



Visa Policy, Security and Transatlantic Relations

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Managers of a multinational corporation call an emergency meeting in London and a US businessman hops on a flight to Heathrow; a German couple books a last-minute vacation and flies to Florida; a Boston woman breaks her hip and her Irish sister comes from Dublin to care for her. Such spontaneous transatlantic travel has become a common occurrence made possible by international cooperation enabling visa-free travel – cooperation that is taken for granted until the relative ease of travel is threatened, as it was after the attacks of Sept 11, 2001.

The Visa Waiver Program (VWP), which permits visa-free travel to the US for nationals of states such as the UK, France, Germany and Ireland, emerged from obscurity after the 9/11 attacks, when it became clear that Zacarias Moussaoui, the so-called “20th hijacker,” had entered the US using just his French passport. Then British national Richard Reid boarded a transatlantic flight in December 2001 with only his passport and tried to detonate a bomb in his shoes. Citing such examples, Robert Leiken described the risks of “a passport-carrying, visa-exempt mujahideen coming from the United States’ western European allies.”²

After 9/11, the US Congress considered abolishing the Visa Waiver Program but then only stiffened its requirements while adding new members

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² Robert Leiken, “Europe’s Angry Muslims,” *Foreign Affairs*, July/August 2005.

was put on hold. Meanwhile, excluded states like Bulgaria, the Czech Republic, Hungary, Poland, Romania, Slovakia and the Baltic states were joining the US-led “coalition of the willing” to fight the “war on terrorism” in Iraq and Afghanistan and they expected US reciprocity with visa-free travel. Radek Sikorski, now Poland’s Foreign Minister, once poignantly noted that British and French citizens, whose ranks included al Qaeda terrorists detained in Guantanamo, were allowed to travel to the US without a visa, whereas not a single Polish national had been identified as a terrorist but visas were still required of Poles.³ Polish soldiers returning from a tour of duty in Iraq could not take their families to Disneyworld without considerable extra costs and hassles, even if they managed to get a visa.

The US Visa Waiver Program excluded all but one of the ten new member states that joined the European Union (EU) in May 2004. Given that the EU has a common visa policy, asymmetries in US treatment of “old” and “new” EU member states raised a thorny transatlantic problem. According to the EU’s common visa policy at the time, any EU member state from which the US requires a visa could reciprocally require visas of US nationals and invoke a solidarity clause that would, in turn, result in US nationals needing visas to travel to all EU member states. Were this to occur, the US would require visas of all EU citizens and visa-free transatlantic travel would end, resulting in State Department consular service costs in the hundreds of millions of dollars, tourism losses in the billions and incalculable ill-will among the traveling public.

Due to painstaking diplomacy between the Department of Homeland Security (DHS) and its European counterparts, a revision of the EU’s common visa policy and reform of the US Visa Waiver Program that enabled entry of seven EU member states, transatlantic visa-free travel has survived. However, the diplomatic impasse festers given that the US still requires visas of nationals from several EU member states. The political compromise of US visa reforms may also have unforeseen consequences for international travel that raise new issues for policymaking and diplomacy. Nevertheless, there are few realistic options for the Obama administration other than fully implementing legislation already passed and pressing Congress for sufficient resources to do so.

³ Radek Sikorski, statements made on panel discussion, “Fortress America? The Implications of Homeland Security on Transatlantic Relations,” American Enterprise Institute, Mar. 4, 2004. A video of the event is available at: http://www.aei.org/events/eventID.758,filter.all/event_detail.asp.

A New World Order of Networking Homeland Security Officials

In the opening of her book, *The New World Order*, Anne Marie Slaughter draws attention to the networks of government officials who “increasingly exchange information and coordinate activity to combat global crime and address common problems on a global scale”.⁴ Rather than thinking of the world in terms of unitary states interacting through the head of state or foreign ministry, Slaughter argued that the state has become “disaggregated” with the accelerating growth of “transgovernmental relations”⁵ between parts of states, including interactions of finance ministries, environmental ministries and interior ministries.

