SAN DIEGO BORDER INFRASTRUCTURE ENVIRONMENTAL LITIGATION: RETURN OF THE WALKING DEAD

BY
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The Secretary of Homeland Security waived numerous environmental laws in 2017 that allowed the construction of new barrier fences and border wall prototypes on the U.S.–Mexico border in California. The Federal district court and Ninth Circuit upheld the Secretary's waivers in In re Border Infrastructure Environmental Litigation. This Article argues that the federal courts' decisions were erroneous because the waivers were ultra vires and unconstitutional. The Secretary's waiver authority was limited to the border fencing specifically authorized in the Immigration Reform and Immigrant Responsibility Act. This fencing was completed in 2013. At this point the Secretary's waiver authority ended, so the 2017 waivers were ultra vires. Furthermore, the Secretary's waiver authority was unconstitutional. The unlimited scope of the waiver authority and constrained judicial review violated the non-delegation doctrine. Congress should terminate the Secretary's waiver authority and enact legislation that balances national security and environmental protection along the border.

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I. INTRODUCTION

On January 25th, 2017, President Donald Trump issued Executive Order 13,767, Border Security and Immigration Enforcement Improvements, which instructed the Department of Homeland Security (DHS) to construct a wall along much of the 2000 mile-long U.S.–Mexico border. DHS began to consider proposals for two border wall prototypes. DHS also planned to replace the existing fourteen-mile primary and secondary border fences in the San Diego (SD) sector and two miles of border fences in the El Centro sector. In August 2017, Secretary of Homeland Security (SHS) John Kelley determined that the San Diego Project Area “is an area of high illegal entry” and exercised his authority under section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to waive National Environmental Protection Act (NEPA), Endangered Species Act (ESA), Coastal Zone Management Act (CZMA) and thirty additional laws not at issue in *In Re Border Infrastructure Environmental Litigation*

1 Wall is defined as “a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.” Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8794 (Jan. 30, 2017); see also *In re Border Infrastructure Envtl. Litig. (Curiel)*, 284 F. Supp. 3d 1092, 1106 (S.D. Cal. 2018).


5 *Curiel*, 284 F. Supp. 3d at 1106.

6 IIRIRA, 8 U.S.C. §§ 1101–1363a. Section 102(c) states: “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.” *Id.* § 1103(c)(1).


Two projects specified in the waiver determination included the replacement of approximately fifteen miles of existing primary fencing near San Diego and the construction of border-wall prototypes on the eastern end of the secondary barrier near San Diego.

In September 2017, acting SHS Elaine Duke declared that the “El Centro Sector is an area of high illegal entry” and waived compliance within NEPA, ESA, and numerous other statutes. DHS planned to build a replacement fence in the El Centro Sector “along an approximately three mile segment of the border that starts at the Calexico West Land Port of Entry and extends westward.”

The State of California, the California Coastal Commission, and several environmental groups brought suits, challenging the SHS waivers. The claimants alleged that the waivers were ultra vires because they were not authorized by Congress in section 102(b) of IIRIRA. Other statutory and constitutional violations were also asserted. In February 2018, the U.S. District Court for the Southern District of California in Curiel held that SHS waivers that allowed the aforementioned projects to proceed were not ultra vires. The court also held that the section 102(c) waivers did not violate the non-delegation doctrine. The Ninth Circuit upheld the district court decision.

This Article asserts that the district court and Ninth Circuit decisions were erroneous. It traces the history of the conflict regarding California’s border fencing and the evolution of IIRIRA sections 102(b) and (c). The Article demonstrates that the courts should have found the SHS two waivers for the three projects were ultra vires because the SHS waiver authority under section 102(c) is limited to the fencing authorized in section 102(b). The waivers also violated the non-delegation doctrine. Several post-litigation developments are discussed.
particularly the ongoing controversy over border wall funding. The Article concludes that Congress should terminate the SHS waiver authority, reconsider the costs of the border walls and enact legislation that balances environmental protection and national security along the southwest border.

II. PRIOR HISTORY AND EVOLUTION OF THE STATUTORY FRAMEWORK

The U.S.–Mexico “border was established with the Treaty of Guadalupe Hidalgo in 1848 and the Gadsden Purchase in 1853.” The Immigration and Naturalization Service (INS) in 1977–1978 approved funding for constructing border fences in El Paso, Texas; San Ysidro, California (on the border south of San Diego); and San Luis, Arizona (on the border south of Yuma). The new fences would replace the older dilapidated fences and divert illegal immigrants away from the cities into the desert where they could easily be captured. In October, 1978, INS announced that the new twelve-foot high fences would be capped with barbed wire. These fences became known as the “Tortilla Curtain.”

The North American Free Trade Association negotiations in the early 1990s focused attention on environmental concerns along the southwest border. Programs and institutions were created to deal with binational environmental issues, including Border XXI and the Border Environmental Cooperation Commission. The North American Development Bank funded efforts for environmental improvements along the border. However, the U.S. Border Patrol (USBP), which was part of DHS, was reluctant to comply with environmental statutes in its interdiction efforts.

22 Id. at 270.
23 Id.
24 Id.
26 Id.
27 Id.
28 Id. at 9; see also BRIAN P. SEEGEE & JENNY L. NEELEY, DEF. OF WILDLIFE, ON THE LINE: THE IMPACTS OF IMMIGRATION POLICY ON WILDLIFE AND HABITAT IN THE ARIZONA BORDERLANDS 28–30 (2006) (“In several instances, the Border Patrol has made
The USBP completed the construction of the primary fence in the San Diego sector in 1993. The fence cut across the first fourteen miles of the southwestern border, “starting from the Pacific Ocean, and was constructed of 10-foot-high welded steel.” The USBP in 1994 began an aggressive effort to stop illegal immigration through major urban areas. The USBP’s Southwest Border Strategy stressed “prevention through deterrence” and was designed to “make it so difficult and so costly to enter this country illegally that fewer individuals would try.” The Clinton administration launched “Operation Gatekeeper” south of San Diego in October 1994, which involved more agents and technology in specific areas. These measures and the primary fence proved to be successful, but “fiscally and environmentally costly.” President Clinton in his January 1996 State of the Union message declared, “[a]fter years and years of neglect, this administration has taken on a strong stand to stiffen protection on our borders.” The INS noted, “[t]he border is harder to cross now than at any time in history.”

Congress strengthened border security by enacting the IIRIRA in 1996, which was attached as a rider on an appropriation bill. The IIRIRA was the first legislative enactment, which specifically mandated the construction of “physical barriers and roads.” Section 102(a)
granted the U.S. Attorney General (AG) authority to construct border barriers. Section 102(b) authorized the building of secondary and tertiary fences and roads between the fences in the San Diego sector. The concept of the three-tiered fence came from a 1993 study prepared by Sandia Laboratories. Section 102(c) allowed the AG to waive only NEPA and ESA requirements for the construction of fourteen miles of fencing along the San Diego sector.

After 9/11, Congress intensified its effort to improve border security. In 2002, the newly created DHS assumed responsibility for border security. The Homeland Security Act specifically addressed the San Diego fencing, stating it was “the sense of the Congress that completing the 14-mile border fence project required to be carried out under section 102(b) of the [IIRIRA] should be a priority for the Secretary.” INS was dissolved and its duties were transferred to the Bureau of Customs and Border Protection (CBP). Binational efforts to protect and manage the environment along the southwest border suffered during the Bush Administration.

Efforts to complete the San Diego fencing were halted because of environmental concerns. The first 9.5 miles from east of the San Ysidro border crossing was finished shortly after 2001, but completion of the remaining 4.5 miles west of San Ysidro to the Pacific proved controversial. The remaining fence extension would have to traverse the south side of the Tijuana River National Wildlife Refuge, the Tijuana River National Estuarine Research Reserve, Border Field State Park, and the San Diego County Regional Park. The construction of the secondary fence and twenty-four-foot wide patrol road required the

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39 IIRIRA § 102(a). The AG delegated this authority to the INS, which housed the USBP. Michael John Garcia, Cong. Research Serv., R43975, Barriers Along the U.S. Borders: Key Authorities and Requirements 4 n.20 (2017).
40 IIRIRA § 102(b).
41 The Sandia study asserted that, “[t]he illegal aliens have shown that they will destroy or bypass any single measure placed in their path.’ The study concluded that, ‘A three-fence barrier system with vehicle patrol roads between the fences and lights will provide the necessary discouragement.’” Andreas, supra note 32, at 595 (quoting Sandia Nat’l Laboratories, Systematic Analysis of the Southwest Border ES-5 (1993)).
42 IIRIRA § 102(c).
44 Id. § 446 (citation omitted); see also Garcia, supra note 39, at 4 (stating that § 102 “requires a specified amount of fencing in priority areas along the southwest border”).
45 Garcia, supra note 39 (stating “the INS was abolished and its enforcement functions were generally transferred to DHS, along with Border Patrol”); 6 U.S.C. § 251 (2012) (providing a transfer of functions to Under Secretary for Border and Transportation Security).
46 See Mumme, supra note 25, at 3, 14.
48 Mumme, supra note 25, at 10.
movement of 2.1 million cubic feet of solid fill into Smugglers Gulch. Opponents pointed out that soil erosion from the construction would adversely affect 2,531 acres of federal estuary at the mouth of the Tijuana River, which is a stopover for 370 species of migratory birds, including six endangered species.

The California Coastal Commission (CCC) halted construction of the remaining 4.5 miles of San Diego fencing in 2004. The CCC, utilizing its consistency authority under the CZMA, determined that the planned fencing was not consistent “to the maximum extent practicable” with the federally approved California Coastal Zone Management Act. The CCC was specifically concerned with potentially significant adverse effects on 1) the Tijuana River National Estuarine Research and Reserve; 2) state and federally listed threatened and endangered species; 3) lands set aside for protection within California’s Multiple Species Conservation Program; and 4) other aspects of the environment. The CCC alleged that the CBP failed to show that other less environmentally damaging alternatives, which were rejected, would have prevented compliance with the IIRIRA. Representative Filner (D. Cal.), declared, “[t]he waiving of all environmental rules for this is just criminal. It’s just too extensive a trade-off for the limited security advantage.” Environmental groups also opposed the construction.

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51 The CZMA requires “[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone [to] be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of an approved State management program.” 16 U.S.C. § 1456(c)(1)(A) (2012). If a federal court finds a federal activity to be inconsistent with an approved state program and the SHS determines that compliance is unlikely to be achieved through mediation, the President may allow the activity to go forward “if the President determines that the activity is in the paramount interest of the United States.” Id. § 1456(c)(1)(B); see also Edward A. Fitzgerald, California Coastal Commission v. Norton: A Coastal State Victory in the Seaweed Rebellion, 22 UCLA J. ENVT'L. L. & POL’Y 155, 183 (2004) (describing this presidential authority as “a limited exemption for consistency”).
54 Id.
56 Center for Biodiversity stated, “[w]e already have one fence that goes all the way to the ocean. The fact that crime and arrests have dropped so low only proves our point. They have solved the problem.” Annual arrests have dropped to 3,000 from 25,000 over the past three years. California, Feds At Odds Over Border Fence, UP INT’L (Apr. 20, 2004), https://perma.cc/DGU8-UT7L.
Legislative efforts to complete the San Diego border fencing continued. The Real ID Act of 2005 (RIDA) expanded the SHS waiver authority under section 102(c) to cover all barriers constructed under the IIRIRA. The SHS is allowed to waive, not only NEPA and ESA requirements, but “all legal requirements [the Homeland Security] Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads . . . .”

RIDA also limits judicial review. Federal district courts only have the authority to review claims “alleging a violation of the Constitution of the United States,” and “[a]ny cause or claim brought . . . shall be filed not later than 60 days after the date of the action.” Furthermore, it removes the appellate jurisdiction of the Circuit Courts of Appeal, declaring that district court decisions regarding the use of the waiver “may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.”

Sierra Club had brought suit in February 2004 to block the construction of the San Diego fences until SHS complied with NEPA. Subsequently, RIDA was enacted, which allowed the SHS to waive all laws that impeded construction of border fencing. On September 13, 2005, Secretary Chertoff waived eight statutes to permit the expeditious construction of fourteen miles of border fence in San Diego.

Sierra Club amended its complaint, alleging that 1) the waiver violated the non-delegation doctrine; 2) application of waiver to this case violated the Constitution by enabling SHS to abolish the district court’s jurisdiction; and 3) application of the waiver to the pending case was an impermissible retroactive application of the waiver legislation. The U.S. District Court for the Southern District of California in 2005 rejected all the allegations and dismissed the case. Nevertheless, the court noted that:

Congress [in RIDA] simply broadened the scope of the waiver authority of the pre-existing delegation to ‘all laws,’ but again only for the narrow purpose of expeditious completion of the Triple Fence authorized by the IIRIRA. Thus, the Waiver Legislation effected no change in the already
The demand for additional border fencing continued. The Secure Fences Act of 2006 (SFA), which was enacted as a separate piece of legislation, amended IIRIRA, section 102(b). The SHS was directed to “provide for least [sic] 2 layers of reinforced fencing, [and] the installation of additional physical barriers, roads, lighting, cameras, and sensors” along 700 miles in five specific segments along the U.S.–Mexico border, across the states of California, Arizona, New Mexico, and Texas. Dates were set for the completion for two segments of priority fencing. Prominent Democrats, who later opposed President Trump’s border wall, supported the SFA, including Senator Barbara Boxer (D. Cal.), Senator Barak Obama (D. Ill.), Senator Joe Biden (D. Del.), Senator Dianne Feinstein (D. Cal.), and Representative Chuck Schumer (D. N.Y.).

