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RESCINDING DHS' WAIVER AUTHORITY FOR BORDER WALL ACT

MAY 2, 2019.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. THOMPSON of Mississippi, from the Committee on Homeland Security, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 1232]

The Committee on Homeland Security, to whom was referred the bill (H.R. 1232) to amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to repeal certain waiver authority relating to the construction of new border barriers, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

	Page
Purpose and Summary	2
Background and Need for Legislation	2
Hearings	3
Committee Consideration	3
Committee Votes	4
Committee Oversight Findings	4
C.B.O. Estimate, New Budget Authority, Entitlement Authority, and Tax Expenditures	4
Federal Mandates Statement	5
Duplicative Federal Programs	5
Performance Goals and Objectives	5
Advisory on Earmarks	5
Section-by-Section Analysis of the Legislation	5
Changes in Existing Law Made by the Bill, as Reported	6
Minority Views	9

89–006

PURPOSE AND SUMMARY

H.R. 1232, the "Rescinding DHS' Waiver Authority for Border Wall Act" repeals the overly broad authority of the Secretary of Homeland Security (Secretary) to waive all legal requirements that, in the Secretary's view, may delay construction of barriers and roads at the U.S. border. Under current law, the Secretary has sole discretion to determine what laws and regulations need to be waived and judicial review over these decisions is extremely limited. Rescinding this authority would ensure that the Department of Homeland Security adheres to the same laws any other federal department or agency would have to follow.

BACKGROUND AND NEED FOR LEGISLATION

In 2005, the Secretary of Homeland Security was granted unilateral authority to waive all local, State and Federal laws to expedite the construction of fences, concrete slabs, or other infrastructure at the border pursuant to a section enacted in an emergency supplemental appropriations funding package enacted for the Global War on Terror and disaster relief.[1] This authority allows the Department of Homeland Security to bypass any law, regulation, treaty, and ordinance that it deems to be an impediment to constructing the border wall and other infrastructure between ports of entry. Laws that have been subject to the waiver include bedrock Federal environmental laws such as the National Environmental Policy Act [NEPA], the Endangered Species Act, the Clean Water Act, the National Historic Preservation Act, the Migratory Bird Treaty Act, the Clean Air Act, the Archeological Resources Protection Act, the Safe Drinking Water Act, the Noise Control Act, the Solid Waste Disposal Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Archaeological and Historic Preservation Act, the Antiquities Act, the Historic Sites, Buildings, and Antiquities Act, the Wild and Scenic Rivers Act, the Farmland Protection Policy Act, the Coastal Zone Management Act, the Wilderness Act, the Federal Land Policy and Management Act, the National Wildlife Refuge System Administration Act, the Fish and Wildlife Act of 1956, the Fish and Wildlife Coordination Act, the Administrative Procedure Act, the Otay Mountain Wilderness Act of 1999, the California Desert Protection Act [Sections 102(29) and 103 of Title I], the National Park Service Organic Act, the National Park Service General Authorities Act, the National Parks and Recreation Act of 1978 [Sections 401(7), 403, and 404], the Arizona Desert Wilderness Act [Sections 301(A)–(F)], the Rivers and Harbors Act of 1899, the Eagle Protection Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Religious Freedom Restoration Act, the National Forest Management Act of 1976, the Multiple Use and Sustained Yield Act of 1960, the Military Lands Withdrawal Act of 1999, the Sikes Act, the Arizona-Idaho Conservation Act of 1988, the Federal Grant and Cooperative Agreement Act of 1977, the Migratory Bird Conservation Act, the Paleontological Resources Preservation Act, the Federal Cave Resources Protection Act of 1988,

[1] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, P.L. 109–13, 2005.

the National Trails System Act, the National Wildlife Refuge System Improvement Act of 1997, the Reclamation Project Act of 1939 [Section 10], the Wild Horse and Burro Act.

At least one waiver issued under this authority resulted in catastrophic damage in a border community. In 2008, during a rain storm in the city of Nogales, Arizona, a storm run-off channel was blocked by a five-foot-tall concrete barrier that the Department of Homeland Security built pursuant to this waiver authority. The border barrier prevented storm water from reaching a water treatment center and placed such pressure on underground pipes that it resulted in a ten-foot-sinkhole that caused upwards of $8 million in damage to downtown Nogales.[2]

There is no requirement that the Secretary consult anyone, even on issues or laws that are not under the Department of Homeland Security's purview or on which the Secretary has no expertise, before the Secretary exercises this discretion. Moreover, if the waiver of laws and the ensuing construction of this border infrastructure results in damage to property or injury to individuals, there is no requirement that the Department mitigate or respond to the resulting harm.

In addition to this unilateral waiver ability, the law also largely insulates the Secretary's decision from judicial review. Exclusive jurisdiction is granted to the district courts of the United States and appellate review can only occur upon petition for a writ of certiorari to the Supreme Court of the United States. Moreover, the courts can only hear claims that allege a violation of the Constitution of the United States. To further limit any possibility of judicial review, a complaint must be brought within 60 days of the waiver decision by the Secretary.

