

How the Visa Waiver Program is Keeping America Safe

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Introduction

Thirty years ago, visitors who wanted to come to the United States applied for a visa at the nearest U.S. embassy or consulate. The embassy performed whatever checks it deemed necessary, including tapping the local rumor mill. If no disqualifying information was unearthed, a visa was issued and glued into the applicant's passport. Then, at the U.S. port of entry, officials visually checked the passport and visa and looked up the person's name in paper-based files or rudimentary automated systems.

Today, the above scenario is unrecognizable, both because the visa process has been modernized to include fully automated security checks and because in the mid-1980s the United States implemented the Visa Waiver Program (VWP). The VWP currently allows eligible nationals of 38 countries – those whose security standards fully satisfy stringent requirements set by the United States government – to travel to the United States without a visa and, if admitted, to remain in our country for a maximum of 90 days for leisure or business purposes. Visa-free travel to the United States builds on our closest bilateral relationships and fosters commercial and personal ties among leisure and business travelers in the United States and abroad. It is also reciprocal, allowing Americans visa-free travel to participating countries.

Contrary to its name, which might suggest a loosening of security standards, those traveling under the VWP today generally do not present a higher security risk than those traveling with visas. Since its inception, the VWP has become an essential tool for increasing security standards, advancing information sharing, strengthening international relationships, and promoting legitimate trade and travel to the United States. Over the past decade in particular, Congress and the Executive branch have worked together to implement a number of enhancements to the VWP to address evolving threats to international travel and to the United States homeland.

As this paper demonstrates, these enhancements have transformed the VWP into a program that provides unmatched benefits to U.S. law enforcement and security interests. Specifically, this paper will 1) describe the key security components of the VWP; 2) outline how the VWP fits into and enhances DHS's larger border security and screening procedures; and 3) briefly discuss sensible reforms to the VWP in the face of evolving threats.

Key Security Components of the VWP

What exactly is "waived" under the Visa Waiver Program? In non-VWP countries, temporary foreign visitors for business or pleasure must obtain a "B" nonimmigrant visa from the Department of State before coming to the United States. A short personal, face-to-face interview is generally required, and consular officers use various databases to screen visa applicants. Under the VWP, the Department of Homeland Security (DHS) waives the "B" nonimmigrant visa requirement for aliens traveling from the 38 approved countries – but that does *not* mean that DHS waives security requirements for these travelers. In fact, as discussed later in this paper, it mandates additional, more stringent security requirements. The result is a system that, in many ways, provides as much security against terrorist or criminal travelers as the regular visa system.

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Like any government program, VWP has been closely reviewed over the past decade, undergoing substantial reform as new security threats arose. Following the September 11, 2001 attacks, there was concern that travelers from participating countries could use the program to evade security checks that might otherwise be performed for foreign nationals when applying for a visa. In 2003, therefore, new requirements were put in place to tighten passport security standards and increase the frequency with which countries are formally reviewed for their designation status. Furthermore, in order to align with the recommendations of the 9/11 Commission, Congress, in 2007, mandated additional security requirements to VWP, including standards for secure travel documents, individualized pre-screening of travelers, mandatory bilateral information-sharing arrangements, prompt reporting of lost and stolen passports, and a threat assessment conducted by the director of national intelligence. Therefore, although critics of the VWP often continue to cite the example of the “Shoe Bomber” Richard Reid, who as a British citizen traveled under the VWP in December 2001, the reforms put in place over the past thirteen years have successfully mitigated this risk. These reforms also demonstrate that not only is VWP a significant, security-enhancing program, but that it is a key component of the layered border security approach the United States has implemented since September 11, 2001.

As described below, the VWP enhances U.S. security in four mutually-reinforcing ways:

- It enables individualized and recurrent screening of travelers against law enforcement and security databases;
- It mandates bilateral and multilateral information and intelligence sharing;
- It requires secure passports to confirm identity; and
- It permits regular audits of the security standards of participating countries.

First, the VWP screens all travelers against multiple law enforcement and security databases before they even depart for the United States. Using the Electronic System for Travel Authorization (ESTA), a VWP traveler is required to provide biographic information (including name, date of birth, and passport number) as well as his or her destination address in the United States. The traveler is also required to answer questions regarding communicable diseases, arrests, convictions for certain crimes, and past history of visa revocation or deportation, among others. ESTA functions as a more powerful screening tool than a traditional visa interview, allowing U.S. government officials to detect and identify threats easier. Rather than relying on an individual consular officer’s perception of risk as a result of an interview that might last less than a minute, ESTA enables individualized pre-travel and recurrent screening of VWP travelers against multiple law enforcement and security databases, including the Terrorist Screening Database and INTERPOL’s Stolen and Lost Travel Document database. If border officials think that an in-person interview and traditional visa procedures are needed in a particular case, they can reject an ESTA application. Individuals whose ESTA applications are rejected must obtain a visa by applying for one at a U.S. Embassy or Consulate abroad prior to undertaking travel to the United States. At that point, the embassy or consulate will presumably have been alerted to the risk indicated by the ESTA denial and may conduct an in-depth interview.

