



One Hundred Sixteenth Congress  
Committee on Homeland Security  
U.S. House of Representatives  
Washington, DC 20515

November 15, 2019

The Honorable Gene Dodaro  
Comptroller General of the United States  
U.S. Government Accountability Office  
441 G. Street, NW  
Washington, DC 20548

Dear Comptroller General Dodaro:

We are writing to express serious concerns with the legality of the appointment of Chad Wolf as Acting Secretary of Homeland Security and Ken Cuccinelli as Senior Official Performing the Duties of Deputy Secretary.

On Wednesday, Mr. Wolf was appointed Acting Secretary pursuant to an “Amendment to the Order of Succession for the Secretary of Homeland Security” issued by then-Acting Secretary Kevin McAleenan on November 8, 2019.<sup>1</sup> This Amendment sought to elevate the position of Under Secretary for Strategy, Policy, and Plans—the position to which Mr. Wolf has recently been confirmed by the Senate—within the order of the succession. However, recently released documents suggest that the installation of Mr. Wolf as the Acting Secretary may violate the law, as Mr. McAleenan may not have been lawfully serving as Acting Secretary.

If so, numerous actions taken by both Mr. McAleenan and Mr. Wolf may be invalid, including Mr. Wolf’s designation on Wednesday of Ken Cuccinelli as Senior Official Performing the Duties of Deputy Secretary. This designation is the latest attempt to install Mr. Cuccinelli in a senior leadership position at the Department of Homeland Security when the Administration knows that the Senate would not confirm him to that—or any other—position.

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<sup>1</sup> Department of Homeland Security, *Amendment to the Order of Succession for the Secretary of Homeland Security* (Nov. 8, 2019) (attached to this letter as Enclosure A).

On April 10, 2019, prior to her departure, then-Secretary Kirstjen M. Nielsen updated the internal Department policy for “DHS Orders of Succession and Delegations of Authorities for Named Positions.”<sup>2</sup> In that update, Secretary Nielsen changed the order of delegation of authority for the position of Secretary “in the event I am unable to act during a disaster or catastrophic emergency.” However, Secretary Nielsen did not change the order of succession “[i]n case of the Secretary’s death, resignation, or inability to perform.” Instead, she left in place the line of succession under Executive Order 13753. At the time, Mr. McAleenan was not next in the order of succession under that Executive Order.<sup>3</sup> In fact, the Department appears to have skipped over two Senate-confirmed officials, the Under Secretary for National Protection and Programs (since renamed by law as the Director of Cybersecurity and Infrastructure Agency) and the Under Secretary for Intelligence and Analysis.

This act may have rendered Mr. McAleenan’s appointment unlawful from the start. That would place many of Mr. McAleenan’s decisions in legal jeopardy, including the November 8, 2019, Amendment that was the basis for Mr. Wolf’s appointment.

The authority for Secretary Nielsen’s order falls under the Homeland Security Act, which by its terms supersedes the Federal Vacancies Reform Act (FVRA).<sup>4</sup> The Homeland Security Act is the only statutory authority for appointing an Acting Secretary of Homeland Security, and it appears that it was not followed in this instance for Mr. McAleenan or, by extension, Mr. Wolf.

Even if Mr. McAleenan’s appointment was somehow valid under the FVRA, however, his November 8 Amendment to the DHS line of succession may still be invalid. Mr. McAleenan issued that Amendment after exceeding the 210-day FVRA statutory limit for Acting officials—meaning that his own appointment may have already expired.<sup>5</sup>

These maneuvers are part of a troubling pattern of legal contortions, as well as an end-run around the Senate’s constitutional Advice and Consent power. This Administration has hollowed out Department leadership, with frequent leadership turnover and abuse of the authority to appoint temporary acting officials. These actions place our nation’s security at risk.

For all these reasons and given GAO’s statutory role in evaluating federal agency vacancies and FVRA issues, we request that you conduct an expedited review to resolve whether Mr. Wolf and Mr. Cuccinelli—who are now engaged in decision-making that impact the security of every American—are legally serving in the position.

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<sup>2</sup> Department of Homeland Security, *DHS Orders of Succession and Delegations of Authorities for Named Positions* (Apr. 10, 2019) (attached to this letter as Enclosure B).

<sup>3</sup> Exec. Order No. 13753, 81 Fed. Reg. 90667 (Dec. 9, 2016).

<sup>4</sup> 6 U.S.C. § 113(g).

<sup>5</sup> 5 U.S.C. § 3346(a)(1).

Thank you in advance for your timely consideration of our request.