This authority has been exercised five times in the twelve years prior to the Trump Administration. In contrast, the Trump Administration has exercised this waiver authority nine times in a little over two years. As waivers become more frequent, the potential for unintended consequences and resulting harm increases.

Given the vastness of this waiver authority, the impacts of the exercise of this authority on landowners and border communities, the limitations on judicial remedies for impacted landowners in border communities, and the increasing frequency of these waivers by the Trump Administration, it is more important than ever that this authority be rescinded.

HEARINGS

This legislation was informed by a Homeland Security Committee hearing on March 6, 2019 entitled, "The Way Forward on Border Security." The Committee received testimony from the Honorable Kirstjen Nielsen, Secretary of the Department of Homeland Security.

COMMITTEE CONSIDERATION

The Committee met on March 13, 2019, to consider H.R. 1232 and ordered the measure to be reported to the House with a favor-

[2] Melissa Del Bosque, *Trump's Border Wall Could Cause Deadly Flooding in Texas. Federal Officials Are Planning to Build It Anyway, Texas Monthly, December 2018.*

able recommendation, without amendment, by a recorded vote of 17 yeas and 12 nays.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report legislation and amendments thereto.

The Committee on Homeland Security considered H.R. 1232 on March 13, 2019, and took the following vote:

On Ordering to be reported was Agreed to: 17 yeas and 12 nays (Roll Call Vote No. 1). The vote was as follows:

ROLL CALL NO. 1

H.R. 1232

On ordering to be reported was AGREED TO, by a recorded vote of 17 yeas and 12 nays (Roll Call Vote No. 1). The vote was as follows:

Representative	Yea	Nay	Representative	Yea	Nay
Mr. Thompson, Mississippi, Chair	X		*Mr. Rogers, Alabama, Ranking Member*		X
Ms. Jackson Lee, Texas			*Mr. King, New York*		X
Mr. Langevin, Rhode Island	X		*Mr. McCaul, Texas*		X
Mr. Richmond, Louisiana	X		*Mr. Katko, New York*		X
Mr. Payne, New Jersey	X		*Mr. Ratcliffe, Texas*		
Miss Rice, New York	X		*Mr. Walker, North Carolina*		X
Mr. Correa, California	X		*Mr. Higgins, Louisiana*		X
Ms. Torres Small, New Mexico	X		*Mrs. Lesko, Arizona*		X
Mr. Rose, New York	X		*Mr. Green, Tennessee*		X
Ms. Underwood, Illinois	X		*Mr. Taylor, Texas*		X
Ms. Slotkin, Michigan	X		*Mr. Joyce, Pennsylvania*		X
Mr. Cleaver, Missouri	X		*Mr. Crenshaw, Texas*		X
Mr. Green, Texas	X		*Mr. Guest, Mississippi*		X
Ms. Clarke, New York	X				
Ms. Titus, Nevada	X				
Mrs. Watson Coleman, New Jersey	X				
Ms. Barragán, California	X				
Mrs. Demings, Florida	X				
			Vote Total	17	12

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

CONGRESSIONAL BUDGET OFFICE ESTIMATE NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received a cost estimate for this bill from the Director of Congressional Budget Office.

The Committee has requested but not received from the Director of the Congressional Budget Office a statement as to whether this bill contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

FEDERAL MANDATES STATEMENT

An estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act was not made available to the Committee in time for the filing of this report. The Chairman of the Committee shall cause such estimate to be printed in the Congressional Record upon its receipt by the Committee.

DUPLICATIVE FEDERAL PROGRAMS

Pursuant to clause 3(c) of rule XIII, the Committee finds that H.R. 1232 does not contain any provision that establishes or reauthorizes a program known to be duplicative of another Federal program.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1232 would rescind the Secretary's ability to unilaterally waive any local, State, or Federal law to expedite the building of a border wall or other infrastructure between ports of entry.

ADVISORY ON EARMARKS

In compliance with rule XXI of the Rules of the House of Representatives, this bill, as reported, contains no congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of the rule XXI.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This section provides that this bill may be cited as the "Rescinding DHS' Waiver Authority for Border Wall Act".

Sec. 2. Repeal of waiver authority for the construction of new border barriers

This section repeals the waiver authority related to the construction of new border barriers by striking subsection (c) of Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of P.L. 104–208, 8 U.S.C. 1103 note), as amended by the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, (P.L. 109–13).

This section will take away the Secretary's ability to waive, without prior consultation or notice to border landowners, border communities, border state Governors, or other interested parties, that a law or regulation must be waived to expedite the building of infrastructure along the border. By rescinding this extraordinary waiver authority—that prioritizes the building of a border wall and

border infrastructure between ports of entry above all other Federal infrastructure and at the expense of the environment, economy, and culture of border communities—the legislation would require the Department of Homeland Security to follow all the laws and regulations that every other federal entity must ordinarily follow for a construction project.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets and existing law in which no change is proposed is shown in roman):

ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

DIVISION C—ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

* * * * * * *

TITLE I—IMPROVEMENTS TO BORDER CONTROL, FACILITATION OF LEGAL ENTRY, AND INTERIOR ENFORCEMENT

Subtitle A—Improved Enforcement at the Border

* * * * * * *

SEC. 102. IMPROVEMENT OF BARRIERS AT BORDER.

