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Part 1

SECURE VISAS ACT

MARCH 8, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 1741]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1741) to authorize the Secretary of Homeland Security and the Secretary of State to refuse or revoke visas to aliens if in the security or foreign policy interests of the United States, to require the Secretary of Homeland Security to review visa applications before adjudication, to provide for the immediate dissemination of visa revocation information, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

19–006

The Amendment

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Secure Visas Act".

SEC. 2. VISA REFUSAL AND REVOCATION.

(a) AUTHORITY OF THE SECRETARY OF HOMELAND SECURITY AND THE SECRETARY OF STATE.—

(1) IN GENERAL.—Section 428 of the Homeland Security Act of 2002 (6 U.S.C. 236) is amended by striking subsections (b) and (c) and inserting the following:

"(b) AUTHORITY OF THE SECRETARY OF HOMELAND SECURITY.—

"(1) IN GENERAL.—Notwithstanding section 104(a) of the Immigration and Nationality Act (8 U.S.C. 1104(a)) or any other provision of law, and except for the authority of the Secretary of State under subparagraphs (A) and (G) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)), the Secretary—

"(A) shall have exclusive authority to issue regulations, establish policy, and administer and enforce the provisions of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) and all other immigration or nationality laws relating to the functions of consular officers of the United States in connection with the granting and refusal of a visa; and

"(B) may refuse or revoke any visa to any alien or class of aliens if the Secretary, or designee, determines that such refusal or revocation is necessary or advisable in the security interests of the United States.

"(2) EFFECT OF REVOCATION.—The revocation of any visa under paragraph (1)(B)—

"(A) shall take effect immediately; and

"(B) shall automatically cancel any other valid visa that is in the alien's possession.

"(3) JUDICIAL REVIEW.—Notwithstanding any other provision of law, including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review a decision by the Secretary of Homeland Security to refuse or revoke a visa, and no court shall have jurisdiction to hear any claim arising from, or any challenge to, such a revocation.

"(c) AUTHORITY OF THE SECRETARY OF STATE.—

"(1) IN GENERAL.—The Secretary of State may direct a consular officer to refuse a visa requested by, or revoke a visa issued to, an alien if the Secretary of State determines such refusal or revocation to be necessary or advisable in the interests of the United States.

"(2) LIMITATION.—No decision by the Secretary of State to approve a visa may override a decision by the Secretary of Homeland Security under subsection (b).".

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall take effect on the date of the enactment of this Act and shall apply to visa refusals and revocations occurring before, on, or after such date.

(b) ISSUANCE OF VISAS AT DESIGNATED CONSULAR POSTS AND EMBASSIES.—

(1) IN GENERAL.—Section 428(i) of the Homeland Security Act of 2002 (6 U.S.C. 236(i)) is amended to read as follows:

"(i) VISA ISSUANCE AT DESIGNATED CONSULAR POSTS AND EMBASSIES.—Notwithstanding any other provision of law, except section 207 of the Foreign Service Act of 1980 (22 U.S.C. 3927) and the process established by the President for determining appropriate staffing at diplomatic missions and overseas constituent posts, the Secretary of Homeland Security—

"(1) shall conduct an on-site review of all visa applications and supporting documentation before adjudication at all visa-issuing posts in Algeria; Canada; Colombia; Egypt; Germany; Hong Kong; India; Indonesia; Iraq; Jerusalem, Israel; Jordan; Kuala Lumpur, Malaysia; Kuwait; Lebanon; Mexico; Morocco; Nigeria; Pakistan; the Philippines; Saudi Arabia; South Africa; Syria; Tel Aviv, Israel; Turkey; United Arab Emirates; the United Kingdom; Venezuela; and Yemen; and

"(2) is authorized to assign employees of the Department to each diplomatic and consular post at which visas are issued unless, in the Secretary's sole and unreviewable discretion, the Secretary determines that such an assignment at a particular post would not promote national or homeland security.".

(2) EXPEDITED CLEARANCE AND PLACEMENT OF DEPARTMENT OF HOMELAND SECURITY PERSONNEL AT OVERSEAS EMBASSIES AND CONSULAR POSTS.—The Secretary of State shall accommodate and ensure—

(A) not later than 1 year after the date of the enactment of this Act, that Department of Homeland Security personnel assigned by the Secretary of Homeland Security under section 428(i)(1) of the Homeland Security Act of 2002 have been stationed at post such that the post is fully operational; and

(B) not later than 1 year after the date on which the Secretary of Homeland Security designates an additional consular post or embassy for personnel under section 428(i)(2) of the Homeland Security Act of 2002 that the Department of Homeland Security personnel assigned to such post or embassy have been stationed at post such that the post is fully operational.

(c) VISA REVOCATION.—

(1) INFORMATION.—Section 428 of the Homeland Security Act of 2002 (6 U.S.C. 236) is amended by adding at the end the following:

"(j) VISA REVOCATION INFORMATION.—If the Secretary of Homeland Security or the Secretary of State revokes a visa—

"(1) the relevant consular, law enforcement, and terrorist screening databases shall be immediately updated on the date of the revocation; and

"(2) look-out notices shall be posted to all Department of Homeland Security port inspectors and Department of State consular officers.".

(2) EFFECT OF VISA REVOCATION; JUDICIAL REVIEW OF VISA REVOCATIONS.—

(A) IN GENERAL.—Section 221(i) of the Immigration and Nationality Act (8 U.S.C. 1201(i)) is amended by striking the final sentence and inserting the following: "A revocation under this subsection shall take effect immediately and shall automatically cancel any other valid visa that is in the alien's possession. Notwithstanding any other provision of law, including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a revocation under this subsection may not be reviewed by any court, and no court shall have jurisdiction to hear any claim arising from, or any challenge to, such a revocation.".

(B) EFFECTIVE DATE.—The amendment made by subparagraph (A) shall take effect on the date of the enactment of this Act and shall apply to revocations under section 221(i) of the Immigration and Nationality Act (8 U.S.C. 1201(i)) occurring before, on, or after such date.

Purpose and Summary

H.R. 1741, the "Secure Visas Act," helps ensure security of the visa issuance process through the establishment of Visa Security Units (VSUs) at all high risk consular posts and ensures that there shall be no judicial review of any visa revocation decision in order to safeguard national security.

Background and Need for the Legislation

A. VISA ISSUANCE PROCESS

The Department of State receives applications for entry into the United States by aliens and issues visas for those approved to emigrate or visit. Before traveling to the United States, a citizen of a foreign country who seeks to enter the U.S. generally must first obtain a U.S. visa, which is placed in the traveler's passport, a travel document issued by the traveler's country of citizenship.[1] A citizen of a foreign country must generally obtain a nonimmigrant visa for a temporary stay or an immigrant visa for permanent residence. The type of visa needed depends on the purpose of the travel.

Having a U.S. visa allows an alien to travel to a port of entry, airport or land border crossing, and request permission of a U.S. Customs and Border Protection (CBP) inspector to enter the U.S.

