



VIA FEDEX

July 22, 2019

The Honorable William Barr
Attorney General of the United States
Office of the Attorney General of the United States
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

The Honorable Jessie K. Liu
United States Attorney
U.S. Attorney's Office for the District of Columbia
555 4th Street, NW
Washington, D.C. 20530

Re: Unlawful Appointment of Kenneth T. Cuccinelli as Acting Director, U.S. Citizenship and Immigration Services

Dear Mr. Attorney General and Ms. Liu:

The undersigned organizations write to request that you institute a proceeding for writ of quo warranto against Kenneth T. Cuccinelli, the purported Acting Director and Principal Deputy Director of U.S. Citizenship and Immigration Services ("USCIS").¹ Quo warranto is "the prerogative writ by which the government can call upon any person to show by what warrant he holds a public office or exercises a public franchise." *Newman v. United States ex rel. Frizzell*, 238 U.S. 537, 545-46 (1915). Under Title 16, Chapter 35 of the District of Columbia Code, the Attorney General or the U.S. Attorney may ask the U.S. District Court for the District of Columbia to issue a writ of quo warranto "against a person who within the District of Columbia

¹ The undersigned organizations—Democracy Forward Foundation, Refugee and Immigrant Center for Education and Legal Services (RAICES), Muslim Advocates, Asian Counseling and Referral Service, Asian Americans Advancing Justice – Los Angeles, National Immigration Law Center, and Capital Area Immigrants' Rights Coalition—each work to protect the rights of immigrants and/or to assist immigrants in seeking relief before the nation's immigration agencies and the courts. They are, therefore, "person[s] interested" in whether Mr. Cuccinelli's service, and any rules or policies he may promulgate as Acting Director, are lawful. D.C. Code § 16-3503.

usurps, intrudes into, or unlawfully holds or exercises, a franchise conferred by the United States or a public office of the United States, civil or military.” D.C. Code § 16-3501.

Mr. Cuccinelli’s appointments violate the Federal Vacancies Reform Act (“FVRA”), 5 U.S.C. § 3345 *et seq.*, and the Appointments Clause of the U.S. Constitution, U.S. Const. art. II, § 2, cl. 2. To avoid the legally established line of succession and instead install Mr. Cuccinelli as the hand-picked Acting Director, the President and the Department of Homeland Security took the extraordinary step of creating a new office of Principal Deputy Director, designating that office as the “first assistant” to the Director, and naming Mr. Cuccinelli to that position, even though he has never served in USCIS. These actions end-run the FVRA’s requirements and Congress’s constitutionally mandated role in confirming nominees under the Appointments Clause. Indeed, these seemingly unprecedented measures appear to have been taken specifically to install an individual that the Senate had not, and would not have, confirmed, in derogation of the separation of powers. Mr. Cuccinelli therefore unlawfully holds the office of Acting Director.

Mr. Cuccinelli’s unlawful service as Acting Director has serious consequences for any rules, policies, or other directives he might promulgate. Under the FVRA, “[a]n action taken by any person who is not acting” lawfully “shall have no force or effect.” 5 U.S.C. § 3348. Similarly, litigants may challenge the actions of officials serving in violation of the Appointments Clause. *See, e.g., Andrade v. Lauer*, 729 F.2d 1475, 1500 (D.C. Cir. 1984). Given the Director’s important role in administering and overseeing the nation’s lawful immigration procedures, these potential consequences cast uncertainty over the entire system, affecting immigrants, visitors, families, employers, and many others. In particular, Mr. Cuccinelli already has used his authority to unlawfully issue several directives to USCIS employees, including attempts to decrease the time available for asylum applicants to consult with an attorney, alter the standard for asylum determinations, and threaten immigration sponsors.²

We therefore request that you act promptly to rectify these legal violations by seeking a writ of quo warranto and compelling Mr. Cuccinelli to demonstrate how his service is lawful. We begin by explaining why Mr. Cuccinelli’s service violates the FVRA, and then address how it also violates the Appointments Clause.

