

PROTECTING THE HOMELAND ACT

DECEMBER 12, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 5401]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5401) to impose limitations on the immigration status and immigration benefits for Libyan and third country nationals acting on behalf of Libyan entities, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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Purpose and Summary

The Protecting the Homeland Act prohibits the lifting of a long-standing prohibition on Libyans coming to the U.S. to attend flight school, to work in aviation maintenance or flight operations, or to study or seek training in nuclear science. This bill simply codifies the existing regulation at 8 C.F.R. § 214.5 that bars Libyan nationals from coming to the U.S. to study or work in the aforementioned fields.

Background and Need for the Legislation

I. OVERVIEW

On November 25, 2013, Judiciary Committee Chairman Goodlatte and Representative Chaffetz wrote a letter to the Department of Homeland Security (DHS) regarding an internal draft final regulation (Billing Code 9111–28) to lift the longstanding prohibition on Libyans entering the United States to work in aviation maintenance, flight operations, or to study or train in nuclear-related fields. Under the terms of this draft final regulation, removal of the prohibition will go into effect without prior notice and comment. The prohibition¹ was put into place in 1983 after a series of terrorist incidents involving Libyan nationals. The Administration’s draft regulation rescinding this prohibition justifies lifting this ban by claiming the United States’ relationship with Libya has been “normalized.”²

Clearly, the U.S. relationship with Libya is anything but normal, as evidenced by the September 11, 2012 assault on the U.S. compound in Benghazi, Libya that resulted in the murder of our ambassador to that country. Not only did four Americans die on that date, but numerous other terror threats have continued from Libya in recent months.

According to the draft final regulation, the rule would allow Libyans to come to the United States to study or obtain training in aviation maintenance, flight operations, or nuclear-related fields. The draft rule also indicates, “DHS is of the opinion that the removal of 8 CFR 214.5 is exempt from § 553 (Rulemaking) of the APA [Administrative Procedure Act] because it involves a foreign affairs function of the United States to the extent that it will impact relations with a foreign government.” Hence, it appears that the rule is planned to be published as a final rule without any prior public notice and comment. The regulation at 8 CFR 214.5 reads:

§ 214.5 Libyan and third country nationals acting on behalf of Libyan entities.

(a) Notwithstanding any other provision of this title, the nonimmigrant status of any Libyan national, or of any other foreign national acting on behalf of a Libyan entity, who is engaging in aviation maintenance, flight operations, or nuclear-related studies or training is terminated.

¹ See *Libyan and Third Country Nationals Acting on Behalf of Libyan Entities*, 8 CFR § 214.5.

² Proposed Draft Rule, *Rescinding Suspension of Enrollment for F and M Non-Immigrant Students from Libya and Third Country Nationals Acting on Behalf of Libyan Entities*, Billing Code, 9111–28, DHS Docket. No. ICEB–2013–0003, RIN 1653, AA69.

(b) Notwithstanding any other provision of this chapter, the following benefits will not be available to any Libyan national or any other foreign national acting on behalf of a Libyan entity where the purpose is to engage in, or seek to obtain aviation maintenance, flight operations or nuclear-related studies or training:

- (1) Application for school transfer.
- (2) Application for extension of stay.
- (3) Employment authorization or practical training.
- (4) Request for reinstatement of student status.
- (5) Application for change of nonimmigrant status.

The November 25, 2013 letter addressed the proposed rescission of this regulation and posed numerous questions to DHS regarding the regulation.

As DHS never responded to the letter, a follow up letter was sent on March 19, 2014 to DHS signed by Judiciary Committee Chairman Goodlatte, Oversight and Government Reform Committee Chairman Issa, Judiciary Subcommittee on Immigration and Border Security Chairman Gowdy, and Oversight and Government Reform Committee Subcommittee on National Security Chairman Chaffetz. The March 19th letter indicated that since the time of the initial November 25th letter, DHS had already moved forward with the draft regulation and had sent it to the Office of Management and Budget (OMB) for review. DHS moved forward with the rule after Members of Congress requested and did not receive information from DHS. A cursory review of the publicly available information on OMB's website demonstrates that DHS sent the regulation to OMB on January 1, 2014.³ While it had time to send the regulation out of DHS and to OMB for review, DHS seemingly did not have time to respond to legitimate congressional oversight.

On March 21, 2014, 2 days after the House Judiciary Committee and House Committee on Oversight and Government Reform sent the follow up letter to DHS, DHS sent an incomplete response answering some of the questions asked. The draft response confirmed information that was already publicly available and of which the Committees were already aware. Specifically, "the draft regulation has been under review, pursuant to Executive Order 12866 *Regulatory Planning and Review*, at the Office of Management and Budget's Office of Information and Regulatory Affairs since January 1, 2014. In the fall 2013 edition of the Unified Agenda of Federal Regulatory and Deregulatory Actions, DHS included an entry for this regulation." DHS did not answer the substantive questions posed in the letter nor provide any update whatsoever on the regulation and when it may become final.

II. LIBYA AND CONCERNS REGARDING THE DRAFT REGULATION

A. Longstanding Ban on Libyans

The prohibition at 8 CFR §214.5, entitled, "Libyan and Third Country Nationals Acting On Behalf Of Libyan Entities," was put

³ See *Rescinding Suspension of Enrollment for Certain F and M Nonimmigrant Students from Libya and Third Country Nationals Acting on Behalf of Libyan Entities*, available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201310&RIN=1653-AA69>, last visited March 28, 2014.

into place in the early 1980's after a series of terrorist incidents involving Libyan nationals. Specifically, in 1969, Muammar al-Qadhafi led an army coup and overthrew the King of Libya.⁴ In 1970, he removed U.S. and British military bases and expelled Italian and Jewish Libyans. In 1973, he took control of foreign-owned oil fields. He reinstated traditional Islamic laws, such as prohibition of alcoholic beverages and gambling.⁵ On December 2, 1979, a mob attacked and burned the U.S. Embassy in Tripoli, and on December 29, 1979, the United States designated Libya as a state sponsor of terrorism.⁶ On May 2, 1980, after the Government of Libya announced a campaign to assassinate dissidents abroad, the United States suspended diplomatic relations with Libya, expelled four Libyan diplomats from Washington, recalled its last two diplomats from Tripoli, and closed the Embassy there.⁷ Qadhafi's government financed a wide variety of terrorist groups across the globe ranging, from Palestinian guerrillas, Philippine Muslim rebels to even the Irish Republican Army.⁸

In order to protect Americans, on March 11, 1983, the Immigration and Naturalization Service (INS) published a final rule prohibiting Libyan nationals, or other foreign nationals acting on behalf of a Libyan entity, from obtaining certain immigration benefits for the purpose of engaging in or seeking to obtain aviation maintenance, flight operations, or nuclear-related studies or training.⁹ The explanatory material to the rule states that:

These prohibitions are based upon a determination by the Secretary of State that aviation and nuclear-related training by foreign nationals in the United States, whose skills could be used by the Government of Libya, are detrimental to the security of the United States.¹⁰

At the time that the prohibition was put in place and thereafter: Qadhafi's confrontational foreign policies and use of terrorism, as well as Libya's growing friendship with the U.S.S.R., led to increased tensions with the West in the 1980's. Following a terrorist bombing at a discotheque in West Berlin frequented by American military personnel, in 1986 the U.S. retaliated militarily against targets in Libya, and imposed broad unilateral economic sanctions. After Libya was implicated in the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland, UN sanctions were imposed in 1992. UN Security Council resolutions (UNSCRs) passed in 1992 and 1993 obliged Libya to fulfill requirements related to the Pan Am 103 bombing before sanctions could be lifted. Qadhafi initially refused to comply with these requirements, leading to Libya's political and economic isolation for most of the 1990's.¹¹

⁴See *Qaddafi leads coup in Libya*, available at <http://www.history.com/this-day-in-history/qaddafi-leads-coup-in-libya>, last visited March 28, 2014.