[1] Nationals of visa waiver program countries do not need visas for visits as tourists for up to 90 days.

While having a visa does not guarantee entry to the U.S., it does indicate a consular officer at a U.S. Embassy or Consulate abroad has determined that an alien is eligible to seek entry for a specific purpose. CBP inspectors, guardians of the nation's borders, are responsible for the admission into the country of travelers to the U.S., for a specified status and period of time.

B. VISA SECURITY PROGRAM

The September 11, 2001, hijackers would not have been able to carry out attacks in the United States if they had been unable to enter the country from the onset. They received valid visas to enter the U.S. in order to harm our nation—demonstrating the relative ease of obtaining a U.S. visa and gaining admission to the United States.[2]

The 19 hijackers applied for 23 visas and obtained 22. They began the process of obtaining visas almost two and half years before the attack. At the time, consular officers were unaware of the potential indications of a security threat posed by these visa applicants who were in reality terrorists. Consular officers had no information about fraudulent travel stamps associated with Al Qaeda and were not trained in terrorist travel tactics generally.[3]

Most of the operatives selected were Saudis, who had little difficulty obtaining visas. The mastermind of the operation, Khalid Sheikh Mohammed, used a travel facilitator to acquire a visa on July 23, 2001, in Jeddah, Saudi Arabia, using an alias.

The 9–11 Commission determined that, "[f]or terrorists, travel documents are as important as weapons. Terrorists must travel clandestinely to meet, train, plan, case targets, and gain access to attack. To them, international travel presents great danger, because they must surface to pass through regulated channels, present themselves to border security officials, or attempt to circumvent inspection points."[4]

Following the 9/11 attacks, Congress gave serious consideration to removing the visa issuance function from the Department of State (DOS) and placing it under the authority of the newly-established Department of Homeland Security (DHS). Such an arrangement would have placed this immigration-related function in the agency with primary authority over immigration matters, and it would have addressed the many serious concerns (which pre-dated 9/11) about the State Department's penchant for treating the consular visa-issuance function more as a public diplomacy and foreign relations tool than as a function fundamentally about national security, law enforcement, and immigration compliance. As a result of a compromise reached in the 2002 Homeland Security Act, the State Department retained its consular visa-issuance function, while section 428 of that Act gave DHS authority to "to issue regulations with respect to, administer, and enforce the provisions of such Act, and of all other immigration and nationality laws, relating to the functions of consular officers of the United States in con-

[2] *See generally, 9/11 and Terrorist Travel, Staff Report on the National Commission on Terrorist Attacks upon the United States* (2004).

[3] *Id.* at 2.

[4] National Commission on Terrorist attacks upon the United States, *The 9/11 Commission Report,* 384 (2004).

nection with the granting or refusal of visas, and shall have the authority to refuse visas in accordance with law."[5]

Section 428 created the Visa Security Program (VSP), and authorized the Secretary of Homeland Security "to assign employees of the Department to each diplomatic and consular post at which visas are issued, unless the Secretary determines that such an assignment at a particular post would not promote homeland security."[6]

Whatever the Homeland Security Act provided, in practice U.S. Immigration and Customs Enforcement (ICE) must obtain the approval not only from DHS headquarters to establish new overseas presences, but also from the chief of mission at each diplomatic post and from DOS headquarters. One of the major obstacles has often been the local embassy leadership, who may see an ICE presence as an invasion of the jurisdiction that traditionally belonged to Consular Affairs or to DOS's Regional Security Officer who is tasked with reviewing visa applications and screening applicants to prevent fraud and to avoid issuance of visas to criminals or terrorists.

With an average office size of two employees, VSP units, also known as VSUs, screen all visa applicants submitted at the Consular Office through DHS databases and conduct targeted reviews of those applicants considered high-risk. According to information provided by ICE, it costs approximately $2.2 million to open a new VSP unit. The cost covers two-three employees, technology, and vehicles.[7] No funding was requested in the DHS FY 2011, FY 2012 or FY 2013 budgets to expand VSP units to additional locations.[8]

To date, DHS has established VSP posts at only 19 locations with a presence in 15 countries. However, there is a list of over 50 designated "high-risk" posts. The opposition from DOS in expanding VSUs and DHS authority in this area is particularly objectionable, because the Homeland Security Act does not give DOS any power to veto or resist DHS's choice of posts at which VSP officers would "promote homeland security."[9]

Opposition from DOS or from parochial interests in individual embassies has not been the only obstacle to implementation of VSP to the full extent of available appropriations. In fact, DHS has left VSU requests pending for several months in the past. For instance, a request from ICE in September 2008 was sent to the Secretary of Homeland Security for approval to create a VSP office in Yemen, but that request was not approved by Secretary Napolitano until January 15, 2010, and finally on February 16, 2010, by the Secretary of State. And it was approved only when it came to light that the Christmas Day bomber had ties to Yemen.

Additionally, on February 10, 2010, DOS notified ICE that its request for a VSU in Jerusalem was denied due to "the principles of rightsizing," and explained that DOS believed its personnel onsite could perform the visa-screening function.[10] Congress was notified of this decision on February 16, 2010, and 2 days later a revised

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[5] Sec. 428 of Pub. L. No. 107–296.
[6] *Id.*
[7] *Presidential Budget for FY 2012.*
[8] *Id.*
[9] *See* Section 428 of the *Homeland Security Act of 2002,* Pub. L. No. 107–296.
[10] *See* American Consulate in Jerusalem unclassified cable to Secretary of State, February 10, 2010.

cable from the American Consulate in Jerusalem was delivered reversing the decision and approving the conditional establishment of the VSU.

The existing memorandum of understanding (MOU) between DOS and DHS states that a consular officer will not issue a visa over the objection of the VSP unit until the objection has been resolved.[11] Thus, the Secretary of Homeland Security does have the authority to prevent a Consular Office from issuing a visa if an objection cannot be resolved. According to ICE, the Secretary has only used this authority once—in 2005.

VSPs are currently present and operational in Abu Dhabi, Frankfurt, Amman, Cairo, Caracas, Casablanca, Dhahran, Dubai, Hong Kong, Islamabad, Jakarta, Jeddah, London, Manila, Montreal, Tel Aviv, Jerusalem, Sana'a, and Riyadh. ICE plans to expand the program to include two more VSP units by the end of 2013. One will be located in Kenya and the other one will be in Turkey. ICE has informed the Committee that if additional funding is identified potential sites for the VSP include, Beirut, and Karachi.

