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Visa Waiver Program

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Visa Waiver Program

Summary

Since the events of September 11, 2001, concerns have been raised about the ability of terrorists to enter the United States under the visa waiver program. The visa waiver program (VWP) allows nationals from certain countries to enter the United States as temporary visitors (nonimmigrants) for business or pleasure without first obtaining a visa from a U.S. consulate abroad. Temporary visitors for business or pleasure from non-VWP countries must obtain a visa from Department of State (DOS) officers at a consular post abroad before coming to the United States. The VWP constitutes one of a few exceptions under the Immigration and Nationality Act (INA) in which foreign nationals are admitted into the United States without a valid visa. Under Department of Homeland Security (DHS) regulations, travelers who seek to enter the United States through the VWP became subject to the biometric requirements of the US-VISIT program on September 30, 2004.

By eliminating the visa requirement, this program facilitates international travel and commerce and eases consular office workloads abroad, but it also bypasses the first step by which foreign visitors are screened for admissibility to enter the United States. In 2003, 13.5 million visitors entered the United States under this program, constituting 49% of all overseas visitors. To qualify for the VWP, the INA specifies that a country must: offer reciprocal privileges to United States citizens; have had a nonimmigrant refusal rate of less than 3% for the previous year or an average of no more than 2% over the past two fiscal years with neither year going above 2.5%; certify that the country issues, or will issue, machine-readable passports; and not compromise the law enforcement or security interests of the United States by its inclusion in the program. Countries can be terminated from the VWP if an emergency occurs that threatens the United States' security interests.

The USA PATRIOT Act enacted a requirement that by October 1, 2003, all aliens applying for admission under the VWP must have machine-readable passports. The act allows the Secretary of State to waive the requirement until September 30, 2007, and the requirement was waived until September 30, 2004, for 22 of the 27 countries participating in the VWP. At this time, aliens entering under the VWP, must present machine-readable passports. In addition, the Enhanced Border Security and Visa Reform Act of 2002 requires that by October 26, 2004, all countries participating in the VWP must issue their nationals machine-readable passports that incorporate *biometric identifiers*; however, the deadline was extended until October 26, 2005 by P.L. 108-299. Nonetheless, it is unclear whether all the VWP countries will be able to meet the new deadline. P.L. 108-458, the Intelligence Reform and Terrorism Prevention Act of 2004, requires that by October 26, 2006, each VWP country, as a condition of being in the VWP, certify that it is developing a program to issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry. In the 109th Congress, H.R. 1320 would require those entering under the VWP to undergo an electronic verification of admissibility before embarkation. In addition, H.R. 688 would suspend the VWP, while other bills (H.R. 634 and H.R. 635/S. 348) would add Poland to the VWP. This report will be updated if legislative action occurs.

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Visa Waiver Program

Current Policy

Under the visa waiver program (VWP), the Secretary of Homeland Security,¹ in consultation with the Secretary of State, may waive the “B” nonimmigrant visa requirement for aliens traveling from certain countries as temporary visitors for business or pleasure (tourists).² Nationals from participating countries simply complete an admission form (I-94) before their arrival and are admitted for up to 90 days. The VWP constitutes one of a few exceptions under the Immigration and Nationality Act (INA) in which foreign nationals are admitted into the United States without a valid visa.

Temporary foreign visitors for business or pleasure from most countries must obtain a visa from Department of State (DOS) offices at a consular post abroad before coming to the United States.³ Personal interviews are generally required, and consular officers use the Consular Consolidated Database (CCD) to screen visa applicants. In addition to indicating the outcome of any prior visa application of the alien in the CCD, the system links with other databases to flag problems that may make the alien ineligible for a visa under the so-called “grounds for inadmissibility” of the INA, which include criminal, terrorist, and public health grounds for exclusion. Consular officers are required to check the background of all aliens in the “lookout” databases, including the Consular Lookout and Support System (CLASS) and TIPOFF databases.⁴

¹ The Secretary of Homeland Security administers the VWP program. Section 402 of the Homeland Security Act of 2002 (HSA; P.L. 107-296), signed into law on Nov. 25, 2002, states: “The Secretary [of Homeland Security], acting through the Under Secretary for Border and Transportation Security, shall be responsible for the following: ... (4) Establishing and administering rules, ... governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States.” Prior to Mar. 1, 2003, the Attorney General in consultation with the Secretary of State was responsible for designating the VWP countries.

² “B” visa refers to the subparagraph in the Immigration and Nationalization Act (INA § 101(a)(15)(B)).

³ To obtain a nonimmigrant visa, individuals submit written applications and undergo interviews and background checks. For more information on temporary admissions, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

⁴ For more information on visa issuances, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

Although the VWP greatly eases the documentary requirements for nationals from participating countries, it has important restrictions. Aliens entering with a B visa may petition to extend their length of stay in the United States or may petition to change to another nonimmigrant or immigrant status. Aliens entering through the VWP are not permitted to extend their stays except for emergency reasons and then for only 30 days.⁵ Additionally, with some limited exceptions, aliens entering through VWP are not permitted to adjust status. An alien entering through the VWP who violates the terms of admission becomes deportable without any judicial recourse or review (except in asylum cases).

VWP Qualifying Criteria

Currently, to qualify for the VWP a country must:

- offer reciprocal privileges to United States citizens;
- have had a nonimmigrant refusal rate of less than 3% for the previous year or an average of no more than 2% over the past two fiscal years with neither year going above 2.5%;
- issue machine-readable passports (and all aliens entering under the VWP must possess a machine-readable passport); and
- be determined, by the Secretary of Homeland Security, in consultation with the Secretary of State, not to compromise the law enforcement or security interests of the United States by its inclusion in the program.

In addition, in the future to be a part of the VWP a country must also:

- certify that it has established a program to issue to its nationals machine-readable passports that are tamper-resistant and incorporate a biometric identifier (deadline October 26, 2005),⁶ and
- certify that it is developing a program to issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry (deadline October 26, 2006).

Countries can be immediately terminated from the VWP if an emergency occurs in the country that the Secretary of Homeland Security in consultation with the Secretary of State determines threatens the law enforcement or security interest of the United States.⁷ For example, because of the economic collapse in Argentina in

⁵ This provision was amended by P.L. 106-406 to provide extended voluntary departure to nonimmigrants who enter under the VWP and require medical treatment.

