

WAIVING GOOD-BYE TO ENVIRONMENTAL LAWS ALONG THE ARIZONA BORDERLANDS

*Defenders of Wildlife v. Chertoff*¹

I. INTRODUCTION

The Arizona borderlands contain some of the most beautiful and unique landscapes in the United States. The Sky Island Ecosystem consists of green lush mountains surrounded by an ocean of desert habitat. The contrast of these forested mountain areas against the open arid desert valleys supports a unique ecosystem of plants and wildlife, from the jaguar to the organ pipe cactus.² This southern border has been described as “a great biological unity, with a meat cleaver of laws shredding it and cutting it in half.”³

In the early 1990s, efforts to control undocumented immigration shifted from populated border areas such as El Paso, Texas to the remote borderlands of Arizona.⁴ The shift resulted in significant degradation of the diverse natural habitats of many plants and wildlife. These areas are now further threatened by the border fence construction and the broad waiver of environmental laws that once protected these lands from destruction.

When the Secretary of the Homeland Security waived numerous environmental laws along the southern borderlands in October of 2007, the Defenders of Wildlife and the Sierra Club filed suit against various government agencies and officials.⁵ The Plaintiffs attempted to enjoin the border fence construction and require compliance with waived

¹ 527 F.Supp.2d 119 (D.D.C. 2007).

² DEFENDERS OF WILDLIFE, ON THE LINE: THE IMPACTS OF IMMIGRATION POLICY ON WILDLIFE AND HABITAT IN THE ARIZONA BORDERLANDS 7 (2006).
http://www.defenders.org/resources/publications/programs_and_policy/habitat_conservation/federal_lands/on_the_line_report.pdf [hereinafter On the Line]

³ *Audio Internet Series: Charles Bowden, The Undocumented War: A Marketplace Special. Part V* (2005), http://marketplace.publicradio.org/features/undocumented_war.

⁴ On the Line, *supra* note 2, at 6.

⁵ Amended Complaint at 5, *Defenders of Wildlife v. Chertoff*, 527 F.Supp.2d 119 (D.D.C. 2007) (No. 07-1801).

environmental laws.⁶ The U.S. District Court for the District of Columbia found in favor of the government agencies and officials in a decision that creates severe environmental consequences and deep constitutional concerns.⁷

II. FACTS AND HOLDING

In 2006, the Secure Fences Act authorized the Department of Homeland Security (“DHS”) to build a double-layer wall along approximately 700 miles of the U.S.-Mexico border to discourage illegal crossing.⁸ A long section of the wall crosses into federally protected lands, including the San Pedro Riparian National Conservation Area (“San Pedro NCA”).⁹ The San Pedro NCA, located in southern Arizona, is a biologically diverse area containing one of the last undammed, free-flowing rivers in the United States.¹⁰

On August 10, 2007, the Army Corps of Engineers (“Corps”) submitted a right-of-way application on behalf of DHS to build fencing and roads along the San Pedro NCA’s southern boundary.¹¹ The Bureau of Land Management’s (“BLM”) environmental assessment decision found that the fencing would not cause significant environmental impact and authorized construction along the southern boundary of the San Pedro NCA,¹² which began on October 3, 2007.¹³

The plaintiffs, Defenders of Wildlife and the Sierra Club, are environmental organizations dedicated to protecting wild animals and

⁶ *Id.*

⁷ *Defenders of Wildlife v. Chertoff*, 527 F.Supp.2d 119, 121 (D.D.C. 2007).

⁸ Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638,2638-39.

⁹ Amended Complaint at 1, *Defenders of Wildlife v. Chertoff*, 527 F.Supp.2d 119 (D.D.C. 2007) (No. 07-1801).

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² *Chertoff*, 527 F.Supp.2d at 121. However, for 1,490 feet within the river and its floodplain temporary vehicle barriers would be installed and for 275 feet of dray washer along the NCA boundary permanent vehicle barriers would be installed. Amended Complaint at 5-6, *Defenders of Wildlife v. Chertoff*, 527 F.Supp.2d 119 (D.D.C. 2007) (No. 07-1801).

