

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
DAVID L. ANDERSON
United States Attorney
ALEXANDER K. HAAS, SBN 220932
Branch Director
ERIC J. SOSKIN
Senior Trial Counsel
KERI L. BERMAN
KUNTAL V. CHOLERA
JOSHUA M. KOLSKY, DC Bar No. 993430
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-7664
Facsimile: (202) 616-8470
Email: joshua.kolsky@usdoj.gov

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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INTRODUCTION

Plaintiffs have sought reconsideration of the Court’s dismissal of their claims challenging the lawfulness of Kevin McAleenan’s former service as the Acting Secretary of Homeland Security. The Court should deny Plaintiffs’ motion. Though Plaintiffs are correct that the President did not designate Mr. McAleenan as Acting Secretary under the Federal Vacancies Reform Act (“FVRA”), Plaintiffs’ claims still should be dismissed. Mr. McAleenan lawfully assumed the position of Acting Secretary following the resignation of Secretary Nielsen, under the Department’s order of succession that Secretary Nielsen established in April 2019. Although the Court previously disagreed with Defendants’ position, Defendants respectfully submit additional explanation below to show precisely how Secretary Nielsen established the order of succession and why it applied when she resigned notwithstanding Section II.A in DHS Delegation Order 00106.

BACKGROUND

On August 7, 2020, the Court granted in part, denied in part, and deferred ruling in part on Defendants' Motion to Dismiss the Amended Complaint in this case. ECF No. 177 ("Order"). As relevant here, the Court dismissed claims Three, Five, and Eight, each of which challenged the lawfulness of former Acting Secretary of Homeland Security Kevin McAleenan's service. *Id.* at 22-26. The Court disagreed with Defendants' argument that in April 2019, then-Secretary Kirstjen Nielsen established a new order of succession that controlled upon her resignation. *Id.* The Court determined that the Secretary's April 2019 order "only replaced Annex A and made no other changes to Delegation No. 00106" and that Annex A "only applied when the Secretary was unavailable due to disaster or catastrophic emergency." *Id.* at 25. The Court also suggested that Secretary Nielsen did not intend to modify the order of succession applicable in cases of the Secretary's death, resignation, or inability to perform the functions of the office. *See id.* ("Had Secretary Nielsen intended to modify the order of succession applicable in case of the Secretary's death, resignation, or inability to perform the functions of the Office, then her order could have so stated.").

Although the Court determined that the April 2019 order did not control the order of succession upon Secretary Nielsen’s resignation, it found that the President nevertheless had the discretion to appoint Mr. McAleenan as Acting Secretary as long as his appointment was permitted by the FVRA, and that “Plaintiffs do not allege that McAleenan failed to meet one of the three options provided by the FVRA for the temporary appointment of officers.” *Id.* at 26. The Court therefore granted Defendants’ motion to dismiss these claims.

On September 10, 2020, Plaintiffs moved for reconsideration of the Court's ruling.

STANDARD OF REVIEW

Reconsideration is appropriate “if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) there is an intervening change in controlling law.” *Cty. of Santa Clara v. Trump*, 267 F. Supp. 3d 1201, 1207-08 (N.D. Cal. 2017) (quoting *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)).

ARGUMENT

I. Acting Secretary McAleenan's Service Was Lawful

Plaintiffs seek reconsideration by pointing to various materials that “clarify, in a manner and to an extent not previously available to Plaintiffs, that, even if the President could have used the FVRA to appoint Mr. McAleenan, as this Court held, he did not use that authority in this case.” Mot. at 7. Plaintiffs are correct that the President did not appoint Acting Secretary McAleenan under the FVRA. Nevertheless, Plaintiffs’ motion should be denied because Mr. McAleenan’s service as Acting Secretary was authorized under 6 U.S.C. § 113(g)(2), for the reasons Defendants presented previously, which are further expanded upon below.

On April 9, 2019, then-Secretary Nielsen exercised her authority under 6 U.S.C. § 113(g)(2), and designated a new order of succession for the office of Secretary of Homeland Security. This order applied to all vacancies in the office, regardless of the reason. Nevertheless, the Court found that Secretary Nielsen did not intend to modify the order of succession. Order 25 (“Had Secretary Nielsen intended to modify the order of succession applicable in case of the Secretary’s death, resignation, or inability to perform the functions of the Office, then her order

1 could have so stated.”). Defendants respectfully disagree with that conclusion.

