Persistent Inaction:
Inviting International Terrorism

The Sixth Annual Special Report by
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"*I believe we are entering a period this summer of increased risk.*"

Michael Chertoff, Homeland Security Secretary
Chicago Tribune, July 11, 2007

"*There are sleeper cells tied directly to al-Qaeda inside the United States. So we have the strategic warning, not the specific tactical warning, but we know their intent.*"

Admiral Mike McConnell, Director of National Intelligence
MSNBC interview, July 22, 2007

Why does the United States remain at risk six years after the mass murder and mass destruction of the September 11, 2001 attacks on our country by al-Qaeda terrorists? The only clear answer to that question is that interests that benefit from maintaining our borders open to a largely unrestricted flow of foreigners into and out of our country have effectively deterred measures that would close major loopholes that perpetuate our continuing vulnerability.

The nation's major continuing vulnerability falls into three categories:

- Inadequate screening of travelers entering and leaving the country.
- Inadequate control over illegal entry into the country and enforcement of the law denying employment to illegal workers.
- Lack of identity security.

Whether or not Homeland Security Secretary Michael Chertoff's "gut instincts" are correct and a new al-Qaeda attack occurs this year, the American public should know why our vulnerability in each of those three areas has not been adequately addressed, and who is responsible for hindering those efforts. It is clear that security against infiltration of international terrorists – or smugglers or illegal workers – will never be absolute in an age of international trade, and travel, but that does not mean that we should tolerate unnecessary loopholes in our defenses against the terrorism threat simply because doing so benefits business interests. The adoption of legislation in August this year to further implement recommendations of the 9/11 Commission does not close the loopholes identified in this report, and actually widens the loophole created by the Visa Waiver Program that admits foreign travelers from certain countries without in-country scrutiny by our consular officers.

We cannot assess whether the nation's ability to detect and disrupt terrorists plotting abroad for an attack on America has improved. However, the judgment that we are still unnecessarily vulnerable to attack indicates that whatever improvement there may have been is not sufficient protection. We must therefore focus on the domestic situation in which an attack will be prepared and executed and ask whether adequate efforts are being made to prevent terrorists from operating on our soil.

A major challenge to protecting the nation's homeland is the enormous stream of hundreds of thousands of foreigners illegally crossing our borders or otherwise taking up illegal residence in our country annually. Identifying and intercepting the intending terrorist in this flow is the age-old problem of finding the needle in the haystack.

Similarly, the presence of 12 million or more illegal residents in the country hampers the surveillance of terrorist cells. The presence of these millions of foreigners is defended by vocal interest groups representing civic, religious, ethnic, and employer associations and like-minded politicians, and in some locations has led to the adoption of sanctuary policies that constrain the vigilance of police forces. This constitutes an environment within which intending terrorists may easily operate. The illegal alien population is one that that hides from authority, owes its presence to knowingly violating our immigration laws, engages in the use of fraudulent identity documents – increasingly on the basis of identity theft of U.S. citizens – and often comes from cultures where law enforcement agencies are seen as oppressors.

The symbiotic relationship between the illegal alien population and terrorists is best demonstrated in the fact that some of the 9/11 terrorists used the same channel regularly used by illegal workers to fraudulently obtain driver's licenses in Virginia.[1] That fact led the 9/11 Commission to identify the urgent need to adopt a national system of secure identity documents.[2] The law enacted in 2005 to implement that recommendation has not yet entered into force. The provisions of the REAL ID Act that were to enter into force in 2008 but have been delayed to 2009 as a number of states have objected to the law's requirements as an unfunded mandate. A number of fringe groups on the right (libertarians) and the left (ACLU and other civil libertarians) are working to overturn the law, thereby perpetuating a major weakness in the nation's defense against terrorism.

The announcement on August 10 by the Bush administration of a package of stepped-up enforcement measures at the border and at the worksite offers the prospect of limiting the flow of illegal immigration into the country and encouraging return migration of those here illegally, but, as is discussed below, loopholes remain that jeopardize national security.

BACKGROUND

Several important measures have been taken to reduce our domestic vulnerability to international terrorism. Some

of these occurred quickly after the attacks, others have been adopted painfully slowly or remain works in progress, while in some areas vested interests have stymied necessary reforms or have worked to widen already existing loopholes in our security.

Most analysis of the conditions that allowed 19 Muslim terrorists on a suicide mission into the country and allowed several of them to train here to fly the commercial airplanes which they turned into weapons of mass destruction and to travel freely in our country over an extended period of time faulted our intelligence services abroad and at home for their failure to identify and prevent the plotting.

There was a rapid response to the country's vulnerability demonstrated so horrifically in the 9/11 attacks which took the form of efforts to locate and screen young Muslim males in the country who might be connected to potential terrorist cells. This had the primary effect of identifying and removing young Muslims who were illegally residing in the country – many of whom simply moved to Canada. Nevertheless, the recent detection of six Muslim plotters – three of whom were illegal aliens and two of whom were immigrants – engaged in plotting a terrorist attack at Fort Dix, New Jersey, suggests that the FBI is less likely today to overlook leads to future terrorist plots.

More slowly, under pressure from Congress, the federal government has undertaken reorganization designed to overcome the intelligence compartmentalization that kept information on some of the 19 terrorists from being shared with either State Department visa issuers, Immigration and Naturalization Service inspectors screening arriving foreign travelers, or with the FBI until it was too late. The creation of the National Intelligence Directorate in 2005 is designed to overcome jurisdictional jealousies among the intelligence collection and evaluation agencies.

The State Department slowly accepted that its laissez faire visa screening procedures, especially in Saudi Arabia, had allowed 15 of the 19 terrorist to obtain visas despite information gaps in their applications. The culture in the State Department's visa issuance operation of providing service to the foreign public and the U.S. tourist industry and other business interests gave way only reluctantly to the view that the role of the visa screener is to deny visas to ineligible travelers – whether they be a threat to the country or simply potential violators of their visa status. Public complaints by business and academic spokespersons about the difficulty – often expressed as slowness – of obtaining visas offer the hope that the State Department's consular service is withstanding the incessant drumbeat of pressures from the travel industry and other U.S. businesses to return to the "business as usual" *status quo ante*.

