

February 9, 2005

Dear Member:

We are writing to oppose section 102 of H.R. 418, the “REAL ID Act of 2005,” which would empower the Secretary of Homeland Security to waive any law, without limit, in the course of building barriers along the nation’s borders. We ask that this section be stripped from the act.

The section we oppose would be an unprecedented and unjustifiable breach of the rule of law. The Constitution charges the executive branch to “take care that the laws be faithfully executed.” This section, however, would excuse the DHS Secretary from executing any law — federal and possibly even state law — at his sole, unreviewable discretion. It is an endless waiver of all law, criminal and civil, for the DHS Secretary. Not even the importance of securing the border can justify placing a government official forever above the law.

**THERE IS NO NEED FOR IT.**

There is no evidence that such an extraordinary rejection of the rule of law is necessary at all. Current law allows the DHS Secretary to waive the National Environmental Policy Act and Endangered Species Act when constructing additional fencing along the border, and this same provision allowed the Attorney General to do so before the creation of DHS. That provision has never, to date, been used. Moreover, many environmental laws also provide project-specific exemptions when needed in the interest of national security. That these exemptions are available but unused underscores the apparent lack of need for this dangerous provision.

**IT IS A BLANK CHECK FOR WAIVING ANY LAW, FOR ANY REASON OR NO REASON AT ALL.**

The unchecked discretion granted by this section is particularly troubling. This language would empower the Secretary to waive “all laws the Secretary, in the Secretary’s sole discretion, determines necessary to ensure expeditious construction” of additional barriers along the nation’s borders. That discretion is absolutely unreviewable. Thus, the Secretary could arbitrarily decide not to comply with the Freedom of Information Act, for example, or the Occupational Safety and Health Act, and then waive them away simply by declaring that he believes the waiver is necessary to expedite construction of border barriers. The section does not require any factual basis for determining that the waiver would actually speed up the construction of border fences; it would simply empower the DHS Secretary to waive FOIA, the OSH Act, or any law, at his own whim, without consequence. In fact, the waiver power extends even to criminal law; the Secretary of Homeland Security would literally be empowered to get away with murder.

**THERE IS NO END IN SIGHT FOR THE WAIVER POWER.**

The power to waive all law is appalling enough, but it is noteworthy that this measure lacks even the relatively limited scope of an earlier version offered in the 108th Congress. That version limited the waiver power to expedite completion of a remaining 14-mile section of fencing in the San Diego area. This version has no such limits. The measure would amend a section of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”). Although one subsection of IIRIRA calls for the construction of second and third fences along specified segments of the southern border, another section empowers DHS broadly to “take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border.” Section 102 of the REAL ID Act links its waiver authority to this broad provision of IIRIRA. This waiver authority would thus have no end point at all and no meaningful limitation.

**IT WILL MAKE BOTH GOVERNMENT AND THE PRIVATE SECTOR UNACCOUNTABLE.**

The exemption from judicial review would make the DHS Secretary unaccountable to any authority. This section does not apparently have any limitations; it could shield not only government agencies but also private contractors from any liability for deaths, dismemberments, or any injuries whatsoever. For example, this section would empower the DHS Secretary to give no-bid contracts for border construction to private companies and then could shield those contractors from all employment discrimination and workplace safety laws. Workers harmed by the contractors would likely be left with no recourse whatsoever.

**IT OPENS A DOOR THAT SHOULD NOT BE OPENED.**

There is simply too much at stake to grant government officials this kind of waiver authority. Not only would section 102 allow DHS to destroy the habitats of threatened and endangered species as well as archaeological sites containing 7,000-year-old Native American artifacts, but it would also grant DHS unchecked authority to abrogate any and all laws, including the following:

- criminal law — from racketeering to murder and everything in-between,
- child labor laws,
- laws that protect workers by ensuring safe and healthy workplaces, preventing unfair contracting through Davis-Bacon Act wage determinations, and banning retaliation against whistleblowers,
- civil rights provisions that bar federal contractors from discriminating on the basis of race and sex,
- ethics laws for clean contracting and procurement policy, and
- laws that give small businesses a chance at winning contracts for construction work along the barrier.

Placing the DHS Secretary above the law will make it too easy to place other government officials above the law in the future. Such a precedent should not be set.

We therefore oppose section 102 of the “REAL ID Act” and urge you to defeat this measure when the bill comes to the floor.

Sincerely,

Mary Beth Beetham, Director of Legislative  
Affairs  
**Defenders of Wildlife**

S. Elizabeth Birnbaum, Vice President for  
Government Affairs  
**American Rivers**

Joan Claybrook, President  
**Public Citizen**

Kevin S. Curtis, Vice President  
**National Environmental Trust**

Anne Georges, Acting Director for Public Policy  
**National Audubon Society**

Linda Lance, Vice President for Public Policy  
**The Wilderness Society**

Charles M. Loveless, Director of Legislation  
**American Federation of State, County &  
Municipal Employees (AFSCME)**

Beth Lowell, Policy Director  
**Endangered Species Coalition**

Betsy Loyless, Vice President of Policy and  
Lobbying  
**League of Conservation Voters**

Daniel R. Patterson, Ecologist & Desert Program  
Director  
**Center for Biological Diversity**

Alan Reuther, Legislative Director  
**International Union, United Automobile,  
Aerospace & Agricultural Implement  
Workers of America (UAW)**

Debbie Sease, Legislative Director  
**Sierra Club**

J. Robert Shull, Senior Regulatory Policy Analyst  
**OMB Watch**

Tiernan Sittenfield, Acting Legislative Director  
**U.S. PIRG**

Karen Wayland, Legislative Director  
**Natural Resources Defense Council**