

## Summary of H.R. 1417— The Border Security Results Act of 2013

September 25, 2013

H.R.1417 is a limited border bill that requires the Department of Homeland Security (DHS) to develop a border security plan and implement certain metrics to measure border security. House Homeland Security Chairman Michael McCaul (R-TX) introduced H.R.1417 after the [GAO revealed](#) that DHS still has no official metric for measuring border security. The language of H.R.1417, however, is virtually identical to portions of the Senate amnesty bill, [S.744](#), and shares many of its flaws. Moreover, the bill is co-sponsored by several senior Democratic Representatives, including Reps. Sheila Jackson Lee (D-TX), Bennie Thompson (D-MS), and Henry Cuellar (D-TX). Below is a summary and explanation of the major components of the bill.

**Assessment of Situational Awareness and Operational Control.** H.R. 1417 first requires DHS to submit a current assessment of border security. Specifically, Section 2 requires DHS to submit annual reports to Congress “that assess and describe the state of situational awareness and operational control.” (p.3) The annual reports must include an identification of “high traffic areas” and the “illegal border crossing effectiveness rate” for each border sector along both the northern and southern borders. (p.3) Ninety days after DHS submits its first status report, GAO must report to Congress “regarding the verification of data and methodology” DHS used to determine high traffic areas and the effectiveness rate.

**Border Security Plan.** In addition to submitting a report on the current state of situational awareness and operational control, Section 3 requires DHS to submit to Congress **a strategy** “for gaining and maintaining”: (1) situational awareness and operational control of *high traffic areas* within 2 years of submission, and (2) operational control along the U.S.-Mexico border within 5 years. (p.4) DHS must update the border security plan every four years. (p.10)

The border security plan must include certain specifics, such as a threat assessment, an assessment of information sharing within DHS, efforts to increase situational awareness, efforts to prevent terrorists from entering the U.S., and the metrics required by this bill. (p.4-8)

The border security plan must also include **metrics** for measuring border security. Section 3 identifies three sets of metrics that DHS must adopt within 120 days: one for activities between ports of entry, one for activities at ports of entry and one for maritime activities. Between ports of entry, these metrics shall include at a minimum:

- (1) An illegal border crossing effectiveness rate, informed by situational awareness;
- (2) An illicit drugs seizure rate;
- (3) A cocaine seizure effectiveness rate;

- (4) Estimates, using alternative methodologies, of total attempted illegal border crossings, deaths and injuries resulting from such attempts; the rate of apprehension of attempted illegal border crossers; and the inflow of illegal border crossers who evade apprehension;
- (5) Estimates of the impact of the Border Patrol's "consequence delivery system." (Section 3(e))(p.10-11)

At ports of entry, these metrics must include at a minimum:

- (1) An "inadmissible border crossing rate";
- (2) An "illicit drugs seizure rate";
- (3) A "cocaine seizure effectiveness rate";
- (4) Estimates, using alternative methodologies, of total attempted inadmissible border crossers, the rate of apprehension of attempted inadmissible border crossers, and the inflow into the U.S. of inadmissible border crossers who evade apprehension;
- (5) The number of "infractions" related to personnel and cargo committed by "major violators" who are apprehended at ports of entry and the estimated number of such infractions committed by major violators who are not apprehended;
- (6) A measurement of how border security operations affect crossing times. (Section 3(f))(p.11-13)

In "the maritime environment," these metrics must include at a minimum:

