UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LA CLINICA DE LA RAZA, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 19-cv-04980-PJH

ORDER GRANTING MOTION FOR RECONSIDERATION

Re: Dkt. No. 183

Before the court is plaintiffs La Clínica De La Raza, California Primary Care Association, Maternal and Child Health Access, Farmworker Justice, Council on American Islamic Relations–California, African Communities Together, Legal Aid Society of San Mateo County, Central American Resource Center, and Korean Resource Center's (collectively, "plaintiffs") motion for reconsideration. The matter is fully briefed and suitable for decision without oral argument. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby rules as follows.

BACKGROUND

On May 20, 2020, plaintiffs filed a first amended complaint ("FAC") asserting eight causes of action: (1) Violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706—Contrary to Law; (2) Violation of APA, 5 U.S.C. § 706—Arbitrary and Capricious; (3) Violation of APA, 5 U.S.C. § 706—Arbitrary and Capricious; (4) Violation of APA, 5 U.S.C. § 706—Arbitrary and Capricious or Not in Accordance with Law; (5) Violation of the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345 et seq., and DHS Organic

Statute, 6 U.S.C. § 113; (6) Violation of the FVRA, 5 U.S.C. § 3345 et seq.; (7) Violation of the Fifth Amendment; and (8) Declaratory Judgment Act—Unlawfully Appointed Agency Director. Dkt. 161. The FAC names as defendants Donald J. Trump, the Department of Homeland Security ("DHS" or the "Department"), the U.S. Citizenship and Immigration Service ("USCIS"), Chad Wolf, and Kenneth Cuccinelli (collectively "defendants") and challenges promulgation of DHS's final rule entitled "Inadmissibility on Public Charge Grounds," published on August 14, 2019. See Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("the Rule").

The FAC alleges that former Acting Secretary of Homeland Security Kevin McAleenan assumed the role in violation of the FVRA and DHS's organic statute and therefore the unlawful appointment renders the Rule invalid. See, e.g., FAC ¶ 138. On August 7, 2020, this court granted in part, denied in part, and deferred ruling in part defendants' motion to dismiss the FAC and, as relevant here, granted defendants' motion to dismiss plaintiffs' third, fifth, and eighth claims concerning McAleenan's appointment as Acting Secretary. Dkt. 177 at 26. Plaintiffs now move for reconsideration of the court's determination pursuant to Federal Rule of Civil Procedure 54(b).

DISCUSSION

A. Legal Standard

Federal Rule of Civil Procedure 54(b) provides in part that "any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12 & n.14 (1983) ("[E]very order short of a final decree is subject to reopening at the discretion of the district judge."). "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) if there is an intervening change in controlling law." Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993) (citation omitted); see Civ. L.R. 7-9(b).

B. Analysis

1. Summary of Prior Order

Plaintiffs' third, fifth, and eighth claims allege that former Acting Secretary McAleenan assumed that role in violation of the Homeland Security Act of 2002 ("HSA") and the FVRA and therefore the Rule should be vacated pursuant to the APA, the FVRA, and the Declaratory Judgment Act. FAC ¶¶ 203, 211–13, 230. Defendants moved to dismiss these claims, arguing that former Secretary Kirstjen Nielsen established a new order of succession pursuant to 6 U.S.C. § 113(g)(2) and under that revised order, McAleenan validly assumed the role of Acting Secretary. Dkt. 166 at 18. In response, plaintiffs argued that, when Secretary Nielsen resigned and McAleenan assumed the role of Acting Secretary, DHS's order of succession—Delegation No. 00106—explicitly provided that in cases of resignation, Executive Order 13753 governed the orderly succession of officials and Secretary Nielsen did not amend the order of succession in cases of resignation. Dkt. 167 at 18. In turn, Executive Order 13753 provided a list of eighteen officers and McAleenan was not next in line according to this list. Id. In reply, defendants argued that in her April 2019 order, Secretary Nielsen exercised her authority to designate the order of succession pursuant to 6 U.S.C. § 113(g)(2) and that order superseded any prior order of succession. Dkt. 172 at 14.

