

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5051
MINORITY (202) 225-5074
<https://oversight.house.gov>

April 30, 2021

Ms. Allison C. Lerner
Inspector General
National Science Foundation
Office of Inspector General
2415 Eisenhower Avenue
Alexandria, VA 22314

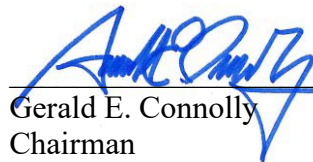
Dear Ms. Lerner:

Enclosed are post-hearing questions that have been directed to you and submitted to the official record for the hearing that was held on Tuesday, April 20, 2021, titled "Restoring Independence: Rebuilding the Federal Offices of Inspectors General."

To ensure a complete hearing record, please return your written response to the Subcommittee on or before Friday, May 14, 2021, including each question in full as well as the name of the member. Your response should be addressed to the Subcommittee office at 2157 Rayburn House Office Building, Washington, D.C. 20515. Please also send an electronic version of your response by email to Amy Stratton, Deputy Chief Clerk, at Amy.Stratton@mail.house.gov.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact Elisa LaNier, Chief Clerk, at (202) 225-5051.

Sincerely,



Gerald E. Connolly
Chairman
Subcommittee on Government Operations

Enclosure

cc: The Honorable Jody Hice, Ranking Member
Subcommittee on Government Operations

Questions for Ms. Allison C. Lerner
Inspector General, National Science Foundation
Chair, Council of the Inspectors General on Integrity and Efficiency

Questions from Chairman Gerald E. Connolly, Subcommittee on Government Operations

April 20, 2021, Hearing: “Restoring Independence: Rebuilding the Federal Offices of
Inspectors General”

1. Prior to his removal, what was Mr. Michael Atkinson’s reputation in the inspector general (IG) community?

When Mr. Atkinson was removed, Michael Horowitz, who was the chair of CIGIE at that time and is currently the IG at the Department of Justice, issued a statement in which he noted that “Inspector General Atkinson is known throughout the Inspector General community for his integrity, professionalism, and commitment to the rule of law and independent oversight. That includes his actions in handling the Ukraine whistleblower complaint, which the then Acting Director of National Intelligence stated in congressional testimony was done “by the book” and consistent with the law.” I concur completely with Mr. Horowitz’s analysis of Mr. Atkinson’s reputation and his actions.

See Mr. Horowitz’s full statement: [Statement -- CIGIE Chair Horowitz.pdf \(ignet.gov\)](#)

2. Is there anything about Mr. Atkinson’s actions regarding the Ukraine whistleblower that the Council of the Inspectors General on Integrity and Efficiency (CIGIE) or the Integrity Committee believes would warrant his investigation or removal?

I am not aware of any action by Mr. Atkinson that would warrant his investigation or removal. In fact, in the aftermath of that removal, Mr. Horowitz and I sent a letter to Assistant Attorney General Engel expressing the IG community’s concern with a legal opinion by the Office of Legal Counsel (OLC) that effectively overruled Mr. Atkinson’s determination about an “urgent concern” complaint under the Intelligence Community Whistleblower Protection Act (ICWPA) that Mr. Atkinson had concluded appeared credible and therefore needed to be transmitted to Congress¹. In that letter, which was also signed by almost all federal Inspectors General, we expressed our support for the position advanced by Mr. Atkinson: that the OLC opinion could seriously undermine the critical role whistleblowers play in coming forward to report waste, fraud, abuse, and misconduct across the federal government. Additionally, we noted that the opinion had the potential to undermine IG independence not just within the Intelligence community but across the entire federal government. If employees and contractors believe that independent IG determinations can be second guessed, effectively blocking the transmission of their concerns to Congress, and raising questions about the protections afforded to them, they will lose confidence in this important reporting channel and their willingness to come forward with information will be chilled.

¹ https://www.ignet.gov/sites/default/files/files/CIGIE_Letter_to_OLC_Whistleblower_Disclosure.pdf

For those reasons, Mr. Horowitz and I agreed with Mr. Atkinson that the OLC opinion created a chilling effect on effective oversight and was wrong as a matter of law and policy. We urged Mr. Engel to reconsider the conclusions of the OLC opinion and withdraw or modify it.