2 At the outset, it is critical to recognize the distinction between an order of succession and
 3 a delegation of authority. 6 U.S.C. § 113(g)(2) empowers the Secretary to designate an “order of
 4 succession” for officers to serve as Acting Secretary in the event of a vacancy. A different
 5 provision, 6 U.S.C. § 112(b)(1), empowers the Secretary to “delegate” her authority to other
 6 officials in the agency, even when the Secretary continues to occupy her office. In other words,
 7 an order of succession determines who will inherit the office of Secretary in an acting capacity
 8 when it is vacated. A delegation permits a subordinate official to exercise the Secretary’s
 9 authority, subject to any limitations described in the delegation, while the Secretary remains in his
 10 or her position.

11 It is apparent that then-Secretary Nielsen’s April 2019 order set forth an order of
 12 *succession*. First, the order expressly states multiple times that Secretary Nielsen was designating
 13 a new “order of succession.” Specifically, the order is titled “[a]mending the *Order of Succession*
 14 in the Department of Homeland Security” and states “I hereby designate the *order of succession*
 15 for the Secretary of Homeland Security as follows[.]” Decl. of Juliana Blackwell, Ex. 1, at 2 (ECF
 16 No. 166-3) (emphasis added). The accompanying memorandum, which Secretary Nielsen signed,
 17 also expressly stated that she was amending the “order of succession.” *See id.* at 1 (the subject of
 18 the memorandum Secretary Nielsen signed was “Designation of an Order of Succession for the
 19 Secretary”); *id.* (the summary of the memorandum explained “you have expressed your desire to
 20 designate certain officers of [DHS] in order of succession to serve as Acting Secretary”); *id.* (the
 21 action line of the memorandum noted that “[b]y approving the attached document, you will
 22 designate your desired order of succession for the [DHS Secretary]”).

23 Beyond Ms. Nielsen’s express language, the statutory authority she relied on—Section
 24 113(g)(2)—shows that she changed the order of succession, not just the delegation of authority
 25 that applied “during a disaster or catastrophic emergency.” As noted, Section 113(g)(2) empowers
 26 the Secretary to designate an “order of succession” for officers to serve as Acting Secretary in the
 27 event of a vacancy. Secretary Nielsen’s order and memorandum expressly cite this statutory
 28 authority three times. Accordingly, the April 2019 order plainly established a new order of

1 succession. Plaintiffs cannot explain why Secretary Nielsen would have invoked her Section
 2 113(g)(2) authority to designate the order of *succession* and repeatedly stated that she was
 3 designating an order of *succession* if she was actually doing nothing but exercising her authority
 4 under Section 112(b)(1) and amending the order for *delegated* authority during an emergency.

5 The Court determined that “the April 9th order only replaced Annex A and made no other
 6 changes to Delegation No. 00106” such that “when Secretary Nielsen resigned ‘the orderly
 7 succession of officials [was] governed by Executive Order 13753, amended on December 9, 2016,’
 8 but not the amended Annex A, which only applied when the Secretary was unavailable due to
 9 disaster or catastrophic emergency.” Order 25 (alteration in original). But although Secretary
 10 Nielsen changed Annex A’s list of officers, she also provided that Annex A would now perform
 11 two separate functions: it would both designate the agency’s order of succession under Section
 12 113(g)(2) and amend the list of officials in the order for delegation of authority.

13 Notably, the April 9 order was the first order of succession under Section 113(g)(2).
 14 Section II.A of Revision 8 to DHS Delegation No. 0106, was not a Section 113(g)(2) order of
 15 succession.¹ At the time Secretary Johnson signed the delegation, the Secretary lacked authority
 16 to designate an order of succession. At that time, only the President had the authority (under the
 17 FVRA) to designate an order of succession. *See* 5 U.S.C. § 3345(a)(2)-(3) (allowing the President
 18 to designate an acting official).² Thus, by tracking the FVRA, Section II.A merely acknowledged
 19 the President’s authority; it noted that the President’s order of succession would apply to a vacancy
 20 covered by the FVRA. Section II.A even listed the same triggering events as the FVRA. *Compare*
 21 5 U.S.C. § 3345(a). Section II.A did not purport to set an order of succession under Section
 22 113(g)(2) because, again, that authority did not exist at that time.³

23 ¹ Section II.A explained that, “In case of the Secretary’s death, resignation, or inability to perform
 24 the functions of the Office,” the order of succession would be governed by Executive Order 13753.

25 ² It was only after Secretary Johnson had signed Revision 8 that Congress gave the Secretary the
 26 power to designate an order of succession that would apply “[n]otwithstanding” the FVRA. *See*
 27 National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1903, 130 Stat.
 2000 (2016) (codified at 6 U.S.C. § 113(g) (Dec. 23, 2016)).