Slaughter’s depiction of growing transgovernmental relations and governmental networks is supported by the fact that the DHS, its counterpart interior ministries in the EU and the European Commission are not only implementing international agreements negotiated by foreign ministries, they are increasingly developing their own diplomatic capabilities and negotiating agreements governing visa policies and border controls. For example, the DHS established an international section of its Office of Policy and posted a DHS attaché to the US Missions to the European Union and NATO in Brussels. Similarly, the European Commission’s Directorate General for Justice, Freedom and Security established an “External Relations and Enlargement” unit and an “International Aspects of Migration and Visa Policy” unit as well as posted an official with responsibility for justice and home affairs in the European Commission’s delegation in Washington. As detailed below, these diplomatic capabilities were put to work in efforts to maintain transatlantic visa-free travel while increasing its security. In some cases, however, agreements between interior ministries and law enforcement agencies are reversing longstanding international norms of state-to-state relations going back to the League of Nations.

⁴ Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2005), p. 1.

⁵ Robert O. Keohane and Joseph S. Nye, “Transgovernmental Relations and International Organizations,” *World Politics*, Vol. 27, No. 1 (Oct., 1974), pp. 39-62.

Passports, Visas and Visa-Free Travel

The modern passport and visa developed toward the end of 19th century and at a 1920 Paris Conference sponsored by the League of Nations, states standardized passport and visa formats, adopting the now familiar multi-page book passport.⁶ At the time, states considered making issuing states responsible for vetting passport applicants for their criminal records and their admissibility to other states but decided to only require that the passport signifies that an individual is the national of the issuing state. Destination states remained responsible for investigating the credentials presented by travelers and making entry decisions. To help control their borders, states increasingly relied on the visa, an authorization given by a state to the nationals of another state to travel and present themselves to authorities for inspection at ports of entry. Visa applications typically involve submission of identity documents, return tickets, bank statements, immunization records and an interview with consular officials abroad who then issue visas by stamping them in the prospective traveler's passport.

As the volume of international travel increased with the introduction of large passenger jets, many states eventually eliminated visa requirements for short term visits on a bilateral reciprocal basis. For example, the US Visa Waiver Program permits travel to the US for purposes of business or pleasure for up to 90 days without a visa by nationals of states that similarly permit visa-free travel by US nationals. Begun as a pilot program with the UK and Japan in 1988, the Visa Waiver Program became permanent in 2000, when 17.6 million travelers entered under the program accounting for over half of overseas visitors.⁷ The program was made permanent largely because it saved billions of dollars in costs that would have been incurred processing visas and facilitated significant growth in international tourism to the US during the 1990s. The program grew to 29 members in 1999; dropped to 27, when Argentina and Uruguay membership was terminated; and, as of December 2013, includes 37 countries.

⁶ See Martin Lloyd, *The Passport: The History of Man's Most Travelled Document* (Stroud, U.K.: Sutton Publishing 2003) and Mark B. Salter, *Rights of Passage: The Passport in International Relations* (Boulder CO: Lynne Rienner Publishers, 2003).

⁷ "Implications of Eliminating the Visa Waiver Program," Report of the United States Government Accountability Office, GAO-3-38, Nov 2002, p. 21.

The visa was initially developed as a tool of immigration law enforcement but it also became a tool of diplomacy. States use the issuance or denial of visas to individuals, certain groups or all nationals of particular states in efforts to influence other states' policies.⁸ As will be made clear below, foreign policy considerations have been crucial in changing US visa policies and, in the process, collided with immigration law enforcement.

Security Concerns vs. Economic Benefits

In response to the 9/11 attacks, Congress passed the USA PATRIOT Act requiring states in the Visa Waiver Program issue machine-readable passports by 2003. After the "shoebomber" incident, members of Congress called for the elimination of the US Visa Waiver Program altogether. The Government Accountability Office then estimated that eliminating the program would initially cost the State Department up to \$1.28 billion for consular facilities and staffing and generate ongoing annual costs of up to \$810 million (roughly 11% of the State Department's entire \$7.4 billion FY 2002 budget). A Commerce Department study estimated that, over a 5-year period, eliminating the program could mean a loss of three million visitors, \$28 billion in tourism receipts and 475,000 jobs.⁹

After fully considering these costs, Congress retained the program but passed legislation in 2002 that required members of the Visa Waiver Program to issue passports with biometrics on radio frequency identification (RFID) chips.¹⁰ Then in 2006, UK officials uncovered a plot of over 20 British nationals of Pakistani origin, who planned to board US-bound flights and blow them up with liquid explosives. Congress held hearings where the Director of National Intelligence testified that Al Qaeda was recruiting Europeans because they could travel to the US with just a passport.¹¹ Once again, members of Congress introduced legislation to eliminate the Visa Waiver Program.

