

CRS Report for Congress

Received through the CRS Web

9/11 Commission: Current Legislative Proposals for U.S. Immigration Law and Policy

Updated October 18, 2004

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Summary

Reforming the enforcement of immigration law is a core component of the recommendations made by the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission). The 19 hijackers responsible for the 9/11 attacks were foreign nationals, many of whom were able to obtain visas to enter the United States through the use of forged documents. Incomplete intelligence and screening enabled many of the hijackers to enter the United States despite flaws in their entry documents or suspicions regarding their past associations. According to the Commission, up to 15 of the hijackers could have been intercepted or deported through more diligent enforcement of immigration laws.

The 9/11 Commission's immigration-related recommendations focused primarily on targeting terrorist travel through an intelligence and security strategy based on reliable identification systems and effective, integrated information-sharing. As Congress has considered these recommendations, however, possible legislative responses have broadened to include significant and possibly far-reaching changes in the substantive law governing immigration and how that law is enforced, both at the border and in the interior of the United States.

There are several major bills that seek to implement recommendations of the 9/11 Commission, and some propose significant revisions to U.S. immigration law and policy. The two notable bills that would revise immigration laws are H.R. 10, the 9/11 Recommendations Implementation Act, as amended, introduced by the Speaker of the House of Representatives Dennis Hastert, and passed by the House as S. 2845 on October 8, 2004, and S. 2845, the National Intelligence Reform Act of 2004, as amended, introduced by Senators Susan Collins and Joseph Lieberman and passed by the Senate on October 8, 2004.

This report briefly discusses some of the major immigration areas under consideration in comprehensive reform proposals, including asylum, biometric tracking systems, border security, document security, exclusion, immigration enforcement, and visa issuances. It refers to other CRS reports that discuss these issues in depth and will be updated as needed.

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Introduction

The July 2004 report of the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) concluded that the key officials responsible for determining alien admissions (consular officers abroad and immigration inspectors in the United States) were not considered full partners in counterterrorism efforts prior to September 11, 2001, and as a result, opportunities to intercept the September 11 terrorists were missed.¹ The 9/11 Commission contended that “(t)here were opportunities for intelligence and law enforcement to exploit al Qaeda’s travel vulnerabilities.” The report went on to state: “Considered collectively, the 9/11 hijackers

- included known al Qaeda operatives who could have been watchlisted;
- presented fraudulent passports;
- presented passports with suspicious indicators of extremism;
- made detectable false statements on visa applications;
- made false statements to border officials to gain entry into the United States; and
- violated immigration laws while in the United States.”²

The 9/11 Commission issued several recommendations that directly pertain to immigration law and policy. These recommendations are:

- Targeting travel is at least as powerful a weapon against terrorists as targeting their money. The United States should combine intelligence, operations, and law enforcement in a strategy to intercept terrorists, find terrorist travel facilitators, and constrain terrorist mobility.
- The U.S. border security system should be integrated into a larger network of screening points that includes our transportation system and access to vital facilities, such as nuclear reactors.

¹ U.S. National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, Executive Summary, p. 14, July 2004 (hereafter *The 9/11 Commission Report*).

² *The 9/11 Commission Report*, Executive Summary, pp. 13-14, July 2004.

- The Department of Homeland Security, properly supported by the Congress, should complete, as quickly as possible, a biometric entry-exit screening system, including a single system for speeding qualified travelers.
- The U.S. government cannot meet its own obligations to the American people to prevent the entry of terrorists without a major effort to collaborate with other governments.³

These recommendations have broad implications for immigration law and policy. Also, as Congress has moved on the Commission's recommendations, immigration-related reforms have been a key component of major legislative proposals. This report summarizes these proposed reforms.

9/11 Implementation Legislation

Of the several bills that seek to implement recommendations of the 9/11 Commission, two have passed their respective Houses, and both of these propose revisions to immigration law: H.R. 10, the 9/11 Recommendations Implementation Act, as amended, introduced by the Speaker of the House of Representatives Dennis Hastert and passed by the House as S. 2845 on October 8, 2004; and S. 2845, the National Intelligence Reform Act of 2004, as amended, introduced by Senators Susan Collins and Joseph Lieberman and passed by the Senate on October 8, 2004.