(a) IN GENERAL.—The Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.

(b) CONSTRUCTION OF FENCING AND ROAD IMPROVEMENTS ALONG THE BORDER.—

(1) ADDITIONAL FENCING ALONG SOUTHWEST BORDER.—

(A) REINFORCED FENCING.—In carrying out subsection (a), the Secretary of Homeland Security shall construct reinforced fencing along not less than 700 miles of the southwest border where fencing would be most practical and effective and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border.

(B) PRIORITY AREAS.—In carrying out this section, the Secretary of Homeland Security shall—

(i) identify the 370 miles, or other mileage determined by the Secretary, whose authority to determine other mileage shall expire on December 31, 2008, along the southwest border where fencing would be most practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States; and

(ii) not later than December 31, 2008, complete construction of reinforced fencing along the miles identified under clause (i).

(C) CONSULTATION.—

(i) IN GENERAL.—In carrying out this section, the Secretary of Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed.

(ii) SAVINGS PROVISION.—Nothing in this subparagraph may be construed to—

(I) create or negate any right of action for a State, local government, or other person or entity affected by this subsection; or

(II) affect the eminent domain laws of the United States or of any State.

(D) LIMITATION ON REQUIREMENTS.—Notwithstanding subparagraph (A), nothing in this paragraph shall require the Secretary of Homeland Security to install fencing, physical barriers, roads, lighting, cameras, and sensors in a particular location along an international border of the United States, if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location.

(2) PROMPT ACQUISITION OF NECESSARY EASEMENTS.—The Attorney General, acting under the authority conferred in section 103(b) of the Immigration and Nationality Act (as inserted by subsection (d)), shall promptly acquire such easements as may be necessary to carry out this subsection and shall commence construction of fences immediately following such acquisition (or conclusion of portions thereof).

(3) SAFETY FEATURES.—The Attorney General, while constructing the additional fencing under this subsection, shall incorporate such safety features into the design of the fence system as are necessary to ensure the well-being of border patrol agents deployed within or in near proximity to the system.

(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to carry out this subsection. Amounts appropriated under this paragraph are authorized to remain available until expended.

[(c) WAIVER.—

[(1) IN GENERAL.—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

[(2) FEDERAL COURT REVIEW.—

[(A) IN GENERAL.—The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

[(B) TIME FOR FILING OF COMPLAINT.—Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.

[(C) ABILITY TO SEEK APPELLATE REVIEW.—An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.]

(d) [Omitted—Amends another Act.]

* * * * * * *

MINORITY VIEWS

In 2006, the House passed the Secure Fence Act (H.R. 6061). This landmark effort led by former Homeland Security Committee Chairman Peter King directed the construction of hundreds of miles of border barriers and passed the House with substantial bipartisan support.

The Secure Fence Act's effectiveness and the effectiveness of nearly all border barrier construction hinges on the exact provision of law that H.R. 1232 would repeal.

The waiver authority H.R. 1232 would repeal has been upheld in the courts, and as former Secretary Nielsen explained before the committee earlier this year, has only been used in cases where it was absolutely necessary.

It is unfortunate that the majority has now rejected the longstanding bipartisan consensus in this committee that border barriers are a key part of border security.

Instead, the majority has spent time building up strawman arguments about massive land grabs, trampled wildlife, and environmental catastrophes allegedly caused by construction of border barriers. There is no such crisis at the southwest border. There is, however, a humanitarian, national security, and illegal immigration crisis.

Illegal border crossings are on track to reach 12-year highs and our broken immigration system is being exploited by smugglers and cartels who make billions of dollars off desperate migrants and lethal drugs.

In Fiscal Year 2018, CBP seized 895,011 pounds of drugs at the border. That includes approximately 2,135 pounds of fentanyl. To put that in perspective, just two milligrams of fentanyl is a fatal dose to most people according to the DEA and 2,135 pounds of fentanyl represents a lethal dose for about 484 million people.

CBP seizes more pounds of drugs between ports of entry than at ports of entry. Since FY2012, CBP has seized more than 11 million pounds of drugs between ports of entry, compared with about 4 million pounds at ports of entry.

Border Patrol regularly conducts capability gap analyses of known and anticipated threats. In doing so, Border Patrol has determined the need for a functioning wall system to gain situational awareness and operational control along the southwest border.

A wall system is a combination of various types of physical border barriers and infrastructure that includes wall or fence, all-weather patrol and access roads, lighting, enforcement cameras, sensors that incorporate anti-tunnel detection, and other 21st century technology.

CBP data clearly shows that in areas where we have built a wall system, illegal traffic has plummeted. In San Diego, illegal traffic

has dropped 92 percent. In El Paso, illegal traffic has dropped 95 percent. And in Tucson, illegal traffic has dropped 90 percent.

It's unfortunate that the Majority refuses to listen to the agents and operators in the field about what it takes to secure the southwest border, and refuses to consider the national security impact of this legislation. H.R. 1232 would make our country less safe and less secure.

MIKE ROGERS.

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