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Exit Tracking: Should The Federal Government Track Noncitizens' Departures From The United States?

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EXIT TRACKING: SHOULD THE FEDERAL GOVERNMENT TRACK NONCITIZENS' DEPARTURES FROM THE UNITED STATES?

BY MARK STEVENS[1]

"[The Department of Homeland Security] has no easy way to identify those individuals who have overstayed their visas."

-Ruth Ellen Wasem, Congressional Research Service[2]

I. INTRODUCTION

The United States does not have a comprehensive system for tracking aliens'[3] departures. The lack of a comprehensive exit tracking system contrasts with the rigorous, biometric entry inspections conducted by U.S. Customs and Border Protection.[4] U.S. inspection practices also contrast with international norms. Whereas many other countries inspect departing aliens, few other countries

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[2]   RUTH ELLEN WASEM, CONG. RES. SERV., OVERVIEW OF IMMIGRATION ISSUES IN THE 112TH CONGRESS 3 (Jan. 12, 2012).

[3]   This paper uses the words "alien" and "noncitizen" interchangeably to refer to people who are neither citizens nor nationals of the United States of America. The term "alien" is not intended to be derogative. Rather, it is a technical term used throughout U.S. immigration law. *See, e.g.*, 8 U.S.C. § 1101 (2006) (defining "alien" and using the term repeatedly).

[4]   U.S. DEP'T OF HOMELAND SEC., *US-VISIT What to Expect When Visiting the United States*, http://www.dhs.gov/us-visit-what-expect (last visited Jan. 5, 2013) (describing biometric entry procedures).

conduct such a thorough, biometric inspection of arriving aliens as the U.S.[5] Many of the approximately 11 million undocumented aliens in the U.S. have remained in the country past their periods of authorized stay.[6] However, the U.S.'s failure to track departures means that the U.S. government does not know who has overstayed.

   This paper will argue that exit tracking would be an important tool for reinforcing the integrity of the immigration system, although implementing it at land borders would be burdensome. Part II of this paper discusses current and past law and procedure on exit tracking. Part III discusses the purposes of exit tracking, and argues that immigration enforcement is the primary purpose, national security is the secondary purpose, and information and criminal law enforcement are two tertiary purposes. Part IV discusses the four competing interests at stake: immigration enforcement, privacy, cost, and freedom of movement. Part V discusses the effects of exit tracking on different populations and entities. Part VI discusses implementing exit tracking and focuses on creative proposals to alleviate the heavy burdens imposed by exit tracking at land borders.

II. Background

   Current U.S. entry inspection practices are a good starting point for discussion of exit tracking. When travelers enter the country, they are usually inspected by an officer from U.S. Customs and Border Protection ("CBP"). This normally entails a short conversation and a check of travel documents, and the officer will often check computer databases for negative information about the traveler.[7] Many travelers are issued an I-94 card to document their entry, and they are supposed to turn in this card upon departure.[8] Entry inspection is one of the primary means of enforcing the immigration laws: CBP decides whether travelers may enter and for how long. Beginning in 2004, the U.S. Visitor and Immigrant Status Indicator Technology program ("US-VISIT") transformed the inspection process.[9] US-VISIT added a biometric component to inspection: many travelers now have their fingerprints and photograph taken during inspection.[10] With US-VISIT, a secondary

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5   Japan and South Korea are among the few countries that do biometric entry inspection. Immigr. Bureau, Ministry of Just., Gov't of Japan, New Entry Procedures Will Start, http://www.immi-moj.go.jp/keiziban/happyou/pdf/poster-english.pdf; U.S. Dep't of State, *Japan Country Specific Information* (last visited Oct. 9, 2012), http://travel.state.gov/travel/cis_pa_tw/cis/cis_1148.html; U.S. Embassy Seoul, *New Biometric Procedures for Foreigners Entering the Republic of Korea Go Into Effect on January 1, 2012* (last visited Oct. 9, 2012), http://photos.state.gov/libraries/korea/187344/ACS_Newsletter/Biometric_Procedures_Jan03_2012.pdf; U.S. Dep't of State, *Republic of Korea Country Specific Information* (last visited Oct. 9, 2012), http://travel.state.gov/travel/cis_pa_tw/cis/cis_1018.html.
6   Alexandra Marks, *Should US Track Each Foreigner's Exit?*, Christian Sci. Monitor (Bos.), Jan. 22, 2007, at 3.
7   Stanley Mailman et al., Immigration Law and Procedure § 8.05[2] (2011).
8   U.S. Customs & Border Protection, *Filling Out Arrival-Departure Record, CBP Form I-94, for Nonimmigrant Visitors With A Visa for the U.S.* (July 2, 2010), http://www.cbp.gov/xp/cgov/travel/id_visa/i-94_instructions/filling_out_i94.xml.
9   U.S. Dep't of Homeland Sec., *US-VISIT What to Expect When Visiting the United States*, http://www.dhs.gov/us-visit-what-expect (last visited Jan. 5, 2013).
10   U.S. Dep't of Homeland Sec., *US-VISIT* (last visited Oct. 9, 2012), http://www.dhs.gov/xlibrary/assets/usvisit/US-VISIT_English_Web_Pamphlet.pdf.

purpose of inspection is to gather biometric data for interior or general law enforcement purposes.[11] This data allows interior law enforcement agencies to identify aliens accurately.[12]

While entry inspection is thorough, the Department of Homeland Security ("DHS") generally does not inspect departing travelers for immigration purposes.[13] DHS collects information from airlines about passengers departing the country by air.[14] However, people departing the country by land are not inspected, nor is any information collected about them.[15] The lack of a comprehensive exit inspection means that the government does not know when travelers "overstay," or remain in the country past their periods of authorized stay. Visa overstays have become a major problem in the U.S. Best estimates put the current population of undocumented noncitizens at 11.9 million, and overstays comprise 31% to 57% of the undocumented population,[16] or 3.6 million to 6.7 million. John Morton of U.S. Immigration and Customs Enforcement estimates that about 300,000 aliens overstay each year.[17]

Congress has been trying to create an exit tracking system since 1996, and the 9/11 attacks created additional pressure to track departures. The statutes on exit tracking have changed many times, and most of them can be found at 8 U.S.C. § 1365b.[18] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 first required the Attorney General to "develop an automated entry and exit control system that will . . . collect a record of departure for every alien departing the United States and match the records of departure with the record of the alien's arrival in the United States."[19] After 16 years, this mandate still has not been implemented. Four years later, Congress tried again and passed the Immigration and Naturalization Service Data Management Improvement Act of 2000, which also mandated an exit tracking system but filled in some of the details.[20] In 2001, the USA-PATRIOT Act required the development of a biometric standard for verifying the

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11   U.S. Dep't of Homeland Sec., *Office of US-VISIT* (last modified Mar. 1, 2011), http://www.dhs.gov/xabout/structure/gc_1190896326320.shtm.

12   *Id.*

13   Alexandra Marks, *Should US Track Each Foreigner's Exit?*, Christian Sci. Monitor (Bos.), Jan. 22, 2007, at 3.

14   U.S. Dep't of Homeland Sec., *Privacy Impact Assessment for the Advance Passenger Information System APIS* (Nov. 18, 2008), http://foiarr.cbp.gov/streamingWord.asp?i=38.

15   Ctr. for Immigr. Stud., The Politics and Practicalities of Exit Controls: Report from a Center for Immigration Studies Symposium 1, 7 (Aug. 2010), *available at* http://www.cis.org/articles/2010/exit-panel.pdf.

16   Ruth Ellen Wasem, Cong. Res. Serv., Nonimmigrant Overstays: Brief Synthesis of the Issue 2 (Jan. 15, 2010).

17   Visa Overstays: Can They Be Eliminated?: Hearing Before the H. Comm. on Homeland Security, 112th Cong. 10 (2010) (statement of John T. Morton, Assistant Secretary, U.S. Immigr. & Customs Enforcement).

18   For good summaries of the different bills regarding exit tracking, see U.S. Gov't Accountability Office, US-VISIT Program Faces Strategic, Operational, and Technological Challenges at Land Ports of Entry 10-12 (Dec. 2006); and Richard F. Grimmett, Cong. Res. Serv., 9/11 Commission Recommendations: Implementation Status 34-35 (Dec. 4, 2006).

19   Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, div. C, § 110 (2006).