On March 31, 2011, the Government Accountability Office (GAO) issued a report on visa security and assessed (1) the ability of ICE to measure the program's objectives and performance, (2) challenges to VSP operations, and (3) ICE efforts to expand the VSP program.[12]

The GAO concluded that ICE does not accurately track data regarding the progress toward its VSP objectives of 1) identifying and counteracting potential terrorist threats from entering the United States, 2) identifying not-yet-known threats and maximizing law enforcement and counterterrorism value of the visa process, and 3) establishing performance measures intended to assess VSP performance, including situations where VSP agents provide information that results in a consular officer's decision to deny a visa.[13]

According to GAO, the source of the problem is ICE's VSP tracking system (VSPTS) which is used to collect data on VSP activities. GAO maintains that this system does not gather comprehensive data on all the performance measures needed to evaluate VSP mission objectives. In addition, data collected by ICE on VSP activities were limited by inconsistencies. Despite upgrades, the system still does not collect data on all the performance measures. Therefore, ICE's ability to evaluate the performance of the VSP remains limited. ICE also has not reported on the progress made toward achieving all VSP objectives. Additionally, despite the MOU, confusion remains at post between DHS VSP agents and DOS consular officials regarding certain roles and operating practices.[14]

DHS did not concur with the recommendations that the VSP collect comprehensive data on all performance measures and track the time spent on visa security activities. GAO continues to maintain that these recommendations are necessary to accurately assess

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[11] *See Memorandum of Understanding Among U.S. Immigration and Customs Enforcement of the Department of Homeland Security and the Bureau of Consular Affairs and Diplomatic Security of the Department of State on Roles, Responsibilities, and Collaboration at Visa Security Units Abroad* (January 11, 2011).

[12] Government Accountability Office: *Border Security: DHS's Visa Security Program Needs to Improve Performance Evaluation and Better Address Visa Risk Worldwide* (March 31, 2011).

[13] *Id.* at "Highlights".

[14] *Id.* at 10–16, 27.

VSP performance. With respect to these non-concurrences, DHS maintains that the VSP captures all required data with respect to its 5 year plan through VSPTS and Treasury Enforcement Communication System and that additional tracking through VSPTS would be redundant.[15]

The GAO report claims some posts experienced difficulties because of the limited guidance regarding interactions between DOS officials and VSP agents, which has led to tensions between the VSP agents and DOS officials. In addition, most VSP posts have not developed standard operating procedures for VSP operations, leading to inconsistency among posts. Additionally, the mandated advising and training of consular officers by VSP agents varies from post to post, and at some posts consular officers received no training.[16]

DHS also did not concur in the recommendation requiring additional standard operational guidance. DHS maintains that additional operational guidance is not necessary as these issues are addressed by the MOU. Standard procedures across all posts would prove overly restrictive, given that each VSP post has an individualized plan for its location.[17]

According to GAO, in 2007, ICE developed a 5-year expansion plan for the VSP, but ICE has not fully followed or updated the plan. For instance, ICE did not establish nine posts identified for expansion in 2009 and 2010. Furthermore, the expansion plan states that risk analysis is the primary input to VSP site selection, and ICE, with input from DOS, ranked visa-issuing posts by visa risk, which includes factors such as the terrorist threat and vulnerabilities present at each post. However, 11 of the top 20 high-risk posts identified in the expansion plan are not covered by the VSP. Furthermore, ICE has not taken steps to address visa risk in high-risk posts that do not have a VSP presence. Although the expansion of the VSP is limited by a number of factors, such as budgetary limitations or limited embassy space, ICE has not identified possible alternatives that would provide the additional security of VSP review at those posts that do not have a VSP presence. [18]

DHS concurred with the recommendations that the VSP provide consular officer training and develop a plan to provide more VSP coverage at high-risk posts.[19]

C. THE CURRENT THREAT ENVIRONMENT

Then CIA Director Leon Panetta testified before the House Permanent Select Committee on Intelligence on Tuesday, February 2, 2010. According to Director Panetta, of the key threats that America faces, the greatest concern was Al Qaeda, and the possibility it could again attack the U.S. here at home. Al Qaeda members are adapting their methods, making them more difficult to detect and posing an even greater threat to the U.S. In addition, Al Qaeda is moving to other safe havens, such as those found in Yemen and Somalia.

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[15] *Id.* at 27 and 34–35.
[16] *Id.* at 14–15.
[17] *Id.* at 34–35.
[18] *Id.* at 24–26.
[19] *Id.* at 34–35.

According to Director Panetta, Al Qaeda is pursuing an effort to strike at the United States by deploying individuals to this country. The U.S. has had a series of arrests of individuals inside the country attempting to carry out such a plot, through the use of terrorists with "clean credentials," i.e. terrorists who do not have a history of terrorism that has come to the intelligence community's attention, and loner-individuals, who, through self-radicalization, engage in attacks by themselves.

Abdul Farouk Abdulmutallab: The Christmas Day Bomber

On December 25, 2009, 23-year-old Nigerian national Abdul Farouk Abdulmutallab attempted to detonate an improvised explosive device (IED) he smuggled onboard Northwest Airlines Flight 253 from Amsterdam to Detroit. The IED did not explode but instead caught fire. Alert passengers and crew immediately restrained Abdulmutallab until he was taken into custody by CBP officers after an emergency landing at Detroit Metropolitan Airport.

In June 2004, Abdulmutallab applied for a B2 tourist visa from Lome', Togo, where he attended boarding school. This application was denied because Togo was not Abdulmutallab's home country.[20] In July 2004, he applied for the same type of visa, this time from Lagos, Nigeria. That visa was issued for a time period of 2 years (standard U.S. visa reciprocity policy with Nigeria provides that a tourist visa is valid for 2 years). Abdulmutallab traveled to the United States on this visa, from July 25, 2004, to August 5, 2004. The visa expired in July 2006.

In June 2008, Abdulmutallab once again applied for a B2 tourist visa. This time he applied at the embassy in London, where he was then attending school. The visa, valid for 2 years, was issued. He entered the United States from August 1, 2008, to August 17, 2008, to attend a religious conference in Texas. He used this same visa to come to the United States on December 25, 2009.[21]

In May 2009, the UK denied Abdulmutallab's application for renewal of his student visa. According the British Home Secretary, Alan Johnson, the application was rejected "after officials had determined that the academic course he gave as his reason for returning to Britain was fake."[22]

On November 19, 2009, Abdulmutallab's father, Dr. Umaru Abdulmutallab, appeared at the U.S. Embassy in Abuja, Nigeria, and told officials with the State Department and CIA that his son had vanished and expressed concern that he had "fallen under the influence of religious extremists in Yemen." According to ABC News, the father's visit with the U.S. authorities was arranged by Nigerian intelligence officials, who the senior Abdulmutallab had contacted after receiving a call from his son that made him fear that his son might be planning a suicide mission in Yemen.[23]

On November 20, the embassy sent out a so-called "Visa Viper" report to U.S. embassies around the world stating that Abdulmutallab might be associating with extremists in Yemen. The

[20] Information from DOS.
[21] *Id.*
[22] John F. Burns, *Britain Rejected Visa Renewal for Suspect,* THE NEW YORK TIMES, Dec. 28, 2009.
[23] Dana Hughes & Kirt Radis, *'Underwear Bomber's' Alarming Last Phone Call,* ABC NEWS, December 31, 2009, *available at* http://abcnews.go.com/WN/bombers-phone-call-father/story?id=9457361.

