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# “HIGH ILLEGAL ENTRY” IN THE AMERICAN BORDERLANDS

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# **“HIGH ILLEGAL ENTRY” IN THE AMERICAN BORDERLANDS**

The Governmental Authority Behind The Border Fence  
And Its Practical Implications for Local Wildlife

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December 16, 2008

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## I. INTRODUCTION

At first glance, the American Southwest appears to be devoid of wildlife, but in actuality it is a cradle of rich bio-diversity.<sup>1</sup> The Arizona Borderlands alone includes protected federal lands spanning 350 miles, and including the Organ Pipe Cactus National Monument, Cabeza Prieta National Wildlife Refuge, Coronado National Forest and the San Pedro Riparian National Conservation Area (“SPRNCA”).<sup>2</sup> The Borderlands are home to many rare, endangered and threatened species, which occur nowhere else in the United States, and include the Sonoran pronghorn, the cactus ferruginous pygmy owl, and the jaguar.<sup>3</sup> Unfortunately, the borderlands are also part of the front lines of the government’s war on illegal immigration.<sup>4</sup>

In 2005, Congress passed the REAL ID Act as part of a military spending and tsunami relief effort.<sup>5</sup> A waiver provision of the act delegated authority to the Secretary (“Secretary”) of the Department of Homeland Security (“DHS”) to waive “all legal requirements” that interfered with the expeditious construction of the border fence.<sup>6</sup> The waiver provision grants the Secretary the ability to waive any federal, state or municipal law the Secretary deems as inhibiting the efficient and expeditious construction of a border wall along the U.S.-Mexican, international boundary.<sup>7</sup> The outer bounds of the

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<sup>1</sup> Telephone interview with Brian Segee, Staff Attorney, Defenders of Wildlife (Oct. 24, 2008).

<sup>2</sup> Brian Segee, *The Impacts of Immigration Policy on Wildlife and Habitat in the Arizona Borderlands*, Defenders of Wildlife, Defenders.org 3 (2006), [http://www.defenders.org/programs\\_and\\_policy/habitat\\_conservation/federal\\_land/border\\_policy/](http://www.defenders.org/programs_and_policy/habitat_conservation/federal_land/border_policy/) (Noting that Defenders’s dispute with the Federal Government concerning the Arizona borderlands is not solely circumscribed within the construction of the Border Fence, but with the entire illegal immigration policy that, in its view, has pushed immigrants out of major cities into the surrounding protected lands, resulting in the construction of miles of illegal roads, the abandonment of scores of vehicles, the damaging of rare desert springs and wetlands, and huge amounts of left-behind trash).

<sup>3</sup> *Id.* at 3.

<sup>4</sup> Wildlife Caught in Crossfire of US Immigration Battle. *Nature Magazine*, 27 July 2006.

<sup>5</sup> REAL ID Act, 119 Stat. 231-305 (2005) (codified as amended at 8 U.S.C. § 1103 (2006)).

<sup>6</sup> § 102(c), 8 U.S.C. § 1103 note.

<sup>7</sup> *Id.*

Secretary's waiver authority are not yet clear,<sup>8</sup> and opponents of the Border Fence fear that it will allow the federal government to abrogate national treaties in addition to all municipal, state and federal laws.<sup>9</sup> To date, judicial challenges to the Secretary's actions by concerned groups such as Defenders of Wildlife and Sierra Club have proved unsuccessful.<sup>10</sup>

Upon completion, the border fence will stretch nearly 670 miles across parts of California, Arizona, New Mexico and Texas.<sup>11</sup> Nearly one quarter of the 1,950-mile U.S.-Mexico border runs across public lands.<sup>12</sup> Acquisition of the rest of the necessary land has therefore consisted of a systematic governmental imposition of eminent domain against private landowners, violation of tribal agreements with Native American groups, and numerous legal battles between state and federal authorities.<sup>13</sup>

The term, "Border Fence" is a misnomer. The Border Fence is really a wall, rising as much as twenty feet out of the desert floor, usually reinforced by a second or third wall.<sup>14</sup> Its primary purpose is to prevent illegal-crossings into the United States.<sup>15</sup> The "Fence" is generally comprised of two basic constructions: pedestrian fencing, made up of large metal-mesh walls intended to prevent crossings by foot; and vehicle fencing, composed mostly of staggered metal poles intended to prevent crossings by motorized vehicle.<sup>16</sup> It is sometimes equipped with video cameras and radio towers, and often accompanied by roads and drainage pipes.<sup>17</sup> Since 1996, the construction of the Border

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<sup>8</sup> Discussed *infra*.

<sup>9</sup> Email Interview with Matt Clark, Southwest Representative, Defenders of Wildlife (Oct. 8, 2008).

<sup>10</sup> Discussed *infra*.

<sup>11</sup> Secure Fence Act of 2006, 8 U.S.C. § 1103.

<sup>12</sup> Defenders of Wildlife, *The Borderlands Conservation and Security Act*, Defenders.org, [http://www.defenders.org/programs\\_and\\_policy/policy\\_and\\_legislation/border\\_legislation.php](http://www.defenders.org/programs_and_policy/policy_and_legislation/border_legislation.php).

<sup>13</sup> Daniel B. Wood, *Where U.S.-Mexico Border Fence Is Tall, Border Crossings Fall*, CSMONITOR.COM (Apr. 1, 2008), <http://www.csmonitor.com/2008/0401/p01s05-usgn.html>.

<sup>14</sup> HOUSE.GOV/, <http://www.house.gov/hunter/newfence.htm>.

<sup>15</sup> H.R. REP. 109-72, at 172, 109th Cong., 1st Sess. 2005, 2005 U.S.C.C.A.N. 240, (2005).

<sup>16</sup> *Id.*

<sup>17</sup> Wood, *supra* note 13.

Fence has been a major priority in Congress as politicians have aimed to control the flood of illegal immigration flowing north from Mexico and Central America.<sup>18</sup>

Despite this fact, the construction of the Border Fence is actually behind schedule and out of financing.<sup>19</sup> As of August 29, 2008, the DHS had completed about half of its congressionally mandated goal.<sup>20</sup> Construction is being delayed due to litigation with private owners and a general inability to rapidly acquire the necessary parcels of land.<sup>21</sup> The Bush administration has so far left allocation of additional funds to the Democratic-lead Congress.<sup>22</sup> As a result, the DHS has made the conscious decision to ensure the installation of the tactical infrastructure by reallocating money intended for construction of virtual fences and surveillance equipment to the construction effort.<sup>23</sup> The completion of the rest of the construction is dependent upon additional appropriations by Congress.<sup>24</sup> It is safe to assume that such appropriations will be passed and that absent a large shift in immigration policy, the wall will be completed sometime in the next couple of years.<sup>25</sup>

Recent information suggests that undocumented immigration levels across the southern U.S. border have risen sharply despite more than a decade of border patrol efforts.<sup>26</sup> There is considerable evidence that the flow of illegal immigration has adapted to recent enforcement postures, including the Border Wall, and has simply shifted from urban areas to the more remote areas of the Arizona desert.<sup>27</sup> Some doubts have arisen, therefore, as to the effectiveness of the current immigration policy.<sup>28</sup> Decreased levels in localized, urban areas have been more than offset by increased levels in less patrolled and

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<sup>18</sup> See, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 1996 HR 3009-546 (1996).

