



Testimony of Efrén C. Olivares, Director of Racial and Economic Justice at the Texas Civil Rights Project, to the U.S. House Committee on Homeland Security, Subcommittee on Border Security, Facilitation, and Operations

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It is a great honor to testify before such a distinguished Committee about the disastrous impact that a border wall would have on border communities in the Rio Grande Valley of Texas. Thank you for inviting me.

For my testimony this morning, I draw from my work as Director of the Racial and Economic Justice Program at the Texas Civil Rights Project (“TCRP”). We are Texas lawyers for Texas communities, serving the rising movement for equality and justice. Our Racial and Economic Justice Program fights against discriminatory policies and practices based on immutable characteristics and immigration status. Along the Texas-Mexico border, our team works tirelessly to bring separated families back together, to ensure accountability for wrongful acts by immigration agents, and to defend landowners whose land the federal government seeks to condemn in order to build a border wall. Through litigation, education and advocacy, TCRP fights to ensure that the most vulnerable communities in our state, and especially along the border, can live with dignity, freedom, and without fear.¹

I am a lawyer and an advocate, and also a member of the border community. My goal in this testimony is to highlight two significant ways in which the border wall negatively impacts border communities. First, I will discuss how the eminent domain process leaves affected landowners with little recourse to challenge the government’s takings. Eminent Domain law is extremely favorable to the government, and when compounded by the expansive waiver authority given to the Secretary of Homeland Security, Texas landowners along the border are really left to wonder whether due process of law means anything for them. Secondly, I will touch upon some of the ways in which a border wall would forever alter the way families and communities live in this part of the United States. Families who have lived peacefully along the Rio Grande for centuries— in some cases even before the United States existed as a country—now stand to lose their land, their livelihood, and quite literally their way of life.

¹ Learn more at texascivilrightsproject.org.



I. The eminent domain process in border wall cases

Most of the land along the Texas-Mexico border where the government plans to build a border wall is owned by private landowners. Pursuant to the Fifth Amendment to the United States Constitution, the federal government can only take private land for public use if it pays the owner “just compensation.” U.S. Const. amend. V.

a. Right of Entry (ROE) Requests

Once the government identifies a piece of land where it plans to build the border wall, agents approach the landowner seeking his or her consent to survey the land, take soil samples, and conduct other precursory work on privately-owned land. This typically happens via a letter, known as a Right of Entry (ROE) request. The letters are mailed to the owner of record at the address of the owner on file with the public property records.

These letters will often be followed by in-person visits by the Army Corps of Engineers, who are accompanied by the Border Patrol agents. Landowners describe the in-person visits as both persuasive and misleading, where government officials attempt to explain any intrusion as minimal and unimportant. Landowners have reported that some of these visitors have told them that the government will eventually get possession of the land anyway, so it is of no use to fight the process. The maps attached as Appendix A show the status of ROE requests in Starr County, Texas, as of December 2018.²

When a landowner does not consent to signing the ROE letter, DHS refers the matter to the Department of Justice, and a lawsuit is filed against the tract of land at issue in federal district court. The lawsuits have typically taken the form of a Complaint in Condemnation and Declaration of Taking filed pursuant to the Declaration of Taking Act, 40 USC § 3114 . These complaints consistently alleges that \$100.00 constitutes just compensation for access to the land for surveying and soil sampling purposes, regardless of the size of the land in question. As of April 25, 2019, the Trump administration has filed 12 such cases seeking access to survey land in South Texas, and dozens more, if not hundreds, are expected in the coming months, in light of the Congressional appropriations for FY 2019. TCRP represents some of these affected landowners.

² Although reliable information is hard to come by, Customs and Border Protection officials have indicated that over 90% of ROE’s in Hidalgo County, and around 85% in Starr County were signed voluntarily. In Starr County, ownership of some tracts of land has still not been ascertained.



b. Acquisition of the Land

After surveying is completed pursuant to the ROE, the government will then seek to buy the part of the property it needs. This will be done by a letter requesting to buy the land for a price the government determines. Historically, these initial offers have been significantly below market value.