20   Immigration and Naturalization Service Data Management Improvement Act of 2000, Pub. L. No. 106-215, 114 Stat. 337 (2000).

identities of noncitizens applying for visas or for admission.[21] The Enhanced Border Security and Visa Entry Reform Act of 2002 required commercial air and sea vessels departing the U.S. to submit manifests with detailed information on every occupant.[22] Finally, in 2004, the Intelligence Reform and Terrorism Prevention Act of 2004 required a biometric exit system, using the identity standard developed under the USA-PATRIOT Act.[23]

Currently, DHS does collect information about some departures. First, DHS issues I-94 cards to most nonimmigrants upon arrival, and travelers are supposed to turn them in to transportation carriers upon departure.[24] However, compliance with this system is so low that the system does not yield good enough data for immigration enforcement purposes. In 2009, 39 million aliens were admitted on nonimmigrant visas, and about three million of them never turned in I-94 cards.[25] While some of those three million may have overstayed, most of them likely departed without turning in the I-94 card. With three million annual noncompliances, this system identifies too many overstay "false positives" for the system to be useful.[26] DHS cannot investigate three million leads. Second, through the Advance Passenger Information System ("APIS"), DHS collects passenger manifests from commercial air and sea vessels departing the U.S.[27] The transportation company collects information from passengers, including information from passports, and transmits the information electronically to DHS.[28] This system also has gaps. A dual citizen may enter on one passport and depart on another, which would prevent DHS from matching the entry and exit records. Also, a traveler may arrive by air but depart by land, so there would be an entry record but no exit record.[29] An underlying weakness to both the I-94 and manifest systems is that they rely on private transportation companies to verify travelers' identities. The I-94 cards are turned in to transportation companies,[30] so only a company has the opportunity to match the name on an I-94 card to a traveler's

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21   Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 403(c), 115 Stat. 272 (codified at 8 U.S.C. § 1379).

22   Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, § 402, 116 Stat. 543 (2002).

23   Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7208, 118 Stat. 3638 (2004).

24   U.S. Customs & Border Protection, *Filling Out Arrival-Departure Record, CBP Form I-94, for Nonimmigrant Visitors With A Visa for the U.S.* (July 2, 2010), http://www.cbp.gov/xp/cgov/travel/id_visa/i-94_instructions/filling_out_i94.xml.

25   James C. McKinley Jr. & Julia Preston, *U.S. Can't Trace Foreign Visitors on Expired Visas*, N.Y. Times, Oct. 11, 2009, at A1.

26   Visa Overstays: Can They Be Eliminated?: Hearing Before the H. Comm. on Homeland Security, 112th Cong. 23-24 (2010) (statement of Edward Alden, Senior Fellow, Council on Foreign Relations) (describing shortcomings in the I-94 system).

27   U.S. Dep't of Homeland Sec., *Privacy Impact Assessment for the Advance Passenger Information System APIS* (Nov. 18, 2008), http://foiarr.cbp.gov/streamingWord.asp?i=38.

28   *Id.* at 2.

29   Visa Overstays: Can They Be Eliminated?: Hearing Before the H. Comm. on Homeland Security, 112th Cong. 21 (2010) (statement of Edward Alden, Senior Fellow, Council on Foreign Relations).

30   U.S. Customs & Border Protection, *Filling Out Arrival-Departure Record, CBP Form I-94, for Nonimmigrant Visitors With A Visa for the U.S.* (July 2, 2010), http://www.cbp.gov/xp/cgov/travel/id_visa/i-94_instructions/filling_out_i94.xml.

passport. Similarly, APIS information is collected by transportation companies,[31] so only a company has a chance to identify the traveler and ensure that DHS receives accurate information.

DHS has successfully used the available data to find overstays still in the U.S. and to deny visas or reentry to overstays who have left the U.S. US-VISIT uses complex algorithms and manual review to identify overstays using available data. In 2009, US-VISIT put almost 17,000 names on a list of people who had overstayed and then left the U.S. This list allowed the Department of State to deny visas to 1,065 people and allowed CBP to deny admission to 1,437 people in one year.[32] In 2009, US-VISIT also identified 16,000 overstays still in the U.S. and forwarded their names to U.S. Immigration and Customs Enforcement ("ICE") for investigation. These leads resulted in 568 arrests in one year.[33] This is impressive work, but considering about 300,000 travelers overstay each year, these small enforcement numbers represent a drop in the bucket.

Since 2001, DHS has run several projects with exit tracking components. First, the controversial National Security Entry-Exit Registration System ("NSEERS") required citizens of certain countries to report to Immigration and Naturalization Service or DHS officers upon departure.[34] If an alien subject to NSEERS failed to report his or her departure, he or she was presumed inadmissible in the future. DHS terminated this program in 2011 because it had become redundant.[35] DHS has also run pilot projects testing exit inspection. It tested a biometric exit tracking program at 14 air- and seaports from 2004 to 2007.[36] This project tested three setups: self-service kiosks, "mobile devices" presumably operated by government personnel, and a combination of the two.[37] This project showed that biometric exit tracking is technically feasible at air- and seaports, but passenger compliance was low.[38] From 2005 to 2006, DHS also ran a pilot program at five land ports that used radio frequency identification technology ("RFID") to scan travel documents as people drove out of the country.[39] The problem with RFID is that it could not physically match travelers to their documents. Even if the system recorded a document as leaving the country, there was no guarantee that the doc-

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31   U.S. Dep't of Homeland Sec., *Privacy Impact Assessment for the Advance Passenger Information System APIS* 2 (Nov. 18, 2008), http://foiarr.cbp.gov/streamingWord.asp?i=38.

32   Visa Overstays: Can They Be Eliminated?: Hearing Before the H. Comm. on Homeland Security, 112th Cong. 4-5 (2010) (statement of Rand Beers, Under Secretary, National Protection and Programs Directorate, Department of Homeland Security).

33   Visa Overstays: Can They Be Eliminated?: Hearing Before the H. Comm. on Homeland Security, 112th Cong. 8 (2010) (statement of Rand Beers, Under Secretary, National Protection and Programs Directorate, Department of Homeland Security).

34   Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214 & 264).

35   Removing Designated Countries From the National Security Entry-Exit Registration System (NSEERS), 76 Fed. Reg. 23830 (April 28, 2011).

36   U.S. Gov't Accountability Office, US-VISIT Pilot Evaluations Offer Limited Understanding of Air Exit Options 23 (Aug. 2010).

37   *Id.*

38   *Id.*

39   Alexandra Marks, *Should US Track Each Foreigner's Exit?*, Christian Sci. Monitor (Bos.), Jan. 22, 2007, at 3; Rachel L. Swarns & Eric Lipton, *Administration to Drop Effort to Track if Visitors Leave*, N.Y. Times, Dec. 14, 2006, at A1.

ument was being carried by the person to whom it was issued.[40] Finally, DHS ran a pilot project in 2009 testing two different configurations for exit tracking at airports.[41] One configuration involved CBP officers scanning travelers at the gate, and another configuration involved the Transportation Security Administration ("TSA") scanning travelers at the aviation security checkpoint.

III. The Purposes of Exit Tracking

Exit tracking could serve four possible purposes: immigration enforcement, national security, enforcement of criminal laws, and informational purposes. It is important to trace how each of these policies factors into an exit tracking system because the system will be shaped by the policies underlying it. Immigration enforcement is the primary goal, national security is the secondary goal, and criminal law enforcement and information are tertiary goals.

Immigration Enforcement

The primary purpose of an exit tracking system would be to enforce the immigration laws.[42] Exit tracking would help immigration enforcement in five ways. First, exit tracking would help the government enforce the three and ten year bars to reentry for illegal presence. The Immigration and Nationality Act contains penalties for overstaying visas. Aliens are inadmissible for three years if they were unlawfully present in the U.S. for 180 days to one year, and they are inadmissible for ten years if they were unlawfully present in the U.S. for one year or longer.[43] One common way to accumulate unlawful presence is to overstay a nonimmigrant visa. Since there is currently no comprehensive exit tracking system, enforcement of these reentry bars is difficult and haphazard. With an exit tracking system, enforcement of the reentry bars would be easy. If someone overstayed his or her visa, left the U.S., and applied for a new visa or for admission, government agencies would have reliable information that the person overstayed and could deny the application.

Second, exit tracking would enable stronger enforcement of two grounds of deportability. Aliens are deportable if they are in the U.S. in violation of law or if they fail to maintain nonimmigrant status.[44] Overstaying a nonimmigrant visa triggers both these grounds of deportability, but since there is no comprehensive exit tracking system, the government does not have complete information on who triggers these grounds of deportability. With an exit tracking system, the government could discover when someone overstays and could begin removal proceedings. One commentator has suggested that, if overstays are targeted for deportation, the government should focus on

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40   U.S. Gov' Accountability Office, US-VISIT Program Faces Strategic, Operational, and Technological Challenges at Land Ports of Entry 46-53 (Dec. 2006).

41   U.S. Dep't of Homeland Sec., *DHS Begins Test of Biometric Exit Procedures at Two U.S. Airports* (last modified May 28, 2009), http://www.dhs.gov/ynews/releases/pr_1243605893203.shtm; U.S. Gov't Accountability Office, US-VISIT Pilot Evaluations Offer Limited Understanding of Air Exit Options 25 (Aug. 2010).

42   Nathan A. Sales, *Exit Stage Right*, Nat'l Rev. Online (Apr. 24, 2008 4:00 AM) www.nationalreview.com/blogs/print/224294.

43   8 U.S.C. § 1182(a)(9)(B)(i) (2006).

