

Backgrounder

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House Border Security Bill Falls Short

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The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437) is the House of Representatives' effort to create a border security strategy. The bill's 13 titles deal with everything from securing the border and minimizing corruption and fraud to increasing penalties for being unlawfully present in the country to tightening the rules for legally entering and remaining in the United States.

H.R. 4437 makes a useful contribution to the debate over how best to secure our nation's borders, but it is not the comprehensive legislation needed to reduce illegal entry into and unlawful presence in the United States significantly. Congress needs to craft more comprehensive legislation that addresses all the critical aspects of immigration and border security reform. Parts of this bill could contribute to the comprehensive legislation that is needed. Instead of the layered approach taken in this bill, better legislation should take a system-of-systems approach.

What Is Needed and Why

Any effective solution for reducing illegal border crossings and the unlawful population in the United States must address all three aspects of the problem: internal enforcement of immigration laws, international cooperation, and border security. Internal enforcement and international cooperation are essential to reducing and deterring the flood of illegal entrants into the United States, thereby making the

Talking Points

- The current "layered systems" approach to U.S. border security is inadequate and is still entrenched in the Homeland Security department's mindset. The problem is that the layered approach does not prioritize investments. Not all layers are of equal value.
- H.R. 4437 makes a useful contribution to the debate over how best to secure our nation's borders, but it does not serve as the comprehensive legislation needed to reduce illegal entry into and unlawful presence in the United States significantly.
- Any effective solution for reducing illegal border crossings and the unlawful population in the United States must address all three aspects of the problem: internal enforcement of immigration laws, international cooperation, and border security.

This paper, in its entirety, can be found at:
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challenge of securing America's borders affordable and achievable.

The current "layered systems" approach to U.S. border security is inadequate and is still entrenched in the mindset of the Department of Homeland Security (DHS). A layered defense suggests that the border can be secured by multiple security features, with each layer backing up the others so that no layer has to be perfect.

The problem is that the layered approach does not prioritize investments. Not all layers are of equal value. In fact, investments are often based more on politics than on sound strategy. The most powerful stakeholders and influential advocates tend to get their priorities funded first and best. Meanwhile, the United States has underinvested in the most important components of the system, such as infrastructure (e.g., adequate bridges and roads) at the points of entry.

Furthermore, there is no substantive requirement that systems must work together. To fix the problem, the Administration must build a "system of systems" that welds all of the nation's border assets into a single coherent security enterprise that deploys the right asset to the right place at the right time to do the right thing.¹ To create system-of-systems security, the Administration and Congress will need to make key investments in infrastructure, organization, technology, and resources and then support these investments with legislation and policy reform.

What the Bill Does

H.R. 4437 begins with a statement of the sense of Congress, in which Members state that U.S. immigration and naturalization policy should "enhance the economic, social and cultural well-being of the United States of America." That is the right sentiment, but the bill takes a piecemeal approach to the problem that rightly addresses some issues but misses the mark on others and fails to offer a comprehensive, holistic solution.

Title I, "Securing United States Borders," calls for numerous reports on how to achieve operational control on the border and requires the DHS to develop a National Strategy for Border Security within six months of the legislation's enactment. It also recognizes the need for allies in securing U.S. borders by requesting reports on the progress of cross-border security agreements with Mexico and Canada.

Titles II, IV, VI, and VIII focus on combating alien smuggling and illegal entry and presence and on speeding up removal procedures. These titles update older immigration legislation and increase penalties for illegally entering or staying in the country. They also reclassify many civil immigration violations as criminal ones, which lead to greater fines, jail times, or removal from the country. Title VIII revamps the removal procedures to prevent abuse of the system and long delays before a person illegally present can be removed from the country.

Titles III and V attempt to strengthen cooperation among the various entities involved in border security and to ensure effective coordination and operation.

The remaining titles cover a disparate collection of border security issues.

- Title VII calls on the Secretary of Homeland Security to establish and maintain a verification system to enable employers to determine whether or not an individual has the right to work in the United States;
- Title IX mandates a pilot program to evaluate using automated systems to immediately pre-screen air passengers flying on foreign flights;
- Title X requires additional fencing in parts of the southern border states and requires the DHS to conduct a study on the efficacy and cost-effectiveness of putting a barrier system on the Canadian border;
- Title XI eliminates the diversity immigrant program;

1. For more on systems of systems, see James Jay Carafano, Ph.D., "Safeguarding America's Sovereignty: A 'System of Systems' Approach to Border Security," Heritage Foundation *Background* No. 1988, November 28, 2005, at www.heritage.org/Research/HomelandDefense/bg1898.cfm.

- Title XIII codifies the oath that new citizens take; and
- Title XIII establishes procedures to eliminate corruption and prevent fraudulent acquisition of immigration benefits.

Proposals Supporting a System-of-Systems Approach

Both the border security strategy and the improved cross-border agreements called for in Title I are important components of a system-of-systems approach to border security. In many ways, the bill's subsequent provisions are supposed to make the creation of the National Border Security Strategy easier, although in reality they do not do so.