<sup>19</sup> Spencer S. Hsu, *Delay Seen for Fence at U.S.-Mexico Line*, WASHINGTONPOST.COM (Sep. 11, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/10/AR2008091003419.html>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Interview with Brian Segee, *supra* note 1.

<sup>26</sup> Brian Segee, *supra* note 2, at 3.

<sup>27</sup> *Id.*

<sup>28</sup> Hsu, *supra* note 19.

more remote parts of the border.<sup>29</sup> Thus, the “pipeline” of human foot traffic is diverting to other areas as illegal-immigrants acclimate to the government’s policies.<sup>30</sup> Animals have not proven as adaptable, and the Border Fence is proving very effective at disrupting wildlife corridors, destroying natural habitats, and isolating subspecies from one another.<sup>31</sup> In Arizona alone, the Border Patrol estimates that 39 species protected or proposed to be protected under the Endangered Species Act (“ESA”) are already being affected by its policies.<sup>32</sup>

The apparent desolation of the American Southwest may be a major reason why groups like Defenders of Wildlife and Sierra Club have failed to gain much traction regarding the fight over the construction of the Border Fence.<sup>33</sup> And halting illegal immigration provides a more politically-provocative platform than conserving wildlife populations.<sup>34</sup> Indeed, to much of the public at large, even many Arizonans, the unprecedented destruction of the state’s borderland environment is largely unknown.<sup>35</sup> But the Southwestern borderlands of the U.S. are teeming with diverse species, many of which are currently fighting for recovery and survival.<sup>36</sup> They require effective and coordinated cross-border management with international involvement.<sup>37</sup> Yet, recent actions of the federal government demonstrate that the protection of such species is a lower governmental priority than quelling the flow of illegal immigration.<sup>38</sup> Thus, despite the contrary mandate of laws like the ESA, the construction of the Border Fence threatens to destroy the ecosystem of the southern border; “a great biological unity, with a meat cleaver of laws shredding it and cutting it in half.”<sup>39</sup>

This governmental prioritization has incurred much opposition, stemming from concerns over the Border Wall’s environmental and ecological impacts. But the current

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<sup>29</sup> Brian Segee, *supra* note 2, at 3.

<sup>30</sup> Wood, *supra* note 13.

<sup>31</sup> *See*, Brian Segee, *supra* note 2.

<sup>32</sup> Defenders, *supra* note 12.

<sup>33</sup> Interview with Brian Segee, *supra* note 1.

<sup>34</sup> *Id.*

<sup>35</sup> Brian Segee, *supra* note 2, at 6.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 25.

<sup>38</sup> Discussed *infra*.

<sup>39</sup> Brian Segee, *supra* note 2, at 7 (Quoting the writings of Charles Bowden).

challenge for Border Wall opponents is to spell out these concerns as a sufficiently persuasive legal argument. Framing the magnitude of the change the Waiver Provision has caused in our legislative process in a way that effectively moves a judge has proven extremely difficult.<sup>40</sup> From a lay point of view, it is easy to see that the Waiver Provision has a greatly expanded scope in comparison to past waivers. It is much harder, however, to describe the same in compelling legal terms. Moreover, the United States Supreme Court has so far chosen to remain silent with regard to the Waiver Provision’s constitutionality.<sup>41</sup>

But the ability of an unelected, unaccountable executive employee to subvert the force of innumerable laws flies in the face of the founding constitutional conception of separation of powers.<sup>42</sup> The waiver provision impermissibly infringes on Congress’ duty to legislate by avoiding the typical statutory requirements of bicameralism and presentment without providing adequate governmental oversight.<sup>43</sup> In short, the Waiver Provision is unconstitutional, and an affront to liberty.<sup>44</sup>

“When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.”<sup>45</sup>

The purpose of this paper is to examine the past, present and future legislative states of the REAL ID Act waiver provision (“Waiver Provision”) and the logic behind the judicial decisions shaping the fight over its application. First, I examine the legislative history of the Waiver Provision—how it originated and how it evolved into its

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<sup>40</sup> Discussed *infra*.

<sup>41</sup> Discussed *infra*.

<sup>42</sup> See, Brief of *Amici Curiae* William D. Araiza and Other Constitutional and Administrative Law Professors Listed Herein in Support of Petitioners, Defenders of Wildlife, et al. v. Chertoff, 128 S.Ct. 2962 (2008) (No. 07-1180).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Clinton v. City of New York*, 524 U.S. 417, at 451 (1998). (Kennedy, J., concurring) (quoting *The Federalist No. 47*, at 303 (James Madison) (Clinton Rossiter ed., 1961)).

present form. Second, I analyze the effect of the Waiver Provision's current statutory force. Third, I discuss the present state of the fight, viewed through the lens of recent litigation, stemming from secretarial enactment of the waiver authority. Finally, I look to the options left for wildlife conservation groups like Defenders of Wildlife as they pursue new ways to combat the construction of the Border Fence, and attempt to protect the species and habitat the Border Fence threatens to decimate.

## II. THE LEGISLATIVE HISTORY OF THE SECTION 102(c) WAIVER PROVISION

To properly understand the scope of the Secretary's authority under the waiver provision, it is important to know how it has evolved from its original form, specifically, to what degree the REAL ID Act expanded the 102(c) waiver authority in the Secretary of the DHS.<sup>46</sup>

In 1996, Congress passed Section 102(c) as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").<sup>47</sup> Congress intended IIRIRA to be a comprehensive legislative approach to legal and illegal immigration within the United States.<sup>48</sup> IIRIRA included the authorization to build secondary layers of fencing, buttressing the completion of a fourteen-mile stretch of "primary fence" outside of San Diego, California.<sup>49</sup>

IIRIRA's waiver provision defined a much narrower authoritative scope than the current, amended version promulgated in the REAL ID Act of 2005.<sup>50</sup> The original Section 102(c) authorized the Attorney General of the United States to take such actions as may be necessary to install additional barriers and roads in the vicinity of the United States border in order to deter illegal crossings in areas of "high illegal entry."<sup>51</sup> Importantly, the waiver provision only applied to the Endangered Species Act of 1973,

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<sup>46</sup> 8 U.S.C. § 1103 note.