⁶ All passports issued after October 26, 2005 presented by aliens entering under the VWP will have to be machine-readable and contain a biometric identifier.

⁷ An emergency is defined as: (1) the overthrow of a democratically elected government; (2) war; (3) a severe breakdown in law and order in the country; (4) a severe economic collapse; and (5) any other extraordinary event in the program country where that country's participation could threaten the law enforcement or security interests of the United States. INA § 217(c)(5)(B).

December 2001,⁸ and the increase in the number of Argentine nationals attempting to use the VWP to enter the United States and remain illegally past the 90-day period of admission,⁹ that country was removed from the VWP in February 2002. While the number of Argentine nonimmigrant travelers to the United States declined between 1998 and 2000, the number of Argentines denied admission at the border and the number of interior apprehensions increased. The Department of Justice¹⁰ in consultation with DOS determined that Argentina's participation in the VWP was inconsistent with the United States' interest in enforcing its immigration laws.¹¹

Similarly, on April 15, 2003, Uruguay was terminated from the VWP because Uruguay's participation in the VWP was determined to be inconsistent with the U.S. interest in enforcing the immigration laws. Between 2000 and 2003 Uruguay experienced a recession causing its citizens to enter under the VWP to live and work illegally in the United States. In 2002, Uruguayan nationals were two to three times more likely than all nonimmigrants on average to have been denied admission at the border. Uruguayan air arrivals had an apparent overstay rate more than twice the rate of the average apparent overstay rate for all air arrival nonimmigrants.¹²

Additionally, there is probationary status for VWP countries that do not maintain a low visa refusal rate. Countries on probation are determined by a formula based on a disqualification rate of 2%-3.5%.¹³ Probationary countries with a disqualification rate less than 2% over a period not to exceed three years may remain VWP countries.¹⁴ Countries may also be placed on probation if more time is necessary to determine whether the continued participation of the country in the VWP is in the security interest of the United States. In April 2003, Belgium was placed on provisional status because of concerns about the integrity of nonmachine-

⁸ Beginning in Dec. 2001, Argentina experienced a serious economic crisis, including defaulting on loans by foreign creditors, devaluation of its currency, and increased levels of unemployment and poverty. For more information on the financial collapse in Argentina see CRS Report RS21072, *The Financial Crisis in Argentina*, by J. F. Hornbeck.

⁹ In addition, many Argentine nationals were trying to use the VWP to obtain entry to the United States solely for the purpose of proceeding to the Canadian border and pursuing an asylum claim in Canada. According to Citizenship and Immigration Canada (CIC), between 1999 and 2001, more than 2,500 Argentines filed refugee claims in Canada after transiting the United States under the VWP. *Federal Register*, Feb. 21, 2002, vol. 67, no. 35, p. 7944.

¹⁰ The Department of Homeland Security did not exist in Feb. 2002, and authority for the VWP resided with the Attorney General in the Department of Justice.

¹¹ *Federal Register*, Feb. 21, 2002, vol. 67, no. 35, pp. 7943-7945.

¹² *Federal Register*, Mar. 7, 2003, vol. 68, no. 45, pp. 10954-10957.

¹³ "Disqualification rate" is defined as the percentage of nationals from a country who applied for admission as a nonimmigrant who either violated the terms of the nonimmigrant visa, who were excluded from admission or who withdrew their application for admission as a nonimmigrant.

¹⁴ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208).

readable Belgian passports and the reporting of lost or stolen passports. Belgium's participation in the VWP was to be re-evaluated in 2004.¹⁵

VWP Inspections

Unlike other nonimmigrants, no background checks are done on travelers under the VWP prior to their departure for the United States. This expedited process allows only one opportunity — immigration inspectors at port of entry — to identify inadmissible aliens. Prior to the alien's arrival, an electronic passenger manifest is sent from the airline or commercial vessel to immigration inspectors at the port of entry which is checked against security databases.

Since October 1, 2002, passenger arrival and departure information on individuals entering and leaving the U.S. under the VWP has been electronically collected from airlines and cruise lines, through DHS's Bureau of Customs and Border Protection's (CBP) Advanced Passenger Information System (APIS) system. If the carrier fails to submit the information, an alien may not enter under the VWP. APIS sends the data to the DHS's Bureau of Immigration and Customs Enforcement's (ICE) Arrival and Departure Information System (ADIS)¹⁶ for matching arrivals and departures and reporting purposes. APIS collects carrier information such as flight number, airport of departure and other data.¹⁷

At port of entry, immigration inspectors observe and question applicants, examine passports, and conduct checks against a computerized system to determine whether the applicant is admissible to the United States.¹⁸ DHS's CBP inspects aliens who seek to enter the United States. Primary inspection consists of a brief interview with an immigration inspector, a cursory check of the traveler's documents, and a query of the Interagency Border Inspection System (IBIS).¹⁹ At 115 airports and 14 seaports, many nonimmigrants are entered into the new US-VISIT system that uses biometric identification (finger scans) to check identity and track presence in the United States. Those entering under the VWP are subject to US-VISIT. Currently, inspectors at the border collect the following information on aliens entering under the VWP: name, date of birth, nationality, gender, passport number, country of issuance, a digital photograph, and prints for both index fingers. Primary inspections are quick (usually lasting no longer than a minute); however, if the inspector is suspicious that

¹⁵ *Federal Register*, Mar. 7, 2003, vol. 68, no. 45, pp. 10954-10957. It is not clear that this re-evaluation was completed.

¹⁶ ADIS feeds information to the Interagency Border Inspection System (IBIS).

¹⁷ [<http://www.dhs.gov/dhspublic/display?theme=43&content=736&print=true>].

