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THE VISA WAIVER PROGRAM: MITIGATING RISKS TO ENSURE SAFETY OF ALL AMERICANS

HEARING

BEFORE THE

SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Feinstein, Hon. Dianne, a U.S. Senator from the State of California	1
prepared statement	49
Kyl, Hon. Jon, a U.S. Senator from the State of Arizona	3

WITNESSES

Baker, Stewart, Assistant Secretary, Office of Policy, Department of Homeland Security, Washington, D.C.	7
Ford, Jess T., Director, International Affairs and Trade, Government Accountability Office, Washington, D.C.	5

QUESTIONS AND ANSWERS

Responses of Stewart Baker to questions submitted by Senators Kennedy and Hatch	27
Responses of Jess T. Ford to questions submitted by Senator Feinstein	41

SUBMISSIONS FOR THE RECORD

Baker, Stewart, Assistant Secretary, Office of Policy, Department of Homeland Security, Washington, D.C., statement	43
Ford, Jess T., Director, International Affairs and Trade, U.S. Government Accountability Office, Washington, D.C., statement and attachment	51

VerDate Aug 31 2005 09:28 Jan 08, 2009 Jkt 045063 PO 00000 Frm 00003 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\45063.TXT SJUD1 PsN: CMORC

THE VISA WAIVER PROGRAM: MITIGATING RISKS TO ENSURE SAFETY OF ALL AMERICANS

WEDNESDAY, SEPTEMBER 24, 2008

U.S. SENATE,
SUBCOMMITTEE ON TERRORISM, TECHNOLOGY,
AND HOMELAND SECURITY,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:32 p.m., in room SH–216, Hart Senate Office Building, Hon. Dianne Feinstein, Chairman of the Subcommittee, presiding.

Present: Senators Feinstein and Kyl.

OPENING STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Chairman FEINSTEIN. I am going to call the hearing to order.

This afternoon, we are here once again to look at what is being done or not done to ensure the safety of the Visa Waiver Program. I have long expressed my concern that the Visa Waiver Program is the soft underbelly of this Nation's immigration system because it offers an opportunity for people to come into the United States to do us grievous injury without knowledge. Travelers from visa waiver countries not only bypass the interview and individualized security screening process, but as the GAO report confirms, they are also lost once they arrive in the United States.

This problem is exasperated because DHS is only checking if and when individuals depart at our airports, so if you have 16 million people coming into the country in a given year and you only check those who leave, you never know how many came in and disappeared.

I have held multiple hearings over several years, and time and time again, I repeat my frustrations, and yet there seems to be no improvement, no change in how the Department implements this program. Current law requires that before DHS admits any new countries into the Visa Waiver Program, it must: one, put in place a fully operational electronic travel authorization system for all travelers from visa waiver countries; and, two, verify the departure of 97 percent of foreign travelers leaving U.S. airports.

Department of Homeland Security measures just 97 percent of who leaves, not who comes in.

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DHS states that they will have these requirements met prior to admitting new countries into the program, but this is only true because of their limited interpretation of the statutory requirements.

However, the GAO report found that the Department of Homeland Security has not done the groundwork to prepare the embassies, travel industry, and travelers to make electronic travel fully operational.

The GAO report also reaffirmed that DHS is not taking into account countries' overstay rates—that is when they come in, they say they are here for a limited period of time, and they overstay it—in the air exit system. DHS continues to maintain that certification of an air exit system is fulfilled by simply tracking 97 percent of individuals who exit through U.S. airports, not whether 97 percent of individuals who entered at airports actually left.

In the meantime, the GAO report shows that the administration is moving full steam ahead in working to bring in as many as 8 to 10 new countries by the end of this year. And this chart shows you the 10 countries. You see only in one case has the State Department (1) officially nominated the country for entry into the Visa Waiver Program. (2) that country is Greece. And you see, (3) the Department of Homeland Security is moving forward with the other countries—Malta, Estonia, South Korea, Czech Republic, Hungary, Latvia, Slovakia, Lithuania—without this State Department nomination.

I have a hard time understanding why DHS is moving so quickly to add new countries to the program without properly mitigating security risks. These risks are particularly apparent when we look at the statistics on the number of fraudulent and stolen passports and other international documents. And I have been through this before, but I want to provide an update.

Between January 2002 and June 2004, 28 foreign governments, including visa waiver countries, reported 56,943 stolen blank foreign passports to the State Department. And just this summer, a security van in London was hijacked, resulting in the loss of 3,000 blank British passports and visas that were destined for overseas embassies.

DHS's own Inspector General, Clark Ervin, has testified that "the lost and stolen passport problem is the greatest security problem associated with the Visa Waiver Program. Our country is vulnerable because gaps in our treatment of lost and stolen passports remain."

Radicalism and homegrown terrorism in Europe is growing, and we know that al Qaeda is looking to exploit the Visa Waiver Program. But instead of acknowledging the threat this poses to the American people, the administration is working to admit new countries even with higher visa refusal rates. A visa refusal occurs when the consular officer believes that that individual is not going to return back to their country. So if you have a high visa refusal rate as a country, it means that a substantial proportion of the people simply are not going to come back. They are going to overstay their visa, which is a temporary visa, and remain in the United States.

Secretary Chertoff himself has acknowledged the loophole that the Visa Waiver Program leaves open for those who wish to do us

harm. Just this year he stated that, "We have a Visa Waiver Program which allows most Europeans who come to be tourists to come without visas. This means that the first time we encounter them is when they arrive in the United States, and that creates a very small window of opportunity to check this out."

Now, I can tell you from an intelligence point of view that, reportedly, al Qaeda is looking for Europeans and Asians, not necessarily Middle Easterners, to send to this country on various missions. The Visa Waiver Program becomes a program to exploit, and it has been exploited. That is how Moussaoui got in the country. That is how others get in the country.

I find it ironic that the Department of Homeland Security whose number one goal is to "protect the Nation from dangerous people" is instead expediting the expansion of a program that we know is exploited by dangerous people.

The Visa Waiver Program leaves open both a major gap in our domestic security and a way to exploit our immigration laws. So I am very committed to do whatever I can about it. The Strengthening the Visa Waiver Program to Secure America Act is a bill that I am looking at introducing, and I look forward to working with my Ranking Member, hopefully, on this bill.

I did want to point out specific comments that the GAO found. I want to really compliment the GAO witness for his work. As I said, he may be bloodied but he is unbowed, and I thank you for your very honest appraisal of this. And in our Q&A I hope we can go through some of your findings as well.

[The prepared statement of Senator Feinstein appears as a submission for the record.]

I would like now to recognize someone I have worked with—is it 12 years or 14 years? I could not remember.

Senator KYL. I think we are on number 13 or 14 now.

Chairman FEINSTEIN. And either Senator Kyl has been the Chairman or I have been the Chairman.

OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Madam Chairman. But either way, I know we can both agree that it has been great to work with each other because we have exactly the same goals and frequently the same ideas about how to achieve those goals. And in this case, I think that is true. I have reviewed a draft of the legislation that Senator Feinstein has talked about and find it to be very good, and I do want to work with you on it. I think it is well worth introducing.

I have also, by the way, spoken with at least one of our witnesses today and know that the administration shares the same goals. And while there may be some different ideas about how to achieve them, this is one of those cases where working together the two branches of Government I think can work effectively.

I do want to thank you for calling this hearing in particular because we have the report to review as well as hearing about the progress that the administration is making on the ancillary issues related to the Visa Waiver Program. As we all know, it facilitates trade and travel for the U.S. and 27 of our allies. It allows millions

of people to visit the United States each year. But by allowing program participants to travel to the U.S. without first being interviewed by consular offices, the Visa Waiver Program can inadvertently make it easy for individuals who would do harm to our country to get here. And for that reason, since the beginning of the program, Congress has required that minimum standards be met before any new country is admitted to the program.

In the 9/11 Commission Act, Congress awarded the DHS and its partner agencies the discretion to waive some of the minimum standards when admitting new countries to the program. In that legislation, to ensure that expansion of the program did not compromise the safety and the security of the American people, Congress also set benchmarks that have to be met before DHS can exercise its waiver authority. We will hopefully hear today on whether DHS has met the benchmarks, but it appears that DHS might potentially use its waiver authority to admit countries whose visa refusal rates fall between 3 and 30 percent, and perhaps even countries that have rates above 10 percent. We will want to explore that today.

I am also hoping that at today's hearing, the purpose of which is to review the GAO's new report, the testimony will shed light on the continued problems as well as advances in the Visa Waiver Program and look constructively at how better to ensure its validity and security.

Our office and Senator Feinstein's office—and Senator Sessions's office, I might add—have had a number of conversations with DHS about whether the agency is meeting the letter of the law as it pertains to either the exit or the Electronic System for Travel Authorization, or ESTA, requirements established in the visa waiver portion of the 9/11 Act. And I think we will get answers today about that.

We also want to explore whether it is a good idea and whether the 9/11 law intended to allow DHS to admit countries through a waiver with visa refusal rates above 10 percent. Regarding the exit requirements, I believe that Congress intended that DHS record the departure of every alien participating in the Visa Waiver Program, not just those who are checking in for a flight to exit the U.S. But I recognize that we may not have achieved that goal in the exact wording that we passed.

I also believe the Electronic System for Travel Authorization should be up and running in all countries that currently participate in the Visa Waiver Program before any waiver or expansion of the program is considered.

I am hopeful that DHS can provide assurances it will meet the aforementioned benchmarks, and in the meantime, as I said, I look forward to working with Senator Feinstein on legislation that will help ensure that we continue to provide important trade and travel benefits at the same time that we do not weaken our national security enforcement capabilities.

Again, Senator Feinstein, thank you for calling the hearing today. I know we both look forward to the testimony of the witnesses.

Chairman FEINSTEIN. Thank you very much, Senator Kyl. And as you well know, I too appreciate working with you very much.

I will introduce the two witnesses. The first is Jess Ford, the Director of International Affairs and Trade. Mr. Ford joined the Government Accountability Office in 1973 and is currently Director of International Affairs and Trade. He has an extensive background in the area of national security and international affairs on issues related to trade, foreign assistance, and foreign policy. He has managed GAO audits of the Agency for International Development, the State Department, and the Department of Defense. In January 1994, he was selected into GAO's Senior Executive Service. Mr. Ford has received numerous awards throughout his tenure at GAO, including the Meritorious Service Award and the Distinguished Service Award.

And I will introduce Mr. Baker at this time, if I might. He is the Assistant Secretary for Policy of the Policy Directorate in the Department of Homeland Security. His office is responsible for crafting and implementing policies, planning, and programs designed to strengthen homeland security. Prior to assuming this position, he served as General Counsel of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction from 2004 to 2005; General Counsel of the National Security Agency, the NSA; and Deputy General Counsel of the Department of Education. Mr. Baker has also worked extensively outside of Government service. Mr. Ford, since I asked you to perform this GAO report, would you begin by giving this Subcommittee an analysis of your findings, please?

STATEMENT OF JESS T. FORD, DIRECTOR, INTERNATIONAL AFFAIRS AND TRADE, GOVERNMENT ACCOUNTABILITY OFFICE, WASHINGTON, D.C.

Mr. FORD. I would be happy to. Chairman Feinstein, Senator Kyl, members of the Subcommittee, I am pleased to be here today to discuss our recent report on the Department of Homeland Security's oversight of the Visa Waiver Program and executive branch plans to expand the program by the end of this calendar year, by the end of 2008.

The Visa Waiver Program enables citizens of 27 participating countries to travel to the United States for tourism or business for 90 days or less without first having to obtain a visa from a U.S. embassy or consulate overseas. The program has many benefits. However, the program also poses inherent security, law enforcement, and illegal immigration risks to the United States.

Effective oversight of the Visa Waiver Program is essential to finding the right balance between facilitating legitimate travel and screening for potential terrorists, criminals, and others who may pose a law enforcement or illegal immigration risk to the United States.

The executive branch aims to expand the Visa Waiver Program to countries in Central and Eastern Europe and to South Korea. Some of these countries are U.S. partners in the war in Iraq and have high expectations that they will be able to join the program due to their close economic, political, and military ties to the United States.

In August of 2007, Congress passed the 9/11 Act, which allows DHS to consider admitting countries that otherwise meet the pro-

grams requirements but who have refusal rates between 3 and 10 percent if the countries meet certain conditions, such as cooperating with the United States on counterterrorism initiatives. Previously, only countries with refusal rates below 3 percent in the prior fiscal year qualified to be considered for admission.

Before DHS can exercise this new authority, the 9/11 Act requires the Department complete certain actions aimed to enhance the security of the program. The executive branch is moving aggressively to expand the Visa Waiver Program by the end of 2008. But in doing so, DHS has not followed a clearly transparent process. The Department did not follow its own November 2007 standing operating procedures which set forth key milestones that DHS and aspiring countries must meet before additional countries are admitted to the program. As a result, U.S. embassy officials, State and Justice officials, and several aspiring countries told us that it had been difficult for them to explain the expansion process to their foreign counterparts and manage their expectations about when these countries may be admitted under the Visa Waiver Program.

State officials said it was difficult to explain to countries with fiscal year 2007 refusal rates below 10 percent, such as Croatia, Israel, and Taiwan, why DHS is not negotiating with them. DHS, however, is negotiating with several countries that have fiscal year 2007 visa refusal rates above 10 percent, including Hungary, Latvia, Lithuania, and Slovakia, with the expectation that the fiscal year 2008 rates will fall below this ceiling.

Nevertheless, DHS has achieved a number of security enhancements to the Visa Waiver Program during the expansion negotiations. DHS has secured commitments from several current and aspiring countries to improve the watchlist information that it is sharing with the United States. In addition, DHS has received commitments from aspiring countries to report on lost and stolen passports within strict time limits. And DHS has also implemented many of our prior recommendations from our 2006 report to strengthen the oversight of the program.

However, DHS has not fully developed the tools to assess and mitigate the risks to the Visa Waiver Program. In particular, DHS has not yet met two key certification requirements in the 9/11 Act that would allow DHS to consider admitting new countries into the program with refusal rates between 3 and 10 percent.

First, DHS must certify that it can verify the departure of not less than 97 percent of foreign nationals who exit the United States from U.S. airports. In February of 2008, we testified that DHS's proposed plan to meet this provision will not demonstrate improvements in the air exit system because the plan does not account for data for those who remain in the country beyond their authorized stays. To date, DHS has not indicated to us how it intends to implement this provision or what options it is considering.

DHS must also certify that the Electronic System for Travel Authorization, ESTA, for screening visa waiver travelers in advance of their travel is fully operational. DHS has not yet announced when it plans to make this certification. However, ESTA became available on a voluntary basis on August 1st of this year, and DHS

anticipates that ESTA authorizations will be required for all visa waiver travelers by January 12th of 2009.

We identified several challenges in implementing ESTA, such as adequately informing the public and the travel industry, working with the airlines to help passengers comply with ESTA requirements, developing a user-friendly system, and working with the State Department to potentially mitigate risks of additional costs to the State Department with ESTA refusals.

In addition, the 9/11 Act requires that the air exit system also incorporate biometric indicators, such as fingerprints, by July 1 of 2009. DHS faces significant challenges in meeting this timeline due to several internal management challenges and resistance from airlines and the travel industry.

Finally, DHS does not fully consider countries' overstay rates when assessing illegal immigration risks in the Visa Waiver Program because the Department's overstay data has a number of weaknesses. To improve the management of the Visa Waiver Program and better assess and mitigate risks associated with it, we have made recommendations in our report that DHS establish a clear process, in coordination with the State Department and Department of Justice, for program expansion that would include criteria to determine which countries will be considered for expansion and timelines with key milestones that clearly identify the process.

In addition, we recommended that DHS designate an office with responsibility for developing overstay rate information in the Visa Waiver Program, explore cost-effective actions to further improve the data's reliability, and use the validated data to help evaluate whether current or aspiring Visa Waiver Program countries pose a potential illegal immigration risk to the United States.

The Department in their comments to us either agreed with our recommendations or stated that it is in the process of implementing many of them. That concludes my statement. I would be happy to answer any questions.

[The prepared statement of Mr. Ford appears as a submission for the record.]

Chairman FEINSTEIN. Thank you very much, Mr. Ford. Mr. Baker, your comments, and the degree to which you 3 could respond to Mr. Ford, it would be helpful. Thank you.

STATEMENT OF STEWART BAKER, ASSISTANT SECRETARY, OFFICE OF POLICY, DEPARTMENT OF HOMELAND SECURITY, WASHINGTON, D.C.

Mr. BAKER. Thank you, Senator Feinstein. It is really a pleasure to appear before you and Senator Kyl on this topic.

Chairman FEINSTEIN. Thank you. I hope you leave feeling that way, too.

[Laughter.]

Mr. BAKER. Well, as I think you may remember, I had to move a cardiologist appointment to come here.

Chairman FEINSTEIN. That is right.

Mr. BAKER. He said, "This is not going to be exciting, is it?" And I said, "Well, we will see." I am looking forward to this because I think we do share the same goals, and I wanted to start by talking about the points on which we agree. And I start with some trepi-

dation because I suspect that my quotes are going to end up on your easel the next time you have a hearing on this, because, in fact, we do agree that the Visa Waiver Program, as it was originally designed, had some very serious security holes in it. And it simply was not designed to deal with the threat of terrorism.

I have put together a slide talk here on my right that talks about the progress in preventing terrorist travel that deals with the three security problems that we were concerned about. The first question that you have to answer about the Visa Waiver Program is: Do we know who is coming to the United States? And the answer is that we did not know who was coming to the United States when the program was first created. People would show up at the booth, and we had 30 seconds to interview them and decide whether to admit them.

The second problem that the Visa Waiver Program had was whether we knew which risky travelers we should be looking for, and, again, we did not have very good measures of who was a risky traveler. We did not get good information about which citizens of a foreign country we should be concerned about.

