

Statement of Stephen Heifetz
before the

United States House of Representatives
Committee on Oversight and Government Reform
Subcommittee on National Security
Subcommittee on Government Operations

“The President’s Waiver of Restrictions on the Visa Waiver Program”

February 10, 2016

Thank you Chairman DeSantis, Ranking Member Lynch, Chairman Meadows, and Ranking Member Connolly. Thank you to all of the distinguished members of the Subcommittees on National Security and on Government Operations. I appreciate the opportunity to participate in this hearing about the Visa Waiver Program (VWP).

My name is Stephen Heifetz. I am a partner at Steptoe & Johnson LLP, an international law firm. Prior to joining Steptoe, I served from 2006-2010 in several positions at the Department of Homeland Security (DHS), including as Deputy Assistant Secretary for Policy Development, where I had oversight responsibility for the VWP.

VWP Misperceptions

Under the VWP, DHS waives the “B” nonimmigrant visa requirement for aliens traveling from 38 approved countries – all U.S. allies – to permit stays of up to 90 days for business or tourism. The effect of the waiver is that the standard visa interview by a U.S. consular officer, which generally requires the traveler to go to a consular office in person, is not required.

This does *not* mean, however, that DHS waives security requirements for these travelers. In fact, under the VWP, DHS mandates additional, more stringent security requirements, for both the individual traveler and his or her home country. The 38 U.S. allies that are VWP members must meet high security standards to enter and maintain membership in the VWP, and substantial checks are conducted on every traveler. The result is a system that provides as much security against terrorist or criminal travelers as the visa system.

Nevertheless, many in the media and elsewhere have labored under the misapprehension that security standards have been looser for VWP travelers than for those traveling with a visa, and that this poses a threat to U.S. national security. At least since reforms implemented about a decade ago, that perception has been inaccurate. Security experts in both the Bush and Obama administrations have lauded the VWP as a good security program. But, like any successful security program, the VWP has continued to be closely reviewed over the years, undergoing further reform as new threats are perceived.

New VWP Restrictions

The most recent VWP statutory reforms, the “Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015” were enacted as part of the 2016 Consolidated Appropriations Act in December 2015. Among other things, the new law generally precludes travel under the VWP for dual nationals of Iran, Iraq, Syria, and Sudan; further, the new law generally precludes travel under the VWP for those who have traveled to these countries.

There are, however, exceptions for those who traveled to perform military service or other official duties of a VWP member country. In addition, the new law provides that the DHS Secretary may, with respect to any particular traveler, waive the prohibitions with regard to Iran, Iraq, Syria, and Sudan if doing so is in the national security interests of the United States. Such a waiver would allow VWP travel to the U.S. by a citizen of a VWP member country, notwithstanding dual nationality or travel involving the four countries of concern. For example, a Japanese businessperson who travels to Sudan for business, or an Australian doctor who provides humanitarian aid in Syria, generally would be ineligible for VWP travel under the new law, but that ineligibility can be waived by the DHS Secretary.

Importance of Waiver Authority

This national security waiver authority is important. Here is one illustration why. The United States and other world powers recently signed a momentous deal with Iran that addresses Iran’s nuclear weapons program. Under this deal – the Joint Comprehensive Plan of Action (“JCPOA”) – European companies now will have regular business dealings with Iran. It is common and will become ever more common for a European businessperson to travel to Iran to conduct legitimate business.

But if that European businessperson’s travel will preclude further travel to the U.S. under the VWP, that might deter European business dealings with Iran. If you are a Londoner or Parisian sitting in London or Paris and considering traveling to Iran to scout a business deal, you might reconsider because of the potential loss of VWP travel privileges.

As part of the JCPOA, though, the U.S. committed to refrain from creating new types of sanctions on Iran. More specifically, the U.S. agreed to refrain from “imposing exceptional or discriminatory regulatory and procedural requirements in lieu of the sanctions and restrictive measures covered by the JCPOA.”