DHS predicted that the fourteen-mile San Diego border fence would cost $127 million, approximately $9 million per mile. Construction of the first 9.5 miles of fencing had cost $31 million, approximately $3 million per mile. While construction for the last 4.5 miles of fencing was projected to cost $96 million, approximately $21 million per mile. Complex construction in Smugglers Gulch accounted for vast disparity in costs. Congress provided $35 million for San Diego border fence construction in FY2006. Congress recommended $30.5 million for San

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67 Id. at *5.
69 Id. § 3(2). Section 3 of the Secure Fence Act mandates fences along 698 miles in five areas:

   (i) extending from 10 miles west of the Tecate, California, port of entry to 10 miles east of the Tecate, California port of entry [22 miles]; (ii) extending from 10 miles west of Calexico, California, port of entry to 5 miles east of the Douglas, Arizona, port of entry [361 miles]; (iii) extending from 5 miles west of the Columbus, New Mexico, port of entry to 10 miles east of El Paso, Texas [88 miles]; (iv) extending from 5 miles northwest of the Del Rio, Texas, port of entry to 5 miles southeast of the Eagle Pass, Texas, port of entry [51 miles]; and (v) extending 15 miles northwest of the Laredo, Texas, port of entry to the Brownsville, Texas, port of entry [176 miles].

Id. (amending IIRIRA § 102(b)(1)). The CBP estimated that because of topographical features, the SFA mandated fencing amounted to 850 miles. GARCIA, supra note 39, at 8.
70 GARCIA, supra note 39, at 8–9 (fencing near Calexico, CA, and Douglas, AZ, by May 30, 2008 and fencing near Laredo, TX, by December 31, 2008).
72 NUÑEZ-NETO & GARCIA, supra note 53, at 6.
73 Id. at 5.
74 Id.
75 Id.
76 Id.
Diego border fence construction for FY2007. Furthermore, since 1990 Congress had provided funding to the Defense Department to assist federal agencies in counter-drug activities, which included construction of fencing and roads along the border to stop flow of illegal narcotics into the country.

There was, however, little support for the aspirational goal of 700 miles of double layered fencing. President Bush, Secretary Chertoff, the Senate, and democratic congresspersons only planned for 370 miles of priority fencing and 330 miles of vehicle barriers and/or virtual fencing. Former Representative Jim Kolbe (R. Az.) commenting on the SFA, stated, “[t]his administration has never shown any real interest, and who’s going to push for it [border fence]?” His successor, Democratic Representative Gabby Giffords, noted, “[i]t’s a lot smarter to have high-tech enforcement than thinking that a fence is going to solve the problem.”

After the Democrats took control of Congress in 2007, they abandoned the aspirational goal and loosened the SFA mandate with the Consolidated Appropriations Act of 2008. Congress scaled back the DHS duties under section 102(b). First, it eliminated the specific locations for barriers. Fencing was only required across 700 miles of the southwest border, but only if and where the SHS determined it would be “most practical and effective.” Second, double-layered fencing was no longer required. Third, 370 miles of “priority areas” for border fences had to be identified by December 31, 2008. Finally, the SHS was required to consult with Secretaries of Interior and Agriculture, state and local governments, Native American tribes, and property owners to minimize the impact on the environment, culture, commerce, quality of life for communities and residents where barriers would be constructed. The only remnant of the SFA mandate that remained was

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77 Id.
78 Id.
81 Id.
83 The Secretary was not required to construct fences or other border barriers “in a particular location along an international border of the United State, if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location.” Id. § 564, 121 Stat. 1844, 2090.
85 Id.
the 700 miles of fencing, while the composition and location of such was left up to the SHS discretion.86

Federal district courts continued to support the SHS waiver authority. Save Our Heritage Organization (SOHO) brought suit, seeking an injunction to halt the construction of two portions of physical barriers and roads along the U.S.–Mexico border, one near San Diego, California and the other near Yuma, Arizona.87 SOHO alleged the SHS action violated numerous statutes and the waiver of these statutory requirements was unconstitutional.88 Further, the construction of the San Diego barrier was no longer authorized under section 102(b) of the SFA.89 However, the Yuma section remained in one of the five mandated areas under the SFA.90

The U.S. District Court for the Southern District of California in 2008 upheld the Secretary’s waiver. The court held that even though the San Diego barrier had not been designated in the SFA, San Diego had been previously identified in the IIRIRA.91 Furthermore, the general purpose of section 102(a) provided the SHS with “general authority to construct border barriers.”92 The court also held that SHS waiver authority under section 102(c) did not violate the non-delegation doctrine.93

There were unsuccessful efforts to create the virtual fence. The Bush Administration was awarded $67 million in 2005 to establish a virtual fence, consisting of radar, infrared devices, and cameras.94 Sensors were designed to distinguish people from animals and allow the border patrol to pursue intruders.95 However, the GAO in 2008 reported that after the DHS had spent more than $20 million experimenting and developing virtual fence, the technology had not proven to be successful.96 The GAO estimated that the $2.4 billion virtual fence

86 Id.
88 Save Our Heritage Organization, 533 F. Supp. 2d at 60.
89 Id.
90 Id.
91 Id.
92 Id. at 61.
93 Id. at 63–64
would cost $6.5 billion to maintain over next 20 years. Representative Hunter (R. Cal.) called the virtual fence a waste of taxpayer dollars. Most border barriers were constructed during second term of Bush Administration. Secretary of Homeland Security Michael Chertoff exercised the section 102(c) authority five times, waiving 35 laws: 1) San Diego (14 miles); 2) Barry Goldwater Range in Arizona (37.3 miles); 3) San Pedro Riparian National Conservation Area (BLM) in Arizona (5.5 miles); 4) Hidalgo County, Texas (21 miles); and 5) Texas, New Mexico, Arizona, California (546.5 miles). The DHS in September 2008 revised its goal of completing 670 miles of fencing by December 31, 2008. Instead, DHS promised to have 661 miles either built or under construction by December 31, 2008. As of December 31, 2008, DHS had constructed 578 miles of fencing.

President Obama was not a proponent of border fencing. During a presidential debate in 2008, candidate Obama stated, “I think that the key is to consult with local communities, whether it’s on the commercial interest or the environmental stakes of creating any kind of barrier.” SHS Janet Napolitano, while governor of Arizona, often voiced her skepticism of border fencing stating, “You show me a 50-foot wall, and I’ll show you a 51-foot ladder at the border.” Nevertheless, Secretary Napolitano decided to allow border fence projects already contracted

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103 73 Fed. Reg. at 18,293.
105 Id.
under the Bush administration to continue.\textsuperscript{106} However, CBP decided to disregard Chertoff’s waiver for a segment of vehicle barrier on the Tohono O’odham Nation in southwest Arizona and proceed with the standard environmental and cultural reviews.\textsuperscript{109} California officials continued to complain that the border fence was damaging the Tijuana River and its estuary. The estuary, which encompasses a national wildlife refuge, and state parklands, is also the home of number of endangered bird species, including the light-footed clapper, the California least tern, the least Bell’s vireo and the American peregrine falcon.\textsuperscript{110} The CCC declared, “this project was just a disaster…. Not only is it a wall of shame, but to override the protections after the state spent tens of millions of dollars to restore the estuary and to just come in and blast the place . . . it’s just shameful.”\textsuperscript{111} CBP promised to address the problems.\textsuperscript{112}

President Obama in 2011 declared that fencing along the U.S.–Mexico border is “now basically complete.”\textsuperscript{113} The Obama Administration also ended efforts to create a virtual fence in 2011. SHS Napolitano stated “independent, quantitative, science-based review made clear” the virtual fence “cannot meet its original objective of providing a single, integrated border security technological solution.”\textsuperscript{114} Funds provided for the high-tech virtual fence would go to other proven technology.\textsuperscript{115}

As of May 2015, DHS installed 353 miles of primary pedestrian fencing, 300 miles of vehicle fencing (total 653 miles), 36 miles of secondary fencing behind the primary fencing, and 14 miles of tertiary pedestrian fencing behind the secondary fence.\textsuperscript{116} CBP had identified a total of 653 miles of border as appropriate for fencing and barriers.\textsuperscript{117}

III. \textit{IN RE BORDER INFRASTRUCTURE ENVIRONMENTAL LITIGATION}

President Trump came to office committed to building a wall across the U.S.–Mexico border. President Trump did not see the need for border wall that will stretch across the 2,000 miles of the U.S.–Mexico border infrastructure to continue.\textsuperscript{106} However, CBP decided to disregard Chertoff’s waiver for a segment of vehicle barrier on the Tohono O’odham Nation in southwest Arizona and proceed with the standard environmental and cultural reviews.\textsuperscript{109} California officials continued to complain that the border fence was damaging the Tijuana River and its estuary. The estuary, which encompasses a national wildlife refuge, and state parklands, is also the home of number of endangered bird species, including the light-footed clapper, the California least tern, the least Bell’s vireo and the American peregrine falcon.\textsuperscript{110} The CCC declared, “this project was just a disaster…. Not only is it a wall of shame, but to override the protections after the state spent tens of millions of dollars to restore the estuary and to just come in and blast the place . . . it’s just shameful.”\textsuperscript{111} CBP promised to address the problems.\textsuperscript{112}

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border, but envisioned “anywhere from 700 (1,126 km) to 900 miles (1,144 km) of see-through wall.” President Trump promised that Mexico will fund the wall, but Mexico has refused to pay for the wall.

Environmental groups are particularly concerned about adverse effects of the proposed wall on wildlife. Border fences, walls, and barriers cause numerous environmental problems. First, barriers fragment wildlife habitat and territory on the border, which create negative impacts on the distribution, movement, and abundance of animals. Second, barriers stop wildlife migration and dispersion between the two countries. This prevents the genetic exchange between populations, which is necessary for species health. Third, barriers allow for the proliferation of exotic and noxious fauna, such as rats and birds, which can adversely affect wildlife. Fourth, electric lighting affects the behavior and movement of nocturnal animals. Fifth, noise pollution generates stress that can cause harmful metabolic, hormonal, and behavior problems. Sixth, barriers hamper the collaborative efforts with Mexico regarding wildlife and natural resource management.

DHS notified Congress in February 2017 that it planned to reprogram $20 million from other CBP program funding in previous years.

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118 Trump says Mexico Wall Doesn’t Need to Cover the Whole Border, THE GUARDIAN (July 13, 2017), https://perma.cc/TG6J-DWCB.
120 Leah Donnella, The Environmental Consequences of a Wall on the U.S.-Mexico Border, NAT’L PUB. RADIO (Feb. 17, 2017), https://perma.cc/ZJ8L-FHMD. The Center for Biological Diversity determined that the wall would have the following detrimental impacts: 1) 93 threatened, endangered and candidate species would potentially be affected by the construction and related infrastructure across the entire border, including jaguars, Mexican wolves and Quino checkerspot butterflies; 2) The critical habitat for 25 species that occur within 50 miles of the border, including the jaguar, arroyo toad, and Peninsular bighorn sheep, would be degraded or destroyed; and 3) Studies demonstrate that the wall precludes the movement of some wildlife, including the low-flying cactus ferruginous pygmy owl. NOAH GREENWALD ET AL., A WALL IN THE WILD: THE DISASTROUS IMPACTS OF TRUMP’S BORDER WALL ON WILDLIFE 1 (2017).
122 Id.
123 Id. at 66.
124 Id.
125 Id.
years to fund the planning and design of barriers along the southwest border, including the construction and testing of barrier prototypes. 127
CBP requested proposals for border wall prototypes in March 2017. One proposal was for prototypes made of concrete. 128 The other was for prototypes made of different materials. 129 CBP awarded contracts of $3 million to six companies to design and construct eight prototypes in September and October 2017. 130
Congress provided limited funding for President Trump’s border wall. The Consolidated Appropriations Act of 2017 provided $341.2 million for the replacement of “40 miles of existing primary pedestrian and vehicle border fencing” in high priority areas, “using previously deployed and operationally effective designs, such as currently deployed steel bollard designs, that prioritize agency safety; and to add gates to existing barriers.” 131 CBP planned to spend the funds in part to replace fourteen miles of primary pedestrian fencing in the San Diego sector and two miles of primary pedestrian fencings in the El Centro sector. 132
Representative Ron DeSantis (R. Fla.), chair of National Security Subcommittee of the House Committee on Oversight and Government Reform stated, “we’re not talking about a 2000 mile wall. It’s going to be basically finishing the job of the 2006 Secure Fence Act.” 133
After SHS Kelley and Acting SHS Duke invoked their authority under section 102(c) to waive numerous statutes, construction of the San Diego and El Centro replacement fencing and border wall prototypes proceeded. 134 Construction of the prototypes began on September 26, 2017 and was completed on October 26th, 2017. 135
Construction of the Calexico three-mile replacement fence and the San Diego replacement fencing were scheduled to begin in 2018. 136
The State of California, DOW, and CBD brought suits challenging SHS waiver of numerous statutes regarding the three border wall construction projects. CBD stated, “Trump is willing to throw

128 Id. at 14.
129 Id.
130 Id. at 13—14.
131 Consolidated Appropriation Act of 2017, Pub. L. No. 115-31, 131 Stat. 135, 434. The bill also provided $78.8 million for acquisition and deployment of border security technology and $77.4 million for new border road construction. Id.
132 U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 127, at 9–11.
133 Press Release, House Comm. on Oversight and Gov’t Reform, President’s Promised 2,000 Mile Border Wall, Hearing Wrap-Up: Chairman Dismisses President’s Promised 2,000-Mile Border Wall (Apr. 27, 2017), https://perma.cc/YW3Q-7UB7.
135 Id. at 1107.
136 Id.
environmental protections out the window to fulfill his divisive and destructive campaign promise.”

