



District Court Decision May Help Pave the Way for Trump Administration's Border Wall Plans

Adam Vann

Legislative Attorney

April 2, 2018

The construction of potentially hundreds of miles of fencing and other barriers along the U.S.-Mexico border is a [key pillar](#) of the Trump Administration's border security strategy. Completing this objective would likely require the Secretary of the Department of Homeland Security (DHS), acting pursuant to [existing statutory authority](#), to waive application of laws that the Secretary determined would impede the expeditious constructing of barriers along the border. A recent [decision](#) by Judge Gonzalo Curiel of the U.S. District Court for the Southern District of California, turning aside challenges to DHS's exercise of this waiver authority for two border projects in southern California, is consistent with [earlier court decisions](#) upholding the DHS Secretary's waiver of numerous laws that might impede border fence deployment projects along the U.S.-Mexico border. Taken together, these court rulings suggest that those seeking to constrain the DHS's ability to waive environmental and other laws that might impede the construction of border fencing would likely need to pursue legislative options to achieve their ends, as repeated judicial challenges have been unsuccessful.

Background

[Section 102](#) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) is the primary authority relied upon by DHS to deploy barriers along the U.S. international borders. Initially, the statute authorized (but did not require) the construction fencing and other barriers "to deter illegal crossings in areas of high illegal entry into the United States," and provided immigration authorities with the power to waive application of the Endangered Species Act and the National Environmental Protection Act if deemed necessary to ensure the expeditious construction of such fencing. But Congress amended the statute three times from [2005 to 2007](#), greatly expanding its potential effect. In addition to requiring

Congressional Research Service

7-5700

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LSB10111

the deployment of fencing along 700 miles of the U.S.-Mexico border, IIRIRA Section 102 also provides for the deployment of additional barriers and infrastructure to achieve “operational control” of the border. Significantly as well, amendments to IIRIRA Section 102(c) allow the DHS Secretary to waive “all legal requirements” that may impede construction of barriers and roads under IIRIRA Section 102.

These amendments to IIRIRA Section 102, along with increased funding for projects, resulted in the deployment of [several hundred miles of new barriers](#) along the southwest border between 2005 and 2011. Large-scale fencing projects were accompanied by notices that the Secretary, acting pursuant to IIRIRA 102(c), had waived [numerous environmental, historical preservation, and administrative law requirements](#) determined to impede fence deployment. As noted above, although some of these exercises of waiver authority were challenged in court, none of these challenges proved successful.

After 2011, fence deployment along additional mileage of the U.S.-Mexico border largely halted, at least in part due to changing border enforcement priorities by the Obama Administration. But the Trump Administration has [called for the construction of a “physical wall”](#) along at least some portions of the U.S.-Mexico border. In two waiver determinations, published on [August 2](#) and [September 12, 2017](#), then-DHS Secretary John Kelly and the subsequent acting DHS Secretary Elaine Duke waived various laws pursuant to IIRIRA Section 102(c). The purpose of these waivers was to ensure the expeditious replacement of existing fencing near San Diego and to construct prototype barriers that could serve as possible models for future barrier construction. These waivers were challenged by the State of California and other parties before the U.S. District Court for the Southern District of California.

The District Court Opinion

The plaintiffs challenging the exercise of waiver authority under IIRIRA Section 102 raised both statutory and constitutional arguments. First, the plaintiffs [alleged](#) that the waiver determinations were “ultra vires acts that are not authorized under section 102,” and therefore the government’s decision to move forward with the projects was in violation of a number of the waived statutes. Specifically, the plaintiffs contended that the waiver in Section 102(c) should not be interpreted to authorize broad waivers of border fencing projects, but rather only certain types of projects explicitly mandated by Section 102. Second, the plaintiffs alleged that the waivers were unconstitutional violations of the non-delegation doctrine, separation of powers principles, and the Take Care Clause.