Second, the VWP mandates robust information and intelligence sharing between the United States and its VWP partners, including agreements concerning known or potential terrorists and criminals and the reporting of lost and stolen passport (LASPs) data to the United States. Specifically, countries must complete 1) a Preventing and Combating Serious Crime (PCSC) Agreement to share information on

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criminals; 2) a Homeland Security Presidential Directive-6 (HSPD-6) arrangement to share information on known and suspected terrorists; and 3) an agreement to share LASP data through INTERPOL. Supplementing the U.S. government's "watch lists" and other databases with these three pieces of information from a traveler's home government greatly enhances DHS's ability to identify and stop travelers who pose a threat.

Third, all VWP travelers must use secure travel documents that meet internationally-recognized standards, which allows for easier detection of forged or fraudulent passports. The majority of VWP travelers are required to use electronic passports (e-passports), which have an embedded chip that includes the bearer's biometric information.¹ At the port of entry, the biographic and biometric data contained in the electronic chip is compared to both the traveler and the travel document being presented. There are many other layers of technical security in the e-passport production process and the document itself that make duplication or forgery much less likely.

Lastly, VWP countries are required to submit to periodic eligibility reviews designed to ensure that VWP membership does not compromise U.S. security, law enforcement, and immigration enforcement interests. The eligibility review must also assess the existence and effectiveness of agreements and procedures for extraditing individuals to the United States. These comprehensive eligibility reviews are conducted by DHS, with the assistance of other U.S. government agencies as appropriate. Critically, these reviews involve a site visit during which a team of U.S. government subject matter experts examines the country's security and law enforcement capabilities and procedures, among other issues. The findings from the site visit form the core of the comprehensive DHS evaluation of a country's fitness to continue participating in the VWP. Key elements of the comprehensive evaluation include:

- Document security issues, including the security of a country's passport application, production, issuance and delivery processes; physical security features of passports and other documents used to demonstrate identity and citizenship; and incidence of fraud or misuse involving passports and other documents;
- Frequency of reporting lost and stolen passports to INTERPOL;
- Border and immigration controls and alien smuggling activities in the country, and efforts to address such issues;
- Aviation and airport security measures;
- Nationality and citizenship laws and procedures, and application of such laws and procedures;
- Level of integration of immigrant groups and national minorities;
- Existence of security and law enforcement threats in the country (terrorist activities, separatist movements, radicalization, organized crime, money laundering, human and drug trafficking, etc.) and efforts to address such issues;
- Cooperation and information sharing with the United States and other international partners on law enforcement and security issues;
- Stability of the country politically and economically; and
- A threat assessment conducted by the Director of National Intelligence.

¹ All passports issued after October 26, 2006, presented by aliens entering under the VWP must be electronic passports.

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Should DHS identify any issues or concerns during the course of its review, it can propose and insist on mitigation measures.

To complement these reviews and to ensure recommended mitigation measures are carried out, DHS has developed a continuous and vigorous monitoring process to ensure awareness of changing conditions in VWP countries. This monitoring process includes regular consultation with U.S. law enforcement and intelligence agencies, as well as frequent communication with relevant U.S. Embassies abroad and foreign embassies in Washington for updates on law enforcement or security concerns related to the VWP. Overall, no other program provides the U.S. government with the opportunity to conduct as far-reaching and consequential audits of foreign security standards, ensuring alignment with our high standards for managing risk. DHS has the authority to immediately terminate a country's membership if an emergency occurs in the country that threatens the law enforcement or security interest of the United States. The Director of National Intelligence is also able to recommend immediate suspension to DHS if any current and credible threat poses an imminent danger to the United States or its citizens and originates from a country participating in the VWP.

Overall, VWP has proven to be an effective leverage point for raising and maintaining security standards while providing unprecedented levels of information sharing and access, allowing the United States to know far more about participating countries and their citizens. That the modernized VWP enhances U.S. security is widely recognized by security experts across the political spectrum. The last three secretaries of homeland security, for example, have praised the program's contribution to U.S. and international security. Former Secretary Chertoff recently captured this consensus stating, "I think the Visa Waiver Program is a plus-plus for our national security and for our economic security. I think that we have constructed a program that makes a reduction in vulnerabilities very powerful."² Indeed, for precisely that same reason, both the Bush and Obama administrations have added countries to the VWP in recent years.

