

The REAL ID Act

H.R. 418

It is perhaps obvious to state that terrorists cannot plan and carry out attacks in the United States if they are unable to enter the country. . . [E]ven after 19 hijackers demonstrated the relative ease of obtaining a U.S. visa and gaining admission into the United States, border security still is not considered a cornerstone of national security policy. We believe . . . that it must be made one.

—9/11 Commission staff monograph, 9/11 and Terrorist Travel, Preface

The Basics

[A]buse of the immigration system and a lack of interior immigration enforcement were unwittingly working together to support terrorist activity.

—9/11 Commission staff monograph, p. 46

The provisions of the REAL ID Act address four basic homeland security issues:

- 1) Asylum reform to make it more difficult for terrorists to abuse the asylum system in order to remain in the United States while they plan and carry out attacks;
- 2) Completion of the border fence authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to protect the U.S. Naval Base in San Diego;
- 3) Reform of admissibility and deportability laws to make it more difficult for terrorists to enter the United States legally, like the 19 9/11 hijackers did, and to ensure that the government can deport them if they do manage to enter; and
- 4) Minimum standards for the issuance of state driver's licenses if such licenses are to be used for Federal identification purposes, including to board commercial aircraft and to enter Federal buildings.

Congress has made significant improvements to U.S. intelligence capabilities in the wake of 9/11. It is imperative that Congress also address the serious deficiencies in our ability to secure the homeland. Increased intelligence gathering and unsurpassed military might alone will not protect Americans from another attack on U.S. soil. Whether that attack comes at the hands of terrorists who are

granted visas to enter legally, or at the hands of terrorists who sneak across our porous land borders, is largely up to Congress. Whether those terrorists are able to live comfortably among us without attracting attention while they finance, plan, rehearse, and then carry out their attack, is largely up to Congress, as well. The common-sense provisions of HR 418 represent a critical first step toward gaining control over our borders and protecting American lives.

1) Asylum Reform

[O]nce in the United States terrorists and their supporters tried to get legal immigration status that would permit them to remain here, primarily by committing serial, or repeated, immigration fraud, by claiming political asylum, and by marrying Americans.

—9/11 Commission staff monograph, p. 46

In many cases, the act of filing for an immigration benefit sufficed to permit the alien to remain in the country until the petition was adjudicated. Terrorists were free to conduct surveillance, coordinate operations, obtain and receive funding, go to school and learn English, make contacts in the United States, acquire necessary materials, and execute an attack.

—9/11 Commission staff monograph, p. 98

The asylum provisions in HR 418 are vitally important to protect Americans from terrorists seeking to abuse our asylum system in order to prolong their stay here. The asylum process must, and will under HR 418, remain open to those who have a good faith claim to asylum. However, it should be remembered that Mir Aimal Kansi murdered two CIA employees at CIA headquarters, and Ramzi Yousef masterminded the first World Trade Center attack, while free after applying for asylum. After Yousef drove the van filled with explosives into the garage of the World Trade Center, he disappeared. One of his compatriots, though, was caught:

Although Ajaj was arrested for involvement in the bombing, he did not give up on his political asylum claim. [He] asked to file a new political asylum claim and was given ten days by an immigration judge to do so. Thus, Ajaj was able to file a political asylum claim after his arrest for involvement in the bombing of the World Trade Center.

—9/11 Commission staff monograph, p. 47

Some have argued that the asylum system already has been fixed—as a direct result of cases like Kansi’s and Yousef’s. It is true that the then-INS improved the asylum system in 1995, and Congress made some significant changes in 1996. Since then, however, the 9th Circuit Court of Appeals has steadily rolled back some of the reforms and misapplied others. As a result, terrorists are once again looking to the asylum process to give them enough time in the United States to carry out their plans. During the Republican Convention in New York City last year, for example, a Pakistani national was plotting to blow up the Herald Square subway station and the Verrazano-Narrows Bridge. He was quoted as saying, “I want at least 1,000 to 2,000 to die in one day.” This man was free pending adjudication of his asylum claim when he was, thankfully, arrested by the New York City police on August 27th.

One of the main goals of the asylum reforms in the REAL ID Act is to ensure that our asylum system is consistent with our overall justice system. The bill retains all the current steps in the asylum process so those with legitimate claims are assured of an opportunity to make their case. In fact, 98 percent of those who present an affirmative asylum claim are found by DHS asylum officers to have a “credible fear” of persecution and scheduled to appear before an immigration judge.