The Bush Administration saw initial efforts to open the border with Mexico through an amnesty for illegal aliens and a new expansive guest worker program sidelined by the 9/11 attacks. Although none of the 19 terrorists had sneaked across the border into the country, the earlier apprehension in December 1999 of "millennium bomber," Ahmed Ressam, as he entered from Canada with explosives intended for an attack at Los Angeles International Airport pointed clearly to our vulnerability to terrorist infiltration across our borders. Congress enacted authority and funding for increased border security – Border Patrol personnel, equipment, and fencing – and the administration has increased operations to locate and remove aliens with outstanding deportation orders. However, major changes in the practice of dealing with illegal entrants have only begun to show signs of a serious effort in the past year under the leadership of Homeland Secretary Chertoff. His initiatives to end the "catch and release" practice, i.e., citing apprehended illegal entrants to show up for a subsequent removal hearing and then releasing them into the country, and to increase workplace enforcement demonstrate that the current laws provide ample opportunity for ending the perception that our immigration law enforcement effort is a sham that can be ignored with impunity.

Congress also enacted a number of measures recommended by the 9/11 Commission as needed to increase the nation's defense against further terrorist attacks. A key measure was the requirement that the issuance of driver's licenses – our de facto national identification system – incorporate new safeguards to thwart issuing these IDs to foreigners who are in our country in violation of the law or for whom an intelligence alert has been issued. The REAL ID law, however, is not yet operative, and a rear-guard effort is underway to sidetrack it before it can be implemented. Opposition comes not only from the various advocacy groups with a vested interest in maintaining the status quo, but from foot-dragging bureaucrats in state DMVs who are by nature resistant to change.

This effort is reminiscent of the successful reversal of a law adopted by Congress in 1996 to establish a system of secure state-issued identity cards. The 1996 law was

adopted in response to recommendations of the U.S. Commission on Immigration Reform prompted by the first terrorist attack on the World Trade Center in 1993. Had that earlier law not been reversed before it went into effect, the 19 terrorists would have been less likely to have been able to show U.S. driver's licenses in order to board the four airliners on September 11, 2001.

That consular screening process has been partially short-circuited since 1986 when Congress was convinced by the tourist industry to eliminate the requirement for a visa for foreign travelers from countries considered to have few ineligible travelers and which reciprocally do not require visas for U.S. travelers. The Visa Waiver Program (VWP) pilot project, adopted at a time when this nation felt impervious to international terrorism, was made permanent in 2000. It exempts travelers from a current list of 28 countries from the first screening step.

"*We judge the U.S. Homeland will face a persistent and evolving terrorist threat over the next three years. The main threat comes from Islamic terrorist groups and cells, especially al-Qa'ida, driven by their undiminished intent to attack the Homeland and a continued effort by these terrorist groups to adapt and improve their capabilities.*"

National Intelligence Estimate 2007
"The Terrorist Threat to the U.S. Homeland"

Despite these remedial actions taken in response to the 9/11 attacks, and the acknowledgement by the Secretary Chertoff and other administration officials that we remain vulnerable, several glaringly needed reforms remain undone.

AGENDA OF UNDONE REFORMS

Inadequate Screening of Travelers Entering and Leaving the Country

The Visa Waiver Program

The system of protecting the country against foreign travelers who would do harm to the public or who are undesirable is a two-step process. The first step is an evaluation by consular officers as to whether an applicant is qualified under our immigration law for a visa. The second step is an examination by immigration inspectors at U.S. ports of entry.

Grounds for refusal of nonimmigrant travelers by our consular officers include whether the visa applicant is excludable for one or more of the criteria specified by the Immigration and Nationality Act. Those include crimes, communicable diseases, membership in organizations considered a threat, likelihood of becoming a public charge, or simply intending to take up residence in our country as an illegal alien rather than coming as a *bona fide* temporary visitor.

The second step of screening at the port of entry – which is the only screening undergone by travelers entering from visa waiver countries – is largely confined to automated checking of whether the traveler's passport has been recorded as belonging to someone who is inadmissible, and a visual determination of whether the passport and visa – if there is one – appear authentic and belong to the entry applicant. This step often conducted under pressure of a long line of arriving passengers is generally cursory and unlikely to identify *mala fide* travelers unless they are in the database of excludable travelers.

The 9/11 terrorist attacks raised serious questions about the wisdom of the VWP. In part, alarm bells went off because a majority of the 9/11 terrorists entered the country with visas obtained in Saudi Arabia. While Saudi Arabia is not one of the designated VWP countries, the only reason that it was not among those preferential countries was because Saudi Arabia rejected reciprocal treatment to traveling Americans. For that reason, the visa-issuing officers in Saudi Arabia were reportedly under instructions to issue visas with virtually no screening. That proved to be the case when the visa applications of the 9/11 terrorists were examined in the post mortem. Required information that might have led to greater scrutiny was missing but went unchallenged.

"*All the hijackers whose visa applications we reviewed arguably could have been denied visas because their applications were not filled out completely. Had State [Department] visa officials routinely had a practice of acquiring more information in such cases, they likely would have found more grounds for denial. For example three hijackers made statements on their visa application that could have been proved false by U.S. government records…, and many lied about their employment or educational status.*"

The 9/11 Commission Report, p. 564.

In the aftermath of the attacks, other concerns about the VWP arose from the identification of Zacharias Moussaoui, who was undergoing commercial pilot training in the United States. Moussaoui was convicted of involvement in terrorism plotting. He was able to enter the United States without a visa because he is a French national of Moroccan ancestry. Moussaoui was also an associate of Richard Reid, the shoe bomber who attempted to blow up a commercial airliner en route to the United States. Reid also was traveling to the United States without a visa, as he was traveling on a British passport.

