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Examining the Human Rights and Legal Implications of DHS’ “Remain in Mexico” Policy

U.S. House of Representatives
Committee on Homeland Security
Subcommittee on Border Security, Facilitation and Operations

Statement of Michael A. Knowles

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Council 119, American Federation of Government Employees (AFGE)

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Chairwoman Rice, Ranking Member Higgins and other Members of the Subcommittee: Thank you for inviting me to submit this statement for the record.

Introduction

I have proudly served in the United States Asylum Officer Corps since 1992, one year after its creation. Prior to that, I served for many years as a case worker, program manager and policy analyst with various non-governmental organizations responsible for refugee protection, resettlement and humanitarian assistance in the United States and abroad (Afghanistan, Cambodia, Indonesia, Pakistan, Malaysia, Singapore and Thailand).

I appear here in my capacity as the Special Representative for Refugee Asylum and International Operations for the National Citizenship and Immigration Services Council 119 of the American Federation of Government Employees (AFGE) — the labor organization that represents over 13,500 bargaining unit employees of the US Citizenship and Immigration Services (USCIS) world-wide. As Special Representative, I report directly to the Council President, Danielle Spooner, on all matters related to asylum and refugee matters.

Concurrently, I serve as the elected President of AFGE Local 1924 -- the Council 119 affiliate that represents 2,500 USCIS employees in the National Capitol Region. My views represent the Union and its members. They are not official positions of the US government.

Today's hearing shines critical Congressional light on the Migrant Protection Protocols (MPP) "Remain in Mexico" Policy rolled out by the Trump administration this year. I expect my co-panelists to produce significant evidence demonstrating why MPP is an unmitigated disaster for everyone involved. My testimony focuses on how MPP is affecting – and hurting – my fellow Asylum Officers, who must either carry out orders and run the program they reasonably believe violate the law and endanger asylum seekers or leave their jobs.

Unless otherwise noted, my testimony is based on public source information. In particular, I recommend to the Subcommittee the report published late last week by the Office of US Senator Jeff Merkley (D-OR),¹ It describes the extensive efforts by the Trump administration to deter and prevent asylum seekers from legally claiming asylum within the United States. It also reveals how programs like MPP are part of a larger, systematic effort undermining the functioning of the US asylum system. I urge you to review its detailed findings and adopt its recommendations.

¹ *Shattered Refuge - A US Senate Investigation into the Trump Administration Gutting of Asylum* (Nov. 2019), available at <https://www.merkley.senate.gov/imo/media/doc/SHATTERED%20REFUGES%20-%20A%20US%20Senate%20Investigation%20into%20the%20Trump%20Administration%20Gutting%20of%20Asylum.pdf> (Merkley Report).

About Asylum Officers

To begin, my Union has taken and continues to take stands against policies we consider illegal. We actively support our members who exercise their lawful rights to report abusive policies, programs and practices to Congress and other agencies, as well as their first amendment rights.

We have filed Amicus Curiae briefs in four major court cases challenging the Trump administration's illegal and dangerous policies regarding the US Refugee and Asylum programs: (i) the 2017 travel ban that suspended most overseas refugee processing; (ii) the MPP policy; (iii) the substantive changes to USCIS training and guidance materials for Asylum Officers; and (iv) the so-called "third country transit bar" -- the insidious rule barring migrants arriving at the southern border from receiving asylum if they transited through a third country and did not apply for and were denied asylum while there.² Because of the relevance of our MPP Amicus brief to today's hearing, it is attached here as Exhibit 1 and is incorporated into my testimony.

Asylum Officers have tough jobs. We make decisions that have life or death consequences. Most of us consider the work a calling; we make significant personal sacrifices to carry out the nation's founding mission -- to serve as a beacon to the persecuted across the globe. Frankly, the job takes its toll -- even in the best of times.

But we are now far from the best of times. Since the start of the current administration, policies and procedures have been imposed that I and many of my colleagues believe to be illegal. More importantly, they are fundamentally wrong and threaten to shred the moral fabric of our society.