It is at this level that the reforms of HR 418 are vital. The bill would:

- Reiterate the existing standard that the claimant, who seeks the protection of the court, bears the burden of proof, just as is the case in every other U.S. court proceeding;
- Allow judges to assess the witness’s credibility, just as judges or jurors do in every other U.S. court proceeding, including capital punishment cases; and
- Require claimants to either produce or explain the absence of evidence to corroborate their claims, just as is expected in every other U.S. court proceeding.

In accord with both U.S. and international law, which define an asylee as someone having a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion,” HR 418 states that one of these five grounds must be “a central reason” for the persecution. Incredibly, this provision was needed to overturn a court precedent that would actually grant asylum expressly because the claimant has been accused of membership in a terrorist organization. The claimant merely has to assert that his home government is trying to “persecute” him because of his “alleged” membership in the terrorist group. The court then has to pretend that the tenets of the terrorist group are, in fact, the claimant’s “political opinion” for which he seeks protection. To make the situation even worse, this precedent places an impossible burden on the U.S. government—which is barred by law from verifying

the facts in an alien's asylum application—either to disprove the alien's claim or to prove that the alien is a terrorist.

America has always strived for a system in which justice is blind and the law is applied uniformly. HR 418 moves us one step further toward that goal by setting uniform standards for asylum proceedings nationwide, rather than allowing individual courts to make their own rules. This is simple common sense at a time when the erroneous decision of one court could put the lives of countless Americans in jeopardy.

Border Fence

It is elemental to border security to know who is coming into the country. Today more than 9 million people are in the United States outside the legal immigration system. We must also be able to monitor and respond to entrances between our ports of entry.

—9/11 Commission's Final Report, p. 390

[E]ntrenched human smuggling networks and corruption in areas beyond our borders can be exploited by terrorist organizations. Recent information...strongly suggests that al-Qaida has considered using the Southwest Border to infiltrate the United States. Several al-Qaida leaders believe operatives can pay their way into the country through Mexico and also believe illegal entry is more advantageous for operational security reasons."

—Statement of Admiral James Loy, Deputy Secretary of DHS, before the Senate Select Intelligence Committee, February 16, 2005

In their travels, terrorists use evasive methods, such as altered and counterfeit passports and visas, specific travel methods and routes, liaisons with corrupt government officials, human smuggling networks, supportive travel agencies, and immigration and identity fraud.

—9/11 Commission's Final Report, p. 384

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 mandated the construction of a series of border fences and roads inland from the Pacific Ocean along a 14-mile stretch of the U.S.-Mexico border in San Diego. The goal was to reinforce the fence that was already there by building second and third fences with Border Patrol roads between them. Congress felt it was particularly important to reinforce this sector of the border because of the close proximity of a U.S. Naval Base. In the early to mid-1990s, this stretch of border was one of the

most trafficked corridors for illegal entry and smuggling. The entire area, including the Naval Base, was being overrun, which created significant security concerns. To ensure expeditious completion of the fence, Congress authorized the Attorney General to waive any provisions of the National Environmental Policy Act and the Endangered Species Act that might slow construction.

More than eight years later, there is still a 3½-mile gap in the fence, leaving the Naval Base at risk. Opponents of the fence bypassed the Attorney General's waiver authority by challenging construction of the fence under California state environmental laws. HR 418 finally settles the issue by waiving all laws that could obstruct completion of the San Diego border fence. The bill extends this waiver to cover construction of any physical barriers and roads as are necessary to reduce illegal crossings in high volume areas along the border.

Some have argued that this provision is much broader than is necessary and that it could result in large-scale environmental damage in sensitive areas of the border. There are two major flaws in this thinking:

1. Construction of roads and barriers is totally dependent on appropriations, which have been in relatively short supply in recent years. In any event, Congress would effectively retain full control over the use of this waiver provision through its appropriations power; and
2. If one can imagine the extent of environmental degradation that could be caused by the construction of fences and roads along the border, it is only too easy to see that the impact of thousands of illegal aliens trampling through sensitive lands, dumping trash, and building campfires would be significantly more devastating to a much larger area of land. In fact, some of the most pristine border environments have become crisscrossed with trails worn into the ground by thousands of feet, and they are overflowing with trash and human waste, which is poisoning some native animal species.

More ominous, though, are the occasional Muslim prayer rug and Arabic journal strewn among the piles of trash. We know that all 19 of the 9/11 terrorists entered the United States by presenting documents for inspection at a port of entry. We must remember, though, that terrorists have proven their adaptability. As the United States tightens enforcement at official ports of entry, terrorists will look for alternatives. Our massive, open, and largely unguarded land borders are an obvious next choice. As long as a single illegal alien can cross illegally into the United States, so too can terrorists.

