

The Taking: How the federal government abused its power to seize property for a border fence

A decade ago, many border Texans got a raw deal when the federal government seized land for a barrier — while others pushed up the price. Will the government's rushed, haphazard process be repeated as it pushes for a border wall?

By T. Christian Miller, ProPublica and [Kiah Collier](#) and [Julián Aguilar](#), The Texas Tribune. December 14, 2017

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Juan Cavazos at his home on Oklahoma Avenue in Brownsville, Texas. The federal government took part of the former teacher's land to build the border fence. Martin do Nascimento for The Texas Tribune

BROWNSVILLE — The land agents started working the border between Texas and Mexico in the spring of 2007. Sometimes they were representatives from the U.S. Army Corps of Engineers. Other times they were officers from the U.S. Border Patrol, uniformed in green, guns tucked into side holsters. They visited tumbledown mobile homes and suburban houses with golf course views. They surveyed farms fecund with sugar cane, cotton and sorghum growing by the mud-brown Rio Grande. They delivered their blunt news to ranchers and farmers, sheet metal workers and university professors, auto mechanics and wealthy developers.

The federal government was going to build a fence to keep out drug smugglers and immigrants crossing into the United States illegally, they told property owners. The structure was going to cut straight across their land. The government would make a fair offer to buy property, the agents

explained. That was the law. But if the owners didn't want to sell, the next step was federal court. U.S. attorneys would file a lawsuit to seize it. One way or the other, the government would get the land. That, too, was the law.

The visits launched the most aggressive seizure of private land by the federal government in decades. In less than a year, the U.S. Department of Homeland Security filed more than 360 eminent domain lawsuits against property owners, involving thousands of acres of land in the border states of Texas, New Mexico, Arizona and California.

Most of the seized land ran along the Rio Grande, which forms the border between Texas and Mexico. All told, the agency paid \$18.2 million to accumulate a ribbon of land occupying almost half the length of the 120 miles of the Rio Grande Valley in southernmost Texas.

Years before President Donald Trump promised to build his wall, Homeland Security erected an 18-foot-high fence here in a botched land grab that serves as a warning for the future.

An investigation by ProPublica and The Texas Tribune shows that Homeland Security cut unfair real estate deals, secretly waived legal safeguards for property owners, and ultimately abused the government's extraordinary power to take land from private citizens.

The major findings:

- Homeland Security circumvented laws designed to help landowners receive fair compensation. The agency did not conduct formal appraisals of targeted parcels. Instead, it issued low-ball offers based on substandard estimates of property values.
- Larger, wealthier property owners who could afford lawyers negotiated deals that, on average, tripled the opening bids from Homeland Security. Smaller and poorer landholders took whatever the government offered — or wrung out small increases in settlements. The government conceded publicly that landowners without lawyers might wind up shortchanged, but did little to protect their interests.
- The Justice Department bungled hundreds of condemnation cases. The agency took property without knowing the identity of the actual owners. It condemned land without researching facts as basic as property lines. Landholders spent tens of thousands of dollars to defend themselves from the government's mistakes.
- The government had to redo settlements with landowners after it realized it had failed to account for the valuable water rights associated with the properties, an oversight that added months to the compensation process.
- On occasion, Homeland Security paid people for property they did not actually own. The agency did not attempt to recover the misdirected taxpayer funds, instead paying for land a second time once it determined the correct owners.

- Nearly a decade later, scores of landowners remain tangled in lawsuits. The government has already taken their land and built the border fence. But it has not resolved claims for its value.

The errors and disparities played out family by family, block by block, county by county, up and down the length of the border fence.

The Loop family spent more than \$100,000 to defend their farmland from repeated government mistakes about the size, shape and value of their property. The government built a fence across Robert De Los Santos' family land but almost a decade later has yet to reach a settlement for it. Ranch hand Roberto Pedraza was accidentally paid \$20,500 for land he did not even own.

Retired teacher Juan Cavazos was offered \$21,500 for a two-acre slice of his land. He settled for that, figuring he couldn't afford to hire a lawyer.

Rollins M. Koppel, a local attorney and banker, did not make the same mistake. A high-priced Texas law firm negotiated his offer from \$233,000 to almost \$5 million — the highest settlement in the Rio Grande Valley.

“We got screwed,” said Cavazos, 74.



Juan Cavazos, 74, at his home on Oklahoma Avenue in Brownsville. The retired teacher accepted \$21,500 for the two acres the government seized, but later discovered that neighbors who hired lawyers got paid much more for their land. “We got screwed,” he said. Martin do Nascimento for The Texas Tribune

Homeland Security and the U.S. Army Corps of Engineers referred questions to the Justice Department.

A Justice Department official, who insisted on anonymity, said all agencies involved in the land seizures followed proper procedures. He declined to respond to specific questions.

“[F]or any large public works project impacting hundreds of properties, the values are likely to cover a large range because so many different kinds of property are being acquired,” the official said. “It is these very differences in uses that cannot be captured in a cursory statistical analysis of the properties acquired and the prices paid for these lands.”

Michael Chertoff, the former secretary for Homeland Security under President George W. Bush who personally approved the condemnations in Texas, declined to comment.

Greg Giddens led the fence building project at Homeland Security. Now retired, Giddens said his team faced pressure from both U.S. Customs and Border Protection, which wanted the fence built quickly to benefit law enforcement, and from Congress, which set a deadline to complete the structure.

“Everybody wanted to do this right. But it was clear that the mission was to get this done,” Giddens said.

Hyla Head, the former Army Corps official who oversaw the condemnation process for the agency, said the government did everything according to regulation.

“There is a process that we have to follow and we followed that,” said Head, now retired. “I think we did a damn good job with the constraints that we were under.”

The fence was born in the middle of a fierce national debate on immigration reform. In 2006, Rep. Peter King, a New York Republican, introduced a plan to build hundreds of miles of a physical barrier along the southern border. Although controversial, the proposal won bipartisan support. Then Sen. Jeff Sessions, the Alabama Republican, led the fight for its passage. Yea votes came from Democratic Sens. Hillary Clinton and Barack Obama.

