

The REAL ID Act of 2005 (H.R. 418): Summary and Selected Analysis of Provisions as Passed by the House

TITLE I: AMENDMENTS TO FEDERAL LAWS TO PROTECT AGAINST TERRORIST ENTRY

Section 101—Preventing Terrorists from Obtaining Relief from Removal: This provision alters the standards and evidentiary burdens governing asylum applications, applications for withholding of removal, and other discretionary grants of relief from removal. Specifically, this section:

- Raises the standard for asylum and withholding of removal eligibility and requires all applicants to prove that a “central reason” for their persecution was one of the enumerated grounds (race, religion, national origin, political opinion, or social group);
- Allows judges to require credible asylum and withholding applicants to obtain *corroborating evidence* “unless the applicant does not have the evidence and cannot reasonably obtain the evidence without leaving the country” and effectively bars judicial reversal of determinations regarding the availability of corroborating evidence;
- Authorizes adverse credibility determinations to be based on any *single* factor, including demeanor, inaccuracy, or the consistency of an applicant’s written or oral statements made at any time to any individual, whether or not under oath and whether or not the factor is material to the claim of asylum;
- Expands the aforementioned corroborating evidence and credibility standards to all other requests for relief from removal, including: applications for withholding or deferral of removal under CAT, cancellation of removal, VAWA cancellation, NACARA, HRIFA, Cuban Adjustment Act, voluntary departure, etc.
- Bars any court from review of any discretionary judgments, decisions, or actions, regardless of whether made in the context of removal proceedings;
- Repeals the provision enacted in the intelligence reform legislation mandating a study of vulnerabilities in our asylum system; and
- Eliminates the annual cap on the number of asylees who are eligible to adjust their status to permanent residence.

Effective Dates: The provisions affecting the standard and burden of proof apply to applications made on or after the date of enactment. The provision affecting judicial review applies to all cases in which the final removal order was issued before, on, or after the date of enactment. The provision affecting judicial review of discretionary administrative decisions applies to all cases pending before any court on, before, or after date of enactment.

Analysis: Terrorists, people who have persecuted others, people who have committed serious non-political crimes abroad, and people who pose a danger to the security of our country are already excluded from both asylum and withholding of removal. This proposal therefore does nothing to enhance our security. It simply denies asylum to people who cannot prove the central motive of their persecutor, who cannot produce corroborating evidence of their account, who make an inconsistent or inaccurate statement immaterial to the underlying claim, or whose demeanor is inconsistent with an immigration judge's preconceived expectations.

Proving motive is already a difficult exercise for many individuals fleeing persecution. To require individuals to establish the centrality of one motive above potentially several motives would be to impose a nearly insurmountable standard of proof. The "demeanor" of a person who has suffered torture or persecution has repeatedly been found to be a poor indicator of credibility. Victims of trauma often have a "flat" effect, and find it difficult to make eye contact or discuss the details of abuse. Demeanor is also culture-specific: in many cultures, avoiding looking one's interlocutor in the eye, particularly if the interlocutor is an authority figure, is a sign of respect. Moreover, in light of the trauma asylum applicants have experienced, inaccurate or inconsistent statements about minor details or dates unrelated to their claim for relief would be expected and should not alone serve as a basis for an adverse credibility determination.

An asylum applicant may be unable to produce corroborating evidence for reasons other than the fact that the applicant "does not have the evidence and cannot reasonably obtain the evidence without departing the United States." An applicant, for example, may be unable to obtain documentation from the persecuting government without endangering his own safety or that of family members back home who would have to try to obtain such documentation for him.

While elimination of the annual cap on adjustment of status for asylees is long overdue, it cannot mitigate the damage created by the companion provisions which will make it nearly impossible for many asylum seekers to find relief in the United States in the future.

Section 102—Waiver of Laws Necessary for Improvement of Barriers at Borders:

This provision amends the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) to provide the Secretary of Homeland Security with authority to waive *all* laws the Secretary deems necessary, in his sole and absolute discretion, to expedite construction of security fences and barriers at the borders. It also prohibits all judicial, agency, administrative, or other review of any decision made by the Secretary under this section.

Section 103—Inadmissibility Due to Terrorist and Terrorist-Related Activities: This provision significantly expands the terrorism-related grounds of inadmissibility. Specifically, this provision:

- Broadens the INA’s definitions of “terrorist organization” and “engage in terrorist activity”;
- Expands the grounds of inadmissibility based on endorsement of or support for terror-related activity, “terrorist organizations” or members of a terrorist organization; and
- Establishes a new ground of inadmissibility based on receipt of military-type training.

Effective Date: These amendments apply retroactively.

Analysis: See Section 104 below.

Section 104—Removal of Terrorists: This provision makes all of the terrorism-related grounds for removal coextensive with the grounds for inadmissibility, as newly expanded by Section 103.

Effective Date: This expansion of the grounds of removal applies retroactively.

