



By Certified U.S. Mail (overnight delivery)

July 30, 2019

Hon. Kevin McAleenan
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Acting Secretary McAleenan and Mr. Cuccinelli:

We write to notify you that Mr. Cuccinelli's purported appointment to the role of Acting Director of U.S. Citizenship and Immigration Services ("USCIS") is invalid and illegal under the Constitution and federal law. Specifically, his purported appointment violates the Appointments Clause of the United States Constitution, U.S. Const. art. II, § 2, cl. 2; a provision governing the appointment of Department of Homeland Security officers, 6 U.S.C. § 113(a)(1)(E); and the Federal Vacancies Reform Act (FVRA), 5 U.S.C. § 3345 *et seq.* We are deeply troubled by Mr. Cuccinelli's service, both because it causes uncertainty about the legal status of all USCIS actions taken at his direction and because it appears to be part of a larger pattern of this Administration purporting to appoint acting officials in violation of both the Appointments Clause and federal law.

Under the Appointments Clause, all high-level federal officers must be appointed by the President and confirmed by the Senate, and all other officers must also be so appointed unless federal law provides otherwise. The Director of USCIS clearly exercises significant authority pursuant to the laws of the United States, *see Freytag v. C.I.R.*, 501 U.S. 868, 881-82 (1991), and is therefore at least an inferior officer who must win Senate confirmation before serving in office unless federal law provides otherwise.

Here, federal law does not provide otherwise. Instead, it expressly provides that the Director of USCIS must be appointed by the President and confirmed by the Senate. 6 U.S.C. § 113(a)(1)(E). President Trump acknowledged as much when he considered nominating Mr. Cuccinelli for the position of USCIS Director, changing course only after it became clear that the Senate would not confirm him. *See, e.g., Burgess Everett & Eliana Johnson, Republicans Ready*

to *Quash Cuccinelli, Politico* (June 4, 2019), <https://www.politico.com/story/2019/06/04/cuccinelli-immigration-nomination-1353314>. The Constitution prevents the President from denying Congress its role in the process.

Mr. Cuccinelli has purportedly been named Acting Director of USCIS pursuant to the FVRA, the law which governs the designation of acting officers to temporarily fill vacancies that can only be permanently filled following Senate confirmation. That law provides three ways for an individual to serve in an acting capacity. First, when there is a vacancy in an office that requires Senate confirmation, the default rule is that “the first assistant to the office of such officer shall perform the functions and duties of the office temporarily.” 5 U.S.C. § 3345(a)(1). Second, the President can select another individual to serve as an “acting” officer if that individual has already been confirmed by the Senate for another office. *Id.* § 3345(a)(2). Third, the President can select another individual to serve as an “acting” officer if that individual has served as an officer or employee in the same agency as the vacant office for not less than 90 days and at the GS-15 pay level. *Id.* § 3345(a)(3).

Mr. Cuccinelli’s appointment does not satisfy any of the requirements set out in the FVRA for service as an acting official. He plainly fails to meet the requirements to serve in an acting capacity pursuant to subsection (a)(2) or (a)(3) of 5 U.S.C. § 3345 because he has not been confirmed by the Senate for another office and he has never before served as an officer or employee of USCIS.

Mr. Cuccinelli also could not legally become Acting Director as the “first assistant to the office of such officer” under subsection (a)(1) because he was not the first assistant at the time of the vacancy. When the former Director of USCIS resigned, there was an individual serving in the role of Deputy Director of USCIS—the position long considered the first assistant to the Director of USCIS. Mr. Cuccinelli was subsequently placed in a brand-new role, that of “Principal Deputy Director,” which was then designated as the first assistant to the Director. Through this maneuver, he is serving as the purported Director of USCIS.

However, the text of the first-assistant provision makes clear that to assume an acting role as first assistant, an individual must be the first assistant *at the time of the vacancy*. Subsection 3345(a)(1) provides that when there is a vacancy, “the first assistant . . . shall perform” the officer’s duties. By virtue of its use of the word “shall,” the first-assistant provision is an automatic, default procedure for installing an acting officer that is triggered *by* a vacancy, at the time of the vacancy. It would violate this plain text for an individual who was *not* the first assistant at the time of a vacancy to assume the acting role.

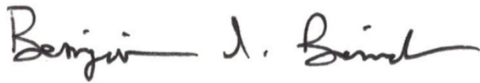
Allowing an individual to become an acting officer who was not in government at the time of the vacancy would also undermine Congress’s plan in enacting the FVRA. Congress passed the FVRA in 1998, in order to prevent the President from circumventing the Senate’s advice-and-consent process by taking someone from outside the government and installing them in a vacant federal office in an acting capacity. Thus, Congress created a default rule in which the person currently serving as first assistant would serve as the acting official, but allowed the President to designate other individuals who were already serving in the government—either in a position

already subject to Senate confirmation or in a senior position in the relevant agency. The maneuver through which Mr. Cuccinelli was purportedly appointed would entirely undermine this scheme, and would render § 3345(a)(2) and (a)(3) nullities. The FVRA does not allow the President to simply create a new office after a vacancy exists, designate that office the first assistant, and install any individual, inside or outside the government, in the role.

Because Mr. Cuccinelli’s purported appointment violates the FVRA, it also violates the Appointments Clause. As the Supreme Court has recognized, “[t]he Senate’s advice and consent power is a critical ‘structural safeguard [] of the constitutional scheme.’” *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017) (quoting *Edmond v. United States*, 520 U.S. 651, 659 (1997)). For that reason, any individual who exercises “significant authority pursuant to the laws of the United States,” *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), must be confirmed by the Senate before taking office, unless federal law provides otherwise.

Because Mr. Cuccinelli has no valid legal claim to the office of Director of USCIS, all actions that he takes in that role “shall have no force or effect.” 5 U.S.C. § 3348. Moreover, his continued attempt to occupy the office does real damage both to the constitutionally-mandated separation of powers and, by causing uncertainty about the legal status of all USCIS actions taken at his direction, to the families that USCIS serves.

Sincerely,



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The Protect Democracy Project



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