alone. Although a Senate bill reasonably proposes enhancing the notice requirement to clarify that a barebones statement of lost confidence is insufficient,[188] these incidents make clear that Congress also needs a standard against which to measure the propriety of any IG terminations.

As discussed above, the bills before Congress would restrict removal of an IG to, among other things, instances of "inefficiency, neglect of duty, [and] malfeasance."[189] The bills do not provide further definition of the statutory terms, and courts have not offered a definitive interpretation in cases involving similar good cause provisions that exist for other executive officers and commissions.[190] Nonetheless, the absence of prior cases does not mean removal for

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[187] Some counter that good cause protection, at least in the private employment context, is ineffective because terminated employees face challenges of proof and deference to employer judgment when litigating post hoc claims. *See* Arnow, *supra* note 167, at 19, 72 (noting the challenges for an employee to prove an unjust termination and court deference to employer decisions). Though IGs could also face these challenges if forced to litigate a removal, they are not at the same disadvantage as private employees insofar as Congress can defend the good cause requirements by enforcing notice and probing the decision through its own oversight.

[188] Securing Inspector General Independence Act, S. 3994, *supra* note 19, at § 2(a) (proposed requirement that the President's notice include the "substantive rationale, including detailed and case-specific reasons" for IG termination). *See also* S. Rep. No. 110-262, at 4 (2008) (explaining that the notice provision, with a 30-day waiting period before termination, was added to the Act to "allow for an appropriate dialogue with Congress in the event that the planned transfer or removal is viewed as an inappropriate or politically motivated attempt to terminate an effective Inspector General").

[189] Inspectors General Independence Act of 2020, S.3664 & H.R. 6668, *supra* note 13, at § 2(a-b).

[190] *See* Bowsher v. Synar, 478 U.S. 714, 729 (1986) (noting, in rejecting congressional aggrandizement of removal authority, that the terms of a similar good cause provision were "very broad" and would permit removal "for any number actual or perceived transgressions"). *Cf.* Selia Law, 140 S.Ct. at 2206 (noting an argument from amicus

cause fails to provide an administrable standard. If it ever comes to pass that a court is called upon to rule on the meaning of the IG removal for cause provision in litigation, it will examine the statutory language and purpose to apply the law to the particular facts of the case.

Had it existed at the time, the IG removal for cause provision would have barred the terminations of Atkinson and Linick. In Atkinson's case, post hoc explanations suggest that the White House and Attorney General believed that Atkinson erred in his judgment that the anonymous whistleblower reported an "urgent concern" under the law and sharing the whistleblower's letter with Congress.[191] However, Atkinson followed the law by initially reporting his determination to the Director of National Intelligence and, when they disagreed about reporting to Congress, notifying Congress about the disagreement; the Director, not Atkinson, ultimately shared the letter with Congress.[192] In Linick's case, Secretary Pompeo's purported reason for termination was leaks to the media about draft reports, though his advisor conceded that Linick was apparently not personally responsible.[193] Even if improper disclosures about an ongoing investigation might arguably rise to the level of "malfeasance" or "inefficiency," the alleged disclosures here did not personally involve Linick, which strongly suggests that the proffered reason is subterfuge to justify the termination of an IG whose office was actively investigating the Secretary and a Saudi arms deal.

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counsel that the Court could avoid constitutional questions by narrowly interpreting the provision to reserve broad authority for the President to remove the CFPB director).

[191] Letter from Senators Dianne Feinstein and Mark Warner to Jeffrey Ragsdale, Office of Professional Responsibility, and Michael Horowitz, DOJ IG (Apr. 17, 2020).

[192] *See* 50 U.S.C. § 3033 (k)(3)(A)(i) (stating that the intelligence community IG "shall immediately notify, and submit a report to, the congressional intelligence committees on [any] matter" where the IG is unable to resolve disagreement about execution of IG duties with the Director). *See also* Letter from Feinstein & Warner, *supra* note 173.

[193] Chris Cillizza, *Mike Pompeo's Explanation for the Firing of State's Inspector General Doesn't Make Sense*, CNN, May 19, 2020, https://www.cnn.com/2020/05/19/politics/mike-pompeo-steve-linick-state-department/index.html

B. Independent Appointments

Another way to protect IGs is for Congress to establish reasonable conditions on the President's appointment of permanent and acting IGs. Alexander Hamilton emphasized the important role of Congress in regulating presidential appointments as "an excellent check upon a spirit of favoritism in the President" and "the appointment of unfit characters . . . from family connection, from personal attachment, or from a view to popularity."[194] Safeguards that prevent the President from replacing effective IGs with loyal political appointees have the potential to deter IG removals in the first place by requiring that IGs are qualified, independent actors. These rules can also limit the individuals who can serve as temporary, acting IGs after the removal or departure of an IG, and to protect the continuity of ongoing investigations. More generally, Congress can create laws that seek to address the problem of extended vacancies.