⁵See *id.*

⁶See Arms Control Association, *Chronology of Libya's Disarmament and Relations with the United States*, available at <http://www.armscontrol.org/factsheets/LibyaChronology> (Feb. 2014).

⁷See *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Libya*, available at <http://www.state.gov/outofdate/bgn/libya/120759.htm>, last visited March 28th, 2014.

⁸See *id.*

⁹See 48 Fed. Reg. 10, 296, 8 C.F.R. § 214.5.

¹⁰*Id.*

¹¹*Supra* note 7.

B. The Draft Regulation

The draft final regulation contemplated by the Administration would allow Libyans to come to the United States to study or obtain training in aviation maintenance, flight operations, or nuclear-related fields. Specifically, the draft rule states:

[DHS] is amending its regulations by rescinding the regulatory provisions promulgated in 1983 that terminated the nonimmigrant status and barred the granting of certain immigration benefits to Libyan nationals acting on behalf of Libyan entities who are engaging in or seeking to obtain studies or training in aviation maintenance, flight operations, or nuclear-related fields. The United States and the Government of Libya have *normalized* their relationship and most of the restrictions and sanctions imposed by the United States and United Nations towards Libya have been lifted. Therefore, DHS, after consultation with the Department of State and the Department of Defense, is rescinding the restrictions that deny nonimmigrant status and benefits to a specific group of Libyan Nationals.¹²

Should the regulation be rescinded, any Libyan could seek to enter the U.S. in order to work in aviation maintenance, flight operations, or study or train in nuclear related fields.

On February 1, 2010, DHS received a letter from then-Assistant Secretary of State for the Bureau for Near Eastern Affairs, Jeffrey Feltman, requesting the rescission or revision of 8 C.F.R. § 214.5.¹³ Shortly thereafter, widespread unrest in Libya precluded the U.S. government from engagement with Libya. The post-Arab Spring civil war in Libya led to the fall of the Qadhafi regime in August 2011, and Qadhafi was captured and then killed by rebel forces in October 2011. Following the revolution, the Obama Administration once again began the process of “normalizing” relations with that country.

On May 31, 2012, DHS received a second letter from then-Assistant Secretary Jeffrey Feltman, with a joint signature from Joseph McMillan, Acting Assistant Secretary of Defense for International Security Affairs, stating the “outdated regulation does not reflect current U.S. government policy towards Libya.”¹⁴

Immediately after this request was made, on September 11, 2012, US Ambassador John Christopher Stevens and three other State Department officials were killed when terrorists stormed the U.S. Consulate in Benghazi, Libya. “Armed men attacked the consulate building in Benghazi late on September 11, setting it ablaze and burning it down. Witnesses said the diplomatic building was ransacked and looted before being set on fire. They say it had also been badly damaged by homemade bombs and rocket-propelled grenades.”¹⁵ Furthermore, a statement by U.S. State Department spokeswoman Victoria Nuland said the United States condemned

¹² *Supra* note 2 (emphasis added).

¹³ See February 1, 2010 letter from then-Assistant Secretary of State for the Bureau for Near Eastern Affairs, Jeffrey Feltman to then Assistant Secretary Heyman of DHS Policy.

¹⁴ See Letter to DHS Assistant Secretary Heyman from Jeffrey Feltman of the Department of State and Joseph McMillan of the Department of Defense (May 31, 2012).

¹⁵ Radio Free Europe Radio Liberty, *U.S. Ambassador, Staff Killed In Attack On Benghazi Consulate*, available at <http://www.rferl.org/content/american-staffer-killed-in-attack-against-benghazi-consulate/24705590.html>, last visited October 29, 2014 (September 12, 2012).

the attack “in the strongest terms” and was working with Libyan security forces to secure the compound. Obama called the attack in Benghazi “outrageous and shocking,” and vowed its perpetrators will face justice. “I’ve also directed my administration to increase our security at diplomatic posts around the world.”¹⁶ President Obama said, “And make no mistake—we will work with the Libyan government to bring to justice the killers who attacked our people.”¹⁷

Despite the attacks, the Obama Administration continues to argue that the long-standing prohibition that was put in place by then-President Reagan’s Administration in order to protect the homeland against serious threats from terrorists from a particularly unstable and dangerous country is no longer needed today. However, many of the characteristics that caused the regulation to go into place regarding Libya persist today—regardless of any progress that may have been made following the removal of Muammar Qadhafi from power and attempts to improve relations with the fragile Libyan government in Tripoli. Unfortunately, the terror threat continues and numerous news reports document recent terror-related activity involving Libyans.

Further, the draft regulation goes on at length to discuss the manner in which relations with Libya have improved and are now “normalized,” but fails to make any mention whatsoever of the terrorist attack in Libya on September 11, 2012. Ignoring this event in a draft regulation that deals squarely with the threat of terror from Libyan nationals is unacceptable and will not obscure the fact that it occurred, nor will it do anything to address the safety of Americans. The U.S. consulate attack on September 11, 2012 that resulted in the death of Ambassador Christopher Stevens and three other Americans, as a minimum, highlighted the considerable instability in Libya.

Finally, DHS is moving forward on the regulation without apprising Congress. The Committee learned via web publication that the final regulation was approved by OMB and is now back at DHS awaiting Secretary Johnson’s signature. OMB completed its review on July 18, 2014.¹⁸ At any point in time now, DHS Secretary Johnson can sign the rule so that it can be published in the Federal Register and henceforth “flight students” and nuclear science students from Libya will be free to come to the United States. All of this despite the fact that Libya has descended into utter chaos since the Committee’s hearing on April 3, 2014.

C. Continued Terror Threat from Libya

The National Transitional Council (NTC) has struggled to govern Libya effectively since the fall of Qadhafi:

The majority of territory outside Tripoli has fallen under the control of armed militias that have refused to disarm. Violent campaigns along tribal and ideological lines have been waged by Libyans determined to settle old scores and influence the ongoing political transition. Libya’s armed Islamists are well positioned to shape the course of events.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See OMB Website, available at <http://www.reginfo.gov/public/do/eoReviewSearch>.

