

Mandate of the Special Rapporteur on the right to privacy

REFERENCE:
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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolution 37/2.

In this connection, I would like to bring to the attention of your Excellency's Government concerns I now have regarding Statute 50 USC 3033. Indeed, I am writing to formally and very strongly recommend to your Excellency's Government to urgently reform Statute 50 USC 3033 due to significant deficiencies in the dismissal mechanism which have been recently illustrated by the manner in which the President of the United States dismissed the United States Inspector General of Intelligence (IGI) on 3 April 2020.

On 31 October 2019, I communicated via email, with the US Department of Justice, in preparation for my very cordial and productive meetings in Washington D.C. with various US Government officials on 1 November 2019 as part of my official visit to the United States of America. During my exchange, I had then indicated my intention to "*a) double-check status of independence of Inspector General of Intelligence and effectiveness of protection afforded to whistleblowers*" since, at that moment in time it appeared that "*- the recent Michael Atkinson case seems to be a good case study of how that particular safeguard is actually working relatively well in practice*". I had noted the independent manner in which Mr. Atkinson appeared to have been carrying out his duties and subsequently reflected this as a positive point to be inserted in an updated draft of my official country visit to the USA, now scheduled for presentation to the UN Human Rights Council in March 2021.

I regret that circumstances now compel me to write and advise your Excellency's Government that the initial positive assessment I made on 1 November 2019, during my official visit, now needs to be revised downwards, and indeed reversed.

My concern lies chiefly with Statute 50 USC 3033 (c) (4) (Inspector General of the Intelligence Community):

“The Inspector General may be removed from office only by the President. The President shall communicate in writing to the congressional intelligence committees the reasons for the removal not later than 30 days prior to the effective date of such removal. Nothing in this paragraph shall be construed to prohibit a personnel action otherwise authorized by law, other than transfer or removal.”

As part of our ongoing dialogue, I am respectfully submitting my recommendation that Statute 50 USC 3033 be reformed to ensure that the oversight of intelligence agencies is carried out in an independent manner. Regrettably, current US law does not provide adequate statutory protection of office for the Inspector General of Intelligence, nor for most of the other key senior figures who provide oversight of the US intelligence operations. True independence can only be assured by statutory independence of office.

“Losing the confidence” of the President, of any President in any country, is an untenable position when it comes to appropriate legal safeguards for the independence of key officials tasked with oversight of intelligence and other functions vital to a healthy democracy. Neither would it seem in this case, was the letter of the law respected.

Statute 50 USC 3033 (c) (4) requires the President to communicate the reasons for the removal. A close reading of the identical letters communicated to the Select Committee of Intelligence of both the Senate and House of Representatives shows that the President did not provide any reasons for his loss of confidence.

I would recommend that Article 3033 (c) (4) be amended to read that the Inspector General may be removed from office only by a motion backed by not less than two thirds of the members of the Senate which confirmed his or her appointment.

Political history world-wide and in the United States of America too, shows that oversight of intelligence is almost always inextricably linked to the behavior of senior political figures, including the country’s President. In my considered view, the decision of removal from office should be taken out of the hands of the Executive and instead invested in another branch of Government, the Legislature.

There are a number of other amendments too that may be introduced into USC 50 3033, including fixed terms of appointment and restrictions on the number of renewals of appointment but these should be discussed in the cold light of reality and not in the heat of the COVID-19 situation. The timing of this dismissal is extremely regrettable. That it is being done now means that the Congressional Intelligence Committees will possibly, indeed probably, not have the bandwidth to carry out proper oversight of such a decision by the Executive, to the extent that any oversight is allowed to them by law.

My forthcoming report, from my official country visit to the United States, will outline a number of strengths in the US system, however, it will also draw attention to the need to reinforce the tenure and thus the independence of those who are tasked on a day to day basis with carrying out the oversight of intelligence and surveillance. The dismissal of the US Inspector General of Intelligence should serve as a sad but stark wake-up call to legislators of all political hues in the US Congress, that US law needs to be overhauled, to ensure that *all* of those appointed under a law to carry out oversight of intelligence in the USA, should also have their independence adequately protected by law.

The dismissal of the Inspector General of Intelligence illustrates the concern expressed in this letter of the risk of arbitrary decisions by the Executive in this respect. It underscores a serious weakness of the appointment and dismissal process. A robust and independent Inspector General of Intelligence is essential to ensuring the State's classified actions and information are well protected and that powerful, highly invasive surveillance powers are not abused.

In consideration of the above, I urge the US Congress, acting in tandem with the President, to seriously review this critical issue and undertake to strengthen the legislation that ensures an effective and independent oversight of intelligence which is an essential safeguard for the protection of the right to privacy. My mandate re-iterates its availability and keen interest to work with all branches of the Government in order to explore effective solutions in that respect. The reform of US federal law on a number of counts as part of a carefully thought-out package including complementary parts of the oversight of intelligence functions would be a good start to reclaiming a global leadership role in this domain, which is, in my assessment, very much needed.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please advise if amendments to USC 50 3033, as outlined in this letter, will be taken under consideration at the earliest opportunity.
2. Please advise if detailed written reasons have been provided to Congress since the effective removal of the Inspector General of Intelligence on 3 April 2020

This communication, as a comment on legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

I may publicly express my concerns in the near future as, the issue warrants particular attention on the part of the highest US authorities. I also believe that given the human rights implications, the wider public should be informed. I would however

welcome a prompt response to this communication. Any public expression on my part will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of my highest consideration.

Joseph Cannataci
Special Rapporteur on the right to privacy