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GROWING DISPUTE OVER TRANSATLANTIC VISA RECIPROCITY COULD LEAD TO US VS. EU LEGAL BATTLE

*Robert S. Wilson**

I. INTRODUCTION

Americans enjoy thinking of their country as an open, welcoming nation—a nation who opened its borders and, more importantly, its markets to the huddled, tired masses of the world. The hallmarks of the American openness of spirit are numerous. America's description of itself as a "melting pot" reflects the historical fact that people from all over the world not only immigrated to this country but were quickly assimilated into its culture. During its bid to host the 2012 Olympics, New York City billed itself as "the world's second home,"¹ a reference not only to the city's vast assortment of immigrant communities and nearly ubiquitous portrayal in film, but also to the massive number of foreign tourists who visit every year. Two of the City's most famous landmarks—Ellis Island and the Statue of Liberty—are iconic testaments to the alluring promise and hope America once afforded the world. While few would still argue the merits of continuing the open-door immigration policy employed in the past, even fewer realize the extent to which this country has devolved from a "city on a hill" to a seemingly impenetrable fortress.²

Part I one of this discusses how American visa policy has far-reaching consequences that must be taken into account before any changes to the Visa Waiver Program are performed. Specifically, the article discusses how overly-restrictive visa policies encourage anti-Americanism which feeds into the global security threats facing the United States. This article suggests

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¹ *NYC Seeks to Trademark a New Slogan*, USA TODAY, Feb. 17, 2005, available at http://www.usatoday.com/travel/news/2005-02-17-apple-slogan_x.htm.

² See Amy Yee, *US Tourism 'Losing Billions Because of Image.'* FIN. TIMES, May 8, 2005, available at <http://www.ft.com/cms/s/9d3b32bc-bfe8-11d9-b376-00000e2511c8.html>.

that a visa policy that keeps foreign nationals out of the United States is not just ineffective at improving national security, but can actually have the opposite effect.

Part II of this article discusses the past and present development of the Visa Waiver Program (VWP) and how it both helps and harms American interests in its current form, such as the security issues inherent in the Program as well as the festering diplomatic struggles over which countries are invited to join. Part III of this article discusses possible solutions to these issues, including scrapping the traditional bilateral nature of the VWP in favor of a common visa policy for the entire European Union. Part IV summarizes how the United States has failed to use the VWP to its full potential and outlines the leverage provided by the Program.

A. Scope of the Current Situation

Illegal entry by foreign nationals into this country across our southern border has received varying degrees of political and media attention throughout the last few decades. The events of September 11, 2001 instilled this issue with added fervor as inadequately defended borders are just as easily crossed by potential terrorists as by those seeking better wages and employment. This threat became forever immortalized when our government revealed the fact that several of the hijackers entered this country using false passports of our European allies, which afforded them easy, visa-free entry under the VWP.³

The September 11 terrorists hijacked more than airplanes; they hijacked the VWP, a program designed to facilitate travel, economic development, and cross-cultural understanding,⁴ and used it to effectuate the exact opposite of its intent. While the current debate about border security and immigration overwhelmingly chronicles the U.S.-Mexican border to the south, many Americans are unaware that one of the United States' most problematic borders is to the east—the transatlantic border with Europe. After September 11, the United States began intensifying its scrutiny of the screening process of admitting foreign nationals entering this country, including tourists and business travelers from our closest allies in Europe. Unfortunately, this additional scrutiny has created frenzy in our airports, damaged our

³ Topher Greene, Note, *The Importance of Improving U.S. Immigration Law and the Changes Made Since 9-11*, 4 REGENT J. INT'L L. 101, 107 (2006).

⁴ Letter from Michael G. Rokos, President, American Friends of the Czech Republic, AFoCR Launches Visa Waiver Issue Education Campaign (Sept. 19, 2006), <http://www.afocr.org/news.php>.

international reputation, and burdened our economy without any real increase in national security.⁵

B. The Negative Consequences of a "fortress America"

The argument in favor of stricter controls for access to the United States⁶ is premised on the theory that by scrutinizing every foreign national seeking admission into the country, the possibility of again allowing terrorists to slip through our fingers is greatly diminished. Unfortunately, even such a simple and straightforward concept is not without serious consequences.⁷ It is widely understood that the costs of inspecting every ship or cargo vessel entering America's ports—assuming we could even logistically accomplish such a task—would devastate our economy.⁸ The same holds true regarding the screening of foreign visitors. For example, while international tourism has increased by 52% worldwide since the 1990s, the number of foreigners visiting the United States declined by 36%.⁹ An effective visa policy for the screening of persons should resemble our system for screening cargo entering our ports, which targets vessels for inspection entering from high-risk countries while reducing the level of inspection for vessels entering from allied countries with effective security measures of their own.¹⁰

The declining interest in visiting and doing business in America largely stems not from an unpopular president or war in Iraq, but from the difficulties involved in simply applying for a visa.¹¹ The ramifications of continuing to dissuade foreign nationals from visiting the United States are dire. First, we run the risk of damaging our economy. Tourists, including free-spending visitors from overseas, form the backbone of an industry generating one hundred billion dollars per year in revenue and employing

⁵ Rey Koslowski, *Smart Borders, Virtual Borders or No Borders: Homeland Security Choices for the United States and Canada*, 11 LAW & BUS. REV. AM. 527 (2005).

