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Visa Overstay Tracking: Progress, Prospects and Pitfalls

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Hearing on "Visa Overstays: Can They be Eliminated?"

Chairman Thompson, Ranking Member King and distinguished members of the Committee on Homeland Security, thank you for the opportunity to testify today on the issue of "Visa Overstays: Can They be Eliminated?" Congress has long sought the creation of a system to allow the U.S. government to identify accurately those who come lawfully to the United States but then overstay the terms of their entry. Considerable progress has been made, but a range of obstacles has so far prevented its completion. This hearing serves as an excellent opportunity to reassess future directions, and to ensure that, in the effort to discourage visa overstays, the perfect will not be the enemy of the very good.

I will make four points in the testimony that follows:

First, the problem of identifying all those who overstay their visas or other entry conditions remains unsolved, but the Department of Homeland Security (DHS) has made significant and under-recognized progress for air departures through the use of passenger manifest data. Congress should encourage the

administration to build on these accomplishments rather than insisting on a fingerprint-based, biometric exit system for identifying visa overstayers.

Second, the primary value of a system for tracking overstays is to bring greater integrity to U.S. immigration laws and to discourage illegal immigration. Exit tracking has little or no utility as a counterterrorism tool, and there are other better tools available for discouraging illegal immigrants who choose to overstay their nonimmigrant visas.

Third, the government must be extremely vigilant that the deployment of additional measures to prevent overstays does not have the unintended consequence of deterring lawful travelers to the United States. Travel to the United States fell sharply following the September 11 terrorist attacks, and overseas travel had yet to recover to pre-9/11 levels even before the current recession. Discouraging foreign travel has hurt the U.S. economy, and damaged America's ability to project its values by encouraging people to come to the United States and see the country first-hand rather than through a foreign media lens.

Finally, the costs of deploying of a full biometric exit capability as currently envisioned by Congress are likely to exceed the benefits. The United States should consider seriously other options at the land borders, especially better use of RFID capabilities already embedded in many identity documents and data sharing with the Canadian and Mexican governments that would allow the United States to access records for those entering Canada and Mexico across the land border.

It remains difficult to identify all visa overstayers, but there has been significant progress in tracking air departures

There has long been considerable uncertainty about how many of those living out of status in the United States initially entered the country on legal visas. Demographers at the old Immigration and Naturalization Service estimated that 41 per cent of the illegal immigrant population had entered legally but then overstayed non-immigrant visas. That 40 per cent figure is the one still most commonly cited. A 2002 study by Douglas Massey and others based on survey data produced a similar estimate that 42 per cent of the illegal immigrant population had overstayed a visa. The Pew Hispanic Center in 2006 estimated that about 45 per cent of the illegal immigrant population was overstayers.

These are only estimates, however, because the government still has no fully reliable method for tracking those who overstay. Every one entering the United States on a nonimmigrant visa is required to fill out a form I-94 Arrival/Departure record, or an I-94W for visitors from Visa Waiver Program (VWP) countries. When an individual is inspected by a Customs and Border Protection (CBP) officer at the arriving airport or at the land border, the bottom third of the form is detached and given to the traveler. That departure record is supposed to be returned to the airline or shipping agent upon departure, or to Mexican or Canadian officials for land border exits. Those departure stubs are then matched against arrival records as part of DHS's Arrival and Departure Information System (ADIS) created in 2002 to help monitor visa overstays. In practice, however, matching is well short of 100 per cent for a variety of reasons, including lost stubs, fraud, failure by airlines to collect the forms, individuals changing their visa status after they arrive in the United States, or individuals entering by air and leaving by land.

Congress first legislated the creation of a comprehensive entry-exit system to track visa overstays in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). As I detail in my book, *The Closing of the American Border: Terrorism, Immigration and Security Since 9/11*, that requirement was strongly resisted by state and local governments and businesses along the land borders with Mexico and Canada, which feared that an exit tracking system would create costly delays and damage cross-border travel and trade. Among the opponents of the 1996 provision was Tom Ridge, then the governor of Pennsylvania. Partly as a result of such opposition, the scheme never made it past the pilot stage.

