

## Property Musings at the U.S.-Mexico Border

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# Property Musings at the U.S.-Mexico Border

GERALD S. DICKINSON<sup>†</sup>

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## I. INTRODUCTION

President Donald J. Trump issued an Executive Order calling for “a physical wall on the southern border” of the United States in January, 2017.<sup>1</sup> In his address before Congress, the President stated, “[W]e will soon begin the construction of a great wall along our southern border.”<sup>2</sup> The political response to the Executive Order has been swift.<sup>3</sup> Representative Lamar Smith of Texas views the Executive Order as a testament to the President “honoring his commitment” to

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1. Exec. Order No. 13767, 82 Fed. Reg. 18, 8793 (Jan. 30, 2017). A physical wall, according to the Order is defined as a “contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.” It further states that the Secretary of Homeland Security shall take the necessary steps to allocate resources to construct the wall. The mandate also authorized the Department of Homeland Security to plan, design and construct the physical barrier.

2. Aaron Blake, *President Trump’s Surprisingly Presidential Speech to the Nation*, annotated, WASH. POST (Feb. 28, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/02/28/president-trumps-first-big-address-to-the-nation-annotated/?utm\\_term=.af7dc0aa06af](https://www.washingtonpost.com/news/the-fix/wp/2017/02/28/president-trumps-first-big-address-to-the-nation-annotated/?utm_term=.af7dc0aa06af).

3. Julie Hirschfeld Davis, *Trump Orders Mexican Border Wall to be Built and Plans to Block Syrian Refugees*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/politics/refugees-immigrants-wall-trump.html>; David Nakamura, *Trump Signs Directive To Start Border Wall With Mexico, Ramp Up Immigration Enforcement*, WASH. POST, (Jan. 26, 2017), [https://www.washingtonpost.com/politics/trump-pledges-to-start-work-on-border-wall-within-months/2017/01/25/dddae6ee-e31e-11e6-ba11-63c4b4fb5a63\\_story.html?utm\\_term=.71a471698bdc](https://www.washingtonpost.com/politics/trump-pledges-to-start-work-on-border-wall-within-months/2017/01/25/dddae6ee-e31e-11e6-ba11-63c4b4fb5a63_story.html?utm_term=.71a471698bdc).

immigration enforcement.<sup>4</sup> Senator Ron Johnson of Wisconsin favorably compares the border mandates in Israel and Egypt as successful examples of how to mitigate illegal immigration.<sup>5</sup> Opponents focus on the cost and financing of the wall.

Some estimate that Congress needs to appropriate \$20 billion to cover the costs for construction.<sup>6</sup> Representative Will Hurd of Texas stated that a physical wall is “the most expensive and least effective way to secure the border.”<sup>7</sup> The California state legislature is seeking to halt state contracts for builders seeking to profit from the wall.<sup>8</sup> House Minority Leader Nancy Pelosi of California threatened to shut down the government if demands for funding the project continued from the Trump Administration.<sup>9</sup> Then-Secretary of the Department of Homeland Security (“DHS”) John Kelly noted that the agency could not prepare an all-inclusive cost estimate related to longer-term border security initiatives until an analysis was conducted and other variables, such as land acquisition, were addressed, and that a wall, in and of itself, would not be enough.<sup>10</sup> The controversy over the wall goes beyond the U.S. borders. Mexico President Enrique Peña Nieto responded that “Mexico will not pay for any wall.”<sup>11</sup> While the

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4. Bill Lambrecht, Jason Buch & Aaron Nelsen, *Trump Orders ‘Immediate’ Construction Of Border Wall*, SAN ANTONIO EXPRESS-NEWS (Jan. 25, 2017), <http://www.expressnews.com/news/local/article/Trump-orders-immediate-construction-of-10884419.php>.

5. *Fencing Along the Southwest Border*: S. Homeland Security and Governmental Aff. Comm., 115th Cong. 1 (2017) (statement of Sen. Ron Johnson, Chairman, S. Comm. on Homeland Security & Governmental Aff.).

6. David Nakamura, *Trump Signs Directive To Start Border Wall With Mexico, Ramp Up Immigration Enforcement*, WASH. POST (Jan. 26, 2017), [https://www.washingtonpost.com/politics/trump-pledges-to-start-work-on-border-wall-within-months/2017/01/25/dddae6ee-e31e-11e6-ba11-63c4b4fb5a63\\_story.html?utm\\_term=.71a471698bdc](https://www.washingtonpost.com/politics/trump-pledges-to-start-work-on-border-wall-within-months/2017/01/25/dddae6ee-e31e-11e6-ba11-63c4b4fb5a63_story.html?utm_term=.71a471698bdc).

7. See Lambrecht, et al., *supra* note 4.

8. Philip Molnar, *California Bill Stops Trump Border Wall Builders from Getting State Contracts*, SAN DIEGO UNION TRIB. (Apr. 6, 2017, 5:25 PM), <http://www.sandiegouniontribune.com/business/economy/sd-fi-sb30-trump-20170406-story.html> (noting California introduced a bill to restrict the approval of state contracting with builders that provide goods and services for the wall).

9. Kelsey Snell & Robert Costa, *Showdown Looms as Trump Demands Funding for Wall on U.S.-Mexico Border*, WASH. POST (Apr. 23, 2017), [https://www.washingtonpost.com/powerpost/showdown-looms-as-trump-demands-funding-for-wall-on-us-mexico-border/2017/04/23/5e0a2840-276a-11e7-b503-9d616bd5a305\\_story.html?utm\\_term=.2f5456ee756c](https://www.washingtonpost.com/powerpost/showdown-looms-as-trump-demands-funding-for-wall-on-us-mexico-border/2017/04/23/5e0a2840-276a-11e7-b503-9d616bd5a305_story.html?utm_term=.2f5456ee756c).

10. *Written testimony of DHS Secretary John F. Kelly for a Senate Committee on Homeland Security and Governmental Affairs Hearing Titled “Improving Border Security and Public Safety”*, DEP’T OF HOMELAND SECURITY (April 5, 2017), <https://www.dhs.gov/news/2017/04/05/written-testimony-dhs-secretary-kelly-senate-committee-homeland-security-and>.