Some have argued that this commitment necessitates U.S. waivers to allow legitimate business travel to Iran without the loss of VWP privileges. Even if one thinks the JCPOA was a bad deal, the Administration fairly can claim that it is in the national security interest of the United States to ensure JCPOA compliance by Iran. And ensuring compliance is made much more difficult if Iran can allege that the U.S. has breached its obligations by creating obstacles to Iranian travel.

That is one reason that the Administration should be granted deference in determining how to utilize the waiver authority under the new VWP law. And there are other reasons. There is a great need for humanitarian intervention in some of the four countries of concern – Syria and

Iraq in particular. Without the exercise of waivers, the loss of VWP privileges may deter needed humanitarian travel to these countries – the Australian doctor who wants to offer medical services in Syria may reconsider if doing so will cause a loss of VWP privileges. Such thinking could, ironically, have adverse effects on U.S. security.

More fundamentally, waivers that allow travel under the VWP should not cause security concerns, because the VWP fundamentally is a strong security program. I've alluded to that point above and will address that point in detail below.

Evolution of the VWP

Since its inception in the late 1980s, the VWP has evolved into an essential tool for increasing global security standards, advancing information sharing, strengthening international relationships, and promoting legitimate trade and travel to the United States.

Over the past decade in particular, Congress and the Executive branch have worked together to implement a number of enhancements to the VWP to address evolving threats to international travel and to the United States homeland. Although critics of the VWP often cite the example of the “Shoe Bomber” Richard Reid, who as a British citizen traveled under the VWP in December 2001, the reforms put in place since that time have successfully addressed this risk to date.

In particular, in order to align with the recommendations of the 9/11 Commission, Congress, in 2007, mandated additional security requirements for the VWP, including standards for secure travel documents, individualized pre-screening of travelers, bilateral information-sharing arrangements, prompt reporting of lost and stolen passports, and a threat assessment conducted by the Director of National Intelligence. These reforms have made the VWP a significant, security-enhancing program and a critical element of the layered border security approach the U.S. has implemented since September 11, 2001.

Key Security Components of the VWP

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

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

First, the VWP screens all travelers against multiple law enforcement and security databases, including the Terrorist Screening Database, before they depart for the United States. Using the online Electronic System for Travel Authorization (ESTA), a VWP traveler is required to provide biographic information (including name, date of birth, and passport number) as well as his or her destination address in the United States. The traveler is also required to answer questions regarding communicable diseases, arrests, convictions for certain crimes, past history of visa revocation or deportation, and other relevant history. ESTA functions as a powerful

screening tool, enabling recurrent, individualized vetting of travelers. Travelers without an ESTA approval cannot board a flight to the United States.

Second, the VWP mandates robust information and intelligence sharing between the United States and its VWP partners, including agreements concerning known or potential terrorists and criminals and reporting lost and stolen passport (LASP) data to the United States. Supplementing the U.S. government's "watch lists" and other databases with information from a traveler's home government greatly enhances DHS's ability to identify and stop travelers who pose a threat.

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

Lastly, VWP countries are required to undergo periodic eligibility reviews designed to ensure that VWP membership does not compromise U.S. security, law enforcement, and immigration enforcement interests. These comprehensive assessments are conducted by DHS, with the assistance of other U.S. government agencies as appropriate. Critically, these reviews involve a site visit during which a team of U.S. government subject matter experts examines the country's security and law enforcement capabilities and procedures. Among other issues, a site visit focuses on the existence of radicalized groups in the country and the government's efforts to address this concern. The findings from the site visit form the core of the DHS evaluation of a country's fitness to continue participating in the VWP. Should DHS identify any issues or concerns during the course of its review, it can propose and insist on mitigation measures.

To complement these reviews and to ensure recommended mitigation measures are carried out, DHS has developed a vigorous monitoring process to ensure awareness of changing conditions in VWP countries. This monitoring process includes regular consultation with U.S. law enforcement and intelligence agencies, as well as frequent communication with relevant U.S. Embassies abroad and foreign embassies in Washington for updates on law enforcement or security concerns related to the VWP. Overall, no other program provides the U.S. government with the opportunity to conduct as far-reaching and consequential audits of foreign security standards, ensuring alignment with our high standards for managing risk.

