

BORDER WALL: BROADEST WAIVER OF LAW IN AMERICAN HISTORY

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BORDER WALL HISTORY

1848 – 1990 Open Borders for People – Fences for Cattle

The boundary for the 1,952 mile U.S.-Mexico border was originally delineated in a series of joint surveys carried out following the signing of the Treaty of Guadalupe-Hidalgo. The boundary was lengthened after the Gadsden purchase of Arizona and parts of New Mexico in 1853, and delineated further as late as the 1970.¹ A series of boundary markers were placed on the boundary from the Pacific Ocean to El Paso, where the Rio Grande becomes the boundary marker. There were no border stations until 1894, and no border patrol until 1904, when about 75 mounted inspectors were assigned to the U.S. border to apprehend Chinese immigrants. The first immigration act to set up a permanent immigration system based on country of origin, passed in 1924, excluded individuals from Latin America, including Mexico, from the quota system. Barbed wire fence went up randomly along the border, principally the work of private ranchers and to a lesser extent the Bureau of Land Management seeking to keep US and Mexican cattle separated. In a number of places, unofficial but regular crossing points, on land and across the Rio Grande by pedestrian bridge or water transport, were known and permitted by government officials on both sides.

From 1990 – 2005 The Beginning of Wall and Waivers

The federal government began building walls for the purpose of separating people in 1990, starting with a single fence at the border south of San Diego. In the early 1990's, this was identified as an area of high unauthorized crossing, including drug smuggling, although the fence was controversial even at that time. A visit by a Congressional staff person in the mid-1990's began the conversation about the need for waivers from environmental laws. The staff person inquired as to why the grass in a particular area by the border was so high, speculating that it could be used for concealment by crossing migrants. A border patrol agent responded that there was a mouse listed under the Endangered Species Act that lived in the grass and that the law prevented the grass from being mowed. In fact, it turned out that the only endangered mouse in that area is the Pacific Pocket mouse and brush clearing and mowing actually

¹ Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, U.S.-Mex., Nov. 23, 1970, 23 U.S.T. 371.

benefits it. Not a single document could be produced showing that the Endangered Species Act had prevented the grass from being cut.² But no matter – the story circulated widely in Congress and the stage was set for the beginning of the broadest waiver of law in American history.

At about the same time as this incident occurred, various versions of what ultimately emerged as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 were being considered. Ultimately, the bill was included in the Omnibus Consolidated Appropriations bill for fiscal year 1997. It included a section that directed the Attorney General to “take such actions as may be necessary to install additional barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossing in areas of high illegal entry into the United States.”³ It also directed the Attorney General to build a second and third fence parallel to the just constructed 14 mile fence south of San Diego.⁴ Notably, it also included authority for the Attorney General to waive “to the extent . . . necessary to ensure expeditious construction of the barriers and roads under this section” provisions of the Endangered Species Act and the National Environmental Policy Act.⁵ While the bill was still in Congress, both Attorney General Janet Reno and Secretary of the Department of the Interior Bruce Babbitt made it clear that the bill was “unnecessary, and we strongly oppose it.”

Despite opposition by both cabinet officers and other administration officials, the waivers stayed in the bill. President Clinton’s signing statement for the Omnibus Consolidated Appropriations bill included this caveat: “I am, however, extremely concerned about a provision in this bill that could lead to the Federal Government waiving the Endangered Species Act and the National Environmental Policy Act in order to expeditiously construct physical barriers and roads on the U.S. Border. I know the Attorney General shares my commitment to those important environmental laws and will make every effort, in consultation with environmental agencies, to implement the immigration law in compliance with those environmental laws.”⁶

Officials of the Clinton Administration vowed not to use the waivers. Department of the Interior Secretary Babbitt noted that he had already “informed Congress that full compliance with the ESA would not be an impediment to the timely and effective construction of border infrastructure contemplated by this provision.”⁷

² Memo to Cordia Strom, Counsel, House Subcommittee on Immigration, from Heather Weiner, Legislative Counsel, Defenders of Wildlife, re “ESA Waivers in H.R. 2202, Immigration Bill”, August 28, 1995.