The major areas under consideration in these comprehensive reform proposals are briefly discussed below. References to CRS reports that analyze these issues in depth are listed for each major area.⁴

Monitoring of Persons Entering and Leaving the United States

As mentioned above, actions to identify and intercept terrorists who are attempting to enter or leave the United States are a key component of the 9/11 Commission's recommendations. In 1996, Congress required the development of an automated entry and exit data system to track the arrival and departure of aliens, but such a system has yet to be fully implemented. Following the 9/11 terrorist attacks, Congress enacted additional measures, including the USA PATRIOT Act (P.L. 107-56) and the Enhanced Border Security and Visa Reform Act of 2002 (P.L. 107-173), to encourage the more expeditious development of an automated entry and exit data system, and to further require that biometric identifiers be used in passports, visas, and other travel documents to improve their security. To keep inadmissible aliens abroad, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, P.L. 104-208, Division C) required the implementation of a pre-inspection program at selected locations overseas under which immigration officers

³ For a discussion of these recommendations, see *The 9/11 Commission Report*, Chapter 12.4, pp. 383-389, July 2004.

⁴ For an overview of all major immigration legislation under consideration, see CRS Report RL32169, *Immigration Legislation and Issues in the 108th Congress*, coordinated by Andorra Bruno.

inspect aliens before their final departure to the United States, and authorized assistance to air carriers at selected foreign airports to help in the detection of fraudulent documents.

A number of proposals have been made to improve the accurate monitoring of persons entering and exiting the United States. Many of these proposals are not specific to aliens, but cover all persons traveling to or from the United States. These proposals include:

- hastening the development and installation of a biometric entry and exit data system that is integrated with various databases and data systems that process or contain information on aliens [House-passed, Senate-passed];
- requiring the Secretary of Homeland Security to issue a notice of proposed rulemaking to allow for the pre-flight comparison of passenger records for any flight to or from the United States with the integrated terrorist watch list, and establishing an appeals process allowing for modification of records [House-passed];
- requiring the Secretary of Homeland Security to implement a watchlist for passengers of cruise ships [Senate-passed];
- authorizing DHS to establish permanent pre-enrollment programs that subject participants, who may be either aliens and citizens of the United States, to criminal and watch-list screenings and fingerprint checks, so that the inspections of such program participants may be expedited at ports of entry [House-passed];
- improving the security of passports and other travel documents, including through the strengthening of security requirements for “breeder” documents that are used to obtain passports or other travel documents [House- and Senate-passed];
- encouraging the adoption of international standards for the uniform translation of names into the Roman alphabet for purposes of travel documents and security systems [House-passed];
- expanding pre-inspection programs in foreign countries and assistance to air carriers at selected foreign airports in the detection of fraudulent documents [House- and Senate-passed];
- improving the security of the visa issuance process by providing consular officers and immigration inspectors greater training in detecting terrorist indicators, terrorist travel patterns and fraudulent documents [House- and Senate-passed];
- improving the security of the visa issuance process by, among other things, (1) establishing an Office of Visa and Passport Security within the State Department to develop a strategic plan to disrupt the operations of individuals and organizations engaged in travel document fraud, (2) increasing the number of consular officers, (3) codifying that all applications for temporary visas be adjudicated by a consular officer, (4) providing consular officers greater training in detecting fraudulent documents, and (5) stationing anti-fraud specialists at consular posts overseas [House-passed];

- requiring persons applying for nonimmigrant visas between the ages of 12 and 65 to be interviewed by consular officer prior to visa issuance, subject to waiver in certain circumstances [Senate-passed];
- authorizing and encouraging the President to enter into international agreements to curtail terrorist travel by upgrading verification and information-sharing systems [House- and Senate-passed];
- limiting the President's ability to waive general statutory requirements requiring U.S. citizens traveling abroad or attempting to enter the United States to bear a valid U.S. passport, so that such a waiver can only be exercised with respect to U.S. citizens traveling to or from foreign contiguous territories who are bearing identification documents designated by DHS as (1) reliable proof of U.S. citizenship, and (2) of a type that may not be issued to an unlawfully present alien within the United States [House-passed];
- amending the present waiver authority concerning document requirements for arriving nationals from foreign contiguous countries or adjacent islands, so that such waivers may only be granted (in non-emergency situations) through a joint determination by the Secretary of DHS and Secretary of State on the basis of reciprocity, and then only if the arriving foreign national is in possession of identification documents deemed secure by the Secretary of DHS [House-passed]; and
- requiring the Secretary of State, in consultation with DHS, expeditiously to develop and implement a plan for the use of biometric passports. This plan would require U.S. citizens and foreign nationals from contiguous territories or adjacent islands (i.e., aliens currently waived in § 214(d)(4) of INA) to present biometric passports, or some other type of secure biometric travel document, for travel into the United States [Senate-passed].

