

2009

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### Recommended Citation

Jaime Nielsen, *Locking Down Our Borders: How Anti-Immigration Sentiment Led to Unconstitutional Legislation and The Erosion of Fundamental Principles of American Government*, 18 J. L. & Pol'y (2009).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol18/iss1/10>

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# LOCKING DOWN OUR BORDERS: HOW ANTI-IMMIGRATION SENTIMENT LED TO UNCONSTITUTIONAL LEGISLATION AND THE EROSION OF FUNDAMENTAL PRINCIPLES OF AMERICAN GOVERNMENT

*Jamie Nielsen\**

## I. INTRODUCTION

### *A. History of the Real ID Act*

Feeding off of the wave of anti-immigration sentiment following the events of September 11th 2001, the Real ID Act was designed to quell illegal immigration by implementing a national ID card system and bolstering border security. The Act was first introduced by Wisconsin U.S. Representative James Sensenbrenner as part of the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>1</sup> Due to heavy opposition in the Senate, the Real ID provisions were dropped prior to passage.<sup>2</sup> However, it was reintroduced in 2005 and attached to legislation that House leaders were certain would pass in the Senate.<sup>3</sup> Thus,

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\* B.S., Bryant University, 2001; J.D., Brooklyn Law School, expected 2010. The author wishes to thank her parents for providing endless support and encouragement, as well as the members of the *Journal of Law and Policy* for all of their hard work.

<sup>1</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7212, 118 Stat. 3638 (2004).

<sup>2</sup> Media Matters, *O'Reilly Misleadingly Claimed Real ID Act Passed Senate 100-0*, MEDIA MATTERS, May 13, 2005, <http://mediamatters.org/items/200505130002>.

<sup>3</sup> “[A]pparently recognizing that the stand-alone bill lacked support in the Senate, the House leadership attached the legislation to the House version of

the bill was passed as a rider to the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005.<sup>4</sup> As noted by one legal scholar, “[i]t would have been a serious political liability for a congressperson to vote against funding for the war on terror and tsunami relief. So it is unsurprising that there was no debate on, no hearings on, and no public vetting of the act.”<sup>5</sup>

The Real ID Act is most notorious for requiring a national identification card system, which in turn requires states to fund and implement a system of federally standardized drivers licenses.<sup>6</sup> The cards will contain the personal information of the holder and will be equipped with machine-readable technology, allowing them to be scanned.<sup>7</sup> The cards will not only be necessary for activities such as flying or visiting federal buildings, but also for “‘everyday transactions,’ such as receiving government benefits, voting, or applying for a job. The private sector will also begin mandating a Real ID card for everyday purposes.”<sup>8</sup> In order to obtain the new cards, people will be required to present documentation to their state Department of Motor Vehicles proving their “name, date of birth, Social Security number, their principal residence . . . and that they are lawfully in the U.S.”<sup>9</sup> In addition to excluding many individuals living within the states from receiving an ID card,<sup>10</sup> the law will be outrageously costly.<sup>11</sup>

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the emergency funding bill.” *Id.*

<sup>4</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005).

<sup>5</sup> Anita Ramasastry, *Why the ‘Real ID’ Act, Which Requires National Identity Cards, is a Real Mess*, FINDLAW, Aug. 10, 2005, <http://writ.news.findlaw.com/ramasastry/20050810.html>.

<sup>6</sup> Emergency Supplemental Appropriations Act §§ 201-207.

<sup>7</sup> *Id.* at § 202(b).

<sup>8</sup> New York Civil Liberties Union, *Why Oppose the Real ID Act?*, [http://dev.nyclu.org/realid/why\\_oppose](http://dev.nyclu.org/realid/why_oppose) (last visited Sept. 30, 2009).

<sup>9</sup> Ramasastry, *supra* note 5; *see also* Emergency Supplemental Appropriations Act § 202(c)(1)-(2).

<sup>10</sup> The documentation requirements will prevent not only illegal immigrants already residing in the United States from receiving ID cards, but

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While opponents have voiced strong criticism regarding the cost, invasion of privacy, identity theft, and immigrant discrimination that accompany the identification cards,<sup>12</sup> little has been said about the other provisions of the Act—in particular Section 102(c)<sup>13</sup>, designed to amend Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>14</sup> Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 aimed to deter illegal crossings at United States borders with two protective fences “along the 14 miles of the international land border of the United States, starting at the Pacific Ocean and extending eastward.”<sup>15</sup> This project was expanded following September 11th, when Congress began to play off of America’s terrorism

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also many legal immigrants. *See* NAT’L IMMIGRATION LAW CTR., QUESTIONS AND ANSWERS ABOUT DRIVER’S LICENSES NOW THAT FINAL REAL ID REGULATIONS HAVE BEEN ISSUED (2008), *available at* [http://www.nilc.org/immspbs/DLs/QA\\_re\\_DLs\\_post-regs\\_2008-02-27.pdf](http://www.nilc.org/immspbs/DLs/QA_re_DLs_post-regs_2008-02-27.pdf). Further, legal citizens may have difficulty obtaining the required documents due to factors such as age or poverty. *See* Joan Fridland, Nat’l Immigration Law Ctr., Presentation at the Immigration Advocates Network Webinar: Immigrants, Driver’s Licenses, and the Real ID Act: Requirements, Implementation, and Options Available to States (Dec. 15, 2006), *available at* [http://www.democracyinaction.org/dia/organizationsORG/NILC/images/REAL\\_ID\\_webinar\\_NILC.ppt](http://www.democracyinaction.org/dia/organizationsORG/NILC/images/REAL_ID_webinar_NILC.ppt).

<sup>11</sup> The DHS [Department of Homeland Security] originally estimated that the law would cost \$23.1 billion. The final regulations slash this estimate to \$9.9 billion over 11 years by relying on the ridiculous premise that only 75 percent of licensed drivers will seek to obtain a Real ID. As of February 2008, Congress had set aside only \$80 million to help pay for implementing Real ID across the entire country.

N.Y. Civil Liberties Union, *supra* note 8.

<sup>12</sup> *See, e.g., id.*; Real Nightmare, Opposition Voices, <http://www.realnightmare.org/opposition/9/> (last visited Sept. 24, 2009).

<sup>13</sup> Section 102 of the Real ID Act is titled “Waiver of Legal Requirements Necessary for Improvement of Barriers at Borders.” Emergency Supplemental Appropriations Act § 102.

<sup>14</sup> 8 U.S.C.A. § 1103 note (c) (West 2009) (Improvement of Barriers at Border).

<sup>15</sup> Omnibus Consolidated Appropriations Act, Pub. L. No. 104–208, § 102(b)(1), 110 Stat. 3009 (1996).

fears in order to strengthen immigration controls. Amendments such as those made in the Secure Fence Act of 2006<sup>16</sup> provided for “reinforced fencing along not less than 700 miles of the southwest border.”<sup>17</sup>

Similarly, while the Illegal Immigration Reform and Immigrant Responsibility Act originally provided for waiver of provisions of the Endangered Species Act of 1973 and the National Environmental Policy Act of 1969 “to the extent the Attorney General determines necessary to ensure expeditious construction of the barriers and roads,”<sup>18</sup> Section 102(c)(1) of the Real ID Act amended this to read:

IN GENERAL.—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.<sup>19</sup>

The Department of Homeland Security was created as an executive agency by President Bush following September 11th and assumed several functions previously held by other governmental agencies.<sup>20</sup> In particular, the authority previously granted to the Attorney General in Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 was assigned to the Secretary of Homeland Security.<sup>21</sup> Under the new provisions of Section 102 of the Real ID Act, the Secretary

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<sup>16</sup> Secure Fence Act of 2006, Pub. L. No. 109–367, § 3, 120 Stat. 2638 (2006).

<sup>17</sup> 8 U.S.C.A. § 1103 note (b)(1)(A) (West 2009) (Improvement of Barriers at Border).

<sup>18</sup> Omnibus Consolidated Appropriations Act § 102(c).

<sup>19</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109–13, § 102(c)(1), 119 Stat. 231 (2005).

<sup>20</sup> See Homeland Security Act of 2002, Pub. L. No. 107–296, § 1511, 1517, 116 Stat. 2135 (2002).

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

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now has sole discretion to waive any and all laws he deems necessary for expeditious construction of the border fence, 670 miles of which had a completion deadline of December 31, 2008.<sup>22</sup> Additionally, the Real ID Act significantly narrows judicial review of the Secretary's discretionary decisions:

IN GENERAL.—The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph . . . . Any cause or claim brought pursuant to subparagraph (A) shall be filed not less than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified . . . . 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.<sup>23</sup>

Thus, as this Note will argue, Section 102(c) of the Real ID Act is unconstitutional, violating the separation of powers doctrine by granting entirely too much power to one individual while leaving little room for judicial review. Additionally, when given the opportunity to review the constitutionality of the Act

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<sup>22</sup> 8 U.S.C.A. § 1103 note (b)(1)(B) (West 2009) (Improvement of Barriers at Border). The Illegal Immigration Reform and Immigrant Responsibility Act specified “370 miles, or other mileage determined by the Secretary” shall be completed by December 31, 2008. *Id.* The Department of Homeland Security committed to having 670 miles of fencing completed by December 31, 2008 (370 miles of pedestrian fencing and 300 miles of vehicle fencing). OFFICE OF THE INSPECTOR GEN., DEP’T OF HOMELAND SEC., OIG-09-56, PROGRESS IN ADDRESSING SECURE BORDER INITIATIVE OPERATIONAL REQUIREMENTS AND CONSTRUCTING THE SOUTHWEST BORDER FENCE 15 (2009).

<sup>23</sup> Emergency Supplemental Appropriations Act § 102(c)(2).

in *Defenders of Wildlife v. Chertoff*,<sup>24</sup> the Supreme Court denied certiorari and failed to perform its job as a check on legislative power. The Note will begin with an overview of *Chertoff* and the district court's rationale in upholding the Real ID Act. Part II will examine the historical importance of the separation of powers doctrine, including application of the doctrine in significant case law. Part III will demonstrate the unconstitutionality of the Real ID Act by comparing the Real ID Act to other separation of powers cases. Part IV examines the devastating results of such legislation and the Supreme Court's inaction. Finally, Part V proposes a solution to redress the consequences of the Court's inaction.

