Congressional Research Service
Informing the legislative debate since 1914

U.S. Senate Committee on Homeland Security & Governmental Affairs,
Hearing on "Securing the Border: Fencing, Infrastructure, and Technology Force Multipliers"
May 13, 2015

Michael John Garcia
Legislative Attorney
Congressional Research Service

Chairman Johnson, Ranking Member Carper, and Members of the Committee:

My name is Michael Garcia, and I am a legislative attorney in the American Law Division of the Congressional Research Service. I am honored to be testifying before you today regarding the legal authorities and requirements related to the deployment of fencing and other infrastructure along the U.S. borders.[1]

The primary statute governing the Department of Homeland Security's (DHS's) deployment of fencing and other barriers is Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA[2]). Congress made significant amendments to IIRIRA Section 102 through three enactments—the REAL ID Act of 2005, the Secure Fence Act of 2006, and the Consolidated Appropriations Act, 2008.[3] These amendments required that DHS construct hundreds of miles of new fencing along the U.S.-Mexico border, and also provided the Secretary of Homeland Security with broad authority to waive legal requirements that may impede the construction of barriers and roads along the border.

The amendments to IIRIRA Section 102, along with increased funding for border projects, resulted in the deployment of several hundred miles of fencing and other barriers along the southwest land border between 2005 and 2011.[4] A portion of this infrastructure is fencing that is primarily intended to prevent illegal border crossings by pedestrians (referred to by DHS as "pedestrian fencing"), while other types of barriers have been installed to impede vehicles from smuggling persons or contraband into the United States (referred to by DHS as "vehicle fencing"), but which do not stop crossings by persons traveling on foot. In some instances, secondary or tertiary layers of fencing may also be installed behind primary pedestrian fencing to further impede illegal crossings.

---

[1] This testimony addresses matters covered more extensively in CRS Report R43975, *Barriers Along the U.S. Borders: Key Authorities and Requirements*, by Michael John Garcia.

[2] P.L. 104-208, div. C, §102(a)-(c), codified at 8 U.S.C. §1103 note. Unless otherwise indicated, references in footnote citations to "IIRIRA §102" refer to the current version of the statute. The text of IIRIRA §102, as amended, is attached as an **Appendix**.

[3] REAL ID Act of 2005, P.L. 109-13, div. B, §102; Secure Fence Act of 2006, P.L. 109-367, §3; Consolidated Appropriations Act, 2008, P.L. 110-161, div. E, §564(a).

[4] For a graphic illustration of these changes, see CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*, by Lisa Seghetti, at "Figure 4. Tactical Infrastructure Appropriations and Miles of Border Fencing, FY1996-FY2013."

Largely on account of changes in DHS's border enforcement strategy and prioritization of resources,[5] the construction of additional fencing along the land border with Mexico has effectively halted. In October 2014, DHS indicated that it had constructed a total of 352.7 miles of pedestrian fencing (in addition to 36.3 miles of secondary fencing), and 299 miles of vehicle fencing along the southwest border.[6] The total amount of pedestrian and vehicle fencing identified by DHS was slightly less than the 653 miles that the U.S. Border Patrol had reportedly identified as appropriate for fencing and other barriers.[7] Unless the statute may reasonably be construed to permit DHS to construct a lesser mileage, it appears that DHS still needs to deploy fencing along nearly 50 additional miles of the southwest border before it satisfies IIRIRA's requirement that fencing be installed "along not less than 700 miles" of the border.[8].

Key Statutory Authorities and Requirements

Prior to 1996, federal immigration statutes did not expressly authorize or require the construction of barriers along the U.S. international borders.[9] In the preceding years, authority to deploy any such barriers appears to have primarily derived from the general responsibility of the Attorney General (and now the Secretary of Homeland Security) to "guard the boundaries and borders of the United States against the illegal entry of aliens."[10] Perhaps the most prominent example of this general authority being employed to construct barriers occurred in the early 1990s, when 10-foot-high steel fencing was installed along roughly 14 miles of the border near San Diego to deter illegal crossings.

In 1996, Congress passed IIRIRA, which expressly instructed immigration authorities to construct barriers along the international land borders to deter unauthorized migration.[11] In its current form, IIRIRA Section 102 has three key components: (1) Section 102(a) confers general authority to DHS to deploy barriers and roads along the U.S. borders; (2) Section 102(b) requires fencing to be installed along a certain mileage of the U.S.-Mexico land border; and (3) Section 102(c) enables the Secretary of Homeland Security to waive any legal requirement that impedes upon the expeditious construction of barriers and roads under Section 102.[12]

[5] *See generally id.*

[6] *See* DHS Secretary Jeh Johnson, "Border Security in the 21st Century," Remarks as Delivered and Accompanying Slide Presentation, Oct. 9, 2014, *available at* http://www.dhs.gov/news/2014/10/09/remarks-secretary-homeland-security-jeh-johnson-border-security-21st-century.

[7] *See* "The Border Security, Economic Opportunity, and Immigration Modernization Act, S.744: Hearing Before the Senate Committee on the Judiciary," Apr. 23, 2013 (remarks by DHS Secretary Janet Napolitano in response to question, stating that the U.S. Border Patrol had identified 653 miles along the southwest border where fencing was appropriate).

[8] IIRIRA §102(b)(1)(A).