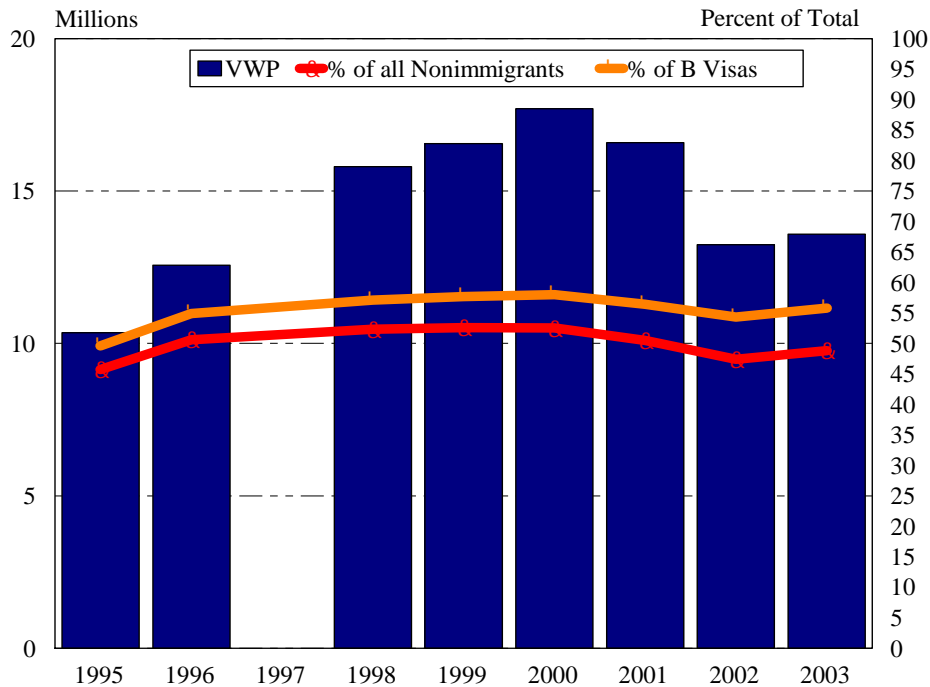
¹⁸ Although aliens who enter under the VWP do not need a visa, all visa waiver program applicants are issued nonimmigrant visa waiver arrival/departure forms (Form I-94W).

¹⁹ IBIS interfaces with the FBI's National Crime Information Center (NCIC), the Treasury Enforcement and Communications System (TECS II), National Automated Immigration Lookout System (NAIIS), Non-immigrant Information System (NIIS), CLASS and TIPOFF terrorist databases. Because of the numerous systems and databases that interface with IBIS, the system is able to obtain such information as whether an alien is admissible, an alien's criminal information, and whether an alien is wanted by law enforcement.

the traveler may be inadmissible under the INA or in violation of other U.S. laws, the traveler is referred to a secondary inspection. Those travelers sent to secondary inspections are questioned extensively, travel documents are further examined, and additional databases are queried.²⁰

Trends in Use of the VWP

Figure 1. Number of Entrants under the VWP for FY1995-FY2003, Percent of All Nonimmigrant Entrants Who Are VWP Entrants, and Percent of All B Visa Entrants Who Are VWP Entrants



Source: Data for FY1995-FY2001 from the Statistical Yearbook of the Immigration and Naturalization Service. Data for FY2002-FY2003 from the Department of Homeland Security, Yearbook of Immigration Statistics. Data are not available for FY1997.

Note: Number of countries participating in the VWP at the end of the Fiscal Year — FY1995: 23; FY1996: 25; FY1998: 26; FY1999-FY2001: 29; FY2002: 28; and, FY2003: 27.

The number of people entering under the VWP grew steadily as countries were added to the program, and reached a peak of 17.7 million in FY2000. The number of visitors entering under the VWP declined by 3.4 million or 20% between FY2001

²⁰ Lookout databases such as TIPOFF, which is integrated with CLASS, contain information on aliens who are inadmissible for entry into the United States. NSEERS and SEVIS are also used during secondary inspections. Immigration inspectors may access NAILS II, which is a text-based system that interfaces with IBIS and CLASS. For more information, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

and FY2002. The number of all nonimmigrants entering the United States declined by 4.9 million or 14.9% during the same period, but the number of nonimmigrants who were not from VWP countries declined by 1.6 million (9.6%). Similarly, the number of foreign nationals entering the United States with B visas between FY2001 and FY2002 declined by 13.4% or 1.7 million, which is a smaller decline than the decline in the percent of visitors entering under the VWP. Between FY2002 and FY2003, the number of people entering under the VWP increased slightly from 13.2 to 13.6 million, while the number of people entering as nonimmigrants decreased slightly from 27.9 to 27.8 million, and the number of aliens entering as temporary visitors for business or pleasure remained almost unchanged. In 2003, visitors entering under the VWP constituted 48.8% of all nonimmigrant admissions, and 55.8% of all temporary visitors.²¹

Legislative History

Visa Waiver Pilot Program

The Visa Waiver Program (VWP) was established as a temporary program (Visa Waiver Pilot Program) by the Immigration Reform and Control Act of 1986 (P.L. 99-603). Congress periodically enacted legislation to extend the program's authorization, and program participation grew to include 29 countries.²² The pilot program was scheduled to expire on September 30, 1997, but temporary extensions were included in both Continuing Resolutions passed in the 105th Congress. The Commerce, Justice, State, and Judiciary (CJS) FY1998 Appropriations Act (P.L. 105-119) also contained an extension through April 30, 1998. In 1998, Congress enacted legislation (P.L. 105-173) that not only extended the program through April 30, 2000, but made other changes to the standard by which countries are selected (designated) to participate in the VWP.²³

Visa Waiver Permanent Program Act

On October 30, 2000, the Visa Waiver Permanent Program Act was signed into law (P.L. 106-396). The statutory authority for the Visa Waiver Pilot Program had expired on April 30, 2000, but in the interim, the Commissioner of the former

²¹ Temporary visitors include aliens who entered with B visas and those who entered under the VWP.

²² As of Apr. 2003, 27 countries were eligible to participate in the VWP: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. Argentina was removed from the VWP in February 2002, and Uruguay was removed in Apr. 2003.

²³ For further information, see CRS Report 97-309, *Immigration: Visa Waiver Pilot Program*, by Ruth Ellen Wasem (archived report, available on request from the author, 7-7342).

