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## **The Implications of Environmental Law and Latino Property rights on Modern-Age Border Security: Rejecting a Physical Border and Embracing a Virtual Wall**

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# THE IMPLICATIONS OF ENVIRONMENTAL LAW AND LATINO PROPERTY RIGHTS ON MODERN-AGE BORDER SECURITY: REJECTING A PHYSICAL BORDER AND EMBRACING A VIRTUAL WALL

Kevin Hernandez\*

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## I. INTRODUCTION

For many, the construction of a physical border is a rational solution to national security concerns at the southern border. However, there is much evidence indicating that the negative impacts of building a physical border wall far outweigh its benefits. Particularly, the border region’s eco-systems have much to lose in the form of extinctions, biodiversity reduction, and critical habitat destruction. On top of that, a number of Latino communities would be the victims of various eminent domain claims that would strip them of land that, in many cases, has been in their family for multiple generations. The broad, almost unilateral, scope of authority granted to the President to build a physical border wall would eviscerate decades of

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environmental protection and cost the United States billions of dollars to build and upkeep the wall.

Proponents of a physical border fail to acknowledge the shortcomings of the policy, as exemplified by their disregard of its environmental impacts. Proponents of a physical border also fail to see that there is an option that is much more effective and efficient. Abandoning the idea of a physical-border wall and embracing a “virtual wall”<sup>1</sup> would provide effective border security, prevent further environmental degradation, and prevent the economic harm to Latino communities that would result from constructing a physical wall.

This paper will proceed by explicating:

- (1) the statutory development of US border policy since 1996;
- (2) the impact that a wall would have on Latino land ownership along the U.S.–Mexico Border;
- (3) the economic and environmental impact of constructing a physical border;
- (4) the way in which the environmental impact may be used to prevent the construction of the wall; and
- (5) an alternative to a physical border that will promote national security and ensure the longevity of the border region’s ecosystems and economy.

## II. BACKGROUND

### A. *Historic Border Wall Policy*

Modern U.S.–Mexico border policy began on September 30, 1996, when the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) was passed.<sup>2</sup> Section 102 of the IIRIRA empowered the Attorney General to begin the installation of a border wall, and also granted him wide discretion to waive the National Environmental Policy Act (“NEPA”) and the Endangered Species Act (“ESA”).<sup>3</sup> The ESA and NEPA are two of the most influential and protective environmental statutes in the United States.<sup>4</sup> When the IIRIRA was passed, Congress was clearly indicating that national security takes precedence over environmental concerns, which may have been a sound political and legislative decision at the time. However, the statute allowed for a *complete* disregard of environmental degradation in the construction of the wall—which is not a sound nor practical policy decision today.

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<sup>1</sup> See *infra* Part IV.

<sup>2</sup> Illegal Immigration Reform and Immigrant Responsibility Act, USCIS (Sept. 30, 1996), <https://www.uscis.gov/sites/default/files/ocomm/ilink/0-0-0-10948.html>, archived at <https://perma.cc/6K72-52ED>.

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

<sup>4</sup> See generally *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

The IIRIRA initially cabined the Attorney General's legislative waiver powers with three substantive limitations. The limitations were the length of the wall,<sup>5</sup> the limited number of waivable statutes,<sup>6</sup> and that it did not diminish appellate jurisdiction.<sup>7</sup> However, these limitations were effectively gutted by two subsequent amendments to the IIRIRA, the Real ID Act, and the Secure Fence Act.

The first substantive amendment to the IIRIRA was the Real ID Act of 2005. It had major effects on the statute and created incredible hurdles in challenging the government's construction of a physical-border wall. The Real ID Act removed the limitation to waiving *only* the ESA and NEPA and gave the Secretary of Homeland Security<sup>8</sup> ("Secretary") the power to waive "all legal requirements . . . [at the] Secretary's sole discretion."<sup>9</sup> In effect, this stripped Congress of any oversight of the border region.<sup>10</sup> The Secretary could waive legislation as he saw fit if the waiver was in pursuit of "install[ing] additional physical barriers and roads . . . to deter illegal crossings."<sup>11</sup> This amount of discretion in determining border policy with such little oversight is unprecedented<sup>12</sup> and is borderline a grant of legislative power. With such a breadth of power one would expect Congress to have imposed stringent judicial oversight, but quite the opposite was done. In fact, the Real ID Act made challenging the Secretary's power incredibly difficult with three provisions limiting the act's vulnerability to legal challenges.

First, the Real ID Act required that any claim filed against the waiver power must be made within sixty days of the Secretary's action.<sup>13</sup> Second, it gave the United States district courts exclusive jurisdiction to hear claims challenging the Secretary's waiver of federal legislation.<sup>14</sup> Third and finally, the Real ID Act gave *sole* appellate jurisdiction to the Supreme Court.<sup>15</sup> These three changes to the IIRIRA substantially altered the Secretary's power and discretion in relation to building a physical border, but Congress did not stop there.

The Secure Fence Act of 2006 ("SFA") was the second amendment that drastically expanded the scope of the Secretary's power under the IIRIRA. Initially, the wall envisioned by the IIRIRA was to extend fourteen

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<sup>5</sup> USCIS, *supra* note 2.

<sup>6</sup> *Id.*

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

<sup>8</sup> The Real ID Act also transferred waiver power from the Attorney General to the Secretary of Homeland Security.

<sup>9</sup> Andrea C. Sancho, *Environmental Concerns Created by Current United States Border Policy: Challenging the Extreme Waiver Authority Granted to the Secretary of the Department of Homeland Security Under the REAL ID Act of 2005*, 16 SE. ENVTL. L.J. 421, 425–26 (2008).

