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Symposium Remarks: Changing the Face of Immigration: A Year in Transition

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SYMPOSIUM REMARKS: CHANGING THE FACE OF IMMIGRATION: A YEAR IN TRANSITION

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What I want to talk about today is, in general terms, the issue of biometrics in our society. More specifically, I will discuss how, consistent with both U.S. law and international agreements, the Department of State will introduce biometrics into the travel documents that aliens use to come to the United States and American citizens use to travel abroad. So let me begin by my one or two minute discussion of Biometrics 101.

What do I mean by biometrics? What I am talking about are those unique features that identify you as you. We have all seen CSI and shows like that. We know about DNA and about fingerprint scans. But with biometrics what we are really showing is that an individual is linked irrefutably to his or her fingerprints, or this individual is linked to their facial image.

What is also important in any discourse on this issue is the issue of identification versus verification or what is sometimes called "one to many" searches as compared to "one to one" matches.

I think you have probably all read in the press recently that the Department of Homeland Security has initiated a program at U.S. ports of entry in which they take the fingerprints and a photograph of aliens arriving on visas.[1] The program began on the fifth of January and has been quite successful. This application involves the use of biometrics; in this case, two scans of fingers in an identification mode. You may notice my use of the word "fingerscans." I am reluctant to even call the US-VISIT

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[1] *See* Jennifer Lee, *The Art and Craft of Security: Passports and Visas to Add High-Tech Identity Features*, N.Y. TIMES, Aug. 23, 2003, at 26 (explaining the fingerprinting and photographing procedures at ports of entry).

collection process "fingerprints" because that always makes one think about inkpads and rolling fingers and things like that. Instead, these are electronic scans of the two index fingers.[2] US-VISIT runs those scans back against a database called "IDENT." Using this system they are finding several people a day coming in the United States who have previous serious criminal records in our National Criminal Information Center ("NCIC") system, have been deported, or have previous encounters with DHS as an illegal entrant. IDENT includes a download of about a million records of fingerprints from the FBI fingerprint system. US-VISIT is an identification system.[3] In other words, they are doing, what they call in biometrics, a one to many match.

There is also the concept of what is called a one to one match. I will talk more about this in terms of the U.S. passport. At its most basic level, it involves "verifying" that the person presenting a travel document is the person to whom it was issued.[4] In other words, the authorized bearer of the passport is the person there. You match one to the other and you go on from there.

There is also a side feature that I should mention as well, science always having more ways to deal with an issue. You have one to many, one to one, and then you actually have what they call one to a watch list system.[5] And what we are talking about here would be comparing photographs, not just of the individual bearing the document back against that document, but also comparing that individual's photograph to essentially a very small watch list. We would not want Osama bin Laden to come in the United States on a passport and not have his picture checked against a database. The point is that we do have small

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[2] *See generally* Sam Lubell, *Gadgets That Warm to the Real You*, N.Y. TIMES, Apr. 17, 2003, at G6 (detailing the process of electronic fingerprinting and related technology).

[3] *See generally* Jerry Seper, *Alien Fingerprint-system Integration Still Years Away; Report Says U.S. Borders Vulnerable to Criminals*, WASH. TIMES, Mar. 3, 2004, at A06 (reporting the need to integrate Ident and other fingerprint identification systems at border patrol sites).

[4] *See* Jennifer Lee, *Threats and Responses: Identity Documents; Report Suggests Use of Facial and Fingerprint Scanning on Foreigners*, N.Y. TIMES, Feb. 12, 2003, at A19 (defining verification as the process of making a one to one match to confirm that a person presenting a identifying document is actually the person to whom the document was originally issued).

[5] *See generally* Robin Feldman, Article, *Considerations on the Emerging Implementation of Biometric Technology*, 25 HAST. COMM. & ENT L.J. 653, 655–57 (2003) (articulating the differences between one to one and one to many matching).

databases of photos of people we want to keep out of the United States, and we would like to check travelers against that database.

I was explaining to someone at this conference earlier today that we really do not care who you are before you give us your biometric, but once your biometric is given, you are basically locked to that identity from that day forward. For example, if you say you are Mickey Mouse and you can present identity documents to that nature, you will get a passport as Mickey Mouse. However, your identity will now be locked through your biometric; you will be Mickey Mouse from that day forward whether you like it or not.

