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S. Hrg. 115–295

FENCING ALONG THE SOUTHWEST BORDER

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

APRIL 4, 2017

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TUESDAY, APRIL 4, 2017

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APPENDIX

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University of Pittsburgh
School of Law

Barco Law Building
3900 Forbes Avenue
Pittsburgh, PA 15260
Office: 412-624-2415
Email: gerald.dickinson@pitt.edu

April 4, 2017

The Honorable Ron Johnson
Chairman
340 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Claire McCaskill
Ranking Member
442 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Johnson and Ranking Member McCaskill:

It is with great pleasure that I submit this written testimony at the request of the Office of the Ranking Member, Senator McCaskill. I am pleased that the Homeland Security and Governmental Affairs Committee is devoting its April 4, 2017 hearing to an examination of efforts to secure the southwest border through the construction of a wall. Further, as a law professor who writes and teaches in the areas of constitutional property and land use, I take great interest in the committee's focus on the legal authorities related to the wall construction along the U.S.-Mexico border.

On March 5, 2017, I penned an op-ed in the Washington Post highlighting the eminent domain conflicts that lie ahead if Congress approves funding for and the Executive Branch proceeds with the construction of a physical wall.[1] I would like to focus your attention on several concerns raised in the op-ed, specifically the application of the Fifth Amendment Takings Clause as well as statutory requirements necessary to acquire the land to build the wall.

The Executive Order ordering the securing of the "southern border of the United States through the immediate construction of a physical wall on the southern border" raises serious questions regarding the use of federal eminent domain powers.[2] Countless private property owners, along with local and state governments and Native American reservations, may be subject to lengthy eminent domain disputes across approximately 1,300 miles of the border. Only about one-third of the land the wall would sit on is owned by the federal government or by Native American tribes, according to the Government Accountability Office. The rest of the border is controlled by states and private property owners, especially along the Texas-Mexico border. A significant portion of the land in Arizona is occupied by the Tohono O'odham Nation reservation extending along 62 miles of the border.

The Takings Clause states that "nor shall private property be taken for public use, without just compensation."[3] This longstanding prohibition against uncompensated takings has been applied over the years to an increasing variety and types of eminent domain takings, such as building highways, bridges, airports and dams to taking private property for purposes of urban renewal

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and economic development. In 2005, the United States Supreme Court held, in *Kelo v. City of New London,* that a local government's exercise of eminent domain power in furtherance of economic development satisfied constitutional "public use" requirement.[4] This ruling was consistent with longstanding precedent giving deference to legislatures over matters of health, safety and general welfare. However, many in the broader public disagreed with the Supreme Court, which led to widespread outrage cutting across gender, racial, party and ideological lines.[5] In response to the ruling, forty-five states amended their eminent domain statutes to restrict or bar economic development takings, while eleven states changed their constitutions to provide greater constitutional protection for property. In fact, the U.S. House of Representatives passed a resolution denouncing the *Kelo* decision by a lopsided margin.[6]

Often times, when the affected litigant in a condemnation challenge is a sympathetic single-parcel homeowner like the one in the *Kelo* saga, as opposed to a commercial developer or owner of undeveloped land, state actors and the general public are more likely to resist or oppose federal takings doctrine where court rulings are perceived to threaten investments in single-family homes. By extension, eminent domain actions by the Executive Branch for purposes of building a wall that affects hundreds, if not thousands, of single-parcel homeowners, as well as ranchers, farmers and Native tribes along the southwest border, risks being perceived as federal overreach and abuse of private property rights on a level potentially exceeding the backlash from *Kelo*. Many single-parcel homeowners – the kind that brought outrage post-*Kelo* – are the kind of affected landowner-litigants that would probably draw intense public attention to the construction of the wall. Researeh also indicates that compensation awards in takings cases often fail to fully compensate owners (even for the fair market value required by the courts, much less their full losses), which will only exacerbate the harm likely to be caused by such a large takings project like the construction of a physical wall along the border.[7]

Indeed, the construction of a physical wall is unlikely to be completed without the exercise of federal eminent domain powers pursuant to the Declaration of Taking Act ("DTA")[8] and the General Condemnation Act ("GCA").[9] While the GCA gives the federal government the general power to exercise eminent domain, the DTA created a procedure to expedite the taking of title and possession of lands to enable the United States to begin construction work before final judgment. This expedited procedure has raised concerns amongst affected landowners as to whether the federal government will adequately negotiate or properly consult with landowners prior to, during or after condemnation proceedings. Congress mandates some level of negotiation between the federal government and the affected landowner of a property interest prior to the institution of eminent domain procedures.[10] The negotiation must be a bona fide effort.[11] Further, a federal court may direct additional negotiations as a condition precedent to condemnation if it finds negotiations inadequate.[12]