44   8 U.S.C. § 1227(a)(1)(B)-(C) (2006).

long-term overstays and not prosecute short-term overstays.[45] Some short overstays are legitimate: a noncitizen may apply for an immigration benefit and then go out of status temporarily while waiting several months for a decision on the application.[46] Disregarding short overstays would protect legitimate cases like this.

Third, exit tracking would enable another mode of immigration enforcement that would be cheap and gentle.[47] If ICE knew a noncitizen had overstayed, it could send the alien a letter informing him that his overstay had been noted by the government, and telling him the penalties for continuing to remain in the USA illegally. These letters would remind overstayers of obligations to comply with the law, and they would raise the prospect of deportation in the overstayers' minds. Many overstayers might depart voluntarily once they knew that the government had noticed their overstays. This mode of enforcement would be cheap because detention and removal proceedings would not be necessary. It would also be gentle because it would allow the noncitizen to depart on his or her own terms. The downside to this mode of enforcement is that ICE may be unable to find mailing addresses for many overstayers. This problem could be solved by demanding email addresses from travelers during the visa application process and sending emails instead.

Fourth, exit tracking would make it easier for ICE to target any alien for deportation. Currently, when ICE targets for deportation someone whom it does not have in custody, it must first investigate whether that person is still in the country.[48] With exit tracking, ICE would not have to investigate whether a noncitizen is still in the United States. This would free up resources and enable ICE to focus on other aspects of immigration enforcement.

Fifth, exit tracking would help clear the backlog of outstanding final orders of removal. There are about 400,000 outstanding final orders of removal in the United States.[49] An outstanding final order of removal means that the government has ordered a person removed from the country, but DHS has not yet enforced that order. Many of these people may have departed from the United States voluntarily, but without exit tracking the government has no way of knowing who has left. Canada has a similar number of outstanding final orders of removal relative to its population, and its main interest in exit tracking is clearing the backlog.[50] If someone with a final order of removal has already left, instituting exit tracking after his or her departure would not clear the order of removal because it would be too late to record the departure. However, exit tracking would reduce part of the backlog and prevent new cases from accumulating.

Enumerating the ways in which exit tracking aids immigration enforcement naturally leads to a comparison between deportation and denying admission. Denying visas or admission to all overstayers would be cheap and easy with an exit tracking system, but deporting all overstayers would be expensive, time-consuming, and difficult even with exit tracking. Deportation or removal can be a

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45   CTR. FOR IMMIGR. STUD., THE POLITICS AND PRACTICALITIES OF EXIT CONTROLS: REPORT FROM A CENTER FOR IMMIGRATION STUDIES SYMPOSIUM 2 (Aug. 2010), *available at* http://www.cis.org/articles/2010/exit-panel.pdf.

46   *Id.* at 2-3.

47   *Id.* at 11.

48   *Id.*

49   *Id.* at 9.

50   *Id.*

lengthy, expensive, messy process, sometimes taking several years[51] and costing on average $12,500 per person.[52] It hinges on the resource availability of ICE, administrative adjudicators in the Executive Office for Immigration Review ("EOIR"), and the federal judicial courts. ICE currently faces more immigration violations than it can process.[53] EOIR is also underfunded,[54] and in 2009 it completed 290,233 immigration proceedings[55] with only 232 immigration judges[56] and 62 law clerks.[57] The lack of resources for immigration enforcement means that exit tracking probably would not lead to an immediate, precipitous increase in the number of deportations. However, if more resources become available in the future, exit tracking would give ICE the information it needs to remove more overstayers.

National Security

A secondary purpose of exit tracking is national security. National security also underlies many of the immigration laws, so it is difficult to analyze national security separately from immigration enforcement. However, much of the recent discussion of exit tracking has viewed the issue exclusively through a national security or counterterrorism lens. This is a mistake. Hundreds of millions of people travel into and out of the country every year,[58] and exit tracking has the potential to disrupt the travel of everybody. The government should only subject millions of people to increased administrative burdens if there is a clear reason to do so. If a policy has high costs, the government should only implement it if the need for that policy is also great. The link between exit tracking and terrorism is tenuous, and exit tracking cannot be justified solely on counterterrorism grounds.

There is significant *prima facie* evidence that exit tracking is a counterterrorism issue. First, four

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51   Bogle & Chang, LLC, *Deportation and Removal* (2010), http://www.immigrationlegalteam.com/Deportation_ Defense.html ("The length of the deportation proceedings can last from several months if the immigrant is in custody, to several years if the immigrant is out of custody.").

52   Associated Press, *Feds Estimate Deportation Costs $12,500 Per Person*, cnsnews.com (Jan. 27, 2011), http://cnsnews. com/news/article/feds-estimate-deportation-costs-12500-person.

53   ICE recently announced, "[T]he agency is confronted with more administrative violations than its resources can address . . . ." John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. Immigr. & Customs Enforcement 2 (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

54   Arnold & Porter LLP, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, 2010 A.B.A. Comm'n on Immigr. 2-16.

55   Office of Planning, Analysis, & Tech., *FY 2009 Statistical Year Book*, Executive Office for Immigr. Review B6 (Mar. 2010), http://www.justice.gov/eoir/statspub/fy09syb.pdf.

56   Office of Legis. & Public Affairs, *Fact Sheet: Executive Office for Immigration Review Immigration Judge Hiring Initiative*, Executive Office for Immigr. Review 3 (Mar. 11, 2010), http://www.justice.gov/eoir/press/2010/EOIR_IJHiring_ FactSheet.pdf.

57   Arnold & Porter LLP, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, 2010 A.B.A. Comm'n on Immigr. 2-17.

58   U.S. Gov't Accountability Office, US-VISIT Program Faces Strategic, Operational, and Technological Challenges at Land Ports of Entry 16 (Dec. 2006).

of the nineteen 9/11 hijackers overstayed their visas.[59] Second, Amine El Khalifi, who was arrested for attempting to attack the U.S. Capitol, overstayed his visa for years.[60] Third, Hosam Maher Husein Smadi, who was arrested for attempting to bomb a Dallas skyscraper, had also overstayed.[61] Fourth, from September 11, 2001 to 2012, more than 36 overstayers were convicted of "terrorism-related charges."[62] This evidence initially creates an impression that overstays and exit tracking are national security issues.

Evidence abounds that policymakers have bought into this narrative. First, Congress has embodied this view in statute, "[C]ompleting a biometric entry and exit data system as expeditiously as possible is an essential investment in efforts to protect the United States by preventing the entry of terrorists."[63] Second, Candice Miller, Chairman of the House of Representatives Subcommittee on Border and Maritime Security, used the Amine El Khalifi case to push for exit tracking.[64] Third, DHS recently announced that plans for exit tracking are forthcoming, and the announcement was made by John Cohen, DHS's Deputy Counterterrorism Coordinator.[65] This suggests that counterterrorism policies are the animating spirit of recent government activity on exit tracking. However, the empirical and logical link between overstaying and terrorism is weak.

Four of the 9/11 hijackers overstayed, but the whole overstay population was several million. Four out of several million is not statistically significant. To justify targeting the entire overstay population of several million people, there must be statistically significant evidence that overstayers are more likely to commit acts of terrorism. It is true that many terrorists who would like to attack the U.S. are noncitizens, and that it is sometimes possible for a noncitizen to get a visa, overstay it, and commit terrorist attacks. However, it is possible for any type of person to commit terrorist attacks.

There are only two links between overstaying and terrorism, and neither is particularly strong. First, overstaying allows noncitizens to remain in the U.S. for longer, and they may use their time

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59   Nat'l Comm'n on Terrorist Attacks Upon the United States, The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (2004). The overstayers were Zacarias Moussaoui (p 273), Satam al Suqami (p 527), Mohamed Atta (p 564), and Nawaf al Hazmi (p 564).

60   Sari Horowitz et al., *Federal Agents Arrest Amine El Khalifi; He Allegedly Planned to Bomb Capitol*, Wash. Post (Feb. 17, 2012), http://www.washingtonpost.com/world/national-security/federal-agents-arrest-man-who-allegedly-planned-suicide-bombing-on-us-capitol/2012/02/17/gIQAtYZ7JR_story.html.

61   James C. McKinley Jr. & Julia Preston, *U.S. Can't Trace Foreign Visitors on Expired Visas*, N.Y. Times, Oct. 11, 2009, at A1.

62   Rep. Candice S. Miller, *Further Securing Our Homeland Against Our Terrorist Enemies* (Mar. 26, 2012), http://candicemiller.house.gov/press-release/rep-miller-further-securing-our-homeland-against-our-terrorist-enemies.

63   8 U.S.C. § 1365b(a) (2006), enacted by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7208, 118 Stat. 3638 (2004).