⁶ *Should Congress Extend the October, 2004 Statutory Deadline for Requiring Foreign Visitors to Present Biometric Passports Before the H. Comm. On the Judiciary*, 108th Cong. (2004) (testimony of Tom Ridge, Sec. of Homeland Security), available at https://www.dhs.gov/xnews/testimony/testimony_0023.shtm.

⁷ Susan Martin and Philip Martin, *International Migration and Terrorism: Prevention, Prosecution, and Protection*, 18 GEO. IMMIGR. L.J. 329 (2004).

⁸ James G. Barr, *Improving Cargo Security*, Dec. 2002, available at <http://www.faulkner.com/products/securitymgt/dec2002/cargosecurity.htm>.

⁹ Fareed Zakaria, *Hassle and Humiliation: How Homeland Security Harms U.S. Image, Economy*, NEWSWEEK, Feb. 19, 2007, available at <http://www.msnbc.msn.com/id/17201007/site/newsweek/from/ET/>.

¹⁰ Barr, *supra* note 8.

¹¹ Zakaria, *supra* note 9.

more than seventeen million Americans.¹² Second, by discouraging foreign tourism through draconian visa policies and security measures at airport customs, we further erode any goodwill towards this country in two critical ways. Our current labyrinthine visa application process lends validity to our reputation as an insular, somewhat hostile nation to foreigners. And by keeping foreigners out, we rob the world of the chance to debunk the stereotypes and propaganda about this country by seeing America firsthand.¹³

C. Roadmap for strong security, international trade, and goodwill

The current state of the VWP is plagued by ineffective screening mechanisms, arbitrary regulations, and haphazard implementation, with the concomitant result of diminished national security and contentious diplomatic relations. The overarching issue regarding the VWP is how to best resolve the security problems inherently involved in visa-less travel while still maintaining a system that encourages trade and tourism and reduces bureaucracy. The United States must increase its cooperation with allies abroad to facilitate a more accurate and precise system of monitoring international travel. The VWP need not threaten our national security; in fact, participation in the VWP can be an effective carrot-and-stick tool to encourage greater cooperation and increased security measures from our allies abroad.

Overly fortifying our ports of entry for foreign visitors carries serious economic, political, and even security risks. Without a reevaluation of the methods employed to monitor the nation's points of entry, we risk overburdening our personnel, clogging our channels of commerce, and alienating our allies with our heavy-handed yet largely ineffective visa policies. This note seeks to analyze ways the United States can simultaneously improve border security as well as access to this country by legitimate foreign tourists and business persons. Specifically, this note focuses on ways to expand the VWP's inclusiveness and adapt its membership to more properly reflect our strongest alliances. Such an expansion of the VWP could be most effectively accomplished in Central and Eastern Europe, an area of the world that is not only more pro-American than many of the current VWP countries but also contains members of the European Union (EU) and North Atlantic Treaty Organization (NATO).¹⁴

¹² *Id.*

¹³ *Id.*

¹⁴ CSIS, Roundtable on Visa Issues in Central and Eastern Europe, <http://www.friendsofslovakia.org/fos/news/news10.htm>.

II. THE ARGUMENT IN FAVOR OF MAINTAINING A MODIFIED VERSION OF THE VWP

A. *Borders and national security: pre- and post-September 11*

The Customs and Border Patrol Agency (CBP) represents one of this country's most important lines of defense.¹⁵ Borders are effectively the last mechanism preventing entry of criminals, terrorists, and other undesirable persons attempting to the United States,¹⁶ and it was the catastrophic failure of this system that afforded many of the 9/11 hijackers legal access into the country. As a result, in the post-September 11 rush to increase security in a manner sufficiently visible to reassure the public, the open and welcoming America recognized both here and abroad began to change.¹⁷ To wit, because of the growing difficulties associated with procuring visas for foreign workers, many U.S. corporations have begun reassessing hiring foreign nationals to come work in this country.¹⁸

The protectors of U.S. borders carry the burdensome responsibility of balancing the demands of national security with the pragmatic need for efficient international movement of goods and persons. When faced with a foreign visitor from a VWP participating country, this burden is amplified by the fact that most of the processes designed to pre-screen visitors before their arrival have been eliminated, effectively making the border control agent the only line of defense determining whether the foreign national is fit to enter the country. Border control agents at major air and seaports nationwide have less than thirty seconds to decide whether to admit a foreign national into this country.¹⁹ An effective and complete border control plan should include a forward-projecting line of defense that equally screens all persons visiting the United States, regardless of whether they carry a VWP-eligible passport.²⁰ However, the VWP should be maintained for U.S. allies in order to facilitate efficient movement of people and capital.

The contrary demands of free movement of goods and people at the country's perimeter need not be inconsistent with the goals of increased

¹⁵ A. James Vazquez-Azpiri & Daniel C. Home, *Doorkeeper of Homeland Security: Proposals for the Visa Waiver Program*, 16 STAN. L. & POL'Y REV. 513 (2005).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Paul T. Wangerin, *A Beginner's Guide to Business-Related Aspects of United States Immigration Law*, 5 NW. J. INT'L L. & BUS. 844, 844 (1983-84).

¹⁹ James A. R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 67 (1991).

²⁰ See Koslowski, *supra* note 5.

screening and security. Current U.S. visa regulations are haphazard, contentious, and increasingly, an Achilles Heel of national security. By working with strategic allies such as the EU, the United States can implement a cost-effective and secure screening system that befits the longstanding historical, social, and economic transatlantic relationship and encourages further growth in the areas of international trade and tourism.