This year the NTC will be challenged to integrate the Islamists into the national political system, yet failure to do so will likely result in marginalized militants playing the spoiler. If current events in Algeria and Mali are an indication of what the future holds for Libya, Islamists may be expected to wage armed attacks against their opponents and western targets.¹⁹

Reports have indicated that al-Qaeda Senior Leadership (AQSL) is seeking to create an al-Qaeda clandestine network in Libya that could be activated in the future to destabilize the government and/or to offer logistical support to al-Qaeda's activities in North Africa and the Sahel.²⁰ Al-Qaeda in the Islamic Maghreb (AQIM) has reportedly formed sleeper cells that are probably connected to an Al-Qaeda underground network in Libya, likely as a way to secure the supply of arms for its ongoing jihadist operations in Algeria and the Sahel. Al-Qaeda and its North African affiliate have clearly taken advantage of the still-evolving, post-revolutionary, political and social dynamics in Libya.²¹

Even before the deadly attack on the U.S. consulate in Benghazi on September 11, 2012, there were clear signs that the security situation in eastern Libya was deteriorating.²² The pattern of violent incidents attributed to Salafist groups²³ from March 2012 to September 2012 clearly demonstrated a worsening security environment. One important inflection point was a large demonstration that was held in Benghazi on June 7, 2012, in which heavily armed Salafist groups from across the country gathered and called for the establishment of Sharia law in Libya.²⁴ Between June and September 2012, numerous security incidents occurred in and around Benghazi:

- June 6, 2012—Improvised Explosive Device (IED) attack on the Special Mission Compound. The IED detonates with no injuries but blows a large hole in the compound's exterior wall. A terrorist group makes an unsubstantiated claim of responsibility.
- June 8, 2012—Two hand grenades target a parked U.K. diplomatic vehicle in Sabha (800 km south of Benghazi).
- June 11, 2012—While in Benghazi, the British Ambassador's convoy is attacked with an Rocket Propelled Grenade (RPG) and possible AK-47s. Two U.K. security officers are injured; the U.K. closes its mission in Benghazi the following day.
- June 12, 2012—An RPG attack is made on the International Committee of the Red Cross (ICRC) compound in Misrata (400 km west of Benghazi).

¹⁹Daniel Wagner & Giorgio Cafiero, *Rise of Radical Muslim Groups in Libya* (January 23, 2013), available at http://www.realcrowworld.com/articles/2013/01/23/rise_of_radical_muslim_groups_in_libya_100499.html, last visited October 29, 2014.

²⁰See A Report Prepared by the Federal Research Division, Library of Congress, *Al-Qaeda in Libya: A Profile*, available at <https://www.fas.org/irp/world/para/aq-libya-loc.pdf> (August 2012).

²¹See *id.*

²²See *id.*

²³Salafism is a militant group of extremist Sunnis.

²⁴See *Details and analysis of the Benghazi attack* available at http://www.wdrep.com/_wp/war/details-and-analysis-on-the-benghazi-attack, last visited October 31, 2014.

- June 18, 2012—Protestors storm the Tunisian consulate in Benghazi.
- July 29, 2012—An IED is found on grounds of the Tibesti Hotel.
- July 30, 2012—A Sudanese consul in Benghazi is carjacked and the driver is beaten.
- July 31, 2012—Seven Iranian-citizen ICRC workers are abducted in Benghazi.
- August 5, 2012—ICRC Misrata office is attacked with RPGs. ICRC withdraws its representatives from Misrata and Benghazi.
- August 9, 2012—A Spanish-American dual national NGO worker is abducted from the Islamic Cultural Center in Benghazi and released the same day.
- August 20, 2012—A small bomb is thrown at an Egyptian diplomat's vehicle parked outside of the Egyptian consulate in Benghazi.²⁵

In addition, during the 6 months prior to September 11, militant Salafists targeted U.S and other Western diplomatic and humanitarian entities, such as the U.N. and U.K. missions in Libya and the offices of the ICRC. They attacked physical structures and mobile targets including diplomatic vehicles. Attackers employed weapons ranging from RPGs to IEDs.

More Recent Terror Attacks

The draft regulation also turns a blind eye to more recent terrorist activity. For example, the regulation makes no mention that on September 10, 2013, a group calling itself the Islamic Emirate of Libya posted a notice online listing the U.S. Embassy in Tripoli as a possible target of a terror attack coinciding with the anniversary that week of the September 11th terrorist attacks. The group stated in an Arabic-language online posting that it was asking supporters to select a target for a bombing to be carried out that week to commemorate the September 11 attacks by al-Qaeda:

The first indications that jihadists might be benefiting from the unrest in Libya came not long after violence broke out, as regional leaders and press reports suggested that AQIM had gained weapons from abandoned Libyan stocks, including surface-to-air missiles. Others suggested that the group had forged connections with Libya's rebels, and that AQIM or al-Qaeda central might seek to implant itself in Libya.²⁶

In July and August 2013, U.S. military equipment used by U.S. Special Forces in Libya was stolen by terrorist groups from a mili-

²⁵ See U.S. Senate Select Committee on Intelligence, *Review Of The Terrorist Attacks On U.S. Facilities In Benghazi, Libya, September 11-12, 2012* at 12-14, available at: <http://www.intelligence.senate.gov/benghazi2014/benghazi.pdf>. (January 15, 2014).

²⁶ Aaron Y. Zelin, Andrew Lebovich, *Assessing Al-Qa'ida's Presence in the New Libya*, available at <https://www.etc.usma.edu/posts/assessing-al-qaidas-presence-in-the-new-libya> last visited October 31, 2014.

tary training camp run by U.S. Special Forces outside Tripoli.²⁷ Specifically, highly sensitive U.S. military equipment stored in Libya was stolen over the summer by groups likely aligned and working with terrorist organizations.²⁸ These raids contributed to the decision to pull Special Forces personnel from the country.²⁹ “Dozens of M4 rifles, night-vision technology and lasers used as aiming devices that are mounted on guns and can only be seen with night-vision equipment were lost in the raids.”³⁰ One source indicated, “The loss of this military equipment is what pulled the plug on the U.S. operation.”³¹ The source went on to say “No one at the State Department wanted to deal with the situation if any more went wrong, so State pulled its support for the training program and then began to try and get the team moved out of the country.”³²

To make matters worse, on October 5, 2013, U.S. special operations forces captured Abu Anas al-Liby in Tripoli.³³ He was a senior al-Qaeda operative responsible for the 1998 bombings of the U.S. embassies in Tanzania and Kenya, killing 224 people.³⁴ On October 6, 2013, after Abu Anas al-Liby was captured, Libya’s interim government condemned the United States for what it alleged to be the “kidnapping of a Libyan citizen” and Libyan lawmakers threatened to remove the prime minister if the government was involved.³⁵ The General National Congress, Libya’s most senior national authority, also called the capture of al Liby “flagrant aggression” against sovereignty and demanded that he be turned over immediately.³⁶ On October 8, 2013, Islamic militants called for the kidnapping of U.S. citizens in Libya and targeted attacks on American property following the raid by U.S. Special Forces to seize Abu Anas al-Liby.³⁷ On October 10, 2013, Libyan Prime Minister Ali Zeidan was kidnapped and held for a short period of time before being released unharmed by a group angry at the leader for alleged support for the U.S. operation against al Liby.³⁸

These incidents demonstrate the violent backlash in Libya created by any U.S. anti-terror activity in that country, but, per the Obama administration’s draft regulation, such actions are the benign fruit of a “normal” international relationship.