Congress has the authority to establish qualifications and eligibility criteria for IG appointments. As the Court acknowledged in *Myers*, Congress has the power "to prescribe qualifications for office" as long as "these qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation."[195] Congress exercised this authority with respect to IG appointment by requiring that the President appoint IGs "without regard to political affiliation and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations."[196] However, these appointment criteria should revisit whether they are satisfactory to ensure executive appointments of independent IGs. The generality of the qualification criteria is arguably too malleable to ensure appointment of individuals with the necessary independence or appropriate experience. More

[194] THE FEDERALIST NO. 76 (Alexander Hamilton).
[195] *See Myers*, 272 U.S. at 128. *See also id.* at 265 (Brandeis, J., dissenting) (noting that "a multitude of laws have been enacted which limit the President's power to make nominations").
[196] 5 U.S.C. § 3(a).

stringent requirements, including a specified a number of years in a management or enforcement role with a federal or state IG office, federal or state prosecutor, or audit organization would better target candidates with suitable law enforcement, investigations, or audit experience than the flexible "demonstrated ability" qualification.[197] Objective requirements, rather than amorphous categories such as "public administration" experience, are also more likely to reduce risks of politicized or unqualified appointments for IG positions.

Congress also has authority to regulate the individuals who hold vacant IG positions on an acting basis. Under the Vacancies Act, the President is currently permitted to make temporary appointments to acting positions from among policymaking officials, even when the President fires an IG or removes an acting official with previous experience in the IG office.[198] As noted above, President Trump's acting appointments in the wake of the termination of IGs and replacement of acting IGs included political appointees who were not serving in IG offices and held policymaking appointments. To protect the independence of IG oversight during the pendency of vacancies, Congress should enact a bill that would limit the universe of eligible individuals for acting IG roles to current, senior members of the particular IG office with the vacancy, an individual already confirmed by the Senate as an IG for another agency, or a senior member from another IG office who is recommended by CIGIE.[199] Such a limit on the executive discretion to select individuals

[197] Congress also could consider requiring that the President and agency heads select IGs from lists of qualified candidates prepared by CIGIE. *See* Mistretta v. United States, 488 U.S. 361, 368 (1989) (upholding the statutory requirement that President select three judges for U.S. Sentencing Commission from list of six judges rec by Judicial Conference of the United States); *Bowsher*, 478 U.S. at 728-29 (noting Comptroller General is selected by the President from a list of three candidates provided by House Speaker and President *pro tempore* of the Senate).

[198] Pub. L. No. 105-277, Div. C, tit. 1 §151, 112 Stat. 2681, 2681-611 to -612 (1998) (codified as amended at 5 U.S.C. § 3345(a) (2004)).

[199] A similar proposal is pending before Congress. *See* Securing Inspector General Independence Act, *supra* note __, at § 3(a); Accountability for Acting Officials Act, *supra* note __, at § 2(d). Congress could expand these bills to include the CIGIE recommendation list to include additional qualified candidates for acting positions from within the IG community. *See supra* note 179.

for acting IG roles by Congress is a constitutional exercise of legislative power.[200] Amending the law in this manner would require the President to make acting appointments from among the ranks of IG offices. It would prohibit interim appointments such as the policymaking official that President Trump made acting DOT IG, while permitting the temporary cross-designation of a previously confirmed IG, as happened when the EPA IG was tapped to temporarily serve as acting DOD IG. Additional provisions requiring reports on the status of vacancies would allow Congress to monitor the status of acting IGs and efforts to select permanent IGs to lead the offices.[201]

Terminations of IGs and the replacement of acting officials also raise concerns that the impetus for such moves is not only punishment for past oversight, but also, to thwart ongoing investigations. Congress should consider a requirement that acting IGs continue any investigations or reviews that were ongoing at the time of the vacancy. The need for such a rule is highlighted by President Trump's termination of the State Department IG while his office had active investigations relating to the Secretary of State, who requested the removal of the State Department IG. A law that prevents the termination of an existing IG investigation after the removal of an IG or replacement of an acting IG will provide a degree of protection against the misuse of removal to undercut oversight.