This court determined that, contrary to defendants' argument, Secretary Nielsen's April 9, 2019 order only amended the portion of Delegation No. 00106 that applied in cases when the Secretary is unavailable to act during a disaster or catastrophic emergency but did not apply in cases of death, resignation, or inability to perform the functions of the office. Dkt. 177 at 25. The court agreed with plaintiffs that Executive Order 13753 controlled the order of succession in cases of resignation and that McAleenan, as the Commissioner of Customs and Border Patrol ("CBP"), was seventh in line with two individuals ahead of him. Id. at 26. However, the court relied on subsection (b)(ii) of Executive Order 13753, which states that "[n]otwithstanding the provisions of this section, the President retains discretion, to the extent permitted by the

Vacancies Act, to depart from this order in designating an acting Secretary." Id. The court reasoned that because plaintiffs did not allege that McAleenan failed to meet one of the three options under the FVRA for the temporary appointment of officers, the President had discretion to appoint McAleenan as Acting Secretary. Id. Thus, plaintiffs failed to state a claim based on invalid appointment. Id.

2. New Evidence

In their motion for reconsideration, plaintiffs offer four pieces of evidence that occurred after this court's prior order that purportedly establish that McAleenan was not appointed as acting secretary pursuant to the FVRA and the court should therefore modify its prior order. First, on August 14, 2020, defendants DHS and Chad Wolf appeared before the district court for the District of Maryland and at a hearing on a motion for preliminary injunction, they repeatedly disavowed that the President appointed McAleenan pursuant to the FVRA. Mtn. at 4. Second, also on August 14, 2020, the Government Accountability Office ("GAO") issued an opinion in which it determined that McAleenan was not validly appointed to his position as Acting Secretary. Id. at 5–6. Third, DHS submitted a letter to the GAO on August 17, 2020 demanding that GAO withdraw its opinion and stated that GAO's report did not concern an appointment under the FVRA. Id. at 6. Fourth, Acting Secretary Wolf has publicly disagreed with the GAO report and represented that the authority to appoint successors was governed by the Homeland Security Act, not the FVRA. Id. at 7.

The court discusses this new evidence in the broader context of the FVRA, the HSA, and the DHS's order of succession. Article II, section 2 of the Constitution requires that the President obtain "the Advice and Consent of the Senate" to appoint "Officers of the United States." U.S. Const., art. II, § 2, cl. 2.

> Given this provision, the responsibilities of an office requiring Presidential appointment and Senate confirmation—known as a "PAS" office—may go unperformed if a vacancy arises and the President and Senate cannot promptly agree on a replacement. Congress has long accounted for this reality by authorizing the President to direct certain officials to temporarily carry out the duties of a vacant PAS office in an acting capacity,

without Senate confirmation.

N.L.R.B. v. SW Gen., Inc., 137 S. Ct. 929, 934 (2017).

The FVRA is the current version of Congress's authorization for the President to temporarily appoint acting officers. 5 U.S.C. § 3345 et seq. Section 3345(a) outlines three categories of individuals who may become acting officers. The first category, the first assistant to the office, "automatically fills the vacancy as an acting officer unless someone else is appointed." Hooks v. Kitsap Tenant Support Servs., Inc., 816 F.3d 550, 557 (9th Cir. 2016) (citing 5 U.S.C. § 3345(a)(1)).

> Signaled by the phrase "notwithstanding paragraph (1)," the statute goes on to provide two ways the President may override the automatic operation of (a)(1). First, (a)(2) permits the President to designate an acting officer from the second category of eligible candidates—prior Senate-confirmed officers. Alternatively, under (a)(3), the President may designate a within-agency officer or employee, provided that the individual served in the Executive agency for not less than ninety days in the year preceding the date of the vacancy in a position with a rate of pay equal to or greater than the minimum GS–15 rate.

Id. Each of the three categories in § 3345(a)[1] is subject to the time limit in section 3346, which generally provides that "the person serving as an acting officer as described under section 3345 may serve in the office—for no longer than 210 days beginning on the date the vacancy occurs." 5 U.S.C. § 3346(a)(1).

