



January 11, 2024

The Honorable Robert P. Storch  
Office of Inspector General  
U.S. Department of Defense  
4800 Mark Center Drive  
Alexandria, VA 22350-1500

RE: Request for investigation into apparent violations of U.S. law and DoD policy regarding succession of the Secretary of Defense and the Continuity of Operations (COOP)

Dear Inspector General Storch,

The American people, not to mention “top staff” at the Pentagon, were shocked to learn over the weekend that Defense Secretary Lloyd J. Austin III had been hospitalized, likely unable to perform the duties of his office, without the White House, National Security Advisor, or other leadership in the national security infrastructure aware of his absence.<sup>1</sup> The Department of Defense (DoD) Deputy Secretary Kathleen H. Hicks, tasked with assuming duties in the Secretary’s absence, was on vacation in Puerto Rico during this time and remained far away from the Pentagon during the entirety of his absence. There is no good time for a void in leadership at the top of DoD but, with ongoing hot conflicts involving our allies and the potential for a Chinese invasion of Taiwan looming at any time, the current moment is one of the more perilous in memory for DoD to experience such uncertainty in the chain of command.

The Center to Advance Security in America (CASA) is a nonpartisan organization dedicated to improving the safety and security of the American people through greater transparency. To this end, we are requesting that the Department of Defense Inspector General (DOD IG) open an investigation into the circumstances surrounding the failure of either leadership under Secretary of Defense Lloyd Austin and his team or existing policies and procedures necessary to properly ensure timely notification and assumption of duties in the event of incapacitation of an Officer of the United States. We suggest you probe the actions of Secretary Lloyd Austin, Chief of Staff Kelly Magsamen, Press Secretary Patrick Ryder, and Assistant to the Secretary of Defense Chris Meagher as well as any relevant policies, procedures, and structures currently in place to assess where any failures emerged, which could have jeopardized the American public’s safety and hampered the ability of the U.S. military to lawfully respond to a national security event, should one have occurred.

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<sup>1</sup> Alexander Ward, Lara Seligman, and Jonathan Lemire, “Pentagon didn’t inform Biden, White House for days about Austin’s hospitalization”, Politico, January 6, 2024, <https://www.politico.com/news/2024/01/06/pentagon-took-3-days-to-inform-white-houses-nsc-of-austins-hospitalization-00134176>



## 1. Background

While much of what happened inexplicably remains shrouded in mystery, it has been disclosed publicly that on December 22, 2023, Secretary Austin was admitted to Walter Reed National Military Medical Center for a surgical procedure to treat prostate cancer. During this procedure, Secretary Austin was under general anesthesia. He recovered from this surgery and returned home on December 23, 2023.

On January 1, 2024, Secretary Austin was readmitted to the hospital with complications from the procedure. On January 2, 2024, Austin was admitted to the Intensive Care Unit (ICU), where he reportedly remains as of January 9, 2024.

According to Pentagon Press Secretary Maj. Gen. Pat Ryder, on January 2, Secretary Austin delegated some – but apparently not all – of his authority to Deputy Secretary of Defense Kathleen Hicks.<sup>2</sup> Additionally, on January 2, Austin’s Chief of Staff Kelly Magsamen, Senior Military Assistant Lt. Gen. Ronald Clark, and Chairman of the Joint Chiefs of Staff Gen. CQ Brown were notified of Austin’s hospitalization. According to reports, “National security advisor Jake Sullivan and other senior White House aides didn’t know of Austin’s Jan. 1 hospitalization until the Defense Department sent over word on Jan. 4.”

Austin reportedly returned to his duties as Secretary of Defense on January 5, 2024 despite remaining in the hospital.

## 2. Legal requirements

As an Officer of the United States, nominated by the President and confirmed by the United States Senate, Secretary Austin has been vested with significant authority to fulfill his Constitutional and legal responsibilities. These responsibilities are accompanied by obligations to the American people, above all else, to ensure his duties are properly performed at all times during his tenure. This obligation exists until either a new Secretary of Defense assumes control or he becomes incapacitated, in which case he must immediately relinquish control for the entire duration of his incapacitation. The succession of the chain of command for the Secretary of Defense is laid out in various laws and legal authorities that appear to be implicated in these circumstances. Aside from any legal requirements, the safety and security of our nation and of our fighting men and women overseas relies on a capable, informed, and engaged leadership at the Department of Defense.

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<sup>2</sup> Haley Britzky, Natasha Bertrand, Oren Liebermann, “What we know about Defense Secretary Lloyd Austin’s hospitalization,” CNN.com, Jan. 9, 2024, <https://www.cnn.com/2024/01/08/politics/lloyd-austin-hospitalization-what-we-know/index.html>.



The Federal Vacancies Reform Act (FVRA) (5 U.S.C. 3345) states:

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS–15 of the General Schedule.

10 U.S. Code § 132, states in Section (b):

The Deputy Secretary shall act for, and exercise the powers of, the Secretary when the Secretary dies, resigns, or is otherwise unable to perform the functions and duties of the office.

Executive Order 13963 (Dec. 10, 2020) outlines the order of succession within the DoD whereby the officials listed, beginning with the Deputy Secretary of Defense:

...Shall act as and perform the functions and duties of the office of the Secretary of Defense (Secretary) during any period in which the Secretary has died, resigned, or otherwise become unable to perform the functions and duties of the office of the Secretary, until such time as the Secretary is able to perform the functions and duties of that office.

Additionally, the U.S. Constitution and the Presidential Succession Act of 1947 outline the presidential order of succession. The Secretary of Defense is sixth in line for the presidency. In order to maintain proper COOP and COG planning, the whereabouts and health of the Secretary of Defense are pivotal and must be known at all times.