C. Expanding IG Authority

Independence also entails sufficient authority to conduct inquiries concerning the relevant objects of oversight. As discussed above, the DOJ IG's lack of authority to investigate attorney

[200] *See* Office of Legal Counsel Opinion, *103 Authority of the President to Remove the Staff Director of the Civil Rights Commission and Appoint an Acting Staff Director* 104-05 (Mar. 30, 2001) (stating that the President has the inherent authority to make temporary appointments subject to "congressional prohibition" (quotation marks omitted)). *See also* Jack Goldsmith, *A Constitutional Response to Trump's Firings of Inspectors General*, Lawfare (June 10, 2020) (making a similar proposal to restrict presidential acting IG appointments and explaining the constitutionality of such limits).

[201] The House passed the Inspector General Protection Act, which would require the president to submit a report on vacancies that last longer than 210 days and mandate notification to Congress within 30 days if there is a change in status for an inspector general, such as being put on leave. H.R. 1847. The Senate has not yet passed the law.

misconduct is a glaring gap in IG authority. DOJ attorneys make charging decisions and sentencing recommendations that warrant oversight to ensure that those decisions are consistent with the law, ethics, and policy when allegations of misconduct or political interference come to light. Prosecutorial abuse at DOJ during the Trump administration, where individuals connected with the President received favorable treatment in criminal prosecutions against them, epitomize the type of misconduct that the DOJ IG should have authority to review. The existing prohibition on DOJ IG oversight of attorney misconduct, however, bars its review of these instances of apparent abuse because they relate to prosecutorial decisions. The House has passed a bill to eliminate the prohibition, and the Senate Judiciary Committee has voted the bill out of committee.[202]

The DOJ IG is the appropriate oversight institution to provide this oversight due to its independence and its ability to competently review attorney misconduct matters. OPR, which currently has authority over these matters, lacks the independence of the DOJ IG because the Attorney General appoints and can remove the OPR director. Moreover, OPR's past performance reveals its minimal impact in promoting integrity, transparency, and accountability with respect to attorney misconduct reviews.[203] At present, the DOJ IG only appears to review prosecutorial misconduct matters jointly with OPR, as in the case of the mass firings of U.S. Attorneys during the Bush administration,[204] or with the approval of the Attorney General, as the DOJ IG is doing

[202] Inspector General Access Act of 2019, S. 685, 116th Cong. (as voted out of the Judiciary Committee on June 25, 2020); Inspector General Access Act of 2019, H.R. 202, 116th Cong. (as passed by the House, Jan. 15, 2019).
[203] *See supra* Part II.C..
[204] *See generally* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, & OFFICE OF PROFESSIONAL RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008).

in conducting a review of interference in matters at the U.S. Attorney's Office for the Southern District of New York after the firing of former U.S. Attorney Geoffrey Berman.[205]

To be sure, judicial oversight offers an external check against prosecutorial misconduct. At the sentencing of, the district court judge confirmed that the U.S. Attorney's Office in the District of Columbia ordinarily advocates a particular sentence, but was not doing so in Stone's case, and noted the "unprecedented actions of the Department of Justice" in submitting their supplemental filing with no recommendation.[206] In the Flynn case, after DOJ sought dismissal of the indictment, the district court judge appointed amicus counsel in order to receive briefing on the highly irregular maneuver, and the D.C. Circuit recently granted en banc rehearing of a panel decision that directed dismissal as mandamus relief.[207] However, unlike the courts which require justiciable claims, the DOJ IG's role as an internal check on executive law enforcement powers offers a fuller opportunity to investigate abuses of prosecutorial power.[208] DOJ IG review would not only consider criminal law and procedure, but also inquire as to the ethical and policy judgments of prosecutors. Additionally, the DOJ IG's access to records and ability to interview DOJ officials could create a more comprehensive record, unlike a court that will often be limited to the materials submitted by the parties to an action. Accordingly, judicial review, though clearly an important check on prosecutorial abuse, is no substitute for DOJ IG oversight that could look into the inner workings of prosecutorial decisions for evidence of abuse.

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[205] *See* Katie Benner, Nicholas Fandos and Charlie Savage, *Senate Panel Moves to Empower Justice Dept. Watchdog Over Barr's Objections*, N.Y. TIMES, June 25, 2020 (noting that the Attorney General permitted the DOJ IG to review the circumstances of Berman's firing).
[206] Tr. of Sentencing, *United States v. Stone*, 19-Cr-018, at 49, 77 (Feb. 20, 2020).
[207] Josh Gerstein & Kyle Cheney, *Appeals Court Will Rehear Case About Michael Flynn Prosecution*, POLITICO, July 30, 2020.
[208] *See* Sinnar, *supra* note 7, at 1029 (noting the advantage that IGs have over the courts as an internal oversight institution).