Another point I want to make is about the international acceptability of biometrics. I do a lot of traveling for the State Department to international forums to discuss biometrics before groups like the International Civil Aviation Organization[6] in Montreal. The Group of Eight process, for which the U.S. has the chairmanship this year, is also deeply involved in this issue[7] as is the European Union. The issue of biometrics is an international one, and in some, respects, the European Union is actually further along than the United States is in its use of this technology.[8]

I know we are obviously looking at this from an American legal perspective, but trust me, if you look at international law you will see the same discussions about biometrics, privacy, civil liberties, and immigration policy going on in many other parts of the world. Some of this discussion is a clear result of changes in U.S. law, but other influences include concerns about terrorism, as well as economic migration and asylum abuse, especially in

6 *See International Civil Aviation Organization*, WIKIPEDIA, *available at* http://en.wikipedia.org/wiki/International_Civil_Aviation_Organization (last visited Oct. 20, 2004) (explaining that the IACO "develops the principles and techniques of international air navigation and fosters the planning and development of international air transport to ensure safe and orderly growth. The ICAO Council adopts standards and recommended practices concerning air navigation, prevention of unlawful interference, and facilitation of border-crossing procedures for international civil aviation").

7 *See* John Tagliabue, *The President in Europe: Group of Eight; Chirac to Call for a Shift From Battling Terrorism to Helping Poorer Nations*, N.Y. TIMES, June 1, 2003, at 15 (noting that the Group of Eight, composed of Britain, Canada, Germany, Italy, Japan, Russia and the United States, currently focuses on the global economy and terrorism).

8 *See generally* Marlise Simons, *Amsterdam Journal: Security on the Brain, Solutions in the Eyes*, N.Y. TIMES, Oct. 25, 2001, at A4 (describing security measures in the international airport in Amsterdam, the first international airport to employ retinal scanning identification technology).

the case of the United Kingdom.[9] So this is not just a U.S.-centric issue.

Let me now address the issue of how the State Department is employing biometric technology and how we are trying to do it in a way that also continues to protect civil liberties.   I have to go back to Section 303 of the Enhanced Border Security and Visa Entry Reform Act ("EBSA"),[10] which was enacted in May of 2002.[11] That section has set up some very interesting procedures. The first has to do with the issue of travelers from Visa Waiver Program countries.[12] Here, I am talking about travelers from countries like Britain, Japan, or Australia.   Nationals of these countries are able to come to the United States for purposes of business or tourism and stay for up to ninety days without requiring a U.S. visa.[13] There are about 13 million people each year who enter the United States under the Visa Waiver Act.[14]

Section 303 of EBSA requires that as of October 26, 2004 those 27 participating countries all have in place, first, a program to introduce biometrics into their passports,[15] and second, that they will issue passports to their nationals that contain embedded biometrics that meet international standards set up by the International Civil Aviation Organization.[16] {As an aside, I will say this is the only time I have ever encountered in government a situation where someone supposed to have both a program as of a given date and that the program is supposed to go into effect on the same date.   Normally you have a program and then you

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[9] *See generally* Davor Sopf, *Temporary Protection in Europe After 1990: The "Right to Remain" of Genuine Convention Refugees*, 6 WASH. U. J.L. & POL'Y 109, 120 (2001) (discussing abuses of asylum in the United Kingdom and other European countries).

[10] Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173 (H.R. 3525) (2002).

[11] *Id.*

[12] *See generally* US Department of State, *available at* http://travel.state.gov/ (last visited Oct. 20, 2004) (providing the details of the Visa Waiver Program).

[13] *Id.* (discussing the limits and requirements for visitors from qualifying countries).

[14] Maia Jachimowicz, *Government Widens Efforts to Scrutinize Foreign Visitors, at* http://www.migrationinformation.org/Feature/display.cfm?ID=154   (Aug.   1,   2003) (discussing the number of annual visitors estimated to be affected if the Visa Waiver Program were to be changed).

[15] Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173 (H.R. 3525) (2002).

[16] *See* D. Ray Mantle, Note & Comment, *What Foreign Students Fear: Homeland Security Measures and Closed Deportation Hearings*, 2003 BYU EDUC. & L.J. 815, 817 (2003) (noting Enhanced Security and Visa Entry Reform Act requires electronic data system known as the Chimera System to be used by visa-issuing and enforcement officers).

implement it.} The implementation date in terms of production is being looked at seriously by the U.S. government and by other governments because no VWP country may be able to meet it.