Immigration and Naturalization Service (INS)²⁴ exercised the Attorney General's parole authority to extend the program temporarily.²⁵ Besides making this program's authorization permanent, the Visa Waiver Permanent Program Act included provisions designed to strengthen documentary and reporting requirements. P.L. 106-396 included provisions that:

- mandate that by October 1, 2007 all entrants under the VWP must have machine-readable passports;
- require that all visa waiver program applicants be checked against lookout systems;
- require ongoing evaluations of participating countries (not less than once every five years);
- require the collection of visa waiver program arrival/departure data at air and sea ports of entry; and
- require that the calculation of visa refusal rates for determining country eligibility shall not include any refusals based on race, sex, or disability.²⁶

At the time, many maintained that P.L. 106-396 balanced the competing concerns of facilitating travel and tightening immigration controls.

USA Patriot Act of 2001

The USA Patriot Act (P.L. 107-56), signed into law on October 26, 2001, advanced the deadline for all entrants under the VWP to have machine-readable passports to October 1, 2003, but allowed the Secretary of State to waive this requirement until October 1, 2007 if the VWP country can show that it is making progress toward issuing machine-readable passports. In addition, the USA Patriot Act directed the Secretary of State each year until 2007 to ascertain that designated VWP countries have established programs to develop tamper-resistant passports.

On September 24, 2003 the Secretary of State extended the deadline for visitors from 21 VWP countries to present a machine-readable passport at the ports of entry until October 26, 2004.²⁷ At this time, all entrants under the VWP must present a machine-readable passport, or a passport which is not machine-readable and a visa.

²⁴ The Homeland Security Act of 2002 (P.L. 107-296) abolished the Immigration and Naturalization Service (INS) and effective Mar. 1, 2003, transferred most of its functions to three bureaus in the new Department of Homeland Security (DHS): Citizenship and Immigration Services (USCIS); Bureau of Immigration and Customs Enforcement (ICE); and, Bureau of Customs and Border Protection (CBP).

²⁵ Parole is a temporary authorization to enter the United States and is normally granted when the alien's entry is determined to be in the public interest (INA § 212(d)(5)(A)).

²⁶ Many of these requirements were included to address shortcomings in the program, as identified by the Inspectors General of both the Departments of Justice and State.

²⁷ The 21 countries granted a postponement were: Australia, Austria, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Spain, Sweden, Switzerland, and the United Kingdom. On Nov. 11, 2003, Luxembourg was granted an extension of the deadline.

Enhanced Border Security and Visa Entry Reform Act of 2002

The Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act),²⁸ signed into law on May 14, 2002, mandated that by October 26, 2004 the government of each VWP country needs to certify that it has established a program to issue to its nationals machine-readable passports that are tamper-resistant and incorporate a *biometric identifier*.²⁹ The Border Security Act specified that any person applying for admission to the United States under the VWP must have a tamper-resistant, machine-readable passport with a biometric identifier unless the passport was issued prior to October 26, 2004. The USA Patriot Act established the deadline for all foreign nationals entering under the VWP to have machine-readable, tamper-resistant passports, and the Border Security Act stated that the new requirement of biometrics in the passports does not change the deadline in the USA Patriot Act for the presentation of machine-readable, tamper-resistant passports. The biometric passport requirement deadline was extended to October 27, 2005 by P.L. 108-299.³⁰ Thus, as of October 27, 2005 (the day after the new deadline) all entrants under the VWP must present machine-readable, tamper-resistant passports (as required by the USA Patriot Act, and P.L. 108-299), but only passports issued after October 26, 2005 must have a biometric identifier. The Border Security Act also required all VWP countries to certify that they report in a timely manner the theft of blank passports, and required, prior to admission in the United States, that all aliens who enter under the VWP are checked against a lookout system.

The Intelligence Reform and Terrorism Prevention Act of 2004

P.L. 108-458,³¹ the Intelligence Reform and Terrorism Prevention Act of 2004, added the requirement that by October 26, 2006, as a condition of being in the VWP, each VWP country must certify that it is developing a program to issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry.

Policy Issues

The VWP is supported by the U.S. travel and tourism industry, the business community, and DOS. The travel and tourism industry views the VWP as a tool to facilitate and encourage foreign visitors for business and pleasure, which results in increased economic growth generated by foreign tourism and commerce for the

²⁸ P.L. 107-173. The original bill, H.R. 3525, was sponsored by Representative F. James Sensenbrenner.

²⁹ The act tasked the International Civil Aviation Organization (ICAO) with developing the biometric standard.

³⁰ Signed into law on Aug. 9, 2004.

³¹ The original bill, H.R. 2845, was sponsored by Senator Susan M. Collins and signed into law on Dec. 17, 2004.

United States.³² DOS argues that by waiving the visa requirement for high-volume/low-risk countries, consular workloads are significantly reduced, allowing for streamlined operations, cost savings, and concentration of resources on greater-risk nations in the visa process. Additionally, some contend that currently DOS does not have the resources to resume issuing visas to all the visitors from VWP countries.³³

Nonetheless, while the program has significantly reduced the consular workload and facilitated travel to the United States, it has increased the workload of immigration inspectors at ports of entry by shifting background checks to ports of entry. Furthermore, others contend that the relaxed documentary requirements of the VWP increase immigration fraud and decrease border security. Immigration inspectors have stated that terrorists and criminals believed they would receive less scrutiny during the immigration inspection process if they applied for admission into the United States under the VWP.³⁴ On February 28, 2002, the House Judiciary Committee's Immigration and Claims Subcommittee held a hearing on the VWP. Testimony by the Inspector General of the Department of Justice pointed out several shortcomings in the current program. Of particular concern were the former INS's inability to account for nonimmigrant overstays, stolen passports from VWP countries, and INS's ability to correctly and consistently check applicants against the lookout system.