<sup>47</sup> *Id.*

<sup>48</sup> Visalaw.com, *IIRIRA 96 - A SUMMARY OF THE NEW IMMIGRATION BILL*, VISALAW.COM, <http://www.visalaw.com/96nov/3nov96.html>.

<sup>49</sup> OpenCRS, *Border Security: Barriers Along the U.S. International Border*, OPENCRS.COM (May 13, 2008), <http://openocrs.com/document/RL33659>.

<sup>50</sup> § 102(c) of IIRIRA, 8 U.S.C. § 1103 note.

<sup>51</sup> *County of El Paso, et al. v. Chertoff*, 2008 WL 4372693 1 (W.D. Tex.).

and the National Environmental Policy Act of 1969 (“NEPA”), allowing the Attorney General to waive any relevant provisions of those two specific statutes to the extent “necessary to ensure expeditious construction of the barriers and roads under this section.”<sup>52</sup> Congress thereby carved holes in the authority of the ESA and NEPA, abolishing federal culpability under either statute for actions authorized by the Attorney General and regarding border fence construction.<sup>53</sup>

The ratification of the IIRIRA waiver was controversial. IIRIRA represented a compromise between Democratic President, Bill Clinton, and the Republican Party, which had recently assumed control of both the House of Representatives and the Senate.<sup>54</sup> Immediately after its passage, Clinton instructed the issuance of an internal memorandum throughout the Department of Justice (“DOJ”), expressing concern over the broad allocation of authority in the waiver provision.<sup>55</sup> The memo conveyed his belief that the waiver authority, though authorized, should not be used.<sup>56</sup> In the DOJ memorandum, Assistant Attorney-General, Lois Schiffer, stated that she and the agency shared the President’s concerns about the provision.<sup>57</sup> She instructed that the Immigration and Naturalization Service (“INS”) would therefore not seek invocation of the waiver in the future and would continue to abide by all environmental laws, even in matters concerning the construction of the Border Fence.<sup>58</sup>

On November 4, 2000, the country elected George W. Bush to be the forty-third president of the United States.<sup>59</sup> President Clinton left office on January 19, 2001, signifying oncoming and widespread turnover within the Executive Branch of the U.S. government, including a presidential positional shift regarding the Border Fence.<sup>60</sup> On

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<sup>52</sup> *Id.*

<sup>53</sup> Discussed *infra*.

<sup>54</sup> DFLORIG.COM, <http://www.dflorig.com/partycontrol.htm>.

<sup>55</sup> Memorandum from David A. Yentzer, Assistant Commissioner, U.S. Department of Justice (Mar. 6, 1997) (on file with author).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See, Alessandra Stanley, *Congratulations, and Some Skepticism, as Other Nations Size Up Bush*, NYTIMES.COM (Dec. 15, 2000), <http://www.nytimes.com/2000/12/15/politics/15REAC.html?ex=1225684800&en=50d098212ee14f5a&ei=5070>.

<sup>60</sup> *Id.*

November 25, 2002, at the direction of President Bush, Congress enacted the Homeland Security Act.<sup>61</sup> The HSA created the Department of Homeland Security (“DHS”). It likewise abolished the INS and transferred the responsibility for the construction of the border wall from the Attorney General to the Secretary of the DHS.<sup>62</sup>

On May 11, 2005, Congress amended the IIRIRA waiver provision by ratifying the REAL ID Act.<sup>63</sup> The passage of the REAL ID Act greatly expanded the scope of the Secretary’s delegated authority.<sup>64</sup> The Act passed in the form of a rider attached to the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005.<sup>65</sup> It revised the narrow waiver authority over NEPA and the ESA and gave the Secretary the power “to waive *all legal requirements* such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads” along the Nation’s Mexican border.<sup>66</sup> Such decision becomes effective when the Secretary publishes the law in the Federal Register.<sup>67</sup>

The statute itself does not contain a definition of, “all legal requirements.”<sup>68</sup> However, both the plain language of the statute and congressional intent supports the conclusion that the scope of the waiver authority shall be as large as necessary to ensure expeditious completion of the fence.<sup>69</sup> Recently, the Supreme Court recognized “all legal requirements” to include all forms of state and local law, including state constitutions, regulation, rules, and common law.<sup>70</sup> Proponents fear that the waiver’s scope may even include treaties<sup>71</sup> as “all legal requirements” could logically apply to any regulation, state

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<sup>61</sup> Homeland Security Act of 2002, 116 Stat. 2135 (2002).

<sup>62</sup> *El Paso*, 2008 WL 4372693 at 1.

<sup>63</sup> 8 U.S.C. § 1103 note.

<sup>64</sup> Brief of Fourteen Members of the U.S. House of Representatives as *Amici Curiae* in Support of Petitioners at 2, *Defenders of Wildlife v. Chertoff*, 128 S.Ct. 2962 (2008) (No. 07-1180).

<sup>65</sup> 8 U.S.C. § 1103 note.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> H.R. REP. 109-72, at 172.

<sup>70</sup> *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999, 1007-09 (2008).

<sup>71</sup> Interview with Matt Clark, *supra* note 9.

or federal, having the weight of law—except of course, for legal requirements imposed by the U.S. Constitution.<sup>72</sup>

Congress amended the Waiver Provision for the final time to date in the Secure Fence Act of 2006.<sup>73</sup> Congress kept the heart of the Waiver Provision intact, but allocated additional financing to fund technological improvements to the fence structure including reinforced fencing, lighting, cameras and sensors.<sup>74</sup> Importantly, the Secure Fence Act amended Section 102 to clearly delineate the geographical boundaries of the Border Fence and to set a timetable for its completion.<sup>75</sup> The Secure Fence Act requires the Secretary to construct not less than 700 miles of fencing along the southern border of the U.S.<sup>76</sup> Additionally, the Act requires the construction of double-layer, reinforced walls along large sections, stretching from San Diego, California to just outside Brownsville, Texas, less than 30 miles from the Gulf of Mexico.<sup>77</sup> It further instructed the Secretary to ensure the fence be completed by May 30, 2008.<sup>78</sup>

### III. THE EFFECT OF THE REAL ID WAIVER AMENDMENT

Congress amended the Waiver Provision to increase the speed and efficiency of the construction of the Border Fence.<sup>79</sup> The Conferees of the House Conference Report and proponents of the amended Waiver Provision emphasized that the purpose of the secretarial waiver was solely and emphatically to get the wall built.<sup>80</sup> Therefore, they proposed amending Section 102(c) to allow the Secretary nearly unfettered waiver authority, unhindered by prolonged judicial review.<sup>81</sup> Congress accepted this advice and amended the original waiver provision to include, “all legal requirements,” and

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<sup>72</sup> Brief of Fourteen Members, *supra* note 64, at 4.

<sup>73</sup> 8 U.S.C. § 1103 note.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> CRS, *supra* note 49.

<sup>77</sup> Defenders, *supra* note 12.

