



Homeland Security

August 17, 2020

Dear Mr. Armstrong:

Under the Homeland Security Act of 2002 (HSA), 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. We request that the GAO immediately rescind its Report claiming otherwise, as the Report's conclusion is fundamentally erroneous.

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In response to congressional requests from Democrat leadership in the House of Representatives, on August 14, 2020, the GAO issued a Report concerning the appointments of Acting Secretary Wolf and SOPDDS Cuccinelli.¹ The Report does not allege that Acting Secretary Wolf and SOPDDS Cuccinelli are ineligible, unfit, unqualified, unable, or incapable of serving in their current roles. Rather, the GAO claims, based on its preferred (but not exclusive) reading of an internal DHS document, that former Secretary Kirstjen M. Nielsen's order of succession required the appointment of a different successor than the one that she designated in that order, personally swore into office, and announced to the public, and whom DHS, as directed by then-Secretary Nielsen, actually and ultimately installed. In doing so, the GAO neglects relevant evidence and subsequent designations.

The GAO's conclusions are baseless and baffling. Baseless because the GAO glosses over the import of DHS's unique order-of-succession authority found in the HSA; disregards key statements made by then-Secretary Nielsen; and ignores each piece of evidence that makes clear whom then-Secretary Nielsen was choosing as her successor, including express statements by Secretary Nielsen and President Trump that then-U.S. Customs and Border Protection (CBP) Commissioner Kevin K. McAleenan had been selected to serve as Acting Secretary and Secretary Nielsen's swearing-in of Commissioner McAleenan to serve in that role. Baffling because the GAO staff admitted that even if then-Secretary Nielsen's April 9, 2020, memorandum is considered in isolation, DHS's interpretation of its own internal memorandum was "a possible interpretation." Yet, despite the obvious fact that the agency is entitled to interpret its own internal memoranda, the GAO improperly rejected DHS's reading. 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 highest-ranking attorney.

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As an initial matter, GAO's authority to issue the Report is questionable. As its source of authority, the GAO states that the Report was issued pursuant to 5 U.S.C. § 3349, a section of the Federal

¹ *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*, GAO, File: B-331650 (Aug. 14, 2020).

Vacancies Reform Act of 1998 (FVRA) that gives the GAO the authority to report to Congress if “an officer [designated under the FVRA] is serving longer than the 210-day period” maximum allowed under the FVRA.² The GAO confirmed the claim to this source of authority by posting its Report on its website under the section for the FVRA.³ The Report, however, did not concern an appointment under the FVRA and the GAO is not claiming that any official at DHS exceeded the 210-day maximum. Instead, the Report concerned an appointment under § 103 of the HSA.⁴ The GAO has no authority under § 3349 to opine on the application of the HSA. For this reason alone, the Report should be rescinded.

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The Report is premised on multiple errors. Most prominently, it rests on the faulty contention that when then-Secretary Nielsen stated that then-Commissioner McAleenan would be her successor and swore him in as her successor, those actions had no legal significance in determining whom she actually chose as her successor. That error doomed the Report.

Then-Secretary Nielsen legally changed the succession order for the Secretary in April 2019 as evidenced by three official acts. First, on April 9, 2019, then-Secretary Nielsen issued a document designating the order of succession for any and all vacancies in the position of the Secretary, which provided that then-Commissioner McAleenan would be her successor (the Nielsen Memorandum). Second, then-Secretary Nielsen reaffirmed this change in a message to the entire agency when she stated that “Kevin McAleenan will now lead DHS as your Acting Secretary.” Finally, then-Secretary Nielsen personally executed her order of succession when she swore in then-Commissioner McAleenan as the Acting Secretary.

The relevant statute in this area is the HSA. Section 103(g)(2) of the HSA allows the Secretary of Homeland Security “to designate such other officers of the Department in further order of succession to serve as Acting Secretary.” This statute vests *exclusive* authority in the Secretary—not in the GAO—to determine the order of succession.

The order of succession established by then-Secretary Nielsen provided that then-Commissioner McAleenan was to serve as Acting Secretary when she resigned. In the Nielsen Memorandum, then-Secretary Nielsen designated as follows: “By the authority vested in me as Secretary of Homeland Security, including the Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2), I hereby designate the order of succession for the Secretary of Homeland Security as follows,” after which she listed the order of succession for any and all vacancies in the position of the Secretary.

For context, on December 15, 2016, then Secretary Jeh Johnson published an order of succession/delegation—before 6 USC §§ 113(g)(1) and (2) were added to the HSA—which

² Chapter 33 of Title 5.