²⁷ See Adam Housley, *Sources: US weapons stolen in Libya raids, fueling Special Forces pull-out*, available at <http://www.foxnews.com/politics/2013/09/11/us-military-weapons-equipment-stolen-in-libya-raids/> (September 11, 2013).

²⁸ See *id.*

²⁹ See *id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See Reuters, *US forces detain Abu Anas Al Libi Al Qaeda leader accused of 1998 embassy bombings* <http://www.emirates247.com/news/region/us-forces-detain-abu-anas-al-libi-2013-10-06-1.523483>, (October 6, 2013).

³⁴ See *id.*

³⁵ See Carlotta Gall and David D. Kirkpatrick, *Libya Condemns U.S. for Seizing Terror Suspect*, available at http://www.nytimes.com/2013/10/07/world/africa/american-raids-in-africa.html?_r=0 (October 6, 2013).

³⁶ See Bill Gertz, *Terrorists Threaten to Strike Back, Terrorists threaten Americans, journalists in Libya following U.S. capture of al Qaeda leader*, available at <http://freebeacon.com/terror-threats-up-in-libya/> (October 11, 2013).

³⁷ See Tracey Shelton, *US citizens threatened with attack, kidnap in Libya after terror raid*, available at <http://www.nbcnews.com/news/world/us-citizens-threatened-attack-kidnap-libya-after-terror-raid-v20870872> (October 8, 2013).

³⁸ See Ulf Laessing, *Libyan PM flees country after tanker escapes rebel-held port*, available at <http://www.reuters.com/article/2014/03/12/us-libya-oil-idUSBREA2B0N920140312> (March 12, 2013).

There have been numerous concerns regarding the political situation in Libya more recently. For example, on March 12, 2014, the Libyan prime minister Ali Zeidan “fled after parliament voted him out of office,” a North Korean oil tanker “illegally picked up a cargo of crude from rebels in the east of the country” and then manage to sail away with no problems even though government officials said that the vessel would be “turned into a pile of metal” if it left the country.³⁹ “Militias based in Misrata, western Libya, notorious for their violence and independence, have launched an offensive against the eastern rebels in what could be the opening shots in a civil war between western and eastern Libya. Without a central government with any real power, Libya may be falling apart.”⁴⁰ To make matters worse:

Libya’s oil exports have fallen from 1.4 million barrels a day in 2011 to 235,000 barrels a day. Militias hold 8,000 people in prisons, many of whom say they have been tortured. Some 40,000 people from the town of Tawergha south of Misrata were driven from their homes which have been destroyed. “The longer Libyan authorities tolerate the militias acting with impunity, the more entrenched they become, and the less willing to step down” said Sarah Leah Whitson, Middle East and North Africa director at Human Rights Watch. “Putting off repeated deadlines to disarm and disband militias only prolongs the havoc they are creating throughout the country.”⁴¹

On March 19, Libya acknowledged for the first time that “terrorist groups” were behind dozens of attacks against security services. The government indicated that “Benghazi, Derna, Sirte and other cities are facing a terrorist war waged by Libyan and foreign elements who have hostile, evil agendas.”⁴²

On March 20, 2014, Libya’s government requested assistance from the international community to help it fight the terrorism that is causing instability in the country.⁴³ On the same day, a missile was launched at the Tripoli runway shutting down the airport. Then:

On July 13, 2014, heavy fighting broke out between rival militias vying for control of Libya’s main airport, killing at least seven people and forcing a halt of all flights in the worst fighting in the capital in 6 months. An election in June had been aimed at rebuilding state institutions in an attempt to quell 3 years of spreading violence since the ouster of long-time ruler Muammar Qadhafi. The recent fighting is part of growing turmoil in the North African oil producer, where the government is unable to control bat-

³⁹ See *Three years after Qadhafi, Libya is imploding into chaos and violence. World View: Its government has no real power; militias are ever more entrenched, and now the state itself is under threat*, available at <http://www.independent.co.uk/voices/commentators/three-years-after-Qadhafi-libya-is-imploding-into-chaos-and-violence-9194697.html>, (March 16, 2014).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Ali Al-Gattani, *Libya Seeks Help to Combat Terrorism*, available at <http://allafrica.com/stories/201403211519.html>, (March 21 2014).

⁴³ See Voice of America, *Libya: Govt Seeks World’s Help to Fight Terrorism*, available at <http://allafrica.com/stories/201403200678.html> (March 20, 2014).

tle-hardened militias that helped to overthrow Qadhafi in 2011 but continue to defy state authority.⁴⁴

On July 26, 2014, “the United States suspended operations at its embassy in Libya and evacuated its diplomats to neighboring Tunisia under U.S. military escort amid a significant deterioration in security in Tripoli as fighting intensified between rival militias.”⁴⁵ The State Department indicated that “Due to the ongoing violence resulting from clashes between Libyan militias in the immediate vicinity of the U.S. Embassy in Tripoli, we have temporarily relocated all of our personnel out of Libya.”⁴⁶ The withdrawal demonstrated the continued threat in Libya and the need to protect diplomats abroad, “particularly in Libya after the deadly 2012 attack on the U.S. mission in the eastern city of Benghazi.”⁴⁷ Approximately “70 embassy staffers were driven out of the city in a caravan by 80 Marines.”⁴⁸

On August 4, 2014, militia clashes in Libya spread from Tripoli to the town of Zawiya close to the Tunisian border, resulting in the death of four people.⁴⁹ Most foreign governments have closed their embassies and evacuated staff after weeks of clashes that “turned Libya’s two main cities—Tripoli and Benghazi—into warzones in the worst fighting since the NATO-backed war against Qadhafi.”⁵⁰ Unfortunately, “three years after Qadhafi’s fall, Libya’s government has been unable to tame rival brigades of former rebel fighters who have allied themselves with competing political factions in a struggle over post-war spoils.”⁵¹

On August 27, 2014, Libya warned the U.N. Security Council that the country could “descend into full-scale civil war if heavily armed warring factions are not disarmed.”⁵² The council met to discuss Libya days after its parliament, “which was replaced in an election in June, reconvened and chose an Islamist-backed deputy as the new prime minister. That left the country with two rival leaders and assemblies, each backed by armed factions.”⁵³

In August, Libya’s elected government was forced to flee the capital, Tripoli, and take shelter in Tobruk, a port city near the border with Egypt.⁵⁴ And as of September 9, 2014, Libya’s parliament-in-exile was under siege, and compelled to find accommodation in a Greek car ferry moored at Tobruk’s docks.⁵⁵ The 17,000-ton boat, typically used to convey vehicles between Italy and Greece, is the

⁴⁴ Louis Charbonneau, *Libya warns United Nations of possible slide into civil war*, available at <http://www.reuters.com/article/2014/08/27/us-libya-security-un-idUSKBN0GR1TT20140827>, last visited October 30, 2014.