⁸ See Kevin D. Stringer, "The Visa Dimension of Diplomacy," Discussion Papers In Diplomacy, No. 91, (2004) Netherlands Institute of International Relations (Clingendael) at: http://www.clingendael.nl/publications/2004/20040300_cli_paper_dip_issue91.pdf.

⁹ See "Implications of Eliminating the Visa Waiver Program," *op. cit.*, pp. 22-23.

¹⁰ The Enhanced Border Security and Visa Entry Reform Act of 2002, P.L. 107-173.

¹¹ Testimony of Mike McConnell, Director of National Intelligence, "Hearing on Confronting the Terrorist Threat to the Homeland Six Years after 9/11," Senate Committee on Homeland Security and Governmental Affairs, September 10, 2007.

US – EU Diplomacy and Political Pressures for Change

Other members of Congress and President Bush became advocates for expanding the program in response to domestic pressures, changing foreign policy agendas and EU enlargement. The Visa Waiver Program included all 15 members of the EU before the May 2004 enlargement (except Greece) but only one of the 10 new member states (Slovenia). US citizens enjoy visa-free travel to all EU member states under its common visa policy but after enlargement, nationals of ten EU member states did not enjoy visa-free travel to the US. As enlargement approached, then Director General for Justice, Freedom and Security of the European Commission, Jonathan Faull, argued that the US should allow visa-free travel to citizens of all EU member states.¹² Nevertheless, the US resisted such arguments and persisted in bilateral arrangements that bypassed the EU's common visa policy.

Visa-free travel became a top priority of Central and Eastern European foreign policy towards the US. For example, during his January 2004 visit to the US, Polish President Aleksander Kwasniewski put President Bush on the spot during a photo-op and asked him to drop the US visa requirement.¹³ Members of Congress with large Central and East European ethnic constituencies also took up the cause. Noting that 9.2 million Americans of Polish ancestry live in the United States, then Congressman Rahm Emanuel introduced legislation in April 2004 to include Poland in the Visa Waiver Program.¹⁴ The cause spread through Congress leading the 2006 Comprehensive Immigration Reform Act to include provisions that would establish a probationary admission to the Visa Waiver Program for EU member states “providing material support to the United States or the multilateral forces in Afghanistan or Iraq.”¹⁵

US visa policy reform efforts and US-EU diplomacy occurred under the shadow of a nuclear option that would eliminate transatlantic visa-free travel and could be triggered by a single EU member state invoking a solidarity clause in the common EU visa policy that would, in turn, result in US nationals needing visas to travel to all EU member states. In early 2004, EU officials

¹² Jonathan Faull, statements made on panel discussion, “Fortress America? The Implications of Homeland Security on Transatlantic Relations,” American Enterprise Institute, Mar. 4, 2004. A video of the event is available at: http://www.aei.org/events/eventID.758,filter.all/event_detail.asp.

¹³ Al Kamen, “Turning a Photo Op into a Lobbying Op,” *Washington Post*, January 2004.

¹⁴ Rep. Emanuel Introduces Resolution to Make Republic of Poland Eligible for Visa Waiver Program,” *States News Service*, April 22, 2004.

¹⁵ *Comprehensive Immigration Reform Act of 2006*, S. 2611, Title IV, Section 413.

warned Washington of this scenario as new member states were about to join. As tensions peaked at the end of 2004, the Bush Administration developed a “Road Map” initiative to clarify requirements for joining the Visa Waiver Program and 13 countries seeking admission joined the process, including new EU member states, and future EU member states, Bulgaria and Romania. In June 2005, the EU took the nuclear option off the table by amending the solidarity mechanism¹⁶ and instituting a requirement whereby the European Commission issues regular progress reports on visa reciprocity by third countries, like the US. Lack of progress can be grounds for imposing visa restrictions. For example, if the Visa Waiver Program did not expand to at least some new member states by the end of 2008, the EU promised to impose temporary visa requirements on US nationals holding diplomatic and official passports.