State Department ran a check to see if Abdulmutallab had an active U.S. visa, but a misspelling of his name led DOS to believe that he did not have a valid visa. Therefore, the report did not contain any reference to Abdulmutallab's visa status. Nor, according to DOS officials, did the Visa Viper report mention that the concern arose from the subject's own father or that the father was a credible and high-ranking Nigerian official.

DOS corrected the misspelling of Abdulmutallab's name in the Visa Viper report 2 days later in a supplementary notice. The CIA station in Nigeria prepared two more robust reports, one of that was sent to Langley, while the other remained in Nigeria in draft form and was only circulated after the attack. The government of Yemen claims the information was not shared with Yemeni officials.

The State Department's Visa Viper report was received in Washington and entered into the Terrorist Identities Datamart Environment (TIDE), a large database administered by the National Counterterrorism Center which reportedly contains 550,000 names of people with suspected ties to terrorist organizations or activities. The TIDE database constitutes the lowest level (and the broadest) of the government's data sources on potential terrorists, and reportedly includes many duplicate records and "false positives" due to misspelled or alternate names. Ultimately, DOS never revoked his visa.

Following the Christmas Day bombing attempt by Abdulmutallab, it was learned that he had ties to Al Qaeda and had received training and support for his botched terrorist attempt in Yemen.

D. VISA REVOCATION

After a visa has been issued, a consular officer has the discretionary authority to revoke a visa at any time. In fact, in his January 20, 2010, testimony before the Senate Judiciary Committee, Department of State Undersecretary for Management Patrick Kennedy stated, "since 2001 we have revoked over 51,000 visas . . . including over 1,700 for suspected ties to terrorism."

Under DOS procedures, when derogatory information about an individual comes to light after a visa is issued, consideration is given to whether it would be prudent to revoke the visa. DOS officials sometimes prudentially revoke visas, *i.e.,* they revoke a visa as a safety precaution to ensure that all relevant or potentially relevant facts about the applicant are thoroughly explored. Prudential revocations are precautionary actions that can be taken when the alien's admissibility is deemed to raise national security concerns. Although DOS has previously testified to Congress about this being a "low threshold," they have recently indicated they would not prudentially revoke a visa for security reasons unless there was an "immediate threat" or at least more than what Abdulmutallab's father provided.[24]

While DHS has clear authority over the policies to grant or deny visas, from a legal authority perspective the role of DHS in the visa

[24] Testimony of Janice L. Jacobs, Deputy Assistant Secretary of State for Visa Services, hearing before the Senate Comm. on the Judiciary's Subcomm. on Immigration, Border Security and Citizenship, *Visa Issuance, Information Sharing and Enforcement in a Post-9/11 Environment: Are We Ready Yet?,* July 15, 2003.

revocation process is unclear. As previously stated, the law specifically provides that after a visa has been issued, a consular officer has the discretionary authority to revoke a visa at any time. The statute makes no mention of DHS, and there is no explicit grant of authority DHS in section 428 of the Homeland Security Act to revoke a visa.

Nonetheless, it could be argued that DHS, through the broad language of section 428, is granted the ability to revoke as it is a matter "relating to the functions of consular officers of the United States in connection with the granting or refusal of visas."[25] Furthermore, the MOU between DOS and DHS on the implementation of section 428 provides that "if the Secretary of Homeland Security decides to exercise the authority to refuse a visa in accordance with law, *or to revoke a visa,* the Secretary of Homeland Security *shall request* the Secretary of State to instruct the relevant consular officer to refuse or revoke the visa."[26] This language appears to acknowledge the authority of the Secretary of Homeland Security to revoke a visa; however, it also seems to indicate that the Secretary of State has final say over the revocation.

The MOU also bars the Secretary of Homeland Security from delegating the visa refusal or revocation decision outside DHS headquarters, effectively making it impossible for the Secretary to pass this responsibility to the Assistant Secretary for ICE, who has direct authority for the DHS program that monitors visa issuance and identifies security or fraud threats.

E. REMOVAL PREDICATED ON VISA REVOCATION DECISIONS

GAO issued a report in 2003 finding that "30 individuals whose visas were revoked on terrorism grounds entered the United States either before or after revocation and may still remain in the country" and that "INS and the FBI were not routinely taking actions to investigate, locate, or resolve the cases of individuals who remained in the United States after their visas were revoked."[27] GAO expressed concern that "there is heightened risk that suspected terrorists could enter the country with revoked visas or be allowed to remain after their visas are revoked without undergoing investigation or monitoring."[28]

There are two underlying factors which contributed to this state of affairs. First, DOS revocation certificates state that in the case of aliens present in the United States, revocation are not effective until after the aliens' departure from the United States.[29] Second, it is unclear as to whether the fact of revocation in and of itself was a grounds for removing an alien who had been admitted to the U.S.—"A visa revocation by itself [was] not a stated grounds for removal under the Immigration and Nationality Act"[30]; INS (the predecessor agency to ICE) investigators "believed that under the INA, the visa revocation itself does not affect the alien's legal sta-

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[25] Sec. 428 of Pub. L. No. 107–296.

[26] *Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002,* Sept. 26, 2003, at 8 (emphasis added).

[27] U.S. General Accounting Office, *Border Security: New Policies and Procedures Are Needed to Fill Gaps in the Visa Revocation Process* (GAO–03–798) 4 (2003)(footnotes omitted).

[28] *Id.* at 27.

[29] *Id.* at 25.

[30] *Id.* at 5 (footnote omitted).

tus in the United States."[31] The GAO found that "[the] issue of whether a visa revocation, after an alien is admitted on that visa, has the effect of rendering the individual out-of-status is unresolved legally. . . ."[32]

While the INS could have initiated deportation proceedings against an alien on the basis of other grounds of removal—such as terrorist activity, this was problematic. The burden of proof is on the government in deportation proceedings against admitted aliens. Compounding this fact:

> INS officials stated that the State Department provides very little information or evidence relating to the terrorist activities when it sends the revocation notice to INS. Without sufficient evidence linking the alien to any terrorist-related activities, INS cannot institute removal proceedings on the basis of that charge. [E]ven if there is evidence, INS officials said, sometimes the agency that is the source of the information will not authorize the release of that information because it could jeopardize ongoing investigations or reveal sources and methods. . . . INS officials state that sometimes the evidence that is used to support a discretionary revocation from the Secretary of State is not sufficient to support a charge of removing an alien in immigration proceedings before an immigration judge. [State Department officials] said that most of the time, the information on which these revocations is based is classified.
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> At some point in the proceedings . . . in establishing that the alien is removable . . . the government could be called on to disclose any classified or law enforcement sensitive information that serves as the basis of the charges against the alien. According to INS attorneys, this can be challenging since many times the law enforcement or intelligence agencies that are the source of the information may not authorize the release of that information because it could jeopardize ongoing investigations or reveal sources and methods.[33]

