International Law & National Security

The REAL ID Act Border Fence Provision: Congress Delegates Power To the Executive to Waive Laws In the Interest of National Security

*By Margaret D. Stock**

Most readers of *Engage* are likely familiar with the ongoing public controversy over proposals to build fences along the United States borders with Canada and Mexico. Like most Americans, they see the issue as one requiring hard policy choices by Congress. However, since 2005, Congress has delegated its legislative power and jurisdiction over this conflict almost entirely to the Executive. It has also deprived aggrieved parties of most judicial review of Executive decisions concerning construction of the fence.

On May 11, 2005, the United States Congress passed Section 102 of the REAL ID Act of 2005[1]—without debate and without any hearings—as part of a measure funding the war on terrorism; the section was described as an act to ensure speedy construction of a border fence between the United States and Mexico. This highly unusual law delegates to the Secretary of Homeland Security "sole discretion" to waive all local, state, and federal laws and regulations, if doing so is determined necessary to construction. Congress voted in addition to allow only the narrowest possible court review of the border fence decisions of the Secretary.

To date, Secretary of Homeland Security Michael Chertoff has twice invoked the law to waive application of U.S. environmental laws. His first invocation of the power effectively ended an environmental lawsuit that halted construction of a border fence near San Diego, California. His second invocation will likely forestall similar lawsuits over border fences and barriers planned in Arizona. Beyond the immediate effect of stopping certain environmental lawsuits, however, the law remains a precedent that could be broadly applied to override not only environmental laws, but also labor, safety, tort, and zoning laws, among others, as they inhibit construction anywhere along the U.S. border.

The law has been upheld by the one federal court to review it, yet raises novel legal questions. Through this law, Congress has delegated to the Executive sole discretion to waive "all legal requirements" that interfere with its legislative objective, although at the time of enactment it was unclear how many future border fences might be constructed. This unprecedented delegation of power raises novel separation of powers and federalism issues that should be of particular interest to conservatives and libertarians, and of general interest to vigilant Americans.

Nations have, for hundreds of years, built external walls in attempts to enhance their security by preventing people from crossing their borders. The Great Wall of China, Hadrian's Wall in Roman England, and the Berlin Wall are the most obvious examples. Until late in the twentieth century, however, the United States did not have a significant history of promoting border fences as official policy. In fact, most Americans appeared to view border barriers as reflective of totalitarian thinking; this view was perhaps best expressed when President Ronald Reagan famously stood at the Brandenburg Gate in Berlin and demanded, "Mr. Gorbachev, tear down this wall."[2]

This philosophy towards border walls began to change in the late 1990s, when the Congress and Executive first showed serious interest in fences as a means to protect certain areas of the border from migrants who were crossing illegally. This interest accelerated as illegal immigration became a topic of intense national discussion after the 2001 terrorist attacks on the World Trade Center and the Pentagon. By the end of 2005, the United States had constructed approximately fourteen miles of high-security border fencing along the U.S.-Mexico border, and was in the process of authorizing hundreds of miles of additional fencing. Discussions about completing a fence along the entire border between the United States and Mexico, and even along the border with Canada, were commonplace.[3] These discussions led ultimately to passage of the Secure Fence Act of 2006, in which Congress mandated the construction of more than eight hundred miles of additional border barriers along the southern U.S. border.[4] The U.S. trend tracks a similar trend world-wide, as countries such as Israel, India, and Saudi Arabia have recently constructed fences in an effort to enhance security.[5]

The evolution of the change in law affecting U.S. border fences has been equally rapid. In 1990, using its general power to control the border,[6] the United States Border Patrol began constructing the first significant American border fence near San Diego, California, in an attempt to cope with massive unregulated international migration in the area.[7] In 1993, the Border Patrol—with the help of the Department of Defense—completed a fourteen-mile "primary" fence in the same region.[8] This initial effort having been judged a success after illegal migration in the area dropped,[9] the Border Patrol later made plans to improve the primary fence with a three-tiered fence system that would include special lighting, roads, and high-technology sensors.

The Border Patrol's plan, however, ran into serious legal obstacles—primarily, but not entirely, as a result of conflicts with the California state Coastal Management Program. The Immigration & Naturalization Service (INS), and later the Department of Homeland Security (DHS), sought to build the fence in an environmentally sensitive area, and construction of the fence in the manner desired by the agencies would have violated various state and federal environmental laws. Thus, a conflict arose between environmental interests and perceived requirements of domestic security.