³ Pub. L. 104-208, §102(a) (September 30, 1996).

⁴ The impetus for a three-tiered fence came out of a 1993 study prepared by Sandia National Laboratory commissioned by the Immigration and Naturalization Service. See, Nuñez-Neto and Garcia, *Border Security: Barriers Along the U.S. International Border*, CRS Report for Congress, Updated June 27, 2007, at www.house.gov/waxman/pdf/crs/RL33659.pdf

⁵ *Id.* at §102(c).

⁶ Statement by the President, October 1, 1996.

⁷ Statement by Secretary Babbitt on Objections to New Environmental Waivers included in Immigration Bill, October 1, 1996.

The Immigration and Naturalization Service issued a memo stating that, “The INS position is that we will not seek the AG’s use of this waiver, and the INS will continue to abide by all environmental laws.”⁸

After passage of the law and the Administration’s statements that they would not invoke the waivers, the controversy faded from the national spotlight but continued to be of concern locally in southern California. Construction of the set of three-tiered fences was vigorously opposed by the California Coastal Commission which objected to the proposed filling in of a deep canyon on the border close to the ocean with over two million cubic yards of dirt so that the triple-fence could be extended across the filled gulch. The Coastal Commission’s approval of the project was necessary to obtain Clean Water Act permits. Construction proceeded slowly and essentially ground to a halt over the California Coastal Commission’s objections.

Following the September 11, 2001, attacks in New York City, Washington D.C. and Pennsylvania, Congress passed the Homeland Security Act of 2002. Among other things, the Act transferred responsibility for border security from the Department of Justice to the Department of Homeland Security (hereinafter, DHS) and abolished the Immigration and Naturalization Service.⁹

WAIVER OF LAWS AT THE BORDER

Irritated by the delay in constructing the three-tier fence in San Diego, Rep. Duncan Hunter of California, then Chairman of the House Armed Services Committee, began working on a broader waiver of law. Rep. Hunter said that the gap caused by the California Coastal Commission’s objections, “was a yawning hole in America’s defenses through which terrorists, smugglers and illegal immigrations can enter the country.”¹⁰ The result of these concerns on the part of Rep. Hunter, Rep. Sensenbrenner and others was a provision in the original “Real ID Act” (a major purpose of which was to require uniformity in identification cards) that provides the Secretary of the Department of Homeland Security with unprecedented authority to waive all laws – not just environmental laws. That section reads in its entirety:

“Waiver

(1) IN GENERAL – Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

⁸ Memorandum by David A. Yentzer, Assistant INS Commissioner, February 24, 1997.

⁹ Pub. L. No. 107-296.

¹⁰ “House Votes to Plug Gap in Fence between California and Mexico”, Marty Curtius and Richard Marosi, Los Angeles Times, February 11, 2005, p. A 25. None of the individuals who attacked the United States on September 11, 2001, crossed into the United States illegally or came from or through Mexico.

(2) FEDERAL COURT REVIEW

(A) **IN GENERAL** The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this paragraph.

(B) **TIME FOR FILING OF COMPLAINT** Any cause or claim brought pursuant to paragraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.

(C) **ABILITY TO SEEK APPELLATE REVIEW** An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

No hearings were held on the provision in either the Senate or House of Representatives. A few concerns were registered. For example, Rep. Jackson-Lee stated on the House floor that:

“To my knowledge, a waiver this broad is unprecedented. It would waive all laws It is so broad that it would not just apply to the San Diego border fence that is the underlying reason for this provision. It would apply to any other barrier or fence that may come about in the future. At the very least, we should have a hearing to consider the consequences of such a drastic waiver.”¹¹

Representative Jackson-Lee’s understanding that a waiver this broad was unprecedented was correct.¹² But ultimately, the provision was added by Congressman Sensenbrenner as a rider to the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief. It passed the Senate 100-0 and was signed into law by President Bush on May 11, 2005.

