

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

July 17, 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. 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” (one presumes this means along the border) 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.

Perhaps the most glaring weakness of this provision lies in the definitions of terms. To make matters worse, these same terms are key to the provision that requires a border security plan. 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. 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)
- **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 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)
 - 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 was 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 entries of which DHS is unaware, a point Homeland Security Secretary Napolitano conceded during a Senate hearing. (Senate Judiciary Committee hearing transcript, April 23, 2013) The exchange between Senator Cornyn and Secretary Napolitano in 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.*
 - Importantly, the definition of “effectiveness rate” is also subject to political manipulation because of the relatively imprecise methods used to calculate the number of “got aways”. (See FAIR’s [analysis](#), June 19, 2013)
- **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 vague definition indicates that the Secretary of Homeland Security will have the discretion to define and then identify these areas. Again, this discretion may lead to political manipulation of DHS reports to Congress.

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, and (2) operational control along the U.S.-Mexico border within 5 years. (p.5) 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))

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))

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.”

Like the requirement that DHS analyze the current state of situational awareness and operational control, this provision requiring DHS to submit a border security plan suffers because it is dependent on the same flawed definitions. However, even if the definitions were improved, one should note that there are absolutely no consequences if DHS does not submit a border security plan to Congress. Finally, even if DHS did submit a border security plan to Congress in compliance with the bill, **it is important to note that, like the Senate amnesty bill, H.R. 1417 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.**

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)

- 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 DHS to provide the GAO with the data and methodology used to develop the metrics implemented pursuant to the bill. Note, however, that the bill does not set a specific deadline by which the GAO must submit this report. That is, the bill requires DHS to submit its data and methodology to the GAO, but the bill does not specify by when. The bill then provides that GAO shall submit a report to Congress on the “suitability” and “statistical validity” of such data and methodology within nine months of receiving the data from DHS.

Certifications. H.R. 1417 requires DHS to submit certifications or reports to Congress depending on whether the Secretary determines that DHS has obtained and maintained operational control of the border. But again, as noted above, despite requiring certifications and reports, H.R. 1417 does not require DHS to obtain situational awareness or operational control

of the border, and the bill contains no consequences if DHS does not follow its border security plan or does not use the metrics set forth in the bill.

Under Section 3(k), 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) GAO shall review these certifications and submit reports to Congress on such reviews. (p.18-19)

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.

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.

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,” DHS shall submit to Congress a plan 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.

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