Since the 9/11 attacks, Congress has mandated and the administration has pursued the creation of a comprehensive entry-exit system in which the identity of arriving and departing travelers would be verified through biometrics. On the entry side, the DHS has fulfilled this mandate by establishing the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) Program at all international airports, and at nearly all land border ports of entry. Through US-VISIT, CBP officers collect fingerprints and photographs for all arriving overseas travelers. At the land borders, however, the entry system exempts both Mexicans and Canadians, which means that only third country nationals are enrolled in US-VISIT when they enter the country via land. This has been a practical necessity. Given the volume of daily crossings at the land borders – about 300 million land inspections occur each year, down from more than 400 million a decade ago -- taking fingerprints from all arriving travelers would be impossible without unacceptable delays to cross-border commerce and movement of people. Instead, DHS has move forward with the Western Hemisphere Travel Initiative (WHTI), which requires secure documentation such as passports, enhanced driver's licenses or trusted traveler cards for cross-border travel. The WHTI is still in the process of full implementation, but the initial indications are that the requirement has produced substantial improvements in document security with little or no disruption to the flow of cross-border travel.

Efforts to establish an exit system have faced greater hurdles. The most recent congressional deadline for establishment of a biometric exit system from U.S. airports passed June 30, 2009 with no system deployed, though pilot programs have tested different alternatives. The administration published a proposed rule in April, 2008 that would require the airlines to collect and transmit to DHS the fingerprints of departing foreign nationals leaving the United States. But the airlines have pushed back strongly, and are opposed to absorbing the costs of the new system or to finding themselves in the middle of contentious disputes over privacy. DHS has done several pilots on biometric exit. From 2004 to 2007, the department carried tests at a dozen airports with kiosks that required travelers to present themselves for exit. The technology was successful but compliance rates were low. Last year, DHS undertook two additional pilots. In Detroit, CBP officials were deployed to departure gates to record fingerprints of departing foreign nationals. In Atlanta, Transportation Security Administration (TSA) officials collected biometrics at the TSA check-in points. In both cases the pilot tests showed that the technology was adequate and that traveler delays were minimal, but both tests required intensive use of government personnel which would be costly to replicate at all international airports. No airline has yet agreed to participate in a pilot test.

Despite the difficulties in meeting the congressional mandate for a biometric entry-exit system, DHS has made considerable progress in improving the tracking of departures from U.S. airports through the use of passenger manifest data, which is entered into the ADIS database. The collection and use of such data is one of the great success stories of the post-9/11 DHS. Immediately following the terrorist attacks, one of the

highest priorities for CBP was to begin collecting from all foreign airlines advanced information (including name, nationality and passport number) on all incoming passengers. That data has been vital in helping DHS to identify passengers who should be kept off planes entirely (the "no fly" list), those on terrorist watch lists who require intense scrutiny, and others who should be pulled aside for secondary screening when they arrive in the United States.

Since February, 2008 DHS has also required airlines to transmit the same passenger manifest information on passengers departing from the United States. Compliance with this requirement is in the range of 99 per cent, according to DHS officials. That has allowed the department to match up passenger data for arriving and departing passengers, giving DHS a much more complete picture of whether individual foreign nationals are departing before their visas expire.

The biggest success in this regard has been the VWP, which accounts for the majority of overseas travel to the United States. In November, 2008, then DHS Secretary Michael Chertoff certified that DHS had met the congressional requirement to match positively the identification of 97 percent of foreign national departing the United States by air. That system continues to improve as airlines have enhanced their collection and dissemination of passenger manifest data.

There are certainly limitations in using manifest data for tracking overstays. A traveler who arrives by air could leave over the land borders, for example, and not be traced. Or a dual-national could enter the country on one passport and leave on another. Given those possibilities, it is difficult for DHS to conclude with certainty that a particular traveler who has failed to return home in time has in fact remained in the United States in violation of his or her entry terms. The Government Accountability Office has pointed out these and other shortcomings in the methodology used by DHS to meet the 97 percent match rate.

These are real issues, and if identifying visa overstayers were a critical matter for protecting the United States against future terrorist attacks, that uncertainty would be an unacceptable risk. But that is not the case.

Overstay tracking is primarily a tool for managing and enforcing immigration laws, not for preventing or discouraging terrorist attacks. There are more effective tools available for curbing illegal immigration.

The initial post-9/11 impetus for tackling the issue of overstays was the fear of another terrorist attack. In particular, some in the Justice Department seized on the fact that several of the 19 hijackers in the plot had overstayed tourist visas and were thus in the United States unlawfully at the time of the attacks. Significantly, three of the hijackers had been stopped for traffic violations when they were living illegally in the United States, including the pilot Ziad Jarrah who was cited for speeding just two days before the attacks. If the information that those individuals had overstayed visas had been available to local law enforcement officials, in theory several of the hijackers might have been detained and deported, potentially disrupting the 9/11 plot.