64   *From the 9/11 Hijackers to Amine el-Khalifi: Terrorists and the Visa Overstay Problem: Hearing Before the Subcomm. on Border & Mar. Sec. of the H. Comm. on Homeland Sec.*, 112th Cong. (2012) (statement of Rep. Candice S. Miller, Chairman, H. Subcomm. on Border & Mar. Sec. of the H. Comm. on Homeland Sec.), *available at* http://homeland.house.gov/hearing/subcommittee-hearing-911-hijackers-amine-el-khalifi-terrorists-and-visa-overstay-problem.

65   *From the 9/11 Hijackers to Amine el-Khalifi: Terrorists and the Visa Overstay Problem: Hearing Before the Subcomm. on Border & Mar. Sec. of the H. Comm. on Homeland Sec.*, 112th Cong. (2012) (statement of John Cohen, Deputy Counterterrorism Coordinator, Dep't of Homeland Sec.), *available at* http://www.dhs.gov/news/2012/03/07/written-testimony-deputy-counterterrorism-coordinator-and-ice-homeland-security.

in the U.S. to plan attacks. However, this proposition does not go very far. Many noncitizens are admitted on tourist visas, as were at least 13 of the 9/11 hijackers.[66] Tourists are often authorized to stay for six months, and this is plenty of time for a committed terrorist to carry out an attack. The second link between overstaying and terrorism is more significant: overstayers are deportable, so if there is any suspicion at all that an overstayer is planning an attack, the government can deport the person. It is much easier to deport someone than it is to criminally prosecute him or her for terrorism.[67] There are only two links between overstaying and terrorism; one is weak and the other is significant but not significant enough to justify the costs of exit tracking.

Although the attacks of 9/11 stimulated interest in exit tracking, exit tracking would not have hindered the attacks. The 9/11 Commission Report only specifies the length of overstay for two of the four hijacker overstayers. Satam al Suqami overstayed for four months and Nawaf al Hazmi overstayed for eight months.[68] Even if ICE were given the many billions of dollars it would need to go after all overstays, it still would not have prevented these two men from participating in the attacks. Four months is arguably within the ambit of potentially legitimate overstays that the government should not prosecute, as discussed above. Regarding Hazmi, eight months is often not long enough to complete removal proceedings, which can take years.[69] Even if Hazmi had been arrested the same day he overstayed, he probably would have posted bond and would have been free to commit the attacks, unless there were credible information that he was a national security threat. If such information did exist, it would likely be strong enough to detain him without bond on criminal charges. Exit tracking would not have given the U.S. any protection from Hazmi that the criminal justice system did not already provide.

Since 2001, no overstayer has successfully committed a terrorist attack on the U.S. Even if overstaying were a national security threat in 2001, counterterrorism resources have increased so dramatically since then that overstaying is no longer a terrorist threat. Policymakers thought NSEERS was necessary after 9/11, but by 2011 the program was redundant due to improved intelligence sharing and DHS terminated it.[70] Policymakers should not fall into the trap of designing policies based solely on the failures of the past, and examinations of past failures should be tempered by reason. Amine El Khalifi and Hosam Maher Husein Smadi represent law enforcement successes, not visa

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66   Nat'l Comm'n on Terrorist Attacks Upon the United States, The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 527 n.114 (2004).

67   Mary Beth Sheridan, *Immigration Law as Anti-Terrorism Tool*, Wash. Post, June 13, 2005, at A1 ("Whereas terrorism charges can be difficult to prosecute, Homeland Security officials say immigration laws can provide a quick, easy way to detain people who could be planning attacks. Authorities have also used routine charges such as overstaying a visa to deport suspected supporters of terrorist groups.").

68   Nat'l Comm'n on Terrorist Attacks Upon the United States, The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 564 (2004) ("[T]wo hijackers overstayed their terms of admission by four and eight months respectively (Satam al Suqami and Nawaf al Hazmi).").

69   Bogle & Chang, LLC, *Deportation and Removal* (2010), http://www.immigrationlegalteam.com/Deportation_Defense.html.

70   Muzaffar Chishti & Claire Bergeron, Migration Information Source, *DHS Announces End to Controversial Post-9/11 Immigrant Registration and Tracking Program 3* (May 17, 2011), http://www.migrationinformation.org/usfocus/display.cfm?ID=840.

tracking failures.[71] Both culprits were under investigation by the Federal Bureau of Investigation ("FBI"), and were never close to successfully carrying out attacks.[72] Similarly, the 36 convictions for "terrorism related" charges may represent law enforcement successes rather than visa tracking failures.

The goal of our counterterrorism machinery is to prevent actual terrorist attacks, not to prevent any possible or conceivable attack, and our current systems accomplish this even without exit tracking. The Khalifi and Smadi attempted attacks were orchestrated by the FBI for the purposes of convicting the suspects, and they never actually endangered the public. It is understandable that a cautious lawmaker might ask, "But what if they actually had been in contact with Al Qaeda, rather than with the FBI?" In that case, their communications would likely have been picked up by the National Security Agency and forwarded to the FBI for investigation. One of the FBI's main roles is to protect Americans from terrorism, and obviously the U.S. would face greater danger if the FBI did not exist. Engaging in counterfactual, "What if…?" thinking produces misguided policies that misallocate resources.

Exit tracking will cost billions of dollars, removing all overstayers will cost many billions more, and trying to stop potential terrorists at the border is like looking for a "needle in a haystack."[73] If counterterrorism is the only goal, those billions of dollars would be better spent on intelligence.[74] The immigration system can and should be an important weapon in the fight against terrorism, but it cannot do all the work. Law enforcement and intelligence agents also have a critical role to play, and terrorism-related arrests of overstayers do not represent failures. Exit tracking can and should serve national security purposes, but this should not be the only goal.

Immigration enforcement should be the primary goal of exit tracking and national security a secondary goal.[75]

Enforcement of Criminal Laws

Exit tracking can support enforcement of criminal laws, especially laws against smuggling. If a traveler has a history of smuggling or there is other intelligence that the person may be a smug-

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71   Visa Overstays: Can They Be Eliminated?: Hearing Before the H. Comm. on Homeland Sec., 112th Cong. 46 (2010) (statement of Edward Alden, the Bernard L. Schwartz Senior Fellow at the Council on Foreign Relations).

72   Regarding Khalifi, see Sari Horowitz et al., *Federal Agents Arrest Amine El Khalifi; He Allegedly Planned to Bomb Capitol*, WASH. POST (Feb. 17, 2012), http://www.washingtonpost.com/world/national-security/federal-agents-arrest-man-who-allegedly-planned-suicide-bombing-on-us-capitol/2012/02/17/gIQAtYZ7JR_story.html ("[Authorities] said Khalifi had been the subject of a lengthy investigation and never posed a threat to the public."). Regarding Smadi, see James C. McKinley Jr. & Julia Preston, *U.S. Can't Trace Foreign Visitors on Expired Visas*, N.Y. TIMES, Oct. 11, 2009, at A1 ("[Smadi] met with agents posing as members of Al Qaeda . . . . His arrest on terrorism charges came after he parked a truck that he had been told was carrying explosives in the building's underground garage . . . .").

73   Alexandra Marks, *A Harder Look at Visa Overstayers*, CHRISTIAN SCI. MONITOR (Bos.), Feb. 5, 2002, at 2.

74   Alexandra Marks, *Should US Track Each Foreigner's Exit?*, CHRISTIAN SCI. MONITOR (Bos.), Jan. 22, 2007, at 3 (quoting Allan Wernick, chairman of the Citizenship and Immigration Project at the City University of New York).

75   *Accord* Nathan A. Sales, *Exit Stage Right*, NAT'L REV. ONLINE (Apr. 24, 2008 4:00 AM) www.nationalreview.com/blogs/print/224294 ("The main value of exit is related to immigration — the ability to verify that guests don't overstay their welcome . . . . While exit is largely about immigration, it also has national security-advantages.")

gler, the traveler could be subjected to increased security screening while exiting the country. Also, people with outstanding arrest warrants for any type of crime, from murder to reckless driving, could be arrested as they exit the country. As a person is processed for exit inspection, DHS could query a national database of arrest warrants, such as the National Crime Information Center.[76] If the query finds an outstanding warrant, the person could be detained for further investigation. Outstanding arrest warrants are the most common reason for stopping people during exit inspection in Australia.[77]

Informational Purposes

The final purpose of exit tracking is to produce information that could be used in various situations. Exit tracking would give the government reliable information on who is in the country. This information could be used many ways, four examples of which are most evident. First, it would help the government craft immigration policy. If the government knows that people from a certain country or people in a certain visa category are overstaying at a higher than normal rate, it can adjust immigration policy accordingly. Second, the information could serve diplomatic purposes. If there is ever a disaster in the U.S., other countries might appreciate knowing how many of their citizens are in the U.S. Third, the information could serve national security. If the U.S. ever declares war on a foreign state and wants to investigate noncitizens from that state, knowing how many of them are in the country would provide a starting point. Fourth, if the government ever wants to provide services to noncitizens, knowing how many of them are in the country would be helpful. For example, if nationals from a certain country are found to carry a contagious disease, knowing how many of them are in the U.S. would allow the government to deploy adequate resources to treat them.

