

How Property Rights Are Affected by the Texas-Mexico Border Fence: A Failure Due to Insufficient Procedure

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Abstract

The project pursued in this paper is a normative and positive discussion of the procedural failings of the Department of Homeland Security (DHS) in acquiring property for construction of the Texas-Mexico border fence. The factual situation is unique and informs what the procedure ought to be, why, and how existing procedure has been insufficient, and the degree to which process may mitigate the damage to property rights and the secondary harms that result from threats to such rights.

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I. INTRODUCTION

In 1996, the U.S. government ordered the construction of a border fence between the United States and Mexico to reduce illegal entry of people and narcotics from Mexico into the United States. With that mandate, Congress gave the Attorney General—and later the Secretary of Homeland Security—authority to seize, if necessary, private property through eminent domain. That mandate has resulted in the construction of an eighteen-foot high fence at certain segments of the U.S.-Mexico border, intersecting the private property of landowners, many of whose families have held the land for generations.

This paper examines how the Department of Homeland Security (DHS) has implemented its construction mandate, looking specifically at the impact on private property rights and the secondary harms that result from threats to those rights. The focus of this paper is not to challenge the value of the policy choice of the border fence itself, but rather to evaluate and question the process by which the DHS has acquired property in execution of this mandate and how it has decided where along the border to construct segments of the fence. This paper concludes that the policies employed by the DHS, as well as the Congressional mandate, lack sufficient procedural safeguards to protect the rights of property owners.

Congress has mandated that the DHS construct 700 miles of fencing along the U.S.-Mexico border, 370 miles of which were to be completed by the end of 2008. However, the DHS Secretary has exclusive discretion to determine the location of the fencing, the process by which those location decisions are to be made, and how the land for the border fence is to be acquired.

While detailed policies and procedures exist to measure the impact of government actions on the environment or Native American lands, no similar processes have been established to measure the impact of government actions on property owners or property rights. Indeed, there are no standard or formal procedures by which the land acquisition process should proceed. All of these factors contribute to insufficient due process for property owners at the Texas-Mexico border.

Although Congress has required border fencing along the Mexican border in California, Arizona, New Mexico, and Texas, the focus of this paper is on Texas because of the consequences of some of the takings of private property there.¹ The federal government, through the DHS and in the interest of national security, has:

1. Most of the land along the border in California, Arizona, and New Mexico was designated as

- (1) acquired private property, on which landowners reside;
- (2) built an eighteen-foot tall steel fence along only some segments of the border, but not on others;
- (3) severed properties in some instances, thereby leaving portions of a single property on separate sides of the fence; and
- (4) in the process, has separated families, cultures, and land.

These features have particular relevance when evaluating and characterizing the procedural failures of the border fence project, the harms that have resulted, and the normative solutions.

In the Section II of this paper, I will explain the legislative background of the Border Fence, as well as provide information on the formation and reorganization of the DHS, the agency responsible for executing the border fence project. The internal structure of the DHS can offer a positive explanation of its capacity to provide due process. In the Section III of this paper, I will offer evidence of the means by which the DHS has carried out the subject mandate—how it has acquired property, how it has interacted with property owners, and how property rights were violated and the harms that resulted in those instances. In the Section IV of this paper, I will characterize those particular dealings as procedural failings and offer suggestions for the types of procedures that need to be implemented. I will explore the harms caused to property owners because of the absence of sufficient safeguards, and I will offer suggestions on the types of procedures that should be implemented. My solutions include two categories: reason-giving and negotiation procedures.

II. STATUTORY BACKGROUND OF THE BORDER FENCE AND THE DEPARTMENT THAT MUST IMPLEMENT IT—THE DHS

A. *Border Fence Enabling Legislation and Source of Land Acquisition Authority*

Responsibility for the construction of the border fence is vested in the U.S. Border Patrol, which is a division of U.S. Customs and Border Protection (CBP), an agency within the DHS.² In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which as originally enacted required the Attorney General (AG) to construct fencing in the border area near San Diego, California.³

The actual construction of the fence has been implemented under an agreement between CBP and the U.S. Army Corps of Engineers (Corps).⁴ Under this

federal property by President Theodore Roosevelt, under the “Roosevelt Reservation.” Consequently, the scope of government takings was far less significant and prevalent than it is at the Texas border. CHAD C. HADDAL, YULE KIM, & MICHAEL JOHN GARCIA, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER, CONG. RESEARCH SERV., RL 33659, at 17–18 (Mar. 16, 2009) [hereinafter CRS REPORT].

2. *Id.* at 1.

3. Omnibus Consolidated Appropriations Act, of 1997, Pub. L. No. 104-208, 110 Stat. 3009-546, Div. C, § 102 (B)(1).

4. CRS REPORT, *supra* note 1, at 18.

agreement, after CBP acquires the land, the Corps conducts engineering studies for the construction and in some instances actually provides the manpower for construction.⁵ At other times the military or state National Guards have provided the labor.⁶ Since 2008, however, private contractors have been responsible for constructing the fence.⁷

IIRIRA gives the Secretary⁸ authority to “contract for or buy any interest in land, including temporary use rights, adjacent to or in the vicinity of an international land border when the [Secretary] deems the land essential to control and guard the boundaries and borders of the United States.”⁹

The Fifth Amendment Takings Clause requires: 1) a government taking of private property be for a “public use,” and 2) the government pay the property owners “just compensation.”¹⁰ Under IIRIRA, Congress established an explicit “public use” for the construction of the border fence: to “guard the boundaries and borders of the United States against the illegal entry of aliens.”¹¹ This public use justifies granting the Secretary authority to “commence condemnation proceedings” if the landowner and Secretary are “unable to agree upon a reasonable price.”¹²

In 2005, Congress passed the Secure Fence Act of 2006, which expanded fence construction beyond California and identified the exact locations of fencing in “priority areas” along the Texas and Arizona borders.¹³ In December 2007, Congress again amended IIRIRA with the passage of the Consolidated Appropriations Act of 2008 (“the 2008 Act”).¹⁴ This Act repealed the language directing construction at five specified segments along the border, and instead provided a general mandate to install fencing where it “would be most practical and effective.”¹⁵ Thus, the 2008 Act grants the Secretary full discretion to decide where along the U.S.-Mexico border to construct fence segments.¹⁶ The 2008 Act required, however, no less than 700 miles of fence on the southern border, of which 370 miles were to be completed by December 2008.¹⁷

5. *Id.* at 20.

6. *Id.*

7. *Id.* at 20–21.

8. After the DHS was reorganized under the Homeland Security Act of 2002, authority over the border fence was vested in the Secretary of Homeland Security, as opposed to the Attorney General. The language of IIRIRA was amended by the Consolidated Appropriations Act of 2008 to refer specifically to the Secretary of the DHS when vesting authority for the border fence. Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844.

9. 8 U.S.C. § 1103(b)(1) (2008).

10. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

11. 8 U.S.C. § 1103(a)(5) (2008).

12. Omnibus Consolidated Appropriations Act of 1997 § 102(d)(3).

13. *See* Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638, § 3(1)(B)(ii), (indicating exact location of reinforced fencing in the Rio Grande Valley, e.g., “15 miles northwest of the Laredo, Texas, port of entry to 15 miles southeast of the Laredo, Texas, port of entry”).

14. Consolidated Appropriations Act of 2008 § 564.

15. *See id.* § 564(2)(A) (amending how the Secretary should carry out subsection (a) of 8 U.S.C. § 1103); 8 U.S.C. § 1103 note (b)(1)(B).

16. *See* Consolidated Appropriations Act of 2008 § 564 (listing the powers and authority of the Secretary of Homeland Security in constructing border fence segments).

17. *Id.* § 564(a)(2); 8 U.S.C. § 1103 note (b)(1)(A)(C) (2009).

