

TESTIMONY

OF

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BEFORE

**THE SENATE COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS**

ON

***“THE LESSONS AND IMPLICATIONS OF THE CHRISTMAS DAY ATTACK:
SECURING THE VISA PROCESS”***

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Chairman Lieberman, Senator Collins and other distinguished Members, thank you for the opportunity to appear before the Committee to discuss the Department of Homeland Security's (DHS) work in the area of promoting and overseeing secure travel to the United States.

Targeting terrorist travel is one of the most powerful weapons we have to counter the ability of terrorists to operate. Travel security begins with international travelers obtaining legitimate identity documents from national authorities. Should a visa be needed, the international traveler applies for one at a U.S. Embassy or Consulate and undergoes a personal interview and checks against law enforcement, terrorism, and immigration databases. Travel security also includes passenger and baggage screening, before and during travel, flight security through air marshals, hardened cockpit doors, as well as other measures. Finally, it includes passport control and customs and immigration inspection upon arrival (or prior to departure in certain locations). Every step along this pathway presents a vulnerability to would-be attackers, who must come out of the shadows and interact with security personnel at ports of entry and abroad.

Foreign travelers to the United States come to the attention of U.S. officials either by applying for a visa at a U.S. Embassy or Consulate or by traveling to the United States under a visa-free program, one of which, the Visa Waiver Program (VWP), requires advance authorization to travel. The Department of State is responsible for the day-to-day operations of visa issuance. DHS' role in visa policy and guidance is outlined in Section 428 of the Homeland Security Act of 2002 (HSA), which gives the Secretary of Homeland Security the authority to issue regulations with respect to the granting or refusal of visas. The attempted attack by Umar Farouk Abdulmutallab on December 25, 2009, was one more reminder of the importance of ensuring that visa screening procedures utilize tools to counter terrorism; to that end, screening must include functionally related measures such as document verification capabilities and enhanced international information sharing. Taken as a whole, these procedures help ensure not only the integrity of our borders and immigration system, but also the security of the traveling public and the global air transportation system.

The first part of travel security is the authorization step, which is the focus of this hearing. My colleague, Assistant Secretary John Morton, U.S. Immigration and Customs Enforcement (ICE), will testify on DHS' Visa Security Program and other DHS initiatives to effectively screen large numbers of individuals well in advance of travel to the United States. Ambassador Janice Jacobs, Assistant Secretary for Consular Affairs at the Department of State, will discuss the visa issuance process. For my part, I will limit my testimony to the VWP, the program administered by DHS under Section 217 of the Immigration and Nationality Act (INA), as amended. The VWP currently allows citizens from 36 countries to travel to the United States without a visa and, if admitted, to remain in our country for a maximum of 90 days for tourist or business purposes.

Some have argued that travel under the VWP carries inherent and inevitable risks not found in visa travel. We would argue that the VWP drives international travel security initiatives and enhances law enforcement and security cooperation with foreign governments while promoting legitimate trade and travel. I will elaborate on the merits and security value of the program in several critical respects throughout this hearing.

Today I would like to: 1) provide a brief overview of the VWP's security benefits; 2) discuss how DHS and its partners are working with VWP countries to ensure their compliance with the information sharing requirements of the "*Implementing Recommendations of the 9/11 Commission Act of 2007*" (9/11 Act); 3) highlight our progress to date in that endeavor—along with some of the remaining challenges; 4) provide an update on our efforts to evaluate the overstay rates of VWP countries; and 5) outline where we see the program going in the future.

I) VWP Security Benefits

The VWP is an important tool for increasing security standards, advancing information sharing, strengthening international partnerships, and promoting legitimate trade and travel to the United States. The VWP was first authorized by Congress as a pilot program in 1986 to facilitate low-risk travel to the United States, boost international trade and cultural links, and promote more efficient use of consular resources. Since the program's inception, Congress and the Executive Branch have worked together to implement a number of security enhancements. Immediately after 9/11, for example, new requirements were put in place to tighten passport security standards and increase the frequency in which countries are formally reviewed for their designation status.