And, finally, the third question that we ask here is: If we have a system for identifying risky travelers, can people beat that system by, as you mentioned, getting a lost or a stolen passport or some other form of identity fraud? And, again, there was very little cooperation among countries, including visa waiver countries, giving us information about passports that had been stolen in those countries that we would need to watch for.

What I think we disagree with is the notion that the program has not changed, that DHS has been administering the same program for the last 5 years. There have really been two sets of changes in the program, and both of them have made us more secure. You will see on that chart there is a pre-9/11 with a relatively small number of security measures; post-9/11 there were more. The ones I would like to draw your attention to are the ones that are circled in red because these are—it is on this side—oh, I am sorry. I thought you had a small copy as well. OK.

On the first question, who is coming here, we now are going to be implementing for everyone in the Visa Waiver Program the ESTA that will tell us exactly who is coming to the country, and they will have to tell us in their own words and give us the information directly from their own knowledge and passports. So we will have advanced knowledge of the people who want to come to the United States.

Second, identifying risky travelers, perhaps the most important strides that we have made in reforming the program using the tools that Congress gave us in 2007 is to negotiate with countries an expanded information-sharing process in which for the first time many of them are telling us about criminal convictions of their citizens. If we encounter them, we will be able to find out whether these are pedophiles or smugglers, something we never knew before. And they are also signing agreement to give us information about who within their borders may be terrorists. This is information, again, that we were never able to get prior to the tools that you gave us to negotiate new agreements.

And then, finally, on the question of lost and stolen passports and new identities, we have had two successful sets of expansions of our security tools: First, using VWP conditionality from 2005, we were able to get people to provide us with blank passports that had been stolen. In this latest round of negotiations, countries have agreed to give us all the passports that are stolen, including issued passports.

All of this is going to substantially increase our security. None of it could have happened but for the legislation that passed in 2007 because, as you will see, almost all of the measures that we are talking about that improve our security are things that could only happen with the cooperation, the voluntary cooperation of other countries. And by opening negotiations with countries that wanted to join Visa Waiver, we were able to offer them the prospect of Visa Waiver in exchange for the additional security measures that they were providing to us. And that is what has broken the dam and allowed us to get what I believe will be seven sets of agreements on sharing terrorism information, seven sets of agreements on sharing criminal data, seven sets of agreements on sharing lost and stolen passports. So that is the security measures that we have taken.

Also, in the other chart that I hope you will have in front of you, I would like at some point to talk about the measures that we have for identifying who is leaving the country. We think that, in fact, we can identify and remove overstays, particularly dangerous overstays. We agree that having an exit system is crucial to that effort and that we can improve the exit system is the most cost-effective way. I hope we will be able to discuss that in more detail later on.

In summary, we share the same security goals. We would like to work with you on your proposed legislation to try to find a way to improve visa waiver and visa waiver legislation in yet another round of legislation, if necessary.

Thank you.

[The prepared statement of Mr. Baker appears as a submission for the record.]

Chairman FEINSTEIN. Thank you very much, and, of course, we will work with you. That goes without saying, and I recognize that.

Just for a moment, Mr. Baker, consider this chart. The bottom line is the 3 percent. You know, you say, well, DHS has other security arrangements with these countries, but the fact of the matter is the law requires certain things of you which you are ignoring. And you have, Estonia, South Korea, you know, maybe one quarter of theses countries at about a 4 percent Visa refusal rate; the Czech Republic, maybe 6 percent; and then it goes up. And it is as if it does not matter what the law says. You are going to do it anyway because you are going to do it on a political basis.

Here is my concern. If, in fact, it is true that al Qaeda is looking for people who indeed are European, who indeed have easy access, who can pick up a fraud-proof blank passport on the black market, and 24 hours later could be in the United States for 90 days as a visitor, they have got it made in terms of coming into this country. And I do not understand why you do it with these countries, and yet you have Israel, Taiwan, and Croatia that meet the strictures,

and you do not negotiate with them. So I have got to believe that something is rotten in Denmark.

Mr. BAKER. Would you like me to answer?

Chairman FEINSTEIN. Yes.

Mr. BAKER. I am glad to answer that.

Senator KYL. Dubrovnik.

Chairman FEINSTEIN. Dubrovnik.

[Laughter.]

Mr. BAKER. Yes, exactly. I think you have asked two questions. One, are you going to let people in willy nilly even though they have not met the legal requirements? And—

Chairman FEINSTEIN. Why don't you follow the legal requirements?

Mr. BAKER. Let me start with that. We will follow the legal requirements. We will not admit anyone to this program who does not meet the 10-percent rejection rate requirement that is part of the statute. I can give you the assurance that I have made that clear to all of the candidate countries, especially the ones who are at the edge of 10 percent. We will not be admitting people to the Visa Waiver Program if their rejections are higher than 10 percent. We have been negotiating with these countries because, in fact, their rejection rates have been declining at a remarkable rate. Some of these countries were at 20 and 25 percent 2 years ago, and they have declined dramatically in recent years.

The calculation of this fiscal year's rejection rate will not happen until the fiscal year ends on October 1. However, given the trends over the past years in which there have been multiple-digit declines in the rejection rate, we predict—we believe that all four of the countries that are currently just over 10 percent will be well below it. That is why we are negotiating with people. We are not making them a promise. We are just negotiating.

Chairman FEINSTEIN. Then the law provides—and correct me if I am wrong, because I could be—that you need to certify first the electronic travel is fully operational.

Mr. BAKER. Yes.

Chairman FEINSTEIN. Which you are not able to do, and that the 97-percent exit system is in place without a phony formula of getting there, which you do not agree to do.

Mr. BAKER. We believe that ESTA will be fully operational within 6 weeks. That is to say, it is operational now. We have 125,000 people who have filled out ESTA and come to the United States after having filled out and obtained approval to travel to the United States. And we are having 15,000 to 17,000 people every week go through that system. It is running well.

There are some improvements that we need to make to make sure that it can handle the load, but it is operational now, and we believe it will be fully operational very soon.

The 97 percent, we do have, I think, a disagreement over what the law allows—

Chairman FEINSTEIN. Would you stop on that one point?

Mr. BAKER. Yes.

Chairman FEINSTEIN. Mr. Ford, do you believe that the electronic travel system is fully operational now in your study?

Mr. FORD. Well, they turned it on on August 1st. We do not know much about how it is working. It has not been certified yet. The DHS has not yet certified that it is fully operational, but they did turn it on on August 1st. And, again, we do not have enough information on how it is working.

Chairman FEINSTEIN. OK, so the jury is out on that.

Mr. FORD. Yes.

Chairman FEINSTEIN. Mr. Baker, I did not mean to interrupt you, but I did. Please go ahead.

Mr. BAKER. As I said, we believe that ESTA will be fully operational, that things are going well with the system, the testing of the system. We have some improvements that we need to make, but we will make them, and we believe they will allow us to declare this system fully operational within roughly 6 weeks.

On the 97 percent, we have been around on that several times. We believe and our lawyers believe that the 97 percent requirement requires that we be able to verify the departures of 97 percent of the people who leave by air.

Chairman FEINSTEIN. Regardless of how many people come in. I mean, you are not measuring them coming into the country. So how do you know 97 percent are leaving?

Mr. BAKER. I understand. This is not a measure of how many people have overstayed. The 97-percent calculation, as we have estimated it, is designed to say how good is your exit measuring system. How good a job are you doing to make sure that the airlines are recording everybody who leaves and gathering information on those people? That is a valuable part of an exit system. It is not the whole thing.

Chairman FEINSTEIN. I want to give Senator Kyl the opportunity, but let me say this: You go to China, you fill out a slip on the plane, what you are going for, where you are going to be staying, how long you are going to be there. When you leave, you fill out another slip that marks your departure—and you attach to it the slip you filled out when you came in. A simple system. They know you have come, they know you have gone.

I do not understand why you do not want to do this, because we are not interested, at least I am not interested, in promoting a program that allows people to come in and remain in the country illegally.

Mr. BAKER. If I could, this is the other chart, and I will not spend time on the entire chart, but there is a column here for I–94s. That is, in essence, the system that you described with the Chinese; that is to say, when people come in today, they fill out a form, an I–94 form, and they go through customs. In the course of that, the stub is torn off of the I–94, and they carry it with them until they leave, and they hand it in as they depart.

That system is a way of determining who has left and who has not, and we do use it for that purpose.

Chairman FEINSTEIN. So what conclusions have you come to? How many people overstayed this past year?

Mr. BAKER. We cannot give you that information based on the I–94 system because the I–94 system does not result in every arrival being matched with every departure. People lose the paperwork. They fail to turn it in. They cross the land border. Lots of things

go wrong with the paperwork system. I am sure that happens to the Chinese, too. It is not a perfect system. It is the beginning of an exit system, and I think a good beginning. It is not a complete exit system from our point of view.

Chairman FEINSTEIN. So, in other words, you do not know. You do not know how many people misuse the visa waiver system. See, I believe in my heart of hearts that you do not want to know. That is my problem with it. We know that 40 percent of illegal immigrants are visa overstayers. And this is a likely program for them to use.

And I do not understand why Homeland Security does not want to tighten that up. You want to know how many people are coming in. You know 13 million come in on this program.

Mr. BAKER. Actually, it is even more than that. It is close to 16 million. And I would draw your attention back to the chart that we put together, because that is a description of the exit system that we have and the exit improvements that have been proposed. And I think you will see that we really have made substantial improvements because we do want to know with as much accuracy as possible who has overstayed, and an exit measurement system is part of that process.

So if you look, along the top you will see the ways in which we keep track of people who come and go. The I–94 system that I described earlier with the stubs is the first one, and we have improved that system by taking what was a paper system and making it a computerized system so that we can keep track of people in a computerized fashion. We actually key in that information. Obviously, with ESTA that will be much easier.

The second and probably the most important part of our program for keeping track of people is the airline manifest program in which airlines tell us everyone that they bring to this country, everyone they take away from this country who is not a U.S. citizen. They do that by taking the information off the passport. It ought to be good information, and it ought to match up.

Now, this depends on having the airlines do a very good job of gathering that information from every passenger. We have substantially, just in the last year, improved their performance in gathering that information by auditing them, by raising the possibility of fining them for errors. We did a spot-check audit in the last several months to see how good a job they were doing of recording the data on people who were leaving, and they are up in the 98-, 99-percent range.

In addition, the biometric system, the air biometric system that we have proposed would add another few percentage points to the accuracy of the matches that we perform.

And then, finally—and I think this is important because the last step in all of this process is tracking down the overstays. The whole point of this is to make sure that our investigators do not waste their time looking for somebody who has already left or who is otherwise misrecorded by the system. And so we have begun to put more effort and more resources into the process of tracking the high-priority overstays that we have identified in this fashion.

Chairman FEINSTEIN. I am going to turn it over to Senator Kyl, but let me say one thing. In my view, it is a worthless system, and

here is why: You do not know how many people you start out with, and the Department, through all our hearings, has refused to collate it with entry. And if you do not collate it with the entry system, to me it is worthless.

Mr. BAKER. Senator, I share your concern about this. We are very worried about errors in this system, and there will be errors that will distort the calculations. But I have asked our people to go back and make exactly the calculation you are talking about. Take the arrivals, take the date when they are supposed to leave, and say, OK, how many people who were supposed to leave in that period, say 6 months, actually left by our records, and try to correct the errors to the extent we can. We are in the process of doing that.

Chairman FEINSTEIN. It is 90 days, right? It is not 180 days. It is—

Mr. BAKER. I picked a 180-day period. Yes, if they are in the Visa Waiver Program, they need to leave within 90 days. If they have a visa, they may have a different departure date. We are trying to do not just Visa Waiver Program but all persons who come to the U.S. who have—

Chairman FEINSTEIN. Then, again, you mix it up. But what we are trying to evaluate is the Visa Waiver Program, whether the country is protected against security hits or illegal entries through the Visa Waiver Program.

Mr. BAKER. Let me see if we can break out just the Visa Waiver Program. I suspect that the visa waiver countries are actually going to have fewer overstays than the visa countries. And we may be able to break that out for you.

Chairman FEINSTEIN. That would be very helpful.

Senator Kyl?

Senator KYL. Thanks. Some of my questions will just follow on what Senator Feinstein was asking.

Let me, first of all, make two points about your testimony, Secretary Baker. First of all, you said that there is a tension between getting valuable security information from countries and our willingness to grant visa waiver; that the more liberal we are in granting countries visa waiver authority who want it, the more they are willing to cooperate with us in getting a variety of helpful security information, which you detailed on this one chart.

Obviously, there is a tension there because there is the potential for both terrorism and illegal immigration if there are errors or overstays in the Visa Waiver Program itself. So you have to weigh the value there. We understand that tension, but we do need to make sure that we are at least complying with the law as to the former.

Secondly, I have looked at your legal analysis of this 97-percent requirement, and I agree with the totally contradictory opinions of both Senator Feinstein and you, meaning I think technically from a legal interpretation point of view, you are exactly right. I think we drafted it incorrectly, because I think I know what our intention was, and it is really right now kind of a moot argument, although I do understand why you feel it is valuable to generate the data on the effectiveness of the identification program, the 97-percent aspect of that.

But the real question, the big elephant in the room is the visa overstayers, and we all acknowledge that. So that kind of gets us to the next question.

Now, as I understand, Mr. Ford, your testimony is that DHS has not developed the tools to enforce a requirement to determine visa overstayers—I am trying to simplify what you said—and that they must develop clear criteria and timelines to be able to establish the overstayer data and to evaluate the extent of the problem of illegal immigration as both a result of the Visa Waiver Program and all of the other ways in which people enter the country as well, both of those things that Secretary Baker just referred to.

First of all, am I correct in that?

Mr. FORD. Yes, you are. That is correct.

Senator KYL. OK. And now let me ask you just a technical question. On the chart, we talked a little bit about the countries that will only be admitted once they qualify, once they are below that 10 percent. But, Secretary Baker, what about the ability to determine if they have lapsed into noncompliance at a future date? What can you tell us about that? And, Mr. Ford, did your GAO report deal with that in any way as well?

Mr. BAKER. We obviously will not be able to use visa rejection rates to evaluate visa waiver participants because visas are not granted in a Visa Waiver Program. So we will have to develop other tools for determining whether countries have met the requirements and continue to meet the requirements.

I would put considerable emphasis on whether they are, in fact, cooperating on all of the security and immigration-focused parts of the program. That has got to be a big part of this. And then we do have to look at the question of how are they doing relative to the other Visa Waiver Program participants in terms of overstays.

My biggest concern with looking at overstays is that when you get down to something that says we have accounted for 95 or 97 percent of all the people who came in, we have matched them with all the people who left, if you had even missed 2 percent in your effort to match people up, you are going to have an impression that it is a 3-percent overstay rate when really you have got a 2-percent error rate and a 1-percent overstay. So that is my biggest concern in that area.

Senator KYL. Let me just interrupt there. We know that right now we do not have an effective visa overstayer identification program. We understand that. What we are going to try to do is to push the DHS and State and anybody else that is working in this area to get that to be as effective as possible for a whole lot of different reasons. This is one of them.

To the extent that you identify a potential error rate, we can always discount the data to that extent. But would you not agree that it is important for us not only to be able to make the initial determination for granting the authority to work under the program, but also to ensure compliance every year that the countries are, in fact, doing that?

Mr. BAKER. I do agree that it is a completely relevant consideration for continued participation in the Visa Waiver Program. In the end, we did suspend the participation of Argentina and Uruguay in the Visa Waiver Program precisely because we saw too

much illegal immigration from those countries after their economic crises. It would be better to be able to do that on a more objective basis.

Senator KYL. And, Mr. Ford, if you want to respond to any of that last question, you certainly may, too.

Mr. FORD. Yes. Well, I think that was one of the key points in our report, that we felt DHS is not at a point at this stage to provide the quality of data that is necessary to make those judgments. And we believe that they need to strengthen their whole data-gathering apparatus, and we made a recommendation in our report that they do so, because we think that it is a foundation not only for judging aspiring countries and current members, but it is also a vehicle for law enforcement.

DHS is currently using what data they do have with whatever limitations they have for law enforcement purposes. They turn over information to ICE, who uses it to investigate cases of individuals who have overstayed their visas, and I believe in our report we cited in 2007 that ICE had identified over 12,000 cases that had been referred to them based on overstay data. So there is a lot of value, in our view, to coming up with good, solid numbers, and we do believe that DHS should be able to deal with some of the error issues that they currently have, and they ought to be able to explain what the margin of error is for making those judgments. And then once they have done that, they can report that to the Congress, and Congress can determine whether they think that is a feasible rate for continuing their participation in the program.

Senator KYL. All of the legislation that Senator Feinstein has been thinking about here deals in significant measure with this whole overstayer issue, and it gets around this 97-percent problem and says that is moot. We want to know about overstayers. I am not sure it had a section on the countries that may have lapsed in their performance, and we would want to add that if it does not.

Chairman FEINSTEIN. That is right.

Senator KYL. By the way, may I ask just one more question?

Chairman FEINSTEIN. Sure.

Senator KYL. It is a follow-up to your question, and that is, is there a response that you could give us today with regard Israel, Croatia, and Taiwan?

Mr. BAKER. I can give you a basic response. In 2005, early 2005, before I joined the Government and before Secretary Chertoff came to DHS, DHS and the State Department came up with a set of road map countries, that is to say, the countries that they thought should be given a road map to visa waiver status. And they listed all of the countries that are on that chart, plus a few, and said you are the countries that we are going to be looking at most closely in this first convoy of potential visa waiver candidates. None of the countries that you mentioned—Croatia, Taiwan, Israel—were on that road map. And so we have focused our attention on the people in whom we created a certain amount of expectation.

We will have to take another look at who the next candidates are once we have finished this round. But I guess I would say that, in fact, if you look around at the geopolitical events of the last several months, this has turned out not to be such a bad idea. These are countries whose friendship with the United States and whose ties

to the United States should be bolstered. They are new NATO members, and belonging to NATO is a much more important thing now than it was just 6 months ago, and strengthening our ties there I think would be a wise step.