What Asylum Officers Do

For good reason, we are focused today on the southern border. There, Asylum Officers are the ones who have to decide in an initial screening interview whether persons seeking refuge in the US have shown a credible fear of persecution in the countries from which they have fled. By law, the standard we apply at this early stage in the asylum process is a low one -- intended to weed out patently false allegations and identify those who have a significant possibility of making a valid asylum claim. If they pass our screening, they then proceed to federal immigration court. They are not returned to the dangers they face in the countries from which they are fleeing -- consistent with the obligation of *non-refoulement* that are enshrined in our laws and ratified international treaties. The screening is intended to be a "safety net;" it is not a final adjudication of asylum claims.

In immigration court, a judge conducts a full hearing of the evidence and applies a higher standard: whether the evidence shows that the individual has suffered past persecution or has a

² *Trump v. International Refugee Assistance Project*, Nos. 16-1436 & 16-1540 (S.Ct.) (2017 travel ban Amicus brief filed Sept. 7, 2017); *Innovation Law Lab v. McAleenan*, No. 19-15716 (9th Cir.) (MPP Amicus brief filed June 26, 2019); *Kiakombua v. McAleenan*, No. 19-cv-01872-KBJ (D.D.C.) (USCIS training and guidance materials Amicus brief filed Sept. 20, 2019); *East Bay Sanctuary Covenant v. Barr*, No. 19-16487 (9th Cir.) (third country transit bar Amicus brief filed Oct. 15, 2019).

well-founded fear of future persecution in their home countries.³ The standards applied by Asylum Officers and immigration judges are *not* the same. The passing rate in immigration court in immigration court is, by design, far lower.

What Now Happens Under MPP

MPP turns the process upside down. Now, many asylum applicants are referred to the immigration courts by Customs and Border Patrol (CBP) Agents without a credible/reasonable fear screening by USCIS Asylum Officers — but are first returned to wait on the Mexico side of the border, pending their court hearings. It is no secret that the towns and cities at the southern border are among the most dangerous in Mexico -- the State Department warns everyone not to travel to the region around Matamoros, for instance, because carjacking, and sexual assault are common, gang gun battles are widespread and it has one of the highest kidnapping rates in the country.⁴ Yet applicants are made to wait in Mexico unless they affirmatively assert a fear of serious harm and can prove to an Asylum Officer under the higher, “more likely than not” standard that they would face persecution in that country. Now, over 57,000 refugees have been returned to wait in perilous conditions in Mexico under this cruel policy.

The dangers of waiting in Mexico under MPP were graphically illustrated this past weekend on an episode of the This American Life podcast/radio show devoted to MPP. A transcript is attached as Exhibit 1.⁵

- One woman from Honduras, who has been waiting in Matamoros for three months for her court date said she, her husband and daughter were kidnapped by a Mexican cartel for 15 days.
- In Nuevo Laredo, across the Rio Grande from Laredo, Texas, kidnapping is so prevalent that men living inside a shelter for migrants are terrified to go outside. One family from Honduras, a father and eleven-year-old son, were kidnapped and held for ransom for four days. According to the father, on the day of the kidnapping he and 100 other asylum applicants sent back under MPP, were taken from the international bridge crossing the Rio Grande to the local Mexican immigration office for processing. After that a man wearing a Mexican immigration officer uniform agreed to take him and his son to the bus station so they could go to a safer city. But as soon as they got to the station the father and son were grabbed and taken to a normal-looking house holding more than 20 other

³ Congressional Research Service (CRS), *Asylum and Related Protections for Aliens Who Fear Gang and Domestic Violence*, 2 (2018).

⁴ US Department of State, *Mexico Travel Advisory* (April 9, 2019), available at <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>.

⁵ This American Life, *The Out Crowd*, Episode 688 (Air Date Nov. 15, 2019), transcript available at <https://www.thisamericanlife.org/688/transcript>.

migrants. While there, the boss told the father that his son's organs were good for selling because he was only 11 years old. The father and son were released after the father's sister paid a ransom, by wiring the money to a bank account connected to the Mexican immigration officer.

Other reporting has similarly documented widespread violence and inhumane conditions facing migrants stranded in Mexico.⁶

Action by Asylum Officers and Their Union

In the face of this my Union, its members and other USCIS employees have not been idle. Here are three recent examples of tangible action in opposition to MPP. And to be clear: hundreds of current and former USCIS employees share the views expressed through these actions.