⁴⁵ *US evacuates embassy in Libya amid clashes in Tripoli*, Fox News, available at <http://www.foxnews.com/world/2014/07/26/us-evacuates-embassy-in-libya-amid-clashes-in-tripoli/> (July 26, 2014).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Aziz El Yaakoubi, *Libya militia clashes spread beyond Tripoli towards Zawiya oil port*, available at <http://news.yahoo.com/libya-militia-clashes-spread-beyond-tripoli-towards-zawiya-181224987.html> (August 7, 2014).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Supra* note 44.

⁵³ *Id.*

⁵⁴ See Chris Stephen, *Libyan parliament takes refuge in Greek car ferry: Elyros liner is deployed as floating hotel for legislature that has fled war-torn capital for eastern town of Tobruk*, available at <http://www.theguardian.com/world/2014/sep/09/libyan-parliament-refuge-greek-car-ferry>, last visited October 31, 2014 (September 9, 2014).

⁵⁵ *See id.*

temporary residence for dozens of lawmakers in need of sanctuary.⁵⁶

Overall:

Since the uprising against Qadhafi began in February 2011, Libya has become a source of attention for jihadists and a grave concern for regional and Western leaders. There are clear signs of jihadist efforts to infiltrate Libya, and even signs of some possible success for al-Qaeda in establishing a small but significant presence in Libya. Security officials must be vigilant for signs of support for al-Qaeda among Libyan militias and further expansion of the group's reach, especially evidence of training and indoctrination of Libyans by al-Qaeda-linked figures.

It appears that AQIM in particular has chosen to profit from the Libyan unrest by seizing weapons, but has remained ensconced in safe havens in northern Mali and Algeria. The same cannot be definitively said for other al-Qaeda-linked figures, who are accustomed to operating clandestinely when setting up funding and operational networks and may be doing the same in Libya. Given al-Qaeda's expressed interest in the country and the key role Libyan militants have historically played in the organization, this concern cannot be easily dismissed.⁵⁷

All of these issues show that the time now is not ripe to lift the longstanding regulation put into place to protect U.S. interest. Given the instability of the government, it is highly possible that even if we assist with training Libyans for whom the government has vouched, should the government fall apart, our training, resources, and tools could be used against us, or our allies. As Janice Kephart elaborated in her testimony before this Committee:

Concerns about aviation education are widely understood, mostly due to the facts and circumstances of the four 9/11 hijacker pilots who obtained their expertise in aviation primarily at U.S. flight schools. Perhaps a little less well known is that the Pentagon pilot, Hani Hanjour, was likely picked for the 9/11 operation due to his attendance to flight school in the U.S. in the mid-1990's. The 9/11 Final Report supplement, 9/11 and Terrorist Travel, provides an in-depth explanation of how the two lead 9/11 pilots abused the immigration process to enter the United States without vocational "M" visas, but attended flight school anyway.⁵⁸

D. Country Specific Bans

Libya is not the only country that is subject to a country specific bar, hence it is not accurate to say that there are no other similar bars. There are numerous statutes that bar nationals from specific

⁵⁶ See *id.*

⁵⁷ *Supra* note 26.

⁵⁸ Testimony of Janice Kephart, Joint Hearing before the House Judiciary Committee Subcommittee on Immigration and Border Security and the House Oversight and Government Reform Committee Subcommittee on National Security, *Overturning 30 Years of Precedent: Is the Administration Ignoring the Dangers of Training Libyan Pilots and Nuclear Scientists*, April 3, 2014.

countries from certain immigration benefits, signifying that Congress has seen fit to block nationals from certain countries from obtaining certain benefits under the Immigration and Nationality Act.

For example, in 2012 President Obama signed into law legislation banning Iranian nationals from engaging in nuclear studies.⁵⁹ Military visitors from certain listed countries may not obtain a visa waiver to travel to the U.S. available to military members of other countries. Countries ineligible for the waiver include Cuba, Mongolia, North Korea, Vietnam, and the People's Republic of China.⁶⁰ Further, nationals of state sponsors of terrorism cannot receive P visas, and all visa applications in Saudi Arabia need to be reviewed by U.S. Immigration and Customs Enforcement prior to adjudication.⁶¹ In short, many other countries have special restrictions or limitations placed upon them.

E. Integrity of the Immigration System and Visa Applicant Screening

Ultimately, we must determine whether national security has been adequately considered in the making of this rule and whether the immigration system has sufficient integrity to withstand potential uncertainties about applicants' long term interests in obtaining sensitive security information and education from the United States.⁶²

Mohammad Atta and the 9–11 hijackers got around the screening in place in 2001 and Umar Farouk Abdulmutallab (the “Underwear Bomber”) got past the supposedly hi-tech screening in place in 2009. Any database is only as good as the intelligence we possess. Given Libya’s current state of disarray, our ability to make adequate findings of fact regarding the intentions of Libyan visa applicants is questionable at best. Hence, it is important to remember that these systems are not foolproof and it is imprudent to do away with a sensible restriction while Libya remains in chaos and appears to be descending into civil war, 2 years since our Ambassador to that country was murdered by an armed terrorist force. Further, core 9/11 Final Report recommendations and 9/11 and Terrorist Travel staff report findings of fact show that vigilance is essential when assuring immigration integrity against entry of foreign nationals who may threaten national security.⁶³

The integrity of our immigration system “is grounded in confidence that nations actively engaged in sending their foreign nationals to the United States for training or study programs that are listed on the Technology Alert List⁶⁴ such as nuclear science, or technical training in aviation, will not support proliferation of weapons of mass destruction; restrain from developing destabilizing conventional military capabilities in unstable regions of the world;

⁵⁹ See section 501 of Pub. L. No. 112–158 (The Iran Threat Reduction and Syria Human Rights Act of 2012).

⁶⁰ See 22 CFR § 41.3(e).

⁶¹ See INA § 214(c)(4)(F)(i).

⁶² *Supra* note 58.