### *B. Defenders of Wildlife v. Chertoff*

In September of 2007, at the direction of the Department of Homeland Security, the Army Corps of Engineers began construction of the border fence, along with a road and drainage structures, in an area known as the San Pedro Riparian National Conservation Area (SPRNCA) in Arizona.<sup>25</sup> The SPRNCA consists of approximately 57,000 acres of public land in Cochise County, Arizona.<sup>26</sup> The San Pedro River, "one of the last free-flowing rivers in the United States"<sup>27</sup> runs through the SPRNCA and the area has been described as "one of the most biologically diverse areas of the United States."<sup>28</sup> Congress officially

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<sup>24</sup> *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 128 S. Ct. 2962 (2008).

<sup>25</sup> *Id.* at 121.

<sup>26</sup> United States Department of the Interior, San Pedro RNCA, [http://blm.gov/az/st/en/prog/blm\\_special\\_areas/ncarea/sprnca.html](http://blm.gov/az/st/en/prog/blm_special_areas/ncarea/sprnca.html) (last visited Sept. 30, 2009) [hereinafter San Pedro RNCA].

<sup>27</sup> Press Release, Defenders of Wildlife & Sierra Club, Conservation Groups Ask Federal Government to Consider Border Fence's Overall Impact to Wildlife, Public Lands in Arizona (Oct. 1, 2007), *available at* [http://www.defenders.org/newsroom/press\\_releases\\_folder/2007/10\\_01\\_2007\\_groups\\_appeal\\_to\\_feds\\_on\\_border\\_fence.php?ht=](http://www.defenders.org/newsroom/press_releases_folder/2007/10_01_2007_groups_appeal_to_feds_on_border_fence.php?ht=).

<sup>28</sup> *Defenders of Wildlife*, 527 F. Supp. 2d at 121 (internal quotation marks omitted).

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designated it as a conservation area on November 18, 1988.<sup>29</sup>

Recognizing the ecological significance of the SPRNCA and the potential damage of fencing,<sup>30</sup> Defenders of Wildlife filed a motion for a temporary restraining order in district court. The motion alleged that the Bureau of Land Management (the agency charged with managing the SPRNCA) conducted an inadequate Environmental Assessment prior to granting a perpetual right of way to the Department of Homeland Security for fence construction<sup>31</sup> and that the bureau also erred in determining that an Environmental Impact Statement was not required by the National Environmental Policy Act of 1969.<sup>32</sup> Defenders of Wildlife further argued that the right-of-way grant violated the Arizona-Idaho Conservation Act of 1988, which required the Bureau of Land Management to “manage the SPRNCA ‘in a manner that conserves, protects, and enhances the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the

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<sup>29</sup> San Pedro RNCA, *supra* note 26.

The primary purpose for the special designation is to protect and enhance the desert riparian ecosystem, a rare remnant of what was once an extensive network of similar riparian systems throughout the American Southwest. One of the most important riparian areas in the United States, the San Pedro River runs through the Chihuahuan Desert and the Sonoran Desert in Southeastern Arizona. The river’s stretch is home to 84 species of mammals, 14 species of fish, 41 species of reptiles and amphibians, and 100 species of breeding birds. It also provides invaluable habitat for 250 species of migrant and wintering birds and contains archaeological sites representing the remains of human occupation from 13,000 years ago.

*Id.*

<sup>30</sup> *Defenders of Wildlife*, 527 F. Supp. 2d at 121 n.1 (“The challenged fence construction requires excavation on up to 225 of the SPRNCA’s 58,000 acres, and the proposed fence segments will cover approximately 9,938 feet at the border when completed.”).

<sup>31</sup> *Id.* at 121. The Bureau of Land Management “concluded that the proposed fencing would have no significant impact on the environment when paired with certain mitigation measures and that an Environmental Impact Statement (‘IS’) was not therefore required by the National Environmental Policy Act of 1969 (‘NEPA’).” *Id.* (citations omitted).

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



conservation area' and to 'only allow such uses of the conservation area' that further the purposes for which it was established."<sup>33</sup> The court granted the temporary restraining order, noting that "plaintiffs had demonstrated a substantial likelihood of success on the merits with respect to their NEPA claims and that the balance of equities favored plaintiffs,"<sup>34</sup> and construction of the border fence was halted.<sup>35</sup>

However, approximately two weeks later, the Secretary of Homeland Security, Michael Chertoff, used his discretionary powers to waive twenty statutes in their entirety (most of them environmental) in order to continue the fence construction.<sup>36</sup>

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

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

<sup>35</sup> *Id.*

<sup>36</sup> On October 26, 2007, the Secretary's decision to waive the following statutes was announced in the Federal Register: The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*)), the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 *et seq.*)), the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) (Act of June 30, 1948, c. 758, 62 Stat. 1155 (33 U.S.C. 1251 *et seq.*)), the National Historic Preservation Act (Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966) (16 U.S.C. 470 *et seq.*)), the Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*), the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Archeological Resources Protection Act (Pub. L. 96-95, 16 U.S.C. 470aa *et seq.*), the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*), the Noise Control Act (42 U.S.C. 4901 *et seq.*), the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*), the Federal Land Policy and Management Act (Pub. L. 94-579, 43 U.S.C. 1701 *et seq.*), the Fish and Wildlife Coordination Act (Pub. L. 73-121, 48 Stat. 401, 16 U.S.C. 661 *et seq.*), the Archaeological and Historic Preservation Act (Pub. L. 86-523, 16 U.S.C. 469 *et seq.*), the Antiquities Act (16 U.S.C. 431 *et seq.*), the Historic Sites, Buildings, and Antiquities Act (16 U.S.C. 461 *et seq.*), the Arizona-Idaho Conservation Act of 1988 (Pub. L. 100-696, 16 U.S.C. 460xx *et seq.*), the Wild and Scenic Rivers Act (Pub. L. 90-542, 16 U.S.C. 1281 *et seq.*), the Farmland Protection Policy Act (7 U.S.C. 4201 *et seq.*) and the Administrative Procedure Act (5 U.S.C. 551 *et seq.*). Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure

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Additionally, Chertoff stated that he reserved the “authority to make further waivers from time to time.”<sup>37</sup> Using the highly subjective standards set forth in the Act, Chertoff stated that the SPRNCA “is an area of high illegal entry” in which “there is presently a need to erect fixed and mobile barriers . . . and roads.”<sup>38</sup> Therefore, he deemed it “necessary” to exercise his waiver authority and, as a result, the temporary restraining order was vacated.<sup>39</sup>

In response, Defenders of Wildlife filed an amended complaint in district court, alleging “that the waiver provision of the REAL ID Act violates separation of powers principles embodied in Articles I and II of the Constitution because it ‘impermissibly delegates legislative powers to the DHS Secretary, a politically-appointed Executive Branch official.’”<sup>40</sup> Specifically, the plaintiffs argued that the case fell precisely within the Court’s holding in *Clinton v. City of New York*,<sup>41</sup> where provisions of the Line Item Veto Act were found unconstitutional because Presidential repeal of laws is not constitutionally permissible.<sup>42</sup> The defendants moved to dismiss the complaint<sup>43</sup> on grounds that the Real ID Act’s waiver provisions constituted a permissible delegation of legislative power to the Executive Branch under the Court’s “nondelegation” jurisprudence because “it provides the Secretary with an ‘intelligible principle’ that ‘clearly delineate[s] the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority.’”<sup>44</sup> Additionally, the defendants set forth the argument that “‘Congress may delegate in even broader terms’ than otherwise permissible in matters of

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Fence Act of 206, 72 Fed. Reg. 60,870 (Oct. 26, 2007).

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

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

<sup>39</sup> *Defenders of Wildlife*, 527 F. Supp. 2d at 123.

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

<sup>41</sup> *Id.* at 124 (citing *Clinton v. City of New York*, 524 U.S. 417 (1998)).

<sup>42</sup> *Clinton v. City of New York*, 524 U.S. 417, 438 (1998).

<sup>43</sup> Defendants moved to dismiss under FED. R. CIV. P. 12(b)(1) and 12(b)(6). *Defenders of Wildlife*, 527 F. Supp. 2d at 123.

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

immigration policy, foreign affairs, and national security, because ‘the Executive Branch already maintains significant independent control’ over these areas.”<sup>45</sup>

In issuing its opinion, the district court quickly dismissed the plaintiff’s comparison to *Clinton*.<sup>46</sup> The court held that the repeal of laws in *Clinton* was distinguishable from the waiver of laws at issue here.<sup>47</sup> Whereas in *Clinton* repeal meant the affected laws no longer had “any ‘legal force or effect’ under any circumstance,”<sup>48</sup> the waived laws at issue “retain[] the same legal force and effect [they] had when [] passed by both houses of Congress and presented to the President.”<sup>49</sup> The court further stated:

The fact that the laws no longer apply to the extent they otherwise would have with respect to the construction of border barriers and roads within the SPRNCA does not, as plaintiffs argue, transform the waiver into an unconstitutional ‘partial repeal’ of those laws. By that logic, *any* waiver, no matter how limited in scope, would violate Article I because it would allow the Executive Branch to unilaterally ‘repeal’ or nullify the law with respect to the limited purpose delineated by the waiver legislation.<sup>50</sup>

With regard to the plaintiffs’ separation of powers argument, the court cited the rationale from *Smith v. Fed. Reserve Bank of N.Y.* that “‘the Supreme Court has widely permitted the Congress to delegate its legislative authority to other branches,’ so long as the delegation is accompanied by sufficient guidance.”<sup>51</sup> Further, that delegation is permitted where “Congress ‘lay[s] down . . . an intelligible principle to which

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 124.