Visa Wavier Program Reform

Congress eventually struck a political compromise between the two extremes of eliminating the Visa Waiver Program and adding new states to the existing program by opting to reform the program. The biggest obstacle to expanding program membership has been its three percent visa refusal rate requirement. The visa refusal rate is the percentage of visa applications from a country’s nationals that are rejected by consular officers and it largely depends on officers’ judgment of whether applicants are likely to comply with the terms of their visas. The Implementing Recommendations of the 9/11 Commission Act of 2007 authorized the Secretary of Homeland Security to waive the three percent visa refusal requirement and accept countries with refusal rates of between 3-10 percent, thereby opening the door to several EU member states.

¹⁶ See Council Regulation (EC) No. 851/2005 of 2 June 2005 amending Regulation (EC) No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirements as regards the reciprocity mechanism. *Official Journal of the European Union* L 141/3 (June 4, 2005).

Visa Refusal Rates (percent) of States Joining “Road Map” Initiative^a

	FY 2007	FY 2008	FY2009
Romania	37.7	25.0	26.3
Poland	25.2	13.8	13.5
Bulgaria	14.3	13.3	17.8
Lithuania	12.9	9.0	17.6
Slovakia	12.0	5.3	8.3
Latvia	11.8	8.3	19.5
Hungary	10.3	7.8	21.1
Czech Rep.	6.7	5.2	6.9
South Korea	4.4	3.8	5.5
Estonia	4.0	3.9	6.2
Malta	2.7	2.5	3.8
Cyprus	1.8	1.7	1.4
Greece	1.6	1.5	2.0

a Source FY 2007 and FY 2008 tables posted on “Calculation of the Adjusted Visa Refusal Rate for Tourist and Business travelers under the Guidelines of the Visa Waiver Program” webpage at: <http://travel.state.gov/pdf/refusalratelanguage.pdf>.

Congress initially required the three percent refusal rate in order to minimize the arrival of travelers who enter the US legally but overstayed their visas, as had been the case with an estimated 30-40 percent of the 11.5 million illegal migrants in the country. It would have made sense to require a maximum visa overstay rate but exit data was deemed too inaccurate to calculate reliable overstay rates. Exit data is only collected from airline manifests and the traveler’s I-94 arrival/departure card, half which is collected upon entry at passport controls, with the other half to be collected upon departure by airlines. All too often, I-94 forms are lost or not properly entered into databases and no exit data is collected at land borders. The DHS really does not know who leaves the US and will not until it fully implements the exit capabilities of the automated biometric entry-exit system, US-VISIT.

This helps explain why Congress conditioned its authorization for DHS to admit countries with 3-10 percent visa refusal rates on several DHS actions and applicant state cooperation with the US on counter-terrorism initiatives. The legislation specifically required: implementation of an Electronic System for Travel Authorization (ESTA), development of DHS capacity to verify the departure of those travelers who entered the US and information sharing agree-

ments between the US and Visa Waiver Program members on “known and suspected terrorists,” “preventing and combating serious crime” and “lost and stolen passports.”

Congress required the DHS to put in place an Electronic System for Travel Authorization (ESTA) similar to that used by Australia for over a decade. ESTA requires travelers to submit biographical data found in their passports through a website at least 72 hours in advance of departure. As of January 12, 2009, all Visa Waiver Program travelers must use ESTA. DHS anticipates that authorization will be denied to less than 4 percent of ESTA users and those denied will be directed to apply for a visa at a US consulate.¹⁷

Although there were a few initial hiccups, the system has been working well. Anticipated press reports of Italian grandmothers being turned back at US immigration controls because they did not get on the internet and submit their data through ESTA did not materialize because there was little enforcement of the system when it was launched. There was no automated system that informs airline staff issuing boarding passes for US-bound flights whether or not a traveler received authorization through ESTA to board. Beverley Good, ESTA director at DHS at the time noted that there is a “grace period for both airlines and travellers” and it would take until January 2010 to complete full system implementation.¹⁸ But the verification system went live in 2010 and, in that year, airlines managed to comply the requirement to verify ESTA approval for almost 98 per cent of passengers travelling under the VWP before boarding.¹⁹

Congressional authorization of Visa Waiver Program expansion also required that states with 3-10 percent visa refusal rates could only join the Visa Waiver Program after the DHS could certify the departure of 97 percent of international air travelers. In order for DHS to maintain this authority, the 9/11 Act further requires that departure of those who enter under the Visa Waiver Program is verified by biometric exit controls at airports by June 30, 2009 – a deadline that was not met.