B. The Function and Role of Visas in Security, Commerce, and Diplomacy

Visas are documents issued by governments that grant permission for foreign nationals to enter the host country for a specified amount of time.²¹ The documents come in countless forms, the most common being those for short-stay tourist or business-related trips.²² For residents of countries not included in the VWP, travel to the United States can entail a great burden. The application process mandates an in-person interview at the U.S. Embassy or consulate in one's home country.²³ For many countries, this translates into an expensive trip to the nation's capital. Processing fees begin at \$100.00, applicant interviews often border on interrogations, and approval is in no way guaranteed.²⁴ In fact, applicants who are rejected for a visa—even for technical errors—forfeit the \$100.00 application fee and must restart the entire process, including payment of the application fee.²⁵

C. History of the VWP and the changing face of Europe

The Visa Waiver Program was enacted in 1988 by 8 U.S.C. § 1187²⁶ in an attempt to foster better economic and cultural ties with our capitalist Western European allies.²⁷ The program represented a consolidation of a number of bilateral reciprocal agreements waiving visa requirements for citizens of the United States and the citizens of the country party to the agreement. The VWP formally instituted a program that simplified the border control process by setting forth clear guidelines and procedures for admitting the vast majority of foreign nationals at our borders—regular tourists and

²¹ Bryan Paul Christian, *Visa Policy, Inspection and Exit Controls: Transatlantic Perspectives on Migration Management*, 14 GEO. IMMIGR. L.J. 215 (1999).

²² *Id.*

²³ *Id.*

²⁴ See Rokis, *supra* note 4.

²⁵ See Christian, *supra* note 21.

²⁶ Visa Waiver Program for Certain Visitors, 8 U.S.C. § 1187 (2006).

²⁷ See Workpermit.com, EU Wants Visa-Free Travel For All Its Members to U.S. (Feb. 9, 2006), http://www.workpermit.com/news/2006_02_09/us/eu_wants_visa_free_travel.htm.

business people from other democratic, namely Western, countries—without the need for formal a interview, application, or tendering a fee.²⁸

For years, the free countries of Europe could be entered by Americans visa-free, and the same freedom of visa-free travel to the United States was returned to the citizens of those countries.²⁹ Under this system, the citizens of the most closely allied nations—such as the member nations of NATO—had reciprocal easy access to each others' countries.³⁰ This allowed for greater cross-cultural dialogue and understanding and led to a marked increase in study abroad and student exchange programs, tourism, and foreign investment.³¹ Today, Europe accounts for 70% of all foreign investment into the United States.³² Not surprisingly, the top ten countries for foreign investment in the United States are all VWP participants.³³ However, with the fall of communism, the transatlantic relationship, the composition of our allies, and the face of Europe itself all changed dramatically. The advent of the euro and the disappearance of borders signaled a new, more transparent, more federalized European continent through the auspices of such cooperative frameworks as the Schengen Agreement all the way to EU.³⁴ The former Eastern Block, eager to rejoin the West, liberalized their governments and economies as well as their visa requirements, allowing Americans and most other Westerners visa-free access to their cash-starved economies.³⁵

Unfortunately, very few Western countries followed suit. Although the number of post-communist countries in the EU now roughly equals the number of original capitalist member states, and while travel visas have been

²⁸ See Rokos, *supra* note 4.

²⁹ See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (upholding constitutionality of exclusion of alien for advocating "world communism"), and Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT'L L. 63 (2002), n.168.

³⁰ 8 U.S.C. § 1187 (a)(2)(A) (2007).

³¹ Carl U. Zachrisson, *New Study Abroad Destinations: Trends and Emerging Opportunities*, available at <http://www.aifs.com/aifsfoundation/pdf/Destinations.pdf> (last visited Feb. 25, 2007).

³² U.S. DEP'T OF STATE, *FOREIGN DIRECT INVESTMENT IN THE UNITED STATES* (2006), available at <http://www.state.gov/r/pa/prs/ps/2006/63553.htm>.

³³ JENNY BATES, PROGRESSIVE POLICY INSTITUTE, *INTERNATIONAL CAPITAL FLOWS, FOREIGN INVESTMENT, AND TRADE* (1999), available at http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=108&subsecID=900009&contentID=1423.

³⁴ See Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and The Convention Applying the Agreement, June 14, 1985, 30 I.L.M. 68 (1991).

³⁵ Peter Brownfield, *Visa Program Angers Allies*, FOXNEWS.COM, Mar. 10, 2004, <http://www.foxnews.com/story/0,2933,113744,00.html>.

abolished, all but three EU countries—the UK, Ireland, and Sweden—maintain work and residency visa restrictions on EU citizens from many Central and Eastern European countries.³⁶ The conjured threat of the “Polish plumber” wrenching jobs from French hands played its share in the run up to their symbolic rejection of the EU Constitution.³⁷ The newest members of the EU faced no better treatment at the hands of U.S. policymakers. The United States continues to hypocritically require visa-free reciprocity from VWP participants while ignoring the growing number of European countries who abolished visa requirements for Americans.³⁸ Many of these countries have supported U.S. policy despite the risks of alienating their EU brethren, such as before the invasion of Iraq³⁹ and the row over CIA renditions and secret prisons.⁴⁰ Despite this and our own statutorily-mandated demand for reciprocity in all visa arrangements, the pleas for visa-free status from the former Eastern Bloc have proven fruitless for over a decade.⁴¹