¹³ Amended Complaint at 7, *Defenders of Wildlife v. Chertoff*, 527 F.Supp.2d 119 (D.D.C. 2007) (No. 07-1801)..

plants in their natural communities.¹⁴ The plaintiffs filed suit on October 5, 2007, against the Department of Homeland Security and its secretary, Michael Chertoff, the Bureau of Land Management and its director, Jim Caswell, the Department of the Interior (“DOI”) and its secretary Dirk Kempthorne, and the Army Corps of Engineers and its Commander and Chief of Engineers, Robert L. Van Antwerp.¹⁵ The plaintiffs also moved for a temporary restraining order. The organizations argued that the agencies performed an environmental assessment without public involvement and without properly considering the impacts of the wall and road building activities on the environment.¹⁶ Plaintiffs claimed that the defendants were violating the National Environmental Policy Act of 1969 (“NEPA”), the Arizona-Idaho Conservation Act, and the Administrative Procedure Act (“APA”).¹⁷

On October 10, 2007, the district court found a substantial likelihood of success of the merits for the plaintiffs and issued the temporary restraining order temporarily enjoining the defendants from any construction in the San Pedro NCA.¹⁸ However, pursuant to the waiver authority granted to him in Section 102(c)(1) of the Real ID Act, the Secretary Chertoff waived nineteen environmental laws in connection with the border wall construction on October 26, 2007.¹⁹ Upon notification of the waiver, the court vacated its temporary restraining order on the same day.²⁰ The plaintiffs amended their complaint to allege that Secretary Chertoff’s waiver authority violated the separation of powers principles in Articles I and II of the Constitution.²¹

The Amended Complaint requested that the court declare the waiver authority granted to the Secretary of DHS²² and the Secretary’s

¹⁴ *Id.* at 2-3.

¹⁵ *Chertoff*, 527 F.Supp.2d at 121, at 121.

¹⁶ *Id.*

¹⁷ Amended Complaint at 1, *Defenders of Wildlife v. Chertoff*, 527 F.Supp.2d 119 (D.D.C. 2007) (No. 07-1801).

¹⁸ *Chertoff*, 527 F.Supp.2d at 121.

¹⁹ *Chertoff*, 527 F.Supp.2d at 121-22..

²⁰ *Chertoff*, 527 F.Supp.2d, at 123.

²¹ *Id.*

²² REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 231 (2005); 8 U.S.C. § 1103 note (2000).

waiver of nineteen laws²³ unconstitutional and requested that the court set aside the waiver authority and the Secretary's exercise of that waiver in connection with the border wall.²⁴ Next, the plaintiffs requested the court to declare that the defendants have violated NEPA, the Arizona-Idaho Conservation Act of 1988, and the APA, and to order the defendants to prepare a regional and comprehensive Environmental Impact Statement ("EIS") assessing and disclosing the environmental impacts caused by the construction of the border wall and consider reasonable alternatives that comply with NEPA.²⁵

The plaintiffs then requested that the court set aside the right-of-way granted to the Corps by the BLM on August 31, 2007, and require defendants to remediate any environmental effects of the border wall and road construction to come into compliance with all applicable laws.²⁶ Lastly, the plaintiffs requested that the court enjoin defendants from constructing any border wall until they come into compliance with all applicable environmental laws.²⁷ The defendants moved to dismiss the amended complaint under Rules 12(b)(1) and (6), arguing that the waiver provision is constitutionally permissible under the Supreme Court's "nondelegation" cases.²⁸

At trial, the court considered one issue: whether the DHS Secretary's waiver of nineteen laws violated the separation of powers.²⁹ The court distinguished the waiver clause from the power to partially repeal or amend laws at issue in *Clinton v. City of New York*³⁰ on the ground that the waiver clause at issue did not alter the text of any statute.³¹ The court stated that the laws waived by Secretary Chertoff still had the same legal force as when they were passed.³² However, they would now

²³ 72 Fed. Reg. 60,870 (Oct. 26, 2007).

²⁴ Amended Complaint at 14, *Defenders of Wildlife v. Chertoff*, 527 F.Supp.2d 119 (D.D.C. 2007) (No. 07-1801).

²⁵ *Id.* at 14.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Defenders of Wildlife v. Chertoff*, 527 F.Supp.2d 119, 123 (D.D.C. 2007)

²⁹ *Id.*

³⁰ *Clinton v. City of N.Y.*, 524 U.S. 417 (1998).

³¹ *Chertoff*, 527 F.Supp.2d 119 at 124.

³² *Id.*

not apply to the extent they used to with respect to the border wall construction.³³

The court also stated that the executive branch has traditionally been allowed a larger degree of discretion in matters relating to foreign affairs and immigration, and the REAL ID Act's waiver provisions relates to such issues.³⁴ Therefore, the court held that a congressional delegation of power comports with the separation of powers when the lawmakers include an "intelligible principle" within a statute that narrows the exercise of legislative power delegated to the Executive Branch to a level "not lower or higher than necessary."³⁵

III. LEGAL BACKGROUND

A. *The Non-Delegation Doctrine*

Separation of powers and the non-delegation doctrine have guided the Supreme Court since at least 1892, when it concluded in *Field v. Clark* that Congress could not delegate legislative authority to the president.³⁶ *Field* considered whether the Tariff Act of 1890,³⁷ conferring authority on the president to levy duties on items imported from other countries, was an unconstitutional delegation of legislative power.³⁸ The Court concluded that to violate the non-delegation doctrine, a delegated power must be legislative in nature.³⁹ The court found that the President's duties under

³³ *Id.*

³⁴ *Id.* at 12.