When fence construction was delayed in California because of environmental concerns, Congress passed the Real ID Act of 2005, which amended the IIRIRA to include an expanded waiver provision that would allow the Secretary to waive laws and requirements if necessary to facilitate a faster construction of the fence.¹⁸ The current waiver provision provides:

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

This waiver provision constitutes a large grant of authority and discretion to the DHS Secretary when executing fence construction. In Hidalgo County, Texas, Secretary Chertoff waived twenty-seven laws, ranging from environmental protections to procedures regulating Native American territory and burial grounds.²⁰ Additionally, the Real ID Act expressly limits judicial review of DHS waivers to constitutional violation claims, restricting appellate review of those claims to grants of certiorari by the U.S. Supreme Court.²¹ This restriction effectively denies claimants any cognizable appellate review due to the extremely limited number of cases accepted by the Supreme Court. While the waiver provision does not permit the DHS to circumvent the constitutional limits on government takings under the Fifth Amendment,²² it has functioned to restrict process in the DHS's policies of land acquisition of certain areas along the border.²³

B. Formation and Structure of the DHS Can Explain Challenges in Executing Border Fence Mandate

One way to understand the DHS's land acquisition policies along certain areas of the border is to view the Department's actions as a function of its organizational structure. Cohen, Cuellar, and Weingast have studied the reorganization of the DHS and concluded that the creation of this new Department has resulted in a "net

18. CRS REPORT, *supra* note 1, at 5–7 (stating that the scope of the new waiver expansion is substantial, and while "Congress commonly waives preexisting laws . . . the new waiver provision uses language and a combination of terms not typically seen in law").

19. 8 U.S.C. § 1103 note (c) (2009) (emphasis added).

20. *See generally* CRS REPORT, *supra* note 1, at 49–50 (listing in Appendix K all the legal requirements waived by Chertoff in Hidalgo County pursuant to Real ID Act of 2005).

21. 8 U.S.C. § 1103 note (c)(2)(C) (2009).

22. *See Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (stating that 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 specific provisions of the Constitution").

23. Several cases have challenged the constitutionality of the waiver provision and the restriction of judicial review under the Real ID Act, but to date the Fifth Circuit has not agreed with that position nor has the Supreme Court granted certiorari. *See Defenders of Wildlife and the Sierra Club v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007); *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008) (finding the DHS's waiver authority to be constitutional); *County of El Paso v. Chertoff*, 2008 LEXIS 83045 (W.D. Tex. Aug. 29, 2008) (holding that DHS's waver authority is constitutionally valid).

loss in the efficiencies associated with homeland security.”²⁴ They attribute this result to the internal management failures and coordination deficiencies of the Department.²⁵ Indeed, even the Government Accountability Office (GAO), as recently as September of 2009, reported to Congress that the DHS was burdened by managerial and leadership challenges, explaining that the “failure to effectively address the DHS’s management challenges and program risks could have serious consequences for our national security.”²⁶

On March 1, 2003, pursuant to the Homeland Security Act, the DHS was completely restructured to absorb twenty-two existing agencies, with a combined quarter of a million federal employees, all refocusing their collective mission to one of national security.²⁷ However, the newly organized civilian agency incorporated a vast array of agencies ranging from the U.S. Coast Guard to the INS, many of which had existing legacy mandates and functions not even tangentially related to national security.²⁸

The stated purpose for this colossal centralization was to increase communication between various agencies that have a role in national security.²⁹ In fact, it had the opposite effect, making “it harder for organizational leaders to master their organization, to understand its separate parts, and to understand the complex ways in which better coordination can be achieved.”³⁰ These structural complexities of the new DHS can affect its capacity to implement negotiation and transparency in its land acquisition dealings at the border.³¹ Additionally, these internal challenges, which insert an even larger wedge between the Department’s leadership and its policies,³² explain why certain border community members have found the DHS to be particularly unresponsive to their circumstances, failing to communicate effectively with them.³³

24. Dara Kay Cohen, Mariano-Florentino Cuellar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 751 (2006) [hereinafter Cohen et al.].

25. *Id.*

26. *Despite Progress, DHS Continues To Be Challenged in Managing Its Multi-Billion Dollar Investment in Large-Scale Information Technology Systems: Hearing Before the Subcomm. on Government, Management, Organization, and Procurement, of the H. Comm. on Oversight and Government Reform*, 111th Cong. 2 (2009) (statement of Randolph C. Hite, Director Information Technology Architecture and System Issues).

27. Cohen et al., *supra* note 24, at 676; see Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (restructuring DHS to absorb other agencies, such as The U.S. Customs Service, The Immigration and Naturalization Service, U.S. Coast Guard, and the U.S. Secret Service); Department of Homeland Security, History: Who Became Part of the Department?, http://www.dhs.gov/xabout/history/editorial_0133.shtm (last visited Feb. 17, 2010).

28. Cohen et al., *supra* note 24, at 691, 696–97.

29. Department of Homeland Security, “Strategic Plan: One Team, One Mission, Securing Our Homeland,” <http://www.dhs.gov/xabout/strategicplan/> (last visited Feb. 18, 2010).

30. Cohen et al., *supra* note 24, at 710.

31. *Id.* at 710–11 (discussing a range of possible consequences for the complex bureaucratic structure of the new DHS).

32. See *id.* at 743 (arguing that “[w]hen an agency is saddled with such a massive panoply of bureaucratic units and missions, the nature of its expertise becomes far less obvious”).

33. See Margo Tamez, *Open Letter to Cameron County Commission*, 2 CRIT 110, 121–22 (2009) [hereinafter *Open Letter*] (comparing the government’s recent efforts with prior efforts to remove Texas Apache peoples from their lands and arguing that “the amnesia which infects government policies today is incapable of making ‘sense’ or ‘logic’ of why the river-based peoples are the most highly resistant to these modern racist policies”).

Another feature of the DHS reorganization involved adding new layers of hierarchy by replacing bureau chiefs with department heads and political appointees.³⁴ The structural changes create uncertainty for bureaucrats about their future career, causing many to leave the agency, or even worse, to have very little stake in the work they perform.³⁵ As bureaucrats leave the Department, institutional memory and expertise leave with them.³⁶

The combination of this diminished expertise and a more detached bureaucracy is consistent with the perceptions of certain border stakeholders—that the DHS’s reliance on its technical expertise is insufficient to justify DHS decisions to place the fence at some segments of the border and not at others.³⁷ This combination reveals both the drawbacks of imbuing the DHS Secretary with total waiver authority under the Real ID Act³⁸ and the rationalization for having a waiver provision to enable the gargantuan new Department to execute its border mandates.³⁹

Although the DHS has become an amalgamation of so many diverse agencies, the DHS is charged with the overarching role of guarding national security. This national security role, and its close connection to crisis and emergency offers a positive explanation for why the DHS may be more inclined to be less engaged with the public and more guarded with its information. While the Department is legally a civilian agency, its function in securing the borders is a hybrid of a civilian and a

34. Cohen et al., *supra* note 24, at 714, 729.

35. *Id.* at 711–12, 718.

36. *See id.* at 753 (asserting that “[i]t is difficult to accept that [former Secretaries] Ridge or Chertoff were simultaneously experts in customs interdiction, disaster response, and technical cyber-security”); *see also* National Commission on the Public Service, *Leadership for America: Rebuilding the Public Service 17* (1989) (The Commission found that the growth in presidential appointees “year after year inevitably discourage[s] talented men and women from remaining in the career service, or entering in the first place. The ultimate risk is reduced competence among careerists and political appointees alike.” *Id.* at 18. The Commission further concluded “excessive numbers of political appointees serving relatively brief periods may undermine the President’s ability to govern, insulating the Administration from needed dispassionate advice and institutional memory.” *Id.* at 7.).

37. *See* Cohen et al., *supra* note 24, at 744 (explaining that “the case for deferring to expertise is stronger when the interpretation itself is coming from officials directly involved in policymaking (such as Coast Guard officials) rather than higher-level political appointees (such as the Secretary or General Counsel of DHS)”; *see, e.g.*, LEAH NEDDERMAN ET AL., UNIVERSITY OF TEXAS WORKING GROUP ON HUMAN RIGHTS & THE BORDER WALL, VIOLATIONS ON THE PART OF THE UNITED STATES GOVERNMENT OF THE RIGHT TO PROPERTY AND NON-DISCRIMINATION HELD BY RESIDENTS OF THE TEXAS RIO GRANDE VALLEY 11–13 (2008) [hereinafter WORKING GROUP: PROPERTY] (articulating the Working Group’s concern with the DHS rationale for the fence location).

