

# Can Trump Build a Wall? The Administrative Obstacles to the Border Wall

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## I. INTRODUCTION

While campaigning for the presidency, then-candidate Donald Trump promised his supporters he would build a wall on the southern border of the United States to thwart the flow of immigration from Mexico. President Trump appears determined to follow through on his promise. On January 25, 2017, five days after being inaugurated, the President issued an executive order with the goal to “secure the southern border of the United States through the immediate construction of a physical wall on the southern border.”<sup>1</sup> According to the order, the authority to build a wall is derived from the Secure Fence Act of 2006, a statute that has already been utilized to construct physical barriers along the border with Mexico. This order, along with the President’s executive order banning the immigration of refugees, has incited a firestorm of protests across the country.<sup>2</sup> While the debate has justifiably focused on the effect these orders will have on immigrants and refugees, the significant impact that a physical border wall will have on the environment cannot be overlooked. This Field Report will evaluate the legal considerations and impediments to the border wall’s construction from an environmental and administrative law perspective.

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1. Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8793 (Jan. 25, 2017).
2. Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

## II. ENVIRONMENTAL IMPACTS OF THE WALL

The border between Mexico and the United States is 1933 miles long,<sup>3</sup> close to 650 miles of which have already been fenced to some degree by the Department of Homeland Security (“DHS”).<sup>4</sup> Prior to the construction of a physical barrier beginning about a decade ago, experts noted: “border wall construction and maintenance will be significant and detrimental to past, present, and future conservation efforts.”<sup>5</sup> The areas around the southern border contain 111 endangered species, 108 species of migratory birds, 4 wildlife refuges and fish hatcheries, and an unknown number of protected wetlands.<sup>6</sup> In addition, several iconic endangered species populate the area surrounding the border including the Mexican gray wolf, the ocelot, and the jaguarondi.<sup>7</sup> Each species relies on travel corridors between Mexico and the United States, and interruption of these channels would thwart attempts by both Mexican and American governments to maintain healthy populations of these species. In addition, the wall will require massive quantities of cement, a product whose manufacturing accounts for around 5% of global carbon dioxide emissions.<sup>8</sup> This kind of activity has the potential to frustrate efforts to curtail global warming at a time when global temperatures continue to rise. Similar to the recent withdrawal of the United States from the Paris Agreement, the erection of an unnecessary, resource-intensive wall would be further evidence to the rest of the world that the United States has relinquished its role as a global leader in the fight against climate change.

Unfortunately for conservationists and environmentalists, it appears that existing environmental laws will be unable to prevent the Trump administration from erecting the wall. As authorization for the construction of the wall in his executive order, President Trump cited the REAL ID Act of 2005, which authorizes the

3. JANICE CHERYL BEAVER, CONG. RESEARCH SERV., RS21729, U.S. INTERNATIONAL BORDERS: BRIEF FACTS 2 (2006).

4. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R43975, BARRIERS ALONG THE U.S. BORDERS: KEY AUTHORITIES AND REQUIREMENTS 2 (2017).

5. LINDSAY ERIKSSON & MELINDA TAYLOR, THE ENVIRONMENTAL IMPACTS OF THE BORDER WALL BETWEEN TEXAS AND MEXICO 5 (2008).

6. U.S. FISH & WILDLIFE SERV., TRUMP WALL—IPAC TRUST RESOURCES REPORT (2016).

7. *Id.*

8. Madeleine Rubenstein, *Emissions from the Cement Industry*, STATE OF THE PLANET (May 9, 2012, 1:55 PM), <http://blogs.ei.columbia.edu/2012/05/09/emissions-from-the-cement-industry/> [https://perma.cc/X7K3-GX7U].

secretary of DHS to waive “all legal requirements” to the extent “necessary to ensure expeditious construction of the barriers.”<sup>9</sup> Michael Chertoff, the Secretary of DHS from 2005 to 2009, waived compliance with at least twenty state and federal laws in the construction of the current border wall that exists today.<sup>10</sup> This broad waiver of discretion was challenged in the U.S. District Court for the District of Columbia in 2007, but was ultimately upheld.<sup>11</sup> With Chertoff’s waivers as precedent, current DHS Secretary John Kelly could similarly waive any legal obstacles, environmental or otherwise, in the construction of the wall. Trump has also issued an executive order requiring agencies to expedite environmental review of infrastructure projects.<sup>12</sup> With broad waiver discretion and direction from the White House to expedite any environmental review, DHS will likely not have many obstacles from current environmental laws.