11. See e.g., Daniella Diaz, *Mexican President Cancels Meeting with Trump*, CNN (Jan.

physical construction of the wall will, inevitably, come down to whether Congress appropriates sufficient funds for the project, the biggest obstacles for the wall may not necessarily be the money, but acquiring the land to build the wall.<sup>12</sup>

The U.S.-Mexico border spans 2,000 miles. One-third of the land is owned by the federal government or by Native American tribes.<sup>13</sup> States and private property owners own the rest.<sup>14</sup> If voluntary sale and purchase negotiations fail, the only other option to acquire the land would be through eminent domain. As Senator Claire McCaskill noted during a U.S. Senate Committee on Homeland Security and Governmental Affairs hearing, “it is really controversial for the government to be seizing land and that’s what this is about, the government seizing private land.”<sup>15</sup>

The Fifth Amendment Takings Clause states that “nor shall private property be taken for public use, without just compensation.”<sup>16</sup> This longstanding prohibition against uncompensated takings has been applied to many different federal land acquisition projects, ranging from the building of arsenals, forts, courthouses, and roads to many of the modern day defense, infrastructure and national park projects.<sup>17</sup> This Essay offers some musings on the property and land obstacles that the Trump Administration faces in its pursuit of constructing an international wall. Taking private property for a wall along the southwest border would arguably rival some of the federal government’s largest land acquisition projects. Indeed, such a project would result in the federal government turning its full weight “to fortifying the United States border” through controversial land

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27, 2017, 9:40 AM), <http://www.cnn.com/2017/01/25/politics/mexico-president-donald-trump-enrique-pena-nieto-border-wall/index.html>.

12. Gerald S. Dickinson, *The Biggest Problem for Trump’s Border Wall Isn’t Money. It’s Getting The Land*, WASH. POST (Mar. 3, 2017), [https://www.washingtonpost.com/posteverything/wp/2017/03/03/the-biggest-problem-with-trumps-border-wall-isnt-money-its-getting-the-land/?utm\\_term=.9f44307e5af8](https://www.washingtonpost.com/posteverything/wp/2017/03/03/the-biggest-problem-with-trumps-border-wall-isnt-money-its-getting-the-land/?utm_term=.9f44307e5af8).

13. U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-399, SOUTHWEST BORDER: ISSUES RELATED TO PRIVATE PROPERTY DAMAGE 5 (2015) <https://www.gao.gov/assets/670/669936.pdf>.

14. *Id.*

15. *Fencing Along the Southwest Border*: S Homeland Security and Governmental Aff. Comm., 115th Cong. 3 (2017) (statement of Sen. Claire McCaskill, Ranking Member, S. Comm. on Homeland Security & Governmental Aff.).

16. U.S. CONST. amend. V.

17. 40 U.S.C. § 3113 (2002), (acquisition by condemnation); *United States v. Certain Interests in Prop. in Cty. of Cascade*, 163 F. Supp. 518 (D. Mont. 1958); *United States v. 1.04 Acres of Land, More or Less*, 538 F. Supp. 2d 995 (S.D. Tex. 2008).

seizures.<sup>18</sup>

## II. THE U.S.-MEXICO BORDER AND THE TRUMP ADMINISTRATION'S BORDER WALL EXECUTIVE ORDER

### A. *The Land Along the Southwest Border*

The U.S.-Mexico land and border relations date back hundreds of years.<sup>19</sup> The land, like much of the land in the United States, was highly contested amongst several different sovereigns.<sup>20</sup> Most of the land in the western territories was acquired by the United States from foreign powers through purchase and treaty.<sup>21</sup> The first major conveyance along the border was the Arizona Gadsden Purchase in 1853.<sup>22</sup> Then, the United States ceded land to Mexico, which is today considered the northern bank of Rio Grande.<sup>23</sup> Later, a Presidential Proclamation by President Theodore Roosevelt in 1907 designated a “public reservation of all public lands within 60-feet of the” U.S.-Mexico border in California, Arizona, and New Mexico in what is known as the “Roosevelt Reservation.”<sup>24</sup> In fact, several of the states were compelled to accede to the proclamation before being admitted to the Union.<sup>25</sup> Since substantial portions of the land were not privately-owned, most of the land along the border at the time of the proclamation transferred directly to the federal government.<sup>26</sup> While some private property

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18. Davis, *supra* note 3.

19. CHAD C. HADDAL, YULE KIM & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 33659, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER, 17-18 (2009) (available at <https://www.cfr.org/timeline/us-mexico-relations>).

20. Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5:2 U. PENN. J. CONST. L. 405, 405-06 (2003) (discussing how the early history prior to and shortly after the Republic was founded was shaped by competing interests and sovereign control over the Western lands).

21. See Haddal, Kim, & Garcia, *supra* note 19, at 17-18.

22. See Gloria Valencia-Weber & Antoinette Sedillo Lopez, *Stories in Mexico and the United States About the Border: The Rhetoric and the Realities*, 5 INTERCULTURAL HUM. RTS. L. REV. 241, 265 (2010); see also Gadsden Purchase Treaty, U.S.-Mex., art. I, Dec. 30, 1853, 10 Stat. 1031.

23. Convention Signed at Mexico City Aug. 29, 1963, Boundary: Solution of the Problem of the Chamizal; Jan 14, 1964, 15 U.S.T. 21.

24. The Roosevelt Reservation “extends sixty-feet from the margin of any river that forms the international boundary.” However, it does not extend to lands abutting the Rio Grande River, because federal “public lands” were not designated in Texas. See Haddal, Kim, & Garcia, *supra* note 19, at 17 n.63.

25. See Morgan Lewis, Comment, *Good Fences Make Good Neighbors, But Do They Make Good Cents?: A South-of-the-Border Fence Guide to Theories of Compensation for Property*, 41 TEX. TECH. L. REV. 1193, 1198 (2009).

26. See *id.* at 1198; see also Haddal, Kim & Garcia, *supra* note 19, at 17.

interests were recognized at the time of the acquisition, the bulk of the land was granted to the United States.<sup>27</sup> Further, a significant portion of the land in Texas was sold to private individuals under the terms of federal public land laws.<sup>28</sup> Each state that entered the Union was guaranteed “equal footing” with the original states. But, the federal government reserved ownership of unappropriated lands within each state<sup>29</sup> and continues to hold vast amounts of land in the West. These lands are classified as “public domain” lands or “reserved” lands and are available for settlement or public sale, and not restricted to dedication to any public purpose.<sup>30</sup>

Arizona and Texas share approximately 1,084 miles of the border today, with the rest of the border occupying tracts of land located in California and New Mexico.<sup>31</sup> The land is unique in character.<sup>32</sup> For example, Arizona’s border includes desert and rugged mountains, while Texas is divided by the Rio Grande.<sup>33</sup> As for California, it comprises mostly coastal beaches, inland mountains, rugged canyons and a high desert.<sup>34</sup> The New Mexico border is mostly mountains. This special physical character of the border, along with its history of land swapping with sovereigns and four separate states, practically makes the construction of a physical, contiguous wall quite daunting. Putting aside the natural and topographical obstacles, there are political and legal hurdles to an international wall.

### *B. The Border Wall Executive Order*

The Executive Order mandates the “immediate construction of a physical wall on the southern border” of the United States.<sup>35</sup> The

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27. See Lewis, *supra* note 25, at 1198; see also Haddal, Kim & Garcia, *supra* note 19, at 17.