The first statutory authorization for the border fence itself had come in the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA).[10] Section 102 of IIRIRA

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gave the Attorney General the authority to construct fences at U.S. international borders, and Section 102(b) specifically authorized a border fence near San Diego. The language in the statute recognized that the construction of a border fence might result in conflicts with other laws. To deal with some of those conflicts, the law authorized safety features for Border Patrol agents, allowed the government to buy land and obtain real property easements, and waived the application of the Endangered Species Act[11] and the National Environmental Policy Act.[12]

By 2005, DHS had completed more than nine miles of the fourteen-mile "three-tiered" fence. The remaining miles of the fence had not been completed, however—in large part because of the legal stance taken by the California Coastal Commission (CCC), the state agency charged with responsibility for carrying out California's Coastal Management Program.[13] The CCC, which held regulatory authority under the federal Coastal Zone Management Act (CZMA), objected to the Border Patrol's plans to complete the border fence by dumping fill into a deep canyon called Smuggler's Gulch, "a 300-foot-deep gully that has been a prime route for bandits, border jumpers[,] and raw sewage from Tijuana to Southern California for more than 150 years."[14] The Border Patrol's plan apparently involved "shaving off the tops of two mesas and moving 2.2 million cubic yards of dirt to create" a road that could be more easily patrolled and fenced.[15] Although IIRIRA had allowed for a waiver of two environmental laws,[16] it did not waive all of them—and CCC cited numerous ways in which the Border Patrol's project did not comply with state and federal laws.[17]

Interestingly, neither INS nor its successor agency DHS ever attempted to exercise the environmental waiver authority granted in IIRIRA. Instead, INS—and later, DHS—reportedly complied with the requirements of the Endangered Species Act and the National Environmental Policy Act, the two laws for which it had been given the power to obtain waivers.[18]

Thus, when the 109th Congress convened for its first session in the fall of 2004, the San Diego border fence remained incomplete. At the same time, immigration issues were taking an increasingly visible and controversial place on the national legislative stage. Observers predicted that the border fence issue would be central to this debate.

The Congressional Research Service outlined several possible policy options for resolving the border fence conflict: Congress could (1) allow DHS to waive some or all applicable laws in order to expedite the construction of all fences along all U.S. international borders; (2) allow DHS to waive some or all applicable laws only to finish the construction of the fourteen mile triple-fence in San Diego; (3) establish a panel of experts to review all proposed border fence construction projects; or (4) require DHS to propose alternative construction plans that would mitigate the environmental impact of the fence's construction.[19]

Congress chose the first option. As the immigration debate heated up in the 109th Congress, proponents of the idea of a legal waiver succeeded in attaching border fence language to the House-passed "REAL ID Act of 2005," H.R. 418. The language chosen for the border fence section of the REAL ID Act caused an immediate stir among those who read it. Not only did the H.R. 418 language mandate that the Secretary of Homeland Security override possible environmental laws that conflicted with construction of any border fence, it delegated unprecedented power to the Secretary of Homeland Security to waive the application of all laws of any kind and denied aggrieved persons access to any federal court to review any administrative decisions.

Opponents of the REAL ID Act fought its enactment vociferously but were rebuffed. While H.R. 418 did not become law as a separate piece of legislation, its supporters managed in conference to mount a slightly modified version on the back of one of the traditional legislative workhorses of the U.S. government—a military appropriations bill. On February 11, 2005, as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005,[20] Congress enacted, and the President signed into law a broadly-worded border fence section. The enacted law stated:

> WAIVER OF LEGAL REQUIREMENTS NECESSARY FOR IMPROVEMENT OF BARRIERS AT BORDERS; FEDERAL COURT REVIEW.
>
> Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1103 note) is amended to read as follows:
> (c) 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.
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> (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 subparagraph.
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> (B) Time for filing of complaint.—Any cause or claim brought pursuant to subparagraph (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.
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> (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.[21]

The earlier border fence law, Section 102(c) of IIRIRA, had only allowed for waiver of the Endangered Species Act and the National Environmental Policy Act. In marked contrast, the new provision of the REAL ID Act allowed for waiver of "all legal

requirements" that obstructed construction of border fences. The language "all legal requirements" was meant to include any local, state, or federal statute, regulation, or administrative order.[22] The law allowed the Secretary of Homeland Security to invoke the waiver upon notice in the Federal Register, and gave "sole discretion" to the office to decide if a waiver was necessary. Thus, as an initial matter, Congress' latest effort went far beyond any waiver language ever enacted.[23]

The judicial review provisions were also highly unusual, although they had been modified from the initial draft language so as to comply with Constitutional requirements.[24] Rather than denying all judicial review, the enacted law limited any judicial review to the Constitutional minimum and barred all review in any circuit court. (The legislators' choice of language may have been driven by a desire to avoid review by the Congressionally unpopular Ninth Circuit Court of Appeals, which had shown a propensity for rigorously enforcing federal environmental statutes.) Under the law, aggrieved parties can now seek review of border fence construction decisions only through an original action in U.S. district court and appellate review only in the U.S. Supreme Court.