<sup>10</sup> *Id.* at 426.

<sup>11</sup> USCIS, *supra* note 2.

<sup>12</sup> Sancho, *supra* note 9, at 445.

<sup>13</sup> Real ID Act of 2005, 119 Stat. 231, 306 (2005).

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

<sup>15</sup> *Id.*; David Fisher, Note, *The U.S.–Mexico Border Wall and the Case for Environmental Rights*, 50 TEX. INT'L L.J. 145, 163–64 (2015).

miles from the Pacific Ocean and was purposed with curtailing illegal immigration near San Diego, California.<sup>16</sup> However, fourteen miles turned into more than 800 miles after the SFA passed.<sup>17</sup> The SFA *required* the Secretary to provide two layers of reinforced fencing along more than 800 miles of the border.<sup>18</sup> However, Congress realized the impracticality of that mandate and subsequently removed the “shall” language, and provided the Secretary discretion as to his means of securing the border.<sup>19</sup> Although the SFA expanded the areas in which a border had to be established, some good did come out of this amendment. The SFA’s general provision section indicated that pursuant to the Secretary’s duty to secure the border he could use “technology, such as unmanned aerial vehicles.”<sup>20</sup> This discretion is crucial for the implementation of a virtual wall. The idea of a virtual wall has become more enticing and will be further explored below.<sup>21</sup>

### B. *The Eminent Domain Powers of the Federal Government*

If the Trump administration continues with its ill-advised physical border wall policy, land acquisition through eminent domain will play an integral role. Because much of the land slated for the wall is privately owned, numerous condemnation suits must be won to establish a contiguous physical border. It has been estimated that the federal government will use its condemnation powers in an estimated 1,200 condemnation claims to acquire the necessary land.<sup>22</sup>

However, the unfortunate reality is that if the government wants your land, there is very little stopping them from taking it.<sup>23</sup> The government’s taking is limited by the need to prove public use<sup>24</sup> and provide the private land owner with just compensation. But, after the opinion handed down in *Kelo v. City of New London*, scholars across the ideological spectrum concluded that the federal government could take land with almost any justification.<sup>25</sup> The just compensation clause doesn’t do much better in limiting the eminent domain power of the government. Just compensation has been recognized as paying the fair market value of the property.<sup>26</sup> Therefore, the just

<sup>16</sup> Sancho, *supra* note 9, at 425–26.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Robert Farley, *Obama Says the Border Fence is ‘Now Basically Complete’*, POLITIFACT (May 16, 2011, 5:03 PM), <http://www.politifact.com/truth-o-meter/statements/2011/may/16/barack-obama/obama-says-border-fence-now-basically-complete/>, archived at <https://perma.cc/HW95-HSZD>.

<sup>20</sup> Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638.

<sup>21</sup> See *infra* Part IV.

<sup>22</sup> Lauren A. Ferrigni, *Environmental and Eminent Domain Impediments to a Great, Great Border Wall*, 15 REAL EST. CONDEMNATION & TR. LITIG. 1, 5 (2017).

<sup>23</sup> See CATO INST., CATO SUPREME COURT REVIEW 2004–2005, at 3–4 (Mark K. Moller ed. 2005).

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

<sup>25</sup> E.g., *id.*

<sup>26</sup> *Olson v. United States*, 292 U.S. 246, 253 (1934).

compensation clause has become more of a political limitation than a judicial one because the executive merely needs adequate appropriations to pay for the condemnation claims. The wall will likely meet the requirements for an eminent domain condemnation because establishing a border in pursuance of national security is a clear public use.

Given the expansive scope of the IIRIRA and the eminent domain powers of the federal government, challenges to the government's *ability* to erect a physical border wall will likely be unsuccessful. However, the waiver power, which is crucial to construction, may be subject to challenges.

*C. Understanding the Treaty of Guadalupe–Hidalgo in order to Explain the Present-Day Threat to Latino Property Ownership Along the U.S.–Mexico Border*

With all the political discourse occurring throughout the country, it may be easy to overlook the border communities who will feel the greatest impact of a physical border wall. Specifically, it is easy to overlook the threat to their property rights and the likelihood of deprivation. The communities that live along the U.S.–Mexico border are predominantly Latino, given the long history of Mexican and South American migration to the area.<sup>27</sup> And, these communities are only expected to grow.<sup>28</sup> Although there are varying concerns amongst the four states that border Mexico, most are uniformly against its construction.<sup>29</sup> Texas provides a particularly interesting dilemma to building the wall—private property ownership. It is estimated that 95% of the land adjoining the real border—the Rio Grande River—is privately owned. Many of these tracks of land are owned by Latinos whose land has been in their family for generations.<sup>30</sup> The threat of a physical wall looms high for these Latino property owners because the use of the eminent do-

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<sup>27</sup> Scott Simon, *Private Landowners Along Trump's Proposed Border Wall Risk Losing Property*, NPR (Jan 12, 2019), <https://www.npr.org/2019/01/12/684748447/private-landowners-along-trumps-proposed-border-wall-risk-losing-property>, archived at <https://perma.cc/4Y6U-QT8M> (stating that much of the land along the Texas part of the border is owned by Latino families who have had claim to the land since Spain's ownership of Texas).

<sup>28</sup> Leah Donnell, *The Environmental Consequences of a Wall on the U.S.–Mexico Border*, NPR (Feb. 17, 2017), <https://www.npr.org/sections/codeswitch/2017/02/17/514356130/the-environmental-consequences-of-a-wall-on-the-u-s-mexico-border>, archived at <https://perma.cc/GYC8-AG2Q> (explaining an expected a 15 million population increase in the next thirty years).