- (1) A total number of "undocumented migrants" DHS fails to interdict
  - Note that there is currently no statutory definition for the term "undocumented migrant," nor does H.R.1417 provide one.
- (2) An "undocumented migrant interdiction rate";
- (3) An "illicit drugs removal rate" that measures the amount and type of drugs removed inside a transit zone in a fiscal year compared to the past five fiscal years;
  - H.R. 1417 defines "transit zone" as "the sea corridors of the western Atlantic Ocean, the Gulf of Mexico, the Caribbean Sea, and the eastern Pacific Ocean through which undocumented migrants and illicit drugs transit...." Note that this definition is similar to that used by the Coast Guard, which generally defines "transit zone" as a six million square mile area between the U.S. and South America, which includes the Caribbean, Gulf of Mexico, and the Eastern Pacific. (See Coast Guard [website](#), updated June 25, 2012)
- (4) An "illicit drugs removal rate" that measures the amount and type of drugs removed outside a transit zone in a fiscal year compared to the past five fiscal years;
- (5) A "cocaine removal effectiveness rate" inside a transit zone;
- (6) A "cocaine removal effectiveness rate" outside a transit zone;
- (7) A response rate which measures DHS's ability "to respond to and resolve known maritime threats." (Section 3(g))(p.14-15)

**Collaboration with National Laboratories and Centers of Excellence.** Paragraphs (h) and (i) of Section 3 require DHS to collaborate with the head of a national laboratory within the DHS "laboratory network" and the head of a "border security university-based center" within DHS's

centers of excellence network to develop the metrics required for use between ports of entry, at ports of entry, and in the maritime environment. (p.15-16) The laboratory and center of excellence shall make recommendations to DHS for other suitable metrics that may be used to measure the effectiveness of border security. (p.16) However, the bill does not require DHS to implement these recommendations.

- Note that H.R. 1417 does not provide definitions or cross references to definitions of the Department of Homeland Security laboratory network or DHS centers of excellence. However, one can read more about these entities on the DHS [website](#).

**GAO Evaluation of DHS Metrics.** Section 3(j) requires the GAO to submit a report to Congress on the “suitability” and “statistical validity” of the metrics DHS implements pursuant to the bill. However, while the bill requires DHS to “make available” its data and methodology to the GAO, the bill does not specify by when. This creates a loophole that allows DHS to delay sending any data in order to prevent the GAO from scrutinizing and reporting on its data. (p.16)

**Certifications.** Section 3(k) requires DHS to submit various certifications to Congress depending on whether the Secretary determines that DHS has obtained and maintained situational awareness or operational control of the border. If the Secretary of Homeland Security determines that situational awareness and operational control of *high traffic areas* have been achieved within 2 years after DHS submits its implementation plan to Congress, the Secretary shall certify such to Congress and the GAO. (p.17)

In addition, if the Secretary determines that operational control along the U.S.-Mexico border has been achieved within 5 years of submitting the implementation plan, the Secretary shall certify such to Congress and the GAO. (p.17-18) Each year thereafter, if the Secretary determines that operational control is being maintained, the Secretary shall certify such to Congress and the GAO. (p.18) The GAO shall review these certifications and submit reports to Congress on such reviews. (p.18-19)

**Failure to Achieve Situational Awareness or Operational Control.** Under Section 3(l), if the Secretary determines that situational awareness, operational control, or both, have not been achieved by two or by five years, or if the Secretary determines that operational control is not being annually maintained, the Secretary shall, within 60 days of such deadlines, submit a report to Congress describing why. (p.19)

**GAO Report on Duplication of Activities within DHS.** Section 3(m) requires the GAO, within one year of enactment, to submit to Congress a report addressing “areas of overlap in responsibilities within the border security functions” of DHS and the relative cost-effectiveness of border security strategies. (p.19-20)

**DHS Report to Congress.** Section 3(n) requires DHS to submit annual reports to Congress that includes the following:

- (1) A “resource allocation model” for current and future year staffing requirements.