If the landowner refuses to sell, the government will initiate eminent domain proceedings to take the land by filing a Complaint and Declaration of Taking pursuant to its authority under the Declaration of Taking Act (40 USC § 3114) and acquisition by condemnation (40 USC § 3113).³ Historically, the government typically has also deposited \$100 as estimated “just compensation”⁴ to acquire the property, regardless of the size or quality of the land. If the landowner fails to answer the lawsuit or challenge the alleged amount of just compensation, the government can take the land for that amount. This happened in multiple cases in “border fence” cases filed by the federal government in 2008. As an example of how far below market value these initial offers are: **in one case handled by TCRP, the initial offer was \$100.00 for 1.3 acres of land, and the case ultimately settled for \$56,000.**

After filing the Complaint, the government typically files a Motion for Order of Immediate Possession and a Motion for Expedited Hearing, seeking to obtain expedited access to the land. Importantly, **the government consistently seeks to take physical possession of the land before the issue of just compensation is resolved.** As a result, there are dozens of landowners who have lost their land to the government, the government has built a border fence on their property years ago, and as of today, they have not received a dime in compensation for their land. Ms. Maria Garcia, in the City of San Benito, *died* years after the border fence was built on her property, without ever being compensated.

In some instances, landowners have also endured the government’s indecision on border wall construction, leading to years of negotiations, back and forth over portions of the property to be condemned, with the uncertainty looming over their heads for over a decade now. Pamela Rivas, a landowner in Los Ebanos, Texas, whose property is situated by the last hand-drawn

³ In these initial filings, the government argues that upon the filing of the Complaint, Declaration of Taking, and the depositing of the estimated “just compensation,” title of the subject property is *immediately* vested to the United States. However, we have argued that 40 U.S. Code § 3114(d) specifically authorizes the court to fix the time and terms under which a landowner will transfer possession of property to the government. *See* 40 U.S. Code § 3114(b)(1).

⁴ As required by the Declaration of Taking Act, 40 U.S. Code § 3114.



ferry on the United States-Mexico border, has dealt with government agents for well over 10 years now. Some years the government only wanted a small slice of the property, others to bisect it in half, and now they want nearly all of her property. She still has not been compensated, and she still does not know how much of her land the government wants. Our office represents her, and we will ensure she is treated fairly, despite the unconscionable amount of time this has taken.

In other eminent domain takings, the landowner can challenge the authority for the taking, or the public use. In border wall cases, however, it is difficult to challenge the authority for the taking, since it is the federal government who takes it, pursuant to the [Secure Fence Act of 2006](#), Pub. L. 109-367, H.R. 6061, and subsequent Congressional appropriations. Similarly, the government alleges “national security” reasons as the public purpose for the taking, and courts tend to defer to the Executive Branch in matters of national security. Landowners are left with the possibility of challenging only the amount of just compensation.

Under Federal Rule of Civil Procedure 71.1, a landowner may request a jury trial to decide the issue of just compensation. Of the [approximately 334 eminent domain actions filed by the federal government in 2008 in the Southern District of Texas](#), not a single one went to trial. Most of them settled or were dismissed, and over 50 are still pending as of today.

II. The impact of the border wall on border communities

The Rio Grande Valley contains some of the poorest areas of the country. The median incomes in the three southeasternmost counties in Texas, where border wall construction is scheduled to take place, are: \$36,095 per year in Cameron County, \$37,097 in Hidalgo County, \$27,133 in Starr County.⁵ Approximately 95% of the population in the region identifies as Latino or Hispanic.

