

Web Memo



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Terrorist Loophole: Senate Bill Disarms Law Enforcement

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The Comprehensive Immigration Reform Act (CIRA, S.2611) before the U.S. Senate is touted by proponents as a “compromise,” combining amnesty for current illegal immigrants with stepped-up enforcement provisions. Nothing could be further from the truth. A previously unnoticed provision in this complicated legislation would disarm America’s state and local police in the war against terrorism.

A Costly Lesson

One of most important lessons that the United States learned on 9/11 was that state and local law enforcement can be the difference between an unsuccessful terrorist plot and a devastating terrorist attack.

Five of the nineteen hijackers had violated federal immigration laws while they were in the United States. Amazingly, four of the five had actually been stopped by local police for speeding. All four terrorists could have been arrested if the police officers had asked the right questions and realized that they were illegal aliens.

Police officers across the country responded by stepping up their efforts to assist the federal

government in making immigration arrests. But CIRA would stop them from protecting the American public in this way.

The cases of two of the 9/11 hijackers show just how critical a role state and local police can play.

Lebanese terrorist Ziad Jarrah was at the flight controls of United Airlines Flight 93 when it crashed in rural Pennsylvania. Jarrah first entered the United States in June 2000 on a tourist visa. He immediately violated federal immigration law by taking classes at the Florida Flight Training Center in Venice, Florida—a violation because he never applied to change his immigration status from tourist to student. Jarrah was therefore detainable and removable from the United States almost from the moment he entered the country. Six months later, Jarrah committed his second immigration violation when he overstayed the period he was authorized to remain in the United States on his tourist visa.

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Jarrah successfully avoided contact with state and local police for more than fourteen months. However, at 12:09 A.M. on September 9, 2001, just two days before the attack, he was clocked driving at 90 miles-per-hour in a 65-miles-per-hour zone on Highway 95 in Maryland, 12 miles south of the Delaware state line. He was traveling from Baltimore to Newark in order to rendezvous with the other members of his team.

The Maryland trooper did not know about Jarrah's immigration violations. Had the officer asked a few questions or simply made a phone call to the federal government's Law Enforcement Support Center (LESC), which operates around the clock from Williston, Vermont, he could have arrested Jarrah. Instead, the trooper issued Jarrah a \$270 speeding ticket and let him go. The ticket would be found in the car's glove compartment at Newark Airport two days later, left behind when Jarrah boarded Flight 93.

Saudi Arabian terrorist Nawaf al Hazmi was the second-in-command of the 9/11 attackers and a back-up pilot. He entered the United States on a tourist visa in January 2000 and rented an apartment, where he lived for more than a year, with fellow hijacker Khalid Almihdhar in San Diego. As with Jarrah, Hazmi's period of authorized stay expired after six months—after July 14, 2000, Hazmi was in the United States illegally. In early 2001, Hazmi moved to Phoenix, Arizona, to join another 9/11 hijacker, Hani Hanjour.

On April 1, 2001, Hazmi was stopped for speeding in Oklahoma while traveling cross country with Hanjour. Had the officer asked Hazmi a few basic questions or asked to see Hazmi's visa, he might have discovered that Hazmi was in violation of U.S. immigration law. Once again, the officer could have detained him but did not. The officer also had the authority to

detain Hanjour, who had entered the country on a student visa but never showed up for classes.

All of the 9/11 hijackers' encounters with local law enforcement were missed opportunities of tragic dimensions. If even one of the police officers had made an arrest, the terrorist plot might have been unraveled.

Lesson Learned

In the wake of the attacks, the Department of Justice announced the conclusion of a new Office of Legal Counsel (OLC) opinion: state and local police officers do have the legal authority to arrest *any* deportable illegal alien. This announcement did not create any new authority—the police had possessed it all along. Rather, the announcement reminded local law enforcement agencies of the crucial role that they could, and should, play in the war against terrorism by making immigration arrests.

The OLC opinion affirmed the conclusion of numerous U.S. Courts of Appeals that states have the inherent authority to assist the federal government by making immigration arrests. Moreover, Congress has never acted to displace, or “preempt,” this inherent authority. As the Tenth Circuit concluded in *United States v. Santana-Garcia* (2001), federal law “evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws.”

Police departments across the country responded to the lessons of 9/11 and the OLC opinion by exercising their inherent arrest authority with renewed determination. The number of calls to LESG by local police officers who had arrested illegal aliens nearly doubled, reaching 504,678 in FY 2005—or 1,383 calls per day, on average. Local police have become a crucial participant in the enforcement of federal immigration laws.

Disarming Law Enforcement

The Senate's immigration reform proposal would change all of that. Section 240D would restrict local police to arresting aliens for *criminal* violations of immigration law only, not *civil* violations. The results would be disastrous.

All of the hijackers who committed immigration violations committed *civil* violations. Under the bill, police officers would have no power to arrest such terrorists.

Moreover, as a practical matter, CIRA would discourage police departments from playing any role in immigration enforcement. Most police officers (indeed, most *lawyers*) do not know which immigration violations are criminal and which violations are civil. There is no particular logic to the distinctions. Overstaying a visa (something hijackers from the Middle East are more likely to do) is a civil violation, but marriage fraud is a criminal violation. Which one is more dangerous to national security?

Afraid of arresting the wrong type of illegal alien—and getting sued as a result—many police departments will stop helping the federal government altogether.

As the country is making progress in the war against terrorism, the Senate is poised to unilaterally disarm the men and women on the front line. Sadly, many senators aren't even aware of the damage they might inflict on U.S. national security.

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