<sup>29</sup> Rachel Martin, *We Don't Need a Physical Wall, Laredo Mayor Pete Saenz Says*, NPR (Jan 4, 2019), <https://www.npr.org/2019/01/04/682157001/we-dont-need-a-physical-wall-lore-do-mayor-pete-saenz-says>, archived at <https://perma.cc/7CV8-LHJQ>; Ted Hesson & Renuka Rayasam, *Border Lawmakers Spurn Trump's Wall Proposal*, POLITICO (Jan. 10, 2019), <https://www.politico.com/story/2019/01/10/border-lawmakers-spurn-trump-wall-proposal-1071707>, archived at <https://perma.cc/472M-NTBH> (finding that amongst the 17 Senate and House members who represent border communities from Texas to California, only two directly support a physical wall).

<sup>30</sup> Gus Bova, *Trump's Wall is Coming to Texas. Meet its First Victims.*, TEXAS OBSERVER (Jan. 14, 2019), <https://www.texasobserver.org/trumps-wall-is-coming-to-texas-meet-its-first-victims/>, archived at <https://perma.cc/6NCF-ZN82>.

main power described above would mean that they would have their property seized.

This is not the first time the federal government has sought to deprive Latinos along the U.S.–Mexico border of their property rights.<sup>31</sup> The property rights of Latinos were systematically disregarded after the “ratification” of the Guadalupe–Hidalgo Treaty.<sup>32</sup> This treaty ended the Mexican–American War and established comity between the two countries.<sup>33</sup> But, it can also be said that the treaty resulted in one of the largest land grabs in the US’s history.<sup>34</sup> Despite Mexico ceding Texas, New Mexico, California, Arizona, Nevada, Utah, and half of Colorado, there were three articles initially included in the treaty that were meant to secure the property rights of Latinos who remained in the ceded territories.<sup>35</sup> Articles 8,<sup>36</sup> 9,<sup>37</sup> and 10<sup>38</sup> of the treaty were included to ensure that the nearly 100,000 Latinos who ended up on the US side of the newly established border were secure in the land that they owned.<sup>39</sup>

However, the legislature and judiciary took actions to ensure that these articles fell short of their purpose. First, Congress removed article 10 of the treaty before ratification.<sup>40</sup> Its removal served “notice to Mexicans that the treaty was not going to be honored.”<sup>41</sup> Congress’ purported “correction” to the omission of article 10 was ineffectual. After the initial treaty was ratified, Congress passed the Protocol of Querétaro, which was meant to correct the omission of article 10, but the protocol failed to prevent the invalidation of Mexican land titles.<sup>42</sup> The Protocol failed to protect Latino property rights derived from the treaty because of *Cessna v. United States*.<sup>43</sup> In *Cessna*, the US Supreme Court held that the Protocol of Querétaro was not relevant to land cases, which meant that the intent of article 10 was never effectuated.<sup>44</sup>

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<sup>31</sup> See generally Richard Griswold del Castillo, *Manifest Destiny: The Mexican–American War and the Treaty of Guadalupe Hidalgo*, 5 Sw. J.L. & TRADE AM. 31 (1998).

<sup>32</sup> *Id.* at 43.

<sup>33</sup> *Id.* at 31.

<sup>34</sup> See *id.* at 38.

<sup>35</sup> Refugio I. Rochin, *Reflections on the Treaty of Guadalupe Hidalgo and the Border it Established*, 5 Sw. J.L. & TRADE AM. 141, 141–42 (1998).

<sup>36</sup> PEACE, FRIENDSHIP, LIMITS, AND SETTLEMENT (TREATY OF GUADALUPE HIDALGO), <https://www.loc.gov/law/help/us-treaties/bevans/b-mx-ust000009-0791.pdf> (last visited Jan. 22, 2019), archived at <https://perma.cc/RZD9-N6J5>.

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

<sup>38</sup> Rochin, *supra* note 35, at 143 (“all grants of land made by the Mexican Government or by the competent authorities, in territories previously appertaining to Mexico, and Remaining for the future within limits of the United States, shall be respected as valid, to the same extent that the same grants would be valid, if said territories had remained within the limits of Mexico”).

<sup>39</sup> Griswold del Castillo, *supra* note 31, at 36.

<sup>40</sup> *Id.*

<sup>41</sup> Rochin, *supra* note 35, at 143.

<sup>42</sup> Griswold del Castillo, *supra* note 31, at 36.

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

<sup>44</sup> See generally, *Cessna v. United States*, 169 U.S. 165 (1898).

The resulting treatment of articles 8 and 9 was no less unjust. Due to various legislative and judicial interpretations of the language in articles 8<sup>45</sup> and 9, the citizenship and property protections were not effectuated.<sup>46</sup> Due to the ineffectual, almost negligent, disregard of the property protections, the Latino middle class was nearly destroyed, and they entered “the twentieth century as an underdeveloped people.”<sup>47</sup> Under its treaty responsibilities, the US was supposed to protect the property rights of Latinos along the U.S.–Mexico border. Instead it set the stage for Latinos to have their land taken.<sup>48</sup> Quantifying the fallout of the Guadalupe–Hidalgo land grabs is nearly impossible, but one thing is clear: had Latino property rights been protected—as the letter of the law intended—Latinos along the U.S.–Mexico border would be in very different circumstances today. The ultimate result of the US’s treatment of Latino property rights was economic subordination, “[w]hether by laws, force, foreclosure, or litigation, many Tejanos lost title to their ancestral lands in the period between 1848 and 1923.”<sup>49</sup>