³⁵ *Id.* at 127 (citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474, 476 (2001)).

³⁶ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

³⁷ *Id.* at 662-63. The statute provided that "[s]o often as the President shall be satisfied that the government of any country...imposes duties or other exactions upon the agricultural or other products of the United States...he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of sugars, molasses, coffee, tea and hides...and during such suspension duties shall be levied, collected, and paid..." *Id.* at 680.

³⁸ *Id.*

³⁹ *Id.* at 693-94. The court stated that legislative power was a policy making function. *Id.* at 693.

the Act were fact finding, rather than legislative, and upheld the statute.⁴⁰ Additionally, the Court noted that the Act set forth specific procedures that kept the President from exercising his own discretion.⁴¹

During the New Deal, the Court took a different approach to strike down statutory provisions for violating the non-delegation doctrine. In *Panama Refining v. Ryan*,⁴² the Court held that a section of the National Industrial Recovery Act ("NIRA") was unconstitutional for delegating broad authority to the President without an "intelligible principle" to guide his decisions.⁴³ The NIRA authorized the President to decide whether interstate shipments of petroleum products were excessive, to prohibit such shipments, and to impose criminal penalties.⁴⁴ The Court found that Congress had delegated legislative powers by failing to delineate policy or standard for the President to make his findings.⁴⁵

Similarly, in *A.L.A. Schechter Poultry Co. v. United States*, the Court struck down another NIRA section for granting the President discretion over trade group and industry conditions.⁴⁶ When analyzing the statute, the Court again found that the authority Congress had delegated to the President gave him the power to enact law, contrary to the separation of powers doctrine.⁴⁷

After 1935, the Supreme Court again changed its position by routinely upholding broad congressional delegations of authority.⁴⁸ *Mistretta v. United States* served as a prime example of the continued loosening of the non-delegation doctrine.⁴⁹ Congress created an independent agency, the United States Sentencing Commission, to create federal sentencing guidelines.⁵⁰ John Mistretta, sentenced to 18 months in prison and three years' probation for selling cocaine, alleged that the

⁴⁰ *Id.* at 693-94.

⁴¹ *Id.*

⁴² *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

⁴³ *Id.* at 429-30.

⁴⁴ *Id.* at 406 (citing 15 U.S.C. § 709(c) (1933)).

⁴⁵ *Id.* at 418-19, 430.

⁴⁶ *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 541-42 (1935).

⁴⁷ *Id.*

⁴⁸ See Daniel J. Hulsebosch, *The New Deal Court: Emergence of a New Reason*, 90 COLUM. L. REV. 1973, 1979 n.31 (1990).

⁴⁹ *Mistretta v. U.S.*, 488 U.S. 361 (1989).

⁵⁰ *Id.* at 367-68.

Sentencing Commission exercised unconstitutional legislative authority.⁵¹ The Court noted that Congress' need for administrative support called for flexibility in non-delegation jurisprudence.⁵² It upheld the delegation on the ground that when Congress enunciates an "intelligible principle," separation of powers principles may bend to allow Congress necessary flexibility in its duties.⁵³ Again, the Supreme Court said that Congress must enunciate "intelligible principles" to guide the administrative agencies that carry out its policies.⁵⁴

The two basic principles of the separation of powers cases are that the branches of government must maintain a degree of separation and the branches should be allowed to depend on one another to allow a workable government.⁵⁵ However, courts drew differing lines in each case.⁵⁶ The deciding factor in each case depended on whether the court viewed the separation of powers doctrine formally, such as in the New Deal cases, or functionally, such as in *Mistretta*.⁵⁷

B. The Presentment Clause

In *Clinton*, two groups of plaintiffs filed suit against the President for exercising his cancellation powers under the Line Item Veto Act.⁵⁸ A district court struck down the Act, and the Supreme Court affirmed.⁵⁹ Rather than applying the non-delegation doctrine, the Supreme Court found that the President's cancellation power under the Line Item Veto Act violated the Presentment Clause by avoiding constitutional procedures for repealing statutes.⁶⁰ The Court held that even if part of the canceled

⁵¹ *Id.* at 371

⁵² *Id.* at 372.