28 ³ In Section II.B, Secretary Johnson separately exercised his authority under 6 U.S.C. §

1 Therefore, when Ms. Nielsen invoked Section 113(g)(2)—which she expressly did three
 2 times—she exercised, for the first time, the Secretary’s authority under that statute and designated
 3 an order of succession that applied “[n]otwithstanding” the FVRA, 6 U.S.C. § 113(g)(2). As a
 4 matter of law, that order of succession would necessarily supersede the order of succession under
 5 Executive Order 13753 when an official on the Secretary’s list was able to serve as Acting
 6 Secretary. There is no logical reason why Section II.A, which was simply a statement
 7 acknowledging the President’s authority under the FVRA, could somehow control over Secretary
 8 Nielsen’s express designation of the order of succession, which by statute applies notwithstanding
 9 the FVRA.

10 The text of the April 2019 order cited Section 113(g)(2) and used that authority to
 11 “designate the order of succession for the Secretary of Homeland Security as follows[.]” The
 12 information that “follows” included the amended list of officials in Annex A. Annex A was
 13 introduced with another clause and title showing that it would simultaneously continue to serve its
 14 original function as an order for delegation of authority. But Annex A’s amended list was followed
 15 by a new provision that had not appeared in the delegation-only version of Annex A. The new
 16 provision noted that “[n]o individual who is serving in an office herein listed in an acting capacity,
 17 by virtue of so serving, shall act as Secretary pursuant to this designation.” That reference to a
 18 “designation”—rather than a “delegation”—is yet another textual and structural acknowledgment
 19 that Annex A had executed the Secretary’s new authority under Section 113(g)(2). *See* 6 U.S.C.
 20 § 113(g)(2) (authorizing the Secretary to “designate such other officers . . . in further order of

21
 22 112(b)(1)—authority that the Secretary had long possessed—and delegated the authorities of his
 23 office to a list of officials in the event that he was temporarily “unavailable to act during a disaster
 24 or catastrophic emergency.” This was not an order of succession—the circumstances addressed
 25 by Section II.B are not the kind of vacancy that would trigger the FVRA, and the Section II.B
 26 delegation would not make someone exercising that authority an Acting Secretary. *Cf. English v.*
Trump, 279 F. Supp. 3d 307, 322 (D.D.C. 2018) (“Defendants argue, with some force, that
 27 [unavailability to act is] commonly understood to reflect a temporary condition, such as not being
 28 reachable due to illness or travel,” rather than a permanent condition such as a vacancy.). And, as
 explained, the Secretary had no statutory authority to designate an order of succession at this time.

1 succession to serve as Acting Secretary”).⁴

2 For these reasons, the Court’s conclusion that the April 2019 order did not control the order
 3 of succession at the time of Secretary Nielsen’s resignation is only possible if one reads out of the
 4 order all three references to Section 113(g)(2), disregards its structure (what introduces and
 5 concludes its list of officials), and reads Secretary Johnson’s document as creating an order of
 6 succession that he lacked the power to designate. At minimum, the Court should defer to DHS’s
 7 interpretation of Secretary Nielsen’s order, which is the agency’s own internal document. *Cf.*
 8 *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (explaining that the Court ‘ha[s] deferred to ‘official
 9 staff memoranda’’’ (citation omitted)).

10 **II. The GAO Decision Is Flawed**

11 Plaintiffs discuss an August 14, 2020 decision by the Government Accountability Office
 12 (“GAO”) concluding that Mr. McAleenan did not lawfully assume the office of Acting Secretary.
 13 ECF No. 183-3 (“Decision”). The Court should not follow the analysis in the GAO decision,
 14 which suffers from at least two fundamental flaws and is not binding on the Court or DHS.

15 First, the Decision wrongly assumes that the controlling document is Revision 8.5 to DHS
 16 Delegation No. 00106, and hangs its analysis on that administrative document. *See* Decision at 6
 17 & n.10 (characterizing DHS, Orders of Succession and Delegations of Authorities for Named
 18 Positions, Delegation No. 00106, Revision No. 08.5 (Apr. 10, 2019) as “April Delegation”); *id.* at
 19 9 (claiming that Ms. Nielsen “only amended Annex A “[w]hen [she] issued the April Delegation”
 20 (emphasis added)). The Decision focuses on the “plain language” and the “express terms” of the
 21 wrong document. *See* *id.* at 7, 8, 9. As the Secretary, Ms. Nielsen was the only person in the
 22 agency who could designate an order of succession, 6 U.S.C. § 113(g)(2), and she never signed or
 23

24 ⁴ That additional sentence at the conclusion of Annex A is a mainstay in orders of succession:
 25 “[W]hen Presidents issue orders of succession as an advance exercise of their authority to name
 26 acting officials under the [FVRA], they often specify that ‘[n]o individual who is serving in an
 27 office . . . in an acting capacity, by virtue of so serving, shall act as [the agency head] pursuant to
 28 this order.’” Office of Legal Counsel, Designating an Acting Director of National Intelligence, 43
 Op. O.L.C. __, *8 (Nov. 15, 2019), <https://www.justice.gov/olc/file/1220586/download>; *id.* at *8
 n.3-4 (citing illustrative orders of succession).