If a VWP nation does not have a program in place by that date, they will become "a former member of the VWP". Nor do we want nations to not be producing biometric passports. Either outcome would require the United States government to gear up to adjudicate millions of additional visa application and, quite honestly, we are unable to do that.[17] The third section of Section 303 requires that, as of October 26, of 2004, all visas issued by the United States government abroad contain biometrics.[18]

Let me now describe what the State Department is doing. I will start with the visa, then return to the passport. In terms of visas, we are working on using fingerprint scans because we are in fact doing both a verification check, as well as an identity check. We have installed this technology right now at about a third of our posts around the world.[19] There are about 214 visa-issuing posts run by the United States government around the world, and we adjudicate between 6 and 7 million visas a year.[20] By this October, this process will be in place at all of our posts.[21] It builds on technology called the Border Crossing Card program in Mexico.[22]

A point to keep in mind is that these fingerprint scans are not written to the document; they are not on the actual visa.[23] They

[17] *See generally*, Symposium, *GLOBAL HUMAN RIGHTS: From the Reign of Terror to Reigning in the Terrorists: The Still-Unidentified Rights of Non-Citizens in the "Nation of Immigrants,"* 9 NEW ENG. J. INT'L & COMP. L. 47, 59–60 (2003) (explaining purpose of Enhanced Security and Visa Entry Reform Act is to monitor student visa entrants and limit visas to persons from countries "designated as state sponsors of terrorism").

[18] *See* Heather Jacobson, Note, *Refugees and Humanitarian Emergencies*, 17 GEO. IMMIGR. L.J. 667, 681 (2003) (stating advanced technology of visas will require visa-bearer to be person identified on visa).

[19] *See* Catherine Etheridge Otto, Comment, *Tracking Immigrants in the United States: Proposed and Perceived Needs to Protect the Borders of the United States*, 28 N.C. J. INT'L L. & COM. REG. 477, 502 (2002) (noting announcement by Attorney General Ashcroft that first phase of plan was to install new technology at chosen ports by September 11, 2002).

[20] *Id.* at 484 (citing 2000 census figures which states INS processes more than six million green cards and citizenship applications each year).

[21] *See* Jacobson, *supra* note 18, at 681 (explaining Enhanced Security Border Act requires issuance of biometric visas by October 26, 2004).

[22] *See* Otto, *supra* note 19, at 503 (commenting on effectiveness of technology used on U.S. – Mexican border).

[23] *See generally id.* at 500 (discussing initiatives taken to coordinate information on databases of various agencies).

reside on a U.S. government database, the same database as accessed by DHS through the US-VISIT program. These finger scans and work by DHS of port-of-entry allow the U.S. to verify that the person did not have a U.S. criminal record at the time of visa adjudication, and then on subsequent visits to the United States did not engage in criminal behavior. The program will be in full effect by October 26, 2004.[24]

Now we get to the question of the passport. You may have noticed when I was talking about Section 303, I kept talking about Visa Waiver Program participants. Section 303 does not apply to the United States and, theoretically at least, there is no requirement under U.S. law for the State Department to embed biometrics in U.S. passports.[25] Well, I think it is also reasonable to recognize that there are principles such as reciprocity. If we are requiring France to do this, it is reasonable to expect that France will anticipate similar documents to be borne by U.S. travelers. But there are two other important issues. First, this new security initiative requires U.S. leadership to have it implemented. The best way to show leadership is by doing, not just talking. And the second point, and perhaps the most important, is it does make for a better passport. With passport design and passport systems, we are always trying to stay ahead of the bad guy who is attempting to forge a passport. As an aside, we have all seen the movies where the person takes the photograph and cuts it up in the dark alley in Berlin to forge a passport. But reality is that we are trying to keep ahead of the bad guys. We are trying to make a secure process, a secure system. One of the ways to do that is by strengthening the link between the bearer of the document and the document itself.[26] All we are doing, however, is writing the same data currently found in a passport to a contact-less chip in the back of the book.[27] It will be the same data that you currently see on the

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[24] *See* Jacobson, *supra* note 18, at 681 (stating date required for implementation of biometric visas).

[25] *See id.* (noting section 308 of the Enhanced Border Security Act requires implementation of a tracking system for stolen passports).

[26] *See* Press Release, Philip T. Reeker, Department of State (Apr. 2, 2002) *available at* http://www.state.gov/r/pa/prs/dpb/2002/9129.htm (stating that the new passport will incorporate a digitized photograph of the passport carrier).

[27] *See State Department Investigates 64K 'Intelligent Passport,'* CARDTECHNOLOGY.COM, *available at* http://www.cardtechnology.com/cgi-bin/readstory.pl?

data page of your passport. The data would include your date of birth, your passport number, your full name, and your photograph. The purpose of the photograph is of course to establish the linkage between the document and the bearer and between the bearer and the document.