The VWP and US Border Security

The challenge the United States has confronted over the past decade-plus in regards to border security is this: how to set up a screening regime that permits millions of legitimate travelers to safely come to the United States while identifying and stopping the small fraction that present a concern? Because of the security components described above, the VWP has become an integral part of the U.S. government's ability to identify security or other risks associated with travelers at the earliest possible point and push-out the "virtual" border of the United States so that those posing an unacceptable level of risk are not able to board planes or gain entry into our physical border. The VWP helps answer the three key questions necessary to implement an effective data- and risk-based screening system:

- "Who is a threat?" – U.S. officials need to identify known and suspected terrorists as well as other individuals who may pose a threat.
- "Is the person coming to the U.S.?" – U.S. officials need to know, as early as possible, if the traveler should be examined more closely.

² <http://www.heritage.org/events/2014/10/visa-waiver-program>.

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- “Is the person really who he says he is?” – U.S. officials determine if the traveler is presenting fraudulent documents.

1. *Who is a threat?*

The U.S. government collects and maintains an array of information designed to identify those associated with terrorism or other illicit activities. These “watch lists” use identifiers – primarily biographic, but increasingly incorporating biometrics – to support border-screening protocols and procedures. As a result of various post-9/11 reforms, the watch lists have been consolidated into a single database used by front-line screening agencies such as DHS to positively identify known or suspected terrorists trying to travel to the United States.

However, when it comes to identifying dangerous individuals from abroad, the U.S. government is not the only, or necessarily the best, source of information. In fact, if you wanted to identify potentially dangerous individuals from a particular country, say the UK, your first stop would not be Washington; it would be London. Many European countries have rapidly growing ethnic and religious immigrant communities, a small minority of which has the potential to become radicalized. It makes sense then that the person’s home country is the best source of information about which of its citizens or residents is most likely to pose a risk to the United States. This kind of unprecedented bilateral and multilateral information sharing mandated by the VWP, along with the routine audits and inspections made possible by the program improves the U.S. government’s overall ability to identify bad actors and activity.

2. *Is the person coming to the U.S.?*

DHS begins the screening process well before a potentially-risky traveler reaches the U.S. border; in fact, DHS begins the process before the traveler even arrives at an airport through ESTA. In addition to the ESTA requirement for VWP travelers, DHS requires airlines to provide a copy of their passenger manifests and data from their reservation files. This information – which applies to all travelers and is provided to DHS a minimum of 72 hours in advance – helps the agency determine who to allow onboard a U.S.-bound plane, who requires further screening and investigation upon arrival, and who should be turned away and referred to appropriate law enforcement personnel.

These advance-screening measures give DHS a better, more informed understanding of who is coming to the United States. But there’s an additional value to the advance information DHS now receives about travelers – airline reservation data, in particular, has the potential to reveal connections among passengers and known criminals or terrorists. DHS uses this data to find links that highlight travelers who might otherwise disappear into the crowd.

3. *Is the person really who he says he is?*

No amount of “watch listing” and passenger screening will detect terrorists if they are able to travel on an assumed identity with fraudulently-obtained or fake documents. In order to verify that people are who they say they are when they travel, DHS insists on high standards for documents acceptable for entry to the United States. These standards are highest for VWP travelers. For example, the electronic passports mandated by the VWP enable DHS to incorporate biometric verification—digital photographs and, increasingly, fingerprints—in the screening process to confirm that the person presenting the document is

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the person that the document describes. Upon arrival, the traveler's passport is scanned and information is again run against various systems. To confirm identity, a digital photo is taken or compared to that already in system and on the document and fingerprints are taken or compared to those in system and on the document. The fingerprint and photo captured by the document must be the fingerprint and photo of the person presenting the document. And, as noted above, DHS routinely audits the document production and issuance process in VWP countries to ensure standards are being met. In other words, VWP makes it harder to enter the United States using fraudulent documents and forged identities at the border.

These three elements – who's risky, who's coming here, and who's who – work together both prior to take off and at the port of entry to help DHS officials identify terrorists and criminals. The improved collection, analysis and sharing of information on travelers, combined with advanced identity verification technology made possible by the VWP not only has improved overall U.S. border security, but it has also facilitated the flow of lawful travel.

Features of the VWP

In recent weeks, the efficacy of the VWP has been called into question. Concerns have been raised, for example, about the ability of ISIS terrorists to enter the United States under the VWP by circumventing the consular interview. But, as demonstrated above, these concerns are unsupported. The security value of conducting a visa interview with every one of millions of travelers to the United States is vastly outweighed by the security benefits of the VWP: better data about who poses a threat, documents that are harder to forge, better foreign security standards, and routine auditing of those standards by the U.S. government. If anything, the VWP mandates stringent security requirements for participating countries which ensures alignment with our country's high standards for managing risk and ensuring security.