Lifting the attorney misconduct restriction would clarify that the DOJ IG has the authority to review any prosecutorial or personnel decisions at DOJ. The DOJ IG could then pursue critical inquiries of whether the Attorney General or other DOJ officials make any of these decisions under pressure from the President or the White House, violate any laws or policies in rendering those decisions, or gave favorable treatment to defendants with a personal connection to the President. Independent oversight of such decisions ensures that no one – not presidential appointees or associates – are beyond scrutiny.

CONCLUSION

Oversight independence norms have suffered the estrangement of a presidency that does not share its values. Misuse of the removal power to retaliate against IGs for reporting allegations of misconduct or to derail ongoing investigations is anathema to IGs' freedom from political pressure in exercising their duties to promote integrity, transparency, and accountability without reprisal. Manipulation of permanent and acting appointments to insert appointees with conflicts of interest, inadequate experience, or loyalty to the existing administration subverts the requirement of qualified, nonpartisan IGs. Political interference in prosecutorial decisions shielded from IG review due to statutory gaps incentivizes impunity in undermining the impartial, evenhanded administration of justice.

Reinforcement of oversight independence norms requires that Congress act to set reasonable conditions on the President's ability to appoint, remove, or interfere with IGs. An IG removal for cause provision would prohibit egregious terminations in future cases like the Atkinson and Linick firings, where the President had no legitimate reason for the removals. Though *Selia Law* expands the President's removal power, an IG removal for cause provision should withstand constitutional analysis because a strong argument exists that IGs are

inferior officers with limited duties and authority, who rely on agencies to act upon their findings and recommendations. Due to constitutional uncertainty after *Selia Law*, and its retention of *Morrison* and *Humphreys Executor* as applicable precedents, Congress should consider a restructured IG institution that incorporates good cause protection into (1) an independent, multimember IG commission; (2) court-appointed IG offices; or (3) agency head appointments of IGs. Additionally, Congress has authority to establish qualifications for acting IG designations and permanent appointments. It should strengthen eligibility requirements to respond to the conflicts in the President's acting designations and concerns about the independence of nominees. Further, Congress should eliminate the DOJ IG attorney misconduct exception.

What remains unknown is whether the President and Congress after the 2020 election will be committed to laws that will protect our democratic institutions, including IG independence, against future threats. It is essential that we have leaders who could act to preserve IG oversight independence, one of our most fundamental guards against corruption and abuse of power. While bipartisan agreement on the value of IGs to the promotion of good government has historically provided a line of defense against efforts to subvert independent oversight, independence norms that supplied common ground, despite political differences, have frayed in recent years. President Trump's hostility to oversight fuels and reflects the deepening polarization that sows mistrust in government institutions. Yet, the condemnation of the President's attacks on IGs, along with legislative proposals to strengthen IG independence, some bipartisan, suggest that grounds for consensus remain possible. A burgeoning movement to empower oversight involving not only Congress, but also civil society organizations, journalists, and citizens, will be critical to address the need for scrutiny and evaluation of government action in our current predicament. IGs are currently engaged in the review of the government's handling of the COVID-19 pandemic,

response to protests of policing and systemic racism, and programs impacting citizens' ability and right to vote.[209] Consensus to protect IG independence is tantamount to a commitment to meaningful, objective review of government and the oversight values of integrity, transparency, and accountability.

[209] *See* CARES Act, H.R 748, 116th Cong. §15010(b)(1)(2) (2020) (enacted) (establishing the PRAC committee of IGs to monitor more than $2 trillion in emergency pandemic response spending for fraud, waste, and abuse); OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, DOJ IG ANNOUNCES INITIATION OF WORK (July 23, 2020), https://oig.justice.gov/news/doj-oig-announces-initiation-work (announcing joint investigation with Homeland Security IG regarding use of force allegations against federal agents at protests); Marshall Cohen and Kristen Holmes, *Postal service inspector general reviewing DeJoy's policy changes and potential ethics conflicts*, CNN POLITICS, Aug. 14, 2020 (reporting on Postal Service IG review of the Postmaster General based on allegations that policy changes are "intentionally undermining postal service operations to sabotage mail-in voting" in the 2020 presidential election).