In February 2018, the U.S. District Court for Southern District of California, in *Curiel*, held that SHS waivers of numerous laws that allowed the three projects to proceed were not ultra vires, outside the scope of the Secretary’s statutory authority. The court also determined that the SHS waiver authority under section 102(c) did not violate the Constitution.

**A. Ultra Vires-Step One**

The district court acknowledged that there is “strong presumption” regarding judicial review of administrative action. This “strong presumption may be overcome by ‘specific language or specific legislative history that is a reliable indicator of congressional intent,’ or a ‘specific congressional intent to preclude judicial review that is ‘fairly discernible’ in the detail of the legislative scheme.’” The court recognized that Congress had precluded judicial review of non-constitutional violations, but held it still retained authority to determine whether the SHS waiver decisions were “ultra vires.” However, this exception is an “extremely narrow one” and “extraordinary.” It has been described as “essentially a Hail Mary pass—and in court as in football, the attempt rarely succeeds.” In order to prevail, the plaintiffs must first demonstrate that SHS acted in excess of their delegated powers by demonstrating the issuance of the two waivers contravened the “clear and mandatory” language in section 102. Plaintiffs must also show that precluding judicial review would deprive them of any “meaningful and adequate means of vindicating its statutory rights.”

The district court correctly determined that despite curtailment of judicial review in 102(c), it still retained authority to determine whether the SHS waivers were ultra vires. Congress acknowledged the court’s ultra vires authority when it enacted the Administrative Procedure

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137 Press Release, Brian Segee, Ctr. for Biological Diversity, Lawsuit Challenges San Diego Border-wall Waiver as Unconstitutional (Sept. 6, 2017), https://perma.cc/XA2U-G36P.
138 *Curiel*, 284 F. Supp. 3d at 1115, 1128.
139 *Id.* at 1130–46.
140 *Id.* at 1111 (quoting Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986); El Paso Natural Gas Co. v. United States, 632 F.3d 1272, 1276 (2011)).
141 *Curiel*, 284 F. Supp. 3d at 1111 (quoting *Bowen*, 476 U.S. at 673).
142 *Id.* at 1111, 1114–15.
143 *Id.* at 1113 (quoting Nat’l Air Traffic Controllers Ass’n. AFL-CIO v. Fed. Serv. Impasses Panel, 437 F.3d 1256, 1263 (D.C. Cir. 2006); Am. Airlines, Inc. v. Herman, 176 F.3d 283, 293 (5th Cir. 1999)).
144 *Id.* (quoting Nyunt v. Chairman, Broad. Bd. of Governors, 589 F.3d 445, 449 (D.C. Cir. 2009)).
145 *Id.* at 1113–14.
146 *Id.* at 1110, 1114.
Act\textsuperscript{147} (APA). The Senate Committee report on the APA declared, “[i]t has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified.”\textsuperscript{148}

The Supreme Court recognized its authority to declare an administrative action ultra vires even when judicial review was precluded.\textsuperscript{149} The Supreme Court in \textit{Leedom v. Kyne}\textsuperscript{150} held the district court retained jurisdiction to review a non-final agency order “made in excess of its delegated powers and contrary to a specific prohibition in the [National Labor Relations] Act.”\textsuperscript{151} The Court declared that it “cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.”\textsuperscript{152}

The Court qualified the ultra vires doctrine in \textit{Board of Governors of Federal Reserve System v. MCorp Financial, Inc.},\textsuperscript{153} when it upheld a statute that precluded judicial review. The Court distinguished \textit{Kyne} on two grounds. First, the plaintiffs in \textit{Kyne} were deprived of any way of vindicating their statutory right, but \textit{MCorp} plaintiffs were provided the opportunity for judicial review.\textsuperscript{154} Second, the preclusion of judicial review was inferred by silence in \textit{Kyne}, but there was clear and convincing evidence in \textit{MCorp} that precluded judicial review.\textsuperscript{155}

Numerous federal circuit courts have relied on analogous reasoning to \textit{Kyne} and \textit{MCorp} to review agency actions taken pursuant to statutory provisions expressly prohibiting judicial review.\textsuperscript{156} For example, the D.C. Circuit in \textit{Dart v. United States}\textsuperscript{157} held judicial review is available when the Secretary exercises functions that are not specified in statute.\textsuperscript{158} The court stated that even “where Congress is understood generally to have precluded [judicial] review, the Supreme Court has found an implicit but narrow exception, closely paralleling the historic origins of judicial review for agency actions in excess of [its] jurisdiction.”\textsuperscript{159} The court noted that “[w]hen an executive acts ultra

\begin{footnotesize}
\begin{enumerate}
  \item Dart \textit{v. United States}, 848 F.2d 217, 224 (D.D.C. 1988) (quoting S. REP. NO. 752, 79TH CONG., 1ST SESS. 26 (1945)).
  \item Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110 (1902).
  \item 358 U.S. 184 (1958).
  \item \textit{Id.} at 188.
  \item \textit{Id.} at 190.
  \item \textit{Id.} at 43–44.
  \item \textit{Id.} at 44.
  \item See, e.g., Spencer Enters., Inc. \textit{v. United States}, 345 F.3d 683, 689, 700 (9th Cir. 2003); Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 638 n.17 (1978); United States \textit{v. Bozavar}, 974 F.2d 1037, 1045 n.8 (9th Cir. 1992); Amgen Inc. \textit{v. Smith}, 357 F.3d 103, 117 (D.C. Cir. 2004).
  \item 848 F. 2d 217 (D.C. Cir. 1998).
  \item \textit{Id.} at 221.
  \item \textit{Id.}
\end{enumerate}
\end{footnotesize}
vires, courts are normally available to reestablish the limits on his authority.”

The district court, relying on *Kyne* and *Dart*, held that plaintiffs must show clear and convincing evidence of contrary legislative intent regarding the scope of the SHS jurisdiction. The district court upheld SHS waivers because it could not find any specific textual references that constrained the SHS waiver authority. The court dismissed the plaintiff’s arguments as plausible, but not definitive.

The district court failed to recognize that the parameters of the SHS actions are determined not only by the “express language, but also from the structure of the statutory scheme, its objectives, its legislative history and the nature of the administrative action involved.” The court’s assessment of these factors was incorrect. An analysis of the text, intent, and purposes of section 102 provide clear and convincing evidence that the SHS waivers of numerous environmental statutes regarding the replacement fencing and border wall prototypes were ultra vires because they were not authorized under section 102(b).

1. Text

Statutory interpretation begins with the text. The district court did not find the text determinative. The text, however, confines the SHS authority in two ways. Section 102 (b)(1)(B), regarding “priority areas,” instructs the SHS to:

(i) Identify the 370 miles, or other mileage determined by the Secretary, whose authority to determine other mileage shall expire on December 31, 2008, along the southwest border where fencing would be most practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States; and (ii) not later than December 31, 2008,

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160 *Id.* at 224.
161 *Id.* at 221 (quoting *Bowen*, 476 U.S. 667, 671–72 (1986)) (alterations in original).
163 *Id.* at 1115, 1119.
165 Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa Cty., 627 F.3d 1268, 1270 (9th Cir. 2010); *Brock v. Writers Guild of Am., W., Inc.*, 762 F.2d 1349, 1353 (9th Cir. 1985).
166 *Curiel*, 284 F. Supp. 3d at 1118.
complete construction of reinforced fencing along the miles identified under clause (i).  

Secretary Chertoff identified the 370 miles of priority areas for border fencing and 300 miles of vehicle barriers, executed the relevant waivers, and committed DHS to 661 miles of fencing by December 31, 2008.  

If “the other mileage” in section 102(b)(1)(B) only refers to “priority areas,” there is another constraint in section 102(b)(1)(A), which states “[i]n carrying out subsection (a), the [SHS] shall construct reinforced fencing along not less than 700 miles of the southwest border . . . .” This language grants the SHS authority to build at least 700 miles of fencing, the aspirational goal previously articulated in the 2006 SFA. This defines the maximum, not the minimum, amount of fencing authorized. Once this congressional mandate was met, the SHS waiver authority ended. This was accomplished in 2013. If the SHS retained unlimited authority to waive any law, at any time, pursuant to section 102(a), the restrictions in section 102(b)(1)(A) and (B) become superfluous.  

Other requirements in section 102 (b)(2) and (4) reinforce this view. These sections assume present action regarding the designated areas, not future actions ten years later or in perpetuity. Section 102(b)(2) calls for prompt acquisition of necessary easements. Section 102(b)(4) authorizes appropriations “as may be necessary to carry out this subsection.” These easements and appropriations refer to areas designated under section 102(b), the 370 miles of priority fencing and the 700 miles of fencing authorized under the SFA.

2. Legislative History

Since the district court did not find the text to be clear, it examined the legislative history. The district court held that “[t]he parties’
varying plausible interpretations concerning the scope of section 102(c) demonstrate [the lack of a clear statutory mandate].” The legislative history, however, demonstrates that Congress specified the location and amount of fencing in section 102(b); consequently, confined the SHS use of the section 102(c) waiver authority. The IIRIRA and the RIDA limited the use of waiver under section 102(c) to the San Diego border fence. The SFA expanded the fencing authorized under section 102(b) to five specific locations across 700 miles of the southwest border. The Consolidated Appropriations Act of 2008 limited the amount of border fencing to 370 miles of priority fencing and at least 700 miles of fencing overall, which was the amount of fencing designated in the SFA.

IIRIRA was specifically enacted to complete the construction of border fencing in the San Diego sector. The AG was granted authority to construct border barriers and waive NEPA and ESA requirements to facilitate the construction of fourteen miles of border fencing along the San Diego sector.

While the bill was being considered, AG Janet Reno stated that the bill was “unnecessary, and we strongly oppose it.” President Clinton signed the bill, but registered his skepticism stating:

I am, however, extremely concerned about a provision in this bill that could lead to the Federal Government waiving the [ESA] and [NEPA] 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.

Secretary of Interior Bruce Babbitt “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.” The INS declared that “we will not seek the Attorney


175 Curiel, 284 F. Supp. 3d at 1127.
176 Id. at 1103–04.
177 Id. at 1104.
178 Id.
180 Id.
182 Id. (quoting President Bill Clinton, Statement (Oct. 1, 1996)).
183 Id. (quoting Dep’t of the Interior, Secretary Babbitt, Statement on Objections to New Environmental Waivers Included in Immigration Bill (Oct. 1, 1996)).
General’s use of this waiver, and the INS will continue to abide by all environmental laws.”

After completion of the San Diego fencing was delayed by the California Coastal Commission, Representative Sensenbrenner (R. Wisc.), chair of the House Judiciary Committee, building on an earlier effort, inserted a provision into the RIDA that amended section 102(c) to allow the completion of the San Diego fence in 2005. Statements by the sponsors of the legislation are “an authoritative guide to the statute’s construction” because they “know what the proposed legislation is all about, and other Members can be expected to pay special heed to their characterizations of the legislation.” Representative Sensenbrenner stated: “[T]he REAL ID Act will waive Federal laws to the extent necessary to complete gaps in the San Diego border security fence, which is still stymied 8 years after congressional authorization. Neither the public safety nor the environment are benefiting from the current stalemate.” Comments by other U.S. Representatives confirmed that section 102(c) was designed to complete the San Diego fence.

The Congressional Budget Office’s (CBO) budget estimate regarding the impact of the waiver authority in HR 418 (RIDA) also demonstrated its narrow scope. The CBO estimate stated:

[IIRIRA] provided for the construction of a serious of roads and fences along the U.S.-Mexico border near San Diego to deter entry of illegal immigrants. All but about 3 miles of this barrier have been completed. Since February 2004, completion of the barrier has been delayed because of environmental conflicts with the Coastal Zone Management Act.

