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# The USA Patriot Act and the Enhanced Border Security and Visa Entry Reform Act: Negatively Impacting Academic Institutions by Deterring Foreign Students from Studying in the United States

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**The USA PATRIOT Act and the Enhanced Border Security and Visa Entry Reform Act: Negatively Impacting Academic Institutions by Deterring Foreign Students from Studying in the United States**

*Adrian Arroyo\**

TABLE OF CONTENTS

I. INTRODUCTION .....412

II. NON-IMMIGRANT STUDENT VISAS AND REFORM .....415

    A. *Background: The Congressional Response to Deficiencies in the Student Visa Program* ..... 418

    B. *The USA PATRIOT Act of 2001* .....420

        1. *Federal Privacy Rights of Foreign Students* .....421

        2. *The Student and Exchange Visitor Information Program (SEVIS)* .....423

    C. *The Enhanced Border Security and Visa Entry Reform Act of 2001* .....425

III. MAJOR CRITICISMS OF THE USA PATRIOT ACT AND THE ENHANCED BORDER SECURITY AND VISA ENTRY REFORM ACT OF 2001 .....426

    A. *The Clash Between Student Privacy and National Security* .....426

    B. *Complying with the SEVIS Requirements: Too Much to Ask of U.S. Universities?* .....428

        1. *Delays in the Application Process* .....428

        2. *Expenses for Universities* .....429

    C. *The Impact on Graduate Programs in the United States* .....430

IV. PROPOSED SOLUTIONS.....433

    A. *The Cornell Approach*.....434

    B. *NAFSA Recommendations* .....435

V. CONCLUSION.....437

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*International exchanges are not a great tide to sweep away all differences, but they will slowly wear away at the obstacles to peace as surely as water wears away a hard stone.*

—George W. Bush, *President of the United States*<sup>1</sup>

## I. INTRODUCTION

The United States has become the host to an increasing number of foreign students during the second half of the Twentieth Century.<sup>2</sup> Traditionally, the United States has maintained a very liberal stance toward foreigners. This is especially true of foreign students because of their contributions to the U.S. economy.<sup>3</sup> The open door immigration policy has many advantages, including fostering diversity in U.S. educational institutions and supplying the U.S. economy with qualified workers.<sup>4</sup> One of the most significant justifications for the liberal U.S. immigration policy is the promotion of knowledge and understanding of foreign cultures to forge ties with future leaders abroad through international education programs.<sup>5</sup> However, terrorists began to take advantage of the United States' desire to cultivate international educational programs. Terrorists used the liberal U.S. immigration policy to enter the United States and launch an internal attack.<sup>6</sup> As a result, Congress began taking measures to strengthen the shortcomings of the student visa program in an effort to combat terrorism and heighten homeland security.<sup>7</sup>

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1. George W. Bush, *The U.S. Presidents on Fulbright and International Exchange Programs*, NAFA: ASSOCIATION OF INTERNATIONAL EDUCATORS (1989), available at <http://www.nafsa.org/content/AboutInternationalEducational/Resources/Presidents.htm> (last visited Jan. 28, 2003) (copy on file with *The Transnational Lawyer*) (compiling a variety of quotations from former U.S. Presidents regarding the positive impact foreign scholars and student exchange programs have on the United States); see also The Institute of International Education, *The Fulbright Graduate Student Program*, available at <http://www.iie.org/Template.cfm?Template=/programs/fulbright/fulbfor.htm> (last visited Feb. 18, 2003) (copy on file with *The Transnational Lawyer*) (stating that in 1946, at the end of World War II, the Fulbright Program was created to increase mutual understanding between citizens of the United States and foreign countries. *Id.* The program awards grants to foreign national students, teachers, professors, and professionals so they can study, teach, lecture, and conduct research in the United States. *Id.* It also provides funds for U.S. nationals to do the same in other countries. *Id.*

2. James H. Johnson, Jr., *U.S. Immigration Reform, Homeland Security, and Global Economic Competitiveness in the Aftermath of the September 11, 2001 Terrorist Attacks*, 27 N.C. J. INT'L L. & COM. REG. 419, 422 (2002) (providing an overview of U.S. immigration policy).