Turning first to the plaintiffs’ argument that the challenged waivers were not authorized by statute, the district court first considered whether IIRIRA Section 102 barred judicial review of the claim. The court [noted](#) that Section 102(c)(2) restricts legal challenges to any action taken by the DHS Secretary pursuant to the waiver authority except when “alleging a violation of the Constitution of the United States,” thereby creating an explicit statutory bar on judicial review based on non-constitutional grounds. But the court [recognized](#) a narrow exception this and similar bars on judicial review when an agency actions “contrary to ‘clear and mandatory statutory language.’” The court [concluded](#) that this exception allowed consideration of plaintiffs’ claims, as they were premised upon the DHS Secretary allegedly exercising waiver authority in a manner not authorized by the governing statute.

The court turned next to the breadth of the waiver authorization in Section 102(c) and whether the DHS Secretary permissibly exercised the waiver authority with respect to the two border projects at issue in the case. The defendants sought a narrow interpretation of the Section 102(c), which by its terms applies to projects to construct “barriers and roads under this section,” as applying only to those border infrastructure projects *required* under IIRIRA Section 102, but not to all border fencing projects generally authorized by the statute. However, the court [found](#) the DHS Secretaries’ broader interpretation of the waiver authority applied not only to required projects, but to all “physical barriers and roads” authorized by IIRIRA Section 102 to be plausible. The court therefore deferred to interpretative discretion of the DHS Secretaries, and [declared](#) that the court “cannot conclude that the Secretaries acted in excess of their

delegated powers contrary to a ‘clear and mandatory’ provision in section 102.” As a result of this finding, and following a conclusion that the federal border projects that were the subject of the waiver determinations fell within the scope of Section 102, the court rejected the claim that the waivers were beyond the Secretaries’ legal authority to issue.

The court then turned to the plaintiffs’ various constitutional claims. The court rejected the argument that the Section 102(c)’s broad waiver provision was a violation of the non-delegation doctrine and the separation of powers. The court observed that Congress had specified that DHS may only waive laws in relation to the construction of barriers and roads under IIRIRA Section 102, and then only if the Secretary deems such waiver necessary to ensure the expeditious construction of such infrastructure. The court described these limitations as consistent with Supreme Court precedent stating that delegations provide “an intelligible principle” to which an agency’s actions must conform. The district court also believed it relevant that the Executive has “independent and significant constitutional authority” over immigration enforcement and border security matters, because “Congress can confer more discretion to an entity when that entity already has significant, independent authority over the subject matter.”

The court also concluded that the plaintiff had not articulated an argument as to how the waivers had violated the Take Care Clause, finding that the cases cited by the plaintiffs did not provide a basis for concluding that an exercise of discretionary authority like the waiver determinations violated the clause. Finally, the court quickly dismissed a number of other allegations of constitutional violations that the court determined were not applicable. As a result, the court dismissed nearly all of the plaintiff’s challenges, setting aside only a Freedom of Information Act-based claim that was not addressed in the decision and will be resolved either via settlement or separate briefing.

Takeaways for Congress

Though the plaintiffs can potentially seek Supreme Court review of the district court’s decision (review of such decisions by the lower appellate courts is barred by IIRIRA Section 102(c)(2)), the district court’s decision suggests persons seeking to challenge the DHS Secretary’s use of waiver authority face an uphill battle. Accordingly, the ability of DHS to pursue fence deployment is most directly affected by the availability of funding. Indeed, following the district court decision, Congress passed the omnibus spending bill which authorized \$1.57 billion for border fencing and related border security measures. This authorization funds specific fencing projects, but also restricts funds from use to deploy fencing in other areas, and further limits use to already deployed types of fencing designs.

The court’s decision may also have broader implications for future border security projects, as it illustrates the breadth of the DHS Secretary’s authority to waive otherwise applicable requirements that the Secretary determines would deter the deployment of “physical barriers and roads in the vicinity of the United States border” authorized under IIRIRA Section 102. Judicial recognition of the constitutionality of this waiver authority may encourage legislation conferring similar waiver authority for other agency actions. Indeed, legislation has been introduced that allows DHS to use such waiver authority to facilitate the deployment of tactical infrastructure in addition to fencing.