In response, in September, 2002 the Justice Department launched the National Security Entry-Exit Registration System (NSEERS), sometimes called Special Registration. The program requires that all males between the ages of 16 and 45 from roughly two dozen countries considered as potential terrorist risks, as well as selected others, be routed through secondary screening and registered upon arrival in the United States. Those admitted to the United States on nonimmigrant visas under NSEERS can only leave the United States through designated airports and land border facilities at which special exit facilities have been established. The idea was to establish a functioning entry-exit system for a small subset of travelers considered higher risk, and one that would allow for law enforcement officials to be alerted to visa overstayers. That system remains in place today.

The practical limitations of using overstay data as a terrorist tracking tool far exceed the potential benefits, however. Why?

First, the fundamental challenge with regard to foreign-based terrorists is to keep them out of the United States in the first place. Quite simply, those who come to the United States to carry out a terrorist attack are unlikely to leave. Congress and the administration have therefore correctly put priority on improving entry screening systems -- including visa screening, the US-VISIT entry procedures, advanced passenger information and passenger name records, the creation of the Electronic System of Travel Authorization (ESTA) for VWP countries, and international data sharing on lost and stolen passports. Those are the systems that need to be made as nearly foolproof as possible. The near-miss Christmas bombing showed both the strengths and continued problems that remain in the entry systems. CBP analysts had identified Omar Farouk Abdulmutallab as someone deserving extra scrutiny while his flight was en route to Detroit. Unfortunately that same judgment needed to be reached earlier, before he boarded the plane.

Second, Immigration and Customs Enforcement (ICE) is far short of the resources that would be necessary to routinely track down, arrest and deport visa overstayers. Under the Secure Communities program, ICE has rightly put its focus on identifying and deporting illegal immigrants who also have criminal records, not on trying to arrest and detain all unauthorized immigrants. If the rough estimates of visa overstays are correct, there may be as many as four or five million illegal immigrants who are visa overstayers, requiring that there be some priorities set in deploying limited ICE resources to track and arrest such individuals.

Third, and more plausibly, DHS could routinely make information on visa overstayers and other visa violators available for local law enforcement officials through the FBI's National Crime Information Center (NCIC) database. That would allow for overstayers to be identified through routine traffic stops and other encounters with local police who had been authorized to check for immigration violations under the 287(g) program. But that would still raise the issue of limited ICE resources to detain and deport those individuals, and would further expand the 287(g) program, which has been resisted by most local police forces as potentially interfering with their fundamental mission of maintaining peace and security in their communities.

Some will point to the recent case of Hosam Maher Husein Smadi, a 19-year-old Jordanian visa overstayer who was accused of attempting to blow up a Dallas office tower last September. The issue of whether an exit tracking system might have stopped him received front page treatment in the *New York Times* last October because Smadi was pulled over by a sheriff in Ellis County, Texas for driving with a broken taillight just two

weeks before the attempted bombing. Critics have argued that if the evidence that Smadi was a visa overstayer had been available to the sheriff, Smadi would have been detained and handed over to ICE for removal. Instead he was jailed overnight and released. But given the circumstances of the case, that claim does not hold up to scrutiny. Under the improved information-sharing arrangements put in place since 9/11, the sheriff was able to learn immediately that Smadi was the subject of an FBI investigation. Indeed, it appears that the FBI ordered Smadi to be released. The attempted bombing of the Dallas skyscraper turned out to be a sophisticated sting operation mounted by the FBI; had Smadi been held on immigration charges by local police, the sting would have been disrupted and Smadi would potentially have faced only deportation rather than criminal terrorism charges.

The limitations of overstay tracking as an effective counterterrorism tool have long been recognized by Congress. For instance, a Senate Judiciary Committee report on 1997 legislation that would have exempted the land borders from an automated exit system stated the following:

> "The Committee is keenly aware that implementing an automated entry-exit 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."

Stewart Baker, the former assistant secretary for policy at DHS in the George W. Bush administration, has rightly said that an exit system is "an immigration accounting system. It's less about safety and more about immigration record-keeping."

So does this mean that the United States can do nothing to discourage individuals from overstaying their visas and remaining illegally to live and work in this country? Not at all.

Indeed, under the current system, enforcement against visa overstayers has increased significantly. The primary enforcement tool for penalizing visa overstayers is to deny them re-entry to the United States should they attempt to return. Even with the limits of the current exit tracking system through the I-94s and passenger manifest data, the number of individuals denied visas or stopped from re-entering the United States has increased significantly each year. Congress already has strong laws on the books that penalize visa overstayers. Under IIRAIRA, those who overstay a visa by more than six months and then depart are barred for three years from returning to the United States. Those who overstay by a year or more are barred for 10 years. Indeed, the real problem with the current implementation of IIRAIRA is not lack of penalties, but the need for greater flexibility in implementation to ensure that people who inadvertently fall out of status are not wrongly barred from returning to the United States.