On Oct. 26, 2006, President Bush signed the Secure Fence Act. President Obama oversaw the fence’s construction. All told, Homeland Security built 654 miles of fence — just short of the 700 mile goal set by Congress — at a cost of \$2.4 billion.

Now Trump has promised to finish the job with a much larger wall — nearly twice the height of the current fence, made of concrete, and occupying much of the remaining 1,300 miles of southern border unguarded by a physical barrier. His administration has declared its intent to take more land to build the wall in the central Rio Grande Valley, where much of the property remains in private hands.

For Trump to succeed, the federal government will have to file more eminent domain lawsuits using the same law that resulted in uneven payments the last time. Many of the players who oversaw construction of the fence are now working on making Trump's wall a reality.

Mauricio Vidaurri's voice catches when he envisions a wall running across his family farm south of Laredo on the banks of the Rio Grande.

A rancher, Vidaurri strongly supports better border protection. Border crossers constantly trespass on his land, and drug couriers have broken into a home on the ranch.

But a wall would almost certainly split the ranch that has been in his family since the 1700s. If Homeland Security wants to build a wall, Vidaurri knows he will be almost helpless to stop it.

"That's a battle that we can't win," he said.

Video embed: <https://www.youtube.com/watch?v=DicKNdE5RYk>

More than a decade ago, the federal government began taking private property to build a border fence in Texas' Rio Grande Valley. The Texas Tribune and ProPublica visited one street on the edge of Brownsville to ask residents how they were informed of the coming barrier — and whether they were adequately compensated for the loss of their land.

A sovereign power

"Eminent domain" probably exists as a phrase in the consciousness of most Americans in some way or another. Maybe you heard it when the government was building a highway, or clearing a route for gas pipelines.

The sovereign power to seize land — and the need to protect property owners from its abuse — dates to the beginning of modern democracy.

In 1215, the Magna Carta limited royal power — including curtailing the sovereign's ability to take property from his nobles. "No free man shall be seized or imprisoned, or stripped of his rights or possessions," it read. A man's castle was his home, and not even a king could take it without due process. The language survives unaltered in modern British law.

More than five centuries later, America's earliest lawmakers enshrined private property rights in the U.S. Constitution. The Fifth Amendment required that the government provide "just compensation" if it took property through eminent domain — the English rendering of a Latin phrase meaning "supreme lordship." If the government was going to appropriate property, it had to pay for it, fairly and fully.

Over the decades, eminent domain transformed the American landscape. The U.S. Interstate Highway System and some national parks, NASA's Cape Canaveral and the U.S. Supreme Court building itself — none would have been possible without federal land condemnation. During World War II, the Justice Department boasted of being the largest real estate broker in the nation. The federal government acquired more than 20 million acres of land to build bases and other military sites — an area the size of South Carolina.

At the same time, the potential for abuse inspired deep-seated fear. An early Supreme Court justice described eminent domain as a “despotic power.” Property owners — from gigantic timber companies to people evicted from their homes — have fought bitterly to stop the government from taking their land, or to ensure a fair market price.

Politically, an unusual coalition of the right and the left has resisted the use of eminent domain.

Progressives have argued that disadvantaged groups feel the pain of condemnation more than most. In the 1950s and 1960s, officials deployed eminent domain to bulldoze mostly minority, mostly poor inner-city neighborhoods in the name of urban renewal. Government planners called it “blight removal.” Writer James Baldwin had another term: “It means negro removal,” he said after a meeting with U.S. Attorney General Robert Kennedy in 1963. “And the federal government is an accomplice to this fact.”

On the right, conservatives have warned of the so-called “grasping hand” of bureaucratic attacks on private property rights. That concern rose to national prominence in 2005, when the U.S. Supreme Court ruled against private property owners in the landmark case *Kelo v. City of New London*.

The Connecticut city condemned the homes of Susette Kelo and her neighbors to turn the land over to a private developer. The developer planned to build a hotel, housing, and office space to complement a new research center by Pfizer Corp., the pharmaceutical giant. The city determined the new development would generate jobs and tax revenue.

In a 5-4 decision, the court decided that taking land from one set of private property owners to give to another private entity was permissible as a “public use.” Kelo’s small pink house was relocated and her neighborhood was bulldozed, but nothing was ever built.

The ruling united ideological enemies. Ralph Nader blasted it. So did Rush Limbaugh. A few property rights activists were so angry they sought to condemn the New Hampshire home of Justice David Souter and replace it with the “Lost Liberty Hotel.”

One of the few high-profile supporters of the ruling was Donald Trump, then a New York developer. “I happen to agree with it 100 percent,” he said. His opinion was informed by experience. In the 1990s, he lost an eminent domain battle when a local agency failed in its bid to tear down an elderly woman’s home in Atlantic City to make room for a limousine parking lot for Trump’s casino.

Trump’s enthusiasm for taking land endures. During a February 2016 presidential debate, Trump described it as almost like winning the lottery. “When eminent domain is used on somebody’s property, that person gets a fortune,” he told the audience. “They get at least fair market value, and if they are smart, they’ll get two or three times the value of their property.”

In response to the *Kelo* decision, 45 states, including Texas, passed new laws to improve landholder protections. Some states banned private-to-private takings. Others required

“supercompensation” — payments at greater than the fair market value. Those reforms built on others passed over the years. California pays out up to \$5,000 for property owners to hire their own appraisers. Texas provides special commissions to review land seizures before the start of costly legal proceedings. Utah created an independent ombudsman to help landowners navigate the process.

But the furor to fix eminent domain abuse bypassed one important entity: the federal government. After Kelo, President Bush issued an executive order requiring agencies to better monitor land seizures. Congress passed no meaningful legislation.

And so, by the time the land agents had finished knocking on doors in the Rio Grande Valley at the end of 2007, the property owners faced a federal government armed with powerful legal tools, many created decades earlier for a very different purpose than building a border fence.

Tools for the taking

The Homeland Security officials in charge of building the border fence were getting nervous.

Congress had set a deadline to complete the project: Dec. 31, 2008. In little more than a year, Homeland Security, working through its U.S. Customs and Border Protection division, needed to issue millions of dollars’ worth of government contracts, buy 145,000 tons of steel, and build hundreds of miles of fence across unforgiving terrain.