Next, section 3347, the exclusivity provision, states that sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting officer to perform the functions and duties of any office subject to Senate confirmation. 5 U.S.C. § 3347(a). However, section 3347 carves out an exception to the exclusivity provision for "a statutory provision" that either designates an officer or employee to perform the functions and duties of an office or expressly authorizes the President, a court, or the head of an

[1] The three categories in § 3345(a) are also subject to the limitations of § 3345(b). "Subsection (b)(1) . . . precludes someone from continuing to serve as an acting officer after being nominated to the permanent position, unless he or she had been the first assistant for ninety days of the prior year." Hooks, 816 F.3d at 558 (citing 5 U.S.C. § 3345(b)(1)). There is no allegation that the President nominated McAleenan for the permanent Secretary position and subsection (b)(1) does not appear to apply here.

Executive department to designate such an officer or employee. 5 U.S.C. § 3347(a)(1). "Accordingly, when such an agency-specific statute exists, the FVRA is no longer the 'exclusive' means, but rather is 'a means' of selecting a person to serve in an acting capacity for a vacant PAS office." Casa de Md., Inc. v. Wolf, — F. Supp. 3d —, 2020 WL 5500165, at *16 (D. Md. Sept. 11, 2020) (citing Hooks, 816 F.3d at 556; Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 356 F. Supp. 3d 109, 143 (D.D.C. 2019) ("Agency-specific statutes like the AG Act were expected to operate alongside the FVRA, not to displace it"), aff'd on other grounds, 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam)).

On December 9, 2016, President Obama signed an executive order in which he exercised his authority under the FVRA, 5 U.S.C. § 3345, to designate in advance the order of succession to perform the functions and duties of the office of the Secretary of Homeland Security. See Executive Order 13753, 81 Fed. Reg. 90667, 90667 (Dec. 14, 2016). On December 15, 2016, former DHS Secretary Jeh Johnson signed and issued Revision 8 to DHS Delegation No. 00106 that implemented Executive Order 13753. Revision 8 contained two relevant provisions. Section II.A provided for an order of succession, stating "[i]n the 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." Immigrant Legal Res. Ctr. v. Wolf, — F. Supp. 3d —, 2020 WL 5798269, at *5 (N.D. Cal. Sept. 29, 2020). Section II.B authorized delegation of authority in certain situations: "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." Id.

At the time Secretary Johnson issued Revision 8 to Delegation No. 00106, the FVRA provided the exclusive means to appoint an acting secretary. See Opp. at 4 n.2; see also 5 U.S.C. § 3347. Under the FVRA, only the president had the authority to

designate an order of succession. See 5 U.S.C. § 3345(a)(2)–(3) ("[T]he President (and only the President) may direct a person . . . ."). Thus, Executive Order 13753 codified the President's designated order of succession and Delegation No. 00106 cross referenced that order. Further, the HSA provided that the Deputy Secretary of Homeland Security would be the Secretary's first assistant for purposes of the FVRA and provided no authority to the Secretary to designate an order of succession. See 6 U.S.C. § 113(a)(1)(A) (2012).

On December 23, 2016, Congress amended the HSA in two relevant ways. See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1903, 130 Stat. 2000, 2672 (2016). First, the HSA established that the Under Secretary for Management would "serve as the Acting Secretary if by reason of absence, disability or vacancy in office, neither the Secretary nor the Deputy Secretary is available to exercise the duties of the Office of Secretary." 6 U.S.C. § 113(g)(1). Second, the Secretary has the authority, notwithstanding the FVRA, "to designate such other officers of the Department in further order of succession to serve as Acting Secretary." 6 U.S.C. § 113(g)(2). As both parties acknowledge, (FAC ¶ 148; Opp. at 4–5), Secretary Nielsen could amend the order of succession; the question is whether she in fact did amend the order of succession.

a. Whether Secretary Nielsen Amended the Order of Succession

Similar to their motion to dismiss, defendants' opposition to the motion for reconsideration asserts that, prior to her resignation in April 2019, Secretary Nielsen issued an order of succession pursuant to her section 113(g)(2) authority that effectively designated McAleenan as next in line to assume the role of acting secretary. Opp. at 2. Before addressing the parties' arguments on this issue, the court will detail the substance of Secretary Nielsen's order.