The historical impact of the Guadalupe–Hidalgo treaty suggests that the current disregard for Latino property rights is not new. The use of eminent domain necessary to build a wall is simply the modern-day iteration of the land grabs that steadily occurred between the late 19th and early 20th centuries. In fact, the story of Mr. Fred Cavazos may be seen as a cautionary case study of what is to come for Latino land owners along the modern U.S.–Mexico Border.<sup>50</sup> Fred Cavazos is a sixty-year old lifelong resident of Mission, Texas where he owns 65 acres of land along the Rio Grande River.<sup>51</sup> Until recently, Cavazos ran a profitable 30-lot riverside rental park.<sup>52</sup> He repurposed the land, which he inherited from his father who once farmed various fruits on the property.<sup>53</sup> A physical wall would bisect the property that has been in his family for generations. The wall would put a portion of his land in “no man’s land,” which lays between the Rio Grande River and the erected portions of the wall.<sup>54</sup> If the wall were to be erected, he would still own the land, but would only be able to access it with an electronic gate, which the government has yet to guarantee.<sup>55</sup> Cavazos is certain that even with an electronic gate his business of renting lots to families for recreation would have to close.<sup>56</sup>

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<sup>45</sup> Guadalupe T. Luna, *En El Nombre De Dios Todo-Poderoso: The Treaty of Guadalupe Hidalgo and Narrativos Legales*, 5 Sw. J.L. & TRADE AM. 45, 71 (1998).

<sup>46</sup> Griswold del Castillo, *supra* note 31, at 36.

<sup>47</sup> *Id.* at 38.

<sup>48</sup> See Luna, *supra* note 45, at 46.

<sup>49</sup> Griswold del Castillo, *supra* note 31, at 42.

<sup>50</sup> Bova, *supra* note 30.

<sup>51</sup> *Id.*

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

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

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

Not only does Cavazos face the threat of having his business fail, there is also the risk that the compensation he would be entitled to under eminent domain law would be delayed or even outweighed by court costs.<sup>57</sup> Together, Presidents Bush and Obama built 110 miles of fencing in Texas, and much can be learned from the condemnation proceedings during their years in office.<sup>58</sup> The condemnation proceedings under Bush and Obama were wrought with under compensation, bureaucratic errors,<sup>59</sup> and corruption.<sup>60</sup> If the procedures seen during the past two administrations is any indication of what to expect under the Trump administration, then Cavazos is likely to be deprived of both a profitable business and the just compensation he is entitled to. Fred Cavazos' story is not unique and unfortunately many Latino land owners may face the same fate.<sup>61</sup>

“While a vast amount of rhetoric and constitutional law purports to protect private property, it nonetheless, failed to protect the grantee[s] of Mexican descent.”<sup>62</sup> This quote originally described the Guadalupe–Hidalgo land grabs. But, the principle seems eerily applicable to today’s political discourse. If the power of eminent domain is used to effectuate the physical-border wall, Latino communities along the border will suffer.

The Latinos in border communities don’t want this physical wall and almost uniformly reject its need,<sup>63</sup> but they are the communities that will face the environmental, economic, and aesthetic harm. The desire to build a physical wall is supported by those who don’t understand the needs of border communities and won’t ever have to look at or live with the wall. To ignore the perspectives of those who will live on or near the wall is to ignore the voices of those who have the most at stake and who have the best under-

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

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

<sup>59</sup> T. Christian Miller et. al., *The Taking: How the Federal Government Abused its Power to Seize Property for a Border Fence*, TEXAS TRIBUNE (Dec. 14, 2017), <https://www.texastribune.org/2017/12/14/border-land-grab-government-abused-power-seize-property-fence/>, archived at <https://perma.cc/J4CG-PQMD>.

<sup>60</sup> Kiah Collier et. al., *How a South Texas Bureaucrat Became a Multimillionaire Amid the Rush to Build a Border Fence*, TEXAS TRIBUNE (Dec. 29, 2017), <https://www.texastribune.org/2017/12/29/how-south-texas-bureaucrat-became-multimillionaire-amid-rush-build-bor/>, archived at <https://perma.cc/94BB-77FR>.

<sup>61</sup> See Martin Rogers, *This Texas Golf Course Had No Chance Stuck Behind a Border Wall*, USA TODAY (Sept. 20, 2017), <https://www.usatoday.com/story/sports/2017/09/20/texas-golf-course-had-no-chance-stuck-behind-border-wall/681415001/>, archived at <https://perma.cc/4HBT-84P9> (describing the story of a man who owned a profitable golf course along the Rio Grande River that was shut down due to the wall being erected in the middle of it); see also Leila Macor, *Apache Woman, in Odd Twist, Has Key to New US Border Wall*, YAHOO (July 4, 2018), <https://www.yahoo.com/news/apache-woman-odd-twist-key-us-border-wall013852649>, archived at <https://perma.cc/ABL3-2DNJ> (describing a Latina/Apache woman who had her land bifurcated by the wall).

<sup>62</sup> Luna, *supra* note 45, at 58.

<sup>63</sup> See Gordon Dickson, *Wall of Contention*, STAR-TELEGRAM, <https://www.star-telegram.com/news/state/texas/article152402734.html>, archived at <https://perma.cc/Z2DW-UMWB>, (last visited Jan. 22, 2019).

standing of a physical wall's cumulative effect.<sup>64</sup> We must listen to them and their opposition of the wall. Otherwise, the country's history of stripping Latinos of their land will be repeated.

*D. Challenges Against the Bush Administration's use  
of the IIRIRA Waiver Power*

During the Bush administration, the IIRIRA was substantially expanded and the Secretary used its waiver power on five occasions. Each time, the exercise of power was unsuccessfully challenged.<sup>65</sup> Although each challenge was unsuccessful in preventing the use of the waiver powers, each case gave important insight into the application and implication of the power granted by the IIRIRA.