⁵³ *Id.*

⁵⁴ *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472-76 (2001).

⁵⁵ Thomas Charles Woodworth, *Meet the Presentment Clause: Clinton v. New York*, 60 L.A. L. REV. 349, 366 (Fall 1999).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Clinton v. City of New York*, 524 U.S. 417, 449 (1998).

⁵⁹ *City of New York v. Clinton*, 985 F.Supp. 168, 178-79 (D.D.C.), *aff'd* 524 U.S. 417 (1998).

⁶⁰ *Clinton*, 524 U.S. at 439.

section retained some legal effect, the cancellation was the functional equivalent of a partial repeal.⁶¹

The *Clinton* court distinguished the President's cancellation power under the Line Item Veto Act from the President's power to suspend import duties in *Field*. First, the court noted that the suspension of import duties was contingent on a condition that did not exist at the time the Tariff Act was passed, while the President's power of cancellation under the Line Item Veto Act was based on the same conditions evaluated by Congress when it passed the statute. The next distinction was the higher amount of discretion allowed to the President under the Line Item Veto Act, compared with the standard that an import duty be "reciprocally unequal and unreasonable" before the President could suspend an exemption in *Field*. Lastly, the court noted that the President was acting pursuant to policies embodied in the statute when duties were suspended under *Field*, while, under the Line Item Veto Act, the President was acting on his own policy judgments.

C. Post-9/11 Immigration Reform

After the terrorist attacks of September 11, 2001, Congress created the National Commission of Terrorist Attacks Upon the United States ("9/11 Commission").⁶² The 9/11 Commission prepared a report detailing its findings on the circumstances leading up to the attacks and providing recommendations for Congress to prevent future attacks.⁶³ The Commission report cited immigration as an underlying cause of the United State's vulnerability to terrorist attacks.⁶⁴ The 108th Congress considered two bills to implement the recommendations: H.R. 10, the 9/11

⁶¹ *Id.* at 440.

⁶² NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES xv (2004) <http://govinfo.library.unt.edu/911/report/911Report.pdf> [hereafter 9/11 COMMISSION REPORT].

⁶³ *Id.* at 416.

⁶⁴ *Id.* at 66, 199.

Recommendations and Implementations Act (“9/11 RIA”);⁶⁵ and S.B. 2845, the Intelligence Reform and Terrorism Prevention Act (“IRTPA”).⁶⁶

The IRTPA was drafted by a bipartisan group of senators to gain majority support for the bill. The bill received ninety-six votes in its favor. However, the 9/11 RIA was drafted by only Republicans and included many controversial immigration provisions. It was not until two months after the House passed 9/11 RIA and the Senate passed IRTPA, that an agreement was reached and the Intelligence Reform and Terrorism Prevention Act of 2004 passed both houses and was signed into law by the President.⁶⁷ The Intelligence Reform and Terrorism Prevention Act of 2004 was stripped of 9/11 RIA’s immigration provisions, only on the agreement that the Chairman of the Judiciary Committee, James Sensenbrenner, could include the immigration in the first must-pass bill in the 109th Congress.⁶⁸

Representative Sensenbrenner introduced H.R. 18: The Real ID Act of 2005 on January 26, 2005.⁶⁹ As promised, the immigration provisions excluded from the Intelligence Reform and Terrorism Prevention Act of 2004 had been attached to “must pass” appropriation measures for troops in Iraq and tsunami relief.⁷⁰ A major provision of the act included the waiver of laws to facilitate physical barriers along the United States borders and to improve border infrastructure.⁷¹

The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provided for constructing barriers along the United States borders and allowed the Attorney General to waive specified environmental restrictions to the extent he or she deemed necessary to

⁶⁵ H.R. 10, 108th Cong. (2004).

⁶⁶ S. 2845, 108th Cong. (2004) (enacted).

⁶⁷ Ed Henry & Ted Barret, *House approves intelligence bill: Senate scheduled to vote on reform bill Wednesday*, CNN (Dec. 8, 2004), <http://www.cnn.com/2004/ALLPOLITICS/12/07/intelligence.bill/index.html>.

⁶⁸ Joan Friedland, *REAL ID Act sent to Senate in “must pass” emergency appropriations bill*, <http://www.nilc.org/immspbs/DLs/DL022.htm>

⁶⁹ H.R. 418, 109th Cong. (2005).

⁷⁰ H.R. 1268, 109th Cong. (2005).