3. See *id.* at 427 (noting the number of non-immigrations allowed into the country increased from 11.7 million in 1981 to 31.5 million in 1999).

4. See *id.* at 436 (explaining that 12% of the U.S. workforce was not born in the United States). Additionally, international students or children of immigrants account for almost all of the increased enrollment in the physical sciences, math, and engineering programs at the graduate and post graduate levels of education. *Id.*

5. Diana Jean Schemo, *A Nation Challenged: Immigration; The Students Eager for Foreign Students, Universities Drop Plan to Limit Visas*, N.Y. TIMES, Nov. 18, 2001, at A1 [hereinafter Schemo, *A Nation Challenged*].

6. Johnson, *supra* note 2, at 419-20 (claiming that the culmination of the 1993 World Trade Center bombing and the September 11, 2001 terrorist attacks resulted in increased constraints on immigration).

7. See *id.* (noting these reforms in immigration law have significantly encumbered the flow of capital, people, goods, and services into the United States).

The first reform in the U.S. student visa program occurred after it was discovered that one member of the terrorist group responsible for the 1993 World Trade Center bombing<sup>8</sup> entered the country on a student visa without ever enrolling in school. Congress amended the immigration laws to require the Immigration and Naturalization Services (“INS”) to track all international students.<sup>9</sup> This tracking system would have allowed the INS to monitor all foreign students in the United States and any changes in their visa status in order to help curtail the problem of so many students overstaying their visas.<sup>10</sup> Although the amendment was codified in the Illegal Immigration Reform and Responsibility Act (“IIRIRA”),<sup>11</sup> the Act was never implemented or enforced.<sup>12</sup> Unfortunately, the problems resulting from the inability to track foreign students after they enter the United States were highlighted once again when one of the September 11, 2001 hijackers was found to be in the United States on a student visa.<sup>13</sup> Congress quickly passed the USA PATRIOT Act,<sup>14</sup> reaffirming and expanding the IIRIRA. As a result, the INS developed the Student and Exchange Visitor Information System (“SEVIS”), an electronic database useful in implementing the provisions of the USA PATRIOT Act.<sup>15</sup> In addition to the USA PATRIOT Act, Congress passed the Enhanced Border Security and Visa Entry Reform Act (“Border Security Bill”), further strengthening the foreign student monitoring program by requiring universities and foreign students to report additional information.<sup>16</sup>

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8. Dave Williams, *The Bombing of the World Trade Center in New York City*, INTERPOL (1998), available at [http://www.interpol.int/public/publications/icpr/icpr469\\_3.asp](http://www.interpol.int/public/publications/icpr/icpr469_3.asp) (last visited Feb. 22, 2003) (copy on file with *The Transnational Lawyer*) (providing an overview of the 1993 World Trade Center bombing). On February 26, 1993, at about 12:18 p.m., a bomb exploded on the second floor of the World Trade Center in New York City. *Id.* Six people died and more than one thousand were injured. *Id.* Five foreigners were found guilty for what was considered the most significant terrorist attack on the United States to date. *Id.*

9. Johnson, *supra* note 2, at 441.

10. Michael Hedges, *Delays Hurt Foreign Student Tracking*, HOUS. CHRON., Oct. 7, 2001, at 16A (explaining that because the tracking system would have included data on the students’ addresses in both the United States and their home country, a list of enrolled classes, and faculty advisors, the system would have allowed the INS to identify patterns of education by nationality, region, or origin). In addition, the information would have allowed the INS to identify students who overstayed their visas. *Id.*

11. Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

12. Johnson, *supra* note 2, at 441 (explaining that the tracking system was developed and pilot tested in 1997, but it was never implemented due to a concern that it would stigmatize foreign students).