Sincerely,



Bennie G. Thompson  
Chairman  
Committee on Homeland Security



Carolyn B. Maloney  
Acting Chairwoman  
Committee on Oversight and Reform

cc: Chad F. Wolf, Acting Secretary of Homeland Security

# **Enclosure A**

**Amendment to the Order of Succession for the Secretary of Homeland Security**

Section II.A of DHS Delegation No. 00106, *DHS Orders of Succession and Delegations of Authorities for Named Positions*, is amended hereby to state as follows: "In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the order of succession of officials is governed by Annex A."

By the authority vested in me as Secretary of Homeland Security, including the Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2), I hereby designate the order of succession for the Secretary of Homeland Security by amending Annex A of *DHS Orders of Succession and Delegations of Authorities for Named Positions*, Delegation No. 00106. Annex A is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof:

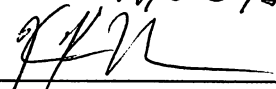
Annex A, Order for Delegation of Authority by the Secretary of the Department of Homeland Security

*Pursuant to Title 6, United States Code, Section 113(g)(2)*

1. Deputy Secretary of Homeland Security;
2. Under Secretary for Management;
3. Commissioner of the U.S. Customs and Border Protection;
4. Under Secretary for Strategy, Policy, and Plans;
5. Administrator and Assistant Secretary of the Transportation Security Administration;
6. Administrator of the Federal Emergency Management Agency;

No individual who is serving in an office herein listed in an acting capacity, by virtue of so serving, shall act as Secretary pursuant to this designation.

Dated: 11/08/19

  
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Kevin K. McAleenan  
Acting Secretary of Homeland Security

# **Enclosure B**

Department of Homeland Security  
DHS Delegation Number: 00106  
Revision Number: 08.5  
Issue Date: 12/15/2016  
Updated Date: 04/10/2019

# **DHS ORDERS OF SUCCESSION AND DELEGATIONS OF AUTHORITIES FOR NAMED POSITIONS**

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## **I. Purpose**

This is a succession order for named positions and a delegation of authority for the continuity of essential functions of officials at the Department of Homeland Security (DHS) in case of absence, the inability of the incumbent to act during disasters or catastrophic emergencies, or vacancies in offices.

## **II. Succession Order/Delegation**

A. In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the orderly succession of officials is governed by Executive Order 13753, amended on December 9, 2016.

B. I hereby delegate to the officials occupying the identified positions in the order listed (Annex A), my authority to exercise the powers and perform the functions and duties of my office, to the extent not otherwise prohibited by law, in the event I am unavailable to act during a disaster or catastrophic emergency.

C. The order of succession for the named positions, other than the Office of the Secretary, are provided in Annexes B through AC.

D. I hereby delegate authority to the officials occupying the identified positions in the orders listed in Annexes B through AC to exercise the powers and perform the functions and duties of the named positions in case of death, resignation, inability to perform, absence, or inability to act during a disaster or catastrophic emergency until that condition ceases.

E. In terms of named positions in which appointment is required to be made by the President, by and with the advice and consent of the Senate (PAS), if positions are vacant as that term is used in the Federal Vacancies Reform Act of 1998, the First Assistant shall act as the incumbent until a successor is appointed, unless otherwise designated by the President. The individual serving in the position identified as the first to succeed is designated the “First Assistant” for the purposes of the Federal Vacancies Reform Act of 1998. If the First Assistant position is vacant, the next designated official in the order of succession may exercise all the powers, duties, authorities, rights, and functions authorized by law to be exercised by the incumbent, but may not perform any function or duty required by law to be performed exclusively by the office holder.

F. For all other positions that are not subject to the Federal Vacancies Reform Act of 1998, any official in the order provided for in the succession order may exercise all the powers, duties, authorities, rights, and functions authorized to be performed by the incumbent, to the extent not otherwise limited by law.

G. Only officials specifically designated in the order of succession for each of the named positions in Annexes B through AC are eligible, subject to modification in accordance with Section II.I. Unless formally appointed by the Secretary, persons appointed on an acting basis, or on some other temporary basis, are ineligible to serve as a successor; therefore, the order of succession would fall to the next designated official in the approved order of succession.

H. The prohibition on any re-delegation of powers, authorities, functions, and duties contained in Departmental Delegations, Directives, Management Directives, Instructions, Manuals, or similar internal documents is not applicable to restrict the authority of any individual who is exercising the authority of a vacant position under this Delegation. Such an individual shall, however, be bound by such Departmental Delegations, Directives, Management Directives, Instructions, Manuals, or similar internal documents, and shall not further re-delegate powers to any individual.

I. Each Annex may be updated separately. A Component Head seeks modification of his/her order of succession by forwarding a proposed updated Annex to the Office of Operations Coordination (OPS), Continuity Division and the Office of the Under Secretary for Management (MGMT), Program Manager, Delegations and Directives; Annexes are processed by MGMT, in consultation with the Office of the General Counsel (OGC), for approval of the Secretary. At a minimum, the Annex is coordinated with OGC and the White House Liaison. Where possible, Component orders of succession should be at least three positions deep and geographically dispersed.