The DHS considered three options for collecting biometric exit data: at airlines’ departure check-in; at the Transportation Security Agency (TSA)

¹⁷ “DHS Reminds Visa Waiver Program Travelers of ESTA Requirements Effective Today,” DHS Press Release, January 12, 2009.

¹⁸ Quoted in “Full Implementation of ESTA Delayed” *Travel Weekly*, May 20, 2009.

¹⁹ *Visa Waiver Program: DHS has Implemented Electronic System for Travel Authorization, but further Steps Needed to Address Potential Program Risks*, Government Accountability Office, GAO-11-335, May 2011.

security checkpoint or at the departure gate. Airlines argued that collecting passenger biometrics is a government function. It would also be costly for the airlines to collect biometrics and they want to automate the check-in process and eliminate interaction with airline staff when possible. Airports argued against collecting biometrics at the TSA security checkpoint because another inspection process would make long lines even longer. That would take up valuable space, which generates revenue with shops and restaurants. Collecting biometrics at the departure gate is problematic because US airports were not built with departure control areas at gates, as is the case in many European airports. Gates might need rebuilding and, in any case, this option would require many more Customs and Border Protection inspection staff.

The DHS initially decided in April 2008 to require airlines to collect biometrics but after intensive airline lobbying, Congress required that DHS go back and test the three options. When no airline was willing to participate, DHS tested the TSA checkpoint and departure gate options during June 2009. Once a biometric air exit process is in place, the 9/11 Act requires the DHS to set a maximum visa overstay rate for membership in the Visa Waiver Program. DHS delayed announcing a decision on which of the options it would implement and then effectively abandoned plans to implement a biometric air exit process and focused on improving collection of biographic exit data from airline manifests. Members of Congress repeatedly called on DHS to complete biometric exit controls and, in 2013, several Senators made their support of Comprehensive Immigration Reform legislation conditional on the inclusion of provisions to make biometric exit data collection mandatory. They succeeded in getting a provision in the bill that passed the Senate, which mandates biometric air exit capabilities at the 10 U.S. airports with the highest international travel volume.²⁰

When ESTA is combined with the requirement that Visa Waiver Program states share criminal data and terrorist information regarding their citizens, US authorities can grant visa-free travel on the basis of individual screening instead of a traveler's nationality. Information sharing agreements have been negotiated by the DHS and corresponding ministries of new Visa Waiver Program countries and, subsequently, with the balance of those countries previously in the program.

²⁰ S. 744, Section 3303.

The texts of most agreements were not made public but some, such as the Preventing and Combating Serious Crime (PCSC) agreement between the US and Estonia have.²¹ This agreement states that Estonia and the US may “even without being requested to do so, supply the other Party’s relevant national contact point [...] with personal data [...] (which) shall include, if available, surname, first names, [...] date and place of birth, current and former nationalities, passport number, numbers from other identity documents, and fingerprint data, as well as a description of any conviction or of the circumstances giving rise to the belief [...] that the data subject(s) [...] will commit or has committed a serious criminal offence [...] (or) [...] will commit or has committed terrorist or terrorism related offenses.” Serious criminal offense is defined as an offense “punishable by a maximum deprivation of liberty of more than one year or a more serious penalty” and “for the United States, serious crimes shall be deemed also to include any criminal offense that would render an individual inadmissible to or removable from the United States under US federal law.” For reference, a first offence driving under the influence (DUI) carries a maximum penalty of one-year imprisonment in many US states. The agreement also enables US and Estonian national contact points to conduct anonymous automated searches of each other’s fingerprint and DNA databases. If a submitted biometric produces a “hit,” additional personal data may be supplied according to rules governing mutual legal assistance. DHS has also indicated that the Visa Waiver Program reforms instituted uniform requirements for all Visa Waiver Program countries; that new members would not become “second class members.” As of May 2011, 34 of the then 36 VWP countries had signed agreements on sharing information on lost and stolen passports (although all 36 VWP countries shared data according to INTERPOL).²² As of January 2013, all of the then 36 VWP countries signed agreements with the DHS pursuant to Homeland Security Presidential Directive 6 (HSPD 6) on sharing information regarding known and suspected terrorists.²³ DHS reports on its website that it “has completed Preventing and Combating Serious Crime (PCSC) Agreements, or their equivalent with 35 Visa Waiver Program