3. What about Mr. Steven Linick, Mr. Glenn Fine, and Mr. Mitch Behm? Were they respected in the IG community? Is there anything about their performances that CIGIE believes would warrant removal?

All three gentleman were held in high regard across the IG community. With respect to Mr. Linick, his record speaks for itself. After serving for 15 years as a career prosecutor in the Department of Justice, he was nominated first by President George W. Bush and then President Barack Obama to serve as the first IG of the Federal Housing Finance Agency. Confirmed by the Senate in 2010 by unanimous consent, by March 2013 his office had secured \$3.6 billion in restitution orders, \$2.8 billion in recoveries for taxpayers, and 86 convictions/pleas. In September 2013, IG Linick was confirmed by the Senate, again by unanimous consent, as the State IG. Under his leadership, he oversaw investigations of high-level officials of both parties, and his office identified over \$1.4 billion in potential savings for the agency and conducted investigations that yielded over \$100 million in recoveries for taxpayers. Results like these were only possible because IG Linick and his staff conducted their duties with fairness, objectivity, and independence, principles that are at the core of successful oversight.

Personally, I worked very closely with Mr. Linick for many years, first when we chaired CIGIE's Suspension and Debarment Working Group and later when we both served on CIGIE's IG Candidate Panel. Far from having any reason to question his integrity, I found him to be a brilliant partner: thoughtful, whip smart, and dedicated to his staff and his office's mission. My faith in his judgment was confirmed by CIGIE's Integrity Committee (IC), which after examining concerns forwarded to it by Under Secretary of State Bulatao (concerns shared *after* Mr. Linick was removed, I would note) found that the evidence it had assembled refuted all of the allegations of misconduct concerning Mr. Linick's handling of the leak investigation. The IC also concluded that a formal investigation of Mr. Bulatao's complaints regarding IG Linick's use of personal email or of his actions while on administrative leave was not warranted, given the record before it.

With respect to Mr. Fine, during his years of service as the Inspector General of the Department of Justice he set the standard of what it means to be an effective, non-partisan Inspector General. In that role, he was universally respected for his ability to tackle complex investigations of controversial topics and produce high quality reports that provided invaluable insights to the leadership of his Department, Congress, and the American taxpayer. His outstanding contributions continued when he served as Acting Inspector General at the Department of Defense. Over the course of his career, Mr. Fine was exactly the sort of Inspector General we all aspire to be.

Mr. Behm's reputation is sterling as well. Of particular note is the high regard in which he was held by former Transportation Department Inspector General Calvin Scovel, who strongly supported Mr. Behm's service as acting Inspector General prior to his retirement. Next to Mr. Fine, there are few Inspectors General held in higher esteem

than Mr. Scovel, so his assessment of Mr. Behm's integrity and ability carries the highest weight.

4. Most IGs do not have testimonial subpoena authority. Some, like the Department of Defense IG and the Department of Health and Human Services IG, do have it. How has testimonial subpoena authority made these IGs more effective?

It is my understanding that the agencies that have testimonial subpoena authority do not have to use it very often, as having the authority makes it much more likely that they will get voluntary cooperation.

The negative impact of not having such authority is illustrated by a recent investigative summary that was posted by the Department of Justice (DOJ) Office of Inspector General (OIG). That summary detailed misconduct by a former senior DOJ official for failing to appear for a compelled OIG interview and then refusing to cooperate with the OIG after the official left the Department.

The incident described in the summary is not the only time this has happened to DOJ OIG. In fact, the fact that they lack this authority has undermined investigations and accountability across administrations. In addition to the immediate example above, the DOJ OIG noted non-cooperation by significant witnesses in their recent review of the DOJ zero tolerance policy, in their 2019 review of the Carter Page FISA applications, in their review of the Department's actions in advance of the 2016 presidential elections (Midyear), and during their 2012 Fast and Furious review. Their inability to compel testimony by former employees is also a significant deterrent to accountability in less high-profile cases, where department officials resign in lieu of being interviewed about their misconduct. Unfortunately, the problems described above are not unique to DOJ—they occur throughout the IG community.

