

IMMIGRATION

A Whole Bunch Of Anti-Immigrant DHS Rules Might Be Moot Under Federal Law

And let us say: HAW-ha!

By LORELEI LAIRD

Oct 8, 2020 at 11:49 AM



(Photo by Mark Wilson/Getty Images)

I have observed here before that the Trump administration [can't govern](#). They put on the suits, they show up to the offices, but they don't seem to be willing or able to handle the basic nuts and bolts of governing, and it hurts them. It's why they ended up with three versions of the Muslim ban, and also why the original ban's implementation in early 2017 was such a dumpster fire. It's also why they keep getting sued for Administrative Procedure Act violations.

And now, deliciously, it might lead to voiding a whole bunch of administrative rules passed by the Department of Homeland Security over the past 18 months. As you may recall, the most recent DHS Secretary who was actually confirmed by the Senate was Kirstjen Nielsen,

secretary Kevin McAleenan, who lasted seven months, and current acting secretary Chad Wolf.

The trouble is, the Government Accountability Office [concluded in August](#) that neither man was legally appointed to the office. Buckle in; it's administrative law time! Under the Homeland Security Act, the acting secretary position should have passed to the director of the Cybersecurity and Infrastructure Security Agency after Nielsen left. However, the Trump administration chose McAleenan, who at that time was the Commissioner of Customs and Border Protection. (CBP is known for [providing no accountability whatsoever](#) to its officers, so maybe Stephen Miller thought McAleenan would play along with Trump's adult-toddler ideas like [shooting immigrants in the legs](#).)

McAleenan would have been the legally appropriate choice if Nielsen had been incapacitated by a disaster, but the GAO does not (publicly) consider Trump a disaster. As a result, it concluded on August 14 that McAleenan "was not the designated Acting Secretary." This, in turn, delegitimizes Wolf because Wolf got his position only through changes McAleenan made to the order of succession shortly before he left — changes GAO said he didn't have the authority to make. (By the way, both McAleenan and Wolf were actually fourth in line, but ascended because all the positions above them were open. Because the Trump administration cannot govern.)

Immigrant rights organizations have been exploiting this for the past six weeks, and early data suggest it's working. In mid-September, a variety of immigrant rights organizations won a preliminary injunction against rule changes at DHS that "make it substantially harder, if not impossible" for asylum seekers to get work permits while they wait for their cases to be decided. That's according to Judge Paula Xinis, who in [Casa de Maryland et al v. Wolf](#) accepted the GAO's reasoning (along with some Administrative Procedure Act arguments).

That decision, in turn, informed [a Sept. 29 decision](#) by a Northern California federal court, striking down the fee increase at U.S. Citizenship and Immigration Services. You may recall that [I wrote in August](#) that the effect — and likely also purpose — of the fee increase is to price people out of immigrating legally. [A parallel lawsuit](#) in D.C. district court makes similar arguments, but I'm not aware of any decision on that one yet.

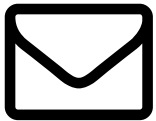
executive” could do.

Lorelei Laird is a freelance writer specializing in the law, and the only person you know who still has an “I Believe Anita Hill” bumper sticker. Find her at wordofthelaird.com.



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