The 9/11 Act transformed the VWP from a program that evaluated security threats broadly on a country-by-country basis into one that has the added capability to screen individual travelers for potential threats that they may pose to the security or welfare of the United States and its citizens. In addition, the 9/11 Act mandated more robust information sharing between the United States and its VWP partners. Since the passage of the 9/11 Act, DHS and its partner agencies have worked diligently to implement the new requirements.

Some have also argued that the program has deficient security measures in place and that each individual VWP country's security risks need to be thoroughly reviewed. In fact, because of the 9/11 Act and pre-existing statutes, that's exactly what we are doing. DHS, for example—in cooperation with other departments and agencies—conducts intensive biennial reviews of VWP countries. Often these reviews include site-visits to the country being evaluated so that DHS can observe, among other things, the country's border and passport security procedures.

A critical innovation of the 9/11 Act was the requirement for the Electronic System for Travel Authorization (ESTA), which allows for the pre-travel and recurrent screening of VWP travelers to the United States. Since ESTA became mandatory for all VWP travelers in January 2009, DHS has taken a measured approach to ESTA compliance and has worked to make the implementation of ESTA as smooth as possible for VWP partners, travelers, and stakeholders. In January 2010, DHS transitioned from informed compliance to enforced compliance for ESTA. This transition focused on repeat offenders—those travelers who have previously arrived at a U.S. port of entry under the VWP without an ESTA approval. DHS informed air carriers that effective March 20, 2010, they would be subject to significant administrative fines for carrying non-compliant ESTA passengers to the United States.

The ESTA screening process is providing tangible security benefits, such as identifying matches to the Terrorist Screening Database maintained by the Federal Bureau of Investigation's Terrorist Screening Center (TSC) and more than 5,700 lost or stolen passport (LASP) matches. ESTA provides DHS with the capability to conduct advance screening of VWP travelers. This is critical because it enables DHS to preclude some travelers who are ineligible for the VWP from initiating travel to the United States. Travelers whose ESTAs are denied must undergo the visa application process.

As of April 7, 2010, more than 18 million ESTA applications have been processed. In most cases (more than 99.5 percent overall), ESTA provides an immediate determination of eligibility for travel under the VWP. Overall compliance by VWP travelers is extremely high. Notably, since DHS transitioned from informed to enforced compliance in the last three months, the average ESTA daily compliance rate for all VWP travelers has increased by approximately six percent and is likely to continue to increase. The ESTA compliance rate is currently above 97 percent.

The security benefits of the VWP are many and mutually reinforcing. The VWP requires bilateral information sharing arrangements regarding the exchange of terrorism screening information and the possible perpetrators of other serious crimes, as well as the sharing of LASP information. Moreover, there are higher standards for transportation security, aviation security, border security, and document integrity for VWP countries than for countries that do not participate in the program. DHS, with the support of the Departments of State and Justice and the Intelligence Community, reviews these standards and capabilities on a regular basis as a condition for continuing designation in the program. No other mechanism provides DHS with the opportunity to regularly conduct as broad and consequential inspections of foreign security standards as does the VWP.

It is important to note that DHS conducted such inspections well before the 12/25 incident and we will continue to do so. To complement these efforts, DHS has developed a continuous and vigorous monitoring process to ensure awareness of changing conditions in VWP countries, including regular communication with the relevant U.S. and foreign embassies for updates of law enforcement or security concerns related to the VWP.

II) Status of VWP Information-Sharing Agreements

Overview

The 9/11 Act requires that VWP countries enter into agreements with the United States to share information regarding whether citizens and nationals of the country represent a threat to the security or welfare of the United States and its citizens, and information on LASPs. This emphasis on information sharing with trusted international partners is especially critical in the aftermath of the failed terrorist attempt to bring down Northwest Flight 253 on December 25, 2009.