On April 9, 2019, Secretary Nielsen signed a memorandum prepared by John M. Mitnick, the DHS General Counsel, that acknowledged the Secretary's authority "set forth in section 113 of title 6, United States Code" and summarized that Secretary Nielsen

"expressed [her] desire to designate certain officers of the Department of Homeland Security (DHS) in order of succession to serve as Acting Secretary." Dkt. 166-3 at 2.[2] The memo stated "[b]y approving the attached document, you will designate your desired order of succession for the Secretary of Homeland Security in accordance with your authority pursuant to Section 113(g)(2), of title 6, United States Code." Id. The attachment to the memorandum stated:

> 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 as follows: Annex A of DHS Orders of Succession and Delegations of Authorities for Named Positions, Delegation No. 00106, is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof:

Id. at 3. The attachment then describes the replacement text for Annex A: "Annex A. Order for Delegation of Authority by the Secretary of the Department of Homeland Security" and includes a list of eighteen positions. Id.

On April 10, 2020, DHS updated Delegation No. 00106 to reflect Secretary Nielsen's order. This update, Revision 8.5, did not change the text of section II.A (pertaining to order of succession) or section II.B (pertaining to delegation of authority). Revision 8.5 did, however, include the updated Annex A that was attached to Secretary Nielsen's April 9th order. See Dkt. 167-1 at 2, 6. When Secretary Nielsen resigned, the office of the Deputy Secretary was vacant, and the Under Secretary of Management resigned the same day as Nielsen. See Dkt. 183-3 at 8. At the time, McAleenan was serving in the Senate-confirmed role of CBP Commissioner and assumed the role of DHS Acting Secretary. According to Annex A of Revision 8.5 to Delegation No. 00106, the CBP Commissioner was third in line, but according to Executive Order 13753, the CBP Commissioner was seventh in line of succession. The divergence between Annex A's

[2] Pin citations to Secretary Nielsen's order, (Dkt. 166-3), Revision 8.5 to Delegation No. 00106, (Dkt. 167-1), the GAO Opinion, (Dkt. 183-3), and Acting Secretary Wolf's memo, (Dkt. 186), refer to the electronically stamped ECF page numbers at the top of each page.

order and the order established by Executive Order 13753 is the focus of the parties' arguments here.

Defendants urge the court to reconsider its prior determination that Secretary Nielsen's order did not alter the order of succession. Defendants' argument relies on the distinction between the terms "order of succession" and "delegation of authority." Defendants explain that section 113(g)(2) empowers the Secretary to designate an order of succession, while section 112(b)(1) empowers the Secretary to delegate his or her authority to other officials, even when the Secretary continues to occupy his or her office. Opp. at 3. According to defendants, Secretary Nielsen's April 9th order sets forth an order of succession because the document only refers to amending DHS's "order of succession," not a delegation of authority. Id. Defendants also rely on the fact that the order references section 113(g)(2), which empowers the Secretary to designate an order of succession, in three separate locations demonstrating that the April 9th order intended to establish a new order of succession pursuant to section 113(g)(2). Id. at 3–4.

Defendants also advance other arguments. They assert that Annex A performed two separate functions; it designated the order of succession and it amended the list of officials for delegation of authority. Id. at 4. Next, they contend that Secretary Nielsen "designate[d] the order of succession" and the use of the term "designation"—rather than the term "delegation"—confirms that the amended Annex A was a designation of the order of succession. Id. at 5. Finally, defendants argue that the court should defer to DHS's interpretation of Secretary Nielsen's order. Id. at 6.

In reply, plaintiffs first contend that defendants' opposition is essentially a motion for reconsideration filed by defendants without requesting the court's permission to file such a motion in violation of Civil Local Rule 7-9(a). Reply at 4–5. With respect to the substance of defendants' opposition, plaintiffs argue that the plain text of Secretary Nielsen's order only changed Annex A but did not amend the portion of Delegation No. 00106 providing for succession according to Executive Order 13753. Id. at 7. Plaintiffs characterize defendants' argument as premised on disregarding the plain text of the

order and relying instead on out-of-context prefatory language or surrounding circumstances to divine what Secretary Nielsen intended. Id. at 8. They also cite two district court opinions that have likewise determined that Secretary Nielsen did not alter the order of succession. Id. at 9–10. Plaintiffs also point out that section 113(g)(2) does not necessarily apply only in cases of succession due to vacancy and, when read with section 113(g)(1), also applies to circumstances where the Secretary is not available to exercise the duties of the office due to absence or disability. Id. at 12.