⁷¹ *Id.*

guarantee prompt construction of the barriers.⁷² Because barrier construction was delayed due to state coastal laws,⁷³ Congress attempted to avoid a similar situation by adding a provision to the REAL ID Act the Secretary of Homeland Security broad waiver authority.⁷⁴

IV. INSTANT DECISION

A. The Presentment Clause

District Judge Ellen Segal Huwelle decided the case.⁷⁵ She first rejected the Plaintiffs' argument that the waiver authority in the REAL ID Act was unconstitutional under *Clinton v. City of New York*.⁷⁶ The court held that President Clinton had "unilateral power to change the text of duly enacted statutes" so that they no longer had "any legal force or effect," while the REAL ID Act waiver did not alter the text of any statute.⁷⁷

Judge Huwelle stated that the laws waived by Chertoff still had the same legal force as when they were passed.⁷⁸ The effect of Chertoff's waiver was only that the laws would not apply with respect to the border wall construction.⁷⁹ Additionally, if the waiver provision was declared unconstitutional, many other authorizations of executive waivers would suffer the same fate.⁸⁰

The court noted that, while *Clinton* identified three critical differences between itself and *Field*, it did not adopt a test based on those

⁷² Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 302, 110 Stat. 3009-546 (1996) (codified as amended at 8 U.S.C. § 1225(b)(1)(A)(ii)(2005)).

⁷³ MICHAEL JOHN CARCIA ET. AL, OPEN CRS, CRS REPORT FOR CONGRESS, IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF H.R. 418, THE REAL ID ACT OF 2005 [hereinafter CRS Immigration Report] 10, <http://w2.eff.org/Activism/realid/analysis.pdf>.

⁷⁴ *Id.* at 11.

⁷⁵ *Defenders of Wildlife v. Chertoff*, 527 F.Supp.2d 119, 120 (D.D.C. 2007).

⁷⁶ *Id.* at 124; *Clinton v. City of New York*, 524 U.S. 417 (1998).

⁷⁷ *Chertoff*, 527 F.Supp.2d 119 at 123-26 (citing *Clinton*, 524 U.S. at 437).

⁷⁸ *Id.* at 124.

⁷⁹ *Id.*

⁸⁰ *Id.*

factors for determining when a waiver provision is constitutional.⁸¹ The three factors were not applicable to the deciding factor in *Clinton*, because in *Clinton* the veto was the “functional equivalent of repeals of acts of Congress” and in *Field* the suspensions under the tariff act “were not exercises of legislative power.”⁸² Finally, the court stated that the distinction between *Clinton* and *Field* also depended on the fact that the Tariff Act in *Field* was in “the foreign affairs arena,” where the executive branch has a higher degree of discretion.⁸³ The court held that, similarly, the REAL ID Act’s relation to foreign affairs would allow the executive to exercise greater discretion.⁸⁴

B. Separation of Powers

When addressing the Plaintiffs’ separation of powers argument, the court focused on *Mistretta v. U.S.*,⁸⁵ and the considerations the Supreme Court laid down there to determine the propriety of waiver authority.⁸⁶ *Mistretta* held that delegation of power to the executive branch is permissible when Congress “lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.”⁸⁷ Judge Huwelle considered that the statute required the DHS Secretary to determine whether a waiver is “necessary to ensure expeditious construction of the barriers and roads.”⁸⁸ The court also noted that the barriers and roads were to be constructed only in areas of “high illegal entry into the United States.”⁸⁹ When applying these considerations to the waiver provision at issue, the court upheld the policy as “clearly delineated.”⁹⁰

⁸¹ *Id.* at 125 (discussing *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892)).

⁸² *Id.* (quoting *Clinton*, 524 U.S. at 444).

⁸³ *Id.* at 125-26.

⁸⁴ *Id.* at 126.

⁸⁵ *Mistretta v. U.S.*, 488 U.S. 361 (1989).

⁸⁶ *Chertoff*, 527 F.Supp.2d at 127.

⁸⁷ *Id.* (quoting *Mistretta*, 488 U.S. at 372).

⁸⁸ *Id.* (citing 8 U.S.C. § 1103 note (2007)).

⁸⁹ *Id.* (citing 8 U.S.C. § 1103 note (2007)).

⁹⁰ *Id.* (quoting *Mistretta*, 488 U.S. at 372-73.)