³ https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act#violation_letters.

⁴ Homeland Security Act of 2002, Pub. L. No. 107-296, § 103, 116 Stat. 2135 (Nov. 25, 2002), as amended by National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1903, 130 Stat. 2000, 2672 (Dec. 23, 2016), codified at 6 U.S.C. § 113.

distinguished between the two different scenarios that occurred under the FVRA—an order of succession and an order of delegation. First, in section II.A, he provided for an order of succession consistent with 5 U.S.C. § 3345(a), which stated that the *order of succession* in case of the Secretary’s death, resignation, or inability to perform followed Executive Order 13753. This was necessary because under the existing law at the time (the FVRA), only the President could provide for an order of succession in these circumstances. Second, in section II.B and Annex A, Secretary Johnson provided a separate *order for delegation of authority*, which would apply during a disaster or catastrophic emergency—circumstances not covered by the FVRA.

Although the Nielsen Memorandum did not expressly revoke the language in section II.A that referred to an order of succession issued by the President under the FVRA in December 2016, it did supersede both aspects of Secretary Johnson’s order by creating a single list, designated by the Secretary, of the officials who would be both in the “order of succession for the Secretary” (superseding section II.A) and recipients of the delegation of authority (revising Annex A). This was possible because 6 USC §§ 113(g)(1) and (2) now allowed Secretary Nielsen to change her order of succession in all circumstances, not just during a disaster or catastrophic emergency.

Four aspects of the text of Nielsen’s one-page Memorandum establish that, contrary to the conclusion in the GAO Report, she changed both the *order of succession* and *order for delegation of authority*—not just the *order for delegation of authority*. First, the title of the document said it was “Amending the Order of Succession.” That title makes no sense if she was only amending the *order for delegation of authority*. Second, the first line invoked the Secretary’s authority under 6 U.S.C. § 113(g)(2), which is a power to designate officials in “order of succession to serve as Acting Secretary,” notwithstanding the FVRA, thus demonstrating her intention to supersede the FVRA, not simply to revise a delegation of secretarial authority for use when there is not a vacancy for FVRA purposes. Third, she said “I hereby designate *the order of succession* for the Secretary of Homeland Security as follows.” And fourth, the decision document attached to the Nielsen Memorandum, which Secretary Nielsen signed, makes this unambiguously clear: “By approving the attached document, you will designate *your desired order of succession for the Secretary . . .* in accordance with your authority pursuant to the [HSA].” Accordingly, consistent with the HSA, then-Secretary Nielsen established a single order of succession for all vacancies that may arise. Under this amended order of succession the Commissioner of CBP was to become the Acting Secretary in case of a vacancy.⁵

Then-Secretary Nielsen’s designation of then-Commissioner McAleenan to serve as Acting Secretary was subsequently confirmed by her official statements and actions. As part of her amendment to the order of succession, then-Secretary Nielsen clearly and unambiguously articulated her intent when she stated in her farewell message to the entire agency: “Kevin McAleenan will now

⁵ The source of the Report’s confusion appears to be that the “follow[ing]” list of officials was then preceded by a separate introductory clause noting that Annex A—the list associated with the delegation—was also being “amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof.” In context, however, the two different introductory clauses for the same list of officials simply showed that Secretary Nielsen was creating one list that would serve both the order-of-succession purposes of section II.A and the delegation-of-authority purposes of section II.B. This is supported by all of the other evidence about Secretary Nielsen’s intention at the time.

lead DHS as your Acting Secretary.” This was consistent with the public announcement from President Trump that “Kevin McAleenan, the current U.S. Customs and Border Protection Commissioner, will become Acting Secretary.”⁶ Further, on April 10, 2019, Secretary Nielsen made her designation unambiguous and clear when she personally swore in Commissioner McAleenan to serve as the new Acting Secretary.⁷



Posted on DHS’s Twitter account (@DHSgov) on April 10, 2019

Few things constitute a more unambiguous designation of a successor than personally swearing your successor in. Even if the GAO were correct that the Nielsen Memorandum did not designate then-Commissioner McAleenan as then-Secretary Nielsen’s successor—which it is not—the swearing in of then-Commissioner McAleenan (and the accompanying announcement) unequivocally supplanted that prior designation.

It follows, then, that Acting Secretary Wolf and SOPDDS Cuccinelli are lawfully performing their current roles at DHS. Invoking the HSA, then-Acting Secretary McAleenan later amended the order of succession, resulting in Acting Secretary Wolf’s taking office. Acting Secretary Wolf subsequently amended the order of succession for Deputy Secretary, enabling Ken Cuccinelli to assume the role of the SOPDDS. The Report does not contend these subsequent actions were unlawful, and if the GAO had not ignored then-Secretary Nielsen’s words and actions, then this letter would be unnecessary.