<sup>78</sup> *Id.*

<sup>79</sup> H.R. REP. 109-72, at 172.

<sup>80</sup> *Id.* at 171.

<sup>81</sup> *Id.*

eliminated most legal obstacles hindering the expeditious construction of the border fence such as ongoing and future litigation over secretarial violation of conflicting state laws.<sup>82</sup>

The amended Section 102 contains two central constraints that accomplish the stated goal: (1) It confines acceptable waiver challenges to only those constitutional in nature; and (2) It curbs permissible judicial review by eliminating intermediate review in the Federal Circuit Courts of Appeals.<sup>83</sup>

(1) The amended Waiver Provision limits challenges to those of a constitutional nature thereby eliminating the ability to contest the agency's actions either substantively or procedurally.<sup>84</sup> Section 102(c)(2)(A) states:

IN GENERAL.--The district courts of the United States shall have exclusive jurisdiction to hear all causes and 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.<sup>85</sup>

Normally, the Administrative Procedures Act of 1946 ("APA") governs the validity of all final administrative agency decisions and rules, including those made by the DHS.<sup>86</sup> Section 706(2) of the APA states the proper manner to challenge agency actions, and allows for substantive, procedural and constitutional challenges.<sup>87</sup> A substantial challenge contests a final agency action as being "arbitrary and capricious"—a decision executed in the absence of a sufficient substantiating record, as an excessive exercise of delegated authority, or as a rationally incongruent decision as it pertains to the

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<sup>82</sup> H.R. REP. 109-72, at 171.

<sup>83</sup> 8 U.S.C. § 1103 note.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See, United States v. Florida East Coast Railway*, 410 U.S. 224 (1973).

<sup>87</sup> Administrative Procedures Act, 5 U.S.C. § 706(2) (Stating that procedural challenges include those of inadequate notice, improper rulemaking and standard of review).

supporting facts.<sup>88</sup> Therefore, substantive challenges often dispute agency actions as being based on incorrect or unsubstantiated information, or as an impermissible agency overreach, outside of its statutory jurisdiction. Procedural challenges contest agency actions as defects in conformity with required APA regulations like failure to provide proper notice and comment, or failure to give sufficient time for public discussion absent “good cause.”<sup>89</sup> The Waiver Provision, however, prohibits using either a substantive basis or procedural basis as grounds for a claim.<sup>90</sup> The express language of the provision prohibits any claim that does not allege a constitutional violation.<sup>91</sup> The provisional text thereby emasculates the applicable agency regulations of the APA, salvaging secretarial accountability only as required by the U.S. Constitution.

This makes challenging waiver enactment particularly difficult because the Constitution makes no mention of rights in wildlife.<sup>92</sup> Without a prescribed fundamental rights violation on which to base their claims, organizations or persons seeking to challenge the Waiver Provision have to base their claims on violations of more amorphous constitutional conceptions such as the nondelegation doctrine or a violation of the separation of powers.<sup>93</sup> These issues are present in nearly every piece of federal legislation, and though they offer an avenue for success on the merits, violations of them are harder to pin down and success is often more remote.<sup>94</sup> In reality, the difficulty to challenge the Waiver Provision is a testament to the abilities of the Waiver Provision drafters. Section 102(c) is essentially immune from the force of thousands of federal and state statutes and is only limited in its scope by the United States Constitution, which in turn provides no explicit right of action regarding wildlife law violations.

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<sup>88</sup> See, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 410 U.S. 402 (1971).

<sup>89</sup> *Id.* (As governed by 5 U.S.C. §553).

<sup>90</sup> 8 U.S.C. § 1103 note.

<sup>91</sup> *Id.*

<sup>92</sup> See, U.S. Constitution.

<sup>93</sup> See, e.g., *Defenders of Wildlife v. Chertoff*, and *County of El Paso v. Chertoff*, discussed *infra*.

<sup>94</sup> Not a single nondelegation challenge has succeeded in the U.S. Supreme Court in over sixty years despite countless expansive delegations of legislative power (ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 331 (3d Ed. Aspen Publishers 2006)).

(2) The REAL ID Waiver Provision eliminates intermediate judicial review by the Federal Circuit Courts of Appeals, and effectively narrows total review to a single decision by a single Article III judge.<sup>95</sup> The text of Section 102(c) explicitly grounds jurisdiction in the federal district courts.<sup>96</sup> It subsequently restricts review of a final district court decision to the United States Supreme Court upon a grant of *certiorari*.<sup>97</sup> It thereby categorically bars all litigation challenging the waiver in a state court, and eliminates any intermediate review in the Federal Circuit Courts of Appeals. Moreover, considering the low number of cases accepted by the Supreme Court, it also effectively reduces the entire judicial review process to the decision of the reviewing district court.<sup>98</sup>

It is clear from the legislative history of the REAL ID Act that by amending the IIRIRA waiver provision to apply to all laws, Congress intended to expedite the construction of the Border Fence.<sup>99</sup> They did so by eliminating many options of legal recourse for potential claimants.<sup>100</sup> It is an end well served by its means. District courts as a whole may be reluctant to make large policy decisions, especially when those decisions may contradict congressional intent. A grant of *certiorari* is made more unlikely by the fact that the Supreme Court hears a limited number of cases each year, and that number has continued to decrease recently.<sup>101</sup>

Additionally, the waiver's judicial review limitation appears even more effective when one considers that it may discourage the grant of *certiorari* in other ways. For example, one of the primary reasons that the Supreme Court grants *certiorari* is to settle inter-circuit conflicts on a particular issue.<sup>102</sup> By barring Circuit Court review, Congress effectively denied this possibility from occurring.<sup>103</sup>

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<sup>95</sup> 8 U.S.C. § 1103 note.

<sup>96</sup> § 102(c), 8 U.S.C. § 1103 note.

<sup>97</sup> *Id.*

<sup>98</sup> Brief of Fourteen Members, *supra* note 64, at 5.

<sup>99</sup> H.R. REP. 109-72, at 172.

<sup>100</sup> *Id.* at 171.

<sup>101</sup> The Supreme Court heard 69 cases out of 7,000 plus petitions for *certiorari* in the 2005-06 term, the lowest number since 1953 (Linda Greenhouse, *Dwindling Docket Mystifies Supreme Court*, NYTIMES.COM (Dec. 12, 2006), <http://www.nytimes.com/2006/12/07/washington/07scotus.html>).

<sup>102</sup> Brief of Fourteen Members, *supra* note 64, at 5.