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184 Id. at 3 (quoting David A. Yentzer, Assistant INS Commissioner, Memorandum (Feb. 24, 1997)).
185 San Diego Border Fence, CITY NEWS SERV. (Oct. 8, 2004); MUMME, supra note 25, at 5.
186 The Supreme Court stated that statements by bill sponsors during the floor debate “deserve to be accorded substantial weight in interpreting the statute.” Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976).
187 Eskridge, supra note 174, at 638.
189 Representative Bono: “The San Diego fence is a project that was started several years ago, but a 3.5-mile section of that fence was not completed due to environmental concerns . . . . This legislation puts those priorities front and center.” 151 CONG. REC. H453 at H471 (daily ed. Feb. 9, 2005). Representative Lungren: “H.R. 418 will remove impediments to completing the fence along the San Diego corridor of our southern border.” Id. at H457. Representative Hastings: “H.R. 418 allows SHS to waive all laws necessary for the construction of the San Diego border wall. None of us are of a mind to believe that the completion of the 3-mile gap in that wall should not be undertaken.” 151 CONG. REC. H527 at H529 (daily ed. Feb. 10, 2005). Memorandum of Points and Authorities in support of Plaintiffs Def. of Wildlife, Animal Legal Def. Fund, and Sierra Club’s Motion for Summary Judgement at 18–19, In Re Border Infrastructure Environmental Litigation, 284 F. Supp. 3d 1092 (S.D. Cal. Feb. 9, 2018) (No. 17cv1215–GPC–WVG), 2017 WL 5760040 [hereinafter DOW Memo].
(CZMA). HR 418 would permit DHS to waive this act and any other laws as necessary to complete construction of the barrier.\footnote{DOW Memo, \textit{supra} note 189, at 19 (quoting 151 CONG. REC. H438 (daily ed. Feb. 9, 2005)).}

The CBO concluded that the waiver authority would not impose significant additional costs because it merely authorized

\[\text{[T]he Secretary of [DHS] to waive any laws necessary to complete construction of a physical barrier between the United States and Mexico near San Diego, California, and prohibit any court from having jurisdiction to hear claims or ordering relief for damage resulting from the waiver of such laws. This provision would preempt state authority.}\footnote{Id.}


Senate Democrats sought to remove the provision in conference, but again were unsuccessful.\footnote{Dianne Feinstein, \textit{Senator Feinstein Urges Removal RIDA from Supplemental Spending Bill Conference}, STATES NEWS SERV. (Apr. 28, 2005); see also Brian Stempeck, Allison A. Freeman & Dan Berman, \textit{Senate Sends $82B Supplemental to the White House}, ENV’T & ENERGY DAILY (May 11, 2005), https://perma.cc/C2LD-ULFC.} The conference committee report is important because it is the “best evidence of bicameral agreement” and “explicates the chambers’ resolution of differences.”\footnote{H.R. REP. NO. 109–72, at 170 (2005) (Conf. Rep.).} The committee stated that

\[\text{[C]onstruction of San Diego area barriers has been delayed due to a dispute involving other laws. The California Coastal Commission has prevented completion of the San Diego border security infrastructure because it alleges that plans to complete it are inconsistent with California Coastal Management Program . . . notwithstanding the fact that the San Diego border security infrastructure was designed to avoid and/or} \]
minimize adverse environmental impacts, and Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security testified before the California Coastal Commission that the plans for completion were consistent with the Coastal Management Plan to the maximum extent practical without sacrificing the effectiveness of the border security infrastructure. Continued delays caused by litigation have demonstrated the need for additional waiver authority with respect to other laws that might impeded the expeditious construction of security infrastructure along the border, such as the Coastal Zone Management Act.198

Conferees did make changes to allow constitutional challenges to waivers, including takings.199

After the House passed the supplemental appropriation bill by a bipartisan vote 368–58,200 Representative Sensenbrenner stated, “the REAL ID bill strengthens our border security by shutting down ‘Smugglers Gulch,’ a canyon along the westernmost California–Mexico border frequently used for illegal entrance into the U.S., so law-abiding Americans are better protected from terrorists, drug smugglers, alien gangs, and violent criminals seeking to operate here.”201

President Bush signed the RIDA into law, which was an unrelated rider on the “Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005.”202 The RIDA expanded the SHS waiver authority under section 102(c) to cover “all legal requirements [the Homeland Security] Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads.”203 The RIDA also severely constrains judicial review.204

Additional border fencing was authorized through the SFA, which was introduced before the midterm election year in 2006.205 Many House Democrats opposed the measure.206 Environmental groups opposed the

199 Mumme, supra note 25, at 5.
201 Id.
206 Rep. Neil Abercrombie (D. Haw.) stated:
SFA.207 DOW stated that the additional fencing “would damage numerous protected lands and break up the habitat of many imperiled animals, including jaguars, desert bighorn sheep, and Sonoran pronghorn . . . the [SFA] is an inflexible approach that fails to consider a fence’s potential impact on wildlife, natural resources, and communities.”208

Native American tribes also opposed the SFA.209 At least four of the twenty-seven Native American tribes that inhabit the border region have lands directly abutting the U.S.–Mexico border.210 Two of the tribes have lands that straddle the southwest border, the Tohono O’Odham in southern Arizona and the Kickapoo in Texas. Tohono O’Odham land, which is the size of Connecticut and the second largest Native American landholding, shares a 75-mile border with Mexico.211 The proposed border fence would separate their land and preclude them from visiting their sacred sites in Mexico. The Kickapoo have been granted free passage across the border pursuant to a 1983 statute.212 Federal trust responsibility requires the federal government to consult with the tribes whenever federal actions affect them.213 Tohono O’Odham Nation declared that the SFA “as proposed and ensuing


208 Id.

209 David Roche, Environmental Impacts of the Border Wall, 47 ENVTL. L. REP. NEWS & ANALYSIS 10,477, 10,482 (2017).

210 MUMME, supra note 25, at 14.

211 Id. at 13; see also Sam Levin, ‘Over My Dead Body’: Tribe Aims to Block Trump’s Border Wall on Arizona Land, GUARDIAN (Jan. 26, 2017), https://perma.cc/9D5B-A8L7.


213 MUMME, supra note 25, at 14. Under current law, the Secretary of Interior may grant rights-of-way over and across tribal land, provided the Secretary receives prior written consent of the tribe. 25 U.S.C. § 324 (2012). If the tribe does not consent, DHS may utilize its new waiver authority to construct a fence across tribal lands. It is unclear, however, whether the expanded waiver that was given SHS would allow DHS to override the statutory authority given to another federal agency. Ultimately, the federal government holds Indian lands in trust, and Congress may take such lands for public purposes, as long as it provides just compensation as required by the Fifth Amendment. See United States v. Sioux Nation of Indians, 448 U.S. 371, 408–09, 416 (1980); CHAD C. HADDAL ET AL., CONG. RESEARCH SERV., RL-33659, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER 10, 30–31 (2009).
construction of walls would effectively nullify in its entirety the collaborative approach.”

The House passed the bill by a vote of 283–138, with the support of 64 Democrats. It moved over to Senate, where it had bipartisan support. The Senate passed the SFA with 54 of 55 Republicans and 26 of 44 Democrats voting in favor of the bill. The SFA, which was enacted as a separate piece of legislation, amended section 102(b). The SHS was instructed to construct two layers of reinforced fencing along 700 miles in five specific segments along the U.S.–Mexico border.

President Bush signed the SFA, noting that “a combination of fencing and technology [will] make it easier for the border patrol to enforce our border.” Republicans praised the bill. However, doubts were raised regarding the construction of 700 miles of border fencing because of the lack of funding. The CBO estimated that addition fencing would cost $3.2 million per mile, totaling over $2 billion, but only $1.2 billion had been appropriated in FY 2007. This would only cover 370 miles, not 700 miles, of fencing.

Democrats regained control of Congress after the November 2006 election and promised to revisit border fencing. This angered House Republicans. However, President Bush and Senate Republicans were...

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216 Senator Kennedy (D. Mass.) opposed the bill, pointing out that Secretary Chertoff had testified that only 370 miles of fencing and 461 miles of vehicle barriers in targeted urban areas were needed. Press Release, U.S. Fed. News, Sen. Kennedy Issues Statement in Opposition to Secure Fence Act of 2006 (Sept. 26, 2006) (on file with LexisNexis). The Senate had already appropriated $1.8 billion to meet this goal. Id. Any longer fence would be a waste of money. Id.
219 Id.
226 Representative Sensenbrenner stated,

Majority leader Steny Hoyer is wrong to say that Democrats in House will revisit the planned border fence to help secure our Southern border with Mexico. The ink is
not strong supporters of the aspirational goal of 700 miles of double layered fencing, but only wanted 370 miles of fencing, 200 miles of vehicle barriers, and 300 miles of electronic surveillance.\(^{227}\) SHS Chertoff only planned to construct 370 miles of priority fencing and 330 miles of vehicle barriers.\(^{228}\) Representative John Shadegg (R. Az.) stated, “It would be my belief or opinion that the 700 miles of fence authorized by the last Congress will not be built, period.”\(^{229}\) He noted that “there’s a belief among Democrats that that was a political maneuver and that that will not accomplish anything.”\(^{230}\) The only remnant of the aspirational goal of 700 miles of double layered fencing in the SFA that remained was the 700 miles of fencing, the composition and location of which was left up the SHS discretion.

Proponents of additional border fencing opposed any weakening of the SFA mandate.\(^{231}\) Rejected proposals are informative because “it is direct evidence that Congress considered an issue and agreed not to adopt a specified policy.”\(^{232}\) Senator Graham (R. N.C.) introduced the “Border Security First Act of 2007” as an amendment to the DHS appropriation bill.\(^{233}\) The Act amended section 102(b) to require 700 miles of fencing and 300 miles of vehicle barriers along the southwest border in two years and other immigration changes.\(^{234}\) The proposed amendment was rejected because it was outside the scope of the appropriation bill. Senator Graham then introduced a new amendment, which retained the 700 miles of fencing and 300 miles of vehicle barriers within two years and provided the necessary funding.\(^{235}\) The amendment was accepted by a vote of 89–1 and included in the Senate barely dry from President Bush signature on the Secure Fence Act, passed by Republicans with strong Democratic support last year to protect the homeland. It is vital to our homeland security that Congress fully fund the border fence so that it can be built.


230 Id.


232 Eskridge, supra note 174, at 638.

233 GARCIA, supra note 39, at 10–12.

234 Id. at 10.

235 Id. at 11.
passed DHS appropriation bill. However, many of the FY 2008 appropriation bills were combined into the omnibus appropriation bill. The competing House and Senate versions had to be reconciled in conference. The Graham Amendment was not included in the final Consolidated Appropriation Act of 2008.

Congress loosened the SFA mandate in the Consolidated Appropriations Act of 2008. Congress scaled back the DHS duties. The double layered fencing and specific locations for border barriers were eliminated. The DHS was only required to construct 700 miles of border fencing, but only if and where it would be “most practical and effective.”

Proponents of the SFA mandate were disappointed. Representative Peter King (R. N.Y.), the sponsor of the SFA, noted, “[t]his is either a blatant oversight or a deliberate attempt to disregard the border security of our country. . . . the omnibus language guts the Secure Fence Act almost entirely . . . it is unacceptable.”

There were numerous unsuccessful efforts to restore the SFA mandate to construct 700 miles of double layered pedestrian fencing. Senator DeMint (R. S.C.) introduced the Finish Fence Act (FFA) in 2009. The FFA was added as an amendment to the FY 2010 DHS appropriation bill, but was later dropped by the conference committee. Senator DeMint’s amendment mandated “fencing that does not effectively restrain pedestrian traffic (such as vehicle barriers and virtual fencing) may not be used to meet the 700-mile fence requirement.” Senator DeMint stated, “[a] strong bipartisan Senate majority voted to finish the fence by end of 2010 and it’s very

236 Id.
237 Id. at 12.
238 Id.
239 Id. at 11-12.
241 Id. § 564(2)(B).
245 James Rosen, Senate Defeats DeMint’s Bid to Finish U.S.-Mexico Border Fence, MCCLATCHY NEWSPAPERS (May 27, 2010), https://perma.cc/7G99-RAPN.
247 Goodman, supra note 246.
disappointing that Democrat leaders are thwarting the will of the American people behind closed doors.”

Representative David Price (D. N.C.) countered that “[t]he DeMint amendment was dropped because it was cost-prohibitive and counterproductive to the Border Patrol’s plan for securing the border.”

Senator DeMint’s second effort to restore the SFA mandate in 2010 was also defeated.

President Obama in 2011 declared that the southwest border fence is “now basically complete.” DHS reported that 649 of 652 miles described in the SFA had been finished. The vast majority of the SFA mandated fencing consisted of vehicle barriers and single-layered pedestrian fence. There were only 36.3 miles of double layered fence.

Nevertheless, President Obama noted that many of his Republican opponents will not be satisfied, stating:

We have gone above and beyond what was requested by the very Republicans who said they supported broader reform as long as we got serious about enforcement. . . . All the stuff they asked for, we’ve done. But even though we’ve answered these concerns, I’ve got to say I suspect there are still going to be some who are trying to move the goal posts on us one more time.

President Obama warned, “They’ll want a higher fence . . . . Maybe they’ll need a moat. Maybe they want alligators in the moat. They’ll never be satisfied. And I understand that. That’s politics.”

Senator DeMint countered that the Obama Administration has “not done its job to finish the border fence that is a critical part of keeping Americans safe and stopping illegal immigration.” The SFA mandated “a 700-mile double-layer border fence along the southwest border . . . This is a promise that has not been kept. Today . . . just 5 percent of the double-layer fencing is complete, only 36.3 miles.”