One can question whether this provision would have sailed through as easily as it did had it applied to the U.S. border with Canada. Indeed, a representative of the Heritage Foundation alluded to this by saying, “If the new Secretary of Homeland Security says, “We need this on the southern border and I’m authorizing it,” people will

¹¹ 151 Cong. Rec. H459 (daily ed. Feb. 9, 2005).

¹² Memorandum from Stephen R. Viña & Todd Tatelman, Legislative Attorneys, Am. Law Division, Cong. Research Serv., on Section 102 of HR 418, Waiver of Laws Necessary for Improvement of Barriers at Borders, (Feb. 9, 2005).

nod and say, yes. If he waives all laws for a border on the northern plains between the U.S. and Canada, people will look at him with fish eyes.”¹³

2006 – 2008 The Secure Fence Act and Subsequent Modifications

Over a year after passage of the Real ID Act, Congress gave the Department of Homeland Security both broad discretion and explicit direction on building border barriers. In the Secure Fence Act,¹⁴ Congress directed the Secretary of Homeland Security to take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States. Congress also directed the Secretary to construct at least two layers of reinforced fencing and to install additional physical barriers, roads, lighting, cameras, and sensors in five specific areas in California, Arizona, New Mexico, and Texas. The Act allowed for exceptions to a fence only if the “topography of a specific areas has an elevation grade that exceeds ten percent”, in which case other means, including surveillance and barrier tools could be used. The required segments added up to approximately 850 miles, with deadlines of May 30, 2008 for construction of a segment in Arizona and December 31, 2008, for fencing around Laredo. At least twenty-two other bills were introduced in the 109th Congress that included border barrier language, some requiring construction of a continuous wall from the Pacific Ocean to the Gulf of Mexico.

Issues raised by representatives of border communities, especially in Texas, led Senator Kay Bailey Hutchison (R-Texas) to express concern about, “Congress making decisions about the location of the border fencing without the participation of State and local law enforcement officials working with the Secretary of Homeland Security.” She and other Members worked to include provisions in the 2008 appropriations bill for DHS that required consultation with affected federal agencies, state and local governments, and local landowners before obligating funds. The provision also required publication of any environmental waivers in the *Federal Register* fifteen days before initiating work, required a segment by segment (defined as no more than 15 miles) analysis and justification, and gave the Secretary of Homeland Security discretion as to where and how much of the fence must be built by the end of calendar year 2008. Despite attempts in the House of Representatives to repeal even those modest requirements, those provisions remained.

Use of the Real ID Provision to Waive Laws

Former Secretary of Homeland Security Michael Chertoff first used Section 102(c) to waive seven environmental and historic preservation laws, the Administrative Procedure Act, and “all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of” those laws for the fourteen mile stretch of

¹³ “Critics Blanch at Dodging Laws to Build Border Wall”, Congressional Weekly, Feb. 21, 2005, p. 442.

¹⁴ P.L. 109-367, (Oct. 26, 2006).

triple wall not yet completed at the southern border.¹⁵ He used the waiver authority again to exempt compliance from seven environmental and historic preservation laws, the Administrative Procedure Act, the Military Lands Withdrawal Act of 1999, and all derivative and related federal, state or other laws, regulations and legal requirements for an area within the Barry M. Goldwater Range in southwestern Arizona.¹⁶ 72 Fed. Reg. 2,535 (Jan. 19, 2007). As discussed in more detail below, twenty statutes were waived on October 26, 2007 for a segment in southern Arizona that had been the subject of a temporary restraining order in a lawsuit brought by environmental plaintiffs.¹⁷

On April 1, 2008, former Secretary Chertoff announced that he was signing two more waivers of law. One waiver pertained to a levee-border barrier project in Hidalgo County, Texas. It waived twenty-two environmental and historic preservation laws, the Administrative Procedure Act, three laws relating to protection of Native American graves, religious practices and religious freedom, and the Federal Grant and Cooperative Agreement Act of 1997. As in all of the waiver statements, the Secretary also announced waiver of all state, local and “other laws” derived from or related to the subject of the federal laws to be waived.¹⁸