[9] Border construction activities had previously been expressly authorized for purposes such as boundary demarcation. *See* Act of August 19, 1935, 49 Stat. 660 (authorizing the executive branch "to construct and maintain fences, monuments and other demarcations of the boundary line between the United States and Mexico," in accordance with relevant boundary and water allocation treaties between the two countries).

[10] Immigration and Nationality Act §103(a)(5), 8 U.S.C. §1103 (a)(5).

[11] P.L. 104-208, div. C., §102.

[12] IIRIRA§102, as amended, also includes provisions concerning the availability of judicial review of DHS's exercise of waiver authority; the acquisition of easements on private land to construct fencing; and consultation requirements with federal, state, tribal, and private entities regarding the placement of fencing.

General Authority to Install Barriers and Roads

IIRIRA Section 102(a) provides that the Secretary of Homeland Security "shall take such actions as may be necessary to install additional physical barriers and roads ... in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." Although this provision is fashioned as a statutory command, providing that the Secretary "shall" take action, this command is qualified by the language that follows, which affords the Secretary the discretion to determine the appropriate amount of "additional" barriers to deploy, as well as the most appropriate locations to install barriers "to deter illegal crossings." Accordingly, this provision perhaps most reasonably could be construed as conferring general authority to DHS to construct barriers and roads along the international borders, so as to deter crossings in areas of "high illegal entry" (a term not defined by the statute).[13]

Section 102(a) generally authorizes the construction of roads and physical barriers, without specifying any particular form that such barriers may take, or establishing a maximum or minimum amount of "additional" barriers that may be constructed. For example, the authority conferred under Section 102(a) could be used to provide legal support for the installation of a concrete barricade near a land port of entry to assist in directing traffic to inspection sites. But it could also provide legal support for DHS to install hundreds of miles of additional fencing along the border, at least so long as the action was determined appropriate to deter illegal crossings in areas of high illegal entry.

Requirement for Installation of Fencing Along the Southwest Border

IIRIRA Section 102(b) imposes specific requirements upon DHS to construct reinforced fencing along the southwest border. The nature of these requirements has changed over the years, including to expand the mileage along the border where fencing must be installed, and to afford the Secretary greater discretion in determining the layers of fencing to be installed and the location of fence deployment.

Modifications of Fencing Requirements

The fencing requirements of IIRIRA Section 102(b) have been substantially revised over the years. To better appreciate the scope of the current requirements, it may be useful to review how Section 102(b) has been amended.

Original Requirement to Augment the San Diego Border Fence

As originally enacted, IIRIRA Section 102(b) directed immigration authorities to supplement the already existing 14-mile primary border fence near San Diego with two additional layers of fencing.[14] Environmental concerns and litigation resulted in significant delays in fulfilling this requirement.[15]

---

[13] *See* Save Our Heritage Organization v. Gonzales, 533 F.Supp.2d 58, 61 (D.D.C. 2008) (distinguishing the Secretary's "general authority" to install barriers under IIRIRA §102(a) from the specific mandate under IIRIRA §102(b) to construct fencing in certain areas).

[14] P.L. 104-208, div. C, §102(b).

[15] In late 2003, the California Coastal Commission (CCC) essentially halted further construction of the San Diego fence. The CCC determined that DHS had not demonstrated, among other things, that the project was "to the maximum extent practicable" consistent with the policies of the California Coastal Management Program—a state program approved under the federal Coastal Zone Management Act, 16 U.S.C. §§1451, *et seq*. *See* California Coastal Commission, *W 13a Staff Report and Recommendation*

(continued...)

Expansion of Fencing Requirements Under the Secure Fence Act of 2006

Congress substantially modified IIRIRA Section 102(b) by way of the Secure Fence Act of 2006. Section 102(b)'s original requirement concerning fencing in the San Diego area was replaced with a more expansive instruction to deploy "at least 2 layers of reinforced fencing," along with other tactical infrastructure, along five specified stretches of the southwest border. DHS estimated that this mandate covered roughly 850 miles.[16]

Although IIRIRA Section 102(b) no longer required additional fencing in the San Diego vicinity, DHS ultimately completed a double-layered fence pursuant to its more general authority under IIRIRA Section 102(a).

Modification of Fencing Requirements Pursuant to the Consolidated Appropriations Act, 2008

The most recent revisions to IIRIRA Section 102 were enacted slightly more than a year after Congress passed the Secure Fence Act. The Consolidated Appropriations Act, 2008, amended IIRIRA Section 102(b) to significantly increase the Secretary of Homeland Security's discretion as to where to construct fencing along the southwest border. In particular, the 2008 Appropriations Act modified IIRIRA Section 102(b) in four ways:

- **Eliminated earlier requirement of double-layered fencing.** Whereas the prior language of IIRIRA Section 102(b) had generally required "at least 2 layers of reinforced fencing" to be deployed in specified areas, Section 102(b) now mandates only a single layer of reinforced fencing (while not precluding additional layers from being deployed, if deemed appropriate).
- **Provided more flexible requirements concerning location of fencing and other border infrastructure.** While the Secure Fence Act required fencing to be installed along specific stretches of the southwest border, the 2008 Appropriations Act replaced this specification with a more general requirement that fencing be deployed "along not less than 700 miles of the southwest border where fencing would be most practical and effective."[17] DHS was also instructed to construct "additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border." The Appropriations Act also amended IIRIRA Section 102(b) to provide that the Secretary was not obligated to deploy fencing or other border security infrastructure "in a particular location along an international border of the United States, if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location."[18]

(...continued)

on Consistency Determination, CD-063-03, Oct. 2003, *available at* http://www.coastal.ca.gov/cd/W8a-10-2003.pdf.