Attempts to restore double layered fencing across 700 miles of the southwest border continued during the Obama administration. Representative McCaul (R. Tex.) in 2015 introduced Secure Our Borders First Act. Representative Ross (R. Fla.) in 2016 reintroduced the

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248 Id.; Gov’t Dismisses Call for More Texas Border Fencing, CBS NEWS, Oct. 9, 2009, https://perma.cc/X7M3-HAPN.
249 CBS News, supra note 248.
250 Rosen, supra note 245.
251 Farley, supra note 113.
252 Id.
253 Id.
254 Id.
255 Id.
256 Id.
257 Id.
258 Id.
FFA. These unsuccessful efforts indicate that congressional authorization of additional fencing is necessary to justify the exercise of the SHS waiver authority. Otherwise these subsequent congressional efforts to restore the SFA mandate and create additional miles of border fence were unnecessary.

3. Statutory Purposes

The district court held that the general purpose of section 102(c) of the IIRIRA granted the SHS unlimited authority to waive any and all laws related to border fence construction in perpetuity. The court read too much into general statutory purposes and ignored the specific limitations present in text and legislative history. Section 102(a) states the SHS “shall take such actions as may be necessary to install additional physical barriers and roads . . . to deter illegal crossings in areas of high illegal entry into the U.S.” In so far as this is “a discrete, judicially reviewable command,” it is limited to fencing authorized by section 102(b). This in turn, confines the SHS waiver authority under section 102(c) to construction of fencing designated in section 102(b).

Section 102(a), which is entitled a “General” provision, is followed by section 102(b), which provided the DHS with express instructions on where to construct and the extent of southwest border barriers. Section 102(b) constrains section 102(a). It is a cardinal rule of “statutory construction that the specific governs the general,” especially where “Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.” This prevents the specific provision from being “swallowed by the general one.” Furthermore, section 102 must be construed so that “no clause, sentence, or word shall be superfluous, void, or insignificant.” If section 102(a) granted the SHS unbridled authority to construct border

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263 IIRIRA § 102.
264 GARCIA, supra note 39, at 5.
265 IIRIRA § 102.
268 Id.
barriers, it would render section 102(b) “insignificant, if not wholly superfluous.”270 This would violate the principle that “effect shall be given to every clause and part of a statute.”271 Statutory terms should not be treated “as surplusage in any setting.”272

B. Ultra Vires-Step Two

The district court, following the ultra vires dictate in Keyn and Dart, held plaintiffs must also demonstrate that barring judicial review would deprive them of a “meaningful and adequate means of vindicating” their statutory rights to prevail on the ultra vires claim.273 The district court found that plaintiffs had not “conducted a meaningful analysis on this prong.”274 Even if they had, the plaintiffs still failed to meet the requirements of step one to “establish a plain violation of an unambiguous and mandatory provision of section 102.”275

The court failed to acknowledge that SHS waived 37 federal laws—including NEPA, ESA, CZMA, and APA—as well as “all federal, state, or other laws” related to the San Diego replacement fencing and border wall prototypes.276 The SHS waived twenty-seven federal laws, and all state laws related to the El Centro project.277 Section 102(c) limits judicial review to constitutional claims,278 so plaintiffs are deprived of any means to question SHS violation of numerous federal statutes. Granted, section 102(c) allows plaintiffs to raise constitutional issues. When the revision of section 102(c) was initially proposed in RIDA, federal courts were deprived of all jurisdiction regarding border barriers.279 This was properly changed in the final version.280 Congress

270 Id. (quoting Duncan, 533 U.S. at 174).
271 RadLAX, 566 U.S. at 645 (quoting D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932)).
272 TRW, 534 U.S. at 31 (quoting Duncan, 533 U.S. at 174).
274 Id.
275 Id.
278 Section 102(c)(2)(A) states:

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.

279 See MUMME, supra note 25, at 5.
280 Id. at 5–6.
cannot deprive federal courts jurisdiction over constitutional questions. Professor Eisenberg explained that “it is clear that jurisdictional statutes are subject to constitutional limitations... When their effect is to abrogate constitutional rights, they are no more valid than any other statute violating the Constitution.” Congress has the authority to “withdraw jurisdiction from all cases except those in which a particular outcome is mandated by the Constitution.” Jurisdictional statutes “which have substantive impact must be subject to constitutional scrutiny. The conclusion is also inescapable that Congress cannot withdraw federal jurisdiction to hear cases in which constitutional rights are at stake.” However, limiting judicial review solely to constitutional issues does not allow plaintiffs to question SHS adherence to substantive issues protected by environmental statutes.

Section 102(c) also deprived federal circuit courts the ability to hear any appeals from the district courts regarding the SHS exercise of waiver authority. Section 102 only allows appeal by writ of certiorari to the Supreme Court, which has discretion regarding the few cases it will consider. This further limited the plaintiff’s ability to adjudicate their statutory rights. Appellate courts are essential to defining and clarifying the legal questions. Professor Eisenberg pointed out that “the framer’s aspirations for the national judiciary cannot be fulfilled today without lower federal courts.” Federal courts are essential to check other branches, provide uniformity, and counteract local bias. The Supreme Court cannot do the job alone. Lower federal courts are necessary to protect constitutional rights and implement Supreme Court decisions.

Judicial review is furthered hampered because the plaintiffs only have 60 days “after the date of the action or decision” made by the SHS to raise their objections. This is a very short time to assert a constitutional claim, particularly in light of the SHS broad waiver authority. Furthermore, some potential claims might not be ripe within 60 days. The Supreme Court has stated, “it is essential that such...

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282 Eisenberg, supra note 281, at 527.
283 Id. at 527–28.
284 Id. at 532.
285 Section 102(c)(2)(c), entitled “Ability to seek appellate review,” states: “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.” 8 U.S.C. § 1103(c)(2)(C) (2012).
286 Eisenberg, supra note 281, at 504.
288 Eisenberg, supra note 281, at 511–13.
290 Sancho, supra note 20, at 450–53.
statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action . . . .”

Section 102(c) represents an extreme example of positive political theory, which posits that government institutions behave as rational actors, seeking to have their policy preferences prevail. Congress granted the SHS unlimited authority and constrained the federal courts ability to check the SHS discretionary authority. Congress clearly did not want any judicial interference in the construction of border fences.

C. Non-Delegation Doctrine

Despite the jurisdictional constraint posed on statutory violations, section 102(c) grants federal district courts jurisdiction to hear constitutional arguments regarding the SHS waivers. The district court did not find that the section 102(c) violated the non-delegation doctrine, which posits “Congress may not constitutionally delegate its legislative power to another branch of Government.”

The non-delegation doctrine is based on Article I, section 1, of Constitution, which provides “all legislative Powers herein granted shall be vested in a Congress of the U.S.” The non-delegation doctrine serves three purposes: 1) ensures that important social policy is made by Congress, the branch responsive to public will; 2) requires Congress to articulate an intelligible principle to guide the exercise of delegated authority; and 3) facilitates judicial review to test agency action against ascertainable standards.

The district court held section 102(c) sets forth a general policy, which is to stop illegal crossing by the construction of roads and barriers. The SHS is clearly granted waiver authority. The intelligible principle limiting the delegation of authority is that the SHS may do whatever is necessary for the expeditious construction of border barriers to stop illegal entry. Greater specificity is not required because immigration, border control, and national security fall under the Executive’s constitutional authority. The district court, however, failed to recognize the unprecedented scope of authority delegated in

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291 Id. at 451 (quoting Wilson v. Iseminger, 185 U.S. 55, 62 (1902)).
293 Curiel, 284 F. Supp. 3d 1092, 1136 (S.D. Cal. 2018).
296 Curiel, 284 F. Supp. 3d at 1103.
297 Id. at 1146.
298 Id. at 1104.
299 Id. at 1135.
section 102(c) and the lack of any intelligible principles limiting the exercise of such authority.

Only two Supreme Court decisions in 1935 have struck down statutes for violating of the non-delegation doctrine.\textsuperscript{300} Since then the Court has consistently upheld broad delegations of congressional authority.\textsuperscript{301} The Court declared that Congress may delegate its authority, as long as the statute contains “an intelligible principle to which the person or body authorized to [act] is directed to conform.”\textsuperscript{302} A statute meets the intelligible principle standard if it “clearly delineates the general policy, the public agency which is to apply it, and the boundaries of the delegated authority.”\textsuperscript{303}

The U.S. District Court for the District of Columbia in \textit{Defenders of Wildlife v. Chertoff}\textsuperscript{304} upheld the SHS waiver of environmental laws that allowed the construction of border fencing in Arizona. The court acknowledged the unprecedented scope of SHS waiver authority, but recognized it was constrained by the “intelligible principle” in section 102(b).\textsuperscript{305} The court upheld the waiver because “the Secretary may only exercise the waiver authority for the ‘narrow purpose’ prescribed by Congress: ‘expeditious completion’ of the border fences authorized by IIRIRA in areas of high illegal entry. Thus, the scope of the Secretary’s discretion is expressly limited.”\textsuperscript{306}

\begin{itemize}
\item \textsuperscript{300} Pan. Refining Co. v. Ryan, 293 U.S. 388, 414 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935). Recently, Justice Gorsuch, in dissent, pointed out that even though the nondelegation doctrine has only been invoked in two cases, the Court has continued to police broad delegations under different guises, such as the major questions doctrine, the void for vagueness doctrine, and separation of powers doctrine. Gundy v. United States, No. 17-6086, slip op. at 20–22 (June 20, 2019) (Gorsuch, J. dissenting).
\item \textsuperscript{301} The Supreme Court has noted that “even in sweeping regulatory schemes we have never demanded...that statutes provide a ‘determinate criterion’ for saying ‘how much [of the regulated harm] is too much.’” Whitman v. Am. Trucking Ass’n Inc., 531 U.S. 457, 475 (2001) (alterations in original) (quoting Am. Trucking Ass’n v. U.S. Envtl. Prot. Agency, 175 F.3d 1027, 1034 (D.C. Cir. 1999)). Supreme Court has noted that “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” Mistretta v. United States, 488 U.S. 361, 372 (1989).
\item \textsuperscript{302} Id. at 372 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).
\item \textsuperscript{303} Id. at 372–73. Justice Gorsuch in dissent, pointed out that the “intelligible principle” remark in \textit{J.W. Hampton} “has no basis in the original meaning of the Constitution.” Gundy No. 17-6086, slip op. at 17. It is based on “misunderstood historical foundations.” Id. (alteration in original). When some judges “claimed to see ‘intelligible principles’ many ‘less discerning readers [have been able only to] find gibberish.’” Id. (alteration in original) (quoting Gary Lawson, \textit{Delegation and Original Meaning}, 88 VA. L. REV. 327, 329 (2002)). “Even Justice Douglas, one of the fathers of the administrative state, came to criticize excessive congressional delegations in the period when intelligible principle ‘test’ began to take hold.” Id. at 17–18.
\item \textsuperscript{304} 527 F. Supp. 2d 119, 129 (D.D.C. 2007).
\item \textsuperscript{305} Id. at 128–29.
\item \textsuperscript{306} Id. at 128.
\end{itemize}
There is an ongoing academic debate regarding the non-delegation doctrine. Critics argue that responsible administrative decision making can only be insured by precise legislative directives. Proponents counter that broad delegation promotes accountability and public responsiveness.

Professors Barron and Rakoff, proponents of the non-delegation doctrine, point out that Congress has created the “Big Waiver,” which is “the delegation of power to unmake law Congress has made rather than to make law Congress has not.” The “Big Waiver” inverts the traditional approach to delegation. It allows Congress to enact laws that service narrow partisan or ideological interests with the understanding that the laws will never take effect. Congress can put into place policy choices that might not be possible, knowing that the policy choices will be altered and monitored in the administrative process. The “Big Waiver” grants Congress and the Executive the means to avoid partisan gridlock. Congress provides agencies with policy guidance without limiting agency policymaking. Congress permits agencies to address problems and update policy without having to overcome legislative hurdles. The “Big Waiver” transfers blame to the president, who will incur the political costs resulting from the execution of waiver. Professors Barron and Rakoff assert that the “big waiver functions less to undermine congressional lawmaker than to facilitate it.”

Professors Barron and Rakoff specifically noted that the SHS waiver authority under section 102(c) “may be the biggest Congress has yet passed.” The statute grants limitless power to SHS to waive any and all statutes that interfere with border fence construction. It grants a single agency, DHS, the ability to waive “the entire U.S. Code.” Furthermore, the SHS is provided with “no standards for picking and choosing among laws to cancel.”

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311 Id. at 271.
312 Id.
313 Id. at 290.
314 Id.
315 Id.
316 Id.
Prior delegations to administrative agencies involved directions to waive particular provisions of specific laws and were subject to judicial review. The Congressional Research Service recognized the unprecedented scope of discretion granted to the SHS, stating:

After a review of federal law . . . we were unable to locate a waiver provision identical to that of §102 of H.R. 418—i.e., a provision that contains “notwithstanding language,” provides a secretary of an executive agency the authority to waive all laws such secretary determines necessary, and directs the secretary to waive such laws. Much more common, it appears, are waiver provisions that (1) exempt an action from other requirements contained in the Act that authorizes the action, (2) specifically delineate the laws to be waived, or (3) waive a grouping of similar laws.317

Other waivers have relied on agency expertise and specialized knowledge.318 Agencies develop “subsidiary rules under the statute.”319 This “diminishes the risk that the agency will use the breadth of a grant of authority as cloak for unreasonable or unfair implementation.”320 The SHS is the sole arbiter of his waiver authority under section 102(c). Congress did not limit the SHS waiver authority in any way. When Congress delegates such broad power, it must establish parameters—intelligible principles—that define the scope of delegated power. Section 102(c) lacks any such restrictions. There is no limitation regarding the scope of waiver authority, the duration of waiver, and the geographical area over which the waiver applies. SHS can waive any and all substantive and procedural rules, including environmental, public health, religious, and other laws, which are outside the SHS authority and beyond the SHS expertise.321

Congress recognized the unprecedented scope of the section 102(c) waiver. During the House floor debate on RIDA, Representative Blumenauer (D. Or.) speculated that the SHS has authority to

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318 The Supreme Court noted:

Such delegations of power permit the legislature to declare the end sought and leave technical matters in the hands of experts, or to leave to others the task of devising specific rules to carry out congressional policy in a variety of factual situations. Where, as is often the case, even major policy decision may turn on specialized knowledge and expertise beyond legislative [knowledge], delegation of rulemaking power may be made under broad standards to a body chosen for familiarity with the subject matter to be regulated.