Inadmissibility/Deportability of Terrorists

[In response to concerns about a millennium attack, an Administration working group recommended] taking legal action to prevent terrorists from coming into the United States and to remove those already here, detaining them while awaiting removal proceedings.

—9/11 Commission's Final Report, p. 187

These immigration cases against suspected terrorists were often mired for years in bureaucratic struggles over alien rights and the adequacy of evidence.

—9/11 Commission staff monograph, p. 143

Terrorist organizations have been using front organizations and alleged charities to support and provide cover for their terrorist activities. As President Bush has stated: "international terrorist networks make frequent use of charitable or humanitarian organizations to obtain clandestine financial and other support for their activities." Money given to terrorist organizations is fungible. Under current law, an alien can provide funding or other material support to terrorist organizations and then escape deportation by claiming that he did not know that the funds would be spent on terrorist activities.

The REAL ID Act provides that an alien who contributes funds or other material support to a terrorist organization is inadmissible and deportable unless he can demonstrate by clear and convincing evidence that he did not know, and should not have known, that he was helping a terrorist organization. If enacted, this provision should significantly cut funding for terrorist organizations, since few people will be willing to take the risk.

HR 418 also makes inadmissible any alien who has received military-type training from a terrorist organization. It is difficult to conceive of a legitimate reason for someone to undergo such training absent the intent to use it to commit a terrorist act.

Current law makes it easier to keep a terrorist out of the United States than it is to deport a terrorist who manages to get into the United States. Terrorists have become experts at using our legal system to prolong their stay in this country in the hopes that they will have time to execute their plans. HR 418 settles this by making aliens who are in the United States deportable for any terrorism-related offense for which they would be inadmissible if they were outside the country.

Federal Standards for Driver's Licenses

Secure identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification, such as driver's licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists.

—9/11 Commission's Final Report, p. 390

The fact that illegal aliens and terrorists are able to obtain driver's licenses and identification cards in 10 states is a monumental gap in the national security policy of the United States. That fact that the 19 terrorists who murdered 3,000 Americans on September 11, 2001, had dozens of state-issued driver's licenses and identification cards speaks to the urgency of this matter. The hijackers used these IDs to rent cars and apartments, open bank accounts, take flying lessons, and otherwise blend into American society while they planned their attacks. They also used these IDs to board the airplanes they turned into weapons that morning.

While the 9/11 terrorists were issued visas to enter the United States, at least two of them overstayed their visas and obtained licenses and IDs despite their unlawful status. As we tighten our visa and entry systems, terrorists increasingly will resort to illegal entry to gain access to our country. Illegal entrants are, by definition, aliens who have not undergone either criminal or terrorist screening and whose identity has not been firmly established by federal authorities. Ensuring that illegal aliens are not issued licenses is, therefore, of the utmost importance to homeland security. H.R. 418 establishes minimum standards for the issuance of driver's licenses and ID cards that states must meet within three years if these documents are to be recognized by the federal government as reliable proof of identity.

Among the minimum standards set forth in H.R. 418 are requirements that:

- The expiration date of a license or ID card issued to a temporary foreign visitor match the expiration date of the visa.
- If there is no expiration date on the visa, the license or ID card must expire in one year.
- Only U.S.-issued documents and valid foreign passports may be used to establish the identity of applicants.
- Each applicant provide proof of U.S. citizenship or lawful presence in the United States.
- Documents presented during the application process must be independently verified.

Some critics of the REAL ID Act have charged that the bill would create a national ID card based on a national database under the government's control, which could be used for nefarious purposes. Others claim that the bill would require the United States to link its databases with Mexico's and Canada's. These charges stem from a provision in the bill that requires states to "*participate in the interstate compact regarding sharing of driver license data, known as the 'Driver License Agreement,' in order to provide electronic access by a State to information contained in the motor vehicle databases of all other States,*" in order for the states to be eligible for the grants or other financial assistance available in under HR 418. By its own words, though, the provision makes clear that each state would continue to maintain and control access to its own motor vehicle database.

The Driver License Agreement (DLA) was initiated in the 1960s by representatives of state motor vehicle agencies. The original goal was to "promote highway safety by sharing and transmitting driver and conviction information" among states. Only two states—Michigan and Wisconsin—have chosen not to participate. Through the sharing of information regarding motor vehicle violations and restrictions, along with basic information about licensees, including name, address and gender, participating states are moving toward a "one driver, one license and one identity system." Such a system will prevent people with suspended or revoked licenses from obtaining new ones in a different state, ensure that penalties for violations will be enforced even if the violator moves to a different state, and make identity theft more difficult.