Union Action: Lawsuits. Based on the kind horrific reports described above (along with many others), my Union argues in our Amicus brief supporting the challenge to MPP, attached as Exhibit 1, that the policy is contrary to America's longstanding tradition of providing safe haven to people fleeing persecution, and that it violates our nation's legal obligations to not return asylum seekers to where they may face persecution. In our Amicus brief supporting the challenge to the Trump administration's transit bar we argue that it is inconsistent with our asylum law and that it is contrary to the nation's longstanding asylum framework and produces absurd results.

Individual Action: Documented Resignation. Brave Asylum Officers have done much more. In the last seven days alone, Senator Merkley disclosed and the Washington Post, CNN, the Los Angeles Times and This American Life reported on an Asylum Officer in San Francisco who resigned rather than participate in MPP.⁷

⁶ See, e.g., Human Rights First, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy* (Oct. 2019), available at <https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf> ("More than one thousand children, families, and adults are sleeping on the streets in front of the Matamoros port of entry without adequate access to water or proper sanitation, too afraid to enter the city because of the extreme violence there. An American nurse, visiting as a volunteer, told Human Rights First researchers that many of the children were suffering from diarrhea and dehydration."); Los Angeles Times, Molly O'Toole, *Borderline: Trump's Immigration Crackdown*, Los Angeles Times (August 5, 2019), available at <https://www.latimes.com/politics/story/2019-08-05/borderline-trumps-immigration-crackdown>.

⁷ Merkley Report, at 51-52; Washington Post, Greg Sargent, *In Scathing Manifesto, An Asylum Officer Blasts Trump's Cruelty to Migrants* (Nov. 12, 2019), available at <https://www.washingtonpost.com/opinions/2019/11/12/scathing-manifesto-an-asylum-officer-blasts-trumps-cruelty-migrants/>; CNN, Priscilla Alvarez, *Senate Report: Whistleblowers Blast Trump Administration's Immigration Policies* (Nov. 14, 2019), available at <https://www.cnn.com/2019/11/14/politics/merkley-asylum-report/index.html>; Los Angeles Times, Molly O'Toole, *Asylum Officers Rebel Against Trump Policies They Say Are Immoral and Illegal* (Nov. 15, 2019), available at <https://www.latimes.com/politics/story/2019-11-15/asylum-officers-revolt-against-trump-policies-they-say-are-immoral-illegal>; This American Life, *The Out Crowd*, Episode 688 (Air Date Nov. 15, 2019), transcript available at

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As recounted on *This American Life*, in June 2019, Doug Stephens was assigned to MPP interview duty. His first interview was father and son asylum applicants from Honduras. The father described encountering criminal cartels, witnessing other migrants being murdered and tortured, fleeing and barely getting away while death threats are being shouted at him. And the father said they had been stopped by the police – who took their money and cell phones. But the father failed to say the magic words: “they threatened me because I’m Honduran.” Doug sent them back to Mexico – under MPP protocol the father had to state, flat-out, those words. He hadn’t.

Two days and four interviews later, Doug had had enough. A trained lawyer, he researched the law and identified seven, separate legal problems with MPP. He told his supervisor he would do no more MPP interviews. The supervisor said that Doug would be subject to discipline and that disciplinary proceedings would begin. USCIS management’s position is that their lawyers have said MPP is legal (notwithstanding pending legal challenges), that Doug received a “lawful” order to work on MPP, and that Doug’s refusal to follow a lawful order constituted insubordination.⁸

Doug responded by drafting a legal memorandum that he initially sent to USCIS management justifying his decision. He also sent the memo to Senator Merkley’s office and to the Union. The federal Whistleblower Protection Act allows federal employees to lawfully make such disclosures to Congress (as well as the Office of Special Counsel, to the agency’s Inspector General and to agency employees designated to receive such disclosures).⁹ After receiving no response from management, he quit. On his last day, he sent his memorandum to the 80 employees in the San Francisco Asylum office.