The Executive Order also references the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") which gives the Attorney General the authority to purchase or bring condemnation actions to acquire lands in the vicinity of the United States–Mexico border.[13] This federal statute became the focus of litigation in 2007 and 2008 under the Bush Administration when the Attorney General and Secretary of the Department of Homeland Security ("DHS") took just one of many actions to acquire easements or condemn land outright for the construction of fences along the southwest border of Texas pursuant to the Secure Fence

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Act of 2006.[14] While the United States prevailed in condemning some land, the litigation and negotiation process for just one case took years to resolve. It was troublesome during some of these condemnation proceedings that the United States attempted to circumvent compliance with the federal law, which requires the United States to engage in some level of consultation with property owners, local and state governments and Native American tribes prior to the institution of eminent domain procedures.[15] Indeed, the mandatory language of the consultation clause inserted by Congress permits courts to find it proper to require compliance as a condition prior to entry onto the affected land.[16]

While federal courts have held such requirements to be valid, looming in the backdrop of this large-scale land acquisition for a wall is a lesser-known, but powerful and sweeping, authority under Section 102(c)(1) of the IIRIRA as amended by the REAL ID Act of 2005. Under the law, Congress gave the Secretary of DHS the power to waive all legal requirements that the Secretary determines necessary to ensure expeditious construction of barriers along the border.[17] The Secretary may selectively waive rules and regulations in every area of the law beyond the department's specialized expertise without giving any reason for the waiver. More concerning is that Congress also made the waivers unreviewable by federal courts except on constitutional grounds.[18] To put this "big waiver" power into perspective,[19] former Secretary of DHS Michael Chertoff issued five waivers nullifying 30 statutes that governed various rules, regulations and legal requirements along the border. These nullified laws included environmental protections, religious freedom restoration, administrative procedures, and Native American territory. Having given the Secretary authority to waive such requirements, Congress has raised serious constitutional concerns. In other words, the Secretary of DHS has been given, and exercised, such broad discretion that articulates no standard for exercising the authority and the ability to choose among a variety of federal laws to waive, on top of curtailing judicial review.[20]

The Supreme Court has only been asked several times to review the constitutionality of such a broad sweeping waiver power, and it declined to review at the time.[21] In fact, members of the House of Representatives filed an amicus brief in 2009 in support of a petition requesting the Supreme Court to review the waiver powers, stating the law "greatly undermines - and manifests an utter lack of respect for - the many laws that the *amici curiae* (and members of prior Congresses) have drafted, debated and defended."[22] Federal courts of appeals, likewise, have never reviewed such broad delegation of legislative power to the executive branch since they were stripped of such judicial review by Congress.[23] The only precedential rulings to date by federal district courts have held the waiver authority constitutional.[24]

Indeed, if construction of the wall begins and federal condemnation powers are employed to acquire land, we could be facing a constitutional showdown in the next several years. It is important to note that while the waiver authority may allow the DHS to forego negotiation and consultation requirements prior to instituting condemnation proceedings, this does not permit the DHS to waive and effectively circumvent the constitutional requirements of public use and limitations on uncompensated takings under the Fifth Amendment.[25] Thus, waiver of these negotiation and consultation requirements (which, in and of itself, would be a serious and concerning step) would still yield significant litigation along the border on the Takings Clause questions. To date, the DHS has not waived the statutory requirements of negotiation or consultation in condemnation proceedings along the border. However, given the magnitude of the proposed construction of a physical wall along approximately 1,300 miles of borderland, one

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would expect that such power is already being contemplated by the Executive Branch, thus raising the possibility of a constitutional showdown. The combination of federal challenges over "big waiver" authority and federal exercises of eminent domain could trigger decades of court disputes before anything is built, while simultaneously sparking the potential for a backlash similar to the *Kelo* saga.