The second waiver covered large segments of the border area in California, Arizona, New Mexico and Texas, covering an estimated 470 total miles. This waiver included the construction of roads, fixed and mobile barriers, detection equipment of all types including radar and radio towers and lighting, and upkeep of these objects once constructed.¹⁹ And as the number of miles covered by the waiver increased, so too did the list of laws waived; to wit:

The National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

The Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

The Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251 *et seq.*

The National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*

The Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*

The Clean Air Act, 42 U.S.C. § 7401 *et seq.*

The Archaeological Resources Protection Act, 16 U.S.C. § 470aa *et seq.*

The Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*

The Noise Control Act, 42 U.S.C. § 4901 *et seq.*

¹⁵ 70 Fed. Reg. 55,622, 623 (Sept. 22, 2005).

¹⁶ 72 Fed. Reg. 2,535 (Jan. 19, 2007).

¹⁷ 72 Fed. Reg. 60,870 (Oct. 26, 2007).

¹⁸ 73 Fed. Reg. 18,294 (Apr. 3, 2008); 73 Fed. Reg. 19,077 (Apr. 8, 2008) (corrected version including geographic coordinates).

¹⁹ 73 Fed. Reg. 18,293 (Apr. 3 2008).

The Solid Waste Disposal Act, as amended by the Resources Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*

The Comprehensive Environmental Response, Compensation And Liability Act, 42 U.S.C. § 9601 *et seq.*

The Archaeological and Historic Preservation Act, 16 U.S.C. § 469 *et seq.*

The Antiquities Act, 16 U.S.C. § 431 *et seq.*

The Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. § 461 *et seq.*

The Wild and Scenic Rivers Act, 16 U.S.C. § 1281 *et seq.*

The Farmland Protection Policy Act, 7 U.S.C. § 4201 *et seq.*

The Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*

The Wilderness Act, 16 U.S.C. § 1131 *et seq.*

The Federal Land Policy and Management Act, 42 U.S.C. § 1701 *et seq.*

The National Wildlife Refuge System Administration Act, 16 U.S.C. §§ 668dd-668ee

The Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*

The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

The California Desert Protection Act, Pub. L. No. 103-433, 108 Stat 4471 (1004), Title I §§ 102(29) and 103

The Otay Mountain Wilderness Act of 1999, Pub. L. 106-145, 102(29) and § 103 of the California Desert Protection Act, Pub. L. 103-433

The National Park Service Organic Act, 16 U.S.C. §§ 1, 2-4

The National Park Service General Authorities Act, 16 U.S.C. §§ 1a-1 *et seq.*

The National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467, §§ 401(7), 403, and 404

The Arizona Desert Wilderness Act, Pub. L. 101-628, 104 Stat. 4469 (1990) § 301(a)-(f)

The Rivers and Harbors Act of 1899, 33 U.S.C. § 403

The Eagle Protection Act, 16 U.S.C. § 668 *et seq.*

The Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.*

The American Indian Religious Freedom Act, 42 U.S.C. § 1996

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb

The National Forest Management Act of 1976, 16 U.S.C. § 1600 *et seq.*

The Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531

Legal Issues

The first case challenging the constitutionality of the REAL ID waiver provision to reach the Supreme Court raising this issue, *Defenders of Wildlife v. Chertoff* (2008), was originally brought in 2007 in district court as a case related to a decision by the Bureau of Land Management (hereinafter, BLM or the Bureau), an agency within the Department of the Interior. In response to a request from DHS, the Bureau granted a right-of-way to the U.S. Army Corps of Engineers which is acting as contractors for DHS, for construction of the border wall, vehicle barriers and a road within the San Pedro Riparian National Conservation Area, a congressionally authorized area with a high degree of protection from environmental intrusion. The San Pedro Riparian area had been protected by Congress for several reasons. It is one of the last free-flowing rivers in the Southwest, cutting a swath of green and gold through the Sonoran desert. It is critically important habitat for a wide variety of animals, including approximately 390 bird species and millions of migrating songbirds. It was designated as the National Audubon Society's first Globally Important Bird area, and is the focal point for valuable ecotourism in southern Arizona.

