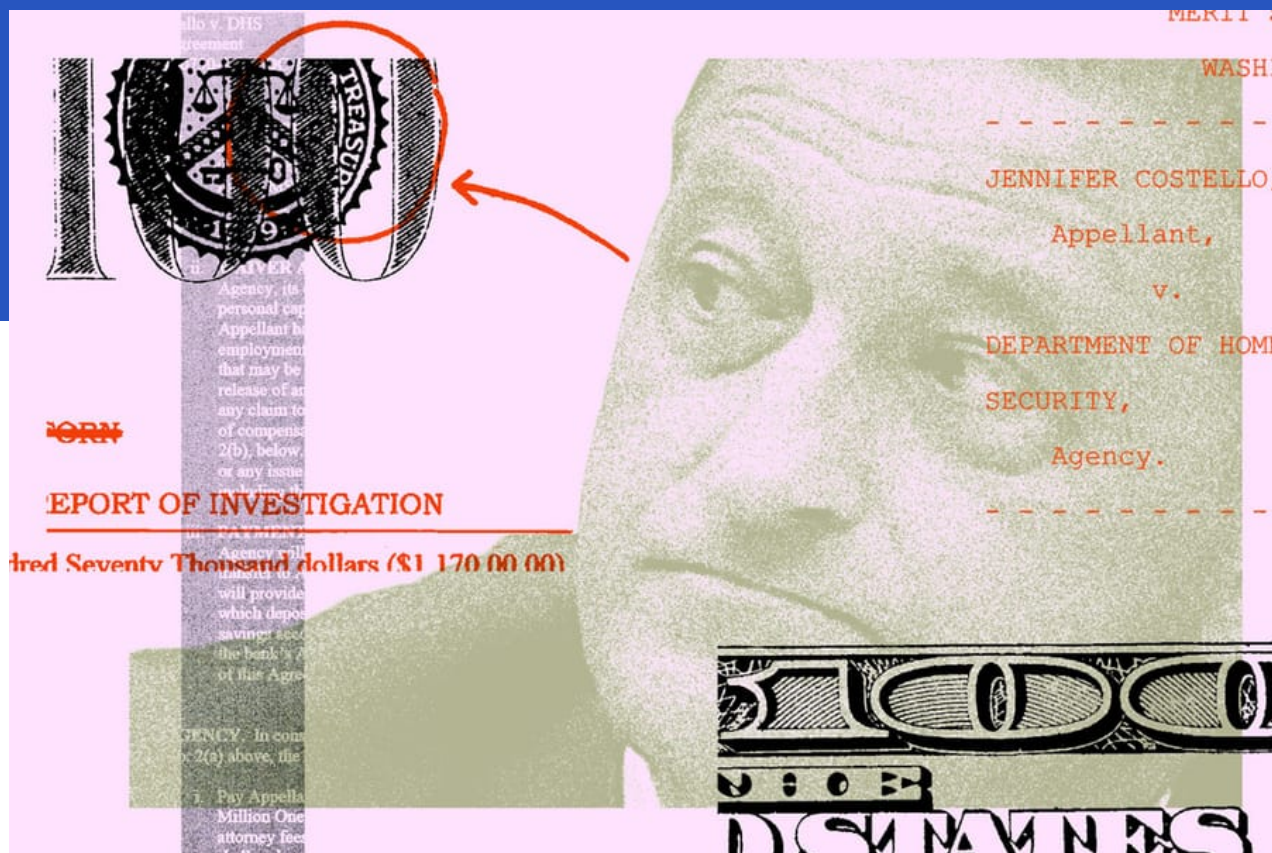


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# DHS Watchdog Settles Whistleblower Reprisal Case for \$1.17 Million

Inspector General Cuffari Faces Probes of Alleged Misconduct

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(Photos: CSPAN, Wikimedia Commons; Illustration: Leslie Garvey / POGO)

Department of Homeland Security Inspector General Joseph Cuffari's office has agreed to spend \$1.17 million in taxpayer funds to settle claims that he retaliated against a whistleblower, according to a copy of the settlement agreement signed this month and obtained by the Project On Government Oversight (POGO).

The whistleblower is Cuffari's former deputy, Jennifer Costello. In 2019, Costello made disclosures about Cuffari to Congress and to the Council of the Inspectors General on Integrity and Efficiency (CIGIE), whose Integrity Committee examines allegations of watchdog misconduct. Among these disclosures was that Cuffari improperly delayed a report on DHS's struggles to track migrant children and parents who were split apart as a result of the Trump administration's family separation policy. Cuffari terminated her employment in June 2020.