Biometric Deadline

The 108th Congress passed H.R. 4417, signed into law on August 9, 2004, as P.L. 108-299, which extended the deadline for VWP countries to certify that they have a program to issue machine-readable passports with biometric identifiers until October 26, 2005. On March 17, 2004, the Secretary of Homeland Security, Thomas Ridge, and the Secretary of State, Colin Powell, sent a letter to Representative F. James Sensenbrenner stating that none of the VWP countries would be able to meet the October 26, 2004 deadline for establishing a program to issue to its nationals machine-readable passports that are tamper-resistant and incorporate a biometric

³² The example of Argentina was frequently used to illustrate this relationship; during the first year Argentina was in the VWP, tourism from that country to the United States grew by 11.5%. Some cite Korea as a country that should be participating in VWP because of the trade and tourism growth it could generate, and contend that this factor should be added to the criteria used to select participating countries. Other proponents of the VWP, however, contend that the criteria should not be broadened to include tourism potential if the thresholds of refusal rates and visa overstay violations are weakened, arguing that these provisions are essential to safeguard and control our borders.

³³ In his testimony before the House Immigration and Claims Subcommittee on Feb. 28, 2002, William S. Norman, President and Chief Executive Officer of the Travel Industry Association of America, stated that it would take hundreds of new consular staff and tens of millions of dollars to issue visas to visitors currently entering under the VWP.

³⁴ U.S. Department of Justice, Office of Inspector General Report I-2002-002, *Follow-Up Report on the Visa Waiver Program*, Dec. 2001. (Hereafter cited as DOJ, *Follow-Up Report*.)

identifier.³⁵ The letter stated that countries were trying to meet the deadline, but were unable due to “interoperability issues, privacy issues, chip durability concerns, as well as production and procurement delays.”³⁶ Secretary Ridge and Secretary Powell asked Representative Sensenbrenner to extend or waive the deadline for two years, as they contended, by 2006, the majority of VWP countries will be issuing biometric passports. On April 21, 2004, the House Judiciary Committee held an oversight hearing entitled “Should the Congress extend the October, 2004 Statutory Deadline for Requiring Foreign Visitors to Present Biometric Passports?” Secretary Ridge and Secretary Powell testified at the hearing.³⁷

Although Congress extended until October 26, 2005, the deadline for VWP countries to certify that they have a program to issue machine-readable passports with biometric identifiers, it is possible that some VWP countries will be unable to meet the new deadline. Under the law, there is no mechanism other than Congressional action to extend the deadline. On February 18, 2005, Representative F. Sensenbrenner sent a letter to the VWP countries to obtain information on their ability to meet the biometric passport deadline. Franco Frattini, Vice-President of the European Commission, wrote that:

On 13 December 2004 the European Union adopted a Regulation (No 2252/2004) on standards for security features and biometrics and travel documents issued by Member States, which is binding for all member states except the United Kingdom and Ireland. The regulation mandates that EU Member States to issue passports and travel documents in compliance with a series of minimum security standards related to the production of the document. Furthermore, the passport will contain a contactless chip on which the facial image will be stored, taking into account the specifications of the International Civil Aviation Organization (ICAO). The EU has decided to go even further as required by ICAO in rendering the passport more secure. Two fingerprints in interoperable formats will be added in a mandatory way on the chip....

The letter continues that “despite all the progress by the EU member States...the critical aspects of the biometric technology ... are still being finalized,” and notes that the ICAO technical reports were released rather late, making it impossible to begin

³⁵ For a discussion of the letter, see Rachel L. Swarns, “Passport Deadline Extension Is Sought,” *New York Times*, Mar. 25, 2004, p. A23.

³⁶ Previously, DOS has stated that the timetable for the biometric requirement is too quick since the International Civil Aviation Organization (ICAO) finalized the standards for the biometric identifier in May 2003. DOS also maintains that research, development and testing of new passports usually takes several years. Testimony of Maura Harty, in U.S. Congress, House Select Committee on Homeland Security, Infrastructure and Border Security Subcommittee, *Hearing to Evaluate the US-VISIT Program*, 108th Cong., 2nd sess., Jan. 28, 2004. (Hereafter cited as *Testimony, Maura Harty*.) Department of Homeland Security, DMIA Task Force, *Data Management Improvement Act (DMIA) Task Force Second Annual Report to Congress*, Dec. 2003, p. D-6.

³⁷ The hearing testimony is available at [<http://judiciary.house.gov/Oversight.aspx?ID=32>].

implementation earlier. Finally, the letter requests that Congress consider extending the biometric deadline until August 28, 2006.³⁸

On April 7, 2005, Representative Sensenbrenner sent a letter in response to the EU letter, which sought to clarify the requirements of the deadline, and to discuss that the EU countries could have used a “less technically ambitious approach” to fulfill the biometric passport requirement which could have made it possible to meet the October 26, 2005 deadline. Representative Sensenbrenner reiterated that only passports issued after October 26, 2005, would need to have a biometric. People attempting to enter under the VWP using machine-readable³⁹ passports without biometric identifiers issued before that date could still enter under the VWP. In addition, the letter stated

I am well aware that the ICAO was not prompt in establishing the standards for compliance. ICAO has also added a standard to address those nations desiring to incorporate an electronic chip as an identity confirming option, a technological advance that adds complexity ... Previously unknown secondary-consequences of new technology should not further delay realizing the fundamental purpose of the requirement, which is to establish the identity of people entering this country and thereby reduce the risk of future foreign terrorist attacks.

The Border Security Act stipulated only that biometric identifiers and documents meet ICAO standards, and that the passport be “machine-readable.” Congress, in passing the Act, anticipated that ICAO would establish reasonable, cost-effective standards which relied upon existing technology. That the ICAO would become enmeshed in new and unproven technology, and that the EU should choose an elaborate and expensive path to meet the requirement has led to consequences that are regrettable, but not insurmountable.⁴⁰

In addition, Belgium has already begun issuing machine-readable passports with biometric identifiers which appears to meet the biometric passport requirement of the VWP. The chip in the Belgium passport contains a digital photograph, and has enough space to encode fingerprints.⁴¹

³⁸ Letter from Franco Frattini, Vice-President of the European Commission, to Rep. F. James Sensenbrenner, Mar. 23, 2005.

³⁹ As of Oct. 26, 2004, all aliens entering under the VWP must present a machine-readable passport.

⁴⁰ Letter from Rep. F. James Sensenbrenner, Jr., to Luc Frieden, President of the European Council of Ministers, and Franco Frattini, Vice-President of the European Commission, Apr. 7, 2005.

⁴¹ [<http://europa.eu.int/idabc/en/document/2552/599>].