Chairman FEINSTEIN. So you are saying because 8 years ago a decision was made to create some road maps, that in 8 years you have not changed that?

Mr. BAKER. Three years, but yes, we—

Chairman FEINSTEIN. I thought you said the prior administration.

Mr. BAKER. No, no, sorry. Before I came to Government, before Secretary Chertoff came.

Chairman FEINSTEIN. I beg your pardon.

Mr. BAKER. It was actually 2005.

Chairman FEINSTEIN. Right.

Mr. BAKER. And so we began the negotiations with those countries. I would stress that there is nothing today that prevents countries that want to be part of the Visa Waiver Program from coming in and saying, "We would like to start sharing information with you about people who are terrorists when they come to your country, about people who committed crimes and they come to your country." Our door is open. If they want to come in tomorrow and start talking about that, it gives them a leg up when the time comes to say, "Please consider us for visa waiver status." I would talk to every one of those countries tomorrow if they wanted to come in and do that.

Chairman FEINSTEIN. Let me ask this question, if I may. What is being done about the extraordinary number of stolen passports, particularly in visa waiver countries?

Mr. BAKER. We have engaged with both Interpol and the individual countries and have really begun to monitor their performance on an almost daily basis. We can tell you about particular countries—I would prefer to do that in a private session—what their performance has been in terms of how well they have done in reporting stolen passports within 24 hours of getting a report that the passport has been stolen.

Now, there are a number of security measures built into these passports that makes it hard for people who have stolen them to turn them into plausible, long-lasting forged passports that can be used. But you are absolutely right that we have been very troubled by the extent to which organized crime has felt that these passports were so valuable that they would rather steal them than money in many cases. And all we can do is make sure that we are alert to invalidate them as quickly as possible, just as you would with a stolen credit card.

Chairman FEINSTEIN. What concerns me is we are now going into the so-called fraud-proof passport, and, in fact, I know this number, at least 10,000 stolen in France a while ago were, in fact, fraud-proof passports, Geneva Convention travel documents, international driver's licenses. Now, why—

Mr. BAKER. Well, we do not let people into the country with an international driver's license. They have to have a passport.

Chairman FEINSTEIN. Well, that is something that is good.

Mr. BAKER. But we are very alive to this concern. Now, just stealing it does not help. You still have to turn it into a plausible finished passport if you have stolen a blank, or you have to look a lot like the person that is identified in the passport.

Also, you know, we take the fingerprints of everyone who comes to the country from outside the United States, and if they are using a stolen passport from someone who has been to the United States, their fingerprints are not going to match the fingerprints that were used the last time they came in. We have found a couple thousand people just by matching their fingerprints to people that we are looking for. All of that makes it much harder to pull off identity fraud even if you successfully steal a blank passport from a VWP country.

Chairman FEINSTEIN. Has anyone from your Department actually spoken with Ron Noble of Interpol?

Mr. BAKER. Absolutely. We have linked into their data bases. We have sent people to work at Interpol on problems of this sort. We are one of the largest users of their lost and stolen passport resources. We were the ones who pushed them to improve their resources so they could be more timely.

Chairman FEINSTEIN. The reason I ask this is that the problem seems to be getting worse, not better. And as we go into the fraud-proof passport, can tell you from immigration documents that are made on Alvarado Street in Los Angeles, they are done in 15 minutes, and you cannot tell the difference. This is a very dangerous area, I think.

Mr. BAKER. It absolutely is, and I would not myself use the term "fraud-proof passport." It is like a fraud-proof credit card. It is very difficult to be fraud-proof. You raise the cost of trying to forge it, and then you have

to build a lot of security measures around it, including back-end measures. Just as you get a lost credit card or a stolen credit card needs to be reported and then invalidated and the person who has it arrested, you need to do the same thing with passports. And that is part of our strategy in dealing with these stolen passports.

Chairman FEINSTEIN. Thank you.

If I might ask Mr. Ford this question, and this is kind of a toughie because it is going to call for your quick analysis. You have done a lot of good work, and I thank you for that very, very much. If you had to identify three things that could be done to make our concerns met, what would those three things be?

Mr. FORD. Well, the first one would be one I have already talked about, which is developing the capability at DHS to look at the overstay data and more effectively use it. I already talked about that, but that would be one of the three.

I think a second area that the DHS is currently working on but we would like to see them accelerate is in this issue of lost and stolen passports. They have established agreements with a number of aspirant countries. We would like to see them extend those to the current members as well. We believe that they have a plan to do so, but we have not seen that. But we think that is an important.

Chairman FEINSTEIN. What kind of agreement is it?

Mr. FORD. These are information-sharing agreements that Secretary Baker already talked about. We have those agreements with

the aspirant countries, I think seven or eight. I think it is either seven or eight. We would like to see that expanded-

Chairman FEINSTEIN. So you would expand that to the other 23?

Mr. FORD. Well, we have 27 current members. We would like to see agreements with those 27 members because this issue of lost and stolen passports is a critical issue. And, you know, I think that currently we are operating more or less on a voluntary basis as to whether or not they provide that information on a timely basis, something that we were concerned about in the past. I think moving that ball down the court a little further by establishing more formalized agreements would be something that we ought to consider to strengthen that aspect of the program.

Chairman FEINSTEIN. Let me get a reaction from Secretary Baker on that. That sounds like a good idea.

Mr. BAKER. In general, I think Mr. Ford has identified something that is very much the concern for the next 2 years in the Visa Waiver Program, which is taking the standard that we have set with the aspirant countries, the high

security standards that we have set for them joining the Visa Waiver Program, and making sure that we have not created a two-speed Visa Waiver Program. We have to apply all those security standards across the board to all the visa waiver members.

Chairman FEINSTEIN. Will you do it? Mr. Baker. We will begin that process, and we—

Chairman FEINSTEIN. Can you say yes or not?

Mr. BAKER. Yes.

Chairman FEINSTEIN. You are on the record.

Mr. BAKER. I could not be more determined. We have said to the aspirant members you are not joining as a second-class member of visa waiver with more obligations than the other members. But the other members are in, and we need to give them time to come up to the same standard that you have set.

Chairman FEINSTEIN. You realize that the bill that we are thinking about would require it. We would require that current visa countries sign passport data agreements before new countries could be admitted.

Mr. BAKER. Well, that is the one place where I would put a footnote. The performance of each of these countries with respect to lost and stolen passports is really about execution and it is not about the agreements you have signed. And people who sign agreements have good

performance, and some of them have not so good performance. We really would prefer to judge people by their performance rather than by whether they have signed an agreement. But that is a point on which—I think that is a relatively minor point.

Chairman FEINSTEIN. Mr. Ford, your third point?

Mr. FORD. I think the third area that I would raise at this point is to assess whether ESTA actually functions as it is intended on January 12th when DHS hopes to make it mandatory to all of the current members and the aspiring members, those that they decide that they want to bring into the program. So I think we want to make sure that system works, and so that would be the third area.

Chairman FEINSTEIN. Well, do I need to ask you or do we need to ask you to do this, or are you going to do that, assess whether it works?

Mr. FORD. Well, we have not been asked to do that. I think—

Chairman FEINSTEIN. You will be, with a letter.

Mr. FORD. That is what I get for bringing it up, right?

[Laughter.]

Chairman FEINSTEIN. Senator?

Senator KYL. Well, again, follow up on some of these questions, I had understood, Secretary Baker, that actually some of the existing visa waiver countries had been approached about also complying with some of the security measures that the new countries will be required to implement. You have indicated it is your intention, but isn't that manifested by the fact that some of these countries already have been approach with a request to do these things?

Mr. BAKER. Absolutely. We have already begun talking to countries about the security standards that we think are essential to have a good Visa Waiver Program. And, indeed, there are incumbent members who already meet those standards, so we are aggressively pursuing this. It is just, you know, we have gone through our process in which we have been negotiating this with seven countries, and my team is a little sleep deprived. And so turning to the next 27, I would like to give them a break of, you know, at least a long weekend.

Senator KYL. Well, to make it clear to all of our friends around the world that this is not just a Department of Homeland Security that is trying to give them a hard time, that the legislative branch is at least as anxious that everyone sign up to these agreements, and more, that this is a United States of America unified desire. My hope would be that we could work with you in identifying some incentives that can be put in the legislation that Senator

Feinstein is talking about to encourage all countries to provide this information, certainly anybody that wants to remain in the Visa Waiver Program. And I think in some cases what you have indicated is for one reason or another that we do not have to get into, it has been more difficult for them all to agree to these things. And to the extent we can provide incentives for them to do so, that could help. Would that be helpful?

Mr. BAKER. We would like to work with you on that. The Visa Waiver Program is good for the United States, too. It brings a lot of foreign exchange here, and that is something that we need. So we do not want to cutoff our nose to spite our face, but we have to have a secure program, too. So we would be delighted to work with you on that.

Senator KYL. Right. Well, the idea here is that the rest of the world would know that we are united in desiring that this gets done, and there are lots of different incentives that we could build into legislation.

Mr. BAKER. I think the bipartisan team that you and Senator Feinstein have presented has stood us in good stead already in our discussions with other countries.

Senator KYL. Sure. Thank you.

Actually, here is a question for both of you, but I am not sure, Mr. Ford, that you gave the answer—or that we asked you to an-

swer whether the deadline you think is going to be met on the biometric, the July 2009 biometric requirement for exits from airports. Is that going to be met? And if it is, how is it going to be met, Secretary Baker? And if not, what has to be done here to get it done?

Mr. FORD. Well, you know, DHS clearly faces some challenges in meeting that timeframe. They have indicated that they believe they will. You know, they have got—I am not sure if they have got their final rule out yet regarding how they plan to implement that, but we do know there is a lot of resistance in the airline industry and the travel community, largely, I assume, because of the potential cost involved for them to manage that part of the program.

And then just in the past, we have had some issues with DHS in terms of the schedules that they have put in place to try to implement the exit program as part of US-VISIT. We are in the process now of looking at that issue, but I think our current view is we think it is going to be a challenge for them to get there, but we will see. It is not July 2009 yet.

Mr. BAKER. I essentially agree with Mr. Ford. This is a challenge. However, we have put out a proposed rule that would have the airlines that are already gathering information from the passport also administer the fingerprinting that would give us the biometrics. That is the most cost-effective and efficient mechanism for both the Government and for the industry, we believe.

We have taken comment on that. As Mr. Ford says, it is quite controversial with the airlines, and so they will not want us to implement this. But if we do not implement it under the existing statute, there will not be a second convoy of these waiver candidates, and that will disappoint a large number of people and may make it harder to get the security measures that we would like to get.

Senator KYL. Here, again—and I appreciate the answer-we understand the stresses that the airline industry is under right now. With the high cost of fuel, they are under enormous stresses. Nonetheless, they have as much of an incentive as everyone else does to ensure safe travel. And perhaps we can work together to find incentives of one kind or another to gain their cooperation here. I know it is going to be the law, but we frequently ask someone to bear the costs of something here, and since this is a security matter for the entire United States, maybe there are ways that we can ameliorate the cost to the folks that we are asking to help us perform this work. If you have any ideas right now, fine, but I think that is probably something we will want to visit with you about later.

Mr. BAKER. Once again, as with other nations, to the extent that the executive branch and Congress are saying the same thing and presenting a united front, that is much more likely to produce results.

Senator KYL. I had one last question. It is pretty general, and you may have covered this, Mr. Ford, in your report. I confess that I have only skimmed it and talked to staff about it. You may have this in there, but going back to the fundamental question that we are getting at, how can we develop an as accurate as possible entry-exit system that is so useful in so many different ways here? The one chart shows a lot of different things that are being done

or need to be done, the costs of them and the fact that there are problems with each of them.

What is the best way for either the Department or perhaps for GAO to help us understand how each of the different mechanisms work together? How they could lead to a coherent and effective program with very little error? And what would have to be done to cause that to happen if what we already have is not going to get us there? It is kind of a convoluted question, but I think you see where we are going. Just by way of illustration, not everybody that comes in by air leaves by air. OK? That is problem No. 1. How do you account for those who leave by another mechanism? And so on.

What would be the best way for us to understand what is still needed? Sometimes we have the notion that we get only exactly what we ask for and that we are not expert enough to be able to ask for everything that is really needed. I mean, it is a little bit like on that 97-percent question. I think you did exactly what we told you to do, but we did not tell you to do what we really intended for you to do. And I have a feeling that somebody probably knew that, but it is easier to just comply and not say anything. And that is not a pejorative comment. You have got enough to do. But how do we put this program together so that we know what else Congress needs to do, whether it is money or additional authority, and you all have identified how to actually make it work and it is a system that can be audited in such a way that we have an idea of how it is working for the ultimate compliance issues as well as just substantively wanting to make the system work?

Mr. FORD. Well, let me say, first of all, that our current report, the one we just issued, we have no extensively analyzed the process, as you have just articulated it. So we are not in a good position at this point to tell you what type of model, for example, DHS ought to follow. We do not have a good sense of the precise criteria that DHS is currently considering in trying to design an effective exit system that measures this overstay data rate information.

The recommendations that we have made in our current report are designed to make DHS put together a more coherent—I am going to use the words "more coherent"—effort in gathering that data. At the time we did our work, there were several different offices within DHS that collect statistics related to people who enter and leave the country. There was not one particular place in DHS that was responsible for examining this overstay issue.

We suggested that DHS consider establishing a focal point for that. We understand that they are considering it, although we do not know the details of it.

But to answer your general question about what should this program look like, how can we assure that it is working, how can we assure that it is being complied with, whatever requirements that DHS lays out, we have not really fully examined that, so I cannot give you a comprehensive answer to it. I can only give you a partial answer, which is basically that we want DHS to strengthen their capabilities to at least assess the data that they collect so that they then can design a more effective exit system. That is really what our recommendation is designed for.

Mr. BAKER. I would start by saying it is not just Senators who sometimes feel as though they have gotten just the answer to the question that they have asked. I have had that experience myself.

I have been thinking a lot about this in preparation for the testimony, and I wonder if to some extent we have not started with the wrong end of the telescope and whether we might make more progress in this fashion. We do have an exit system that produces a list of people who are either we do not know what has become of them or they are overstays. And we have a mechanism by which those people are investigated by Immigration and Customs Enforcement, particularly the high-priority ones who may come from backgrounds that make us concerned.

If we started with that list, the high-priority people that we are looking at, and said, well, what is the source of the errors—because when our ICE investigators go out, they find a lot of errors—and what is the most cost-effective way to fix them and then walk back through the process, then we are likely to find something that, once we have judged the cost, we can make the most cost-effective tweaks to the system. It may be that a land exit system is the right approach, but I was struck when I asked someone what is the largest source of error, and the investigator said, well, one of the biggest is we go out, we have somebody who has overstayed, who was supposed to leave a year ago, he is still here, as far as we can tell, we go to the address and he is there. And we say, "OK, we got you." And he says, "But, no, I have a piece of paper from CIS that extended my stay by 2 years. So I am here legally. I did not leave when I was supposed to, but your records just have not caught up with the new date by which I have to leave."

Now, that is a problem we have not discussed at all today because it does not have anything to do with matching arrivals and departures. It has to do with making sure that our record systems are fully automated and talking to each other. But if we start with the people we are looking for and ask why are we not finding them, why is this list wrong, we may actually make more progress in fixing that problem than if we start with a predetermined notion of how to solve the problem.

Chairman FEINSTEIN. If I might interject, on page 16 of the GAO report, if you have it in front of you, I think you will see a good alternative approach. And it states in the second to the last sentence, "As we previously testified, an alternate approach would be to track air arrivals from a given point in time and determine whether those foreign nationals have potentially overstayed." In other words, take just one window of time and do the analysis.

Mr. BAKER. If you will let me get a little geeky here, I think that is actually a pretty good proposal from GAO, but it is not as good as starting with people who have arrived and say let's take that same constrained period of time and ask who should have left in that period. It should produce the same result, but it is much easier to take a look at our departure records in a recent period of time, because if you start with arrivals and you say, "When were you supposed to leave? "—since you are looking at visas as well as visa waiver—you are going to get dates that are 3 years out, a year out, 90 days out. And then you have to go take all of those dates and try to come up with a departure—an overstay rate. It is a lot

easier to start with the date when people were supposed to leave, and then you can just investigate a very recent period of time, say 6 months or a year, or 3 months, and say, OK, let's take all the people who should have left then. Did we find a record of their departure? And if not, why not?

But that is a very small difference from what GAO is talking about. We completely agree that that is, broadly speaking, the best way to start getting at the overstay problem.

Chairman FEINSTEIN. Limiting the universe by time—

Mr. BAKER. Yes, so I apologize for that diversion to detail.

Chairman FEINSTEIN. Mr. Ford, do you have a comment on that?

Mr. FORD. No. I think that approach would be useful.

We are not really at a point where we can prescribe exactly the best way to do this. Our suggestion that you just mentioned was designed to look at—since we have pretty good information on who comes in, at least on the air side, we have good data there, we thought that since that data seems to be pretty reasonably sound, that would be a basis to go back and find out, well, if we know how many are coming in and we have a pretty good idea of that, then we should be able to design something that would link back to that for the exit part of it, so that way you could say Joe came in on March 1st, did Joe leave 90 days later, yes or no.

But I do not disagree that one way to do it is the way the Secretary is mentioning it here.

Senator KYL. The only point I would make is that this reminds me a little bit about the debate about the people who stay here illegally after they have come in via a different route, that is to say, across the California or Arizona border. And until we committed ourselves to trying to find those folks and tell them they have to leave, the problem just kept getting worse and worse and worse. And we also designed systems to try to prevent their illegal entry in the first place.

Theoretically, the answer to this problem is to have a cohort of enforcement officers sufficiently resourced to start going out the day after somebody is supposed to have left, you know that he was supposed to be here 90 days, you have no record of him leaving, let's go see if we can find him.

