

United States District Court for the District of Columbia.

DEFENDERS OF WILDLIFE

v.

CHERTOFF

December 18, 2007

MEMORANDUM OPINION

ELLEN SEGAL HUVELLE, District Judge.

Plaintiffs Defenders of Wildlife and the Sierra Club initially brought this lawsuit to challenge defendants' compliance with several environmental statutes with respect to the construction of physical barriers and roads along the U.S.-Mexico Border within the San Pedro Riparian National Conservation Area ("SPRNCA") in Arizona. Plaintiffs have now amended their complaint to allege that the Secretary of Homeland Security's waiver of numerous federal environmental laws under section 102 of the REAL ID Act of 2005 is unconstitutional. Because the Court finds that the waiver does not offend the principles of separation of powers or the nondelegation doctrine, it rejects plaintiffs' constitutional attack, and it will grant defendants' motion to dismiss.

BACKGROUND

At the direction of Congress, the Department of Homeland Security ("DHS") has undertaken to construct "physical barriers and roads" at various points along the United States' border with Mexico in order "to deter illegal crossings in areas of high illegal entry into the United States." . . . The SPRNCA is managed by the Bureau of Land Management ("BLM"), which issued a perpetual right of way to DHS for the area of the fence project. Before granting the right of way, BLM completed an Environmental Assessment ("EA"), which concluded that the proposed fencing would have no significant impact on the environment when paired with certain mitigation measures, and that an Environmental Impact Statement ("IS") was therefore not required by the National Environmental Policy Act of 1969 ("NEPA").

After initially attempting to pursue administrative remedies within the BLM, plaintiffs filed this action on October 5, 2007, and simultaneously moved for emergency injunctive relief to halt the construction of the fence within the SPRNCA. In support of their motion, plaintiffs argued that BLM's EA was inadequate and that NEPA required the preparation of a full IS. They also argued that the BLM's grant of the right-of-way violated the Arizona-Idaho Conservation Act of 1988, which directs the BLM to manage the SPRNCA "in a manner that conserves, protects, and enhances the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area" and to "only allow such uses of the conservation area" that further the purposes for which it was established. After conducting a hearing on October 10, 2007, the Court granted plaintiffs' motion for a Temporary Restraining Order ("TRO"), finding that plaintiffs had demonstrated a substantial

likelihood of success on the merits with respect to their NEPA claims and that the balance of the equities favored plaintiffs. In response to the Court's order, defendants halted construction of the fence within the SPRNCA.

Approximately two weeks later on October 26, 2007, DHS Secretary Michael Chertoff published a notice in the Federal Register waiving NEPA, the Arizona-Idaho Conservation Act, and eighteen other laws with respect to the construction of the SPRNCA fence under the authority granted to him by section 102 of the REAL ID Act of 2005. Section 102 of the REAL ID Act gives the Secretary of Homeland Security “the authority to waive all legal requirements” that he determines “necessary to ensure expeditious construction” of border fences and roads “to deter illegal crossings in areas of high illegal entry.” This provision also limits judicial review of claims arising from the Secretary's exercise of the waiver authority, and it allows the district courts to consider only those claims that allege a violation of the Constitution.

. . . Upon notification of the Secretary's waiver, the Court vacated the TRO. Plaintiffs subsequently amended their complaint to allege that the waiver provision of the REAL ID Act violates the separation of powers principles embodied in Articles I and II of the Constitution because it “impermissibly delegates legislative powers to the DHS Secretary, a politically-appointed Executive Branch official.”

In response, defendants have moved to dismiss plaintiffs' amended complaint under Rules 12(b)(1) and (6). . . .

ANALYSIS

The only issue presented is whether the Secretary's waiver under the REAL ID Act is constitutional. First and foremost, plaintiffs argue that the REAL ID Act's waiver provision is unconstitutional under *Clinton v. City of New York*, 524 U.S. 417 (1998), because it “provides the DHS Secretary with a roving commission to repeal, in his sole discretion, any law in all 50 titles of the United States Code that he concludes might impede construction of a border wall.” In *Clinton*, the Supreme Court struck down the Line Item Veto Act of 1996, which gave the President the authority to “cancel” certain federal spending items that had been passed by Congress, because the Court found that the Act- “[i]n both legal and practical effect”-allowed the President to amend Acts of Congress by repealing portions of them. *Clinton*, 524 U.S. at 438. Article I of the Constitution requires that all federal legislation pass both houses of Congress, and “before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.” The cancellation procedures in the Line Item Veto Act, the Court held, were unconstitutional because “[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.” “Amendment and repeal of statutes, no less than enactment, must conform with” the bicameralism and presentment requirements of Article I.

Plaintiffs argue that “[t]he power granted by section 102 of the REAL ID Act to the Secretary of DHS to ‘waive’ the applicability of any law that would otherwise apply to border wall and fence construction projects is unmistakably the power partially to repeal or amend such laws,” and thus, that *Clinton* “squarely governs this case.” The laws waived by the Secretary's federal register notice are “repeal[ed],” plaintiffs argue, “to the extent that they otherwise would have applied to wall and road construction” within the SPRNCA, and the waiver is therefore an “impermissible exercise of legislative authority.”