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 126 (citing *Smith v. Fed. Reserve Bank of N.Y.*, 280 F. Supp. 2d 314, 324 (S.D.N.Y. 2003)).

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the person or body authorized to [exercise the delegated authority] is directed to conform . . . .”<sup>52</sup> The *Chertoff* court held that the provisions requiring that fencing be erected specifically in areas “of high illegal entry,”<sup>53</sup> “to deter illegal crossings,”<sup>54</sup> and that the Secretary only exercise his waiver authority as he “determines necessary to ensure expeditious construction of the barriers and roads”<sup>55</sup> constituted “clearly delineated” boundaries under which the Secretary was authorized to act.<sup>56</sup>

The *Chertoff* court also found that the broad scope of the Secretary’s power to waive “all legal requirements”<sup>57</sup> that he deems necessary in his “sole discretion”<sup>58</sup> was not unconstitutional.<sup>59</sup> Despite finding a lack of historical support for such sweeping waiver authority,<sup>60</sup> the court found that it was constitutional because “under the nondelegation doctrine, the relevant inquiry is whether the Legislative Branch has laid down an intelligible principle to guide the Executive Branch, not the scope of the waiver power.”<sup>61</sup> The court further agreed with the defendants<sup>62</sup> that legislative delegations may be broader when the subject matter is one over which the Executive Branch already

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<sup>52</sup> *Id.* at 127 (citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

<sup>53</sup> 8 U.S.C.A. § 1103 note (a) (West 2009) (Improvement of Barriers at Border).

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

<sup>55</sup> *Id.* note (c)(1).

<sup>56</sup> *Defenders of Wildlife*, 527 F. Supp. 2d at 127.

<sup>57</sup> 8 U.S.C.A. § 1103 note (c)(1) (West 2009) (Improvement of Barriers at Border).

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

<sup>59</sup> *Defenders of Wildlife*, 527 F. Supp. 2d at 129.

<sup>60</sup> The Court cited a Congressional Research Service Memorandum which stated “the REAL ID Act’s waiver provision appears to be unprecedented in that it ‘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.” *Id.* at 128.

<sup>61</sup> *Id.* at 129.

<sup>62</sup> *See supra* text accompanying note 45.

possesses considerable constitutional power.<sup>63</sup> Therefore, because the border fence falls under the Executive controlled areas of foreign affairs and immigration control,<sup>64</sup> the broad delegation of authority to the Secretary of Homeland Security by the legislature was constitutionally permissible.<sup>65</sup>

Following the district court's dismissal with prejudice, Defenders of Wildlife exercised the only available option under the Act and petitioned for a writ of certiorari to the Supreme Court.<sup>66</sup> Fourteen members of the U.S. House of Representatives, numerous distinguished law professors, and various organizations (ranging from environmental groups to the United Church of Christ) filed Amicus briefs in support of the petitioners.<sup>67</sup> However, in June of 2008, the Supreme Court denied certiorari.<sup>68</sup> In a public statement, House Representative Lamar Smith criticized the Supreme Court's decision as allowing border fences to be built "without legal restrictions or interference from environmentalists."<sup>69</sup>

Rule 10 of the Rules of the Supreme Court of the United States sets forth basic guidelines for the Court to grant a petition

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<sup>63</sup> "When the area to which the legislation pertains is one where the Executive Branch already has significant independent constitutional authority, delegations may be broader than in other contexts." *Defenders of Wildlife*, 527 F. Supp. 2d at 129 (citing *Sierra Club v. Ashcroft*, Civ. No. 04-272, 2005 U.S. Dist. LEXIS 44244, at \*17 (S.D. Cal. Dec. 12, 2005)).

<sup>64</sup> *Id.* at 129.

<sup>65</sup> *Id.*

<sup>66</sup> Petition for Writ of Certiorari, *Defenders of Wildlife v. Chertoff*, 128 S. Ct. 2962 (2008) (No. 07-1180).

<sup>67</sup> Brief for Fourteen Members of the U.S. House of Representatives as Amici Curiae in Support of Petitioners, *Defenders of Wildlife*, 128 S. Ct. 2962 (No. 07-1180); Brief of William D. Araiza et al. as Amici Curiae in Support of Petitioners, *Defenders of Wildlife*, 128 S. Ct. 2962 (No. 07-1180); Brief of the National Advocacy Center of the Sisters of the Good Shepherd et al. as Amici Curiae Support of Petitioners, *Defenders of Wildlife*, 128 S. Ct. 2962 (No. 07-1180).

<sup>68</sup> *Defenders of Wildlife*, 128 S. Ct. 2962.

<sup>69</sup> Gary Martin, *Court's Fence Ruling Strengthens Government Power*, SAN ANTONIO EXPRESS-NEWS, June 28, 2008, at 9B.

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for certiorari.<sup>70</sup> Of those standards, one is particularly pertinent—where “a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court” the court should grant certiorari.<sup>71</sup> The Court’s denial of certiorari without explanation has left commentators at a loss, with some speculating that “the decision served as a death knell for future legal challenges to the fence,”<sup>72</sup> and others holding out “hope that a second, separate legal challenge may yet succeed.”<sup>73</sup> Nevertheless, it is clear that the Court should have granted certiorari because the district court’s decision to uphold Section 102(c) of the Act “conflicts with relevant decisions of”<sup>74</sup> the Supreme Court by violating the fundamental doctrine of separation of powers.

## II. SEPARATION OF POWERS AND CHECKS AND BALANCES

*A. Historical Significance of Separation of Powers*

The Constitution clearly divides the power of the federal government into three distinct branches, with Article I granting legislative power to Congress,<sup>75</sup> Article II giving executive power to the President,<sup>76</sup> and Article III vesting judicial power in the Supreme Court.<sup>77</sup> In *The Federalist* No. 47, James Madison

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<sup>70</sup> SUP. CT. R. 10.

<sup>71</sup> *Id.* at 10(c).

<sup>72</sup> Martin, *supra* note 69.

<sup>73</sup> *Border Fence Legal Waivers Still Under Threat in Second Lawsuit*, DEF. ENV’T ALERT, Jul. 8, 2008.

<sup>74</sup> SUP. CT. R. 10(c).

<sup>75</sup> “All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives.” U.S. CONST. art. I, § 1.

<sup>76</sup> “The executive Power shall be vested in a President of the United States of America. U.S. CONST. art. II, § 1, cl. 1.

<sup>77</sup> “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

wrote that “the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>78</sup> Thus, the founding fathers recognized that in order to maintain this democratic form of government, a reliable method of reigning in branch power was essential.<sup>79</sup>

Thus, the constitutional system of checks and balances was created, whereby “the President . . . may veto legislation; the Senate may confirm or deny the President’s appointment of his or her principal executive officers as well as federal judges; and Congress, by exercising its impeachment power, may remove judges and executive officers, including the President.”<sup>80</sup> In addition to these explicit grants of authority, the power of judicial review stands as one of the most important constitutionally implied checks.<sup>81</sup> Chief Justice Marshall categorically reinforced this principal in *Marbury v. Madison*,<sup>82</sup> holding that “it is emphatically the province and duty of the judicial department to say what the law is.”<sup>83</sup>

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<sup>78</sup> THE FEDERALIST NO. 47, at 313 (James Madison) (Sherman F. Mittell, ed., 1938).

<sup>79</sup> But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others . . . . Ambition must be made to counteract ambition . . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

THE FEDERALIST NO. 51, at 337 (James Madison) (Sherman F. Mittell, ed., 1938).

<sup>80</sup> CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW 333 (2d ed. 2005).

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

<sup>82</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>83</sup> *Id.* at 177.

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The separation of powers doctrine, and its accompanying system of checks and balances, is a fundamental characteristic of the American government. As stated by Professor Thomas Sargentich, the doctrine continues to “serve the highly valued ends of avoiding undue concentration of governmental power, expanding representation and access to power, as well as promoting deliberation and counteracting factional influence on the government.”<sup>84</sup> In Sargentich’s analysis of the separation of powers, the “normally emphasized”<sup>85</sup> function of “prevention of concentrated power”<sup>86</sup> is only part of the greater purpose served; the doctrine also brings together different actors in an effort to develop public policy. Legislation must filter through three distinct arenas before impacting society.<sup>87</sup> Thus, public policy evolves from a broad base, more representative of the needs and values of American citizens.<sup>88</sup>

The separation of powers doctrine “also multiplies the points of access for citizens who wish to get involved . . . [and] expands access to power in a society with great diversity and social division.”<sup>89</sup> Complementing this principle of comprehensive representation is Sargentich’s point that the doctrine encourages discourse on varying societal attitudes.<sup>90</sup> By forcing the branches to deliberate, differing viewpoints are expressed and compromises are inevitably made, thus

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<sup>84</sup> Thomas O. Sargentich, *The Contemporary Assault on Checks and Balances*, 7 WIDENER J. PUB. L. 231, 240 (1998).

<sup>85</sup> *Id.* at 236.

<sup>86</sup> *Id.* at 237.

<sup>87</sup> The second value served by the separation of powers and checks and balances is to bring together three main governmental actors in the development of public policy: the House of Representatives, elected from local districts; the Senate, elected from the states; and the President, elected in a national electoral contest.

*Id.* at 239.

<sup>88</sup> *See id.*

<sup>89</sup> *Id.*

<sup>90</sup> “[T]he separation of powers and checks and balances tend to promote deliberation about public values and public purposes.” *Id.*



minimizing the possible influence of special interest groups.<sup>91</sup> It would be impossible and, perhaps, counterproductive to draw a clean line between each branch of government. The separation of powers doctrine “did not mean that these departments ought to have no *partial agency* in, or no *control over*, the acts of each other.”<sup>92</sup> Therefore, the Supreme Court has consistently solidified the importance of the separation of powers doctrine and the necessity of judicial review, while recognizing the need for some interaction among the branches.

