



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

September 14, 2020

The Honorable Bennie G. Thompson
Chairman
Committee on Homeland Security
U.S. House of Representatives
H2-176 Ford House Office Building
Washington, DC 20515

The Honorable Carolyn B. Maloney
Chairwoman
Committee on Oversight and Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Re: GAO Decision No. B-331650 (August 14, 2020)

Dear Chairman Thompson and Chairwoman Maloney:

This responds to your letter of August 27, 2020, in which you ask that I review the matters referred to the Department of Homeland Security Office of Inspector General (DHS OIG) by the Government Accountability Office (GAO) in the August 14, 2020 decision issued by the GAO General Counsel. I have reviewed the matter and am taking the following actions.

GAO's Decision

To begin with, GAO concluded in its decision that Messrs. Chad Wolf and Kenneth Cuccinelli "were named to their respective positions of Acting Secretary and Senior Official Performing the Duties of Deputy Secretary [in the Department of Homeland Security] by reference to an invalid order of succession." GAO referred the following matters to DHS OIG:

- (i) "who should be serving as the Acting Secretary and Senior Official Performing the Duties of Deputy Secretary"; and
- (ii) the "consequences of actions taken by these officials, including consideration of whether actions taken by



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these officials may be ratified by the Acting Secretary and Senior Official Performing the Duties of Deputy Secretary as designated in the April [10, 2019] Delegation.”

Federal Vacancies Reform Act and the Homeland Security Act

There are several troubling aspects to GAO’s decision. For example, GAO cites 5 U.S.C. § 3349, which is part of the Federal Vacancies Reform Act (FVRA), as the authority for its examination of the legality of the services of Messrs. Wolf and Cuccinelli. Section 3349 charges GAO with the responsibility of collecting information about high-level vacancies in agencies and reporting to Congress when an official “is serving longer than the 210-day period” specified elsewhere in the FVRA for certain acting officials. Yet, the substantive analysis in GAO’s decision has nothing to do with service of more than 210 days under the FVRA, but instead focuses entirely on whether Messrs. Wolf and Cuccinelli were properly designated as Acting Secretary and Senior Official Performing the Duties of Deputy Secretary, respectively, under a different law, the Homeland Security Act (HSA).

Another concerning aspect of GAO’s decision is that it acknowledges that the President is generally empowered to fill a vacant high-level position under the FVRA, yet it does not even discuss whether the President validly designated an Acting Secretary in his public, written announcement on April 7, 2019.

Further, although GAO’s decision finds that the Director of the Cybersecurity and Infrastructure Security Agency should be serving as Acting Secretary, the decision inexplicably refers to DHS OIG the question of “who should be serving as the Acting Secretary.”

Pending Litigation

In addition, GAO’s decision expressly acknowledges that “certain actions taken by Acting Secretary Wolf and his authority to take them are currently the subject of litigation,” and identifies the parties and docket numbers in three lawsuits pending in federal court. GAO’s decision does not mention that GAO’s own published *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (2006), provides at page 8:

There are several types of issues which [GAO] OGC [Office of General Counsel] will not decide or opine upon. For example, unless required by law or requested by a court or administrative forum, OGC will decline to decide or opine on



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an issue when it becomes aware that the issue is pending before a federal court or administrative entity.

GAO's decision is not required by law, and GAO's decision does not state that it was requested by a court or administrative forum. There is a larger problem, however.

Inter-branch Disagreement

GAO's decision carries no binding force. DHS indicated that it disagreed with GAO's conclusion and sought reconsideration, but on August 21, 2020, GAO issued a decision "declin[ing] to reverse or modify" its August 14, 2020 decision. The parties to this inter-branch dispute are at an impasse. Considering the stakes, what is needed is a binding determination on the legality of Messrs. Wolf and Cuccinelli serving in their respective positions of Acting Secretary and Senior Official Performing the Duties of Deputy Secretary. Neither GAO nor DHS OIG can issue a binding determination on that issue, but a federal court can and probably will.

While DHS OIG does not have a strict policy against reviewing matters that are the subject of litigation, under the particular circumstances presented it would be pointless for DHS OIG to add its voice to what has become a bitter inter-branch disagreement. There is no reason to believe that all stakeholders, including DHS, Congress, GAO, and private parties who object to decisions of acting DHS leadership, would accept a determination by DHS OIG on the matters referred and treat it as an enforceable ruling. Moreover, the federal courts that are considering the issues addressed in GAO's decision would give no weight to the opinion of DHS OIG. *Cf. Specht v. Jensen*, 853 F.2d 805, 807-08 (10th Cir. 1988) (a court may not admit a legal conclusion into evidence; doing so would interfere with the role of the court as the "sole arbiter of the law").

Transcending Delegations of Authority

Regardless of the validity of the designation of Messrs. Wolf and Cuccinelli as Acting Secretary and Senior Official Performing the Duties of Deputy Secretary, respectively, prior delegations of authority from the Secretary to subordinate DHS officials would generally remain in effect, thus allowing vital DHS functions to continue. *See UC Health v. Nat'l Labor Relations Board*, 803 F.3d 669 (D.C. Cir. 2015).

Based on the foregoing, DHS OIG declines to take further action regarding GAO's August 14, 2020 decision, No. B-331650.



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DHS OIG Activities

DHS OIG is examining the other matters mentioned in your letter. Specifically, DHS OIG has initiated: (1) An investigation into allegations that DHS law enforcement personnel improperly detained and transported protestors on July 15, 2020; (2) an investigation into whether DHS' Office of Intelligence and Analysis improperly gathered intelligence on U.S. journalists; (3) a multidisciplinary review examining DHS' deployment of law enforcement officers to Portland to protect federal property, including the preparation, activities, and authority of the officers; and (4) an investigation into allegations about why and how inaccurate or misleading statements were made by DHS officials to the Department of Justice, the public, and the U.S. District Court for the Southern District of New York regarding DHS's decision to bar New Yorkers from several Trusted Traveler Programs.

Please call me with any questions at 202-981-6401.

Sincerely,

Joseph V. Cuffari, Ph.D.
Inspector General

cc: The Honorable Mike Rogers
Ranking Member
Committee on Homeland Security
U.S. House of Representatives

The Honorable James Comer
Ranking Member
Committee on Oversight and Reform
U.S. House of Representatives

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
U.S. Senate



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The Honorable Gary Peters
Ranking Member
Committee on Homeland Security and Governmental Affairs
U.S. Senate

The Honorable Joaquin Castro
Chairman
Congressional Hispanic Caucus

The Honorable Gene Dodaro
Comptroller General
Government Accountability Office

The Honorable Chad Wolf
Acting Secretary
Department of Homeland Security