After the GAO report was issued, DHS and DOS entered into an agreement whereby DOS agreed to revoke visas retroactive to the time of issuance on a case-by-case basis if requested by DHS.[34] The State Department, however, had concerns regarding "the litigation risks involved in removing aliens based on visa revocations", wanting to "avoid steps that will weaken our ability to use revocations flexibly and aggressively to protect homeland security" and to avoid "a situation in which courts start second-guessing our revocation decisions."[35]

The House of Representatives included in the legislation to implement the recommendations of the 9–11 Commission a provision

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[31] *Id.* at 25.
[32] *Id.*
[33] *Id.* at 25, 35.
[34] *See Hearing before the House Committee on Government Reform's Subcommittee on National Security, Emerging Threats, and International Relations,* 108th Cong. (2004)(statement of Tony Edson, Managing Director (Acting), Office of Visa Services, U.S. Department of State).
[35] *Id.*

explicitly making revocation of a nonimmigrant visa a grounds for removal. The only factor an immigration judge could consider in a deportation proceeding was whether in fact DOS had revoked the visa. In addition, the House provided that there would be absolutely no means of judicial review of a visa revocation or a deportation action based on the revocation.[36] This Committee stated that "[t]he section will prevent an alien whose visa has been revoked [from being able] to challenge the underlying revocation in court, where the government might again be placed in a position of either exposing its sources or permitting potentially dangerous alien to remain in the U.S."[37]

However, in the conference committee, the Senate inserted a modification providing that a removal based on visa revocation was judicially reviewable if revocation was the sole basis for the order of removal.[38] The Senate language has made the use of the visa revocation section problematic. Judicial review could force the release to the alien and the public of the sensitive information that the revocation ground of removal was intended to protect. It could also undermine the consular non-reviewability doctrine and open the door to judicial second-guessing of all visa denial decisions.

What are the constitutional issues of visa revocation without judicial review of an alien present in the U.S? The INA could not be clearer: "There shall be no means of judicial review . . . of a revocation [of a visa or other documentation] under this subsection, *except in the context of a removal proceeding if such revocation provides the sole ground for removal under section 1227(a)(1)(B) of this title*."[39]

The question of whether the Constitution requires judicial review turns on whether a visa issuance is discretionary in nature. Several circuit courts have ruled that similar to visa issuance, visa revocation is a "discretionary" decision. These circuit courts, such as the Seventh,[40] Third,[41] and Fifth,[42] have concluded that since visa revocations are in fact a discretionary power held by the Secretary of DHS, that the Constitution does not require judicial review.

The circuit courts focused on 8 U.S.C. § 1155, which provides that "[t]he Secretary of Homeland Security may, at any time," revoke the approval of a visa petition "for what he deems to be good and sufficient cause." The regulation for this section notes that DHS "may revoke the approval of [a] petition upon notice to the petitioner on any ground . . . when the necessity for the revocation comes to [its] attention . . ."[43]

This revocation power is subject to 8 U.S.C. § 1252(a)(2)(B), which provides: "Notwithstanding any other provision of law (statutory or nonstatutory), . . . and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the

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[36] *See* section 3009 of S. 2845 (engrossed amendment as agreed to by House)(108th Congress, 2004).
[37] H.R. Rept. No. 108–724, part V, at 189 (2004).
[38] *See* section 5304 of Pub. L. No. 108–458.
[39] Section 221(i) of the INA (emphasis added).
[40] *El-Khader v. Monica,* 366 F.3d 562, 568 (7th Cir. 2004).
[41] *Jilin Pharm. USA, Inc. v. Chertoff,* 447 F.3d 196, 206 (3d Cir. 2006).
[42] *Ghanem v. Upchurch,* 481 F.3d 222, 224–25 (5th Cir. 2007).
[43] 8 C.F.R. § 205.2(a).

authority for which is specified under this title [8 USCS §§ 1151 et seq.] to be in the discretion of the Attorney General or the Secretary of Homeland Security. . . .'' This provision was added to the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[44] one purpose of which was ''to improve deterrence of illegal immigration to the United States . . . by reforming exclusion and deportation law and procedures.'' [45]

A district court in the Seventh Circuit held that visa revocations were discretionary, stating ''[t]his language plainly signifies a discretionary decision.'' [46] Furthermore, the court found that ''the appellant has failed to present us any case law from any Circuit, nor have we located any, that has expressly ruled on whether a [visa revocation] is discretionary. Nevertheless, in our opinion, the discretionary nature of the decision is apparent from the plain language of the statute. Initially, we cannot help but repeat the actual words employed by the statute, which involve the permissive 'may' and a temporal reference to 'at any time'. This language plainly signifies a discretionary decision.'' [47] Ultimately, the court held ''[t]he statute [48] strips a court's jurisdiction to review 'any other decision or action . . . where the Attorney General [now the Secretary] has discretionary authority.' [49] The meaning of the statute is clear and unambiguous—it precludes the courts from reviewing any discretionary decision of the INS.[50] The alien in this case was present in the U.S.'' [51]

A key question under the Fifth Amendment's Due Process Clause as to the constitutional necessity of judicial review is whether there is any constitutionally protected property interest in a visa. While the better argument is that a visa issued by the government is not an inherent property right of visa holders,[52] the Supreme Court has not considered whether a property interest exists in visa petitions, visa approvals or, for that matter, what due process requirements would flow from such an interest.

Hearings

The Committee on the Judiciary's Subcommittee on Immigration Policy and Enforcement held a hearing on H.R. 1741, the ''Secure Visas Act,'' on May 11, 2011. Testimony was received from Gary Cote, Acting Deputy Assistant Director, International Affairs of Immigration and Customs Enforcement at the Department of Homeland Security; David Donahue, Deputy Assistant Secretary for Visa Services, Bureau of Consular Affairs, U.S. Department of State; Janice Kephart, Director of National Security Policy, Center for Immigration Studies; and Edward Alden, Bernard L. Schwartz Senior Fellow, Council on Foreign Relations.

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[44] Section 306 of division C of title III of Pub. L. No. 104–208.
[45] H.R. Rep. No. 104–828, at 1 (1996).
[46] *El-Khader v. Perryman,* 264 F. Supp. 2d 645, 647 (N.D. Ill. 2003).
[47] *Id.*
[48] 8 U.S.C. § 1252(a)(2)(B)(ii).
[49] *El-Khader at* 50 (*citing CDI Information Services, Inc. v. Reno,* 278 F.3d 616, 619 (6th Cir. 2002).
[50] *Id.*
[51] *Id.*
[52] DHS Brief in *ANA Int'l, Inc. v. Way,* 393 F.3d 886, 894 (9th Cir. 2004). The Ninth Circuit ruled otherwise. *ANA Int'l, Inc. v. Way,* 393 F.3d at 894.

Committee Consideration

On June 23, 2011, the Committee met in open session and ordered the bill H.R. 1741 favorably reported with amendments, by a rollcall vote of 17 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. 1741.