“The clock is ticking,” Giddens, head of the fence task force, warned colleagues in a September 2007 email.

The biggest problem was Texas. Unlike other border states, most of the land where the fence was going rested in private hands. And people in the Rio Grande Valley were refusing to sell. The land agents would close only 22 deals.

On Dec. 7, 2007, Chertoff announced his decision: If landowners wouldn’t cooperate, the government was going to take the land. They had 30 days to decide. “We would of course like to reach an agreement with the landowner,” he said. “But if we are unsuccessful, we are prepared to use eminent domain,” he told reporters.

Over the following seven months, Homeland Security filed hundreds of lawsuits against scores of landowners along the Rio Grande. Most of the targeted acreage was farmland. But homes, golf courses, businesses and even nature preserves were sliced into pieces.

Alberto Garza, 91, lost 10 acres that provided access to the sugar cane farm he had worked for 50 years. The De Leons were disowned of four separate tracts that had been in their family since the 1790s, when Spain ruled the region. Ray Loop was forced to give up a swath of property that ran in front of his home near the Rio Grande. The Nature Conservancy, one of the country’s leading environmental organizations, surrendered eight acres of its preserve. The University of Texas-Rio Grande Valley was cut off from the golf course where its team practiced.

All told, the agency built 50 miles of fence in disconnected strips 40 to 60 feet wide — and seized a total of 564 acres. A process that can take years for a single parcel had been compressed into months.



Ponies graze next to the border fence in Cameron County, Texas. The federal government seized residents' property across the Rio Grande Valley to build the fence a decade ago. Martin do Nascimento for The Texas Tribune

The seizures were made possible by a piece of paper called a Declaration of Taking.

The Taking Act was passed by Congress during the Great Depression to help stimulate the economy. It was designed as an alternative to traditional, slow-moving eminent domain lawsuits. The idea was to expedite land seizures, allowing the federal government to quickly build public works projects and generate new jobs.

By using a so-called quick-take, a federal agency gained title to a person's property on the same day it filed a declaration of taking in court. The bulldozers could roll as soon as a judge approved an order to possess the land. The landowner was almost powerless to stop the process.

To balance this muscular exercise of sovereign power, the law required the government to immediately deposit a check with the court to pay the landholder. The amount was supposed to be the fair market value, the amount that a willing buyer would pay a willing seller. The landowner could take the money, or try to convince the government to pay more — a process that could take years.

“They can just grab the property now and worry about the price later,” said Robert H. Thomas, past chair of the American Bar Association’s eminent domain committee. “It’s a pretty potent tool.”

But not powerful enough for Homeland Security. The agency deployed a second tool to make it easier and faster to seize land. It issued a waiver that eviscerated a federal law designed to protect property owners from unfair seizures.

The so-called Uniform Act required the government to negotiate with the owners before seizing land. An agency couldn’t take coercive action to force a sale, and owners would receive a detailed description of the property to be seized.

Perhaps the most important provision was that the government had to formally appraise land worth more than \$10,000 before taking an owner to court. The appraisal had to be done according to the exacting standards spelled out in the 262-page Yellow Book — the federal government’s bible for pricing land.

The idea was to prevent lowballing. The government’s initial offer to buy property was not an opening bid in a negotiation. It was supposed to be as close as possible to the final, full value of the land, priced at its “highest and best” economic use. So, for example, if you had fallow land that could be planted with crops, an agency was supposed to pay as though your fields were abundant.

There was an exception to the law. An agency could bypass any of the law’s requirements, so long as doing so would “not reduce any assistance or protection provided to an owner.”

With virtually no public notice, Homeland Security took advantage of the loophole. It waived the law’s requirements for negotiation and eliminated conflict-of-interest provisions. The agency also increased the appraisal threshold to \$50,000 for property seized along the border.

In practice, the higher threshold meant that the agency did not have to formally appraise most of the property it wanted. Land is cheap in the Rio Grande Valley, and the government was appropriating only small strips for the fence. Of 197 tracts seized by Homeland Security, 90 percent were valued at less than \$50,000.

In place of formal appraisals, Homeland Security directed the Army Corps to assign values to targeted land. Army Corps evaluators did not have to be certified appraisers. They did not have to abide by Yellow Book standards. They did not have to identify the owners, and they didn’t need precise legal descriptions, called metes and bounds, to spell out property lines.

Homeland Security worried that the Army Corps did not have the expertise or manpower to complete the job, according to a September 2007 report. Giddens, head of the fence project, said Homeland Security directed the agency to gather real estate experts from other Army Corps offices and hire contractors to do the work as fast as possible.

It was not worth waiting long to conduct the condemnation process, given strong opposition by landowners in the Valley, Giddens said.

“This was not going to get better with time. None of us thought if we waited six months, people were going to say, ‘Hey, I get it now,’ ” he said. “There was no use in prolonging it.”

In the spring of 2008, the Army Corps representatives fanned out across the Rio Grande Valley to conduct negotiations with holdout land owners.

They were met with confusion and anger, according to an Army Corps report of the negotiations. Landowners wanted to know where the fence would go, how it would affect their property. They asked for more time to consider the offers. The contractors told them they had just weeks to sign a deal or the federal government would sue them.

One negotiator described a farmer’s distress at being pressured to make a decision in less than two weeks in the middle of his onion harvest.

“He takes this a little more to heart and is a little more emotional about the acquisition than some others,” an Army Corps realty specialist wrote. “He had lost confidence that Congress had any common sense.”

Tudor Uhlhorn, 58, a local politician, farmer and business owner, was perplexed by the federal offer to buy land he owned along the Rio Grande. He had been involved in land condemnation cases filed by the state of Texas, and in those cases the state’s attorneys had provided detailed property descriptions and construction plans.

Homeland Security sent him a map that appeared to be taken from Google Earth, with a red rectangle drawn around the targeted tract. When he asked for more information, the Army Corps sent a letter: “The accelerated schedule that is necessary to meet the Congressional mandate will not permit the completion of the ground survey before acquisition,” it read.

Homeland Security would take first, and measure later.

Neither Uhlhorn nor his attorney was informed that Homeland Security had gutted landholder protections, until they argued the case in court.