The four cases that challenged the Secretary's waiver power were: *Cty. of El Paso v. Chertoff*;<sup>66</sup> *Defenders of Wildlife v. Chertoff*;<sup>67</sup> *Sierra Club v. Ashcroft*;<sup>68</sup> and *Save Our Heritage Org. v. Gonzalez*.<sup>69</sup> In *Defenders of Wildlife*, a federal court rejected a non-delegation challenge to the waiver power. The court held that Congress had provided the Secretary with an intelligible principle for the use of the waiver power,<sup>70</sup> but the court did not address the longevity of the statute. The waiver further withstood challenges to its unconstrained judicial review<sup>71</sup> and a direct challenge to the constitutionality of the Real ID Act conferring the power.<sup>72</sup> Given the precedential history of cases surrounding the waiver it seems to be grounded in a constitutional grant of power, however it has been nearly a decade since the power was last used and because of that its longevity raises new questions. Two of the questions addressed in this paper are the longevity of the waiver power once construction of the wall ends and the practicality of its use considering recent technological advances.

In each of the four cases the Supreme Court denied certiorari, so it is still possible that the waiver may be deemed unconstitutional. Therefore, it remains essential that this unilateral power to disregard long-standing federal mandates continues to be challenged. However, even if the power to waive

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<sup>64</sup> See Lulu Garcia-Navarro, *Voices From the Southern Border: Perspectives of Those Who Live and Work There Every Day*, NPR (Jan 13, 2019), <https://www.npr.org/2019/01/13/684894834/voices-from-the-southern-border-perspectives-of-those-who-live-and-work-there-ev>, archived at <https://perma.cc/EBP4-HZL7>.

<sup>65</sup> See Brendan Lenihan, *Homeland Security Versus Environmental Conservation: Searching for Balance Along the Arizona-Mexico Border*, 6 ARIZ. J. ENVTL. L. & POL'Y 619, 631 (2016).

<sup>66</sup> See *Cty. of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008).

<sup>67</sup> See *Def. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007).

<sup>68</sup> See *Sierra Club v. Ashcroft*, No. 04CV0272-LAB (JMA), 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 12, 2005).

<sup>69</sup> See *Save Our Heritage Org. v. Gonzalez*, 533 F. Supp. 2d 58, 59 (D.D.C. 2008).

<sup>70</sup> See *Def. of Wildlife*, 527 F. Supp. 2d at 127.

<sup>71</sup> See *Cty. of El Paso*, 2008 U.S. Dist. Lexis 83045 at 17.

<sup>72</sup> See *Sierra Club*, 2005 U.S. Dist. Lexis 44244 at 39.

federal statutes is held to be constitutional there are practical considerations that could prevent future use of the waiver power.

### III. CHALLENGING THE CONSTRUCTION OF A PHYSICAL BORDER WALL BETWEEN MEXICO AND THE U.S.

#### A. *The Environmental and Economic Detriments Caused by a Physical-Border Wall*

The most effective means of preventing the construction of a physical-border wall is still environmental protection challenges, despite the fact that up to this point they've been largely ineffective. Still, since the environmental crises of the 1970s<sup>73</sup> the United States has emphasized conservation efforts throughout the country—especially in the border region.<sup>74</sup> The construction of a physical-border wall would destroy decades of this conservation work. Because of the waiver of NEPA procedures during the Bush administration's construction of the now standing border wall, the full impact of the wall on the wildlife and environment of the border region is difficult to calculate.<sup>75</sup> However, President Trump's addition to the border wall will inevitably exacerbate the environmental degradation that has already occurred.

The Center for Biological Diversity has begun to collect data on the impact of continued construction, and it has identified ninety-three species and multiple critical habitats that would be adversely affected by the construction and presence of the wall.<sup>76</sup> Absent the waiver power afforded to the Secretary by the IIRIRA the federal government would have an affirmative duty under section 7(a)(1) and 7(a)(2) of the ESA to conserve and to not jeopardize endangered species. Instead the federal government will be taking actions that it knows will lead to the extinction of various species in the border region in explicit contradiction of the purposes of the ESA and NEPA.

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<sup>73</sup> See Alan Taylor, *Documerica: Images of America in Crisis in the 1970s*, THE ATLANTIC (Nov. 16, 2011), <https://www.theatlantic.com/photo/2011/11/documerica-images-of-america-in-crisis-in-the-1970s/100190/> archived at <https://perma.cc/H5BV-X9B7>.

<sup>74</sup> See Cally Carswell, *Trump's Wall May Threaten Thousands of Plant and Animal Species on the U.S.–Mexico Border*, SCI. AM. (May 10, 2017), <https://www.scientificamerican.com/article/trump-s-wall-may-threaten-thousands-of-plant-and-animal-species-on-the-u-s-mexico-border/>, archived at <https://perma.cc/V6CR-TGV3>.

<sup>75</sup> See Noah Greenwald et. al., *A Wall in the Wild: The Disastrous Impacts of Trump's Border Wall on Wildlife*, CTR. BIOLOGICAL DIVERSITY (May 2017), [https://www.biologicaldiversity.org/programs/international/borderlands\\_and\\_boundary\\_waters/pdfs/A\\_Wall\\_in\\_the\\_Wild.pdf](https://www.biologicaldiversity.org/programs/international/borderlands_and_boundary_waters/pdfs/A_Wall_in_the_Wild.pdf), archived at <https://perma.cc/KR3Z-82AR>.