Under current law, DHS has the authority to immediately terminate a country's membership if an emergency occurs in the country that threatens the law enforcement or security interest of the United States. The Director of National Intelligence is also able to recommend immediate suspension to DHS if any current and credible threat poses an imminent danger to the United States or its citizens and originates from a country participating in the VWP.

That the modernized VWP enhances U.S. security is widely recognized by security experts

across the political spectrum. The last three secretaries of homeland security, for example, have praised the program's contribution to U.S. and international security. Indeed, for precisely that same reason, both the Bush and Obama administrations have added countries to the VWP.

The VWP and U.S. Border Security

Because of its strong security components, the VWP has become an integral part of the U.S. government's ability to identify security or other risks associated with travelers at the earliest possible point and push-out our "virtual" border. In particular, the VWP helps answer the three key questions necessary to implement an effective risk-based screening system:

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

Who is a threat?

The U.S. government collects and maintains an array of information designed to identify those associated with terrorism or other illicit activities. These "watch lists" use identifiers – primarily biographic-based – to support border-screening protocols and procedures.

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

Is the person coming to the U.S.?

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

Is the person really who he says he is?

No amount of "watch listing" and passenger screening will detect terrorists if they are able to

travel on an assumed identity with fraudulently obtained or fake documents. In order to verify that people are who they say they are when they travel, DHS insists on high standards for documents acceptable for entry to the United States. These standards are highest for VWP travelers. For example, the electronic passports mandated by the VWP enable DHS to incorporate biometric verification—digital photographs and, increasingly, fingerprints—in the screening process to confirm that the person presenting the document is the person that the document describes. And DHS routinely audits the document production and issuance process in VWP countries to ensure standards are being met. In other words, VWP makes it harder to enter the United States using fraudulent documents and forged identities.

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The VWP accordingly has received bipartisan praise as a strong security program. Against this background, the exercise of occasional national security waivers by the Administration to allow the program to continue to function as it has in the recent past does not seem troublesome. If the Administration makes a judgment that a London businesswoman who travels to Iran for business nevertheless can travel to the U.S. under the VWP – and that it is in the national security interest of the United States to allow such travel under the VWP – that should not trigger any alarms.

Again, thank you for inviting me to participate today. I look forward to answering any questions the committee may have.



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Areas of Practice

- International Regulation & Compliance
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- National and Homeland Security
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- Economic Sanctions
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- Hotels & Hospitality
- Financial Services

Education

- Georgetown University Law Center, J.D., 1996, *magna cum laude*, Order of the Coif, Senior Articles Editor, *Georgetown Law Journal*, Olin Fellow in Law and Economics
- Stanford University, A.B., 1993, with honors

Bar & Court Admissions

- District of Columbia
- Maryland

Stephen Heifetz is a partner in Steptoe's Washington office, where he helps clients navigate laws and policies at the nexus of international business and security. He has worked in senior levels of the federal government and uses that experience to provide counseling regarding legal compliance and political risk, conduct internal investigations, and defend against government investigations and enforcement actions. He is particularly experienced in the following areas:

- Foreign investment reviews by the Committee on Foreign Investment in the United States (CFIUS)
- The Defense Department's National Industrial Security Program (NISPO M) and its Foreign Ownership and Influence (FOCI) rules
- Anti-money laundering laws administered by the Treasury Department's Financial Crimes Enforcement Network (FinCEN), bank regulatory agencies, and other financial regulators
- Economic sanctions administered by the Treasury Department's Office of Foreign Assets Control (OFAC) and by the United Nations Security Council
- United Nations Security Council resolutions, UN monitoring groups, and related rules and investigations
- Travel and transportation facilitation programs administered by the Department of Homeland Security (DHS), particularly the Visa Waiver Program (VWP), Global Entry, and the Customs-Trade Partnership Against Terrorism (C-TPAT)
- Cargo screening rules administered by DHS's Transportation Security Administration (TSA) and Customs and Border Protection (CBP) agencies
- Passenger screening rules administered by TSA
- The SAFETY Act and other private sector counter-terrorism and preparedness programs administered by DHS