Records Costello supplied to POGO reveal that the Integrity Committee is investigating a number of misconduct allegations against Cuffari, even as he seeks to halt those probes through an ongoing lawsuit. The Integrity Committee has been investigating matters that occurred well after he removed Costello from government service. They include Cuffari's months-long failure to inform Congress about the Secret Service's deletion of January 6-related text messages, and whether there was any impropriety related to his handling of a still-unpublished report finding widespread sexual misconduct within DHS.

During a June deposition for Costello's case, Cuffari admitted that the Integrity Committee has expressed problems accessing witnesses and information during at least one probe of his alleged misconduct.

Cuffari's office did not respond to POGO's detailed questions sent yesterday morning.

During Cuffari's deposition he also repeated a denial he made during a June congressional hearing where he revealed he routinely purges texts on his government-issued phone. He said he did not violate the Federal Records Act. But this week, congressional Democrats revealed new documents that show records management experts within Cuffari's office believed he may have violated that law.

## **“IGs are expected to be held to a higher standard.”**

Mark A. Robbins, former Merit Systems Protection Board member

The text message affair and Costello's settlement intensifies the spotlight on Cuffari and the larger question of how to improve the system for holding inspectors general accountable.

“There's been a lot of emphasis placed on protecting IGs from being removed without adequate justification,” Costello told POGO. “But there exists an equal and opposite problem that's rarely discussed: IGs with significant performance or conduct problems linger for years and years without facing disciplinary action.”

# An Unusually Large Settlement

As is standard, the settlement, signed by Costello and Cuffari's chief of staff Kristen Fredricks, is not an admission of wrongdoing.

The \$1.17 million settlement is among the largest publicly known settlements in a federal employee whistleblower retaliation case and the largest known settlement involving an employee from a federal office of inspector general, according to experts and POGO's review of previous cases.

Mark A. Robbins, a former member of the Merit Systems Protection Board and the Office of Personnel Management's general counsel under Presidents Donald Trump and George W. Bush, told POGO he was not surprised by the magnitude of the settlement, given Costello's seniority and previous pay. But he said that the circumstances of the settlement raised his concerns. "IGs are expected to be held to a higher standard," he said. And while the letter of federal whistleblower law doesn't set different standards for inspectors general, "IGs aren't supposed to be engaging in this activity because they're one of the places where whistleblowers can go with allegations."

The settlement agreement came just weeks after Cuffari was deposed in Costello's case. The deposition transcript, which Costello provided to POGO, reveals that several of the reasons he gave for her firing were found to be

without merit or lacked critical context. (POGO redacted the names of employees who are currently GS-15 level or below in records she provided to POGO to protect their privacy.)

Including the \$1.17 million settlement amount, Cuffari's office has spent at least \$3 million of taxpayer funds connected to his firing of Costello, who is herself a divisive figure inside DHS IG. In 2020, he spent \$1.4 million on a contract with a private law firm to produce a report investigating her for disclosures and other matters, and alleging she and two other high-ranking staffers undermined him. An insider told POGO that Cuffari has spent at least \$500,000 in additional taxpayer dollars on government attorneys who've spent a significant amount of their time working on employment litigation involving Costello over recent years.

**“I continue to stand behind my position that IG Cuffari is unfit to lead DHS OIG.”**

Representative Bennie Thompson (D-MS)

“After wasting nearly \$1.4 million dollars to hire a law firm to investigate his own employees, including Ms. Costello, IG Cuffari has now cost the government another million dollars to settle Ms. Costello's claim that the investigation was retaliation,” said Representative Bennie Thompson (D-MS), the ranking member of the House Homeland Security Committee. “The settlement was offered after IG Cuffari admitted that he never investigated the validity of the reasons he used to remove her from her position. Furthermore, some of the reasons were proven to be false.”

“I continue to stand behind my position that IG Cuffari is unfit to lead DHS OIG,” Thompson said.

## **Allegations of Retaliation**

Cuffari's office contracted with the law firm WilmerHale in May 2020 – about a month before he fired Costello. He contracted with the firm after both he and Costello had lodged allegations against each other with the Integrity Committee the previous year, which chose not to investigate these complaints. Costello said she wishes the Integrity Committee had investigated the allegations back then, even if this meant reviewing her actions as well. (POGO has previously criticized the Integrity Committee for closing these matters.)