Doug’s memo is reprinted in Senator Merkley’s report and a copy is attached here as Exhibit 2.¹⁰ He points out that MPP is not supported under existing law, was illegally implemented without following required federal rulemaking procedures and violates international law. He states:

- [T]he MPP both discriminates and penalizes. Implementation of the MPP is clearly designed to further this administration's racist agenda of keeping Hispanic and Latino

<https://www.thisamericanlife.org/688/transcript>. See also Vox, Dara Lind, *Exclusive: Civil Servants Say They're Being Used as Pawns in a Dangerous Asylum Program* (May 2, 2019), available at <https://www.vox.com/2019/5/2/18522386/asylum-trump-mpp-remain-mexico-lawsuit>.

⁸ *This American Life* recorded acting head of USCIS Ken Cuccinelli saying: “I do expect that the professional employees at USCIS will implement the policies in place. They're part of the executive branch, and so long as we're in the position of putting in place what we believe to be legal policies that haven't been found to be otherwise, we fully expect them to implement those faithfully and sincerely and vigorously.”

⁹ See 5 U.S.C. 2302(c)(2)(C)(iii).

¹⁰ At the time he sent his memo to Senator Merkley, Doug was identified an anonymous whistleblower. He later decided to identify himself in reporting by the Los Angeles Times and *This American Life*.

populations from entering the United States. This is evident in the arbitrary nature of the order, in that it only applies to the southern border. It is also clear from the half-hazard implementation that appears to target populations from specific Central American countries

- [I]t is a punitive measure intended to punish individuals who attempt to request protection in the United States.
- [T]he MPP practically ensures violation of our international obligation of non-refoulement.
- [The MPP] process places on the applicants the highest burden of proof in civil proceedings in the lowest quality hearing available. This is a legal standard not previously implemented by the Asylum Office and reserved for an Immigration Judge in a full hearing.
- [E]ven if all the above were remedied, the process is still morally objectionable and contrary to the [USCIS Asylum Office] mission of protection. The Asylum Office would still be complicit in returning individuals to an unsafe and unreasonable situation.

I understand that Doug will be submitting today for the record today written testimony. Council 119 stands firmly behind his insightful statements. Should additional hearings be held we believe that you will find him a most compelling witness.

Union Action: Public Media. I and other Union leaders have exercised our First Amendment rights to express our opinions on behalf of our members. For instance, in a Washington Post opinion article submitted on behalf of our Union, Local 1924 Vice President and Union steward Charles "Chuck" Tjersland said: "the standards for demonstrating [fear of waiting in Mexico] are almost impossibly tough. When I went to San Ysidro, Calif., to conduct interviews for [MPP], I spoke with people whose heartbreaking stories, I knew, wouldn't be good enough."¹¹ He went on to say:

When I started working as an asylum officer more than 26 years ago, it seemed like a dream job. At the time, hundreds of thousands of Central Americans were fleeing horrific political repression by their governments, which had the backing of the United States. I was a law student in Washington, working at an aid center for recent immigrants. Most of my friends and colleagues were pretty skeptical of the federal government. But I thought that this could be a way to help people, while fighting for what I thought America should be: a beacon of freedom, offering refuge to those in need.

¹¹ Washington Post, Charles Tjersland, *I Became an Asylum Officer to Help People. Now I put Them Back in Harm's Way* (July 12, 2019), available at https://www.washingtonpost.com/outlook/i-became-an-asylum-officer-to-help-people-now-i-put-them-back-in-harms-way/2019/07/19/1c9f98f0-a962-11e9-9214-246e594de5d5_story.html.

The Trump administration's policies have turned the process into a Kafkaesque nightmare. My colleagues and I have interviewed thousands of asylum seekers from Guatemala, El Salvador and Honduras and told them that they had to return to Mexico while their cases were processed — knowing all the while that they might be kidnapped, assaulted or killed. Under MPP, also known as "Remain in Mexico," we're not allowed to let them stay here. We're forced to put them back in danger.

Chuck was subsequently interviewed by Steve Inskeep, the host of National Public Radio's (NPR's) Morning Edition.¹² Again speaking in his capacity as a Union leader he said:

- INSKEEP: Do you get messages from your superiors, explicit or implicit, to basically send everyone to Mexico?

TJERSLAND: It's implicit. It's not - there's no explicit order saying that. But by rigging the standards as has been done, that's exactly how it comes across.