For further discussion of these and related topics, see CRS Report RL32399, *Border Security: Inspections Practices, Policies, and Issues*; CRS Report RL32188, *Monitoring Foreign Students in the United States: The Student and Exchange Visitor Information System (SEVIS)*, CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT)*; CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*; and CRS Report RL32221, *Visa Waiver Program*.

Grounds for Alien Exclusion, Removal, and Relief from Removal

A primary area of difference between H.R. 10 and S. 2845 concerns grounds for alien exclusion, removal, and relief from removal, as only H.R. 10 deals extensively with these areas. The Immigration and Nationality Act (INA) establishes admission and removal criteria for all foreign nationals seeking to enter and/or remain in the United States, and also provides certain discretionary and non-discretionary forms of relief from removal, such as granting asylum or withholding removal to a country where an alien is likely to face serious persecution or torture. Starting with the Anti-Drug Abuse Act of 1988 (P.L. 100-690) and continuing through the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132) and the IIRIRA, Congress has expanded the grounds of inadmissibility and deportation and the use of expedited

removal, while it has also restricted relief from removal and judicial review of removal decisions. Subsequently, the Supreme Court has held that there is a strong presumption in favor of judicial review of administrative actions, and therefore, in the absence of a clear statement of congressional intent to repeal habeas corpus jurisdiction over removal-related matters, such review is still considered available.⁵ Furthermore, the Court found that eliminating any judicial review, including habeas review, without any substitute form of review for pure questions of law would raise serious constitutional questions.⁶

Exclusion and Removal. After the 9/11 terrorist attacks, Congress further expanded the terrorism grounds for inadmissibility, removal, and mandatory detention in the USA PATRIOT Act in response to concerns that loopholes and inadequacies in the immigration laws were contributing to the ability of terrorists and their accomplices to travel to and remain in the United States. H.R. 10 seeks to broaden the scope of terror-related activity making an alien inadmissible or deportable, and limit the availability of relief from removal in certain circumstances. These proposals include:

- barring aliens who are engaged or have engaged in terrorist activity from having their removal withheld (except for in cases of aliens seeking relief under regulations implementing the U.N. Convention against Torture), and also denying such relief to aliens found by the Attorney General to have engaged in other terror-related activity (i.e., incitement or espousal of terrorist activities) [House-passed];
- expanding grounds making of terror-related activity making an alien inadmissible and deportable, including receiving military-type training by or on behalf of an organization designated as a terrorist organization at the time of training [House-passed];
- expanding the definitions of “engaged in terrorist activity” and “terrorist organization,” which are used to describe certain grounds for inadmissibility and deportability, to include a broader scope of conduct relating to providing money or material support to a terrorist organization [House-passed];
- providing for the inadmissibility and removability of aliens who have committed, ordered, assisted, incited, or otherwise participated in acts of genocide, torture, or extrajudicial killings abroad, or who have committed severe violations of religious freedom while serving as a foreign government official [House-passed];
- clarifying that an alien may be removed to his country of citizenship, birth, or residence, unless such a country physically prevents the alien from entering the country or unless removal to such a country would be prejudicial to the United States [House-passed];
- providing the Secretary of DHS with greater discretion in deciding the countries to which an inadmissible or deportable alien may be removed [House-passed];

⁵ *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001).

⁶ *Id.*

- expanding the class of aliens arriving in the United States subject to immediate removal without further hearing or review, by increasing the prior continuous U.S. physical presence required for exemption from such removal from two years to five years [House-passed];
- providing that an alien currently being prosecuted for a crime or serving a criminal sentence is not subject to immediate removal, presumably to ensure effective exercise of U.S. criminal jurisdiction [House-passed];
- eliminating habeas review and other non-direct judicial review for certain removal decisions and clarifying that in all immigration provisions restricting judicial review, such restrictions include habeas and other non-direct review, but that such restrictions do not preclude federal appellate court consideration of constitutional claims or other purely legal issues raised in accordance with current statutory procedures [House-passed]; and
- precluding courts from staying a removal order pending judicial review, unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law [House-passed].

