



Primer: Assessing the Texas Border Security Bill (HB20)

Summary

On April 12, Texas lawmakers introduced HB 20 in the House State Affairs Committee for markup and debate.¹ The legislation is designed to provide Texas with the tools necessary to protect itself from the invasion of people, drugs, and chaos along its southern border with Mexico through the creation of a new border security agency. The border crisis—and the federal government’s willful refusal to secure the border—constitutes a clear and ongoing threat to Texans, their property, and the sovereignty of the state of Texas. Additionally, the bill employs existing public health authorities and the constitutional remedy of an invasion declaration to provide some semblance of security for both Texans and the American people more broadly.

House Bill 20: Analysis and Implications

The legislation is a multi-faceted and innovative approach to bolster border security that draws directly from proposals put out by the Center for Renewing America over the past two years.² The primary prongs of HB 20 include the creation of a new law enforcement branch, special powers granted upon the invocation of an Article I declaration of invasion, and the imposition of public health authority measures to suspend illegal entry into the state.

The specific provisions in HB 20 include:

- The creation of a new branch within the Department of Public Safety (DPS), currently named the Border Protection Unit (BPU). This new agency is designated for headquarters in south Texas near the border. *It should be noted that the name of the BPU is subject to change.*
- The authority to structure this new unit with its own director and its own operational paradigm. While technically still a part of DPS for administrative purposes, the new agency operates semi-independently with a specific mission to secure the border.

¹ Hanson, B. (April 12, 2023), “Texas House Committee Discusses Border Bills,” *FOX 4 News Dallas-Fort Worth*. <https://www.fox4news.com/news/texas-house-committee-discusses-border-bills>

² Cuccinelli, K. (October 26, 2021). “Policy Brief: How States Can Secure the Border,” *Center for Renewing America*. <https://americarenewing.com/issues/policy-brief-how-states-can-secure-the-border/>

- The authority of the new agency to arrest, apprehend, or detain those illegally crossing the Texas-Mexico border, as well as to engage in deterrence missions using non-deadly crowd control measures.
- The authority, upon the invocation of an Article I invasion declaration, to deter or repel persons attempting to enter Texas illegally between points of entry. This includes the ability to directly return illegal border crossers back to Mexico. Additionally, the new agency is provided enhanced power to examine ships, aircraft, vehicles, and cargo at or near ports of entry for fentanyl and other narcotic interdiction.
- The authority, upon the governor's Article I invasion declaration, to use force to repel, arrest, or detain cartel operatives in the border region. Since the declaration is already underway, these measures would take effect immediately.
- The authority, provided to the State's Attorney General, to arrest, charge, and prosecute illegal border crossers with felony trespassing under state law.
- The recognition of public health authority as grounds for suspension of entry into Texas from places designated as vectors of communicable disease transmission.

If implemented properly and executed well, the legislation could serve as a blueprint for other states to take similar action with regard to border security in the future. Much will depend on the final version of the legislation as well as the competency with which the executive wields the tools it has been handed.

A comprehensive plan to advertise the new agency and its essential mission will be vital for recruiting officers—many of whom could transfer from Customs and Border Protection (CBP). Border patrol's low morale and constrained mission parameters under an intentionally negligent Biden administration mean dedicated agents who believe in the mission may well see a new opportunity to do the job they originally signed up to do.

But perhaps most consequential will be the precedent that HB 20 sets for using Article I powers inherent to the states. If properly implemented, there could soon be a new era of Article I invocations that sweep through state houses should the federal government continue to abrogate its Article IV responsibilities.

Claim and Response: Debunking Falsehoods About HB 20

A number of claims have been made by opponents in an attempt to prevent the legislation from passing in the Texas legislature. They are addressed below.

Claim #1: The vast majority of drugs seized at the border occur at ports of entry. This legislation would not mitigate the flow of drugs into the United States.

Response: This is an intentionally misleading and dangerous claim. It is imperative to delineate “seizures” from the total supply moving across the border. Seizures represent only one part of the total amount of drugs entering the country.³ So while data shows that the majority of drug seizures do occur at ports of entry,⁴ that is because that is where the majority of security measures—including customs checkpoints—are located. Security between ports of entry is minimal or non-existent across large swaths of border sectors. Opponents of HB 20 using this deceptive talking point are confusing the public in order to avoid passing legislation intended to equip Texas with the ability to secure its border. At a time when record numbers of American parents are burying their children from fentanyl poisonings,⁵ opponents and their allies should explain why they are twisting numbers to create a false impression.

In just the last six months, there has been enough fentanyl seized **between ports of entry** to kill over 315 million Americans⁶—nearly every man, woman, and child inside the United States.

Claim #2: The reference to invasion in the U.S. Constitution refers to invading armies, not non-state actors such as cartels or masses of people generally.

Response: This is both factually and historically false, with no basis in either statutory or constitutional law.