[16] 153 CONG. REC. 9890 (2007)(statement by Sen. Jeff Sessions, observing that DHS had found that, because of topographical issues along the border, the Secure Fence Act effectively required deployment of fencing along "close to 854 topographical miles").

[17] IIRIRA §102(b)(1)(A).

[18] *Id.* at §102(b)(1)(D).

- **New deadline for construction of fencing in "priority areas."** The earlier version of IIRIRA Section 102(b) required the construction of fencing along specified stretches of the border, totaling roughly 370 miles, by May 2008, and fencing along another 30-mile section by December 2008.[19] This was replaced with a new requirement that the Secretary of Homeland Security identify 370 miles "or other mileage" along the southwest border where fencing would be "most practical and effective," and complete construction of such fencing by December 31, 2008.[20] According to a 2010 report by the Government Accountability Office (GAO), DHS opted to comply with the priority fencing mandate by ensuring that reinforced fencing had been deployed along 370 miles of the southwest border before 2009.[21]
- **New consultation requirements.** Section 102(b) of IIRIRA now requires the Secretary of Homeland Security to consult with the Secretaries of the Interior and Agriculture, state and local governments, Indian tribes, and property owners "to minimize the impact on the environment, culture, commerce, and quality of life" in areas near where fencing is to be constructed.[22]

Selected Issues Concerning Current IIRIRA Section 102(b)

As noted above, the 2008 Consolidated Appropriations Act substantially modified IIRIRA Section 102(b) just over a year after the Secure Fence Act had done the same. These revisions, along with sometimes conflicting statements made by DHS officials concerning the agency's interpretation of its duties under Section 102(b), have potentially contributed to some disagreement regarding the nature of DHS's obligations. Four issues may be of particular relevance to Congress in exercising oversight of DHS's implementation of Section 102(b).

Type of Fencing Required Under Current Law

Whereas the Secure Fence Act had amended IIRIRA Section 102(b) to provide for "at least 2 layers of reinforced fencing," IIRIRA Section 102(b) no longer imposes this requirement—a single layer of reinforced fencing appears sufficient to satisfy any statutory mandate. DHS would appear to have discretion to construct additional layers of fencing if it deems such fencing to be appropriate.[23]

Some disagreement has arisen over DHS's use of "vehicle fencing" to satisfy IIRIRA's fencing requirements, as such fencing does not generally prevent crossings by foot.[24] IIRIRA Section 102(b) does not mandate that any particular type of fencing must be deployed along the southwest border, beyond

[19] Secure Fence Act, P.L. 109-367, §3.

[20] IIRIRA §102(b)(1)(B).

[21] GAO, *Secure Border Initiative: Technology Deployment Delays Persist and the Impact of Border Fencing Has Not Been Assessed*, Sept. 9, 2009, at 8.

[22] IIRIRA §102(c)(i). The Consolidated Appropriations Act further provided that funds appropriated for FY2008 could not be expended for border construction activities under IIRIRA Section 102, unless DHS satisfied this consultation requirement. P.L. 110-161, div. E, §564(b).

[23] *See Save Our Heritage Organization*, 533 F.Supp.2d at 61 (upholding authority of DHS to construct additional double-layered fencing along border near San Diego under IIRIRA Section 102(a)).

[24] Vehicle fencing is "used primarily in remote areas to prohibit vehicles engaged in drug trafficking and alien smuggling operations from crossing the border." GAO, *Secure Border Initiative Fence Construction Costs*, Jan. 9, 2009, at 2.

providing that such fencing be "reinforced."[25] The statute does not specify, for example, that deployed fencing must be of a particular height, or be constructed in a particular style. In the absence of such specification, it would appear that DHS enjoys discretion to assess the appropriate type of fencing to deploy in order to achieve operational control of the southwest border.[26]

Total Miles Along the Border Covered by Fencing vs. Total Miles of Fencing

While IIRIRA Section 102(b) is sometimes characterized as requiring DHS to deploy "700 miles of fencing," the express language of the text seems to indicate a somewhat different mandate. Section 102(b) requires DHS to deploy fencing "along not less than 700 miles of the southwest border." This instruction focuses upon the actual mileage of the border covered by fencing, rather than the number of miles of fencing deployed. For example, if DHS hypothetically deployed 30 miles of fencing, but did so through the construction of a ten-layered, three-mile-long fence, it would have installed fencing along only three miles of the border. On the other hand, if DHS deployed such fencing as a single layer of fencing, it would have deployed fencing along 30 miles of the border.

Likely because of the phraseology of IIRIRA Section 102(b), DHS seems to count only the mileage of primary layers of fencing deployed along the southwest border when discussing its efforts to satisfy its statutory mandate, and not the total amount of secondary or tertiary fencing running behind it.[27]

Is DHS Required to Complete Fencing Along 700 Miles of the Border?