<sup>76</sup> *Id.*

However, if the ESA and NEPA weren't waived many of the environmental detriments would be addressed leading to better informed border policy and preventing the imposition of a physical-border wall all together.<sup>77</sup>

The ESA is widely recognized as the most comprehensive environmental statute in the world's history,<sup>78</sup> and building a physical wall on the U.S.–Mexico border will undoubtedly violate section 7(a)(2) of the ESA. Section 7(a)(2) quite simply prohibits the federal government from taking actions that jeopardize the existence of endangered species or pose a threat to their critical habitat.<sup>79</sup> Given the numerous publications and findings on the number of endangered species located in the border region<sup>80</sup> it is unquestionable that absent the use of the waiver power the government would be in violation of the ESA. If applied as intended, the ESA would trigger protections that would likely halt construction. In fact, the ESA is notorious for stopping large scale federal construction initiatives.<sup>81</sup> It is because of its expansive scope and powerful results that advocates against the imposition of a physical-border wall must explore litigation possibilities under the ESA and similar environmental statutes.

NEPA serves a distinct, but important, role in environmental protection. Instead of providing a cause of action in the event of environmental degradation, NEPA requires the federal government to conduct environmental assessments and promulgate environmental impact statements.<sup>82</sup> Environmental impact statements include data such as: the adverse environmental impact caused by federal action; alternatives to the proposed action; and the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.<sup>83</sup> The data collected through NEPA procedures inform agencies on the effects of their actions, but doesn't impose any affirmative duties. However, the effectuation of this statute is just as important as the ESA because it ensures informed policy decisions. Without NEPA procedures a federal agency is effectively ignores environmental consequences, which is precisely what has happened in the aftermath of the Bush administration's construction of a partial border wall. As a result, the extent of the environmental degradation remains uncertain.<sup>84</sup> Therefore, the effectuation of NEPA and the ESA is crucial to maintain the environmental integrity of the border region.

A physical border wall also have economic implications caused by the construction and maintenance of the wall. As with most environmentally detrimental activity, quantifying the economic harm related to losses in bi-

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<sup>77</sup> Although there are many other environmental statutes that could impede the construction of the wall this paper emphasizes the substantive duties under the ESA and procedural duties under NEPA because they were the original statutes made waivable by the IIRIRA.

<sup>78</sup> See *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 176 (1978).

<sup>79</sup> See 16 U.S.C. § 1536 (2017).

<sup>80</sup> Carswell, *supra* note 74.

<sup>81</sup> See *generally Hill*, 437 U.S. 153.

<sup>82</sup> 42 U.S.C. § 4332(2)(C) (2017).

<sup>83</sup> 42 U.S.C. § 4332(C)(ii)-(iv) (2017).

<sup>84</sup> Fisher, *supra* note 15, at 149.

odiversity is extremely difficult. For example, how do we quantify the importance of the existence of the Bald Eagle, a species expected to be impacted by the construction of the wall?<sup>85</sup> Quantifying the value of an endangered species and a healthy environment is a question that remains unanswered. However, the cost of building and maintaining a physical border is more easily quantified. The estimated cost of building the wall is \$70 Billion.<sup>86</sup> This figure does not even factor in necessary maintenance.<sup>87</sup> If one isn't persuaded against a physical border by the environmental impact one must at least see the impracticality of it given that the use of a physical barrier has been shown not to deter illegal entry.<sup>88</sup>

The evident misgivings of a physical-border wall necessitate a complete halt of the physical wall initiative. Unless the environmental statutes are effectuated, this archaic border security policy will remain. To make sure the environmental statutes are effectuated and lead to the prevention of the physical wall the Secretary's waiver power must be abrogated.

### B. Challenging the Waiver Power

As indicated above the environmental statutes currently in effect would likely prevent, or at least impede, the construction of a physical-border wall. However, the scope of the waiver power clearly prevents the ESA, NEPA, and other environmental statutes<sup>89</sup> from serving their purposes. Presuming that this waiver power is constitutionally permissible, the question then becomes: what are its limits? The longevity of the waiver power is not clearly defined by IIRIRA. Although there have been challenges to this waiver power, none have addressed when the waiver ceases to affect the statutes that are waived under it. There are two possible answers to the question of the waiver power's longevity: (1) the statute authorizes the *indefinite* waiver of statutes effecting the border or (2) once the physical wall is completed the waived statutes go back into effect. Both pose problems for the use of the waiver power and the practicality of the physical-border wall. Each outcome will be assessed in turn.

If the waiver power is indefinite, the President can essentially and unilaterally repeal a congressional act. This challenge against the waiver's constitutionality is unlike those mentioned above because under this challenge the constitutionality of the use of the power is conceded. Under this analysis it is the *result* of the power that would be challenged. The court in *Defenders of Wildlife* held that the use of the power was not a partial repeal of the law

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<sup>85</sup> See Greenwald et. al., *supra* note 75.

<sup>86</sup> See U.S. Senate Report: Wall Costs Could Soar Toward \$70 Billion, US S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS (April 18, 2017), <https://www.hsgac.senate.gov/border-wall-report>, archived at <https://perma.cc/6DHX-ZDKR>.

<sup>87</sup> See Pratheepan Gulasekaram, *Why a Wall*, 2 UC IRVINE L. REV. 147, 161 (2012).

<sup>88</sup> *Id.* at 152–53.