### *B. Application of the Doctrine in Case Law*

In *J.W. Hampton, Jr., & Co. v. United States*<sup>93</sup> the Court set forth the enduring rule governing when Congress may tip the delicate balance between the three separate powers and delegate its authority.<sup>94</sup> While reaffirming that “Congress may not delegate its purely legislative power to a commission,”<sup>95</sup> the Court held that legislative delegation is permissible when Congress has set forth an “intelligible principle”<sup>96</sup> to which the authorized party must adhere.<sup>97</sup> Years later, in *Mistretta v. United States*<sup>98</sup> the Court reaffirmed Congress’s constitutional power to delegate its authority in certain situations. Recognizing 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 general

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<sup>91</sup> See *id.* at 239–40. “The key idea is that the requirement of having each of the named constitutional actors agree on a new statutory standard makes it harder for a [special interest group] to capture the government.” *Id.* at 240.

<sup>92</sup> THE FEDERALIST NO. 47 (James Madison), *supra* note 78, at 314 (emphasis in original).

<sup>93</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) (upholding congressional delegation of power to the President to increase or decrease duties according to the Tariff Act of 1922).

<sup>94</sup> *Id.* at 409.

<sup>95</sup> *Id.* at 408.

<sup>96</sup> *Id.* at 409.

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

<sup>98</sup> *Mistretta v. United States*, 488 U.S. 361 (1989).

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directives,”<sup>99</sup> the Court permitted Congress to delegate drafting of the federal sentencing guidelines to the United States Sentencing Commission,<sup>100</sup> an independent agency under the judicial branch of the government.<sup>101</sup> Reaffirming the “intelligible principal”<sup>102</sup> doctrine, the *Mistretta* Court held that “Congress’ delegation of authority to the Sentencing Commission [was] sufficiently specific and detailed to meet constitutional requirements.”<sup>103</sup> While upholding congressional delegations that are sufficiently narrow and precise enough not to violate the separation of powers, the Supreme Court has diligently protected the doctrine and struck down legislation that strays beyond these specifications, or grants too much power to one branch.<sup>104</sup>

In recent years, the Court has exercised its power of judicial review in several cases involving legislation bearing a marked resemblance to Section 102(c) of the Act.<sup>105</sup> For example, in *INS v. Chadha*,<sup>106</sup> the Court declared a legislative provision unconstitutional for violating the separation of powers.<sup>107</sup> At issue in *Chadha* was Section 244(c)(2) of the Immigration and Nationality Act,<sup>108</sup> which allowed either House of Congress to veto, or invalidate, a decision by the Executive Branch to

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<sup>99</sup> *Id.* at 372.

<sup>100</sup> *Id.* at 374 (upholding Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1987) (codified as amended in 18 U.S.C. § 3551 *et seq.* (1988) and 28 U.S.C. §§ 991–98 (1988))).

<sup>101</sup> An Overview of the United States Sentencing Commission, [http://www.uscc.gov/general/USCC\\_Overview\\_200906.pdf](http://www.uscc.gov/general/USCC_Overview_200906.pdf) (last visited November 14, 2009).

<sup>102</sup> *J.W. Hampton*, 276 U.S. at 409.

<sup>103</sup> *Mistretta*, 488 U.S. at 374.

<sup>104</sup> *See, e.g., Clinton v. City of New York*, 524 U.S. 417 (1998); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

<sup>105</sup> *See, e.g., Chadha*, 462 U.S. 919 (holding a congressional veto provision of the Immigration and Nationality Act unconstitutional).

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

<sup>107</sup> *Id.* at 959.

<sup>108</sup> Immigration and Nationality Act § 244(c)(2), 8 U.S.C. 1254(c)(2) (repealed by the Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 308(b)(7), 110 Stat. 3009-615 (1996)).

suspend deportation of an alien residing in the United States.<sup>109</sup> The Court began by noting that “[the] principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.”<sup>110</sup> In analyzing the provision, the Court held that the House action authorized under Section 244(c)(2) was essentially legislative action, requiring conformance with constitutionally established procedures.<sup>111</sup> Therefore, the Court held the “congressional veto provision in § 244 (c)(2) . . . unconstitutional.”<sup>112</sup> The Court felt that the provision granted too much power to one House of Congress<sup>113</sup> and again emphasized the importance of maintaining the specific constitutional powers of each branch:

The bicameral requirement, the Presentment Clauses, the President’s veto, and Congress’ power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of

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<sup>109</sup> *Id.* The Immigration and Nationality Act contained a valid congressional delegation of Executive Power to the Attorney General. *Id.* § 244(a)(1). The delegation set forth an intelligible principle under which the Attorney General was authorized to suspend the deportation of an alien provided that said alien met explicit requirements of the Act, specifically, a continuous physical presence in the United States during the immediately preceding seven years, good moral character, and extreme hardship to the alien or a family member (a United States citizen or lawful permanent resident) upon deportation. *Id.*

<sup>110</sup> *Chadha*, 462 U.S. at 946 (citing *Buckley v. Valeo*, 424 U.S. 1, 124 (1976)).

<sup>111</sup> The single House action authorized under Section 244(c)(2) did not fall under any of the four constitutional exceptions allowing one House of Congress to act alone. *Id.* at 955.

<sup>112</sup> *Id.* at 959.

<sup>113</sup> *See id.* In his concurrence, Justice Powell argued that such cases, involving legislative veto provisions, should be decided on a narrower basis, but nonetheless agreed with the outcome. Justice Powell stated, “when Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the separation of powers.” *Id.* at 960 (Powell, J., concurring).

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powers, the carefully defined limits on the power of each Branch must not be eroded.<sup>114</sup>

Further evidence of the Court's customary protection of the doctrine can be found in the more recent case *Clinton v. City of New York*.<sup>115</sup> Despite the district court's contrary holding in *Defenders of Wildlife v. Chertoff*,<sup>116</sup> the legislation struck down in *Clinton* is strikingly similar to Section 102(c) of the Act.<sup>117</sup> In the well-known *Clinton* case, the Court held as unconstitutional the Line Item Veto Act of 1996<sup>118</sup> which gave the President the power to cancel, or veto, any provision of a bill signed into law that fell under one of three specified categories.<sup>119</sup> The Court, reaffirming *Chadha*, held that "[r]epeal of statutes, no less than enactment, must conform with Art. I,"<sup>120</sup> and noted that "[t]here is no provision in the Constitution that authorizes the President to enact, amend, or repeal statutes."<sup>121</sup> Presidential veto power is authorized only before a bill becomes law and, even then, it may be "overridden by a two-thirds vote in each House."<sup>122</sup> The Court further clarified the difference between a permissible Presidential veto and unconstitutional repeal:

There are important differences between the President's "return" of a bill pursuant to Article I, § 7, and the

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<sup>114</sup> *Id.* at 957–58 (majority opinion).

<sup>115</sup> *Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>116</sup> *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 129 (D.D.C. 2007).

<sup>117</sup> *See Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>118</sup> Line Item Veto Act of 1996 § 204, 2 U.S.C.S. § 691 (2008), *invalidated by Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>119</sup> The Line Item Veto Act provided for presidential cancellation of any provision consisting of "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit," provided that the cancellation would "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest" and that the President adhere to explicit guidelines in considering the cancellation. *Id.*

<sup>120</sup> *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (citing *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 954 (1983)).

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

<sup>122</sup> *Id.*

exercise of the President's cancellation authority pursuant to the Line Item Veto Act. The constitutional return takes place *before* the bill becomes law; the statutory cancellation occurs *after* the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes.<sup>123</sup>

The Court interpreted this silence as "equivalent to an express prohibition."<sup>124</sup> Because the Framers went to such lengths to specify the procedures necessary for statutory enactment, the Court found that the omission of any language authorizing post-enactment repeal prohibits such action.<sup>125</sup> Thus, the Court held that the end result of legislation affected by the Line Item Veto Act would not be "the product of the 'finely wrought procedure' the Framers designed."<sup>126</sup> Justice Kennedy clearly articulated the non-delegation principle, asserting that "[b]y increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure."<sup>127</sup> Notably, Kennedy's statement also describes Section 102(c) of the Act, which has not been struck down and is still in force today.

### III. UNCONSTITUTIONALITY OF SECTION 102(C) OF THE REAL ID ACT

#### A. *Comparison to Clinton v. City of New York*

Similar to the Line Item Veto Act, Section 102(c) of the

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<sup>123</sup> *Id.* at 438-39.

<sup>124</sup> *Id.* at 439.

<sup>125</sup> *See id.*

<sup>126</sup> *Id.* at 440.

<sup>127</sup> *Id.* at 452 (Kennedy, J., concurring).

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Real ID Act vests too much power in one individual. Moreover, because the power is vested in the secretary of an administrative agency, a politically appointed position, the statute represents an especially drastic deviation from the Framers' vision.<sup>128</sup> Further, the power granted to the President under the Line Item Veto Act was subject to more restrictions than that granted to the Secretary of the Department of Homeland Security under Section 102(c) of the Real ID Act. While the Line Item Veto Act set forth specific requirements for the provisions subject to cancellation,<sup>129</sup> it also provided for a built in check on the President's cancellation power.<sup>130</sup> By contrast, the Real ID Act provides no specific requirements for the waiver of laws; the Secretary is granted "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."<sup>131</sup>

There is no built in check on the Secretary's power. The Secretary's waiver decision can only be examined through judicial review;<sup>132</sup> therefore, unless a party with standing files suit, the decision will go unchecked. Significantly, even if a party with standing seeks judicial review, the narrow requirements for such a suit make it highly unlikely to

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<sup>128</sup> See *supra* note 79.

<sup>129</sup> See *supra* note 119.

<sup>130</sup> A cancellation takes effect upon receipt by Congress of the special message from the President. If, however, a "disapproval bill" pertaining to a special message is enacted into law, the cancellations set forth in that message become "null and void." The Act sets forth a detailed expedited procedure for the consideration of a "disapproval bill" . . . . A majority vote of both Houses is sufficient to enact a disapproval bill. The Act does not grant the President the authority to cancel a disapproval bill, but he does, of course, retain constitutional authority to veto such a bill.

