



ANALYSIS

To embrace and uphold our tradition as a nation of immigrants.

REAL ID Act of 2005 (H.R. 418)

Section 101 (“Preventing terrorists from obtaining asylum”)

What the bill would do: Raise the burden of proof for asylum and withholding cases to an insurmountable level.

- **Motive:** It would require all applicants for asylum or withholding of removal to prove a *central reason* behind their persecution is one of the following: the applicant’s race, religion, political opinion, nationality, or membership in a particular social group.
- **Credibility:** It would allow judges to base credibility determinations on the applicant’s demeanor, candor, responsiveness, or inconsistency with any statement made at any time to anyone.
- **Corroboration:** It would allow judges to deny asylum or withholding of removal based on the lack of documentary or “corroborating” evidence even if the applicant presents specific, detailed, and credible testimony, and it bars judicial reversal of decisions that were based on the availability (or lack of availability) of corroborating evidence.
- **Discretion:** It would bar courts from review of all discretionary judgments, including those made in non-removal contexts.
- **GAO Study on Asylum:** It would repeal the requirement in the recently-passed intelligence reform bill for a GAO study on asylum.

Why this doesn’t make us safer:

- Terrorists, persecutors, people who have committed many different classes of crimes, and persons who are real security dangers are already barred from asylum and other discretionary forms of relief.
- Asylum applicants are already required to provide corroborating evidence or an explanation as to why such evidence was not presented, when it is reasonable.
- Asylees already go through one of the most stringent security clearance processes compared to other newcomers.
- The GAO study on asylum mandated in the intelligence reform bill would identify weaknesses, if any, in the asylum system; we should examine the results of this

study before passing sweeping legislation that will severely curtail protection from persecution for genuine refugees.

Additional points on the asylum provision:

- **Motive:** Proving that persecution is on account of one of the enumerated grounds (race, religion, political opinion, nationality, membership in a social group) is already difficult for many individuals fleeing persecution. However, courts have long held that proving the “exact” motive for persecution is near to impossible. Likewise, to require asylum seekers to establish the centrality of one motive above potentially several motives is unreasonable and inconsistent with international and domestic laws.
- **Credibility:** Asylum applicants are already required to establish credibility. Moreover, credibility determinations by Immigration Judges are already given significant deference. But to codify behavior like demeanor and candor is excessive, especially considering that demeanor is culture-specific. For example, in some cultures, avoiding looking one’s interlocutor in the eye—particularly if the interlocutor is an authority figure—is a sign of respect. For this reason, demeanor is not always the best indicator for making a judgment about credibility.

Similarly, to base credibility judgments on previous statements made at any time to anyone sets a standard that would be beyond most human beings. (What member of Congress could pass this standard?) For example, when the asylum seeker lands at the airport, statements made to the immigration officer or to an airline clerk cannot alone reasonably serve as a basis for rejecting credibility. The individual may be limited English proficient, not provided a translator, may have suffered mistreatment by government officials in her home country, or have other good reasons not to be clearly understood. Alternatively, the person taking down the information at the airport may not have taken down the whole story, or may not have gotten the story correctly in the first place. Under these circumstances, airport interviews are unreliable. The REAL ID Act improperly gives the unreliable airport interviews the same weight as sworn testimony before an asylum officer or judge.

- **Judicial Review:** Judges sometimes make mistakes. Judicial review is often the only way to correct such mistakes. In one example involving a federal court case, a judge denied asylum to an applicant who was unable to obtain a registry document from a refugee camp to corroborate an otherwise credible and sufficiently detailed claim. A federal court reviewed the denial and among other things, found that it would be practically impossible to obtain the registry document because the UNHCR, which would issue the document, is backlogged in producing such documents. This delay was confirmed by the Department of State.

Section 102 (“Waiver of laws necessary for improvement of barriers at borders”)

What the bill would do:

- Gives the DHS Secretary authority to waive all laws necessary to ensure expeditious construction of barriers along the US-Mexico border in San Diego, and prohibits all judicial review of such orders.

Why this doesn't make us safer:

- As long as there are plentiful jobs in the U.S., and insufficient legal channels for migrants to come here to fill those jobs, workers will go around fences. What is needed is comprehensive immigration reform. Americans would be far better off with immigration policies that would allow migrants to come legally through the gate in the fence, so that they would not have to go around the fence, and we would know who is here.