28. See generally Lewis, *supra* note 25, at 1198. These federal statutes include the Homestead Act of May 20, 1862, 43 U.S.C. §§ 161 *et seq.* (1976); Desert Land Act of 1877, 43 U.S.C. §§ 321 *et seq.* (1976); Act of August 18, 1894, 43 U.S.C. §§ 641 *et seq.* (1976); Public Lands Act of 1964, 43 U.S.C. §§ 1391 *et seq.* (1976); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.* (1976).

29. California v. United States, 438 U.S. 645, 654 (1978).

30. United States v. City and Cty. Of Denver, By and Through Bd. of Water Com’rs, 656 P.2d 1, 5 (Colo. 1982); Federal Power Commission v. Oregon, 349 U.S. 435, 448 (1955); United States v. Minnesota, 270 U.S. 181, 206 (1926).

31. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-399, SOUTHWEST BORDER: ISSUES RELATED TO PRIVATE PROPERTY DAMAGE (2015).

32. *Id.*

33. *Id.*

34. *Id.*

35. Exec. Order No. 13767, 82 Fed. Reg. 18, 8793 (Jan. 30, 2017). A physical wall, according to the Order, is a “contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.” It further states that the Secretary of Homeland Security

proposal for an international wall to replace or supplement the existing fencing gained political steam in June 2015, when then-Republican candidate Donald J. Trump promised to build a wall if elected.<sup>36</sup> Central to his campaign promise was to impose and enforce additional security to halt illegal immigration into the United States.

The Executive Order is mostly reliant upon prior congressional acts authorizing federal immigration policy, including the Immigration and Nationality Act (“INA”),<sup>37</sup> the Secure Fence Act of 2006,<sup>38</sup> and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (“IIRIRA”).<sup>39</sup> Specifically, the mandate sets out to “ensure that the Nation’s immigration laws are faithfully executed.”<sup>40</sup> The “recent surge of illegal immigration at the southern border with Mexico” was, according to the Executive Order, burdening the federal government’s resources, including straining federal agencies tasked with securing the border.<sup>41</sup> The surge, according to the Trump Administration, resulted in “criminal organizations” trafficking and smuggling dangerous drugs into the country.<sup>42</sup> There is evidence, however, to suggest that more immigrants depart the country by crossing the international border than enter the country.<sup>43</sup> And whether the surge of illegal drugs and drug trafficking is caused by the lack of a physical barriers is mostly speculation. Nonetheless, in an effort to monitor and halt this perceived threat to national security, President Trump proposed several policy initiatives, including the construction of a physical, contiguous and impassable wall along the southern border at all points of entry in accordance with the Secure Fence Act and the IIRIRA.<sup>44</sup> The Executive Order also outlined the need for federal funds to plan, design and

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shall take the necessary steps to allocate resources to construct the wall. The mandate also authorized the Department of Homeland Security to plan, design, and construct the physical barrier.

36. Nick Miroff, *Donald Trump wants a Border Wall. These Statistics Show Mexico is a Step Ahead of Him*, WASH. POST (June 22, 2015), [https://www.washingtonpost.com/news/worldviews/wp/2015/06/22/donald-trump-wants-a-border-wall-these-statistics-show-mexico-is-a-step-ahead-of-him/?utm\\_term=.8bf6e6fba6d7](https://www.washingtonpost.com/news/worldviews/wp/2015/06/22/donald-trump-wants-a-border-wall-these-statistics-show-mexico-is-a-step-ahead-of-him/?utm_term=.8bf6e6fba6d7).

37. 8 U.S.C. §§ 1101 et seq. (2014).

38. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006).

39. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 Div. C (1996).

40. Exec. Order No. 13767, 82 Fed. Reg. 18, 8793 (Jan. 30, 2017).

41. *Id.*

42. *Id.*

43. Philip Bump, *Border Wall? More Mexicans Are Leaving the U.S. than Arriving*, WASH. POST (Nov. 19, 2015), [https://www.washingtonpost.com/news/the-fix/wp/2015/11/19/border-wall-more-mexicans-are-leaving-the-u-s-than-arriving/?utm\\_term=.d4f053d0da19](https://www.washingtonpost.com/news/the-fix/wp/2015/11/19/border-wall-more-mexicans-are-leaving-the-u-s-than-arriving/?utm_term=.d4f053d0da19).

44. Exec. Order No. 13767, 82 Fed. Reg. 18, 8793 (Jan. 30, 2017).

construct the wall, including preparing Congressional budget requests for the fiscal year.<sup>45</sup> In response to the Executive Order, a number of objections from Democrats and Republicans, along with economists and legal scholars, revolved around costs.

### C. *The Cost of the Wall*

The cost to construct the wall became the primary focal point beyond the immigration policy justifications of the Executive Order. Some estimated that Congress would need to appropriate \$20 billion to cover the costs for construction.<sup>46</sup> Congressional members whose districts are located near the border rejected the proposal as “the most expensive and least effective way to secure the border.”<sup>47</sup> But, as a legal matter, Daniel Hemel, Jonathan Masur and Eric Posner have floated an interesting argument regarding the cost of the wall.<sup>48</sup>

Their argument is based on the “necessary and appropriate” requirements set forth by the Supreme Court in *Michigan v. Environmental Protection Agency*.<sup>49</sup> There, several petitioners, including environmental entities, sought review of an Environmental Protection Agency (“E.P.A.”) final rule that sets standards for regulation of hazardous air pollutants emitted by power plants.<sup>50</sup> The Court, in a 5-4 decision, held that the E.P.A. had unreasonably deemed cost “irrelevant” when it decided to regulate power plants.<sup>51</sup> In other words, when determining rules that regulate certain industries, such as hazardous air pollutants, the Court said that the phrase “appropriate and necessary” – as defined in the Clean Air Act provision – requires that the E.P.A. “at least” place “some” attention on cost.<sup>52</sup> The Court went further, noting that such considerations include the cost of compliance with the rule prior to deciding whether the regulation of,

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45. *Id.*

46. David Nakamura, *Trump Signs Directive to Start Border Wall with Mexico, Ramp Up Immigration Enforcement*, WASH. POST (Jan. 26, 2017), [https://www.washingtonpost.com/politics/trump-pledges-to-start-work-on-border-wall-within-months/2017/01/25/dddae6ee-e31e-11e6-ba11-63c4b4fb5a63\\_story.html?utm\\_term=.70142ee6d5a3](https://www.washingtonpost.com/politics/trump-pledges-to-start-work-on-border-wall-within-months/2017/01/25/dddae6ee-e31e-11e6-ba11-63c4b4fb5a63_story.html?utm_term=.70142ee6d5a3).

47. See Lambrecht, et al., *supra* note 4.

48. See Daniel Hemel, Johnathan Masur & Eric Posner, *How Antonin Scalia’s Ghost Could Block Donald Trump’s Wall*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/opinion/how-antonin-scalias-ghost-could-block-donald-trumps-wall.html>.

49. 135 S.Ct. 2699, 2707 (2015).

50. *Id.* at 2706.

51. *Id.* at 2712.