⁶³ See *id.*

⁶⁴ The Technology Alert List is used by consular officials during the interview process in determining the issuance of non-immigrant visas. The list is used in cases that may fall under the Immigration Nationality Act § 212(a)(3)(a), which renders inadmissible aliens who there is reason to believe are seeking to enter the U.S. to violate U.S. laws prohibiting the export of goods, technology or sensitive information.

and prevent the transfer of arms and sensitive dual-use items to terrorist states.”⁶⁵ Indeed, “while U.S. policy states that Libya is no longer a state sponsor of terror per se, by Libya’s own assertion as recently as August 27, 2014, the country suffers from terrorist threat from within.”⁶⁶

DHS claims that even in the absence of 8 C.F.R. § 214.5, Libyan visa applicants whose planned travel raises security concerns would continue to be subject to requirements of interagency review and clearance under the “Visas Mantis” vetting procedure.⁶⁷

However, in regard to adjudication of nuclear or aviation-related student visas, the proposed DHS Final Rule states that Visas Mantis will apply only to “Libyan visa applicants whose planned travel raises security concerns.”⁶⁸

Furthermore, new 2012 State Department consular guidance states: “The Deputy Assistant Secretary for Visa Services may waive personal appearance requirement for an individual [visa] applicant after determining that such waiver is . . . in the national interest of the United States.”⁶⁹ In addition, [State Department consular guidance] gives authority to the Deputy Assistant Secretary for Visa Services to waive the in-person interview requirements if “national security concerns do not require an interview.”⁷⁰

As Janice Kephart stated in her testimony:

Reversing a 30-year Libyan ban on highly sensitive visas such as aviation operation and training and nuclear-related studies in a highly unstable political environment requires active review by the American people. If such a decision is determined to be warranted, all precautions must be in place. This is especially the case in instances where the United States is deciding to actively engage with a former designated state sponsor of terror such as Libya, a country whose nationals continue to conduct deadly terrorist activities against Americans and their own government.

When granting access to highly sensitive U.S. immigration benefits such as aviation and nuclear studies that have a strong and proven impact on national security, best-in-class immigration vetting is essential. Robust visa processing, including mandated interviews, Kingfisher and immigration security reviews are essential prior to visa issuance. Improvements and tracking through SEVIS is essential. Immigration enforcement should apply when necessary. All of these elements should be placed prior to any 214.5 rule rescission.

Without a robust plan in place that assures security vetting for both nuclear and aviation visa applicants’ eligibility, it is of concern that the terrorist organizations that currently plague the Libyan government could attempt to infiltrate the program, the Libyan government could fall to

⁶⁵ *Supra* note 58.

⁶⁶ *Id.*

⁶⁷ Alan Bersin, *Recommendation to take Regulatory Action to Rescind 8. C.F.R. § 214.5*, Memorandum to the Secretary Napolitano, (February 12, 2013).

⁶⁸ *Supra* note 2.

⁶⁹ *Supra* note 83; citing 9 FAM 41.102 N3.2(b).

⁷⁰ *Supra* note 83; citing 9 FAM 1.102 N3.5.

an unfriendly regime, or the Libyan government itself could have an unstated agenda.⁷¹

However, it is quite uncertain that U.S. security could be preserved even with these security measures in place with regard to Libyans seeking to work in aviation maintenance, flight operations or to study or train in nuclear related fields.

Hearings

The Subcommittee on Immigration and Border Security held a joint hearing on April 3, 2014 with the Committee on Oversight and Government Reform's Subcommittee on National Security.

Committee Consideration

On September 10, 2014, the House Judiciary Committee met in open session and ordered the bill H.R. 5401 favorably reported, without amendment, by a rollcall vote of 21 to 11, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 5401.

1) An amendment was offered by Ms. Lofgren that created an exemption for Libyans to come to the U.S. for the purposes of studying or working in aviation or studying nuclear science so long as they participating in a DHS approved program in consultation with DOD. Defeated 13–20.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)		X	
Mr. Holding (NC)		X	

⁷¹ *Supra* note 58.

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)	X		
Ms. DelBene (WA)	X		
Mr. Garcia (FL)			
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Total	13	20	

2) An amendment was offered by Ms. Jackson Lee that required the Administration to submit reports on the need for the bill and provided for a sunset of the bill within 3 years. Defeated 14–19.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Bachus (AL)			
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)		X	
Mr. Holding (NC)		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Collins (GA)			
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)	X		
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Total	14	19	

3. Motion to report H.R. 5401 favorably. Passed 21–11.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)	X		
Mr. Smith (TX)	X		
Mr. Chabot (OH)	X		
Mr. Bachus (AL)	X		
Mr. Issa (CA)	X		
Mr. Forbes (VA)	X		
Mr. King (IA)	X		
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)	X		
Mr. Poe (TX)	X		
Mr. Chaffetz (UT)	X		
Mr. Marino (PA)	X		
Mr. Gowdy (SC)	X		
Mr. Labrador (ID)	X		
Ms. Farenthold (TX)	X		
Mr. Holding (NC)	X		
Mr. Collins (GA)			
Mr. DeSantis (FL)	X		

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Smith (MO)	X		
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)		X	
Mr. Scott (VA)		X	
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)		X	
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)		X	
Ms. Chu (CA)		X	
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)		X	
Ms. DelBene (WA)	X		
Mr. Garcia (FL)			
Mr. Jeffries (NY)		X	
Mr. Cicilline (RI)			
Total	21	11	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

With respect to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, an estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 was not submitted to the Committee before the filing of the report.

Duplication of Federal Programs

No provision of H.R. 5401 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section

21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 5401 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 5401 codifies a longstanding prohibition at 8 C.F.R. § 214.5 on Libyans to come to the U.S. to attend flight school, to work in aviation maintenance or flight operations, or to study or seek training in nuclear science.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 5401 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the “Protecting the Homeland Act.”

Sec. 2. Libyan and Third Country Nationals Acting on behalf of Libyan Entities. Section 2 terminates the non-immigrant status of any Libyan national, or any other foreign national acting on behalf of a Libyan entity, who is engaging in aviation maintenance, flight operations, or nuclear-related studies. It also bars any such person from receiving certain similar enumerated benefits under our immigration laws.

Minority Views

H.R. 5401, the “Protecting the Homeland Act,” codifies and makes permanent a regulation that currently bans all Libyan nationals from coming to the United States to study or train in aviation maintenance, flight operations, or nuclear science. Since the regulation was first issued in 1983, much has changed with respect to America’s immigration system. Under our current system, all visa applicants now must go through extensive background and security checks, including interviews and biometric screenings. Applicants who pose security concerns are subject to additional vetting by the intelligence and law enforcement communities. Much has also changed over the last 31 years with respect to the relationship between the United States and Libya. Beginning in the late 1990’s, Libya took steps to denounce terrorism and abandon its nuclear and chemical weapons programs. During the George W. Bush Administration, the United States lifted economic sanctions against Libya, removed the country from the list of state sponsors of terrorism, and entered into a Science and Technology Cooperation Agreement with the country to educate and train Libyan scientists and technical experts.