DHS has thus far deployed reinforced fencing along roughly 653 miles of the border.[28] At least on first look, it would appear that the department would need to install additional fencing along nearly 50 miles of the southwest border to satisfy the fence deployment specifications of Section 102(b). There have been conflicting views among some policymakers as to the firmness of this mandate. Although one clause of IIRIRA Section 102(b) requires fencing "along not less than 700 miles" of the border, another clause provides:

> Notwithstanding [the 700-mile mandate of this section,] nothing in this paragraph shall require the Secretary of Homeland Security to install fencing, physical barriers, roads, lighting, cameras, and sensors in a particular location along an international border of the United States, if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location.[29]

The meaning and effect of this proviso are arguably open to interpretation. One way to read the clause is simply to reflect the discretion that Congress intended to afford DHS in determining where to deploy

---

[25] "Reinforced fencing" is not defined by statute, but is commonly used to refer to fencing which is constructed in a manner that makes it more durable and sturdy than a typical fence.

[26] While IIRIRA Section 102(b) seems to distinguish "fencing" from other types of "physical barriers," it does not specify any particular features that deployed fencing must have, beyond being reinforced. Accordingly, at least so long as deployed barriers can reasonably be construed to constitute "fencing," it seems that DHS would have discretion to determine the appropriate type to be deployed at any particular location.

[27] *See* DHS: THE PATH FORWARD, HEARING BEFORE THE HOUSE COMMITTEE ON HOMELAND SECURITY, SERIAL NO. 111-1, 111th Cong., 1st Sess. (2009), Written Responses by DHS Secretary Janet Napolitano to Questions Posed by Rep. Lamar Smith, at 65 (identifying only primary pedestrian and vehicle fencing when identifying mileage of fencing deployed along the southwest border pursuant to IIRIRA Section 102(b)).

[28] *See* Remarks of DHS Secretary Jeh Johnson, *supra* footnote 6.

[29] IIRIRA §102(b)(1)(D).

fencing, in contrast to the more specific requirements contained in earlier versions of IIRIRA Section 102(b). While DHS is required to construct fencing along at least 700 miles of the border, the agency retains discretion to determine the most appropriate stretches along the U.S.-Mexico border where the fencing should be deployed.

But it might be possible to construe this "notwithstanding" proviso in a much broader fashion, under which DHS might permissibly construct fencing along less than 700 miles of the border, if DHS determines that a lesser mileage is the most appropriate means to achieve control of the border.

There are difficulties, however, with interpreting the "notwithstanding" proviso as authorizing DHS to deploy fencing along less than 700 miles of the southwest border. As an initial matter, the "notwithstanding" proviso does not expressly state that DHS may opt to install fencing along a lesser amount of *mileage* of the border than is specified elsewhere in Section 102(b)—rather, it says that fencing is not required at "any particular location," if the Secretary of Homeland Security determines that the installation of that infrastructure is not appropriate for "such location."

Moreover, courts typically follow the interpretive principle that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant...."[30] If Section 102(b)'s proviso is construed to mean that DHS is required to deploy only the amount of fencing along the border that it deems appropriate, the clause would render Section 102(b)'s mandate that fencing be deployed "along at least 700 miles of the border" superfluous. Indeed, if DHS is understood to be required to install only the amount of fencing or other barriers it deems appropriate, it would seem that Section 102(b) would be unnecessary—IIRIRA Section 102(a) already provides the department with authority to deploy additional barriers and roads along the border as it deems appropriate to deter illegal crossings, while affording DHS discretion to determine the appropriate amount or mileage to deploy. On the other hand, if the proviso is interpreted to mean that, in carrying out its mandate to construct fencing along at least 700 miles of the land border with Mexico, DHS is not legally required to install the required fencing at any particular point along the border, every provision of IIRIRA Section 102 can be given effect.

The legislative history behind IIRIRA Section 102(b)'s fencing requirements, including companion legislation and contemporary statements by Members of Congress, also seems to support a narrow construction of Section 102(b)'s "notwithstanding" clause. The modifications made to IIRIRA Section 102(b) by the Appropriations Act were originally a component of a package of amendments adopted by the Senate as part of a homeland security bill which, besides amending IIRIRA Section 102(b), would have required DHS to complete fencing along 700 miles of the border within two years.[31] While Congress ultimately opted to enact only the changes made to IIRIRA Section 102(b), and not the separate two-year deadline for fence deployment, presumably the Senate would not have originally approved both amendments if they were understood to be conflicting.[32]

[30] Hibbs v. Winn, 542 U.S. 88, 101 (2004) (quoting 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION §46.06, (rev. 6th ed. 2000)).

[31] *See* S.Amdts. 2412, 2480, and 2486, offered as amendments to S.Amdt. 2383, proposed by Sen. Robert Byrd in the nature of a substitute to H.R. 2638, Department of Homeland Security Appropriations Act, 2008, 110th Cong., 1st Sess. A detailed description of the Senate's consideration of these amendments is found in CRS Report R43975, *supra* footnote 1, at 11-13.

[32] Indeed, Senator Kay Bailey Hutchison, the sponsor of the amendment to IIRIRA Section 102(b) initially adopted by the Senate as part of a homeland security appropriations bill, was a cosponsor of the related amendment adopted by the Senate on the same day that would have required completion of fencing along 700 miles of the southwest border within two years. 153 CONG. REC. S10059 (daily ed., Jul. 26, 2007).

To date, it appears that every federal court which has discussed IIRIRA Section 102(b) has described the provision in mandatory terms: DHS is required to deploy fencing along 700 miles of the southwest border, but it retains discretion to determine the appropriate locations in which to deploy the required fencing.[33] It should be noted, however, that no court has definitively ruled that an alternative interpretation is not permissible. But the uniform interpretation suggests that, as a matter of first impression, Section 102(b) may be most reasonably construed as establishing a mandate to deploy fencing along at least 700 miles of the border.

