



A Brief Analysis of H.R. 158, the “Visa Waiver Program Improvement Act of 2015”

By Dan Cadman

The House of Representatives has voted overwhelmingly in favor of a bill to tighten up the visa waiver program (VWP).¹ Presumably it's meant as a substitute for doing anything meaningful to temporarily suspend admission of Syrian refugees due to serious questions about the government's ability to properly vet applicants and screen out Islamic State or other terrorist radicals.² The bill was originally introduced in January of this year by Rep. Candice Miller (R-Mich.), but has undergone substantial changes through the bill amending process.

The statute under which the VWP operates can be found in Section 217 of the Immigration and Nationality Act.³ H.R. 158 would significantly alter several provisions in that statute.⁴ It is a better, tighter product than a similar bill introduced in the Senate, which I found lackluster, but better than nothing.⁵ That's because the House version has more moving parts, so to speak; it is much more ambitious in the way it changes the VWP.

Key Sections of H.R. 158

Here is a brief analysis of significant provisions in the bill, with relevant comments.

- Effective April 1, 2016, requires VWP travelers to be in possession of machine-readable, chip-embedded passports that contain biometric and biographic information confirming the identity of the possessor.
- Requires countries participating in the VWP to certify that their citizens are issued only such passports as described above, *and* to certify that they maintain at their own ports of entry the machinery necessary to read such passports as a way of validating the identities of their possessors.

An exception has been carved out, however, for countries in the Schengen visa-free zone, which covers nearly all of northern, western, and central Europe, mostly European Union (E.U.) countries.⁶ Given that this includes France and Belgium — obviously hotbeds of fundamental Islamic terrorist activities involving their nationals, as evidenced from recent events — and Germany, which has now taken in hundreds of thousands of unvetted “Syrian refugees” who have already been infiltrated by extremists, and who will in the fullness of time also be entitled to German passports, this exception is the caveat that undoes the intent of the rule.

Ironically, one of our closest allies, the United Kingdom, which from the beginning showed a keen interest in preserving the security of its borders (a wise move, in light of the unchecked flood of migrants flowing into continental Europe in past months) is not a Schengen country, and thus will be obliged to comply with the rule, although that isn't likely a problem.

- Generally, prohibits natives of, or travelers to Syria or Iraq (or other countries that have been designated by the secretaries of State or Homeland Security as state supporters or sponsors of terror, such as Sudan and Iran) anytime from March 1, 2011, onward, from participating in the VWP, requiring instead that they seek visas through interviews by American consular officers.⁷ Exceptions are carved out for VWP

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nationals who served in military or civilian government capacities in Syria, Iraq, or other designated countries; the DHS secretary may issue waivers for others.

The phrasing in this section is substantially the same as that used in the Senate bill and the problems, if they may be called that, remain the same. They are twofold: First is the presumption that consular officers will be able to discern and weed out applicants who pose terrorism and national security threats. Some undoubtedly will be denied visas. Others will not, for the simple reason that the same databases are checked for visa interviewees as are checked in automated fashion, pre-travel, for VWP arrivals. If nothing's in them, then everything falls on the back of the consular officer and his or her interviewing skills, suspicion level, and capacity to sniff out fraud and deceit. That varies considerably depending on expertise and experience. It's well to remember that a considerable portion of the aliens illegally in the United States originally entered in possession of visas, and then just stayed.

The second problem is that border controls in Syria have collapsed, as is evident from the flow of jihadists both into and out of the country. While Iraq is not so tenuous, neither is it hermetically sealed. If a would-be terrorist who has been in Syria or Iraq is known to the U.S. government, he will almost certainly already be on a terrorist or no-fly list, and never permitted to board an airplane headed this way in the first place. But if he's not in the databases of those believed to have visited Syria and Iraq, and he does not choose to self-reveal by applying for a visa, choosing instead to take his chances with disobeying the new VWP restrictions by appearing at a U.S. port of entry, how will our border inspectors know the individual has been in Syria or Iraq? As I observed before, there won't be entry and exit stamps in a passport saying "As-salaam alaikum. Welcome to the Islamic Caliphate" or "Goodbye from ISIS. Thanks for visiting, and Allahu Akbar!"

I am not against these new restrictions. They are indeed prophylactic, but it's important they not be seen as cure-alls. They will likely prevent few aliens from entering via the VWP when their pasts are, at least on the surface, a blank slate. However if, *after* entry using the VWP, it's discovered that an alien did visit Syria or Iraq, the fact that this was withheld provides federal immigration authorities the hook to arrest and expeditiously remove the individual for having been ineligible to enter under the program to begin with. Understand clearly, though, that is after the fact.

- Requires that, within 60 days of enactment, the DHS secretary consult with intelligence officials to determine whether, pursuant to his or her authority, visits to other countries besides Syria or Iraq should be designated as limiting the eligibility of travelers to use the VWP program. This portion of the legislation lays out the criteria for such determinations, e.g., presence in the country increases the likelihood that the traveler is a security risk, there is a strong presence in the country of terrorist organizations, or the country provides safe haven for terrorists. Such determinations are subject to annual review and reporting to the relevant committees of Congress.

This is an extremely useful tool and one can envision that, if used as intended, the pool of VWP ineligible travelers will increase to include those who have visited or resided in such hot-spots as Afghanistan, Somalia, and Libya.

