

Statement of

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On

Visa Overstayers: Can We Bar the Terrorist Door?

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Mr. Chairman and distinguished Members of the Subcommittee, my name is Margaret Stock. I am honored to be here in my capacity as an expert in the fields of immigration, constitutional, military, and national security law. I am an Associate Professor at the United States Military Academy at West Point, New York. The statements, opinions, and views expressed herein are my own, and do not represent the views of the United States Military Academy, the Department of the Army, the Department of Defense, or any other government agency.

As I mentioned previously, I am an Associate Professor at the United States Military Academy at West Point, New York, where I teach National Security Law, Constitutional Law, and Military Law to future military officers. I am also a lieutenant colonel in the Military Police Corps, United States Army Reserve. As an attorney and a graduate of the Harvard Law School, I have practiced in the area of immigration and citizenship law for more than ten years, and have written and spoken extensively on the issue of immigration and national security. Over the years, I have represented hundreds of businesses, immigrants, and citizens seeking to navigate the difficult maze of US immigration law.

I am honored to be appearing before you this afternoon to discuss the issue of "Visa Overstayers: Can We Bar the Terrorist Door?" This hearing could not be more important or timely because it comes as our nation is engaged in an important debate about how we should reform our immigration laws. This hearing can help us focus on the central issues that our nation must address successfully if we are to enhance our security and thrive as a nation. Hopefully, we can clarify the major issues at stake, judge where we have succeeded and failed, and question

any false assumptions we may hold. For example, we must be willing to take a hard look at the measures we have taken to enhance our security and evaluate honestly whether or not they actually make us safer, and whether they are worth the cost. In addition, we must acknowledge that we cannot enhance our security unilaterally, and must work with other nations—this is an area where this Committee can make important contributions. Most of all, we must realize that in these times of unprecedented challenges, we must work together.

You asked me to address the threat that visa irregularities and overstays pose to the United States, especially in light of the War on Terror; the weaknesses of the overstay tracking system; the risks to domestic security; and what might be done to resolve the overstay problem. I want to make three key points:

- **First, we secure our borders best by enhancing our intelligence capacity.** We certainly need effective monitoring of status compliance within the United States combined with effective exit controls when it makes sense from a cost-benefit perspective; I support the Department of Homeland Security's efforts in this regard. Yet visa overstayers are a very tiny piece of the security picture; very few visa overstayers are terrorists, and focusing too many resources on visa overstayers means that we neglect more effective measures, such as improving our intelligence capacity. Going after all visa overstayers is not a cost-effective way to stop terrorists; in fact, such an effort would likely divert resources better used on more focused efforts, such as the use of immigration information to enhance our intelligence on terrorists and their networks. In addition, US VISIT, the system that is supposed to let us track overstays, has been plagued with problems and delays, and the REAL ID Act has handicapped our ability to identify and find people within our borders. National security is most effectively enhanced by improving the mechanisms for identifying actual terrorists, not by implementing harsher immigration laws or blindly treating all foreigners as potential terrorists. Comprehensively reforming our immigration laws will help us to identify those who are here, and reduce significantly the number of visa overstayers.
- **Second, we need to make our borders our last line of defense.** If we are chasing after visa overstayers in order to stop terrorists, we have already in essence lost the fight. This approach assumes that we have already allowed the terrorists into the country. Once terrorists are inside the United States, it is very hard to find them, particularly now that we have decided to restrict the issuance of drivers' licenses and state identification documents severely. In the past, we could locate foreigners within our borders by using the drivers' license databases; that tool has now been degraded. Thus, we are forced to look to our physical borders as the next best option. And yet the physical borders of the United States should be our last line of defense because terrorism does not spring up at our borders. Rather than trying to chase visa overstayers, we should be focusing our efforts on getting resources to the consulates; providing the consulates with adequate, trained staff; and giving consulates access to accurate databases when they make the crucial decision to give someone a visa in the first place.
- **Third, comprehensive immigration reform is an essential component of enhanced security.** Our current immigration system is an obstacle to enhancing our

security because it is dysfunctional. Visa overstayers are a function of the dysfunctional system that we have right now. The vast majority of people who overstay their visas are not terrorists; many are awaiting approval of an adjustment application; hoping that an immigrant visa number will become current; are afraid to leave the United States for fear of triggering a 3-year, 10-year, or permanent bar; or have become “overstays” through some bureaucratic glitch or a failure of their sponsor to file the correct paperwork. Allocating massive resources to find and deport these people makes little sense in a time when we have a far greater problem with poor intelligence on terrorists, an inability to disseminate that intelligence to the agents who need it, and a lack of consular resources to screen visa applicants properly. Once people are in the country, however, it is far easier and more cost-effective to tackle the visa overstay problem with a program to get overstays to come forward voluntarily through comprehensive immigration reform than to try to find them without their cooperation.