For its part, DHS has appeared to take conflicting views regarding the firmness of IIRIRA Section 102(b)'s mandate. Initially, DHS appeared to construe the 700-mile requirement as a firm one. In notices issued in the *Federal Register* in 2008 describing border fencing projects undertaken under IIRIRA Section 102(b), Secretary of Homeland Security Michael Chertoff stated that "Congress has called for the installation of fencing, barriers, roads, lighting, cameras, and sensors on not less than 700 miles of the southwest border…."[34] In March 2009, Secretary of Homeland Security Janet Napolitano wrote to the House Homeland Security Committee, and described IIRIRA as mandating that DHS construct at least 700 miles of fencing, but also indicated that at least for the immediate future, DHS would focus on fence deployment in priority areas.[35]

DHS later appeared to modify its interpretation of IIRIRA Section 102(b), and began to describe the "notwithstanding" proviso as permitting it to deploy fencing along less than 700 miles of the border, if the agency deemed a lesser amount of fencing to be appropriate to achieve operational control.[36] Indeed, four years after describing IIRIRA Section 102(b) as imposing a firm mandate, Secretary Napolitano gave

[33] *See* Gilman v. Department of Homeland Security, 32 F.Supp.3d 1, 5 (D.D.C. 2014) (describing IIRIRA Section 102(b) as having been "amended to mandate 'reinforced fencing along not less than 700 miles of the southwest border' and [to charge] the Secretary of Homeland Security with completing ... reinforced fencing [in priority areas] by the end of 2008. The precise location of the fence, however, was left to ... [DHS] to determine 'where fencing would be most practical and effective....'"); Arizona v. United States, No. 2:10-cv-01413-SRB, Order Dismissing Arizona's Counterclaims, at 16 (D. Az., Oct. 21, 2011) ("[A]s amended by the 2008 Appropriations Act, [IIRIRA Section 102(b)] provides for the construction of 700 miles of fencing and additional infrastructure along the border 'where [it] would be most practical and effective.'"); United States v. 1.04 Acres of Land, More or Less, Situate in Cameron County, Tex., 538 F.Supp.2d 995, 1004 (S.D. Tex. 2008) (describing the most recent amendments to IIRIRA Section 102(b) as "remov[ing] references to specific areas for the construction of the fence, giving the Secretary discretion on where to put the fencing. The Secretary of Homeland Security now has a general mandate to construct at least 700 miles of fencing along the United States-Mexico border where fencing would be most practical and effective."); *See also* United States v. 1.16 Acres of Land, More or Less, Situate in Cameron County, Tex., 585 F.Supp.2d 901, 907 n.3 (S.D. Tex. 2008) "[IIRIRA] Section 102(b) requires the Secretary of Homeland Security to construct a minimum number of miles of fencing in identified areas in the country.").

[34] Dept. of Homeland Security, "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended," 73 FED. REG. 18294 (Apr. 3, 2008), *republished with additional document in* 73 FED. REG. 19077 (Apr. 8, 2008); "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended," 73 FED. REG. 18293 (Apr. 3, 2008), *republished with additional document in* 73 FED. REG. 19078 (Apr. 8, 2008).

[35] DHS: THE PATH FORWARD, HEARING BEFORE THE HOUSE COMMITTEE ON HOMELAND SECURITY, SERIAL NO. 111-1, 111TH CONG., 1ST SESS. (2009), Written Responses by DHS Secretary Janet Napolitano to Questions Posed by Rep. Lamar Smith, at 65 ("As amended, the [IIRIRA Section 102(b)] mandates the completion of 700 total miles of fence. It also mandates that the Secretary identify priority areas "where fencing would be the most practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States." As of March 6, 2009, DHS has completed approximately 611 of the 661 miles of fence identified by the Border Patrol as priority areas. While fencing remains an important tool in achieving effective control, it is only one element of our overall border security strategy that incorporates the proper mix of technology, personnel, and tactical infrastructure. Currently, there are no immediate funded plans to construct additional fencing.").

[36] *See* GAO Report, *supra* footnote 21, at 8.

testimony before the Senate Judiciary Committee in which she appeared to take the view that DHS was legally permitted to construct a lesser amount of fencing.[37]

On the other hand, the executive branch appears to have construed the 700-mile requirement as a firm one in litigation concerning fence deployment decisions. In defending DHS against a legal challenge by the state of Arizona in 2011, in which Arizona sought to compel DHS to complete construction of fencing along 700 miles of the border (and undertake other immigration enforcement actions), the Department of Justice did not dispute the existence of this mandate, but instead argued that DHS decisions as to where to locate such fencing and the speed by which fencing was to be deployed were committed to agency discretion.[38]

It should be noted that, in assessing the permissibility of an agency's interpretation of the laws it administers, reviewing courts typically accord the agency's interpretation of these statutes with some degree of deference, so long as the construction is reasonable.[39] In determining whether an agency's construction of a statute is reasonable, legislative intent is a touchstone for a reviewing court's analysis—an agency's interpretation might be entitled to deference when congressional intent is ambiguous and the agency's construction of the statute is reasonable.[40]