Clinton v. City of New York, 524 U.S. 417, 436-37 (1998) (citing 2 U.S.C.S. § 691).

<sup>131</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, § 102(c)(1), 119 Stat. 231 (2005).

<sup>132</sup> See *supra* text accompanying note 23.

succeed.<sup>133</sup> Though the separation of powers violations in the Real ID Act are more flagrant than those embodied in the Line Item Veto Act, the two statutes, nevertheless, bear remarkable similarities.

The Court in *Clinton* explicitly stated that “[t]he cancellation of one section of a statute may be the functional equivalent of a partial repeal even if a portion of the section is not cancelled.”<sup>134</sup> In *Clinton*, a partial repeal was held unconstitutional under Article I, Section 7.<sup>135</sup> A “partial repeal” is precisely what the Secretary of Homeland Security is authorized to do under the Real ID Act.<sup>136</sup> By refusing to apply any and all statutes he deems necessary along the border, the Secretary is in effect partially repealing these statutes.<sup>137</sup> While the district court held that this did not constitute a partial repeal because a waived law “retains the same legal force and effect as it had when it was passed by both houses of Congress and presented to the President,”<sup>138</sup> this is clearly not the case. When statutes, particularly environmental ones, are enacted they are intended to protect specific places or things deemed especially valuable to society and to ensure the safety and health of citizens.<sup>139</sup> How can it logically be argued that these statutes are not being partially repealed when they exempt over 700 miles of United States land,<sup>140</sup> containing various endangered species<sup>141</sup> and

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<sup>133</sup> *See id.*

<sup>134</sup> *Clinton v. City of New York*, 524 U.S. 417, 441 (1998).

<sup>135</sup> *Id.* at 444.

<sup>136</sup> Plaintiff’s Opposition to Defendants’ Renewed Motion to Dismiss, *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007) (No. 07-1801); Plaintiff’s Lodged Surreply to Defendants’ Renewed Motion to Dismiss, *Defenders of Wildlife*, 527 F. Supp. 2d 119 (No. 07-1801).

<sup>137</sup> Plaintiff’s Opposition to Defendants’ Renewed Motion, *supra* note 136; Plaintiff’s Lodged Surreply, *supra* note 136.

<sup>138</sup> *Defenders of Wildlife*, 527 F. Supp. 2d at 124.

<sup>139</sup> *See supra* note 36.

<sup>140</sup> 8 U.S.C.A. § 1103 note (b)(1)(A) (West 2009) (Improvement of Barriers at Border).

<sup>141</sup> *Defenders of Wildlife*, Border Fence Construction: San Pedro Riparian NCA, [http://www.defenders.org/programs\\_and\\_policy/in\\_the\\_courts/legal\\_docket/border\\_fence\\_construction\\_san\\_pedro\\_riparian\\_nca.php](http://www.defenders.org/programs_and_policy/in_the_courts/legal_docket/border_fence_construction_san_pedro_riparian_nca.php)

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specifically designated as a conservation area?<sup>142</sup> When statutes are not applied to several of the items they were designed to protect, they are being partially repealed.

While the district court stated that labeling the Secretary's actions under the Real ID Act a partial repeal would invalidate "numerous other statutory authorizations of executive waivers,"<sup>143</sup> this reasoning is flawed. The statutory waiver authorizations cited by the district court in support of this proposition were far more specific and detailed than the sweeping authorization in Section 102(c) of the Real ID Act.<sup>144</sup> Further, the Line Item Veto Act "require[d] the President to adhere to precise procedures whenever he exercises his cancellation authority. In identifying items for cancellation he must consider the legislative history, the purposes, and other relevant information about the items,"<sup>145</sup> while the Real ID Act requires no such consideration and is entirely discretionary on

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(last visited Sept. 30, 2009).

<sup>142</sup> See *supra* note 29.

<sup>143</sup> *Defenders of Wildlife*, 527 F. Supp. 2d at 125.

<sup>144</sup> The court cited:

10 U.S.C. § 433 (Secretary of Defense, "in connection with a commercial activity," may waive compliance with "certain Federal laws or regulations pertaining to the management and administration of Federal agencies" if they would "create an unacceptable risk of compromise of an authorized intelligence activity"); 15 U.S.C. § 2621 (EPA may waive compliance with Toxic Substances Act "upon a request and determination by the President that the requested waiver is necessary in the interest of national defense."); 20 U.S.C. § 7426(e) (Secretaries of the Interior, Labor, Health and Human Services, and Education "[n]otwithstanding any other provision of law. . . shall have the authority to waive any regulation, policy, or procedure promulgated by [their] department" necessary for the integration of education and related services provided to Indian students); 22 U.S.C. § 7207(a)(3) (President may waive a statutory prohibition on assistance to certain countries "to the degree [he] determines that it is in the national security interest of the United States to do so, or for humanitarian reasons").

*Id.* at 125 n.5.

<sup>145</sup> *Clinton v. City of New York*, 524 U.S. 417, 436 (1998).



the part of the Secretary.<sup>146</sup> This raises the obvious question of why there is such incongruence between the Supreme Court's management of the two Acts. After declaring the Line Item Veto Act unconstitutional, the Court declined to test the constitutionality of the Real ID Act,<sup>147</sup> thereby permitting a violation of the separation of powers.

*B. Comparison to INS v. Chadha*

Similar inconsistency can be seen when comparing the Court's inaction in *Defenders of Wildlife* to its holding in *Immigration and Naturalization Service v. Chadha*.<sup>148</sup> The legislative veto at issue in *Chadha* was, as the Court conceded, a "convenient shortcut."<sup>149</sup> However, while acknowledging that a one House veto was "on its face, an appealing compromise," the Court stated that "it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency."<sup>150</sup> Allowing the Secretary of the Department of Homeland Security to waive "all legal requirements . . . [he] determines necessary to ensure expeditious construction"<sup>151</sup> of border fences and roads clearly has the appeal of swift action. During the period of increasing xenophobia following September 11th, the rapid completion of border reinforcements became desirable to many government officials and American citizens alike.<sup>152</sup> However, as the Court

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<sup>146</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, § 102(c)(1), 119 Stat. 231 (2005).

<sup>147</sup> *Defenders of Wildlife v. Chertoff*, 128 S. Ct. 2962 (2008).

<sup>148</sup> *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (holding one-House veto provision of the Immigration and Nationality Act unconstitutional).

<sup>149</sup> *Id.* at 958.

<sup>150</sup> *Id.* at 958-59.

<sup>151</sup> Emergency Supplemental Appropriations Act § 102(c)(1).

<sup>152</sup> See Jeffrey M. Jones, *Nearly Half of Americans Say Immigration Levels Should Be Decreased*, GALLUP, July 10, 2003, <http://www.gallup.com/poll/8815/Nearly-Half-Americans-Say-Immigration-Levels-Should-Decreased.aspx>.

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noted in *Chadha*, “[t]he choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.”<sup>153</sup> Of course it is a convenient shortcut to waive any and all statutes that would interfere with border reinforcements, most of which are environmental and would require surveys and the possible alteration of construction plans. However, the separation of powers doctrine forbids such an unrestrained grant of power to one individual and, as the Court stated in *Chadha*, “[t]here is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by Congress or by the President.”<sup>154</sup> Simply put, no branch of government may discount the carefully constructed constitutional system of separation of powers and checks and balances in the interest of efficiency.

This tension between expediency and constitutionality is not the only parallel between Section 244(c)(1) of the Immigration and Nationality Act and Section 102(c) of the Real ID Act.<sup>155</sup> Both acts deal with the power to nullify constitutionally valid decisions or statutes.<sup>156</sup> Clearly, the doctrine of checks and balances places great emphasis on the value of internal government regulation.<sup>157</sup> However, this process was carefully laid out in the Constitution and the power to nullify proposed legislation was delegated to the President.<sup>158</sup> This delegation of power “was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be

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<sup>153</sup> *Chadha*, 462 U.S. at 959.

<sup>154</sup> *Id.* (referencing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

<sup>155</sup> Emergency Supplemental Appropriations Act § 102(c)(2).

<sup>156</sup> *See supra* text accompanying notes 19, 109.

<sup>157</sup> *See supra* note 79.

<sup>158</sup> U.S. CONST. art. I, § 7, cl. 2.

most carefully circumscribed.”<sup>159</sup> Because no such veto power was conferred elsewhere, the Court in *Chadha* held that the ability of one House of Congress to void a constitutionally valid decision of the Executive Branch was unconstitutional.<sup>160</sup> Similarly, the ability of one Executive Branch administrative agency officer to waive any and all statutes he deems necessary far exceeds the Framers’ precisely carved out veto provision.<sup>161</sup> The current system is far from perfect, but as the Court aptly stated in *Chadha*, “[w]ith all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.”<sup>162</sup>

It is when these explicit constitutional procedures begin to erode in the name of convenience that the entire system of government is in danger. While there exists a natural push and pull between the three branches, it is expected that when legislation extends beyond constitutional boundaries, the Court will step in and perform its function as a legislative check.<sup>163</sup> These decisions will not always be straightforward. As the Court stated in *Chadha*, “[q]uestions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.”<sup>164</sup> However, instead of performing its constitutionally appointed duty, the Court chose to avoid the issue in *Defenders of Wildlife*. Section 102(c) of the Real ID Act should have been evaluated by the Court and declared unconstitutional for violating the separation of powers doctrine, specifically its nondelegation doctrine.

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<sup>159</sup> *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 947 (1983).

<sup>160</sup> *Id.* at 959.

<sup>161</sup> See U.S. CONST. art. I, § 7, cl. 2.

<sup>162</sup> *Chadha*, 462 U.S. at 959.

<sup>163</sup> See *supra* notes 77–79 and accompanying text.

<sup>164</sup> *Chadha*, 462 U.S. at 944.