“They were building the fence on me without a full set of plans. They had no plans they could show me,” Uhlhorn said. “They just said it starts sort of in this area here and it ends sort of over there.”

Homeland Security’s decision — changing a single digit in an obscure line of the federal code — left landowners in the Valley vulnerable to the caprice of federal agencies more focused on fence construction than fair compensation.

That's because the Uniform Act contained a final weakness. Even if a property owner could show that Homeland Security had violated the law's requirements, there was nothing the court — or anyone else — could do to fix it.

Buried deep in the law, Congress had included a sentence that said the Uniform law “creates no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.”

In other words, there was a law. But there was no way to enforce it. In legal terms, it was “nonjusticiable” — beyond the reach of the federal court.

“This is pretty much a very dark corner of the law,” said Gideon Kanner, a professor emeritus at Loyola Law School in Los Angeles and a longtime champion of private property rights. “Any notions of due process that you may have will have to be re-examined.”

Out of commission

Delia Perez Weaver, 74, started working on her grandfather's farm near San Benito in the fourth grade. Back then, Mexican workers would come across the Rio Grande under temporary work permits granted under the bracero program. They would pick okra and cotton, green beans and tomatoes.

When the Army Corps came to talk with her, Weaver had rented out the farmhouse and the land. They told her they needed an acre to construct the fence and secure an access road. As compensation, she would receive almost \$15,000.

To Weaver, the offer seemed low. A relative told her she'd received a larger payment for a similar piece of land up the road. The 18-foot-high fence was an eyesore that would drop the land's value. And so much of her life, and her family's life, was wrapped up in her grandfather's farm. She asked the Army Corps representative for more money. He told her no. So she took the offer.

“This is it,” she remembered him saying. “If you want some more you need to go to court and that's going to cost you more money.”

The Army Corps official was right. Property owners sued by the government have no right to be assigned an attorney. They must hire their own, or find one willing to work on a contingency fee. That's not easy. By tradition, private eminent domain lawyers take roughly 30 percent of the increase over the initial offer. Few will take on cases where the property is worth less than \$100,000 — it's not worth their time.

The federal courts, however, had developed a solution for owners like Weaver. In projects involving many owners of inexpensive tracts spread out over a large area, a judge could appoint a land commission composed of local real estate experts to determine property values. The commissions allowed small landowners to plead their cases without the expense or formal procedures involved in a judicial hearing.

Commissions were used in the two largest eminent domain cases in U.S. history: the creation of Florida National Everglades Park, which involved more than 40,000 lawsuits over three decades, and the Tennessee Valley Authority, a congressionally chartered hydroelectric power company that required acquiring hundreds of thousands of acres of land. Such commissions have also been used in much smaller condemnation projects, some involving as few as 16 properties.

As the lawsuits started, the Justice Department, representing Homeland Security, urged the federal judge overseeing most of the cases in the Valley to appoint such a commission.

Virginia Butler, the chief of the Justice Department's real estate acquisition section, warned in a motion to Judge Andrew S. Hanen that failure to do so would "result in protracted litigation of these matters and disparate awards to claimants — a very unsatisfactory result for all parties involved."

"In order to achieve fair, uniform compensation awards expeditiously for all affected owners (represented and unrepresented) in the Rio Grande Valley, appointment of a commission is required," she wrote.

Hanen is best known now as the judge who blocked an Obama order to ease immigration laws. But before, he was the "fence judge" — handling nearly all of the cases along the Rio Grande. Hanen rejected Butler's request. A jury trial, he said, was the best forum for the cases. And there was no need to worry about defendants without legal counsel, according to Hanen, because all the cases before him already had lawyers.

When it came to negotiations between the government and landowners, Hanen declared that he would be "hands off."

Hanen's confidence was misplaced. As the lawsuits played out in court instead of before a commission, Butler's dire predictions came true. Payments were unequal and lawsuits dragged on for years, according to a review by ProPublica and the Texas Tribune of 197 cases in the Rio Grande Valley where the government took possession of property from landowners. The review did not include cases which remain open, or temporary land seizures.

The Justice Department takings lawsuits resulted in splitting the community into three groups, not on the basis of the land they owned, but on their ability to retain an attorney.

The biggest group was made up of landholders of modest means, many elderly, some Spanish-only speakers. They didn't hire attorneys and took the government's initial offer. Half the lawsuits had that result. The median settlement was \$8,000. The median seizure was just over one-third of an acre.

Those who settled were people like Otilia Perez, 81, and her 85-year-old husband Tomas. They lived in a modest brick home across from their farmland. When the Army Corps approached them, Tomas had long ceased working the land himself, instead renting it out to tenant farmers.

Neither he nor his wife felt like fighting the government. They accepted \$21,000, and the government took two acres of land.

“My folks are old and didn’t need to be in that legal battle, so we said, “Look, just take whatever they give you now ‘cause it’s gonna happen anyway,” said Joe Perez, their son who handled discussions with the government.

Jack Coleman, 77, was a military veteran who retired from the Naval Space Command in 1996. When the government offered him \$10,600 for a piece of overgrown land that he used as a personal firing range, it seemed like a good deal. It was almost the same amount that he’d paid for the entire five-acre tract years before. “They offered a more than fair price,” he said.

But when taking slices of land from larger parcels, as happened in the Rio Grande Valley, the government didn’t price property in the way that real estate transactions are typically valued.

Under federal guidelines, Homeland Security was supposed to evaluate the worth of a piece of land before building the fence, and do so again after construction. Subtracting the second figure from the first produces an estimate of the damage inflicted on the property by the construction of the fence. The formula is designed to capture price differences caused when land is severed from a parent tract.

But many in the Valley weighed the offer on a price-per-acre basis at a time when the best irrigated cropland was selling for \$10,000 an acre. To those who didn’t know about the formula, the government offers seemed generous — at first.

The Cavazos family lived in a home on 30 acres wedged between the Rio Grande and Oklahoma Avenue, a two-lane stretch of blacktop on the eastern edge of Brownsville. Much of the land was between the river and a levee — good only for crops.