The Integrity Committee did open an investigation in 2021, which is still ongoing, into whether the WilmerHale review was launched in retaliation for protected disclosures by Costello and others. Costello told POGO she was interviewed by agents conducting this investigation last week. “These are top-tier agents trying to get to the bottom of a complicated situation,” Costello said. An Integrity Committee spokesperson declined to comment.

The tension between Cuffari and Costello even briefly led to the involvement of the FBI. During his deposition, Cuffari spoke of an effort in 2020 to have the FBI investigate Costello for a private statement she made to a colleague more than a year earlier.

Cuffari said he did not and still does not know what her statement was. Prior to his confirmation in July 2019, Costello had sent an email to a colleague comparing her future boss to the Night King in the HBO show *Game of Thrones* and alluding to one of the show's protagonists, Arya Stark, who kills him. “Perhaps Arya would consider taking care of some business here?” Costello wrote. Costello does not know if this is the statement that prompted Cuffari's push to involve the FBI. Costello says she was never contacted by the FBI, which closed the matter nine days after it was sent to them at Cuffari's behest by Jim Read, the top attorney in DHS IG.

Whatever the statement was, the FBI determined it was “not a threat to life” and the U.S. Attorney's Office for the District of Columbia “determined no prosecutable violation was present,” according to a letter the FBI wrote to Cuffari that POGO obtained through the Freedom of Information Act.



## **“A review of his deposition reveals at least some of the claims Cuffari used to justify his removal of Costello are inaccurate.”**

Cuffari made a number of allegations to justify Costello's removal that were challenged by her attorney during his deposition. Those allegations included claims that Costello falsely held herself out as acting DHS IG, that she sought to review draft DHS IG reports (which Cuffari admitted was part of her job duties), and that she questioned his need to print thousands of pages when those documents could be read electronically.

A review of his deposition reveals at least some of the claims Cuffari used to justify his removal of Costello are inaccurate. For example, Cuffari claimed that Costello had failed to refer former Acting DHS Inspector General John V. Kelly for possible misconduct to the Integrity Committee. He conceded that claim was inaccurate.

Another reason Cuffari has cited for the firing is that Costello allegedly ordered a retaliatory investigation of another employee early in his tenure as DHS IG. But during his deposition, he admitted he did not review a sworn declaration from another person who said they were the one who actually prompted the investigation. “I didn't realize that this was part of the file,” Cuffari said.

In yet another instance, Cuffari asserted that Costello and another official tried to have him sign off on a report of investigation that found former CIA IG David Buckley had retaliated against a whistleblower named Andrew Bakaj.

“I had a conflict of interest,” Cuffari said in his deposition, “They were trying to entice me to sign a report knowing that I had a conflict of interest.”

Buckley is Cuffari's longtime friend: They had worked together at the Air Force Office of Special Investigations earlier in their careers, and Buckley was mentioned during Cuffari's Senate confirmation hearing as supporting Cuffari's nomination as DHS IG.

But Cuffari's claim about what Costello tried to do is not accurate. Bakaj's attorney, Mark Zaid, provided POGO with a copy of the report. It was signed by outgoing Acting DHS Inspector General Kelly on June 10, 2019 – about a month and half before the Senate confirmed Cuffari as DHS IG.

(Due to DHS IG's reprisal finding, POGO's executive director opposed the hiring of Buckley as staff director of the House select committee that examined the January 6 attack on the U.S. Capitol. Buckley has reportedly denied retaliating against Bakaj.)

# **“A Personality Conflict”**

At the time Cuffari was confirmed by the Senate on July 25, 2019, there had been turmoil at the leadership level within the DHS watchdog office for quite some time, stretching back to the tenure of then-Acting Inspector General Charles K. Edwards during the Obama administration. But instead of breaking the cycle, Cuffari has continued it. Indeed, an anonymous letter by DHS IG employees calling on President Biden to remove Cuffari alluded to this. “We were hopeful that IG Cuffari would make meaningful change,” the letter states, “but here we are and the situation is the same.” (POGO’s executive director has also called for Biden to remove Cuffari.)

Many of those long-standing management problems predated and had little to do with Jennifer Costello. But without a doubt Costello was, and still is, a divisive figure at DHS IG. Numerous sources who have worked with her and who have spoken with POGO have expressed a wide range of views: Some deeply dislike her and characterize her as toxic, while others said they found her funny and professionally supportive.

