

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

February 2, 2018

The Honorable Kirstjen Nielsen  
Secretary  
U.S. Department of Homeland Security  
3801 Nebraska Ave. NW  
Washington, DC 20016

Dear Madam Secretary:

I write to request additional information regarding new legal authorities the Department of Homeland Security (DHS) is seeking in order to expedite the seizure of private property and the construction of a wall along the U.S.-Mexico border.

On January 5, 2018, I received a document detailing the Department's plans to construct 722 miles of new, replacement, and secondary barriers—at a cost of approximately \$18 billion—over a 10-year period.<sup>1</sup> The document also describes several legal authorities DHS is seeking in order to expedite construction of the “continuous, physical wall” that President Trump has ordered.<sup>2</sup> Specifically, the Department is requesting amendments to existing law that would “allow for more expedited acquisition of land” and “clarify and expand the Secretary’s waiver authority.”<sup>3</sup> However, the document provides no further details about this proposed legislation.<sup>4</sup>

As you know, the federal government already has extraordinary eminent domain power along our nation’s borders. The Attorney General has the general authority to acquire land adjacent to or in the vicinity of our nation’s international border upon deeming the land “essential to control and guard the boundaries and borders of the United States[.]”<sup>5</sup> In instances where the Attorney General and a lawful property owner cannot agree upon a reasonable price for a particular parcel of land, the Attorney General is authorized to commence condemnation proceedings.<sup>6</sup> Upon filing a declaration of taking in U.S. District Court and depositing what government officials determine to be just compensation for the taking in the court registry, the federal government has the ability to assume ownership of private property before compensation

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<sup>1</sup> Department of Homeland Security, *Critical CBP Requirements to Improve Border Security* (Dec. 27, 2017).

<sup>2</sup> Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

<sup>3</sup> Department of Homeland Security, *Critical CBP Requirements to Improve Border Security* (Dec. 27, 2017).

<sup>4</sup> *Id.*

<sup>5</sup> 8 U.S.C. § 1103(b)(1).

<sup>6</sup> 8 U.S.C. § 1103(b)(3).

has been adjudicated and before a landowner has received compensation for the taking.<sup>7</sup> In some cases, private landowners living along the southwest border are still waiting to be compensated for takings that occurred nearly a decade ago during previous fence deployment efforts.<sup>8</sup>

The Homeland Security Secretary also has the authority to “waive all legal requirements” in instances where such a waiver is necessary “to ensure expeditious construction of ... barriers and roads” in the vicinity of the international border.<sup>9</sup> This authority has been referred to as “possibly having greater reach than any other waiver authority conferred by statute.”<sup>10</sup> To date, this waiver authority has been invoked eight times—five times by former Secretary Chertoff,<sup>11</sup> once by former Secretary Kelly,<sup>12</sup> once by former Acting Secretary Duke,<sup>13</sup> and once by you.<sup>14</sup> The most recent waiver that you issued waived more than 20 federal statutes, including the Clean

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<sup>7</sup> 40 U.S.C. § 3114.

<sup>8</sup> *The Taking: How the Federal Government Abused Its Power to Seize Property for a Border Fence*, Texas Tribune (Dec. 14, 2017) ([www.texastribune.org/2017/12/14/border-land-grab-government-abused-power-seize-property-fence/](http://www.texastribune.org/2017/12/14/border-land-grab-government-abused-power-seize-property-fence/)).

<sup>9</sup> 8 U.S.C. § 1103 note.

<sup>10</sup> Congressional Research Service, *Barriers Along the U.S. Borders: Key Authorities and Requirements* (R43975) (Nov. 18, 2016).

<sup>11</sup> Department of Homeland Security, *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005*, 70 Fed. Reg. 55622 (Sept. 22, 2005); Department of Homeland Security, *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006*, 72 Fed. Reg. 2535 (Jan. 19, 2007); Department of Homeland Security, *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006*, 72 Fed. Reg. 60870 (Oct. 26, 2007); Department of Homeland Security, *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended*, 73 Fed. Reg. 19077 (April 8, 2008); Department of Homeland Security, *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended*, 73 Fed. Reg. 19078 (April 8, 2008).

<sup>12</sup> Department of Homeland Security, *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended*, 82 Fed. Reg. 35984 (Aug. 2, 2017).

<sup>13</sup> Department of Homeland Security, *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended*, 82 Fed. Reg. 42829 (Sept. 12, 2017).

<sup>14</sup> Department of Homeland Security, *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended*, 83 Fed. Reg. 3012 (Jan. 22, 2018).

Air Act, the Federal Water Pollution Control Act, the Endangered Species Act, the National Historic Preservation Act, the Native American Graves Protection Act, and the Administrative Procedure Act.<sup>15</sup> It was issued to facilitate the construction of approximately 20 miles of replacement fencing in the Border Patrol's El Paso sector.<sup>16</sup> This extraordinarily broad waiver authority cannot be invoked, however, in violation of an individual landowner's Fifth Amendment right to just compensation for any public taking of private property.<sup>17</sup>

I am concerned that the additional legal authorities requested by the Department may enable the Department to circumvent existing law and constitutional protections for individual landowners. The federal government should exercise extreme caution when condemning private property for public use, and this action should only be taken after bona fide notification, consultation, and negotiation with landowners has been conducted. Furthermore, I concur with a statement made by former Secretary Kelly before this Committee on January 10, 2017, that "it's, in a lot of ways, dangerous to think that you can pick and choose which laws [need to be followed]." "The law is the law, and I think the law has to be followed," the former Secretary said.<sup>18</sup> In your confirmation hearing on November 8, 2017, you also pledged to "enforce our laws."<sup>19</sup>

In order to better understand the legal authorities you feel you lack and the Department's proposals for addressing these concerns, please provide detailed answers to the following questions:

1. In your view, what additional legal authorities are needed to "allow for more expedited acquisition of land" and to "clarify and expand the Secretary's waiver authority"?
2. Please provide any and all legislative proposals the Department has drafted or received related to these additional legal authorities.
3. What specific obstacles is DHS seeking to remove by requesting these additional authorities?

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> U.S. Const. amend. V; *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

<sup>18</sup> Senate Committee on Homeland Security and Governmental Affairs, *Hearing on the Nomination of General John F. Kelly, USMC (Ret.), to be Secretary, U.S. Department of Homeland Security*, 115th Cong. (Jan. 10, 2017).

<sup>19</sup> Senate Committee on Homeland Security and Governmental Affairs, *Hearing on the Nomination of Kirstjen M. Nielsen to be Secretary, U.S. Department of Homeland Security*, 115th Cong. (Nov. 8, 2017).

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I ask that you respond to this letter at your earliest convenience but in no event later than February 8, 2018. If you are unable to meet this deadline, or should you have any questions, please contact Joel Walsh at (202) 224-2627 or Joel\_Walsh@hsgac.senate.gov. Please send any official correspondence related to this request to Lucy Balcezak at Lucy\_Balcezak@hsgac.senate.gov. Thank you in advance for your prompt attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Claire McCaskill". The signature is fluid and cursive, with the first name "Claire" being more prominent and the last name "McCaskill" following in a similar style.

Claire McCaskill  
Ranking Member

cc: Ron Johnson  
Chairman