Management and Oversight

In April 2004, the Inspector General (IG) for the DHS released a report entitled *An Evaluation of the Security Implications of the Visa Waiver Program*.⁴² The report details security concerns with the VWP, some of which result from establishment of DHS in March 2003, and the transfer of the VWP's administration to DHS's Border and Transportation Security Directorate (BTS). The report found that since the abolishment of the Immigration and Naturalization Service (INS), the VWP has had a series of acting managers and officials, and that many within DHS and other federal agencies were unsure who was in charge of the program. The report also stated that due to several issues, including lack of funding and trained personnel, BTS is unable to perform the Congressionally mandated reviews of each VWP country to see if the countries should continue to be included in the program. In addition the report found that there was no process for re-evaluating Belgium's probationary status to determine whether Belgium should continue to be a VWP country. This review was supposed to be completed by May 15, 2004.

Lost and Stolen Passports

The IG April 2004 report also found that due to lack of country reviews, BTS is unable to assess the information provided by the countries on lost and stolen passports. The information provided by VWP governments on lost and stolen passports has not been checked against United States' entry/exit data to determine whether the passports have been used to enter the United States. The report noted that collection of data on lost and stolen passports is not proactive, uniform, nor disseminated in an organized manner. In addition, the report observed that the lack of international standardization in passport numbering systems complicates the ability to identify people using stolen VWP country passports.

The April 2004 report also noted that the U.S. lacked a centralized mechanism for foreign governments to report lost and stolen passports. In May 2004, the United States joined 40 other countries in providing information on lost and stolen passports to the U.S. National Central Bureau of the International Criminal Police Organization (INTERPOL). The INTERPOL lost and stolen passport database is available to law enforcement and immigration authorities worldwide.⁴³ Seven of the 27 VWP countries provide data to the INTERPOL database.

⁴² U.S. Department of Homeland Security, Office of Inspections, Evaluations, and Special Reviews OIG-04-26, *An Evaluation of the Security Implications of the Visa Waiver Program*, Apr. 2004.

⁴³ The INTERPOL lost and stolen passport database became operational in July, 2002. The United States agreed to transfer 320,000 records of lost or stolen U.S. passports reported since 2002. INTERPOL's database presently contains approximately 1.6 million records reported by the 41 countries. Of the 1.6 million records, approximately 60% are passports, predominantly lost or stolen from the bearer, while 40% are national identification documents. U.S. Department of Homeland Security, Office of Inspections, Evaluations, and Special Reviews OIG-05-07, *A Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States*, Dec. 2004, pp. 7-8. (Hereafter cited as DHS, *Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States*.)

Due to the findings in the April 2004 report detailing deficiencies in the reporting of lost and stolen passports, in December 2004 DHS' Office of the Inspector General⁴⁴ released a follow up report entitled, *A Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States* which found that the majority of aliens applying for admission to the United States using stolen passports are admitted, and that the likelihood of being admitted only slightly declined if the passport was posted in the lookout system.⁴⁵ The study reviewed two groups of aliens who used stolen passports to attempt to enter the United States. One group did not have lookouts posted for the stolen passports, and 79 out of 98 aliens were admitted (81%). The other group had lookouts posted for the stolen passports, and 57 out of 78 aliens were admitted (73%), of which 33 of the admissions occurred after September 11, 2001.

The study focused on aliens using stolen passports which had been entered into the lookout system, and found that 39 aliens were admitted during primary inspection. The report concluded that aliens were admitted directly from primary inspections because the inspectors either did not heed the lookouts or did not detect the forged information on the stolen passports, or both.⁴⁶ In the report, CBP officials discussed reasons why an inspector at primary inspections might miss a lookout for a stolen passport including human error (e.g., the inspector enters the wrong passport number into the system), or the inspector failing to detect forged information on the passport.⁴⁷ The contention by some CBP officials that all stolen passport "hits" are automatically sent to secondary inspection was not confirmed by the research.⁴⁸

In addition, 39 aliens with passports in the lookout system were referred to secondary inspection, and 18 were subsequently admitted. The report noted that the records from secondary inspection were not detailed enough (if they existed) to explain the inspectors' rationale for admitting the alien from secondary inspection. The report also found that when CBP receives new reports of stolen passports that they do not check entry records to determine if the stolen passport was used to enter the country. Lastly, the report observed that there was no law enforcement pursuit

⁴⁴ U.S. Department of Homeland Security, Office of Inspections, Evaluations, and Special Reviews OIG-05-07, *A Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States*, Dec. 2004.

⁴⁵ A lookout system contains information on aliens who are or may be inadmissible to the United States, or who may be of interest to law enforcement for reasons such as immigration violations, alien smuggling, suspected or actual criminal activity, and suspected ties to terrorists.

⁴⁶ The Inspector's Field Manual (IFM) requires that inspectors conduct TECS queries for all aliens during primary inspections using the aliens' last name, first name, DOB, and passport number. The researchers entered these data into TECS and got "hits" for all 78 attempted entries, including the 39 admitted directly from primary inspections. DHS, *Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States*, pp. 14-15.

⁴⁷ CBP officials asserted that inspectors are "so well trained and vigilant" that they would catch even the very best forgeries.

⁴⁸ DHS, *Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States*, p. 16.

once it had been determined that an alien had used a stolen passport to enter the country.

