Implementing the 9/11 Act Mandates for Enhancing the Visa Waiver Program
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Chairwoman Sanchez, Ranking Member Souder, and Members of the Subcommittee, thank you for inviting me to testify on this important issue. My name is Nathan Sales. I am a law professor at George Mason University School of Law, where I teach national security law and administrative law. Previously, I was Deputy Assistant Secretary for Policy Development at the United States Department of Homeland Security. The views I will express today should not be attributed to any past or present employer or client.

My testimony will discuss the important steps that Congress and the Administration have begun to take to secure the Visa Waiver Program, or VWP, against terrorists who might exploit it to gain entry to the United States. Among the most important new security standards are the measures that provide DHS with advance information about persons who are traveling to the United States from VWP countries. I also discuss DHS's efforts to develop an exit system capable of tracking whether or not visitors to this country have departed on time. In particular, I will examine some of the reasons to deploy exit controls, including their potential benefits for immigration enforcement and national security. Finally, I will consider what role private sector entities such as airlines should play in tracking alien departures, and will offer some suggestions to improve the DHS exit proposal.

I. Terrorist Travel and the Visa Waiver Program

Before turning to the Department's specific biometric exit proposal, I'd like to spend a few moments discussing a more general issue: Congress's efforts to modernize the Visa Waiver Program and the recurring problem of terrorist travel. The VWP has served the United States and our allies well since Congress first established it on a pilot basis in the late 1980s.[1] The program was designed to encourage travel between this country and our partners, thereby spurring trade, economic growth, and cross-cultural interactions. It has lived up to Congress's expectations. Originally limited to just two members – Japan and the United Kingdom – the VWP was made permanent in 2000[2] and now includes nearly 30 countries, mostly in Western Europe but also around the Pacific region.[3] In 2007, some 13 million people entered the United States under the Visa Waiver Program.[4]

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[1] *See* Pub. L. No. 99-603, § 313, 100 Stat. 3359 (1986).

[2] *See* Visa Waiver Permanent Program Act, Pub. L. No. 106-396, 114 Stat. 1637 (2000).

[3] The 27 VWP members are: Andorra, Austria, Australia, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

[4] *See* GOVERNMENT ACCOUNTABILITY OFFICE, REPORT NO. GAO-08-458T, VISA WAIVER PROGRAM: LIMITATIONS WITH DEPARTMENT OF HOMELAND SECURITY'S PLAN TO VERIFY DEPARTURE OF FOREIGN NATIONALS 4 (2008).

Despite its successes, the VWP in many ways is a relic of the September 10 world. The program suffers from two major flaws. First, it slights some of the United States' closest allies in the war on terrorism. Countries like the Czech Republic, Estonia, Poland, and South Korea have been steadfast partners in America's efforts to keep al Qaeda at bay. Yet these and other nations are unlikely to satisfy the statutory criteria for VWP membership in the foreseeable future. A country is not eligible to join the program unless, among various other requirements, it achieves a nonimmigrant visa refusal rate of three percent or lower.[5] (A country's visa refusal rate aggregates decisions by State Department consular officials on whether to grant visas to citizens of that country; it is a rough way of measuring the likelihood that a country's citizens might overstay in the United States.) Because some U.S. allies' visa refusal rates exceed three percent, their immediate prospects for membership are dim.

Even more importantly, the VWP's security standards are inadequate in an era of global terrorism. The 9/11 Commission has emphasized that, for terrorists, the ability to travel is "as important as weapons."[6] Yet the VWP was not designed as a national security tool. Instead, its traditional focus has been the threat of illegal economic migration – i.e., the risk that citizens of less prosperous nations might relocate to the United States in search of better financial prospects. Moreover, to the extent the VWP does try to measure security risks, the manner in which it does is quite imprecise. The program screens for threats on a *country by country* basis, not a *passenger by passenger* basis. In other words, it assumes that citizens of non-members represent a greater security risk, and that citizens of members pose a lesser risk.