Analysis: Taken together, Sections 103 and 104 make it a deportable offense to:

- Endorse “terrorist activity,” broadly defined as virtually any use of a weapon or threat to use a weapon against person or property.
- Urge support for or endorse a “terrorist organization,” even more broadly defined as any two or more people who have ever engaged in such activity.
- Support any “terrorist organization” or a member of any terrorist organization even where the individual can prove that his activities did not further any terrorist activity whatsoever.
- Be the spouse or minor child of an individual meeting the above criteria (with some temporal limitations), even if the spouse or child had no knowledge of the association or activity.

These provisions impose “guilt by association,” rendering people deportable for wholly lawful and peaceful activity if such activity supports any group that has engaged in the use of weapons or has threatened to use weapons. Anyone who has given money to entities such as a hospital or school that has an association in any way with a group that uses guns (or threatens to use guns) would be deportable. The proposed measures apply retroactively and would render deportable individuals who provided support to a group or a member thereof, whether or not the group was a designated terrorist organization.

Elimination of the requirement that the group be a “designated” terrorist organization vitiates an agreement brokered during PATRIOT Act debate. Under the PATRIOT Act, a foreign national who supports a designated terrorist group already is automatically deportable. A foreign national who supports a non-designated group that has engaged in ‘terrorism’ (including any use or threat to use a weapon) also is

deportable but ONLY if he supported the group's "terrorist activity." Under the REAL ID Act, the individual is deportable unless he can prove by clear and convincing evidence that he neither knew nor should have known that the organization is a "terrorist organization."

Section 105 – Judicial Review of Orders of Removal: This provision, among other things, significantly expands the current restrictions on judicial review contained in the Immigration and Nationality Act (INA). Specifically, this section:

- Eliminates statutory and non-statutory habeas corpus review wherever judicial review is eliminated throughout the INA, including review of detention orders and final orders of removal.
- Excepts from the bars on judicial review "constitutional claims or pure questions of law", but only when such review is sought pursuant to a petition for review before the U.S. Court of Appeals.
- Makes petitions for review before a U.S. Court of Appeals the sole and exclusive means for judicial review of claims under the Convention Against Torture (CAT).
- Eliminates, for all practical purposes, the power of a federal court to stay an order of removal even while an appeal of such order remains under review by the court.
- Mandates transfer to U.S. Court of Appeals of all cases challenging final orders of removal that are pending in the federal district courts on date of enactment.

Effective Date: The amendments to the judicial review provisions take effect on the date of enactment and apply to cases in which the final order was issued before, on, or after the date of enactment.

Analysis: Further impediments to meaningful judicial review are controversial, have not been subject to any hearings, and will not make us safer. These proposed changes may well be unconstitutional and would certainly be challenged in the federal courts, leading to years of unnecessary litigation and to mass deportation of people who would be deported before the courts could rule on their claims. Such draconian measures have nothing to do with enhancing our security and needlessly undermine our commitment to core principles of fairness.

The elimination of temporary stays of removal pending judicial review would have the absurd and tragic result of sending asylum seekers back to countries where they may be killed or persecuted, even though they would later win their cases once the court had the opportunity to review their claim. Moreover, this measure would separate U.S. families by deporting an immigrant parent while her case was being appealed—only to have a federal court later order her return. Asylum seekers and other immigrants who appeal to the federal courts are challenging the government's decision to deport them. By preventing the courts from staying their deportation pending review of that decision, this provision makes meaningless even the constricted rights of appeal that would otherwise remain under this section.

Section 106 -- Delivery Bonds: This provision provides unprecedented authority to bounty hunters to “pursue, apprehend, detain and surrender” immigrants in removal proceedings. Among other things, this provision:

- Allows bail bondsmen to take noncitizens into custody and deliver them to DHS “[a]t any time, before a breach of any bond conditions, if in the *opinion* of the surety or bonding agent” the noncitizen becomes a flight risk.
- Allows bail bondsmen to keep the bond premium paid by the immigrants or their families if they “change address without notifying the surety, the bonding agent, and the Secretary of Homeland Security in *writing prior* to such change.”
- Allows bail bondsmen to keep the bond premium if the bonding agent determines in his discretion that the noncitizen “hides or is concealed” from the bonding agent.
- Provides bail bondmen unfettered access to all information the government possesses about a noncitizen subject to bonding.

Effective Date: These provisions take effect on the date of enactment and apply to bonds and surety undertakings executed on, before, or after the date of enactment.

Analysis: This is an unprecedented grant of authority over basic liberty decisions to the private sector and a frightening abdication of government responsibility. Bail bondsmen are not subject to the same due process restraints that govern law enforcement officers. It is unclear what recourse, if any, even innocent people (ex. mistaken identity) would have when the bail bondsmen violate their rights in the course of arresting and detaining noncitizens.

This section would allow unscrupulous bail bondsmen to take advantage of vulnerable immigrant families and take their hard-earned money. Whether a noncitizen poses a “flight risk” is a legal question that, given the ramifications for individual liberty, should be determined by an impartial adjudicator. In addition, according bondsmen access to any personal information that “may be helpful” raises serious privacy concerns. Adjudicators, not private bounty hunters, are in the best position to exercise discretion, apply legal standards, and act in a way that is consistent with the Constitution.