As we sit here today, construction—or, should I say, destruction—activities have already begun. These activities have begun in federally-owned land in the city of Mission, in Hidalgo County, Texas. Since this is federally-owned land, the government does not have to go through the condemnation process described above. But, those federally-owned lands happen to be wildlife refuges, particularly the “La Parida” Banco tract, part of the Lower Rio Grande Valley

⁵ United States Census “Quick Facts” for Cameron, Hidalgo, and STarr Counties, available at <https://www.census.gov/quickfacts/fact/table/cameroncountytexas/PST045218>, <https://www.census.gov/quickfacts/fact/table/hidalgocountytexas/PST045218>, and <https://www.census.gov/quickfacts/fact/table/starrcountytexas/SEX255217>.



National Wildlife Refuge. As we sit here today, bulldozers have begun destroying that formerly protected wildlife sanctuary.

a. Waiver authority under the Real ID Act of 2005

What allows the government to build a wall on protected wildlife property? The answer is simple: the waiver authority Congress conferred on the Secretary of Homeland Security by the [Real ID Act of 2005](#), Pub. L. 109-12, 119 Stat. 302, enacted May 11, 2005. The Real ID Act grants what has been described as the broadest waiver authority ever granted by Congress. It allows the Secretary of Homeland Security “to waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of barriers and roads” along the border. Pub. L. 109-12, 119 Stat. 302, Sec. 102(c). This waiver authority allows the Secretary of Homeland Security to waive every conceivable law, save the Constitution and treaties.

Such broad waiver authority compounds the already unfavorable legal landscape that landowners face in these condemnation cases. Laws that would have made it illegal to build a border wall—from the Endangered Species Act to the Clean Water Act to the Religious Freedom Restoration Act and the American Indian Religious Freedom Act—have been waived by the Secretary, thereby depriving landowners of their rights under those laws. Whether it is called a wall, a fence, or a barrier, it will devastate border communities.

b. “No man’s land” - thousands of acres of U.S. soil walled off

Additionally, the proposed path of the border wall, as reflected in Appendix B, is far away from the Rio Grande River. In some places, the wall would be more than half a mile from the actual border. The physical location of the proposed wall presents a series of problems.

First, it belies the Trump administration’s claim that the wall would stop people or contraband from entering the United States. People will still be able to enter United States soil, and in some areas walk hundreds of yards north before reaching the border wall. If criminal activity does take place, the vast area between the border wall and the river stands to become a “staging area” for such activity.

Second, there are families, businesses, communities that lie on the area that will be walled off, the so-called “no man’s land” between the border wall and the river. Professor Kenneth Madsen, from Ohio State University at Newark, has calculated that over 43,000 acres of



land will be in no-man's land in Texas.⁶ Over 42,000 of those acres will be in the Rio Grande Valley alone. His maps depicting the thousands of acres of United States land that will be walled off from the rest of the country are attached as Appendix B.

Every person and every property located south of the wall will be blocked from access to public utilities, roads, public transportation, and their families on the other side of wall. Getting public utilities to the south side of the wall in the future will be prohibitively expensive. Many families stand to lose their livelihoods, as it may become impossible to raise cattle, farm, or lease out the riverfront property. Some riverfront tenants have already expressed that they intend not to renew their leases if the wall is built as planned.

Such is the case of the Cavazos family. The Cavazos family has owned property along the Rio Grande in Mission, Texas, for decades. Mr. Fred Cavazos is paralyzed from the waist down, so he uses a wheelchair for mobility purposes. He makes a living by raising cattle and leasing out riverfront properties for recreational purposes. Several of his tenants have expressed that they may leave the premises if the wall is built on Mr. Cavazos's property. Mr. Cavazos's cousin, Mr. Rey Anzaldua, a Vietnam Veteran and retired U.S. Customs agent, also stands to lose access to this family property.⁷ Simply getting into his property will become a challenge for Mr. Cavazos: if the government decides to install a gate on his property, he will have to maneuver his wheelchair-accessible van over the flood control levee, and into his property.