Section 103 (“Inadmissibility due to terrorist and terrorist-related activities”) and Section 104 (“Deportability of terrorists”)

What the bill would do:

- **Definition:** It would expand the already broad definitions of “terrorist organization” and “engage in terrorist activity,” and make it easier to make inadmissible and deportable non-citizens who fit these definitions.
- **Guilt by Association:** The bill would create broad “guilt by association” grounds for deporting or barring individuals who are involved with any political group that uses violence, even if the association is in the form of peaceful protest or donations to a hospital or school.
- **Standard of Evidence:** It would raise the defense to a “clear and convincing evidence” standard for proving that one did not know that such an organization fit this overly broad definition of “terrorism.” This is a nearly impossible standard to meet.
- **Retroactivity:** It would make it possible to deport long-term lawful residents accused of involvement in any political group that uses violence, even if the association occurred years ago, and was legal at the time.
- **Spouses and Minor Children:** It would extend punishment to many spouses and minor children of people meeting the above criteria, even if they had no knowledge of the association.

Why this does not make us safer:

- Under the PATRIOT Act, a foreign national who supports or has engaged in "terrorism" (broadly defined) is already deportable if he supported the group's "terrorist activity."

Section 202 ("Minimum document requirements and issuance standards for federal recognition")

What the bill would do:

- **Repeal The Driver's License Provision That Passed With The Intelligence Reform Bill:** The just-passed intelligence reform law sets up a process whereby states, the federal government, and interested parties would make recommendations for establishing minimum federal standards for IDs. The REAL ID Act eliminates this stakeholder process and instead prescribes a very complicated and burdensome set of requirements on states.
- **Curtails States' Rights:** The REAL ID Act outlines and imposes federal standards for issuance of drivers' licenses and IDs; if states don't comply, their drivers' licenses and IDs can't be accepted as proof of identity by federal agencies.
- **Creates a Legal Presence Requirement:** The bill makes proof of legal immigration status a requirement for obtaining a driver's license or state-issued ID and limits the definition of legal status to certain foreign nationals.
- **Creates a Two Class System:** The bill sets up a tiered system where some non-citizens will receive "temporary" driver's licenses and others will receive "regular" ones.
- **Stringent and Bureaucratic Document Requirements:** Documents required to support an application are outlined in great detail, and are both highly limited (for foreign documents, passport only) and may be impossible to obtain in some circumstances.
- **Verification of Documents:** Requires verification of each document supporting an application with the issuing entity—an impossible task even for US-issued documents, much less foreign passports.

Why this doesn't make us safer:

- This proposal would not have prevented a single 9/11 hijacker from obtaining a driver's license and will not prevent a single terrorist from boarding a plane. (The hijackers all could have gotten licenses or IDs under this proposal, and foreign terrorists can always simply use passports to travel.)
- Some states have decided that giving undocumented immigrants and other immigrants easier access to legal licenses and IDs serves a public safety interest. (It is better to have licensed, insured, and trained drivers on our roads. Also, denying

identification documents to a class of people does not make it easier for law enforcement to establish their identities.) This proposal would take away states' rights to make these determinations.

Additional points on the practical effects of these provisions:

- U. S. citizens will have to prove their citizenship.
- Many applicants will face delays when the “issuing entity” fails to verify their feeder documents in a timely manner. Specifically, the REAL ID Act require states DMVs to verify everyone’s citizenship, including U.S. citizens, and to get a response back from document-issuing agencies for every document people present to show their eligibility for a driver’s license. This would include utility bills, birth certificates, social security cards, and both U.S. and foreign government-issued passports.
- There will be longer lines at motor vehicle departments, with temporary licenses expiring more regularly and greater burden on staff due to document verification requirements.
- Motor vehicle departments will face substantial expense for training, updating systems, and for responding to lawsuits likely to arise when they violate civil rights in trying to implement this language.
- Any person born outside the U.S. (even naturalized citizens) who must rely on a passport for one of the feeder documents (i.e. proof of birth date) will face a nearly insurmountable task in trying to get the foreign government to “verify” the passport. Many foreign governments would refuse to “verify” such documents.
- The standardized driver’s license will be a national ID in disguise.
- This proposal does not just affect states that issue driver’s licenses to undocumented persons. It will require most, if not all, states to expend scarce resources in revamping driver’s license rules and procedures, in training their employees, and the like.

Prepared by the National Immigration Forum
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