1. The first rollcall vote was on amendment #4 offered by Ms. Jackson Lee, which was defeated 11 to 17. The amendment requires a GAO study regarding the cost effectiveness of VSUs and provided that the bill would not go into effect until the GAO study was complete.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot		X	
Mr. Issa		X	
Mr. Pence			
Mr. Forbes			
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi			
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Total	11	17	

2. The second rollcall vote was on amendment #3 offered by Mr. Deutch and Ms. Waters, which was defeated 10 to 15. This amendment sought to strike the provisions in the bill restricting judicial review for individuals who are placed in removal proceedings.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler			
Mr. Scott	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson			
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Total	10	15	

3. The final rollcall vote was on a motion to report the bill favorably to the House (approved 17–11).

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren			
Mr. Chabot	X		
Mr. Issa			
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert			
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz			
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy	X		
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle	X		
Mr. Conyers, Jr., Ranking Member		X	
Mr. Berman			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Nadler			
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Cohen		X	
Mr. Johnson			
Mr. Pierluisi		X	
Mr. Quigley		X	
Ms. Chu		X	
Mr. Deutch		X	
Ms. Sánchez			
Ms. Wasserman Schultz			
Total	17	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

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1741, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 13, 2011.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed revised cost estimate for H.R. 1741, the Secure Visas Act, which supersedes the estimate transmitted to you on September 1, 2011.

This revised estimate explains that H.R. 1741 contains a private-sector mandate as defined in the Unfunded Mandates Reform Act. The estimated Federal cost to implement the legislation is unchanged and remains the same as we reported in the cost estimate transmitted on September 1, 2011.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1741—Secure Visas Act

As ordered reported by the House Committee on the Judiciary on June 23, 2011

SUMMARY

H.R. 1741 would direct the Department of Homeland Security (DHS) to review visa applications at all U.S. consular posts that issue visas in 27 selected countries. The bill also would shift some of the current authority for issuing visas from the Department of State to DHS. CBO estimates that implementing H.R. 1741 would cost $382 million over the 2012–2016 period, assuming appropriation of the necessary amounts.

Pay-as-you-go procedures do not apply to this legislation because it would not affect direct spending or revenues.

H.R. 1741 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of State, local, or tribal governments.

H.R. 1741 would impose a private-sector mandate as defined in UMRA by eliminating a right of action for foreign-born individuals in the United States. CBO estimates that the cost of complying with the mandate would fall below the annual threshold established in UMRA for private-sector mandates ($142 million in 2011, adjusted annually for inflation).

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 1741 is shown in the following table. The costs of this legislation fall within budget function 750 (administration of justice).

By Fiscal Year, in Millions of Dollars

	2012	2013	2014	2015	2016	2012–2016
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Costs for Additional DHS Personnel						
Estimated Authorization Level	32	65	67	69	71	304
Estimated Outlays	29	62	67	69	71	298
Support Costs						
Estimated Authorization Level	37	12	12	12	13	86
Estimated Outlays	33	14	12	12	13	84
Total Costs						
Estimated Authorization Level	69	77	79	81	84	390
Estimated Outlays	62	76	79	81	84	382

Note: DHS = Department of Homeland Security.

BASIS OF ESTIMATE

For this estimate, CBO assumes that the bill will be enacted near the end of fiscal year 2011. We assume that the necessary amounts will be appropriated near the start of each fiscal year and that spending will follow historical patterns for similar activities.

Costs for Additional DHS Personnel

H.R. 1741 would direct DHS to review visa applications at all U.S. consular posts that issue visas in 27 selected countries, including Algeria, Canada, Egypt, Pakistan, Turkey, and the United Kingdom. According to Immigration and Customs Enforcement (ICE)—an agency within DHS—there are currently ICE agents in 19 overseas posts in those countries who review visa applications. ICE expects that implementing H.R. 1741 would require agents to be stationed in 40 additional posts in the affected countries.

ICE anticipates that a total of 117 agents (about three for each location) would need to be hired to staff the 40 additional posts. Based on the costs of similar overseas personnel, CBO estimates that each agent, on average, would cost about $550,000 annually, including salary and benefits, enhanced pay for overseas law enforcement personnel, security measures, housing and other expenses for accompanying family members, and necessary support staff. Once fully phased in, CBO estimates that the total costs of new employees would reach $65 million annually. For this estimate, we assume that the new positions would be fully staffed by fiscal year 2013 and that costs would be adjusted for anticipated inflation.

Support Costs

Based on information from ICE, CBO estimates that there would be start-up costs in 2012 of about $900,000 per post, on average, mostly to purchase and implement security measures and to install computer systems. Beginning in 2013, we estimate that there

would be recurring support costs of about $300,000 annually per office, on average, including information technology expenses and payments for staff and assistance provided by the host country. CBO estimates that total support costs would be $37 million in 2012 and $12 million annually thereafter.

PAY-AS-YOU-GO CONSIDERATIONS:

None.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

H.R. 1741 contains no intergovernmental mandates as defined in UMRA and would not affect the budgets of State, local, or tribal governments.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

H.R. 1741 would impose a private-sector mandate as defined in UMRA by prohibiting foreign-born individuals in the United States from seeking judicial review if their visa is revoked. The prohibition would impose a mandate by eliminating a right of action for individuals in the private sector. According to the Department of Homeland Security and the Department of State, few, if any, foreign-born individuals seek judicial review or other claims involving revocation of their visas under current law. Therefore, CBO estimates that the cost of complying with the mandate would fall below the annual threshold established in UMRA for private-sector mandates ($142 million in 2011, adjusted annually for inflation).

PREVIOUS CBO ESTIMATE

This revised cost estimate supersedes an estimate for H.R. 1741 that was transmitted on September 1, 2011. The previous estimate incorrectly reported that the legislation contains no private-sector mandates as defined in UMRA. The revised estimate corrects that error. The estimated Federal cost of implementing the legislation is unchanged from the previous estimate.

ESTIMATE PREPARED BY:

Federal Costs: Mark Grabowicz
Impact on State, Local, and Tribal Governments: Melissa Merrell
Impact on the Private Sector: Paige Piper/Bach

ESTIMATE APPROVED BY:

Theresa Gullo
Deputy Assistant Director for Budget Analysis

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. 1741, the "Secure Visas Act", helps ensure security of the visa issuance process. Through the establishment of VSUs at all high risk consular posts and ensures that there shall be no judicial review of any visa revocation decision in order to safeguard national security.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1741 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 *"Secure Visas Act"*.

Sec. 2(a): Authority of Secretary of State and Secretary of Homeland Security. This subsection clarifies that the Secretary of DHS has the explicit power to grant, refuse or revoke an alien's visa if the Secretary "determines that such refusal or revocation is necessary or advisable in the security interests of the United States."

Subsection (a) provides that such a revocation take effect immediately and shall automatically cancel any other valid visas held by the alien.

Subsection (a) prohibits all judicial review of the DHS Secretary's refusal or revocation of a visa.

Subsection (a) also states that the Secretary of State may not override the visa refusal or revocation decision by the Secretary of DHS. The State Department maintains it independent ability to refuse or revoke a visa.