- (2) “Detailed information” on the level of manpower available at all air, land, and sea ports of entry.
- (3) “Detailed information” that describes the difference between the staffing model and the actual staffing at each port of entry and between ports of entry.
- (4) “Detailed information” that examines both the security impacts and competitive impacts of entering into a reimbursement agreement with foreign governments for CBP “preclearance” facilities. (p.20-21)

**Report on US-VISIT (biometric entry-exit).** Section 4 requires DHS, within 6 months, to submit to Congress a plan “to implement immediately a biometric exit capability at ports of entry” under the US-VISIT program in accordance with the Enhanced Security and Visa Entry Reform Act of 2002 (Public Law 110-161), passed in 2004). That law required that DHS issue “only machine-readable, tamper-resistant visas and other travel and entry documents that use biometric identifiers.” It also required that the government install biometric readers and scanners “at all ports of entry of the United States...” (Public Law 107-173, Sec. 303, 8 U.S.C. 1372)

Interestingly, Section 4 requires DHS to submit a plan for biometric exit “capability” in accordance with the 2002 Act, but does not require that DHS conform its plan to prior or subsequent laws on the biometric entry-exit system. For example, the PATRIOT Act, passed in 2001, actually required that the entry-exit system first adopted in 1996 be biometric. (Public Law 107-56, October 2001) Later, in 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004, which required DHS to move forward with a biometric entry-exit program “as expeditiously as possible.” (Pub. L. 108-458, Title VII, Sec. 7208, Dec. 17, 2004, now 8 U.S.C.S 1365b) Thus, the limited requirement of Section 4 raises doubts as to whether the mandated plan will indeed lead to a full biometric entry-exit system.

Then, as if anticipating that result, Section 4 provides that if DHS determines that the development of such a system “is not feasible,” the Secretary of Homeland Security shall submit to Congress a plan – designed entirely in her discretion -- to implement “an alternative program to provide the same level of security.” This requirement to implement an alternative flatly ignores the fact that Congress has repeatedly demanded a biometric entry-exit system and that pilot programs executed by DHS show that such a system is entirely feasible. (p.24)

**Prohibition on Land Border Crossing Fee.** Section 5 incorporates language from the Senate amnesty bill (S.744) that prohibits DHS from conducting any study regarding the imposition of border crossing fees for pedestrian or passenger vehicles at land ports of entry along the Southern or Northern borders. (p.24) This language was added to the Senate amnesty bill through an amendment offered by Judiciary Committee Chairman Pat Leahy (D-VT).

**Overarching Weaknesses of H.R. 1417. The greatest weakness of H.R.1417 is that the bill – like the Senate amnesty bill –does not require that DHS actually obtain situational awareness or operational control of any part of the border. It only requires DHS to submit a plan for doing so.**

Second, if DHS submits a border security strategy based on a goal of achieving “effective control,” the vague definitions leave the assessment of border security subject to political manipulation. In many cases, H.R.1417 adopts definitions from the Senate amnesty bill that have loopholes. In other cases, the definitions are vague, inherently give the Secretary of Homeland Security broad discretion, and fail to ensure that Congress will be able to hold DHS accountable for its actions. To make matters worse, these same terms are key to the border security plan. The following definitions provide examples:

- **Definition of Situational Awareness.** H.R.1417 vaguely defines “situational awareness” as “knowledge and an understanding of current illicit cross-border activity... and the ability to forecast future shifts in such threats and trends.” (p.23) Note that the definition refers to “activity,” not specifically the movement of people across the border. It could be interpreted to mean the trafficking of contraband. In addition, the term “cross-border” does not specify in which direction this “activity” is taking place. In total, the term is so vague as to allow the Secretary of DHS to interpret it as knowledge and understanding of the trafficking of guns from the U.S. to Mexico, not as the movement of illegal aliens from Mexico into the United States.
- **Definition of Operational Control.** H.R.1417 essentially adopts the Senate’s definition of “effective control,” defining operational control as the achievement of at least a “90 percent illegal border crossing effectiveness rate” and a “significant reduction” (so vague as to be meaningless) in the movement of “illicit drugs and other contraband.” (p.23)(See also S.744, Sec. 5, p.12)
- **Definition of Illegal Border Crossing Effectiveness Rate.** H.R.1417 adopts the Senate’s definition of “effectiveness rate,” defining it the number of “apprehensions and turn backs” divided by “the number of apprehensions, turn backs, and got aways.” (p.22; see also S. 744 at p.12)
  - While the bill requires DHS to collect and report such data “in a consistent and standardized manner” across all Border Patrol sectors, the term is still subject to political manipulation, just as it is under S.744. This is mainly due to the fact that “got aways” refers to the number of illegal entrants of which DHS is actually aware. It does not include number of illegal entrants of which DHS is unaware. Homeland Security Secretary Napolitano conceded this point during a Senate hearing on S. 744. (Senate Judiciary Committee hearing transcript, April 23, 2013) The exchange between Senator Cornyn and Secretary Napolitano was as follows:
    - *SEN. CORNYN: OK, now here's the harder part, and that is in the bill, as you point out, there are different measures for effective control of the border, and it calls for a 90-percent effectiveness rate. The problem I have is do you know how many people actually cross the border unbeknownst to the department and effectively get away? In other words, we don't know the denominator.*