Assuming that DHS's interpretation of the requirements under IIRIRA Section 102(b) is subject to legal challenge, the degree of deference that a reviewing court gives to the agency's interpretation may be informed by a number of factors, including (1) whether the plain text of the statute is ambiguous, and DHS's interpretation is reasonable; (2) if other indicia of legislative intent favor a particular interpretation; and (3) the degree of deference that may be afforded to the DHS's interpretation of IIRIRA Section 102(b),[41] and whether the apparent modification of its interpretation entitles its current interpretation to a lesser degree of deference.[42]

---

[37] COMPREHENSIVE IMMIGRATION REFORM, SENATE COMMITTEE ON THE JUDICIARY, SERIAL NO. J–113–4, Feb. 13, 2013, at 11 (Secretary Napolitano responded to a question regarding fence deployment by stating, "On the fence, the original act was for 700 miles. There was a subsequent amendment or adjustment to that—I think it was proposed by Senator Hutchison—to 655 miles. All but one mile of that is now complete, and the one mile or different little sections, most of them are in some litigation or another with private property owners. But the fence, to the extent it has been appropriated for, is complete.").

[38] Arizona v. United States, No. 2:10-cv-01413-SRB, Counterdefendants' Reply in Support of Their Motion to Dismiss Counterclaims, at 9 (D. Az., Jul. 12, 2011) ("DHS has already completed 649 of the 700 miles—over 92% of the target that Congress set a little over three years ago without a deadline—and ... much of this fencing covers the Arizona border."); Counterdefendants' Motion to Dismiss Counterclaims and Memorandum of Law in Support Thereof, at 22 (D. Az. Apr. 12, 2001) ("Section 102 of the IIRIRA (as amended) vests in the Secretary complete discretion for determining how to gain operational control of the border and where fencing and additional measures should be utilized in that effort ... Further, the Act prescribes no deadline for completing the construction of 700 miles of fencing or installing additional physical barriers, roads, lighting, cameras, and sensors along the southwest border, despite the fact that the Act prescribed deadlines in other instances.").

[39] *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

[40] *Id.* at 842-843 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); United States v. Shimer, 367 U.S. 374, 383 (1961) (When an agency is tasked with "accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.").

[41] Agency interpretations of statutory requirements are usually afforded a lesser degree of deference when the agency interpretation is not the result of a notice-and-comment rulemaking process or formal adjudication. In such circumstances, the level of deference given to the agency's interpretation typically "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to (continued...)

Potential Constraints on Judicial Review

Regardless of the appropriate interpretation of IIRIRA Section 102(b)'s fencing mandate, the statute imposes no clear deadline for when the contemplated fencing must be deployed. In the 2011 litigation in which Arizona sought to compel DHS to complete construction of fencing required under IIRIRA Section 102(b), the reviewing federal district court dismissed Arizona's motion, in part because "no deadline mandates completion of the fencing and infrastructure developments or any required discrete action by a specified time."[43]

The absence of a deadline for the completion of the fencing requirements of IIRIRA Section 102(b) does not necessarily mean that DHS has no judicially enforceable legal obligation to complete any remaining fencing. The Administrative Procedure Act, for example, provides courts with the authority to compel a required agency action, when such action has been "unlawfully withheld or unreasonably delayed."[44] Determining whether an agency has unreasonably delayed undertaking a required action is a fact-specific determination made on a case-by-case basis, with reviewing courts typically showing more deference to an agency when there is not a statutory deadline for agency action.[45]

If a court determined that DHS had unreasonably delayed fulfillment of its obligations under IIRIRA Section 102(b), it might deem the completion of at least 700 miles of fence along the southwest border to constitute "a discrete agency action" that it would potentially have the power to compel.[46] The district court in the *Arizona* case found that completion of the border fence was not a "discrete agency action" that it could compel DHS to take, but it did not explain the basis for this conclusion.[47]

(...continued)

persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). In *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1996), the Supreme Court afforded *Chevron* deference to the Comptroller of Currency's "deliberative conclusions" regarding the interpretation of banking laws, on account of the Comptroller being "charged with the enforcement of banking laws to an extent that warrants the invocation" of a high standard of deference to his interpretations. Subsequently, in *United States v. Mead Corp.*, the Supreme Court seemed to suggest that the conclusion it reached in *NationsBank* was at least partially on account of "longstanding precedent" recognizing the Comptroller's interpretative authority. *Mead Corp.*, 533 U.S. at 231 n.13. Accordingly, the possible relevance of *NationsBank* to decisions outside the banking context, including with respect to DHS interpretations of fencing requirements of IIRIRA, is unclear.

[42] A change in agency interpretation is not itself a ground to view the later construction as impermissible, at least so long as reasons for the change in policy are adequately explained. *See, e.g.*, National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 981 (2005).

[43] Arizona v. United States, No. 2:10-cv-01413-SRB, Order Dismissing Arizona's Counterclaims, at 16 (D. Az., Oct. 21, 2011).

[44] 5 U.S.C. §706(1).

[45] For further discussion, see CRS Report R43013, *Administrative Agencies and Claims of Unreasonable Delay: Analysis of Court Treatment*, by Daniel T. Shedd. *See also* Telecommunications Research and Action Center v. F.C.C., 750 F.2d 70. 79-80 (D.C. Cir. 1984) (observing that "the first stage of judicial inquiry is to consider whether the agency's delay is so egregious as to warrant mandamus," and identifying several factors that should be appropriately considered when assessing an agency delay claim).