DHS, with the support of the interagency, has determined that the preferred mechanisms to meet the information sharing requirements with VWP countries, per the 9/11 Act, include: a bilateral Homeland Security Presidential Directive-6 (HSPD-6) arrangement to exchange terrorism screening information; a bilateral Preventing and Combating Serious Crime (PCSC) Agreement to exchange information on possible perpetrators of serious crimes; and an exchange of diplomatic notes memorializing the intent to report LASP data according to INTERPOL's standards. Pre-existing arrangements with some VWP countries that allow for the exchange of equivalent information are reviewed by an interagency working group and may be deemed sufficient in place of HSPD-6, the PCSC, or the LASP diplomatic note. The nine countries that were designated after the 9/11 Act came into force were required to meet the Act's information-sharing requirements in advance of VWP designation, as will any other countries designated in the future.

Progress to Date and Plans to Move Forward

Currently, our primary focus as it relates to the VWP is bringing the 27 pre-2008 VWP countries into compliance with the 9/11 Act information sharing requirements by 2012. To date, the Department—in cooperation with its partner agencies—has made substantial progress in this endeavor. For example:

- Almost all VWP countries have now concluded an exchange of diplomatic notes with the United States expressing their intent to report LASP data to the United States via INTERPOL or other acceptable mechanism. We are confident that we will be able to complete the exchange of diplomatic notes with the remaining VWP countries in the coming months.

- PCSC Agreements—which establish the framework for a new method of law enforcement cooperation by providing each party electronic access to their fingerprint databases on a query (hit/no hit) basis—have been signed with 14 VWP countries: the Czech Republic, Estonia, Finland, Germany, Greece, Italy, Latvia, Lithuania, Hungary, Malta, Portugal, South Korea, Spain, and Slovakia. Negotiations to conclude additional PCSC Agreements are under way and DHS fully expects to sign several new agreements in the next few months. Given the sensitive nature of these discussions, I would be happy to provide any additional details in a follow-up closed session.
- Details regarding HSPD-6 Arrangements are classified. The State Department leads the diplomatic outreach and conducts negotiations together with the TSC, which is the implementing agency. The State Department and TSC have a standing offer to provide classified briefings to Members on HSPD-6 progress.

In an effort to bring each VWP country into compliance with the 9/11 Act’s information sharing requirements, the U.S. government (USG), through a White House interagency policy committee, has developed and adopted a compliance strategy that ties completion of the 9/11 Act requirements to each country’s biennial review of continuing VWP eligibility. While the dates of expected compliance vary depending on where each country falls in the review cycle, all countries are expected to be fully compliant by no later than June 2012. Last month, all VWP posts were instructed by the Department of State to demarche their host governments on the applicable compliance deadlines.

The interagency compliance strategy calls for a series of measures that, beginning six months prior to the date of expected compliance, may be taken by the USG to apply pressure on countries that resist entering into good faith negotiations to conclude these agreements. While DHS prefers to work with VWP countries so as to maintain their designation, we will not hesitate – in consultation with other relevant agencies – to implement corrective actions or other measures as necessary, including possible probation or termination.

Remaining Challenges

Despite our progress to date in reaching information-sharing agreements with the pre-2008 VWP countries, work remains to be done. DHS—in cooperation with the Departments of State and Justice—has invested considerable resources over the past two years in negotiating and concluding PCSC Agreements. The PCSC Agreement requires intensive face-to-face discussions with foreign governments to explain the Agreement in detail and address each country’s concerns.

Signing a PCSC Agreement is only *one* important part of the process. Implementation of the 14 PCSC agreements that have been signed is legally and technologically complex. For example, most VWP countries require parliamentary ratification for the agreement to take effect. Technologically, a common IT architecture must be developed to allow the

United States and each of its participating foreign partners to query each other's fingerprint database automatically. The technical architecture now being developed for Germany will be replicated with other VWP countries. We estimate that the exchange of biometric data with Germany will begin this fall. DHS expects that process to proceed rapidly and has begun discussions on implementation with a number of countries.