Now, maybe there is a chance of 1 in 100 that, gee, it was just because we did not coordinate our efforts with the other Department, the State Department that has granted him an extension or something. But that is not the reason why 40 percent of the people who are here illegally are visa overstayers. They came here, they wanted to stay, and they decided to stay because we have no means of enforcement to identify them and ask them to leave.

So that is the simple answer to the question, but I understand getting all of that coordinated and resourced is still a complicated matter.

Mr. BAKER. The resources is the big concern. For the foreseeable future, we will have to prioritize. We will have to say we are going to after first the people we believe are criminals or that we believe may be terrorists, and we will not be able just to go after everyone. And I would say from what I have heard about this program, it turns out a surprisingly large percentage of the people who are listed as overstays leave within 10 days. So instead of leaving on day

90, they leave on day 100. Partly, people cannot count. Partly, people think it doesn't really matter. So we probably should not rush out to get them on day 91. But after a short period of time, and actually if they are somebody we think is a criminal, we should go after them on day 91.

Chairman FEINSTEIN. My point is this is a huge program. It is 16 million people coming in from 27 different countries with no consular check. The first time you know anything about them is when they enter the country. It portends danger. And I think the danger element is a very big element, and we can track back various individuals that corroborate that.

You know, I am very candid. I am not for expanding the program. I am for limiting the program. I am for getting the numbers down to a manageable number where you have got the systems to handle it. And to me, the way the Department goes about it is sort of backwards. You do deals with people and then bring them in the program, and you cannot really monitor it, you cannot really control it. You do not really know who is coming. You may know who is going, maybe someday. And to me, that does not sound like a program that protects the security of the American people.

Mr. BAKER. Senator, I agree with you in part. I am as alive to the danger of this program, the risks to this program, as you are, and I completely share your concerns about the risks. I believe, as you do, that al Qaeda thinks it is going to get in using the Visa Waiver Program if it can. It is exploring all kinds of opportunities to come to the U.S., and certainly this is one that we should worry about.

I think we have done a lot on the front end to make it much harder to get into the country. Concerns about whether we can pick people up after 90 days, a different question, and I think less security than immigration focused. But I understand the security element to it as well.

Chairman FEINSTEIN. OK. Let me ask you a question. Belgium. You have had al Qaeda use Belgium visa waiver passports to come in. What has been done to prevent that?

Mr. BAKER. We have pressed the Belgian Government very hard, and I think with some success, to do a much better job of reporting lost and stolen passports. But as I said, in the long run, we need good cooperation from them in identifying terrorists within their territory so that when they try to come to the U.S., we know that this is somebody who needs a lot of scrutiny. And we frankly need to get a better information-sharing relationship with a number of Northern European countries, including Belgium.

Chairman FEINSTEIN. Because my own view is the heart of Europe is really the area at issue. Would you agree with that?

Mr. BAKER. I do agree with that. There are problems from our point of view, and in many cases from the local government's point of view all across Northern Europe, but also down in a number of countries on the Mediterranean.

Chairman FEINSTEIN. And, it might be interesting to ask the GAO to take a look and give us some recommendations on how that issue might be better dealt with, because any way you look at it, you have no pre-screening of these people. And I certainly do not have the answer, but, Mr. Ford, could you take a look at that?

Mr. FORD. Well, sure. I mean, if you ask us to look at it, to the extent we are, we would be more than happy to try to get at it. As I mentioned earlier, I think one vehicle would be, again, to see whether or not the ESTA system is working, because it is a tool that, if it does work, will provide advance information before people actually get on an airplane. So that tool could be at least one vehicle to try to prevent bad people from getting on the airplane; whereas, currently now they might get on the airplane, and we do not find out they are bad until they are already in the air, which is not good.

Chairman FEINSTEIN. How many people in the—and you may not know this, and I do not know it either—Visa Waiver Program when they come in are sent back?

Mr. BAKER. It is a relatively small number. I can tell you what our rejection rate under ESTA has been, which is roughly similar to the—it is actually larger, substantially larger than the send-back rate for people arriving here, and it is less than one-half of 1 percent. I would guess that we send back 30, 40 people a day, on that order.

Yes, I have just been handed a note. Over a million people came from Germany last year, and we sent home about 500 of them because we felt that they had either misrepresented their status or were a threat to the United States.

So we are really looking for a needle in a haystack, and it is important to remember that the whole point of our having this good data is to allow the people who are not a threat to feel completely welcome and not to stand in line for 3 hours, while at the same time the people that we are worried about get worked over pretty hard in terms of questions and examination of their passport, their luggage.

Chairman FEINSTEIN. Well, just if I may in conclusion, please do not feel that we are adversaries. This is a bipartisan effort. We do want to work with the Department and the GAO. I would really like to do this as a first-day bill next year. We will have a little bit of time to work on it, and I would like to ask, Mr. Ford, if you could participate and give us your best judgments. I think getting people that have knowledge of this program—and Mr. Ford certainly does—is helpful. And if we need to redefine what we meant on the 97 percent, I think we are happy to do that.

Mr. BAKER. Senator, could I join in that? I believe that we are allies at heart, and I am really delighted that we have had this kind of exchange. Some of the things that we would love to talk to you about are law enforcement sensitive or diplomatically sensitive, and so it might be useful not only to talk about the legislation you are planning but to give you a briefing on the details of some of the concerns that we have about the Visa Waiver Program. And we would be glad to do that with you and Senator Kyl at your convenience.

Chairman FEINSTEIN. I think that would be very much appreciated. Perhaps we could do it before the end of the week.

Mr. BAKER. OK.

Chairman FEINSTEIN. Is that all right? Do you have other questions?

Senator KYL. No, I do not.

Chairman FEINSTEIN. Well, let me say thank you very much. Our interest is not going to wane. We will both be here next year, I think regardless of whoever is Chairman of this Subcommittee. We are going to continue our pursuit of this. We will have a bill to introduce to clarify it. We look forward to working with both of you in developing it.

I, too, have thought a lot about the issue of commerce, because I have heard from the Chamber of Commerce and I have heard from the convention and all these people that want more and more people coming into our country because it means business. We learned a big lesson on 9/11, and it cannot be business as usual. And so we have to remember that. I see this as just an enormous weakness, and we have to correct that weakness.

So I want to work with you. I want to do the right thing. I think protecting America is much more important than business. So that is where I am.

Senator Kyl, do you have a concluding remark?

Senator KYL. No. Thank you very much.

Chairman FEINSTEIN. In any event, thank you both for coming. We appreciate it very much, and the hearing is adjourned.

[Whereupon, at 4:01 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Question#:	1
Topic:	court opinion
Hearing:	The Visa Waiver Program: Mitigating risks to ensure safety of all Americans
Primary:	The Honorable Edward M. Kennedy
Committee:	JUDICIARY (SENATE)

Question: On August 1, 2008, the U.S. Court of Appeals for the Seventh Circuit issued an important opinion holding that "waivers of rights under the VWP must be knowing and voluntary." Bayo v. Chertoff, 535 F.3d 749, 756-57 (7th Cir. 2008). The court rejected the government's argument that aliens seeking admission to the U.S. at a port-of-entry lack constitutional due process rights.

As the court stated, "due process . . . require[s] that the government take steps reasonably designed to assure that the waiver is knowing and voluntary," such as providing a waiver in the alien's spoken language. The court remanded the case to the Department of Homeland Security to determine whether the petitioner had knowingly waived his right to a removal hearing and "to fashion adjudicatory procedures consistent with due process." 535 F.3d at 757.

What measures has the Department undertaken, and what measures is the Department planning to undertake, to comply with the Seventh Circuit's Bayo decision and to ensure that waivers under the Visa Waiver Program (Form I-94W) are knowing and voluntary?

What adjudicatory procedures will the Department implement to ensure, consistent with the court's due process concerns, that waivers of rights under the Visa Waiver Program are knowing and voluntary?

Response:
The case of Bayo v. Chertoff, Case No. 07-1069 (7th Cir.), remains pending in active litigation. On October 15, 2008, the Department of Justice filed a petition for rehearing en banc with the U.S. Court of Appeals for the Seventh Circuit, citing several errors in the panel's decision. On October 20, 2008, the Seventh Circuit Clerk requested that Mr. Bayo's attorney respond to the government's petition. Should the court grant the government's petition, the panel's holding that an alien's waiver of a removal hearing under the Visa Waiver Program (VWP) be "knowing and voluntary" may be modified or even reversed. Therefore, it is premature for the Department to institute measures to comply with the panel's decision until the litigation is fully resolved and a mandate from the court has issued. Of course, the Department will take appropriate action to comply with the final decision of the courts at the conclusion of litigation.

Nevertheless, it bears noting that waivers executed by aliens under the current procedures

45063.001

Question#:	1
Topic:	court opinion
Hearing:	The Visa Waiver Program: Mitigating risks to ensure safety of all Americans
Primary:	The Honorable Edward M. Kennedy
Committee:	JUDICIARY (SENATE)

are always voluntary. By choosing to enter the United States under the VWP, aliens are entering subject to the program's restrictions. Aliens from VWP countries may still apply for a visa rather than entering under the VWP, which would enable them to preserve any rights they may have to contest their removal or to seek other forms of relief in removal proceedings.

Similarly, the current procedures provide aliens with ample opportunity to understand the consequences of executing the Form I-94W waiver. The Form I-94W waiver language is clear. The Form I-94W form explicitly provides that "[The alien] hereby waive[s] any rights to review or appeal of an immigration officer's determination as to [his] admissibility, or to contest, other than on the basis of an application for asylum, any action in deportation." In addition, the alien must certify on the Form I-94W that he "has read and understand[s] all the questions and statements on this form. The answers [he has] furnished are true and correct to the best of [his] knowledge and belief." The current Form I-94W is provided and available in several languages.

Information about the VWP generally, and the Form I-94W specifically, also is readily available from the State Department and U.S. Customs and Border Protection (CBP) public websites. Indeed, the CBP website specifically states "[t]he applicant must sign and date the Form I-94W, which indicates agreement to waive his/her right to a hearing before an immigration judge." Furthermore, aliens who may have questions about the VWP can contact U.S. Consulates or seek assistance from numerous private organizations and advisors.

Finally, the condition that aliens entering under the VWP agree to waive any right to a contest removal (other than requesting asylum) is stated explicitly in federal law. See 8 U.S.C. § 1187(b) [INA § 217(b)] ("An alien may not be provided a waiver under the program unless the alien has waived any right – (1) to review or appeal under this chapter of an immigration officer's determination as to the admissibility of the alien at the port of entry in to the United States, or (2) to contest, other than on the basis of an application for asylum, any action for removal of the alien.").. It is a fundamental principle that individuals are presumed to know, and abide by, the law of a foreign country that they are visiting. In sum, the information necessary to understand the conditions for entry under the VWP is widely available, and it always remains the responsibility of the foreign visitor to take advantage of the information provided.

45063.002

Question#:	2
Topic:	overstay data
Hearing:	The Visa Waiver Program: Mitigating risks to ensure safety of all Americans
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

Question: Mr. Baker, you mentioned in your statement that DHS is currently assessing the feasibility and effectiveness of designating a single office to assume responsibility for developing overstay rate estimates and has taken several steps to improve the accuracy and reliability of the overstay data.

What steps have been taken to improve the accuracy and reliability of the overstay data?

Response:

DHS determines the number of overstay violators by matching biographic departure manifest records along with I-94 departure information with the records of nonimmigrants confirmed to have arrived at air and sea ports as recorded in the Arrival Departure Information System (ADIS). Nonimmigrants who (1) have no matching record of departure (in-country), or (2) have a matching record of departure, after they were supposed to have departed (out-of-country), are classified as overstay violators. The business rules used to classify persons as overstay violators were reviewed and approved during this past year.

In general, the accuracy and reliability of the overstay estimates are improved through the more complete collection of departure records; by collecting more accurate data on the arrival and departure records; and by having more accurate systems and algorithms to match the records. DHS has recently been addressing each of these areas as described below.

Departure Records

The percentage of departure records collected at air and sea ports has increased over the past several years. Significant improvements followed the mandatory requirement that air and sea carriers provide departure manifest data to U.S. Customs and Border Protection (CBP) through the Advance Passenger Information System (APIS);[1] these are subsequently included within ADIS. DHS has also incorporated I-94 departure records into ADIS, and CBP has undertaken additional measures to ensure carrier compliance.

[1] The final rule amending 8 CFR Parts 217, 231 and 251 and 19 CFR Parts 4, 122 and 178, entitled "Electronic Transmission of Passenger and Crew Manifests for Vessels and Aircraft," was published in the Federal Register on April 7, 2005. See 70 Fed. Reg. 17,820 (Apr. 7, 2005). This rule made submission of electronic passenger and crew manifests mandatory effective June 6, 2005.

45063.003

Question#:	2
Topic:	overstay data
Hearing:	The Visa Waiver Program: Mitigating risks to ensure safety of all Americans
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

For example, in May 2008, CBP initiated an ongoing operation to assess travel-document compliance and manifest-submission completeness. This audit targets outbound flights that contain the largest concentration of Visa Waiver Program (VWP) passengers. From mid-May to mid-July 2008, CBP targeted 439 outbound flights for which it received 89,827 APIS records. CBP officers at the departure gates identified an additional 474 passengers onboard those flights (a total of 90,301), for a manifest completeness rate of 99.5 percent. In September 2006, ADIS began receiving information collected from the departure portion of I-94 Arrival/Departure records to ensure that someone classified as an overstay violator did not have a record of on-time departure.

The collection of departure records at the land ports continues to be more challenging. The lack of complete data collection at these ports, particularly of the exit data of travelers arriving by air or sea with land departures, may cause an inflation of overstay estimates.

Data Accuracy
The US-VISIT Data Integrity Group (DIG) manually reviews approximately 12,000 system-identified records per month to determine if they were correctly classified. Approximately 57 percent of these records are determined to be correctly classified. The remaining 43 percent were incorrectly classified due to error in data collection at the port, other system error, or an ADIS matching error. US-VISIT has been working closely with CBP to correct processing errors at the ports. ADIS errors are being systematically tracked with system upgrades being performed on a regular basis. The contributing system errors are reconciled with the specific system owner(s) and technical staff.

Matching Accuracy
Various processing rules have been created in ADIS to increase the system's ability to correctly match travel records that are received from different sources. These processing rules, or algorithms, are periodically evaluated and updated in a continuing effort to improve the ability of DHS to accurately determine a nonimmigrant traveler's status.

In June 2007, US-VISIT entered into an Inter-Agency Agreement (IAA) with the Department of Energy to obtain the services of Lawrence Livermore National Laboratory. Lawrence Livermore was requested to:

- independently assess, in a scientifically defensible manner, the current accuracy of ADIS record matching;
- establish a test bed and associated procedures to accurately project the effect of changes made to current record matching logic and algorithms; and

45063.004

Question#:	2
Topic:	overstay data
Hearing:	The Visa Waiver Program: Mitigating risks to ensure safety of all Americans
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

- compare current ADIS record matching performance to the performance of other types of record matching algorithms, such as those available in "off the shelf" products.

Question:

What will be done with this data?

Response:

ADIS overstay data, as determined by DIG analysis, are provided to the Department of State (DOS) and other DHS operational components such as ICE, CBP, and CIS that utilize the information for law-enforcement action, determination of admissibility, benefit, and visa eligibility. For fiscal year 2008, US-VISIT overstay information has assisted DHS components and DOS by informing:

- ICE agents in the apprehension of 715 immigration violators (e.g., individuals who overstayed the terms of their admission);
- CBP officers in the interception of 891 immigration violators attempting to re-enter the country at the ports of entry; and
- DOS Consular officers to take appropriate adjudicative measures in the cases of 550 visa applicants at U.S. consulates.

ADIS data are also used to support National Security agencies and Law Enforcement agencies for criminal investigations and informed managerial/operational decision-making (e.g., estimates of overstay violators) and also support DOS visa-validation studies and visa revocations.
The following excerpt from the May 2008 issue of *Fraud Digest* reports an example of how DOS has used ADIS data along with their assessment of the value the data has added in accomplishing their mission:

> "For the past nine months, CA/FPP [Consular Affairs/Fraud Prevention Program] has run a pilot program for access to ADIS. This program provided ADIS access to six posts (Jerusalem, Krakow, Warsaw, Lagos, Sao Paulo, and Astana) as well as CA/FPP liaison officers. Despite a number of technical challenges, the system has been of immense value in resolving issues of verifiable travel of individuals and in completing validation studies."

And also,

45063.005

Question#:	2
Topic:	overstay data
Hearing:	The Visa Waiver Program: Mitigating risks to ensure safety of all Americans
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

> "Based on experience to date, posts can anticipate that there may be difficulties in establishing and using these accounts that will require assistance from CA/FPP, the Office of Consular Systems and Technology (CA/CST), and the DHS Service Desk. While this is a time-consuming undertaking, CA feels that the benefits of access to ADIS are worth this extra effort."

The more complete collection of departure records has allowed DHS to develop preliminary estimates of overstay rates for the first time since the early 1990s

45063.006

Question#:	3
Topic:	negotiations
Hearing:	The Visa Waiver Program: Mitigating risks to ensure safety of all Americans
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

Question: Mr. Baker, in Mr. Ford's statement he states that Department of State officials had difficulties explaining to countries with fiscal year 2007 refusal rates below 10 percent that have signaled interest in joining the Visa Waiver Program why DHS is not negotiating with them.

Instead, DHS is negotiating with several countries that had fiscal year 2007 visa refusal rates above the 10 percent ceiling, with the expectation that fiscal year 2008 rates will be below this ceiling.

Could you please explain the reasoning behind your negotiations with these countries?