Since 2009, Congress, on a bipartisan basis, has attempted to provide the IG community with testimonial subpoena authority (see, e.g., 115th Congress, "IG Subpoena Authority Act," Steve Russell and Matt Cartwright; 114th Congress, "IG Empowerment Act" (included TSA as introduced), Chuck Grassley, Claire McCaskill, Tammy Baldwin, Ron Johnson, Joni Ernst); 114th Congress, "IG Empowerment Act" (included TSA as introduced), Jason Chaffetz, Elijah Cummings, Mark Meadows; 113th Congress, "IG Empowerment Act" (included TSA), Darrell Issa, Elijah Cummings, Mark Meadows; 111th Congress, "IG Authority Improvement Act (TSA bill at the time)," Ed Towns, Darrell Issa). We are grateful to see that testimonial subpoena authority is included in the *Inspector General Independence and Empowerment Act*. We greatly appreciate the ongoing, bipartisan efforts to move this important bipartisan reform.

5. What is CIGIE's Inspector General Candidate Recommendations Panel? Who sits on the panel, and what does the panel look for in a candidate?

The *Inspector General Reform Act of 2008* charged CIGIE with, among other things, submitting recommendations of individuals to the appropriate appointing authority for any vacant presidentially or agency head-appointed position described in the IG Act. To

fulfill that responsibility, in January 2009 CIGIE's Chair created the Inspector General Candidate Recommendations Panel. That panel is led by CIGIE's Vice Chair and currently includes one additional presidentially appointed IG and 3 agency head-appointed IGs. It has worked with presidential administrations and agency heads since its inception to fulfill its responsibility to identify candidates "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."

In assessing candidates for IG positions, the panel focuses on the candidate's understanding of the non-partisan role of an Inspector General and the challenges faced by IGs. It also considers candidates' experience dealing with Congress and delivering difficult messages, as well as their leadership experience and philosophy. Finally, the panel considers candidates' professional experiences, to ensure they are consistent with the disciplines noted in the IG Act, and other relevant issues.

6. How and why has the role of this panel evolved over the years?

With respect to presidentially appointed IG vacancies, prior to 2017 the panel's process generally involved reviewing a candidate's resume and any additional information submitted by the candidate and providing feedback to the White House Counsel's Office. In the spring of 2017, the White House Counsel's Office asked the panel to enhance the steps it took to review potential candidates by interviewing candidates. Recognizing the value of this additional effort, since 2017 and continuing to the present, the panel has interviewed individuals interested in being considered for presidentially appointed IG positions before making any recommendations to the White House. Insights resulting from these conversations with potential candidates have strengthened the process and the quality of the feedback the Panel is able to provide. The ensuing discussions about candidates with the White House have been robust and extensive.

Panel interviews are currently conducted remotely via Microsoft Teams—a practice that will continue after the pandemic, given the challenge of coordinating the schedules of five Inspectors General and one candidate. The interviews usually last about an hour and consist of questions designed to probe the candidate's understanding of the role of an Inspector General and the challenges faced by IGs; experience dealing with Congress; leadership experience and philosophy; demonstrated ability in the disciplines noted in the IG Act; and other relevant issues. Following the interview, the panel decides whether to recommend (or not recommend) the candidate for consideration for an Inspector General position. Through this process, CIGIE has provided dozens of recommendations to both the Trump and Biden Administrations for vacant presidentially appointed Inspector General positions.

The panel also provides support to agency heads seeking to fill vacant Inspector General positions. As such vacancies are ordinarily filled competitively, the panel's actions must be consistent with the federal hiring process, which limits the Panel's ability to make recommendations to the appointing authority. In light of that limitation, the Panel has identified other ways to help agency heads identify the strongest possible candidates for IG positions. Among other things, the panel has provided technical assistance on vacancy announcements for agency-appointed IG positions; reviewed and ranked applications received in response to such announcements; provided questions for candidate interviews; and, in some cases, participated in those interviews. The panel has also assisted headhunters hired by agencies working to fill IG positions.

7. How many IGs nominated by former President Trump and confirmed by the Senate were vetted through this panel? Which of his nominations were not?

