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STATE DRIVER'S LICENSE POLICIES FOR ILLEGAL IMMIGRANTS SHOULD SURVIVE LEGAL ATTACKS

By

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The 9/11 hijackers obtained American driver's licenses from Florida, Virginia and New Jersey, which they used to board the planes they would crash shortly thereafter. Hijackers Hanni Hanjour and Khalid Al-Midhar, for example, obtained driver's licenses in Virginia by hiring an illegal alien to vouch for their residency and listing his address as theirs. The next day, Hanjour and Al-Midhar used their new licenses to sponsor two other hijackers, Salem Al-Hamzi and Majed Moqed.

Courts have recently recognized that illegal immigrants use driver's licenses to conceal their illegal status and to defraud the government. *United States v. Remache-Garcia*, No. 03-3243, July 8, 2004 (3d Cir., unpublished) ("The evidence here established that Remache-Garcia was using a legal alien's license and the jury could reasonably infer that he was doing so to evade U.S. immigration and labor laws.").

In the late 1990s, immigrants' rights organizations, frustrated that Congress would not enact another amnesty for illegal immigrants, mounted a major effort to authorize illegal immigrants to obtain American driver's licenses. To aid that effort, the Mexican government offered a special identity card (a *matricula consular*) to illegal immigrants for use in the United States. By 2001, twelve states had no restrictions on providing driver's licenses to illegal immigrants. Illegal immigrants who wanted American driver's licenses flocked to states without documentation requirements. In May 2001, Tennessee dropped its requirement that applicants have a Social Security number, and applications increased thirty-fold in some counties.

Following 9/11, however, several of these states began to tighten their rules on driver's license issuance. In January, 2004, Virginia, which issued driver's licenses to four of the 9/11 hijackers, reformed its issuance policies to include documentation of the applicant's legal presence in the United States. New procedures have been implemented in Florida, Texas, Colorado and Kentucky to block illegal immigrants from obtaining driver's licenses.

The August 2004 Final Report of the 9/11 Commission recognized the danger posed to the United States by illegal aliens and terrorists obtaining American driver's licenses: "The federal government should set standards for the issuance of birth certificates and sources of identification, such as driver's licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists."

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Yet the push for driver's licenses for illegal immigrants continues. Legislatures in Florida and Maryland recently considered legislation granting driver's licenses to illegal immigrants, even though the furor over similar legislation in California is thought to have been one reason for the successful recall of former Governor Gray Davis.

The House of Representatives, in its proposals to implement the 9/11 Commission recommendations, would have prohibited illegal immigrants from obtaining driver's licenses. The Senate, however, refused to adopt these new prohibitions. The controversy helped to stall the entire bill for several weeks. The final legislation only retains provisions requiring standards for documents to be accepted by federal agencies for official purposes. F. James Sensenbrenner (R-WI), the Chairman of the House Judiciary Committee, who helped block consideration of the bill until immigration concerns were addressed, promised further action next year.

One of the most curious developments of the current effort to make driver's licenses available to illegal immigrants comes from New York, where the Puerto Rican Legal Defense and Education Fund (PRLDEF) filed suit challenging a new state requirement that driver's license applicants provide documentation of legal residence in the United States. The lawsuit, filed in the Supreme Court in Manhattan, asserts that requiring applicants to show evidence of legal residence is unconstitutional under the Due Process Clause of the United States and New York Constitutions. A "Preliminary Statement" to the Complaint asserts that the new policies "have less to do with motor vehicle regulation and more to do with the post-September 11 anti-immigrant frenzy that has resulted in official actions at all levels of government that are discriminatory, arbitrary and unlawful." The Complaint suggests that verifying immigration status "is the responsibility of the federal government, not a state motor vehicle agency." Cesar A. Perales, President of the PRLDEF and former state social services commissioner under former Governor Mario Cuomo, complained to the *New York Times* that national security was "a smokescreen."

It's not clear why PRLDEF is using this driver's license requirement to challenge a "post-September 11 anti-immigrant frenzy." Nor is the constitutional and statutory basis for the PRLDEF challenge to immigration documentation any more clear.

The Supreme Court has recognized the overwhelming value of a driver's license in today's society: "Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities." *Delaware v. Prouse*, 440 U.S. 648, 662 (1979). Nevertheless, the states have a "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles." *Id.*, 440 U.S. at 658. A state may condition the issuance of a license on reasonable criteria, including a belief that the criteria help promote public safety. *Continental Baking Co. v. Woodring*, 286 U.S. 352, 365-66 (1932). "Motor vehicles may properly be treated as a special class, because their movement over the highways, as this Court has said, 'is attended by constant and serious dangers to the public.'" *Id.*, quoting, *Hendrick v. Maryland*, 235 U.S. 610, 622 (1915).

The question in modern times is slightly different since the driver's license requirements have morphed from simply presenting evidence of possessing certain qualifications to operate a motor vehicle into evidence of a person's qualifications to do much more. For example, as the 9/11 Commission noted, a driver's license allowed the 9/11 hijackers access to the planes. In light of the recent court cases cited above, preventing driver's licenses from being used to defraud the federal government and defeat its security mechanisms constitutes a "reasonable interest" of the state. Given the clear recognition of this role by government agencies, is it beyond New York's power to require applicants for a driver's license to demonstrate that they are, in fact, the lawful residents they claim to be?

Combined with the overheated rhetoric about "anti-immigrant frenzy," this lack of legal justification for the PRLDEF suit indicates that the continued promotion of driver's licenses for illegal immigrants is more about policy than about rights. Since the states have a clear interest in protecting their driver's licenses from being misused to disastrous effect, the PRLDEF claim against New York should be swiftly dismissed.