Evidence of the threat of providing automatic preferential entry to travelers from the mostly European countries that participate in the VWP is not limited to just those two instances. Europe has very large enclaves of immigrants from countries with majority Islamic populations. Moreover, Europe has become a breeding ground of Islamic extremism, stoked by radical imams. While the 9/11 terrorists were citizens of Saudi Arabia and Egypt, most were indoctrinated into radical Islam in Europe.

The danger of European bred Islamic radicalism has not abated since 9/11. Members of those populations have participated in recent terrorist attacks in Europe – in London, in Madrid, in Glasgow – and, because of their nationality could just as easily have entered the United States without visa screening to carry out their attacks here.

An additional vulnerability resulting from the operation of the VWP is the potential of intending terrorists to enter the United States with stolen or altered passports of countries that participate in the program. The seriousness of this threat is compounded by the lack of real time reporting of lost and stolen passports – especially unissued passports. As Sen. Dianne Feinstein noted in a press release on May 13, 2004, "Furthermore, lost and stolen passports from Visa Waiver Program countries provide easy access documents to any terrorist that wants to enter this country, More fundamentally, as the Office of Inspector General [Homeland Security] points out, the Visa Waiver Program does not have the safeguards in place by which passports can be readily identified as fraudulent or stolen. This is the greatest security problem with the Visa Waiver Program, and poses a major security risk to our country."

As of July 2006, the Government Accountability Office reported that despite efforts by the U.S. Department of Homeland Security (DHS), four of the VWP countries still were not reporting to Interpol missing passports so this information was not available to the database used by U.S. immigration inspectors at ports of entry.[3] The GAO recommended that the DHS act to require the reporting by VWP countries of non-biographical data from blank or lost or stolen issued passports and to make that information automatically available to inspectors at U.S. ports of entry.

The Gaping Loophole

All of the above factors highlight the security threat that is represented by the VWP. In the current environment, in which the continuing threat of attack on U.S. targets by al-Qaeda or other terrorists is so patent that governmental leaders have felt compelled to go on record warning the American public about this threat, it should be expected that the VWP would have at least been suspended until such time as the loophole was closed. Instead, legislation was signed into law on August 3 that will expand the number of countries that may participate in the VWP by loosening the criteria for participation. The legislation mandates pre-departure electronic database screening for travelers entering without visas, but this offers protection only against known terrorists traveling with documents in their own name.

Why the Loophole?

The VWP was adopted at the urging of the U.S. tourist/travel industry as a measure designed to encourage more foreigners to visit as tourists. The criteria for participation in the program specify that citizens from a participating country have a low rate of visa refusal, i.e., fewer than three percent of applicants and that they are traveling for tourism or business. This rate of refusal criterion was accepted as a reasonable risk that the travelers might be excludable because of a criminal record, communicable disease, or simply because they intended to stay illegally and look for work. A margin of error of three percent of travelers, when applied to possible terrorists, is an unacceptable one. The recent loosening of that standard defies logic when considered from the perspective of national security.

The expansion of the VWP is largely a result of the lobbying effort of the travel/tourism industry, but there also has been support from the administration, both during the Clinton and the Bush terms. The VWP resulted in a major workload reduction on the State Department's consular operations in the designated countries, which was apparently welcomed by the State Department leadership.

There is also some domestic nationality group advocacy for this change. For example, the *Polish News*, which bills itself as "America's Leading Polish Bilingual Illustrated Monthly," carried a May 17, 2006 announcement from the Polish American Congress organization which states, "Please contact your Senators today and urge them to vote for S. 2454 Securing America's Borders Act [which would allow Poland to be included in the Visa Waiver Program]."

The VWP has been largely limited to developed (OECD) countries. But with the recent expansion of the European Community to include Eastern European former Iron Curtain countries, this has generated diplomatic pressure to accord the new EC members the 'respect' accorded to the original members. This diplomatic pressure has included the argument that the support of some of these countries for our military involvement in Iraq, by sending their troops to that country, should be a sufficient basis for their inclusion in the VWP.

These domestic and diplomatic pressures for expansion of the VWP demonstrate a fundamental problem with the program, i.e., the VWP discriminates among countries. As a result there is a natural tendency by nationals of a country that see themselves discriminated against to demand equal access to the program.

How to Close the Loophole

FAIR has long criticized the VWP as an unnecessary risk of admitting travelers who should be excluded and has called for its termination. There should be no presumption just because a person comes from a given country that they are unlikely to be a threat to the U.S. public or are a *bona fide* nonimmigrant unlikely to remain illegally in the country.

The argument that ending the VWP would be a major cost to the U.S. taxpayer because of the increased personnel resources needed abroad to issue visas to travelers is disingenuous. While it is true that State Department personnel resources that have been cut since the adoption of the VWP would have to be restored, the visa issuance process is based on fees set at levels to cover the cost. Therefore, the cost would not be borne by the U.S. taxpayer.

Arguments about enormous inconvenience to foreign travelers leading to a reduction in travel are also misplaced.

> "*Without a delay [in implementing the requirement that travelers from VWP countries present passports containing biometric identifiers], VWP travelers will be required to apply for visas, thus increasing FY05 visa applications to almost double the FY03 demand. As a consequence, these visitors will most likely be subjected to the additional scrutiny and hassle of the visa process, which has already experienced heavy backlogs and turned away legitimate travelers.*"
>
> The Travel Business Roundtable[4]

The operation of the visa screening process before adoption of the VWP in the countries that are now included in that program normally entailed mail applications for most of those visa applicants with the requirement of an in-person visit to a consulate only in those cases of persons whose applications raised doubts about their visa eligibility. For travelers who obtained a visa, that visa normally was indefinitely valid – in effect the visa application process could be a once-in-a-lifetime experience for an adult.

The argument about inconvenience is also belied by the large number of travelers from visa waiver countries who voluntarily submitted applications for the INSPASS cards that facilitated faster entry screening at U.S. airports and by the acceptance of the application process for NEXUS passes that similarly currently facilitate the entry of Canadian travelers, who like VWP countries, also do not need visas to enter for business or pleasure.