52. *Id.* at 2707.



say, power plants is “appropriate and necessary.”<sup>53</sup> The late-Justice Antonin Scalia, writing for the Court, stated that E.P.A. had failed to meet such a requirement and that “[n]o regulation is ‘appropriate’ if it does significantly more harm than good.”<sup>54</sup>

Hemel, Masur and Posner argue that the Secure Fence Act, likewise, includes the “appropriate and necessary” language and, similarly to the Clean Air Act, authorizes the Secretary of the DHS to exercise certain powers to secure the border with a “fence.”<sup>55</sup> Hemel, Masur and Posner question whether the cost of an international wall, estimated at \$15-25 billion, would meet the “appropriate and necessary” standard in light of the return on investment, i.e. mitigation of illegal immigration across the border.<sup>56</sup> It is arguably the case that the expenditure of billions of dollars may not result in a return worth the billion dollar investment, because a wall is unlikely to keep illegal immigrants out and the majority of unlawful immigrants enter the country via visas,<sup>57</sup> which invariably expire and result in overstays.<sup>58</sup> As Hemel, Masur and Posner argue, “even if the wall does lower the number of unlawful immigrants in the United States, the economic gains from reducing illegal immigrants are not greater than the cost of the wall,” largely because the economic impact would probably result in a net negative.<sup>59</sup> Senator McCaskill raised similar concerns, noting at a Senate hearing, “Let’s start today by speaking frankly about how much it’s going to cost, how difficult it will be to acquire the land, and some of the impacts on American landowners on the border – and whether the benefits of a wall justify those costs.”<sup>60</sup> Further, the claim that illegal immigrants who commit violent crimes would be deterred from entering the country as a result of the wall is also arguably dubious, since there is little, if any, evidence that such immigrants commit violent crimes at higher rates than citizens.<sup>61</sup>

But there is more at stake than billions of dollars in economic loss

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53. *Id.*

54. *Id.*

55. *See* Hemel, Masur & Posner, *supra* note 48.

56. *Id.*

57. *Id.*

58. Robert Warren & Donald Kerwin, *Beyond DAPA and DACA: Revisiting Legislative Reform in Light of Long-Term Trends in Unauthorized Immigration to the United States*, 3 J. MIG. HUM. SEC. 80, 101 (2015).

59. *See* Hemel, Masur & Posner, *supra* note 48.

60. *Fencing Along the Southwest Border: Hearing Before U.S. Senate Committee on Homeland Security and Governmental Affairs Hearing*, April 4, 2017 (statement of Sen. Claire McCaskill).

61. *Id.*

and failed immigration policy. In August 2017, President Trump stated at a rally in Arizona, “Build that wall . . . the obstructionist Democrats would like us not to do it. But believe me, if we have to close down our government, we’re building that wall.”<sup>62</sup> However, neither the Democrats nor the funding are obstructing the construction of the wall. The primary obstruction is acquiring the land to build the wall.<sup>63</sup>

#### *D. Land Acquisition Obstacles*

The land acquisition problems that lie ahead have received little attention in academia or the media generally. Senator McCaskill drew awareness to the issue at a Senate committee hearing in April 2017.<sup>64</sup> The U.S.-Mexico border wall may pose immeasurable acquisition problems. The border is 2,000 miles and subject to a variety of property interests and holders. Today, only about one-third of the land is owned by the federal government or by Native American tribes.<sup>65</sup> Taking Native American land is another hurdle.

A significant portion of the land in Arizona is a reservation occupied by the Tohono O’odham Nation extending along 62 miles of the border. Congress is authorized to condemn tribal lands, but doing so may abrogate existing treaty rights or executive orders.<sup>66</sup> The taking of land occupied by the Tohono O’odham Nation, which was granted by executive order, is compensable.<sup>67</sup> Indeed, condemning tribal lands for the wall raises questions concerning Congress’s willingness to abrogate existing federally recognized property rights of Native tribes, let alone the ongoing pressure from the Tohono O’odham Nation for the Trump Administration to back down from permitting the wall to

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62. Mike DeBonis, Damian Paletta & Elise Viebeck, *Conflict Between Trump And Congress Escalates As Difficult Agenda Looms*, WASH. POST (Aug. 23, 2017), [https://www.washingtonpost.com/powerpost/trumps-shutdown-threat-raises-stakes-for-lawmakers-in-looming-funding-battle/2017/08/23/0782be8c-8800-11e7-961d-2f373b3977ee\\_story.html?utm\\_term=.c95b38123215](https://www.washingtonpost.com/powerpost/trumps-shutdown-threat-raises-stakes-for-lawmakers-in-looming-funding-battle/2017/08/23/0782be8c-8800-11e7-961d-2f373b3977ee_story.html?utm_term=.c95b38123215).

63. Dickinson, *The Biggest Problem For Trump’s Border Wall Isn’t Money*, *supra* note 12; see also Gerald S. Dickinson, *Forget Funding The Wall, Trump Needs The Land First*, THE HILL (Aug. 25, 2017, 8:20 AM), <http://thehill.com/blogs/pundits-blog/the-administration/347912-forget-funding-the-wall-trump-needs-the-land-first>.

64. See WOLA *Defense Oversight Research Database*, WOLA (Apr. 4, 2017), <https://defenseoversight.wola.org/clip/3446> (providing an audio clip of Sen. McCaskill’s testimony).

65. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-399, SOUTHWEST BORDER: ISSUES RELATED TO PRIVATE PROPERTY DAMAGE (2015).

66. See *United States v. 2,005.32 Acres of Land, etc.*, 160 F. Supp. 193, 196 (D.S.D. 1958).

67. *Tohono O’odham Nation v. Acting Phoenix Area Director, Bureau of Indian Affairs*, 22 IBIA 220, 234 (1992).

cut through their land.<sup>68</sup>

Texas poses significant obstacles. The state was admitted to the Union by annexation in 1845 and retained title to all its public lands as an exception to the Roosevelt Reservation.<sup>69</sup> States and private property owners in Texas control the rest of the border as a result of its exclusion.<sup>70</sup> Recent studies have also determined that 4,900 tracts of land are privately-owned and located within 500 yards of the Texas-Mexico border.<sup>71</sup> Indeed, a major national infrastructure project that extends thousands of miles will inevitably affect property interests amongst a variety of stakeholders along the border, surely culminating in the use of the federal eminent domain power if landowners refuse to negotiate the sale of their land.

The federal government does have the power to expedite the takings process if it so chooses. The “quick-take” power may speed up the acquisition of land to build the wall by taking possession of the property before there is a final judgment by the court.<sup>72</sup> This process, authorized by Congress, avoids the condemnation delays that often hinder land acquisition, and allows the government to move quickly on its public projects.<sup>73</sup> Yet, the quick-take raises serious due process concerns for thousands of landowners.<sup>74</sup> It is unclear whether DHS would choose to pursue land acquisition through its quick-take powers to build the wall, but one suspects it probably would. Beyond the quick-take procedures, the process of determining just compensation raises some complications.