Response:

In 2005 and 2006, the Department of State (DOS) and the Department of Homeland Security (DHS) formulated a list of 13 countries with whom the U.S. Government (USG) planned to engage as it sought to expand the Visa Waiver Program (VWP). This effort was called the "Roadmap Initiative." DOS and DHS formulated the "Roadmap" list on the basis of a variety of factors, including: the likelihood the country could meet the Program's requirements; the country's close cooperation with the United States in the War on Terrorism; the likely impact of the country's entry into the VWP on the law enforcement, national security, and immigration enforcement interests of the United States; travel patterns; and the country's extension of visa-free travel privileges to U.S. citizens. A low visa refusal rate alone was not a sufficient basis for inclusion in the "Roadmap."

For several years, the USG had extensive discussions with the "Roadmap" countries about reforms necessary to qualify for membership in the Program, including the development of electronic passports (e-passports) and the reporting of lost and stolen passports (LASP) to the USG or Interpol. DOS-led Consular Working Groups were established in each of the "Roadmap" countries to discuss ways to qualify for the Program and DHS hosted numerous technical workshops for representatives from "Roadmap" countries on the security requirements of the VWP. After passage of the Implementing Recommendations of the 9/11 Commission Act in August 2007, DHS intensified its discussions with "Roadmap" countries whose fiscal year (FY) 2007 visa refusal rates fell below or were just over the 10 percent threshold. The "Roadmap" countries with FY 2007 refusal rates slightly exceeding 10 percent—Hungary, Latvia, Lithuania, and Slovakia—had each achieved sustained and substantial reductions in their

45063.007

Question#:	3
Topic:	negotiations
Hearing:	The Visa Waiver Program: Mitigating risks to ensure safety of all Americans
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

visa refusal rates over the previous fiscal years. In addition, they had demonstrated significant progress in meeting the other statutory requirements for VWP designation. Accordingly, DHS was confident these countries would fall under 10 percent for FY 2008 and felt it prudent to discuss VWP designation requirements with them in a proactive manner. The DOS recently issued preliminary final FY 2008 refusal rates and each of these countries fell under 10 percent:

- Hungary (7.8 percent)
- Latvia (9.0 percent)
- Lithuania (8.3 percent)
- Slovakia (5.3 percent)

45063.008

Question#:	4
Topic:	GAO report
Hearing:	The Visa Waiver Program: Mitigating risks to ensure safety of all Americans
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

Question: Mr. Baker, the GAO report mentions that DHS signed Memorandums of Understanding with aspiring Visa Waiver Program countries before conducting in-country visits.

Why is that?

Do MOUs commit the United States to admitting those countries into the Visa Waiver Program?

Response:

As part of the Department of Homeland Security's (DHS) efforts to expand and modernize the Visa Waiver Program (VWP), DHS required aspirant VWP countries to sign Memoranda of Understanding (MOUs). Eight aspirant countries have signed MOUs to date (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia, and South Korea). The MOUs are non-binding documents that outline the aspirant countries' commitments to meet the enhanced security requirements of Section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act). The MOUs, however, do not commit the United States to admit signatory countries into the VWP. Rather, they are preparatory; they lay out each country's obligations that are necessary—but not sufficient—to be admitted under the 9/11 Act. DHS will not admit a country to the program until all statutory requirements have been met.

Indeed, the MOU indicates a country's intention to meet those requirements. For example, it notes that before aspirants are designated as VWP member countries, DHS, in consultation with the Department of State, intends to evaluate the effect that these designations would have on U.S. security, law enforcement, and immigration enforcement interests as required by the 9/11 Act. Such evaluations include in-country visits by a DHS-led technical team. It also notes a country's intention to report lost and stolen passports in a timely manner and share other relevant data with the United States. It was an exercise of prudence and good government to ensure that these commitments were in place before committing to a resource-intensive in-country visit.

45063.009

Question#:	5
Topic:	ESTA
Hearing:	The Visa Waiver Program: Mitigating risks to ensure safety of all Americans
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

Question: Mr. Baker, the GAO asserts that developing a user-friendly Electronic System for Travel Authorization could be difficult.

What are your thoughts about the effectiveness of the ESTA?

How will the ESTA improve overall U.S. security?

Response:

The Electronic System for Travel Authorization (ESTA) provides the Department of Homeland Security (DHS) with the capability to conduct enhanced screening of Visa Waiver Program (VWP) travelers. This enables DHS to preclude some travelers who are ineligible for the VWP from initiating travel destined for the United States without first undergoing the additional security of applying for a visa. ESTA applications are queried against appropriate law enforcement databases including Terrorist Screening Database records (the terrorist watchlist, which includes the No Fly list); lost and stolen passports (to include Interpol's Stolen and Lost Travel Documents database); and visa revocations.

On August 1, 2008, DHS began to accept voluntary applications through the ESTA website. The rollout has been very successful with an overall approval rate that has held consistently at or slightly above 99.6 percent. Of those applications that have not been approved, the percentage of denials that have resulted from a match to a law enforcement database record has closely aligned with our expectations based on pre-implementation simulations and historical VWP refusal rates at our ports of entry.

The overwhelming majority of denied ESTA applications have resulted from affirmative responses to the VWP eligibility questions. DHS is aware that the VWP eligibility questions can be confusing for some applicants; but DHS has included an ESTA website "Help" section to better explain the questions, including circumstances under which an applicant should answer "yes" or "no."

Though ESTA is not yet a mandatory program, our ESTA application screening process has already provided positive results. In one case, a traveler applied for an ESTA and was denied. Upon applying for a visa at the local U.S. Embassy, it was confirmed that the traveler was not eligible for the VWP, but after undergoing an additional degree of scrutiny that confirmed the traveler did not pose a security threat to the United States, a visa was granted. In this example, the ESTA screening process referred the alien to the

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Question#:	5
Topic:	ESTA
Hearing:	The Visa Waiver Program: Mitigating risks to ensure safety of all Americans
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

State Department to undergo the additional scrutiny of the visa application process. Before ESTA, an alien would have only learned of his or her ineligibility for travel under the VWP upon being refused admission to the United States under the program at a port of entry. In this case, the alien was not eligible for travel under the VWP, but was eligible for a non-immigrant (B1/B2) visa. There are many cases where aliens will not be eligible for travel under the VWP, and will likewise not be eligible for a non-immigrant visa. ESTA provides an additional layer of screening that will prevent those who are ineligible for the VWP from initiating travel to the United States.

ESTA is a cornerstone security enhancement included in the Implementing Recommendations of the 9/11 Commission Act of 2007 that supports transforming the VWP from a program that addresses security threats on a country-by-country basis into one that can screen for risks on a passenger-by-passenger basis. While still in its infancy and not yet mandatory, the ESTA program has already demonstrated that it will facilitate legitimate travel to the United States under the VWP, while simultaneously improving the overall security of the United States by providing us with an additional tool to prevent security risks from being admitted to our country.

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Question#:	6
Topic:	EXIT system
Hearing:	The Visa Waiver Program: Mitigating risks to ensure safety of all Americans
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

Question: Mr. Baker, with regard to the EXIT system, what has DHS done to improve the system since 9/11?

To what extent does DHS focus EXIT tracking on individuals who have been identified as high risk to the United States?

Question:

Mr. Baker, with regard to the EXIT system, what has DHS done to improve the system since 9/11?

Response:

Since 9/11, the Department of Homeland Security (DHS) has integrated, in electronic format, historical biographic arrival and departure information for foreign nationals and has also worked to improve the quality of approximately 1 million data transactions per day that are received and processed through the Arrival and Departure Information System (ADIS). DHS efforts to improve data quality are evidenced by a decrease in the number of entry records that do not have a corresponding departure record following the expiration of the foreign national's authorized period of stay. DHS continues to improve data quality by contracting with Lawrence Livermore National Laboratory to initiate detailed analysis of ADIS data and matching capabilities to provide reliable benchmarks of record matching accuracy.

DHS has also increased the credibility and amount of validated overstay information provided by the United States Visitor and Immigrant Technology (US-VISIT) Program to U.S. Immigration and Customs Enforcement (ICE) for further enforcement action.

Implementing biometric exit control is important to ensuring the integrity of our Nation's immigration system. Since 2003, DHS has worked to overcome technical and operational challenges and to deploy biometric procedures for both entry to and exit from the country through the US-VISIT Program.

The Department published a Notice of Proposed Rulemaking in April 2008 which would require biometrics from foreign nationals departing through air and seaports to be collected and transmitted to DHS. Specifically, the proposed rule would require

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Question#:	6
Topic:	EXIT system
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Primary:	The Honorable Orrin G. Hatch
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commercial air carriers and cruise line owners and operators to collect and transmit international visitors' biometric information to DHS within 24 hours of their departure from the United States. Carriers are already required to transmit biographic information to DHS for all passengers prior to their departure from the United States. Further, the proposed rule would enable the Secretary of Homeland Security to retain the necessary authority to effectively manage the VWP.

Congress included a provision in the FY 2009 DHS Appropriations Act, Public Law 110-329, to restrict DHS from obligating US-VISIT funds provided under the Act for implementation of a final air exit solution under the rulemaking until additional pilot tests have been completed, with reports on the tests provided to the Appropriations Committees and with review by the Government Accountability Office (GAO). One required pilot test, in particular, presupposes the voluntary participation of at least one airline, which must be servicing an international port and be willing to undergo new passenger embarkation procedures that its competitor airlines will not also be required to follow.

The new pilot tests as envisioned by Congress in Public Law 110-329 cannot be effectively planned, conducted, reported upon and reviewed by GAO before January 2009, when DHS had intended to implement biometric exit procedures. The new Congressional requirements will delay the long-planned deployment of a biometric exit system.

The Department is doing everything possible to conduct the pilot tests as expeditiously and effectively as possible, but the Department may not be able to meet the June 30, 2009 deadline set in the *Implementing Recommendations of the 9/11 Commission Act*. Failure to meet the deadline would suspend the Department's ability to extend VWP privileges to additional countries pursuant to the waiver authority at 8 U.S.C. § 1187(c)(8)(B).

Question:

To what extent does DHS focus EXIT tracking on individuals who have been identified as high risk to the United States?

Response:

DHS focuses on preventing high-risk individuals from entering the United States by screening biometric and biographic identifiers against various terrorist watch lists and criminal databases. DHS works in cooperation with the Department of State (DOS) to ensure that this screening begins from the moment an individual first applies for a visa.

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Question#:	6
Topic:	EXIT system
Hearing:	The Visa Waiver Program: Mitigating risks to ensure safety of all Americans
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

The US-VISIT Program regularly receives new biometric and biographic watch list records from the Department of Justice, DOS, DHS components, the Intelligence Community, and other sources. These watch list records are continually checked against the biometric and biographic identifiers of individuals previously granted visas or entry to the United States. US-VISIT prioritizes travelers for exit matching through review of overstay violators by risk group as identified by ICE. In addition, US-VISIT prioritizes notices to ICE (non-exit) based on risk groups. All overstay violator leads forwarded to ICE are labeled to identify the type of lead being recommended.

Question#:	6
Topic:	EXIT system
Hearing:	The Visa Waiver Program: Mitigating risks to ensure safety of all Americans
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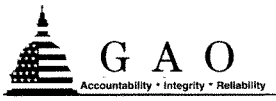
When previously unknown derogatory information is discovered regarding a foreign national who has already been admitted to the United States, US-VISIT notifies ICE, which then takes appropriate actions for locating the individual and initiating removal proceedings, as necessary.



United States Government Accountability Office
Washington, DC 20548

October 20, 2008

The Honorable Dianne Feinstein
Chairman
Subcommittee on Terrorism, Technology,
Homeland Security
Committee on the Judiciary
United States Senate

Subject: *Hearing on Visa Waiver Program, Response to Questions for the Record*

Dear Chairman Feinstein:

On September 24, I testified before the subcommittee on the Department of Homeland Security's (DHS) oversight of the Visa Waiver Program and management of the program's expansion.

Please find below my response for the record to questions you submitted following this hearing.

Questions:

What are the concerns the airline industry has regarding the biometric air exit system?

Is the opposition solely based on the belief that the collection of digital fingerprints of travelers departing the U.S. is a public sector responsibility?

Response:

In our recent report,[1] we stated that the implementation of a biometric exit system before July 2009 will be difficult. DHS released a proposed rule for the biometric exit system in April 2008. According to the proposed rule, air and sea carriers are to collect, store, and transmit to DHS travelers' biometrics. During the public comment period on the proposed rule, airlines, Members of Congress, and other stakeholders have raised concerns about DHS's proposal,

[1]GAO, *Visa Waiver Program: Actions Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks*, GAO-08-967 (Washington, D.C.: Sept. 15, 2008).

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and resolving these concerns could take considerable time. For example, the airline industry opposes DHS's plans to require airline personnel to collect digital fingerprints of travelers departing the United States and believes it is a public sector function. In addition, under DHS's proposal, the carriers would be responsible for the purchase, deployment, and maintenance of all biometric collection equipment and software needed. According to the proposed rule, for the high end of each range, US-VISIT assumes that first year costs to the carriers will be $379.2 million with an average recurring annual cost of $443.6 million; for the low end of each range, US-VISIT assumes that first year costs will be $223.0 million with an average recurring annual cost of $206.1 million. We have issued a series of reports on the US-VISIT program indicating that there is no clear schedule for implementation of the exit portion of the system.[2] We are currently reviewing DHS's proposed rule, among other things, and plan to report later this year on our findings.

If you or your staff have any further questions, please do not hesitate to contact me on 202-512-4268 or fordj@gao.gov.

Sincerely yours,

Jess T. Ford [*signed*]
Director, International Affairs and Trade

[2]GAO, *Homeland Security: Prospects For Biometric US-VISIT Exit Capability Remain Unclear*, GAO-07-1044T (Washington, D.C.: June 28, 2007); *Border Security: US-VISIT Program Faces Strategic, Operational, and Technological Challenges at Land Ports of Entry*, GAO-07-248 (Washington, D.C.: Dec. 6, 2006).

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SUBMISSIONS FOR THE RECORD

STATEMENT OF STEWART BAKER
DEPARTMENT OF HOMELAND SECURITY

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

"The Visa Waiver Program: Mitigating risks to ensure safety of all Americans"

24 September 2008

Hart Senate Office Building - 216

Chairman Feinstein, Senator Kyl, and Members of the Subcommittee on Terrorism, Technology, and Homeland Security, thank you for the opportunity to appear before you today to discuss the Visa Waiver Program (VWP)

A modernized VWP that strengthens our country's national security, law enforcement, and immigration interests is a top priority for the Administration. Section 711 of the *Implementing Recommendations of the 9/11 Commission Act of 2007* (the 9/11 Act) (P.L. 110-53) supports this objective by concurrently enhancing the VWP's security requirements and expanding opportunities for new countries to become VWP members. Enhancing the VWP's security requirements and expanding membership opportunities are mutually reinforcing goals. As a result, both current and prospective VWP members will continue to contribute to a secure environment for international travel as well as deepen their cooperation with the United States on security-related issues.

The Government Accountability Office's (GAO) recently released report, entitled "Visa Waiver Program: Actions Needed to Improve Management of Expansion Process and Assess and Mitigate Program Risks," recognizes this fact. Moreover, in its report, the GAO acknowledges that the Department of Homeland Security (DHS or the Department) has achieved several significant security enhancements during the expansion

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process well in advance of adding new members to the VWP. One example of these enhancements is the requirement that both VWP member and prospective countries enter into agreements with the United States to exchange information on their citizens and nationals traveling to the United States so that we may assess whether they pose a security threat. To date, agreements to exchange watchlists of known and suspected terrorists, to improve the reporting of lost and stolen passports, and to enhance overall counterterrorism and law enforcement cooperation have been concluded with several current and aspirant VWP countries. These agreements, along with the other aspects of the modernized VWP, will provide U.S. government personnel with new tools to secure the borders, help prevent terrorist and criminal activities in the United States and in VWP partner nations, and promote a safer international travel environment for our citizens and those of our VWP allies. The improved reporting of lost and stolen passports is especially noteworthy in this regard. As a direct result of the VWP expansion process, for example, aspirant countries have begun reporting both blank and personalized lost and stolen passports every 24 hours. The Department is therefore able to screen more effectively arriving passengers to detect, apprehend, and limit the movement of terrorists, criminals, and other mala fide travellers.

Overall, the Department believes that the report is broadly supportive of our efforts to date to enhance the security of the VWP while moving forward with expansion of the program. It concludes, for instance, that DHS has fully implemented the majority of the recommendations from the 2006 GAO report on the VWP thereby improving the Department's ability to assess and mitigate program risks. Many of the GAO's recommendations also are consistent with DHS's current approach. In fact, several of the

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issues identified by GAO already were being addressed prior to the report's release. For example, DHS and the Department of State have begun general discussions on creating procedures so that future candidate countries are selected and designated in a manner that is as transparent and uniform as possible and so that expectations are appropriately managed during the process. Similarly, DHS currently is assessing the feasibility and effectiveness of designating a single office to assume responsibility for developing overstay rate estimates and has taken several steps to improve the accuracy and reliability of the overstay data.

In short, DHS is confident that the steps it has taken to implement the security provisions mandated by the 9/11 Act and manage the expansion process will ensure that the VWP is appropriately structured to assess and mitigate program risks and to adapt to evolving travel needs and security standards.

The Department also has taken the appropriate steps to ensure that VWP expansion would not negatively impact U.S. security, law enforcement, or immigration interests. Over the past 10 months, DHS-led interagency teams have traveled to the Czech Republic, Estonia, Greece, Hungary, Slovakia, Latvia, Lithuania, and South Korea to comprehensively review their counterterrorism capabilities; immigration, citizenship and naturalization laws; passport production and issuance controls; efforts to combat crime; law enforcement cooperation with the United States; and border control mechanisms. A country cannot be admitted into the VWP until it receives a favorable determination from DHS, in consultation with the Department of State (DOS). DHS has also commissioned the required Director of National Intelligence (DNI) assessment of these countries to inform its determinations.

