

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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Chairman Feinstein, Ranking Member Kyl, and other subcommittee members, thank you for the opportunity to be here today to discuss weaknesses in the Visa Waiver Program (VWP), which are important to consider as the Department of Homeland Security (DHS) moves to expand the program rapidly. This expansion is proceeding before the needed tools are in place to manage the program effectively, and apparently without regard to legitimate security and law enforcement concerns about visitors from many of the countries in question. As a result, Americans will be more vulnerable to terrorist attack, more exposed to organized criminal enterprises, and will experience even more illegal immigration, all of which comes at enormous fiscal and social cost to the nation.

What is the hurry? The U.S. travel industry, which is one of the organized interests pushing for the expansion, is coming off of one of its most prosperous years ever, and is hardly an industry in crisis. Yet if another attack occurs because we have let our guard down, the travel industry will be particularly hard hit, as it was after 9/11. It is vitally important that Congress vigilantly exercise its oversight authority to ensure that DHS provides the missing security and enforcement pieces to minimize the inherent risk in this program.

Rudimentary Exit Recording, But Still No Overstay Reporting.

Immigration policymakers on the Hill and in the Executive Branch have understood for well over a decade that visa overstayers represent a significant share of the illegal alien population. Estimates range from one-third to one-half of the illegal alien population, or between four to six million illegal aliens. They present a possible national security risk -- several of the 9/11 hijackers were visa overstayers, and others have been caught working in critical infrastructure facilities or other sensitive locations. They commit crimes. For example, among the most violent criminal gangsters arrested under ICE's Operation Community Shield were several murderers who entered on non-immigrant visa. In addition, like other illegal immigrants, visa overstayers are costly to taxpayers. The total net cost of illegal immigration runs about \$10 billion per year, after taxes are accounted for, so the share of that cost attributable to visa overstayers is likely \$3-5 billion per year.

With all we know about the risks and costs associated with visa overstayers, it is hard to understand

why DHS has displayed so little curiosity about this population. Most observers agree that collecting and analyzing information on visa overstayers is key to maintaining the integrity of the immigration system. Congress first mandated the development of an entry-exit system in 1996, after the first World Trade center bombing. In addition to producing actionable enforcement leads, a true entry-exit recording system would enable policymakers to assess which travelers are not complying with the law. Visa overstay data provide information on how travelers actually behave, and are less speculative than refusal rates, which reflect the aggregate of consular officers' assessment of possible behavior.

This data is important to consular officers, who crave better information to use in making visa issuance decisions. It is especially important in making an objective and sound determination of which countries might qualify for the Visa Waiver Program. How DHS can contemplate expanding the system before the entry-exit system is ready is beyond my comprehension, but that is exactly what is happening.

As a condition for granting DHS the sole authority and discretion for determining membership in the Visa Waiver Program, last year Congress directed the agency to establish an exit recording system for air travelers that can account for at least 97% of those who depart by air. This is in addition to long-standing requirements for DHS to implement an exit recording system as part of US-VISIT, and long-ignored requirements for DHS to produce annual estimates of how many travelers have overstayed visas and the nationality of visa overstayers (the Data Management Improvement Act of 2000 and the Visa Waiver Permanent Program Act).

DHS has made good progress in establishing the entry system (US-VISIT). But not only has DHS failed to move forward on establishing a true exit system, it has not made full use of those tools already in place, specifically the biographic matching system based on information collected by airlines on passenger manifests. Essentially, DHS is trying to eat its cake and hide it too -- it claims that the biographic matching system fulfills the requirements of the VWP expansion law, but will not produce any reports from the system to inform the selection of countries to be included in the expansion, or to meet its obligations under the law.

The biographic matching system has been in place since the beginning of 2004. It has a number of limitations. First of all, it is maintained by the airlines, and there is no way to verify the accuracy of the information. Since it is biographic, not biometric, it cannot authenticate the identity of departing passengers. This means it would be easy for someone to create a record of leaving the country without actually leaving. Finally, DHS is not attempting to match records to determine compliance with the terms of the visa, only to any previous departures or adjustments.

It's fair for Congress to ask why, after all these years, is DHS still unable to fulfill this requirement? Since 2004, DHS has operated the Compliance Enforcement Unit (CEU), which receives and analyzes information from US-VISIT, SEVIS, NSEERS, and other sources to generate enforcement leads for ICE. CEU has provided data to the State Department for an evaluation of overstays in the H-2B guestworker program. It provides data to FBI agents in Philadelphia, who map the location of overstayers, along with other lawbreakers, as part of a local crime-solving effort known as Project Pinpoint. If DHS can manage to provide information of this level of detail to other agencies to use in very specific ways, why can they not produce even a basic report on the estimated number and citizenship of overstayers to help establish if certain countries are a good bet for the Visa Waiver Program?

Electronic Travel Authorization of Limited Use in Detecting Unqualified Travelers.