- INSKEEP: Is there a story of someone you sent back to Mexico that you had trouble getting out of your head when you went home that night?

TJERSLAND: Oh, yeah, yeah, yeah. I mean, not knowing where, you know, where, you know, a man or a woman was going to be keeping their children safe, literally - where are they going to be?

- INSKEEP: Would she ask you, what am I supposed to do when I get to Mexico?

TJERSLAND: Well, you know, this is my - these are the questions we're supposed to ask. We're supposed to ask, so if you were to go back today, where would you be going? Where are you going to go? And they're really - they are at their wit's end. They're saying, the shelter is full. We've been told we can't go back there.

- INSKEEP: Do you have colleagues who've quit?

TJERSLAND: We've had colleagues that have quit. We're driving away some of the brightest minds, most motivated hearts. Many still remain. Don't get me wrong. But it's really a shame.

¹² NPR Morning Edition, *Asylum Officers Are Being Used As An Immigration Deterrent, Tjersland Says* (Aug.19, 2019), available at <https://www.npr.org/2019/08/16/751672742/asylum-officers-are-being-used-as-an-immigration-deterrent-tjersland-says>.

DHS Actions and Reactions

The current political leadership of the Department of Homeland Security (DHS) and USCIS has aggressively -- and wrongfully -- reacted to these actions. They have also taken prohibited retaliatory measures.

Partisan Broadcasts to Employees. Ken Cuccinelli was publicly named acting USCIS Director on June 10, 2019.¹³ He has since been named acting Deputy Secretary of DHS. On June 10, he sent the following email to USCIS staff:

We must work hand in hand with our colleagues within DHS along with our other federal partners to address challenges to our legal immigration system and enforce existing immigration law. Together we will continue to work to stem the crisis at our southwest border ... We will also work to find long term solutions to close asylum loopholes that encourage many to make the dangerous journey into the United States so that those who truly need humanitarian protections and meet the criteria under the law receive them

Mr. Cuccinelli's first-day of work statement was not well received by the workforce. According to the media report quoting the email, "one DHS official said the announcement was dropped on employees suddenly and could be distracting during an already tumultuous time. 'My concern is with employees and their morale,' the official said. ... Former USCIS officials said the email sent by Cuccinelli ... was concerning. ... 'Everything in that email suggests he is more interested in enforcement than in services, which is the agency's mission,' said Ur Jaddou, former chief counsel at the agency."¹⁴

Mr. Cuccinelli then went further. Eight days after his start, he sent on June 18, 2019 a highly-partisan broadcast email to Asylum Division employees. According to a contemporaneous media report:

Cuccinelli began the message by relaying the number of apprehensions at the southwest border and that the system had reached a breaking point. He told staffers that USCIS needed to do its "part to help stem the crisis and better secure the homeland."

"Asylum officers, you took an oath to support and defend the constitution of the United States. As a public servant your role as an asylum officer requires faithful application of the law."

¹³ USCIS Press Release, *Cuccinelli Named Acting Director of USCIS* (June 10, 2019), available at <https://www.uscis.gov/news/news-releases/cuccinelli-named-acting-director-uscis>.

¹⁴ BuzzFeed News, Hamed Aleaziz, *Trump's New Immigration Services Chief Took a Hard Line on Immigrants' Children* (June 10, 2019), available at <https://www.buzzfeednews.com/article/hamedaleaziz/trump-has-appointed-an-immigration-hardliner-to-run-an>.

The acting director cited statistics used by the Trump administration about the individuals who do not show up for their immigration court hearings and those who do not end up being granted asylum.

Cuccinelli then told staffers, in an apparent warning, that the gulf between the number of individuals granted passage under the screening and those who are granted asylum by an immigration judge was wider than the “two legal standards would suggest.”

“Therefore, USCIS must, in full compliance with the law, make sure we are properly screening individuals who claim fear but nevertheless do not have a significant possibility of receiving a grant of asylum or another form of protection available under our nation’s laws,” he said.

Cuccinelli added that officers have tools to combat “frivolous claims” and to “ensure that [they] are upholding our nation’s laws by only making positive credible fear determinations in cases that have a significant possibility of success.”