As noted above, if it were not for the VWP and the fact that the U.S. visa issuance practice in Saudi Arabia was operating prior to the terrorist attacks as if that country were a VWP-eligible country, the admission of several – if not all – of the 9/11 terrorists might have been denied. In addition, the legal entry of persons who intend illegal residence in the United States would be diminished. Although, nationals of the current VWP countries do not rank high among estimates of the illegal alien population, they are not inconsiderable, as attested to by the activities of the Irish Lobby for Immigration Reform (ILIR), which has become a ubiquitous vocal advocate for the adoption of amnesty for illegal aliens.

Any reasonable focus on national security should result in rejection of the idea of expansion of the VWP. It would be less irresponsible to advocate suspension of the VWP until comprehensive data is available on a real-time basis to port of entry immigration inspectors on all stolen VWP-country passports and until the US-VISIT entry-exit data collection and comparison system is fully operational. However, neither of those measures would fully substitute for the in-country screening and judgment of consular officers trained in country conditions and the local culture and speaking the language of the country who have traditionally been the first line of defense against dangerous and undesirable foreign travelers.

The US-VISIT Program

The first international terrorist attempt to destroy the World Trade towers in New York in February 1993 led to recommendations that the country restore a system of data collection on all foreign travelers that matched the exit with the entry, and thereby identified foreign travelers who do not depart at the end of their authorized entry. As a result, Congress enacted, in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Section 110 of which required the development of an integrated electronic entry and exit data system.

The mandate for the government to develop this data recording system was suspended before it ever began by the adoption in 2000 of the Immigration and Naturalization Service Data Management and Improvement Act. The pressure for eliminating the foreign traveler tracking system came largely from the travel/tourist industry and business interests in border states that argued that the requirement would diminish cross-border commerce and tourism.

Therefore, when the 19 terrorists launched their simultaneous attacks on American targets in 2001, killing nearly 3,000 innocent victims, the country was no better protected than it had been eight years earlier. One of the terrorists had been admitted as a student but never enrolled in the school that had admitted him. Others were in violation of their status by overstaying the authorized entry. Still others were admitted despite the fact they had earlier violated their entry status. None of this information was available to the immigration authorities because it was not collected.

Following the 9/11 attacks, the mandate for developing a comprehensive entry-exit data collection system was renewed in the USA Patriot Act in 2001. The evolving system is termed the United States Visitor and Immigrant Status Indicator Technology (US-VISIT). In the ensuing six years, action on implementing this legal mandate has resulted in DHS establishing at all air and sea ports of entry a system to collect critical data. The system allows immigration officials to electronically read data in the passports of arriving travelers, collect fingerprints of travelers from VWP countries, and electronically compare data on arriving travelers from other countries with the data captured abroad when they obtained their visa. This data collection and comparison technology has also been installed at land ports of entry.

Separately, the DHS instituted a data reporting and collection system for foreign students which requires reports

from U.S. educational institutions on the students they enroll, i.e., the Student and Exchange Visitor Information System (SEVIS).

The Gaping Loophole

Knowing who is entering our country and whether they are doing so for their stated purposes is important, but the system still contains gaps that can easily be exploited by terrorists and others. The major loophole that remains is the absence of the comprehensive data collection on departing passengers and the comparison of entry and departure records to identify travelers who have violated their entry permit and have overstayed or remain illegally in violation of their permitted entry.

For example, a traveler currently entering from Canada may present a Canadian driver's license despite the fact that the document may be issued to foreigners residing in Canada or may be fraudulent. International travelers exiting the United States at land ports of entry-exit have to go out of their way at present if they want their exit recorded.

In the checklist of increased enforcement released by the Department of Homeland Security and the Commerce Department on August 10, the administration pledged to, "…explore effective and cost-efficient means of establishing biometric exit requirements at land border crossings." Another way to read this statement is that the U.S. is still not covered by the comprehensive entry-exit system that was mandated by the USA Patriot Act in 2001, and there is no commitment to complete that data collection system in the foreseeable future.

Is this an important loophole? The absence of a comprehensive data collection system for all entries and exits virtually assures that the immigration authorities will have no information on foreigners who enter the country and fail to leave when they are supposed to. Past experience with this problem when paper records were being collected indicates that as long as data gaps existed in exit information – sometimes as a result of non-collection by airlines and other times as a result of non-collection of the travel forms at land ports of departure – the authorities assumed that the absence of evidence of a departure was a data gap rather than an unlawful overstay, which was often the case. This assures that resources will not be expended on investigating whether any individual or group of individuals may be illegally residing in the country as they plot a terrorist attack.

Another loophole is the absence of a requirement of data reporting by employers or sponsors of foreign nonimmigrants admitted to the country for extended periods of time, as is required for foreign students. Participation in a reporting system similar to the SEVIS program should be required of the employers of long-term temporary workers, e.g. those with visas designated as H (stays up to and beyond 6 years), L (stays up to 5-7 years), R (1 to 4 years), TN (indefinitely renewable for 1-year periods). As with students, when one of these foreigners who is admitted for multi-year periods ends the employment that led to the visa issuance, the employer should be required to notify the DHS, and DHS should be looking for evidence that the individual has departed the country.

Why the Loopholes?

The evidence of apparent foot-dragging by the administration in implementing the US-VISIT data collection system appears in part to be technological, but it also appears to be a reaction to political pressure from the same travel/tourism and border state objections that led to the suspension in 2000 of implementation of the first mandate for the creation of a comprehensive entry-exit data collection system that was adopted in 1996.

The technological issues involve how to electronically collect data on departing passengers in a way that the data can be compared with the entry data without an unreasonable burden on transportation companies or on the government. For air and sea ports this is less a problem than for land ports because records are already generated on those travelers.

At land ports, the problem comes from the fact that most travelers come across the border in automobiles, and anything that constitutes more than cursory screening can lead to large traffic jams. Electronic screening similar to an EZ-Pass system would overcome the electronic data collection problem, but would record the passage of a vehicle rather than the travelers in the vehicle, so it would not be a solution.

The travel/tourism industry, joined by border state business interests have, since the beginning of efforts to require comprehensive entry-exit data collection, effectively raised objections to any provision that would slow or deter the flow of foreigners into the country.