The Cavazos kept cattle, horses and chickens that roamed the thick grassland and pastures behind their single-story tan brick ranch house. The area is rural: horses graze on tall grass on the sides of roads. There are no street lights, and fields of cotton, corn and citrus trees line the road.

The Army Corps told the family that it would build a fence to run just behind the house, and also put in a gravel side road. To compensate them for the loss of two acres to the project, Homeland Security offered \$21,500 and promised to install a gate with a security code that would give them access to their land remaining on the other side.

Juan Cavazos was a teacher. His wife worked as a secretary for the school district. They didn’t want the fence. They thought there were smarter ways to stop the crossers and smugglers who darted across their land. But who were they to fight the government? They figured an attorney would just take a big contingency fee.

“Regardless of whether we were going to be opposed or in favor of it, they were going to build it,” Cavazos said. “We were totally against building the border wall but we couldn’t do anything about it.”

They took the money. Homeland Security built the barrier. It looms in the backyard, sharp and jagged, like a giant's picket fence. The gate in the middle lets Cavazos stroll the back portion of his property. Border patrols officers race past on the gravel road.

Had he known anything about the law, Cavazos could have argued for more money. For instance, he could have insisted that his land be valued for its farming potential — its highest and best use. Or he could have hired an appraiser to counter the government's estimate. Cavazos didn't know any of that, though. The sole burden to prove the full market value lies upon the owner — not the government.

He learned later that nearby landowners got higher payments than he did for similar parcels of land. He also believes the barrier has permanently reduced the resale value of the land now caught between the river and the fence.

“At the time, we thought it was a fair offer,” Cavazos said. “The people who didn't hire the lawyers got screwed.”

People didn't have to have a lawyer to prove the government's offer was too low — in some cases, all they had to do was pick up the phone.

The De Leons fell into a second group of property owners. Like the first group, they, too, faced Homeland Security without counsel. But they were able to negotiate an increase in their final settlement. Of the 131 lawsuits in which landowners had no attorney, 30 settled for an increase of 33 percent higher than the median government offer. The payment for a median one-third acre tract increased from a median of \$6,000 to just under \$8,000.

Many of these landowners had some familiarity with the workings of government — they were local, state or federal employees. Or they had connections to power brokers like local attorneys or politicians. Or they were simply comfortable negotiating directly with the U.S. Attorney's Office.

Frequently, it did not take much to get a higher offer. Landowners who contacted the Justice Department often described a quick, cordial discussion. While few got what they were asking, they usually received some additional money or an agreement to reduce the effect of the fence on their land. For instance, farmers negotiated deals to install electronic gates to allow them to get farm equipment to their fields.

The government informed Rosalia Gonzalez that it would pay \$700 for a little more than a tenth of an acre from a 1.4-acre lot she owned in Brownsville near the Rio Grande. Gonzalez asked for \$60,000. “The United States is not aware of any land in the area of your property that has a fair market value as high as what you have requested,” a federal attorney wrote back. He did, however, boost the offer to \$1,000. Gonzalez took it.

Retired teacher Josephine Weaver, 80, saw her offer for a little more than a tenth of an acre of her 3.5 acre lot near Los Indios increase from \$1,150 to \$3,000 after she protested. “They were doing the right thing,” she said.

In the De Leons’ case, the family had deep roots — historically and politically. The De Leons traced their presence in the Rio Grande Valley to the days of the Spanish empire. One De Leon has a gold-framed family tree on the wall of his home with dates going back to the 1790s, when the family’s ancestors received a Spanish land grant in the Brownsville area.

At 82, Ernesto De Leon was the family’s patriarch. He once served as a city commissioner in Brownsville. He helped raise money for former Texas Gov. Rick Perry, a Republican who is now Trump’s energy secretary.

When the land agents came around, they wanted five different parcels of land owned by the family. De Leon picked up the phone and started making calls.

“I got on it and talked to my congressman. Talked to my state representative and county judge, and all the people that could help,” De Leon said. “By the grace of God we were able to make them understand.”



Ernesto De Leon, an 82-year-old former Brownsville city commissioner, started making phone calls after receiving the government’s initial offer for his family’s land and negotiated a higher price. Martin do Nascimento for The Texas Tribune

De Leon wound up speaking to the assistant U.S. attorney assigned to the family's cases. On one plot of farmland, he convinced the government to raise its offer from \$13,700 to \$17,000 — a modest 24 percent boost.

But on another piece of agricultural land — this one closer to Brownsville — he more than quadrupled Homeland Security's offer from \$11,300 to \$48,120 for the damage of losing a little more than an acre and a half from a 50-acre tract. He also worked out a deal to ensure that Homeland Security installed an electronic security gate to provide continued access to the land.

“I say, don't rock the boat. In other words, what they offer you, see if you can negotiate a better price.” De Leon said. “Don't be greedy, get a reasonable price for your property and move forward.”

For most people who had the money, hiring a lawyer proved a smart investment. Not everyone with an attorney got more money — but those who did reaped significant returns.

For about 30 landowners represented by attorneys, the jump between the government's median opening bid and its final offer was 207 percent — from a median offer of \$13,100 to a settlement of \$40,305. (In another 20 cases, the final settlement included additional land, making direct before-and-after comparisons difficult.)

The reason for the huge jumps became apparent during the battles between landholders and government attorneys: The Army Corps' evaluators had consistently undervalued the land.

As part of the government's defense preparations, the Justice Department hired independent appraisers to evaluate the targeted land. In the few lawsuits where those appraisals were made public, the government's outside experts invariably priced the land higher than the Army Corps' evaluators.

Take the case of Rollins Koppel. In 2002, Koppel and his investors bought 420 acres of vacant land wedged in a prime location between Brownsville and Matamoros, its sister city across the river in Mexico. They planned a neighborhood of affordable homes that would be surrounded by a park overlooking the Rio Grande. Koppel successfully lobbied the Brownsville City Commission to establish a special taxing district for the development.

By 2007, Koppel had managed to install sewer and water lines, and he had platted the subdivision. But it was still just vacant land.

Then the federal government showed up with a Declaration of Taking. The border fence cut up the development and destroyed any chance for a riverfront park. Homeland Security made him an offer: \$233,000 in return for a little more than six acres of land.