The implementation of the Electronic Travel Authorization (ETA) process has been touted as a major security enhancement to the Visa Waiver Program. It is important to recognize that while this process will provide the opportunity for advance database checks on travelers before they arrive, and may succeed in alerting officials to the pending arrival of people who may be of interest, the ETA tool is really of very limited utility in determining the eligibility of travelers or screening out terrorists and criminals. As far as I can tell, the ETA process is simply an advance automated name check. Certainly this adds another layer and another opportunity for screening, but not much more than would be accomplished anyway at the port of entry. The port of entry screening is much more thorough because it authenticates the traveler's identity using fingerprint and digital photo matching, checks an array of security and crime databases, and includes verbal questioning.

The ETA is certainly no substitute for a consular interview. Much as a doctor can best make a diagnosis by seeing and talking with the patient, the consular interview is the best tool for evaluating the qualifications of prospective visitors. And qualifying for admission to the United States is not simply a matter of not being a known terrorist or criminal. To be admitted, visitors need to demonstrate that they have a legitimate reason for travel and that they are likely to return home. That determination simply cannot be done electronically.

Some Proposed Expansion Countries Raise Security and Law Enforcement Concerns.

The State Department once stated in a response to a GAO report, "The Department recognizes that a major reason for the [Visa Waiver] Program's success lies in the strict standards for participation."

DHS's move to designate as many as nine new VWP countries this year represents a marked deviation from what has been a reasonably successful approach. The nine countries being proposed are: South Korea, the Czech Republic, Greece, Malta, Slovakia, Hungary, Lithuania, Latvia, and Estonia. While some of these countries appear to meet the criteria for the program, even under the old, stricter rules, a number of them do not. Because we currently lack the safeguards to prevent large numbers of inadmissible travelers from entering, and because we lack the ability to identify and remove those who overstay, the expansion of the program to include more than the small handful of clearly-qualified countries is risky. A number of the countries on the DHS list are associated with serious law enforcement problems such as organized crime and visa fraud, and a number of the countries have large numbers of visa applicants who are not qualified and whose visitors have poor records of visa compliance.

While overstay rates in combination with other security requirements would be the best measure to determine if a country should be included in the Visa Waiver Program, in their absence DHS may continue to use refusal rates. Two of the nine proposed countries, Greece and Malta, have refusal rates below three percent, which is the old threshold for participation (along with other security factors). Another three countries have refusal rates under the new 10% threshold DHS is allowed to use: the Czech Republic (6.7%), Estonia (4%), and South Korea (4.4%). Each of these countries has its own unique problems to overcome, but on balance each presents a relatively reasonable case for consideration.

Four of the countries on the DHS list have refusal rates above the limit proscribed by the law: Lithuania (12.9%), Latvia (11.8%), Hungary (10.3%) and Slovakia (12%). Without data showing strong records of compliance, these four countries appear to be weak candidates for the VWP.

Some observers have suggested that the visa refusal rates are an unfair representation of a country's readiness for the Visa Waiver Program, and that consular officers judge applicants from these countries too harshly. Yet a new study by the Center for Immigration Studies finds the opposite – that

consular officers are too lenient in issuing visas, and that issuance rates are much higher than conditions in many countries warrant, especially Eastern European countries. For one thing, the lack of feedback consular officers receive on travelers receiving visas who are later denied entry or caught overstaying causes many to underestimate the scale of the problem. In addition, many diplomats fail to appreciate the deep quality of life differences between the United States and the charming countries in which they serve – for example, a \$600 a month office clerk salary may seem comfortable for Prague or Budapest, especially relative to what others there earn, but is much less attractive than what that person can earn here. Finally, the “issuance” and “customer service” culture that prevailed in the consular corps before 9/11 is still dominant today. Consular officers have little incentive to be tough or even realistic in their decisions, and face no accountability for repeatedly issuing visas to unqualified applicants. On the contrary, they are instructed to find excuses or reasons to issue, despite what the law requires.

Pressure to help some of the VWP roadmap countries meet the refusal rate criteria could be one factor behind the recent drop in refusals in some of these countries (as happened with Ireland in the period before its acceptance). From 2006 to 2007, the refusal rates of Lithuania and Latvia dropped by about 50% (from 27.7% to 12.9% and from 21.6% to 11.8% respectively). Over the same period Hungary’s dropped from 12.7% to 10.3%, and Slovakia’s went from 16% to 12%. Meanwhile, validation studies and other reports suggest overstay rates may be as high as 25-30% for citizens of some of these countries.

It has been suggested that conditions have improved in these countries sufficiently so that fewer applicants would seek to overstay in the United States, or that those who wish to move would be more likely to relocate in other European Union countries, not the United States. These claims are speculative at best. For one thing, these countries have significant diasporas in the United States to attract and shelter new illegal immigrants. Even more important, the absence of a visa requirement will almost certainly cause far more people to consider illegal immigration as an option, as there will be virtually no chance of rejection at the port of entry, as long as the traveler is not a known terrorist or criminal.