13. See *id.* at 438 (explaining that one of the hijackers, Hani Hanjour, entered the United States on a student visa but never enrolled in school). In addition, several other September 11th hijackers overstayed their visas and became illegal immigrants. *Id.* Prior to the attacks, the United States did not have any system to monitor whether or not foreign students left the United States when their visas expired. *Id.* at 440-41.

14. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C., 22 U.S.C., 31 U.S.C., 42 U.S.C., 50 U.S.C.).

15. Press Release, U.S. Dep’t of Justice, Final Rule for Student and Exchange Visitor Information System Announced (Dec. 11, 2002), available at [http://www.ins.gov.graphics/publicaffairs/newrels/02.12finalrul\\_nr.htm](http://www.ins.gov.graphics/publicaffairs/newrels/02.12finalrul_nr.htm) (copy on file with *The Transnational Lawyer*).

16. Enhanced Border Security and Visa Entry Reform Act of 2001, Pub. L. No. 107-173 (amending 8 U.S.C. § 1372).

The USA PATRIOT Act and the Border Security Bill are designed to strengthen U.S. borders, secure the visa entry system, and enhance the ability to track potential terrorists.<sup>17</sup> The USA PATRIOT Act and the Border Security Bill will achieve these objectives by tightening the requirements for obtaining a student visa, cracking down on foreigners who overstay their visas, broadening the power of law enforcement to pursue terrorism, and heightening the reporting requirements for both students and universities admitting foreign students.<sup>18</sup> Although the objectives behind the foreign student monitoring system are commendable, SEVIS, the computerized system designed to track foreign students, has been met with criticisms from both university officials and foreign students.<sup>19</sup>

Unfortunately, the criticisms of SEVIS are not unfounded. The increased burden on universities and foreign students to comply with the foreign student monitoring program will likely have substantial economic implications for engineering and science graduate programs in the United States because a significant number of students enrolled in these programs are from foreign countries.<sup>20</sup> In addition, many foreign students apply for temporary work visas in order to remain in the United States and work in the science and engineering fields after graduation.<sup>21</sup> Consequently, the USA PATRIOT Act and the Border Security Bill may affect the U.S. economy in these areas because their impacts will lead to fewer foreign students entering the country.<sup>22</sup> In turn, this will

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17. See NAFSA: Association of International Educators, *The Enhanced Border Security and Visa Entry Reform Act of 2001: Summary*, available at <http://www.nafsa.org/content/publicpolicy/nafsaonthesissues/kennedyfeinsteinsummary.htm> (last visited Nov. 16, 2002) [hereinafter NAFSA: *Summary*] (copy on file with *The Transnational Lawyer*) (providing an overview of how the legislation will help further these objectives).

18. See Johnson, *supra* note 2, at 449-50 (adding that the USA PATRIOT Act also establishes a foreign terrorist tracking taskforce, triples border control and customs presence along the Canadian border, works with Mexico and Canada to prevent terrorists from entering at the borders, and delays efforts to ease immigration regulations for Mexican immigrants).

19. See NAFSA: Association of International Educators, *International Educator Group Recommends Steps to Improve U.S. Visa Screening Process*, Nov. 14, 2002, available at <http://www.nafsa.org/content/whatsnew/PressReleases/visaproc111402.htm> [hereinafter NAFSA: *International Educator Group*] (copy on file with *The Transnational Lawyer*) (presenting the concerns voiced by foreign student advisors over the impact of delays in approving visa applications). These delays have resulted in students and foreign faculty members missing program start dates, slowing scientific research, and losing potential foreign students and scholars who have chosen to go to other countries. *Id.*; see also Elizabeth Dunbar, *Foreign Students at U. Minnesota Find Difficulty in Getting Visas*, MINN. DAILY, Sept. 16, 2002, available at <http://www.mndaily.com/article.php?id=264&year=2002> (copy on file with *The Transnational Lawyer*) (discussing that foreign students may go to other countries to study because of the increased scrutiny the foreign student monitoring system places on them. *Id.*

20. See Mark Krikorian, *Are Foreign Students Good for America? Panel Discussion Transcript*, CENTER FOR IMMIGR. STUD., June 25, 2002, available at <http://www.cis.org/articles/2002/foreignstudents.html> (copy on file with *The Transnational Lawyer*) (citing panelist George Borjas as stating that foreign students receive 35% of all Ph.D.s in the physical sciences, 49% in engineering, and 23% in the social sciences).