<sup>89</sup> See Fisher, *supra* note 15, at 148–49.

and therefore not unconstitutional.<sup>90</sup> But, presumably, a complete repeal of a federal law would violate the constitutional separation of power doctrine. The Supreme Court, in *Clinton v. City of New York*, deemed a “line item veto” was unconstitutional because it afforded the executive the power to legislate.<sup>91</sup> If the waiver is held to be an indefinite abrogation of the waived statutes the executive branch has effectively utilized a power that was deemed unconstitutional under the *Clinton v. City of New York* analysis.<sup>92</sup> The similarity between the waiver and the “line item veto” is found in the excising of parts of federal law. By waiving the ESA and NEPA in their applicability to the border region the executive has effectuated a “line item veto” on the statutes. When passed, the ESA and NEPA were to be applied nationwide, so there was no specification of the different regions where they would take effect. If, however, the ESA or NEPA had broken the US into regions the waiver of its applicability to one of the specific regions would clearly resemble a post-enactment “line item veto.” If the waiver power is indefinite, then the executive has exercised a power that allows him to *repeal* federal law in the border region. It is worth noting that past challenges to the waiver only addressed the constitutionality of the waiver during the construction of the wall and did not address the waiver once construction finished that is what distinguishes this potential challenge. Regardless of the waiver’s, presumed, constitutional use; the constitutionality of its longevity remains a question.

However, the more likely outcome, where the waiver power is not indefinite and the waived statutes go back into effect after construction, a new economic issue will arise. When statutes go back into effect, the ESA will require wide spread environmental review to assess the damage caused by the construction of the physical wall. Application of the ESA is a notoriously costly as it is purposed with halting and reversing the trend towards species extinction *no matter the cost*. Accomplishing this at the border will cripple the federal environmental budget and necessitate increased appropriations because the construction of a wall will endanger many more species and destroy numerous critical habitats. It is common for the government to spend millions of dollars on conservation for a single species;<sup>93</sup> the scope of degradation caused by the wall will undoubtedly exacerbate these costs. Admittedly, there isn’t data indicating what the environmental degradation would cost for future conservation after the wall is constructed, but it will likely exceed costs of past efforts given the numerous ecosystems that will be affected by a physical-border wall.

These two challenges to the waiver power, constitutional and economic, implicate a significant reassessment of the current US border policy. I sug-

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<sup>90</sup> See *Defs. of Wildlife*, 527 F. Supp. 2d at 127.

<sup>91</sup> See *Clinton v. City of New York*, 524 U.S. 417, 449 (1998).

<sup>92</sup> *Id.* at 439.

<sup>93</sup> Brian Palmer, *The Endangered Species Act is Under Attack. But How Much Trouble is it in?*, AUDUBON (Feb. 8, 2017), <http://www.audubon.org/news/the-endangered-species-act-under-attack-how-much-trouble-it>, archived at <https://perma.cc/B4Y8-CJB2>.

gest below an alternate solution to achieving the desired border security, while preventing further environmental degradation, and ensuring that property rights of Latinos along the border are respected.

#### IV. IMPLEMENTATION OF A VIRTUAL WALL

The potential solution to both the national security and environmental degradation concerns posed by this paper is a *virtual* wall, which is focused on establishing infrastructure that is centered around technological barriers rather than a physical one. A wall based in technological infrastructure will serve the needs a physical border and more effectively *sustain* a secure border. A border policy centered around a physical wall is archaic; economically & pragmatically ineffectual; and environmentally detrimental. However, it is unquestionable that a secure border is crucial for maintaining national security.

The US is already using technology based preventive measures, but the administration's insistence on a physical wall is an impediment on the full implementation of a virtual wall. The ground work for a virtual wall has already begun with 8,000 cameras; 11,000 underground sensors; 107 aircrafts; 8 drones; 175 mobile surveillance units; and 84 boats the US government is equipped to secure the border without the creation of a physical barrier.<sup>94</sup> By increasing these resources—specifically the drone capabilities at the border—the US Customs and Border Patrol (“CBP”) will be more effective and efficient in its work.<sup>95</sup> The CBP's actions will shift to emphasize surveillance of the border and with funding—that would otherwise be wasted to construct an ineffectual physical wall—increased technology based patrols, i.e. drones, will be more constant and allow the CBP to have concerted efforts when illegal crossings occur. The use of the drones will allow the CBP to surveil the areas of the border that are not readily accessible to patrol agents, and it will allow them to expand their control of the border region. The reliance on drones will remove the need of increased boots on the ground, prevent environmental degradation (caused by building the wall), and allow for upgrades in border policy.

As evidenced above, there are numerous justifications, whether they be environmental or practical, that indicate a virtual wall is preferable to a physical barrier. However, the use of drones in implementing a virtual wall policy, justifiably, raises concerns of unconstitutional surveillance. The use of drones will be crucial in the implementation of a virtual wall, so these constitutionality concerns will be addressed below, the discussion below will

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<sup>94</sup> Julia Jacobo & Serena Marshall, *Nearly 700 Miles of Fencing at the US–Mexico Border Already Exist*, ABC NEWS (Jan. 26, 2017), <http://abcnews.go.com/US/700-miles-fencing-us-mexico-border-exist/story?id=45045054>, archived at <https://perma.cc/JT39-LP7D>.

<sup>95</sup> Will Hurd, *We Need a Smarter Border Wall, Not a 3rd Century Solution*, USA TODAY (Aug. 7, 2017), <https://www.usatoday.com/story/opinion/2017/08/07/border-security-we-need-smart-wall-will-hurd-column/539618001/>, archived at <https://perma.cc/CA8V-BUES>.

evidence that constitutional privacy concerns will not prevent the implementation of drone surveillance along the U.S.–Mexico border.