Typically, wealthy, influential, or politically-connected landowners have had gates installed on their property, to allow them access to the north side of the wall. Even in those cases, landowners have to negotiate whether they will receive a small, "vehicle gate," or the larger, "farming gate," more suitable for RVs, farming equipment and implements, cattle trailers, and other large vehicles. Unrepresented landowners rarely have a gate installed on their property.

c. Wall design and flooding risks

According to the latest publicly available plans, the government plans to build a wall consisting of a concrete base, with 18-foot high steel bollards on top. In Hidalgo County, the government plans to insert the concrete base into the existing flood control levee, up to the height of the levee, and then install the steel bollards atop that base. The bollards would be six-inches wide, set four-inches apart. (See figure on next page.) In Starr County, where there are

⁶ Professor Madsen's maps are available at: <http://u.osu.edu/madsen.34/maps/>.


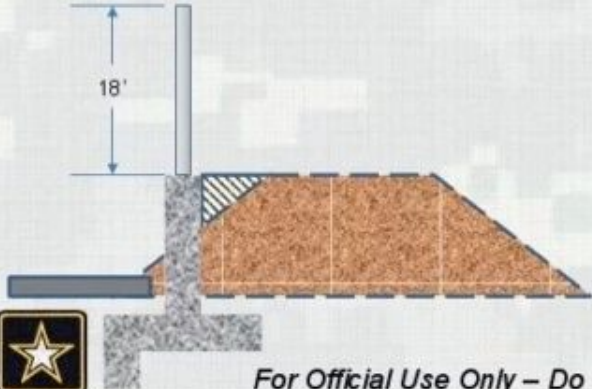
⁷ TCRP represents Mr. Cavazos and Mr. Anzaldua in their eminent domain case.



no flood-control levees, the government plans to install the steel bollards at the surface level, with the concrete base buried into the ground.

RGV Requirements

Levee Wall Concept

- Flood Wall same height as levee
- 18' Bollard Fence on top
- USACE Design Standards
- FEMA Certification



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Figure 1. "Levee Border Wall" concept. Source: U.S. Army Corps of Engineers.



In addition to the border wall, the government has indicated its intention to build an “enforcement zone” spanning 150 feet from the wall on the river side, in which all vegetation and structures would be cleared and demolished to make way for an all-weather road, 24/7 lighting, sensors, and other Border Patrol operations.