38. *See Open Letter, supra* note 33, at 110, 120 (daughter of displaced landowner stating that the “rupture of over 35 Constitutional and Federal laws of the [U.S.] by one individual agency is nothing less than a mutiny from within the United States”); Press Release, Defenders of Wildlife, Faith, Human Rights, Environmental Leaders Applaud Congressional Efforts to Restore Rule of Law in Borderlands, Jun. 23, 2009, http://www.defenders.org/newsroom/press_releases_folder/2009/06_23_2009_coalition_applauds_congressional_efforts_to_restore_rule_of_law_in_borderlands.php (announcing that twenty-seven members of Congress sent a letter to Secretary Napolitano, urging her to abandon the waiver policy created by the Real ID Act).

39. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-555, Div. C, § 102(c) (granting the Attorney General waiver authority to the extent “necessary to ensure expeditious construction of the barriers”). After the DHS overhaul in 2003, the waiver provision was expanded. Secretary Chertoff waived 112 laws during fence construction from 2005 through 2008, whereas fence construction that began in California in 1996 proceeded without the execution of any waivers. CRS REPORT, *supra* note 1, at 5, 7–8, 43–53, apps. H–L (2009).

military agency.⁴⁰ For instance, just like the civilian Department of the Interior or the Department of Transportation,⁴¹ the DHS must acquire private property in order to fulfill its Congressional orders.⁴² However, unlike those agencies, the DHS is not acquiring land for a road or fire station, but rather to secure the U.S. borders, a role akin to that of the Department of Defense. The DHS's quasi-military function suggests why its actions in certain cases, with respect to land acquisition at the border, have involved fewer procedural safeguards than government takings in other civilian contexts.

This dichotomy of roles is further complicated by the eminent domain jurisprudence itself, which distinguishes between situations where the government is acting in a military, as opposed to a civilian, capacity. In the military context, the Government does not owe compensation to a landowner when private property is destroyed by an act of military necessity during war.⁴³ However, in all other civilian contexts, the Fifth Amendment requires the government to pay "just compensation" when private property is seized for a "public use."⁴⁴

C. *Status of the Fence Construction*

The most recent government reports on the status of the fence construction were issued in June 2009. Those reports explain that 633 miles of the original 700-mile fence mandate were constructed and that twenty miles of fence remain to be built in the Rio Grande Valley.⁴⁵ Secretary Napolitano has indicated that she will not stop the remaining construction because contracts have been made and the project is nearing to a close.⁴⁶ However, Congress has decided not to appropriate new funds for continuation of the border fence project beyond the original construction mandate.⁴⁷

40. See Department of Homeland Security, Department Subcomponents and Agencies, <http://www.dhs.gov/xabout/structure/> (last visited Feb. 17, 2010) (listing the different resources and agencies DHS utilizes); STEVE BOWMAN, HOMELAND SECURITY: THE DEPARTMENT OF DEFENSE'S ROLE, CONG. RESEARCH SERV., RL 31615 (May 14, 2003) (explaining how the Department of Defense helps DHS fulfill its military functions).

41. See Department of the Interior, What We Do, <http://www.doi.gov/whatwedo/> (last visited Feb. 17, 2010) ("The U.S. Department of the Interior uses sound science to manage and sustain America's lands, water, wildlife, and energy resources, honors our nation's responsibilities to tribal nations, and advocates for America's island communities.").

42. See 8 U.S.C. § 1103(b) (2009) (granting the Secretary authority to "contract for or buy any interest in land").

43. See *United States v. Pac. R.R.*, 120 U.S. 227, 234 (1887) (explaining that the "destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone, as one of its consequences"); *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 764 (Fed. Cl. 2003) (holding that the "[Takings] [C]ause applies to the civil functions of Government and not to the military").

44. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

45. U.S. GOV'T ACCOUNTABILITY OFFICE, SECURE BORDER INITIATIVE: TECHNOLOGY DEPLOYMENT DELAYS PERSIST AND THE IMPACT OF BORDER FENCING HAS NOT BEEN ASSESSED 20, 21 (2009) [hereinafter GAO REPORT: DELAYS].

46. See Stephanie Simon, *Border-Fence Project Hits a Snag*, WALL ST. J., Feb. 4, 2009, <http://online.wsj.com/article/SB123370523066745559.html> (reporting that Secretary Napolitano has given no sign of stopping the remaining fence construction).

47. Gary Martin, *Border Fence Funds Pulled At Request of Lawmakers*, HOUSTON CHRON., Oct. 9, 2009, at A3.

Since then, no new information about the status of the fence in terms of actual mileage or location of either remaining or completed fence has been made publically available or been provided to border stakeholders after their numerous Freedom of Information Act requests.⁴⁸ This absence of information is consistent with the general lack of transparency that has characterized much of the fence construction.⁴⁹

III. LAND ACQUISITION AT THE TEXAS-MEXICO BORDER

A. *Due Process Requirement and Takings*

The U.S. Supreme Court has articulated the purpose of the compensation requirement for government takings as follows: “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁵⁰ This “public goods” argument is even more valid in the context of the border fence, where the benefit—national security—is dispersed widely over the whole nation, and the costs are concentrated on only a few landowners. This dynamic of particularly broad benefits and concentrated costs can substantiate the normative argument that the federal government should have a greater sensitivity to the costs borne by private property owners as a result of the government takings for a border fence and should compensate them accordingly.⁵¹

Due process is owed to citizens by the federal government under the Fifth Amendment. The Court has articulated the following analysis to determine which procedures are required by due process:

[C]onsideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁵²

48. See, e.g., Complaint, *Gilman v. Dep’t of Homeland Security*, No. 1:2009CV00468 (D.D.C. Mar. 11, 2009) (requesting information about fence locations and maps pursuant to the requests made under the Freedom of Information Act on April 11, 2008); see generally Department of Homeland Security, More on the Southwest Border Fence, http://www.dhs.gov/files/programs/gc_1207842692831.shtm (last visited Feb. 13, 2010).

49. See discussion *infra* Section III.

50. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

51. I do not offer this in the “Procedural Solutions” part of this article, *infra*; however adjusting compensation to reflect particular harms is not precluded because it is one of the terms that could result from the negotiation process I advocate for between the DHS and the landowners.

52. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); see also *Goldberg v. Kelly*, 397 U.S. 254, 262–71 (1970) (holding that due process under the circumstances of the case “require(s) that a [welfare] recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend”).

The 2008 Act itself, which establishes the DHS's fence construction mandate, includes a "consultation" requirement, providing that the Secretary: "[S]hall consult with . . . 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."⁵³

As part of this requirement, the 2008 Act makes explicit that nothing in the legislation shall be "construed to . . . affect the eminent domain laws of the United States or of any State."⁵⁴ The import of this language suggests that Congress recognized the potential for the fence to infringe on property rights and to have immediate consequences for the people living along the border. The consultation provision further demonstrates that Congress specifically intended that some sort of process be developed by the DHS to confront and engage these issues.

Consistent with Congress's intention that the DHS enact procedural safeguards with respect to fence construction, I suggest two categories of process that the DHS should provide to both private property owners at the border and members of the surrounding communities.⁵⁵ The two procedures, which are explained in Section IV, are characterized as "negotiation" and "reason-giving." These two processes involve informational feedback loops that require the DHS to gather, coordinate, understand, apply, and disclose information both to and from the agency (through its hierarchical ladder) as well as to and from the private property owners and relevant communities. However, these normative solutions may be difficult to implement when combined with the positive understanding of the DHS's structural weaknesses.⁵⁶

*B. Limited Due Process in the DHS's Land Acquisitions*⁵⁷

The government's takings of private property at the border have come in two phases. The first consists of the temporary easement to survey the land and

53. 8 U.S.C. § 1103 note (b)(1)(B) (2009).

54. *Id.* (b)(1)(C)(ii)(II).

55. *See* Complaint para. 6, *Texas Border Coal. v. Napolitano*, No. 08CV00848, 2008 WL 2259965, at *2 (D.C.C. May 15, 2009) (asserting that "[a]s a matter of Fifth Amendment due process and fundamental fairness, and to avoid arbitrary decision-making, plaintiffs . . . are entitled to know the rules, guidelines, instructions, directives or policies relating to the process of negotiation required by § 102 of the IIRIRA and how the government will arrive at its position of fixed price for the property interest sought from plaintiffs . . . both to survey and eventually to actually build a border wall.").