A. Mr. Cuccinelli’s Appointment Violates the Federal Vacancies Reform Act

The Federal Vacancies Reform Act, enacted in 1998, provides the President with limited authority to appoint acting officials while preserving the Senate’s advice and consent power—a power which serves as “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

² *See, e.g.,* Hamed Aleaziz, *Immigrant Asylum-Seekers May Get Less Time to Prepare Their Cases Under a New Trump Administration Rule*, BuzzFeed News (July 9, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/immigrant-asylum-seekers-less-time-to-prepare>; Geneva Sands, *Cuccinelli Email to Asylum Officers Sparks Anger, Push Back*, CNN (June 18, 2019), <https://www.cnn.com/2019/06/18/politics/ken-cuccinelli-email-asylum-officers/index.html>; Ken Cuccinelli II, *Presidential Memorandum on Enforcing the Legal Responsibilities of Sponsors of Aliens*, U.S. Citizenship & Immig. Servs. (June 14, 2019), <https://www.uscis.gov/news/presidential-memorandum-enforcing-legal-responsibilities-sponsors-aliens>.

(1997)). As the Supreme Court recognized in *Southwest General*, “[t]he Framers envisioned” the Senate’s role in the nomination process “as ‘an excellent check upon a spirit of favoritism in the President’ and a guard against ‘the appointment of unfit characters . . . from family connection, from personal attachment, or from a view to popularity.’” *Id.* (quoting *The Federalist* No. 76 at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Given that the confirmation process may take time, however, Congress has repeatedly enacted statutes permitting the President to appoint acting officials under limited and explicitly articulated circumstances. *Id.*

Specifically, the FVRA permits an individual to act as an official in an office requiring Presidential nomination and Senate confirmation (often referred to as a “PAS” office) in three ways. At the outset, the FVRA provides a default rule: “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). However, the President may select another individual to temporarily fill the vacancy if they either already serve in a PAS office, *id.* § 3345(a)(2), or if, during the year prior to the vacancy, served as an officer or employee in the same agency for not less than 90 days and at the GS-15 rate of pay, *id.* § 3345(a)(3). Reflecting the FVRA’s aim of providing the President with *limited* authority to name acting officials, these provisions allow the President to deviate from the FVRA’s “first assistant” default rule and select someone else if they have either received the Senate’s approval or have met certain seniority requirements. In these circumstances, the President could have selected an individual from *any* of these three categories to serve as Acting Director of USCIS.

Mr. Cuccinelli, however, could not become the Acting Director of USCIS through any of these three paths—the only paths consistent with the FVRA. He had not been serving in a PAS office and had not been employed by USCIS (or, indeed, any other DHS component) in the year prior to the vacancy. Nor was he the “first assistant.” We understand that the Deputy Director of USCIS has been designated as the first assistant to the Director since the agency’s creation. At the time Lee Francis Cissna, the last confirmed Director of USCIS, resigned, Mark Koumans served as Deputy Director, and Mr. Koumans continues to serve in that position.³ In appointing Mr. Cuccinelli to serve as Acting Director, we understand that President Trump, DHS, and/or USCIS took the unprecedented steps of creating an entirely new position of Principal Deputy Director, designating the holder of that office as first assistant to the Director, and appointing Mr. Cuccinelli as Principal Deputy Director, notwithstanding that Mr. Cuccinelli has never served in USCIS in any capacity.⁴

This extraordinary attempt to manipulate the structure of USCIS to install Mr. Cuccinelli violates the FVRA in several ways. Most importantly, an individual may only fill a vacancy as the first assistant if they served as the first assistant when the vacancy arose. Indeed, the D.C. Circuit suggested in *Southwest General* that “subsection (a)(1) may refer to the person who is

³ See Letter from Rep. Jerrold Nadler, Chairman, House Comm. on Judiciary, et al. to Kevin K. McAleenan, Acting Sec’y, Dep’t of Homeland Sec. 1 (June 18, 2019), <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/06-18-2019%20Letter%20to%20Acting%20Secretary%20McAleenan.pdf>.

⁴ *Id.*

serving as first assistant *when the vacancy occurs*,” although the court did not ultimately resolve the question. *SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 76 (D.C. Cir. 2015).

The FVRA’s text and structure confirm this understanding. Section 3345(a)(1) (emphasis added) mandates that, when an officer “dies, resigns, or is otherwise unable to perform the functions and duties of the office[,] ... the first assistant ... *shall* perform” those duties. It therefore provides what courts have characterized as an “automatic,” “default” procedure for immediately filling a vacancy with the first assistant at the moment the office becomes vacant. *See, e.g., SW Gen.*, 137 S. Ct. at 940; *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 11 (D.C. Cir. 2019); *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 557 (9th Cir. 2016); *English v. Trump*, 279 F. Supp. 3d 307, 312 (D.D.C. 2018). What matters, then, is who is serving as first assistant at the time that triggering event occurs.