1. Characteristics, Purpose, and Other Uses of the VWP

a. *Improving International Relations*

There is a documented relationship between visa-waiving agreements and the strength of bilateral relations, both on a diplomatic and general social level.⁴² Janusz Bugajski of the Center for Strategic & International Studies’ (CSIS) East Europe Project describes the repercussions of the U.S. current asymmetrical visa regulations in political, social, economic, and strategic terms.⁴³ As globalization and market liberalization increasingly opens the floodgate of American goods and culture into the former Eastern Bloc, without reciprocal reductions in barriers to travel in and access to America, the unbalanced flow fosters ill-will and anti-Americanism.⁴⁴

³⁶ EU-10 Migrants, Services, Seasonals, Migration News Vol. 12 No. 3, July 2005, available at http://migration.ucdavis.edu/mn/more.php?id=3117_0_4_0.

³⁷ See *Polish Plumber Beckons French*, BBC NEWS, June 21, 2005, available at <http://news.bbc.co.uk/2/hi/europe/4115164.stm>.

³⁸ See generally CSIS, *supra* note 14.

³⁹ See Craig S. Smith, *THREATS AND RESPONSES: BRUSSELS; Chirac Scolding Angers Nations That Back U.S.*, N.Y. TIMES, Feb. 19, 2003, available at <http://select.nytimes.com/gst/abstract.html?res=F10B13FD3C590C7A8DDDAB0894DB404482&partner=rssnyt&emc=rss>.

⁴⁰ See Sabina Zaccaro, *European Parliament Turns Policeman Over Renditions*, INTER PRESS SERVICE NEWS AGENCY, Feb. 17, 2007, available at <http://ipsnews.net/news.asp?idnews=36499>.

⁴¹ *Id.*

⁴² See generally CSIS, *supra* note 14.

⁴³ CSIS, *supra* note 14.

⁴⁴ *Id.*

In many countries, including staunch American allies Poland and the Czech Republic, the visa issue is widely considered the dominant cause of anti-American sentiment.⁴⁵ A recent poll conducted by the tourism industry reveals the true extent of the problems faced by citizens of VWP and non-VWP countries alike who wish to visit the United States.⁴⁶ The results of this poll placed the United States as the worst travel destination, among those polled, based on the difficult entry process (for both VWP and non-VWP passport holders), as well as the rude treatment by immigration officers.⁴⁷ Interestingly, the people who responded to this poll had a favorable view of the United States by a margin of three to one, suggesting that not only is U.S. policy discouraging potential visitors but that the worldwide negative impressions of our visa policies are borne out of widely-held perceptions and are not the result of mere anti-Americanism.⁴⁸

b. Promoting international tourism and commerce

Congress established the VWP in 1988 in an effort to encourage greater international tourism and commerce.⁴⁹ Since its creation, VWP has successfully attracted tourists and business people on short-stay visits, becoming the number one vehicle through which non-immigrant foreign nationals gain entry to the United States.⁵⁰ Approximately twenty-five million foreign nationals visit the United States as tourists or business visitors each year.⁵¹ Stated another way, roughly 5% of the total U.S. population arrives at major ports of entry each year.⁵² The ability of our customs officers to efficiently and safely process such a large number of visitors is due in no small part to the effectiveness of the VWP.⁵³

Since September 11, implementation of VWP criteria has become more onerous, queues have become longer, and international tourism has declined.⁵⁴ While the threat of terrorism, a perceived sluggish global economy, and an unpopular President all play important roles in the declining number of international visitors to the United States, the tedious and often unpredictable process of navigating U.S. visa and customs regulations—even under the supposedly “streamlined” VWP system—has undoubtedly

⁴⁵ See Rokos, *supra* note 4.

⁴⁶ Zakaria, *supra* note 9.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Visa Waiver Program for Certain Visitors, 8 U.S.C. § 1187 (2006).

⁵⁰ Vazquez-Azpiri & Horne, *supra* note 15, at 513.

⁵¹ *Id.* at 514.

⁵² *Id.*

⁵³ *Id.* at 515.

⁵⁴ *Id.*

discouraged many potential tourists and business people from crossing the Atlantic.⁵⁵ While other international markets such as London, Dubai, and Singapore have experienced strong growth in the number of arrivals of foreign business travelers, international business travel to the United States is down by 10%.⁵⁶ Examples such as the experience of British novelist-journalist Elena Lappin lend support to these allegations.⁵⁷ In 2004, Lappin—a frequent visitor to the U.S.—was handcuffed, strip-searched, and spent a night in jail before being physically removed from the country.⁵⁸ The heavy-handed tactics of the CBP officials’ stemmed from Lappin’s stated purpose for visiting the United States.: conducting interviews for a newspaper article.⁵⁹ Moreover, Lappin received no explanation as to why this behavior was now considered a violation of VWP policy when the same statement had never before caused any concern.⁶⁰ Traditionally, the United States barred persons entering under the VWP from taking up actual employment; however, they were not precluded from conducting interviews, attending business meetings, or other tasks related to their employment outside the United States.⁶¹ The overwhelming international outrage and disgust at the treatment of Lappin led to a revised CBP policy allowing customs officials to use their discretion to allow one-time VWP entry notwithstanding minor technicalities,⁶² but the event’s caustic effect on international tourism in the U.S. persists.

