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Executive Branch

Trump Fired 17 Inspectors General—Was It Legal?

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Probably so, but Congress has lawfully constrained the president's authority to replace the fired IGs.

On Friday night, President Trump removed at least 17 inspectors general, the executive branch watchdogs who conduct audits and investigations of executive branch actions. The removals are probably lawful even though Trump defied a 2022 law that required congressional notice of the terminations, which Trump did not give. Trump probably acted lawfully, I think, because the notice requirement is probably unconstitutional.

The real bite in the 2022 law, however, comes in the limitations it places on Trump's power *to replace* the terminated IGs—limitations that I believe are constitutional. This aspect of the law will make it hard, but not impossible, for Trump to put loyalists atop the dozens of vacant IG offices around the executive branch. The ultimate fate of IG independence during Trump 2.0, however, depends less on legal protections than on whether Congress, which traditionally protects IGs, stands up for them now. Don't hold your breath.

Background

The Inspector General Act of 1978 states that "[a]n Inspector General may be removed from office by the President." For a long time the Act had also required the president to communicate to Congress the "reasons" for the removal within 30 days before removal. A recent amendment to the Inspector General Act, the Securing Inspector General Independence Act of 2022 (Title LII, Subtitle A), changed the notice provision to require a "substantive rationale, including detailed and case-specific reasons" for the removal. It also narrowed the president's options under the Federal Vacancies Reform Act of 1998 (FVRA), for replacing a terminated IG. The 2022 law was mainly a response to Trump's first-term IG firings and manipulations of the IG system. It was one of very few executive branch reforms during the Biden administration.

The Friday IG terminations were announced in emails from Sergio Gor, the White House Director of Presidential Personnel. Gor said the removals were immediate and reflected "changing priorities." Hannibal Ware, the IG of the Small Business Administration, was one of the fired IGs. In his capacity as the chairperson of the IG oversight and coordination body, he wrote Gor to claim that the firings are not "legally sufficient to dismiss" presidentially appointed and Senate confirmed IGs.

On Saturday night, Trump defended the terminations on the ground that "it's a very common thing to do." (Ronald Reagan fired "15 confirmed and acting IGs then working across the executive branch" soon after his 1981 inauguration, though the IG statute at the time authorized him to do so without constraint; and Presidents Obama and Biden fired at least one IG, but they complied with different versions of the notice requirement, as did Trump in his first term.)

"I don't know [the fired IGs]," Trump added, "but some people thought that some were unfair or were not doing the job." According to the Washington Post, "Trump said he intended to install new people in the roles but said they would have some independence."

The Notice Standard May Not be Constitutional

The congressional notice requirement does not specify the grounds on which the president can remove an IG. Rather, it requires the president to provide Congress, with thirty days notice, a "substantive rationale, including detailed and case-specific reasons" for the removal. This is plausibly seen as a very weak for-cause requirement—the president must provide some cause (a "substantive" rationale) in advance of the firing, with details.

One could argue that "changing priorities" is a substantive rationale for the firings. Gor apparently did not provide detailed and case-specific reasons for each firing, but there might have been no reasons to give beyond the "changing priorities" rationale. Yet Trump clearly did not give any notice to Congress. So the administration did not comply with the notice provision.

The Trump administration has a pretty strong argument that the notice provision is unconstitutional. The Court has recognized the president's "unrestricted removal power" over executive branch officials, subject to only "two exceptions." The potentially relevant exception here comes from the shriveled and maybe-dead precedent of *Morrison v. Olson* (1988). There the Court ruled that the removal protections on the old independent counsel didn't unduly interfere with the functioning of the Executive Branch because "the independent counsel [was] an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority."

For reasons explained in this paper by Ari Spitzer, an inspector general is probably an inferior officer under the Court's appointments clause cases. The main reason is that the IG must "report to and be under the general supervision of the head of the establishment involved."

The president can remove an inferior officer, under *Seila Law*'s interpretation of *Morrison*, unless the officer has "*limited* duties and *no* policymaking or administrative authority." I agree with Spitzer that an IG probably exceeds this standard. IGs in some respects have narrower powers than the independent counsel that was deemed constitutional. They cannot prosecute, for example. But in other dimensions—indefinite tenure and expansive jurisdiction and freedom to initiate an audit or investigation—their powers can be seen as broader than the independent counsel's.