The court rejects defendants' arguments for several reasons. First, the court agrees with plaintiffs that defendants' opposition is a de facto motion for reconsideration for which defendants did not request the court's permission to file. Moreover, defendants are not relying on new evidence, arguing the court committed clear error, or that there was a change in law to support their arguments; rather, they take issue with the court's prior ruling, putting forward similar arguments as those previously advanced. As a general rule, a motion for reconsideration "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (citing 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999)). That rule applies here as defendants' arguments could have been raised in their motion to dismiss. Defendants' failure to request leave to file a motion for reconsideration, combined with the fact that defendants have not presented a basis to grant such reconsideration, is sufficient grounds to reject their arguments. Given the importance of the issues and the fact that the ultimate disposition of this motion does not prejudice plaintiffs, the court briefly addresses the substance of defendants' arguments.

Second, as discussed in the court's prior order, the plain language of Nielsen's order is clear and unambiguous. As a general rule of interpretation, "[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 878 (9th Cir. 2001) (en banc) (quoting

Caminetti v. United States, 242 U.S. 470, 485 (1917)); see also Safe Air for Everyone v. U.S. EPA, 488 F.3d 1088, 1097 (9th Cir. 2007) (applying plain meaning rule to regulations).[3] Secretary Nielsen's order amended Annex A by stating, "I hereby designate the order of succession for the Secretary of Homeland Security as follows: Annex A of . . . Delegation No. 00106, is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof." Dkt. 166-3 at 3 (emphasis added). The specific change made by the order was to strike the prior version Annex A in its entirety and replace it with an amended Annex A. The order did not amend the circumstances that would trigger Annex A's application; that is, it did not modify section II.A or II. B of Delegation No. 00106. Revision 8.5 to Delegation No. 00106, released after Secretary Nielsen's order, is persuasive contemporaneous evidence that the replacement of Annex A was the only such change effectuated by the order.

In light of the plain meaning, defendants' arguments concerning the surrounding references to order of succession are unpersuasive. As a general principle, "prefatory clauses or preambles cannot change the plain meaning of the operative clause." Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1978 (2016) (citing Yazoo & Miss. Valley R. Co. v. Thomas, 132 U.S. 174, 188 (1889)). As the district court in Casa de Maryland recognized, the memo prepared by the DHS general counsel constitutes such a prefatory clause or preamble and the memo does not detract from the operative language that altered only Annex A. See Casa de Md., 2020 WL 5500165, at *22. Further, as noted in the prior order, the fact that on November 8, 2019, McAleenan purported to revise Delegation No. 00106 by amending Section II.A to explicitly reference Annex A in cases of resignation, instead of Executive Order 13753, confirms that Nielsen's revision did not do so. See Dkt. 177 at 25–26; see also Casa de Md., 2020 WL

[3] The court notes that neither Secretary Nielsen's order nor Delegation No. 00106 are statutes or regulations. Yet, as defendants pointed out in their reply in support of the motion to dismiss, it is appropriate to apply rules of statutory construction to administrative orders delegating authority. See Dkt. 172 at 14 & n.7 (citing Crowell v. IRS (In re Crowell), 258 B.R. 885, 889 (E.D. Tenn. 2001)).

5500165, at *21 ("McAleenan next amended Delegation Order 00106 on November 8, 2019. But unlike Nielsen's amendment, McAleenan actually changed the order of succession applicable in the event of vacancy . . . .").

Third, subsequent to this court's prior order, three district courts have examined this precise question and have also concluded that Secretary Nielsen's April 9th amendment only changed Annex A but did not amend the order of succession in cases of resignation. See Batalla Vidal v. Wolf, — F. Supp. 3d —, 2020 WL 6695076, at *9 (E.D.N.Y. Nov. 14, 2020); Immigrant Legal Res. Ctr., 2020 WL 5798269, at *7–8; Casa de Md., 2020 WL 5500165, at *22–23. On August 14, 2020, the GAO issued an opinion that examined whether Acting Secretary Wolf had validly assumed the title of Acting Secretary. Dkt. 183-3 at 2. As a necessary predicate to determining whether Wolf was validly appointed, the GAO examined whether McAleenan was validly appointed as Acting Secretary following the resignation of then Secretary Nielsen. Similar to this court's prior order, the GAO concluded that Secretary Nielsen's April 9th order only amended Annex A but did not amend the order of succession established in Executive Order 13753. Id. at 8. These opinions are persuasive and support the court's interpretation.