Sec. 2(b): Issuance of Visas at Designated posts and U.S. Embassies. This subsection requires that DHS create and/or maintain VSUs at the nineteen consular posts that already have VSUs as well at the five additional posts that DHS has requested.

Subsection (b) retains authority of DHS's Secretary to place VSUs at additional consular posts which the Secretary shall do unless it is determined that such an assignment would not promote national or homeland security.

Subsection (b) also requires placement, staffing, and operation of VSUs as provided in this subsection, no later than 1 year after the date of enactment.

Sec. 2(c) Visa Revocation. This subsection requires that when a visa is revoked by the Secretary of DHS or DOS that all appropriate consular, law enforcement and terrorist screening databases be immediately updated as to the revocation and also that DOS lookout notices be posted to all DHS port inspectors and DOS consular officers.

Subsection (c) precludes judicial review (including section 2241 of title 28) of all visa revocation decisions made by the government, including revocations providing the sole ground for removal of aliens present in the U.S.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

HOMELAND SECURITY ACT OF 2002

* * * * * * *

TITLE IV—DIRECTORATE OF BORDER AND TRANSPORTATION SECURITY

* * * * * * *

Subtitle C—Miscellaneous Provisions

* * * * * * *

SEC. 428. VISA ISSUANCE.

(a) * * *

[(b) IN GENERAL.—Notwithstanding section 104(a) of the Immigration and Nationality Act (8 U.S.C. 1104(a)) or any other provision of law, and except as provided in subsection (c) of this section, the Secretary—

[(1) shall be vested exclusively with all authorities to issue regulations with respect to, administer, and enforce the provisions of such Act, and of all other immigration and nationality laws, relating to the functions of consular officers of the United States in connection with the granting or refusal of visas, and shall have the authority to refuse visas in accordance with law and to develop programs of homeland security training for consular officers (in addition to consular training provided by the Secretary of State), which authorities shall be exercised through the Secretary of State, except that the Secretary shall not have authority to alter or reverse the decision of a consular officer to refuse a visa to an alien; and

[(2) shall have authority to confer or impose upon any officer or employee of the United States, with the consent of the head of the executive agency under whose jurisdiction such officer or employee is serving, any of the functions specified in paragraph (1).

[(c) AUTHORITY OF THE SECRETARY OF STATE.—

[(1) IN GENERAL.—Notwithstanding subsection (b), the Secretary of State may direct a consular officer to refuse a visa to an alien if the Secretary of State deems such refusal necessary or advisable in the foreign policy or security interests of the United States.

[(2) CONSTRUCTION REGARDING AUTHORITY.—Nothing in this section, consistent with the Secretary of Homeland Security's authority to refuse visas in accordance with law, shall be construed as affecting the authorities of the Secretary of State under the following provisions of law:

[(A) Section 101(a)(15)(A) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(A)).

[(B) Section 204(d)(2) of the Immigration and Nationality Act (8 U.S.C. 1154) (as it will take effect upon the entry into force of the Convention on Protection of Children and Cooperation in Respect to Inter-Country adoption).

[(C) Section 212(a)(3)(B)(i)(IV)(bb) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(i)(IV)(bb)).

[(D) Section 212(a)(3)(B)(i)(VI) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(i)(VI)).

[(E) Section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi)(II)).

[(F) Section 212(a)(3)(C) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(C)).

[(G) Section 212(a)(10)(C) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(10)(C)).

[(H) Section 212(f) of the Immigration and Nationality Act (8 U.S.C. 1182(f)).

[(I) Section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a)).

[(J) Section 237(a)(4)(C) of the Immigration and Nationality Act (8 U.S.C. 1227(a)(4)(C)).

[(K) Section 401 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (22 U.S.C. 6034; Public Law 104–114).

[(L) Section 613 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1999 (as contained in section 101(b) of division A of Public Law 105–277) (Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999); 112 Stat. 2681; H.R. 4328 (originally H.R. 4276) as amended by section 617 of Public Law 106–553.

[(M) Section 103(f) of the Chemical Weapon Convention Implementation Act of 1998 (112 Stat. 2681–865).

[(N) Section 801 of H.R. 3427, the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001, as enacted by reference in Public Law 106–113.

[(O) Section 568 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002 (Public Law 107–115).

[(P) Section 51 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2723).]

(b) AUTHORITY OF THE SECRETARY OF HOMELAND SECURITY.—

(1) IN GENERAL.—Notwithstanding section 104(a) of the Immigration and Nationality Act (8 U.S.C. 1104(a)) or any other provision of law, and except for the authority of the Secretary of State under subparagraphs (A) and (G) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)), the Secretary—

(A) shall have exclusive authority to issue regulations, establish policy, and administer and enforce the provisions of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) and all other immigration or nationality laws relating to the functions of consular officers of the United States in connection with the granting and refusal of a visa; and

(B) may refuse or revoke any visa to any alien or class of aliens if the Secretary, or designee, determines that such refusal or revocation is necessary or advisable in the security interests of the United States.

(2) EFFECT OF REVOCATION.—The revocation of any visa under paragraph (1)(B)—

(A) shall take effect immediately; and

(B) shall automatically cancel any other valid visa that is in the alien's possession.

(3) JUDICIAL REVIEW.—Notwithstanding any other provision of law, including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review a decision by the Secretary of Homeland Security to refuse or revoke a visa, and no court shall have jurisdiction to hear any claim arising from, or any challenge to, such a revocation.

(c) AUTHORITY OF THE SECRETARY OF STATE.—

(1) IN GENERAL.—The Secretary of State may direct a consular officer to refuse a visa requested by, or revoke a visa issued to, an alien if the Secretary of State determines such refusal or revocation to be necessary or advisable in the interests of the United States.

(2) LIMITATION.—No decision by the Secretary of State to approve a visa may override a decision by the Secretary of Homeland Security under subsection (b).

* * * * * * *

[(i) VISA ISSUANCE PROGRAM FOR SAUDI ARABIA.—Notwithstanding any other provision of law, after the date of the enactment of this Act all third party screening programs in Saudi Arabia shall be terminated. On-site personnel of the Department of Homeland Security shall review all visa applications prior to adjudication.]

(i) VISA ISSUANCE AT DESIGNATED CONSULAR POSTS AND EMBASSIES.—Notwithstanding any other provision of law, except section 207 of the Foreign Service Act of 1980 (22 U.S.C. 3927) and the process established by the President for determining appropriate staffing at diplomatic missions and overseas constituent posts, the Secretary of Homeland Security—

(1) shall conduct an on-site review of all visa applications and supporting documentation before adjudication at all visa-issuing posts in Algeria; Canada; Colombia; Egypt; Germany; Hong Kong; India; Indonesia; Iraq; Jerusalem, Israel; Jordan; Kuala Lumpur, Malaysia; Kuwait; Lebanon; Mexico; Morocco; Nigeria; Pakistan; the Philippines; Saudi Arabia; South Africa; Syria; Tel Aviv, Israel; Turkey; United Arab Emirates; the United Kingdom; Venezuela; and Yemen; and

(2) is authorized to assign employees of the Department to each diplomatic and consular post at which visas are issued unless, in the Secretary's sole and unreviewable discretion, the Secretary determines that such an assignment at a particular post would not promote national or homeland security.