2. Conditions for Membership

There are four main requirements a state must meet in order to join the VWP: reciprocity, acceptable refusal rates of traditional visa applicants, use of proper passport technology, and a negligible overall threat posed to U.S. security.⁶³

a. Reciprocity

The first requirement is reciprocity. The U.S. government dictates that visa-free travel to the United States be granted to the partner country only upon the partner responding in kind by dropping all similar requirements for American citizens.⁶⁴ Although this requirement may appear extreme,

⁵⁵ See Wangerin, *supra* note 18, at 845.

⁵⁶ See Zakaria, *supra* note 9.

⁵⁷ See Vazquez-Azipri & Horne, *supra* note 15, at 516-17.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 517.

⁶³ CSIS, *supra* note 14.

⁶⁴ *Id.*

functionally, it is of little significance. Many countries that maintain diplomatic relations with the United States see American tourists as potential economic boons for their economies, and are eager to make traveling to their country as easy as possible for Americans.⁶⁵ Some countries not only waive visa requirements, but offer to pay the passport application fees for American tourists without a valid passport.⁶⁶ Countries not going to such extremes still generally present few obstacles to American tourists and require no visa or pre-flight interview at their consulate back home.⁶⁷

While the United States demands reciprocity in its VWP, the same favor is not extended even to our closest allies, including NATO partners and members of the EU.⁶⁸ For example, the Czech Republic and Poland are considered stable and trustworthy enough to be full members of NATO and participate militarily in Iraq and Afghanistan, but are still deemed to be outside the scope of eligibility for VWP.⁶⁹ Such double standards explain how American visa policy in Central and Eastern Europe remains a chaotic mess frustrating to their diplomats and citizens alike.⁷⁰

b. Refusal Rates

The second requirement for participation in the VWP is a non-immigrant refusal rate less than 2 or 3%.⁷¹ The non-immigrant visa refusal rate represents the total number of tourists or short-stay business persons seeking admission into the United States who are rejected because of potential security or overstay risks.⁷² The latter risk—overstaying the visitation period prescribed by one's visa—remains the number one reason for the deportation of foreign nationals from the United States.⁷³

⁶⁵ See, Sarah Schilcter, *Caribbean Resorts Offer to Pay for Your Passport*, MSNBC, Jan. 22, 2007, <http://www.msnbc.msn.com/id/16638168>.

⁶⁶ *Id.*

⁶⁷ The Associated Press, Agence France-Presse, Reuters, *3 Countries Head List for Visa-Free Travel*, Feb. 3, 2006, last accessed April 19, 2007, available at <http://www.ihf.com/articles/2006/02/02/news/travel03.php>.

⁶⁸ See CSIS, *supra* note 14.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *id.*

⁷² U.S. DEPT. OF STATE, CALCULATION OF THE ADJUSTED VISA REFUSAL RATE FOR TOURIST AND BUSINESS TRAVELERS UNDER THE GUIDELINES OF THE VISA WAIVER PROGRAM, available at <http://travel.state.gov/pdf/CombinedRefusalRate.pdf>.

⁷³ Jan Ting, *Immigration Law Reform After 9/11: What Has Been and What Remains to be Done*, 17 TEMP. INT'L & COMP. L.J. 503, 506 (2003).

While such a clear security threat is a compelling reason for stringent pre-arrival screening of foreign nationals, the U.S. government has shown great flexibility in the past in working with allies who fall short of the refusal rate requirement. Ireland gained entry to the U.S. VWP despite its refusal rate for non-immigrant visas falling outside the prescribed limits of 2-3%.⁷⁴ In fact, Ireland not only gained membership in the exclusive VWP club, but also became the first and only European country to host a U.S. Customs and Border Protection (CBP) immigration preclearance facility, allowing air passengers flying from Shannon and Dublin airports to undergo immigration checks before boarding the plane for the United States.⁷⁵ Clearly, the refusal rate requirement is negotiable, and with little to no subsequent security problems.

The number of direct flights from the former Eastern Bloc to American airports likely does not necessitate the installation of a preclearance facility in Central or Eastern Europe, but neither do their non-immigrant visa refusal rates justify continued visa requirements. For example, an October 2006 European Union report on visa reciprocity stated that former Eastern Bloc EU members had consistently declining visa refusal rates in Australia—a country with similar visa concerns and security threats as the United States—and that all former Eastern Bloc member's now fell within Australia's prescribed limits.⁷⁶ The same report stated none of the former Eastern Bloc EU members currently meet all the requirements for U.S. VWP; however, the report also noted the substantial steps taken by non-VWP former Eastern Bloc states towards compliance and stressed the EU's steadfast, long-term goal of visa-waiver reciprocity between all member states and the United States.⁷⁷ The report goes on to suggest a pan-European categorical reinstatement of visa requirements for Americans as a possible leverage tool if the United States fails to cooperate on the visa issue in the future.⁷⁸

c. Passport Technology

The third condition for acceptance into VWP requires the partner country to issue machine readable passports,⁷⁹ a condition which most recently has been expanded to include the incorporation of biometric identification

⁷⁴ See CSIS *supra* note 14.

⁷⁵ US Customs and Border Protection, Preclearance Locations, http://www.cbp.gov/xp/cgov/toolbox/contacts/preclean_locations.xml (last visited Feb. 25, 2007).

⁷⁶ European Commission, *Cases Where Visa Waiver Non-Reciprocity Is Maintained by Third Countries*, at 14 (2006) 568 final (Oct. 3, 2006) [hereinafter *Non-Reciprocity*].