Fourth, the court need not defer to defendants' interpretation of the April 9th order. While courts have sometimes "deferred to 'official staff memoranda' that were 'published in the Federal Register[,]' . . . . [that] interpretation must at least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context." Kisor v. Wilkie, 139 S. Ct. 2400, 2416 (2019). In this case, the court assumes the Secretary's order and the memo attached to the order are authoritative. Yet, defendants are asking the court to defer to their interpretation of the order offered in the context of this litigation, not the Department's contemporaneous explanation. See Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020) ("The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether *post hoc* justifications are raised in court by those appearing on

behalf of the agency or by agency officials themselves." (citations omitted)). In other words, DHS has not issued an interpretation of Secretary Nielsen's order, rather the interpretation is a litigation position to which the court owes no deference. See United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (9th Cir. 1995) ("No deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position.").

Therefore, the court reaffirms its prior findings that former Secretary Nielsen's April 9th order did not alter the Department's order of succession in cases of resignation and that Executive Order 13753 continued to govern the order of succession at the time of Secretary Nielsen's resignation.

b. Whether McAleenan's Appointment Was Valid Under the FVRA

Assuming Executive Order 13753 governed the order of succession, the court next examines whether McAleenan validly assumed the role of Acting Secretary pursuant to that executive order and the FVRA. In its prior order, the court determined that, despite the order of succession established in section (a) of Executive Order 13753, subsection (b)(ii) reserved to the President the discretion to depart from subsection (a) as long as the FVRA permitted McAleenan's appointment. Dkt. 177 at 26. Because plaintiffs did not allege that McAleenan's appointment was invalid under the FVRA, they failed to state a claim. Id. Plaintiffs move for reconsideration of this finding.

Plaintiffs contend that, subsequent to this court's finding, new evidence demonstrates that defendants have taken the position that the President did not appoint McAleenan as Acting Secretary pursuant to his FVRA authority. Mtn. at 7. According to plaintiffs, the court's prior legal conclusion relied on a factual premise that defendant did not advance before the court and have now admitted was incorrect. Id. For their part, defendants state that plaintiffs are correct that the President did not appoint Secretary McAleenan under the FVRA. Opp. at 2. They offer no further argument on this point.

As stated previously, President Obama issued Executive Order 13753 as an advance exercise of his FVRA authority. See Executive Order 13753 ("By the authority

vested in me as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.*, ...”). Section (a) establishes the President’s designated order of succession and subsection (b)(ii) reserves to the President discretion to depart from section (a) so long as that departure meets the requirements of the FVRA. The relevant inquiry here is therefore whether the President exercised that discretion under section (b)(ii) because there is no dispute that under the order of succession in section (a), there was one individual ahead of McAleenan at the time of Secretary Nielsen’s resignation.[4]

As described in plaintiffs’ new evidence and in defendants’ opposition to the motion for reconsideration, defendants have repeatedly represented that McAleenan was appointed pursuant to the HSA and not the FVRA. See, e.g., Dkt. 183-2 at 40:5–9; Opp. at 2 (“Plaintiffs are correct that the President did not designate Mr. McAleenan as Acting Secretary under the [FVRA] . . . .”). Other opinions have arrived at a similar outcome, though no opinion appears to have considered the implications of subsection (b)(ii). For example, the district court in Casa de Maryland determined that the order of succession in section (a) of Executive Order 13753 dictated the order of succession. See Casa de Md., 2020 WL 5500165, at *18 (“McAleenan’s leapfrogging over Director Krebs therefore violated the agency’s own order of succession. From this record, the Court cannot help but conclude that McAleenan assumed the role of Acting Secretary without lawful authority.”). The GAO Report also applies section (a) without any discussion of the President’s reserved discretion in subsection (b)(ii). See Dkt. 183-3 at 9 (“The first previously confirmed official in the order of succession in E.O. 13753 was the Director of CISA. However, instead of following the order of succession in E.O. 13753, DHS applied the one in Annex A.” (footnote omitted)).