In the US-VISIT type of scenario, you can see that since it is a chip that can be read electronically, we will have the opportunity to read that chip while a traveler is in the immigration queue at a port-of-entry. With biometrics, we have the capability to read the chip, capture the traveler's photograph electronically, compare the two, and then give the immigration inspector in effect a red light/green light, which says the photo matches the person. This will put the traveler literally and figuratively a step closer to entering the United States.

We are well on the way towards implementing this system. We hope to be in production in a pilot phase by this October, and have this introduced throughout the U.S. passport system by the end of next year.[28] I say hopefully because a company has a protest against a contract we were attempting to award for the actual procurement of the contact-less chips. The U.S. Government Accounting Office is resolving that protest. We hope to have it resolved shortly, and then to be able to actually procure the chips.

Just a little bit about the chips themselves. They meet international standards set up by the International Civil Aviation Organization.[29] The U.S. will be using a 64 Kb (kilobyte) chip, which we will write your full facial image plus this bio data. We also have some additional capacity on that chip that we are reserving for the possibility, which in the future, you will actually have more than a single photograph taken as part of the passport application process. This is because the more photographs that a system has to compare with in facial recognition, the better. But again, it is only a one-to-one match; we are not doing national criminal identity checks on citizens applying for U.S. passports.

story=20030723IDNN547.xml (last visited Mar. 31, 2004) (stating that the contact-less chips are embedded with digital photographs).

[28] *See id.*

[29] *See id.*

The third point I want touch on briefly is the overall issue of security in documents. It is important as one looks at security, especially in this post-9/11 world, that an observer look not only at things like embedding biometrics in passports or associating visas with fingerprint scans, but also assess the security of the document itself and the underlying adjudication process. On both the visa side and the passport side, the U.S. Department of State is investing people, money, time, in some cases overseas, and even space to improve these processes. We have a better adjudication system to support a better product.

I would also like to note for those of you who have a passport, we are not calling them in to implement biometrics. They remain valid travel documents until they their expiration date. Instead, biometrics will be implemented as passports are replaced or new ones issue. Passports issued after this fall not only will have an embedded biometric, but will also have a whole new array of security features embedded in them to further ensure that that passport you carry, which we believe is the most important document in the world, continues to meet global standards and provide global interoperability.

I have just a few additional points to make. One involves security of data on the chip. What the Department of State is producing in terms of a passport must be globally interoperable.[30] The data that will be written to the passport, the bedrock data, is the face and the bio-data. Optionally, some countries, not the United States, may add fingerprints to that and/or what is called an iris scan.[31] However the data will be locked down using what is called digital signature technology.[32] I do not profess to understand all the details, but from the people who work for me, a digital signature makes it impossible to

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[30] *See* Vandana Sinha, *Smart Passports Will Soon Face Up to Tough Scrutiny*, GOV'T COMPUTER NEWS, *available at* http://www.gcn.com/22_24/biometrics/23223-1.html (last visited Mar. 31, 2004) (detailing Frank Moss' comments about the implementation of a globally interoperable passport system).

[31] *See* Press Release, Associated Press, Amsterdam Airport Debuts Iris Scan (Oct. 27, 2001) *available at* http://www.simplifying-travel.org/public/news.php?information%5Bid_information%5D= 540 (stating that the iris scans have already started being implemented in European airports).

[32] *See NIST PKI Program*, NAT'L INST. STANDARDS AND TECH., *available at* http://csrc.nist.gov/pki/ (last visited on March 31, 2004) (detailing the digital standards utilized by the NIST).

manipulate the data on the chip without it being readily apparent to another reader of that data.

I also know many of you have questions about the job market. Let me assure you that the U.S. government is always hiring young attorneys, and the State Department is always hiring Foreign Service officers. So if you think that maybe law is not the career for your, the Foreign Service may be. Trust me, we do have many, many former attorneys and law school graduates as members of the Foreign Service.

My final point is that if you need a passport this summer, for example if you are a second-year student and you are expecting to have a couple weeks off at the end of the summer and want to go to Europe, please apply early. Passport demand is up by about 12 percent this year, not just because people are traveling more internationally, but also because many people are acquiring passports as portable proofs of citizenship and identity, and using them at airports for domestic as well as international travel.[33]

I want to thank you for your attention, thank my fellow panelists for being here, and I look forward to your questions.

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[33] *See generally* Passport Statistics, U.S. DEP'T OF STATE, *available at* http://travel.state.gov/ passport_statistics.html (last visited Mar. 31, 2004) (showing the number of passports issued per year since 1974).