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BEFORE THE

**COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND
SECURITY
UNITED STATES SENATE**

CONCERNING

**"WEAKNESSES IN THE VISA WAIVER PROGRAM: ARE THE NEEDED
SAFEGUARDS IN PLACE TO PROTECT AMERICA?"**

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Chairman Feinstein, Senator Kyl, thank you for the opportunity to testify today before this distinguished committee. I will summarize my formal written statement and provide my full testimony for the record.

Recognizing legitimate concerns that the Visa Waiver Program could pose security risks to the United States, it is important to explore ways in which the program's structure could be modified to maintain its considerable benefits while also limiting potential exposure.

Last year, with passage of the *Secure Travel and Counterterrorism Partnership Act of 2007*, Congress responded to pressing new security realities by adjusting the criteria of the visa-free travel system to reduce its vulnerability to terrorist exploitation, requiring closer security collaboration against terrorism with participating countries.

The new law attempts once again to mandate an exit system. Perhaps not everyone will recall that Congress first attempted to mandate an effective exit system as part of the Visa Waiver Pilot Program in 1986, and tried again subsequently.

This time around, the new law tries to cover two bases by mandating both a working biographic and biometric exit system.

To work, these protections must be developed with care — and must actually be implemented — to be effective. The United States must take reasonable risks because absolute protection against all risks is impossible. But it cannot rely on methods of protecting travel and homeland security that are invoked in principle but do not actually function.

In my view, the steps Congress authorized last year do have the potential to enable the Visa Waiver Program to be strengthened and expanded. Based on current assessments by homeland security and intelligence community officials, and the overall interests of the United States in deepening security collaboration with economic partners, designing a tailored response to the specific risks of visa-free travel seems far more appropriate than eliminating the program altogether.

To achieve an effective system, however, several points I consider critical must be addressed. These are, in order:

- information sharing relating to terrorism, including both information about individuals and about travel documents;
- a working Electronic Travel Authorization (ETA);
- a functioning exit system; and
- the ability of the Secretaries of Homeland Security and State to suspend the program with any individual country if the Director of National Intelligence provides threat information that warrants the suspension.

All of these can work together to raise the level of confidence in the visa-free travel system if they are properly implemented. My observations below point to the areas I believe are important in the implementation process.

Information sharing. Congress now requires the Secretary of Homeland Security to certify that the partner country cooperates with the United States on “counterterrorism initiatives, information sharing, and preventing terrorist travel” as one set of required risk-mitigation measures. This is the most important provision from a security perspective, but it is vague. It would be helpful if it clearly specified what the actual required security elements are.

The most important of them would be completed reciprocal agreements requiring any new partner country to provide information sufficient to screen for individuals that each government identifies as known or suspected terrorists. Governments should not join the Visa Waiver Program until the actual agreement is completed. That is, their expressed willingness to make an information-sharing agreement in the future is insufficient.

According to the Department of State, the United States has signed such agreements with seven countries and is in the process of negotiating another dozen or so. It matters how many partner information-sharing agreements with Visa Waiver Program countries have been completed, and how many others are being negotiated with countries already in the program or with those in the discussion process.

It would make sense to take up these agreements with partner governments in an order that reflects the locations of greatest risk — that is, where there is the greatest likelihood that citizens may pose a terrorist threat to the United States or to their own country.

As a risk-mitigation measure for the United States and its Visa Waiver Program partners, these information-sharing agreements also should be sought with countries that are not a part of the program but are necessary partners in efforts against terrorists, including by preventing terrorists from obtaining visas and detecting them during travel.

Another important information-sharing priority is for program partners to jointly improve the ability to detect dangerous individuals through screening and scrutiny of travel documents. Gleaning information from passports and other travel documents is one method by which officials can detect terrorists as they travel, including when their identities are not already known through prior information sharing.

Among the important factors in deriving the information potential of travel documents is the ability to confer in real time with the passport-issuing authority, to verify findings and enable legitimate travelers to continue on their journey. This is one arena in which the United States and its partners should consider providing assistance to other countries.

Both the screening information concerning known or suspected terrorists and the travel document information heighten the value of existing agreements to provide passenger information and any future reciprocal agreements exchanging passenger information. Passenger information has distinctly greater value if it can be checked against well-vetted information about known and suspected terrorists, and against lost and stolen passports data known to the issuing governments.

The Electronic Travel Authorization. Enacted as part of the new law last year, the ETA is a critical new function. It will allow the United States and other countries that may adopt an ETA the time to check travelers' biographic information to determine whether they should be permitted to travel. There is no reason to think such a system cannot work, as it is already in use in Australia. However, as I am not yet clear on the implementation plan, I will flag a few of the aspects I believe should be considered going forward.

The ETA system will require that any traveler who is not cleared immediately apply for and obtain a visa before departure. It is not certain what information will be sought. At least at this point, simply providing passport data and the minimal information included on I-94Ws would not be a significant burden on travelers and would enable an important check.

But depending on how that check is done, it could generate many rejections or fewer rejections. If it generates too many rejections, the consular sections in Visa Waiver Program countries would be overwhelmed. If it generates too few, travelers who should not be permitted to travel could travel anyway. The result: Inspectors and infrastructure at the ports of entry would be overwhelmed, with deleterious effects on the orderly and efficient flow of people at the ports of entry, and a higher likelihood that time pressure would lead to erroneous decisions. Either scenario would be troublesome.

Some scenarios should be run using current data to assess the impact of an ETA using different assumptions and screening methodologies. If the system cannot be expected to work consistent with resources and infrastructure, this needs to be considered early.

A more strategic security problem is that if the ETA system sends a notably large percentage of travelers with Arabic names to apply for visas, the resulting ill will might well overcome the critical operational advantages that pretravel screening clearly provides. In the long-term effort to reduce the lure of terrorism, it is important to make sure that discrimination against Muslims and Arabs is eliminated and opposed; that all citizens are able to fully enjoy the benefits of the countries in which they live; and that protective systems are perceived to be fair and reasonable, whether in the immigration and border systems or at the local police level. This is the only way to build trust and diminish the draw of terrorism. Therefore, it is important to make sure that the screening systems that support the ETA are as accurate and nondiscriminatory as possible.

In addition, potential problems with name recognition must be addressed carefully. If individual travelers are rejected through the ETA because of an initial name recognition problem and are later granted visas, there should be a way of ensuring that the next time they seek to travel they are not forced to reapply for a visa without additional reason.

The ability to refine systems sufficiently acutely to detect the dangerous few without undue errors, discrimination, and costly delays has presented a serious challenge to border screening. This same challenge exists in the construction of an ETA.

An exit system. The concept of an exit system has generally been seen as an immigration enforcement measure because that is how it was conceived when

Congress first authorized it in 1986. With respect to terrorism, the exit system is often viewed as unimportant for counterterrorism purposes because if a dangerous alien has departed the United States, the key security objective is achieved.

With Congress having pushed for an exit system for over 20 years, the time has come to take this mission seriously for immigration compliance, crime control, and counterterrorism purposes.

An exit system is self-evidently important for achieving a higher level of compliance with immigration laws, including identifying those who might overstay their visas to carry out criminal or terrorist activities. The well-known estimate is that 25 to 40 percent of unauthorized immigrants are visa overstayers. The 9/11 Commission Report and other reports have documented how the combination of complex immigration laws, ineffectual compliance systems, and weak enforcement have led to exploitation of the visa system by terrorists.

Congress has mandated that the exit system initially be required to be 97 percent effective in establishing who exits. Within a year, the system is required to include a biometric exit check for all departing air passengers. The 97 percent formula only makes sense as a compliance verification mechanism in the visa system if the effect is to match arrivals to departures for 97 percent of entering travelers.

A biometric exit system would allow for a higher rate of accuracy of identification, especially for people with common names or using multiple valid travel documents; a higher rate of accuracy for entry matching against arrival records; and the ability to establish a platform for a trusted traveler program that would speed previously approved travelers through the security process.

Such a system would also allow for detection of wanted individuals, for instance parents abducting children. However, this raises one important question about the exit system: the lack of a law enforcement capability to respond to information generated by the system. Establishing the exit system requires more than getting the technology right; it requires designing and building a related compliance and enforcement system.

As with illegal entry over land borders, fixing the illegal overstay problem will require considerably more effort than even designing and instituting a working exit system supported by a response capability. The United States has to redesign the visa laws so as to reduce the incentives to overstay valid visas by providing a foundation earlier in the process for transitioning to a status permitting a longer stay where it is in the interests of the United States. But if anything has been learned in the past year of immigration debate, it is that security confidence and confidence in enforcement systems is essential to

forward movement. Therefore, both legal reform and an exit system should be tackled.

In addition to deterring illegal conduct, an effective exit system can be directly useful to counterterrorism officials as a tool to track suspects and networks.

When an individual becomes a person of interest after arriving in the United States and surveillance authority is granted, officials will want to know if that person exits the United States and what their destination is. That individual may lead officials to a terrorist cell somewhere overseas. Officials notoriously missed spotting the U.S. entries of Khalid al-Mihdhar before the 9/11 operation. At any point, becoming aware of al-Mihdhar and being able to track his movements would have been helpful to investigators. And while a passenger manifest may be analyzed after departure, a real-time exit verification provides more options for intervention.

Lawful exit tracking is part of the apparatus that officials can employ to catch people. There is no longer a hard divide between internal security and global intelligence. Travel intelligence is one of the ways in which that divide must be bridged, including by sharing information with trusted allies while meeting all legal requirements.

Suspension authority. There is one final element of the visa waiver modernization law that makes the program workable in the new security environment. It is important to grant the Secretaries of State and Homeland Security the authority to suspend a visa-waiver agreement based on security threats rather than only on immigration law compliance measures. In particular, holding the Directorate of National Intelligence accountable for providing relevant threat information potentially adds a significant layer of security by reinforcing that the Department of Homeland Security is an important customer as well as a major source of intelligence for the rest of the intelligence community. It would, of course, be extremely costly if it were necessary to exercise such authority, but far more so if it were not exercised if appropriate, and crucial public confidence in the system were thereby lost.

LEVEL OF RISK

The governments participating in the Visa Waiver Program are allies or friends that do not overtly threaten each other's populations. However, it is clear that individual citizens of participating countries may be associated with terrorist organizations or beliefs, and are potentially able to pose a significant threat in the United States. Terrorism, therefore, partially undermines the security assumptions under which the United States and its partners entered into the visa-free travel program.

This is not only a theoretical concern. According to the intelligence community, al Qaeda figures in Afghanistan and Pakistan still strive to achieve a successful attack in the United States. Such an attempt was made in summer 2006, when a plot designed to take liquid explosives aboard flights from Britain to the United States was disrupted. Expert assessments of al Qaeda suggest that attacking the United States remains a plausible strategic choice. However, intelligence experts are currently focused on Europe as a primary concern. The European threat has two components: a possible attack on Europe, and the potential for exploitation by terrorists of the Visa Waiver Program to stage an attack on the United States.

The appeal of al Qaeda's message among European Muslims is real, and the intelligence community states that al Qaeda has recruited and trained a small number of Anglo-looking Europeans. Their methodology is to recruit from Western Europe, send the recruits to training in areas such as the tribal region of Pakistan, and then return them to Europe in order either to carry out missions there or to travel onward to the United States.

Al Qaeda has historically paid close attention to operational planning involving travel channels. It is therefore logical to expect al Qaeda to seek recruits who look European, particularly those with clean papers. These individuals may be able to make use of visa-free travel under the Visa Waiver Program to gain relatively easy access to the United States. They are less likely to trigger alarms once they arrive at the border, and can easily integrate into their destination communities without making mistakes that could draw attention to them. Given these assessments, there is continuing reason to take seriously the risk that terrorists may exploit the Visa Waiver Program.

VISA WAIVER PROGRAM'S OPPORTUNITIES

The original driving motivation for the Visa Waiver Program was economic. By dropping the visa requirement, the Department of State saved visa-processing staffing costs. And travelers saved time and money, encouraging tourism and a freer flow of commerce.

The benefits to the United States from the program are proven. In fiscal year 2006, citizens of the 27 countries participating in the U.S. Visa Waiver Program were admitted without visas approximately 15.2 million times. The largest numbers of visa-free admissions to the United States were from the United Kingdom, at almost 4.6 million recorded admissions; followed by Japan at 3.4 million; Germany at 1.5 million; and France at 1 million. Of those who were admitted under the Visa Waiver Program, 84.5 percent came for pleasure while the remaining 15.5 percent were on business.

Nonimmigrants arriving under the Visa Waiver Program constitute almost half of all nonimmigrant I-94 admissions to the United States. In fiscal year 2006, approximately 45 percent of all nonimmigrant I-94 admissions to the United

States were through the Visa Waiver Program. Furthermore, a large majority of citizens of countries participating in the Visa Waiver Program visit the United States via said program. Of all of the nonimmigrant I-94 admissions from Visa Waiver Program countries in fiscal year 2006, 87.4 percent were under the Visa Waiver Program.

A 2002 Government Accountability Office report estimated that a visa-waiver traveler on average spent \$2,253 in the United States in 2000, compared with \$1,274 for non-visa-waiver travelers. That same report noted that the direct and indirect spending among visa-waiver travelers added between \$75 billion and \$102 billion to the U.S. gross domestic product in 2000.

The GAO, relying on information from the Travel Industry Association of America, noted that international tourism provides more than 1 million U.S. jobs, of which more than 60 percent are located in Florida, California, New York, and Hawaii. The association also estimated that in 2001, U.S. spending generated from international tourism contributed \$16 billion in tax revenues. The Department of Commerce commissioned a study in 2002 on the economic effect of the Visa Waiver Program and estimated that, between 2003 and 2007, eliminating the program would result in a loss of 3 million visitors, \$28 billion in tourism exports, and 475,000 jobs.

Thus, the Visa Waiver Program is clearly fulfilling its original purpose by contributing significantly to the expansion of business and economic opportunity for the United States and its allies.

New political and security opportunities. It is also becoming increasingly clear that the Visa Waiver Program provides important potential political and security benefits, signifying a level of trust that symbolizes countries' acceptance in the Western alliance of states.

The United States initiated the Visa Waiver Program just before the fall of the Berlin Wall. The countries that joined in visa-waiver agreements with the United States were post-World War II allies and trading partners: the United Kingdom, France, Japan, Germany, Italy, the Netherlands, Switzerland, and Sweden. The security premise implicitly underpinning these agreements was that the future was without foreseeable conflict among the developed democracies. So, in effect, the Visa Waiver Program was a form of peace dividend. It allowed allies to deepen their economic relationships without major security concerns.

When the program's expansion was halted in 1999, the list of U.S. partners significantly overlapped membership in other post-World War II organizations. Of the 29 countries participating in the Visa Waiver Program at that time, nearly 70 percent were also members of the then 29-member Organization for Economic Cooperation and Development; over 40 percent were also members of the then 19-member North Atlantic Treaty Organization; nearly 76 percent were also

members of the then 54-member Organization for Security and Cooperation in Europe; and 48 percent were also members of the then 15-member European Union. Only four Visa Waiver Program countries — Argentina, Uruguay, San Marino, and Singapore — were not part of any of these other organizations in 1999. This snapshot shows an image of the alliance of Western and democratic states with firm or growing commitments to democracy, market economies, and individual rights, an alliance with a still limited membership.

The Visa Waiver Program partnerships provide a platform for enabling the United States to help sustain, protect, and further improve and expand the common global travel channels that provide benefits to law-abiding individuals. These travel and visitor arrangements help maintain and expand a global sphere of economic freedom, democracy, and individual rights. Continuing to expand and facilitate travel by law-abiding citizens is one of the ways by which the United States and friends around the world jointly project the greater appeal of societies that are open, democratic, and based on recognition of individual rights as against the visions perpetuated by terrorists.

Many of the governments participating in the Visa Waiver Program as members of NATO and OSCE, through other multilateral commitments, and as individual entities have committed to working with the United States against terror networks directly, and in formulating and carrying out policies to address states that safeguard, sponsor, or facilitate terrorist organizations or networks. Building new protections into common travel channels is an important dimension of that joint security and economic agenda.

CONCLUSION

From a security perspective, what seems most important in examining the new Visa Waiver Program law is an essential marriage of elements: establishing information-sharing agreements; building an ETA and making it work fairly and transparently; delivering on the long-awaited promise of an exit system that can become the basis for an improved compliance system, serve a travel intelligence function, and be paired with visa law reform; and operating the program with the assistance of a threat-based suspension authority. The fundamental principle of the program is reciprocity with allies and trading partners, and this linkage to support travel and commerce, and effectively counter terrorism and crime, needs to be more fully acknowledged and more deeply developed.