- Specifies the time frame in which VWP participating countries must report lost and stolen passports to within 24 hours of awareness; also requires those countries to certify that they use Interpol (and other) databases to screen entrants into their territory for "unlawful activity" — but once again an exception is carved out for Schengen zone nations, which constitute the vast majority of countries presently approved under the VWP, rendering the requirement nearly specious.
- Tightens up the requirement that VWP countries have a passenger information exchange agreement with the United States, by adding that the agreement *must be implemented*. This recognizes that such agreements have been a point of contention with E.U. nations, which have exhibited concern over the privacy rights of their citizens.
- Adds a series of new authorities for the secretaries of DHS and State to terminate a country's participation in the VWP if they don't share required passenger information, or they fail to screen entrants as provided by some of the other new provisions in this bill. Re-designation approval is also provided for, upon a finding that they have begun to comply with their information exchange and screening obligations.

These are important and welcome new authorities, but frankly the history of the VWP tells a different story: one in which global politics and foreign policy interests have almost always trumped the already existing statutory requirements for termination of a country's participation — for instance, for having VWP traveler refusal rates in excess of 2.5 percent, egregious failure to report in a timely manner lost/stolen passports, or noncompliance with passport anti-fraud and security standards. Given this dubious backdrop, one wonders what good the new authority to terminate is worth when the existing authorities are uniformly ignored. This is an important question that lawmakers should ponder, given that they have been a part of the problem in exerting pressure on cabinet officers in the past to ensure that favored nations do not get unceremoniously terminated or suspended from the program.

- Modifies the yearly reporting requirements to Congress by updating which committees shall receive such reports, and also specifying that the report(s) must include a national security threat assessment for each VWP participant country, as well as an evaluation of their ability to comply with the certifications and agreements required.

Notably, this includes a specific requirement to report on “high risk” participants using criteria such as the number of travelers who have traveled to Syria, Iraq, or other designated no-go areas, capacity to combat passport fraud, level of cooperation with the United States, etc. In such cases, the DHS secretary may suspend (as opposed to terminate) participation of such countries until they are no longer found to constitute a high risk.

- Permits the DHS secretary to limit the period of eligibility of a traveler using the VWP to time frames of less than the usual three-year increments in appropriate circumstances.
- Directs DHS to examine opportunities to expand its capability to detect fraud and other security risks in its VWP electronic systems infrastructure; requires a yearly report to Congress on its progress in doing so.
- Authorizes DHS to expand the amount of information collected from VWP applicants to include *all* countries of nationality held prior to assuming citizenship of a VWP participating nation, and permits the secretary to make evaluations of an individual's eligibility for entry under the VWP based on an assessment that includes that information; requires periodic reporting to Congress of statistical information based on these evaluations, including denials and revocations of travelers' VWP eligibility using such information.
- Directs the DHS secretary to assist non-VWP participant countries in establishing protocols for identification of passport and travel document fraud, production of fraud-resistant passports, port-of-entry screening, reporting of lost or stolen documents to Interpol, etc.
- Asserts a “sense of the Congress” that the International Civil Aviation Organization (ICAO) should establish international standards for “specifications and best practices related to the administration and governance of border controls and inspection formalities, should establish standards for the introduction of electronic passports, and should obligate member countries to utilize such e-passports as soon as possible.”

Conclusion

As can be seen from this analysis, H.R. 158 is not without limitations. Nonetheless, it represents major strides toward closing some of the gaps that in the past have caused me to label the VWP the “soft underbelly of homeland security”.⁸

Unfortunately, this bill does not in any way whatsoever ameliorate the serious concerns that any thinking observer must still retain over the flaws and inadequacies of the refugee and asylum vetting programs, which still pose a considerable threat to national security.⁹ Congressional inaction in that area simply because of dissension and controversy, while pretending that addressing the VWP alone is adequate, is a disservice to all Americans.

End Notes

¹ See, for instance, Patricia Zengerie, [“House passes bill to tighten visa waiver program”](#), Reuters, December 8, 2015.

² See Dan Cadman, [“Why Syrian Refugee Vetting Will be Indisputably Fallible”](#), Center for Immigration Studies, October 16, 2015.

³ Section 217 of the INA is codified at [8 U.S.C. § 1187](#).

⁴ H.R. 158 is titled [“The Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015”](#).

⁵ For a prior analysis of the Senate version, see the “Flake-Feinstein bill” portion of Dan Cadman, [“Pending Bills Dealing with Syria and National Security”](#), Center for Immigration Studies, November 24, 2015.

⁶ [Schengen zone countries](#) include nearly all of the European Union (E.U.), as well as non-E.U. Scandinavian countries.

⁷ There appears to be a drafting problem in the language of the legislation at lines 11-14 on p. 5, in that it states “regardless of whether the alien is a national of a program country, the alien is not a national of ... Iraq or Syria.” Use of the word “national” a second time is a redundancy and likely an error. If an individual is a national of a VWP-participating country, he is unlikely at that point to also be a “national of Iraq or Syria”. One surmises that the legislation ought more properly to say, “regardless of whether the alien is a national of a program country, the alien is not a *native* of ... Iraq or Syria.”

⁸ See Dan Cadman, [“Is the Visa Waiver Program the Soft Underbelly of Homeland Security?”](#), Center for Immigration Studies, January 22, 2015.

⁹ See Dan Cadman, [“GAO Vets Asylum Vetting and Finds it Lacking”](#), Center for Immigration Studies, December 9, 2015.