Multiple lawsuits are targeting Chad Wolf’s authority as head of the Homeland Security Department.
President Trump has leaned heavily on the Homeland Security Department to stir up culture-war headlines in recent months, most recently through the deployment of federal law enforcement to protests in Portland, Oregon.

Two new lawsuits allege that Trump’s handpicked leader was improperly installed atop the department and lacks the authority to lead it.

Chad Wolf has led DHS in an acting capacity since November, when his predecessor, Kevin McAleenan, placed Wolf next in line before resigning the top spot. The Trump administration had used a similar maneuver to elevate McAleenan above other career DHS officials when Kirstjen Nielsen resigned last April.

Both moves were designed to sidestep the Senate, which is constitutionally empowered to confirm a permanent DHS secretary. The department has gone without a Senate-confirmed leader for almost 500 days, the longest Cabinet-level vacancy in recent history.

The lawsuits allege that the Trump administration bungled the maneuver, and that McAleenan and Wolf were not actually next in line for promotions to the top spot. The challenges could roll back dozens of controversial DHS policies established since April 2019, including Wolf’s decision to sign off on the deployment of federal officials to Portland.

“I don’t need invitations by the state, state mayors, or state governors to do our job,” Wolf said last Monday. “We’re going to do that whether they like us there or not.” The Senate confirmed Wolf as undersecretary for strategy, policy, and
plans in November.

The first lawsuit was brought by immigration-rights advocates on behalf of asylum seekers looking to obtain work-authorization documents. Plaintiffs hope to block two new rules that would throw up hurdles for applicants, leaving many “without the ability to provide [for] themselves and their families during a global pandemic,” said Conchita Cruz, co-executive director of the Asylum Seeker Advocacy Project. “Work authorization is a critical lifeline for asylum applicants, providing a means to work, a form of identification, access to a driver’s license in many states; it also facilitates access to housing and health insurance.”

Lawyers will argue for a preliminary injunction in mid-August.

The second lawsuit was filed Monday on behalf of protesters in Portland. The plaintiffs argue that federal law enforcement officials violated protesters’ constitutional rights of free speech, assembly, and due process, and against unreasonable seizures. Nestled into both complaints is the allegation that Wolf lacked the authority to sign off on DHS policy because he was never lawfully serving as the acting DHS secretary.

“The appointments clause is a major structural part of the Constitution to enforce the separation of powers, and we’re seeing what happens when the executive plays games with and ... tries to get around [it],” said Ben Berwick, a lawyer with the legal advocacy group Protect Democracy, which is helping bring the Portland case. “You get these people in these really critical offices, in leadership positions, who are more interested in doing the bidding of the administration and advancing the president’s political interests than being faithful to the law and the Constitution.”
Plaintiffs' arguments against Wolf are multilayered. One revolves around the baton-pass between Nielsen and McAleenan.

By default, a law known as the Federal Vacancies Reform Act controls succession protocol at executive-branch departments. The law also sets up a 210-day time limit for officials serving without Senate confirmation, which is designed to enforce the Senate’s constitutional advice-and-consent power.

At the Department of Homeland Security, however, another statute generally supersedes the order setup under FVRA: The Homeland Security Act. Before she resigned, Nielsen amended the HSA to allow McAleenan to take over if she were “unable to act during a catastrophe or catastrophic emergency.” But she neglected to modify the succession order that applies when the secretary resigns—as she soon would.

“Chad Wolf’s service is lawful only if Kevin McAleenan’s service is lawful, and Kirstjen Nielsen did not properly change the succession order before she left,” said Brianne Gorod, chief counsel at the Constitutional Accountability Center, which is not a party to the lawsuits.

The argument runs parallel to another challenge to Wolf’s tenure from the House Oversight and Homeland Security committees, which asked the Government Accountability Office in November to investigate whether Wolf and Ken Cuccinelli, whom Wolf tapped as his second-in-command, are serving legally.

The GAO told National Journal that the investigation is ongoing.

“We reached out to DHS to obtain additional factual information and to allow them an opportunity to provide their legal views, which is our standard protocol for all such reviews,” GAO spokeswoman Sarah Kaczmarek wrote in an email.
Legal challenges descend on Trump’s acting DHS head

“We have now received a response from DHS, and it’s under review.”

Plaintiffs’ second argument points to the 210-day time limit for acting officials allowed under the Federal Vacancies Reform Act. Lawyers told National Journal that regardless of which statute the Trump administration used to install Wolf and McAleenan—either HSA or FVRA—both are still subject to the time limit.

“With the Federal Vacancies Reform Act, Congress imposed a limit on how long any acting secretary may serve—a limit that has been grossly exceeded here, in what appears to be the longest Cabinet-level vacancy in history,” said Zachary Manfredi, a lawyer for the Asylum Seeker Advocacy Project. “The Vacancies Act’s time limits were meant to protect the constitutionally mandated separation of powers, and those requirements apply here as well.”

For both the Portland protest case and the immigration case, the judge could sidestep the FVRA arguments altogether by ruling on another part of litigants’ claims, legal experts told National Journal. In the asylum case, for example, the judge could rule in favor of the plaintiffs by determining that the new rules violate the Administrative Procedure Act. The lawsuits could also be deemed moot should Trump lose the election and DHS reverse course.

But the department’s reliance on a nebulous informal network of temporary officials has already begun to play out in the courts. Similar lawsuits have been filed against Customs and Border Protection Acting Director Mark Morgan, and Cuccinelli, who now holds two senior positions at DHS.

In March, a federal judge struck down immigration policies promulgated by Cuccinelli upon determining that his appointment as “principal
deputy director” of U.S. Citizenship and Immigration Services violated the FVRA.

The case mirrors the Wolf-McAleenan saga—McAleenan had installed Cuccinelli into the new spot before shuffling the USCIS succession order in an attempt to “leapfrog” the deputy director, the judge ruled.