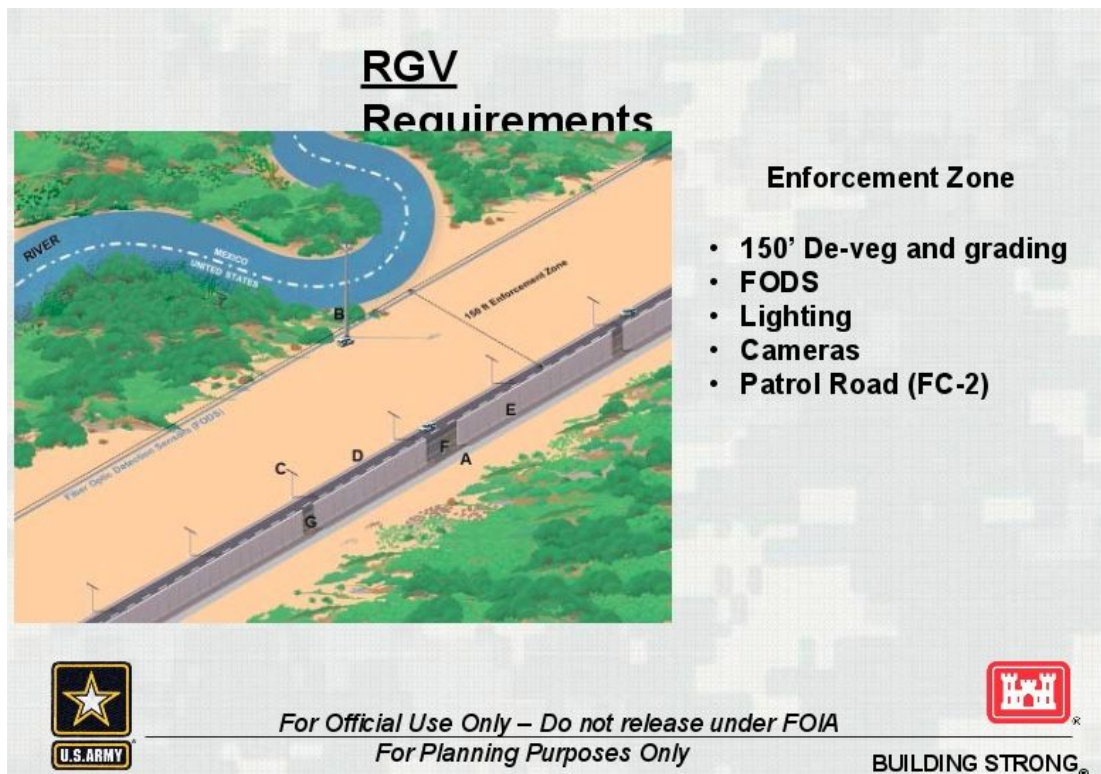


Figure 2. “Enforcement Zone” concept depiction. Source: U.S. Army Corps of Engineers.

This wall design raises significant flooding concerns 1) on the south side of the wall into Mexico; 2) in the walled-off “no man’s land;” and 3) on the north side of the wall. The [Rio Grande Valley is a hurricane zone](#), seeing an average of one significant hurricane every three years, in addition to several tropical storms and tropical depressions. The last significant hurricane to hit the Rio Grande Valley was hurricane Alex, in 2010, which flooded thousands of acres in the area for months.

If the border wall is built as planned, it will unquestionably exacerbate flooding risks. First, if the Rio Grande River overflows, the wall will prevent water from flowing freely to the north, and it will flow disproportionately into Mexico and stagnate in the “no-man’s land.”



Although the top portion of the wall is designed to be made of bollards, every flood carries with it debris, branches and other solid materials and will quickly clog up the wall, blocking water from flowing freely.

Similarly, even if the river does not overflow, in case of significant rain, the wall will prevent runoff water coming from the north side of the wall from flowing into the river. The same clogging-up phenomenon will keep the water from being able to drain into the river, thereby flooding cities and towns where the wall is scheduled to be built, particularly in Starr County. Appendix C shows a flooding model of the expected effects of border wall construction in the City of Roma, Texas.

III. Conclusion and Recommendations

To those of us who live on the border, hearing the national debate around the border wall and the so-called “border crisis” and “national emergency” is extremely frustrating. I am an advocate, but I am also a member of this community, a community that has been vilified, demonized, and constantly attacked by this President.

The border is a welcoming, vibrant place, full of hardworking and resilient people from all walks of life. I am proud to live on the border. And it pains me to see how often it appears that politicians forget that the Rio Grande Valley is also part of the United States. Consider for a minute, if the federal government were planning to build infrastructure that would take hundreds of acres of land from U.S. citizens, not in South Texas, but in Washington or New York. How would people react if the government were about to wall off 43,000 acres of United States soil, not along the Rio Grande, but along the Potomac or the Hudson? It would be a scandal. Yet for us in South Texas, this plunder and pillaging of our largely Latino and Mexican-American communities is, sadly, all too familiar.

In light of the above, I recommend Congress take the following actions:

1. Amend the Declaration of Taking Act, specifically 40 U.S.C. 3114(d), to require that a landowner receive full just compensation, pursuant to a final judgment of a competent court, before the government can take physical possession of the land;
2. Revoke the waiver authority granted by the Real ID Act of 2005, by amending section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1103 note);



3. Do not appropriate any more money for the construction of border walls, fences, barriers, “enforcement zones,” or any other such infrastructure; and
4. Require the federal government to conduct comprehensive Yellow Book appraisals before filing a condemnation action against a landowner related to the border wall.

Respectfully submitted by:

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