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68. Fernanda Santos, *Border Wall Would Cleave Tribe, and its Connection to Ancestral Land*, N.Y. TIMES (Feb. 20, 2018), <https://www.nytimes.com/2017/02/20/us/border-wall-tribe.html>.

69. See City and Cty. Of Denver, *supra* note 30, at 5 n.2; see Haddal, Kim, & Garcia, *supra* note 19, at 17 n.63.

70. *Id.*

71. Anne Ryman, Dennis Wagner, Rob O’Dell & Kirsten Crow, *The Wall: Journey Reveals Reality of the Border – and Roadblocks to a Wall*, USA TODAY NETWORK, <https://www.usatoday.com/border-wall/> (last visited Feb. 23, 2018). “In Texas, any new wall would have to be built some distance from the border, because the line itself runs down the middle of the Rio Grande. To gauge the possible impact, the USA TODAY NETWORK used the state’s open-records law to obtain digital property maps from all 13 Texas counties with border frontage... All told, a network analysis shows, about 4,900 parcels of property sit within 500 feet of the border in Texas.”

72. See Declaration of Taking Act, 40 U.S.C. §§ 258a-258e (2000). Quick-take procedures require the government to file a declaration of takings and deposit the fair market value with the court.

73. Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 102, 128 (2006).

74. *Id.*

There are several approaches to making these determinations. First, appraisers ordinarily find applicable data on the sale of similarly situated property.<sup>75</sup> The appraisers then adjust the sales price based on the “unique” character of the property and based on the appraised value at the time of condemnation.<sup>76</sup> This is what some call the “comparable sales method” to determining fair market value.<sup>77</sup> There are drawbacks to this approach. A comparable approach requires a reasonable comparison to other properties in the vicinity. The problem, of course, is that there is a lack of data of similarly situated property due to the limited number of property owners that reside in large stretches along the southwest border. In other words, the number of properties that have been sold off along the border for which appraisers could compare – and adjust and propose an appraisal – is relatively few.<sup>78</sup> This approach is the usual manner for valuating property in residential takings, but the approach must be modified in situations where the property at issue is special use property.<sup>79</sup> Thus, a substitute method may also be required in condemnation cases along the border where the land at issue is special or unique in character.

Second, the cost approach is useful for valuing land that may be special in character and infrequently exchanged on the market.<sup>80</sup> Courts calculate the “current cost of reproducing or replacing improvements, minus the loss in value from depreciation, plus land value.”<sup>81</sup> In other words, courts can estimate the “market value of proposed construction, special purposes properties, and other properties that are not frequently exchanged in the market.”<sup>82</sup> Indeed, given that properties along the international border are infrequently exchanged on the market, the cost approach is likely an appropriate method to value condemned land for the border wall.<sup>83</sup> These approaches tend to be used by both state and federal courts in fair market value determinations.

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75. *See Sw. Bell Tel. Co. v. Ramsey*, 542 S.W.2d 466, 476 (Tex. Civ. App.-Tyler 1976, writ ref'd n.r.e.).

76. *Id.*

77. *See United States v. 819.98 Acres of Land, More or Less, Located in Wasatch & Summit Counties, Utah*, 78 F.3d 1468, 1471 (10th Cir. 1996).

78. *See Religious of Sacred Heart of Tex. v. City of Houston*, 836 S.W.2d 606, 616 (Tex. 1992).

79. 4-12C NICHOLS ON EMINENT DOMAIN, § 12C.01[3] 20-33 (3d ed. 1978).

80. *See Religious of Sacred Heart of Tex.*, 836 S.W.2d at 616.

81. AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, *THE APPRAISAL OF REAL ESTATE* 62 (9th ed. 1987).

82. *Id.*

83. Morgan Lewis, Comment, *Good Fences Make Good Neighbors, But do They Make Good Cents?: A South-of-the-Border Fence Guide to Theories of Compensation for Property*, 41 TEX. TECH. L. REV. 1193, 1214 (2009).

Federal officers and agencies who acquire land utilize professional appraisers or contract appraisers, usually those from major professional organizations, such as the American Institute of Real Estate Appraisers or the Society of Real Estate Appraisers.<sup>84</sup> In the past, federal agencies have been criticized in public works projects for inadequate utilization of the market or comparable sale approach, sometimes failing to explain “specifically how the value of the property in question was derived” from transactions.<sup>85</sup> Further, appraisers for federal land acquisitions must also consistently re-appraise lands during the sale and purchase process, particularly if the transaction fails and condemnation is required.<sup>86</sup> There are also time and cost drawbacks to repeated appraisal updates.<sup>87</sup> And when land disputes wind their way into federal court over condemnation proceedings, there is evidence to suggest that the “testimony of staff appraisers in court has been less effective than that of contract appraisers.”<sup>88</sup> Thus, often times the Department of Justice or U.S. Attorney’s office, alongside the respective federal agency seeking to acquire land, will select contract attorneys in consultation.<sup>89</sup>

These valuation methods must be considered, particularly when or if the federal government decides to acquire land in Texas, where almost 5,000 parcels along the border are owned by private property owners.<sup>90</sup> The time and cost to acquire the land raises the questions of how such major land acquisition projects in the past have been completed, how long they took, and the legal and political impediments to completion. Here, it is useful to take a step back in history to fully understand how prior major federal land acquisition projects help color today’s debates over condemning private property for an international wall.

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84. U.S. GEN. ACCOUNTING OFFICE, CED-80-54, FEDERAL LAND ACQUISITIONS BY CONDEMNATION—OPPORTUNITIES TO REDUCE DELAYS AND COST 28 (1980).

85. *Id.* at 34.

86. *Id.*

87. *Id.*

88. *Id.* at 35.

89. *Id.*

90. Ryman, et al., *supra* note 71.

### III. HISTORICAL AND MODERN DAY FEDERAL LAND ACQUISITION PROJECTS

The President's Executive Order is nothing new to immigration policy in the U.S.—it is the extent of the land acquisition proposal that is. Debates over physical barriers along the border for national security purposes have been ongoing for decades. Historically, federal land acquisition projects were conducted for the purpose of building courthouses, post offices, lighthouses, railroads, roads and fortresses.<sup>91</sup> However, the federal government did not purely condemn private property. Instead, the early practice was consent and cooperation with the states.<sup>92</sup> Often times the government would simply ask a state legislature to seize the private land and then purchase.<sup>93</sup> Other times, the government would file suit in state court and follow state eminent domain procedures.<sup>94</sup> Indeed, many major civil and military projects were completed through a cooperative federalism system.<sup>95</sup> However, this system of land acquisition changed soon after the Supreme Court's ruling in 1875, in *Kohl v. United States*, holding that “[t]he Constitution itself contains an implied recognition of [eminent domain] beyond what may justly be implied from the express grants.”<sup>96</sup> A little over a decade later Congress authorized federal agencies and officers to acquire property necessary for major federal projects.<sup>97</sup>

Today, any federal officer may exercise the power to acquire real estate.<sup>98</sup> The Land and Water Conservation Act of 1965 was the catalyst for many of the federal government's modern day federal land acquisitions programs.<sup>99</sup> In the 1970s and 1980s, somewhere between

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91. See Gerald S. Dickinson, *The Founders Would Have Opposed Seizing Land for Trump's Border Wall*, WASH. POST (Nov. 29, 2017), [https://www.washingtonpost.com/news/posteverything/wp/2017/11/29/the-founders-would-have-opposed-seizing-land-for-trumps-border-wall/?utm\\_term=.70f57ca393c6](https://www.washingtonpost.com/news/posteverything/wp/2017/11/29/the-founders-would-have-opposed-seizing-land-for-trumps-border-wall/?utm_term=.70f57ca393c6); William Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 787 (noting that road building was the “most common occasion in colonial America for the exercise of the eminent domain power.”); see also William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1747 (2013).