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⁶ <https://twitter.com/realDonaldTrump/status/1115011885303312386>

⁷ <https://theborderobserver.wordpress.com/2019/04/11/cbp-commissioner-kevin-mcaleenan-sworn-in-as-the-acting-dhs-secretary/>

The moment that Secretary Nielsen invoked her authority, she overrode all past designations, including Former Secretary Jeh C. Johnson's 2016 order of succession, which had been issued under the FVRA, *not* the HSA. This intentional and deliberate act by Secretary Nielsen was understood by all at DHS and across the Administration to have the scope that DHS has understood it to have. The GAO must accept this permissible interpretation. The GAO cannot ignore that interpretation to choose a different, preferred interpretation of its own in order to suit partisan ends. In reaching a contrary conclusion, the Report commits several egregious errors.

First, the GAO erred in failing to defer to DHS's interpretation of its own internal memorandum. The Nielsen memorandum is a wholly internal DHS document that does not have the binding effect of law, like a regulation governing the public, nor is its interpretation subject to challenge. Rather, the proper interpretation of the memorandum is solely within the authority of the Agency.⁸ To that end, courts have found that not only do "the internal guidelines of a federal agency . . . not confer substantive rights on any party,"⁹ but also it would be inappropriate for anyone "to second guess the Government[']s" interpretation of its own policies and internal memoranda "or demand that the Government" comply with its own "non-binding manual[s]" or internal memoranda.¹⁰

However, at a minimum, the GAO should have at least followed the Supreme Court's reasoning in *Kisor v. Wilkie* (2019)¹¹ and afforded the Department's interpretation deference. In fact, the Supreme Court explicitly held in *Kisor* and *Ford Motor Credit Co. v. Milhollin* (1980)¹² that such deference was owed *even to* official staff memoranda "never approved by the agency head."¹³ This principle undergirding the Supreme Court's prevailing precedents entitles DHS in this matter to even more robust deference because the Nielsen Memorandum was, for the reasons DHS has given, "approved by the agency head" herself.¹⁴

At a minimum, DHS's interpretation of the Nielsen Memorandum should have received "controlling weight" unless it was plainly erroneous or inconsistent with internal DHS regulations or federal law.¹⁵ Yet, as the GAO admitted, DHS's interpretation was neither plainly erroneous nor inconsistent with regulations or laws. Indeed, during a telephonic briefing with GAO staff on August 14, 2020, GAO officials responsible for the Report's drafting conceded that DHS's construction of the Nielsen Memorandum was a "possible interpretation." It was more than just a possible interpretation—it remains the *only* interpretation given by senior political and career officials at DHS. This key concession should have ended the inquiry.

⁸ See *California v. F.C.C.*, 39 F.3d 919, 925 (9th Cir. 1994) (citations omitted).

⁹ *United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir. 1990), *cert. denied*, 498 U.S. 1015 (1990); see also *United States v. Ivic*, 700 F.2d 51, 64 (2d Cir. 1983) (stating that "non-compliance with internal departmental guidelines is not, of itself, a ground of which defendants can complain").

¹⁰ *United States v. Cason*, 2015 WL 4988206, *8 (N.D. W. Va. Aug. 19, 2015); see also *Northwest Motorcycle Assoc. v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1479 (9th Cir. 1994) (concluding that an agency's decision should be upheld even if it is "of less than ideal clarity," as long as "the agency's path may be reasonably discerned").

¹¹ 139 S. Ct. 2400.

¹² 444 U.S. 555.

¹³ *Kisor*, 139 S. Ct. at 2417 (citing *Ford Motor Credit Co.*, 444 U.S. at 566, n. 9).

¹⁴ *Id.* (citing *Ford Motor Credit Co.*, 444 U.S. at 566, n. 9).

¹⁵ *Id.* at 2416 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).

Second, the Report refused to consider the official acts or statements of the key decision-maker: then-Secretary Nielsen. The HSA confers the Secretary with the exclusive authority to “designate such other officers of the Department . . . as Acting Secretary.” Based on the statute, one would expect that the words and actions of then-Secretary Nielsen would be highly relevant to determining whom she was “designat[ing] . . . as Acting Secretary.” Not, however, for the GAO. Relying on Supreme Court cases discussing post-enactment legislative history in the context of *statutory* interpretation, the Report claims that it would be inappropriate to consider then-Secretary Nielsen’s words and actions.¹⁶ This analysis misses a key distinction: The GAO was not interpreting a statute; it was interpreting an *internal agency memorandum* about whom then-Secretary Nielsen designated as her successor. Then-Secretary Nielsen was acting through that memorandum under a statute that gave her exclusive authority to set the order of succession. To ignore her words and her acts about the meaning of her memorandum was inexcusable and indefensible error.