Finally, the court addressed the Plaintiffs' argument that the REAL ID Act waiver provision was of a scope "unprecedented in our history," because it allowed an appointed official to waive any law, while other waiver provisions applied to specific laws or provisions of laws.⁹¹ The court noted that the Secretary was authorized to exercise only the authority for the "expeditious completion of the border fences authorized by IIRIRA in areas of high illegal entry."⁹² Thus, the court held that the scope of the waiver authority was sufficiently limited.⁹³

In its conclusion, the court held that it lacked the power to invalidate the waiver provision simply because of "the unlimited number of statutes that could potentially be encompassed by the Secretary's exercise of his waiver power."⁹⁴ Instead, under the nondelegation doctrine, the court found it must determine "whether Congress has laid down an intelligible principle to guide the executive branch, not the scope of the waiver power."⁹⁵ Therefore, the court held that the REAL ID Act's waiver provision constitutionally delegated waiver authority to the DHS Secretary and granted the defendant's Motion to Dismiss.⁹⁶

V. COMMENT

The decision in *Chertoff* allowed ephemeral policy pressures to override solid constitutional considerations. The D.C. District Court overlooked the factors distinguishing the Department of Homeland Security's waiver authority from such authority at issue in earlier decisions. *Chertoff* goes beyond offending environmental concerns to also affect humanitarian, philosophical, and deep-rooted constitutional issues. As the consequences of the decision begin to take shape, *Chertoff* probably will not survive the critical eye of the future.

A. The Presentment Clause versus the Non-delegation Doctrine

⁹¹ *Id.* at 128.

⁹² *Id.* (internal quotes omitted) (quoting *Sierra Club v. Ashcroft*, 2005 U.S. Dist. LEXIS 44244, at *20).

⁹³ *Id.*

⁹⁴ *Id.* at 129.

⁹⁵ *Id.*

⁹⁶ *Id.*

Clinton is the most recent decision analyzing issues similar to *Chertoff*. *Clinton* makes an interesting departure from previous case law by its use of the Presentment Clause, rather than the non-delegation doctrine, to strike down the Line Item Veto Act. Another factor that distinguished *Clinton* from other non-delegation decisions is it that analyzed the issue under circumstances where Congress delegates cancellation authority, rather than legislative authority, to the executive branch.

Chertoff also involved the delegation of cancellation authority, but the court refrained from deciding that under the Presentment Clause. Instead, the court held that Congress had articulated an “intelligible principle” to guide the DHS Secretary’s waiver power.⁹⁷

Clinton’s Presentment Clause rationale rested on the argument that the cancellations at issue were unilateral repeals by the President of statutes at issue.⁹⁸ The defendants argued that the statutory provisions still had a “real, legal budgetary effect,” because there was no textual changes to the law and the statutes were left intact as they were written.⁹⁹ However, the majority concluded that even though the provisions still retained some legal effect, the fact that the provisions were “entirely inoperative as to appellees” rendered them the equivalent of a partial repeal in violation of the Presentment Clause.¹⁰⁰

Chertoff held that the laws waived by the Secretary of Homeland Security retained the “same legal force and effect” as when they were passed, but only “no longer apply to the extent they otherwise would have with respect” to the border fence construction.¹⁰¹ Because the laws still retained some legal effect, the court found that the waiver was not an unconstitutional “partial repeal” of the environmental laws.¹⁰² However, applying the logic of *Clinton*, the laws waived by the Secretary were “entirely inoperative” as to the plaintiffs. Because the environmental laws no longer applied to the land that the plaintiffs had an interest in

⁹⁷ *Id.* at 127 (quoting *Mistretta*, 488 U.S. at 372).

⁹⁸ *Id.* at 124.

⁹⁹ *Clinton v. City of New York*, 524 U.S. 417, 440-41 (1998).

¹⁰⁰ *Id.* at 441.

¹⁰¹ *Id.*

¹⁰² *Id.*

protecting, the waiver could be considered a partial repeal in violation of the Presentment Clause.

Chertoff stated that *Clinton's* discussion of *Field v. Clark* did nothing to support the plaintiffs' argument.¹⁰³ *Clinton* distinguished the cancellation power of the Line Item Veto Act from that in *Field* by noting three key differences.¹⁰⁴ First, the Presidential power to suspend the exemption of import duties in *Field* depended on a condition that did not exist when Congress passed the Tariff Act.¹⁰⁵ Second, the President had limited discretion and could suspend exemptions only if the necessary contingency existed that allowed him to exercise his cancellation power.¹⁰⁶ Lastly, the President's exercise of his cancellation power was pursuant to the policy judgments of Congress, rather than his own policy judgments.¹⁰⁷

When analyzing *Chertoff* under these three factors, the necessary condition in the statute that allows the DHS Secretary to waive laws appears to be his own determination that a waiver is "necessary to ensure expeditious construction of the barriers and roads...to deter illegal crossings in areas of high illegal entry."¹⁰⁸ First, it is impossible to know whether the DHS Secretary's personal determination to waive laws environmental laws affecting the border construction existed at the time Congress passed the REAL ID act. But, the "areas of high illegal entry" that would be subject to *Chertoff's* discretion were clearly ascertainable in 2005 when Congress passed the REAL ID Act.