Plaintiffs' arguments are unavailing, however, because the waiver provision of the REAL ID Act is not equivalent to the partial repeal or amendment at issue in *Clinton*. It was “critical” to the *Clinton* Court's decision that the Line Item Veto Act essentially “g[a]ve[] the President the unilateral power to change the text of duly enacted statutes.” The line items cancelled by the President would no longer have any “legal force or effect” under any circumstance. . . .

The REAL ID Act's waiver provision differs significantly from the Line Item Veto Act. The Secretary has no authority to alter the text of any statute, repeal any law, or cancel any statutory provision, in whole or in part. Each of the twenty laws waived by the Secretary on October 26, 2007, retains the same legal force and effect as it had when it was passed by both houses of Congress and presented to the President. The fact that the laws no longer apply to the extent they otherwise would have with respect to the construction of border barriers and roads within the SPRNCA does not, as plaintiffs argue, transform the waiver into an unconstitutional “partial repeal” of those laws. By that logic, *any* waiver, no matter how limited in scope, would violate Article I because it would allow the Executive Branch to unilaterally “repeal” or nullify the law with respect to the limited purpose delineated by the waiver legislation. Yet, as plaintiffs acknowledge, there are myriad examples of waiver provisions in federal statutes, and they have not questioned Congress's ability to confer the waiver power in these circumstances. If the REAL ID Act's waiver provision is unconstitutional under *Clinton*, numerous other statutory authorizations of executive waivers would also be invalid. Such a conclusion is certainly not supportable under *Clinton* or any other case cited by plaintiffs.

* * *

. . . [T]he deciding factor for the *Clinton* Court was that the cancellations under the Line Item Veto Act were the “functional equivalent of repeals of Acts of Congress,” while the suspensions under the Tariff Act [in *Marshall Field Co. v. Clark*] were “not exercises of legislative power.” In particular, the Court noted that the Line Item Veto Act authorized the President “to effect the repeal of laws[] for his own policy reasons,” thereby “rejecting the policy judgment made by Congress and relying on his own policy judgment.” By contrast, when the DHS Secretary exercises his waiver authority under the REAL ID Act, he is acting as Congress has expressly directed-*i.e.*, to “expeditious[ly]” construct “physical barriers and roads . . . to deter illegal crossings in areas of high illegal entry . . .” And more importantly, the *Clinton* Court distinguished the Tariff Act from the Line Item Veto Act on the ground that it related to “the foreign affairs arena,” a realm in which the President has “a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.” The REAL ID Act's waiver provision . . . relates to foreign affairs and immigration control-another area in which the Executive Branch has traditionally exercised a large degree of discretion. For these reasons, the *Clinton* Court's discussion of *Field* does not support plaintiffs' arguments.

* * *

Plaintiffs also argue more generally that the waiver authority violates fundamental separation of powers principles because it is an unconstitutional delegation of legislative power to the Executive Branch. “[T]he fundamental constitutional role of the Executive Branch under Article II,” plaintiffs argue, “is to ‘faithfully execute’-not selectively void-the laws. The

Secretary's attempt to repeal unilaterally nineteen laws that otherwise would have constrained his conduct, and the law that purports to authorize him in taking such improper action, thus squarely offend both Article I and Article II.” But “the Supreme Court has widely permitted the Congress to delegate its legislative authority to the other branches,” so long as the delegation is accompanied by sufficient guidance. A delegation of legislative power to the Executive Branch is permissible under Supreme Court precedent where Congress “lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform. . . .”

In order to exercise the waiver authority under the REAL ID Act, Congress has required the Secretary to determine if the waiver is “necessary to ensure expeditious construction of the barriers and roads under [section 102 of IIRIRA].” Furthermore, he is directed to construct fencing only “in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.” This legislative directive meets the requirements of the Supreme Court's nondelegation cases. The “general policy” is “clearly delineated”-*i.e.* to expeditiously “install additional physical barriers and roads ... to deter illegal crossings in areas of high illegal entry.” And, the “boundaries” of the delegated authority are clearly defined by Congress's requirement that the Secretary may waive only those laws that he determines “necessary to ensure expeditious construction.”

* * *

. . . But even if, as argued by plaintiffs, this waiver provision is unique insofar as the number of laws that may be waived is theoretically unlimited, the Secretary may only exercise the waiver authority for the “narrow purpose” prescribed by Congress: “expeditious completion” of the border fences authorized by IIRIRA in areas of high illegal entry. Thus, the scope of the Secretary's discretion is expressly limited.

More importantly, despite the surface appeal of plaintiffs' arguments, they cannot survive careful scrutiny, for there is no legal authority or principled basis upon which a court may strike down an otherwise permissible delegation simply because of its broad scope. . . .

* * *

This conclusion is further buttressed by the well-established principle that was decisive in the *Clinton* case—“[w]hen the area to which the legislation pertains is one where the Executive Branch already has significant independent constitutional authority, delegations may be broader than in other contexts.” The construction of the border fence pertains to both foreign affairs and immigration control-areas over which the Executive Branch traditionally exercises independent constitutional authority. Thus, with respect to border control measures such as those at issue here, the Executive has “a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.” Because these powers are “also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise [them]”