All of the individuals nominated by former President Trump and confirmed by the Senate were interviewed by the Panel. One nominee, who was not confirmed, was not interviewed.

8. How many of the current sitting IGs—whether appointed by the president or an agency—were vetted by CIGIE in some way?

CIGIE does not possess sufficient records to answer this question definitively. Beyond the information provided in response to QFR 7, we can say with certainty that the Panel has worked with administrations since 2009 to fulfill its responsibilities to identify the strongest possible candidates for Inspector General positions. I would also note, again, the limits on our ability to make recommendations about agency-head appointed Inspectors General when those positions are filled competitively.

9. What can the IG community and Congress do to ensure robust and effective oversight and counter attempts by federal officials to thwart that oversight by making reference to executive privilege?

While agency personnel cannot be precluded from making claims of executive privilege, they should be required to identify and describe the records they seek to protect and to clearly justify why they believe those records are subject to the privilege. They should also provide evidence that they have coordinated this claim with the White House. OIGs can use this information to assess the reasonableness of the claim.

If an agency's assertion of executive privilege delays the IG's access to records necessary for oversight, thereby undermining the "timely access" provisions of Section 6(a)(1)(A) of the IG Act, the OIG should report that delay and the reason for it to Congress through their Semiannual Report to Congress or the seven-day letter process. When Congress is notified of such situations, the relevant committee should conduct robust oversight of the agency involved through their power to investigate and hold hearings. If they find that the agency is abusing its authority, they can consider other measures to influence the executive branch, including actions through the appropriations process.

10. In March, the Project on Government Oversight called on CIGIE to encourage IGs to review government contracts for required language on whistleblower protections. What steps is CIGIE taking to ensure that all IGs are prioritizing this work?

In March, I shared and discussed the letter from the Project on Government Oversight with CIGIE's Executive Council (which consists of the leaders of all of CIGIE's standing committees, plus key CIGIE staff). After that conversation, I shared the letter with all IGs and at the March CIGIE meeting (which is attended by all IGs) DOJ IG Michael Horowitz discussed the approach his office took to review agency contracts to ensure that contractors were incorporating mandatory whistleblower protections into employment agreements and, if they were not, to work with agency

leadership to incorporate this mandatory language in all employment agreements. After Mr. Horowitz's remarks, I led a discussion with the IGs focused on the approaches members of our community are taking to address whistleblower protection in their agencies, with the goal of identifying many ways to strengthen oversight in this critical area.

11. How long does it typically take for the Integrity Committee to complete an investigation? What is the longest an Integrity Committee investigation has taken, and what factors contributed to the investigation's length?

As of May 13, 2021, 371 days is the average length of an Integrity Committee (IC) investigation.² The longest investigation has taken 784 days and remains pending. We expect that matter to be completed by late summer, and the IC will be able to substantively comment on the reasons for delay at that time. For other lengthy cases, the following factors have affected the time required for the investigations: 1) the time required to locate and secure a disinterested OIG that has the expertise and resources necessary to conduct the investigation; 2) the complexity of the allegations being examined; 3) the time it takes to find, document, and verify relevant facts; 4) the time required to analyze the evidence collected; and 5) the time needed to draft the report. Additional time is sometimes required for transmittal of the draft report to the subject, affording the subject time to prepare and submit comments, and reviewing the subject's comments. For one case, which took 512 days, lack of access and cooperation by the subject played a significant role in delaying the report. Finally, limited IC staff (one attorney and one program manager) who have competing priorities (such as FOIA responses and litigation support) is an overarching contributor to delays in moving these matters forward.

12. How can Congress help the Integrity Committee achieve timelier completion of its investigations?

Clearing a backlog and reducing the time from allegation to issuance of an investigation report with recommendations is among the IC's highest priorities. One measure that would be enormously helpful to the IC is making funding available to hire one or more senior investigative attorneys and giving CIGIE the authority to hire retired investigators, so they can help move the cases forward without having to grapple with competing priorities. Both the quantity and complexity of the current caseload make these measures imperative to achieve timely disposition of serious allegations.

13. How could the Integrity Committee have handled the investigation of Case 912 differently to better protect whistleblowers from continued mistreatment?