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*C. The Intelligible Principle Requirement of the  
Nondelegation Doctrine*

Recognizing that, in an ever-changing, complicated society, circumstances would necessarily arise in which congressional delegation of authority was warranted, the Supreme Court set forth strict guidelines for such delegation in *J.W. Hampton Jr., & Co. v. United States*.<sup>165</sup> Under the nondelegation doctrine, Congress may enact legislation delegating some of its rulemaking authority to administrative agencies as long as the legislation sets forth an “intelligible principle” to which the agency must adhere.<sup>166</sup> Because Congress had provided explicit guidelines in the Tariff Act of 1922,<sup>167</sup> its delegation of tariff adjustment duties to the President was held constitutional in *Hampton*.<sup>168</sup> Specifically, the President was only permitted to adjust tariffs when certain requirements were met.<sup>169</sup> Congress also provided a detailed list of factors for the President to consider in making his determination.<sup>170</sup> Investigations were

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<sup>165</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

<sup>166</sup> *Id.* at 409.

<sup>167</sup> Tariff Act of Sept. 21, 1922, ch. 356, § 315, 42 Stat. 941–943 (repealed 1930).

<sup>168</sup> *J.W. Hampton*, 276 U.S. 394.

<sup>169</sup> When the difference between the domestic production cost of a product and the production cost of the product in a competing foreign country was not equalized by the current tariff, the President was authorized to adjust the tariff in order to achieve equalization. *Id.* at 401.

<sup>170</sup> (c). That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

*Id.* at 401–02 (quoting Tariff Act Sept. 21, 1922, ch. 356, § 315, 42 Stat.

required prior to the tariff adjustments, including public hearings.<sup>171</sup> Further, Congress included restrictions prohibiting the “transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, [or] a change in form of duty” and specified that the adjustments were subject to reversal when the requirements were no longer met.<sup>172</sup> Thus, Congress delegated its power under detailed criteria in the Tariff Act and the Court utilized these standards when setting forth the “intelligible principle” doctrine.<sup>173</sup>

The Court further defined the “intelligible principle” concept in the more recent case, *Mistretta v. United States*, where it stated that in order for a delegation to be constitutionally valid, Congress must “clearly delineat[e] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”<sup>174</sup> The Court again found a constitutional delegation because in delegating authority to the United States Sentencing Commission to promulgate sentencing guidelines under the Sentencing Reform Act of 1984,<sup>175</sup> Congress set forth numerous parameters. Using a formula similar to the Tariff Act, Congress articulated precise requirements for the formation of the sentencing guidelines,<sup>176</sup> provided factors to be considered by the

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941–943 (repealed 1930)).

<sup>171</sup> Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard.

*Id.* at 402.

<sup>172</sup> *Id.*

<sup>173</sup> *See id.* at 409.

<sup>174</sup> *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

<sup>175</sup> Sentencing Reform Act of 1984, 18 U.S.C. § 3551 *et seq.*, 28 U.S.C. § 991–98 (2008).

<sup>176</sup> Congress instructed the Commission that these sentencing ranges must be consistent with pertinent provisions of Title 18 of the United States Code and could not include sentences in excess of the

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Commission,<sup>177</sup> and set forth specific restrictions.<sup>178</sup> Additionally, the Commission was given a list of what the newly formed guidelines were required to include.<sup>179</sup> Because, “in addition to

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statutory maxima. Congress also required that for sentences of imprisonment, “the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.” Moreover, Congress directed the Commission to use current average sentences “as a starting point” for its structuring of the sentencing ranges.

*Mistretta*, 488 U.S. at 374–75 (citing 28 U.S.C. § 994).

<sup>177</sup> To guide the Commission in its formulation of offense categories, Congress directed it to consider seven factors: the grade of the offense; the aggravating and mitigating circumstances of the crime; the nature and degree of the harm caused by the crime; the community view of the gravity of the offense; the public concern generated by the crime; the deterrent effect that a particular sentence may have on others; and the current incidence of the offense. Congress set forth 11 factors for the Commission to consider in establishing categories of defendants. These include the offender’s age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon crime for a livelihood.

*Id.* at 375–76 (citing 28 U.S.C. § 994).

<sup>178</sup> “Congress also prohibited the Commission from considering the ‘race, sex, national origin, creed, and socioeconomic status of offenders,’ and instructed that the guidelines should reflect the ‘general inappropriateness’ of considering certain other factors, such as current unemployment, that might serve as proxies for forbidden factors.” *Id.* at 376 (citing 28 U.S.C. § 994).

<sup>179</sup> Congress mandated that the guidelines include: “(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment; (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment; (C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term; and (D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or

these overarching constraints, Congress provided even more detailed guidance to the Commission,”<sup>180</sup> the Court found that the intelligible principal standard had actually been exceeded and “in actuality [Congress] legislated a full hierarchy of punishment.”<sup>181</sup> Nonetheless, the “intelligible principle” doctrine was reaffirmed and further elucidated by the Court.<sup>182</sup> It is clear from both *Hampton* and *Mistretta* that in order to be constitutional, a congressional delegation must set forth more than a general directive.<sup>183</sup> Rather, it must include definite standards to guide the agency in its decision-making.<sup>184</sup>

The absolute lack of standards in Section 102(c) of the Real ID Act is a glaring violation of the nondelegation doctrine. In fact, it is difficult to compare the Act to *Hampton* and *Mistretta* because there are virtually no guidelines in Section 102(c) on which to base a comparison.<sup>185</sup> Both the Tariff Act and the Sentencing Reform Act began with specific requirements that had to be met in order for the designated authority to act.<sup>186</sup> The only requirement in Section 102(c) is the wholly discretionary opinion of the Secretary that the action is “necessary to ensure expeditious construction of the barriers and roads.”<sup>187</sup> This is hardly the same kind of standard upheld in *Hampton* and *Mistretta*. While the Illegal Immigration Reform and Immigrant Responsibility Act sets forth several factors to be considered in erecting the border fences,<sup>188</sup> the Secretary is not directed to

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consecutively.”

*Id.* at 374 n.8 (citing 28 U.S.C. § 994(a)(1)).

<sup>180</sup> *Id.* at 376.

<sup>181</sup> *Id.* at 377.

<sup>182</sup> *Id.* at 372–77.

<sup>183</sup> *See id.*; *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

<sup>184</sup> *See Mistretta*, 488 U.S. 361; *J.W. Hampton*, 276 U.S. 394.

<sup>185</sup> *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109–13, § 102(c)(1), 119 Stat. 231 (2005).

<sup>186</sup> *See supra* text accompanying notes 145, 154.

<sup>187</sup> Emergency Supplemental Appropriations Act § 102(c)(1).

<sup>188</sup> In general. In carrying out this section, the Secretary of

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consider *any* factors in making his determination of statutory waivers.<sup>189</sup> Thus, while the Secretary may choose to consider the aforementioned factors, the language of the Real ID Act does not require him to.<sup>190</sup> Rather, the only guiding principle is his “sole discretion.”<sup>191</sup> He is simply authorized to “waive all legal requirements.”<sup>192</sup> This absence of any meaningful restriction on the Secretary’s authority is an unprecedented deviation from the “intelligible principle” standard.

The district court’s finding that the specifications of areas of “high illegal entry,” deterring “illegal crossings,” and “necessary to ensure expeditious construction” constitute sufficient guiding principles is not convincing.<sup>193</sup> Imagine a similar directive in *Mistretta*. Surely the Court would not have upheld a delegation to the Sentencing Commission to promulgate sentencing guidelines that the Commission, in its sole discretion, deemed necessary to punish criminals. Likewise, the Tariff Act delegation in *Hampton* would not have passed constitutional muster had it delegated power to the President to adjust any tariffs he deemed necessary in the interest of equality between domestic and foreign production or, even more akin to *Defenders of Wildlife v. Chertoff*, allowed the President to waive such tariffs. The holding in *Defenders of Wildlife v. Chertoff* is clearly at odds with both landmark nondelegation cases.

At the same time, Section 102(c) of the Real ID Act bears a striking resemblance to legislation the Court has previously

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Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed.

8 U.S.C.A. § 1103 note (b)(1)(C)(i) (West 2009) (Improvement of Barriers at Border).

<sup>189</sup> See Emergency Supplemental Appropriations Act § 102(c)(1).

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

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

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

<sup>193</sup> See *supra* notes 53–56 and accompanying text.



struck down on nondelegation grounds.<sup>194</sup> In *Panama Refining Co. v. Ryan*, the Court found the congressional delegation under Section 9(c) of the National Industrial Recovery Act of 1933<sup>195</sup> “without constitutional authority.”<sup>196</sup> In an effort to regulate the national oil industry, Section 9(c) delegated power to the President to enforce limits on oil transportation.<sup>197</sup> However, similar to Section 102(c) of the Real ID Act, this delegation lacked a sufficient intelligible principle.<sup>198</sup> The Court noted, “Section 9(c) does not state whether, or in what circumstances or under what conditions, the President is to [act under the given authority] . . . . It establishes no criterion to govern the President’s course . . . [and] does not require any finding by the President as a condition of his action.”<sup>199</sup> Likewise, Section 102(c) of the Real ID Act provides no guide for when the Secretary may or may not exercise his statutory waiver authority. The district court found that the phrase “areas of high illegal entry,” in reference to fencing sites, constituted a

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<sup>194</sup> See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>195</sup> National Industry Recovery Act, Pub. L. No. 73-67, § 9(c), 48 Stat. 195, 200 (1933), *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

<sup>196</sup> *Panama Refining*, 293 U.S. at 433.

<sup>197</sup> (c) The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed \$ 1,000, or imprisonment for not to exceed six months, or both.

National Industry Recovery Act § 9(c).

<sup>198</sup> “As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.” *Panama Refining*, 293 U.S. at 430.

<sup>199</sup> *Id.* at 415.