The DHS currently has suspended any change in the entry-exit process for Mexicans and Canadians at land

"*International travel alone is one of the largest 'exports' for the U.S. and the largest services sector export category favorably impacting our balance of trade. These travelers spend more and stay longer than our domestic travelers and generated over $13 billion in tax revenues last year. Unfortunately, these travelers are declining as a direct result of post-9/11 concerns coupled with confusion about our security policies going forward. For every 1 percent drop in international arrivals, we lose 173,000 jobs and $1.2 billion in tax revenue.*"

Testimony of Eric Pearson, Senior Vice President, E-Commerce InterContinental Hotels Group
"Travel, Tourism, and Homeland Security: Improving Both without Sacrificing Either"
House Subcommittee on Commerce, Trade, and Consumer Protection, June 23, 2004

ports as it studies the issue of how to collect data. For Mexicans, the possibility already exists for electronically collecting entry data from the Border Crossing Cards or passports for arriving travelers. That system is not currently possible for Canadian arriving travelers by land, and there is no active effort to collect exit data on either land boundary.

How to Close the Loophole

Airlines already swipe passports of most international travelers and collect that data electronically. They are also able to compare check-in and departure manifests to identify any persons who have checked in but failed to board the flight. The information on these final manifests in electronic form offers a major, but not foolproof, means for collecting the departure data needed to compare with the entry data without any significant burden on the carriers. This should work as well for sea travelers.

The flaw in this system would be for persons who checked in for an international departure and then gave their ticket to another person to board the carrier. The control on that is the cursory screening that compares the traveler's picture ID with the name on the ticket and the fact that international and domestic departures are separated. This check is not foolproof, but it does offer a control on easy circumvention. The experimental program of DHS to get departing international travelers to electronically 'sign out' at kiosks in departure areas has not been successful and would not appear to work as long as it depends on the traveler's voluntary compliance.

The data collection system at land ports is more difficult to solve. Even though all travelers are required to have secure, machine-readable IDs, immigration inspectors are not presently collecting entry data on arriving foreign travelers, let alone departing travelers. For arriving foreign travelers other than Canadians and Mexicans, immigration instructors are supposed to obtain electronic entry data in the same way as at air and sea ports. That is also required for Canadians and Mexicans entering for other than short-term tourism or business visits – for which visas are required.

But the bulk of visits by Canadians and Mexicans are without visas. Mexicans enter with a Border Crossing Card issued by the U.S. Government, and Canadians enter with a Canadian driver's license or ID. DHS has been exploring with the Canadian government the possibility of the incorporation of nationality data in the driver's license so that non-Canadians could be identified at the port of entry. Another approach being considered is the issuance of a mini-passport that would be in the form of a machine-readable card that could be used by Canadians as well as Americans for cross-border travel. Or Canadians could be issued the same Border Crossing Card used by Mexicans. However, the problem is the issue of entering by automobile and screening multiple occupants.

Some countries, such as Mexico, use a two-tiered entry screening system so that local cross-border traffic can be speeded through, and then secondary document inspection occurs further into the country away from the population center. The more extensive U.S. highway and local road system would make that an expensive undertaking as a comprehensive screening system rather than its current spot-check operation. Besides, that would also entail the need for more comprehensive checks of border airports where foreigners can board domestic flights without proving legal status.

Given these constraints, the only truly comprehensive screening and data collection at land ports would appear to require the personal screening of all incoming passengers in the same way that all passengers are screened at an air or sea port. This implies that arriving travelers would

have to exit their vehicles and pass through a screening area. Arguably the flow of vehicles across the border could be maintained by moving them in the same fashion that vehicles are moved through a car wash. Admitted travelers would be reunited with their vehicles after screening, but facilities would have to be made available for moving the vehicles of non-admitted travelers out of the entry flow. An additional advantage would be that the empty vehicles could be consistently scrutinized for hidden aliens or drugs as they moved along the conveyer line.

Delays in the cross-border traffic could be ameliorated by pre-screening of frequent border crossers. The NEXUS Pass, already in use between the U.S. and Canada allows frequent travelers to go through a one-time screening procedure, after which they can move back and forth with only cursory checks by border guards. Fees collected from issuing these documents could be used to add pre-screened lanes or even separate checkpoints to expedite legitimate cross-border travel.

The problem of collecting exit data on international travelers could be handled similarly. However, an additional alternative would exist in the form of cooperative programs whereby traveler identification information collected by Mexican and Canadian officials on travelers entering from the United States could be furnished to the United States in exchange for information collected by U.S. authorities. This would require assurance that the same information collecting procedures as used by the United States were in force in the neighboring countries and were reliable.

Inadequate Border Control and Interior Enforcement

Turning Off the Job Magnet

The continuing massive flow of foreigners illegally seeking greater economic opportunity in our country is largely one that sneaks in across the border from Mexico. Of the average number of annual apprehensions by the Border Patrol, about 97 percent have been on the U.S.-Mexican border, and about the same share have been Mexican nationals. Apprehensions so far in FY 2007 are reported to be lower than average, perhaps as a result of increasingly effective enforcement or perhaps because of decreased employment opportunities in construction, or probably a combination of factors.

Nevertheless, the flow of illegal entrants is still so massive that detecting a terrorist or a reentering criminal deportee remains less than probable.

Congress recognized that turning off the job magnet was essential to cutting off illegal entry when it enacted the employer sanctions law in the 1986 Immigration Reform and Control Act (IRCA) legislation. It recognized that that law was ineffective in the 1996 IIRAIRA legislation when it instructed the administration to set up the means for employers to verify the work eligibility documents of their employees. This was done to allow employers who try to comply with the law a reasonable assurance that their workforce is legal. The verification system is still operating as a voluntary pilot project with only a small, but growing, share of the nation's employers participating in it.

The system works by verifying electronically with the Social Security Administration (SSA) that the employee's Social Security Number (SSN) is valid and issued to that named person. If the employee is foreign-born, the SSA forwards the file inquiry to the immigration authorities to verify that the individual is in a legal work status. Safeguards in the system prevent it from being used as a screening tool before employment and to allow an employee whose legal status cannot be verified to correct any data record error.