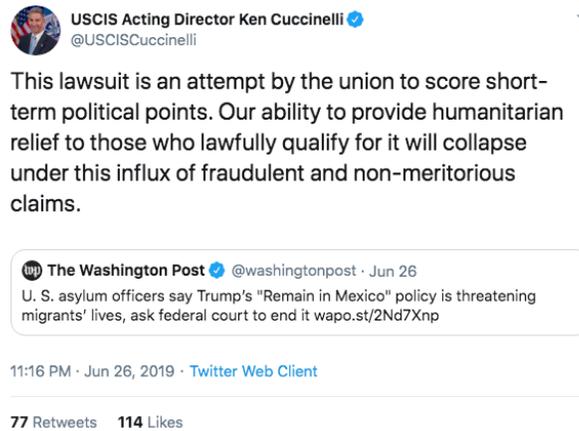
One official at the Department of Homeland Security — of which USCIS is a part — said the email was “insane,” while former officials said the email was clearly a threat.¹⁵

Needless to say, we regarded such messages as an affront to the professionalism and loyalty of the Asylum Officer Corps. We have always been fervently committed to upholding our oath to defend the Constitution and faithfully apply the laws of the United States of America; and we have served with great distinction so doing for almost three decades. I can confirm that Mr. Cuccinelli’s harsh admonishment of USCIS Asylum Officers has had an intimidating effect upon employee morale and performance.

Attacking the Union. Mr. Cuccinelli continued on this course in ensuing days. On June 26, 2019, we filed our Amicus brief supporting the legal challenge to MPP.¹⁶ Late that evening, Mr. Cuccinelli, a prolific Twitter user, tweeted “[t]his lawsuit is an attempt by the union to score short-term political points.”

¹⁵ BuzzFeed News, Hamed Aleaziz, *A Top Immigration Official Appears to Be Warning Asylum Officers About Border Screenings* (June 18, 2019), available at <https://www.buzzfeednews.com/article/hamedaleaziz/uscis-director-asylum-officers-email>.

¹⁶ *Innovation Law Lab v. McAleenan*, No. 19-15716 (9th Cir.) (Amicus brief filed June 26, 2019).



Minutes later, he tweeted “[t]his demonstrates the complaining union leaders are choosing to deny reality.”



The next day, USCIS issued a press release quoting Mr. Cuccinelli accusing me and my leadership of “playing games” and engaging in a “cheap political stunt.”¹⁷ That night, Mr. Cuccinelli was interviewed on CNN by Erin Burnett.¹⁸ When asked whether we were right when we said in our Amicus brief (at page 24) that Asylum Officers “should not be forced to honor departmental directives that are fundamentally contrary to the moral fabric of our Nation and our international and domestic legal obligations,” he said:

Absolutely not. If you look at the rest of their filing, you'll also see that they say there isn't a problem basically on the border. We can handle this. We don't need to institute

¹⁷ Press Release, *USCIS Acting Director Cuccinelli Response to Amicus Brief Filed by AFGE Local 1924 Leadership* (June 27, 2019), available at <https://www.uscis.gov/news/news-releases/uscis-acting-director-cuccinelli-response-Amicus-brief-filed-afge-local-1924-leadership>. Mr. Cuccinelli is quoted in more detail as follows:

“Union leadership continues to play games while the border crisis intensifies. Lives are being lost, detention facilities are unsustainably overcrowded, and illegal aliens with frivolous claims continue to overwhelm our system. The fact of the matter remains that our officers signed up to protect the truly vulnerable, our asylum system, and most importantly, our country. A cheap political stunt helps no one and certainly does not help to contain this crisis.

¹⁸ CNN, *Erin Burnett Out Front* (June 27, 2019), available at <https://podcasts.apple.com/us/podcast/biden-sanders-about-to-take-center-stage-as-democrats/id475738195?i=1000443007137>.

special considerations, things like MPP that's being worked on with Mexico and expanded. They're in denial of reality.

And thankfully most of our asylum officers don't think that. The union has gone ahead and filed this Amicus brief, but it clearly doesn't represent the state of play at the border or that we are dealing with in our agency as it relates to asylum.

Mr. Cuccinelli's words were chilling and intimidating then; they are chilling and intimidating now. That should be obvious when coming from the head of the agency -- who very publicly castigates a Union for exercising its lawful rights on behalf of its members.