Experience since 9/11 shows how wrong, and dangerous, those assumptions are. The terrorist threat from Western Europe – which accounts for the bulk of the VWP's membership – is chillingly real. Convicted al Qaeda member Zacarias Moussaoui is a citizen of France. Shoebomber Richard Reid is a Briton. The men who allegedly plotted to bomb planes flying between London's Heathrow airport and the United States held British passports. All of them could have exploited – and in some cases did exploit – the Visa Waiver Program to fly to this country with little, if any, advance scrutiny.

Fortunately, Congress and the Administration have been working together to remedy these shortcomings. Last year, as part of the 9/11 Act, Congress enacted legislation that adds seven new security features to the VWP; it also gives DHS more flexibility to admit countries that have not reached the three percent visa refusal rate requirement.[7] Critically, DHS has announced its intention to apply the new security standards not just to aspiring members – the so-called "Roadmap" countries – but to current participants as well. That seems reasonable from a fairness standpoint. VWP members should be subject to the same standards regardless of whether they happened to join the program in 1989 or in 2009. It seems even more reasonable from a threat standpoint. Western Europe is home to significant and increasingly assertive

[5] *See* 8 U.S.C. § 1187(c)(2)(A).

[6] THE 9/11 COMMISSION REPORT 384 (2004).

[7] *See* Implementing the Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 711, 121 Stat. 266, 339 (2007).

populations of radicals, and it is here that the new security measures have the potential to do the most good.

While each of the new requirements is important, my sense is that the most vital of all are the ones that provide DHS with more information about passengers flying to the United States. Unlike ordinary travelers, citizens of VWP members are not required to complete detailed visa application forms. They don't participate in interviews with consular officials. And there is no requirement that they provide fingerprints before traveling. As a result, authorities know very little about them before they arrive at a port of entry, seeking to be admitted to this country.

The VWP reforms help close that information gap. For instance, Congress has directed DHS to create an Electronic System for Travel Authorization, or ESTA. ESTA is modeled on a system pioneered by Australia more than a decade ago, and it enables visitors to give U.S. authorities certain basic information before they travel – for instance, their names, nationalities, passport numbers, and other types of data passengers currently provide when they complete a Form I-94 upon arrival in the United States. DHS can run this information against watchlists of known or suspected terrorists or analyze it to find ties between known terrorists and their unknown associates. The 9/11 Act also calls on VWP members to share more information about U.S.-bound travelers, such as their own terrorist watchlists, airline reservation data, and information about suspects who are wanted in those countries for serious crimes. By enriching the data available to U.S. border officials, the 9/11 Act enables them to make better decisions about which passengers should be allowed to board flights for this country, and which should not.

II. Exit: Law and Policy

Since 2004, the Department's US-VISIT program has overseen the collection of biometric identifiers – fingerprints and digital photographs – from most aliens who arrive at air or sea ports of entry.[8] In April of this year, the Department issued a Notice of Proposed Rulemaking outlining its plan to collect biometrics from aliens who are exiting the United States by air or sea.[9] Under the DHS proposal, airlines and other carriers would be responsible for taking the fingerprints of departing aliens and transmitting them to DHS within 24 hours of their departure. DHS would match the data against entry records to verify whether aliens who were admitted to the United States left on time.

Exit controls are not as vital as entry controls. It is more important to prevent a terrorist from entering the United States than to know whether a terrorist has left. So why develop an exit system at all? The short answer is: Because Congress has required one. In fact, Congress has been calling for a system that can reliably track the departures of foreign visitors for more than a decade. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 directed the

[8] *See Implementation of the United States Visitor and Status Indicator Technology Program ("US-VISIT")*, 69 Fed. Reg. 468 (Jan. 5, 2004); *United States Visitor and Immigrant Status Indicator Technology Program ("US–VISIT")*, 69 Fed. Reg. 53,318 (Aug. 31, 2004).

[9] *See Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure*, 73 Fed. Reg. 22,065 (Apr. 24, 2008).

