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Re: Recommendations to Improve the “Visa Waiver Program Security Enhancement Act” (S. 2337)

Dear Senators,

The ACLU recognizes the importance for Congress to respond to the terrorist attacks of November 13th and the need to strengthen security in the Visa Waiver Program (“VWP”). We offer the following suggestions for improving S. 2337 to ensure that it accomplishes its security objectives without encroaching on civil liberties.

The “Visa Waiver Program Security Enhancement Act” raises privacy, civil liberties, and logistical concerns for U.S. citizens and citizens of VWP countries. The bill would unduly restrict travel, potentially expand U.S. and other government’s access to biometric information on millions of international travelers, and would create economic and logistical harms.

- **S. 2337 would unduly restrict travel of scholars, human rights investigators, humanitarian aid workers, and other professionals who have traveled to Iraq or Syria in the past five years.**¹ The bill would end VWP privileges for all recent travelers to Iraq or Syria during the past five years, including those who traveled there for professional or educational purposes. This broad travel restriction has no exemptions and would apply to scholars, refugee caseworkers, humanitarian aid workers, human rights investigators, and many others. These people are producing reports and providing services that the U.S., indeed the whole world, depends upon, now more than ever. They should not lose their VWP travel privileges for their work in Syria or Iraq. Furthermore, because the VWP is reciprocal, it is possible that similar restrictions could be placed on U.S. citizens by other countries in the future. Examples of those who could lose their privilege to travel include:
 - Swiss social worker who traveled to a Kurdish refugee camp in northern Iraq;

¹ Visa Waiver Program Security Enhancement Act, S. 2337, 114th Cong. § 2 (2015).

- Belgian human rights investigator who traveled to Syria to document abuses committed by ISIL.
- **Because the obligations in the VWP could be reciprocally applied by other countries, S. 2337 could expand the collection and transmittal of biometric information on millions of Americans.** The bill would require VWP countries to provide the biometric information (including photographs and fingerprints) of their citizens to the U.S. *in advance of travel*.² Because the VWP is reciprocal, it is likely that similar obligations would be put on U.S. travelers by other countries. Indeed, EU diplomat David O’Sullivan recently noted that U.S. changes to the VWP could impact discussions in the EU on reforming the program next year.³
 - With 38 countries currently in the VWP, a requirement for the U.S. government to hand over biometric information in advance of citizens’ traveling could substantially harm the privacy and security of U.S. travelers. For example, a VWP country may have inadequate security or privacy measures in place for the storage and transmittal of such sensitive information.
 - Obligations for VWP countries to provide biometric data on travelers to the U.S. “as soon as practicable” would create additional costs and, according to the U.S. Travel Association, could create economic harms to the tourism industry.⁴ In addition, likely reciprocal demands on the U.S. could create significant burdens for DHS which has repeatedly certified that they are unable to create an entirely biometric exit system, and even if developed, such a system could result in significant travel delays.⁵
- **S. 2337 would encourage the dissemination of sensitive information about refugees and asylum seekers.** The bill would require the Department of Homeland Security (DHS) to consider whether the VWP country shares biometric and other detailed information about refugees and asylum seekers, regardless of whether they even seek to travel to the U.S.⁶ This would wrongly encourage countries to share and disseminate information that could be harmful to an already vulnerable population.
 - For example, existing U.S. law prohibits the U.S. from sharing the information *only* of domestic refugee and asylum applicants. Thus, if the U.S. received information about a refugee from Germany, this information could be provided to other countries, including the country of origin. This is starkly at odds with UNHCR best practices, which encourage a strict confidentiality policy for refugees and asylum seekers and state that their information should not be shared with the country of origin.⁷

² *Ibid.* § 5(a).

³ Nahal Toosi, *Europe Urges Congress to Slow Down on Visa Waiver Changes*, POLITICO, (Dec. 3, 2015), <http://www.politico.com/story/2015/12/congress-visas-europe-216416>

⁴ *Travel Community Decries Attacks on Security Value of Visa Waiver Program*, U.S. TRAVEL ASSOCIATION, (NOV. 19, 2015), <https://www.ustravel.org/news/press-releases/travel-community-decries-attacks-security-value-visa-waiver-program>

⁵ *Fulfilling A Key 9/11 Commission Recommendation: Implementing Biometric Exit*, House Comm. on Homeland Security, Subcommittee on Border and Maritime Security, Sep. 26, 2013 (Written testimony of U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement) *available at* <http://www.dhs.gov/news/2013/09/26/written-testimony-cbp-and-ice-house-homeland-security-subcommittee-border-and>.

⁶ Visa Waiver Program Security Enhancement Act, S. 2337, 114th Cong. § 4(b)(1)(C)(2015).

⁷ *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, UNHCR (accessed Dec. 9, 2015), <http://www.unhcr.org/4aa76da49.pdf>.

Suggested Improvements to S. 2337

The following changes should be made to the draft bill to resolve the significant privacy, civil liberty, and logistical flaws noted above:

1. **Add an exemption to the VWP travel restrictions to ensure that scholars, human rights investigators, humanitarian aid workers, and other professionals do not lose their travel privileges.**
2. **Place a two-year sunset on the VWP travel restriction for all persons so that Congress will revisit whether citizens of VWP countries traveling to Iraq and Syria warrant selective targeting for VWP travel restriction purposes.**
3. **Delete the provision requiring submission of biometric data in advance of travel to the U.S.**
4. **Remove the provision requiring consideration of whether countries provide information on refugees or asylum seekers as part of the VWP process, and include a prohibition on the dissemination of information about asylees or refugees that the US receives from third parties.**

For more information please contact Legislative Counsel Joanne Lin at jlin@aclu.org or 202-675-2317, or Legislative Counsel Neema Guliani at nguliani@aclu.org or 202-675-2322.

Sincerely,



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Cc: Cosponsors of S. 2337