Moreover, IG duties cannot plausibly be described as "limited." And the IG has at least some policymaking authority. It has a duty "to provide policy direction for . . . audits and investigations" even though it does not "determine[] policies to be pursued by the United States in the nationwide administration of Federal laws." On top of these points, *Seila Law* and more recent decisions have jettisoned other elements of *Morrison*, including its anti-formalist methodology, in the direction of an expanded presidential removal power.

For these reasons, it is a good bet that the Supreme Court will not look kindly on Congress's requirement of a "substantive rationale" and notice for firing IGs. One could see this combination as less onerous than a traditional for-cause restriction of "inefficiency, neglect of duty, or malfeasance in office," though the traditional restriction typically does not have a thirty-day delay. But I don't think these differences matter. The Court has been highly formalistic in its recent removal decisions (including in its removal discussion in *Trump v. United States*). If the Court determines, as I think it will, that the president's exclusive removal power controls the issue, *any* type of congressional constraint must give way.

(There is another tricky issue with the IG removals that I will flag here but lack space to analyze. At least a few of the terminated IGs were career Senior Executive Service (SES) officials with independent statutory job protections. This raises the question whether the president can discharge them from government service (as the removed political IGs clearly are), or whether they must remain in the government in some other SES role. This question intersects with the Trump administration's schedule F gambit and the proper interpretation of the president's power to "remove[]" an IG under the IG statute, and tees up harder Article II questions than I have addressed here. More on this in due course.)

Constitutionally Valid Limitations on Acting IGs

The IG removal issue is not the biggest of deals, since President Trump had clear statutory authority to remove the IGs if he had provided the easy-to-satisfy substantive rationale and thirty days notice. The much more important issue concerns who replaces the removed IGs. On this issue the 2022 IG law has more bite. The law narrows the definition of the "first assistant" who, under the FVRA, presumptively takes over for the removed IG. It also authorizes the president to replace the first assistant only with another Senate-confirmed IG or a GS-15 or higher employee who was in office for more than 90 days during the year prior to the vacancy.

The practical bottom line is that a career official high up in the office of each IG will by law become the acting IG, and Trump can replace that person only with someone already in the IG cadre.

We do not yet know how Trump plans to replace the fired IGs within these constraints. He might nominate new IGs, but they must be confirmed by the Senate, and that likely will not happen this year. The important question is thus whether Trump can find a lawful and congenial replacement for the first assistant under the 2022 law.

One possibility is an already-confirmed IG such as Joseph Cuffari, the embattled Department of Homeland Security IG who was appointed in Trump 1.0 and whom Trump did not fire on Friday. Or Trump can try to find a congenial IG among the non-political employees who were in place during the Biden administration, which might be hard.

The point I want to make for now is that Congress's narrowing of the president's options for acting IGs is much more likely to stick in court because Congress has greater authority over acting replacements for a fired IG than it does over the president's authority to fire an IG in the first place. The reason, in a nutshell, is that "the power to remove attends the power to appoint," and the Appointments Clause is not the source of authority for the president to appoint acting officials. The president's constitutional removal power is thus likely not in play with respect to congressional regulation of actings.

I explained this point five years ago:

> The Justice Department has long made clear that the Take Care Clause, not the Appointments Clause, gives the president authority to appoint acting officials. It has also made clear that the president's power to make temporary appointments is defeasible by Congress. As OLC explained in 1994:
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> > The President's take care authority to make temporary appointments rests in the twilight area where the President may act so long as Congress is silent, but may not act in the face of congressional prohibition. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579,

> 637 (1952) (Jackson, J., concurring). Thus, the Vacancies Act, 5 U.S.C. §§3345-3348, constitutes a restriction on the President's authority, as opposed to a source of power. If it applies to a given position, the Vacancies Act constitutes the sole means by which a temporary appointment to that position may be made.