The Bureau of Land Management initially prepared an environmental assessment under the National Environmental Policy Act.²⁰ Defenders of Wildlife (hereinafter, "Defenders"), along with the Sierra Club as co-plaintiffs, challenged BLM's compliance with NEPA, as well as its compliance with the Arizona-Idaho Conservation Act,²¹ the legislation that established the San Pedro Riparian National Conservation Area, and the Administrative Procedure Act.²² During the hearing to consider whether to issue a temporary restraining order, Judge Ellen Huvelle identified serious problems with BLM's compliance with these statutes. She stated that, ". . . I find [BLM's] discussion of cumulative impacts to suffer from both a factual and legal flaw The Court finds that [BLM's] failure here to not even acknowledge the potential cumulative impacts of anything outside the San Pedro watershed, including other border fencing areas, renders this EA inadequate under NEPA. . . ." She also found that there was irreparable environmental injury.

Although DHS was not a party to the litigation, former Secretary Chertoff published a waiver sixteen days after the court issued the TRO, waiving not only the three laws that were the subject of Defenders' litigation, but seventeen other laws.²³ Defenders filed an amended complaint, alleging that the Secretary's waiver and the authority to waive all laws provided by the REAL ID Act violate the Constitution's doctrine of separation of powers, and specifically, Article 1, Section 1, which directs that "all legislative Powers herein granted shall be vested in a Congress of the United States." Defenders argued that under the Constitution, Congress may not delegate legislative authority to an executive branch agency, and that while some delegations had been found to be pass constitutional muster, those provisions were more constrained in several

²⁰ 42 U.S.C. §4321 *et seq.*

²¹ 16 U.S.C. §460xx-1

²² 5 U.S.C. §706.

²³ See discussion at fn. 16.

identifiable ways. For example, almost all other waiver provisions have granted authority to the head of an agency or department to waive laws or processes that are within the jurisdiction and expertise of that particular government entity. In case of the REAL ID waiver provision, however, the Secretary of DHS enjoys authority that extends across the entire executive branch. Other waiver provisions also generally have language that describes more specifically the circumstances that can trigger the use of the waiver.

Further, plaintiffs argued that the lack of a right to judicial review of the DHS Secretary's implementation of the waiver removed an essential "check" on the executive branch's use of such delegated authority. Several cases upholding different waiver provisions had pointed to the availability of judicial review as a safeguard against executive branch abuse of Congress' intent.

Judge Huvelle's concluded that the REAL ID Act's waiver provision contained an "intelligible principle to guide the Executive Branch" by constraining it to "the expeditious construction of barriers and roads". Further, she found that the executive branch's strong constitutional role in foreign affairs and immigration matters supported the government's argument that the delegation was proper.²⁴

Utilizing their only available option under the REAL ID Act provision, Defenders and Sierra Club filed a timely petition to the Supreme Court for a writ of *certiorari*. Their petition was supported by three *amici curiae* briefs. Interestingly, one of the briefs was filed on behalf of fourteen Members of the U.S. House of Representatives, including the Chairpersons of the Committee on Homeland Security, Energy and Commerce, Transportation and Infrastructure, Education and Labor, Rules, Veteran Affairs, and the Intelligence Committee. The other two *amici* briefs were filed on behalf of constitutional and administrative law professors and national religious and environmental organizations, respectively. The Supreme Court denied the petition without comment on June 23, 2008.

A case based on a constitutional challenge to the more sweeping waivers of law issued in April, 2008, was filed in June, 2008 by the County of El Paso, City of El Paso, two Texas water districts, the Ysleta Del Sur Pueblo, various friends of national wildlife refugees and an individual. The complaint in *El Paso v. Chertoff*, similar to the *Defenders* litigation, challenges the constitutionality of the REAL ID delegation provision. It also pleads an additional argument concerning the Secretary's purported waiver of all state, local and other laws derived from or related to the subject matter of the waived federal laws. Plaintiffs argue that a federal cabinet secretary's waiver of unnamed non-federal laws is a violation of the Tenth Amendment to the Constitution. While all of the waivers purport to waive all state, local and other laws derived from or related to the subject matter of the federal laws enumerated in the waiver, none of the Secretary's waiver statements have identified which state, local or "other laws" might, in his view, be covered by the waiver. Plaintiffs filed for a preliminary injunction to stop the government from constructing any wall, fence, road, or other barrier or related infrastructure until the government has complied with all applicable laws. The court