Immigration enforcement is the primary goal of exit tracking, national security is a secondary goal, and criminal law enforcement and information are tertiary goals. Since implementation differs depending on the objectives,[78] this leads to one important principle for an exit tracking system. The main goal of exit tracking is to reduce the number of noncitizens present in the U.S. illegally, so it does not necessarily need to track every single departure of a noncitizen. The goal is to slowly but surely chip away at the number of undocumented aliens, not to apprehend all of them immediately. However, if counterterrorism were the only goal, the system would have to track every single departure, because even a single terrorist can cause havoc.[79]

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76   This FBI database contains information about "wanted persons" with outstanding warrants, among other things. Fed. Bureau of Investigation, *National Crime Information Center*, http://www.fbi.gov/about-us/cjis/ncic (last visited Jan. 5, 2013).

77   Ctr. for Immigr. Stud., The Politics and Practicalities of Exit Controls: Report from a Center for Immigration Studies Symposium 8 (Aug. 2010), *available at* http://www.cis.org/articles/2010/exit-panel.pdf.

78   *Id.* at 5.

79   Edward Alden, *Immigration and Border Control*, 32 Cato J. 107, 114 (2012).

IV. The Competing Interests at Stake

Exit tracking affects many different areas of public interest, and any successful implementation of exit tracking must balance them. Four interests are most prominent: immigration enforcement, privacy, cost, and freedom of movement.

First, immigration enforcement is the main purpose of exit tracking.[80] Exit tracking will give law enforcement agencies more information they can use (or abuse) in the course of doing their job. It will also subject immigrants to the possibility of tighter enforcement of the laws against overstaying. On the other hand, if the government can reduce the number of overstayers, it may actually be able to admit more noncitizens because the immigration system would not be as heavily burdened.

Second, exit tracking affects privacy rights.[81] There are various ways of implementing exit tracking, from an automated biometric system to an interview, and they all involve government intruding into people's lives to acquire more information about them. Biometric exit tracking systems are particularly problematic because they take information directly from people's bodies, and therefore represent an intrusion of the government into the most private sphere of personal life. Many people will face the hassle of an additional procedure before leaving the country, and most people will not enjoy having to give fingerprints. However, the arguments against biometric data collection are not strong. First, biometric data collection must be compared to the alternatives. If there must be some sort of exit inspection, and the only two options are an automated biometric system or waiting in a long line for an interview with an officer, some people may find the automated biometric system less intrusive. Second, biometric exit tracking would not give the government access to new types of data. The government already has access to much biometric information about aliens through US-VISIT, and it already has access to departure information on aliens departing by air and sea from passenger manifests.[82] Biometric exit tracking only involves a linking of the two types of data, such as linking a fingerprint to a specific departure. Comprehensive exit tracking will merely produce information about more departures, and the government is entitled to know when noncitizens cross U.S. borders.

The third interest at stake is cost. A comprehensive exit tracking system will cost billions of dollars. The entry portion of US-VISIT was relatively cheap to deploy because it piggybacked on the pre-existing infrastructure for entry inspection.[83] However, DHS currently does not inspect departing travelers, so exit tracking would require large upfront expenditures for new infrastructure

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80   *Supra* Part III.

81   For discussion of the privacy issues involved in exit tracking, see U.S. Dep't of Homeland Sec., *Privacy Impact Assessment for the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) Program Comprehensive Exit Program: Air Exit Pilot* (May. 20, 2008), http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_air_exit.pdf.

82   *Supra* Part II.

83   As of 2010, DHS had spent $1.3 billion on the entry portion of US-VISIT. Diem Nguyen & Jena Baker McNeill, Biometric Exit Programs Show Need for New Strategy to Reduce Visa Overstays 4 (Heritage Found., 2010), *available at* http://s3.amazonaws.com/thf_media/2010/pdf/bg_2358.pdf.

at all land and sea ports of entry.[84] At airports, exit tracking could piggyback on the pre-existing TSA infrastructure for security screening. Since DHS would need new personnel to run the program, there would also be ongoing expenditures. There are many different estimates of how much exit tracking would actually cost: $1.3 billion to $2.8 billion,[85] $3.1 to $6.4 billion over ten years,[86] ten billion dollars,[87] and tens of billions of dollars.[88] Some have rightly questioned whether exit tracking is worth it.[89] Currently, exit tracking is an unfunded mandate.[90] One may interpret this as reflecting conflicting views within Congress on the value of exit tracking. For there to be any hope of implementing exit tracking, an economic study of the costs involved must be commissioned. Currently, all that one can say is that it would cost billions of dollars.

Fourth, exit tracking could hinder freedom of movement, which includes movement of both people and goods.[91] There is a strong public interest in allowing the legitimate passage of people and goods. International trade and travel are essential for the U.S.'s economic and technological prowess, and an enlightened government should aim to allow people as much freedom of movement as possible. Welcoming noncitizens strengthens our diplomatic relationships and builds the "soft power" of the United States; it strengthens our leadership of the international community. Exit tracking imposes an additional procedure or obstacle that travelers must overcome to leave the country. Many travelers may find their departures delayed while they wait to be processed. These delays may affect U.S. citizens and noncitizens, depending on the context and the system's design. In the case of airports, even domestic travelers may face delays if the system is underresourced or designed poorly. Airline passengers are accustomed to extensive security screening before flights, so adding one more procedure may not impact air travelers very much. However, at land borders,

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84   For discussion of the need for new infrastructure, see U.S. Gov't Accountability Office, US-VISIT Program Faces Strategic, Operational, and Technological Challenges at Land Ports of Entry 40-41 (Dec. 2006).

85   Ctr. for Immigr. Stud., The Politics and Practicalities of Exit Controls: Report from a Center for Immigration Studies Symposium 1 (Aug. 2010), *available at* http://www.cis.org/articles/2010/exit-panel.pdf.

86   Diem Nguyen & Jena Baker McNeill, Biometric Exit Programs Show Need for New Strategy to Reduce Visa Overstays 4 (Heritage Found., 2010), available at http://s3.amazonaws.com/thf_media/2010/pdf/bg_2358.pdf.

87   Ctr. for Immigr. Stud., The Politics and Practicalities of Exit Controls: Report from a Center for Immigration Studies Symposium 3 (Aug. 2010), *available at* http://www.cis.org/articles/2010/exit-panel.pdf.

88   Alexandra Marks, *A Harder Look at Visa Overstayers*, Christian Sci. Monitor (Bos.), Feb. 5, 2002, at 2.

89   "Comparing the risks, costs, and benefits of a biometric exit system demonstrates that while there is some benefit gained from tracking this data, the costs and manpower associated with such a system simply outweigh the benefits." Diem Nguyen & Jena Baker McNeill, Biometric Exit Programs Show Need for New Strategy to Reduce Visa Overstays 5 (Heritage Found., 2010), *available at* http://s3.amazonaws.com/thf_media/2010/pdf/bg_2358.pdf.

90   The DHS budget for fiscal year 2013 includes only one substantive reference to exit tracking, and seems to describe efforts to enhance existing systems rather than deploy new programs. U.S. Dep't of Homeland Sec., FY 2013 Budget in Brief 7 (2012), *available at* http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf ("DHS has initiated implementation of an enhanced biographic exit program, which will better aggregate the information within existing data systems, enhance review of potential overstays, increase automated matching, incorporate biometric elements, and provide the foundation for a future biometric exit solution.").

91   Richard M. Stana, U.S. Gov' Accountability Office, *US-VISIT Program Faces Strategic, Operational, and Technological Challenges at Land Ports of Entry* 15 (testimony before the Senate Subcommittee on Terrorism, Technology, and Homeland Security, Jan. 31, 2007), http://www.gao.gov/new.items/d07378t.pdf.

departing travelers currently face no departure procedures at all, and exit tracking will require millions of travelers to stop for processing instead of proceeding freely to Canada or Mexico. This is the strongest objection to exit tracking, and the most likely stumbling block.[92] This paper explores some creative solutions to this problem below. Exit tracking should not overly obstruct freedom of movement.

The four competing interests at stake in exit tracking are immigration enforcement, privacy, cost, and freedom of movement. How these policies play out depends on how the system is designed and what type of port is being used. A few examples of how these policies interact will be helpful in designing an exit tracking system. First, if exit tracking is merely biographic instead of biometric, privacy would be served but immigration enforcement would suffer because of reduced confidence that travelers are who they say they are. Second, if exit tracking uses poor infrastructure, the system may be cheap but it would likely produce poor data for immigration enforcement or impose needless delays on travelers. Third, if screening queues get backed up at an airport, DHS may decide to clear the queue by foregoing exit tracking for a brief period, which would aid freedom of movement but hinder immigration enforcement. Finally, in considering a choice between an automated biometric system and a biographic system that requires an interview, the biometric system may infringe privacy but enable people and goods to pass more quickly.