1 otherwise issued Revision 8.5 to DHS Delegation No. 00106. But she did sign her April 9 order—
 2 and that order controls. More than simply analyzing the wrong document, the Decision explicitly
 3 tosses aside the plain language in the memorandum that Ms. Nielsen signed on the line reading
 4 “[a]pprove.” *See id.* at 9 (“Notwithstanding the General Counsel’s statement in the Memorandum
 5 asserting the Secretary’s intentions in amending the April Delegation, the plain language of the
 6 delegation controls, and it speaks for itself.”).

7 The Decision similarly errs in concluding that Ms. Nielsen adopted Executive Order 13753
 8 as her own order of succession under § 113(g)(2) in February 2019. *See id.* at 5. To draw this
 9 conclusion, the Decision again relies on an internal administrative document (Revision 8.4 to DHS
 10 Delegation No. 00106) that Ms. Nielsen never signed. *See id.* at 5 n.7 (citing DHS Orders of
 11 Succession and Delegations of Authorities for Named Positions, DHS Delegation No. 00106,
 12 Revision No. 08.4 (Feb. 15, 2019)). But in the February 2019 document the Decision cites, Ms.
 13 Nielsen set an order of succession for the office of Strategy, Policy, and Plans—not for the office
 14 of the Secretary—in Annex U. Based on the faulty assumption that Ms. Nielsen designated her
 15 own order of succession for the office of the Secretary in February 2019, the Decision wrongly
 16 assumes that Ms. Nielsen needed to say that her order superseded Section II.A. *Cf. id.* at 9. She
 17 did not. Rather, Ms. Nielsen’s order superseded the Executive Order and Section II.A, which were
 18 based entirely on the FVRA, as a matter of law. *See* 6 U.S.C. § 113(g)(2) (Secretary’s designated
 19 order of succession governs in the event of a vacancy, “[n]otwithstanding” the FVRA).

20 Second, the Decision does not grapple with the consequences of its unusual reading of Ms.
 21 Nielsen’s order because the Decision confuses orders of succession and delegations of authority.
 22 The Decision concludes that Ms. Nielsen designated an order of succession when she amended
 23 Annex A because she altered Section II.B and “[e]ach ground,” that is, Section II.A and Section
 24 II.B, “had its own order of succession.” Decision at 5. Thus, the Decision concludes, Ms. Nielsen
 25 “effectively established two different orders of succession.” *Id.* at 7. But the Decision is only able
 26 to reach this conclusion by ignoring the difference between orders of succession and delegations
 27 of authority and the different sources of the Secretary’s statutory authority for each. *Compare* 6
 28 U.S.C. § 113(g)(2) (order of succession), *with id.* § 112(b)(1) (delegation of authority). As

1 explained, when Ms. Nielsen signed her order, Section II.B in DHS Delegation No. 00106 was not
2 an order of succession—it was a delegation of authority. So if, as the Decision concludes, Ms.
3 Nielsen's order applied only to Section II.B, then she set an order for delegation of authority, not
4 an order of succession. And under that reading, the Decision has no explanation for how—by
5 signing an order to “amend the order of succession” under Section 113(g)(2)—Ms. Nielsen
6 actually did nothing but amend the order for delegation of authority under Section 112(b)(1). In
7 fact, she employed both powers and thus provided that Annex A would serve both succession and
8 delegation purposes.

9 **CONCLUSION**

10 For the foregoing reasons, the Court should deny Plaintiffs' motion for reconsideration.

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Respectfully submitted,

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14 JEFFREY BOSSERT CLARK
15 Acting Assistant Attorney General

16 ALEXANDER K. HAAS, SBN 220932
17 Branch Director

18 /s/ Joshua Kolsky
19 KERI L. BERMAN
20 KUNTAL V. CHOLERA
21 JOSHUA M. KOLSKY, DC Bar 993430
22 ERIC J. SOSKIN
23 Trial Attorneys
24 U.S. Department of Justice
25 Civil Division, Federal Programs Branch
26 P.O. Box 883
27 Washington, D.C. 20044
28 joshua.kolsky@usdoj.gov

Attorneys for Defendants