Article IV, Section 4 of the U.S. Constitution states the following, “*The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion;...*”

The guarantee clause is unconditional, fundamental, and expansive. The Framers of the Constitution were keenly aware that the country would continue to face a variety of external threats from every direction, threats posed by lawless bands as well as threats posed by the forces of a foreign government. “The territories of Britain, Spain, and of the Indian nations in our neighborhood ... encircle the union....”⁷

³ Finklea, K. (July 3, 2019), “Illicit Drug Flows and Seizures in the United States: What We Do [Not] Know?” *Congressional Research Service*. <https://sgp.fas.org/crs/misc/R45812.pdf>

⁴ Sganga, N. and Montoya-Galvez, C. (February 3, 2023), “Fentanyl Seizures Rise at U.S.-Mexico Border: Here’s Why,” *CBS News*.

<https://www.cbsnews.com/news/fentanyl-seizures-rise-u-s-mexico-border-heres-why/>

⁵ National Center for Health Statistics (February 15, 2023), “Provisional Drug Overdose Death Counts,” *Centers for Disease Control and Prevention*. <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm>

⁶ Customs and Border Protection (accessed April 17, 2023), “Drug Seizure Statistics FY2023,” *U.S. Customs and Border Protection Dashboard*. <https://www.cbp.gov/newsroom/stats/drug-seizure-statistics>

⁷ Hamilton, A. (December 21, 1787), “Federalist No. 25,” *The Federalist Papers*. <https://guides.loc.gov/federalist-papers/text-21-30#s-lg-box-wrapper-25493338>

Given the encircling nature of the various threats, the Framers concluded that it was appropriate to entrust the common defense against invasion to the federal government. “The [encircling] danger, though in different degrees, is therefore common. And the means of guarding against it ought, in like manner, to be the objects of common councils, and of a common treasury.” (Id.) And they argued “that [the federal] government ought to be clothed with all the powers requisite to the complete execution of its trust.”⁸

The possible failure by, or inability of, the federal government to provide for this common defense against invasion, however, necessitated the inherent powers of self-defense retained by the states in Article I, Section 10, Clause 3 of the U.S. Constitution. This self-defense authority provides states with recourse to defend their own citizens in lieu of federal inability or unwillingness to do so.

Historically, one may conclude with confidence that the original meaning of the word “invasion” contained in Article IV, Section 4 of the Constitution encompasses threats to the safety, security, or well-being of the states and their citizens posed by any external group, not just those posed by the organized forces of a foreign government. The invading threat includes drug traffickers, gang members, other violent criminals, and suspected terrorists hidden among the throngs crossing our undefended southern border, as well as the illegal border crossers themselves.

Claim #3: This bill is unconstitutional. The Supreme Court already ruled in Arizona v. U.S. that states cannot supplant federal authorities when it comes to enforcing federal immigration statutes.

Response: HB 20 is not immigration law. Period. Texas’ constitutional authority to protect itself against invasion is completely separate and legally outranks immigration law. *Arizona v. U.S.* does not apply to this discussion.

One of the remedies provided in HB 20 is grounded in Texas’ inherent constitutional Article I self-defense powers. Properly exercised, Article I, Section 10, Clause 3 powers cannot violate federal immigration laws because the Constitution supersedes federal statutes. Every time.

Indeed, the approach taken in HB 20 is specifically intended to disentangle state authorities and actions from immigration laws and policies altogether. Because these measures are rooted in constitutional powers that supersede federal immigration

⁸ Hamilton, A. (December 18, 1787), “Federalist No. 23,” *The Federalist Papers*.
<https://guides.loc.gov/federalist-papers/text-21-30#s-lg-box-wrapper-25493336>

statutes, constraints imposed by federal immigration statutes are largely inapplicable. Furthermore, these powers have every right to be invoked in lieu of the federal government's clear abrogation of its Article IV, Section 4 responsibilities to defend states from invasion.

Claim #4: The structure of the bill is problematic as it circumvents the director of the Department of Public Safety. Who does the chief of this new unit ultimately answer to?

Response: The bill is structured to provide the new border security agency with a focused mission to secure the Texas-Mexico border while still operating under the broader purview of the Department of Public Safety. Ultimately, the agency director answers to the governor, who will be tasked with implementing and executing the new agency's operational parameters upon passage of the legislation.

Current DPS director Steve McCraw has not inspired much in the way of confidence—both in his execution of Operation: Lone Star, which has done little to curb the flow of migrants and drugs into Texas, as well as his handling of the Uvalde school shooting. Keeping the new agency director untethered to McCraw's supervision is a key element to ensure the success of the agency's mission, while McCraw remains the head of Texas DPS.

Claim #5: The legislation will empower vigilantes to take matters into their own hands on the border. It will create more chaos.

Response: This is an absurd claim that does not pass the barest of scrutiny of HB 20's bill text. The legislation outlines key requirements for the qualifications and standards of the new agency's officers. Commissioned officers must hold a peace officer license under Chapter 1701, which puts them on equal footing with the law enforcement officers currently deployed in support of Operation: Lone Star.