Perhaps no property owner along the Rio Grande was more savvy about the value of his land than Koppel. With deep roots in Brownsville, Koppel had practiced law in the area for more than 45 years. He had partnered with some of the biggest developers in Texas to build the project.

So when the Justice Department filed its Declaration of Taking, Koppel hired one of Texas' top law firms, Vinson & Elkins, renowned for its ferocious litigators, to fight back.

Over the next three years, the two sides faced off in court, even as Homeland Security built the fence. Koppel's attorneys attacked the integrity of the government's appraiser.

Justice attorneys argued that Koppel's appraiser had not properly followed government standards. And Koppel, they said, was overvaluing the market for his development in one of the most economically depressed parts of Brownsville.

On one point, though, both sides agreed. The government's initial evaluation had vastly underestimated the damage the fence would do to Koppel's development. Koppel's attorneys put the total price at more than \$14.6 million. The government's attorneys said it was \$1.4 million.

When the two sides finally settled, Homeland Security paid Koppel \$4.9 million. That was the highest payout for any property in the Rio Grande Valley, and it represented a 2,043 percent increase from the government's initial estimate of fair market value.

In the end, even that might not have been enough. Koppel was never able to get the subdivision built. He died earlier this year at 88. His attorney did not return phone calls seeking comment.

Equal but different

U.S. courts have held that appraisals are more art than science. Actual market sales are the single most important component in most appraisals — but real estate in the Rio Grande Valley did not turn over often. Nor had anyone ever sold property with a border fence on it. The government's experts were left guessing at values — and often getting them wrong.

A close look at the Loop family's case exposes the inequity of the government's work in the Rio Grande Valley.

The Loops have been farming at the very edge of America since the early 1900s. The family's land runs along the Rio Grande at the southernmost tip of Texas, just a few miles before it unspools into the Gulf of Mexico. Loop brothers, uncles and cousins grew navel oranges and tangerines, cabbages and corn, green peas and cotton — pretty much anything they wanted to put in the ground. The rich soil, bottomland, is blessed with yearlong sunshine and warmth.

The family lived the border's problems. Drug couriers hauling duffel bags stuffed with narcotics hiked across their farm. People from Mexico, elsewhere in Central America, as far away as Romania, illegally crossed the border into their land. Every once in a while, dead bodies floated past in the river.

When the government came looking to build the border fence in 2007, Ray and Frank and their cousins, Tim and Paul, were working more than 5,200 acres on contiguous properties. Though the barrier didn't make much sense to them, they welcomed the idea of better border control.

“Good fences make good neighbors; isn’t that what Robert Frost said?” Ray Loop remarked.

The border fence cutting across the Loops’ land was going to trap most of it between the river and the fence. It would also strand Tim’s home and Ray’s home in the no man’s land that remained. The Loops’ biggest concern was their farms: How would they be able to get to them?

Both pairs of brothers talked with the land agents sent out by the Army Corps. To a person unfamiliar with the finer points of eminent domain law, the offers looked awfully generous.

In Ray and Frank’s case, the government announced its intention to take 5.5 acres. The compensation would be \$210,000.

But issues beyond the amount of money bothered Ray Loop. He was having trouble nailing down answers to questions. Was Homeland Security going to build a gate? Would the road be wide and durable enough to accommodate his 42,000-pound, 26-foot-wide John Deere combine? And what about his family? He had three daughters. If they had a code to the gate, wouldn’t they become targets for drug dealers who wanted access?

“The safety issues were terrible,” he said. “I was worried all the time.”

Ray Loop talked it over with his family. He decided to fight. He hired one of the best-known eminent domain law firms in Texas, a boutique outfit called Barron Adler. Steve Adler, the politically connected co-founder, would become Austin’s mayor. (Adler also provided initial funding for the launch of The Texas Tribune.)

Kim Loessin, the Barron Adler lawyer who handled the Loops’ case, believed the government offer ignored key facts. Loop got money from his farm, and from a sand mining operation and a hunting camp. How would the value of the land between the fence and the Rio Grande be affected?

Loessin hired a professional appraiser to judge the property’s value. Using the government’s formula, the Loops’ appraiser put the total damages across the 630-acre farm at \$1.4 million. The damage tally included an additional four acres of land for fence construction, troubles with access to the farmland, and the effect of the fence on the resale value of Ray Loop’s home.

The government hired its own appraiser. Unlike the Army Corps, he was required to carry out a full assessment using Yellow Book standards. His estimate of the harm done to the Loop farm was just under \$1 million.

The two professional estimates differed — not unusual in a court battle. But both soared far above the Army Corps’ initial estimate of \$210,000.

“It was one of the only projects that I had ever encountered in this area of practice where the government just skated on so many things,” said Loessin, who wound up representing dozens of owners in the Rio Grande Valley. “I’m not just generally an anti-government person, but that just infuriated me, with regard to property rights in particular.”

Tim and Paul Loop took a different path. They did not respond to requests for an interview, but Tim submitted a sworn affidavit in court files that tells their story.



Paul and Tim Loop, seen here in April of 2008, before the border fence began construction on their land. Brad Doherty for The Texas Tribune

Tim and Paul Loop decided to accept the Army Corps' initial offer — a payment of \$160,000 for the damage to their farming operation caused by the fence. It would run across seven acres on scattered strips of land. The price seemed right.

“It was our desire to not be an obstruction to our government’s getting a job done,” Tim Loop declared in his affidavit. “We wanted to do our patriotic duty.” Nobody told the family that the money was supposed to represent all the losses to their farming operation.

Only after Ray and Frank’s experience did they realize the government had shortchanged them. After all, they farmed similar crops, on the same land — the Loops’ farms bumped up against each other. Why were the two sets of cousins being compensated so differently? Tim and Paul tried to reopen negotiations. But by then, it was too late. The government already owned the land.

“We trusted our government to treat us fairly,” Tim Loop wrote. “We trusted the representatives of the government to be honest and forthright when dealing with us.”

In the end, the government took additional land to build the fence. By then, Tim and Paul had hired Loessin. The brothers' final compensation was \$400,000, with a loss of 20 acres.