Additionally, although the DHS Secretary's policy judgments in deciding to waive the laws may have reflected the policy reasons embodied in the REAL ID Act, the conditions necessary for him to make such policy judgments already existed when Congress passed the Act. In his dissent in *Clinton*, Justice Breyer argued that separation of powers principles should be considered "in light of the need for a 'workable government.'"¹⁰⁹ However, here it appears that Congress's delegation of

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 443.

¹⁰⁶ *Id.* at 443-44.

¹⁰⁷ *Id.* at 444.

¹⁰⁸ 8 U.S.C. § 1103 (2000).

¹⁰⁹ *Clinton*, 524 U.S. at 473.

authority was an attempt to avoid making difficult policy decisions, rather than a delegation that was necessary to ensure a workable government.

Even though the necessary conditions for the DHS Secretary's policy decisions existed when the REAL ID Act was passed, *Chertoff* avoided analyzing the Act's waiver provision under *Clinton*'s three factors distinguishing *Field*. Rather, *Chertoff* held that the three differences articulated by *Clinton* were not a three-part test to be used in determining a waiver's constitutionality.¹¹⁰ Instead, the court believed the deciding factor in *Clinton* was that the "cancellations under the Line Item Veto Act were the 'functional equivalent of repeals of Acts of Congress.'"¹¹¹ Since the court had incorrectly held that the waivers were not partial repeals, it found that the DHS Secretary was acting in compliance with the statute in exercising his waiver authority.¹¹²

Even if the court was correct in its determination that the three factors articulated in *Clinton* were not applicable, there is a valid argument that the DHS Secretary's waiver was a partial repeal since it rendered the laws "entirely inoperative" as to the plaintiffs' interests. If a court were to employ the logic of the *Clinton* majority and deem the waivers in *Chertoff* to be partial repeals, this "deciding factor" of *Clinton* would lead to the conclusion that the delegation of legislative authority at issue in *Chertoff* is unconstitutional.

The *Chertoff* court also relies on the arguments that the authority delegated to the executive in the REAL ID Act is permissible due to the Executive Branch's greater discretion in foreign affairs and immigration matters.¹¹³ To support this argument, the court again relies on *Clinton* court's analysis of *Field*.¹¹⁴ *Clinton* distinguished the Line Item Veto Act from the Tariff Act on the ground that the former relates to "the foreign affair arena," where the President has "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."¹¹⁵

¹¹⁰ *Defenders of Wildlife v. Chertoff*, 527 F.Supp.2d 119, 125 (D.D.C. 2007).

¹¹¹ *Id.* at 125 (quoting *Clinton*, 524 U.S. at 444).

¹¹² *Id.* at 125.

¹¹³ *Id.* at 126.

¹¹⁴ *Id.*

¹¹⁵ *Id.* (quoting *Clinton*, 524 U.S. at 445).

First, it is worth noting that the *Clinton* court did not expressly include immigration in its “foreign affair area.”¹¹⁶ It is arguable that the immigration issue cannot be categorized in the same vein as typical foreign affairs, and instead is a domestic issue. Immigration legislation does not involve careful negotiation with other countries that would justify presidential involvement. Rather, immigration legislation is a unilateral decision by the United States to promote solely a domestic agenda.

Additionally, *Chertoff* fails to address the distinction between delegating authority to the President and delegating authority to an unelected member of the executive branch. Both the President and Congress, as elected officials, stand accountable to their constituents for the difficult policy decisions they make. However, the DHS Secretary as an appointed member of the executive branch has no accountability to the people.

Rather than choosing between the Presentment Clause and the non-delegation doctrine, *Chertoff* picked and chose pieces between the two. The court carefully selected parts of *Clinton* and parts of other non-delegation doctrine decisions to construct a messy combination of constitutional doctrine that is unlikely to provide the much-needed guidance for future courts deciding similar issues.

B. Separation of Powers

After deciding that the REAL ID Act was a constitutional delegation of waiver authority to the DHS Secretary, the court did not decide the Plaintiffs’ separation of powers argument. Courts have been reluctant to take on the difficult task on balancing the non-delegation doctrine against separation of powers principles. The majority in *Clinton* made it clear that the decision addressed only the issue concerning the “finely wrought procedure commanded by the Constitution.”¹¹⁷ However, in his concurrence Justice Kennedy argued that the structure of the

¹¹⁶ *Id.* at 125-26 (quoting *Clinton*, 524 U.S. at 445).