92. *United States v. Carmack*, 329 U.S. 230, 237 (1946).

93. *Id.*; see also *United States v. 1.04 Acres of Land, More or Less*, 538 F.Supp.2d 995, 1001 (S.D. Tex. 2008).

94. *Id.*

95. See Baude, *supra* note 91, at 1752.

96. 91 U.S. 367, 372 (1875).

97. 40 U.S.C. § 3113 (2006).

98. *Id.* (“An officer of the Federal Government authorized to acquire real estate for the erection of a public building or for other public uses may acquire the real estate for the Government by condemnation, under judicial process, when the officer believes that it is necessary or advantageous to the Government to do so.”); 40 U.S.C. § 3113 (2006).

99. 78 Stat. 897 (1964). The purpose of the Act was “to assist in preserving, developing

seven and eight thousand federal condemnations were filed each year.<sup>100</sup> Although that number has significantly declined over the years, possibly as a result of the time and expense involved in commencing condemnation proceedings.<sup>101</sup> It is also possible that the decline is due to the federal government having acquired all the land that it needs.<sup>102</sup> Nevertheless, congressional authorization (and delegation) of federal takings power to federal agencies has played a significant role in shaping infrastructure and public works throughout the country, such as recreation, environmental and wildlife protection, civil and military public works and various other projects.<sup>103</sup>

The Attorney General has available a variety of federal statutes setting forth the substantive and procedural mechanisms to effectuate a federal taking. The primary statute, the General Condemnation Act, was enacted in 1888. However, that statute contains no specific procedures, and, oddly enough, has resulted in the authorization of nearly 300 different procedures for the federal government to follow in eminent domain proceedings in federal court.<sup>104</sup> Perhaps even more peculiar is that the language in the 1888 statute has barely changed in the approximately 130 years since its enactment.<sup>105</sup>

The Bush Administration's fencing along the border project starting in 2007 and through the Obama Administration is the most comparable recent federal project to a physical international wall. In 1996, Congress passed the IIRIRA to streamline U.S. immigration laws and improve border control.<sup>106</sup> The Act specifically gave the Attorney General the authority to purchase or bring condemnation actions to acquire lands in the vicinity of the U.S.–Mexico border in order to commence construction of fencing.<sup>107</sup> The Act's border control goals were initially to deter border crossings by constructing only 14 miles of fencing near the San Diego border.<sup>108</sup> As part of those initial

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and assuring accessibility to all citizens of the United States of America of present and future generations...such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation.”

100. U.S. GEN. ACCOUNTING OFFICE, *supra* note 84, at 2.

101. *Id.*

102. *See* Baude, *supra* note 91, at 1738.

103. U.S. GEN. ACCOUNTING OFFICE, *supra* note 84, at i.

104. *United States v. 1.04 Acres of Land, More or Less*, 538 F.Supp.2d 995, 1002 (S.D. Tex. 2008).

105. *Id.* at 1005; *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 3 (1984) (noting that 40 U.S.C. § 257 and FRCP 71.1, together, provides the straight-condemnation procedure).

106. 8 U.S.C. § 1252 (1994).

107. 8 U.S.C. § 1103 (2002).

108. Pub. L. No. 104–208, § 102, 110 Stat. 3009, 3009–555 (1996).

goals, the Attorney General also acquired easements to build the fence.<sup>109</sup> In 2005, Congress then granted the Secretary of DHS broader powers under the REAL ID Act,<sup>110</sup> which gave the Secretary the power to waive any and all statutes in pursuit of the “expeditious” construction of the fence and accompanying infrastructure.<sup>111</sup> Finally, in 2006, Congress amended Section 102 of the IIRIRA under the Secure Fence Act.<sup>112</sup> The amendments expanded the fencing project to areas along the entire U.S.-Mexico border, which included the Rio Grande Valley in Texas.<sup>113</sup> Further, the construction between Laredo and Brownsville in Texas was to be completed by 2008.<sup>114</sup> Ultimately, Congress removed references to specific areas of construction and instead gave the Secretary sole discretion to decide where to build the fencing along the border.<sup>115</sup> The IIRIRA and the Secure Fence Act are the primary statutory authority that the border wall Executive Order relies upon.<sup>116</sup>

As for the institutional players involved in the acquisition of the land along the border for the fence, the Department of Justice’s Environment and Natural Resource Division has handled most of the litigation on national infrastructure projects since the 1990s, including condemnation proceedings.<sup>117</sup> The Division worked alongside the U.S. Army Corps of Engineers and the U.S. Customs and Border Protection

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109. *Id.*

110. Some argue this is one of the most prominent examples of “big waiver” authority given to Congress to permit the DHS to waive any and all statutes that might interfere with the construction of a fence. *See* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 290 (2011).

111. REAL ID Act § 102, 8 U.S.C. § 1103 note (Supp. V 2012). In 2007, under the Secure Fence Act and the REAL ID Acts, the Department of Homeland Security was directed by Congress to construct physical barriers along the border to deter illegal immigration. It stated: 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. *See* REAL ID Act § 102, 8 U.S.C. § 1103 note (c)(1) (Supp. V 2012).

112. Pub. L. No. 109–367, § 3, 120 Stat. 2638, 2638–39 (2006).

113. *Id.*

114. *Id.*

115. Consolidated Appropriations Act, 2008. Pub. L. No. 110–161, § 564, 121 Stat. 1844, 2090–91 (2007).

116. *Fact Sheet: Executive Order: Border Security and Immigration Enforcement Improvements*, U.S. DEP’T OF HOMELAND SECURITY (Feb. 21, 2017), <https://www.dhs.gov/news/2017/02/21/fact-sheet-executive-order-border-security-and-immigration-enforcement-improvements>.

117. Jeffrey H. Wood, Acting Assistant Attorney General, Environment and Natural Resources Division, Testimony before the House Judiciary Committee Subcommittee on Regulatory Reform, Commercial and Antitrust Law, June 8, 2017, 2017 WL 2472447 (D.O.J.).



to purchase the land necessary for projects along the border.<sup>118</sup> However, if acquisition negotiations failed, the Division conducted condemnation proceedings to effectuate a federal taking.