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As noted earlier in this testimony, the goals of security and expansion are complementary. The 9/11 Act gives the Secretary greater flexibility with regard to aspirant countries' nonimmigrant visa refusal rate, provided the Department certifies: (1) that an air exit system is in place that can verify the departure of not less than 97 percent of the foreign nationals who exit through U.S. airports; and (2) that an electronic travel authorization system is fully operational.

The Department expects to verify a 97 percent biographical match for the departure of foreign nationals exiting through U.S. airports consistent with the statutory requirement later this year. I should note that there are several different methods that may be used for verifying the departures of foreign nationals through U.S. airports. As we've testified previously—and communicated to the GAO—no final decision has been made as to precisely which methodology DHS will use in calculating the 97 percent departure rate. The Department continues to evaluate and look for ways to improve the methodology underpinning the air exit calculations. The Department expects that it will be able to certify this system in November 2008.

In addition to working through questions of methodology, DHS continues to engage air carriers to ensure that they are providing timely and complete passenger manifest information. Improved airline data collection has increased compliance rates, which in turn has led to a positive impact on matching records. In May 2008, U.S. Customs and Border Protection (CBP) initiated an operation to assess travel document compliance and manifest submission completeness. This audit targets outbound flights that contain the largest concentration of VWP passengers. For example, from mid-May to mid-July 2008, CBP targeted 439 outbound flights for which it received 89,827

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Advanced Passenger Information System (APIS) records. CBP officers at the departure gates identified an additional 474 passengers onboard those flights (with a total of 90,301 passengers), for a manifest completeness rate of 99.5%.

The implementation of the Electronic System for Travel Authorization (ESTA) program is also well underway. On August 1, 2008, DHS implemented ESTA on a voluntary basis. The rollout has been smooth and successful so far. To date, ESTA has processed more than 125,000 applications, and our experience so far is consistent with our expectations. DHS continues to work with the Departments of State and Commerce, as well as the travel and tourism industries, on ESTA outreach efforts to make sure travelers are aware of the impending requirement to use ESTA. CBP will use the Advance Passenger Information System (APIS)/APIS Quick Query infrastructure to tell carriers through interactive messaging if an alien has received a travel authorization via ESTA, and carriers may then appropriately approve or deny the alien boarding. Additionally, DHS and CBP will work together with the travel industry to develop a solution that will enable carriers and travel agents to submit ESTA applications on behalf of their customers through a mechanism that is independent of the ESTA Web site

The Department anticipates that ESTA will become mandatory for VWP travelers in January 2009. Overall, it strengthens substantially the security of the VWP by providing DHS with the capability to conduct enhanced advance vetting of VWP travelers. Under the ESTA, VWP travelers are required to submit electronically biographic and other information as currently required by the I-94W Nonimmigrant Alien Arrival/Departure Form to DHS prior to their departure for the United States. ESTA applications are then queried against appropriate databases, enabling DHS to make a

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determination whether each individual is eligible to travel to the United States under the VWP and whether there exists a law enforcement or security interest in permitting the alien to travel to the United States. Travelers who are denied a travel authorization via ESTA are referred to the Department of State Web site to obtain information about applying for a visa. ESTA is essential to transforming the VWP from a program that evaluates security threats on a country-by-country basis to one that is capable of making traveler-by-traveler determinations. In addition to enhancing security, ESTA will provide for greater efficiencies in the screening of international travelers by reducing traveler delays at the ports of entry.

DHS shares Congress's expressed concern that terrorists and criminals may attempt to exploit visa-free travel. That is why the Department is committed to ensuring that both current and aspirant VWP members enhance their security standards and deepen their cooperation with the United States on security-related issues. As I have outlined today, the Department is well on its way to achieving these goals. We appreciate your continued support of programs that help secure U.S. borders, strengthen the U.S. economy, improve relations with our closest allies, and promote a safer international travel environment.

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Senate Judiciary Subcommittee Holds Hearing on Security Concerns Involving Visa Waiver Program in Wake of New GAO Report

–Report found DHS does not adequately track foreign nationals from Visa Waiver countries–

Washington, DC – U.S. Senator Dianne Feinstein (D-Calif.), chairman of the Senate Judiciary Subcommittee on Terrorism, Technology, and Homeland Security, today held a hearing on the nation's visa waiver program in the wake of a new government report that illustrates numerous failures by the Department of Homeland Security in tracking foreign nationals from visa waiver countries.

Following is the text of Senator Feinstein's prepared opening remarks:

"This afternoon we are here, once again, to look at what is being done – or not done – to ensure the safety of the visa waiver program.

I have long expressed my concern that the visa waiver program is the soft underbelly of this nation's immigration system because it offers an opportunity for people to come into the United States to do grievous harm.

Travelers from visa waiver countries not only bypass the interview and individualized security screening process but, as the GAO report confirms, they are also lost once they arrive in the U.S. This problem is exasperated because DHS is only checking if and when individuals depart at our airports. So if they never leave, we often don't know where they are.

I have held multiple hearings over several years and time and time again I am repeating my frustrations and yet there seems to be no improvements – no change in how the Department implements this program.

Current law requires that before DHS admits any new countries into the visa waiver program, it must:

- Put in place a fully operational electronic travel authorization system for all travelers from visa waiver countries; and
- Verify the departure of 97 percent of foreign travelers leaving U.S. airports.

DHS states that they will have these requirements met prior to admitting new countries into the program, but this is only true because of their limited interpretation of the statutory requirements.

However, the GAO report found that DHS has not done the groundwork to prepare the embassies, travel industry, and travelers to make the electronic travel system fully operational.

The GAO report also reaffirmed that DHS is not taking into account countries' overstay rates in the air exit system. DHS continues to maintain that certification of an air exit system is fulfilled by simply tracking 97% of individuals who exit through U.S. airports, not whether 97% of individuals who entered at airports actually left.

In the meantime, the GAO report shows that the Administration is moving full steam ahead in working to bring in as many as 8-10 new countries by the end of this year.

I fail to understand why DHS is moving so quickly to add new countries to the program without properly mitigating the security risks.

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These risks are particularly apparent when we look at the statistics on the number of fraudulent and stolen passports and other international documents.

Between January 2002 and June 2004, 28 foreign governments, including visa waiver countries, reported 56,943 stolen blank foreign passports to the State Department. And just this summer, a security van in London was hijacked, resulting in the loss of 3,000 blank British passports and visas that were destined for overseas embassies.

DHS's own Inspector General, Clark Ervin has testified that:

"The lost and stolen passport problem is the greatest security problem associated with the Visa Waiver Program. Our country is vulnerable because gaps in our treatment of lost and stolen passports remain."

Radicalism and homegrown terrorism in Europe is growing – and we know that Al-Qaeda is looking to exploit the visa waiver program. But instead of acknowledging the threat this poses to the American people, the Administration is working to admit new countries with even higher visa refusal rates — meaning more people could be let into this country who would have previously been refused a visa because of security risks.

Secretary Chertoff himself has acknowledged the loophole that the visa waiver program leaves open for those who wish to do us harm. Just this year, he stated that:

"We have a visa waiver program which allows most Europeans who come to be tourists to come without visas. This means that the first time we encounter them is when they arrive in the United States, and that creates a very small window of opportunity to check them out."

I find it ironic that the Department of Homeland Security, whose number one goal is to "protect the nation from dangerous people," is instead expediting the expansion of a program that we know is exploited by dangerous persons.

Clearly, the visa waiver program leaves open both a major gap in our domestic security and a way to exploit our immigration laws. I am committed to doing everything I can to close it. That is why I plan to introduce "The Strengthening the Visa Waiver Program to Secure America Act," a bill that would tighten the security of the program to mitigate its immigration and security risks.

I look forward to hearing about the Government Accountability Office's findings on the visa waiver program expansion process and the Department of Homeland Security's response. I hope that we can have an open discussion about the Administration's intentions with respect to expanding the visa waiver program.

We need straightforward answers as to what needs to be done to make this program work without compromising our national security."

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United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Terrorism, Technology, and Homeland Security, Committee on the Judiciary, United States Senate

For Release on Delivery
Expected at 2:30 p.m. EDT
Wednesday, September 24, 2008

VISA WAIVER PROGRAM

Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks

Statement of Jess T. Ford, Director
International Affairs and Trade

GAO-08-1142T

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September 24, 2008

Chairman Feinstein and Members of the Subcommittee:

I am pleased to be here to discuss our recent report on the Department of Homeland Security's (DHS) oversight of the Visa Waiver Program and executive branch's plans to expand the program by the end of 2008.[1] The Visa Waiver Program enables citizens of 27 participating countries to travel to the United States for tourism or business for 90 days or less without first obtaining a visa from U.S. embassies and consulates.[2] The program has many benefits, including facilitating international travel for millions of foreign nationals seeking to visit the United States each year. However, as we have reported,[3] the program also poses inherent security, law enforcement, and illegal immigration risks to the United States. In September 2007, the Director of National Intelligence testified that al Qaeda is recruiting Europeans because most of them do not require a visa to enter the United States. Effective oversight of the Visa Waiver Program is essential to finding the right balance between facilitating legitimate travel and screening for potential terrorists, criminals, and others who may pose law enforcement and illegal immigration concerns.

The executive branch aims to expand the Visa Waiver Program to countries in Central and Eastern Europe, and to South Korea. According to DHS, some of these countries are U.S. partners in the war in Iraq and have high expectations that they will join the program due to their close economic, political, and military ties to the United States. In August 2007, Congress passed legislation that allows DHS to consider admitting countries with business and tourism visas refusal rates[4] between 3 percent and 10 percent, that otherwise meet the program's requirements, if the countries meet certain conditions, such as cooperating with

[1]GAO, *Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks*, GAO-08-967 (Washington, D.C.: Sept. 15, 2008).

[2]The participating countries are Andorra, Australia, Austria, 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.

[3]GAO, *Border Security: Stronger Actions Needed to Assess and Mitigate Risks of the Visa Waiver Program*, GAO-06-854 (Washington, D.C.: July 28, 2006).

[4]The refusal rate refers only to the temporary business and tourism visa applications that are denied as a percentage of the total temporary business and tourism visa applications for nationals of that country.

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the United States on counterterrorism initiatives.[5] Previously, only countries with refusal rates below 3 percent in the prior fiscal year qualified to be considered for admission. Before DHS can exercise this new authority, the legislation—referred to as the "9/11 Act"—requires that the department complete certain actions aimed at enhancing security of the Visa Waiver Program.

My testimony today will summarize our observations on the (1) process DHS is following to admit countries into the Visa Waiver Program and (2) actions taken to assess and mitigate potential risks in the program. These observations are derived from our review of the Visa Waiver Program based on a request from this subcommittee. In conducting this work, we reviewed laws governing the Visa Waiver Program and its expansion, and relevant regulations and agency operating procedures, as well as our prior reports and testimonies. We met with several DHS component agencies and offices,[6] including the Visa Waiver Program Office, which is responsible for oversight of Visa Waiver Program requirements. In addition, we interviewed officials from the Department of State (State), the International Criminal Police Organization (Interpol), and the Department of Justice (Justice).[7] We also spoke with officials at U.S. embassies in three current and eight aspiring Visa Waiver Program countries. We conducted this performance audit from September 2007 to September 2008, in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Summary

The executive branch is moving aggressively to expand the Visa Waiver Program by the end of 2008, but, in doing so, DHS has not followed a transparent process. The department did not follow its own November 2007 standard operating procedures, which set forth the key milestones that DHS and aspiring countries

[5]See Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53.

[6]Specifically, we met with officials from DHS's Customs and Border Protection (CBP); Immigration and Customs Enforcement (ICE); and U.S. Visitor and Immigrant Status and Indicator Technology (US-VISIT).

[7]In particular, we met with officials in Justice's Interpol-U.S. National Central Bureau, which facilitates international law enforcement cooperation among the United States and Interpol and its other member countries.

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must meet before additional countries are admitted into the program. As a result, State, Justice, and U.S. embassy officials stated that DHS created confusion among its interagency partners and aspiring visa waiver countries. Absent clear direction from DHS, U.S. embassy officials in several aspiring countries told us it had been difficult to explain the expansion process to their foreign counterparts and manage their expectations about when those countries might be admitted into the Visa Waiver Program. Furthermore, State officials said it was difficult to explain to countries with fiscal year 2007 refusal rates below 10 percent that have signaled interest in joining the Visa Waiver Program (such as Croatia, Israel, and Taiwan) why DHS is not negotiating with them. DHS is, however, negotiating with several countries that had fiscal year 2007 visa refusal rates above the 10 percent ceiling (Hungary, Latvia, Lithuania, and Slovakia), with the expectation that fiscal year 2008 rates will be below this ceiling. Nevertheless, DHS achieved some security enhancements to the Visa Waiver Program during expansion negotiations, including new agreements with several aspiring countries on lost and stolen passport reporting. DHS, State, and Justice agreed, however, that a more transparent process is needed to guide any future consideration of program expansion. In acknowledging weaknesses in the expansion process, DHS's Assistant Secretary for Policy Development said that DHS did not have a clear process at the outset of negotiations in late 2007, in part because the department lacked prior experience in expanding the Visa Waiver Program and because the program's legislative requirements had changed in August of that year.

DHS has not fully developed tools to assess and mitigate risks in the Visa Waiver Program. In particular, DHS has not yet met two key certification requirements in the 9/11 Act that would allow DHS to consider admitting additional countries to the program with refusal rates between 3 percent and 10 percent. First, DHS must certify that it can verify the departure of not less than 97 percent of foreign nationals who exit from U.S. airports. In February 2008, we testified that DHS's plan to meet this provision will not demonstrate improvements in the air exit system and will not help the department mitigate risks of the Visa Waiver Program, because the plan does not account for data on those who remain in the country beyond their authorized period of stay (referred to as "overstays"). Second, DHS must certify that the Electronic System for Travel Authorization (ESTA) for screening visa waiver travelers in advance of their travel is "fully operational." DHS has not yet announced when it plans to make this certification; however, ESTA became available on a voluntary basis on August 1, 2008, and DHS anticipates that ESTA authorizations will be required for all visa waiver

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travelers after January 12, 2009. [8] DHS determined that the law permits it to expand the program to countries with refusal rates between 3 percent and 10 percent after it makes the two 9/11 Act certifications, and after the countries have met certain conditions, but before ESTA is mandatory for all VWP travelers. DHS may face challenges in implementing ESTA, such as adequately informing the public and travel industry about the system. In addition, for DHS to maintain its authority to admit certain countries into the program, the 9/11 Act requires that the air exit system also incorporate biometric indicators (such as fingerprints) by July 1, 2009. However, DHS is unlikely to meet this timeline due to several unresolved issues. In addition, DHS does not fully consider countries' overstay rates when assessing illegal immigration risks in the Visa Waiver Program because the department's overstay data have weaknesses, according to the Visa Waiver Program Office.

To improve management of the Visa Waiver Program and better assess and mitigate risks associated with it, we recommended in our report that DHS establish a clear process, in coordination with State and Justice, for program expansion that would include the criteria used to determine which countries will be considered for expansion and timelines for nominating countries, security assessments of aspiring countries, and negotiation of any bilateral agreements to implement the program's legislative requirements. In addition, we recommended that DHS designate an office with responsibility for developing overstay rate information for the Visa Waiver Program, explore cost-effective actions to further improve these data's reliability, and use these validated data to help evaluate whether current or aspiring Visa Waiver Program countries pose a potential illegal immigration risk to the United States. DHS either agreed with, or stated that it was taking steps to implement, all of our recommendations.

Background

In 2007, almost 13 million citizens[9] from 27 countries entered the United States under the Visa Waiver Program. In February 2005, President Bush announced that DHS and State would develop a strategy, or "Road Map Initiative," to clarify the statutory requirements for designation as a participating country. DHS and State are consulting with 13 "Road Map" countries seeking admission into the

[8]According to DHS, ESTA will be implemented as a mandatory program for all visa waiver travelers 60 days after publication of a notice in the *Federal Register*. DHS anticipates issuing that notice in November 2008, for implementation of the mandatory ESTA requirements on January 12, 2009.

[9]This figure does not account for multiple admissions into the United States under the Visa Waiver Program by the same individual.

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Visa Waiver Program—Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and South Korea.

In August 2007, Congress enacted the 9/11 Act, which provides DHS with the authority to consider admitting into the Visa Waiver Program countries that otherwise meet the program requirements, but have refusal rates between 3 percent and 10 percent, provided the countries meet certain conditions. For example, before being admitted to the program, the countries must demonstrate a sustained reduction in refusal rates, and must be cooperating with the United States on counterterrorism initiatives, information sharing, and the prevention of terrorist travel, among other things. In addition, DHS must also complete two actions aimed at enhancing the security of the program.[10] Specifically, DHS must certify the following to Congress:

- *A system is in place that can verify the departure of not less than 97 percent of foreign nationals who depart through U.S. airports.* While this system will initially be biographic only, Congress required the eventual implementation of a biometric exit system at U.S. airports. If the biometric air exit system is not in place by July 1, 2009, the flexibility that DHS may obtain to consider admitting countries with refusal rates between 3 percent and 10 percent will be suspended until the system is in place.

- *An electronic travel authorization system is "fully operational."* This system would require nationals from Visa Waiver Program countries to provide the United States with biographical information before boarding a U.S.-bound flight to determine the eligibility of, and whether there exists a law enforcement or security risk in permitting, the foreign national to travel to the United States under the program. To the extent possible, according to DHS, applicants would find out almost immediately whether their travel has been authorized, or if their application has been rejected[11], in which case they are ineligible to travel to the United States under the Visa Waiver Program.[12]

[10]Section 711 of the 9/11 Act specifically grants DHS the authority to waive the 3 percent refusal rate requirement for countries—up to a maximum of 10 percent—provided those countries meet other security requirements.

[11]In addition to receiving an authorization or rejection notice upon submitting an ESTA application, the applicant may also receive a response noting that the application is pending.