The VWP's security components make so much sense, in fact, that a recently passed UN Security Council Resolution on policies and security measures to better track and deter terrorist travel activity reflects practices the VWP has enforced for member countries since 2008. Measures called for by the UN that are currently part of VWP include:

- Implementation of effective border controls and controls on issuance of identity papers and travel documents and thorough measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;
- Use of evidence-based traveler risk assessment and screening procedures, including the collection and analysis of travel data;
- Intensification/acceleration of the exchange of operational information through bilateral or multilateral mechanisms;
- Disruption/prevention of financial support to FTFs and implementation of prosecution, rehabilitation, and reintegration strategies for radicalized individuals;
- Requirements for airlines to provide advance passenger information to the appropriate national security authorities in order to detect FTF departure, attempted entry into, or transit through their territories, as well as sharing this information with the state of residence or nationality;
- Improved international cooperation through bilateral agreements, including increased sharing of information for the purpose of identifying FTFs, sharing and adoption of best practices, and improved understanding of the patterns of travel by FTFs;

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- Assistance with criminal investigations or proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence necessary for the proceedings; and
- Intensified efforts to employ INTERPOL resources, including the use of INTERPOL databases to track stolen or forged identity papers and travel documents.

In short, the current VWP is setting global standards for countering terrorist travel.

Despite the VWP's demonstrated success in preventing another "shoe bomber" and its success in influencing global security standards, a few members of Congress have recently introduced legislation that would suspend the VWP. Suspension or termination of the program would be a blow to U.S. security as it would result in the loss of significant leverage over the security standards of both current and prospective members, to say nothing of the economic and diplomatic consequences.

For current VWP members, suspension of the program would undermine current information and intelligence-sharing mechanisms and deprive the U.S. of visibility into their security practices, including those to prevent radicalization and identify foreign fighters. It would also undermine relationships with our closest allies in the face of common threats ranging from ISIS to a resurgent Russia.

For prospective members, the disappearance of the program would remove a powerful and proven incentive to elevate security standards and to enhance cooperation with the United States on security matters. A number of countries, for example, have unilaterally upgraded to e-passports so as to be eligible for the VWP. Likewise, several prospective members have signed the information-sharing agreements and otherwise increased law enforcement and security-related cooperation with the United States in the hopes of meeting the program's requirements. These actions provide tangible security benefits to the United States and to the international travelling public well in advance of potential VWP designation.

The VWP, like any good security program, has evolved over time. It is essential that we continually evaluate successful security programs like the VWP to identify possible enhancements, much like DHS continually evaluates participating countries and recommends improvements to their security postures. For example, in November 2014, DHS expanded the personal data required for an ESTA application, to include national identity numbers for those who have them and data from a second passport if that passport is not from a VWP country among other data elements. As an additional enhancement, DHS could require *all* VWP travelers to use electronic passports. Under current DHS policy, a small number of travelers (those whose passports were issued before October 26, 2006) do not have to meet this requirement. As the last of these passports are set to expire in less than two years, this policy change would enhance security while likely not having a significant practical impact on individual travelers.

For its part, Congress could amend the VWP law to make mandatory several security requirements that are currently discretionary, including those related to airport security standards and whether the country assists in the operation of an effective air marshal program. DHS currently considers these factors during its country audits, but codifying them would strengthen the Department's hand should a country object to a particular DHS recommendation or proposed mitigation measures in these areas.

Working with Congress, DHS could provide additional resources to the Visa Waiver Program Office, which would help to ensure that any issues of concern receive the appropriate level of attention. DHS could also better integrate information from its multiple systems and databases in order to conduct more

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efficient and accurate vetting for VWP and visa applicants alike, along the lines of Kingfisher Expansion, a recent U.S. government system for conducting interagency counterterrorism screening of all visa applicants. Improving this “back-end” processing could help DHS identify and mitigate unknown threats by linking previously-unknown terrorists and criminals to known terrorists or criminals, and to identify high-risk travelers by matching them against travel patterns known to have been used by terrorists.

Conclusion

While some may claim that bypassing the consular interview creates a security loophole, the evidence to support this view is flimsy at best. To the contrary, the evidence demonstrates that the VWP enhances our ability to detect and prevent terrorist travel, ensures elevated security standards for member countries, incentivizes prospective members to meet these elevated security standards, and gives the United States access to unprecedented levels of intelligence and information. To improve U.S. and international travel security, we should seek to enhance and expand the VWP, not curtail it.

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