Homeland Security Secretary Chertoff first invoked his authority under the newly enacted law on September 13, 2005. On September 22, 2005, he published a notice in the Federal Register, waiving eight separate laws—including the Administrative Procedures Act[25]—that he believed were standing in the way of completing the San Diego border fence.[26] Several environmentalist groups—including the Sierra Club, the California Native Plant Society, the San Diego Audubon Society, and the Center for Biological Diversity—had filed a lawsuit in 2004 challenging construction of the fence on the ground that its construction violated NEPA.[27] When Secretary Chertoff invoked his authority to waive the application of NEPA to construction of the border fence, the lawsuit fell into jeopardy of summary dismissal. In the face of an Order to Show Cause why their lawsuit should not be dismissed, the environmentalist groups argued that the REAL ID border fence provision was unconstitutional. According to these groups, the new law presented "no intelligible principle" for the Secretary of Homeland Security to follow regarding waivers, thus creating an unconstitutional delegation of legislative power to the Executive under the seventy-year-old precedents of *Panama Refining Co. v. Ryan*[28] and *Schechter Poultry Corp. v. United States*.[29]

In support of its argument that the environmental lawsuit should be summarily dismissed, the Government stated that Congress had articulated a general policy and the means to carry out that policy, as required by the Supreme Court's decision in *Mistretta v. United States*.[30] Furthermore, said the Government, Congress is permitted to delegate powers broadly in an area where the Executive has independent and significant constitutional authority—and the areas of immigration, national security, and border enforcement were such areas. U.S. District Court judge Larry Burns of San Diego agreed with the Government, ruling that the waiver was not unconstitutional, and tossing out the lawsuit.[31] The environmentalist groups did not appeal his decision.

The congressional push to construct border fences continued unabated throughout late 2005 and early 2006, with both the House and the Senate voting to construct additional fences. On October 26, 2006, President George W. Bush signed into law the Secure Fence Act of 2006, which provides for the construction of new border fences that are estimated by the Congressional Research Service to cost up to $60 billion dollars.[32] The Secretary of Homeland Security continues to have authority to waive any legal requirements that stand in the way of construction of these new fences as well, and those who would challenge his decisions in the courts will face the same limited judicial review. Thus, it appears that future environmental lawsuits—and other lawsuits as well—are likely precluded.

On January 12, 2007, Secretary Chertoff invoked his border fence waiver authority for the second time, publishing a notice in the Federal Register on January 19, 2007 stating that he was waiving "in their entirety, all Federal, State, or other laws, regulations and legal requirements of, deriving from, or related to" a spate of laws, including NEPA, ESA, the Clean Water Act, the Wilderness Act, the National Historical Preservation Act, the National Wildlife Refuge System Administration Act, the Military Lands Act, the Sikes Act, and the APA.[33] This waiver was intended to facilitate construction of border fences and barriers in the vicinity of the Barry M. Goldwater Range along the U.S.-Mexico border in Arizona.[34]

It remains to be seen whether frustration with other litigation will spur Congress to follow the precedent of the border fence provision by granting similar broad waiver authority—and similar limited judicial review—in other areas of "national security" law. In addition, the law's language raises troubling questions: To what extent can Congress delegate to the Executive "sole discretion" to "waive" domestic state and federal laws? How will laws such as the border fence provision address federalism concerns, such as the right of states to enforce their property, health, and safety laws? And finally, is it wise in a democratic republic to allow the logic of "national security" to trump all other laws, at the discretion of a Cabinet-level official? In the wake of the border fence provisions of the REAL ID Act, these questions remain unanswered.

Endnotes

1 Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub.L. No. 109-13, 119 Stat. 231 (May 11, 2005). *See* 8 U.S.C.§1103 note.

2 Ronald Reagan, Remarks at the Brandenburg Gate, West Berlin, Germany, June 12, 1987, *available at* http://usgovinfo.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=usgovinfo&zu=http%3A%2F%2Fwww.reaganfoundation.org%2Freagan%2Fspeeches%2Fwall.asp.