Over the past several years, the Department of Defense (DOD) and the Department of State have several times requested that the Department of Homeland Security (DHS) take steps to rescind the existing regulatory ban. These departments—not one of which is generally considered soft on terror—have argued that lifting the ban would advance America’s security interests and better enable the U.S. government to support the new, democratically-elected Libyan government in its battle against extremist elements that are our common enemy. They also have argued that the background and security checks that are performed on all visa applicants and the enhanced law enforcement and intelligence checks that certain applicants undergo sufficiently protect our national security interests. At the time that H.R. 5401 was considered in Committee, a proposed final rule to rescind the regulatory ban was before the Secretary of Homeland Security. On September 17, 2014, Homeland Security Secretary Jeh Johnson testified before the Committee on Homeland Security that he decided not to rescind the regulatory ban.

Whether or not the existing regulation should remain in place is not the issue presented by H.R. 5401. That question resides with DHS, which decided to keep the regulation in place after consulting with DOD, the Department of State, and the intelligence community. Rather, the issue presented by H.R. 5401 is whether Congress should ignore the recommendations presented by the DOD, the State Department, and DHS and permanently tie the hands of the executive. It is our belief that codifying the existing regulation and making it permanent locks us into an unnecessary and unwise position. To the extent that some congressional action may be needed at this time, we believe that a more tailored approach that acknowledges the legitimate interests of our defense and national security experts would be preferable to the blanket and permanent ban imposed by H.R. 5401.

DESCRIPTION AND BACKGROUND

H.R. 5401 codifies and makes permanent a regulation that currently bans all Libyan nationals from coming to the United States to study or train in aviation maintenance, flight operations, or nuclear science. On September 10, 2014, the Committee voted to report the bill to the full House by a vote of 21–11.

The bill replicates the exact text of the Libyan and Third Country Nationals Acting on Behalf of Libyan Entities regulation.¹ Section 2(a) terminates the nonimmigrant status of any Libyan national, or of any other foreign national acting on behalf of a Libyan entity, who is engaging in aviation maintenance, flight operations, or nuclear-related studies or training.

Subsection (b) prohibits such persons from applying for school transfer, extension of stay, employment authorization or practical training, reinstatement of student status, or change of non-immigrant status.

¹ 8 C.F.R. § 214.5 (1983).

CONCERNS WITH H.R. 5401

I. EXISTING LEGAL AUTHORITIES AND BACKGROUND AND SECURITY CHECKS MAKE A BLANKET VISA BAN ON LIBYAN NATIONALS UNNECESSARY

A statutory ban on immigration benefits to Libyan nationals is not needed to protect the United States or its interests abroad. For example, there are currently no similar statutory or regulatory restrictions banning immigration benefits for nationals of countries such as Cuba, Sudan, and Syria, each of which remains a designated state sponsor of terrorism. Such restrictions are unnecessary because DHS and the State Department have broad authority under section 212(a)(3) of the Immigration and Nationality Act (INA) to deny visas and admission to any person suspected of being a terrorist, providing material support to terrorists, associating with terrorists, or otherwise posing a danger to national security or other U.S. interests.² DHS and the State Department also have wide discretion to deny entry to a person whose entry poses potentially serious adverse foreign policy concerns,³ or a person who is suspected of being likely to violate U.S. immigration law or the terms of admission to the country.⁴

In other words, rather than issuing blanket policies affecting all nationals of particular countries, DHS and the State Department primarily use a more targeted approach that weighs each individual's background, the reason for travel to the country, any U.S. interests that might be affected, and other critical factors. This enables DHS and the State Department to allow admission to persons who may benefit the U.S. while denying admission to persons who may pose a danger to our Nation. Such an approach is far superior to the approach that would be permanently codified into law by H.R. 5401, which denies visas to friends and foes alike.

Moreover, since the Libyan-specific regulation was promulgated in 1983, the U.S. government has significantly improved and expanded its procedures for vetting visa applicants, and today's vetting process considers a far broader range of information than it did in past years. Before the State Department issues a visa, applicants are interviewed and their fingerprints are checked against two law enforcement databases. The DHS Automated Biometric Identification System, or IDENT, screens against available fingerprints of known and suspected terrorists, wanted persons, and immigration law violators. IDENT currently contains approximately 160 million entries. More than 10,000 matches of visa applicants with records on the IDENT watchlist are returned to consular posts every month. The second database is the FBI's Integrated Automated Fingerprint Identification System, which contains more than 76 million criminal history records.⁵

² INA § 212(a)(3)(A); 8 U.S.C. § 1182(a)(3)(A).

³ INA § 212(a)(3)(C); 8 U.S.C. § 1182(a)(3)(C).

⁴ INA § 214(b); 8 U.S.C. § 1184(b).

⁵ *Overturning 30 Years of Precedent: Is the Administration Ignoring the Dangers of Training Libyan Pilots and Nuclear Scientists?*: J. Hearing Before the H. Subcomm. on Immigration and Border Security and the H. Subcomm. on National Security, 113th Cong. 47 (2014) [hereinafter "Libya Hearing"] (statement of Alan D. Bersin, Assistant Secretary for International Affairs and Chief Diplomatic Officer, Office of International Affairs, U.S. Department of Homeland Security).

Visa applicants also are checked against the automated Consular Lookout and Support System (CLASS), which contains 27 million records of persons found ineligible for visas or against whom potentially derogatory information exists. CLASS identifies matches between the names of visa applicants and any derogatory information contained in the database. CLASS has grown more than 400 percent since 2001—largely the result of improved interagency information sharing. Consular officers also run all visa applicants' names against the Consular Consolidated Database in order to detect and respond to derogatory information regarding visa applicants and visa holders. The Consular Consolidated Database contains more than 143 million immigrant and nonimmigrant visa records.⁶

Finally, the National Counterterrorism Center introduced in 2013 the Kingfisher Expansion program, which now subjects all immigrant and nonimmigrant visa applications to counterterrorism reviews based upon a sophisticated, automated comparison of visa application data against U.S. government classified terrorist identity holdings.⁷

Those are the standard checks that are applied to all visa applicants. Additional layers of security exist in the Security Advisory Opinion (SAO) process, which involves additional vetting by intelligence and law enforcement communities.⁸ Foreign nationals coming to the U.S. to engage in flight training, which could now include nationals of such states as Iran, North Korea, Yemen, and Saudi Arabia, are subject to additional security threat assessments and restrictions imposed by statute and regulation.⁹ And persons whose planned travel raises concerns regarding the transfer of sensitive technology or knowledge or the proliferation of weapons of mass destruction undergo still more checks through the Visas Mantis vetting process.¹⁰

II. A BLANKET STATUTORY RESTRICTION ON LIBYAN VISAS COULD HINDER U.S.-LIBYA MILITARY COOPERATION, NONPROLIFERATION, AND OTHER EFFORTS TO STRENGTHEN OUR BILATERAL RELATIONSHIP

During the markup, the Majority argued that the current regulation should not be rescinded in light of the security situation in Libya. Indeed, Secretary Johnson came to the same conclusion 1 month later, telling the Committee on Homeland Security that he was not prepared to rescind the regulation at this time.¹¹ Although the sponsors of H.R. 5401 praised the decision, they nevertheless announced plans to “move forward with legislation to prevent future Administrations from changing this policy.”¹² In effect, they repeated their argument that because certain extremist elements

⁶*Id.* at 47–48.