Attorney General, within two years, to "develop an automated entry and exit control system that will . . . collect a record of departure for every alien departing the United States and match the records of departure with the record of the alien's arrival in the United States."[10] Congress's most recent instructions came in 2007, in the 9/11 Act. That legislation set a hard and fast deadline of August 3, 2008 for DHS to deploy a system that uses biometric data to confirm that aliens participating in the Visa Waiver Program have left the United States.[11] The 9/11 Act also forbids DHS from adding any new countries to the program after June 30, 2009 if it fails to deploy an exit system by that date.[12] At the risk of understatement, exit has been a long time coming.

Apart from the legal mandate that DHS develop exit controls, there are sound policy reasons for doing so. One of the principal advantages of exit has to do with immigration: An exit system enables the government to verify that visitors to this country have departed on time and have not overstayed the terms of their admissions. Federal immigration officers could use exit data to locate violators who are still in the country and have them deported. State and local police could access federal exit databases to check whether aliens they encounter during routine law enforcement activities – for example, aliens who have been pulled over for traffic stops – are out of status. And if border officials know that a particular visitor previously overstayed in the United States, they can bar him from entering if he later tries to return to this country.

While the most obvious advantages are immigration-related, an exit system also offers important national security benefits. Vigilant enforcement of routine U.S. immigration laws is an effective way of detecting and incapacitating terrorist operatives. According to the 9/11 Commission, at least three of the September 11 hijackers – including Mohamed Atta, the plot's operational ringleader – previously had overstayed in the United States.[13] Ziad Jarrah – who would go on to commandeer and then pilot United Flight 93 – was out of status when a Maryland state trooper gave him a speeding ticket just two days before the attacks.[14] With an exit system, border officials might have been able to turn away Atta and other hijackers when they subsequently tried to reenter the United States. And if police had known that Jarrah was out of status, they could have taken him into custody in the course of a routine traffic stop.

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[10] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 110(a), 110 Stat. 3009, 3558 (1996).

[11] *See* Implementing the Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 711(d)(1)(F), 121 Stat. 266, 345 (2007) (codified at 8 U.S.C. § 1187(i)) ("Not later than one year after the date of the enactment of this subsection, the Secretary of Homeland Security shall establish an exit system that records the departure on a flight leaving the United States of every alien participating in the visa waiver program established under this section.").

[12] *See id*. § 711(c), 110 Stat. at 339 (codified at 8 U.S.C. § 1187(c)(8)(A)(iii) ("[I]f the Secretary has not notified Congress in accordance with clause (ii) by June 30, 2009, the Secretary's waiver authority under subparagraph (B) shall be suspended beginning on July 1, 2009, until such time as the Secretary makes such notification.").

[13] *See* THE 9/11 COMMISSION REPORT 564 n.33 (2004) ("Mohamed Atta overstayed his tourist visa and then failed to present a proper vocational school visa when he entered in January 2001. . . . [T]wo hijackers overstayed their terms of admission by four and eight months respectively (Satam al Suqami and Nawaf al Hazmi).").

[14] *See id*. at 253; *id*. at 564 n.33 ("Ziad Jarrah attended school in June 2000 without properly adjusting his immigration status, an action that violated his immigration status and rendered him inadmissible on each of his six subsequent reentries into the United States between June 2000 and August 5, 2001.").

A few caveats are in order. First, this is an argument for exit controls; it is not necessarily an argument for *biometric* exit controls. One could just as easily imagine an exit system that uses *biographic* indicators – e.g., travelers' names, passport numbers, and so on – to verify whether foreign visitors have departed on schedule. Biometric exit controls probably would be significantly more reliable than biographic ones. For instance, it could be difficult to match biographic entry and exit records if a traveler uses one passport when arriving and a different one when departing. (This could be the case with diplomats, travelers with dual citizenship, and others who legitimately hold multiple passports, as well as persons who have different sets of travel documents for less benign reasons.) Another problem could arise if a traveler's biographic data is corrupted when keyed into the system – for example, an operator might inadvertently type "George Maosn" instead of "George Mason." Biometric exit controls would reduce the difficulties with matching entry and exit records; it's harder to game the system when fingerprints are involved. Reasonable minds certainly could differ on whether the additional reliability of a biometric exit system is sufficient to justify the additional costs. But, since biometric exit is required by law, the point is probably moot.