320 Id. (citing 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 207–08 (2d ed. 1978)).
'give a contract to his political cronies that had no safety standards, using 12-year-old illegal immigrants to do the labor, run it through the site of a Native American burial ground, kill bald eagles in the process, and pollute the drinking water of neighboring communities.' . . . The unbridled discretion granted to the executive branch to suspend laws under the REAL ID Act is truly extraordinary.322

Furthermore, “no member of Congress, no citizen could do anything about [such a waiver] because you waive all judicial review.”323

The broad delegation of authority in section 102(c) undermines the separation of powers.324 Congress legislates, the Executive implements, and the judiciary adjudicates.325 Justice Kennedy noted that the structure of the Constitution “requires a stability which transcends the convenience of the moment.”326 Justice Kennedy cautioned that allowing political branches to “reallocate their own authority” threatens the liberties of citizens.327 The delegation of unlimited discretion to the SHS in section 102(c) allows Congress to avoid its constitutional responsibility to make hard policy choices regarding the balance between national security and environmental protection. Justice Kennedy noted that “abdication of responsibility is not part of constitutional design.”328 Section 102(c) grants the SHS, an executive official, the power to reprioritize policy goals, the balance between national security and environmental protection, which is a legislative function. Section 102(c) also allows the SHS to pick winners and losers. Justice Kennedy observed that the “undeniable effects” of such a law “gives the President the sole ability to hurt a group that is a visible target, in order to disfavor the group or to extract further concessions from Congress.”329

The absence of congressional standards in section 102(c) allows the SHS to determine policy, so which interest groups will prevail. The exercise of SHS waiver authority reflects organized interest groups pressure. However, all interest groups do not stand on an equal footing. Environmental groups are at a strategic disadvantage in the DHS,

322 Id. at 288 (quoting 151 CONG. REC. H466 (daily ed. Feb. 9, 2005) (statement of Rep. Blumenauer)).
323 Id. at 288 n.225 (quoting 151 CONG. REC. H466) (statement of Rep. Blumenauer) (alteration in original)).
Justice Gorsuch in dissent declared that the nondelegation is designed to protect the separation of powers. Gundy, No. 17-1686, slip op. at 22 (2019) (Gorsuch, J., dissenting).
327 Id.
328 Id. at 452.
329 Id. at 451.
which prioritizes national security, border barrier construction, and anti-immigrant measures over environmental protection.\textsuperscript{330}

Section 102(c) reflects public choice theory, which views Congress as a legislative market place where congresspersons parcel out public goods to private interests to enhance their opportunity for reelection.\textsuperscript{331} Organized economic interests utilize their influence to have Congress establish exceptions and bridges around environmental laws.\textsuperscript{332} This allows project, like border fences and walls, to go forward that benefit particular interest groups. While environmental laws that protect the public interest are sacrificed on the administrative altar to special interests.

Professors Barron and Rakoff, proponents of the “Big Waiver,” noted that the unrestrained waiver authority in RIDA “seems poorly thought out.”\textsuperscript{333} Granting the SHS broad discretionary power to waive the entire U.S. Code without providing any explanation or procedural protections and precluding judicial review exceed the limits of the non-delegation doctrine. The RIDA “exemplifies bad statutory design.”\textsuperscript{334} Congress was solely concerned with building the fence, while ignoring all other important statutory goals. Professors Barron and Rakoff suggest that “perhaps there should be a constitutional doctrine that says that Congress cannot provide for the big waiver and at the same time completely evade the processes that would help make it legitimate.”\textsuperscript{335}

1. Judicial Review and the Non-Delegation Doctrine

The district court in \textit{Curiel} held that judicial review is not an essential component of the non-delegation doctrine.\textsuperscript{336} The district court noted that prior case law “recognize that judicial review allows for the enforcement of the intelligible principle requirement and the separation of powers.”\textsuperscript{337} The Supreme Court, however, has never held that judicial review is an essential element of non-delegation doctrine.\textsuperscript{338}

The district court failed to recognize the Supreme Court and appellate courts have intimated that judicial review is an essential component of the non-delegation doctrine. Judicial review is essential to determine whether administrative action adheres to the “intelligible

\begin{footnotes}
\item[330] Bowers, supra note 321, at 298.
\item[333] Barron & Rakoff, supra note 310, at 337.
\item[334] Id. at 339.
\item[335] Id. at 338.
\item[336] Curiel, 284 F. Supp. 3d 1092, 1137 (S.D. Cal. 2018).
\item[337] Id.
\item[338] Id.
\end{footnotes}
principle” established by Congress, so stays within the parameters of the delegated authority. Furthermore, judicial review protects “the coherence and the integrity of the regulatory process.”  

Professor Sunstein noted that the mere availability of judicial review plays a salutary role because it “increases the likelihood of fidelity to substantive and procedural norms.”

Judicial review is particularly important because executive agencies lack direct electoral accountability. Justice Harlan noted:

[Judicial review] insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. Second, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

Lower courts have reached conflicting conclusions regarding the need for judicial review regarding non-delegation doctrine. The Ninth Circuit held judicial review is not an essential component of the non-delegation doctrine. While the D.C. District Court, the Eighth Circuit, and the Tenth Circuit held judicial review is essential to determine if an intelligible principle is present.

The Supreme Court has never held that judicial review is an essential requirement of the non-delegation doctrine, but has suggested that judicial review is necessary. The Court in Mistretta v. United States noted that delegation of authority to the Executive is allowed so long as Congress “[L]ays down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.” The Court stressed that the existence of an intelligible principle may be tested “in a proper proceeding.” The Court in Skinner v. Mid-America Pipeline Co. declared that the broad delegation of authority to the executive branch

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340 Id.
343 Bozarov, 974 F.2d 1037, 1042 (9th Cir. 1992).
345 See South Dakota v. U.S. Dep’t of Interior, 69 F.3d 878, 885 (8th Cir. 1995).
346 See United States v. Widdowson, 916 F.2d 587, 589 (10th Cir. 1990).
347 However, these circuit court decisions were subsequently vacated by the Supreme Court, so they cannot be cited as controlling precedent. United States v. Widdowson, 502 U.S. 801, 801 (1991).
350 Id. at 372 (quoting J.W. Hampton, 276 U.S. 394, 409 (1928).
351 Id. at 379 (quoting Yakus, 321 U.S. at 425–26).
was permitted “so long as Congress provides an administrative agency with standards guiding its actions such that a court could ‘ascertain whether the will of Congress has been obeyed.’” Justice Marshal in *Touby v. United States* noted that “judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds.”

2. Foreign Affairs

The district court held that judicial review is not essential because the issues of immigration and foreign policy fall within the Executive’s inherent constitutional authority. The district court held that “Congress can confer more discretion when that entity already has significant, independent authority over the subject matter.” The court failed to recognize that Congress had restricted the president’s authority to construct border fencing in section 102(b).

Congress can delegate broad authority to the President regarding matters within his constitutional authority, but this power is not unlimited. The Supreme Court in *Japan Whaling Ass’n v. Cetacean Society* held that “interpreting congressional legislation is a recurring and accepted task for the federal courts.” The Court must determine the “nature and scope” of the statutory mandate, “which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below.” The Court acknowledged Congress and Executive premier authority over foreign affairs, but emphasized that “under the Constitution, one of the judiciary’s characteristic roles is to interpret statutes.” The Court cannot avoid this responsibility simply because its decision “may have significant political overtones.”

The Ninth Circuit reiterated the Supreme Court’s conclusion in *Center for Biodiversity v. Mattis*. The Ninth Circuit stated, “[w]hen confronting a statutory question touching on subjects of national security and foreign affairs, a court does not adequately discharge its duty by pointing to the broad authority of the President and Congress

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353 *Id.* at 218 (quoting *Mistretta*, 488 U.S. 361, 379 (1989)).
355 *Id.* at 170.
357 *Id.* at 1135.
358 *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (discussing how Congress can delegate matters of foreign policy to the Executive branch because it is within its scope of constitutional authority).
360 *Id.* at 320.
361 *Id.*
362 *Id.*
363 *Id.*
364 868 F.3d 803, 821 (9th Cir. 2017).
and vacating the field without considered analysis.” When reviewing executive compliance with statutes dealing with foreign affairs, the court is “not being asked to supplant a foreign policy decision of the political branches with the courts’ own unmoored determination of what United States policy . . . should be.” “Instead, a court must engage in the ‘familiar judicial exercise’ of reading and applying a statute, conscious of the purpose expressed by Congress.” Furthermore, precluding judicial review of a statute affecting foreign policy “turns on its head the role of courts and our core respect for a co-equal political branch, Congress.”

The Supreme Court in Zivotofsky ex rel. v. Kerry (Zivotofsky II) acknowledged the President’s broad authority over foreign affairs, but held this power is not “unbounded.” The Court did not find that “the President is free from Congress’ lawmaking power in field of international relations.” The Court recognized that “whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law,” and “[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.”

The Supreme Court in Dames & Moore v. Reagan held that the Executive is at his weakest when acting against express intent of Congress. Congress delegated the SHS unbridled discretion regarding statutory waivers under section 102(c), but only regarding the specific border barriers identified in section 102(b). The district court should not have allowed the SHS to hide behind their shield of foreign policy when they exceeded their authority by authorizing replacement fencing and border wall prototypes that were never authorized by section 102(b).

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365 Id. at 827; see, e.g., Conservation Council for Haw. v. Nat’l Marine Fisheries Serv., 97 F. Supp. 3d 1210, 1222 (D. Haw. 2015).

366 Mattis, 868 F.3d at 823 (quoting Zivotofsky v. Clinton (Zivotofsky I), 566 U.S. 189, 196 (2012)).

367 Id. (citing Zivotofsky I, 566 U.S. at 196).

368 Id. at 826.

369 No. 13-628, slip op. (June 8, 2015).

370 Id. at 17.

371 Id. at 18.

372 Id.


375 DOW Memo, supra note 189, at 5.

376 Id. at 26–27.
IV. POST-LITIGATION DEVELOPMENTS

A. General Accounting Office Criticism

President Trump’s border wall continued to be criticized. The General Accounting Office (GAO), utilizing DHS criteria, analyzed and found fault with border wall prototypes. GAO concluded that DHS is proceeding without evaluating such factors as “cost, acquisition baselines, and the contributions of previous barrier and technology deployments.” This means that DHS does not know if its limited resources are being utilized in the most cost effective manner and whether less expensive barriers might provide better border security. GAO warned that by proceeding in the absence of key information, “DHS faces an increased risk that the Border Wall System Program will cost more than projected, take longer than planned, or not fully perform as expected.” Since DHS failed to develop acquisition plans for the San Diego barrier, “DHS may not establish cost, schedule, and performance goals by which it can measure the program’s progress.”

B. Scientific Criticism

Over 2,500 scientists across the globe have criticized the border wall. Scientists point out that President Trump’s border wall “threaten[s] some of the continent’s most biologically diverse regions. Already-built sections of the wall are reducing the area, quality, and connectivity of plant and animal habitats and are compromising more than a century of binational investment in conservation.” Environmental laws are not being enforced. Wildlife populations are being harmed because the border wall eliminates, degrades, and fragments habitats. Conservation investments and scientific research are being set aside. Scientists made the following recommendations: First, Congress must mandate that “the DHS follows the sound scientific and legal frameworks of US environmental laws, including the ESA and NEPA.” Second, rigorous preplanning and pre-implementation surveys must be implemented “to identify species, habitats, and ecological resources at risk” from any barrier construction.

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379 Id. at 33.
380 Id.
381 Id.
383 Id.
384 Id. at 742.
385 Id.
or security operations. DHS “should work closely with pertinent Mexican and US government agencies, tribes, private landowners, the scientific community, and other stakeholders to gather such information.” Third, any resulting environmental harm from border construction must be mitigated “as completely as possible.” Fourth, scientific research in the borderlands should be expanded to “complement and assist environmental evaluations and mitigation efforts.” Over 2,500 scientists across the global have endorsed these findings.

C. Congressional Opposition

Several bills have been introduced in the House that would address some of the scientific concerns. Representative Grijalva introduced Border Security and Accountability Act of 2015. The bill required the DHS, together with relevant departments, to develop a border protection strategy that address the ecological and environmental impacts of the security infrastructure and improves the cooperation and coordination among government agencies to protect national security along the southwest border. The IIRIRA should be amended to accommodate this border security strategy.