²¹ “Agreement between the Government of the United States of America and the Government of the Republic of Estonia on Enhancing Cooperation in Preventing Serious Crime” at: http://www.dhs.gov/xlibrary/assets/agreement_uestonia_seriouscrime.pdf.

²² *Visa Waiver Program: DHS has Implemented Electronic System for Travel Authorization, but further Steps Needed to Address Potential Program Risks*, op. cit., p. 21.

²³ Alison Siskin, *Visa Waiver Program*, CRS Report for Congress, Congressional Research Service, 7-5700, January 15, 2013, p. 14.

(VWP) countries and two additional countries to share biographic and biometric information about potential terrorists and serious criminals.”²⁴

EU Response to Visa Waiver Program Reforms

Visa Waiver Program applicants eagerly began to negotiate the Memoranda of Understanding (MOUs) on counterterrorism cooperation required by the 9/11 Act. However, the Polish Ambassador to the US was disappointed with the reforms and called the visa refusal rate “an arbitrary and inflexible standard” and suggested that it would be possible to lower the visa refusal rate if “the rules that American consuls have to follow in granting visas” were “rethought.”²⁵ Poland’s high visa refusal rate is also caused by many visa applications (and rejections) from several poor rural regions of the country and campaigns to discourage such fruitless applications were launched.²⁶ The argument was also made that the visa refusal rate is not an accurate proxy for actual visa overstay data but US policymakers were unlikely to change program membership criteria until US-VISIT exit was implemented.

After the European Commission received draft DHS counterterrorism cooperation MOUs, it declared them unacceptable because they contained elements of EU responsibility such as ESTA and enhanced travel document standards. The US and EU then agreed to take a two-track approach to the agreements – EU and bilateral.²⁷ Agreements on criminal data and terrorist information sharing would be handled bilaterally. Information sharing with respect to lost and stolen travel documents would be handled by having all states concerned contribute to INTERPOL’s database.

This cleared the way for visa waiver status to go into effect on November 17, 2008 for the Czech Republic, Estonia, Latvia, Lithuania, Hungary, South Korea and Slovakia. The addition of Malta to the Visa Waiver Program became effective December 30, 2008. Greece was the only country nominated by the State Department for membership and had a visa refusal rate below three percent. The US position on the exclusion of Greece referenced the

²⁴ “International Engagement Results,” at: <http://www.dhs.gov/international-engagement-results>.

²⁵ Janusz Reiter, “The Visa Barrier,” *Washington Post*, August 29, 2007.

²⁶ See Krystyna Iglicka, “U.S. Visas: Myths, Facts, Recommendations,” Center for International Relations, May 2008 at: http://www.csm.org.pl/images/rte/File/Program%20Migracje/CSM_MPPZ_Wizy_ang.pdf.

²⁷ “Fourth Report from the Commission to the Council and the European Parliament on certain third countries’ maintenance of visa requirements,” Commission of the European Communities, COM(2008) 486 final/2, Brussels, September 9, 2008, pp. 8-9.

