WASHINGTON
LEGISLATIVE OFFICE

May 10, 2011

The Honorable Lamar Smith
Chairman
House Judiciary Committee
2409 Rayburn House Office Bldg.
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
House Judiciary Committee
2426 Rayburn Office Bldg.
Washington, DC 20515

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TREASURER

Dear Chairman Smith and Ranking Member Conyers:

RE: ACLU Opposes the Secure Visas Act of 2011 (H.R 1741)

On behalf of the American Civil Liberties Union ("ACLU"), a non-partisan organization with over half a million members, countless additional activists and supporters, and 53 affiliates nationwide, we urge you to oppose the Secure Visas Act of 2011 (H.R. 1741) when the bill comes up for consideration. For 90 years the ACLU has protected the rights of immigrants by ensuring equal protection and fairness under our laws. The Secure Visas Act, specifically section 2(b)(3), is an attack on the federal courts' vital oversight function – essential to our separation of powers – that is secured through independent judicial review by Article III judges of visa revocations. Review by an independent federal court is a tried-and-true oversight mechanism checking executive branch action. Removing it is an affront to the Constitution's guarantees of due process and judicial review.

Under long-established law, individuals placed in deportation proceedings on account of visa revocation are guaranteed judicial review by an immigration judge. Without judicial review, the government could abruptly revoke the visas of individuals admitted to the U.S. as permanent residents or those admitted based on their possession of valued skills - investors, physicians or engineers, for example. Upon visa revocation, those whom our government once welcomed into this country as valuable contributors would be subject to many permanent consequences including deportation, separation from U.S. citizen family members, termination of employment and severing of investment and other financial ties to the U.S. With so much at stake, Congress has seen fit to retain judicial review for those placed in deportation proceedings on account of visa revocation to protect law-abiding individuals against mistakes or violations made by government authorities.

Section 2(b)(3) of the Secure Visas Act mandates that "no United States court has jurisdiction to review a decision by the Secretary of Homeland Security to refuse or revoke a visa." This provision is intended to end access to federal courts for those admitted to the United States on the basis of a visa that is subsequently revoked on *any* ground. Yet Congress itself recently and specifically required judicial review of these visa revocations when it passed the Intelligence Reform and Terrorism Prevention Act of 2004.[1] Combined with the provisions of the REAL ID Act of 2005,[2] these post-9/11 statutes established a baseline of judicial review that must be harmonized with the Supreme Court's holding that "some judicial intervention in deportation cases is unquestionably required by the Constitution." *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)). If enacted, the Secure Visas Act would end "judicial intervention" in visa revocations and thereby violate the Supreme Court's constitutional principle of independent Article III judicial review. As a result, the Act would be subject to a lengthy (and successful) litigation challenge, frustrating its purpose of "allow[ing] U.S. officials to expedite the removal of terrorists who are in the United States on a visa."[3]

In considering the Act, it is also crucially important to scrutinize its overbreadth and the incorrect claims made on its behalf. First, while purporting to be a national security measure, the Act strips judicial review for *all* visa revocations. The Secure Visa Act's provision to end judicial review of visa revocations would affect a much wider range of people than the bill's purported national security focus. There are multiple grounds for visa revocation that have nothing to do with national security or terrorism, some of which are highly technical and/or easily infringed without malicious intent. *See* 22 C.F.R. § 41.122(h) (listing nine grounds for visa revocation other than national security concerns, including alleged fraud and cases where "the visa has been physically removed from the passport in which it was issued"). Past judicial review of visa revocations has corrected legal errors, such as the revocation of a family's visas because the primary applicant's spouse and two minor children did not personally appear for a consular interview. *See Wong v. U.S. Dep't of State*, 789 F.2d 1380, 1385 (9th Cir. 1986) ("Mrs. Wong and her children traveled to the United States. To revoke a nonimmigrant visa at that stage because the consular officer failed to ensure that the correct procedures were followed, when the alien is actually qualified to receive the visa, seems harsh, indeed.").

The Secure Visa Act's constitutional infirmities are compounded by exaggeration of its practical benefits. An inaccurate claim in support of the Act states that "[u]nder current law, a terrorist whose visa has been revoked is allowed to remain in the U.S. to fight their deportation instead of being sent home."[4] In fact, challenges to visa revocation, like all other petitions for federal court review, can continue without the person being in the U.S.; only individuals who are granted judicial stays of removal, which require "a strong showing that he [or she] is likely to succeed on the merits," are permitted to remain in the U.S. while their cases are heard. *See* 8 U.S.C. § 1252(b)(3)(B); *Nken v. Holder*, 129 S. Ct. 1749 (2009). Equally misleading is the contention that "H.R. 1741 simply applies the same review standard to visa revocations that is currently applied to visa denials."[5] Visa applicants from abroad, who have not been admitted to the United States, are not granted access to administrative review of visa denials before Article I

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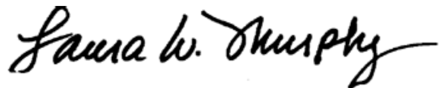
[1] Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5304.
[2] REAL ID Act of 2005, Pub. L. No. 109-13.
[3] House Committee on the Judiciary, "Chairman Smith Introduces Secure Visas Act." (May 5, 2011), available at http://judiciary.house.gov/news/SecureVisas.html
[4] "Secure Visas Act," *supra* note 3.
[5] *Id.*

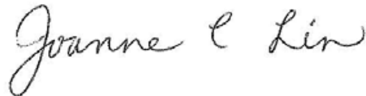
adjudicators – an immigration judge and the Board of Immigration Appeals, who are part of the executive branch – in contrast to those persons whose visas are revoked when they are within the United States.

In 2004-05 Congress recognized that visa revocations by the executive branch require independent oversight by the Article III judiciary. There is no indication that the current regime of judicial review is impeding expeditious removal of terrorists whose visas were revoked. The ACLU urges the House Judiciary Committee to oppose the Secure Visas Act. Please contact Joanne Lin, ACLU legislative counsel, with any questions at 202/675-2317 or jlin@dcaclu.org.

Sincerely,



Laura W. Murphy
Director, Washington Legislative Office



Joanne Lin
Legislative Counsel

Cc:

Members of the House Judiciary Committee