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sufficient guideline.<sup>200</sup> However, there is no definition for this term anywhere within the Real ID Act.<sup>201</sup> It is mentioned but once in the Illegal Immigration Reform and Immigrant Responsibility Act, without providing even general criteria.<sup>202</sup> The other guideline, what the Secretary deems “necessary,”<sup>203</sup> is even more subjective, open to almost limitless interpretation. The Court’s characterization of Section 9(c) in *Panama Refining Co.* is an all too apt description of Section 102(c) of the Real ID Act.<sup>204</sup> Section 9(c) actually provided more direction by furnishing distinct rules for the President to follow,<sup>205</sup> whereas the Real ID Act relegates decision-making to the Secretary’s sole discretion. Nonetheless, the Court in *Panama Refining Co.* held the delegation unconstitutional because it provided “the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.”<sup>206</sup> This is precisely the type of authority Section 102(c) of the Real ID Act grants to the Secretary of Homeland Security.

*Panama Refining Co.* is not the only example of the Court’s incongruous treatment of *Defenders of Wildlife v. Chertoff*.<sup>207</sup> In *A. L. A. Schechter Poultry Corp. v. United States*, the Court

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<sup>200</sup> *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 128 (D.D.C. 2007).

<sup>201</sup> See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005).

<sup>202</sup> 8 U.S.C.A. § 1103 note (a) (West 2009) (Improvement of Barriers at Border).

<sup>203</sup> Emergency Supplemental Appropriations Act § 102(c)(1).

<sup>204</sup> *Id.*; see also *supra* notes 198–99 and accompanying text.

<sup>205</sup> The President was required to use state laws, regulations, or orders as the benchmark for permitted transportation quantities. National Industry Recovery Act, Pub. L. No. 73-67, § 9(c), 48 Stat. 195, 200 (1933), *invalidated by* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>206</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1934).

<sup>207</sup> See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1988); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

struck down another unconstitutional congressional delegation.<sup>208</sup> The legislation at issue in *Schechter*, Section 3 of the National Industrial Recovery Act,<sup>209</sup> again bore a strong resemblance to Section 102(c) of the Real ID Act. Under Section 3, the President was granted authority to approve industry codes of “fair competition.”<sup>210</sup> “Fair competition” was not defined in the National Industrial Recovery Act,<sup>211</sup> just as “high illegal entry” and “necessary” are not defined in the Real ID Act.<sup>212</sup> Due to

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<sup>208</sup> *A.L.A. Schechter Poultry*, 295 U.S. 495.

<sup>209</sup> National Industry Recovery Act § 3.

<sup>210</sup> *Id.*

(a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: *Provided*, That such code or codes shall not permit monopolies or monopolistic practices: *Provided further*, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

*Id.* § 3(a).

<sup>211</sup> The Court struggled to find a definition, referencing sources such as the common law and the Federal Trade Commission Act. *A.L.A. Schechter Poultry*, 295 U.S. at 531–35.

<sup>212</sup> See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005).

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the ambiguous language, the Court in *Schechter* found that Section 3 supplied “no standards for any trade, industry or activity.”<sup>213</sup> Further, the Court held that it lacked sufficient guidelines “aside from the statement of the general aims of rehabilitation, correction and expansion described in section one.”<sup>214</sup> A “statement of general aims” is precisely what Congress set forth in Section 102(c) of the Real ID Act. The Secretary is directed to use his discretion in furtherance of the broad goals of “deter[ing] illegal crossings”<sup>215</sup> and “ensur[ing] expeditious construction” of barriers.<sup>216</sup> It was exactly this sort of directive in *Schechter* that led the Court to hold, “[i]n view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President . . . is virtually unfettered” and, therefore, “an unconstitutional delegation of legislative power.”<sup>217</sup> This begs the obvious question of why the Court did not come to the same conclusion in *Defenders of Wildlife v. Chertoff*. The Secretary’s limitless statutory waiver authority is a clear violation of the nondelegation doctrine. Given the Court’s intelligible principle jurisprudence, it is clear that the congressional delegation in Section 102(c) of the Real ID Act is unconstitutional.

## IV. DETRIMENTAL RESULTS OF THE SUPREME COURT’S INACTION

*A. Environmental Effects*

The Secretary’s vast power is only exacerbated by the drastically limited options for review provided by the Real ID Act.<sup>218</sup> Given the narrow restrictions placed on judicial

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<sup>213</sup> *A.L.A. Schechter Poultry*, 295 U.S. at 541.

<sup>214</sup> *Id.*

<sup>215</sup> 8 U.S.C.A. § 1103 note (a) (West 2009) (Improvement of Barriers at Border).

<sup>216</sup> *Id.* § 1103 note (c)(1).

<sup>217</sup> *A.L.A. Schechter Poultry*, 295 U.S. at 541–42.

<sup>218</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, § 102(c)(2), 119 Stat. 231 (2005).

intervention,<sup>219</sup> the Court's denial of certiorari was especially troublesome. Unfortunately, the Court's inaction will likely have a lasting effect on the environment. Defenders of Wildlife warned that construction of the border fence in the SPRNCA would "fragment[] critical corridors for wildlife, including jaguars, black bear . . . and many other species."<sup>220</sup> This presents an especially dire situation for the endangered jaguars whose long-term survival is dependent upon their ability to roam over a large area.<sup>221</sup> In addition, the fence would block "numerous desert washes feeding the San Pedro River and floodplain, resulting in erosion and sedimentation into the river, which provides habitat for hundreds of breeding, migratory, and wintering bird species, as well as more than 80 species of mammals."<sup>222</sup>

Further, the Bureau of Land Management, whose initial Environmental Assessment (EA) found "no significant environmental impact,"<sup>223</sup> subsequently issued a supplemental memorandum following a visit to the fence site.<sup>224</sup> The memo expressed serious concerns about floods resulting from debris build-up on the fence.<sup>225</sup> It continued, "[t]he timing and intensity of seasonal flood flows in the San Pedro River are essential for maintaining riparian function as well as recharging the alluvial aquifer. Regardless of the maintenance commitments by Border Patrol, the proposed/existing fence could inadvertently act as a flood control structure altering natural flood characteristics."<sup>226</sup>

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<sup>219</sup> See *supra* text accompanying note 19.

<sup>220</sup> Border Fence Construction, *supra* note 141.

<sup>221</sup> Joe Zentner, *Jaguars on the Fence*, DESERT USA, <http://www.desertusa.com/mag06/dec/jaguars.html>.

<sup>222</sup> Border Fence Construction, *supra* note 141.

<sup>223</sup> *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 121 (D.D.C. 2007).

<sup>224</sup> Memorandum from the Bureau of Land Management, BLM EA #AZ-420-2007-051 Supplement (Oct. 4, 2007), *available at* [http://www.biologicaldiversity.org/programs/public\\_lands/rivers/san\\_pedro\\_river/pdfs/blm-foia-resp-040808-BLM-concerns-100407.pdf](http://www.biologicaldiversity.org/programs/public_lands/rivers/san_pedro_river/pdfs/blm-foia-resp-040808-BLM-concerns-100407.pdf).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

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Notably, the supplemental memo was issued several weeks prior to Chertoff's waiver.<sup>227</sup> Chertoff only cited to the initial EA's finding of "no significant environmental impact" in support of his waiver decision.<sup>228</sup>

Unfortunately, the memo proved to be an accurate predictor. In July of 2008, the combination of heavy rains and border fencing in southwestern Arizona resulted in severe flooding at the Organ Pipe Cactus National Monument.<sup>229</sup> According to news reports, the flooding was caused by "debris and water backup [at the fence] during a . . . storm."<sup>230</sup> Just as many fence opponents feared,

[r]apidly moving runoff in washes dislodged or eroded large chunks of concrete foundations, and debris stacking up against the fence itself created barriers or dams redirecting the water, creating gullies and causing even more erosion . . . . It created backwater pools up to seven feet deep and lateral flows several hundred feet wide that moved out of the washes, eroding some areas along patrol roads. The waters even scoured some fence and vehicle barrier foundations.<sup>231</sup>

Despite these seemingly prophetic events, fence construction at the SPRNCA continued. Unlike Organ Pipe Cactus National Monument, the plans for SPRNCA include movable barriers in the riverbed that may be removed to minimize affecting water

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<sup>227</sup> Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 60,870 (Oct. 26, 2007).

<sup>228</sup> Press Release, Dep't of Homeland Sec., Department of Homeland Security: Statement Regarding Exercise of Waiver Authority (Oct. 2007), available at [http://www.biologicaldiversity.org/programs/public\\_lands/rivers/san\\_pedro\\_river/pdfs/dhs-EXEMPTION-statement-200710.pdf](http://www.biologicaldiversity.org/programs/public_lands/rivers/san_pedro_river/pdfs/dhs-EXEMPTION-statement-200710.pdf).

<sup>229</sup> The flooding occurred at the port of entry at Lukeville, Arizona and Sonoyta Sonora, Mexico. Arthur H. Rotstein, *Border Fence Causing Flooding Trouble*, TUCSON CITIZEN, Aug. 24, 2008, <http://www.tucsoncitizen.com/ss/local/94705.php>.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

flow.<sup>232</sup> However, recognizing the irony of placing removable barriers in an area known for flash floods, one critic stated, “[i]t’s a joke . . . [l]ike they’re going to anticipate when it’s going to flood and they’re going to go out and remove them.”<sup>233</sup> Thus, the SPRNCA remains vulnerable to destruction similar to that experienced at Organ Pipe.<sup>234</sup>

### *B. Political Consequences*

While the environmental effects of the Court’s inaction are potentially devastating, so are the political ramifications if the Court stays this course. The “separation of powers framework was designed to prevent special interests from co-opting the government . . . . [T]hese special interests must convince three different groups with three different constituencies of the correctness of their proposals.”<sup>235</sup> Consequently, the erosion of the separation of powers doctrine by Section 102(c) of the Real ID Act provides special interest groups with the ability to wield extensive influence simply by swaying the judgment of one individual. In *Chadha*, the Court recognized the danger in such a situation, noting that the purpose of congressional power to override a presidential veto is to “preclud[e] final arbitrary action of one person.”<sup>236</sup> However, final arbitrary action is precisely what Chertoff exercised in his waiver of the twenty statutes.<sup>237</sup>

While the direct effects of Section 102(c) are disconcerting,

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<sup>232</sup> Howard Fischer, *BLM: Border Barriers Would Harm San Pedro Area*, EAST VALLEY TRIBUNE, Apr. 27, 2008, <http://www.eastvalleytribune.com/story/114902>.

