

Congressional Research Service

Terrorism:

Immigration Law: Legal Frameworks
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Issue Definition

As part of the response to the terrorist attack of September 11, 2001, and the on-going war against terrorism, Congress and the Administration have been reexamining and restructuring our immigration laws and policies to strengthen them as effective components of our counterterrorism policy. This entails preventing the admission of and facilitating the tracking and removal of terrorists, while satisfying constitutional principles and legitimate commercial, familial and humanitarian goals of immigration. These efforts have resulted in the immigration provisions enacted as part of the USA PATRIOT Act, P.L. 107-56; the Enhanced Border Security and Visa Entry Reform Act of 2002, P.L. 107-173; the Homeland Security Act of 2002, P.L. 107-296; and in various administrative policies. Congress and the Administration continue to consider further refinement of the immigration laws.

Current Laws

Security considerations are expressed in immigration law through, among other provisions, grounds for exclusion and removal, detention authority, authority to use undisclosed evidence, summary exclusion, special removal procedures for suspected terrorists, and presidential authority to impose targeted immigration restrictions. Commerce and trade are facilitated, in part, through broader waivers of visa requirements for tourists, easier entry of certain business persons and professionals from adjacent countries, and calls for expedited processing of arriving passengers. The core constitutional rights due aliens in the enforcement of immigration law remain uncertain under Supreme Court precedent, even as the courts have recognized the general due process rights of aliens in the United States. Most efforts to broaden the rights of aliens in immigration proceedings in recent years have occurred in the context of lower federal court decisions and congressional proposals to amend certain statutory restrictions, especially those enacted in 1996 out of security concerns.

The USA PATRIOT Act somewhat broadened the existing terrorism grounds for excluding aliens, while adding express statutory authority for mandatory detention of aliens who are certified by the Attorney General as security threats. The primary immigration statute, the Immigration and Nationality Act of 1952 (INA), as amended, had already barred the admission of any alien who has engaged in or incited terrorist activity, is reasonably believed to be carrying out a terrorist activity, or is a representative or member of a designated foreign terrorist organization. The USA PATRIOT Act added representatives of groups that endorse terrorism, prominent individuals who endorse terrorism, and spouses and children of aliens who are deportable on terrorism grounds on the basis of activities occurring within the previous five years. Separately, the INA

contains grounds for inadmissibility based on criminal activities or foreign policy concerns.

The terrorist grounds for removing an alien already in the U.S. have not included, and still do not include, representation or membership, but, rather, are limited to participation in terrorist activity. Still, the definition of "engaging in terrorist activity" is broad, including support for an individual or organization through information gathering, fund raising, or harboring individuals or weapons. As is the case with exclusion, there are criminal and foreign policy grounds for deportation. However, at least one court has questioned the permissible scope of the foreign policy grounds.

Most significantly the USA PATRIOT Act provided for mandatory detention of a removable alien upon certification that the alien is engaged in activities described in the terrorism-related grounds for exclusion or deportation or in other activities that threaten national security, regardless of the actual grounds of removal. Review is more circumscribed than under other detention authority in the INA. There is a seven-day deadline for bringing criminal or immigration charges and, in keeping with the Supreme Court decision in *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001), a prohibition on indefinitely detaining an alien under a final removal order whom no country will accept, unless the alien still threatens national security. More recently, in *Demore v. Kim*, 123 S. Ct. 1708 (2003), the Court upheld the mandatory detention of a criminal alien pending removal proceedings. The new mandatory detention provisions do not specify certification procedures, and presumably certification may be based on evidence not shared with the detainee.

Immigration law has long authorized the use of secret evidence to exclude an alien when security concerns are implicated. Secret evidence also is allowed in deciding whether to grant an alien discretionary relief from removal. More recently, Congress, in 1996, established the Alien Terrorist Removal Court with special procedures for determining whether an alien is deportable on terrorist grounds; certain evidence presented by the government in this procedure may be kept secret from the alien and, except in cases against legal permanent resident aliens, any representative of the alien. While this latter provision was highly controversial when enacted, this special court has yet to be utilized.

The Enhanced Border Security and Visa Entry Reform Act built on changes made in the USA PATRIOT Act. It increased the number of enforcement personnel and funding for technology improvements. Federal law enforcement and intelligence agencies must share information necessary to assist in screening visa applicants. An interoperable law enforcement and intelligence electronic data system (Chimera) must be implemented; the immigration databases must be integrated to be compatible with each other and with the interoperable data system. Additional standards are established for an integrated entry-exit data system.

The federal government must issue machine-readable, tamper-resistant visas and other travel documents with biometric identifiers by a given deadline (currently Oct. 26, 2004) and readers and scanners for comparing such documents must be installed at all U.S. ports of entry by a certain deadline and in accordance with certain technology standards. The issuance of non-immigrant visas to nationals of countries that sponsor international

terrorism is restricted. Upon implementation of the Chimera system, stolen passport numbers must be entered into the system within 72 hours of the theft notification. Subject to certain exceptions, commercial passenger ships or aircraft traveling to the United States must transmit a passenger and crew manifest to immigration personnel at the port of entry prior to arrival. Also, such ships and aircraft departing from the United States must provide a manifest upon departure. The biometric and manifest requirements are part of the newly implemented US-VISIT program administered by the Department of Homeland Security (DHS).