56. *See supra* Section II(B).

57. At some time during the summer of 2009, the DHS provided some clear and publicly available information on their website indicating information about what types of fence would be used, some of the factors they consider when choosing fence location, and measures they have employed to engage the community and the stakeholders. This information is an improvement on the very limited information that was previously available to property owners, either publicly or upon request. However, at the time such information was published, only twenty miles of fence remained to be completed along the Texas-Mexico border. Therefore, almost all of the fence in this region has proceeded without access to this information. Consequently, the analysis of this paper is concerned primarily with the DHS's policies up until the summer of 2009; *see, e.g.*, Complaint, *Gilman v. Dep't of Homeland Security*, No. 1:2009CV00468 (D.C.C. Mar. 11, 2009) (requesting information about fence locations and maps pursuant to the requests made under the Freedom of Information Act on April 11, 2008); *see generally* Department of Homeland Security, [More on the Southwest Border Fence](http://www.dhs.gov/files/programs/gc_1207842692831.shtm), http://www.dhs.gov/files/programs/gc_1207842692831.shtm. (last visited Feb. 13, 2010).

determine if and where to place the fence.⁵⁸ The second is the process of the permanent title transfer of property planned for occupation by the border fence.⁵⁹ Both of the phases have involved instances of inadequate process by the DHS.⁶⁰

In the summer of 2007, DHS agents served hundreds of property owners in South Texas with letters requiring a signature to establish a “voluntary right of entry” onto their land by government officials for site assessment and survey.⁶¹ These waivers indicated that the government would have a six-month right-of-way onto the private land to “move structures and vegetation, store vehicles and equipments and bore holes in the property.”⁶² The letter threatened suit if the property owners did not sign the attached waiver.⁶³ These letters did not include an offer to pay for either the use of the land or for any property damage incurred as a result of such use.⁶⁴ In addition, the letters did not disclose the right of the property owners to negotiate a price or additional terms.⁶⁵ Many landowners did sign these letters, however, fearing suit by the federal government and never understanding that the law provided them with the right to negotiate.⁶⁶ Another hundred or so landowners did not sign the waiver, an act resulting in condemnation proceedings against the landowners, filed by the DHS.⁶⁷

The procedural failings in construction of the border fence were captured in a complaint filed by the Texas Border Coalition (TBC)⁶⁸ against Secretary Chertoff, asserting:

58. Complaint para. 23, *Texas Border Coal.*, 2008 WL 2259965.

59. *Id.* para. 24.

60. *See id.* para. 6 (asserting that Secretary Chertoff has “failed to issue or make known to border property owners any rules, guidelines, instructions, directives or policies relating to the process of negotiation required by § 102 of the IIRIRA or how the government will arrive at its position on a fixed price for the property interest sought”).

61. *See United States v. Muniz*, 540 F.3d 310, 311 (5th Cir. 2008) (explaining how the DHS agents sought right of entries); *see also* Reply Brief of Appellants at 7–9, *United States v. Muniz*, 540 F.3d 310 (5th Cir. 2008) (No. 08-40372) (discussing the voluntary rights of entry); Working Group: Property, *supra* note 37, at 8 (noting that the Secure Fence Act of 2006 and the Consolidated Appropriations Act of 2008 will affect the fate of “hundreds of property owners in South Texas”).

62. WORKING GROUP: PROPERTY, *supra* note 37, at 14. The “Working Group” referenced throughout this paper is a “multi disciplinary collective of faculty and students at The University of Texas at Austin, which has gathered to analyze the human rights impact of the construction of the border wall on the Texas/Mexico border . . . In May 2008, a delegation of the Working Group traveled to the Rio Grande Valley area of the Texas/Mexico border to conduct fact finding regarding the impact of the border wall on human rights and to speak with individuals affected by the construction of the wall.” Press Release, University of Texas Working Group on Human Rights & The Border Wall, UT Working Group Alleges Texas/Mexico Border Wall Violates Human Rights (June 13, 2008), http://www.utexas.edu/law/news/2008/061608_working_group.html.

63. Reply Brief of Appellants at 8, *Muniz*, 540 F.3d 310 (5th Cir. 2008) (No. 08-40372).

64. *Id.* at 9.

65. *Id.*

66. *See Cases Against Border Landowners Prepared*, USA TODAY, Jan. 9, 2008, http://www.usatoday.com/news/nation/2008-01-09-border-fence_N.htm (noting that the government sent out 135 letters directing landowners to comply, but only 33 complied).

67. *See* Howard Witt, *U.S. Fence Creates River of Ill Will on Texas Border*, CHI. TRIB., Jan. 16, 2008, <http://www.chicagotribune.com/news/chi-080115fence,0,6983165.story> (noting that over 100 landowners refused to comply); Department of Homeland Security Office of Inspector General, *Progress in Addressing Secure Border Initiative Operational Requirements and Constructing the Southwest Border Fence*, Apr. 2009, http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_09-56_Apr09.pdf.

68. The TBC identifies itself in the Complaint it filed against Secretary Chertoff as a “group of cities,

As a matter of Fifth Amendment due process and fundamental fairness, and to avoid arbitrary decision-making, plaintiffs and their putative class members are entitled to know the rules, guidelines, instructions, directives or policies relating to the process of negotiation required by § 102 of the IIRIRA and how the government will arrive at its position of fixed price for the property interest sought from plaintiffs and putative class members both to survey and eventually to actually build [the] border wall.⁶⁹

Under the IIRIRA Congress specifically grants the Secretary authority to “buy any interest in land, including *temporary use rights* . . . as soon as the lawful owner of that interest fixes a price for it and the [Secretary] considers that price reasonable.”⁷⁰ The statute also stipulates that the Secretary can commence a condemnation proceeding “[w]hen the [Secretary] and the lawful owner . . . are *unable to agree* upon a reasonable price.”⁷¹ The language not only demonstrates that the DHS can pay for easements on the property, but that the process should include a negotiation between the DHS and landowner in which they can attempt to “agree upon a reasonable price” for the government’s use rights.

In defending its efforts to negotiate, the federal government has argued that the request for a “voluntary right of entry” actually constituted an offer of payment in the sum of zero dollars because a temporary easement was valueless.⁷² By March 2008, when many of the condemnation proceedings for temporary easements were well on their way, and the landowners had filed countersuits, the DHS began offering Defendant-landowners \$100 for unlimited use of the land during a three or six-month period.⁷³ The DHS made these post-hoc payment offers to comply with IIRIRA, which the U.S. District Court has explained requires a bona fide attempt at negotiation that can be satisfied by post-suit negotiations.⁷⁴

With respect to the “consultation” requirement added by the 2008 Act, the U.S. District Court for the Southern District of Texas has held that the federal government’s failure to consult is not a defense to the taking, but may be a “condition prior to entry onto the property after the taking has been completed.”⁷⁵

counties, Chambers of Commerce, and Economic Development Commissions located proximate to the border between the United States and Mexico in the State of Texas.” Many of the city and county member entities own property on the border along the path where the United States has built or intends to build the fence. Complaint para. 1, *Texas Border Coal.*, 2008 WL 2259965, at *1–2. Members of the TBC have traveled to Washington regularly to lobby the federal government to change its policies regarding the Border Fence construction. See Sylvia Moreno, *In Texas, Frustration Over Senate Impasse*, WASH. POST, June 11, 2007; Gary Martin, *Border Officials Ask Congress to Stop Pedestrian Fence*, HOUSTON CHRON., Sept. 9, 2009 http://blogs.chron.com/txpotomac/2009/09/border_officials_ask_congress.html (discussing the TBC’s lobbying efforts).

69. Complaint para. 6, *Texas Border Coal.*, 2008 WL 2259965, at *2.

70. 8 U.S.C. § 1103(b) (2009) (emphasis added).

71. *Id.* (emphasis added).