<sup>233</sup> *Id.* (quoting Sandy Bahr, Sierra Club).

<sup>234</sup> See *supra* text accompanying notes 226, 231.

<sup>235</sup> Michael G. Locklar, *Is the 1996 Line-Item Veto Constitutional?*, 34 HOUS. L. REV. 1161, 1179 (1997).

<sup>236</sup> *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983).

<sup>237</sup> See Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 60,870 (Oct. 26, 2007).

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an even larger potential problem exists if the Court stays the course of inaction while similar unconstitutional legislation is enacted. The danger in violating the separation of powers doctrine and, thus, allowing special interest groups increased power over legislation is embodied in the very title of these groups. Special interests strive to further the goals of specific sects of society, as opposed to the general public.<sup>238</sup> Because these groups vary in size and funding, the more powerful groups tend to be those with the most funding.<sup>239</sup> A system that facilitates the interests of the affluent while ignoring those with less means drastically deviates from the Framers' vision of equal representation and protection from "improvident laws."<sup>240</sup>

However, well-funded special interests are not the only danger associated with the deterioration of the separation of powers doctrine. Political parties also represent different sects of society, at times greatly at odds with one another. Upon its first introduction, the Real ID Act was passed in the House of Representatives with ninety-six percent of Republicans voting for it and seventy-eight percent of Democrats voting against it.<sup>241</sup>

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<sup>238</sup> Some well known special interest groups include the National Association for the Advancement of Colored People (NAACP), Anti-Defamation League, and Gay and Lesbian Advocates and Defenders (GLAD). Political Advocacy Groups, A Directory of United States Lobbyists, <http://www.vancouver.wsu.edu/fac/kfountain/alpha.html> (last visited Sept. 28, 2009).

<sup>239</sup> A Fortune Magazine survey confirmed "the more money a group spent on its plain old lobbying efforts in Washington, the more influence it wielded." Jeffrey H. Birnbaum, *Follow the Money. Hard Money. Soft Money. Lobbying Money. Which Buys the Most Influence in Washington? FORTUNE's Power 25 Survey Attempts an Answer and Ranks the Top Lobbying Groups*, FORTUNE, Dec. 6, 1999. According to Fortune's Power 25 survey, the American Association of Retired Persons (AARP) was the most powerful lobbying group, while the National Rifle Association was tied for second place. *Id.*

<sup>240</sup> *Chadha*, 462 U.S. at 951.

<sup>241</sup> Brian Murphy, *The Real ID Act of 2005: Tightening the Burden on Asylum Seekers, Federal Standards for Driver's Licenses, and Patching a Hole in a Border Fence at the Cost of Other Legislation*, 19 GEO. IMMIGR. L.J. 191, 191 (2004) (citations omitted). The bill was not passed due to opposition in the Senate. See *supra* note 2 and accompanying text.



This disparity illustrates the profound divide between the two political parties. It also serves as a warning against granting sweeping authority to one individual. Despite the expected uneven distribution of representatives in Congress, the presence of both parties encourages dialogue and debate regarding important legislative matters. In stark contrast, the delegation of broad authority to one individual requires no debate. Legislation, such as Section 102(c) of the Real ID Act, leaves important legislative matters to the discretion of one individual and, consequently, the unfettered will of one political party. Ironically, the Court's negligence in addressing this violation of separation of powers means that the solution will likely come from exertion of political party power.

#### V. A CONGRESSIONAL SOLUTION TO THE COURT'S FAILURE AS A LEGISLATIVE CHECK

Fortunately, some legislators are aware of the unconstitutionality of Section 102(c).<sup>242</sup> As illustrated by the original House vote in 2005, the majority of those legislators are Democrats.<sup>243</sup> In fact, in June of 2007 U.S. Rep. Raul Grijalva, D-Ariz., introduced legislation that would have repealed the Secretary's waiver authority granted under the Real ID Act.<sup>244</sup> The Borderlands Conservation and Security Act<sup>245</sup> not only provided for the outright repeal of Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, but also required the Secretary to:

develop a border protection strategy that supports the border security needs of the United States in a manner that best protects—(A) units of the National Park System; (B) National Forest System land; (C) land under the

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<sup>242</sup> Forty-eight U.S. Representatives, all of whom were Democrats, co-sponsored the Borderlands Conservation and Security Act that, if passed, would have repealed Section 102(c) of the Real ID Act. Borderlands Conservation and Security Act of 2007, H.R. 2593, 110th Cong. (2007).

<sup>243</sup> See *supra* text accompanying note 241.

<sup>244</sup> H.R. 2593.

<sup>245</sup> *Id.*

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jurisdiction of the Bureau of Land Management; (D) land under the jurisdiction of the United States Fish and Wildlife Service; and (E) other relevant land under the jurisdiction of the Department of the Interior or the Department of Agriculture.<sup>246</sup>

U.S. Rep. Earl Blumenauer, a fellow Democrat, expressed support for the bill, stating “[i]t is unprecedented that a single person can be above the law without any judicial appeal or remedy . . . . And it is absurd to claim that he must waive the Safe Drinking Water Act and Clean Air Act, to name a few, in order to build this border fence.”<sup>247</sup> Unfortunately, the bill stalled in committee shortly after its introduction.<sup>248</sup> As a result it was “cleared from the books” upon termination of the 110th congressional session.<sup>249</sup> There is still hope that the Democratic victory in the recent election<sup>250</sup> may revive the bill or lead to similar legislation.<sup>251</sup> This corrective legislative action is necessary due to the Court’s failure to perform its duty as a legislative check. While such congressional action would correct

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<sup>246</sup> *Id.* § 4(a)(1). The Secretary is directed to develop the protection plan in cooperation with the Secretary of the Interior and the Secretary of Agriculture. *Id.*

<sup>247</sup> David McLemore, *Fight Over Border Fence Environmental Waivers Could Reach Supreme Court*, DALLAS MORNING NEWS, Apr. 15, 2008, (quoting U.S. Rep. Earl Blumenauer, D-Ore.).

<sup>248</sup> The Bill was referred to the Committee on Homeland Security, Committee on Natural Resources, and Committee on Agriculture on June 6, 2007. H.R. 2593.

<sup>249</sup> GovTrack, H.R. 2593: Borderlands Conservation and Security Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2593> (last visited Sept. 28, 2009).

<sup>250</sup> The Democratic Party won majority control of both Houses of Congress in 2008. *House of Representatives Big Board Election Results 2008*, N.Y. TIMES, Dec. 9, 2008, <http://elections.nytimes.com/2008/results/house/votes.html>; *Senate Big Board Election Results 2008*, N.Y. TIMES, Dec. 9, 2008, <http://elections.nytimes.com/2008/results/senate/votes.html>.

<sup>251</sup> Legislation has already been introduced in the House and Senate that would repeal Title II of the Real ID Act, the section requiring national ID cards. REAL ID Repeal and Identification Security Enhancement Act of 2009, H.R. 3471, 111th Cong. (2009); Providing for Additional Security in States’ Identification Act of 2009, S. 1261, 111th Cong. (2009).

the separation of powers violation, it is likely too late to mitigate the damage to border lands and wildlife. The 670 miles of border fence originally slated for December 31, 2008 completion<sup>252</sup> are now nearly finished.<sup>253</sup> Additionally, Rep. Grijalva admits that the poor state of the economy<sup>254</sup> means the Act is no longer a congressional priority.<sup>255</sup> Unfortunately, Section 102(c) of the Real ID Act may now be relegated to serving as a warning beacon for future legislators.

If Congress recognizes its prior error, it may be more cautious before enacting future legislation that threatens the separation of powers doctrine. As Professor Jonathan Turley, a constitutional law scholar at George Washington University explained, “there is no evidence Congress considered the implications of giving Homeland Security such broad waiver power.”<sup>256</sup> As Congress now realizes the consequences of granting such sweeping authority, it may be more diligent in analyzing the effects of future delegations. The full environmental cost of this lesson remains to be seen, but its

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<sup>252</sup> See *supra* note 22 and accompanying text.

<sup>253</sup> See Department of Homeland Security, Southwest Border Fence Construction Status Map, [http://www.cbp.gov/linkhandler/cgov/newsroom/highlights/fence\\_map.ctt/fence\\_map.pdf](http://www.cbp.gov/linkhandler/cgov/newsroom/highlights/fence_map.ctt/fence_map.pdf) (last visited Sept. 29, 2009).

<sup>254</sup> See Edmund L. Andrews, *Fed Chief Defends Steps Taken to Contain Crisis*, N.Y. TIMES, Feb. 18, 2009.

<sup>255</sup> “There’s a shift in priorities now with the economy . . . Throwing \$450 million at a fence pales in comparison to fixing our economy.” Melissa Del Bosque, *Back to the Wall*, TEXAS OBSERVER, Feb. 6, 2009 (quoting U.S. Rep. Raul Grijalva).

<sup>256</sup> McLemore, *supra* note 247 (quoting Prof. Jonathan Turley, George Washington University). Professor Turley:

is a nationally recognized legal scholar who has written extensively in areas ranging from constitutional law to legal theory to tort law . . . . He has served as a consultant on homeland security and constitutional issues, and is a frequent witness before the House and Senate on constitutional and statutory issues as well as tort reform legislation.

George Washington University Law School, Jonathan Turley, <http://www.law.gwu.edu/Faculty/profile.aspx?id=1738> (last visited Sept. 30, 2009).

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significance should not be underestimated.<sup>257</sup> As one Defender's of Wildlife representative stated, "[w]hen you disregard environmental laws, it leads to real adverse impacts . . . . It's not just an academic argument."<sup>258</sup>

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<sup>257</sup> See *supra* text accompanying notes 226, 231.

<sup>258</sup> Del Bosque, *supra* note 255 (quoting Defenders of Wildlife federal lands associate Noah Kahn).