

Testimony
United States Senate Committee on the Judiciary
Weaknesses in the Visa Waiver Program: Are the Needed Safeguards in Place to Protect America
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BEFORE THE UNITED STATES SENATE JUDICIARY
SUBCOMMITTEE ON HOMELAND SECURITY, TECHNOLOGY, AND TERRORISM

IMPACT OF THE “IMPLEMENTING RECOMMENDATIONS OF THE 9/11 COMMISSION ACT OF 2007” ON THE VISA WAIVER PROGRAM AND THE EXECUTIVE BRANCH’S PROGRESS IN APPLYING THESE REFORMS

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226 DIRKSEN SENATE OFFICE BUILDING
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Chairman Feinstein, Senator Kyl, and Members of the Subcommittee on Terrorism, Technology, and Homeland Security: I would like to thank you for the opportunity to appear before you today as you examine how the Department of Homeland Security (DHS or the Department) is responding to Visa Waiver Program (VWP) modifications in the “Implementing Recommendations of the 9/11 Commission Act of 2007” (P.L. 110-53).

A VWP that promotes legitimate travel to the United States without compromising, and even strengthening, our country’s national security, law enforcement, or immigration interests is a clear top priority for the Administration. Section 711 of the Act accomplishes this objective by concurrently enhancing the VWP’s security requirements and creating flexibility that expands opportunities for new countries to become VWP members.

These twin goals of security and flexibility are complementary: the prospect of VWP membership creates tremendous incentives for improved security postures in aspirant or “Roadmap” countries. In many respects, we will end up with stronger travel security cooperation with VWP countries than with non-VWP countries.

Let me spend a few moments updating you on the steps the Department has taken to further strengthen the VWP’s security features and expand the program’s membership.

As you know, Section 711 provides four mandatory security enhancements to the VWP which affect both current VWP countries and those that aspire to participate in the VWP through the waiver of the 3% visa denial rate requirement: (1) an Electronic Travel Authorization (ETA) system; (2) more robust data sharing efforts; (3) requirements for timely reporting of blank as well as issued lost and stolen passports; and (4) guarantees that VWP countries accept the repatriation of their nationals ordered removed from the United States. There are also three discretionary enhanced security factors to be taken into consideration when determining whether the 3% visa denial rate requirement can be

waived: (1) airport security standards; (2) air marshals programs; and (3) standards for national travel documents.

To ensure both current VWP members and Roadmap countries understand the legislative changes and enhanced security standards, DHS has implemented an aggressive outreach and engagement strategy. This strategy will allow the new standards to be brought online expeditiously. Since summer 2007, DHS has informally met with current and aspirant VWP countries alike to explain exactly what the enhanced security measures entail. This outreach effort involves both high-level consultation and working-level technical conversations between DHS personnel, in partnership with our colleagues in the Department of State, and their foreign counterparts. More recently, the Department has formalized all seven of the security enhancements into draft memoranda of understanding (MOUs) and is working to finalize associated implementing arrangements that will detail the terms of the new security measures. DHS is requiring each member and aspirant country to sign an MOU as well as the appropriate implementing arrangements (once those have been finalized), unless other arrangements or agreements already in place fulfill the new security requirements of the VWP legislation. Those countries seeking to join the VWP will have to comply with all of the new security measures upon admission; current participants will have to meet those new requirements, including discretionary requirements, by October 2009. Staggering the times for compliance in this way best enables us to ensure a smooth and efficient path to uniform security standards for all VWP members. As we've stated before, uniform security standards are essential because the terrorist threat is not confined to particular corners of the globe.

To enable the expeditious adoption of these new security requirements, DHS-led interagency teams have begun intensive dialogue with multiple countries, including: the Czech Republic, Estonia, Germany, Greece, South Korea, and the United Kingdom. Earlier this month, a DHS-led delegation visited Athens, Prague, Berlin, and Tallinn for MOU negotiations. And, at the end of January, a Korean delegation was here in Washington for a second round of MOU discussions. We will soon begin formal consultations with Hungary, Slovakia, Latvia, and Lithuania, and expect to travel to their respective capitals for negotiations next month. Among others, Germany and the United Kingdom have a history of pursuing innovative bilateral security initiatives with the United States. The eight aspirant countries in the above list have met or are close to meeting the program's technical requirements. Equally important, they have strong incentives to commit to implementing the full suite of security standards, and each has indicated a willingness to do so.

As most of you are probably aware, Secretary Chertoff had the pleasure of signing the MOU with the Prime Minister of the Czech Republic earlier this week. We believe that the information sharing arrangements detailed in the MOUs and which will be further detailed in the related implementing arrangements—which may include enhanced access to passenger information for those traveling to the U.S.; information on those engaged in significant criminal activity in VWP countries; information on asylum denials, fraudulent asylum claims, and immigration violations; and the timely reporting of all lost and stolen passport data—will provide our operators and analysts with new tools to secure our nation as well as help prevent terrorist and criminal activities in our VWP partner nations. As such, they will go a long way toward mitigating risks of the VWP program.