Union Reaction: Grievance Filed.¹⁹ AFGE Council 119 reacted to the foregoing by filing a national-level grievance against Mr. Cuccinelli. The grievance alleged Mr. Cuccinelli violated multiple provisions of the Collective Bargaining Agreement of 2016 between USCIS and Council 119 and the Federal Labor Relations Act (FLRA) by committing one or more egregious unfair labor practices.²⁰ More specifically, it charged Mr. Cuccinelli with making hostile and unfounded statements about our Amicus brief filing by denouncing the Union for a brief he believes does not represent the views of our members, and by challenging the legitimacy of the USCIS employees who have exercised their First Amendment rights and who have exercised their rights to participate in and act for the Union. His actions have had the effect of interfering with the Union's effective representation of the bargaining unit — and hindered the employees from exercising their first amendment rights through their Union's advocacy on their behalf.

As required under the Collective Bargaining Agreement, Council 119 submitted the grievance to USCIS on August 1, 2019; it was rejected on August 29, 2019. USCIS justified its decision on the grounds that Mr. Cuccinelli was merely expressing his personal opinion and “[t]here is simply nothing hostile about [his] statements.” To continue defend our freedom of expression and the rights of USCIS employees we invoked our right to third-party arbitration on September 29, 2019. Council 119 and Agency representatives are seeking the assistance of the Federal Mediation and Conciliation Service to select an arbitrator and schedule a hearing in the matter.

Mr. Cuccinelli Refuses to Meet with the Union. Mr. Cuccinelli has repeatedly rebuffed the Union's requests to meet and address the concerns of our members. At his first and only town hall meeting with USCIS employees on October 23, 2019, I asked Mr. Cuccinelli if he would meet with the Union. According to a media report, he said: “I believe the day you tried to get on

¹⁹ Some of the information found in this section is not currently in the public domain. AFGE, the party that sent or received the information discussed here, now consents to its publication.

²⁰ The grievance alleged that Mr. Cuccinelli's statements were unfair labor practices inasmuch as the FLRA makes it an unfair labor practice for an agency “to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter.” 5 U.S.C. § 7116(a)(1).

my calendar was the day you went on CNN and had some things to say, and I didn't want to legitimize some of what you were saying there ... Maybe another day, but it's hard to meet with people who are suing you.”²¹ His refusal is particularly disturbing in view of the contentious negotiations that occurred between the Union and the Agency over our term collective bargaining agreement (it has been sent to our membership for ratification).

Hunting for Whistleblowers. Mr. Cuccinelli has made finding and punishing “leakers” a top priority. He boasted about it during a November 3, 2019 TV interview.

[I]n my first 100 days here we disciplined 27 leakers. We have a handful more still in the pipeline for discipline. I have had confrontations unfortunately with employees instigated by them, not by me, on policy matters that our agency is engaged in, and I think those discussions, frankly, are more appropriate to the political arena than to an employee-management relationship.²²

Of course, this kind of talk is chilling and intimidating for everyone, particularly whistleblowers. The work of Asylum Officers has come under increased scrutiny; many are fearful for their jobs. Regular notices warn employees of disciplinary action for those who “leak” internal policy and procedural guidance documents to outside parties. Moreover, the anxiety is now even higher because, other than Mr. Cuccinelli's boast, USCIS has provided the Union with no formal notification of such a high number of disciplinary actions having been taken against “leakers.” This Subcommittee can and should demand answers.

Leadership “Reassignment.” In late September 2019, Acting Director Cuccinelli took the highly unusual step of reassigning the Asylum Division's long-time and highly respected Chief to a lower-level management position. As described in Senator Merkley's report:

The reassignment of John L. Lafferty, an experienced career manager, delivered a harsh message to USCIS staff. ... Whistleblowers have reported that Mr. Lafferty was told he was being reassigned just days before it was announced. It took the form of a “rubber-stamped” letter from Acting Director Cuccinelli. Mr. Lafferty reluctantly accepted the transfer – albeit by informing management that he considered it “involuntary.”