Section 107 – Release of Aliens in Removal Proceedings: This provision would set the minimum bond amount at \$10,000 and prohibit the Department of Homeland Security (DHS) from releasing on recognizance anyone placed in proceedings. It authorizes release on recognizance only pursuant to an immigration judge’s order expressly stating that the individual is not a flight risk or threat to the United States.

Effective Date: The provisions take effect on the date of enactment.

Analysis: This provision, as a practical matter, will make it virtually impossible for many noncitizens to be released on bond while their cases are under adjudication.

Section 108 – Detention of Aliens Delivered by Bondsmen: This section requires the Secretary of Homeland Security to take into custody any noncitizen subject to a final order of removal and cancel any previously posted bond if the bondsman produces the noncitizen within the prescribed time limit.

Effective Date: These provisions take effect on the date of enactment and apply to bonds posted before, on, or after such date.

TITLE II: IMPROVED SECURITY FOR DRIVER'S LICENSES AND PERSONAL IDENTIFICATION CARDS

Section 201—Definitions: This section provides definitions of terminology used throughout Title II.

Section 202—Minimum Document Requirements and Issuance Standards for Federal Recognition: This provision prohibits federal agencies from accepting for any official purpose a state-issued identification card or driver's license that does not meet numerous minimum document requirements and issuance standards, including verification of immigration status. For all noncitizens authorized to be in the United States for a temporary period, the validity period of a driver's license or identification card issued by the State may not exceed the period of authorized stay. For noncitizens with no fixed period of authorized stay but who are nonetheless here in a lawful status, the validity period of driver's licenses and identification cards shall not exceed one year.

Among other things, this provision requires states to verify with the issuing agency the issuance, validity, and completeness of each document required to be presented. In addition, states must enter into a Memorandum of Understanding with DHS no later than September 11, 2005 to verify the legal presence of all noncitizen driver's license applicants.

Effective Date: These provisions become effective three years after the date of enactment.

Analysis: This set of provisions usurps the states' authority to set eligibility requirements and imposes a long list of "minimum" federal standards, including restrictions on immigrants' access to driver's licenses.

Preventing immigrants from obtaining driver's licenses undermines national security by pushing people into the shadows and fueling the black market for fraudulent identification documents. Moreover, it undermines the law enforcement utility of Department of Motor Vehicle databases by limiting rather than expanding the data on individuals residing in a particular state. Perhaps more to the point, it is clear from the 9/11 and Terrorist Travel staff report that the proposed restrictions would not have prevented a single hijacker from obtaining a driver's license or boarding a plane.

The staff report correctly points out that some of the hijackers were mistakenly issued valid visas or lawfully admitted to the U.S. The rest were here legally. All therefore had the immigration documents necessary to prove legal immigration status and that status would have been verified by federal authorities if checked. Indeed, five of the terrorists fraudulently obtained their licenses by falsely claiming state residency, which is different from legal residency for immigration purposes. States have since tightened requirements for proof of state residency to correct this deficiency in their laws. The terrorists did not need U.S.-issued driver's licenses to board the planes on September 11; they had foreign passports that allowed them to board airplanes. Use of foreign passports to board airplanes would still be permitted under this provision.

Section 203—Linking of Databases: This provision requires, as a precondition to federal financial assistance, that States participate in the interstate compact for sharing driver's license information known as the Driver License Agreement.

Section 204—Trafficking in Authentication Features for Use in False Identification Documents: This provision modifies federal criminal code provisions related to trafficking in authentication features. It also requires DHS to enter the background information of any person convicted of using a false driver's license for the purpose of boarding an airplane into the appropriate aviation security screening database.

Section 205—Grants to States: This provision authorizes the Secretary of Homeland Security to make grants to states complying with the provisions of this title and authorizes appropriations necessary for such grants for fiscal years 2005 through 2009.

Section 206—Authority: This provision accords the Secretary of Homeland Security, in consultation with the Secretary of Transportation and the States, the authority to issue regulations, certify compliance, and issue grants pursuant to this title.

Section 207—Repeal: This section repeals Section 7212 (the driver's license and personal identification provisions) of the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458).

TITLE III: BORDER INFRASTRUCTURE AND TECHNOLOGY INTEGRATION

Section 301 -- Vulnerability and Threat Assessment: This section requires DHS to study (and report to Congress on) the technology, equipment and personnel needed to address security vulnerabilities for each BCBP field office with responsibility over any stretch of U.S. borders with Canada and Mexico.

Section 302 – Use of Ground Surveillance Technologies for Border Security: This section requires DHS, within 180 days of enactment, to develop a pilot program to utilize or increase utilization of ground surveillance technologies for border security. One year after implementation of the program, DHS is required to submit a report to Congress.

Section 303 – Enhancement of Communications Integration and Information Sharing on Border Security: This section requires DHS and other appropriate agencies to develop and implement, within 180 days of enactment, a plan to improve communications systems between and among the departments and agencies of the federal, state, and local governments.

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