



U.S. Department of
Homeland Security

DHS rebukes GAO's deeply flawed attempt to revive its partisan impeachment efforts with baseless report

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On Monday the Department of Homeland Security's (DHS) Office of General Counsel (OGC) responded to the baseless legal opinion issued by the Government Accountability Office on Friday. In a detailed, [eight-page letter](https://www.dhs.gov/sites/default/files/publications/20_0817_ogc_gao-as1-succession-response.pdf) (https://www.dhs.gov/sites/default/files/publications/20_0817_ogc_gao-as1-succession-response.pdf), OGC shows not only that the GAO's legal reasoning and treatment of the evidence are deeply flawed, but also how the timing and authorship of the opinion both reveal it to be a brazenly partisan product issued by supposed nonpartisan agency.

Key Points of the Letter:

From its origins to its problematic conclusions, indications of the report's partisan ends are impossible for any reasonable observer to ignore.

- Not only was it released a mere 80 days before the Presidential election—but 274 days after the GAO had been asked by congressional Democrats to look into the issue.
- According to the GAO staff, the report was prepared by a junior GAO staffer who previously worked on a Democrat campaign and the partisan Senate Democratic Steering and Outreach Committee — an arm of Senate Democratic leadership.
 - The staffer also appears to have very limited experience practicing law, having finished law school only three years ago.
- “It should have been easy to find a seasoned, non-partisan attorney among the GAO's 3,000 employees to serve as the lead staffer for this report,” the letter reads.

On substance, the report itself ignores key evidence and precedent in arriving at its baseless and wholly unserious conclusion.

- The relevant statute in this area is the Homeland Security Act of 2002, Section 103(g)(2) of which vests *exclusive* authority in the Secretary to determine the Department's order of succession.
- The DHS succession order was lawfully and unambiguously amended by former Secretary Nielsen and former Acting Secretary McAleenan in an internal agency memoranda.
- Then-Secretary Nielsen's designation of McAleenan as her successor was subsequently confirmed by her official actions and statements, including in her farewell message and her act of swearing in McAleenan as her successor.
- “[D]espite the obvious fact that the agency is entitled to interpret its own internal memoranda, the GAO improperly rejected it,” the letter notes. “Instead, the GAO decided that its preferred interpretation should displace that of everyone else's at DHS, including both the Agency head and the Agency's top attorney.”

GAO's authority to opine on the matter is legally suspect.

- GAO said that the report came out under the authority of the Federal Vacancies Reform Act of 1998 (FVRA) – which gives GAO authority to report to Congress if “an officer [designated under the FVRA] is serving longer than the 210-day period” the law permits.
- However, the report does not concern a FVRA appointment, nor does GAO claim that any official has gone over the 210-day limit. Rather, it purports to interpret DHS's exercise of its authority under the Homeland Security Act.
- “For this reason alone, the Report should be rescinded,” the letter explains.

Simply put, both Acting Secretary Chad F. Wolf and Senior Official Performing the Duties of Deputy Secretary (SOPDDS) Kenneth T. Cuccinelli II are lawfully performing their current roles at DHS under the Homeland Security Act of 2002.

Conclusion:

“The Report takes the reader on a march through a marsh. At each refusal to rely on key evidence, the morass thickens and the water deepens, as crucial questions lurking just underneath the surface begin to emerge: Is the ignored evidence and failure to afford DHS deference more than just a good faith disagreement? Does the timing of this Report suggest that something else is motivating this opinion? Does the GAO's unfortunate recent history of issuing partisan and inaccurate reports perhaps explain what is going on? As the reader

reaches the Report's conclusion, he is left with the sinking and inescapable feeling that something is afoot in the swamp."

Full text of the letter is available here.

(https://www.dhs.gov/sites/default/files/publications/20_0817_ogc_gao-as1-succession-response.pdf).

Background:

- Inaccurate reports, anti-Trump flip flops, and partisan timing in GAO actions is nothing new.
- Earlier this year, a GAO gleaned headlines off of one of the most shamefully partisan exercises in American history when it wedged itself into the impeachment trial ([/redirect?url=https%3A%2F%2Fwww.newsmax.com%2Fscotfaulkner%2Fgovernment-accountability-office-trump-report-ukraine%2F2020%2F01%2F17%2Fid%2F950282%](https://www.newsmax.com/Scotfaulkner/government-accountability-office-trump-report-ukraine/2020/01/17/Fid%2F950282/)), by issuing a legal opinion that claimed the administration broke federal law by temporarily withholding funds to Ukraine over corruption concerns. Fortunately, the truth ultimately won out, the American people saw through this claim and President Trump was vindicated in the Senate.
- In a 2018 legal opinion (<https://www.gao.gov/assets/700/695889.pdf>), the agency reversed decades of its own precedent (<https://www.whitehouse.gov/wp-content/uploads/2019/11/Letter-to-GAO-on-Rescissions.pdf>) and argued that President Trump did not have the same rescission powers used by previous presidents under the Impoundment Control Act. Back in the 1970s, two Presidents (Ford and Carter) held money through the end of the fiscal year, and the funds lapsed. GAO noted that the law permitted this and recommended Congress revise the law, which never happened.
 - While the statute didn't change after President Trump came into office, GAO's interpretation of it certainly did.
- Earlier in 2018, a GAO legal opinion claiming that Trump administration agencies weren't following the Congressional Review Act was criticized in a Harvard Law School paper for "substantive legal and methodological errors." ([/redirect?url=http%3A%2F%2Felp.law.harvard.edu%2Fwp-content%2Fuploads%2FGAO-and-the-CRA.pdf](http://elp.law.harvard.edu/wp-content/uploads/GAO-and-the-CRA.pdf))
- Last year, the agency had to reverse (<https://www.gao.gov/assets/710/702288.pdf>) a legally faulty opinion regarding the reimbursement of federal employee travel costs.
- Even before president Trump took office, private sector analysis ([/redirect?url=https%3A%2F%2Fthehill.com%2Fblogs%2Fcongress-blog%2Feducation%2F137995-gao-bias-evident-in-report-on-for-profit-college-industry](https://thehill.com/blogs/congress-blog/education/137995-gao-bias-evident-in-report-on-for-profit-college-industry)) from 2011 found that the agency "inappropriately conducted, analyzed and reported" information bias in one of its reports about higher education.

- In 2012, the agency drew [criticism \(/redirect?url=https%3A%2F%2Freason.org%2Fcommentary%2Fwhy-the-gao-study-on-special-educat%2F\)](#) for the methodology behind its claims that Charter Schools were doing a worse job of serving students with special needs than traditional public schools.
- GAO employees are represented by a public sector union that has overwhelmingly [backed Democrat candidates \(/redirect?url=https%3A%2F%2Fwww.newsbusters.org%2Fblogs%2Fbusiness%2Fjoseph-vazquez%2F2020%2F01%2F1%2Fshocker-nonpartisan-gaos-union-overwhelmingly-supports\)](#) in recent election cycles, including the current one.

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