The act strengthened the foreign student monitoring system; educational institutions are required to report the failure of an alien with a student visa to report for classes. Educational institutions approved to receive foreign students will be reviewed periodically for compliance with foreign student monitoring requirements. Failure to comply could result in termination or suspension of approval to receive foreign students.

The Homeland Security Act of 2002, which created the DHS, abolished the Immigration and Naturalization Service (INS) and transferred immigration-related functions from the INS and other agencies formerly sharing responsibility for certain aspects of immigration to the new Department of Homeland Security in order to enable more effective identification, monitoring, and removal of and prevention of entry by terrorist aliens, among other things. The Bureau of Customs and Border Protection (CBP) and the Bureau of Immigration and Customs Enforcement (ICE) are responsible for border security and interior enforcement functions, respectively, while U.S. Citizenship and Immigration Services (USCIS) is responsible for visa and naturalization services.

Visa issuances continue to be conducted by consular officials in the State Department but under the regulatory authority of and administration by the Secretary of Homeland Security. The Executive Office of Immigration Review remains in the Justice Department, where the Attorney General continues to have authority over immigration adjudications and administrative appeals. Although the agencies are to report to Congress technical corrections necessary to clarify the transfer of functions and some have been made, comprehensive technical corrections to the INA have not yet been enacted.

Various immigration policies and regulations related to counterterrorism and national security that were implemented by Attorney General Ashcroft have proved to be controversial, including the questioning of recently arrived aliens from Middle-Eastern countries; the National Security Entry-Exit Registration System mandating fingerprinting upon arrival and registration for stays exceeding 30 days of aliens from certain high-security risk countries; the targeted arrest and prolonged detention of illegal aliens of Middle-Eastern origin; closed removal hearings for certain removable aliens with alleged terrorism links; the secrecy of information on detainees; and the detention of Haitian refugees to discourage surges in migration that terrorists might use to facilitate entry into the United States.

Certain policies have led to law suits. The blanket closure of removal hearings for aliens with alleged terrorism links was upheld in one federal appellate court, while another held that hearings could only be closed on a case-by-case basis upon particularized findings. The Attorney General

implemented regulations authorizing immigration judges to close hearings on a case-by-case basis and issue protective orders for cases involving security-sensitive information upon request by federal government lawyers. Subsequently, inadvertent disclosure revealed that certain cases have been subject to closure orders that prevented their publication on court dockets and revelation or confirmation of their existence. The New Jersey Supreme Court let stand a lower court ruling that the federal government could prohibit the disclosure of immigration detainee information by local jail authorities, since federal authority over immigration matters preempted state laws requiring disclosure of inmate information. The U.S. Supreme Court let stand a federal appellate ruling holding that there was no First Amendment right for plaintiffs to receive the identities of non-citizen violators of immigration laws and non-citizen material witnesses who were detained in the wake of the September 11 attacks.

Under section 111 of the Aviation and Transportation Security Act (ATSA), P.L. 107-71, airport security screening personnel must be U.S. citizens and must pass a background check, including a criminal records check.

Existing immigration laws provide for a limited role for state and local law enforcement in the enforcement of criminal and civil immigration statutes. Pursuant to such laws, Alabama and Florida have signed agreements with the federal government to permit their agencies to perform certain new law enforcement duties.

The United States and Canada have made efforts to coordinate and harmonize immigration-related policies. These include the "Smart Border Accord," a 30-point plan including improved immigration database compatibility, visa policy coordination, pre-screening of air passengers, etc., and the Safe Third Country agreement, providing that asylum seekers must be processed in the country of first arrival. This agreement was prompted by concerns that persons arriving in the United States first would go to Canada to seek asylum, because Canada's asylum policies were allegedly less stringent than those of the United States.

Legislative Options and Proposals

As noted above, technical corrections to existing immigration laws may be necessary to clarify the transfer of functions to the Department of Homeland Security. H.R. 1416, the Homeland Security Technical Corrections Act of 2003, reported on May 15, 2003, would accomplish this end with respect to §§ 103 and 287(g) of the INA. Legislation such as the Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act, H.R. 2671) and the Homeland Security Enhancement Act of 2003 (S. 1906) reflect congressional interest in increasing state and local involvement in immigration enforcement. However, some commentators have expressed concern about the legal and public policy feasibility of an increased state and local law enforcement role.

Legislation such as the Border Infrastructure and Technology Modernization Act (S. 539/H.R. 1096), the Comprehensive Homeland Security Act of 2003 (S. 6), and (H.R. 853), would enhance border security by authorizing personnel increases, technology improvements and pilot projects, personnel training, and a coordinator for the northern border to further

improve cooperation and coordination with Canada. H.R. 4417, cleared for the White House on July 22, 2004, would extend the deadline for implementing the biometric requirements of the US-VISIT program until October 26, 2005.

S. 205 would permit the non-immigrant admission of certain persons with information about the Iraqi program for weapons of mass destruction, as well as their families; adjustment to lawful permanent residency would be possible on a discretionary basis.

H.R. 277 would authorize the Secretary of Defense to assign military personnel to the border to assist the DHS in preventing the entry of terrorists and illegal aliens, among other things, under certain conditions where necessary to respond to a national security threat. The House-passed version of H.R. 4200, the Defense Department FY2005 Authorizations Bill, contained a similar provision; however, the Senate-passed version did not.