Michael Chertoff, former Secretary of the Department of Homeland Security, utilized this power to construct what would become 700-miles of fencing along the border during the Bush Administration pursuant to the Secure Fence Act.<sup>119</sup> Unsurprisingly, the use of eminent domain along the border for the “fencing” had some critics in Congress. Senator John Cornyn, during hearings regarding amendments to the Secure Fence Act, raised concerns over the taking of private property in Texas, noting that he was “not sure the Border Patrol or the Department of Homeland Security has really thought through the fencing idea and what it would mean to condemn through eminent domain proceedings private property along the border in Texas.”<sup>120</sup> Nonetheless, more than 400 condemnation proceedings were commenced in Texas, New Mexico, Arizona and California to construct the fence.<sup>121</sup>

As one might expect, there were some challenges that made it into federal court. Some cases, such as *U.S. v. 1.04 Acres of Land*, placed procedural limitations on federal takings along the border. There, Judge Andrew Hanen ruled that while the DHS and Attorney General had the power to pursue condemnation proceedings in federal court to acquire land for construction of the fence, the government was required to engage in some level of bona fide negotiations with property owners prior to commencing eminent domain under the IIRIRA.<sup>122</sup> In *Texas Border Coalition v. Napolitano*, a coalition of community organizations, local municipalities and landowners located near the U.S.-Mexico border in Texas challenged the condemnation of land to build the fence as violating due process and equal protection.<sup>123</sup> The court dismissed the matter for lack of standing and lack of

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118. *Id.*

119. See Consolidated Appropriations Act, 2008. Pub. L. No. 110–161, § 564, 121 Stat. 1844, 2090–91 (2007).

120. 153 Cong. Rec. S9869-03, 2007 WL 2126740, Congressional Record—Senate, Proceedings and Debates of the 110th Congress, First Session, Wednesday, July 25, 2007.

121. Wood, *supra* note 117, at 6.

122. *1.04 Acres of Land, More or Less*, 538 F.Supp.2d. While the United States prevailed in condemning some land, the litigation and negotiation process for that case took years to resolve. It is worth noting that the IIRIRA requires the United States to engage in some level of consultation with property owners, local and state governments and Native American tribes prior to the institution of eminent domain procedures, and these safeguards were part of the litigation in 2008.

123. 614 F. Supp.2d 54 (2009).

remedies under the IIRIRA.<sup>124</sup>

The Harry S. Truman Dam-Reservoir, for example, culminated in one of the federal government's highest percentage of condemnations for one project by the 1970s. Its history is useful for understanding the scope of the border wall proposal. The Truman Dam was a long drawn-out acquisition project in Missouri.<sup>125</sup> Today, the reservoir is a multipurpose dam intended to control floods, generate hydroelectric power and to protect the fish and wildlife.<sup>126</sup> Completed in 1979, the project was authorized by Congress in 1954, with the purpose of alleviating the flooding of towns and farms along the Mississippi and Missouri Rivers.<sup>127</sup> However, construction did not begin until 1964.<sup>128</sup> As with many major federal projects, Congress requested the Army Corps of Engineers to acquire the lands in and around the dam, including flowage easements.<sup>129</sup> The best and highest use of many of the lands prior to acquisition for the project were agricultural or cropland purposes, while the usage after acquisition was limited to agriculture, such as pastureland and recreation.<sup>130</sup> The dam, in total, inundated 209,300 acres of land to make way for a shoreline multipurpose pool that is nearly 1,000 miles long.<sup>131</sup>

It took 15 years for the Army Corps of Engineers to acquire all the land,<sup>132</sup> and delays were largely due to funding limitations between fiscal years 1967 to 1971 and litigation over environmental and eminent domain challenges.<sup>133</sup> Approximately, twenty percent of the land acquired was by lengthy condemnation proceedings. The Truman Dam also had one of the highest percentages (20%) of acquisitions by federal eminent domain, with 40% of those actions ultimately being settled before trial.<sup>134</sup>

Another major federal land acquisition project was the Big Cypress National Preserve, which at the time was the largest federal land acquisition project.<sup>135</sup> The Preserve is located near the Everglades

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124. *Id.*

125. *Hendricks v. United States*, 14 Cl.Ct. 143 (1987).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. U.S. GEN. ACCOUNTING OFFICE, *supra* note 84, at 42.

132. *Id.*

133. *Id.*

134. *Id.*

135. U.S. GEN. ACCOUNTING OFFICE, CED-80-54, FEDERAL LAND ACQUISITIONS BY

and considered a natural environment with a diverse ecosystem. To preserve the land, it was necessary for Congress to enact legislation permitting the federal government to acquire over 574,000 acres of land.<sup>136</sup> It would arguably become the most costly park the federal government ever created.<sup>137</sup> During the Congressional hearings for the proposed Preserve, issues pertaining to land acquisition and eminent domain were front and center.<sup>138</sup> At the time of the hearings, held between 1971 and 1975, there were 522,000 acres of privately-owned land within the area proposed for the designation of the preservation, including 35,000 small land “inholdings.”<sup>139</sup> Unlike the current debates over the construction of the border wall, Congress engaged in significant principled debates over land acquisition for the Preserve.

As Senator Clifford P. Hansen of Wyoming remarked, it was a sizeable amount of real estate for a national preserve.<sup>140</sup> The Deputy Interior Secretary, Nathaniel Reed, noted that the federal government had a 10-year period plan that was prepared by the White House Office of Management and Budget to acquire the lands through negotiation and sale.<sup>141</sup> But Representative Louis Arthur Bafalis of Florida voiced his concern that 75% of the land for the Preserve was located in Collier County, where he represented, along with the remaining 25% of the land for the preserve located in Monroe County.<sup>142</sup> His primary concern was land acquisition and dispossession of his constituents. He noted that “it is very important that those people who are now living on the property not be dispossessed and be allowed to continue living there . . . I do not think we can take those people out of their homes and remove them from the land.”<sup>143</sup>

The timing of the land acquisition for Big Cypress was also

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CONDEMNATION—OPPORTUNITIES TO REDUCE DELAYS AND COST 28 (1980).

136. U.S. GEN. ACCOUNTING OFFICE, CED-80-14, THE FEDERAL DRIVE TO ACQUIRE PRIVATE LANDS SHOULD BE REASSESSED 3 (1979).

137. Hearing, Subcommittee on National Parks and Recreation of the Committee on Interior and Insular Affairs, House of Representatives, 93<sup>rd</sup> Congress on H.R. 46 and H.R. 4866, to authorize the acquisition of the Big Cypress National Fresh Water Reserve in the State of Florida, and for other Purposes, May 10 and 11, 1973, No. 93-17, at 17.