Costello told POGO that some within DHS IG’s headquarters dislike her because she undertook actions to address instances of misconduct before Cuffari’s arrival, as is evidenced by a complaint she made to the Integrity Committee in June 2019. She said one of those employees complained about her to Cuffari after his confirmation — a claim supported by records produced



during Costello's litigation at the Merit Systems Protection Board shared with POGO.

"I believe I did my best to navigate some extremely dysfunctional situations, but there's always room for improvement," Costello said. "Legitimate complaints must be investigated. But Mr. Cuffari chose to fire me without investigation and then hire a private law firm to drum up evidence after the fact. That would be unconscionable even if I hadn't made a dozen protected disclosures."

One of her early disclosures regarding Cuffari, even before he was confirmed, was that his doctorate came from a university that was unaccredited at the time it awarded his degree.

Costello told POGO she had formerly worked at the Government Accountability Office on a report on federal employees getting degrees from unaccredited universities, sometimes referred to as "diploma mills." Prominent senators like Susan Collins (R-ME) have raised pointed concerns about federal officials with degrees from unaccredited universities before. Costello said she worried she might have an obligation as a senior federal official with unique knowledge to say something, given the importance of the position Cuffari was nominated for. (The Trump White House cited Cuffari's Ph.D. in its announcement it was nominating him as DHS inspector general.)

Costello told POGO she shared her concern with leadership in the Council of the Inspectors General on Integrity and Efficiency and that they passed it along to the Trump White House. She mentioned the situation and the dilemma she faced with some other colleagues. Costello said she suspects word got back to Cuffari before or soon after his Senate confirmation.

During the deposition, Cuffari said he learned she expressed concerns about his qualifications about a year later. He said statements critical of his qualifications sow "seeds of dissension."

Costello would go on to make other disclosures about Cuffari in the fall of 2019, including about his delayed issuance of a watchdog report on information technology problems that inhibited efforts to reunite migrant parents with their separated children.

When asked by the then-chair of the House oversight committee about the delay, he responded in a letter that the report "is currently undergoing further editing, review, and evaluation" and "additional work is needed before it can be published."

However, during Cuffari's deposition, he says he delayed its issuance because staff for Senators Ron Johnson (R-WI) and Kyrsten Sinema (D-AZ) verbally asked him to personally travel to the border and ensure the report reflected his observations. He said he did that and that his travel led to no changes to the report.

When asked why he didn't provide this explanation for the delay in 2019,

Cuffari said in his deposition, “I don’t know.”

POGO asked a spokesperson for Sinema about Cuffari’s claim that her staff sought his personal travel to the border before he issued the report. Sinema’s spokesperson emailed, “I checked with our staffer at the time – No one can confirm this.” A spokesperson for Johnson did not respond to POGO’s request for comment.

There’s no question that there was mutual dislike between Cuffari and Costello. One basis Cuffari cited for her removal was that during high-level meetings “she would roll her eyes, turn her back, make faces,” he said, and he said that she told him that “you don’t know what you’re doing.”

During Cuffari’s deposition, he conceded that part of his basis for firing Costello – a claim that she was dishonest – was potentially based on their “personality conflict.”

The only instance of dishonesty Cuffari could recall during the deposition was that he says that Costello claimed 40 individuals had accepted final offers of employment at the DHS IG, rather than nine (40 were in the hiring process). Costello denies his characterization of her comments.

“So it was possible that these allegations of dishonesty, for example, were a result of a personality conflict between the two of you?” Costello’s attorney asked him during the deposition. Cuffari replied, “that was my feeling.”

## **Closure or Deeper Discontent?**

The Costello case has loomed large at DHS IG over the last several years. It remains to be seen if its settlement will bring closure, or if it might validate deeper discontent with Cuffari's leadership of the watchdog office. There are reasons to think it may be the latter.

For instance, more than half of respondents within his Office of Counsel did not respond affirmatively when asked if they can blow the whistle without fear of reprisal, according to the most recent Federal Employee Viewpoint Survey results.

Costello said a fundamental breakdown was that the Integrity Committee should have launched an investigation in fall 2019, but did not. "The time to clear the air would have been almost four years ago, when Mr. Cuffari first started making these allegations," Costello told POGO.

"The Integrity Committee must explain why they didn't give me an opportunity to respond back then, and also why they chose not to address my allegations against Mr. Cuffari. Perhaps they would have decided to open investigations into both of us, but the result certainly would not have been this expensive, never-ending mess."

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*(Disclosure: POGO has previously been a WilmerHale client and accepted pro bono services to assist The Constitution Project.)*