<sup>103</sup> *Id.*

Waiver provisions are not uncommon, but the REAL ID Act Waiver Provision may be unmatched in its effect and scope.<sup>104</sup> Indeed, its unique amount of authority led one member of the House of Representatives to exclaim during the relevant heated floor debate, “To my knowledge, a waiver this broad is unprecedented.”<sup>105</sup>

#### IV. LEGAL CHALLENGES TO THE WAIVER PROVISION

In 2007, Defenders of Wildlife (“Defenders”) and Sierra Club challenged Section 102(c) on nondelegation and separation of powers grounds.<sup>106</sup> In *Defenders of Wildlife v. Chertoff*, the central issue presented was necessarily whether the Secretary’s waiver under the REAL ID Act was constitutional.<sup>107</sup> A Federal District Court for the District of Columbia held that the REAL ID Act’s delegation of authority to the Secretary to waive all laws he deemed necessary for the expeditious construction of the Border Fence was not unconstitutional, even if the delegation was unique insofar as the number of laws was theoretically unlimited.<sup>108</sup> The Court based its ruling on the Supreme Court holding in *Mistretta v. United States*, which held such delegations valid as long as Congress laid down an “intelligible principle,” in order to clearly delineate the policy and scope of the delegation.<sup>109</sup>

The dispute arose when the Bureau of Land Management (“BLM”) granted the DHS a permanent right of way to construct the Border Fence—as well as the accompanying road and drainage pipes—across biologically and environmentally sensitive areas along the border between the U.S. and Mexico.<sup>110</sup> The proposed fence would eventually run directly through the San Pedro Riparian National Conservation

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<sup>104</sup> *See, Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Defenders of Wildlife, et al. v. Chertoff*, 527 F. Supp. 2d 119 (D.C.D.C. 2007).

<sup>107</sup> *Defenders*, 527 F. Supp. 2d at 124.

<sup>108</sup> Jay M. Zitter, *Validity, Construction, and Application of REAL ID Act of 2005*, *Pub. L. No. 109-13*, 119 Stat. 231, 11 A.L.R. Fed. 2d. 1.

<sup>109</sup> *Mistretta v. United States*, 488 US 361, 372 (1989) (Applying the intelligible principle to congressional delegations of legislative power).

<sup>110</sup> Brief of Fourteen Members, *supra* note 64, at 7.

Area (“SPRNCA”) in Southern Arizona. The SPRNCA is controlled by the BLM, and is an area described as one of the most biologically diverse in the nation.<sup>111</sup>

On October 5, 2007, Defenders of Wildlife sued, seeking preliminary and permanent injunctive relief, and moved for a temporary restraining order (“TRO”).<sup>112</sup> Defenders claimed that the BLM and DHS had not completed the necessary Environmental Impact Statement as required by NEPA.<sup>113</sup> A Federal District Court judge found for Defenders, stating that they were likely to succeed on the merits of their NEPA claims.<sup>114</sup> The Court ordered the BLM and DHS to halt construction until they completed the proper analysis.<sup>115</sup> On October 26, 2007, Chertoff responded to the Court’s decision by enacting his waiver authority.<sup>116</sup> Accordingly, he published his intention to waive 20 federal and state laws in the federal register.<sup>117</sup> In a leadership Journal posting several days prior to the register publishing, Chertoff justified the decision, asserting that further delay to secure the border presented an unacceptable risk to national security because the area encompassed by the SPRNCA was one of “high illegal entry.”<sup>118</sup> Additionally, he cited environmental concerns in the amount of trash and human waste left at crossing sites in the SPRNCA.<sup>119</sup> The waived laws included the ESA, NEPA, the Arizona-Idaho Conservation Act, the Clean Water Act, the Migratory Bird Treaty Act, the Clean Air Act, the Safe Drinking Water Act and the Solid Waste Disposal Act, among others.<sup>120</sup> Additionally, the waiver enactment rendered Defenders’s TRO/NEPA claims moot by invalidating any effect of NEPA relevant to the Border Wall construction.<sup>121</sup>

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<sup>111</sup> *Defenders*, 527 F. Supp. 2d at 121.

<sup>112</sup> Plaintiff’s Memorandum in Support of Motion for a Temporary Restraining Order in Relation to Border Wall and Road Construction on the San Pedro Riparian National Conservation Area (Oct 5, 2007).

<sup>113</sup> *Defenders*, 527 F. Supp. 2d at 121.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Michael Chertoff, Leadership Journal: Securing the Border While Protecting the Environment, DHS.GOV (Oct. 22, 2007), <http://www.dhs.gov/journal/leadership/2007/10/securing-border-while-protecting.html>.

<sup>119</sup> *Id.*

<sup>120</sup> *Defenders*, 527 F. Supp. 2d at 123.

<sup>121</sup> *Id.*

Defenders instituted a new action, this time challenging the Waiver Provision as an impermissible delegation of congressional authority to an unaccountable official within the executive branch.<sup>122</sup> Defenders contended that the congressional delegation of power granted too broad a legislative power to a politically unaccountable government agency absent proper judicial review, and was therefore a violation of constitutional separation of powers principles.<sup>123</sup>

In order to satisfy the intelligible principle requirement, Congress had to include language in the text of the REAL ID Act waiver that elucidates (1) the general policy for the delegation of authority; (2) which public agency is to apply the statute; and (3) the boundaries of this delegated authority.<sup>124</sup> The District Court Held all three requirements satisfied by the REAL ID Act delegation.<sup>125</sup> The general policy of the Waiver Provision was the expeditious construction of the border wall.<sup>126</sup> The identified public agency was the DHS and specifically, the Secretary.<sup>127</sup> The scope of the Waiver Provision was as many laws as the Secretary deems “necessary” for the expeditious construction of the wall.<sup>128</sup>

In constructing its impermissible delegation argument, Defenders suggested that *Clinton v. City of New York* governed the outcome of the case.<sup>129</sup> In *Clinton*, the Supreme Court held the presidential line-item veto invalid under the Constitution.<sup>130</sup> Specifically, the *Clinton* Court ruled that the presidential amendment or repeal of parts of existing laws without bicameral review and presentment is an impermissible delegation of legislative power to the executive branch.<sup>131</sup> Defenders argued that Section 102(c) delegated limitless waiver authority to an unelected, unaccountable executive official,

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<sup>122</sup> Pursuant to Article I, §1 of the U.S. Constitution.

<sup>123</sup> *Defenders*, 527 F. Supp. 2d at 122-23.

<sup>124</sup> *El Paso*, 2008 WL 4372693 at 2.

<sup>125</sup> *Defenders*, 527 F. Supp. 2d at 127-30.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 122-3 (Stating, “The ‘scope of discretion’ allowed by such a standard, which the Court interpreted to mean ‘not lower or higher’ than is necessary,’ was ‘well within the outer limits of [the Supreme Court’s] nondelegation precedents.” (*Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 474 (2001))).

<sup>129</sup> *Defenders*, 527 F. Supp. 2d at 123.

<sup>130</sup> *See, Clinton*, 524 U.S. 417.