inability to conclude an MOU on anti-terrorism cooperation and information sharing. Greek diplomats argued that the Bush Administration was punishing Greece for its veto of the Former Yugoslav Republic of Macedonia's membership in NATO.²⁸ Greece gained membership in 2010. In any event, with the addition of seven new EU member states to the program, EU threats to impose temporary visa requirements on US nationals holding diplomatic and official passports did not materialize. Still, the European Commission must decide whether ESTA constitutes a visa. The European Commission made a preliminary determination that ESTA is not tantamount to a Schengen visa process²⁹ but a final determination is contingent on a final rule implementing ESTA, which has yet to be issued by DHS. After the DHS issued an interim final rule in 2010 that imposed a \$14 fee, the European Commission sent written comments, to which the U.S did not reply as of November 2012 when the Commission issued its report on "visa requirements in breach of the principle of reciprocity."³⁰ This report noted that the Commission continued to raise the issue of non-reciprocity in a series of EU-US meetings, lauded President Obama for saying in 2010 that he is "committed to make the accession of Member States to the VWP a priority, to be solved during his presidency," and welcomed the introduction of various pieces of legislation that would expand the VWP.³¹ In this report, the Commission made clear that until the ESTA final rule is issued, maintaining transatlantic visa-free travel remains far from certain.

Future Expansion of the Visa Waiver Program?

It is unlikely that there will be much more growth in Visa Waiver Program membership. DHS Authority to expand the Visa Waiver Program to states with 3-10 percent visa refusal rates lapsed on July 1, 2009 when the biometric air exit capabilities of US-VISIT were not in place. Given that the DHS only expects to issue its decision regarding exit data collection in 2010 and system implementation will probably take considerable time, it is unlikely that Poland,

²⁸ "U.S. to waive visa requirements for 7 nations," *USA Today*, Oct. 16, 2008.

²⁹ "The U.S. Electronic System for Travel Authorization (ESTA)," Commission Staff Working Document, Commission of the European Communities, Brussels, SEC(2008) 2991 final, December 2, 2008, posted at: <http://www.statewatch.org/news/2009/jan/eu-com-usa-esta-sec-2991.pdf>

³⁰ "Seventh Report on Certain Third Countries' Maintenance of Visa Requirements in Breach of the Principle of Reciprocity" Report From the Commission to the European Parliament and the Council, COM(2012) 681 final, Brussels, 26.11.2012, p. 12.

³¹ *Ibid.*

Romania and Bulgaria will be included in the Visa Waiver Program in the near future, even if they achieve a visa refusal rate below 10 percent.

This raises the question, if the systems mandated to make the Visa Waiver Program secure are not in place, should those countries that were admitted in anticipation of expected system deployment be removed? Although here is a visa refusal rate it only includes those nationals of VWP countries whose terms of travel or their particular status require them to apply. For example, the refusal rate of UK nationals who applied for B visas was 16.9% in 2013.³² Visa overstay statistics are not made public and their accuracy remains doubtful. It would, therefore, be very difficult, politically speaking, to reimpose visa requirements. In the end, those seven EU member states that managed to get into the Visa Waiver Program in 2008 will remain in the program, while those that were excluded will most likely remain outside.

Twenty two former Presidents, Foreign and Defense Ministers argued in a July 15, 2009 “Open Letter to the Obama Administration from Central and Eastern Europe” that “It is absurd that Poland and Romania – arguably the two biggest and most pro-American states in the CEE region, which are making substantial contributions in Iraq and Afghanistan – have not yet been brought into the visa waiver program. It is incomprehensible that a critic like the French anti-globalization activist Jose Bove does not require a visa for the United States but former Solidarity activist and Nobel Peace prizewinner Lech Walesa does. This issue will be resolved only if it is made a political priority by the President of the United States.”³³ In line with these sentiments, Representative Mike Quigley (D-IL) introduced legislation to extend DHS authority to waive the three percent visa refusal requirement for two more years as “part of a broader strategy to ultimately extend visa waiver privileges to Poland.”³⁴ It remains to be seen whether the 2008 expansion of the Visa Waiver Program will be enough “progress” for the EU to maintain the political equilibrium in US-EU relations on this issue or if excluded EU member states, most notably Poland, press the issue of visa policy inequality in the EU to the extent that the EU reverts to threatening restrictions on visa-free travel for certain US nationals.

³² Source FY 2013 table posted on “Calculation of the Adjusted Visa Refusal Rate for Tourist and Business travelers under the Guidelines of the Visa Waiver Program” webpage at: <http://travel.state.gov/pdf/refusalratelanguage.pdf>.

³³ “Open Letter to the Obama Administration from Central and Eastern Europe” *Gazeta Wyborcza*, July 15, 2009.

