

# *Trump Official's Last-Day Deal With ICE Union Ties Biden's Hands*

A whistle-blower accused Kenneth T. Cuccinelli II of an abuse of power in making sweeping concessions to pro-Trump Immigration and Customs Enforcement agents.



**By Zolan Kanno-Youngs and Charlie Savage**

Published Feb. 1, 2021 Updated March 18, 2021

WASHINGTON — A whistle-blower complaint filed on Monday said a top Trump homeland security official sought to constrain the Biden administration's immigration agenda by agreeing to hand policy controls to the pro-Trump union representing Immigration and Customs Enforcement.

The complaint accuses Kenneth T. Cuccinelli II of “gross mismanagement, gross waste of government funds and abuse of authority” over the labor agreements he signed with the immigration agents' union the day before President Biden's inauguration.

Mr. Cuccinelli — an immigration hard-liner whose legal legitimacy to serve in senior positions at the Department of Homeland Security was contested — essentially sought to tie Mr. Biden's hands, according to the complaint.

“This abuse of authority is shocking,” wrote David Z. Seide, a lawyer representing the whistle-blower, whom he described as “a current federal employee who wishes to remain anonymous” and who “possesses information concerning significant acts of misconduct” by Mr. Cuccinelli.

A senior homeland security official confirmed that since Mr. Biden's inauguration, officials have been meeting to discuss the implications of the ICE labor agreements. The official spoke on the condition of anonymity to discuss internal deliberations.

One clause in the contract requires homeland security leaders to obtain "prior affirmative consent" in writing from the union on changes to policies and functions affecting agents. It also appears to allow the ICE union to argue that it can reject changes such as Mr. Biden's recent order to focus on violent criminals and not prioritize other undocumented immigrants.

Under a federal law, an agency head has 30 days to cancel such an agreement once it is signed, after which it goes into effect.

The agreements essentially require the homeland security secretary — currently David Pekoske in an acting capacity — to notify the union in writing about any elements of the agreements that he may disapprove. In each case, that element would be sent back for further negotiations.

But the agreements signed by Mr. Cuccinelli suggest that the union could appeal any such rejection to the Federal Labor Relations Authority. And once the agreements take effect, they purport to "irrevocably" block the government's ability to challenge anything about the concessions to the ICE union for the next eight years.

Mr. Cuccinelli said in an email that the previous labor agreement with the ICE union had "languished for many years, through several administrations" and argued that the new deal he signed was in the best interest of the agency.

"I absolutely deny any mismanagement, waste of government funds and any misuse of authority," Mr. Cuccinelli said. "The agreement is entirely legal and appropriate, or we wouldn't have executed it."

He declined to respond to a question inquiring how the agreement would affect Mr. Biden's directives to ICE.

Chris Crane, the union president who signed the agreements with Mr. Cuccinelli, did not respond to a request for comment. The ICE union, which represents more than 7,500 agents and employees, endorsed Donald J. Trump in the 2016 and 2020 elections.

Mr. Seide, a senior counsel at the Government Accountability Project, which represents whistle-blowers, filed the six-page complaint with Congress, the Department of Homeland Security's inspector general and the Office of the Special Counsel, which protects whistle-blowers. He attached copies of three "memorandums of understanding" signed on Jan. 19 by Mr. Cuccinelli and Mr. Crane.

Among other things, Mr. Seide's complaint portrayed the agreements as "effectively giving the union unprecedented veto authority in many areas," including enhancing its power "to slow and impede agency activities by requiring its express written approval prior to implementing changes in the conditions of employment" for agents.

One of the agreements, for example, says: "No modifications whatsoever concerning the policies, hours, functions, alternate work schedules, resources, tools, compensation and the like of or afforded employees or contractors shall be implemented or occur without the prior affirmative consent" in writing by the union.

The complaint also characterized the agreements as granting "outsized" levels of "official time" — compensation for time spent on union activities — that vastly exceeded what other public employee unions received, the complaint said. Mr. Seide estimated that these concessions by Mr. Cuccinelli would cost taxpayers several million dollars a year.