[12]ESTA authorizations will be valid for up to 2 years and will allow the individual to travel to the United States repeatedly within that period. In some circumstances, such as when a passport has expired or a traveler has changed his or her name, the traveler must apply for a new ESTA.

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Executive Branch Is Moving Quickly to Expand the Visa Waiver Program without a Transparent Process

DHS has not followed a transparent process for admitting new countries to the program, which has created confusion among U.S. agencies and officials in Washington, D.C., and overseas, and among countries seeking to join the Visa Waiver Program. During the expansion negotiations, DHS has achieved some security enhancements.

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DHS Has Not Followed a Transparent Process for Visa Waiver Program Expansion

We found that the Visa Waiver Program Office has not followed its own standard operating procedures, completed in November 2007, which set forth the key milestones that DHS and aspiring countries must meet before additional countries are admitted into the program. According to the standard procedures, State should submit to DHS a formal, written nomination for a particular country, after which DHS is to lead an interagency team to conduct an in-country, comprehensive review of the impact of the country's admission into the Visa Waiver Program on U.S. security, law enforcement, and immigration interests. Figure 1 depicts the standard procedures that the program office established to guide expansion of the Visa Waiver Program compared with DHS's actions since August 2007. Although State has only nominated one country—Greece—DHS has nonetheless conducted security reviews for countries that State has not yet nominated—Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia, and South Korea. According to State officials, until DHS has implemented the required provisions of the 9/11 Act, and countries have met all of the Visa Waiver Program's statutory requirements, State does not plan to nominate any other countries. DHS's Assistant Secretary for Policy Development told us that the department had determined that it would not follow the standard operating procedures during these expansion negotiations and, thus, had to "make up the process as it went along," in part because DHS had never expanded the program before and because Congress significantly changed the program's legislative requirements in August 2007.

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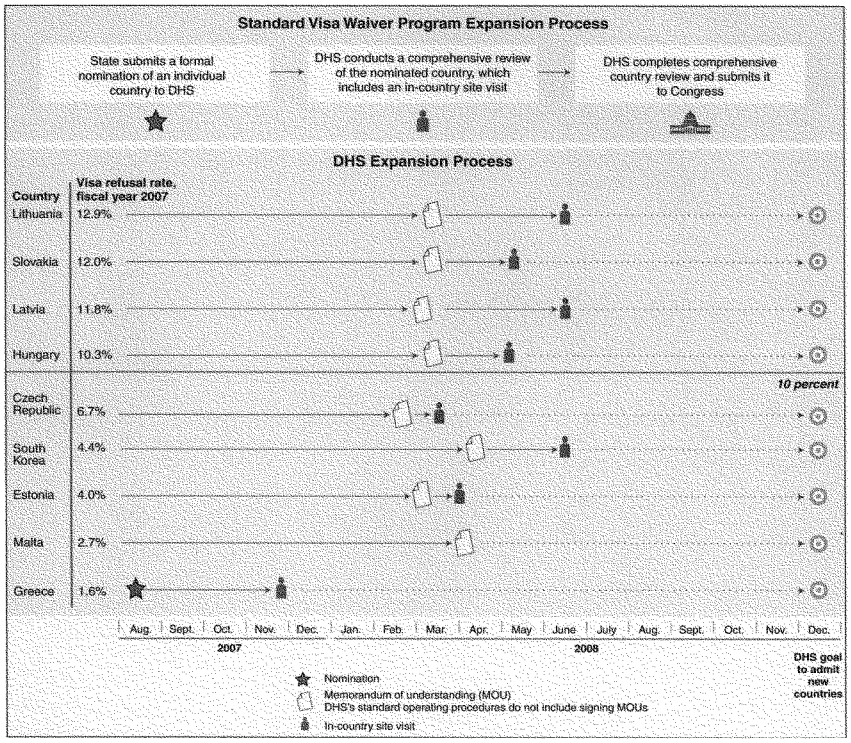
Figure 1: Comparison of DHS's Process to Expand the Visa Waiver Program against the Standard Operating Procedures for Expansion



Sources: GAO analysis of DHS data, Art Explosion images

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State and Justice officials told us that the lack of a transparent timeline and requirements for Visa Waiver Program expansion has led to confusion among U.S. agencies in headquarters' offices and at U.S. embassies overseas, as well as foreign governments seeking to join the program. For example, DHS's standard procedures were not updated to account for the department's plans to sign with each of the aspiring Visa Waiver Program countries separate memorandums of understanding (MOU) that lay out the new legislative requirements from the 9/11 Act. According to DHS, while not required by the act, the U.S. government is seeking to negotiate MOUs with current and aspiring Visa Waiver Program countries to help put the legislative provisions in place. DHS has not yet signed MOUs with any current program countries; the department intends to complete negotiations with existing program countries by October 2009. As indicated in figure 1, DHS signed MOUs with aspiring countries before conducting in-country site visits. As of June 2008, DHS had signed MOUs with eight Road Map countries. However, State and Justice officials told us that DHS had not been clear in communicating these steps to aspiring and current program countries and U.S. embassy officials in several Road Map countries told us that it had been difficult to explain the expansion process to their foreign counterparts and to manage their expectations about when those countries might be admitted into the Visa Waiver Program. In response to our request, in late April 2008, DHS provided us with an outline of the department's completed and remaining actions for expanding the Visa Waiver Program by the end of the year. DHS officials stated that this outline could be a first step in providing guidance for all stakeholders should the program be expanded again in the future. However, this outline does not include criteria for selecting countries under consideration for admission into the program other than the 13 Road Map countries.

The U.S. government is only considering the Road Map countries for potential admission into the program in 2008 because the United States began formal discussions with these 13 countries several years ago, not due to the application of clearly defined requirements. DHS is negotiating with 4 Road Map countries with fiscal year 2007 refusal rates over 10 percent (Hungary, Latvia, Lithuania, and Slovakia), with the expectation that fiscal year 2008 refusal rates for these countries will fall below 10 percent. State officials told us that they lacked a clear rationale to explain to other aspiring, non-Road Map countries with refusal rates under 10 percent (Croatia, Israel, and Taiwan) that they will not be considered in 2008 due to the executive branch's plans to expand the program first to countries in Central and Eastern Europe, and South Korea. (Figure 2 shows the fiscal year 2007 refusal rates for the 13 Road Map countries.)

VerDate Aug 31 2005 09:28 Jan 08, 2009 Jkt 045063 PO 00000 Frm 00064 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\45063.TXT SJUD1 PsN: CMORC

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Figure 2: Short-term Business and Tourism Visa Refusal Rates, by Country, Fiscal Year 2007

Percentage

40 — 40 percent

Romania – 37.7%

30 — 30 percent

Algeria	Costa Rica	Lebanon	St. Kitts and Nevis
Belarus	Djibouti	Libya	St. Lucia
Belize	Dominica	Maldives	St. Vincent and the Grenadines
Bolivia	Ecuador	Morocco	Tanzania
Central African Republic	Equatorial Guinea	Panama	Tunisia
Chad	Gabon	**Poland – 25.2%**	Vanuatu
China	Grenada	Samoa	
Colombia	India	Serbia and Montenegro	
Comoros	Kyrgyzstan	Sri Lanka	

20 — 20 percent

Angola	**Latvia – 11.8%**	Seychelles
Antigua/Barbuda	**Lithuania – 12.9%**	**Slovakia – 12%**
Azerbaijan	Madagascar	Suriname
Bosnia-Herzegovina	Mauritius	Swaziland
Botswana	Mozambique	Thailand
Bulgaria – 14.3%	Papua New Guinea	Turkey
Hungary – 10.3%	Paraguay	Tuvalu
Kazakhstan	North Korea	Uruguay
Kiribati	Russia	Venezuela

10 — 10 percent

Argentina	**Czech Republic – 6.7%**	Oman	**South Korea – 4.4%**
Barbados	**Estonia – 4%**	Marshall Islands	The Bahamas
Brazil	Kuwait	Sao Tome and Principe	
Chile	Macau	Saudi Arabia	
Taiwan	Malaysia	Solomon Islands	
Croatia	Namibia	South Africa	

3 percent

Greece 1.6%	**Malta 2.7%**	Hong Kong	Qatar
Cyprus 1.8%	Bahrain	Israel	

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"Road Map" initiative countries

Source: GAO analysis of Department of State data

Note: DHS may consider adding to the Visa Waiver Program countries with refusal rates below 3 percent in the prior fiscal year, without meeting the two certification requirements in the 9/11 Act

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According to DHS, it could not wait until all statutory requirements were officially met before beginning bilateral negotiations with Road Map countries, because doing so would not allow sufficient time to add the countries by the end of 2008. DHS plans to complete the security reviews and sign MOUs with Road Map countries by the fall of 2008. If these and all other statutory provisions are completed—including countries' achievement of refusal rates below 10 percent—State indicated that it will then formally nominate the countries. However, DHS has acknowledged that if it and the aspiring countries cannot meet all of the program's statutory requirements, the United States will not admit additional countries into the program. In such an event, the U.S. government could face political and diplomatic repercussions given the expectations raised that many of the Road Map countries will be admitted in 2008. DHS, State, and Justice officials acknowledged that following a more transparent process would be useful in the future as additional countries seek to join the program.

DHS Has Achieved Some Results in Visa Waiver Expansion Negotiations

DHS's expansion negotiations with current and aspiring Visa Waiver Program countries have led to commitments from countries to improve information sharing processes with the United States. For example, by signing MOUs, eight aspiring countries have signaled their intent to comply with the program's statutory provision to report to the United States or Interpol in a timely manner the loss or theft of passports—a key vulnerability in the Visa Waiver Program. In addition, as a result of ongoing visa waiver negotiations with the South Korean government, in January 2008, DHS initiated the Immigration Advisory Program at Incheon International Airport in South Korea to help prevent terrorists and other high-risk travelers from boarding commercial aircraft bound for the United States.[13]

[13]According to CBP, the Immigration Advisory Program aims to enhance the safety of air travel by, among other things, reducing the number of improperly documented passengers traveling from or through a country to the United States. As of August 2008, the program operates in airports in Amsterdam, the Netherlands; Frankfurt, Germany; London, England (Heathrow Airport and Gatwick Airport); Manchester, England; Madrid, Spain; Seoul, South Korea; Tokyo, Japan; and Warsaw, Poland.

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DHS Has Not Fully Developed Tools Aimed at Assessing and Mitigating Risks in the Visa Waiver Program

As of July 2008, DHS has not yet implemented key certification requirements in the 9/11 Act necessary for expanding the Visa Waiver Program to countries with refusal rates between 3 and 10 percent. In addition, the Visa Waiver Program Office does not fully consider data on overstay rates for current and aspiring Visa Waiver Program countries, even though doing so is integral to meeting a statutory requirement for continued eligibility in the Visa Waiver Program. Finally, DHS has not yet fully implemented some of the recommendations from our 2006 report aimed at improving efforts to assess and mitigate program risks.

DHS Has Not yet Implemented Key Security Provisions of 9/11 Act That Are Necessary to Admit Certain Countries into the Visa Waiver Program

On February 28, 2008, we testified that DHS's plan for certifying that it can verify the departure of 97 percent of foreign nationals from U.S. airports will not help the department mitigate risks of the Visa Waiver Program.[14] Furthermore, DHS will face a number of challenges in implementing ESTA by January 2009. Finally, it is unlikely that DHS will implement a biometric air exit system before July 2009, due to opposition from the airline industry.

Plan to Verify the Air Departure of Foreign Nationals Will Not Help DHS Mitigate Program Risks

As we have previously mentioned, the 9/11 Act requires that DHS certify that a system is in place that can verify the departure of not less than 97 percent of foreign nationals who depart through U.S. airports. An air exit system that facilitates the development of overstay rate data is important to managing potential risks in expanding the Visa Waiver Program. In December 2007, DHS reported to us that it will match records, reported by airlines,[15] of visitors departing the country to the department's existing records of any prior arrivals, immigration status changes,[16] or prior departures from the United States. In February 2008, we testified that this methodology will not demonstrate improvements in the air exit system and will not help the department mitigate risks of the Visa Waiver Program. At the time of our testimony, DHS had confirmed that it planned to employ a methodology that begins with departure records.

We identified a number of weaknesses with the approach DHS confirmed in December 2007. In particular, DHS's methodology will not inform overall or country-specific overstay rates, which are key factors in determining illegal

[14]GAO, *Visa Waiver Program. Limitations with Department of Homeland Security's Plan to Verify Departure of Foreign Nationals*, GAO-08-458T (Washington, D.C.: Feb. 28, 2008).

[15]Air carriers transmit visitor manifest information, which is obtained directly from government-issued passports, to CBP.

[16]This includes changes and extensions of the visits of lawfully admitted, nonimmigrant foreign nationals.

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immigration risks in the Visa Waiver Program. Also, DHS's methodology does not begin with arrival records to determine if those foreign nationals departed or remained in the United States beyond their authorized periods of admission—useful data for oversight of the Visa Waiver Program and its expansion. As we previously testified, an alternate approach would be to track air arrivals from a given point in time and determine whether those foreign nationals have potentially overstayed.[17] Figure 3 compares DHS's plan to match visitor records using departure data as a starting point with a methodology that would use arrival data as a starting point. An air exit system that facilitates the development of overstay rate data is important to managing potential risks in expanding the Visa Waiver Program. We found that DHS's planned methodology for meeting the "97 percent provision" so it can move forward with program expansion will not demonstrate improvements in the air exit system or help the department identify overstays or develop overstay rates. As of July 2008, DHS had not yet certified this provision nor had it finalized a methodology to meet the provision.

[17]This could include foreign nationals who departed after their authorized period of admission expired, as well as those foreign nationals who may have remained in the country as overstays.

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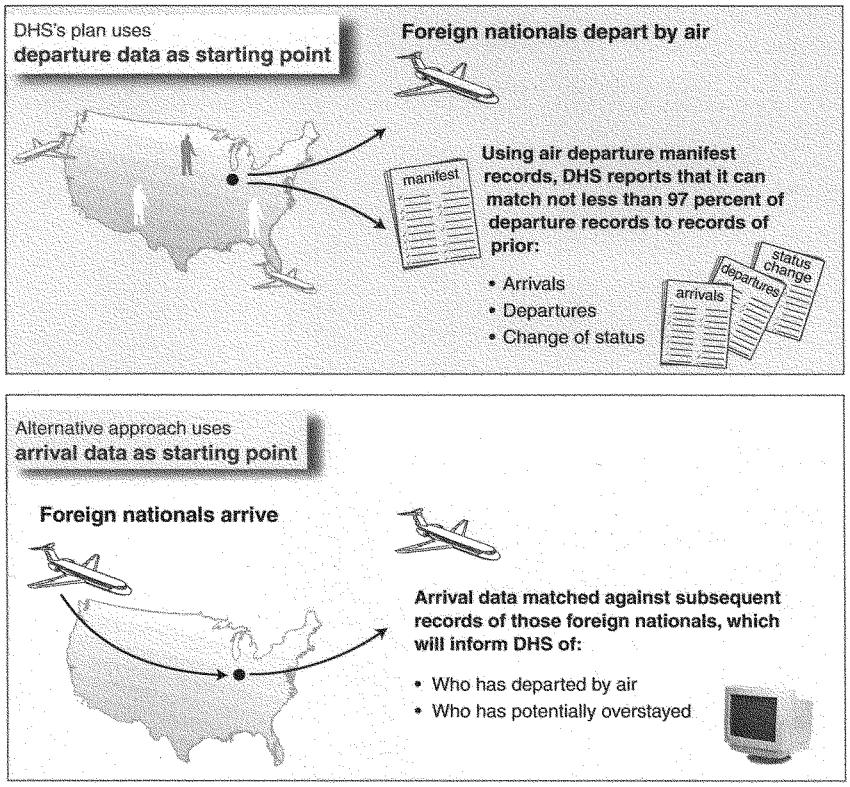
Figure 3: DHS's Current Plan to Meet Air Exit System Provision Omits Those Who Remain in the United States



Sources: GAO analysis of Department of Homeland Security data; Map Resources (maps); Nova Development and Ingram Publishing (clip art).

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In the 9/11 Act conference report,[18] Congress agreed on the need for significant security enhancements to the Visa Waiver Program and to the implementation of ESTA prior to permitting DHS to admit new countries into the program with refusal rates between 3 and 10 percent. According to DHS, ESTA will allow DHS to identify potential ineligible visa waiver travelers before they embark on a U.S.-bound carrier. DHS also stated that by recommending that travelers submit ESTA applications 72 hours in advance of their departure, CBP will have additional time to screen visa waiver travelers destined for the United States.

DHS must follow several steps in implementing ESTA (see fig. 4). The 9/11 Act requires that DHS must certify both the 97 percent air exit system and ESTA as fully operational before the department can consider expanding the Visa Waiver Program to countries with refusal rates between 3 percent and 10 percent. In June 2008, DHS announced in the *Federal Register* that it anticipates that all visa waiver travelers will be required to obtain ESTA authorization for visa waiver travel to the United States after January 12, 2009. DHS stated that if it admits an additional country prior to January 12, 2009, it will require that visa waiver travelers from that country obtain ESTA authorizations immediately. For example, if Estonia was admitted into the program on October 10, 2008, citizens of that country would be required to begin using ESTA on that date; however, visa waiver travelers from existing program countries would not be required to obtain approval through ESTA until January 12, 2009, more than three months later. Figure 4 illustrates the steps that DHS must follow to implement ESTA.

[18]Conference Report on H.R. 1, Implementing Recommendations of the 9/11 Commission Act of 2007, July 25, 2007.