Without commenting on an individual matter, the IC uses a variety of measures to protect whistleblowers. When the IC initially asks a subject about allegations, it does so without revealing the identity of the complainant, insofar as practicable, just as each IG does in their own office. When the IC notifies a subject that an investigation has been opened, the notice letter contains a warning against any retaliation against a complainant or witness. The IC also conducts training for all new IGs and Acting IGs, which includes warnings that anyone subject to

² Days are measured from the day the IC refers a matter to the IC Chairperson for investigation to the day the assisting OIG investigators submit their draft report to the IC.

allegations should not speculate about the identity of the complainant, attempt to identify a whistleblower, or try to influence the testimony of any witness. These admonitions also appear in the Frequently Asked Questions published online by the IC on the CIGIE website. The IC has conducted the same training for all members of CIGIE, as well as for senior OIG staff members across the IG community.

Generally, the IC's investigators ask witnesses about retaliation and encourage them to report any reprisal immediately. The IC works closely with the Office of Special Counsel (OSC) regarding whistleblower issues, ensuring that OSC has an opportunity to pursue any claims within its purview. Where investigators learn of any reprisal taking place during the investigation, they report it immediately to the IC Chairperson, who can take appropriate action.

The IC recently established a process that allows it to take expedited action when a subject refuses to cooperate in an investigation, without regard to whether the IC has completed its investigation of the underlying allegations. The sooner the IC can submit its findings and conclusions to the appointing authority, the smaller the opportunity for whistleblower retaliation is. Finally, prompt and decisive action by the appointing authority in cases of whistleblower retaliation, with bipartisan congressional support, will further fortify the protection of whistleblowers and discourage retaliatory actions.

14. How is the Integrity Committee improving its processes to investigate claims of retaliation?

Currently, when the IC receives a complaint against a person within its jurisdiction (a Covered Person), IC support staff forward the complaint to a three-member panel consisting of a designee of the IC, the Department of Justice, and OSC. This process allows DOJ and OSC to identify any allegation within their jurisdiction, such as criminal conduct or whistleblower retaliation, prior to referring the matter to the IC for review. In addition to the measures noted above, the IC also takes appropriate steps to protect the confidentiality of a person who makes an allegation of, or provides information regarding, wrongdoing concerning a Covered Person. The IC will not disclose the identity of such a person without his or her consent, unless the IC Chairperson determines such disclosure is unavoidable during the IC process or is required by law. Again, when IC investigators learn of an act of retaliation during the investigation, they are to immediately report it to the IC Chairperson for action. CIGIE and the IC will continue to seek and assess additional measures that might strengthen whistleblower protections during the pendency of an investigation. The greatest improvement to our current protections would be to increase the IC's staffing to allow prompter disposition of cases, which helps reduce the risk of retaliation.

15. What is the impact of changing the burden of proof for reprisal allegations so that the burden is on the agency to prove that they did not retaliate?

OIGs have strong processes for assessing allegations that come to them and determining if they present evidence of violations of laws, rules or regulations that warrant investigation. An agency's motivation for making a referral is often not apparent to the OIG and would not be a factor considered in making a decision to open a case. Accordingly, it makes sense to focus efforts to address retaliatory investigations on agencies' motivation for referring matters to their OIGs, and not on the OIGs' decision to open cases based on such referrals.

16. Is it common for IGs to use contractors for certain audit work? What are the benefits and risks to relying on contractors to perform audits for an agency?

Large and small OIGs often use Independent Public Accountants (IPAs) to perform statutorily-required financial statement audits, Federal Information Security Modernization Act (FISMA) and DATA Act audits/evaluations. Many others also use IPAs to conduct incurred cost audits of contracts, grants, or cooperative agreements. Using IPAs allows OIGs to tap into sources of expertise that may not exist within their organization, which is especially helpful when an OIG is confronted with a one-time, not ongoing, audit requirement necessitating such knowledge. OIGs who rely on IPAs to conduct audits are required by Generally Accepted Government Auditing Standards (GAGAS) to describe the efforts they undertake to oversee the work done by contractors. A key risk when using contractors is funding-driven: when OIGs have to operate under continuing resolutions for extended periods, that can hamper their ability to fund work by contractors and thus delay necessary oversight.