⁷*Id.* at 48–49.

⁸*Id.* at 48.

⁹See 49 U.S.C. § 44939; see also 49 C.F.R. § 1552.

¹⁰Libya Hearing at 48.

¹¹*Worldwide Threats to the Homeland: Hearing Before the H. Comm. on Homeland Security*, 113th Cong. (Sept. 17, 2014).

¹²Press Release, H. Committee on the Judiciary, Gowdy, Goodlatte, Chaffetz Praise Secretary's Decision to Keep Ban on Libyans Training as Pilots and Nuclear Scientists in U.S. (Sept. 17, 2014), at <http://judiciary.house.gov/index.cfm/2014/9/gowdy-goodlatte-chaffetz-praise-secretary-johnson-s-decision-to-keep-ban-on-libyans-training-as-pilots-and-nuclear-scientists-in-us>.

in Libya are now dangerous and would do us harm, we must retain the regulation at all costs and permanently codify it into law.

Nevertheless, the presence of dangerous factions within Libya actually may be a primary reason to rescind the regulation at some point, according to military and national security experts within the administration. The reason for this, they explain, is that the current ban impedes various U.S. efforts to support the new, democratically elected Libyan government in its battle against those extremist elements.

In 2012, the DOD and the State Department wrote to the DHS to explain that it is in America's interests that Libyan Air Force personnel receive necessary flight training in the U.S. to rebuild their fleet and that the current ban "will have serious implications for U.S.-Libya military cooperation and the overall bilateral relationship."¹³ It is worth remembering that the Libyan government used one of its Lockheed C-130 aircraft to rescue and evacuate the surviving U.S. diplomatic personnel in Benghazi on the night of September 11, 2012. The letter further explained that banning all Libyan students and scientists from pursuing studies and receiving training in nuclear-related fields in the U.S. actually interferes with the efforts of the Department of Energy and the State Department to provide such people with skills and training that can be used for "peaceful and economically viable pursuits."¹⁴

Although the security situation in Libya remained tenuous and the Libyan government continued to face serious challenges from extremists in the region, the DOD renewed its support for rescission of the regulation in April 2014. The Deputy Assistant Secretary of Defense for Africa Policy wrote to "now more than ever the Libyan government needs capable, centrally controlled Armed Forces."¹⁵ In order to do that, the Libyan Air Force must have the ability to maintain and upgrade its aging and increasingly obsolete fleet of U.S.-made aircraft and helicopters. That simply cannot happen if we enact a law that institutes a permanent visa ban on an entire class of Libyan nationals.

Late last year, Senator John McCain (R-AZ) went to Libya and explained the critical importance of training the Libyan Armed Forces. He said, "I have met with the military here and we are confident that we have plans now for training and equipment for the Libyan military."¹⁶ Senator McCain noted that this support was essential for helping the Libyan Armed Forces carry out their security and border management tasks—tasks critical to beating the extremist forces in the region. But the current visa restriction that H.R. 5401 would codify into law and make permanent prevents us from providing much of this training and equipment.

While the present security situation in Libya may now counsel against lifting the regulatory ban on certain travel to the United States, codifying that ban and making it permanent will only make

¹³Libya Hearing at 20 (letter from Jeffrey Feltman, Assistant Secretary of State for Near Eastern Affairs, and Joseph McMillan, Acting Assistant Secretary of Defense for International Security Affairs, to David Heyman, Assistant Secretary of Homeland Security for Policy (May 31, 2012)).

¹⁴*Id.* at 21.

¹⁵*Id.* at 26 (letter from Amanda Dory, Deputy Assistant Secretary of Defense for Africa Policy to Alan D. Bersin, Assistant Secretary for International Affairs and Chief Diplomatic Officer, Office of International Affairs, U.S. Department of Homeland Security (Apr. 1, 2014)).

¹⁶Tom Wescott, *Libya "very important" to the US—Senator McCain*, LIBYA HERALD, Dec. 4, 2013.

it more difficult in the future to respond to the legitimate security and foreign policy needs of the U.S. government.

III. DEMOCRATIC AMENDMENTS WOULD HAVE RESPONDED TO THE NEEDS OF THE DEFENSE DEPARTMENT AND PREVENTED CALCIFICATION OF U.S. IMMIGRATION POLICY WITH RESPECT TO LIBYAN NATIONALS

In an effort to improve the bill, Democratic Members on the Committee offered two amendments. The first amendment, offered by Rep. Zoe Lofgren (D-CA), would have created a single exception to the visa ban for persons who have been accepted into a program that has been approved by the Secretary of Homeland Security, in consultation with the Secretary of Defense. The amendment was designed to strike the right balance by advancing America's interests in helping to support the Libyan government in its effort to combat extremists in the region while also providing an additional level of scrutiny to the visa issuance process. The amendment was defeated on a party-line vote of 13–20.

The second amendment, offered by Rep. Sheila Jackson Lee (D-TX), would have required the President, in consultation with the Secretaries of Defense, Energy, Homeland Security, and State, to submit a report to Congress within 2 years describing the effect of the statutory ban on domestic and foreign interests of the United States, including any effects related the national security. The amendment also would have sunset the statutory ban 3 years from the date of enactment. The amendment was offered in response to the Majority's argument that the tenuous security situation in Libya at the present time justifies a statutory ban of the sort contained in H.R. 5401. By requiring the President to produce a report to Congress within 2 years from the date of enactment and sunseting the bill 1 year later, the amendment would have ensured that a future Congress could make an informed decision about whether to further extend the visa ban. The amendment was defeated on a party-line vote of 14–19.

CONCLUSION

The debate around H.R. 5401 is not about whether Libyan nationals should be granted certain visas or allowed to remain in the United States in nonimmigrant status to pursue certain studies or training. There is already a regulation in place that prevents that from taking place. In fact, the Department of Homeland Security—after consulting with the Department of Defense, Department of State, and intelligence communities—determined that now is not the time to rescind that regulation. In making that decision, Secretary Johnson considered whether the current regulatory ban serves America's strategic interests at home and abroad.

In the event that the Secretary of Homeland Security in the future decides to rescind the regulation, our immigration system would still contain multiple layers of security that would subject visa applicants to numerous routine and enhanced background and security checks. This may mean that no Libyan national is granted a visa to come to the United States to study or train in aviation maintenance, flight operations, or nuclear science for a very long time. We do not object to such an outcome.

Nevertheless, we do object to a permanent blanket ban on such visas for Libyans where our career defense and intelligence professionals believe such visas would serve our national interest. These are the officials who know the situation on the ground in Libya, understand our security threats, and appreciate our diplomatic priorities. We should not be enacting laws that would permanently override these judgments simply because it is politically expedient to do so.

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