Congress has demonstrated its preparedness to make the document verification system mandatory for all employers. That was a provision that passed the House in the 109th Congress, and a similar, but more restricted provision passed the Senate – but only as part of a proposal that would have granted amnesty those illegal aliens already in the country and created a new guest worker program. Similarly, legislation that would make the verification system mandatory has been introduced in the current Congress in the House, and a provision conditional again on amnesty and a new guest worker program was introduced in the Senate, but failed to pass.

Most recently, on August 10, the administration announced new measures designed to discourage employers from continuing to employ illegal workers. Absent any new legislation, the administration announced that in the future employers could no longer ignore 'no-match' letters from the SSA that advised them that the SSNs of their employees did not match any record of the agency. The 'no-match' situation could result from a database error or a name change of which the SSA was not notified, but in most cases it indicated that the employee was using a fake Social Security card with a made-up number. The anguished expressions of concerns by employer associations suggest that they believe this will have a major effect

on their continuing ability to exploit low-wage illegal alien workers.

The Gaping — but Narrowing — Loophole

A flaw in the electronic document and identity verification system is that if the SSN listed by the employee is a legitimate one and the employee claims to be a U.S. citizen, the SSA will find a data match, and the file will not be sent to the immigration authorities. Thus, identity theft from a U.S. citizen thwarts the system. This was demonstrated earlier this year when Immigration and Customs Enforcement raided worksites of Swift & Co. and apprehended hundreds of illegal alien workers. Swift & Co. was enrolled in the document verification system, so those illegally working for the company either were workers hired before the company enrolled in the program or they were using stolen ID.

The same loophole will persist despite the administrations' announcement that it will begin treating the failure of employers to act on 'no-match' letters as *prima facie* evidence of knowingly having illegal workers on the payroll, which is a violation of the law for which fines or even jailing is possible.

The inability of the document verification system to detect identity theft creates a growing likelihood that illegal aliens will resort to this loophole to continue to work in the United States even though the penalties for identity theft are much more serious than for mere possession of a fraudulent ID. It, therefore, becomes increasingly urgent that this loophole be closed.

How to Close the Loophole

Although identity theft escapes the attention of the immigration authorities and may fool the employer, the SSA has the ability in most cases to recognize that the fraud is occurring. Their records reveal, for example if earnings are reported by a person under age to be working or someone who may be retired. Similarly, their records reveal when earnings records indicate that the same person is apparently working in numerous jobs at the same time or in numerous locations around the country. The improbability of these situations clearly should raise red flags suggesting identity theft. However, SSA is currently proscribed from sharing this information with other agencies of the government.

As DHS Secretary Chertoff noted in a press conference to announce the administration's new measures to control illegal immigration on August 10, "…we had asked Congress to give us clear authority to have information sharing with the Social Security Administration so that they could identify those companies which have the highest percentage of no-match letters. Congress didn't give us that; we've asked for that for two years."[5]

Congress, once again, has shown a willingness to provide the authority to close this loophole that, if not closed, will likely lead to an increasing problem of identity theft and perpetuate the ability of foreigners to assume the identity of American while they engage in illegal activities in our country, but the law has not been amended largely because the change has been held hostage to the interests of employers and other defenders of illegal aliens who insist at the same time an amnesty must be adopted for those already in the country illegally.

Would data-sharing between SSA and DHS solve the problem of illegal aliens able to get jobs or benefits through ID theft? This reform would virtually close the loophole, but there will always be instances that slip through the cracks. The objective of the reform is to expose those employers who continue to knowingly hire and exploit illegal aliens so that ICE can effectively focus on them and put them out of business, and in egregious cases, behind bars. When the illegal alien population is diminished by turning off the job magnet, the interior immigration law enforcement can then become more effective in identifying the sweatshops and sex slavers that have always operated outside the law.

Ending Fraud in Humanitarian Entry

Our refugee program represents the altruistic nature of the American public as well as international responsibility. But, the caring nature of humanitarians is sometimes taken advantage of by opportunists and criminals. That is true as well in America's refugee policy.

The State Department recently acted to eliminate fraud in refugee admissions by requiring that a refugee had to identify all living family members at the time that the refugee was accepted for U.S. resettlement. The problem was that, because our refugee policy accepts family members of refugees already in the United States without any requirement that they establish that they too have been persecuted or face persecution, the loophole was being used to claim large numbers of unrelated persons as family members.

A provision of our refugee program known as the Lautenberg Amendment (sponsored by Sen. Lautenberg) has operated since 1989 to admit as refugees Jews and some other religious minorities from communist countries without having to meet the persecution test that applies to other refugees. In effect it is a blanket determination that any religious minority from a communist country is persecuted that may have had some validity during the Cold War, but certainly is not generally true today. Investigations found that the program was being used for members of the Russian mafia to enter the United States as refugees.

and asylees applicants. The importance of identity verification of persons admitted into the country permanently is heightened in the current environment in which the homeland is targeted for terrorist attack by foreign groups.

Then Assistant Secretary of State, Bureau of Population, Refugees, and Migration, Gene Dewey acknowledged to the Senate Judiciary Subcommittee on Immigration, Border Security, and Citizenship in a September 9, 2004 hearing on the U.S. refugee program that the program is susceptible to use by international terrorists. He said that the refugee security screening system has had some

"*So let us take our fair share of the true refugees and act responsible as a government in providing for their necessary expenses. Let us stop skewing the whole process by taking some folks who are not truly refugees in order simply to meet our foreign policy needs or domestic policy demands. There has to be a better way to meet those needs and demands than we are doing now. I think it is embarrassing to all of us who truly know the mission of the Refugee Act.*"

Senator Alan Simpson, Senate Committee on the Judiciary Hearing, Sept. 24, 1991

What all of these unique features of U.S. refugee and asylum policy have in common is that they are outside the normal flow of immigrants into the country, so that rather than having an employer or relative in the United States who is responsible for the refugees, the U.S. public in effect is made the sponsor of these persons. That in effect means that the identity and antecedents of these persons are not readily established and verified. As a result these programs may be used fraudulently by persons who are not innocent victims of persecution, as demonstrated in the case of the criminals entering in the Lautenberg program.