The effort to prevent overstays is already one of the primary missions of State Department consular officers. In FY2009 nearly 2 million out of 7.7 million visa applicants were refused, most because the consular officer suspected they would overstay their visa. Over the past year, all State Department consular

officers have acquired access to the ADIS database, which allows them to do a special query to determine if the visa applicant has been identified by DHS as a visa overstayer. The State Department will soon be able to deploy ADIS so that the overstay information automatically appears on the screen of each consular officer during the visa adjudication process. As travelers become aware of this capability, the deterrent effects for potential visa overstayers will grow.

What about those who remain in the United States and make no effort to return home? Here, the tools should be the same ones that can be used to discourage any sort of illegal immigration. With respect to enforcement of immigration laws, there is no reason to treat visa overstayers differently from other unauthorized migrants. Their mode of entry may have been different, but otherwise they are the same as an illegal immigrant who crossed between the ports of entry. Indeed, efforts by the State Department and CBP to improve entry screening before or at the ports of entry are largely analogous to efforts by the Border Patrol to strengthen enforcement between the ports of entry. The most effective interior enforcement tool is to deny jobs to unauthorized immigrants, and the E-Verify system shows promise here despite its growing pains. But enforcement should coupled with a comprehensive overhaul of immigration laws that includes reforms to create new legal paths for those who wish to live and work temporarily or permanently, and an earned legalization program that would allow many unauthorized migrants (including visa overstayers) to earn to right to remain in the United States. The *Independent Task Force on U.S. Immigration Policy*, which was chaired by Jeb Bush and Mack McLarty and for which I served as project director, makes a series of bipartisan recommendations for reforming the U.S. immigration system along these lines.

Any new measures to identify visa overstayers should be done in ways that do not discourage lawful travel to the United States, which benefits both the U.S. economy and American diplomatic efforts.

The recently released DHS Quadrennial Homeland Security Review states that: "Secure, well-managed borders must not only protect the United States against threats from abroad; they must also expedite the safe flow of lawful travel and commerce." It sets out three central goals for U.S. policies to protect the homeland: security against terrorist and criminal threats; resilience to allow for rapid recovery in the event of attacks or natural disasters; and customs and exchange, expediting and enforcing rules for lawful trade, travel and immigration.

One of the successes of the US-VISIT entry program is that it has been implemented with little disruption to the entry of lawful travelers into the United States. The program was carefully piloted, and then rolled out initially for visa travelers when it became clear that it was possible to capture two digital fingerprints rapidly for each traveler. That success allowed for the later expansion to visa waiver travelers, and then to the more recent capture of ten fingerprints rather than two, which increases accuracy and improves security. Each step was taken by DHS only when it became clear that security enhancements were possible without significant disruption to lawful travelers. The carefully negotiated agreements with the European Union that resulted in the sharing of passenger information and the creation of ESTA were similarly implemented with minimal impacts on air travelers. The WHTI at the northern and southern borders and for Caribbean air and ship travel is also improving security with little or no negative impact on cross-border flows.

The same cannot be said of some of the other border security measures enacted following the 9/11 attacks. The additional scrutiny of visa travelers under the Visas Condor and Visas Mantis programs, for example, contributed to a sharp drop in visa travel to the United States for several years, with the number of visas issued dropping from over 7 million in 2000 to fewer than 5 million by 2003. As recently as last year, long delays continued to plague visa applicants from China, India and Russia who were working in technology fields because of the national security reviews required for these individuals.

The impact was especially acute with NSEERS, which has proved highly burdensome to travelers from the targeted two dozen countries. Travel to the United States from these countries remains sharply depressed at roughly 60 per cent of pre-9/11 levels. The number of visas issued for Pakistanis, for instance, was 88,000 in the year 2000; last year it was just 33,000. From Indonesia the drop has been from 70,000 to 42,000. These are the very countries where the battle for hearts and minds is being fought, and where the United States should be encouraging more people to see this country through their own eyes rather than through the distortions of local media.

While travel to the United States had partially rebounded before the current recession, the United States has lost ground as a destination for international travelers. The U.S. travel industry has estimated that an additional 68 million visitors would have come to the United States over the past decade if it had simply kept pace with global long-haul travel trends.