It is not apparent whether there are specific actions that cost Mr. Lafferty his job, but whistleblowers report that his firing is perceived as the result of acting as a committed, civil servant who played it by the book. In other words, he was too neutral. His reassignment was intended to send a message, and that message was received. Rank-and-

²¹ BuzzFeed News, Hamed Aleaziz, *There Was a Tense Exchange Between One of Trump's Top Immigration Officials and an Asylum Officer* (Oct. 23, 2019), available at <https://www.buzzfeednews.com/article/hamedaleaziz/ken-cuccinelli-uscis-meeting-tense-exchange>.

²² Full Measure, *Immigration Battles* (Nov. 3, 2019), available at <http://fullmeasure.news/news/immigration/immigration-battles>.

file officers drew their own obvious conclusion: that Lafferty was fired for applying asylum law as written rather than skewing it to meet the administration's political goals.²³

I want to elaborate and confirm that Mr. Lafferty's removal dealt a tremendous blow to the morale of the workforce, which took this adverse action as a warning to all concerned. The exact reasons for Mr. Lafferty's transfer remain unknown to the Union. However, our members believe it was because of his ardent defense of the integrity of the Asylum Program, his insistence on proper application of the law — as well as his passionate devotion to the Asylum Officer Corps which has come under attack by the Trump administration.

Retaliatory Investigation. Despite the legal right of Union officials to speak freely to Congress, the media and the public about matters that affect the morale, working conditions and welfare of our members, I and my Union colleagues have continuing concerns about possible retaliation instigated by political leadership.

A notable current example is an ongoing internal investigation USCIS is conducting of Local 1924 Vice President Chuck Tjersland, discussed above, who has been formally warned for having expressed his opinions – in his official Union capacity – to the Washington Post and NPR.²⁴ That is wrong. It again sends a chilling and intimidating message to everyone. Again, this Subcommittee can and should demand answers.

What Can Congress Do?

I close with four recommendations about what you and your colleagues can and should do.

1. **More Hearings Like This.** Over the past three years we have repeatedly seen how bad publicity causes Trump administration policy to veer and reverse course. The evidence we are providing to today is shocking. Congressional hearings uniquely provide a forum for receiving such evidence.
2. **Investigations.** By law, Congress is in a special position when it comes to unearthing and analyzing evidence. As noted above, the federal Whistleblower Protection Act allows federal employees to lawfully make disclosures to Congress.²⁵ Congress can and should leverage such authority to gather evidence from whistleblowers and others. The

²³ Merkley Report, at 41-42 (footnotes omitted). See also CNN, Geneva Sands, *US Asylum Chief Reassigned After Critical Email Publicized* (Sept. 4, 2019), available at <https://www.cnn.com/2019/09/04/politics/uscis-asylum-john-lafferty/index.html>.

²⁴ The information in this section about Chuck is not currently in the public domain. He now consents to its publication.

²⁵ See 5 U.S.C. 2302(c)(2)(C)(iii).

evidence can and should be used as a basis for legislation, hearings and further investigation. Senator Merkley's report is a good example.

3. **Appropriations.** Because Congress controls appropriations, it has and should continue to insert agency mandates into spending bills. For example, the *Consolidated Appropriations Act of 2019*, enacted in February 2019, specifically prohibited DHS from using information obtained by the Department of Health and Human Services to apprehend, detain, or remove sponsors of unaccompanied minors.²⁶ Such mandates should continue to be imposed on DHS.
4. **Improved Whistleblower Protections.** We know that whistleblowers provide vital information used to combat waste, fraud and abuse. But law to protect them is missing and imperfect. Much is still left to be done. We need legislation which establishes stronger, more effective consequences for wrongful retaliation and disclosures of confidential identities, and which further enshrines the independence of offices of inspector generals, the Office of Special Counsel, and the Congress.

Conclusion

Asylum Officers take their oaths to preserve, protect and defend the Constitution seriously. They are now under daily attack from the White House, political appointees and extremist media. Their safety, careers and reputation are all at risk.

You are helping with his hearing today. Please keep helping.

Thank you.

²⁶ H.J.Res.31, Consolidated Appropriations Act 2019 § 224 (Feb. 25, 2019), <https://www.congress.gov/116/plaws/publ6/PLAW-116publ6.pdf>.