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In this mission to secure our borders, we need to grapple with the following questions:

**1. What security measures are most effective—and cost-effective—in preventing attacks?** If we are to succeed in reducing our vulnerability to further terrorist attacks, we must focus our attention and resources on the gaps in intelligence gathering and information sharing that allowed nineteen terrorists to enter the United States. National security is most effectively enhanced by improving the mechanisms for identifying actual terrorists, not by implementing harsher immigration laws or blindly treating all foreigners as potential terrorists. Policies and practices that fail to properly distinguish between terrorists and others take us down the wrong path as ineffective security tools that do more harm than good. Comprehensively reforming our immigration laws is an essential tool to help us distinguish between those who mean to do us harm and those who are here to fill our labor market needs and reunite with close family members.

**2. What is the role of our "borders" in enhancing security?** When people refer to our "borders," they usually mean the geographic boundaries that separate the United States from Canada and Mexico. Yet to enhance our security we must make our physical borders the last line of defense against terrorism, not the first. We must pursue initiatives including multilateral strategies with Canada and Mexico to create a North American Perimeter Safety Zone, and increase the use of pre-clearance and pre-inspection programs that provide U.S. officials the opportunity to check passengers for admission before those passengers board a flight to the United States (while including safeguards to allow asylum protection for those who truly deserve it). We must also provide more resources to our overseas consulates, giving those who make initial visa decisions the tools they need to make the right decisions.

Our government has been touting the United States Visitor and Immigrant Status Indicator Technology program (US VISIT) as a tool that will help to make us safer by identifying terrorists. While US VISIT can help to identify people, its utility as a security tool is unclear. On the issue of overstays, US VISIT is not much help. Once someone is in the United States and fails to depart timely, US VISIT does nothing to help us find them. The only method of finding such overstays is (1) by accident, or (2) by checking other, internal databases that might tell us the location of the overstays. We have crippled our capacity to find such people by

enacting REAL ID, because once REAL ID goes into effect, we will no longer be able to find overstays through state driver license databases. While other databases such as ChoicePoint can provide some alternative information that might allow us to find people, these databases are not nearly as reliable as the state DMV records were prior to enactment of REAL ID.

I call your attention to a June 1998 Senate Judiciary Committee Report (Senate Judiciary Report 105-197 on S. 1360, the Border Improvement and Immigration Act of 1998, June 1, 1998), which made the following apt comment about US VISIT and its utility in tracking overstays:

*The Committee is keenly aware that implementing an automated entry/exit control system has absolutely nothing to do with countering drug trafficking, and halting the entry of terrorists into the United States, or with any other illegal activity near the borders. An automated entry/exit control system will at best provide information only on those who have overstayed their visas. Even if a vast database of millions of visa overstayers could be developed, this database will in no way provide information as to which individuals might be engaging in other unlawful activity. It will accordingly provide no assistance in identifying terrorists, drug traffickers, or other criminals.*

With regard to tracking visa overstayers, the report further stated:

*Even if a list of names and passport numbers of visa overstayers would be available, there would be no information as to where the individuals could be located. Even if there was information at the time of entry as to where an alien was expecting to go in the United States, it cannot be expected that 6 or more months later the alien would be at the same location. Particularly, if an alien were intending to overstay, it is likely that the alien would have provided only a temporary or false location as to where the alien was intending to go.*

It is also important to note that US VISIT has serious problems: Recent government reports reveal that there is a high risk that US-VISIT will not meet its stated goals. Specifically, according to four highly critical GAO reports, US-VISIT has a poor management record. Links to these reports follow:

- In March of 2004, the U.S. Government Accountability Office (GAO) conducted a study of US-VISIT and found that it is "inherently risky" because of the demanding and challenging implementation schedule, enormous potential cost, uncalculated and underestimated costs, and problematic program management. A link to the study follows:  
<http://www.gao.gov/highlights/d04569thigh.pdf>
- In a February 2005 study, the U.S. Government Accountability Office (GAO) found that a high risk remains that US-VISIT will fail to meet its stated goals. Among other findings, the study found that DHS has failed to identify non-governmental costs such as social costs associated with adverse potential economic impact at the border that may be attributable to US-VISIT implementation. A link to the study follows:  
<http://www.gao.gov/new.items/d05202.pdf>.