The Humanitarian Loopholes

The security problems inherent in our humanitarian refugee admission policies derive from the fact that it is very difficult to identify and verify the identity of persons who are living outside their home country. In addition, as these persons allege that they are subject to persecution if returned to their home country there is a constraint on sharing information on the refugee applicant with that person's government in an effort to verify the person's claimed identity and activities.

This inherent difficulty in establishing identity should lead to the adoption of cautionary policies in accepting refugee

"hits," implying that some applicants have been identified as connected to terrorist groups.

Rightly, the administration has slowed the refugee admission process in an effort to verify identity and any possible affiliation of refugee applicants to terrorist groups. The result of this slowdown has been lobbying by the refugee resettlement groups in the United States, most of which are offshoots of religious denominations, to speed up the screening process in order to increase the flow of those admitted. There is a form of vested interest in this advocacy in that the persons pressing for increased refugee admissions owe their livelihood to refugee resettlement programs funded by the federal government.

There is abundant evidence that U.S. humanitarian entry policies are recognized by international terrorists as an opportunity to gain the means to operate freely within our country. The record clearly establishes that this is the case, not only in the United States, but in Canada as well, from which entry into the United States is largely unregulated.

For example, Mir Amal Kansi, a Pakistani who murdered two CIA employees in 1993 was able to move freely in

the country on the basis of his application for political asylum in 1992. Several of the terrorists in the 1993 attempt to blow up the World Trade Center, Ramzi Ahmed Yousef, Mohammed Salameh, and Sheik Abdel Rahman, had similarly applied for asylum and were released. In 1997, arrested terrorists plotting suicide bombings in New York included Ghazi Ibrahim Abu Mezer, a Palestinian who had been released from detention after applying for asylum on the basis he would be persecuted by Israeli authorities for belonging to the Hamas terrorist organization if he were deported. Millennium bomber, Ahmend Ressam, who was arrested upon entered the United States from Canada in 1999 – where he had been granted asylum, was intending to join up with Abdelhakim Tizegha, who had applied for asylum in the United States and had been released pending a hearing.

Narrowing the Loophole

It is not possible to demand verifiable identity documents of all persons who are applying for entry as refugees because of the conditions that create true refugees. The screening process has been made more rigorous since the 9/11 attacks. Nevertheless, the opportunity for foreigners to gain permanent residence in the United States fraudulently through the refugee admission provisions can certainly be lessened further by eliminating the special provisions that have been adopted to admit flows of persons outside of normal international refugee protection programs.

While adoption of these reforms will not entirely eliminate the possibility for international terrorists to insert themselves into the country as refugees, by narrowing the intake of exceptional refugees, many of whom enter the country illegally and then apply for refugee status as asylees, the country's exposure will be lessened, and security screening of refugees will be less over overextended and, therefore, more rigorous.

Lack of Identity Security

The ability of immigration inspectors and domestic law enforcement agencies to protect the American public against terrorism and other threats depends on their ability to identify who it is entering the country and freely moving about within it. As the 9/11 Commission noted, "It is elemental to border security to know who is coming into the country." The Commission report also noted that "All but one of the 9/11 hijackers acquired some form of U.S. identification document, some by fraud."

This focus on the slipshod and corrupted processes of issuing identity documents in our country as well as the proliferation of false identity documents in response to the mushrooming illegal alien population requiring them to get employment led to the adoption of a mandate for a system of secure state issued driver's licenses and identity cards that are based on verification of birth certificates and are interoperable among states so that a person is prevented from gaining multiple identity documents.

It is astonishing that six years after the 9/11 attacks, the nation still remains vulnerable to the ability of terrorists and other law breakers to take advantage of lax local identity document issuance procedures to gain our de facto national identity documents. It is not that the need for secure identity documents has not been recognized or addressed by the nation's policymakers. But the REAL ID law, enacted in 2005, has not yet entered into force, nor have implementing regulations been issued by DHS.

Even though Congress chose to maintain our decentralized state-based identity document system, new features of 'breeder' documents, such as birth certificates has resulted in a campaign to label the new requirements a system of "national ID cards." To libertarians and civil libertarians (e.g. the ACLU) this is seen as an intrusion in individual privacy. These organizations and, presumably, interests that seek to maintain the ability to exploit illegal alien workers have been working at the state level to create policies of non-cooperation with the enacted federal requirements, which are voluntary. Several states have adopted statements of non-compliance even before the federal requirements have been issued.

Assisting the rear guard campaign against the new identity requirements is the fact that Congress has so far defeated efforts to appropriate funds to assist the states in making the transition to the new system.

Opponents of REAL ID base their position on the view that the federal government should not be regulating state practices in issuing identity documents. Neglected in this discussion is the fact that the federal government has been exercising jurisdiction for years over the licensing of commercial truckers so that they are not able to jump from one state to another if they have a suspended license. In a related fashion, the federal government has sole responsibility for licensing pilots for obvious reasons of safety.

In theory, the loophole of slipshod issuance of driver's licenses and identity cards by the states would be closed

by implementation REAL ID, but the posturing of state legislatures – which may be more aimed at seeking federal financing of the transition to the new requirements than anything else – is troublesome, and the issue bears careful watching by all who recognize how vital this is to national security.