³⁴ “Rep. Quigley Introduces Bill to Extend Visa Waiver Program,” *Polish News*, June 23, 2009.

Political Compromises, Transgovernmental Relations and Changing International Norms

Congressional compromises that pitted border security and immigration law enforcement against foreign policy considerations and travel facilitation produced very complicated requirements for Visa Waiver Program membership. These complicated legislative requirements necessitated that generalist diplomats move aside for direct negotiations between interior ministries on increasingly technical matters. The 9/11 Act set in motion intensification of such transgovernmental relations with the signing of MOUs on antiterrorism cooperation and then bilateral information sharing agreements between the DHS and interior ministries in Visa Waiver Program countries.

The many agreements between the DHS and its European counterparts raise questions of effective public administration and diplomacy. Do interior ministry and foreign ministry officials always know what the others are doing internationally? Does increasing cooperation among interior ministries to use visa policies for law enforcement diminish the tool of visa policy within the broader scope of international relations managed by foreign ministries? How many government officials fully understand the implementation of the increasing number of technical cooperation agreements?

Information sharing agreements between the DHS and European interior ministries may be efficacious for screening travelers; however, they raise broader social questions with political and legal repercussions. The signing of agreements to share citizens' data with the DHS has become a concern of civil libertarians and data privacy advocates in EU member states. If the EU deploys its planned electronic travel authorization system, the same may increasingly happen in the US. US citizens traveling to Europe will then become increasingly aware of the information sharing agreements that give EU member states access to the personal data of each US citizen authorities believe "will commit or has committed a serious criminal offence [...] (or) [...] will commit or has committed terrorist or terrorism related offenses".³⁵

While the negotiation of information sharing agreements between the DHS and counterpart interior ministries may seem peripheral within the broader scope of international relations, their consequences may be much greater than expected. Through such information sharing, states are *de facto* becoming obli-

³⁵ "Agreement between the Government of the United States of America and the Government of the Republic of Estonia..." *op. cit.*

gated to determine whether their citizens are fit to travel internationally. This reverses the norms established ninety years ago when League of Nations member states decided that states receiving travelers are responsible for investigating credentials and making entry decisions. While traveler sending states might not deny a passport to a citizen based on a past criminal conviction, they will now share information with receiving states that, in practice, may have the same effect. Such information sharing may facilitate terrorist screening by all states involved but it also means that governments might be able to make it very difficult for certain of their citizens to travel abroad. This, in turn, increases the possibilities for misunderstandings, misuse and mischief.

Looking Forward

It is very unlikely that Congress would vote to eliminate the Visa Waiver Program, unless, of course, someone who travels to the US visa-free successfully executes a major terrorist attack. It is also unlikely that the Visa Waiver Program will be expanded to countries regardless of high visa refusal rates given that President Bush failed to get Iraq War allies Poland and Romania in the program; such foreign policy considerations resonate even less in the Obama Administration; and skeptics of Visa Waiver Program expansion, like Senators Dianne Feinstein (D-CA) hold key committee leadership positions. Rather, the Obama Administration and Congress will have little choice but to navigate within the policy parameters of the political compromise embodied in the Visa Waiver Program reforms of the 9/11 Act.

Although few realistic policy options remain, the Obama Administration can follow through on past legislation and fully implement ESTA and US-VISIT air exit as soon as possible. Rather than wasting any more time considering other approaches, the DHS should collect travelers' biometric exit data at departure gates of the 80 airports with direct international flights rather than at the check-in counters or TSA checkpoints of over 400 airports from which travelers could take connecting flights out of the country. Exit data collection at departure gates may cost taxpayers more in terms of increasing Customs and Border Protection inspections staff and rebuilding gate areas but it minimizes disruption of domestic flight operations and provides more certainty that those individuals whose biometric data was entered into US-VISIT actually boarded the departing aircraft. Given the potential for greater costs, Congress must be ready to appropriate sufficient funds to implement the departure gate option.

Once this is accomplished, the administration could set a reasonable maximum overstay rate, expand membership to those countries that meet this criteria and publish the visa overstay rates of all countries to better justify the exclusion of those states that fail to meet the bar. Only then will the US be on solid ground in negotiating visa-free travel with the EU and explaining its visa policies to the rest of the world.