²⁴ 527 F. Supp. 2d 119 (2007).

dismissed the case on September 11, 2008 (unreported) and the plaintiffs filed a petition for a writ of *certiorari* thereafter.²⁵

A second line of cases, representing landowners in Texas, has been filed by individual property owners, and municipal governments. These cases challenge the procedures by which DHS is undertaking condemnation actions. In turn, DHS has sued numerous landowners to settle title claims. A number of hearings are scheduled for March, 2009.

CURRENT STATUS

As of December 19, 2008, 286 miles of pedestrian fence and 267 miles of vehicle barriers had been constructed.²⁶ The cost of building the wall, initially estimated at \$3.3 million per mile, has soared to an average of between \$3.9 and \$7.5 million a mile according to the General Accountability Office for the pedestrian wall (depending on location and timing) and \$2.8 million a mile for the vehicle fence.²⁷ It is considerably higher in some areas. For example, in southern California, the costs of grading and filing a 3.5 mile stretch of canyon near an estuary is approximately \$48.6 million, or over \$16 million a mile.²⁸

Across the southern border states, problems and concerns abound. Shortly before Christmas, 2008, grading and excavation work began in the Otay Mountain Wilderness area in southern California. The area was designated wilderness by Congress to protect a unique ecosystem, including the endangered quino checkerspot butterfly and the only known stand of Tecate cypress. The work being done in the wilderness area for construction of the wall involves, among other things, extensive drilling and blasting to clear 530,000 cubic yards of rock.

To the west of the wilderness area, construction is ongoing to build the tiered set of three walls in Friendship Park. The Park was dedicated by First Lady Patricia Nixon in August, 1971. Moved by the spirit of friendship memorialized in the dedication plaque still standing at the park, the First Lady had her security detail cut a section of the small barbed wire barrier fence that existed at the time so that she could cross over and hug Mexican children. Since then, the Park became an important meeting place for a variety of peaceful activities: soccer, poetry readings, a binational garden and, recently, weekly communion through the fence. It is also a key meeting place for families separated by immigration laws. As of January, 2009, all access to both a plaque noting Patricia Nixon's dedication and the original Monument Boundary Marker is closed to the public.

²⁵ Supreme Court docket No. 08-751.

²⁶ www.dhs.gov/xprevprot/programs/border-fence-southwest.shtm, last checked 1/28/09.

²⁷ Statement of Richard M. Stana, Director, Homeland Security and Justice Issues, U.S. General Accountability Office, before the Committee on Homeland Security, House of Representatives, September 10, 2008.

²⁸ The canyon, through which a river used to run, empties out into the beach on the Pacific Ocean, the site of "Friendship Park".

Summer rains in southern Arizona revealed a serious problem with construction in Nogales, Arizona, and Nogales, Mexico. The International Boundary and Water Commission is investigating a barrier that was placed under the wall in Nogales, Mexico by the U.S. (but on the Mexican side, without notification to either Mexico or the IBWC) significantly exacerbated a July, 2008, flood that took two lives and caused \$8 million dollars of damage.²⁹

Also in Arizona, and as the result of the same storm that flooded both Nogales, Arizona and Nogales, Mexico, serious scour and erosion, as well as serious adverse effects were documented as the result of the wall bordering Organ Pipe Cactus National Monument. The National Park Service published a report showing that the wall did not meet the standards set by the Finding of No Significant Impact that was done prior to former Secretary Chertoff's waiver, nor did construction meet the US Army Corps of Engineers hydrologic performance standards. Contrary to DHS' early statements, there was significant pooling, lateral flows and scour. The authors of the report stated that, "As a consequence, natural resources of both the national monument and NPS infrastructure were impacted, as well as resources and infrastructure on neighboring lands and Mexico." Short and long-term impacts were identified, including changes in riparian vegetation, channel morphology and floodplain function and even effects on patrol roads. The report ends with a recommendation for an objective third-party review of the hydrological impacts of the wall.³⁰