[46] Norton v. Southern Utah Wilderness Alliance (SUWA), 542 U.S. 55, 64 (2004). Even assuming that the deployment of fencing "along not less than 700 miles of the border where it would be most practical and effective" could be considered a discrete agency action that a court could compel, it is unlikely a court would be able to direct DHS to deploy such fencing at a specific location. *See id.* at 65 ("[W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be.").

[47] *Arizona*, No. 2:10-cv-01413-SRB, Order Dismissing Arizona's Counterclaims, at 16 (D. Az., Oct. 21, 2011) (in considering Arizona's motion seeking to compel completion of fencing, finding that IIRIRA, as amended, did "not mandate any discrete agency action with the clarity to support a judicial order compelling agency action," but not explaining reasoning for this conclusion).

Because the *Arizona* court dismissed the case on these grounds, it did not address the issue of whether Arizona had standing to even bring the claim. In general, a plaintiff needs to show that it has suffered a concrete and particularized injury, and that the injury will be redressed by a favorable court decision.[48] It seems likely it would be very difficult for a plaintiff to identify a concrete, particularized injury that would be effectively remedied if DHS deployed fencing along an additional 50 miles of the border.[49]

Authority to Waive Legal Requirements Impeding Construction of Roads and Barriers

Section 102(c) of IIRIRA confers the Secretary of Homeland Security with broad authority to waive legal requirements that may impede the construction of barriers and roads along the border. The nature and scope of this waiver authority changed significantly pursuant to modifications made by the REAL ID Act of 2005. From 2005 through 2008, the Secretary of Homeland Security employed this waiver authority to facilitate the construction of hundreds of miles of fencing and other infrastructure along several sections of the southwest border. Each of these waivers remains in effect, and applies both to the construction and upkeep of covered fencing projects.

Original Waiver Authority

When initially enacted in 1996, IIRIRA Section 102(c) expressly authorized the waiver of the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA),[50] to the extent that such waivers were determined necessary by the Attorney General to expeditiously construct barriers and roads under Section 102. Other federal laws, however, remained applicable to border construction projects. Federal immigration authorities appear to have not employed IIRIRA Section 102(c), as originally enacted, to waive NEPA and ESA requirements.[51]

Expansion of Waiver Authority Under the REAL ID Act

In part due to delays in the construction of fencing near San Diego,[52] Congress amended IIRIRA Section 102(c) via the REAL ID Act of 2005. As amended, IIRIRA Section 102(c) permits the Secretary of DHS to waive "all legal requirements" necessary to ensure expeditious construction of these security barriers. Such waivers are effective upon publication in the *Federal Register*.[53] Federal district courts are provided with exclusive jurisdiction to review claims alleging that the actions or decisions of the Secretary violate the U.S. Constitution, and district court rulings may be reviewed only by the Supreme Court, whose review is discretionary.

---

[48] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

[49] In addition to these constitutional requirements for standing, prudential considerations could also potentially inform a court's willingness to consider a legal challenge to DHS fence deployment decisions. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 474-475 (1982) (discussing prudential considerations informing court recognition of a plaintiff's standing to bring suit).

[50] P.L. 104-208, div. C, §102(c).

[51] *See* CCC Report, *supra* footnote 15, at 10.

[52] *See* H.REPT. 109-72, 109th Cong., 1st Sess. (2005) at 170-172 (conference report for emergency supplemental appropriations legislation to which the REAL ID Act was attached, describing purposes of the act).

[53] IIRIRA §102(c)(1).

The scope of this waiver authority is substantial, but neither absolute nor applicable to all border-related activities. The Secretary could not rely on Section 102(c) to waive requirements of the U.S. Constitution. Thus, for example, if DHS sought to condemn private land in order to construct fencing at that location, it could not waive the Fifth Amendment's requirement that "just compensation" be provided to the property owner. The Secretary may also waive only those legal requirements that, in effect, would impede the construction of barriers and roads under Section 102. The authority does not appear to permit the Secretary to waive legal requirements that only tangentially relate to, or do not necessarily interfere with, the construction of roads and barriers.[54] The decision of whether to waive a legal requirement is the responsibility of the Secretary of Homeland Security, and authority may be exercised in the Secretary's discretion. Until such time as the Secretary waives an applicable law, however, DHS must generally follow all legal requirements normally imposed on federal agencies.[55]

To date, the Secretary of DHS has provided notice in the *Federal Register* on five occasions regarding the invocation of waiver authority conferred under IIRIRA Section 102(c).[56] In multiple instances, lawsuits were brought challenging the constitutionality of an issued waiver. In each case, the reviewing federal district court upheld the exercise of waiver authority as constitutionally valid.[57] Parties in two of the cases sought Supreme Court review, but the Court declined to grant certiorari in either case.[58]

Conclusion

Congress has conferred DHS with express authority to construct barriers and roads along the international land borders to deter illegal crossings in areas of high illegal entry. Congress has also required DHS to deploy fencing along specified mileage of the southwest border.

[54] In exercising waiver authority under IIRIRA, the DHS Secretary appears to have construed it as applying to physical infrastructure projects built in connection with the construction of barriers and roads, such as radio towers. *See, e.g.*, Dept. of Homeland Security, "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended," 73 FED. REG. 19078 (Apr. 8, 2008) (waiving laws related to access, staging, and construction in the project area including "installation and upkeep of fences, roads, supporting elements, draining, erosion controls, safety features, surveillance, communication and detection equipment of all types, radar and radio towers and lighting").