Title III puts forth a series of proposals that tackle some of the roadblocks to full cooperation among the entities involved in border security. Several areas in particular stand out. Sections 301 and 302 push for consultation and planning between DHS and other departments within the U.S. government. For instance, the bill directs the DHS Secretary to work with the Department of the Interior to evaluate security vulnerabilities on land under the Interior Department's jurisdiction. The Interior Department is responsible for much of the land along the country's borders, and jurisdictional questions often arise as to whether Interior law enforcement or the Border Patrol is responsible for preventing unlawful entry into the country on public land. The legislation directs the DHS to evaluate the vulnerabilities and instructs the Department of the Interior to provide any needed assistance.

Title III also requires the Homeland Security Secretary to design and carry out a national border security exercise within one year of the legislation's enactment. Such an event would help representatives from the private sector and all levels of government to practice working together. It would also test and evaluate the country's capacity to anticipate, detect, and disrupt threats to its borders. Finally, it would test how well information can be shared among federal, state, territorial, local, tribal, and international governments. It is important to test the system's coordination early to ensure that any needed changes can be made and

that the country is not left vulnerable for an even longer period.

Perhaps most important, Title III would also give the DHS the authority to permit states to use certain homeland security grants for border security activities. Under this provision, funds received under the Homeland Security Grant Program, the Urban Area Security Initiative, or the Law Enforcement Terrorism Prevention Program could be used to cover costs that the states incur while carrying out terrorism prevention or deterrence activities related to preventing unlawful entry of persons or things into the country. Title V contains somewhat related provisions to ensure coordination among all border security entities and calls for a means to share and coordinate intelligence information and analysis among headquarters and field offices.

Improved consultation among the various levels of government and the private sector and increased flexibility in using homeland security grants for border security purposes could be powerful tools for protecting the country's borders. However, the legislation offers stovepiped fixes rather than a deliberate a systematic approach to border security.

Unhelpful Provisions

Title II focuses on combating alien smuggling and illegal entry and deterrence. In addition to changing definitions and reclassifying formerly civil immigration violations as criminal ones, Sections 220–225 impose unfunded mandates on law enforcement officers with too little training in immigration law by suggesting that states have an inherent authority to enforce federal immigration laws. While state and local law enforcement officers do have a valuable role to play in immigration investigations, there are better ways to involve them.

State and local governments need to provide more support on the interlinked issues of immigration and border security, but this support should be balanced with equally compelling priorities. Any participation should:

- Respect federalism,
- Safeguard the liberties and rights of U.S. persons,
- Not impose huge unfunded mandates on state and local governments,

- Contribute to reducing the unlawfully present population in the United States and deter illegal entry,
- Help combat transnational threats and violent and organized criminal offenders, and
- Strengthen community policing, facilitating greater cooperation between law enforcement and communities.

At a minimum, state and local law enforcement should neither ignore immigration law during the normal course of criminal investigations nor hesitate to cooperate with federal immigration officials. In fighting counterterrorism and violent and organized crime, more concerted effort is needed.

A program that can meet all the essential requirements for cooperation already exists. Under Section 287(g) of the Immigration and Nationality Act (INA), the DHS and state and local governments can enter into assistance compacts. Both sides negotiate the scope and intent of the programs before they are implemented, which gives states and local communities the flexibility to shape the programs to meet their needs.

State and local law officers governed by a §287(g) agreement must receive adequate training and operate under the direction of federal authorities. In return, they receive full federal authority to enforce immigration law. In addition, in a civil lawsuit, the state law enforcement officers would be considered to have been acting under federal authority, thereby shifting liability to the federal government and providing additional immunity for the state law enforcement officers enforcing federal laws. This underused provision is a better way to distribute the burdens of immigration enforcement.

What Should Be Done

Congress can do better. Any effort to write legislation that would create a system-of-systems approach to border security should:

- **Provide sufficient, but not excessive, oversight.** Congress must exercise its oversight responsibility, but it should carefully consider

its requests so that the DHS and others involved have time to fulfill their duties in addition to responding to congressional queries.

- **Respect federalism.** The federal government should find creative ways to partner with state and local governments. Border security may be primarily a federal issue, but it is also one that cannot be solved without local involvement.
- **Remove pork-barrel spending.** Resources for border security are limited. Congress should not waste taxpayer funds on activities that do not promote a comprehensive border security regime.
- **Integrate information-sharing activities into the strategy.** Congress should include provisions that promote cooperation, information sharing, and creative problem solving—such as those found in Title III—in any legislative attempt to design a border security strategy.
- **Update existing legislation.** The INA should be updated and clarified to ensure that it assists rather than hinders the people seeking to enter the country legally and those who guard the borders. Congress should also consider increasing the penalties for illegal entry and presence to provide a disincentive for those who break the law in the United States.

Conclusion

It is time for Congress to get serious about comprehensive immigration and border security reform. This bill covers a lot of ground. Some of its provisions are good; some are not so good. However, the legislation's biggest problem is that it is a missed opportunity for the House to create a strategic, system-of-systems border security plan. This legislation makes a good start, but there is more work to be done.

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