While some people think of the border as an empty wasteland or barren desert, in fact, there are a considerable number of specially designated federal conservation areas to protect because of the phenomenal biological diversity found in many areas at the border, along with rare endemic species. For example, Coronado National Forest, on the border in southern Arizona, boasts of having the highest species diversity of any national forest in the country. Cabeza Prieta National Wildlife Refuge, famed for the last remaining population of Sonoran pronghorn antelopes, is at the border. The first jaguars coming back into the United States for decades are crossing the border in Arizona and New Mexico. The Santa Ana National Wildlife Refuge and the Rio Grande National Wildlife Refuge are among the wildlife refugees affected in Texas. These refugees are both vital habitat for extremely rare species, such as ocelots, and a magnet for ecotourism in South Texas.

The reservation of the Tohono O'Odham nation, the second largest Native American reservation in the country, also sits on the border in Arizona. The protection of sacred sites and gravesites has been extremely challenging. Indeed, bone fragments of tribal members' ancestors have been in the tire tracks of earth-moving equipment brought in to construct border barriers, and important archaeological sites have been disturbed or destroyed.

²⁹ www.azstarnet.com/sn/printDS249535 (July 23, 2008).

³⁰ "Effects of the International Boundary Pedestrian Fence in the Vicinity of Lukeville, Arizona, on Drainage Systems and Infrastructure, Organ Pipe Cactus National Monument, Arizona," by the National Park Service, August, 2008.

Uniquely in Texas, there are a number of small communities on both sides of the border where families and businesses work closely together from both countries. The Rio Grande is an integral part of life. The boundary itself is in the middle of the Rio Grande River, so engineers have determined to set the wall back by as much as two miles north of the river. Homes, agricultural fields and churches will be affected. The Sabal Palm Grove Audubon Sanctuary south of Brownsville, Texas, contains one of the few remaining stands of the palm forests that greeted Spanish explorers in the 16th century.³¹ All of the Sanctuary's 527 acres will be behind the wall. Also in the Rio Grande Valley, engineers on the ground preparing for construction have, to their surprise, discovered Americans' homes that would be "behind the wall". No plans for ingress and egress to homes, agricultural fields, and nature sanctuaries have been announced.

CONCLUSION

Congress should not wait to see whether the Supreme Court ultimately rules on the constitutionality of the waivers. Waiving all laws for hundreds of miles of construction is fundamentally contrary to the principles of the United States, a country that prides itself as a country that was founded on and adheres to the "rule of law". There are legislative precedents for dispute resolution at the highest level should there be determined to be a clash between two opposing and important needs.

Congress should also suspend construction of the wall. The wall is being built so hastily that careless mistakes are being made. Coordination within the federal executive branch, let alone tribal, state, and local agencies and the public is either not occurring or not going well. Engineers on the ground are surprised by what they find. Damage has only just begun and will continue until someone calls a "time out".

A suspension should be accompanied by a mandate to carefully analyze the situation from several perspectives. Do these various segments of wall actually make the nation more secure? And if so, from what? Former Secretary Chertoff has said publicly that the border with the most risk of terrorists crossing through it is the U.S.-Canada border. GAO has recently reported that only twelve miles of that border can be considered "secure" in any sense of the word, and yet over 95% of DHS's appropriations are going to the southern border. Is the wall a security safeguard or something to placate the public in the face of Congress' failure to pass immigration reform?

Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, summed it up best when he stated at the beginning of the new Congressional session that: ". . . I believe we would be wise to reconsider the effectiveness and cost of a wall along our southern border, which has adversely affected the fragile environment and vibrant cross-border culture of an entire region. Such a wall stands as a symbol of fear and intolerance. This is not what America is about and we can do better."

³¹ The Rio Grande was originally named the "Rio de las Palmas".