The Fourth Amendment allows the American people “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>96</sup> However, warrantless aerial surveillance from publicly navigable airspace has not been held to constitute a search under the Fourth Amendment.<sup>97</sup> Rather, the use of technology in warrantless surveillance is constitutional if the technology is available to the general public and does not provide information that would be otherwise unobtainable without physical intrusion.<sup>98</sup>

The use of drones in immigration surveillance is likely constitutional because aerial surveillance conducted with sense-enhancing technology from publicly navigable airspace has been held constitutional.<sup>99</sup> This means that “drone patrols” although disconcerting will play a crucial role in the future of border security. Drones come in a variety of sizes and capabilities.<sup>100</sup> Many drones are small, discrete, and widely available.<sup>101</sup> In fact, the most prevalent drones flying in the United States are recreational drones that are easily accessible to the public, meaning the government need not use military grade drones to conduct its surveillance.

In determining the constitutionality of constant drone surveillance along the U.S.–Mexico border, the dispositive question is whether the action taken on behalf of the government constitutes a search, against the private lands the drones will eventually pass over, within the meaning of the Fourth Amendment.<sup>102</sup> A Fourth Amendment search occurs when the government violates an individual’s subjective expectation of privacy that society recognizes as reasonable.<sup>103</sup>

In regards to aerial surveillance, physically non-intrusive visual observations made from publicly navigable airspace with the naked eye do not constitute a search.<sup>104</sup> The law has never required federal agents to shield their eyes when making passing observations from public vantage points.<sup>105</sup> Therefore, there is no constitutional protection from aerial surveillance—from publicly navigable airspace—because those observations do not constitute searches under the Fourth Amendment.<sup>106</sup>

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<sup>96</sup> U.S. Const. Amend. IV.

<sup>97</sup> *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *see also* *Florida v. Riley*, 488 U.S. 445, 449–50 (1989).

<sup>98</sup> *See Kylo v. United States*, 553 U.S. 27, 40 (2001).

<sup>99</sup> *See* *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986).

<sup>100</sup> Kelsey D. Atherton, *Flying Robots 101: Everything You Need to Know about Drones*, POPULAR SCI. (Mar. 7, 2013), <https://www.popsci.com/technology/article/2013-03/drone-any-other-name>, archived at <https://perma.cc/8WEJ-4U69>.

<sup>101</sup> *Id.*

<sup>102</sup> *Kylo*, 553 U.S. at 32.

<sup>103</sup> *Id.* at 33 (citing *Katz v. United States*, 389 U.S. 227, 361 (1967) (J. Harlan concurring)).

<sup>104</sup> *Ciraolo*, 476 U.S. at 213; *see Riley*, 488 U.S. at 455.

<sup>105</sup> *Ciraolo*, 476 U.S. at 213.

<sup>106</sup> *Id.*

Publicly navigable airspace is established and regulated by the Federal Aviation Administration.<sup>107</sup> However, the Supreme Court has held that aerial surveillance of a home from 400 and 1000 feet above ground level was constitutionally permissible.<sup>108</sup> Therefore, aerial surveillance within that range of airspace is presumably constitutional.

The Supreme Court had the opportunity to limit the scope of aerial surveillance to what one can see with the naked eye, but instead chose to expand the government's ability to use technology during warrantless aerial surveillance.<sup>109</sup> The Court held that the use of common map making photography equipment to preform aerial surveillance was constitutional because the photographs did not reveal intimate details of the complex being observed.<sup>110</sup> The Court further held that, the use of sense-enhancing technology was not inherently unconstitutional, and thus permissible in warrantless aerial surveillance.<sup>111</sup> Although the Court had not previously limited aerial surveillance to the use of the naked eye, it still had not elaborated on the extent of permissible surveillance technology, until *Dow Chemical*.<sup>112</sup> With the holding in *Dow Chemical* the government's observational capabilities substantially increased because the use of sense-enhancing technology was now permissible in warrantless aerial surveillance.<sup>113</sup>

The Supreme Court further elaborated on the use of technology in federal investigations. In *Kyllo*, it held that devices not generally available to the American public cannot be used to explore details of a home that would be unknowable absent a physical intrusion.<sup>114</sup> The use of the thermal imager constituted a search because the sense-enhancing capabilities allowed the investigator to obtain information regarding the interior of the home.<sup>115</sup> It was the lack of availability to the general public, the sense-enhancing capabilities, and the type of information gathered that made the use of the imager unconstitutionally intrusive.<sup>116</sup>

Although there are concerns related to increased drone presence along the border, their use is likely constitutionally permissible. Undoubtedly, there must be substantial fact finding on how the policy will be implemented, but if the alternative is a physical border then there is no question that a virtual border that emphasizes surveillance using drones must be used instead.

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<sup>107</sup> 49 U.S.C. § 40103 (2017).

<sup>108</sup> *Ciraolo*, 476 U.S. at 215; *Riley*, 488 U.S. at 455.

<sup>109</sup> *See Dow Chem. Co.*, 476 U.S. at 238–39.

<sup>110</sup> *Id.* at 238.

<sup>111</sup> *See Id.*

<sup>112</sup> *Dow Chem. Co.*, 476 U.S. at 238.

<sup>113</sup> *See Id.* at 239.

<sup>114</sup> *Kyllo*, 533 U.S. at 40.

<sup>115</sup> *Id.* at 34.

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

## V. CONCLUSION

Implementing a virtual wall will ensure environmental preservation, respect of property rights, and national security. The use of a policy that emphasizes a brick-and-mortar wall is likely to fail on many fronts, but most certainly will fail in promoting environmental and property right protections. Although political rhetoric would have many believe that a physical wall is the best solution to securing the border, a physical-wall policy is impractical, archaic, and certain to cause substantial harm to Latino border communities. Undoubtedly, there is a universal desire for a secure border, but regardless of an individual's political leaning he or she must demand practical and effective border policy. The implementation of a virtual wall is the practical policy needed on the U.S.–Mexico border.