This reading also gives meaning to the FVRA’s other appointment mechanisms. Subsections (a)(2) & (3) allow the President to deviate from the automatic procedure specified by Subsection (a)(1) and select another official if he or she meets certain specified conditions. If the President can instead name any preferred first assistant at the time the vacancy arises, then the only limitation on the President’s temporary appointment power is whatever conditions the agency’s organic statute imposes for naming a first assistant. In many circumstances—like those present here—the underlying statute may not require Senate confirmation or tenure in the agency for an individual to serve as first assistant, meaning that the President’s power to fill the vacancy would be unbounded. In short, permitting the President to name new first assistants after an office becomes vacant would undermine the FVRA’s carefully crafted scheme.

Conferring unconstrained power upon the President to fill vacancies with acting officials would also conflict with Congress’s purpose in enacting the FVRA. After all, Congress enacted the FVRA to combat “a threat to the Senate’s advice and consent power,” *SW Gen.*, 137 S. Ct. at 936. Requiring the first assistant to be serving at the time the vacancy occurs recognizes the Executive Branch’s legitimate need to quickly and seamlessly fill vacancies that may arise without permitting the President to unilaterally select anyone he or she chooses, regardless of their competence, qualifications, or fitness to serve, and without the assent of the Senate.

The Office of Legal Counsel previously agreed with us. In guidance issued shortly after the FVRA was enacted, OLC correctly noted that the FVRA is best understood to require “that you must be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant.” *Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 64 (1999). Thereafter, OLC erroneously reversed its own opinion, concluding instead that “an individual need not be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant.” *Designation of Acting Associate Attorney General*, 25 Op. O.L.C. 177 (2001).

OLC’s about-face is erroneous and conflicts with intervening Supreme Court precedent. *First*, OLC relied on Subsection (a)(1)’s use of the language “first assistant *to the office*.” However, that qualification was added to the statute to clarify that, if the first acting official—appointed under Subsections (a)(2) or (a)(3)—leaves the office, the first assistant *at that time* would ascend to fill the vacancy. Thomas A. Berry, S.W. General: *The Court Reins in Unilateral Appointments*, 2017 Cato Sup. Ct. Rev. 151, 171-72. Here, that means that Deputy Director

Mark Koumans remained available to serve as Acting Director. *Second*, OLC reasoned that Subsection (b)(1)(A)(i), which bars an individual from assuming the acting position if they have also been nominated for the position unless they served as first assistant prior to the vacancy, would be superfluous if an individual was *required* to have served as first assistant at the time of the vacancy by Section 3345(a)(1). That justification has been “entirely eliminated” by the Supreme Court’s decision in *Southwest General*, 137 S. Ct. 929, which held that Subsection (b)(1)(A)(i) also applies to individuals appointed by way of Section 3345’s other mechanisms. *Berry, supra*, at 171-72.

Even if one were to assume that a particular individual need not have been the first assistant at the time of the vacancy, then, at the very least, the *office* in which that individual serves must have existed at the time of the vacancy. Such a reading preserves the ability to temporarily fill vacancies with the first assistant, even when nobody is serving as first assistant at the time of the vacancy, without according unbounded authority to leapfrog first assistants that are already present. The Principal Deputy Director position has never existed at USCIS. The creation of that position solely so that the President could select an individual with no history of service at USCIS—and who lacked the support of the Senate—to act as its director is an affront to the FVRA.

Finally, the law requires first assistant designations to occur with at least some modicum of formality. Indeed, it may require such designations to occur by statute: agency organic statutes frequently designate first assistants or provide that a particular official will ascend in the event of a vacancy, suggesting that Congress intended to reference and incorporate this practice in the FVRA. Moreover, the Office of Legal Counsel and the Attorney General took precisely this position for decades. *See, e.g., Department of Energy – Vacancies*, 2 Op. O.L.C. 113, 115 n.5 (1978); *Bureau Officers in the Navy Department*, 19 Op. A.G. 503, 504 (1890); *Head of Navy Department*, 28 Op. A.G. 95, 98-99 (1909). In interpreting the FVRA’s predecessor statute, the D.C. Circuit cited these decisions, recognizing that “according to ‘one line of authority,’ the position of ‘first assistant’ must be created by statute before the automatic succession provision of the Vacancies Act applies.” *Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision*, 156 F.3d 190, 192 (D.C. Cir. 1998). At the very least, however, an agency must designate a first assistant by some formal, publicly available means, such as publication in the Federal Register—not simply by the agency’s or the President’s say-so. Otherwise, and especially if a first assistant need not have been serving at the time of the vacancy, there would be no limitation on the power to select acting officials.