(j) VISA REVOCATION INFORMATION.—If the Secretary of Homeland Security or the Secretary of State revokes a visa—

(1) the relevant consular, law enforcement, and terrorist screening databases shall be immediately updated on the date of the revocation; and

(2) look-out notices shall be posted to all Department of Homeland Security port inspectors and Department of State consular officers.

* * * * * * *

IMMIGRATION AND NATIONALITY ACT

* * * * * * *

TITLE II—IMMIGRATION

* * * * * * *

CHAPTER 3—ISSUANCE OF ENTRY DOCUMENTS

ISSUANCE OF VISAS

SEC. 221. (a) * * *

* * * * * * *

(i) After the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation. Notice of such revocation shall be communicated to the Attorney General, and such revocation shall invalidate the visa or other documentation from the date of issuance: *Provided,* That carriers or transportation companies, and masters, commanding officers, agents, owners, charterers, or consignees, shall not be penalized under section 273(b) for action taken in reliance on such visas or other documentation, unless they received due notice of such revocation prior to the alien's embarkation. **[**There shall be no means of judicial review (including review pursuant to section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title) of a revocation under this subsection, except in the context of a removal proceeding if such revocation provides the sole ground for removal under section 237(a)(1)(B).**]** *A revocation under this subsection shall take effect immediately and shall automatically cancel any other valid visa that is in the alien's possession. Notwithstanding any other provision of law, including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a revocation under this subsection may not be reviewed by any court, and no court shall have jurisdiction to hear any claim arising from, or any challenge to, such a revocation.*

* * * * * * *

Committee Jurisdiction Letters

July 13, 2011

The Honorable Peter T. King
Chairman
House Committee on Homeland Security
Washington, DC 20515

Dear Chairman King,

Thank you for your letter regarding H.R. 1741, the "Secure Visas Act," which was reported favorably by the Committee on the Judiciary on June 23, 2011. This bill was also referred to the Committee on Homeland Security.

I am most appreciative of your decision to discharge the Committee on Homeland Security from consideration of H.R. 1741 so that it may move expeditiously to the House floor. I agree that while you are waiving formal consideration of the bill, the Committee on Homeland Security is in no way waiving its jurisdiction over the subject matter contained in the bill. In addition, if a conference is necessary on this bill, I will support any request to have the Committee on Homeland Security represented.

Finally, I would be pleased to include our exchange of letters in the *Congressional Record* during floor consideration of this bill.

Sincerely,

Lamar Smith
Chairman

cc: The Honorable John Boehner
The Honorable Bennie G. Thompson
The Honorable John Conyers, Jr.
Mr. John Sullivan, Parliamentarian

PETER T. KING, NEW YORK
CHAIRMAN

BENNIE G. THOMPSON, MISSISSIPPI
RANKING MEMBER

One Hundred Twelfth Congress
U.S. House of Representatives
Committee on Homeland Security
Washington, DC 20515

July 13, 2011

The Honorable Lamar Smith
Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

I write to you regarding H.R. 1741, the Secure Visas Act. I am aware that there are certain provisions in the legislation which fall within the Rule X jurisdiction of the Committee on Homeland Security.

In the interest of permitting your Committee to proceed expeditiously with consideration of this important legislation, I am waiving the Committee on Homeland Security's jurisdiction pertaining to an initial referral. However, I do so with the understanding that the Committee's jurisdictional claims over subject matters contained in this and similar legislation are in no way diminished or altered. I request that you urge the Speaker to name Members of this Committee to any conference committee which is named to consider such provisions.

Please place this letter into the committee report on H.R. 1741 and into the *Congressional Record* during consideration of the measure on the House floor. Thank you for your consideration of this matter.

Sincerely,

PETER T. KING
Chairman

cc: The Honorable Bennie G. Thompson, Ranking Member
The Honorable John Conyers, Jr., Ranking Member, House Committee on the Judiciary

Additional Views

The purpose of these views is to memorialize Member negotiations that took place after the Committee's mark-up of H.R. 1741, the "Secure Visas Act." Following the mark-up, Members worked together on revisions to the reported bill to address concerns raised by minority Members of the Committee regarding judicial review, as well as concerns raised by the State Department regarding restrictions inadvertently placed on the authority of the Secretary of State to refuse or revoke visas. We have since agreed on alternative language that would revise the bill as reported in several respects. We have agreed that these revisions will be incorporated into any version of the Secure Visas Act that is considered on the House floor this Congress.

First, the reported version of the bill requires that the revocation of a visa take effect immediately and cancel any other valid visa. There is no requirement that the alien receive notice of the visa revocation or that the alien be given an opportunity to depart the country without prejudice upon receiving notice of the revocation. We have agreed to revise this language to permit visa revocations to take effect immediately and cancel any other valid visa in the alien's possession, but it would not require this in every instance. The revised language would also require notice to the alien and, where the revocation was made by the Secretary of State or a consular officer, also to the Secretary of Homeland Security. Upon receiving such notice, the alien would have 21 days to depart the country voluntarily without prejudice. If the alien does not depart within this 21-day period, DHS would be authorized to initiate removal proceedings in its sole discretion.

Second, the reported version of the bill eliminates judicial review for all visa revocations. The language that we have agreed to would preserve the right to such judicial review but add special provisions for cases that raise national security concerns. Specifically, it would leave unchanged the ability to obtain judicial review for any case in which a revocation provides the sole ground for removal and removal through ordinary proceedings would pose no risk to national security. Where such risk exists, however, the Secretary would be authorized to utilize the Alien Terrorist Removal Procedures established in Title V of the Immigration and Nationality Act. Title V describes the process for establishing an Alien Terrorist Removal Court and provides procedures for handling the introduction of classified information under seal. Title V also guarantees the alien certain rights in proceedings, including the right to a public hearing, the right to counsel, and the right to judicial review.

Finally, the reported version of the bill limits the Secretary of State's visa refusal and revocation authority. Current law allows the Secretary of State to refuse a visa where it is "necessary or advisable in the foreign policy or security interests of the United States," [1] and may revoke a visa in her discretion.[2] The reported version of the bill amends this provision to allow the Secretary of State to refuse and revoke visas only for foreign policy-related grounds. The language that we have agreed to would preserve the

[1] Homeland Security Act of 2002, Pub. L. No. 107–296, § 428, 116 Stat. 2135, 2188 (2002).
[2] Immigration and Nationality Act § 221(I), 8 U.S.C. § 1201(i).

Secretary of State's existing authority to refuse or revoke visas on both foreign policy- and security-related grounds.

We have agreed that the above changes will be incorporated into any version of the Secure Visas Act that is brought to the House floor.

LAMAR SMITH.
JOHN CONYERS, JR.
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