The Number of Lost/Stolen Passports. Currently, DOS receives most of the stolen passport reports from foreign governments. Based on DOS reports from January 2002 to June 2004, 28 foreign governments reported 56,943 stolen blank foreign passports.⁴⁹ In June 2004, the Director of the U.S. National Central Bureau of INTERPOL said that for 55 of the 181 INTERPOL countries, there probably were over 10 million lost and stolen passports that might be in circulation. In August 2004, according to CBP, their database contains 1.2 million records of stolen passports.⁵⁰

Inventory Control Number (ICN). In addition, as the United States does with its visas as a safety measure, some countries issue passports with two numbers. One number, the ICN, is placed on the blank passport at the time of production. When the passport is issued to an individual, a second number, the passport issuance number, is added to the passport. Thus, even if the passport issuance number is altered, law enforcement can determine to whom the passport was originally issued. Nonetheless, the December 2004 IG report noted that the two distinct numbers have been a hindrance to finding fraudulent passports because blank stolen passports are reported to the U.S. government by their ICNs, but if inspectors do not detect the forgery, they will enter the forged passport issuance numbers into the system rather than the ICNs, and the lookouts will not be detected.⁵¹

Recommendations of December 2004 IG Report. Although CBP responded to the report by noting that overly broad conclusions were drawn based on a small, nonstatistical sample, it concurred with the recommendations of the report and stated that steps have been taken to carry out the recommendations. ICE also agreed with the report's recommendations, and stated that it has begun to implement the recommendations. The following are the report's recommendations:

- Refer all aliens whose passports are the subjects of lookouts to secondary inspections. CBP noted that the Inspectors Field Manual (IFM) already requires inspectors to take this action. In addition, a policy memorandum issued in April 2004 requires supervisory review regarding the admissibility of persons who are subjects of lookouts. CBP plans to issue another memorandum reemphasizing the requirement to refer all aliens whose passports are the subjects of lookouts to secondary inspections.

⁴⁹ There are two types of lost or stolen passports: passports stolen from individuals, and stolen blank passports. Since passports stolen from individuals are modified by replacing the existing photographs and biographical data with that of the intended users, these changes are usually easier for an inspector to detect, unlike forged stolen blank passports which are often modified with high quality photographs and biographic data and are very difficult to detect.

⁵⁰ DHS, *Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States*, p. 8.

⁵¹ *Ibid.*, p. 15.

- Require inspectors to record in detail the results of the secondary inspections and justifications for subsequent admissions. CBP stated that it plans to develop procedures to ensure comprehensive information in the secondary inspections.
- Require supervisory review and approval of an inspector's decision to admit an alien who was the subject of a lookout; and ensure that the review is recorded as part of the secondary inspections record. CBP noted that a policy memorandum issued in April 2004 requires supervisory review regarding the admissibility of persons who are subjects of lookouts. CBP plans to issue a new memorandum reemphasizing this requirement and requiring information on the review to be a part of the secondary inspections records.
- Require inspectors to enter in a timely manner name-based lookouts for aliens found inadmissible. CBP responded that it plans to issue guidance that will require the posting of lookouts concurrent with case processing.
- Require routine reviews of admission records to identify uses of stolen passports. CBP plans to develop an automated mechanism to query databases to identify uses of stolen passports, and track "hits" on reported stolen passports to assist the inspectors at the POEs in identifying the bearer of the suspected stolen passport.
- Disseminate information on the use of stolen passports to ICE for further investigation. CBP plans to formalize the process to give information on stolen passports and their users to ICE.
- Investigate, locate, and remove from the United States, persons who have used stolen passports to gain entry to the country and report the outcomes of the investigations to CBP. ICE agreed that these leads should be prioritized for investigation.
- Investigate the activities of a group of aliens with possible Al Qaeda links and determine the current whereabouts of aliens who used these passports.⁵² ICE has initiated investigations concerning the individuals that used stolen passports from the two countries to enter the United States.

Overstays

Some maintain that the nonimmigrant visa refusal rate is an unobjective and arbitrary standard, because it is based on decisions made by consular officers rather than the actual behavior of nonimmigrants. When the program was conceived, it was expected that the number of nonimmigrants who overstay the terms of their entry under this program would be a better standard for future program participation. Reportedly, since December 2002, DHS has been matching the entry and exit portions of the I-94 forms for participants in the VWP to create an entry/exit system for VWP nationals. Some question whether this system can produce accurate counts of those who overstay the terms of their entry. Until an automated entry-exit system

⁵² On June 6, 2001, 708 blank passports were stolen from a VWP country. Some of these passports were found in the possession of Al Qaeda operatives. DHS, *Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States*, p. 22.

is fully operational and the data produced are trusted and easily accessible, it is difficult for immigration agents to identify those who have overstayed their 90-day admission periods. Thus, aliens could enter under the VWP and stay indefinitely.⁵³

Legislation in the 108th Congress

Biometrics

P.L. 108-299/H.R. 4417. On June 14, 2004 the House passed H.R. 4417. The Senate passed the bill without any amendments on July 22, 2004. H.R. 4417, which was introduced by Representative F. James Sensenbrenner, was enacted on August 9, 2004 (P.L. 108-299). P.L. 108-299 provides a one-year extension of the deadline for VWP countries to certify that they have a program to issue machine-readable passports with biometric identifiers. The new biometric deadline is October 26, 2005. The bill also amends the law so that any person applying for admission to the United States under the VWP must have a tamper-resistant, machine-readable passport with a biometric identifier unless the passport was issued prior to October 26, 2005.

P.L. 108-458/S. 2845. The Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458), introduced by Senator Susan Collins on September 23 2004, as H.R. 2845, requires that by October 26, 2006, each VWP country, as a condition of being in the VWP, certify that it is developing a program to issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry. The original provision in S. 2845, as passed by the Senate, would have required that each VWP country, as a condition of being in the VWP, have a program to issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are compatible with the biometric identifiers used in the US-VISIT program. The House-passed version of S. 2845 did not contain a similar provision.

H.R. 4550. H.R. 4550, introduced by Representative Turner on June 14, 2004 would have extended the deadline for VWP countries to certify that they have a program to issue machine-readable passports with biometric identifiers until October 26, 2005, and would have allowed the Secretary of Homeland Security to grant two six-month extensions to countries who have made a good faith effort to meet the deadline.

In addition, H.R. 4550 would have established, as part of the entry/exit system, an electronic system that uses biographical data to determine eligibility for admission to the United States. The bill would have required that prior to embarkation, those entering under the VWP electronically submit biographical information through the system. Airlines and other carriers would have had to

⁵³ For further information, see CRS Report RL31019, *Terrorism: Automated Lookout Systems and Border Security Options and Issues*, by William J. Krouse and Raphael F. Perl; and CRS Report 98-89, *Immigration: Visa Entry/Exit Control System*, by William J. Krouse and Ruth Ellen Wasem.

perform an electronic check through the system to determine whether the alien passenger entering under the VWP had been determined to be eligible for admission.