72. Brief of the Appellee at 45, *Muniz*, 540 F.3d 310 (5th Cir. 2008) (Nos. 08-40372, 08-40373).

73. Reply Brief of Appellants at 10, *Muniz*, 540 F.3d 310 (5th Cir. 2008) (No. 08-40372).

74. See *United States v. 1.04 Acres of Land, More or Less, Situated in Cameron County*, 538 F. Supp. 2d 995, 1010–14 (S.D. Tex. 2008) (finding that 8 U.S.C. § 1103(b)(3) “requires the Government to put forth a bona fide effort to negotiate with the landowner”). However, the Fifth Circuit has not reviewed the latter interpretation because efforts to appeal have been unsuccessful based on the fact that the circuit courts can only review final orders, of which the possession orders have not been deemed to be. See *United States v. Muniz*, 540 F.3d 310, 312–14 (5th Cir. 2008) (per curiam).

75. 1.04 Acres, 538 F. Supp. 2d at 1014; see 8 U.S.C. § 1103 note (b)(1)(C) (requiring the Secretary to

Despite the District Court's interpretation that IIRIRA requires negotiation, the court made clear that the rules guiding this negotiation have not been set by the statute, and was therefore unwilling to read the consultation provision as guiding the structure of these required negotiations.⁷⁶ Because no formalized rules exist, either by statute or case law, dictating the form of negotiation required for property takings in this context, the DHS has proceeded to fulfill its construction mandates, at times without meaningful process.

For instance, when the District Court issued its final possession order for the property of Eloisa Támez, it said that prior to the government actually exercising its right of possession, the government must resolve "steps [it] will take to minimize the impact on the environment, culture, commerce and quality of life for the Defendant."⁷⁷ However, days after the Order, the DHS's contractors appeared on Támez's land and completed the fence within twenty-four hours, without any kind of consultation.⁷⁸

In one instance in which the DHS did create a procedure to comply with the consultation requirement, the procedure failed in substance, providing insufficient due process to protect the property interests of border community members.⁷⁹ Here, the DHS, in December 2007, held a single town meeting in Brownsville at which armed guards from the CBP patrolled the meeting, and government officials entered comments from the participants into a computer.⁸⁰ The meeting constituted insufficient process because the government did not provide a "forum or time to make public comments, to exchange information between the DHS and the community or . . . to ask questions directly."⁸¹ Active public participation and exchange between interest groups is necessary in order for this community meeting to constitute a meaningful procedural protection for the private property interests of those living along the border.

C. *Decisions About Fence Location*

The process adopted by the DHS in the planning and construction of the border fence often lacked transparency. In addition to insufficient public participation and negotiation at both the individual and community level, the DHS did not publish comprehensive maps indicating its construction plans until the summer of 2009,

"consult with . . . States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the . . . quality of life for the communities and residents located near the sites at which such fencing is to be constructed").

76. See *1.04 Acres*, 538 F.Supp.2d at 1010 note 9 (holding that 8 U.S.C. § 1103(b)(3) "does not prescribe or require a particular negotiation procedure").

77. Possession Order in Civ. Act. B-08-351, *United States v. Támez-Plata*, 333 Fed. Appx. 841 (5th Cir. 2009).

78. Kevin Sieff, *Border Fence Fight Persists*, BROWNSVILLE HERALD, Apr. 23, 2009, <http://www.brownsvilleherald.com/news/tamez-97265-property-order.html> (reporting that construction of a fence on condemned border property was completed within 24 hours); E-Mail from Margo Támez to Denise Gilman (April 26, 2009, 11:15 AM) (on file with author) (stating that "the decision makers' in D.C. refused the gate issue, in a 5 minute conversation with the U.S. attorney," despite the court consultation order).

79. WORKING GROUP: PROPERTY, *supra* note 37, at 19.

80. *Id.*

81. *Id.*

when only twenty miles of fencing remained.⁸² Consequently, landowners did not have sufficient notice about which properties or locations were going to be directly impacted by the fence, since fencing is to be placed only along certain segments of the border.⁸³

There are justifications for the government's lack of transparency, such as the national security sensitivity of this information and the highly technical nature of determining what topography is appropriate for a border fence. However, without explanations about how the DHS has made its decisions about fence location, the DHS's choices after the initial surveyal process suggest uncomfortable results—the wealthy and the well-connected have fared better in the DHS's takings. The following anecdotes demonstrate these dichotomies.

The property of Eloise Támez, age 72, whose land has been in her family for centuries, was seized by the federal government for construction of the border fence.⁸⁴ However, the River Bend Resort and Country Club, which lies only a couple of miles southeast of the Támez property, has not been similarly burdened by any fence construction.⁸⁵ Had the fence been extended from Támez's property to the resort it would have severed the golf course from the rest of the resort.⁸⁶ Because the federal government did not sufficiently explain the basis of its decisions about fence location, from the standpoint of this property owner, the government appears to value one set of attachments to the land more than the other.

Similarly, in the border town of Granjeno, the DHS planned to install the fence on the private property of Daniel Garza, age 76.⁸⁷ They chose, however, not to extend the fence through the adjacent property, owned by Dallas billionaire Ray L. Hunt, whose property has been designated for a large-scale development project.⁸⁸ Other details that bear on a potential bias include that Mr. Hunt is a friend of President Bush, was a Bush appointee to the Foreign Intelligence Advisory Board, and donated \$35 million to Southern Methodist University for President Bush's library.⁸⁹

Landowners in Eagle Pass, Texas were also concerned with these apparent inequities and brought an equal protection suit against the government. Plaintiffs asserted that the government discriminated against them on the basis of race and wealth, explaining that the government has applied the congressional border fence mandate to their property but not to the 55,000 acres of land owned by Bill Moody, a

82. DENISE GILMAN, WORKING GROUP ON HUMAN RIGHTS AND THE BORDER WALL, OBSTRUCTING HUMAN RIGHTS: TEXAS-MEXICO BORDER WALL: BACKGROUND AND CONTEXT 7 (2008) [hereinafter WORKING GROUP: BACKGROUND]; see Department of Homeland Security Webpage, Southwest Border Fence, <http://www.dhs.gov/files/programs/border-fence-southwest.shtm> (displaying a map noting the current status of the border fence project, posted in August 2009) (last visited Feb. 14, 2010).

83. *Id.* at 6–9.

84. WORKING GROUP: BACKGROUND, *supra* note 82, at 8; Melissa Del Bosque, *Holes in the Wall: Homeland Security Won't Say Why the Border Wall is Bypassing the Wealthy and Politically Connected*, TEXAS OBSERVER, Feb. 22, 2008, at 2–3 [hereinafter *Holes*]; see *United States v. 0.26 Acres of Land*, No. B-08-351, (S.D. Tex. Apr. 16, 2009) (granting the plaintiff (U.S. government) an estate in fee simple and a right to possession in a possession order).

85. WORKING GROUP: PROPERTY, *supra* note 37, at 12; *Holes*, *supra* note 84, at 2.

86. WORKING GROUP: PROPERTY, *supra* note 37, at 12.

87. *Id.*

88. *Id.*

89. *Id.*

wealthy, neighboring rancher.⁹⁰ The Plaintiffs complained that the government bypassed Moody's land after engaging him in negotiation, a procedure which the government did not similarly extend to the Plaintiffs.⁹¹

In each of these cases, the affected landowners feel particularly targeted by the federal government. Even if the government's reasons for choosing to construct the fence at some locations but not at others are perfectly justified, without a process that provides for transparency and communication between property owners and the government, the DHS's land acquisition will maintain an appearance of impropriety.