B. Mr. Cuccinelli’s Appointment Violates the Appointments Clause

The Administration’s failure to comply with the FVRA also has constitutional significance. The Appointments Clause is clear about Congress’s mandatory role in the appointment of officers: it provides that officers of the United States may be appointed by the President only “by and with the Advice and Consent of the Senate.” U.S. Const. art. 2, § 2, cl. 2. And it carves out a limited exception: that only “Congress may by Law vest the Appointment of such inferior Officers, as they think proper,” in the President, the courts, or department heads. *Id.* Again, this procedure “is more than a matter of ‘etiquette or protocol’; it is among the significant structural safeguards of the constitutional scheme.” *Edmond*, 520 U.S. at 659. It follows from this text, and the Supreme Court has held, that any “Officer of the United States”—namely, one

who exercises “significant authority pursuant to the laws of the United States”—must be appointed in the manner prescribed by the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

Mr. Cuccinelli, however, was appointed as Acting USCIS Director in a manner specifically designed to circumvent Congress’s constitutionally mandated role in the appointment of officers. The USCIS Director is responsible for establishing and administering the policies governing the adjudication of most immigration-related applications and petitions in the United States, including immigrant visa petitions, naturalization petitions, and asylum and refugee applications, 6 U.S.C. § 271(a)(3), (b), and he oversees the officers who make determinations on these applications and petitions. To that end, he or she has “significant discretion” to set and implement national immigration policy. *Lucia v. SEC*, 138 S. Ct. 2044, 2047 (2018) (quoting *Freitag v. Comm’r of Internal Rev.*, 501 U.S. 868, 882 (1991)). Thus, under the Appointments Clause, only Congress may, “by Law,” determine the means by which an officer may be appointed to perform the functions and duties of the USCIS Director. *See Edmond*, 520 U.S. at 660. And Congress has spoken precisely on point, providing that the USCIS Director must be Presidentially-appointed and Senate-confirmed. *See* 6 U.S.C. § 113(a)(1)(E).

Because Mr. Cuccinelli has not been nominated by the President or confirmed by the Senate, the only potential source of authority for his appointment as Acting USCIS Director is the FVRA.⁵ For the reasons explained above, however, the FVRA does not authorize his appointment. And the circumstances of Mr. Cuccinelli’s appointment provide further confirmation of the Administration’s intention to evade the Appointments Clause. That improper motive is powerful evidence of a constitutional violation, particularly given the separation-of-powers questions at stake here. *See, e.g., Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 475-76 (1977) (whether Act of Congress imposing recordkeeping requirements on President Nixon was unconstitutional bill of attainder turned on question of legislative purpose).

In the weeks leading up to Mr. Cuccinelli’s appointment, it was widely reported that Director Cissna, who had been appointed by President Trump and confirmed by the Senate, had been directed by the President to resign in order to make room for Mr. Cuccinelli.⁶ Members of the President’s own party, including the Senate Majority Leader, then made clear that the Senate would not confirm Mr. Cuccinelli for any position.⁷ At that point, having failed to seek, much

⁵ This view does not call into question an agency head’s ability to properly delegate authorities to subordinates under the terms of an agency’s organic statute; it is only where, as here, the executive formally designates an individual not authorized by law to serve as an acting official, or delegates the powers of an office to an individual to a degree that it has, in effect, named an acting official, that the Appointments Clause is implicated.

⁶ *See, e.g.,* Nick Miroff et al., *Trump to Place Ken Cuccinelli at the Head of the Country’s Legal Immigration System*, Wash. Post (May 24, 2019), https://www.washingtonpost.com/immigration/trump-to-place-ken-cuccinelli-at-the-head-of-the-countrys-legal-immigration-system/2019/05/24/143fdec8-7e64-11e9-a5b3-34f3edf1351e_story.html.