Second, the benefits of any exit system necessarily will be diminished by the absence of exit controls at the land border. DHS's decision to focus initially on air and sea is prudent, given the presently prohibitive costs of land exit. Yet that choice is not without operational consequences. A system that does not capture land exits can be expected to generate a significant number of false positives. For instance, an air/sea exit system would not record the departure of a European traveler who flies to New York, crosses the land border into Canada, and returns home on a flight from Toronto. Nevertheless, my sense is that deploying a limited exit system is still worthwhile, for several reasons. Experimenting with exit at air and sea ports might inspire new ideas for tracking departures at land borders. Also, many of the travelers who visit the United States under the Visa Waiver Program arrive and depart via air. If nothing else, air/sea exit controls would be a useful way of verifying departures for this subset of visitors.

III. Exit and the Private Sector

Perhaps the most noticeable feature of DHS's exit proposal is that it asks the private sector to play a prominent role in monitoring the departure of aliens from the United States. One's initial reaction might be to wonder why air carriers, cruise lines, and other private companies are charged with collecting departing visitors' fingerprints on behalf of DHS. After all, maintaining control of the border is a quintessentially governmental duty; it is indeed one of the most basic functions that any government performs. Why should the Department be outsourcing that responsibility to the private sector? Moreover, other countries that operate exit systems – Japan and South Korea, for example – collect data from departing aliens themselves. They do not place that responsibility on private entities' shoulders. Why should the United States take a different approach?

On further examination, DHS's proposed reliance on the private sector seems justified – subject to an important qualification that I will offer in a moment. Part of the reason is legal. Federal law already requires private entities to gather a fairly wide range of information about the passengers they carry and to share it with the Department. For instance, Congress has

directed airlines flying to or from the United States to collect, and provide the government with, the "full name of each passenger and crew member," the "date of birth of each passenger and crew member," the "sex of each passenger and crew member," the "passport number and country of issuance of each passenger and crew member," the "United States visa number or resident alien card number of each passenger and crew member," and "[s]uch other information as the [government] determines is reasonably necessary to ensure aviation safety."[15] Congress also has mandated that carriers provide DHS with passenger name record information, or PNR.[16] PNR can include, among other types of data, a passenger's phone number, home address, frequent flyer number, seat assignment, other names on the reservation, and so on. Seen in this light, the DHS exit proposal doesn't break much new ground. It simply adds another type of passenger information – fingerprints – to the list of data that carriers are already responsible for collecting.[17]

Part of the reason for involving the private sector is logistical. Realistically, it's difficult to operate exit controls in any other way. American airports simply weren't built with exit in mind. Unlike facilities in other countries that operate exit systems, U.S. airports typically do not have outbound passport control stations, and it probably would be prohibitively expensive to retrofit existing facilities with the requisite physical plant. Another unattractive option would be to take fingerprints at Transportation Security Administration passenger screening checkpoints. Not to put too fine a point on it, few travelers look forward to standing in the airport security line, and adding exit to the mix would make for an even less pleasant customer service experience. Moreover, asking already overburdened TSA screeners to collect departing aliens' biometrics potentially could distract them from their job of keeping weapons off planes. A final alternative would be to require aliens to give their fingerprints using kiosks located throughout airport concourses. This option has its shortcomings as well. Allowing aliens to check out at out-of-the-way airport kiosks – which DHS tried in an early exit pilot program – virtually guarantees low passenger compliance.[18] There are no good choices for air and sea exit, but involving the private sector might be the least bad.

It might be appropriate to ask airlines to help make exit a reality, but that doesn't mean they should be stuck with the tab. In an era of record fuel prices and looming airline bankruptcies, it seems gratuitous to pile new costs on the travel industry. Under the Department's proposal, airlines are on the hook for, among other responsibilities, buying fingerprint scanners, taking prints, and sending large data files to DHS. That won't be cheap. DHS estimates that the tab could run as high as $3.5 billion over ten years; other knowledgeable

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[15] 49 U.S.C. § 44909(c)(2).