Representative Grishman (D. N.M.) introduced the Build Bridges Not Walls Act that “prohibit[s] construction of a continuous wall or fence between the United States and Mexico.” The bill recognizes that, “[a] continuous border wall would likely harm wildlife, destroy sensitive habitat for endangered species, damage the environment and the natural flow of floodwaters, and lead to costly litigation with landowners, the Native American community, and stakeholders.”

386 Id.
387 Id.
388 Id.
389 Id. at 743.
390 Id.
392 Id. § 5.
393 Id. § 4 (proposed amendment to § 102 of the IIRIRA). Representative Grijalva stated, “Our shared goals of protecting endangered species, building a resilient border economy, and securing the border are not mutually exclusive. In fact, border security is at its best when it is built on a healthy economy and a healthy environment.”
395 Id. § 2. Representative Grisham stated:

The people who know the border the best, . . . all agree that building a wall is unnecessary, impractical, ineffective, and a complete waste of time and taxpayer money. . . . This bill protects taxpayers by stopping the funding for a wall that is not needed and from any other attempts by the President to fund similar orders.
Representative Espaillat (D. N.Y.) introduced This Land is Our Land Act, which prohibits the DHS from constructing, or obligating or expending any funds for the construction of any new border barriers, including walls or fences, on federal lands under the jurisdiction of the Department of Interior or Department of Agriculture within 100 miles of international land borders of the United States.\(^{396}\)

V. NINTH CIRCUIT APPEAL

The appellants, State of California, California Coastal Commission, and environmental groups brought an appeal to the Ninth Circuit.\(^{397}\) Appellants asserted that the district court’s decision was erroneous because the court began its analysis utilizing the conceptual framework of Kyne.\(^{398}\) The district court should have first addressed the underlying legal predicate of their claims that the SHS waiver authority had expired after the goals of section 102(b) had been met in 2008 or 2011. The Secretary’s decision to proceed with the two projects was arbitrary and capricious because it violated several environmental statutes.\(^{399}\) Finally, even if the Kyne standard initially applied, the DHS violated the “clear and mandatory statutory language” because section 102(c) is limited by section 102(b).\(^{400}\)

Federal-appellees countered that the district court correctly determined that it lacked jurisdiction over the plaintiff’s non-constitutional claims.\(^{401}\) The text of section 102(c) clearly precludes appellate court review of all non-constitutional claims, just like the statute in the MCorp.\(^{402}\) The SHS waivers were not ultra vires because

\(^{396}\) This Land is Our Land Act, H.R. 739, 115th Cong. § 1 (2017). Representative Espaillat stated:

> Building President Trump’s wall would trample on our public lands, potentially put precious endangered species at risk and likely disrupt or destroy environmentally important ecosystems and habitats. . . . We should be building a wall around Trump to stop these irrational executive orders instead of this ludicrous $25 billion wall between our closest ally.

Yachnin, supra note 395.

\(^{397}\) Appellants’ Opening Brief, Ctr. for Biological Diversity v. U.S. Dept. of Homeland Sec., No. 18-55474 (9th Cir. May 14, 2018). The appellants did not appeal their constitutional claims, which could only be considered by the Supreme Court under a writ of certiorari. The Court denied certiorari in December 2018. US Supreme Court Turns Away Challenge to Trump’s Border Wall, VOICE OF AM. (Dec. 3, 2018), https://perma.cc/7QH9-PJ4B.

\(^{398}\) Appellants’ Opening Brief, supra note 397, at 32–33.

\(^{399}\) Id. at 22–23.

\(^{400}\) Id. at 20–22.

\(^{401}\) Brief for Appellees at 2–3, Ctr. for Biological Diversity v. U.S. Dept. of Homeland Sec., No. 18-55474 (9th Cir. June 25, 2018).

they did not violate the “clear and mandatory statutory language.” The SHS decisions were consistent with text, structure, and legislative history of the section 102 and entitled to Chevron deference.

The Ninth Circuit upheld the district court decision. The court determined that it retained jurisdiction to consider appellants arguments regarding issues that did not “arise out of” the Secretary’s waivers. Ninth Circuit addressed the “predicate legal question” of the appellant’s arguments and found that section 102(b) does not limit the SHS authority to construct border barriers under section 102(a). The SHS decisions to proceed with the projects did not violate NEPA, CZMA, or APA. Finally, the SHS waivers under section 102(c) were not ultra vires under the Kyne exception because they did not violate any “clear and mandatory statutory language.”

The Ninth Circuit made the same errors as the district court. The Ninth Circuit failed to recognize that section 102(b) limits section 102(a). There is an obvious conflict between section 102(b), which specifies the amount of fencing authorized by Congress, and section 102(a), which is a general statement of statutory purpose. The general/specific canon dictates that specific statutory provision in section 102(b) restricts the general statutory provision in section 102(a). Since the waiver authority had expired with the completion of fencing authorized under section 102(b), the SHS waivers were ultra vires and the SHS failure to comply with mandates of environmental statutes was arbitrary and capricious. Furthermore, the Ninth Circuit relied on a strict textual interpretation and did not acknowledge that the Kyne exception is “determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history and the nature of the administrative action involved.”

VI. BORDER WALL FUNDING CONTROVERSY

DHS requested $1.6 billion for border security in FY 2018, but received $1.33 billion in the Consolidated Appropriations Act of 2018. $445 million was authorized for the replacement and strengthening of...
existing barriers. Customs and Border Patrol received $251 million for “14 miles of secondary fencing, all of which provides for cross-barrier visual situational awareness, along the southwest border in the San Diego Sector.” El Centro barriers were funded out of the $445 million authorized for “replacement of existing border fence along the southwest border.” However, Congress again restricted the funding to “operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017, such as currently deployed steel bollard designs, that prioritize agent safety.” None of the funding could be used to construct any of President Trump’s border wall prototypes.

Construction of replacement fencing in San Diego began in June 2018. The existing 14 mile, 8 to 10 foot high barrier built from scrap metal is being replaced with an 18 to 30 foot high by a bollard style wall topped with anti-climbing plate at a projected cost of $147 million. Construction of the two miles of replacing fencing in Calexico was completed in October 2018.

Funding for the border wall remained contentious. President Trump initially requested $1.6 billion for the border wall in his proposed FY2019 budget, but increased this request to $5 billion. House Republicans approved $5 billion in funding for the border security. The Senate only offered $1.6 billion for border wall construction. Congress passed and President Trump signed a short-term spending bill in September 2018, which did not include any funding for the wall. Subsequently, House majority leader Kevin McCarthy (R. Cal.)

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412 Id.
414 U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 127, at 11.
415 H.R.J. Res. 31-16, 116th Cong. § 230(b) (2018) (citation omitted).
418 Kim Slowey, Border Wall Work in San Diego Begins, SAN DIEGO UNION TRIB. (June 6, 2018), https://perma.cc/NU2A-QQZT. CBP declared, “under this president’s leadership, we have a renewed commitment to secure our border. The new primary wall project represents an important milestone in our work to secure the international border.” Press Release, U.S. Customs & Border Patrol, Border Wall Construction Project Starts in San Diego Sector (May 31, 2018), https://perma.cc/8M2Q-SSXU.
421 Bo Erickson, House Passes Spending Bill with $5 Billion Border Wall Funding, Increasing Likelihood of Shutdown, CBS NEWS (Dec. 20, 2018), https://perma.cc/RVB5-H95R.
422 Diaz, supra note 420.
introduced legislation that included $23 billion to complete President Trump’s border wall. However, Congress agreed to postpone any consideration of border wall funding until after the November mid-term elections.

Congress passed a bipartisan continuing resolution in December 2018, which would keep the remaining federal agencies funded through 2019 but included no funding for the border wall. After criticism from conservative commentators, President Trump refused to sign the bill and executed a partial shutdown of the federal government. President Trump demanded $5.7 billion for 234 miles of new steel-slat fencing in sections of the border, which is projected to cost $24.4 million per mile.

Democrats took over control of the House of Representatives in 2019 and refused to authorize funding for the wall. After the 35 day partial shutdown of the federal government was temporarily halted, a bipartisan committee was created to reach a compromise. The January 2019 compromise provided $1.375 billion for 55 miles of border fencing, all in the Rio Grande Valley in Texas. Funding was limited to type of pedestrian fencing “operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017 . . . such as currently deployed steel bollard designs.” Construction was also prohibited in certain areas.

President Trump signed the agreement, but declared a National Emergency to get around congressional spending restrictions and transfer military funds to pay for his border wall. On February 15, 2019, President Trump announced that he planned to divert $8.1 billion

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424 Dan DeChiaro, McCarthy Bill Would Fund Border Wall, Boost Speaker Bid (Oct. 15, 2018), https://perma.cc/DAN3-KUYQ.
425 Id.
428 Molly E. Reynolds, Congress is Arguing Over Federal Spending Again. This Explains Why, WASH. POST (Sept. 27, 2019), https://perma.cc/TW5B-94SY.
430 H.R.J. Res. 31-16, 116th Cong. § 230(b) (2018); see also Sierra Club v. Trump, 379 F. Supp. 3d 883, 884 (N.D. Cal. 2019).
431 Sierra Club, 379 F. Supp. 3d at 894.

[N]o funds were available for construction within (1) the Santa Ana Wildlife Refuge, (2) the Bentsen-Rio Grande Valley State Park, (3) La Lomita Historical park, (4) the National Butterfly Center, or (5) within or east of the Vista del Mar Ranch tract of the Lower Rio Grande Valley National Wildlife Refuge.

Id.
in federal funds for border wall construction.\textsuperscript{433} The administration identified three funding sources: $3.6 billion from military construction projects; $2.5 billion from other military accounts under counter drug authorities; and the remaining $601 million from the Treasury Forfeiture Fund.\textsuperscript{434}

Both the House and Senate passed resolutions opposing the national emergency declaration.\textsuperscript{435} President Trump vetoed the joint resolution. The House failed to override President Trump's veto.\textsuperscript{436}

The Secretary of Defense in March approved the diversion of funds for the New Mexico–El Paso Project 1 and 2 in the Arizona–Yuma Section 1, 2.\textsuperscript{437} The Secretary relied on sections 8005\textsuperscript{438} and 284\textsuperscript{439} of the FY 2019 Department of Defense Appropriation Act.\textsuperscript{440} The Acting SHS utilized IIRIRA section 102(c) to waive laws obstructing the Project in April.\textsuperscript{441}

The ACLU and Southern Border Communities Coalition (SBCC) brought suit to block the use of funds for wall construction.\textsuperscript{442} On May 24, 2019, the U.S. District Court for the Northern District of California granted a preliminary injunction, halting the transfer of funds for the

\textsuperscript{433} Maura Dolan, Trump May Not Use Military Money for Border Wall, Federal Appeals Court Decides, L.A. TIMES (July 3, 2019), https://perma.cc/P5RA-JCNZ.

\textsuperscript{434} Sierra Club, 379 F. Supp. 3d at 895.


\textsuperscript{437} Sierra Club, 379 F. Supp. 3d at 896.

\textsuperscript{438} Id. Section 8005 allows the Secretary of Defense to transfer up to $4 billion “of working capital funds of the Defense Department or funds made available in this Act to the Department of Defense for military functions (except military construction).” Id. at 901 (quoting § 8005, 132 Stat. at 2999). The Secretary must first find that “such action is necessary in the national interest.” Id. This transfer authority “may only be used 1) for higher priority items than those for which originally appropriated, and 2) based on unforeseen military requirements, but 3) in no case where the item for which the funds are required has been denied by Congress.” Id.

\textsuperscript{439} Id. at 896. Section 284 allows the Secretary of Defense to “provide support for the counterdrug activities . . . of any other department or agency of the Federal Government’ if ‘such support is requested . . . by the official who has responsibility for [such] counterdrug activities.” Id. at 900 (quoting 10 U.S.C. § 284(a), (a)(1)(A) (2012)). Such permissible “types of support” includes the “construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.” Id.


\textsuperscript{441} Id. at 897. Representative Grijalva stated, “the Trump administration consistently stoops to new lows when it comes to building the President’s vanity wall—even if it endangers the public health of our communities and the environment we call home.” Keerthi Vedantam, Critics Blast DHS Environmental Waivers that Clear Way for Border Wall, CRONKITE NEWS (Apr. 24, 2019), https://perma.cc/TW8A-E773. Grijalva went on to say that the President “is sending a clear message to border residents: his political agenda is more important than their homes, health, and livelihoods.” Id.

\textsuperscript{442} Adam Liptak, Supreme Court Lets Trump Proceed on Border Wall, N.Y. TIMES (July 26, 2019), https://perma.cc/MX29-A5VF.
project. The court held the plaintiffs had standing and were likely to succeed on the merits of the case because the federal government action was ultra vires, the plaintiffs would suffer irreparable harm, and the balance of equities favored the plaintiffs. The court determined that the Administration’s action did not comply with section 8005 because 1) the items for which funds are requested have been denied by Congress, 2) the transfer is not based on “unforeseen military requirements,” and 3) accepting the government’s proposed interpretation of section 8005 would raise serious constitutional questions. However, the court held that the plaintiffs were unlikely to succeed on their NEPA claims. Plaintiffs alleged that the SHS waiver authority under section 102(c) only extended to DHS funded projects. The court held that the waiver authority was derivative, so it can be used for Defense Department funded projects that were designed to accomplish DHS goals.