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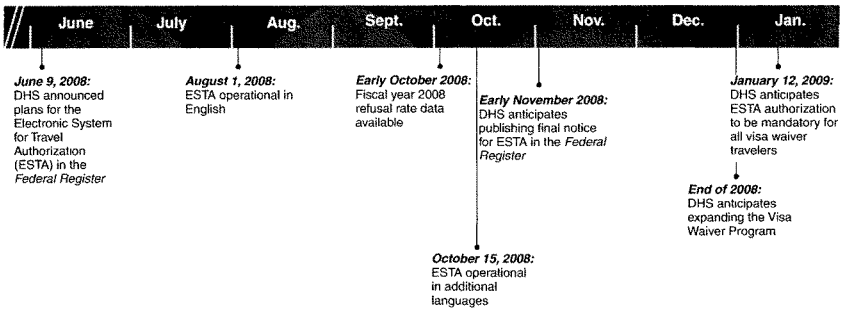
Figure 4: DHS's Anticipated ESTA Implementation Timeline



Source GAO

We identified four potential challenges to DHS's planned implementation of ESTA by January 12, 2009. These challenges include the following:

- *DHS has a limited time frame to adequately inform U.S. embassies in Visa Waiver Program countries and the public about ESTA.* U.S. embassy officials in current and aspiring Visa Waiver Program countries told us that the United States will need to ensure that there is sufficient time to inform travelers, airlines, and the travel industry of ESTA requirements and implementation timelines. However, DHS's announcement in June 2008 accelerated the timeline for ESTA implementation in current visa waiver countries. According to a senior U.S. official at one embassy, DHS had previously confirmed that the department did not plan to require ESTA authorization for travelers from this country until the summer of 2009 or later. Following the June 2008 announcement, a senior U.S. embassy official in another country told us that DHS did not give the embassy adequate advance notice—to prepare translated materials, brief journalists from the major media, prepare the embassy Web site, or set up a meeting with travel and tourism professionals to discuss the implications of ESTA requirements—before publishing the interim final rule for ESTA. DHS officials told us that the department is currently working on an outreach strategy to ensure that travelers are aware of the ESTA requirement.

- *Impact on air and sea carriers could be significant.* DHS estimates that 8 U.S.-based air carriers and 11 sea carriers, as well as 35 foreign-based air carriers and 5 sea carriers, will be affected by ESTA requirements for visa waiver travelers.

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On the basis of DHS's analysis, ESTA could cost the carriers about $137 million to $1.1 billion over the next 10 years, depending on how the carriers decide to assist the passengers. DHS has noted that these costs to carriers are not compulsory because the carriers are not required to apply for an ESTA authorization on behalf of their visa waiver travelers.

- *ESTA could increase consular workload.* In May 2008, we reported that State officials and officials at U.S. embassies in current Visa Waiver Program countries are concerned with how ESTA implementation will affect consular workload.[19] We reported that if 1 to 3 percent of current Visa Waiver Program travelers came to U.S. embassies for visas, it could greatly increase visa demand at some locations, which could significantly disrupt visa operations and possibly overwhelm current staffing and facilities.

- *Developing a user-friendly ESTA could be difficult.* Although the ESTA Web site will be operational in a number of languages by October 15, 2008, ESTA will only allow travelers to fill out the application in English, as with CBP's paper-based form. During our site visits, embassy officials also expressed concerns that some Visa Waiver Program travelers do not have Internet access and, thus, will face difficulties in submitting their information to ESTA.[20] Implementing a user-friendly ESTA is essential, especially for those travelers who do not have Internet access or are not familiar with submitting forms online.

Implementation of Biometric Air Exit System before July 2009 Will Be Difficult

A third provision of the 9/11 Act requires that DHS implement a biometric air exit system before July 1, 2009, or else the department's authority to waive the 3 percent refusal rate requirement—and thereby consider admitting countries with refusal rates between 3 percent and 10 percent—will be suspended until this system is in place. In March 2008, DHS testified that US-VISIT will begin deploying biometric exit procedures in fiscal year 2009. According to the system's proposed rule released in April 2008, air and sea carriers are to collect, store, and transmit to DHS travelers' biometrics. During the public comment period on the proposed rule, airlines, Members of Congress, and other stakeholders have raised concerns about DHS's proposal, and resolving these concerns could take considerable time. For example, the airline industry strongly opposes DHS's plans to require airline personnel to collect digital fingerprints of travelers departing the United States because it believes it is a public sector

[19]See GAO, *Border Security: State Department Should Plan for Potentially Significant Staffing and Facilities Shortfalls Caused by Changes in the Visa Waiver Program*, GAO-08-623 (Washington, D.C.: May 22, 2008).

[20]According to DHS, ESTA is designed to allow third parties to file applications on behalf of another person.

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function. We have issued a series of reports on the US-VISIT program indicating that there is no clear schedule for implementation of the exit portion of the system, and that DHS will encounter difficulties in implementing the system by July 2009.[21] Although DHS program officials stated that DHS is on track to implement the biometric exit system by July 2009, it is unlikely that DHS will meet this timeline. We are currently reviewing DHS's proposed rule and plan to report later this year on our findings.

DHS Does Not Fully Consider Overstay Rates to Assess the Illegal Immigration Risks of the Visa Waiver Program

Some DHS components have expanded efforts to identify citizens who enter the United States under the Visa Waiver Program and then overstay their authorized period of admission. In 2004, US-VISIT established the Data Integrity Group, which develops data on potential overstays by comparing foreign nationals' arrival records with departure records from U.S. airports and sea ports. US-VISIT provides this data to ICE, CBP, and U.S. Citizenship and Immigration Services, as well as to State's consular officers to aid in visa adjudication. In fiscal year 2007, ICE's Compliance Enforcement Unit received more than 12,300 overstay leads from the Data Integrity Group. On the basis of concerns that Visa Waiver Program travelers could be overstaying, ICE has requested that US-VISIT place additional emphasis on identifying potential overstays from program countries. In turn, ICE has received funding to establish a Visa Waiver Enforcement Program within the Compliance Enforcement Unit to investigate the additional leads from US-VISIT. However, DHS is not fully monitoring compliance with a legislative provision that requires a disqualification rate (this calculation includes overstays) of less than 3.5 percent for a country to participate in the Visa Waiver Program.[22] Monitoring these data is a longstanding statutory requirement for the Visa Waiver Program. We have testified that the inability of the U.S. government to track the status of visitors in the country, to identify those who overstay their authorized period of visit, and to use these data to compute overstay rates have

[21]GAO, *Homeland Security: Prospects For Biometric US-VISIT Exit Capability Remain Unclear*, GAO-07-1044T (Washington, D.C.: June 28, 2007); *Border Security: US-VISIT Program Faces Strategic, Operational, and Technological Challenges at Land Ports of Entry*, GAO-07-248 (Washington, D.C.: Dec. 6, 2006).

[22]The disqualification rate is the total for a given fiscal year, of (1) those nationals of the country who were admitted as nonimmigrants and violated the terms of their admission—this would include overstays—and (2) the number of foreign nationals who were denied admission upon arrival in the United States, compared with the total number of nationals of that country who applied for admission as nonimmigrant visitors during the same period. According to the visa waiver statute, the country must be terminated at the beginning of the 2d fiscal year following the fiscal year in which the determination of the disqualification rate was made. See 8 U.S.C. § 1187(f).

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been longstanding weaknesses in the oversight of the Visa Waiver Program.[23] DHS's Visa Waiver Program Office reported that it does not monitor country overstay rates as part of its mandated, biennial assessment process for current visa waiver countries because of weaknesses in US-VISIT's data. [24]

Since 2004, however, the Data Integrity Group has worked to improve the accuracy of US-VISIT's overstay data and can undertake additional analyses to further validate these data. For example, the group conducts analyses, by hand, of computer-generated overstay records to determine whether individuals identified as overstays by the computer matches are indeed overstays. In addition, US-VISIT analysts can search up to 12 additional databases to verify whether a potential overstay may, in fact, be in the country illegally. While it receives periodic reporting on potential overstays from US-VISIT, the Visa Waiver Program Office has not requested that the Data Integrity Group provide validated overstay rate estimates from visa waiver or Road Map countries since 2005. Although DHS has not designated an office with the responsibility of developing such data for the purposes of the Visa Waiver Program, US-VISIT officials told us that, with the appropriate resources, they could provide more reliable overstay data and estimated rates by country to the Visa Waiver Program Office, with support from other DHS components, such as the Office of Immigration Statistics. For example, the Visa Waiver Program Office could request additional analysis for countries where the preliminary, computer-generated overstay rates raised concerns about illegal immigration risks in the program. These resulting estimates would be substantially more accurate than the computer-generated overstay rates. However, the resulting estimates would not include data on departures at land ports of entry and, as we have previously mentioned, airline departure data have weaknesses.[25]

[23]For more than 10 years, we have recommended the collection of departure information and the development of estimates of overstays by air. See GAO/PEMD-93-25 and GAO/PEMD-95-20.

[24]According to DHS officials, the mandated country assessments include a placeholder for data on overstay rates, but this data is not included in the 2003-2004 or 2005-2006 assessments.

[25]Due to limitations in DHS's data, U.S. VISIT officials also noted that some individuals that appear in DHS's systems as being in country legally may actually be overstays, and that country-specific information is not available for about 2 percent of records.

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DHS Has Implemented Many of GAO's Prior Recommendations Aimed at Improving Efforts to Assess and Mitigate Risks in the Visa Waiver Program

In July 2006, we reported that the process for assessing and mitigating risks in the Visa Waiver Program had weaknesses, and that DHS was not equipped with sufficient resources to effectively monitor the program's risks.[26] To address these weaknesses, we recommended that DHS take a number of actions to better assess and mitigate risks of the Visa Waiver Program. As shown in table 1, DHS has taken actions to implement some of our recommendations, but still needs to fully implement others. In particular, DHS has provided the Visa Waiver Program Office with additional resources since our 2006 report. In addition, DHS, in coordination with the U.S. National Central Bureau, has initiated a system that allows DHS to screen foreign nationals' arriving at all U.S. international airports against Interpol's database of lost and stolen travel documents before arriving in the country. Results to date illustrate that the system identifies two to three instances of fraudulent passports per month. According to the National Central Bureau, Interpol's database has intercepted passports that were not identified by DHS's other screening systems.

Table 1: Status of Prior GAO Recommendations

Recommendation	Not implemented	Partially implemented	Implemented
Provide additional resources to strengthen the Visa Waiver Program Office.			X
Finalize clear, consistent, and transparent protocols for the biennial country assessments and provide these protocols to stakeholders at relevant agencies at headquarters and overseas. These protocols should provide timelines for the entire assessment process, including the role of a site visit, an explanation of the clearance process, and deadlines for completion.			X
Create real-time monitoring arrangements, including the identification of visa-waiver points of contact at U.S. embassies, for all 27 participating countries, and establish protocols, in coordination with the appropriate headquarters offices, for direct communication between points of contact at overseas posts and DHS's Visa Waiver Program Office.		X	
Require periodic updates from points of contact at posts in countries where there are law enforcement or security concerns relevant to the Visa Waiver Program.		X	

[26] GAO-06-854.

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Recommendation	Not implemented	Partially implemented	Implemented
Provide complete copies of the most recent country assessments to relevant stakeholders in headquarters and overseas posts.			X
Require that all Visa Waiver Program countries provide the United States and Interpol with nonbiographical data from lost or stolen, blank and issued passports.		X	
Develop and communicate clear standard operating procedures for the reporting of lost and stolen blank and issued passports, including a definition of timely reporting and to whom in the U.S. government countries should report			X
Develop and implement a plan to make Interpol's stolen travel document database automatically available during primary inspection at U.S. ports of entry			X

Source GAO analysis of DHS data and GAO, Border Security *Stronger Actions Needed to Assess and Mitigate Risks of the Visa Waiver Program*, GAO-06-854 (Washington, D C July 28, 2006)

While DHS has taken action on many of our recommendations, it has not fully implemented others. We recommended that DHS require that all Visa Waiver Program countries provide the United States and Interpol with non-biographical data from lost or stolen issued and blank passports. According to DHS, all current and aspiring visa waiver countries report lost and stolen passport information to Interpol, and many report to the United States. The 9/11 Act requires agreements between the United States and Visa Waiver Program countries on the reporting of lost and stolen passports within strict time limits; however, none of the current visa waiver countries have established lost and stolen passport reporting agreements by signing MOUs with DHS. DHS also still needs to fully implement our recommendations to create real-time monitoring arrangements, establish protocols for direct communication with contacts at overseas posts, and require periodic updates from these contacts. For example, while the Visa Waiver Program Office has recently begun communicating and disseminating relevant program information regularly with U.S. embassy points of contact at Visa Waiver Program posts, officials at other Visa Waiver Program posts reported that they had little contact with the office and were not regularly informed of security concerns or developments surrounding the program.

In closing, the executive branch is moving aggressively to expand the Visa Waiver Program in 2008 to allies in Central and Eastern Europe and South Korea, after the countries have met certain requirements and DHS has completed and certified key security requirements in the 9/11 Act. However, DHS has not followed a transparent process for expanding the program, thereby causing confusion among other U.S. agencies and embassies overseas. The lack of a clear process could bring about political repercussions if countries are not admitted to the program in 2008, as expected. In addition, DHS is not fully assessing a critical illegal immigration risk of the Visa Waiver Program and its expansion since it does not consider overstay data in its security assessments of current and aspiring countries. DHS should determine what additional data and refinements

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of these data are necessary to ensure that it can assess and mitigate this potential risk to the United States. Finally, DHS still needs to take actions to fully implement our prior recommendations in light of plans to expand the program.

Chairman Feinstein, this completes my prepared statement. I would be happy to respond to any questions you or other Members of the Subcommittee may have at this time.

Contact and Acknowledgments

For further information about this statement, please contact Jess Ford at (202) 512-4128 or fordj@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. In addition, John Brummet, Assistant Director; Teresa Abruzzo; Kathryn Bernet; Joseph Carney; Martin de Alteriis; Etana Finkler; Eric Larson; and Mary Moutsos made key contributions to this statement.

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Highlights

Highlights of GAO-08-1142T, a testimony before the Chairman, Subcommittee on Terrorism, Technology, and Homeland Security, Committee on the Judiciary, United States Senate

Why GAO Did This Study

The Visa Waiver Program, which enables citizens of participating countries to travel to the United States without first obtaining a visa, has many benefits, but also has risks. In 2006, GAO found the Department of Homeland Security (DHS) needed to improve efforts to assess and mitigate these risks. In August 2007, Congress passed the 9/11 Act, which provides DHS the authority to consider expanding the program to countries whose short-term business and tourism visa refusal rates were between 3 and 10 percent in the prior fiscal year, if certain conditions are met. This testimony discusses GAO's recent report on the Visa Waiver Program. Specifically, it examines DHS's process for expanding the Visa Waiver Program and evaluates the extent to which DHS is assessing and mitigating program risks. GAO reviewed relevant laws and procedures, and interviewed agency officials in Washington, D.C., and in U.S. embassies in eight aspiring and three Visa Waiver Program countries.

What GAO Recommends

GAO recommended that DHS establish a more transparent process for Visa Waiver Program expansion, and improve and monitor overstay rates for current and aspiring program countries. DHS generally agreed with GAO's recommendations. The Department of Justice (Justice) discussed the importance of lost and stolen passport reporting, but did not comment on GAO's recommendations.

To view the full product, including the scope and methodology, click on GAO-08-1142T. For more information, contact Jess Ford at (202) 512-4128 or fordj@gao.gov.

September 24, 2008

VISA WAIVER PROGRAM

Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks

What GAO Found

The executive branch is moving aggressively to expand the Visa Waiver Program by the end of 2008, but, in doing so, DHS has not followed a transparent process. DHS did not follow its own November 2007 standard operating procedures, which set forth key milestones to be met before countries are admitted into the program. As a result, Departments of State (State) and Justice and U.S. embassy officials stated that DHS created confusion among interagency partners and aspiring program countries. U.S. embassy officials in several aspiring countries told us it had been difficult to explain the expansion process to foreign counterparts and manage their expectations. State officials said it was difficult to explain to countries with fiscal year 2007 refusal rates below 10 percent that have signaled interest in joining the program (Croatia, Israel, and Taiwan) why DHS is not negotiating with them, given that DHS is negotiating with several countries that had refusal rates above 10 percent (Hungary, Latvia, Lithuania, and Slovakia). Despite this confusion, DHS achieved some security enhancements during the expansion negotiations, including agreements with several aspiring countries on lost and stolen passport reporting. DHS, State, and Justice agreed that a more transparent process is needed to guide future program expansion.

DHS has not fully developed tools to assess and mitigate risks in the Visa Waiver Program. To designate new program countries with refusal rates between 3 and 10 percent, DHS must make two certifications. First, DHS must certify that it can verify the departure of not less than 97 percent of foreign nationals who exit from U.S. airports. In February 2008, we testified that DHS's plan to meet this provision will not help mitigate program risks because it does not account for data on those who remain in the country beyond their authorized period of stay (overstays). DHS has not yet finalized its methodology for meeting this provision. Second, DHS must certify that the Electronic System for Travel Authorization (ESTA) for screening visa waiver travelers in advance of their travel is "fully operational." While DHS has not announced when it plans to make this certification, it anticipates ESTA authorizations will be required for all visa waiver travelers after January 12, 2009. DHS determined that the law permits it to expand the program to countries with refusal rates between 3 and 10 percent after it makes these two certifications, and after the countries have met the required conditions, but before ESTA is mandatory for all Visa Waiver Program. For DHS to maintain its authority to admit certain countries into the program, it must incorporate biometric indicators (such as fingerprints) into the air exit system by July 1, 2009. However, DHS is unlikely to meet this timeline due to several unresolved issues. In addition, DHS does not fully consider countries' overstay rates when assessing illegal immigration risks in the Visa Waiver Program. Finally, DHS has implemented many recommendations from GAO's 2006 report, including screening U.S.-bound travelers against Interpol's lost and stolen passport database, but has not fully implemented others. Implementing the remaining recommendations is important as DHS moves to expand both the program and the department's oversight responsibilities.

United States Government Accountability Office