D. Dignitary Harms to Landowners

The DHS's land acquisitions have resulted in some landowners feeling disparaged by making them feel like outsiders who are less worthy of government protection. To this end, Margo Tómez⁹² has said that Secretary Chertoff publically labeled border landowners like her mother, who have not voluntarily sold their land to the DHS, as "resisters," "dissenters," and "refusers."⁹³ She argues that Chertoff's conduct implies "that we are somehow of a low moral quality."⁹⁴ Professors Nadler and Diamond have researched the link between property rights and psychology, concluding that a property owner's resistance to a government taking of property is often a largely psychological response.⁹⁵ Nadler explains that there are two sets of reasons why landowners may resist selling their property to the government, having nothing to do with economic rent-seeking.⁹⁶

The first reason is a result of the subjective value that the landowners attach to their property, separate and apart from any financial value.⁹⁷ For instance, landowner Margo Tómez explains that her community's resistance to the fence construction is not at all about increasing the financial gain from sale of the land, but about "preserving [their] land-based culture."⁹⁸

The second reason has to do with "dignitary harms," meaning "emotional reactions like outrage, resentment, and insult, that result from the perception of being unfairly targeted or treated by the government."⁹⁹ In the context of the border fence, property owners would suffer dignitary harms resulting from their perception (whether true or not) that the federal government has specifically targeted their property for fence construction, while relieving wealthy property owners of this

90. Complaint at 2–6, *Herrera v. United States*, No. 2:08-cv-00070-AML (W.D. Tex. Oct. 8, 2008).

91. *Id.* at 5.

92. Margo Tómez is daughter of Eloisa Tómez, one of the above-described landowners, whose family has held title to her border property since the 1700s.

93. *Open Letter*, *supra* note 33, at 119.

94. *Id.*

95. See generally Janice Nadler & Shan Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment and Taker Identity*, 5 J. OF EMPIRICAL LEGAL STUD. 73 (2008), available at <http://www.americanbarfoundation.org/publications/192> (finding that "the strength of the owner's ties to the property . . . had strong effects on perceptions of the propriety of giving up the property").

96. *Id.* at 10.

97. *Id.*

98. *Open Letter*, *supra* note 33, at 119.

99. Nadler & Diamond, *supra* note 95, at 11.

burden. For instance, in her letter to the County Commissioners, Margo Tómez characterizes the government's actions with respect to border community landowners as "de-humanizing."¹⁰⁰

Additionally, Nadler's experiments indicate that the strength of the owner's ties to the property, including how long the property had been held by the family, strongly effects the landowner's willingness to sell at any price.¹⁰¹ This resistance to selling the property is not a demonstration of "hold-outs" (refusing to sell in order to get more money from the government), but rather is an example of a "holdin."¹⁰² In these instances, compensation is never capable of accounting for the subjective valuations of the property because no amount of money would have been sufficient to compensate for the loss.¹⁰³

These non-financial reactions of landowners resulting from eminent domain are important to consider when evaluating DHS procedures for land acquisition because they bear on the efficacy of various government procedures to acquire land for the border fence. For instance, for some property owners whose harms cannot fully be compensated by the fair market value of the land, a land acquisition procedure that involves negotiation and reason-giving may reduce impressions that the government has targeted them and their land. However, for some landowners, no form of process can overcome or undo any or all of these harms since "long term home ownership may instill an entitlement and provoke an outrage that cannot be avoided with even the most democratic decision making process."¹⁰⁴

IV. PROCEDURAL SOLUTIONS

I suggest two categories of process that the DHS could implement in order to overcome their procedural shortcomings (described in Section III *infra*): "reason-giving" and "negotiation." In the former, the DHS explains the basis of its decisions about fence location to border property owners and members of the affected communities; in the latter, the DHS engages in a standardized negotiation process with those stakeholders at specified times during fence planning and construction. These proposals are not mutually exclusive; in fact, the efficacy of each is enhanced if both processes are in place. Reason-giving can mitigate the dignitary harms described in Section II. Negotiation is an individually tailored process between the federal government and the affected landowners, and as such it depends on the government taking account of landowners' subjective valuation and attachments to their properties.

A. Reason-Giving

Reason-giving in the administrative law context "requires that agencies specifically explain their policy choices, their consideration of important aspects of

100. *Open Letter*, *supra* note 33, at 120.

101. Nadler & Diamond, *supra* note 95, at 4.

102. Gideon Parchomovsky and Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 77, 83 (1992).

103. Nadler & Diamond, *supra* note 95, at 3-4.

104. *Id.* at 41.

the problem, and their reasons for not pursuing viable alternatives.”¹⁰⁵ Reason-giving involves a two-step process of fact-finding and public disclosure because information must be collected and analyzed before it can be used to disclose reasons that explain a decision. There are several benefits to this procedural device. For instance, “a decisionmaker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision.”¹⁰⁶ In addition, this process can “[enhance] democratic influences on administration by making government more transparent.”¹⁰⁷

Reason-giving because of the necessary fact-finding involved is a particularly valuable approach to reforming the DHS’s actions with respect to the border fence construction. The DHS’s purpose, to guard national security, may contribute to its lack of transparency, both because of the security sensitivity of the information involved and the difficulty in quantifying the perceived security benefits of DHS actions.¹⁰⁸ If the DHS publicly disclosed its reasons for its border fence decisions, this increased vetting and transparency could result in a “closer alignment with the public’s desired balancing of security with civil liberties” and “improve the quality of the rules themselves.”¹⁰⁹ However, even if the substance of the rules does not change, disclosure implicates due process protections that are independently beneficial for the property owners involved.

1. How to Implement Reason-Giving for Land Acquisition at the Border

In the interest of protecting private property rights of the landowners affected by the border fence, fact-finding (necessary for reason-giving) could culminate in a “takings impact analysis.” In the environmental context, procedures exist to ensure that the government takes into account the impact of their decisions on the environment. For instance, the National Environmental Policy Act is a statute that requires agencies to prepare an environmental impact statement for all legislation that affects the quality of the human environment.¹¹⁰ The rationale for such a procedure is that by “requiring the agencies to explore, consider, and publically describe the adverse environmental effects of their programs, those programs would undergo revision in favor of less environmentally damaging activities.”¹¹¹ Similarly, a

105. Kevin M. Stack, *The Constitutional Foundations of Cheney*, 116 YALE L.J. 952, 972 (2007) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 47–48 (1983)).

106. Nadler & Diamond, *supra* note 95, at 41.

107. Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 180 (1992).

108. Robert L. Strayer, *Making the Development of Homeland Security Regulations More Democratic*, 33 OKLA. CITY U. L. REV. 331, 334 (“[T]he key border security initiatives lack rigorous analysis concerning the benefits and costs of new rules, and suffer from insufficient consideration of alternative policies. These policy decisions fail to provide the transparency necessary to engage the public and relevant interest groups in the decision-making process.”).

109. *Id.*

110. See National Environmental Policy Act, 42 U.S.C. § 4332(C) (2008) (requiring an environmental impact statement for “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment”); see also CRS REPORT, *supra* note 1, at 43 (listing basic procedural requirements of statutes and processes that were waived by Secretary Chertoff, including certain legal requirements of NEPA and the Endangered Species Act).

111. Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 240 (1973).

“takings impact statement” would force the federal government to understand how individual property owners are affected by proposed actions at the border.

In the takings context, this analysis should include information that may ultimately take into account both the subjective and objective impact of the fence on a given property. The analysis could contain information about the demographics of the property owners—their income, nationality, employment, languages spoken, how long they have held title—as well as information about how the fence would physically impact the property and structures that exist on it.

2. Benefits of Reason-Giving for Land Acquisitions at the Border— Applying the Process to the Facts

This process of deliberate and publicly disclosed fact-finding can ensure that the DHS takes certain desired factors into account. At several segments, the border fence bisects private property, leaving landowners with no access to their property on the other side of the fence.¹¹² Although the DHS has stated that it would provide access gates (in fact, the final possession order in the Támez condemnation suit required such access), to date the DHS has neither explained how nor when it will construct these gates.¹¹³ Fact-finding could have led to plans for access gates or constructing the fence so that it would not sever a single property.

Additionally, public disclosure involved in reason-giving can ensure that information on which the DHS bases its decision is accurate and up-to-date. For instance, during the only town hall meeting conducted by the DHS in Brownsville, The University of Texas at Brownsville (UTB) was made aware for the first time that the proposed location of the fence would intersect its property, cutting off a significant portion of the property from the main campus.¹¹⁴ Also at this meeting, UTB officials learned that the DHS had been preparing its proposals based on outdated versions of campus maps, significantly underestimating the amount of UTB land that would be affected by the location of the fence.¹¹⁵ Therefore, public disclosure can improve the data the DHS uses to make its decisions, potentially resulting in an improvement of the decisions themselves.