Asylum and Other Forms of Relief from Removal. The United States has long held to the principle that it will not return a foreign national to a country where his life or freedom would be threatened. Aliens seeking asylum must demonstrate a well-founded fear that if returned home, they will be persecuted based upon one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion. In addition, regulations implementing the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter referred to as Torture Convention) prohibit the return of any person to a country where there are “substantial grounds” for believing that he or she would be in danger of being tortured. Proposals to modify asylum and other forms of relief from removal include:

- establishing more stringent standards for asylum applicants accused by their home countries of being involved in terrorist or guerrilla-related activities, by requiring these applicants to demonstrate that their race, religion, nationality, membership in a particular social group, or political opinion was or will be *a central reason* for their persecution [House-passed];
- expressly providing that aliens who are a danger to the community or national security of the United States and who are ordered removed may be indefinitely detained pending removal, in the Secretary of Homeland Security’s nonreviewable discretion, and subject to review every six months by the Secretary [House-passed].

For additional background, see CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion of Aliens*; CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*; and CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*.

Security of Personal Identification Documents

There has been some concern that the acquisition of U.S. identification documents by terrorist aliens may facilitate their ability to engage in terrorist activities. The 9/11 Commission noted that “[a]ll but one of the 9/11 hijackers acquired some form of U.S. identification document, some by fraud...[and] these forms of identification would have assisted them in boarding commercial flights, renting cars, and other necessary activities.”⁷ Accordingly, the Commission recommended that national standards be set for the issuance of birth certificates and drivers’ licenses to prevent their fraudulent acquisition.

The adoption of national standards for the issuance of drivers’ licenses and other forms of identification has long been the subject of controversy. Although not technically an immigration policy, the concern over these forms of identification — often referred to as “breeder documents” — has often been linked with immigration legislation. Pursuant to § 656 of the IIRIRA, Congress provided standards for acceptance of state drivers’ licenses and birth certificates when used for federal purposes. Many opponents alleged that this provision was a step towards the creation of a national identification card, and it was subsequently repealed in 2000.

In response to the 9/11 Commission’s recommendations, however, a number of proposals have been made to increase federal oversight over and improve the security of drivers’ licenses, birth certificates, and other state-issued forms of identification. Proposals have also been made to improve the security of Social Security documents and verify the identity of persons applying for benefits under the INA. These proposals to improve identification verification procedures and the security of personal identification documents include:

- barring federal agencies from accepting, for any official purpose, state-issued drivers’ licenses or other identification cards unless a state fulfills certain federal security requirements concerning the issuance of such documents [House- and Senate-passed];
- barring federal agencies from accepting, for any official purpose, state-issued documents that do not meet national minimum standards concerning the information and features included upon the drivers’ licenses, identification cards, and birth certificates that states may issue [House-passed, Senate-passed];
- barring federal agencies from accepting, for any official purpose, state-issued documents that do not meet national minimum issuance and record-keeping standards for the issuance of drivers’ licenses, identification cards, and birth certificates by states [House-passed, Senate-passed];
- barring federal agencies from accepting, for any official purpose, state-issued documents that do not meet certain identification verification procedures to ensure the accuracy of drivers’ licenses, identification cards, and birth certificates issued (including under H.R. 10 the prohibition on the acceptance of any foreign documents

⁷ *The 9/11 Commission Report*, p. 390.

- except official passports as a means to verify an applicant's identity) [House- and Senate-passed]; and
- providing relevant federal departments with the authority to conduct periodic audits of each state's compliance with federal requirements concerning the issuance of drivers' licenses, identification cards, and birth certificates [Senate-passed];
 - making certain grants to states contingent upon their participation in an interstate compact linking their respective motor vehicle databases [House-passed];
 - creating electronic birth and death registration systems that rely on a common data set and exchange protocol, so as to assist officials in assessing the validity of birth certificates and other records [House-passed];
 - establishing an electronic interface enabling authorized federal and state officials to verify records concerning vital events (i.e., birth, death, or marriage) [House-passed];
 - restricting the issuance of multiple replacement Social Security cards [House- and Senate-passed];
 - prohibiting a person's Social Security number from being displayed on his or her driver's license or motor vehicle registration [House-passed];
 - improving the application process for the "enumeration at birth" program which provides Social Security numbers to newborns [House-passed];
 - studying means for requiring photographic identification for Social Security numbers [House-passed];
 - requiring independent verification of any birth record submitted with an application for a Social Security account number [House- and Senate-passed]; and
 - requiring that, for purposes of establishing his or her identity to a federal employee, an alien present in the United States may present a valid foreign passport or an immigration document issued by DHS or the Department of Justice under the authority of immigration laws, and no other document can be used for such purposes [House-passed].