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See CSIS, *supra* note 14.

technology.⁸⁰ The United States maintains that such technology improves security by rendering passports more difficult to forge, steal, or misrepresent.⁸¹ Due to controversies over privacy issues as well as logistical difficulties in instituting production of such high-tech passports,⁸² numerous VWP countries failed to meet the original October 2004 deadline.⁸³ The United States, in both a political and pragmatic concession, delayed the biometric passport requirement for two years to prevent nightmarish queues at airports across the country and at American embassies and consulates worldwide.⁸⁴ The U.S. maintains its position that biometric, machine-readable passports are an important part of overall border safety, but the recent two-year delay—especially considering the focus on transatlantic security since September 11—suggests that, like the other VWP conditions, the biometric, machine-readable requirement is negotiable under certain circumstances.

d. Overall security threat

The fourth and final requirement for VWP is more ambiguous than the preceding three conditions: the inclusion of the partner country poses no threat to American security interests.⁸⁵ The State Department performs the analysis of the overall threat posed by inclusion of a country into the VWP.⁸⁶ The State Department then submits the analysis to the U.S. Attorney General, who makes the final determination whether the applicant country is accepted into the program.⁸⁷ The Government's willingness to bargain both with Ireland as well as other non-compliant allies regarding VWP membership reveals the program's multifaceted purpose: economic catalyst, bureaucratic simplification, and perhaps most importantly, a political leverage tool.

It is hypocritical to contend that countries involved in such high-level cooperative organizations such as NATO and the EU pose a threat to U.S. security by participating in the VWP. Perhaps the most striking example of U.S. hypocrisy lies in its discussions with the Czech Republic and Poland on the possible installation of a future missile-defense system within their

⁸⁰ Andy McCue, *EU Wants Biometric Passports Delayed*, CNET NEWS.COM, Apr. 1 2005, available at http://news.com.com/EU+wants+biometric+passports+delayed/2100-7348_3-5650149.html.

⁸¹ See Christian, *supra* note 21.

⁸² See McCue, *supra* note 80.

⁸³ Martyn Williams, *US Delays Biometric Passport Requirements*, IDG NEWS SERVICE, Jan. 23, 2007, available at <http://pcworld.about.com/news/Jun162005id121408.htm>.

⁸⁴ Vazquez-Azpiri & Home, *supra* note 15.

⁸⁵ See CSIS, *supra* note 14.

⁸⁶ See Christian, *supra* note 21.

⁸⁷ *Id.*

borders, a possibility that enrages Russia and even caused some leading members of the Russian military to threaten possible strikes against any such installations.⁸⁸ If the United States trusts the Czechs and Poles to host some of our most expensive and confidential military technology—while also angering their former occupier and threatening their own national security—surely the Czechs and Poles are worthy for visa-free entry into the United States.

3. Diplomatic relations

U.S. authorities are keenly aware of the diplomatic leverage afforded by the former Eastern Bloc's desire for visa-free status. In May 2006, the U.S. Senate passed an amendment to existing immigration law which conditioned entry into a two-year test period for eventual visa-free status on the partner nation's deployment of at least three-hundred troops to Iraq and Afghanistan—of course, pursuant to the concomitance of U.S. military need and approval.⁸⁹ This new statutory language passed notwithstanding the existing substantial troop deployments of nations such as Poland, which contributed approximately 2,500 troops to Iraq and led a high-profile multinational force.⁹⁰

The Senate's coupling of troop commitments with bilateral visa regime requirements evidences a clear dichotomy of purpose regarding American visa law: security versus diplomacy. Czech President Václav Klaus conceded that every nation maintains the right to establish its own visa regime and security protocol, but the recent actions of the U.S. Senate contains an element of hypocrisy.⁹¹ The U.S. *de facto* argument against immediate visa-waiver status for Central European countries remains national security, but the most recent changes to visa policy regarding Central and Eastern Europe are wholly unrelated to true national security interests.

⁸⁸ Julie Farby, *Russia Warns U.S. Over Missile Defense System*, ALL HEADLINE NEWS, Feb. 19, 2007, available at <http://www.allheadlinenews.com/articles/7006511445>.

⁸⁹ ČTK, *EU Delays Report on Measures Over U.S. Visa*, CZECH BUS. WKLY., Oct. 14, 2006, available at <http://www.cbw.cz/phprs/2006073121.html?search=a>.

⁹⁰ Eugene Tomiuc, *Poland: Call For U.S. Visa Reprieve May Inspire Others*, RADIO FREE EUROPE/RADIO LIBERTY, Jan. 30, 2004, <http://www.rferl.org/featuresarticle/2004/01/3f5d5e99-a143-4c59-9dfb-8ffc73d423f2.html>.

⁹¹ See ČTK, *supra* note 89.

III. ISSUES WITH AND RECOMMENDATIONS FOR THE VWP

The current state of the U.S. VWP is unsatisfactory in two compelling ways: ineffective security measures⁹² and considerable ill-will and political concerns caused by a perceived unfairness in policy.⁹³ The need to revamp the VWP to improve security is clear. What is less clear, however, is the potential to not only revamp the VWP to improve security, but to bolster U.S. economic and international relations.