*We know the numerator because we know the people who were detained, but we don't know the people who actually attempt to get across and are successful in doing so unbeknownst to the Border Patrol, do we?*

- *SEC. NAPOLITANO: That's one of the problems with using effectiveness rate as your only measure. Now, as we continue to buy and put in place all the technology according to the plans we've now submitted to Congress for each sector along the border, I think we'll have greater confidence that we will have situational awareness as to that denominator. But I will share with you, Senator, that that is — that is an inherent problem, knowing the actual denominator.*
- *SEN. CORNYN: Well, I've always thought it kind of bizarre that we measure our success by the people we catch and not the people — and don't focus on the people who got away as a measure of our lack of success, but it's an inherent problem, as you point out.*

- The definition of “illegal border crossing effectiveness rate” is also subject to political manipulation because of the relatively imprecise methods used to calculate the number of “got aways”. The Border Patrol calculates the number of “known” illegal entries using various techniques, some more reliable than others. In December 2012, the [GAO reported](#) that to determine the number of turn-backs and got-aways, the Border Patrol relies on a different mix of cameras, “sign cutting,” credible sources, and visual observation. Sign cutting, essentially the art of tracking aliens through the terrain, accounts for the large majority of determining the number of turn-backs and got-aways. (See FAIR’s [analysis](#), June 19, 2013 for more information.)

- **Definition of High Traffic Areas.** H.R. 1417 defines “high traffic areas” as sectors of the (land) border “that have the most illicit cross-border activity, informed through situational awareness.” This definition suffers from the same defects as the definition of “situational awareness” (see above). Moreover, there is no clarity regarding the meaning of “the most”; it is entirely dependent on how DHS defines cross-border activity. For example, if DHS defines it as the movement of illegal aliens from Mexico to the U.S., then “the most” might mean the areas (perhaps Border Patrol sectors?) with the highest number of apprehensions. However, if DHS defines cross-border activity as the movement of goods, “the most” might mean the number of guns seized, the amount of drugs seized, or perhaps the street value of either (or all of the above). If DHS defines cross-border activity as both the movement of illegal aliens into the U.S. and good seized, the calculus very quickly becomes more complicated, as areas with the most trafficking may not be the same areas with the highest number of illegal alien crossings.

Finally, H.R. 1417 does not impose any consequences on DHS or require any further action if DHS does not achieve a 90 percent effectiveness rate. The bill does not even require that DHS implement its own recommendations it must submit to Congress if it fails to achieve its goal.