The DLA also provides a major benefit to drivers throughout the country. When an individual moves from one signatory state to another and applies for a new driver's license, the new state can verify electronically that the individual's old license has not been suspended or revoked. If the old license is valid and not restricted, the individual can obtain a new license without having to re-take the written or driving tests.

Access to and use of the data in each state's motor vehicle database is protected by the Federal Driver's Privacy Protection Act (DPPA). The DPPA prohibits states from disclosing personal information about license and ID holders, except for limited purposes, and restricts access to the data. It provides criminal penalties for misuse of such data. Motor vehicle databases are also protected by each state's privacy laws, some of which are significantly more restrictive than the DPPA.

So how do Canada and Mexico fit into the picture? Actually, only Canadian provinces and Mexican states fit in, since we're talking about agreements between states. There is nothing that bars either Canadian provinces or Mexican states from signing the agreement, except that a province/state can only participate if its licenses and IDs meet established security standards and its motor vehicle laws and penalties are equivalent to those of the other participating states. As of now, apparently four of the seven Canadian provinces meet the requirements and have

signed the agreement. Not surprisingly, *not a single Mexican state has met the requirements*, so none is participating.

Why would we want Canadian provinces or Mexican states to participate in such an agreement? Since large numbers of Canadians and Mexicans come here and large numbers of Americans go to Canada and Mexico, it is in all parties' best interest to have the ability to verify licenses and identity quickly and securely. Under the agreement, our DMVs can verify the validity of a Canadian license issued by one of the four participating provinces, and their DMVs can verify the validity of our licenses.

More importantly, though, Canadians are allowed to enter the United States by presenting a Canadian driver's license or ID card at a port of entry, and nationals of both countries can use their licenses and/or IDs as proof of identity here. Law enforcement agencies, by agreement of the participating states, can verify licenses and identity quickly and they can easily notify the issuing jurisdiction of motor vehicle violations so the violator cannot escape punishment.

Theoretically, if a Mexican state were to meet the requirements to become a signatory, authorities in that state would be able to make electronic inquiries to verify the validity of licenses issued by other participating states. They would not, however, be able to download, manipulate, or alter the information in the databases of other states.

Finally, some opponents of the REAL ID Act have argued that the driver's license provisions would not have stopped any of the 9/11 terrorists because they all entered the United States legally. Technically, of course, none of them came legally because they all committed fraud on their visa applications. More importantly, though, at least two of them overstayed their visas and remained here illegally. Both Nawaf al Hazmi—one of the four hijackers of Flight 77, which flew into the Pentagon—and Hani Hanjour—the pilot of Flight 77 who is believed to have murdered the real pilot by slitting his throat with a box cutter—were *unlawfully present in the United States when they obtained driver's licenses and/or ID cards*.

Al Hazmi entered the United States on a short-term business visa. He was issued a California driver's license while he was in legal status. His authorized period of admission ended on 1/16/01, after which he was unlawfully present. He was issued a Florida driver's license on 6/25/01 and a Virginia ID card on 8/2/01. He was added to the terrorist watchlist on 8/24/01. He applied for and received a re-issuance of his Virginia ID card on 9/5/01. His Saudi passport included an indicator of terrorist affiliation which could have raised a red flag for Federal authorities if they had known about such indicators at that time.

Hanjour entered the United States on 12/08/00 on a student visa. He violated the visa by failing to enroll in school, so he was unlawfully present from the time of his

violation. Hanjour had an Arizona driver's license from a previous visit. He obtained a Virginia ID card on 8/1/01, went to another Virginia Department of Motor Vehicles the following day and failed the Virginia driver's license test, and then obtained a Maryland ID card on 9/5/01. It is likely that he, too, had a terrorist indicator in his passport.

The reason the terrorists got licenses and ID cards in the first place was so that they could avoid using their passports, which they feared would attract unwanted attention. The 9/11 Commission found that the 19 hijackers had been issued 16 state driver's licenses (from Arizona, California, Florida and Virginia) and 14 state ID cards (from Florida, Maryland and Virginia). They also had at least 364 aliases among them, according to the Commission, so it is possible that had additional licenses and/or ID cards that we will never know about.

Had the REAL ID Act been in effect prior to 9/11, neither al Hazmi nor Hanjour would have had a valid license or ID card with which to board the airplane they hijacked. The licenses they obtained while in legal status would have expired with their permission to be in the United States, and they would not have been able to obtain the other licenses and IDs at all. Moreover, had Federal authorities possessed the intelligence information they now have, it is possible that the terrorist indicators in their passports would have been spotted. If either al Hazmi or Hanjour had been unable to board Flight 77, it is possible that the entire plan would have unraveled. At the very least, perhaps the passengers and crew of that flight, along with the Pentagon victims, may have escaped the horrors that ensued.