S. 2324. Introduced by Senator Saxby Chambliss on April 20, 2004, S. 2324 would have extended the deadline for VWP countries to certify that they have a program to issue machine-readable passports with biometric identifiers until November 30, 2006.

Suspending the VWP

H.R. 3534. On November 19, 2003, Representative Thomas G. Tancredo introduced H.R. 3534, which would have suspended the VWP until the Secretary of Homeland Security determined and certified to Congress that the entry-exit system was fully implemented,⁵⁴ all United States ports of entry had functional biometric machine readers, and all countries that participated in the VWP issued their nationals machine-readable biometric passports.

H.R. 2235 and H.R. 3522. H.R. 2235, introduced by Representative Sam Graves on May 22, 2003, and H.R. 3522, introduced by Representative J. Gresham Barrett on November 19, 2003, contained similar provisions and would have suspended the VWP until the Secretary of Homeland Security certifies to Congress that 13 different requirements (11 requirements for H.R. 3522) had been met.

Adding Countries to the VWP

H.R. 3956/S. 2844. H.R. 3956, introduced on March 11, 2004 by Representative Nancy L. Johnson, and S. 2844, introduced by Senator Rick Santorum on September 23, 2004, would have designated Poland as a VWP country.⁵⁵

Legislation in the 109th Congress

Suspending the VWP

H.R. 688. On February 9, 2005, Representative J. Gresham Barrett introduced H.R. 688, which would suspend the VWP until the Secretary of Homeland Security determined and certified to Congress that 11 different criteria have been met including that:

⁵⁴ The automated entry and exit system has been administratively named the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program. For more information on US-VISIT see CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT)*, by Lisa M. Seghetti and Stephen R. Viña.

⁵⁵ Bills were introduced in previous Congresses to legislate countries into the VWP; however, none of the bills were enacted.

- the automated entry-exit system authorized under Section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 was fully implemented and functional,⁵⁶
- all United States ports of entry had functional biometric machine readers, and
- all countries that participated in the VWP issued their nationals machine-readable biometric passports.
- the system of machine-readable, tamper-resistant visas and other travel and entry documents, and the technology standard for visa waiver program participants required by the Enhanced Border Security and Visa Entry Reform Act of 2002 were fully operational at all ports of entry and, where applicable, at consular posts abroad;
- DHS had the operational capability to take into custody and remove from the United States any deportable alien who has been brought to the attention of the DHS by a state or local law enforcement agency;
- the backlog of immigration benefit applications had been eliminated, as required in the HSA; and
- the number of aliens removed from the United States, during each of four months preceding the month in which the certification under this section was executed, was at least 25% higher than in the comparable months of the previous year.

New Program Requirements

H.R. 1320. Similar to H.R. 4550 introduced in the 108th Congress, H.R. 1320, introduced by Representative Silvestre Reyes on March 15, 2005, would establish, as part of the entry/exit system, an electronic system that uses biographical data to determine eligibility for admission to the United States. The bill would require that prior to embarkation, those entering under the VWP electronically submit biographical information through the system. Airlines and other carriers would have to perform an electronic check through the system to determine whether the alien passenger entering under the VWP had been determined to be eligible for admission. In addition, H.R. 1320 would direct the Secretary of Homeland Security to create a Visa Waiver Program Office which would be tasked with several security-related duties including developing the protocols for country reviews, and to collect and analyze lost and stolen passport data.

Adding Poland to the VWP

H.R. 634. Introduced on February 8, 2005, by Representative Sheila Jackson-Lee, H.R. 634 would temporarily designate Poland as a VWP country for 18 months after enactment. The bill would require one year after enactment that the Secretary of DHS determine the overstay rate of aliens from Poland entering under

⁵⁶ The automated entry and exit system has been administratively named the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program. For more information on US-VISIT see CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT)*, by Lisa M. Seghetti and Stephen R. Viña.

the VWP, and use the rate to determine whether Poland should permanently but conditionally be designated as a VWP country. The bill would allow Poland to be a VWP country as long as the annual overstay rate remained below 3%.

H.R. 635/S. 348. H.R. 635, introduced on February 8, 2005 by Representative Nancy L. Johnson, and S. 348, introduced by Senator Rick Santorum on February 10, 2005 would designate Poland as a VWP country.

Possible Issues with Poland and the VWP. It is not clear that Poland meets the criteria to be a VWP country. Additionally, there are indications that a formal determination of Poland's B1/B2 visa refusal rate would reveal a refusal rate that is significantly higher than what is required for participation in the program. Nonetheless, as discussed above, some contend that the nonimmigrant visa refusal rate is an unobjective and arbitrary standard, because it is based on decisions made by consular officers and does not reflect the propensity of nationals from that country to overstay their visas.

Poland's membership in the EU, which it joined in 2004, may also raise another issue concerning the VWP. EU rules require that all member states be treated equally (solidarity clause). In addition, a visa is required for all Polish citizens wishing to travel to the United States, whereas under EU law, Poland does not require visas of US citizens for stays up to 90 days. Presently Poland (or any other of the 10 EU Member States not participating in the VWP) could invoke the EU solidarity clause⁵⁷ and visa reciprocity clause,⁵⁸ the other countries may have to decline to be members of the VWP, or place visa requirements on United States citizens traveling to EU countries unless Poland is allowed to enter the VWP.⁵⁹ Nonetheless, the other EU countries may put pressure on Poland not to file a formal complaint which could strain EU-U.S. relations. Also, Poland may not have raised this issue yet because it is not a full member of the Schengen area.⁶⁰ Notably, Greece a full member of the EU that is not a VWP country has not filed a complaint about unequal treatment

⁵⁷ Poland could contend that the fact that other countries in the EU are part of the VWP constitutes unequal treatment.

⁵⁸ The same visa rules do not apply to U.S. citizens traveling to Poland, and Polish citizens traveling to the United States.

⁵⁹ Conversation with Telmo Baltazar, Justice and Home Affairs Counselor, European Union, Apr. 18, 2005.

⁶⁰ The Schengen area comprises the EU countries which have signed the convention implementing the Schengen Agreements of 1985 and 1990 on the free movement of persons and the standardization of border controls. See [<http://mondediplo.com/maps/schengen2000>].