Noncommissioned officers must be U.S. citizens and either graduates of Texas law enforcement training schools or have experience as a law enforcement officer in another state.

Finally, the bill empowers the commission to create additional criteria for officer qualifications as needed.

Claim #6: The legislation will create a "show me your papers" atmosphere that will result in racial profiling across the state of Texas.

Response: This is a desperate and hyperbolic claim that effectively defines the enforcement of border security as a racist endeavor. The bill text does not prioritize the new border security agency to engage in interior enforcement activities ahead of its clearly-defined border security operations that detain and deter illegal border crossers as they cross into Texas from Mexico.

Opponents who oppose securing Texas through the false cry of racism—a term that has increasingly lost its power since the Left began labeling everything as racist—are empowering drug cartels and human traffickers. Ending the sex trafficking of migrants, the rape trees cartels use on little migrant girls, and the stream of dead migrants strewn in the desert or floating in the Rio Grande is not racist. It is the only humane response.

Opponents of HB 20 must answer why they are unwilling to support legislation that could finally put a stop to the death and destruction being wrought by an open border.

Claim #7: This legislation invokes war powers under Article I of the U.S. Constitution. If an American citizen participates in trafficking drugs or moving people across the border, they could be executed for treason.

Response: Treason carries a specific definition and penalty under the Constitution of the United States that includes the death penalty. Under the Texas Constitution, treason carries a maximum penalty of 20 years in prison. There will be no death penalty for citizens who aid and abet the cartels to inflict pain and devastation on their own communities.

However, there will clearly be a price to pay for American citizens who work with violent international organizations to move drugs and traffic people into Texas—particularly after the invocation of an Article I declaration. It is important to remember that the cartels are already under active consideration for being labeled as foreign terrorist organizations.⁹

Do opponents of HB 20 believe there should be no penalty—including 20 years in prison—for aiding and abetting organizations that could soon be labeled terrorists?

Suggested Technical Corrections

Some outstanding provisions in HB 20 require amendments once the bill is passed out of the House State Affairs Committee and before it moves forward for final floor

⁹ Shaw, A. (March 10, 2023). “Rep. Roy Introduces Bill to Designate Mexican Cartels as Foreign Terrorist Organizations,” *FOX News*.
<https://www.foxnews.com/politics/rep-roy-introduces-bill-designate-mexican-cartels-foreign-terrorist-organizations>

passage. These changes are needed to improve the bill and ensure it has the highest chance of success at achieving its stated goal.

Specifically, the legislation could use corrections to the following sections based on a version of the bill we looked at.:

- **Recommended Change:** On page 16, there is bill language that requires a noncommissioned officer to refrain from exercising his or her border security authority unless authorized by the commission and the governor. References to the commission should be removed, leaving such authorization solely in the hands of the governor. Additionally, there is duplicative and unnecessary language regarding training that should be removed as well.
Rationale: Ultimately, the governor should have control over the implementation and operational parameters of the new border security agency. Including a commission would needlessly bog down security actions and ultimately dilute the power of the executive under a core function of his or her office: defending Texas. Secondly, the legislation already specifies the qualifications needed to become an officer rendering additional training references superfluous.
- **Recommended Change:** On page 18, the language in the Article I Invocation section should be changed to include apprehensions, detentions, and arrests “in the vicinity of the Texas-Mexico border *or a legal port of entry.*” Additionally, language requiring agents to have “observed” illegal immigrants entering should be stricken from the bill as well.
Rationale: The addition of ports of entry language ensures that agency security activity is not unnecessarily restricted on the front end. Furthermore, the elimination of observation requirements ensures officers can apprehend, detain, or arrest without having to have watched an individual physically cross. There are significant technical concerns here that could impact operational implementation. For example, the existing language could hamstring an officer who uses heat signature technology for the identification of an individual; or who observes an individual crossing, loses track of him or her, and then discovers individuals hiding in carrizo cane along the Rio Grande; or who observes an individual crossing, but radios another agent to pick up the invader and return them to Mexico.

As worded, the text could be erroneously construed as limiting the scope of enforcement to physical and literal observation. The language should allow for anyone found within the vicinity of the border that cannot reasonably demonstrate a legal presence within the U.S. to be removed back into Mexico.

Conclusion

The policies implemented in HB 20 present an opportunity for Texas to finally exercise its inherent constitutional powers to defend itself in lieu of willful federal negligence and refusal to secure the southern border. The creation of a new border security agency as well as the invocation of Article I invasion protocols and the subsequent powers granted therein, present the best and most constitutionally sound method for protecting Texans from the ravages of our cartel-controlled southern border.

The downstream results from proper implementation and execution could very well stem the flow of fentanyl, other deadly narcotics, and human trafficking victims into American communities.

The Texas legislature should make the necessary technical corrections to the bill and move forward with HB 20 with full confidence that this is the best way to begin restoring some semblance of security and sanity along the border.