There was another suit, which was brought by California and New Mexico. The Secretary of Defense in May authorized the transfer of $1.5 billion to fund four border projects: one in the El Centro sector in California; and three in the Tucson sector in Arizona. The Secretary again relied on section 8005, as well as the “special transfer authority” under section 9002 of the 2019 Defense Department Appropriation Act and section 1512 of John McCain National Defense Authorization Act of 2019. Section 9002 is subject to the same constraints as section 8005. The DHS waived NEPA requirements for the Tucson projects.

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444 Sierra Club, 379 F. Supp. 3d at 905–07. There was a subsequent case in the U.S. District Court for the District of Columbia brought by Democratic members of the U.S. House of Representatives, challenging the President’s authority to reprogram funds. Liptak, supra note 442. Judge Trevor N. McFadden held the House lacked standing to bring the suit. Id. He stated, “Congress has several political arrows in its quiver to counter perceived threats to its sphere of power,” including legislation ‘to expressly restrict the transfer or spending of funds for a border wall.” Id.
446 Id. at 916–17; see also California v. Trump, 19-CV-00872-HSG, 2019 WL 2715421, at *3 (N.D. Cal. June 28, 2019).
447 Sierra Club, 379 F. Supp. 3d at 922.
448 Id. at 922–23.
449 Id.
450 Jacqueline Thomsen, California, New Mexico Ask Judge to Block Trump from Using Military Funds for Border Wall, THE HILL (June 13, 2019), https://perma.cc/F27D-DD7N.
451 Sierra Club, 379 F. Supp. 3d at 898.
452 Id.
453 Id. at 898 n.7.
454 Id. at 897; Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,798, 21,799 (May 15, 2019). Center for Biological Diversity stated, “[t]he Trump administration just ignored bedrock environmental and public health laws to plow a disastrous border wall through protected, spectacular wildlands. This senseless wall would rip a scar through the heart of the Sonoran Desert, kill endangered wildlife and cause irreversible damage.” Lauren von Bernuth, Trump Waives 41 Environmental Laws to Build 100 Mile Arizona Border Wall,
On June 28, the U.S. District Court for the Northern District of California granted the plaintiffs' request for a declaratory judgment, denying the federal government the ability to transfer funds for the designated projects. The court reaffirmed its earlier decision and held the funds reprogrammed under sections 8005 and 9002 for designated projects were unlawful. The court, however, refused to grant permanent injunction, holding that states had not demonstrated that they are likely to suffer irreparable injury.

The federal government brought an appeal to the Ninth Circuit for a stay of the district court's injunction. On July 3, the Ninth Circuit rejected the federal government's request by a vote of 2–1. The court held that the federal government was unlikely to succeed on the merits.
of the case.\textsuperscript{459} The Trump administration’s action violated congressional authority over appropriations.\textsuperscript{460} Furthermore, the transfer of funds did not meet the requirements of section 8005.\textsuperscript{461}

The federal government appealed to the Supreme Court.\textsuperscript{462} On July 26\textsuperscript{463}, the Supreme Court reversed the lower courts and granted the federal government a stay of district court’s preliminary injunction.\textsuperscript{463} The Court questioned the plaintiff’s standing, stating, “the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary’s compliance with section 8005.”\textsuperscript{464}

Justices Ginsburg, Sotomayor, and Kagan voted to deny the petition.\textsuperscript{465} Justice Breyer argued for a partial stay that would allow the government to finalize the contracts, but not begin construction.\textsuperscript{466} The Court’s decision opened the door to allow the federal government to spend $2.5 billion for the construction of bollard fencing on 130 miles along the U.S.–Mexico border in Arizona, California, and New Mexico.\textsuperscript{467}

\textbf{VII. Conclusion}

SHS waived numerous laws to allow construction of fourteen miles of border barriers in San Diego sector, two miles of border barriers in El Centro sector, and eight border wall prototypes. California and environmental groups brought suit, asserting that the waivers were ultra vires and unconstitutional.\textsuperscript{468} The district court and Ninth Circuit incorrectly concluded SHS waiver of numerous environmental laws pursuant to section 102(c) were not ultra vires. The SHS waiver authority under section 102(c) is limited by section 102(b). Since the San Diego and El Centro replacement fencing and border wall prototypes were not authorized by section 102(b), the SHS waivers under section

\textsuperscript{459} Id.
\textsuperscript{460} Id. at 694.
\textsuperscript{461} Id.
\textsuperscript{462} Josh Gerstein, \textit{Justice Dept. Asks Supreme Court to Lift Border Wall Ruling}, POLITICO (July 19, 2019), https://perma.cc/Y7S6-SUQQ. Sierra Club noted that, “[t]he courts have twice ruled against Trump's request to stay this important court order stopping construction of his ruinous wall. Now he is asking the Supreme Court to step in and save his wall, but we will continue to vehemently fight these tactics.” Id.
\textsuperscript{463} Trump v. Sierra Club, 19A60, 2019 WL 3369425, at *1 (U.S. July 26, 2019).
\textsuperscript{464} Id.
\textsuperscript{465} Id.
\textsuperscript{466} Id. at *1–2.
\textsuperscript{467} Curt Prendergast, \textit{Supreme Court Opens Door to $1 Billion for Wall on Arizona-Mexico Border}, ARIZ. DAILY START (July 27, 2019), https://perma.cc/U6ZV-NSJR. The ACLU stated the administration “lacks authority to spend taxpayer funds on a wall that Congress considered and denied. This was a deliberate decision by Congress . . . Less than 6 months ago, this country endured the longest government shutdown in its history due to Congress’s refusal to appropriate funds for the wall construction at issue here.” Liptak, \textit{supra} note 442.
\textsuperscript{468} Curiel, 284 F. Supp. 3d 1092, 1102 (S.D. Cal. 2018).
102(c) were ultra vires. Furthermore, SHS waivers were not authorized under section 102(a), which is non-enforceable statement of policy.

The district court held that section 102(c) did not violate the Constitution.\textsuperscript{469} The court should have found that section 102(c) violates the non-delegation doctrine. Congress delegated unbridled discretion to the SHS to waive any law that impeded border fence construction.\textsuperscript{470} Congress avoided making hard choices regarding the balance between national security and environmental protection. Congress transferred legislative authority to DHS to make policy.\textsuperscript{471} Environmental groups do not receive the same consideration in the DHS, which is concerned with national security, border wall construction, and stopping illegal immigration.

The district court also held that judicial review is not an essential component of the non-delegation doctrine.\textsuperscript{472} The court should have found that judicial review is an essential component of the non-delegation doctrine. Judicial review ensures that policy is made by politically accountable institutions, not unelected bureaucrats. Judicial review ensures that agencies act within their statutory parameters. The judicial constraints in section 102(c) allowed the SHS to exceed the statutory parameters set forth in section 102(b).

The “Big Waiver” in section 102(c) indicates that Congress was concerned with erecting border fencing along the southwest border, despite severe environmental damage. Congress clearly did not want federal courts interfering with border security, so it granted SHS unprecedented discretion, deprived federal courts of jurisdiction to question the SHS compliance with statutory mandates, and precluded appellate court jurisdiction. Congressional action represents an extreme manifestation of positive political theory. The broad discretionary authority granted to the SHS undermines the separation of powers in the Constitution. In light of this congressional-executive seizure of power, federal courts must be willing to entertain legal theories, such as ultra vires review and the non-delegation doctrine, to protect the environment, and to preserve their institutional role.

There has been ongoing criticism of President Trump’s border wall. GAO pointed out most of border wall prototypes are unsuited for the southwest border.\textsuperscript{473} Scientists have warned about the severe

\textsuperscript{469} Id. at 1147.
\textsuperscript{470} 8 U.S.C. § 1103(a) (2012).
\textsuperscript{471} Public choice theory posits that “delegation enables individual legislators to reduce political costs of policies that injure relatively uninterested voters, without losing credit for benefits bestowed on those interest groups intensely enough motivated to trace chain of power.” Donald A. Dripps, Delegation and Due Process, DUKE L.J. 657, 688 (1988); Bowers, supra note 321, at 302.
\textsuperscript{472} Sierra Club, 379 F. Supp. 3d at 927–28.
\textsuperscript{473} Rafael Carranza, Trump’s Border Wall Prototypes Fail Design Requirements and are Riddled with Deficiencies, AZCENTRAL (Aug. 21, 2018), https://perma.cc/JJ9J-UD4G.
environmental degradation. The public opposes the border wall. Former California Governor Jerry Brown and current Governor Gavin Newsom oppose the border wall. California residents oppose the wall. Nine congressmen who represent border districts, including one Republican, do not see any need for the wall.

Congress must reexamine the wisdom of constructing fences and walls along the southwest border and properly assess their costs and benefits. The fences and walls along limited sections of the southwest border simply create more border tunnels and push migrants to more remote areas where they face a great risk of mortality. The exorbitant cost of the border fences and walls will be borne by the U.S. taxpayer. Border fences and walls are causing conflicts with state and local governments and landowners, who are losing their property. Border fences interfere with Native American religious practices. Border fences and walls are straining the U.S. relations with Mexico, whose cooperation is necessary for many border functions. Border fences and walls harm the environment and are detrimental to wildlife, particularly to endangered and threatened species.

There is an ongoing battle over funding for the border wall. Congress authorized $1.7 billion for 124 miles of new and replacement

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474 Laura Parker, 6 Ways the Border Wall Could Disrupt the Environment, NAT'L GEOGRAPHIC (Jan. 10, 2019), https://perma.cc/QWL9-LY9V.
480 See id. at 26.
481 The U.S. Army Corps of Engineers predicted that the costs of constructing a double layered fence consisting of primary fencing and Sandia fencing would range from $1.2 million to $1.3 million per mile, excluding the cost of land acquisition. Id. at 27. The Corps also predicted that the 25-year life cycle cost of the fence would range from $16.4 million to $70 million per mile depending on damage to the fence. Id.
482 Id. at 29–31.
484 HADDAL ET AL., supra note 479, at 31–32.
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Barrier since President Trump has taken office. President Trump was not satisfied, so he has reprogrammed $8.1 billion for border wall construction. The federal district court issued an injunction, which was upheld by the Ninth Circuit, prohibiting the reprogramming of federal funds. The Supreme Court granted a stay that allowed the reprogramming to continue. Environmental groups are continuing their efforts to stop border wall construction. Congress has begun to take steps to prevent the reprogramming of federal funds. Nevertheless, the Trump administration to date has not constructed any new border fencing. There has only been 51 miles of replacement fencing, which was authorized in FY 2017 and 2018.

Border barriers are scheduled to be constructed along the U.S.–Mexico border in California. Instead of wasting money on fences and border walls, Congress should authorize more manpower on the border and wait until technology is developed to create a virtual fence. Although earlier efforts were unsuccessful, recent efforts are still underway to construct the virtual fence, employing the technology being used for driverless cars. Several companies are testing systems in Texas that employ lasers, digital cameras, sensors and artificial intelligence.

487 Liptak, supra note 442.
488 Id.
490 President Trump requested $8.6 billion for new border wall construction. The House Appropriation Committee reported a bill that denied any funding for border wall construction. The bill also prohibits the Trump administration from building his wall without funds specifically authorized by Congress. The bill also seeks to claw back $601 million that Congress provided in February. House Republicans have warned that the border wall provisions could lead to another government shut-down. Gus Bova, Democrats Finally Play Hardball on Border Wall, TEX. OBSERVER (June 12, 2019), https://perma.cc/V665-QYSX; see also Kenneth T. Walsh, Trump to Ask for Billions More for the Border Wall While Slashing Spending, U.S. NEWS (Mar. 11, 2019), https://perma.cc/J85K-CJFE.
492 Giaretelli, supra note 491; Trump Touts Effectiveness of New Border Fence in Calexico, NBC7 SAN DIEGO (Apr. 5, 2019), https://perma.cc/66R2-2CPQ.
494 Cade Metz, Parts of a ‘Virtual’ Border Wall, Built With the Tech Behind Driverless Cars, N.Y. TIMES (Sept. 18, 2018), https://perma.cc/73PZ-JMWV.
intelligence to locate and track any person who crosses the border. Representative Hurd (R. Tex.) stated that “the only way to have operational control of the border is to look at all 2000 miles of it at the same time. And the only way to do that is through technology.”

Congress should enact legislation that terminates the SHS waiver authority and balances national security and environmental protection. The Borderlands Conservation and Security Acts of 2007 and 2015 provide good models for such legislation. These bills require the DHS to 1) develop a Border Protection Strategy that supports border security efforts while also protecting federal lands; 2) allow land managers, local officials, and local communities to have a say in border security decisions; 3) ensure that laws intended to protect air, water, wildlife, culture, and health and safety are fully enforced; and 4) fund initiatives that will help mitigate damage to borderland habitat and wildlife. Representative Grijalva stated that RIDA and SFA represent a “one fence fits all” solution and impede efforts by local experts to balance national security and environmental protection. Legislation modeled after the Border Conservation and Security Act will foster cooperation, protect the environment, and strengthen border security.

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496 Metz, supra note 494.
497 Press Release, Raúl M. Grijalva, Representative Grijalva Introduces Legislation to Protect and Conserve Land on Border (June 6, 2007), https://perma.cc/454W-ANYZ.
498 Id.
499 Id.