¹¹⁷ *Clinton*, 524 U.S. at 447.

Constitution “requires a stability which transcends the convenience of the moment.”¹¹⁸

Justice Kennedy stated that allowing political branches to “reallocate their own authority” threatens the liberties of individual citizens.¹¹⁹ He stated that “[l]iberty is always at stake when one or more of the branches seeks to transgress the separation of powers.”¹²⁰ Most statutes delegating legislative authority do not seek to enhance the power of the branch of government receiving the legislative authority, but Justice Kennedy argued that these are the “undeniable effects.”¹²¹ He finds that such laws “gives the President the sole ability to hurt a group that is a visible target, in order to disfavor the group or to extract further concessions from Congress.”¹²²

There is little doubt that Justice Kennedy would be similarly troubled with the REAL ID Act’s delegation of authority to the DHS Secretary, which compromises the liberty of individuals who no longer have their interests represented in the DHS Secretary’s legislative decisions. As Justice Kennedy says, “[t]he citizen has a vital interest in the regularity of the exercise of governmental power.”¹²³

Some argue that when Congress voluntarily delegates its legislative authority to another branch, the delegation does not threaten separation of powers principles. Justice Kennedy responds by stating that “[a]bdication of responsibility is not part of the constitutional design.” The *Chertoff* court argued that the DHS Secretary is acting as Congress has expressly directed by exercising his waiver authority. Under Justice Kennedy’s theory, the court’s argument becomes irrelevant. Congress’s concession of its own authority and consent to the DHS Secretary’s actions do not satisfy the constitutional constraints envisioned by the Framers.

C. Environmental Consequences

¹¹⁸ *Id.* at 449 (Kennedy, J., concurring).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 450.

¹²¹ *Id.* at 451.

¹²² *Id.*

¹²³ *Id.* at 452.

In the history of Arizona's borderlands, sightings of the jaguar were once a consistent occurrence.¹²⁴ But during the 1970s, the livestock industry almost succeeded in eradicating the species from the state.¹²⁵ It was not until 1996 that two jaguars began to appear around the Arizona borderlands.¹²⁶ Biologists and wildlife experts flocked to the state to search for and study these rare creatures.¹²⁷ Since then it has since been speculated that one breeding pair may be living in remote areas of the Arizona border region.¹²⁸ The reemergence of the animals in the United States is the result of a migratory corridor used by the jaguars to move between the United States and Mexico.¹²⁹ The fencing and road projects are destined to cut off this migration.¹³⁰

The jaguar is not the only species threatened to disappear altogether from the United States. The Sonoran pronghorn, which previously was found throughout southern Arizona and northern Mexico, has been reduced to an estimated twenty-one animals now living in the United States.¹³¹ Due to its limited ability to jump, fences have become an obstacle for the pronghorns.¹³² Along with fences, paved roads have also contributed to the destruction of the pronghorn habitat.¹³³ With the border fence construction now underway, it is speculated that the pronghorn is threatened with extinction.¹³⁴

The conservation of numerous plant and wildlife depends on effective cross-border management between the United States and Mexico.¹³⁵ The construction of the borderland may destroy international

¹²⁴ On the Line, *supra* note 2, at 21.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 18.

¹²⁹ *See id.* at 18-19.

¹³⁰ *Id.*

¹³¹ *Id.* at 17.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 18.

¹³⁵ *Id.* at 7.

ARIZONA BORDERLANDS

efforts and abilities to protect wildlife and habitat.¹³⁶ The damage may be irreparable for some plant and wildlife habitats.¹³⁷

VI. CONCLUSION

The court's decision in *Chertoff* is disappointing in many respects. As an environmental issue, it shows the judiciary's support for the quick construction of a controversial wall that will have devastating effects on some of the United State's most treasured lands. Additionally, the court avoids the difficult task of taking a clear position on an evolving constitutional issue. But lastly, the policy implications of the decision only deepen the divide between the government and the people who live with the consequences its decisions. Kat Rodríguez of the community organization, Derechos Humanos, says "The walls are so awful. On a human level, there is something very traumatic about the way they divide people, divide families. People can't get through. Animals can't get through. They are a symbol of division and failed policies."¹³⁸

TANA M. SANCHEZ

¹³⁶ *Id.* at 7-8.

¹³⁷ *See generally* On the Line, *supra* note 2.

¹³⁸ Sierra Club, Tucson: Border Walls Put People and the Environment At Risk, <http://www.sierraclub.org/comunidades/ingles/tucson.asp>