Ray and Frank Loop, on the other hand, received \$1.4 million for the loss of 11 acres.

In the years after construction, Ray Loop learned to live with the fence. Sometimes the gates broke down, but the government sent a contractor to fix it. The added border control was hardly perfect. Homeland Security never closed up access at an old farm road, leaving a yawning, 40-foot-wide gap in the fence where anyone could walk through.

But earlier this year, one of Ray's nightmares became real.

Rising early one morning in January, he smelled smoke. A few minutes later, a Border Patrol officer texted him: "Sir, your barn is on fire I believe," it read.

The barn was actually the Loops' home — they lived on the second floor, above a space that housed some of their animals. He rushed to wake his daughters and his wife. The family escaped unharmed, but the animals did not. Four of the family's dogs and a goat burned alive, their cries haunting the family.

Ray believes that the fire engines that raced to his home were hindered by the gate. Fire officials dispute that. But Ray is certain that the engines would have been able to respond faster had they not had to negotiate the fence that was meant to block border crossers — not emergency vehicles.

Ray and his family have rebuilt their home. They are again living in no man's land, that slice of America between the fence and Mexico.

"What else are we going to do?" he asked.



The end of a segment of the border fence just east of Oklahoma Avenue on Aug. 11, 2017. Martin do Nascimento for The Texas Tribune

Comedy of error

It was Feb. 3, 2009, and Assistant U.S. Attorney Eric Paxton Warner had a confession to make.

For more than a year, Justice Department attorneys had been seizing property. And for more than a year, they had been paying the landowners for their losses. They had beaten the Dec. 31, 2008 deadline set by Congress. Contractors were digging wide trenches and pouring concrete for the fence.

But it was only now, in the middle of litigating a case against the Borzynski brothers, two farmers known as the Cabbage Kings of America, that the government realized that it had erred in nearly every single case, Warner told the court.

“I have made a mess of the Borzynski case,” Warner told the court.

The government had not finished title work on many of the properties until Christmas. In the rush, the attorneys had not realized that they had failed to compensate the owners for water rights to their land.

It was an almost unbelievable mistake for anybody who knew anything about the American West.

In Texas, as in many states west of the Mississippi, water rights can be worth more than the land itself. The rights give landowners control over a certain amount of water from the Rio Grande. That allocation can be sold to farmers who need water for their crops. Without water rights, there is no agriculture.

Now, Warner told the judge, the government was going to refile all of its taking cases to ensure that the landholders would retain those rights.

The congressional deadline “required us to kind of, I guess, essentially work backwards from the way a normal condemnation would have been done,” Warner explained.

Justice Department attorneys discovered another giant mistake. Much of the fence had been built on top of an earthen levee running parallel to the Rio Grande. Only after construction did the government realize that property owners actually had title to the land beneath the levee. The government had not paid for any of it.

Daniel Hu, the U.S. attorney overseeing the condemnation lawsuits, offered an apology.

“We actually built the fence on land that we haven’t finished taking yet,” Hu told Hanen at a hearing.

Yet another problem:

The Rio Grande Valley was famous in Texas for murky land claims — the river shifted constantly, changing property lines. Records were missing. Families often had multiple members claiming ownership. But nobody at Homeland Security or the Justice Department appeared to have prepared for the complexity involved. Years would pass before the government would even know who it was suing.

In one case in the small town of Eagle Pass, Justice lawyers found 24 heirs to a half-acre tract overlooking the Rio Grande. The case took almost five years to unravel, with a plot worthy of a Gabriel García Márquez novel. The lawsuit involved the Roman Catholic Church, a competing land claim from another family, and a handwritten deed from 1894 that referred to the property line as “beginning at a mesquite tree eight inches in diameter on the east bank of the Rio Grande.”

When pressed about problems or delays, U.S. attorneys continually blamed the deadline set by Congress for their mistakes.

“The government had to rush,” Warner explained in defending himself from a sanctions motion.

The Justice Department, “working within the parameters set by the realities of the world we live in, rather than as we wish them to be, took the subject properties with the information then available.”

Sometimes, the mistakes seemed farcical. In one case, Homeland Security offered to pay the city of Brownsville \$123,100 for nearly 16 acres abutting the Rio Grande. It turned out the land was owned by the city — but 257 other people also had claim to the property.

What’s more, Homeland Security had relied on a mistaken land survey to seize the tract. The new property line had been drawn to cut through the middle of an irrigation pump house owned by Brownsville.

“[W]e inadvertently took half of a pump house that belongs to the city,” Hu told Hanen. “The federal government doesn’t want it. We want to give it back to the city.”

“Why did you only take half? You didn’t want the whole pump house?” Hanen joked.

“We didn’t even want half actually,” Hu said.

More than nine years later, the case remains open. Justice Department attorneys continue to locate and pay the additional landholders. Just this September, the agency disbursed a payment of \$5,750 to two owners.

The circumstance is not unusual. Pamela Rivas is one of more than 40 property owners who have waited almost a decade for their cases to resolve. Many involve complex ownership claims. The government had to untangle who owned a small tract of land in Rivas’ case.

That dispute, however, was settled years ago. The United States now owns about an acre of her land near a border crossing. But it has yet to agree with Rivas on a final payment..

“I’m just a nobody and they’re going to do what they want to do,” Rivas said. “I don’t think that’s right.”

Roberto Pedraza, meanwhile, hit the jackpot — just not the way he ever imagined.

Pedraza was one of several property owners who were paid by the government for land that they did not own.

Pedraza spent most of his life working as a farmer and foreman for rancher Rex McGarr, whom Pedraza affectionately still calls “my boss man.” When McGarr died, he willed 114 acres of Hidalgo County farmland to Pedraza and his wife, Olivia.

But McGarr’s death led to decades of legal wrangling between other beneficiaries and attorneys for the estate. In 2008, the year Pedraza was first approached by an Army Corps land agent, he still wasn’t clear on what was legally his. But the federal government seemed to have figured that out for him.

“I told him, that person from the government, that [there] was a legal matter on this property,” Pedraza said. “And [the government official] said, ‘Well, according to the records... you own it.’”

In September 2008, Pedraza was paid \$20,500. He and his wife used the money to pay off longstanding bills.