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- Anti-corruption laws (e.g., the Foreign Corrupt Practices Act) enforced by the Department of Justice and the Securities and Exchange Commission
- Security rules related to visa processing, administered by the Department of State's Bureau of Consular Affairs in conjunction with an array of US security agencies
- Codes of conduct applicable to private security providers
- Private sector interface with the US intelligence and security establishments

Prior to joining Steptoe, Mr. Heifetz served in the Department of Justice and the Department of Homeland Security (DHS), as well as the Central Intelligence Agency. In his most recent government position, he served as Deputy Assistant Secretary and Acting Assistant Secretary for the Office of Policy Development at DHS. Mr. Heifetz shaped DHS's role in CFIUS, conducted hundreds of CFIUS reviews, and negotiated many "risk mitigation agreements" that CFIUS deemed necessary to approve foreign investments. He also worked with DHS's agencies – including the Transportation Security Administration, Customs and Border Protection, and Immigration and Customs Enforcement – to develop policy on a range of issues.

Mr. Heifetz has served on the Board of Directors of the International Stability Operations Association and as a term member of the Council on Foreign Relations. He also has served as an adjunct professor at Georgetown law school and has published extensively in trade journals, law reviews, and newspapers, including *The New York Times* and *The Washington Post*.

Noteworthy

- Ranked, *Chambers USA*, International Trade: CFIUS Experts (Nationwide), 2012-2015
- Ranked, *Chambers Global*, International Trade: CFIUS Experts (USA), 2015
- "Sanctions Worked, Congress. Let Them Die." *The New York Times* (August 4, 2015)
- "Those Other Economic Sanctions: Section 311 Special Measures," *The Banking Law Journal* (September 2014)
- Named a Best Lawyer in National Security by *Washingtonian* magazine, 2013, 2015
- "How to Keep Terrorism Grounded," *The New York Times* (November 1, 2010)

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- "The Risk of Too Much Oversight," *The New York Times* (July 21, 2008)
- "A Wasteful Pursuit of Terrorist Money," *The Washington Post*, (August 24, 2005)

Select Seminars & Events

2015 Developments Regarding Economic Sanctions and Export Controls, December 15, 2015, *A Steptoe-sponsored event*

Transatlantic Perspectives on the Iran Nuclear Deal and Sanctions Compliance, December 10, 2015, *A Steptoe and barristers' chambers Brick Court Chambers sponsored event*

Don't Light Up Your Cigars Just Yet...The Long Arm of US Economic Sanctions, American Foreign Law Association, September 16, 2015

Critical Infrastructure, Defense Contracts, Proximity & Supply Chains, ACI's 2nd National Forum on CFIUS, July 21, 2015

Inbound Investments, PLI's Doing Business in and with Emerging Markets 2015, July 9, 2015

CFIUS and Chinese Investment, US-China Business Council, March 18, 2015

Selected Publications

JCPOA Implementation Day Ushers in Extensive, but Still Risk-Fraught, Iran Sanctions Relief
January 21, 2016

CFIUS: A Potential Cause of Deal Delay
October 7, 2015, *The Review of Securities & Commodities Regulation*

What's Sanctions Got to Do with It?
August 24, 2015, *Bloomberg BNA*

Sanctions Worked, Congress. Let Them Die.
August 4, 2015, *The New York Times*

Historic Accord to Contain Iran's Nuclear Program: Significant but Complex Sanctions Relief
July 20, 2015

DDTC, BIS Propose New Rules on Defense Services, Cloud Computing and Harmonized Definitions
July 6, 2015

Americans Abroad: Are You Registered with DDTC to Serve?
May 29, 2015

Navigating Joint CFIUS And DSS Jurisdiction

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March 16, 2015, *Law360*