[16] *See id*. § 44909(c)(3).

[17] To be sure, air carriers compile much of this information in the ordinary course of business (e.g., passenger names and credit card numbers), so the statutory collection mandates do not impose much of a burden. However, airlines probably would not compile other types of data (e.g., birthdates, passport numbers, and "other information to ensure aviation safety") in the absence of a legal requirement that they do so. Hence there is precedent for asking air carriers to gather passenger information that is useful principally, if not exclusively, to the government.

[18] *See Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure*, 73 Fed. Reg. 22,065, 22,069-70 (Apr. 24, 2008).

observers put the figure at $12.3 billion.[19] If airlines help the government track departures, the least the government can do is help airlines foot the bill.

Such an arrangement could take any number of forms. The most basic way to reimburse carriers' exit-related costs would be for them to pass their expenses on to passengers in the form of higher fares. While this approach has the virtue of simplicity, the airlines may well balk at it, sensing that consumers who have already endured several rounds of fuel-related jumps in ticket prices might not tolerate yet another hike. Another disadvantage is that the costs of the exit system would be borne not only by the alien passengers who use it, but by American travelers who by definition are exempt from biometric exit controls. A second alternative would be for Congress to authorize carriers to assess a line-item surcharge, akin to the 9/11 security fee, on foreign visitors to the United States. One upside to this approach is that the cost of the exit system would fall squarely on those who use it. Airlines might find the user fee option unattractive for the same reasons as the direct pass-through. But since American citizens would not be subject to the exit surcharge, the effects on U.S. airlines' customer goodwill probably would be less. A third option would be for Congress to appropriate funds to offset carriers' costs. An advantage of this plan is that it makes the airlines whole with few, if any, consequences for their customer goodwill. An obvious downside is that this approach would amount to a subsidy of foreign visitors by American taxpayers. The costs of operating exit controls would be borne almost entirely by U.S. citizens; the foreign travelers who use the system would get a free pass. Of course there are many other options, and each will have its own unique advantages and disadvantages. My intention here is not to express an opinion on which approach is preferable, but rather to highlight the wide range of policy choices available to decisionmakers in Congress and at the Department.

Let me offer one final recommendation. In its current form, the exit proposal could engender confusion among travelers. The Department's plan gives carriers the discretion to choose the point in the departure process at which they will take exiting aliens' fingerprints.[20] This desire to give carriers flexibility is laudable, but it virtually assures they will adopt different solutions.[21] Passengers flying out of JFK might have their fingerprints taken at the check-in counter, aliens returning home from San Francisco might use a kiosk before the TSA screening checkpoint, and visitors leaving Dulles might give their prints at the gate. Even more confusion would result if different airlines adopted different practices at the same airport.

My suggestion is that Department, in consultation with Congress and interested parties from the travel industry, should pick a uniform standard on where departing aliens will have their fingerprints taken. Perhaps the best option is to do it at the departure gate. If aliens give their

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[19] *See* Spencer S. Hsu, *Plan to Fingerprint Foreigners Exiting U.S. Is Opposed*, WASH. POST., June 22, 2008, at A08.

[20] *See Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure*, 73 Fed. Reg. 22,065, 22,072 (Apr. 24, 2008) ("DHS therefore proposes to permit the air carriers latitude in where they collect biometrics from their departing alien passengers.").

[21] *See id*. ("DHS expects that, in some instances, an alien will be directed to an air carrier's check-in counter or kiosk prior to security screening by TSA . . . . In other instances, DHS expects that air carriers will choose to collect biometrics from aliens at their international departure gates.").

prints at the ticket counter or a kiosk, it would be possible for them to check out but then abscond from the airport without actually leaving the United States. It would be more difficult for an alien to trick authorities into thinking he has departed if travelers' fingerprints are taken as they board their planes. Gateside collection probably offers the strongest assurances that aliens in fact leave the country.

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Chairwoman Sanchez, thank you again for the opportunity to testify this morning. I would welcome any questions you or your colleagues might have.