Most of the visitors from the fast-track or “road map” countries certainly are not terrorists or criminals. However, reports from U.S. and international law enforcement agencies suggest that many of them do present significant law enforcement concerns that are sure to be exacerbated if travel to the United States is made easier. For instance:

- Greece is an important gateway for illegal drugs from the Middle East and Southwest Asia;
- Organized crime is rampant throughout Eastern Europe, and several of the crime syndicates headquartered in Russia and Budapest also have operations in Philadelphia, Miami, Los Angeles, New York, Boston, and Chicago. These groups, which include the notorious Semion Mogilevich Organization and the Solntsevskaya Organization, are involved in arms dealing, drug trafficking, uranium trafficking, murder, and visa and immigration fraud.
- Estonia, the Czech Republic, Hungary, Lithuania, and Slovakia are all home to significant illegal drug production operations ;
- The Czech Republic, Estonia, Greece and Hungary all provide bases for major drug trafficking organizations ;
- A number of Lithuanians have been convicted recently in the United States in major immigration

fraud-related conspiracies .

- Korean criminal enterprises are known for trafficking crystal methamphetamine and heroin, extortion, gambling, alien smuggling, prostitution, and money laundering, and have established particularly strong footholds in Hawaii and the west coast.

In at least one Eastern European country, an organized crime syndicate has successfully hijacked the U.S. diversity visa, or visa lottery, application process. The syndicate used stolen data from a university student database to populate electronic visa lottery applications. Then it intercepted the winners' letters from a local post office, and coerced the unsuspecting winners into completing the green card applications, sometimes with new spouses provided by the syndicate. Upon arrival in the United States, the winners reportedly remained under the hold of the syndicate and were forced into ongoing criminal activity.

Although VWP countries are required to develop more secure passports and share data on lost and stolen passports, serious questions remain about the integrity of passports throughout the European Union, and especially in the "new" European countries. In 2006, a BBC reporter was able to obtain and use 20 different EU passports, (including Czech, Estonian and Latvian passports) paying between 250-1,500 pounds Sterling apiece. Her Estonian passport was registered on the Interpol database of stolen passports, but was not detected as stolen at a port of entry. It probably goes without saying that if a BBC reporter can travel at will on stolen or altered European passports, so can a terrorist.

The United States has long had a problem with prostitution sustained through human trafficking. It is worth noting that, according to government officials, some of the prostitution services trade is accomplished relatively openly, with prostitutes from Korea coming and going from the United States legally on regular B visas, rather than being trafficked in the traditional sense. Obviously Korea's membership in the VWP will facilitate this phenomenon.

All of these examples suggest that opening up admissions to the United States from this group of countries within a short time frame, without adequate safeguards in place, is inviting an increase in illegal immigration and organized criminal activity.

Interior Enforcement Lacking.

Besides lacking adequate screening to prevent the entry of terrorists, criminals and illegal immigrants, the United States devotes relatively few resources to identifying and removing illegal immigrants, or to keeping them from becoming established here. While many visitors lie through their teeth to the consular officer and port of entry inspector about their plans, others do not decide to stay until after they arrive and realize how easy it is to work and live as if they were here legally.

The immigration enforcement agency (ICE) has just a few thousand special agents and deportation officers to cope with an illegal alien population of 12 million plus tens of thousands of criminal aliens who are not here illegally but are removable because they have committed serious crimes. Currently, the agency is capable of removing only about 200,000-250,000 illegal and criminal aliens per year. Only a handful of states require employers to verify the immigration status of new workers, and workplace enforcement is not the top priority for ICE, so few employers feel any urgency to comply voluntarily with the laws forbidding the hiring of illegal workers. A number of states still issue drivers licenses to illegal aliens and temporary visitors. These documents can be used to obtain employment, bank accounts, and firearms, among other trappings of a legal existence. Even if DHS is able to determine which visitors overstay, there is little chance that ICE will act on the information.

So while the expansion of the Visa Waiver Program may serve foreign policy goals and benefit certain foreign travelers, the expansion comes at a price. This price will be paid by those Americans who become victims of crimes committed by people taking advantage of the lack of visa controls, by those who lose job opportunities to new illegal immigrants overstaying their welcome, and by taxpayers who must shoulder the burden of public services, criminal justice expenses, and increased immigration law enforcement that will be necessary as a result. Congress must do what it can to try to reduce the security and fiscal cost of the program by insisting that DHS fulfill its obligations to implement a genuine exit recording system, produce the best possible overstay estimates, along with the other security requirements in the authorizing legislation. In addition, while there is no statutory requirement for this, the pending expansion of the VWP should be accompanied by an infusion of additional resources for law enforcement as well as the implementation of measures, such as mandatory verification of immigration status in the workplace, that will discourage visa overstayers, and all prospective illegal immigrants, from settling here.

Respectfully submitted by,

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