This quotation is from an unpublished OLC opinion, "Memorandum for Neil Eggleston, Associate Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Appointment of an Acting Staff Director of the United States Commission on Civil Rights at 3 (Jan. 13, 1994)," and is quoted and explained on page 164 of this 1996 OLC opinion on "The Constitutional Separation of Powers Between the President and Congress." The George W. Bush administration's OLC relied on the 1994 opinion in 2001 when it reiterated that the president "*may not act in the face of congressional prohibition*" to fill a temporary vacancy (emphasis added).

Some 19th century Justice Department opinions had concluded that Congress could not restrict the president's power to make temporary appointments. The 1996 OLC opinion describes these earlier opinions on pages 162-63 before it rejects their analysis. It further explains that the Justice Department had rejected this earlier view beginning with the enactment of the Vacancies Act of 1868, which "Attorneys General treated . . . as providing the exclusive means of making temporary appointments to those offices covered by the statute."

Congress has a long history of providing specific and narrow criteria that presidents must follow in filling vacancies. For some vacancies, Congress directs the person who shall operate as acting when there is a vacancy and leaves the president no discretion. . . .

Moreover, OLC has made clear—on page 3 of the "Memorandum for Neil Eggleston"—that statutes such as the Federal Vacancies Reform Act that purport to authorize presidents to fill vacancies actually operate as "a restriction on the President's authority, as opposed to a source of power." OLC explained: "If it applies to a given position, the Vacancies Act constitutes the sole means by which a temporary appointment to that position may be made."

Broad congressional control of vacancies makes constitutional sense. If the president had exclusive constitutional power to appoint acting officials, then the Recess Appointments power, with its specific limitations, would be practically irrelevant, since a president [could] appoint nonpermanent officials through a different route with no limitations. That cannot be right.

> Moreover, OLC has justified the president's defeasible power to make temporary appointments as an exercise of the Take Care Clause in order to "keep the government running." The idea seems to be that in the absence of guidance from Congress, the president's duty to enforce the laws entails a residual power to fill vacancies temporarily in the absence of congressional guidance. But this rationale for executive power gives way when Congress provides a rule. The only judicial decision I have found that addresses this issue, *Williams v. Phillips*, is consistent with this conclusion. In *Williams,* the U.S. Court of Appeals for the D.C. Circuit suggested (but did not hold) that any inherent presidential power to appoint an acting officer persisted only "in the absence of limiting legislation."

I think this analysis remains sound and will prevail in court. But *Trump v. United States* could impact it. There the Court appeared to hold that the Take Care Clause has an exclusive element that supports the president's authority "to discuss potential investigations and prosecutions with his Attorney General and other Justice Department officials" free from congressional regulation, even when the investigation is an allegedly fraudulent attempt to obstruct a federal proceeding.

The Court did not explain how it squared this ruling with prior decisions, like *Youngstown Steel* and *Kendall v. United States,* which denied that the Take Care Clause could be a basis to disregard law. As *Kendall* said, "[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." I do not believe that the Court in *Trump v. United States sub silentio* altered this foundational principle of law compliance beyond the novel and unusual issues presented in that case. I thus doubt that *Trump v. United States* impacts the longstanding understanding between the branches that congressional constraints on actings are binding on the president.

Conclusion

Congress's new constraints on the president's ability to replace fired IGs has an excellent chance of surviving unitary executive scrutiny. These are some of the reasons why I supported IG reform for vacancies even as I believed that IG reform on removal was hopeless.

By themselves, however, legal devices like limitations on who can be acting IG cannot save IG independence from an aggressively threatening president and Department head. Only Congress, by pushing back on the administration through politics, can do that.

Whether the Republican-controlled Congress will push back in a meaningful way seems doubtful, especially in light of the tepid reaction to the firings by traditional IG defenders in Congress.

"There may be good reason the IGs were fired," said longtime IG protector, Senator Chuck Grassley, on Saturday. "We need to know that if so. I'd like further explanation from President Trump. Regardless, the 30 day detailed notice of removal that the law demands was not provided to Congress." Senator Rand Paul is another staunch IG advocate, and he chairs the Senate Committee with jurisdiction over the operation of IGs across the government. According to ABC news, Paul "said he believes many of the inspectors general do need to be replaced and that Trump ultimately has the power to do so. But he noted there may be a process that needs to be followed."

Weak stuff from congressional IG champions following Trump's Friday night purge.

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