<sup>131</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 287 (2d Ed., Aspen Publishers 2005).

which he could then unilaterally exercise absent meaningful judicial review.<sup>132</sup> In Defenders’s view, the delegation violated the principle set forth in *Clinton* by effectively allowing the Secretary to legislate, amending as many previously passed laws as he alone deemed fit, absent bicameralism and presentment.<sup>133</sup> Furthermore, the appropriate safeguards of political accountability and sufficient judicial review did not accompany the legislation.<sup>134</sup>

The District Court rejected Defenders’s argument by distinguishing their cause of action from that in *Clinton*.<sup>135</sup> The court rejected the notion that the 102(c) Waiver Provision wields the same statutory force as the line-item veto, holding that President Clinton’s legislative power greatly exceeded the Secretary’s because he was able to effectively amend or repeal federal statutes without limits on the scope of his power.<sup>136</sup> President Clinton could forever render a provision of federal law without “any ‘legal force or effect’ under any circumstance.”<sup>137</sup> The canceling president would then have to return to Congress in order to reauthorize the foregone spending.<sup>138</sup> Instead, the Secretary was operating in a narrow scope of delegated authority in conformance with the intelligible principle laid down by Congress.<sup>139</sup> The amended laws still retained the same legal force and effect and were only limited as to their application in the areas of the Border Fence construction.<sup>140</sup>

Additionally, the Court accepted the Government’s view that the special statutory framework of the Waiver Provision weighed heavily against judicial discretionary review in the absence of extraordinary circumstances.<sup>141</sup> The Court acknowledged that when the legislated area is one in which the Executive branch already has significant independent

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<sup>132</sup> *Defenders*, 527 F. Supp. 2d at 124.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* (Citing, *Byrd v Raines*, 956 F.Supp. 25, 37 (D.C.D.C. 1997)).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 127 (citing *Mistretta v. United States*, 488 US at 372).

<sup>140</sup> *Id.* at 124.

<sup>141</sup> Brief for the Respondent in Opposition, at 10, *Defenders of Wildlife, et al. v. Chertoff*, 128 S.Ct. 2962 (2008) (No. 07-1180).

constitutional authority, delegations may be broader than in other contexts.<sup>142</sup> As the Border Fence pertains to both foreign affairs and immigration control—areas where the executive branch traditionally exercises independent constitutional authority—the congressional delegation could be broader here than in other contexts.<sup>143</sup>

On June 23, 2008 the Supreme Court denied *certiorari* to review the Court’s holding, thus signaling the end of that particular dispute.<sup>144</sup> Two months later, on August 29, 2008, a federal district court for the Western District of Texas reached a similar, pro-government decision in *County of El Paso v. Chertoff*.<sup>145</sup>

In *El Paso*, the petitioners challenged Secretary Chertoff’s use of the waiver authority to abrogate the effect of thirty-seven federal and state laws across 470 miles of proposed Border Fence.<sup>146</sup> The Court relied heavily on the precedent established in *Defenders* while rejecting the plaintiff’s impermissible delegation and separation of powers arguments.<sup>147</sup> The County claimed that *El Paso* was distinguishable from *Defenders* in two key regards: the size and the scope of the secretarial waiver application involved.<sup>148</sup> The Court rejected this claim, stating that the size of the waiver still fit within the constraints of the intelligible principle set forth by Congress in the REAL ID Act despite the uniqueness of the size or scope of the laws waived.<sup>149</sup> When applying the facts to the defined boundaries prong of the intelligible principle doctrine,<sup>150</sup> it accepted the D.C. District Court’s view that the scope of the delegation was only constrained by what is necessary for the expeditious construction of the border fence.<sup>151</sup> Therefore, the number of laws waived was irrelevant to the discussion.<sup>152</sup>

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<sup>142</sup> *Defenders*, 527 F. Supp. 2d at 129.

<sup>143</sup> *Id.* at 129.

<sup>144</sup> *Defenders of Wildlife v. Chertoff et al. v. Chertoff*, 128 S.Ct. 2962 (2008).

<sup>145</sup> *See, El Paso*, 2008 WL 4372693.

<sup>146</sup> *El Paso*, 2008 WL 4372693 at 1.

<sup>147</sup> *See, Id.*

<sup>148</sup> *Id.* at 3.

<sup>149</sup> *Id.*

<sup>150</sup> Discussed *supra* at 15.

<sup>151</sup> *El Paso*, 2008 WL 4372693 at 3.

<sup>152</sup> *Id.*

The County of El Paso is currently petitioning the United States Supreme Court to reconsider their claims on these issues.<sup>153</sup> Opponents of the Border Wall and the Waiver Provision remain optimistic at the petition's chance for success.<sup>154</sup>

## V. ANALYSIS OF THE *DEFENDERS* AND *EL PASO* DECISIONS

In both *Defenders* and *El Paso*, the disputed issue regarding the delegation of power concerns the third prong of the intelligible principle test—the requisite boundaries of the delegated power.<sup>155</sup> *Defenders* and *El Paso* together hold that the waiver authority's scope is not constrained by an actual number of waived laws, but by what the Secretary perceives as necessary within the situation.<sup>156</sup> This would seem to be a permissible interpretation of Supreme Court precedent.<sup>157</sup> Even in sweeping regulatory schemes, the Court has never required the intelligible principle lay down how much is too much in permissible scope.<sup>158</sup>

But the Waiver Provision places an enormous amount of discretion in the Secretary, which manifests outcomes antithetical to established conceptions of APA governance and agency approaches to decision-making.<sup>159</sup> Traditionally, governmental agencies like the DHS have been constrained by courts (through the APA) to consider reasonable alternatives when implementing a policy that may negatively affect a particular group.<sup>160</sup> Here, the Secretary need not make such considerations because his actions are not regulated under the arbitrary and capricious standard of review within the APA.<sup>161</sup> He is not even required to consult the individual agencies that have the relevant expertise or authority to administer the waived statutes.<sup>162</sup> The Secretary maintains the

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<sup>153</sup> Interview with Matt Clark, *supra* note 9.

<sup>154</sup> Interview with Brian Segee, *supra* note 1.

<sup>155</sup> *El Paso*, 2008 WL 4372693 at 3.

<sup>156</sup> Discussed *supra*.

<sup>157</sup> *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 474 (2001).

<sup>158</sup> *Id.* at 475 (interpreting a “requisite” requirement as not higher nor lower than what is necessary to effectuate the purpose of the legislation).

<sup>159</sup> *See, Overton Park*, 410 U.S. 402.

<sup>160</sup> *Id.*

<sup>161</sup> 8 U.S.C. § 1103 note (Discussed *supra*).

<sup>162</sup> Brief of Fourteen Members, *supra* note 64, at 13.

power to decide what laws should be waived despite lacking any expertise or role in administering such statutes.<sup>163</sup> He is only constrained by what is “necessary” for the construction of the Border Fence.<sup>164</sup> “Necessary” is hard to define, and therefore the Waiver Provision allows the Secretary nearly unchecked discretion in making a waiver determination.