V. The Effect of Exit Tracking on Different Populations

Exit tracking will have different effects on different groups of people. There are six discernible groups who will be affected differently by exit tracking: U.S. citizens, legal noncitizen travelers, overstayers, noncitizens who entered without inspection, passenger transportation companies, and freight shipping companies.

U.S. citizens would likely face some inconvenience even though the system is not intended to track their departures. Departing U.S. citizens would have to prove that they are U.S. citizens in order to forego exit tracking, which would mean requiring them to produce documents. However, every U.S. citizen leaving the country should already be carrying documents proving citizenship, because they need these documents to return to the U.S.[93] Therefore, although U.S. citizens would likely have to show proof of citizenship to forego exit tracking, this would not require them to carry any additional documents but merely to produce those documents one more time. This procedure may cause short delays even for U.S. citizens.

Legal noncitizen travelers would similarly face some delay and inconvenience by having to submit to exit tracking. Whether the procedure entails giving biometrics, having an interview, or merely swiping a passport in a machine, it will be a minor annoyance for millions of noncitizens departing the country. If the system is biometric, it will intrude on their privacy by forcing them to submit parts of their body to data capture.

Exit tracking may have undesirable consequences on the behavior of overstayers: it may discour-

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92   *Id.*

93   U.S. Dep't of Homeland Sec., *Western Hemisphere Travel Initiative* (last visited April 28, 2012), http://www.dhs.gov/files/programs/gc_1200693579776.shtm.

age them from leaving the U.S. This is simple economics. Exit tracking can impose a high cost for illegal presence in the U.S., and some overstayers may rationally try to avoid this penalty. Overstayers may choose not to depart rather than to depart and be barred from reentering. Although exit tracking is intended to reduce the number of overstayers, it may actually discourage some overstayers from leaving because they would face the added penalty of being unable to return. Overstayers would not have an incentive to dodge exit tracking by sneaking out illegally, because if an overstayer snuck out illegally and then tried to reenter, a CBP officer may notice that their previous departure was not logged. Exit tracking may encourage some overstayers to remain in the U.S. for longer.

Exit tracking would also change the behavior of noncitizens who entered without inspection ("EWIs"). Under the current system, EWIs can freely depart the U.S. by land without worrying excessively that the U.S. government will log their departure or note their illegal presence in the U.S. With exit tracking, EWIs would potentially be punished for trying to depart through an authorized port of entry. Therefore, some EWIs may either simply stay in the U.S. or they may try to sneak out illegally. This may create a new stream of illegal travel. Whereas most illegal border crossings are committed while entering the U.S., illegal departures might become a new problem for CBP. Exit tracking may encourage some EWIs to remain in the U.S. longer, and may encourage some to sneak out of the U.S. illegally.

Exit tracking may also affect companies. International airlines, bus services, and train services may face complaints from travelers about travel delays. Also, it would be tragic if an airline had to delay the departure of an entire aircraft full of people because a small number of passengers were delayed by exit inspection. Exit tracking could also change the number of passengers. If delays caused by exit tracking are severe, some passengers at the margins may choose not to travel at all. Also, if exit tracking causes delays of differing severity at air, sea, and land ports of entry, travelers who have a choice between modes of transportation may adjust their travel accordingly. For example, a traveler from San Antonio, Texas to Monterrey, Mexico may have a choice between flying and driving. If he faces long delays at the land border caused by exit tracking, he may choose to fly instead. The possibility of travel delays means that exit tracking may affect the business of transportation companies. This underscores the importance of making exit processing quick.

Exit tracking may also impact international freight shippers. If their employees have to submit to an additional procedure before exiting the U.S., vessels may be delayed. However, this is not as big a concern for freight shippers as it is for consumer transportation companies because freight vessels carry far fewer people.

VI. Implementation

Guiding Principles

Exit tracking will be difficult to implement. A few principles will guide implementation. First, policymakers should aim to work within the current system as much as possible and only make reasonable changes that are necessary to accomplish the goals of exit tracking. Machiavelli said, "[T]here is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its

success, than to take the lead in the introduction of a new order of things . . . ."[94] An exit tracking system should avoid disrupting the status quo except when absolutely necessary. This will minimize cost and opposition to policy changes.

Second, when changes are necessary, they will inconvenience different sectors of society to varying degrees, and policymakers must have a clear understanding of how those burdens should be distributed. First and foremost, exit tracking should aim to avoid inconveniencing travelers. Hundreds of millions of people cross U.S. borders annually.[95] If exit tracking delays each traveler even for 30 seconds, and 425 million people depart the U.S. annually,[96] it will add up to 3.5 million man hours lost per year. An exit tracking system should differentiate among the different types of travelers. An exit system should take particular care to avoid inconveniencing U.S. citizens and anyone else not subject to exit tracking, since there is no compelling reason to collect information about such travelers. After considering individual travelers, the next most important stakeholders whose interests should be considered are transportation companies. They are much less numerous than individual travelers, and, as professionals conducting business in an area of national importance, a large part of their job is complying with government regulations. However, exit tracking should mainly be conducted by the government. Airlines refused to participate in the 2009 pilot programs,[97] and an exit tracking program is unlikely to succeed if unwilling transportation companies are forced to bear the burden of operating it. There is an emerging consensus that exit tracking, like entry inspection, is primarily a government function.[98] Finally, the third most important stakeholders whose interests should be considered are government agencies like CBP and TSA. It is their primary function to operate government programs for the benefit of the public, so lawmakers should not be overly concerned about changing agency operations. Indeed, agencies benefit from having more programs, because additional programs require bigger budgets and more personnel. However, for exit tracking to succeed, lawmakers must know what they can realistically expect agencies to accomplish with the available resources.

Biometric Versus Biographic

One of the most important decisions about exit tracking is whether it should be biometric or biographic. Biometric systems involve taking information directly from travelers' bodies, such as fingerprints, photographs, and iris scans. Biographic systems involve collecting information about travelers, such as name, date of birth, nationality, passport number, visa number, and class of ad-

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94   Nicolo Machiavelli, The Prince ch. 6 (W. K. Marriott, trans., 2006). E-book available at http://www.gutenberg.org/files/1232/1232-h/1232-h.htm.

95   In 2004, there were over 425 million entries, and, it is safe to presume, a similar number of departures. U.S. Gov't Accountability Office, US-VISIT Program Faces Strategic, Operational, and Technological Challenges at Land Ports of Entry 16 (Dec. 2006).

96   *Id.*

97   U.S. Gov't Accountability Office, US-VISIT Pilot Evaluations Offer Limited Understanding of Air Exit Options 29 (Aug. 2010).

98   Ctr. for Immigr. Stud., The Politics and Practicalities of Exit Controls: Report from a Center for Immigration Studies Symposium 1 (Aug. 2010), *available at* http://www.cis.org/articles/2010/exit-panel.pdf.

mission. Debating whether a system should be biometric or biographic is moot to a certain extent, because Congress has already mandated a biometric system,[99] and there is strong, bipartisan support for this.[100] However, the biometric mandate has not yet been implemented, Congress has not yet provided adequate resources for it, and some people disagree on whether the program should be biometric.[101]

The most obvious advantage of biometric systems is that they make identity fraud almost impossible.[102] Travelers can deceive biographic systems by presenting photo-switched or fraudulent documents, but travelers cannot change their fingerprints. A bigger advantage to biometrics is that they can be automated, which makes inspection cheaper and faster. For example, the Global Entry program allows certain travelers entering the U.S. to forgo personal interviews with CBP officers and instead submit their fingerprints to machines.[103] The limitations of biographic systems become apparent when one considers a congressional requirement for exit tracking. Congress has required any exit tracking system to verify travelers' identities, meaning it must match the travel document to the traveler.[104] Considering this reasonable mandate, the only choice for a biographic system is for an officer to interview the traveler and verify the identity manually. As many people have experienced while waiting for entry inspection, interviews can create long travel delays. Also, for interviews to occur, many officers must be employed to conduct the interviews, so the system would be more expensive. Since any exit tracking system must verify travelers' identities, biographic systems require interviews. Biometric systems, on the other hand, can be automated to save time and money. These principles will play out differently at air and land ports of entry.

Implementation at Airports

Implementing exit tracking will be easier at airports than at land borders. Currently, DHS receives an electronic passenger manifest from airlines with information about each traveler, and uses this information to track exit in certain cases. Therefore, there is already a serviceable biographic exit tracking system in place. However, matching entry records to departure records is laborious, requiring complicated algorithms and manual review.[105] Also, under the current system, airlines are

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99   8 U.S.C. § 1365b (2006).

100   Ctr. for Immigr. Stud., The Politics and Practicalities of Exit Controls: Report from a Center for Immigration Studies Symposium 2 (Aug. 2010), *available at* http://www.cis.org/articles/2010/exit-panel.pdf.

101   *Id.*

102   *Id.* at 7.