[55] With respect to each of the fencing projects conducted between 2008 and 2011 in which the Secretary had exercised waiver authority, DHS has prepared an environmental stewardship plan (ESP) concerning the potential environmental effects of the project. After a project was completed, Customs and Border Protection (CBP) would prepare an environmental stewardship summary report (ESSR) "documenting the final 'footprint' of the sections built under the waiver to provide an 'as built' summary for the public and regulatory agencies." CBP, *Environmental Stewardship Plans (ESPs) Environmental Stewardship Summary Reports (ESSRs), available at* http://www.cbp.gov/about/environmental-cultural-stewardship/nepa-documents/esp-essr. (providing links to ESPs and ESSRs).

[56] 70 FED. REG. 55622-02, Sept. 22, 2005 (waiving numerous laws potentially impacting fence construction in San Diego area); 72 Fed. Reg. 2535-01, Jan. 19, 2007 (applying to area in vicinity of the Barry M. Goldwater Range in southwest Arizona); 72 FED. REG. 60870-01, Oct. 26, 2007 (concerning the San Pedro Riparian National Conservation Area in southeast Arizona); 73 Fed. Reg. 18294 (April 3, 2008), *republished with additional document in* 73 FED. REG. 19077 (April 8, 2008) (applying to barriers and roads constructed in Hidalgo County, Texas); 73 FED. REG. 18293 (April 3, 2008), *republished with additional document in* 73 Fed. Reg. 19078 (April 8, 2008) (concerning border infrastructure projects in California, New Mexico, Texas, and Arizona).

[57] County of El Paso v. Chertoff, No. EP-08-CA-196, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008); Save Our Heritage Organization v. Gonzalez, 533 F. Supp. 2d 58 (D.D.C. 2008); Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119 (D.D.C. 2007); Sierra Club v. Ashcroft, No. 04-CV-272, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 13, 2005).

[58] *County of El Paso*, No. EP-08-CA-196, (W.D. Tex. Aug. 29, 2008), *cert. denied*, 129 S. Ct. 2789 (2009); *Defenders of Wildlife*, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 128 S. Ct. 2962 (2008).

In recent years, legislative attention has primarily focused upon the fencing requirements contained in IIRIRA Section 102(b). Prior versions of Section 102(b) imposed specific requirements as to the location where fencing was to be installed and the layers of fencing to be constructed. The current provision affords DHS with significantly greater discretion to determine the appropriate location, layers, and types of fencing to be installed along the southwest border.

There has been some dispute as to whether DHS has discretion to construct less fencing than the amount specified under IIRIRA Section 102(b), on account of a proviso that posits that the agency is not required to construct fencing at any "particular location" where it deems fencing to be inappropriate. While there appears to be stronger support for construing Section 102(b) to establish a firm mandate for the deployment of fencing along 700 miles of the border, it is not clear whether a court would have the ability to compel DHS to install additional fencing (or that a plaintiff would have standing to bring such a claim).

Appendix. IIRIRA Section 102, as Amended (Text)

Sec. 102 - Improvement of Barriers at Border

(a) In General.-The Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.

(b) Construction of Fencing and Road Improvements Along the Border.-

(1) Additional fencing along southwest border.-

(A) Reinforced fencing.-In carrying out subsection (a), the Secretary of Homeland Security shall construct reinforced fencing along not less than 700 miles of the southwest border where fencing would be most practical and effective and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border.

(B) Priority areas.-In carrying out this section [amending this section], the Secretary of Homeland Security shall-

(i) identify the 370 miles, or other mileage determined by the Secretary, whose authority to determine other mileage shall expire on December 31, 2008, along the southwest border where fencing would be most practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States; and

(ii) not later than December 31, 2008, complete construction of reinforced fencing along the miles identified under clause (i).

(C) Consultation.-

(i) In general.-In carrying out this section, the Secretary of 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.

(ii) Savings provision.-Nothing in this subparagraph may be construed to-

(I) create or negate any right of action for a State, local government, or other person or entity affected by this subsection; or

(II) affect the eminent domain laws of the United States or of any State.

(D) Limitation on requirements.-Notwithstanding subparagraph (A), nothing in this paragraph shall require the Secretary of Homeland Security to install fencing, physical barriers, roads, lighting, cameras, and sensors in a particular location along an international border of the United States, if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location.

(2) Prompt acquisition of necessary easements.-The Attorney General, acting under the authority conferred in section 103(b) of the Immigration and Nationality Act [8 U.S.C. §1103(b)] (as inserted

by subsection (d)), shall promptly acquire such easements as may be necessary to carry out this subsection and shall commence construction of fences immediately following such acquisition (or conclusion of portions thereof).

(3) Safety features.-The Attorney General, while constructing the additional fencing under this subsection, shall incorporate such safety features into the design of the fence system as are necessary to ensure the well-being of border patrol agents deployed within or in near proximity to the system.

(4) Authorization of appropriations.-There are authorized to be appropriated such sums as may be necessary to carry out this subsection. Amounts appropriated under this paragraph are authorized to remain available until expended.

(c) Waiver.-

(1) 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 [amending this section]. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

(2) Federal court review.-

(A) 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.

(B) Time for filing of complaint.-Any cause or claim brought pursuant to subparagraph (A) shall be filed not later 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.

(C) Ability to seek appellate review.-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.