- In a January 2006 study, the U.S. Government Accountability Office (GAO) found that DHS return-on-investment analyses for US-VISIT exit tracking systems do not demonstrate that these schemes will be cost-effective or work as intended. A link to the study follows:

<http://www.gao.gov/cgi-bin/getrpt?GAO-06-318T>

- In February 2006, the US Government Accountability Office issued a report that was highly critical of the overall management of US-VISIT. The report incorporates the criticisms of the January 2006 report but also looks at deficiencies in VISIT "critical areas" more broadly than does the January report. The February report states: "[P]rogress in critical areas has been slow. ... [T]he longer that US-VISIT takes to implement our recommendations, the greater the risk that the program will not meet its stated goals and commitments." A link to the February report follows:

<http://www.gao.gov/cgi-bin/getrpt?GAO-06-296>

The January 2006 GAO report found that DHS return-on-investment analyses for US-VISIT exit tracking systems do not demonstrate that these schemes will be cost-effective or work as intended. The report is unequivocal that US-VISIT's operational and technology context remains "unclear." At page 12 it states:

*A prerequisite for prudent investment in programs is having reasonable assurance that a proposed course of action is the right thing to do, meaning that it properly fits within the larger context of an agency's strategic plans and related operational and technology environments, and that the program will produce benefits in excess of costs over its useful life. We have made recommendations to DHS aimed at ensuring that this is in fact the case for US-VISIT, and the department has taken steps intended to address our recommendations. These steps, however, have yet to produce sufficient analytical information to demonstrate that US-VISIT as defined is the right solution. Without this knowledge, investment in the program cannot be fully justified.*

The report's conclusion observes that US-VISIT's "core capabilities, *such as exit*, have yet to be established and implemented, and fundamental questions about the program's fit within the larger homeland security context and its return on investment remain unanswered." (Emphasis added.)

US-VISIT Director Jim Williams has acknowledged US-VISIT's technological challenges. At a January 5, 2006 media round table discussion on US-VISIT, he admitted that the technological solutions do not exist at present. "We're pushing the industry" he is quoted as saying. In respect to technological solutions, he later acknowledged "Our toughest challenges in the long term are probably around exit (procedures) and the ability to link databases." (See "US-VISIT system hitting a technological wall," by Meg Olson, The Northern Light (Blaine WA) Jan 12, 2006). Thus, although US-VISIT has been in existence for four years and over a billion dollars has been spent on it to date, major technological issues remain unresolved.

Spending more and more on a system with such problems risks our security if we neglect other, more focused efforts. To improve our security by using the immigration system, we must push for more funding for the DOS and the immigration and intelligence components of DHS, require federal agencies to coordinate and share information needed to identify and intercept

terrorists; encourage the use of new technologies by authorizing funds to improve technology and infrastructure at DHS and DOS; and implement the North American Perimeter Safety Zone.

Congress must step up to the plate and provide the federal agencies impacted with the staffing and funding levels they need to implement these measures, as well as perform adequate oversight. It is simply unacceptable for Congress to pass laws and not give the federal agencies (and states) the funding they need to do a good job.

**3. What is the role of immigration in the post-September 11 world?** Because all nineteen of the September 11th terrorists were foreigners, some observers have been quick to blame our vulnerability to terrorist attacks on lax immigration laws. While such a response was predictable, it was misguided and has inevitably resulted in overreaction. Although the attacks of September 11th revealed serious management and resource deficiencies in the bureaucracies that administer our borders, U.S. immigration laws in and of themselves did not increase our vulnerability to attack. In fact, U.S. immigration laws already are among the toughest in the world and have long provided the federal government with broad powers to prevent anti-American terrorists from entering or residing in the United States. A careful analysis of the September 11th attacks reveals that deficiencies in U.S. intelligence collection and information sharing, not immigration laws, prevented the terrorists' plans from being discovered.

The Joint Inquiry into the events of September 11th, conducted by the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, confirmed that better intelligence—and action on that intelligence—might have prevented the attacks on the Pentagon and World Trade Center. Similarly, a comprehensive study by the Migration Policy Institute points out that "Immigration measures are an important tool in the domestic war against terrorism, but they are not effective by themselves...the lead domestic security response to terrorism should be strengthened intelligence and analysis, compatible information systems and information-sharing and vigorous law enforcement and investigations." In fact, tightening immigration laws and policies in an unfocused manner will make it more difficult for the United States to win the global war on terrorism by damaging the U.S. economy and alienating the immigrant communities and foreign allies whose cooperation the U.S. government most needs. In contrast, immigration reform would allow enforcement efforts to focus on terrorists.

President Bush has been eloquent in his recognition that immigration is in America's self-interest, and that "one of the primary reasons America became a great power in the 20th century is because we welcomed the talent and the character and the patriotism of immigrant families." The President correctly recognizes that our current immigration system makes more difficult the urgent task of securing the homeland. Importantly, President Bush also succinctly identifies a problem that needs immediate attention when he said that "[a]s a nation that values immigration and depends on immigration, we should have immigration laws that work and make us proud. Yet today we do not." Our immigration laws do not make us proud.

**4. Is an "enforcement only" approach sufficient in itself to secure our borders and enhance our security?** No. Our current immigration laws do not make sense, do not make us safer, do not support our economy, and do not reflect our tradition as a nation of immigrants. It is

my view that to secure our borders and effectively reform our immigration laws we need comprehensive immigration reform that includes, along with a worker program, an earned adjustment and family backlog reduction. People who work hard, pay taxes, and contribute to the U.S. should be allowed to obtain permanent residence and pursue a path to citizenship. Reform should stabilize the workforce of U.S. employers, encourage people to come out of the shadows to be scrutinized by our government, and allow immigrants to work and travel legally and be treated equally. Many have been here for years, are paying taxes, raising families (typically including U.S. citizen and lawful permanent resident spouses and children), contributing to their communities and are essential to the industries within which they work. In order to unite families and keep them together, appropriate waivers must be available for grounds of admissibility and deportability. In addition, our immigration system has been characterized by long backlogs in family-based immigration and long delays in business-based immigration. Illegal immigration is a symptom of a system that fails to reunify families and address economic conditions in the U.S. and abroad. To ensure an orderly future process, our system must reduce bureaucratic obstacles and undue restrictions to permanent legal immigration. Developing an increased legal migration flow will make immigration more orderly and legal. It also will allow more people to reunite with their families and work legally in the U.S., and would facilitate fair, equitable, and efficient immigration law, policy, and processing. It is essential to make legal future immigration that otherwise will happen illegally.

Because many of the problems with the current U.S. immigration system are interrelated, reform must be comprehensive to successfully address our nation's needs and realities. The status quo is unacceptable, especially in a post-September 11 world. Enhanced security is central, but part of that security is keeping our economic security through the continued flow of people and goods. Our current system is characterized by families being separated for long periods of time and U.S. employers unable to bring in needed workers. People are forced to live an underground existence, hiding from government for fear of being separated from their families and jobs. The current enforcement system fails to prevent illegal immigration, and precious resources that should be spent on enhancing our security are wasted on stopping hard-working people from filling vacancies in the U.S. Our immigration system must be reformed so that legality is the norm, and immigration is legal, safe, orderly, and reflective of the needs of American families, businesses, and national security.

Immigration reform that legalizes hard-working people already here and that creates a new worker program will help the U.S. government focus resources on enhancing security, not on detaining hard-working people who are filling vacancies in the U.S. labor market and/or seeking to reunite with their close family members. In addition, an earned adjustment program will encourage people to come out of the shadows and be scrutinized by our government, and a new worker visa program will create a legal flow through which people can enter and leave the U.S. The legality that results from these initiatives will contribute to our national security by helping to focus resources on those who mean to do us harm. Such legality also will facilitate enforcement efforts by allowing our government to focus resources. Enforcing a dysfunctional system only has led to more dysfunction, not better enforcement.

**5. How do we resolve the overstay problem?** We resolve the overstay problem through better interior enforcement—to find and track those who overstay their visas, we must have

accurate data on who enters the United States and if they depart. If they do not depart, we must try to obtain the most accurate data necessary to find them. Unfortunately, DHS does not have accurate data--within its own systems—to determine who is an overstay and where the overstays are. When and if the US VISIT exit feature is ever fully implemented, DHS should have data on those who have not departed in a timely fashion—but DHS must still rely on other sources of information to find any overstays. To this end, it was a mistake to enact REAL ID, which will deprive us of valuable interior enforcement data, as I have explained thoroughly in my paper on *Drivers Licenses and Security: Myths and Reality* (copy attached). Yet in the end, we must recognize that any effort to find and deport overstays will have little to do with fighting terrorism.