A. Current problems and potential issues of keeping the VWP status quo

1. Threat of losing visa-free travel in Europe

The European Union is currently finalizing details and beginning the implementation of a common visa scheme encompassing all member state citizens and residents.⁹⁴ The EU has studied the current state of visa inequity amongst the citizens and residents of its various member states in an attempt to create a pan-European offensive to secure equal treatment of its citizens by non-EU nations.⁹⁵ The European Union's Ambassador to the United States, John Bruton, articulated the position of the EU, saying "[w]e don't want other people to be picking and choosing between our members . . . [w]e're a club."⁹⁶ The EU remains intent to tackle the visa reciprocity issue at a Union-wide level, citing slow U.S. progress in negotiations with individual countries.⁹⁷ If progress is not made towards visa reciprocity and equality amongst the EU member states, the EU stated the possibility of using its "nuclear option," suspending all visa-waiving legislation for Americans traveling in Europe.⁹⁸

⁹² See, e.g., James Jay Carafano, Ph.D., and Laura Keith, "President's Proposed Visa Waiver Program Reforms Strengthen Fight Against Terror," Heritage Foundation *WebMemo* No. 1268, November 30, 2006, available at www.heritage.org/Research/NationalSecurity/upload/wm_1268.pdf, and Radek Sikorski, "The Future of Transatlantic Relations," testimony before the Subcommittee on Europe, Committee on International Relations, U.S. House of Representatives, June 17, 2003, at www.aei.org/publications/filter.all.pubID.17741/pub_detail.asp.

⁹³ Jeff Jacoby, op-ed, *How to Offend 'a Fantastic Ally'*, Townhall.com, July 22, 2005, last accessed April 19, 2007, available at www.townhall.com/columnists/JeffJacoby/2005/07/22/how_to_offend_a_fantastic_ally..

⁹⁴ Free Movement of Persons, Asylum and Immigration: Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings, Official Journal C 142, June 14, 2002, available at <http://europa.eu/scadplus/printversion/en/lvb/133191b.htm>.

⁹⁵ See generally Non-Reciprocity, *supra* note 76.

⁹⁶ See Workpermit.com, *supra* note 27.

⁹⁷ See Vazquez-Azpiris & Horne, *supra* note 15.

⁹⁸ *Id.*

The fallout of such a drastic move by the European Union would prove catastrophic for citizens on both sides of the Atlantic. While the direct economic impact would likely be more damaging to the E.U. economy, as U.S. tourism to Europe is increasing⁹⁹ compared to a decreasing number of European tourists to America¹⁰⁰—it is important to consider the greater logistical difficulties presented by traveling in Europe without visa-waiving agreements. Unless the hypothetical American traveler plans on visiting only one country, visas would have to be procured for each and every country visited, amounting to a nearly insurmountable headache for U.S. tourists and business people. Moreover, it is critical to recognize the impact more-difficult international travel would have on a country already notoriously insular in its view and understanding of the world.¹⁰¹ Famously averse to foreign travel, only around 20% of Americans have a passport.¹⁰² Until recently, Americans did not require a passport to travel to Canada, Mexico, or most Caribbean nations.¹⁰³ For those Americans with a passport, the most popular overseas destinations allow visa-free travel for U.S. citizens.¹⁰⁴ If Americans were required to perform the time-consuming, often draconian task of personally applying for a visa at the embassy of every foreign country visited, our already moribund sense of international wanderlust would likely suffer a fatal blow.¹⁰⁵ And if that was not bad enough, consider the fact that the decreased number of foreign tourists has cost the United States almost \$100 billion in lost revenue.¹⁰⁶

2. Security issues

By design, the VWP entry process is quick and as free of bureaucratic red tape as possible. The program was limited to countries that presented a

⁹⁹ EUROPEAN TRAVEL COMMISSION, EUROPEAN TRAVEL INSIGHTS 2005, at 3, available at http://www.etc-corporate.org/DWL/ETC_EuropeanTourismInsights_2005_final.

¹⁰⁰ Benjamin Spillman, "Foreign Tourists Shy Away From U.S.," *Las Vegas Review-Journal*, Feb. 1, 2007, available at http://www.reviewjournal.com/lvrj_home/2007/Feb-01-Thu-2007/news/12315620.html.

¹⁰¹ William Pfaff, AMERICANS FOR INFORMED DEMOCRACY, *Challenging Americans' Insular View of the World*, May 11, 2005, available at http://www.aidemocracy.org/News.cfm?article_id=051705_Pfaff.

¹⁰² Altman Granitsas, *Americans Are Tuning Out the World*, YALE GLOBAL ONLINE, Nov. 24, 2005, at 2, available at <http://yaleglobal.yale.edu/display.article?id=6553>.

¹⁰³ Schilcter, *supra* note 65.

¹⁰⁴ Vazquez-Azpiri & Horne, *supra* note 15, at 526.

¹⁰⁵ See Granitsas, *supra* note 102.