⁷ *See* 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>.

less receive, the advice and consent for which he was hoping, President Trump could and should have begun working to identify an alternate candidate for the job. Instead, he decided to bypass the Senate, having the Acting DHS Secretary create the brand-new position of Principal Deputy Director and simultaneously installing Mr. Cuccinelli into the position—and in the meantime, effectively demoting the USCIS Deputy Director who had just been appointed a month earlier.

The creation of a new office of Principal Deputy Director itself raises profound constitutional questions. The Appointments Clause vests exclusive authority in Congress to “establish[] by Law” all executive branch offices. U.S. Const. art 2, § 2, cl. 2. By specifying that new offices must be established by law, the drafters ensured that only Congress—and not the President—had the authority to create offices. That interpretation of the Appointments Clause has been repeatedly reaffirmed: by Chief Justice John Marshall, *see United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (“The constitution then is understood to declare, that all officers of the United States, except in cases where the constitution itself may otherwise provide, shall be established by law.”); by Justice Souter, *see Weiss v. United States*, 510 U.S. 163, 187 n.2 (1994) (Souter, J., concurring) (“Indeed, the Framers added language to both halves of the Appointments Clause specifically to address the concern that the President might attempt unilaterally to create and fill federal offices.”); and by the Office of Legal Counsel, which concluded that the Appointments Clause “vest[s] responsibility for creating offices of the United States in Congress.” *Limitations on Presidential Power to Create a New Executive Branch Entity to Receive and Administer Funds Under Foreign Aid Legislation*, 9 Op. O.L.C. 76, 77 (1985). Thus, the Administration’s unilateral creation of the Principal Deputy Director position may run afoul of the Appointments Clause.

At the very least, however, this extremely unusual sequence of events demonstrates the Administration’s deliberate steps to circumvent the lawful process for appointing officers of the United States. The President could have selected any number of permissible individuals to serve as Acting Director pursuant to the FVRA, but instead decided to select Mr. Cuccinelli, who did not meet the statutory requirements and could not be confirmed by the Senate. That decision is part-and-parcel of the Administration’s broader efforts to negate the Senate’s mandatory advice-and-consent role. Indeed, focusing only on current vacancies in positions related to immigration and national security, the President has utilized acting officials to serve as Secretary of Defense, Secretary of Homeland Security, Ambassador to the United Nations, Director of Immigration and Customs Enforcement, Director of Customs and Border Protection, and Director of the Federal Emergency Management Agency. As the President has said, “I like ‘acting’ because I can move so quickly”—“It gives me more flexibility.”⁸

But that is not what our Constitution envisions or allows. As Justice Thomas has put it, although the Clause “may ‘often seem clumsy, inefficient, even unworkable’ ... [w]e cannot cast aside the separation of powers and the Appointments Clause’s important check on executive power for the sake of administrative convenience or efficiency.” *SW Gen.*, 137 S. Ct. at 948

⁸ See, e.g., Igor Bobic, *Trump Keeps Bypassing the Senate by Appointing Officials in an Acting Capacity*, HuffPost (June 12, 2019), https://www.huffpost.com/entry/ken-cuccinelli-trump-acting-senate_n_5d0130ece4b0304a1208c6ef; Carrie Cordero & Joshua A. Geltzer, *Trump’s Preference for Acting Officials Puts National Security at Risk*, Lawfare (May 20, 2019), <https://www.lawfareblog.com/trumps-preference-acting-officials-puts-national-security-risk>.

(Thomas, J., concurring). Ultimately, the Administration’s actions threaten serious adverse consequences for governance, accountability, and the “significant structural safeguards of the constitutional scheme” imposed by the Appointments Clause. *Edmond*, 520 U.S. at 659.

* * *

Mr. Cuccinelli’s appointment is unlawful. It casts a shadow over everything he or USCIS may do to administer the nation’s lawful immigration system. Immigrants and non-immigrants alike deserve better. Thus, we ask that you uphold the Federal Vacancies Reform Act and the Constitution and institute proceedings to remove him from office.

Sincerely,

Democracy Forward Foundation

Refugee and Immigrant Center for
Education and Legal Services (RAICES)

Muslim Advocates

Asian Counseling and Referral Service

Asian Americans Advancing Justice – Los
Angeles

National Immigration Law Center

Capital Area Immigrants’ Rights Coalition