The agreements also require the government to cover union-related travel expenses, granting it a benefit that Mr. Trump had banned in 2018.

“When the evidence is collected — the agreements’ last-second timing, their outsized conveyance of power and benefits, their purported invulnerability *and* Mr. Cuccinelli’s extraordinary involvement — it is clear that they are another example of the prior administration’s effort in its waning hours to cement a legacy at taxpayer expense,” Mr. Seide wrote in the complaint.

The last-minute labor deal is one of several ways the departing Trump administration sought to tie its successors’ hands on policy. On Jan. 8, for example, Mr. Cuccinelli signed an agreement with the government of Texas that he hoped would block the Department of Homeland Security from changing deportation policy without giving the state 180 days’ advance notice.

Citing that agreement, Attorney General Ken Paxton of Texas, a Republican, said that Mr. Biden’s 100-day moratorium on most removals of undocumented immigrants was “illegal.”

Texas filed a lawsuit, and a Trump-appointed federal judge last week issued a nationwide restraining order blocking the moratorium. But Mr. Biden’s directive to immigration agents to prioritize undocumented immigrants who recently crossed the border or those with a violent criminal history remains in effect.

Notably, the acting head of ICE at the end of the Trump administration did not sign the new labor agreement, which came together during a period of bureaucratic turmoil. One acting director of ICE, Tony Pham, abruptly resigned at the end of December. He was succeeded by Jonathan Fahey, who abruptly resigned on Jan. 13.

Mr. Fahey was replaced by Tae D. Johnson, who did not sign the agreement. Instead, on the signature lines, Mr. Cuccinelli is identified “for the agency” but without a title. Mr. Cuccinelli said it was appropriate for him to sign as the acting deputy secretary, and he did so after gathering guidance from the general counsel.

Before he resigned, Mr. Fahey had for days pushed back against the efforts to bolster the ICE union and ultimately refused to sign the agreement, according to the senior homeland security official familiar with the matter.

The Trump administration had in various ways tried to give Mr. Cuccinelli a senior leadership role in the Department of Homeland Security without going through Senate confirmation, but the legal legitimacy of his appointment to various positions was a recurring dispute.

In 2019, Mr. Trump tried to make Mr. Cuccinelli the acting head of the department's Citizenship and Immigration Services agency. But in March 2020, a federal judge ruled that his appointment had been illegal, nullifying policies he had made because he lacked the legal authority to be in the position. The Trump administration did not appeal that ruling.

The administration also tried to make Mr. Cuccinelli the No. 2 at the department, giving him the title of senior official performing the duties of deputy secretary. In August, the Government Accountability Office issued an opinion that this appointment was legally invalid as well, although it is not a court ruling.

Mr. Cuccinelli has repeatedly pressured ICE leadership to adopt tougher policies. Soon after joining Citizenship and Immigration Services, Mr. Cuccinelli pushed the agency to add new restrictions to the student visa program, which is under ICE's authority and not the agency he was supposed to be leading at the time. His actions angered other department officials and prompted an intervention by Kevin K. McAleenan, a former acting homeland security secretary.

The complaint filed on Monday is the second major accusation against Mr. Cuccinelli by a whistle-blower in recent months. Brian Murphy, the former intelligence chief for the Homeland Security Department, claimed in September that Mr. Cuccinelli had ordered him to modify intelligence assessments to make the threat of white supremacy "appear less severe" and include information on violent "left-wing" groups. Mr. Cuccinelli denied the accusations.

**Zolan Kanno-Youngs** is a White House correspondent covering a range of domestic and international issues in the Biden White House, including homeland security and extremism. He joined The Times in 2019 as the homeland security correspondent. More about Zolan Kanno-Youngs

**Charlie Savage** is a Washington-based national security and legal policy correspondent. A recipient of the Pulitzer Prize, he previously worked at The Boston Globe and The Miami Herald. His most recent book is "Power Wars: The Relentless Rise of Presidential Authority and Secrecy." More about Charlie Savage

A version of this article appears in print on , Section A, Page 14 of the New York edition with the headline: Last-Day ICE Union Deal Aimed to Tie Biden's Hands, Whistle-Blower Says