However, reason-giving does have its limitations. For instance, in evaluating the value of publicly disclosing environmental impact statements, Joseph Sax explains that “ordinary householders have no expertise, little money, and even less knowledge as to where to find experts or even the literature upon which to raise appropriate questions.”¹¹⁶ He does offer that if such disclosure procedures were to be effective, the government agency would need to find ways to “assure each [party] equivalent degrees of political and economic power.”¹¹⁷ His suggestions include

112. WORKING GROUP: BACKGROUND, *supra* note 82, at 8–9.

113. See E-Mail from Margo Támez to Denise Gilman (Apr. 26, 2009, 11:15 AM) (on file with author) (stating that “The decision makers’ in D.C. refused the gate issue, in a 5 minute conversation with the U.S. attorney,” despite the court consultation order). According to Denise Gilman, access gates have not been constructed on any properties along the border. Interview with Denise Gilman (Apr. 25, 2009).

114. WORKING GROUP: PROPERTY, *supra* note 37, at 19–20.

115. *Id.*

116. Sax, *supra* note 111, at 246.

117. *Id.* at 248.

giving direct money subsidies, granting enforceable legal rights, and engaging in extensive public opinion campaigns.¹¹⁸

A proponent of reason-giving also recognizes the drawbacks of this procedure, acknowledging that “giving reasons requires decisionmakers to decide cases they can scarcely imagine arising under conditions about which they can only guess, in a future they can only imperfectly predict.”¹¹⁹ He also disclaims that giving reasons is a way of committing a person or institution to a particular outcome that can “reduce the reason-giver’s freedom of decision in future cases.”¹²⁰

Although these criticisms are reasonable, forcing the DHS to explain the reasons and bases for its decisions is a value in and of itself—it is a way for the reason-giver to show respect to the subjects of the decision, making sure they “feels more a part of the decision.”¹²¹ While reason-giving may not ultimately change where the border fence is placed, the ensuing disclosure and transparency can mitigate the dignitary harms that result from the perception that decisions about fence placement are arbitrary and capricious.¹²²

B. *Negotiation Procedures*

1. The Benefits of Negotiation

An effective negotiations process requires both individual and group negotiations. From a procedural and process standpoint, many of the circumstances around the government’s efforts to secure temporary easements along the border in Texas have been troublesome.¹²³ The government’s initial notice letters to property owners were coercive. As discussed in Section III of this paper, the evidence suggests that these letters were often distributed without any human contact or discussion. By omitting information about the legal right to payment for temporary use or the landowner’s rights to negotiate on terms, the DHS took advantage of its unique bargaining position, as an agent of the federal government who has the power to threaten eminent domain.

The GAO has reported that the costs of construction have increased because of the shortened timeline under which the remaining parts of the border fence mandate need to be completed.¹²⁴ One of the reasons the DHS is working under such an accelerated timeline now is the extreme difficulty it has found in acquiring land in

118. *Id.*

119. See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 658 (1995).

120. *Id.* at 657.

121. *Id.* at 658.

122. See *id.* at 657–58 (requiring decision-makers to offer reasons will “drive out illegitimate reasons when they are the only plausible explanation for particular outcomes”).

123. See Complaint para. 6, *Texas Border Coal.*, 2008 WL 2259965, at *2 (asserting that Secretary Chertoff has “failed to issue or make known to border property owners any rules, guidelines, instructions, directives or policies relating to the process of negotiation required by § 102 of the IIRIRA or how the government will arrive at its position on a fixed price for the property interest sought”); *supra* Section III.

124. RICHARD B. STANA, U.S. GOV’T ACCOUNTABILITY OFFICE, SECURE BORDER INITIATIVE: OBSERVATIONS ON DEPLOYMENT CHALLENGES 16 (2008).

the Rio Grande Valley area of Texas.¹²⁵ Many of these landowners have refused to sell their property, resulting in ninety-six litigation claims brought by the government there.¹²⁶ By June 29, 2009, thirty-nine cases were unresolved, only seven of which involved properties required for completion of the fence.¹²⁷ The other thirty-two properties have been sought by the DHS for future fencing needs and fence operation and maintenance.¹²⁸

Since rising costs are directly tied to time delays,¹²⁹ the United States could have potentially saved money by instigating more negotiations earlier to avoid prolonged civil suits and to achieve greater buy-in from the border constituents. The government widely employs negotiations with stakeholders when designing environmental protection regulations that amount to government takings of private property.¹³⁰ In this context, proponents of negotiations have argued that rules developed with stakeholder input “enjoy greater legitimacy . . . and increase chances of compliance while reducing the risk of judicial challenge.”¹³¹ Additionally, because of the one-on-one nature of negotiations, this process results in information-sharing between the parties.¹³² These characteristics of negotiation would impact costs and time delays associated with land acquisition.

These benefits of legitimacy, compliance, information-sharing, and reduced litigation would be beneficial in the DHS’s dealings at the border fence as both cost-saving mechanisms that reduce litigation as well as decisional improvements. For instance, negotiation proponents suggest that agency rules promulgated without negotiation, and therefore without informational exchanges, “[encourage] regulated parties to assume extreme positions in court challenges.”¹³³ Property owners at the border have fostered these “extreme positions” in equal protection lawsuits in which they assert that the DHS’s land acquisition policies have discriminated against Mexican and indigent landowners in favor of those that are Caucasian and wealthy.¹³⁴ If the DHS engaged stakeholders individually through negotiations to correct potential misinformation, it could not only reduce these lawsuits, but also lessen landowners’ resistance to acquisition itself, thereby, reducing the number of condemnation suits.

However, negotiation itself may be a time-consuming process that could cause delays and thereby also impose additional costs on the DHS. One study has concluded that negotiated rulemaking resulted in “modest savings of time” and

125. *Id.* at 1, 15–17.

126. GAO REPORTS: DELAYS, *supra* note 45, at 20.

127. *Id.*

128. *Id.*

129. *See id.* at 21 (explaining that the increased costs are one of several consequences of a “compressed timeline”).

130. *See, e.g.,* Shi-Ling Hsu, *A Game-Theoretic Approach to Regulatory Negotiation and a Framework for Empirical Analysis*, 26 HARV. ENVTL. L. REV. 33, 34–37 (2002) (applying game theory to agency negotiations that have been pervasive in the environmental context since the Clinton Administration).

131. *Id.* at 37.

132. *Id.* at 77.

133. *Id.* at 37.

134. *See, e.g.,* Complaint at 1–5, *Herrera v. United States*, No. 2:08-cv-00070-AML (W.D. Tex. Oct. 8, 2008) (comparing treatment of Mexican landowners to treatment of a wealthy Caucasian landowner) (citing Philip J. Harten, *Assess the Assessors: The Actual Performance of Negotiated Rulemaking*, N.Y.U. ENVTL. L.J. 32, 41–44 (2000)).

found little evidence that negotiation results in less litigation.¹³⁵ However, critics of that study claim that these results are based on a flawed research methodology.¹³⁶ Furthermore, one scholar, who himself is not a proponent of negotiations, has warned that since there have only been two empirical studies on negotiated rulemaking no conclusions can be drawn on the effectiveness of this procedural device.¹³⁷ But even if the negotiation does not result in agreed upon terms, negotiation can nonetheless be valuable because it “may have narrowed the issues and facilitated the exchange of valuable information.”¹³⁸

A recent empirical study which applied game-theory to analyze the effects of negotiation confirmed the normative belief that negotiation results in benefits for both the regulator and the regulated—information-sharing and a legitimacy benefit in which the regulated are more likely to comply with the government rule.¹³⁹ Information-sharing and stakeholder cooperation, are both benefits of negotiation that can reduce landowners’ resistance to the acquisition, thereby producing less resistance to government decisions.

2. The Substance of Negotiation at the Border

The Working Group has pointed to the success of the negotiation between UTB and the DHS to demonstrate the full import of negotiation and why they believe negotiation can be both a successful remedy and a procedure that needs to be implemented.¹⁴⁰ The agreement between the parties includes promises from the DHS to:

(1) “[C]onsider the University’s unique status as an institution of higher education and will take care to minimize impact on its environment and culture.”¹⁴¹

(2) “[C]onduct investigations to minimize the impact of any tactical infrastructure on commerce and the quality of life for the communities and residents located near the University,”¹⁴² and

(3) “[C]oordinate all entry to the campus and give prior notice of all activities on campus to campus police.”¹⁴³

The negotiated terms demonstrate that in this particular instance, the DHS was willing to look at the way the fence would impact an individual property holder, based on the context of who that landowner was, in an effort to mitigate the harm

135. Hsu, *supra* note 130, at 40 (citation omitted) (citing Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1309 (1997)).