103   *Global Entry Trusted Traveler Network – About*, U.S. Customs & Border Protection, http://www.globalentry. gov/about.html (last visited Jan. 5, 2013) ("At airports, program participants proceed to Global Entry kiosks, present their machine-readable passport or U.S. permanent resident card, place their fingertips on the scanner for fingerprint verification, and make a customs declaration. The kiosk issues the traveler a transaction receipt and directs the traveler to baggage claim and the exit.").

104   U.S. Gov't Accountability Office, US-VISIT Program Faces Strategic, Operational, and Technological Challenges at Land Ports of Entry 4 (Dec. 2006).

105   Visa Overstays: Can They Be Eliminated?: Hearing Before the H. Comm. on Homeland Security, 112th Cong. 4-5 (2010) (statement of Rand Beers, Under Secretary, National Protection and Programs Directorate, Department of Homeland Security).

responsible for verifying the identity of the traveler. Since immigration enforcement is not a primary goal of airlines, it is unclear whether this suffices for enforcement purposes.

The 2009 exit tracking pilot program showed two possible configurations of an exit program at airports.[106] The first involved TSA adding a layer to its pre-flight security screening process, and the other involved CBP processing travelers at the gate. The TSA approach is superior because it would allow piggybacking on current infrastructure with only minor changes, whereas CBP processing passengers at the gate would require much new infrastructure and personnel. The TSA approach requires only a very small change to TSA procedure. Currently, passengers must present their tickets and photo IDs to TSA, and TSA must verify travelers' identities. Exit tracking would only require two small changes: that TSA scan the ID into a computer, and that the ID provide sufficient information for immigration enforcement purposes. Drivers licenses would not suffice because they usually do not state nationality.[107] However, international travelers should already be carrying citizenship documents, so this would be no inconvenience to them. The biographic, TSA approach requires only the installation of document scanning computers at TSA checkpoints.

A second reason for preferring the TSA approach is that it would allow TSA to incorporate intelligence into its aviation security screening process,[108] which would let it process passengers faster. Currently, intelligence partially informs TSA screenings, but only with the cooperation of airlines. Intelligence informs TSA screenings in two ways. First, when there is intelligence that a traveler is a security threat, TSA may put them on a "No fly" list and prevent them from traveling.[109] Airlines are not supposed to sell tickets to such travelers. Second, if there is some adverse intelligence on a traveler but not enough to merit placing him on the "No fly" list, his name shows up in a database when he checks in. The airline is supposed to mark the boarding pass so that the traveler receives additional screening.[110] With exit tracking, TSA could take responsibility for these processes. TSA officers could scan travel documents into computers, instantly receive any adverse intelligence, and subject the traveler to greater scrutiny if there is adverse intelligence. This takes the airlines out of the process of incorporating intelligence into security screening, and rightfully so, since aviation security should be a government function.[111] If TSA had greater confidence that passengers known to be security threats would receive additional screening, it may enable TSA to give less scrutiny to the vast majority of travelers who are not security risks. An integrated exit tracking and aviation security

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106   U.S. Dep't of Homeland Sec., *DHS Begins Test of Biometric Exit Procedures at Two U.S. Airports* (last modified May 28, 2009), http://www.dhs.gov/ynews/releases/pr_1243605893203.shtm; U.S. Gov't Accountability Office, US-VISIT Pilot Evaluations Offer Limited Understanding of Air Exit Options 25 (Aug. 2010).

107   For examples of drivers licenses that do not state citizenship, see Wash. State Dep't of Licensing, *Driver License Samples* (2013), http://www.dol.wa.gov/driverslicense/licensesamples.html; Tenn. Dep't of Safety & Homeland Sec., *Driver License Card Examples*, http://www.tn.gov/safety/driverlicense/dlcards.shtml (last visited Jan. 5, 2013); and Or. Driver & Motor Vehicle Servs. Div., *Sample Oregon Driver Licenses & ID Cards*, http://www.oregon.gov/odot/dmv/pages/driverid/samplecards.aspx (last visited Jan. 5, 2013).

108   Ctr. for Immigr. Stud., The Politics and Practicalities of Exit Controls: Report from a Center for Immigration Studies Symposium 5-6 (Aug. 2010), *available at* http://www.cis.org/articles/2010/exit-panel.pdf.

109   *Id.* at 5.

110   *Id.* at 6.

111   *Id.*

screening program may mean shorter TSA screenings for everyone.

There are two drawbacks to the TSA approach. First, travelers may pass through the checkpoint and then not board their flights, so TSA would record them as leaving the country while they continued to stay. This is not a problem, since failure to board the plane could be recorded in the passenger manifest. Some really nefarious traveler could go through the checkpoint and then switch boarding passes with a domestic traveler. Some have proposed that the solution to this is to have airlines match boarding passes to travel documents again before boarding.[112] However, this would impose unreasonable delays and administrative burdens on airlines. Since the system need not record every single departure, there is an acceptably small risk that travelers may defraud the system in this way.

The second drawback to the TSA approach is that it is difficult to isolate international travelers. A single TSA checkpoint may screen both domestic and international passengers, so TSA officers would need some way to know whom they should inspect. Placing a code or signal on boarding passes could solve this. A related problem is that a traveler may take a domestic flight followed by an international flight. For example, someone may fly from a small, regional airport in upstate New York to John F. Kennedy International Airport in New York City, and then catch a connecting flight to Paris. Aviation security screening of the passenger would occur at the small airport, and under current procedure, the passenger would not need to undergo security screening again in New York City.[113] Therefore, exit processing would have to occur at the small, regional airport even though it has no international flights. This means that all TSA checkpoints must be equipped for exit tracking, even checkpoints at airports without any international flights. This increases costs significantly, but it may still be less expensive than the alternative: screening passengers at departure gates.

Exit tracking at airports should be a biographic system, with TSA manually checking documents to verify identities. This would only require the installation of document scanning machines at TSA checkpoints and minor changes to current procedure. However, these changes would have to be made at all TSA checkpoints, even those at airports without international flights.

Implementation at Land Borders[114]

The true challenge for exit tracking lies in implementing it at land borders.[115] Land border exit tracking is daunting for four reasons: the high number of border crossings, the current lack of any inspection, spatial restrictions, and the diverse means of conveyance for land traffic. About one million travelers enter the U.S. by land every day,[116] and one may presume that a similar number depart. If exit tracking causes even a slight delay for each traveler, it could grind border traffic to a halt very

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112   *Id.* at 8.

113   *E.g.*, Sdreamer11, Comment to *Connecting Flight Info*, DREAM ACT PORTAL FORUM (April 2, 2012, 1:33 PM), http://dreamact.info/forum/archive/index.php?t-26879.html ("I traveled las [sic] month and had a connecting flight and we did not have to go through TSA again, we just got off one flight and went to our gate to wait for the next.").

114   This paper will not consider implementation at seaports, because there is less information available about seaports and seaports only account for 3.5% of all border crossings. U.S. GOV'T ACCOUNTABILITY OFFICE, US-VISIT PROGRAM FACES STRATEGIC, OPERATIONAL, AND TECHNOLOGICAL CHALLENGES AT LAND PORTS OF ENTRY 16 (Dec. 2006).

115   *Id.* at 1.

116   In 2004, there were over 335 million land entries. *Id.* at 16.

quickly. Currently, departing travelers are not inspected by U.S. authorities at all, so any new inspection would be a vast change. There is also limited room for new infrastructure. An aerial view of the border crossing checkpoint at San Ysidro, California demonstrates the spatial limitations:

While the entrance traffic is divided into 24 lanes to accommodate entry inspection (seen at the bottom of the photo), the departure traffic is squeezed into only six lanes (top). The facility is surrounded by dense, urban infrastructure, leaving little room to expand.[118] Departure traffic cannot be expanded into 24 lanes to accommodate exit inspection.[119] The final challenge at land borders is that people cross on foot and in cars, trucks, vans, buses, and trains. Exit tracking must accommodate all modes of conveyance. Managing all these challenges will be very expensive.

One of the best solutions for these problems is to cooperate with our neighbors. Canada is interested in building a joint system that uses a single inspection both to track exit from the U.S. and to process travelers for entry to Canada.[120] This is an excellent proposal, and it would solve the problem of exit tracking on our northern land border. However, this solution could only work because the U.S. has a good relationship with Canada on immigration issues. For example, Canadian citizens enjoy easy, visa-free access to the U.S.,[121] Canadians account for a very small portion of the undocumented population in the U.S.,[122] and Canada is the only country with which the U.S. has a "Safe

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117   *Id.* at 40.

118   *Id.*

119   *Id.* at 39.

120   CTR. FOR IMMIGR. STUD., THE POLITICS AND PRACTICALITIES OF EXIT CONTROLS: REPORT FROM A CENTER FOR IMMIGRATION STUDIES SYMPOSIUM 9 (Aug. 2010), *available at* http://www.cis.org/articles/2010/exit-panel.pdf.

121   8 C.F.R. § 212.1(a)(1) (2012).