[4] As the GAO Opinion states, Christopher Krebs was serving in the Senate-confirmed role of Director of the Cybersecurity and Infrastructure Security Agency, which was previously known as the Under Secretary for Protection and Programs. Dkt. 183-3 at 7 n.8, 9 n.11. The Under Secretary for Protection and Programs was fourth in the order of succession in Executive Order 13753.

That said, it is not clear that the President failed to designate McAleenan as Acting Secretary. In the FAC, plaintiffs allege that on April 7, 2019, President Trump tweeted that McAleenan would assume the role of Acting Secretary. FAC ¶ 145. Indeed, the President sent two tweets on April 7, 2019, stating:

> Secretary of Homeland Security Kirstjen Nielsen will be leaving her position, and I would like to thank her for her service. . . . I am pleased to announce that Kevin McAleenan, the current U.S. Customs and Border Protection Commissioner, will become Acting Secretary for @DHS.gov. I have confidence that Kevin will do a great job!

Donald J. Trump (@realDonaldTrump), Twitter (Apr. 7, 2019), https://twitter.com/realDonaldTrump/status/1115011884154064896?s=20, https://twitter.com/realDonaldTrump/status/1115011885303312386?s=20.[5]

Of course, these tweets lack the formality of an executive order, but in other instances, courts have noted that the President's tweets are akin to official statements and government speech. See Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 231 (2d Cir. 2019) ("The public presentation of the Account and the webpage associated with it bear all the trappings of an official, state–run account. . . . The President and multiple members of his administration have described his use of the Account as official."); see also id. at 239 ("Everyone concedes that the President's initial tweets (meaning those that he produces himself) are government speech.").

At the very least then, there appears to be a factual conflict whether the President's tweets constituted a designation under section 3345(a)(2) or whether, as both parties maintain, the President did not appoint Acting Secretary McAleenan under the FVRA. That factual conflict cannot be resolved on a Rule 12(b)(6) motion and therefore necessitates reconsideration of the court's prior order granting defendants' motion to dismiss the third, fifth, and eighth claims. Further, if plaintiffs are correct that the

[5] The Ninth Circuit has recognized that the President's tweets are judicially noticeable pursuant to Federal Rule of Evidence 201 and, additionally, plaintiffs referred to the tweets in their FAC. See Hawaii v. Trump, 859 F.3d 741, 773 n.14 (9th Cir.), vacated and remanded on other grounds, 138 S. Ct. 377 (2017).

President did not designate McAleenan as Acting Secretary, then they state a claim that McAleenan's appointment violated the FVRA, which again requires reconsideration of the court's prior order. Accordingly, the court will grant plaintiffs' motion for reconsideration.

One final matter bears mention. On October 8, 2020, defendants filed a notice in which they include a memorandum signed by Acting Secretary Wolf on October 7, 2020. Dkt. 186. Defendants then filed a second notice on November 23, 2020 that includes a second memorandum signed by Acting Secretary Wolf on November 16, 2020. Dkt. 187. Both versions of the memo purport to affirm and ratify certain actions taken by former Acting Secretary McAleenan, including the Rule. The court does not consider the notices or attached memoranda for two reasons. First, Civil Local Rule 7-3(d) prohibits the filing of "additional memoranda, papers or letters" once the reply brief is filed unless a party receives the court's approval. No such approval was sought here, and defendants' filings violate the Civil Local Rules. Second, whether Acting Secretary Wolf validly ratified the Rule has no bearing on the narrow issue raised by plaintiffs' motion for reconsideration, that is, whether their new evidence warrants reconsideration of the court's prior order granting defendants' motion to dismiss.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for reconsideration is GRANTED and defendants' motion to dismiss plaintiffs' third, fifth, and eighth claims pertaining to McAleenan's appointment as Acting Secretary of Homeland Security is now DENIED. The court's prior order on the motion to dismiss will be amended accordingly.

IT IS SO ORDERED.

Dated: November 25, 2020

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge