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CONGRESSIONAL TESTIMONY

“Next Steps for the Visa Waiver Program”

**Testimony before
Subcommittee on Immigration Policy and
Enforcement
Committee on the Judiciary
United States House of Representatives**

**Hearing on “Visa Waiver Program Oversight: Risks
and Benefits of the Program”**

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My name is Dr. James Jay Carafano. I am the Deputy Director of the Kathryn and Shelby Cullom Davis Institute for International Studies and Director of the Douglas and Sarah Allison Center for Foreign Policy Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

Thank you for the opportunity to appear before the committee today and address this vital subject. According to the Congressional Research Service, in “FY2009, 16.2 million visitors entered the United States under this program [the Visa Waiver Program], constituting 50.5% of all overseas visitors.” That makes the Visa Waiver Program arguably the nation’s most important visa program. Getting it right ought to be a top priority for the Congress and the President.

In my testimony today, I would like to concentrate on what I see as three key issues in addressing the next steps for the Visa Waiver Program: (1) decoupling the requirement for a biometric exit registry for those leaving the U.S. at port of entry from management issues related to the Visa Waiver Program; (2) adopting visa overstay rates rather than visa refusal rates as the metric to determine qualification for and participation in the Visa Waiver Program; and (3) ensuring high-security standards while promoting the participation of additional qualified countries. I would like to address these three issues in turn.

My responsibilities at The Heritage Foundation comprise supervising all of the foundation’s research on public policy concerning foreign policy and national security. Homeland security has been a particular Heritage research priority. The foundation produced the first major assessment of domestic security after 9/11.¹ Over the past decade, we have assembled a robust, talented, and dedicated research team. I have the honor and privilege of leading that team.

Heritage analysts have studied and written authoritatively on virtually every aspect of homeland security and homeland defense. The results of all our research are publicly available on the Heritage Web site at www.heritage.org. We collaborate frequently with the homeland security research community, including the Center for Strategic and International Studies (CSIS), the Aspen Institute, the Center for National Policy, the Hudson Institute, the George Washington University Homeland Security Policy Institute, and the Strategic Studies Institute and Center for Strategic Leadership at the Army War College. Heritage analysts also serve on a variety of government advisory efforts, including task forces under the Homeland Security Advisory Council and the Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities. Our research programs are nonpartisan, dedicated to developing policy proposals that will keep the nation safe, free, and prosperous.

I am particularly proud of The Heritage Foundation’s long and substantive record of research on visa management and related security and immigration. This effort reflects

¹ L. Paul Bremer III and Edwin Meese III, *Defending the American Homeland: A Report of the Heritage Foundation Homeland Security Task Force* (Washington, D.C.: The Heritage Foundation, 2002).

the foundation's commitment to advancing public policies that enhance our security by thwarting terrorist travel; encouraging economic growth by promoting the legitimate exchange of goods, peoples, services, and ideas among free nations; and fostering a free and open civil society—all at the same time.

The Visa Waiver Program: Progress and Problems

The Visa Waiver Program allows for visa-free travel—for leisure or business—for up to 90 days among member states. It encourages commerce, tourism, and professional and cultural interchange between allies. Best of all, it enhances security. Countries participating in the Visa Waiver Program must meet higher-than-normal standards in combating terrorism and in law enforcement, border control, document security, and reporting information on lost and stolen passports. More important, they agree to share much more security-related information about travelers than what we get from the standard visa process. This information sharing helps identify and track suspected terrorists and their supporters, international criminals, and visitors who overstay their allotted time in country.

After 9/11, as part of its mission to strengthen our national security, the Department of Homeland Security restructured the program both to beef up the security requirements and to bring more countries into the program. Nine new countries were brought into the improved Visa Waiver Program. Now, however, current law prevents adding new countries with a visa refusal rate greater than 3 percent until Homeland Security develops and implements a system to biometrically track the departure of foreign visitors, a program that will likely never happen and has nothing to do with the Visa Waiver Program.

Requirement for Biometric Exit Outdated

As you well know, the directive for implementing biometric exit—recording of a uniquely identifiable intrinsic physical characteristic (most often fingerprints) at the point of departure from the United States at land, sea, or airport point of entry—predates 9/11. After almost two decades, the federal government has failed to implement this Congressional mandate. Regardless of what merits the framers of the requirement believed biometric exit would have served in the past, either as an immigration management tool, a criminal enforcement measure, or a counterterrorism initiative, the need for this program needs to be reassessed in light of current requirements.

From a counterterrorism perspective, it is difficult to justify the expense of biometric exit. When this program was originally conceived, there were few effective tools for tracking terrorist travel. Today, there are many. It is clear that the U.S. has become a much harder target for transnational terrorism than it was before 9/11. Law enforcement agencies have foiled at least 43 terrorist plots since the attacks on New York and Washington in 2001.²

² James Jay Carafano, "Foiling 43d Terror Plot Test for Administration's Priorities," Heritage Foundation WebMemo No. 3415, November 21, 2011, at http://thf_media.s3.amazonaws.com/2011/pdf/wm3415.pdf;

Increasingly, we find that these plots are “homegrown,” in part because it has been more difficult for transnational terrorist groups to organize operations overseas and dispatch operatives to the United States.

Even where we have seen the requirement for tracking suspects trying to exit the United States in “real time,” we have seen where these tasks can be conducted effectively using existing enforcement tools. No case is more illustrative than the apprehension of Faisal Shahzad, the Times Square bomber, who was placed on a terrorist watch list, indentified, and arrested attempting to flee the country on an international flight less than two days after the aborted attack.