In considering the creation of a biometric exit system, then, both the Bush and Obama administrations should be praised for proceeding cautiously to ensure than any new measures do not unduly discourage lawful travel. The premature rollout of an exit system at the land borders in particular could have extraordinarily negative consequences for cross-border travel and trade with Mexico, the largest and third largest U.S. trading partners respectively. The last detailed evaluation of the land border exit option by the Government Accountability Office, in December, 2006, concluded that, given current technologies, a biometric exit system would require a costly expansion of land port facilities and would produce major traffic congestion. And this would come even as major improvements are still needed in the land border entry facilities, though funds provided through the stimulus package are beginning to address some of those needs.

The costs of deploying of a full biometric exit capability as currently envisioned by Congress are likely to exceed the benefits.

The central philosophy underpinning DHS since its creation has been the idea of risk management, that the costs of new security measures should be carefully weighed against the expected benefits. By any measure, deployment of a biometric exit system will be expensive. While DHS has not released official estimates, biometric exit in the air environment is certain to run into the billions of dollars, particularly if CBP or TSA staff must be used to capture the biometrics. A land border exit system would be more expensive still, and the potential for disruption of two of the largest cross-border trade and travel relationships in the world is significant.

Given the costs and difficulties associated with biometric exit, Congress and the administration should take a serious look at whether further accuracy in tracking visa overstays could be realized through a combination of biographic and biometric means rather than a pure biometric approach. The use of passenger manifest data has demonstrated the promise of this approach in the air environment. Congress and the administration would do well to build on this approach rather than continuing to hold out for a costly biometric exit system that would bring only minimal gains in terms of additional accuracy. Unless a fully functioning biometric land exit system can also be constructed, biometrics in the air environment will still not allow the United States to know with certainty if an individual has overstayed a visa and remains illegally in the United States. As such, biometric exit at airports would be a very costly addition with very small benefits in terms of additional information on overstayers.

At the land borders, a biographic approach also shows greater promise. The new rules under WHTI have required American, Mexican and Canadian travelers to acquire secure documents that allow for accurate records of who is crossing the border into the United States and, potentially, who is leaving. Everyone exiting across the land borders of the United States is also entering either Canada or Mexico. The administration should explore the possibility of data sharing with both countries regarding their inbound travelers. In the case of Canada, there have been on-again, off-again discussions between the two countries sharing data, so that Canada would inform the United States on its border entries and vice-versa. There are certainly difficult impediments to such a negotiation. Canada does not currently have the same document entry requirements as the United States, and would have to move forward on those. The fact that four Canadian provinces have already adopted WHTI-compatible enhanced driver's licenses would make such a transition reasonably easy for Canada. It would also be easier to negotiate an agreement that was initially limited to third country nationals, assuaging Canadian concerns about sharing data on their own citizens. If the U.S. continues to insist on a biometric exit system, however, there is little prospect of success in such a negotiation, since Canada is unlikely to establish biometric entry requirements at its land borders.

If such a deal cannot be negotiated, there continue to be promising developments in RFID technology that could allow for a remote scan of the identification documents of cross border travelers as they are leaving the United States. WHTI-compliant documents are already RFID-enabled, so the building blocks are in place for a system that could identify travelers departing by car through remotely-read documents, without requiring drivers to stop and give a fingerprint or other biometric upon exiting the land borders. While there are still hurdles to overcome, such a system shows particular promise for the southwest border, where cooperation with the Mexican government poses even greater obstacles than on the north border.

Conclusion

To conclude, my answer to the question posed by this hearing – Can visa overstays be eliminated? – is "not entirely," at least if there is any reasonable calculation made of costs and benefits. But there has already been a great deal of progress over the past several years, and DHS and other federal agencies should be encouraged to build on that progress rather than investing heavily in the creation of a new biometric exit capability.

Thank you, and I look forward to responding to your questions.

Edward Alden is the Bernard L. Schwartz senior fellow at the Council on Foreign Relations (CFR), specializing in immigration, visa policy and U.S. economic competitiveness. Mr. Alden is the author of the recent book *The Closing of the American Border: Terrorism, Immigration and Security Since 9/11* (HarperCollins), which was named a 2009 finalist for the J. Anthony Lukas Book Prize for non-fiction writing. The judges called it "a masterful job of comprehensive reporting, fair-minded analysis, and structurally sound argumentation." He was the project director for the *Independent Task Force on U.S. Immigration Policy*, which was co-chaired by former Florida governor Jeb Bush and former White House chief of staff Mack McLarty. The report, which was released in July, 2009, received extensive press coverage, and has been called "a bipartisan blueprint for how to fix our broken immigration system."