### III. ADMINISTRATIVE LAW AS AN ALTERNATIVE LEGAL OBSTACLE

If environmental laws are unable to provide the necessary legal impediment, opponents of the wall may find support from traditional administrative law principles. For example, the Secure Fence Act of 2006 (“Secure Fence Act”) requires that DHS take all measures “necessary and appropriate” to secure the border.<sup>13</sup> In a recent Supreme Court case, *Michigan v. EPA*, the Court found that the phrase “appropriate and necessary” in the Clean Air Act required the Environmental Protection Agency (“EPA”) to undertake some type of cost-benefit analysis before regulating power plants, if they found that certain air pollutants were hazardous to public health.<sup>14</sup> The Clean Air Act does not reference any cost considerations, but the Court read the statute’s silence as mandating some type of cost-benefit analysis by EPA. Justice Kagan’s dissent argued that this was an improper imposition from the Court into the rulemaking process of agencies and would result in the “micromanagement of EPA’s rulemaking.”<sup>15</sup> Assuming that the language of the Secure Fence Act is interpreted the same way as

9. REAL ID Act § 102, 8 U.S.C. §1103 note (c)(1) (Supp. V 2012).

10. *Defs. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 121–22 (D.D.C. 2007).

11. *Id.* at 129.

12. Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017).

13. Secure Fence Act of 2006, Pub. L. No. 109–367, 120 Stat. 2638 (October 26, 2006).

14. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015).

15. *Id.* at 2715.

the language in the Clean Air Act, despite the operative words being in reverse order, it is distinctly possible that opponents could convince a court to delay the “immediate construction” of the wall until a cost-benefit analysis could be completed by DHS.

However, the question remains of how broadly the decision in *Michigan* can be applied. Read narrowly, it could simply stand as a statutory interpretation of the Clean Air Act, and would not be applicable to statutes affecting other agencies. This type of reading would foreclose any possible application to the Secure Fence Act. However, a broader reading would require all agencies to do some type of cost-benefit analysis if the words “appropriate and necessary,” or their equivalent, appear in the authorizing statute. The U.S. District Court for the District of Columbia took this broader view in a recent decision and struck down a designation by the Financial Statement Oversight Council because it did not engage in any informal cost-benefit analysis.<sup>16</sup> The court interpreted the word “appropriate” in the statute to require a cost-benefit analysis pursuant to *Michigan*, even though it was outside the context of the Clean Air Act and had a slightly different wording.<sup>17</sup> It remains unclear whether the Supreme Court would agree with the district court’s analysis, but it bolsters the conclusion that “[c]autious agencies seeking to withstand judicial review after *Michigan* . . . should conduct informal [cost-benefit analysis] at the outset of the rulemaking process.”<sup>18</sup> A broad application of *Michigan* could require the President to go through at least some procedural hoops before construction begins.

Requiring agencies to perform cost-benefit analysis will generally slow down the rule-making process and require agencies to commit resources to ensure that their decisions weigh all the relevant factors, which many consider to be an anti-regulatory approach.<sup>19</sup> To that end, one would think that an anti-regulatory stance by the Court would align well with President Trump’s desire to curtail regulation. The President has issued an executive order entitled “Reducing Regulation and Regulatory Costs,” which requires that for “every one new regulation issued, at least two prior regulations

16. *MetLife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 240–241 (D.D.C. 2016).

17. *Id.*

18. Lauren Packard, *Michigan: An Intrusive Inquiry into EPA’s Rulemaking Process*, 42 COLUM. J. ENVTL. L. 117, 149–50 (2016).

19. Amy Sinden, *Cass Sunstein’s Cost-Benefit Lite: Economics for Liberals*, 29 COLUM. J. ENVTL. L. 191, 222 (2004).

be identified for elimination.”<sup>20</sup> The goal of the order was to ensure that the “cost of planned regulations be prudently managed and controlled through the budgeting process.”<sup>21</sup> The President has also called for a review of regulations in both the Dodd-Frank Act and the Affordable Care Act. The Secure Fence Act is only three pages long and will require prolific regulations to guide the construction of the wall, an unavoidable outcome that seems contrary to the President’s overall deregulatory goals.

The extent to which agencies subject to the Court’s decision in *Michigan* must conduct a cost-benefit analysis is also an important consideration. Three University of Chicago professors recently argued that *Michigan* will pose a serious threat to President Trump, and that if he wants to construct a wall, he will have to explain “why his policies do more good than harm.”<sup>22</sup> Cost-benefit analysis of this type would require a more searching review of the advantages and disadvantages of constructing a wall by the administration. This type of cost-benefit analysis has support in Executive Order 12,866, which states that an agency should “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”<sup>23</sup> However, not all experts agree that *Michigan* requires agencies to perform such a thorough cost-benefit analysis. Harvard Professor Adrian Vermeule argues that the *Michigan* decision merely precludes EPA from only considering the benefits of its decision, without considering any disadvantages.<sup>24</sup> He states that “if mandatory decision-procedures . . . could be implied into general, vague or ambiguous statutory texts . . . the result would be a serious circumvention of the principles underlying *Vermont Yankee*.”<sup>25</sup> The landmark case of *Vermont Yankee v. NRDC* stands for the proposition that the judicial branch may not impose additional procedures upon

20. Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (January 30, 2017).

21. *Id.*

22. Daniel Hemel, Jonathan Masur, & Eric Posner, Opinion, *How Antonin Scalia’s Ghost Could Block Donald Trump’s Wall*, N.Y. TIMES (Jan. 25, 2017), [https://www.nytimes.com/2017/01/25/opinion/how-antonin-scalias-ghost-could-block-donald-trumps-wall.html?\\_r=0](https://www.nytimes.com/2017/01/25/opinion/how-antonin-scalias-ghost-could-block-donald-trumps-wall.html?_r=0) [<https://perma.cc/GS4S-SJNT>].

23. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993).

24. Adrien Vermeule, *Does Michigan v. EPA Require Cost-Benefit Analysis?*, NOTICE & COMMENT (Feb. 6, 2017), <http://yalejreg.com/nc/does-michigan-v-epa-require-cost-benefit-analysis-by-adrian-vermeule> [<https://perma.cc/W7DB-RRSW>].

25. *Id.*

agencies that were not outlined in an authorizing statute.<sup>26</sup> Even if it were clear which type of analysis the Court required, the problem remains that “the requirement to consider an analysis, of any kind, does not provide meaningful guidance about how the agency should respond to the analysis.”<sup>27</sup> The law in this area is unclear, and if *Michigan* can be applied, it remains to be seen whether the cost-benefit analysis will be a small obstacle, or an impossible hurdle, for the administration.

#### IV. CONCLUSION

Despite the many arguments against the construction of the wall, President Trump will likely have the legal authority to follow through with his plan. First, the *Chevron* doctrine gives great judicial deference to executive agencies like DHS,<sup>28</sup> and while the doctrine has encountered significant resistance,<sup>29</sup> it remains the status quo for addressing questions of agency interpretation of congressional statutes. Second, the judicial branch provides another layer of deference to the President in matters concerning immigration and national security. In fact, it has been policy for the Supreme Court to remain deferential to presidential actions involving international policy since 1932, when the Court stated that actions undertaken “within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”<sup>30</sup> This sentiment was also reflected in Justice Jackson’s famous concurrence in *Youngstown v. Sawyer*.<sup>31</sup> Justice Jackson posited that when the President is acting within his Article II powers, which necessarily involve foreign relations and national security, and with the implied or express consent of Congress, then “his authority is at its maximum.”<sup>32</sup> It will be difficult for opponents of the wall to overcome the sizable judicial

26. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

27. David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection*, 32 B.C. ENVTL. AFF. L. REV. 1, 48 (2005).

28. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 865 (1984).

29. Recent legislation has been introduced in Congress that would provide more oversight for agencies and essentially overrule the decision in *Chevron*. See Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. (2016).

30. *United States v. Curtiss-Wright*, 299 U.S. 304, 320 (1936).

31. *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579 (1952).

32. *Id.* at 635.

deference that courts have afforded for the President in matters related to foreign relations. In addition, the prevalence of fortified boundary walls appears to be on the rise. A recent study shows that more than fifty-one fortified walls have been built since World War II ended, half of which were built in the twenty-first century.<sup>33</sup> International rebukes against the President's actions may not be as forceful in light of these statistics, especially considering that many other developed countries such as the United Kingdom are experiencing their own backlash against open borders and continued globalization.<sup>34</sup>

However, there are still reasons for opponents of the wall to remain hopeful. Recently, the Ninth Circuit and the District of Hawaii ruled separately to continue blocking enforcement of the Trump administration's ban on travelers from predominantly Muslim countries.<sup>35</sup> It appears that in these cases at least, the deference to the President in matters of immigration was outweighed by constitutional concerns. Furthermore, there is an argument to be made that the Secure Fence Act prioritizes "systematic surveillance" of the border over the construction of a wall.<sup>36</sup> In fact, the Act outlines methods for surveillance before addressing any physical structures. More specifically, it authorizes surveillance with "unmanned aerial vehicles, ground-based sensors, satellites, radar coverage, and cameras."<sup>37</sup> This language is not surprising, as the strong bipartisan support for this statute was likely not because those who signed it envisioned an enormous contiguous wall along the southern border, but because these non-invasive border surveillance techniques could be employed to make the border safer and more secure. If this were the true purpose of the Act, then implementation through surveillance, rather than by building a costly and potentially environmentally damaging wall, may be the more prudent course of action.

33. Ron E. Hassner, & Jason Wittenberg, *Barriers to Entry: Who Builds Fortified Boundaries and Why?*, INT'L SECURITY, Summer 2015, at 157, 187 (2015).

34. Nelson D. Schwartz & Patricia Cohen, "Brexit" in America: A Warning Shot Against Globalization, N.Y. TIMES, (June 25, 2016), <https://www.nytimes.com/2016/06/26/business/economy/for-america-brexit-may-be-a-warning-of-globalizations-limits.html> [<https://perma.cc/6QVB-TFDU>].

35. *Washington v. Trump*, 847 F.3d 1151, 1164–1169 (9th Cir. 2017) (denying emergency motion for a stay); *Hawai'i v. Trump*, CV No. 17-00050-DKW-KSC, 2017 WL 1011673, at \*17 (D. Haw. Mar. 15, 2017) (granting motion for a temporary restraining order).

36. Secure Fence Act of 2006, Pub. L. No. 109–367, 120 Stat. 2638 (October 26, 2006).

37. *Id.*