Finally, while Officers of the United States are considered to be permanently on-the-clock, there is ostensibly an expectation that notice be provided upon an emergency requiring



leave and temporary incapacity of duties. For instance, the DoD's Financial Management Regulation (Vol. 8, Ch. 5: Leave and Other Absences) provides:

5.2 Advance Notice of FMLA Leave and Medical Certification If FMLA leave is foreseeable, based on an expected birth, placement for adoption or foster care, or planned medical treatment, the employee must provide notice to the agency of his or her intention to take leave not less than 30 calendar days before the date the leave is to begin. However, if the date of birth, placement or planned medical treatment requires leave to begin within 30 calendar days, the employee **shall provide such notice as soon as practicable**. See 5 CFR 630.1207.

It is too much to ask the general public to believe that there is no similar such mandate on the most important official at the Pentagon.

### **3. Secretary Austin and Senior Officials' Failure to Notify Likely Obstructed the Succession of Government Plans and May Have Violated DoD Procedures**

Failure to communicate an imminent, likely, and predictable incapacitation – for ANY period of time – by either the Secretary personally or as an aide to the Secretary with requisite knowledge of such incapacitation may constitute constructive obstruction of the Federal Vacancies Reform Act (5 U.S.C. 3345 *et seq.*), 10 U.S. Code § 132 (b), and Executive Order 13963, among a panoply of violations of other relevant rules, regulations, and policies applicable to the Secretary of Defense. The apparent breakdown in communications – either intentional or through gross negligence – has consequences far greater when the security of the American people is at stake.

The circumstances surrounding the bizarre days-long and unexplained absence from duty of the Pentagon's top official continues to raise questions about what information was relayed and to whom about Secretary Austin's admission into the hospital and then to the ICU on January 2, 2024. The Inspector General's office is one of the few offices imbued with sufficient authority to investigate and uncover the true series of events that led to the Pentagon lacking a fully delegated agency head for a period of days – substantially longer than the 15-minute response time necessary to identify, discuss, and respond to an intercontinental ballistic missile attack. An investigation will determine what direction senior aides to Secretary Austin were given and what information was in fact provided to White House officials, possibly days prior to the decision to alert Deputy Secretary Hicks. It could also identify any gaps in policies or procedures that exist ostensibly to prevent just this sort of fiasco from occurring.

The unfortunate, yet inherent, nature of the military is that when something goes wrong, quite often people die. Hot conflicts are ongoing in Ukraine and Israel. American service personnel are at risk every day from attacks by allies of Hamas throughout the Middle East and the Persian Gulf. Commercial activity through the Persian Gulf and Red Sea has been all but halted due to piracy from Iranian surrogates. China has been increasingly threatening an invasion of Taiwan. We live in an extremely uncertain and perilous time. Yet, the only element that saved



this incident from becoming a disaster was luck. It is imperative that an investigative body with the powers of the IG probe what went wrong and why. We may not be so lucky next time.

It is obvious that a failure, or multiple failures, occurred. Was there a failure in the action or lack of action on the part of Department leadership? Are there gaps in the systems the Department has in place? If so, did no one in leadership recognize that a problem existed and respond? Of all those who knew of the Secretary's absence – Chief of Staff Kelly Magsamen, Press Secretary Patrick Ryder, and Assistant to the Secretary of Defense Chris Meagher – did no one take the initiative to recognize the situation and work to rectify it? Did a non-Senate-confirmed White House official or Defense Department official unlawfully exercise authority delegated to the Secretary of Defense prior to the Deputy Secretary being made aware of Austin's incapacitation? Will there be any accountability for the failure of the knowledgeable senior officials to notify Deputy Secretary Hicks of her increased Constitutional responsibilities? Why was Chief of Staff Kelly Magsamen, through a January 8, 2024 memo, permitted to craft the structure of a review of the incident, when she could be the subject of that review? The errors and missteps appear to continue to this day.

This debacle calls for responsibility, accountability, and correction. This cannot be yet another incident in which "accountability" requires nothing more than a sentence issued in a press release or a brief statement from a podium. This is the Department of Defense, and these are the leaders in which Americans trust the lives of their husbands, wives, sons, and daughters. That trust can only be maintained by accountability and ensuring that failures do not recur.

Only the Department of Defense Inspector General has the mandate and authority to discover the answers to these and other questions and provide the guidance to help avoid a fiasco such as this in the future.

#### **4. Conclusion**

With several ongoing international conflicts and others that could erupt at a moment's notice, the United States Department of Defense and its leadership have no room for error. The U.S. military and DoD broadly operate with a no excuses approach. This is due to the potential implications of failure of its mission.

It is imperative that the DoD Inspector General complete a full investigation of this incident to determine where and, as applicable, with whom any failures occurred. Only luck prevented a spiral into catastrophe. Individuals in leadership whose actions or lack of actions contributed to this debacle must be held to account. Any voids in policies, procedures, and structures must be identified and corrected. The American people deserve no less.

That is why the Center to Advance Security in America is calling for an investigation into the foregoing facts and circumstances surrounding the absence of Secretary Austin and the failure of DoD to properly designate his duties and notify appropriate officials in the national



security chain of command. Left hanging in the balance is the American people's trust that the Department of Defense is fulfilling its duties to protect our nation and its people.

If you have any questions regarding this request, please feel free to contact me at [james@advancing-america.org](mailto:james@advancing-america.org).

Thank you in advance for your assistance in this matter.

Sincerely,

James Fitzpatrick  
Director  
Center to Advance Security in America