From the perspective of both immigration and criminal enforcement, biometric exit would be a very limited tool. Federal authorities lack the resources to investigate every lead such a system might produce. Furthermore, by itself, a report that an individual had failed to register an exit and potentially was unlawfully present in the United States would have scant utility in prioritizing law enforcement resources. Such a report might simply be a false-positive—the individual’s status might have changed. The report alone would provide no assessment of risk.

In terms of both immigration and criminal enforcement, biographical data (name, date of birth, and country of origin) provide suitable data for most enforcement activities. For immigration purposes, the most useful information is trends in overstays from individual countries and classes of users. This information would help to identify accurately where consular officers and officers at the port of entry ought to focus their efforts. Likewise, it would help to identify where U.S. visa policies toward individual countries ought to be reassessed. In addition, for most high-priority immigration violation or criminal investigations, biographical data ought to be sufficient.

In particular, for the management of the Visa Waiver Program where the issue concerns general compliance with visa policies rather than specific individual cases, biographical data should be more than sufficient to provide the U.S. government the information it needs to manage the program effectively.

James Jay Carafano, “Forty-Second Plot Highlights State-Sponsored Terrorism Threat,” Heritage Foundation *WebMemo* No. 3392, October 12, 2011, at <http://www.heritage.org/research/reports/2011/10/forty-second-plot-highlights-state-sponsored-terrorism-threat>; James Jay Carafano, Matt Mayer, and Jessica Zuckerman, “Forty-First Terror Plot Foiled: Homegrown Threat Thwarted by Local Law Enforcement and Intelligence,” Heritage Foundation *WebMemo* No. 3376, September 29, 2011, at <http://www.heritage.org/research/reports/2011/09/forty-first-terror-plot-foiled-homegrown-threat-thwarted-by-local-law-enforcement-and-intelligence>; James Jay Carafano and Jessica Zuckerman, “40 Terror Plots Foiled Since 9/11: Combating Complacency in the Long War on Terror,” Heritage Foundation *Backgrounder* No. 2604, September 7, 2011, at <http://www.heritage.org/research/reports/2011/09/40-terror-plots-foiled-since-9-11-combating-complacency-in-the-long-war-on-terror>.

Given the costs of implementing comprehensive biometric exit, the fiscal constraints that will likely be imposed on the Department of Homeland Security in the years ahead, and the department's many priorities, the biometric exit mandate can no longer be justified. It is past time to repeal the requirement. Decoupling the mandate for biometric exit from the authority of the government to add new countries is a logical first step.

Overstay vs. Refusal Rates

As a qualification for the Visa Waiver Program, “refusal rates”—the percentage of visa applications denied by consular officers—have been used to determine a country's eligibility to participate in the program. The rates were interpreted as a measure of the propensity to “overstay,” to remain unlawfully in the United States beyond the 90-day period authorized under the Visa Waiver Program.

There is ample evidence to suggest, however, that refusal rates are not an optimum metric for assessing the potential to overstay. For example, if an individual submits five visa applications in a year and all are denied, they are all counted toward the refusal rate—thus inflating the rate. While it is true that if a subsequent application is approved in the same year, the previous refusals are not counted against the rate, the reality is that often, as the number of refusals climbs, the likelihood of a subsequent approval does not. Furthermore, individuals may be denied visas for reasons other than a propensity to overstay (including, for example, health-related issues and criminal concerns).

With the advances in biographical exit records management, it would be far more prudent to rely directly on visa overstay rates as an appropriate metric for qualifying for VWP. Strengthening biographical exit records management and compliance, as well enhancing and ensuring compliance with the Electronic System for Travel Authorization (ESTA) ought to be the Department of Homeland Security's priorities. While it would also be prudent to invest more in improving automated entry-exit of existing biographical data, it is time to make the switch from refusal to overstay rates.

Furthermore, it should be remembered that even under the Visa Waiver Program, the U.S. retains mechanisms to deter likely overstays. Individuals, for example, can be denied authorization to travel to the U.S. when they register under the ESTA. Additionally, CBP officers at the port of entry may make determinations of inadmissibility such as seeking work without proper legal certification.

Expanding the Ranks

For both security and economic reasons, it makes sense to judiciously add more countries to the family of the Visa Waiver Program nations.

From a security perspective, the U.S. obtains far more and more useful information for immigration and criminal enforcement and effective counterterrorism from partner Visa Waiver Program countries than from those where visas are required.

From an economic perspective, boosting international travel ought to be a priority. Inbound travel to the U.S. already supports almost 2 million American jobs. The value of global travel is expected to double over the next 10 years to over \$2 trillion. Unfortunately, right now, the U.S. share of that business is shrinking. For example, the U.S. share of long-distance travel is down considerably over the past decade.

If the trend line continues, the U.S. could be shedding jobs in this sector of the economy rather than adding them. On the other hand, if America recaptured its fair share of international travel, by some estimates over an additional 1 million jobs could be created over the next decade.

The most effective way to encourage travel is through the Visa Waiver Program. In some countries, wait times for visas have ballooned to unreasonable lengths. *The Wall Street Journal*, for example, recently reported that in Brazil, the wait times for these interviews run up to four months. It is far more cost-effective to expand VWP than to add the infrastructure that would be required to speed visa processing and management. Expanding VWP will not only allow for bringing in more qualified nations, it will also permit the Departments of State and Homeland Security to shift resources to countries where the demand for visas is outstripping the US government's capacity to issue them in a timely and effective manner.

Thank you for the opportunity to speak today on this important issue. I urge the Congress to decouple the Visa Waiver Program from the biometric exit program, rethink the metrics for qualification for the Visa Waiver Program, and urge the Administration to expand the program to qualified nations as rapidly as practical.

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