RECOMMENDATIONS

- End the discriminatory visa waiver program. *This policy change can be accomplished by executive action in suspending the program for each of the currently participating countries, but should be made permanent in legislation.*
- Withhold any change in temporary worker programs until the US-VISIT program is fully operational for all foreigners entering and departing at all ports of entry. *This is a commitment that is essential to assuring that the means exists to identify individuals and groups who are in violation of their entry status.*
- Require the Social Security Administration to share information with the Department of Homeland Security on instances of possible identity theft and unauthorized work of foreigners. *This badly needed policy improvement would require a change in the law which has already been requested by DHS Secretary Chertoff.*
- Facilitate implementation of the REAL ID program with appropriations to assist the states with the start-up costs of this vital security measure. *Congress has thus far failed to approve proposals to lessen the local fiscal impact of this mandate.*
- Close the provisions in the refugee program that offer those entering the country illegally the ability to stay as refugees except in the most clear-cut cases of protection from persecution. Refugees should be able to bring spouses and minor children, but other relatives should not be admitted unless they meet the refugee criteria in their own right. *Some of these changes can be instituted by executive action while others require Congressional action.*
- Accept no further delays in establishing core standards for secure identity documents and assist the states in making the transition to the new system.

CONCLUSION

Because we will never have air-tight national security, there will always be trade-offs between measures to improve security and measures to accommodate international commerce and travel. It is understandable that businesses that benefit from the freer movement of goods and services into and out of the country will constantly push for relaxed controls. However, the consequences of another 9/11-type attack against the United States would result in far greater harm to these economic interests than the reasonable measures that have been proposed to prevent such an attack.

It is similarly to be expected that ethnic and nationality-specific advocacy groups will constantly push for policies that increase their demographic presence and clout. However, the first responsibility of the federal government is to safeguard the security of the nation and its citizens. These considerations cannot take a backseat to ethnic politics.

Similarly, but less logical, is the practice of foreign governments in pressing the United States not to deport their nationals and to accept increased numbers of migrants from their countries. This short-sighted attitude of promoting the loss of their human capital is spurred by the large flow of remittances that their nationals are able to send home. Clear-cut evidence of this effort to shape our immigration policies through diplomacy may be seen in the recurring pleadings of Central American countries to extend Temporary Protected Status to their nationals so that they can continue to work in the United States and be protected against deportation. In other cases, such as with Cuba where the Castro regime blackmailed the U.S. government – with the threat of unleashing another *Mariel* exodus – into establishing an annual quota of 20,000 immigrants outside of the normal immigration quota system, the motivation is more likely attributable to easing domestic political unrest.

"*…counter terrorism measures must be conducted in a manner that does not unduly interfere with the flow of commerce. …DHS's need to collect information on terrorist suspects and signs of potential terrorist activities could touch on every segment of the industry, affecting hotels, credit card companies, airlines, travel agencies and restaurants, and raising concerns about protecting customers' privacy.*"

Travel Business Roundtable[6]

The role of policymakers is to balance competing interests in crafting laws and in their oversight of government policy and practice. The public interest in being protected against international terrorism is more diffuse than the net income bottom line of a business, and the issues involved in providing protective measures are more abstract. This necessarily means that in the day-to-day give-and-take dynamic of the legislative arena, focused business interests will have a more effectively targeted and insistent voice than the public at large. They are also more likely to see efforts to influence policymaking as a cost of doing business. This is true as well in the administration, where the practice of consulting with "stakeholders" usually means persons with vested interests, rather than groups that speak for the public good.

In this regard, public interests are likely to be slighted unless lawmakers and policymakers give greater attention to the long-term, less tangible priority of public safety from terrorist attack than to the advocacy of vested interests. This is more likely to happen if the administration and Congress are on notice that the public is not only concerned about the issue, but also that the public is aroused and is paying attention to the policies and practices of their elected representatives.

No one can put a cost of the devastating loss of life that would likely occur as a result of another large-scale terrorist attack. Monetary costs are another matter. Against the claims of the tourism industry that they would lose millions of dollars in income if travel provisions for entering the United States were made more difficult, the estimated cost of the destruction caused by the 9/11 attacks must be recognized. Just the short-term costs of that horrendous destruction have been estimated as high as $50 to $60 billion.[7] Longer-term costs in such areas as increased insurance premiums and increased security measures would significantly increase that estimate. And, of course, the terrorist attacks adversely affected tourism as a result of the increased concern among foreigners about being exposed to danger in the United States.

"*I believe the very definition of national security also must include consideration of our economy and the impact our actions may have on it. I know that the U.S. travel and tourism industry is a vital segment of the U.S. economy and one of our largest earners of foreign exchange…For our own well being as a country, and because we have so much to give, we must keep our doors open to the world. We must facilitate legitimate travel while striking the delicate balance between secure borders and open doors of which I have spoken today.*"

Maura Harty, Assistant Secretary of State for Consular Affairs
March 25, 2004 (Department of State website)

ENDNOTES

1 Kephart, Janice L., "Identity and Security: Moving Beyond the 9/11 Staff Report on Identity Document Security," February 2007.

2 The 9/11 Commission Report, p.390, "Secure identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification, such as drivers licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists."

3 "Border Security: Stronger Actions Needed to Assess and Mitigate Risks of the Visa Waiver Program," Government Accountability Office, (GAO-06-864), July 2006.

4 The Travel Business Roundtable, "Statement for the Record to the House Committee on the Judiciary, Hearing on the 2004 Statutory deadline for Requiring Visa Waiver Program Travelers to Present Biometric Passports," April 21, 2004.

5 "Remarks By Homeland Security Secretary Michael Chertoff And Commerce Secretary Gutierrez At A Press Conference On Border Security And Administrative Immigration Reforms," DHS Press Release, August 10, 2007.

6 Travel Business Roundtable website consulted August 13, 2007 (http://demo.democracydata.com/tbr/summary.asp?subject=37)

7 NATO Parliamentary Assembly, 2002 Annual Assembly General Report, *The economic consequences of September 11, 2001 and the economic dimension of anti-terrorism.* "The most obvious and readily calculable damage was to the infrastructure of New York's financial district and the unprecedented insurance claims, which range between $50 and $60 billion."

The Federation for American Immigration Reform (FAIR) is a national, nonprofit, public-interest, membership organization of concerned citizens who share a common belief that our nation's immigration policies must be reformed to serve the national interest.

FAIR seeks to improve border security, to stop illegal immigration, and to promote immigration levels consistent with the national interest–more traditional rates of about 300,000 a year.

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