More than six years passed. Then, one day in 2014, a government representative contacted them. After completing title research, the Justice Department realized that the land had not belonged to him.

The government offered him a deal. Pedraza could keep the money, so long as he signed a document disclaiming ownership to the land.

“The government came in and said, ‘Look if you give the right of way ... then you don’t have to pay,’ ” he said. “I said, ‘Fine,’ because I knew this thing was a big mess.”

The real owner of the land was Pedraza’s next-door neighbor: Alberto Garza, the 91-year-old sugar cane farmer.

Homeland Security had already paid Garza \$45,000 for a total of 3.4 acres from Garza’s sugar cane farm, which stretches on both sides of a highway that parallels the Rio Grande near the hamlet of San Benito.

Border Patrol officials promised to build a gate in the border fence to give Garza continued access to the land that he had farmed for five decades. But when Homeland Security’s contractors showed up, they ignored the promise, according to his daughter, Norma Longoria.

“When we saw that they were putting the poles up, we tried to stop them,” Longoria, a 62-year-old retired state worker, remembered. “They told us no.”



A construction crew works to erect a portion of the border fence along Oklahoma Avenue south of Brownsville on June 9, 2009. Brad Doherty for The Texas Tribune

When the government returned years later to pay the family for land that they thought had belonged to Pedraza, it seemed a recompense for the oversight of not installing the gate. Garza got an additional \$10,500 out of the deal.

But Longoria said her father never fully recovered from the shock of being shut off from his own farm. Before, he followed a dirt road behind his house to get to his sugar cane fields or visit his beloved cattle. Now he must drive a mile down the highway until he reaches a gate, then double back. He still visits his land. But not as often as he used to.

“It’s very inconvenient now,” Longoria said. “We didn’t feel it was fair.”

The Justice Department spokesman explained that the government is not required to provide exact property descriptions or have done research prior to seizing land using a Declaration of Taking.

The spokesman said that many of the condemnation lawsuits in the Valley were filed to clean up problems with property titles. In a so-called “friendly” take, the seller makes no objection, but the government files a condemnation suit to make sure that legal ownership is clear and no debts are attached to the property when the federal government takes possession.

The spokesman declined to comment on any open cases.

Past as present

About 20 miles south of Laredo, Texas, lies a forgotten town.

Four crumbling structures cluster around a soft dirt road. The roofs are gone. The stucco has peeled off the walls, revealing hand-carved blocks of dun-colored sandstone. Mesquite trees and thick grass grow all around. Butterflies flit about.

The ruins are what remain of a town once called Dolores. It was an early settlement north of the Rio Grande, built in the summer of 1750 under the command of José de Escandón, the Spanish conquistador who colonized the region.

For Mauricio Vidaurri, it is home.

Vidaurri is a descendant of one of the pioneers who founded the town. Vidaurri’s family once owned thousands of acres around this spot off a lonely stretch of highway between Laredo and Zapata. Now, they farm some 1,300 acres of watermelon, cucumbers and grazing hay. A power company rents the land to extract natural gas. An irrigation pump draws water from the Rio Grande.

Vidaurri likes to come here sometimes and just sit — there is a mystery, a power, about the place that fills him.

“We’ve been here since before the United States,” he said. “One owner.”

These days, another feeling haunts him: worry. Since the presidential campaign began, Vidaurri has paid close attention to Trump’s promises about building a wall between the U.S. and Mexico. It would be 40 feet high and be made of concrete. It would stretch from the Gulf of Mexico to the Pacific Ocean.

If Trump were to build that wall, it would run straight through Vidaurri’s ranch, which lies north of the Rio Grande Valley. When constructing the border fence, Homeland Security skipped much of the area around Laredo, deciding it was not a high enough priority.

Trump has not announced any plans to build the wall here — but Homeland Security officials have indicated that the agency will be taking land and erecting a fence about 50 miles to the south, around Rio Grande City.

Mark Borkowski, the top contracting official for Customs and Border Protection, told a conference in San Antonio in April that the agency would return to finish what it had started a decade ago. “We’re going to seize more land,” Borkowski said. “We are going to do it.”

Vidaurri is a strong proponent of better border protection. Border crossers trespass on his land constantly. Drug couriers have broken into a home on the ranch.

But Vidaurri thinks the solution lies in the better deployment of technology, like the hidden cameras that Border Patrol has installed throughout his ranch, or the static blimps that hover silently in the sky above, scanning the border.

With Trump still promising the wall, Vidaurri figures it’s only a matter of time until Homeland Security arrives with bulldozers and pile drivers. When the time comes, he knows there will be no stopping the government. And he doesn’t think any amount of compensation will make him whole.

“We can’t say our land is worth so much. Our land was bought with our blood, sweat and tears,” Vidaurri said.

Vidaurri’s concerns are especially personal.

From Dolores’ ruins, Vidaurri can walk a few hundred yards to a small, fenced graveyard on a bank overlooking the Rio Grande. Simple white crosses mark some graves. Others are surrounded by elaborate wrought iron fence. Many of the markers date from the early 1800s. In one corner, two flags fly: that of the United States and that of the U.S. Marine Corps.

Vidaurri stops by the grave of his father, Roberto J. Vidaurri. He served in the Marine Corps during World War II, and was twice wounded in Iwo Jima. The wall would slice right through here, Vidaurri figures, cutting him off from his land, from his father.

It would be like building a wall through his heart.

“You’ll build a wall on our land and destroy sacred ground for us and tear away our history,” he said. “What good will it do?”

The Texas Tribune and ProPublica, which produces investigative journalism in the public interest, partnered on this project to expose the federal government’s unsettling use of eminent domain to seize land for a fence along the U.S -Mexico border.

About this story: To read how we did this, click here:

<https://www.texastribune.org/2017/12/13/how-we-reported-taking/>

The Texas Tribune's reporting on this project was supported by the Pulitzer Center, which is also the lead partner in bringing discussions of this report to schools and universities in Texas and across the United States through its K-12 and Campus Consortium networks.

This article originally appeared in The Texas Tribune at <https://www.texastribune.org/2017/12/14/border-land-grab-government-abused-power-seize-property-fence/>.

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