The fact that the Secretary may alone make such a decision compounds the matter.<sup>165</sup> He is entirely free to “interpret” away Section 102’s substantive requirements by suggesting that “necessary” means “expedient” or “most convenient.”<sup>166</sup> When a reviewing court seeks to approve whether or not the waiver was necessary, they depend almost entirely on the Secretary’s sole opinion and reasoning. Couple these facts with the limitations placed on judicial review by the Waiver Provision and one can see how truly insulated the Secretary is from political and judicial accountability. There may not be a better example for opponents of delegation in general, who see delegation as impermissibly undermining fundamental principles of governmental accountability and separation of powers.<sup>167</sup> The Waiver Provision places enormous legislative authority and political decision making in the hands of an executive official who is unelected and unaccountable, enabling him to waive unlimited numbers of laws to effectuate the purpose of the statute.<sup>168</sup>

The government argued in *Defenders* and *El Paso* that the Constitution in no way requires proper judicial review for proper delegation of legislative authority.<sup>169</sup> The purpose of an intelligible principle is simply to channel the discretion of the executive and to permit Congress to determine whether its will is being obeyed, rather than to permit a court to ascertain whether the will of Congress has been obeyed.<sup>170</sup> This argument may be in accord with cited precedent, but it fails to recognize that the Supreme

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<sup>163</sup> *Id.*

<sup>164</sup> 8 U.S.C. § 1103 note.

<sup>165</sup> Brief of Fourteen Members, *supra* note 64, at 13.

<sup>166</sup> *Id.* at 14.

<sup>167</sup> Erwin Chemerinsky, *supra* note 94, at 331.

<sup>168</sup> Brief of Fourteen Members, *supra* note 64, at 13.

<sup>169</sup> Brief for the Respondent, *supra* note 141, at 18.

<sup>170</sup> *Id.* (Citing *United States v. Bozarov*, 974 F2d 1037, 1041 (9th Cir. 1992), cert. denied 507 U.S. 917 (1993)).

Court has repeatedly found certain forms of legislative delegation constitutionally impermissible, irregardless of the intent of Congress.<sup>171</sup> In sum, the government argues that courts may only disagree with agency actions, properly laid down in an intelligible principle, when they violate the governing statute.<sup>172</sup> This assertion itself is in direct opposition to the fundamental principle of separation of powers.

“[T]he Constitution’s structure requires a stability which transcends the convenience of the moment...Liberty is always at stake when one or more of our branches seek to transgress the separation of powers. Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty.<sup>173</sup>

The fact of the matter, however, is that because the congressional delegation of legislative power to administrative agencies is such a well-settled principle within the government, separation of powers arguments lack any practical weight.<sup>174</sup> Moreover, they will continue to do so absent guidance to the contrary from the Supreme Court.<sup>175</sup>

Such guidance would be invaluable in situations similar to *Defenders* and *El Paso*, where distinguishing the facts from *Clinton* works as a matter of legal application, but is hard to swallow from a common-sense perspective. The *Defenders* and *El Paso* holdings both assert that the “necessary” waiver requirement does not amount to an amendment or repeal of affected laws because the waived laws remain entirely effective in the rest of their individual jurisdictions.<sup>176</sup> This holding is hard to square with the facts on the ground.<sup>177</sup> For the geographic areas affected, the circumstances and the timeframes decided upon by the Secretary, the target laws are a nullity.<sup>178</sup> Practically, the “temporary” repeal of these laws facilitates the permanent construction of the border

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<sup>171</sup> See, *INS v. Chadha*, 462 U.S. 919 (1983); *Clinton*, 524 U.S. 417.

<sup>172</sup> Brief for the Respondent, *supra* note 141, at 18.

<sup>173</sup> *Clinton*, 524 U.S. at 450-51 (1998) (Kennedy, J., concurring).

<sup>174</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 287 (2d Ed., Aspen Publishers 2005).

<sup>175</sup> *Id.*

<sup>176</sup> Discussed *supra*.

<sup>177</sup> Brief Constitutional and Administrative Law Professors, *supra* note 42, at 22.

<sup>178</sup> *Id.*

wall.<sup>179</sup> The Waiver Provision has therefore effectively and permanently emasculated nearly forty current federal and state laws along 500-plus miles of International border and the surrounding vicinities.<sup>180</sup> Many of the waived statutes are pillars of U.S. environmental policy, such as NEPA and the ESA, legislated with the intent of guiding the U.S. Government into more environmentally conscious decision-making.<sup>181</sup> Once waived, those laws no longer have any relevant effect on the DHS's actions and therefore can give no guidance to its decisions. The waived laws do not regain their effect in targeted areas once the wall is built. Therefore, in combined areas that stretch across nearly all of California, Arizona, New Mexico and Texas, numerous laws intended by Congress to regulate government activities “no longer have any force or effect under any circumstance.”<sup>182</sup> To argue that such laws have not been partially repealed just because they still apply elsewhere in the country conflicts with the plain facts that illustrate the results of waiver provision enactment.

## VI. THE FUTURE OF WAIVER CHALLENGES

Should the Supreme Court deny *certiorari* to the plaintiffs in *El Paso*, the chances of successfully challenging the Waiver Provision on the aforementioned constitutional grounds will be negligible.<sup>183</sup> However, there is still hope. The election of President Barack Obama, has increased optimism within certain circles that regime change will lead to drastic shifts in environmental prioritization.<sup>184</sup> Additionally, in light of the failed judicial challenges to the Waiver Provision, wildlife conservation groups are looking to Congress for assistance.

Currently, Defenders is actively supporting new legislation that represents a “common-sense approach to border policy.”<sup>185</sup> Sponsored by Arizona Democratic Congressman, Raul Grijalva, and introduced on June 6, 2007, H.R. 2593 aims to secure

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<sup>179</sup> 8 U.S.C. § 1103 note.

<sup>180</sup> *El Paso*, 2008 WL 4372693 at 1.

<sup>181</sup> Brief of Fourteen Members, *supra* note 64, at 9.

<sup>182</sup> *Defenders*, 527 F. Supp. 2d at 124.

<sup>183</sup> Discussed *supra*.

<sup>184</sup> Interview with Brian Segee, *supra* note 1.