## Bill Comparison—H.R. 1417 and S.744

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H.R.1417 THE BORDER SECURITY RESULTS ACT	S.744 THE BORDER SECURITY, ECONOMIC OPPORTUNITY AND IMMIGRATION MODERNIZATION ACT
<p><b>Within 90 days of enactment</b> Requires DHS to submit a report to Congress and the GAO on the current state of:</p> <ul style="list-style-type: none"> <li>• “Operational control” and</li> <li>• “Situational awareness” (p.3, see definitions below)</li> </ul>	<p><b>Within 90 days of enactment</b> N/A</p>
<p><b>Within 180 days of enactment</b> Requires DHS to submit a <b>strategy</b> for gaining and maintaining:</p> <ul style="list-style-type: none"> <li>• Operational control and situational awareness of “<b>high traffic areas</b>” within 2 years, and</li> <li>• Operational control of the U.S.-Mexico border within 5 years (p.4)</li> </ul>	<p><b>Within 180 days of enactment</b> Requires DHS to submit a <b>strategy</b> for “achieving and maintaining”:</p> <ul style="list-style-type: none"> <li>• “effective control” of the U.S.-Mexico border (p.24-25)</li> </ul>
<p><i>Defines “operational control” as:</i></p> <ul style="list-style-type: none"> <li>• A “90 percent illegal border crossing effectiveness rate” (p.23)</li> </ul>	<p><i>Defines “effective control” as the “ability to achieve and maintain”</i></p> <ul style="list-style-type: none"> <li>• An effectiveness rate of 90 percent or higher (p.12); and</li> <li>• Persistent surveillance (undefined)</li> </ul>
<p><i>Defines “illegal border crossing effectiveness rate” as:</i></p> <ul style="list-style-type: none"> <li>• The number of apprehensions and turn backs divided by the number of apprehensions, turn backs, and got aways (p.22)</li> <li>• Note that “got aways” means illegal aliens DHS knows crossed into the U.S. but did not (for whatever reason) apprehend. It does not include the number of illegal aliens who crossed into the U.S. unbeknownst to DHS. Thus, the definition is inherently an underestimate of the number of illegal aliens coming into the U.S.</li> </ul>	<p><i>Defines “effectiveness rate” as:</i></p> <ul style="list-style-type: none"> <li>• The number of apprehensions and turn backs divided by the total number of illegal entries (p.12)</li> <li>• Note that—like the House definition—“got aways” means illegal aliens DHS knows crossed into the U.S. but did not apprehend. It does not include the number of illegal aliens who crossed into the U.S. unbeknownst to DHS. Thus, the definition is inherently an underestimate of the number of illegal aliens coming into the U.S.</li> </ul>
<p><i>Defines “situational awareness” as:</i></p> <ul style="list-style-type: none"> <li>• Knowledge and understanding of current “illicit cross-border activity” (p.23)</li> <li>• The phrase “illicit cross-border activity” is vague. It does not refer to people; it</li> </ul>	<p>Does not define “persistent surveillance”</p>

<p><i>grants the DHS secretary to interpret it as the movement of contraband, not illegal aliens.</i></p> <ul style="list-style-type: none"> <li>• <i>Also note that cross-border activity does not specify which direction the activity is moving. For example, it is broad enough to allow the DHS secretary to define situational awareness as the knowledge of gun trafficking from the U.S. into Mexico instead of the movement of illegal aliens from Mexico into the U.S.</i></li> </ul>	
<p><i>Defines “high traffic areas” as:</i></p> <ul style="list-style-type: none"> <li>• <i>Border Patrol sectors that have “the most illicit cross-border activity” (p.22)</i></li> <li>• <i>This definition is vague. What does “the most” mean? What does “activity” mean?</i></li> <li>• <i>As with the definition of “situational awareness, note that the phrase “illicit cross-border activity” does not refer to people; the vagueness allows DHS to interpret it as the movement of contraband, such as drugs or guns</i></li> <li>• <i>As with the definition of “situational awareness,” note that “illegal cross-border activity” does not specify which direction the cross-border activity is taking place, giving the Homeland Security Secretary the discretion to define it as the movement of guns from the U.S. into Mexico, instead of the movement of illegal aliens from Mexico into the U.S.</i></li> </ul>	<p><i>The term “high traffic area,” with respect to achieving effective control, was removed from S.744 during mark-up in the Senate Judiciary Committee.</i></p>
<p><b>Requires DHS to submit:</b> An “implementation plan” of the border strategy to Congress and the GAO within 90 days of submission (p.8). DHS must update the implementation plan every four years (p.10)</p>	<p><b>Requires DHS to submit:</b> An implementation report of the border strategy every 180 days after submission (p.41-42)</p>
<p><b>Requires GAO to:</b> Review the implementation plan within 90 days of receipt and to submit a report to Congress on it (p.9-10)</p>	<p><b>Requires GAO to:</b> Conduct annual reviews of DHS’s implementation reports and submit a report to Congress on it (p.44)</p>
<p>H.R. 1417 does <b><u>NOT</u></b> require DHS to achieve:</p> <ul style="list-style-type: none"> <li>• Operational control (90 percent effectiveness rate), or</li> <li>• Situational awareness</li> </ul>	<p>S.744 does <b><u>NOT</u></b> require DHS to achieve:</p> <ul style="list-style-type: none"> <li>• Effective control, defined as 90 percent effectiveness rate and persistent surveillance</li> </ul>

