



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

March 31, 2021

Joseph V. Cuffari
Inspector General
U.S. Department of Homeland Security
Office of Inspector General
Mail Stop 0305
245 Murray Lane SW
Washington, DC 20528-0305

Re: Request for Investigation of Invalid Immigration Enforcement
Agreements Executed by Former DHS Political Appointee Kenneth T.
Cuccinelli

Dear Inspector General Cuffari:

Citizens for Responsibility and Ethics in Washington respectfully requests that the Department of Homeland Security (“DHS”) Office of Inspector General (“OIG”) investigate immigration enforcement “agreements” executed by former DHS political appointee Kenneth T. Cuccinelli and several states in the waning days of the Trump administration. The highly unusual agreements—which DHS, the Department of Justice (“DOJ”), and scores of legal experts have determined are invalid and unenforceable—reflect a gross abuse of DHS’s contracting authority by an illegally-appointed official who lacked any power to bind the agency. The agreements were also plainly designed to sabotage the incoming administration’s policy priorities. Such tactics undermine the orderly transition of executive power, a cornerstone of our constitutional system of government. To shed light on this issue and to deter similar abuses in the future, the OIG should conduct an investigation of Mr. Cuccinelli’s agreements and issue a public report with its findings.

In January 2021, Mr. Cuccinelli quietly executed so-called “Sanctuary for Americans First Enactment” agreements with Texas, Arizona, Alabama, Indiana, Louisiana, Montana, South Carolina, West Virginia, and a sheriff’s office in North Carolina.¹ The agreements purport to allow participating states to halt nationwide immigration policy for 180 days by requiring DHS to “[c]onsult with” the states “before taking any action or making any decision that could reduce immigration enforcement, increase the number of [undocumented immigrants] in the United States, or increase immigration benefits or eligibility for benefits for [undocumented immigrants].”² Mr.

¹ Tim Henderson, Biden Seeks to Squelch Trump Immigration Deals with States, *Pew*, Feb. 12, 2021, <https://bit.ly/2N6a9hj>.

² See, e.g., Agreement Between DHS and Texas, <https://bit.ly/3rAGdJh>; Agreement Between DHS and Arizona, <https://bit.ly/3eqFshU>; Agreement Between DHS and Montana, <https://bit.ly/2PKNZ50>.

Cuccinelli signed the agreements on behalf of DHS in his alleged capacity as “Senior Official Performing the Duties of the Deputy Secretary.”³

On January 22, 2021—just two days after President Biden took office—Texas Attorney General Ken Paxton sued the Biden administration to enforce Mr. Cuccinelli’s agreements.⁴ Arizona and Montana have filed a similar lawsuit.⁵

As DHS, DOJ, and legal commentators have all recognized, Mr. Cuccinelli’s agreements are invalid and unenforceable.⁶ “An outgoing administration cannot contract away the federal government’s plenary power over the enforcement of immigration law,”⁷ because the Executive Branch lacks “authority to contract away the enumerated constitutional powers of . . . its own successors.”⁸ A contrary rule would allow an outgoing administration to lock in its policy preferences by agreeing to cede federal power to states, local jurisdictions, or other third parties before the incoming administration assumes office. Such tactics are antithetical to the orderly transition of executive authority demanded by our Constitution.

The agreements are doubly objectionable because Mr. Cuccinelli lacked authority to take *any* official action binding DHS. That is because, as both the U.S. District Court for the District of Columbia and the Government Accountability Office determined, Mr. Cuccinelli was not properly appointed to his DHS position and thus lacked power to act on behalf of the agency.⁹

Because Mr. Cuccinelli’s agreements reflect a gross abuse of power, as well as of DHS’s contracting authority and the intergovernmental agreement process, they fall squarely within the OIG’s purview. Indeed, every federal government contract requires statutory authorization, and here, as DOJ has pointed out, there is no statute permitting DHS employees to enter into “a contract to grant states the power to delay and review agency policy decisions.”¹⁰ As part of its duty to investigate “waste, abuse, or fraud

³ *Id.*

⁴ See Compl., *Texas v. United States*, No. 6:21-cv-00003, ECF No. 1 (S.D. Tex. filed Jan. 22, 2021).

⁵ See Am. Compl., *Arizona v. DHS*, No. 2:21-cv-00186, ECF No. 12 (D. Ariz. filed March 8, 2021).