¹⁰⁶ Spillman, *supra* note 100.

minimal security threat to the United States.¹⁰⁷ In short, the VWP system was created based on the notion that the governments and citizens of our closest allies could be relied upon and presumed to not be threats to our security. Unfortunately, the fallacy of this belief has been revealed in recent years. Two high profile terrorist suspects, Zacarias Moussaoui and Richard Reid, were apprehended after they successfully used French and British passports, respectively, to take advantage of the VWP to gain entry into the United States.¹⁰⁸ Reid, infamously known as the “Shoe Bomber,” attempted to detonate explosives in his shoes mid-flight en route to the U.S.¹⁰⁹ While this attempt resulted in a categorical ban against cigarette lighters onboard aircraft, the other equally important security issue of the VWP was left untouched.¹¹⁰

The VWP’s biggest weakness is its reliance upon split-second decisions by border control personnel as to whether a foreign national should gain entry into the United States.¹¹¹ Whereas traditional visas require lengthy applications and a one-on-one interview at a U.S. embassy or consulate, the VWP deletes these steps, shifting the burden to the border agent. This shifting burden is problematic in numerous ways. The first problem is it delays the screening process until the foreign national has already arrived on American soil, the result of which being any visitor who is denied entry must either be detained by U.S. authorities or deported. While rejection at the port-of-entry and deportations can never be fully avoided, the better scheme would prevent many of these non-qualified visitors from reaching the United States in the first place.¹¹²

B. Current proposals for improving the VWP

The current administration expressed its intent to work with Congress and U.S. allies to implement changes in the VWP in order to increase the

¹⁰⁷ UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON NATIONAL SECURITY, VETERANS AFFAIRS, AND INTERNATIONAL RELATIONS, COMMITTEE ON GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES, “BORDER SECURITY: IMPLICATIONS OF ELIMINATING THE VISA WAIVER PROGRAM,” p. 7, last accessed April 19, 2007, available at <http://www.gao.gov/new.items/d03338.pdf>.

¹⁰⁸ Greene, *supra* note 3.

¹⁰⁹ Milwaukee Journal-Sentinel, *Wires, Explosives Found in Sneakers*, Dec. 24, 2001, available at <http://www.jsonline.com/story/index.aspx?id=7635>.

¹¹⁰ ALISON SISKIN, CONGRESSIONAL RESEARCH SERVICE, REPORT OF VISA WAIVER PROGRAM, p. 2, Feb. 24, 2004, available at <http://fpc.state.gov/documents/organization/31353.pdf>.

¹¹¹ Jeff Papa, *Basic Options in the Non-Immigrant Context*, 15 IND. INT’L & COMP. L. REV. 279, 280 (2005).

¹¹² *Id.*

efficiency and security of the program.¹¹³ One such proposal included electronic pre-screening over the internet, where foreign nationals could submit their information and verify their passports online in lieu of a traditional interview at an embassy or consulate.¹¹⁴ This system imitates a system that has been utilized in Australia for several years.¹¹⁵ Another proposal included increased cooperation and passenger information exchanges with participating VWP countries.¹¹⁶ This information exchange would include background checks and the sharing of other types of information gathered by the foreign national's home country when the visitor originally applied for a passport.¹¹⁷

In light of the EU's demand that the citizens of all its member states receive equal access to visas as well as the EU's plan to create a pan-European common visa scheme, any changes to the U.S. VWP should include incorporating the countries of Central and Eastern Europe. There are numerous benefits to curtailing the current use bi-lateral visa negotiations in favor of a single visa policy for Europe. First, including the EU member states of Central and Eastern Europe would immediately end one of the most problematic issues in transatlantic diplomacy. Second, extending visa-free travel to these countries would give a much-needed boost to public opinion of the United States and would be a positive step towards repairing America's tarnished post-September 11 image. Third, by developing a common visa scheme with Europe on a continent-wide level, the United States can realize significant savings and reduced bureaucracy. Finally, by working with the EU as a single entity and utilizing their common visa scheme (as it becomes available and fully implemented), we defer a significant amount of the burdensome screening and clearance process to the countries best suited for the task—the home countries of the visitors.

IV. VWP IS A POLITICAL TOOL WE SHOULD USE MORE EFFECTIVELY

The promise of visa-free travel to the United States holds an allure strong enough to create diplomatic leverage. After the United States announced that all VWP participants would be required to issue biometric

¹¹³ DEPARTMENT OF HOMELAND SECURITY, FACT SHEET: SECURITY IMPROVEMENTS TO VISA WAIVER PROGRAM, (Nov. 6, 2006), *available at* http://www.dhs.gov/xnews/releases/pr_1164919987951.shtm.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See supra* note 110 at pp. 7-10.

passports, the Western European countries obliged, albeit begrudgingly.¹¹⁸ Just as the possibility of EU and NATO membership encouraged democratic reforms and market liberalization throughout the former Eastern Bloc,¹¹⁹ VWP membership is an effective way to promote stricter border enforcement, more effective security measures, and worldwide peace and stability.

The United States should capitalize on the power of the VWP and use it more effectively to realize the goals of strong international security, trade, and diplomacy. The VWP in its current state is ill-suited to those goals. The VWP cannot be effectively modernized to reflect the current realities of the United States without also considering the current realities of its allies. Much has changed since the inception of the VWP and it must be changed accordingly. The best place to start is with Europe—the home of our traditional allies as well as a new generation of democracies eager to forge lasting economic, political, and cultural ties with the United States. The countries of Central and Eastern Europe must be included within the VWP. Any other course of action will jeopardize the strength of the transatlantic alliance.

¹¹⁸ BIOMETRICS AND SECURE TRAVEL DOCUMENTS, EUROPEAN INFORMATION ON JUSTICE AND SECURITY POLICY, (Apr. 24, 2006), *available at* <http://www.euractiv.com/en/justice/biometrics-secure-travel-documents/article-132063>.

¹¹⁹ Lyubomir Kyuchucov, Bulgarian Deputy-Minister of Foreign Affairs, speech to Institute of European Affairs, Nov. 28, 2006, *available at* http://www.iiea.com/images/managed/events_attachments/Kyuchukov281106.pdf.