122   The Urban Institute estimates that 65,000 to 75,000 undocumented Canadian citizens live in the US, which is a very small portion of the total undocumented population of over 10 million. Beth Slovic Balovic, *Willamette Week, He's an... Illegal Eh-lien*, WILLAMETTE WEEK (Feb. 20, 2008), http://www.wweek.com/portland/article-8470-herss_an_illegal_eh_lien.html.

third country" agreement on asylum seekers.[123] A joint system with Mexico may not work on the southern border because the U.S. has had a stormy relationship with Mexico on immigration issues. About 6.1 million undocumented Mexican citizens live in the U.S.,[124] Mexican presidents have regularly criticized U.S. immigration policy,[125] and the U.S. is constructing a barrier along much of the southern border.[126] It may not be in the interest of the Mexican government to assist the U.S. with tighter border controls. The U.S. and Mexico may not have a strong enough relationship to conduct joint border inspections. A different solution must be found for the southern border.

Current expectations for land exit tracking are unrealistic. According to the Government Accountability Office, lawmakers require exit tracking physically to match the traveler to the document he or she presents.[127] The Government Accountability Office also says that officials consider it unacceptable to require vehicles to stop for exit tracking.[128] These goals are incompatible with the technology currently available, and one must give way. Since speed and volume are the main problems, automated biometric systems should be used wherever possible.

Vehicle traffic is the main concern. First, vehicle traffic should be divided up into those subject to exit tracking and those not subject to it, to avoid subjecting U.S. citizens to needless delays. Signs would direct U.S. citizens (and any others exempt from exit tracking, such as perhaps legal permanent residents) to enter certain lanes and all others to enter certain other lanes. A CBP officer could conduct cursory inspections of the cars traveling in the U.S. citizen lanes, just to satisfy himself that the cars indeed only contain U.S. citizens. These stops could range from short, visual inspections to conversations, and the process would rely on the officer's instincts to find suspicious travelers. To add some integrity to this process, CBP could require the driver to have immigration documents for all passengers available for a quick glance by the officer, if the officer desires. As stated earlier, departing U.S. citizens should already be carrying immigration documents. Most U.S. citizens (and others exempt from exit tracking) would only have to stop for a few seconds, if at all.

In the lanes designated for exit tracking, an automated, biometric system could process cars rapidly. Since many of the vehicles are cars with very similar dimensions, an experiment should be conducted: have four fingerprint readers, one stationed at each passenger window. The car could pull into position and then all passengers could roll down their windows and have their fingerprints taken simultaneously. The fingerprint reading machine could also scan travel documents, if the

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123   Citizenship and Immigration Canada, *A Partnership for Protection: Year One Review* (Nov. 13, 2006), http://www.cic.gc.ca/english/department/laws-policy/partnership/chapter5.asp.

124   Associated Press, *Illegal Mexican Immigrant Numbers Down as More Migrate Back to Mexico*, CBSNews.com (April 23, 2012, 4:00 PM), http://www.cbsnews.com/8301-201_162-57419334/illegal-mexican-immigrant-numbers-down-as-more-migrate-back-to-mexico/.

125   Traci Carl, *Mexico Blasts U.S. Immigration Policies*, Wash. Post (Sept. 2, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/09/02/AR2007090200958_pf.html.; Thelma Guerrero-Huston, *In Portland, Fox Criticizes U.S. Policy on Mexico*, Statesman J. (Salem, OR), March 20, 2008, at 1.

126   GlobalSecurity.org, *US-Mexico Border Fence / Great Wall of Mexico Secure Fence* (July 13, 2011), http://www.globalsecurity.org/security/systems/mexico-wall.htm.

127   U.S. Gov't Accountability Office, US-VISIT Program Faces Strategic, Operational, and Technological Challenges at Land Ports of Entry 52 (Dec. 2006).

128   *Id.* at 7.

fingerprint alone is insufficient. This experiment would still require an officer to verify visually that each passenger had given a fingerprint before the car moved on, so this system would not be completely automated. However, it would save on labor since one officer could monitor several lanes simultaneously. If this experiment does not work, two choices remain, and neither option is good. First, an officer could take travel documents from everyone in the car, scan them in a machine, and visually verify the passengers' identities. This would be expensive since there would be one officer per lane of travel, and it would also delay travelers while the officer scans documents and verifies identities. The second option would be to use a biometric system that requires each passenger to get out of the car. This would be extremely messy and probably not viable, since it would require a safe place for the passengers to get out. As mentioned previously, space at border checkpoints is often constrained.

Trucks, buses, vans, and other non-car vehicles have different dimensions than cars and would not be able to use the station with four fingerprint readers, so these vehicles should be filtered into yet another lane. Since these vehicles have irregular shapes and differing numbers of passengers, it would be difficult to automate the process. Exit tracking for these vehicle types may require an officer to collect documents, scan them, and verify identity manually, in a setup similar to toll booths.

For trains, exit tracking could be done at the train station or conducted by a CBP officer on board.

Much land border traffic is pedestrian, and an automated solution for pedestrians would be fairly straightforward. The system would function similar to a turnstile: one person would enter a constrained area, give a fingerprint and possibly also swipe a travel document, and then be released on the other side. The constrained area could be a completely isolated booth similar to a telephone booth or it could be a partially constrained space similar to a subway turnstile. The challenge here is making sure that only one traveler gets through for each fingerprint given. The machine may be able to accomplish this alone, or one CBP officer could supervise all the turnstiles from an overhead vantage point.

To alleviate all the pressures that exit tracking would create at land borders, some types of noncitizens should be exempt from exit tracking. First, legal permanent residents ("LPRs") should be exempt. The main goal of exit tracking is to eliminate overstays, and LPRs are authorized to stay in the U.S. for as long as they like, so it is not possible for them to overstay. The second population which should possibly be exempted from exit tracking is holders of Border Crossing Cards ("BCCs"). These B1/B2 visa cards let travelers stay for a limited period and travel a limited distance from the border.[129] BCC holders should possibly be exempted because they account for the vast majority of nonimmigrant land admissions but do not overstay in great numbers. Although a significant number of BCC holders do overstay, their rate of overstay is not very large relative to the

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129   Consulate Gen. of the U.S., Ciudad Juarez, Mex., *Border Crossing Cards & B1/B2 Temporary Visitors for Business or Pleasure* (last visited May 1, 2012), http://ciudadjuarez.usconsulate.gov/tourist_business.html.

number of border crossings they make. According to the Pew Hispanic Center, in 2004 there were 179 million nonimmigrant admissions and 148 million of those were BCC holders.[130] Although BCC holders account for the vast majority of nonimmigrant border crossings, they account for a relatively small share of the undocumented immigrant population: 250,000 to 500,000.[131] Considering that this is the total stock of unauthorized immigrants in the U.S. who entered with BCCs, a fair estimate is that about 50,000 BCC holders overstay annually. The question is whether it is worth tracking 148 million departures just to stop 50,000 new overstays annually. The answer may very well be no. Exempting LPRs and BCC holders would alleviate the strain on exit tracking at land borders. This means compromising the interest in immigration enforcement in favor of the interest in freedom of movement.

In summary, land borders present the main challenge of exit tracking. Any exit system has to accommodate many types of traffic and operate quickly in constrained areas. Since there is no exit inspection infrastructure currently in place, any new system will have to start from scratch and will cost a large amount of money. At the northern border, a joint system with Canada is essential. At the southern border, vehicle traffic should be segregated depending on whether the passengers are subject to exit tracking. Those subject to exit tracking should be further segregated into cars and all other traffic, since cars could potentially use a partially automated system. Compared to the challenges presented by vehicular traffic, pedestrian traffic would be easy to track with an automated, biometric system. LPRs and BCC holders should be exempt from exit tracking.

VII. Conclusion

Comprehensive exit tracking would be an important tool for reducing the population of undocumented immigrants in the United States. Exit tracking is not a cost-effective counterterrorism tool, though it could serve both immigration enforcement and national security simultaneously. Any new exit tracking system has to balance the four competing public interests in immigration enforcement, privacy, cost, and freedom of movement. Implementation is feasible at airports, where the best option is a program conducted by TSA. Exit tracking could be implemented at the northern land border by conducting joint inspections with Canada. On the southern land border, exit tracking will be very difficult to implement, it will cost a lot, and it will slow border traffic significantly. Creative proposals for the southern border include segregating traffic, stationing four fingerprint pads around cars for simultaneous processing of all passengers, and exempting legal permanent residents and holders of border crossing cards from exit tracking. If it is necessary to exempt legal permanent residents and holders of border crossing cards from exit tracking at the southern border, it means that a *completely comprehensive* exit tracking system is not currently feasible.

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130   Pew Hisp. Ctr., Fact Sheet: Modes of Entry for the Unauthorized Migrant Population 2 (May 22, 2006), *available at* http://pewhispanic.org/files/factsheets/19.pdf.

131   *Id.* at 1.