136. *Id.*

137. *Id.* at 39.

138. *Id.* at 42.

139. *See id.* at 40 (reporting the results of the Kerwin & Langbein study); *see generally* Freeman & Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000) (describing the benefits of negotiation).

140. WORKING GROUP: PROPERTY, *supra* note 37, at 16.

141. *Id.* (citing the agreement negotiated between DHS officials and attorneys for the UT system in March 2008).

142. *Id.*

143. *Id.*

from the federal government's land acquisition. However, in this case, the property holder was The University of Texas, a large and powerful entity, with a substantial bargaining position.

The lack of formal and consistent negotiations led Margo Támez, the daughter of a border landowner whose land was condemned for fence construction, to prepare a consultation outline to guide negotiations between particular impacted landowners and the DHS.¹⁴⁴ This guideline, while not exhaustive, offers solutions to improve DHS's land acquisitions which have suffered from limited due process considerations. The proposal incorporates the needs of community members in the border town of El Calaboz in making specific requests of the federal government.¹⁴⁵ Those requests include site-visits by federal government officials in the presence of the landowners, their attorneys, and other experts.¹⁴⁶ Other requests include face-to-face meetings between the individual landowner and the federal government, in the presence of attorneys and experts, which would be mediated by a judge.¹⁴⁷

The purpose of these one-on-one negotiations would be "to determine a mutually acceptable location and form of construction of border fencing . . . as well as a mutually agreeable time frame for construction . . . given the unique impacts on culture and indigenous rights implicated. . . ."¹⁴⁸ Another request is that twenty-four hour access gates be placed on each of the properties, enabling affected property owners to reach the other side of their land without restrictions.¹⁴⁹ Additionally, Támez requests that the government repair and compensate the landowners for damages incurred to the property as a result of the construction.¹⁵⁰

These suggested negotiation guidelines would facilitate the government's understanding of the intangible and dignitary harms caused by severing a property with an eighteen-foot metal fence. In addition, the guide proposes information-sharing about the people from whom the government is taking property.¹⁵¹ Such information could be useful to the DHS not only to gain cooperation for its decisions, but also for its patrolling and maintenance efforts once the fence is erected, since the interaction between these stakeholders may extend beyond the initial construction. Throughout the consultation proposal, its preparers request that the DHS negotiate with affected landowners as they have with some of the other more powerful stakeholders such as UTB.¹⁵²

One drawback of the extensive public involvement advocated for, both by this paper and the Támez consultation proposal, is the limitation and usefulness of information provided to landowners as the result of a negotiation. Individual

144. See generally, Margo Támez, *Consultation in the Matter of U.S. Condemnation & Possession of Customary Lipan Apache Lands in El Calaboz Rancheria* 15–18 (Apr. 23, 2009), <http://www.scribd.com/doc/14595657/Tamez-Consultation-Mtamez-Version-5-2009Apr23>.

145. See generally *id.* (noting individuals and groups who were consulted).

146. *Id.* at 15–16.

147. *Id.* at 16.

148. *Id.*

149. *Id.*

150. Támez, *supra* note 144, at 17.

151. See *id.* at 18 (requesting "understanding between the U.S. government and land owners to provide specific mechanisms, procedures, rules, and regulations to enact cultural trainings of [CBP] personnel about Lipan Apache customary uses of the impacted lands").

152. See generally *id.* at 15–18 (asking the government to "[c]onstruct a wall with similar features at the University of Texas at Brownsville").

landowners may not have the ability to interpret this information or effectively negotiate for their interests since language and resource limitations may exist.¹⁵³

While this characterization may generally be true, in many circumstances landowners do have people they can call upon to advocate on their behalf. For instance, Texas Rio Grande Legal Aid, the Working Group on Human Rights, the Texas Border Coalition, and many other public interest lawyers throughout the country have dedicated their time to advocate for the rights of affected landowners, even without the presence of detailed negotiation procedures.¹⁵⁴ These groups could similarly be engaged if formal negotiations were required and implemented by the DHS.

Despite these informational asymmetries, there is great value to instilling trust of the federal government in this country's residents living on the U.S. border with Mexico. There is no reason that the government, who requires this land for the border fence, needs to approach the acquisition process as an adversary of the landowners. While concerns about holdouts or other collective action problems do exist, the federal government should consider the interests of property owners at the border. Many of these property owners will be affected by the fence even after their land is taken by voluntary sale or condemnation, and after the fence is constructed, because the areas surrounding the fence will be patrolled, monitored, maintained, and repaired by the DHS throughout the anticipated future.

V. CONCLUSION

While President Obama's budget included money for tactical infrastructure, such as lighting and roads, it did not include any funding to extend the border fence beyond the 700 miles already planned or constructed.¹⁵⁵ However, just because the border fence may not be extended under the auspices of the current Obama administration, the implementation of the existing mandate is still steeped with problems. Just one week after news about the border fence budget cuts became public, Brownsville residents wrote to President Obama, seeking his intervention on border fence policies, stating that "officials of your administration, in their zeal to satisfy the goals of the previous administration, are out of control. They [are] bullying local landowners and officials, violating the law and court orders as if they were former Secretary of Homeland Security Michael Chertoff armed with legal

153. See Sax, *supra* note 111, at 246 (explaining that "we have no established mechanisms to assure that members of the public have the professional resources to operate as knowledgeable and informed participants").

154. See Press Release, Texas Rio Grande Legal Aid, Border Wall Testimony on November 13, 2008 (Nov. 17, 2008), <http://trla.wordpress.com/2008/11/17/border-wall-testimony-on-november-13-2008/#more-750>; The Working Group on Human Rights and the Border Wall, The Bernard and Audre Rapoport Ctr. for Human Rights and Justice, The Texas-Mexico Border Wall, <http://www.utexas.edu/law/academics/centers/humanrights/borderwall/analysis> (last visited Jan. 18, 2010) (discussing the Working Group on Human Rights' consultation of border landowners about the border wall); Texas Border Coalition, About Us, http://www.texasbordercoalition.org/index.php?option=com_content&task=view&id=27&Itemid=43 (last visited Jan. 18, 2010) (discussing the Texas Border Coalitions' goals with regard to the individuals living on the Texas-Mexico border).

155. Stewart Powell, *Border Fence Funds Hit a Wall Border: Reversing Bush's Policy Obama Budget Includes Nothing to Extend Barrier Beyond 670 Miles Built or Planned*, HOUSTON CHRON., May 8, 2009, at A1.

supremacy to waive any law.”¹⁵⁶ This reaction simply reiterates the sentiment that unless and until standardized procedures for land acquisition and fence planning are developed, the rights of property owners at the Texas-Mexico border will continue to hang in the balance.

There are approximately 2,000 miles of border between the United States and Mexico,¹⁵⁷ leaving over 1,300 miles of unfenced border after completion of the current construction mandate. Although the current 700-mile mandate is near completion, the potential for a future administration to resume such a fencing strategy remains possible, and therefore the insistence of procedural safeguards for government takings in this context persists as an important policy goal to be discussed and developed.

The success of any of the procedures suggested in this paper ultimately depends on reducing or repealing the waiver provision of the Real ID Act. Because even if the legislature does adopt laws or require regulations creating extensive procedures for DHS actions at the border, such safeguards are meaningless when an appointed Secretary has the authority to waive them by her free will alone.

156. Emma Perez-Trevino, *Resident's Seek Obama's Intervention*, BROWNSVILLE HERALD, May 21, 2009, <http://www.brownsvilleherald.com/news/border-98230-resolution-city.html>.

157. United States-Mexico Border Health Commission, *The United States-Mexico Border Region at a Glance*, <http://www.nmsu.edu/~bec/BEC/Readings/10.USMBHC-TheBorderAtAGlance.pdf> (last visited Jan. 18, 2010).