For further background, see CRS Report RS21953, *The 9/11 Recommendations Implementation Act (H.R. 10) and the National Intelligence Reform Act of 2004 (S. 2845): National Standards for Drivers' Licenses, Social Security Cards, and Birth Certificates*; CRS Report RL32127, *Summary of State Laws on the Issuance of Driver's Licenses to Undocumented Aliens*; CRS Report RL32094, *Consular Identification Cards: Domestic and Foreign Policy Implications, the Mexican Case, and Related Legislation*; CRS Report RS21137, *National Identification Cards: Legal Issues*; and CRS Report RL30318, *The Social Security Number: Legal Developments Affecting Its Collection, Disclosure and Confidentiality*.

Allocation of Additional Resources to Improve Enforcement

DHS is the primary federal agency responsible for enforcing immigration laws and securing the border. The DHS Bureau of Customs and Border Protection (CBP) is responsible for patrolling the U.S. border and conducting immigration and customs inspections at ports of entry, while the DHS Bureau of Immigrations and Customs Enforcement (ICE) investigates immigration and customs violations in the interior of the country. Employees in other federal agencies also play a significant role in enforcing immigration laws and protecting border security, such as consular officers in the State Department who are responsible for screening aliens seeking visas to enter the United States from abroad. In issuing its recommendations to improve homeland security, the 9/11 Commission noted the importance of a border security system that can adequately identify persons attempting to enter the United States. A number of proposals made in response to the 9/11 Commission's findings have called for the allocation of additional resources to improve border security. Of the bills implementing the 9/11 Commission recommendations, the proposals include:

- increasing the number of full-time border patrol agents, immigration and customs-enforcement investigators, and consular officers [House- and Senate-passed];
- directing the Secretary of Homeland Security to increase Detention and Removal Operations (DRO) bed space [House-passed];
- improving the training of immigration enforcement officials within DHS and consular personnel within the State Department [House- and Senate-passed];
- acquiring and deploying to all consulates, ports of entry, and immigration benefits offices, technologies (including biometrics) to facilitate document authentication and detection of potential terrorist indicators on travel documents [House- and Senate-passed];
- expanding and increasing appropriations for pre-inspection at foreign airports of passengers traveling to the United States [House-passed];
- expediting construction to fill two gaps in the 14 mile long barrier at the San Diego border [House-passed];
- directing the Secretary of Homeland Security to develop and implement a plan for continuous surveillance of the Southwest border of the United States by remotely piloted aircraft [Senate-passed]; and
- requiring the Secretary of Homeland Security to carry out an advanced technology security pilot program on the Northern border of the United States [Senate-passed].

For additional background on the roles of various agencies in protecting border security, see CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*; CRS Report RL32399, *Border Security: Inspections Practices, Policies, and Issues*; CRS Report RL32566, *Border and Transportation Security: Appropriations for FY2005*; CRS Report RL32369, *Immigration-Related Detention: Current Legislative Issues*; and CRS Report RL32256, *Visa Policy: Roles of the Departments of State and Homeland Security*.

Penalties for Immigration-Related Fraud and Alien Smuggling

At the heart of the INA are the rules on which aliens may enter and remain in the United States, the conditions of their stay, and the procedures for their entry and removal. In support of this structure, federal law has concomitantly imposed civil and criminal penalties on a variety of activities — i.e., smuggling or harboring illegal aliens, committing immigration-related document fraud to secure either entry into the United States or a benefit under the INA — that facilitate or further violations of the legal immigration system. House-passed S. 2845 proposes to heighten criminal penalties for conduct violating or facilitating the violation of U.S. immigration law, which include increasing the criminal and immigration-related penalties for document fraud, alien smuggling, and making false claims of U.S. citizenship.

For additional background, see CRS Report RL32480, *Immigration Consequences of Criminal Activity*; and, CRS Report RS21043, *Immigration: S Visas for Criminal and Terrorist Informants*.