3 *See, e.g.*, National Public Radio, "Talk of the Nation" (Transcript, May 22, 2005) (on file with author).

4 Secure Fence Act of 2006, Pub.L.109-367 (Oct. 26, 2006).

5 Martin Sieff, "Analysis: US Fence Follows Global Trend," United Press Int'l (May 24, 2006).

6 8 U.S.C. §1103(a)(5).

7 Blas Nuñez-Neto, Congressional Research Service, "Border Security: Fences Along The U.S. International Border" 1-2 (Jan. 13, 2005) [*hereinafter*, C.R.S. Report]. The discussion that follows relies primarily, although not entirely, on the history of the border fence given in this excellent report. The report was also later updated to reflect later changes in the law. *See* Blas Nuñez-Neto,

Congressional Research Service, Border Security: Fences Along The U.S. International Border (Updated, May 9, 2005).

8 *Id*.

9 *Id*. at 2 ("[T]he primary fence… proved to be quite successful but fiscally and environmentally costly"); *see also* U.S. General Accounting Office ("GAO"), "Border Control—Revised Strategy is Showing Some Positive Results," GAO/GGD-95-30 (December 1994), *available at* http://www.gao.gov/archive/1995/gg9530.pdf.

10 Illegal Immigration Reform & Immigrant Responsibility Act of 1996 ("IIRAIRA'), Pub.L. 104-208, Div. C (passed as part of the Omnibus Consolidated Appropriations Act of 1997). The border fence provisions are at 8 U.S.C. §1103.

11 Endangered Species Act of 1973, ("ESA"), 16 U.S.C. §§1531 et seq.

12 National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§4321 et seq.

13 *See* http://www.coastal.ca.gov/perresp.html.

14 John M. Broder, "With Congress's Blessing, A Border Fence May Finally Push Through to the Sea," N.Y.Times (July 4, 2005).

15 *Id*.

16 IIRAIRA Section 102(c) provided for a waiver of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §§1531 et seq., and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§4321 et seq.

17 *See* California Coastal Commission ("CCC"), "W8a Staff Report & Recommendation on Consistency Determination," CD-063-03, October 2003, *available at* http://www.coastal.ca.gov/cd/W8a-10-2003.pdf. *Hereinafter*, "W8a Staff Report."

18 CRS Report; "W8a Staff Report," at 14.

19 CRS Report at 6.

20 Pub. L. 109-13, 109th Congress, 119 Stat. 231.

21 Pub. L. 109-13, Div B, Title I, § 102, 119 Stat. 306.

22 H.Rept. 109-72 at 171 (2005).

23 The only similar law that this author has located is the Trans Alaska pipeline legislation, 43 U.S.C. §1652(c), which allows the Secretary of the Interior and other federal officers to "waive any procedural requirements of law or regulation which they deem desirable to waive in order to accomplish the purposes of this [law]…" This law also limits judicial review to Constitutional issues.

24 Denying all judicial review of federal government action is thought by most legal scholars to be unconstitutional. *See* Erwin Chemerinsky, Federal Jurisdiction (3d ed. 1999) at 201-07.

25 Administrative Procedures Act, 5 U.S.C. §§511-599.

26 70 F.R. 5562-02, 55563, 2005 WL 2295005 (F.R.).

27 Sierra Club v. Ashcroft, Case No. 04CV0272-LAB (JFS) (S.D.Cal., filed Feb. 2004).

28 293 U.S. 388, 415, 421 (1935) (holding a Congressional delegation to the President unconstitutional for lack of any intelligible principle where the delegation failed to "state whether or in what circumstances or in what conditions" the President could prohibit the transport of petroleum products).

29 295 U.S. 495, 541-50 (1935) (holding a Congressional delegation to the President unconstitutional where it conferred authority to regulate the entire economy "on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition'").

30 488 U.S. 361, 372-73 (1989) (interpreting "intelligible principle" to mean that Congress has "clearly delineate[d] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority").

31 Leslie Berestein, *Federal Judge Rejects Attempt to Block Border Fence*, San Diego Union-Tribune, Dec. 13, 2005, at B2.

32 Todd J. Gillman, *Hutchison Skeptical of Border Fence*, Dallas Morning News, Jan. 10, 2007.

33 Dep't of Homeland Sec'y, Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 As Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 2535-36 (Jan. 19, 2007).

34 *Id*.