III) Overstays

DHS has until now refrained from disclosing and using overstay rates to help determine VWP eligibility because precise rates could not be accurately calculated. However, our systems, particularly our collection and verification of biographic departure records for air travelers, have now improved to the point where we are increasingly confident in the reliability of the data. I am pleased to report that preliminary data strongly indicate that VWP travelers are not a significant source of overstays.

Using standard automated protocols to compare departure data with prior arrival records and immigration status changes, US-VISIT has calculated that in FY 2009, 31 out of 36 VWP countries had overstay rates that were well below the two percent disqualification rate threshold that may lead to a country being placed on probation. US-VISIT is conducting a manual review of overstay records from the five countries that, using automated protocols (but not manual verification), yielded an *apparent* overstay rate over two percent. Thus far, this in-depth manual review has been completed for two countries and revealed overstay rates below two percent.

Manual reviews of automated overstay records conducted by US-VISIT in the past have consistently shown that a significant percentage of the *apparent* overstays had in fact departed the United States within the authorized period of admission or had otherwise lawfully adjusted their status in the United States. We are conducting further manual reviews for other countries to reach a point where we are confident that our evaluation is valid. At that point we will likely be in a position to release overstay rates for each VWP country and to begin to use this data to inform VWP decisions.

IV) Future of the VWP

DHS believes that the current security and information-sharing requirements for VWP countries provide the USG with sufficient and timely information to prevent entry and, in the vast majority of cases, travel to the United States of individuals who would try to exploit the program to do our country harm. As noted above, our primary objective at this time is to complete the required information-sharing agreements with all the pre-2008 VWP countries as expeditiously as possible.

Given the security benefits of VWP to the United States and the program's important role in strengthening international partnerships and travel security standards, DHS would support a carefully managed expansion of the VWP to select countries that meet the statutory standards and are willing and able to enter into a close security relationship with the USG and, particularly, DHS.

At present, most of the countries that have expressed an interest in VWP designation have visa refusal rates higher than three percent or other concerns that would have to be mitigated prior to designation. DHS and the Department of State continue to consult with trusted international partners to determine whether VWP designation is possible in the future. DHS and its partner agencies are also pursuing, as feasible, VWP-style information-sharing agreements with countries that are currently ineligible for the VWP but may qualify for the program within the next five years.

Because DHS has not yet notified Congress that a biometric air exit system is in place, any significant expansion of the VWP is unlikely at present. The 9/11 Act allows the Secretary of Homeland Security to waive the low nonimmigrant visa refusal rate requirement (less than three percent) for those countries with refusal rates between three and 10 percent who also meet other requirements. However, the waiver authority has been suspended because the Secretary did not notify Congress that a biometric air exit system was in place by June 30, 2009. This means that countries interested in joining the VWP must once again meet the less-than-3-percent refusal rate requirement until DHS implements a biometric air exit program.

As we know, no single security solution on its own will completely address the challenge of preventing *mala fide* individuals from traveling to the United States. Travel security systems of mutually reinforcing layers—involving such features as rigorous visa issuance standards, the use of visa security units, the screening of passengers through automated targeting systems, and forward-deployed border and immigration security officers—are critical in our efforts to thwart the travel of terrorists and other dangerous people. The VWP is of course a vital part of a robust travel security system for many reasons: the ESTA requirement; the mandatory bilateral information sharing arrangements regarding potential terrorists and criminals; sharing of LASP data; thorough inspections of VWP countries' transportation, aviation, border control, and travel document security standards; and vigorous, ongoing monitoring of changing conditions in VWP countries.

Chairman Lieberman, Senator Collins and other distinguished Members, thank you for the opportunity to appear before you today and for your consideration of this important topic. I would be happy to answer any questions that you might have.