J. The Office of the Executive Secretary, MGMT, and OPS are responsible for maintaining a current list of incumbents holding all positions identified in Annexes B through AC.




K. Nothing in this delegation is intended to limit my discretion as Secretary to depart from this delegation.

### III. Authorities

- A. Title 5, United States Code (U.S.C.) §§ 3345-49 (Federal Vacancies Reform Act of 1998, as amended)
- B. Title 6, U.S.C., § 112 (Secretary; functions)

### IV. Office of Primary Interest

OPS and MGMT is the office of primary interest for maintaining and updating the Annexes to this Delegation.



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Jeh Charles Johnson  
Secretary of Homeland Security

Dec 15 2016  
Date

#### Legend

Career	C
Limited Term Appointment	L
Military Officer	M
Non-Career in the Senior Executive Service or Schedule C	N
Presidential Appointee	P
Presidential Appointee with Senate Confirmation	S
Scientific Professional	T
First Assistant pursuant to the Federal Vacancies Reform Act	*

## DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS OF AUTHORITIES

<b>Annex</b>	<b>Title</b>	<b>Issue Date</b>
Annex A	Order For Delegation of Authority by the Secretary of the Department of Homeland Security	Revision 08.5, 04/10/2019
Annex B	Deputy Secretary, Office of the	Revision 08.5, 04/10/2019
Annex C	Citizenship and Immigration Service Ombudsman	Revision 06, 09/14/2016
Annex D	Citizenship and Immigration Services, United States	Revision 06, 09/14/2016
Annex E	Civil Rights and Civil Liberties, Office for	Revision 06, 09/14/2016
Annex F	Coast Guard, United States	Revision 06, 09/14/2016
Annex G	Countering Weapons of Mass Destruction Office	Revision 08.2, 05/21/2018
Annex H	Customs and Border Protection, United States	Revision 06, 09/14/2016
Annex I	Executive Secretariat	Revision 06, 09/14/2016
Annex J	Federal Emergency Management Agency	Revision 06, 09/14/2016
Annex K	Federal Law Enforcement Training Center	Revision 06, 09/14/2016
Annex L	General Counsel, Office of the	Revision 06, 09/14/2016
Annex M	Immigration and Customs Enforcement, United States	Revision 06, 09/14/2016
Annex N	Inspector General, Office of	Revision 06, 09/14/2016
Annex O	Intelligence and Analysis, Office of	Revision 06, 09/14/2016
Annex P	Legislative Affairs, Office of	Revision 06, 09/14/2016
Annex Q	Management Directorate	Revision 06, 09/14/2016
Annex R	National Protection and Programs Directorate	Revision 08, 07/11/2017
Annex S	Operations Coordination, Office of	Revision 06, 09/14/2016
Annex T	Partnership and Engagement, Office of	Revision 06, 09/14/2016
Annex U	Strategy, Policy, and Plans, Office of	Revision 08.4, 02/15/2019
Annex V	Privacy Office, Chief	Revision 06, 09/14/2016
Annex W	Public Affairs, Office of	Revision 06, 09/14/2016
Annex X	Science and Technology	Revision 07, 01/19/2017
Annex Y	Secret Service, United States	Revision 06, 09/14/2016
Annex Z	Transportation Security Administration	Revision 08.3, 10/23/2018
Annex AA	Chief Financial Officer (DHS)	Revision 06, 09/14/2016
Annex AB	Deputy Administrator, Federal Emergency Management Agency (FEMA)	Revision 06, 09/14/2016
Annex AC	Protection and National Preparedness (FEMA)	Revision 06, 09/14/2016

# **ORDER FOR DELEGATION OF AUTHORITY BY THE SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY**

*Pursuant to Title 6, United States Code, Section 113(g)(2)*

1. Deputy Secretary of Homeland Security
2. Under Secretary for Management
3. Commissioner of U.S. Customs and Border Protection
4. Administrator of the Federal Emergency Management Agency
5. Director of the Cybersecurity and Infrastructure Security Agency
6. Under Secretary for Science and Technology
7. Under Secretary for Intelligence and Analysis
8. Administrator of the Transportation Security Administration
9. Director of U.S. Immigration and Customs Enforcement
10. Director of U.S. Citizenship and Immigration Services
11. Under Secretary for Strategy, Policy, and Plans
12. General Counsel
13. Deputy Under Secretary for Management
14. Deputy Commissioner of U.S. Customs and Border Protection
15. Deputy Administrator of the Transportation Security Administration
16. Deputy Director of U.S. Immigration and Customs Enforcement
17. Deputy Director of U.S. Citizenship and Immigration Services
18. Director of the Federal Law Enforcement Training Centers