<p><b>Border Security Certification:</b></p> <ul style="list-style-type: none"> <li>• IF DHS determines—in its sole discretion -- that it has achieved situational awareness and operational control of high traffic areas within 2 years, DHS shall certify such to Congress (p.17). Requires GAO to review the certification (p.18)</li> <li>• IF DHS determines—in its sole discretion—that it has achieved operational control of the U.S.-Mexico border within 5 years, DHS shall certify such to Congress (p.17-18). GAO to review the certification (p.18)</li> <li>• IF DHS determines that it has not met the deadlines (one or both), DHS shall submit “a report” to Congress that describes why and includes “recommendations” for achieving the goal (p.19)</li> <li>• H.R. 1417 does not provide any consequences if DHS does not achieve operational control (90 percent effectiveness rate) or situational awareness. It does not even require DHS to implement its own recommendations that it submits to Congress if it does not meet the goals.</li> </ul>	<p><b>Border Security Certification</b></p> <ul style="list-style-type: none"> <li>• Does not affirmatively require that DHS certify it has achieved effective control of the border.</li> <li>• However, S.744 provides that if DHS “cannot certify” that it has achieved effective control in all border sectors for at least one year within 5 years of enactment, the “Southern Border Security Commission” shall issue a report with nonbinding recommendations (p.19, 22)</li> </ul>
<p><b>Requires DHS to:</b> Implement specific metrics—including an “inadmissible border crossing rate”—to measure the “effectiveness of security” between ports of entry, at ports of entry and in “the maritime environment.” (p.10-16). Requires the GAO to review, but does not give DHS a deadline for submitting information to the GAO (p.16)</p>	<p><b>Requires DHS to:</b> Report, through updates of the implementation plan, on the effectiveness rate, recidivist apprehensions, and additional measures of the state of security along the U.S.-Mexico border (p.43). Requires the GAO to review (p.44)</p>
<p><b>Regarding biometric entry-exit:</b></p> <ul style="list-style-type: none"> <li>• Within 180 days of enactment, requires DHS to submit “a plan” to implement “a biometric exit capability” at ports of entry in accordance with Public Law 107-173 (1992) (p.24)</li> <li>• If DHS determines that development of a biometric exit system is not feasible, DHS must within 180 days submit to Congress “a plan to implement” “an alternative program to provide the same</li> </ul>	<p><b>Regarding biometric entry-exit:</b></p> <ul style="list-style-type: none"> <li>• Within 2 years of enactment, requires DHS to establish a “mandatory biometric exit data system” at the 10 airports with the highest volume of international travelers (p.671-672)</li> <li>• Within 6 years of enactment, requires DHS to establish a biometric exit system at the 30 busiest international airports (p.672-673)</li> <li>• Within 6 years of enactment, requires DHS</li> </ul>

<p>level of security” within 2 years (p.24)</p> <ul style="list-style-type: none"><li>• Note that this provision gives the DHS secretary discretion to ignore 17 years of laws that require the federal government to implement a biometric entry-exit system.</li></ul>	<p>to submit a plan to Congress “for the expansion of the biometric exit system to “major” sea and land entry and exit points within the U.S. (p.673)</p> <ul style="list-style-type: none"><li>• Note that together these measures are a fraction of what current law requires. (8 U.S.C. 1365b)</li></ul>
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