Sierra to Court: Don’t Fence Us Out

The Sierra Club and immigration law and policy have long been a volatile mix. Beginning in the 1960s, the club stirred controversy by linking natural resource protection with stabilization of the U.S. population, but a true firestorm erupted in 1988 when it made explicit what had long been implicit, which is that population controls should include numerical limits on the permissible number of immigrants to the United States. The resulting friction between Sierra and immigration advocates generated so much heat that the club ultimately retreated in 1996 to a formal statement that it “take[s] no position on immigration levels or on policies governing immigration into the United States.”

With a filing of a petition for a writ of certiorari in late March, Sierra is yet again drawing a high profile link between environmental protection and immigration policy, but this time in a manner that harmonizes rather than divides environmentalists and immigration proponents. The object of the club’s concern is the construction of a border fence between the United States and Mexico, because of the damage the fence would cause to the environment. The Secure Fence Act of 2006 authorizes the federal government to construct a fence up to 700 miles in length along the border.

In the case now pending before the Supreme Court, the Sierra Club and Defenders of Wildlife are asking the Court to review their claim that Congress acted unconstitutionally in enacting a statute that authorizes 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,” including the one now underway on the Mexican border. The same statutory provision sharply cuts back on any possible judicial review. The law limits district court review to constitutional challenges, precluding any judicial review of a claim that the secretary has exceeded the scope of his authority; it eliminates court of appeals review altogether; and it provides only for certiorari review by the Supreme Court of a district court’s resolution of a constitutional challenge.

In the case now pending on petition before the Supreme Court, DHS Secretary Michael Chertoff has waived the application of 19 federal laws, including the National Environmental Policy Act, Endangered Species Act, and the entire Administrative Procedure Act, to the construction of a portion of the border fence. Besides the bare-bones determination that such a waiver is “necessary,” the Secretary offered no explanation.

The petition presents two novel constitutional challenges. The first is that the congressional grant of such expansive waiver authority to the Secretary amounts to an unconstitutional delegation of legislative power. The second is that the grant of waiver authority violates the Constitution’s Article I requirement that repeal of any duly enacted law can be achieved only by legislation approved by both congressional chambers and presented to the president.

Both constitutional claims clearly face an uphill battle because of their extraordinary nature. The last time that the Supreme Court struck down a federal statute for violating the nondelegation doctrine was more than 70 years ago, in 1935. And, just seven years ago, in Whitman v. American Trucking Associations, the Court displayed little affection for such claims of unconstitutionality. Nor are the federal reporters replete with conflicting rulings on the meaning of the nondelegation doctrine, let alone Article I.

Yet the truly extraordinary nature of the statutory provision at issue is also what gives this case a fighting chance. By combining a conferral of unfettered discretion on the Secretary to waive laws with the absence of normal judicial review, Congress has created a statutory Frankenstein that the Court might well want to immediately inter before it has the chance to reproduce. The Court has shown little tolerance in recent years for legislative inventions designed to streamline the lawmaking process, whether legislative vetoes or line-item vetoes. And petitioners can hardly be faulted for being unable to proffer a circuit conflict when the law they challenge effectively prevents any such conflict by eliminating appeals court review altogether.

The petition also has several significant advantages. It was crafted by top-notch Supreme Court advocates at Mayer Brown LLP as part of a pro bono project with Yale Law School’s Supreme Court Clinic. Faddish as such law school clinics have recently become — they are now trumpeted by seven major law schools — they also plainly enjoy a remarkable success rate at obtaining Supreme Court review. In addition, Chertoff has unwittingly aided petitioners with his recent announcement of plans to waive the application of 30 more environmental laws to the construction of the border fence.

Win or lose, the petition provides a welcome opportunity for the Sierra Club to mend a fence of its own.

Richard Lazarus is on the law faculty of Georgetown University. He can be reached at lazarusr@law.georgetown.edu.