<sup>185</sup> *Defenders*, *supra* note 12.

and conserve Federal public lands and natural resources along the international land borders of the United States.<sup>186</sup> It is a bold initiative that would explicitly repeal the 102(c) Waiver Provision.<sup>187</sup> It applies only to public and tribal lands, requiring governmental compliance with federal, state and local laws protecting clean air, clean water, wildlife, culture, and health and safety.<sup>188</sup> As drafted, H.R. 2593 mandates the development of a border protection strategy for all federal and tribal borderlands under the jurisdiction of the Department of the Interior (“DOI”) and Department of Agriculture (“DOA”).<sup>189</sup> Additionally, H.R. 2593 would introduce elements of governmental accountability by mandating resource training for all border agents and by directing the Secretaries of the DOI and DOA to submit inventory reports to the Secretary of the DHS regarding costs and remedies incurred in border patrol related activities.<sup>190</sup> Perhaps most importantly, it would also create the Borderland Conservation Fund.<sup>191</sup> The fund would provide financial assistance to programs geared towards the management and improvement of wildlife habitat for ecologically sensitive species, with the purpose of decreasing the impacts of border enforcement and illegal entry to them.<sup>192</sup>

Essentially, H.R. 2593 is a mitigation effort by wildlife groups to encourage more wildlife-sensitive, governmental decision-making in actions that may effect the environment.<sup>193</sup> The purpose of the bill is not to stop construction of the Border Fence.<sup>194</sup> Indeed, the language of the bill presumes the Fence’s continued construction, but requires mitigation factors be used when practicable.<sup>195</sup>

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<sup>186</sup> GovTrack.us, H.R. 2593—110th Congress (2007): Borderlands Conservation and Security Act of 2007, GOVTRACK.US (database of federal legislation), [govtrack.us/congress/bill.xpd?bill=h110-2593&tab=summary&page-command=print](http://govtrack.us/congress/bill.xpd?bill=h110-2593&tab=summary&page-command=print).

<sup>187</sup> H.R. 2593: Borderlands Conservation and Security Act of 2007, <http://www.govtrack.us/congress/billtext.xpd?bill=h110-2593>.

<sup>188</sup> Defenders, *supra* note 12.

<sup>189</sup> GovTrack.us, *supra* note 186.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Defenders, *supra* note 12.

<sup>194</sup> GovTrack.us, *supra* note 186.

<sup>195</sup> H.R. 2593, *supra* note 187.

§5(a)(3)(D) MANNER OF CONSTRUCTION- In carrying out the requirements of subsection (a), the Secretary of Homeland Security shall, where practicable, prioritize the use of unmanned aerial vehicles, remote cameras, sensors, vehicle barriers, or other low impact border enforcement techniques on lands under the jurisdiction of the Secretary of Agriculture, the Secretary of the Interior, or other Federal agencies.<sup>196</sup>

The listed objectives behind H.R. 2593 are to provide agencies with the ability to pursue alternatives that will least harm the ecosystem; to encourage funding for wildlife initiatives; and to mandate some compliance and accountability.<sup>197</sup> H.R. 2593 is currently in the first step of the legislative process, awaiting review by the Subcommittee on Border, Maritime and Global Terrorism in the U.S. House of Representatives.<sup>198</sup> Under the Bush administration, passage of the bill was unthinkable, but the promise of a Democratic Presidency and Democratic Congress has renewed hope that such legislation could soon be adopted.<sup>199</sup>

## VII. CONCLUSION

In the end, the battle over the Border Wall boils down to prioritization—what the United States values, as a government and as a society. The twelve-year legislative history and evolution of the 102(c) Waiver Provision make clear that Congress believes the prevention of illegal immigration should take precedence over the protection of wildlife.<sup>200</sup> But, one wonders whether Congress truly understood the magnitude of the authority it bestowed in the Secretary by ratifying the REAL ID Waiver Provision.

Through the REAL ID Act, Congress commanded the Secretary of the DHS to construct a 700-mile border-crossing barrier, which will sever the United States from

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<sup>196</sup> *Id.*

<sup>197</sup> Defenders, *supra* note 12.

<sup>198</sup> GovTrack.us, *supra* note 186.

<sup>199</sup> Interview with Matt Clark, *supra* note 9; Interview with Brian Segee, *supra* note 1.

<sup>200</sup> Discussed *supra*.

Mexico.<sup>201</sup> Currently, the Border Fence is irreparably disrupting critical wildlife corridors for numerous species that live in and around the Borderlands.<sup>202</sup> In the fervor to expeditiously build the Border Fence, Congress authorized the Secretary to nullify the localized effect of numerous environmental laws without considering mitigation alternatives that may have protected important habitat.<sup>203</sup> As a result, the fragile ecosystem of the American Southwest is in desperate jeopardy, and its salvation requires substantial and legitimate change in the U.S. Government’s Immigration policies in the near future.<sup>204</sup>

Concededly, the congressional delegation of legislative power is a modern necessity, facilitating the execution of numerous regulatory programs by the executive bureaucracy.<sup>205</sup> The Waiver Provision, however, constitutes unchecked delegated power, seemingly out of control, and absent necessary oversight. It is antithetical to founding separation of powers principles to allow one unaccountable executive official to render powerless nearly forty laws—all of which passed both houses of Congress and were signed into law by the president—and then justify his decision solely with his own decision-making. The Waiver Provision truncates necessary judicial review, vital for the proper functioning of governmental checks and balances.<sup>206</sup> The only limit on its force is provided by mandatory constitutional protections, even though the Constitution is conveniently bereft of a private right of action on which to base claims of wildlife violations.<sup>207</sup> The words of James Madison are prescient to the issue, “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.”<sup>208</sup>

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<sup>201</sup> 8 U.S.C. § 1103 note.

<sup>202</sup> See, Brian Segee, *supra* note 2.

<sup>203</sup> Some of which Congress intended to “be afforded the highest of priorities” (*Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978) (Referring to the Endangered Species Act of 1973).

<sup>204</sup> Brian Segee, *supra* note 2, at 23.

<sup>205</sup> Erwin Chemerinsky, *supra* note 174, AT 287.

<sup>206</sup> Discussed *supra* at 12.

<sup>207</sup> Discussed *supra* at 10.

<sup>208</sup> *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring) (quoting *The Federalist No. 47*, at 303 (James Madison) (Clinton Rossiter ed., 1961)).

The courts, as well as proponents of the Waiver Provision, defend the delegated secretarial authority as within the scope of current constitutional standards. But the Secretary's ability to subvert innumerable critical laws is an affront to founding separation of powers principles.<sup>209</sup> In the same way, it is an affront to liberty. Either the Supreme Court or Congress should address this situation and provide new guidance as to the Waiver Provision's permissibility. They could do so by granting certiorari in *El Paso*, or by ratifying legislation akin to H.R. 2593. The execution of either option would halt the destruction currently occurring along the border. Additionally, they would provide the government with the opportunity to establish a benchmark for future waiver provisions that will limit any improper expansion of waiver authority. Unfortunately, any adopted policy, effectively short of these options, will likely spell disaster for the numerous endangered and threatened species of the American Southwest.

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<sup>209</sup> See, Brief Constitutional and Administrative Law Professors, *supra* note 42.