⁶ See, e.g., Letter from Acting DHS Secretary to Arizona Attorney General, Feb. 2, 2021, <https://bit.ly/3vcqAtv>; Defs.’ Opp. to Pls.’ TRO App., *Texas v. United States*, No. 6:21-cv-00003, ECF No. 8 (S.D. Tex. filed Jan. 24, 2021); Defs.’ Opp. to Pls.’ PI Mot., *Texas v. United States*, No. 6:21-cv-00003, ECF No. 83 (S.D. Tex. filed Feb. 12, 2021); Michelle Hackman, *Texas Files Lawsuit Over Biden’s Deportation Pause*, *Wall Street Journal*, Jan. 22, 2021, <https://on.wsj.com/3t7XXvM>; Nick Miroff and Maria Sacchetti, *Texas sues Biden administration over 100-day deportation ‘pause,’* *Washington Post*, Jan. 22, 2021, <https://wapo.st/3leK6Be>.

⁷ Defs.’ Opp. to Pls.’ PI Mot. at 31, *Texas v. United States*, No. 6:21-cv-00003, ECF No. 83 (S.D. Tex. filed Feb. 12, 2021).

⁸ *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1172 (10th Cir. 2004); see also *Amino Brothers Co. v. United States*, 372 F.2d 485, 491 (Cl. Ct.), cert. denied, 389 U.S. 846 (1967) (“The Government cannot make a binding contract that it will not exercise a sovereign power.”).

⁹ See *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 29 (D.D.C. 2020), appeal dismissed, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020); U.S. Gov’t Accountability Office, *Matter of Department of Homeland Security — Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security*, File No. B-331650, Aug. 14, 2020, <https://bit.ly/3tczGoy>.

¹⁰ Defs.’ Opp. to Pls.’ PI Mot. at 31, *Texas v. United States*, No. 6:21-cv-00003, ECF No. 83 (S.D. Tex. filed Feb. 12, 2021).

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affecting the programs and operations” of DHS, the OIG routinely conducts audits, inspections, and evaluations of DHS contracts and intergovernmental agreements.¹¹ The highly unusual agreements at issue here warrant at least the same level of scrutiny, particularly given the potential for similar abuses if Mr. Cuccinelli’s actions go unexamined. An OIG investigation is also necessary to determine whether Mr. Cuccinelli executed any other similar agreements that have not yet been disclosed,¹² and the extent to which other agency officials were involved in the agreements.¹³

Mr. Cuccinelli’s agreements were transparent attempts to thwart the presidential transition and the results of a democratic election. They also reflect a clear abuse of DHS’s contracting authority by an illegally-appointed official who lacked any power to bind the agency. To ensure the public understands how this was permitted to happen and to deter future abuses, we urge the OIG to promptly investigate and issue a public report with its findings.

Sincerely,



Noah Bookbinder
President



Nikhel Sus
Senior Counsel

¹¹ DHS OIG, *Hotline - Report Corruption, Fraud, Waste, Abuse, Mismanagement or Misconduct*, <https://bit.ly/3rQzuux>.

¹² In addition to the agreements at issue here, Mr. Cuccinelli executed agreements on January 19, 2021 purportedly on behalf of U.S. Immigration and Customs Enforcement (“ICE”) that granted a union representing ICE employees “the ability to ‘indefinitely delay’ the implementation of agency policies.” Nicole Sganga and Camilo Montoya-Galvez, [Homeland Security officials scrap Trump-era union deal that could have stalled Biden’s immigration policies](https://cbsn.ws/2PqnIZR), CBS News, Feb. 16, 2021, <https://cbsn.ws/2PqnIZR>. Following a whistleblower complaint alleging that Mr. Cuccinelli’s actions were a “gross . . . abuse of authority,” DHS reviewed and disapproved the union agreements. *Id.*

¹³ The ongoing litigation involving Mr. Cuccinelli’s agreements does not lessen the need for an OIG investigation. The OIG is responsible for investigating internal abuses of DHS’s contracting authority and is uniquely situated to conduct such an investigation here; the mere pendency of litigation does not relieve the OIG of that responsibility. Nor is there any assurance that the propriety of Mr. Cuccinelli’s agreements will be resolved or even considered in the litigation, as the government has asserted jurisdictional defenses that could preclude judicial review of those issues. See Defs.’ Opp. to Pls.’ PI Mot. at 33-34, *Texas v. United States*, No. 6:21-cv-00003, ECF No. 83 (S.D. Tex. filed Feb. 12, 2021) (asserting sovereign immunity defense).