John F. Kelly, Secretary of DHS, will testify before this committee on April 5, 2017. It is imperative that members also raise questions concerning the use of eminent domain along the border and the extent to which the Secretary will exercise the broad powers authorized by Congress in constructing a physical wall.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Gerald S. Dickinson
Assistant Professor of Law
University of Pittsburgh School of Law

cc: The Honorable Tom Carper
The Honorable Steve Daines
The Honorable Michael Enzi
The Honorable Kamala Harris
The Honorable Margaret Hassan
The Honorable Heidi Heitkamp
The Honorable John Hoeven
The Honorable James Lankford
The Honorable John McCain
The Honorable Rand Paul
The Honorable Gary Peters
The Honorable Robert Portman
The Honorable Jon Tester

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[1] Gerald S. Dickinson, *The biggest problem for Trump's border all isn't the money. It's getting the land,* WASH. POST, March 5, 2017.
[2] Exec. Order No. 13767, 82 FR 8793 (2017).
[3] U.S. Const. amend. V.
[4] Kelo v. City of New London, 545 U.S. 469 (2005).
[5] Ilya Somin, *Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2008).
[6] H.R. Res. 340, 109th Cong. 2005; 151 Cong. Rec. H5592–93 (daily ed. June 29, 2005) (enacted).
[7] Ilya Somin, THE GRASPING HAND: "KELO V. CITY OF NEW LONDON" AND THE LIMITS OF EMINENT DOMAIN, University of Chicago Press (2015).
[8] 40 U.S.C. § 3114.
[9] 40 U.S.C. § 3113.
[10] 8 U.S.C. § 1103(b)(3).
[11] United States v. Certain Interests in Property in County of Cascade, State of Montana, 163 F.Supp. 518, 524 (D.Mont. 1958).
[12] U.S. v. 1.04 Acres of Land, More or Less, 538 F.Supp.2d 995 (S.D. Tex. 2008) (*citing County of Cascade,* 163 F.Supp. 518, 524 (D.Mont.1958)).
[13] 8 U.S.C. § 1103.
[14] U.S. v. 1.04 Acres of Land, More or Less, 538 F.Supp.2d 995 (S.D. Tex. 2008).
[15] Consolidated Appropriations Act, 2008. Pub.L. No. 110–161, § 564, 121 Stat. 1844, 2090–91 (2007).
[16] 8 U.S.C. § 1103 note (Section 102(b)(1)(C)).
[17] The REAL ID Act of 2005 § 102 amended Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and both are codified at 8 U.S.C. § 1103 note.
[18] REAL ID Act § 102(c)(2)(A).
[19] David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver,* 113 COLUM. L. REV. 265 (2013).
[20] 8 U.S.C. § 1103 note (c)(2)(A).
[21] Petition for Writ of Certiorari, Defenders of Wildlife v. Chertoff, 128 S.Ct. 2962 (2008) cert. denied, 128 S. Ct. 2962 (2008); Petition for Writ of Certiorari, County of El Paso v. Chertoff, 129 S. Ct. 2789 (2009) cert. denied 129 S.Ct. 2789 (2009).
[22] Brief of Fourteen Members of the U.S. House of Representatives as Amici Curiae in Support of Petitioners 128 S. Ct. 2962, (No. 07-1180) 2008 WL 1803435 (U.S.) *Amici* were House Committee Chairpersons, Members of the Committee on Homeland Security, and Members representing districts in states that border Mexico. They were Homeland Security Committee Chairman Bennie G. Thompson, Energy & Commerce Committee Chairman John D. Dingell, Transportation & Infrastructure Committee Chairman James L. Oberstar, Education and Labor Committee Chairman George Miller, Rules Committee Chairwoman Louise Slaughter, Veteran Affairs Chairman Bob Filner, Intelligence Committee Chairman Silvestre Reyes, Congressman Solomon Ortiz of Texas, Congressman Sam Farr of California, Congresswoman Sheila Jackson-Lee of California, Congresswoman Susan A. Davis of California, Congresswoman Hilda Solis of California, Congressman Raul M. Grijalva of Arizona, and Congresswoman Yvette D. Clarke of New York.
[23] 8 U.S.C. § 1103 note (c)(2)(A).
[24] Defenders of Wildlife v. Chertoff, 527 F. Supp. 119 (D.D.C. 2007) (finding waiver "valid delegation of authority" and thus constitutional); Save Our Heritage Org. v. Gonzales, 533 F. Supp. 2d 58, 63 (D.D.C. 2008) (holding "the Secretary's waiver authority is not an impermissible delegation of power to the Executive Branch and . . . is constitutional")
[25] Williams v. Rhodes, 393 U.S. 23, 29 (1968) (noting the powers of "Congress or the States...to legislate in certain areas ... are always subject to the limitations that they may not be exercised in a way that violates other various provisions of the Constitution.").

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