Lastly, even if the GAO were correct that the Nielsen Memorandum did not designate Commissioner McAleenan as the successor—certainly, GAO is gravely mistaken in this view—then-Secretary Nielsen twice confirmed her designation when she sent her farewell message and when she swore in then-Commissioner McAleenan. Apart from confirming her intent, those acts, if somehow seen as inconsistent with the Nielsen Memorandum, would have *supplanted* the Nielsen Memorandum as Secretary Nielsen’s designation. Thus, although the most logical interpretation of these three actions is that they were all done consistently and together, even if the GAO continues to unreasonably deny it, then the GAO still must concede that the last designation in time—Secretary Nielsen’s direction to DHS that “Kevin McAleenan will now lead DHS as your Acting Secretary” and swearing in Commissioner McAleenan as the Acting Secretary—controlled.

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Regrettably, the GAO’s actions surrounding the issuance of the Report could cause an objective observer to question its motivations.

First, the timing of the Report is suspect. The Report was released a mere 80 days before the Presidential election—but 274 days after the GAO had been asked by congressional Democrats to investigate the matter.¹⁷ Although the Report argues that the purported illegality of Acting Secretary Wolf’s appointment is “clear,”¹⁸ the GAO took more than nine months to determine it. Clear and obvious legal answers do not take 274 days to divine, particularly for an agency like the GAO, which has approximately 3,000 employees and a \$706 million annual budget.¹⁹

¹⁶ Report at p. 9.

¹⁷ Letter from Chairman, Committee on Homeland Security, U.S. House of Representatives and Acting Chairwoman, Committee on Oversight and Reform, U.S. House of Representatives to Comptroller General (Nov. 15, 2019).

¹⁸ Report at p. 9.

¹⁹ Fiscal Year 2021 Budget Request, U.S. Government Accountability Office (THE GAO), *available at* <https://www.gao.gov/assets/710/704924.pdf>.

Second, GAO's staffing of this Report is suspect. In an August 14, 2020, call between the GAO and DHS staff, GAO held out a junior staffer as the "author" of the Report. This staffer appears to have limited experience practicing law—having graduated from law school only three years ago. He also previously worked on a Democratic campaign and the partisan Senate Democratic Steering and Outreach Committee. Surely, few things could be more significant than the appointment of the head of a cabinet-level agency. It should have been easy to find a more seasoned attorney (whose past political work would not have created even the appearance of impropriety) among the GAO's 3,000 employees.

Third, the GAO's recent history is suspect. The GAO is frequently criticized²⁰ for its "substantive legal and methodological errors."²¹ Indeed, a private-sector analysis found that the GAO had "inappropriately conducted, analyzed and reported" information.²² However, and most problematically, the GAO has recently come under fire for allegedly partisan behavior. The GAO was accused of inappropriately participating in the attempted impeachment of the President and of changing a decades-long legal opinion in order to intentionally disfavor the President.²³ Unfortunately, the issuance of this most recent Report exacerbates legitimate concerns of political partisanship at the GAO.

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²⁰ See, e.g., Lisa Snell, *Why the GAO Study on Special Education in Charter Schools Gets It Wrong*, Reason Foundation, June 20, 2012, available at <https://reason.org/commentary/why-the-GAO-study-on-special-educat/>.

²¹ CURTIS W. COPELAND, ERRORS AND INCONSISTENCIES IN THE GAO'S REPORTS ON THE CONGRESSIONAL REVIEW ACT, Harvard Law School: Environmental and Energy Law Program, July 10, 2018, available at <http://eelp.law.harvard.edu/wp-content/uploads/GAO-and-the-CRA.pdf>.

²² Jean Norris, *GAO bias evident in report on for-profit college industry*, The Hill, Jan. 14, 2011, available at <https://thehill.com/blogs/congress-blog/education/137995-gao-bias-evident-in-report-on-for-profit-college-industry>.

²³ <https://www.newsmax.com/scotfaulkner/government-accountability-office-trump-report-ukraine/2020/01/17/id/950282/>.

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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.

The GAO should rescind its erroneous report immediately.

Very Truly Yours,



Chad Mizelle
Senior Official Performing the Duties of the General Counsel