138. *Id.*

139. “Inholdings” are landowners who hold title to property that is located within the Preserve. *See* Hearing, Subcommittee on National Parks and Recreation of the Committee on Interior and Insular Affairs, House of Representatives, 93<sup>rd</sup> Congress on S.783, S.920, H.R. 10088, to authorize the acquisition of the Big Cypress National Fresh Water Reserve in the State of Florida, and for other Purposes, March 21 and 22, 1974, No. 93-17.

140. *Id.*

141. *Id.*

142. *Id.*

143. Hearing, Subcommittee on National Parks, *supra* note 137, at 17.

problematic for some. Rep. John Seiberling of Ohio questioned whether “someone . . . checked to see whether it is physically possible . . . to acquire this whole property within the space of a couple of years?”<sup>144</sup> He explained that it is an important practical question of “going around, making appraisals, and negotiating with each property owner.”<sup>145</sup> He also asked “how many property owners are there in this area? How many separate parcels are there?”<sup>146</sup> In Collier County alone there was 21,000, according to Rep. Bafalis.<sup>147</sup> Rep. Seiberling acknowledged that “this type of problem [acquisition] would indicate that it will take years, even if all the money were voted, for the Park Service to simply go through the process of acquiring title.”<sup>148</sup> U.S. Secretary of the Interior Roger Morton was somewhat cautious about expediting land acquisition through eminent domain for Big Cypress, noting that “if acquisition can be done without condemnation, we usually end up with a better situation . . . the question is how it is to be used.”<sup>149</sup> But the issue of jury trial also was problematic for some Senators. Senator J. Bennett Johnston of Louisiana noted that “I think sometimes the awards are unreasonably high depending on the skill of the lawyers, and second, because of the time it takes if you are going to have a jury trial every time you have one of these 30,000 landowners, 10 years won’t be enough time.”<sup>150</sup>

In August 1978, the National Park Service condemned a privately-owned tract of 577 acres, which had been in the process of development for many years prior to Congress’s designation of the Big Cypress lands.<sup>151</sup> The land included parks, wells and water systems, houses, and sewage treatment plants, valuing somewhere between \$1.1 million and \$8 million.<sup>152</sup> Instead of negotiating a sale, the Parks Service requested the authority to proceed with a declaration of taking. Finally, in October 1978, the 577-acre condemnation finalized.<sup>153</sup> By the 1980s, the acquisition project for Big Cypress included 10,091 condemnation proceedings, many of which ultimately settled.<sup>154</sup> Many lawyers were employed and appraisers hired for thousands of small

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144. *Id.* at 20.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 21.

150. Hearing, Subcommittee on National Parks, *supra* note 139.

151. U.S. GEN. ACCOUNTING OFFICE, *supra* note 136, at 3.

152. *See* Wood, *supra* note 117.

153. *Id.*

154. U.S. GEN. ACCOUNTING OFFICE, *supra* note 84, at 42–43.

tracts that were acquired by landowners at excessive prices due to high-pressure sales campaigns.<sup>155</sup> As the government acknowledged at the time, “[a]llowing these owners a price greatly in excess of current market value would make the costs of the entire project prohibitive.”<sup>156</sup> Projects like Big Cypress entailed the largest number of acquisitions at the time (40,400) with 28% of those acquisitions by eminent domain.<sup>157</sup> By the late 1970s and early 1980s, the federal government condemned over 11,400 tracts of land. That number represented about 28% of the approximately 40,400 tracts acquired for the project.<sup>158</sup> It took more than eight years to acquire all the land for Big Cypress.

The point here is that major federal land acquisition projects of the past, such as Big Cypress, generated considerable amount of discussion and debate amongst members of Congress that should be instructive for major projects today. A contiguous impassable wall should raise eyebrows amongst members of Congress due to the thousands of private landowners, along with local, state and Native tribal lands that stand in the way. However, neither the debates throughout the “fencing” proposals during the Bush and Obama Administrations nor current debates over the Executive Order enjoyed the same level of scrutiny regarding eminent domain and land acquisition as Big Cypress, which may be telling about general sentiments, and acceptance, of the federal power of eminent domain. To date, Senator Claire McCaskill,<sup>159</sup> along with ten members of the House of Representatives,<sup>160</sup> have been somewhat vocal about the land acquisition aspects of the border wall. However, given the extent of such a proposal, debates about the property fragmentation and potential dispossession of lands should be front and center as the construction of a border wall looms.

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155. *Id.*

156. *Id.*

157. *Id.* at 43.

158. *Id.* at 44.

159. See *Fencing Along the Southwest Border: Full Committee Hearing*, U.S. SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS (Apr. 4, 2017), <https://www.hsgac.senate.gov/hearings/03/27/2017/fencing-along-the-southwest-border> (discussing concerns over use of eminent domain for land acquisition).

160. H.R. 3943, 115th Cong. (2017) (introduced). On October 4, 2017, ten House Representatives introduced the “Protecting the Property Rights of Border Landowners Act” amending the Immigration and Nationality Act (“INA”) to prohibit the Secretary of Homeland Security and Attorney General from “using eminent domain to acquire land for the purpose of constructing a wall, or other physical barrier, along the international border . . . .”

#### IV. CONCLUSION

President Trump's Executive Order mandating the "immediate construction of a physical wall on the southern border" of the United States has raised a plethora of issues regarding U.S. immigration policy and the costs associated with building a wall. Less understood is the land acquisition obstacles that lie ahead if the Trump Administration pursues the construction of the wall. Indeed, the task of acquiring all the land necessary for 2,000 miles of contiguous physical wall is daunting, since only about one-third of the land is owned by the federal government or by Native American tribes, while the rest is owned by private property owners and state and local governments, especially along the Texas-Mexico border. If sale and purchase negotiations fail, the Trump Administration will have to resort to the federal eminent domain power to acquire the land. From the appraisals to the sale and purchase negotiations with landowners, the construction of the wall faces considerable obstacles, notwithstanding condemnation proceedings. Of course, the government could elect to exercise its quick-take powers to expedite the land acquisition, but that process would still generate costly litigation that would extend for years, all the while raising serious due process concerns.

As noted, the fencing project along the southwest border during the Bush and Obama Administrations took years to accomplish, and a significant amount of the land was already owned by the federal government, which made construction in California, New Mexico and parts of Arizona relatively effortless. However, the Tohono O'odham tribe in Arizona retained its land along the border and approximately one percent of the land in Texas was acquired by eminent domain for the fence. Thus, a reiteration of the fence as an impassable wall under President Trump's Executive Order faces a difficult road ahead with land acquisition in Texas. The history of major federal land acquisition projects, such as the Big Cypress Preserve in the 1970s, provides a useful guide to the obstacles that lie ahead and the level of scrutiny that Congress should be employing where vast amounts of land are at stake. Time will tell if the Trump Administration begins executing the mandates set forth in the Executive Order. Until then, it is important to understand the property dimensions at stake in the Trump Administration's immigration proposals.