The MOU signed with the Czechs establishes a new security framework for our nations. We look forward in the coming months to signing similar MOUs with all current and prospective VWP nations. This success is the result of both Czech leadership working diligently towards this goal and engagement with the European Union. While the extension of visa free travel privileges must always remain a bilateral matter for very practical purposes - simply because we must measure the concrete actions of those countries whose citizens may receive this benefit - outreach to the EU has been vital.

The United States and European Union have a common vision in which transatlantic travel is greatly facilitated for the vast majority of travelers who pose no security or law enforcement risks but is increasingly difficult for terrorists and other criminals.

Although DHS is actively engaged with each of the Roadmap countries listed above, Greece is the only VWP-candidate country that has been formally nominated for designation by the Department of State. As you know, initial designation (as well as continuing designation) depends on a determination by DHS, in consultation with the Department of State, that such designation would not negatively impact U.S. security, law enforcement, and immigration interests. To that end, a DHS-led interagency team traveled to Greece late last year to comprehensively review its counterterrorism capabilities; immigration, citizenship and naturalization laws; passport production and issuance controls; efforts to combat organized criminal activities; general law enforcement cooperation with the United States; and border control mechanisms. DHS will undertake a similar assessment of all countries prior to admission, just as we do at least biennially for all current participants.

As noted earlier in this testimony, the twin goals of security and flexibility are mutually reinforcing. The law gives the Secretary greater flexibility with regard to aspirant countries' nonimmigrant visa refusal rate provided the Department: (1) certifies that an air exit system is in place that can verify the departure of at least 97% of the foreign nationals who exit through U.S. airports and (2) implements an Electronic Travel Authorization (ETA) system.

The Department is well on its way to being able to verify a 97% biographical match for the departure of foreign nationals exiting through U.S. airports. I should note that there are several different methods that may be used for verifying the departures of foreign nationals through U.S. airports and that in response to different requests over the past several years, DHS has identified various methodologies and statistics when asked for information on the air exit program. No final decision has been made as to precisely which methodology DHS will use in calculating the 97% match. The Department continues to evaluate and look for ways to improve the methodology underpinning the air exit calculations. To that end, US-VISIT has contracted with Lawrence Livermore National Laboratory (LLNL) to improve the matching algorithm. DHS will receive feedback from LLNL throughout FY 2008.

In addition to working through questions of methodology, DHS is also working with air carriers to ensure that they are providing accurate passenger manifest information. Improved airline data collection has increased compliance rates, which in turn has led to a positive impact on matching records. CBP will continue to work with carriers to improve both the timeliness and comprehensiveness of the records. With the implementation of the APIS Pre-Departure, commercial carriers will be required to transmit manifest information for each traveler prior to issuing a boarding pass. Once the aircraft departs, the air carriers will be required to provide a close-out transmission that will confirm on-board passengers or reconcile the manifest to account for those passengers that did not board.

This again will improve DHS' final calculations for air departure rates of foreign nationals. Finally, when DHS implements biometric air exit processes, the Department expects the biometric data it collects to improve the match rate. This increase in matching accuracy was demonstrated in the Department's biometric exit pilot program at 14 ports of entry, which recently concluded. While DHS was collecting biometrics during the exit pilot, it used the biometric matching capability of the IDENT system to increasing the accuracy of the matches of departure records to other records.

Section 711 also requires the implementation of the ETA system prior to the Secretary's exercise of

his visa refusal rate waiver authority. The ETA system will substantially strengthen the security of the VWP by providing DHS with the capability to conduct enhanced advance vetting of VWP travelers. It is essential to transforming the VWP from a program that evaluates security threats on a country-by-country basis to one that is capable of making traveler-by-traveler judgments. Under the ETA, VWP travelers will be required to electronically submit biographic and other information that is largely the same as that currently collected via the I-94W Nonimmigrant Alien Arrival/Departure Form (I-94W) to DHS prior to their departure for the United States. ETA applications will then be queried against a limited number of appropriate law enforcement databases and watchlists, enabling DHS to make a determination on each individual's eligibility to travel to the United States under the VWP. Travelers denied an ETA will be referred to the U.S. embassy or consulate to apply for a non-immigrant visa.

In support of ETA, DHS is developing a web-based application and screening mechanism for direct access by VWP travelers. The system will be designed for future volume increases and for peak periods of travel. DHS expects that the ETA system will be online during the summer of 2008; DHS will commence an overlapping rollout of the ETA program for all VWP travelers. With support from the Department of State, DHS will initiate a public outreach campaign to promote awareness among affected VWP travelers as well as within the travel and tourism industries. In addition to enhancing security, ETA should provide for greater efficiencies in the screening of international travelers by reducing traveler delays at the ports of entry.

DHS is committed to strengthening the VWP in a substantive way and to bringing new members into the program. Ensuring that secure, legitimate visa-free travel to the United States is available to our allies is a goal we can all agree on.

Madam Chairman and Members of the Subcommittee, I want to thank you for the opportunity to present this testimony today. I would be pleased to respond to any questions you might have at this time.