21. Mario Cervantes & Dominique Guellec, *The Brain Drain: Old Myths, New Realities*, OECD OBSERVER, Jan. 1, 2002, available at 2002 WL 100075034 (noting that 25% of the specialty workers in the high-tech work force were enrolled as foreign students at U.S. universities).

22. See *infra* notes 157-63 and accompanying text (presenting a discussion of how fewer foreign students studying in the United States will cause a decrease in the available number of high-tech foreign workers).

diminish the number of qualified workers available to fill positions traditionally occupied by foreign students choosing to remain in the United States after graduation.<sup>23</sup>

This Comment illustrates how the USA PATRIOT Act and the Border Security Bill will negatively impact graduate institutions by decreasing the number of foreign students wanting to study in the United States and increasing the cost for institutions that enroll foreign students. Part II provides an overview of immigration law and discusses recent changes in the law as a result of the USA PATRIOT Act and the Border Security Bill.<sup>24</sup> Part III presents the major criticisms of the USA PATRIOT Act and the Border Security Bill in relation to foreign students and universities.<sup>25</sup> These criticisms include concerns about amending foreign students' federal privacy rights, substantial delays in the approval of student visa applications, and the high costs associated with implementing SEVIS.<sup>26</sup> Part IV proposes solutions to combat these problems while preserving the goals of the foreign student monitoring system.<sup>27</sup> This Comment reaches the conclusion that the negative impact the USA PATRIOT Act and the Border Security Bill may have on graduate institutions and the U.S. economy is substantially outweighed by the fact that these Acts will help prevent future terrorism directed at the United States.<sup>28</sup> Thus, Congress should continue to implement of the USA PATRIOT Act and the Border Security Bill in addition to adopting the solutions proposed in Part IV of this Comment in order to limit the negative impact on foreign students and universities.

## II. NON-IMMIGRANT STUDENT VISAS AND REFORM

In order to understand the changes in immigration law brought about by Congressional efforts to remedy discrepancies in the student visa system, a basic understanding of the requirements to issue this visa is necessary.<sup>29</sup> First, foreign students must be accepted to a U.S. school approved by the INS.<sup>30</sup> Applicants

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23. See *infra* notes 157-63 and accompanying text (explaining how the USA PATRIOT Act and the Border Security Bill will impact the U.S. economy).

24. See *infra* notes 29-120 and accompanying text (providing an in-depth examination of the changes in U.S. immigration policy brought on by the USA PATRIOT Act and the Border Security Bill).

25. See *infra* notes 121-72 and accompanying text (describing how the USA PATRIOT Act and the Border Security Bill will impact foreign students and graduate programs in the United States).

26. See *infra* notes 121-72 and accompanying text (providing a discussion of the major criticisms of the Acts).

27. See *infra* notes 173-88 and accompanying text (offering several ways to make the implementation of the foreign student monitoring system easier on both foreign students and universities).

28. See *infra* notes 189-93 and accompanying text (asserting that even though implementing these acts will be difficult, the goals of strengthening national security and preventing terrorism are paramount to the burden on academic institutions).

29. Michael Maggio et al., *Immigration Fundamentals for International Lawyers*, 13 AM. U. INT'L L. REV. 857, 868-69 (1998). The INS only issues two types of visas: non-immigrant and immigrant visas. *Id.* Student visas and temporary work visas are types of non-immigrant visas. *Id.* Non-immigrant visas are only given to applicants who can prove that they will return to their home country after the visa has expired. *Id.*

30. U.S.A. Immigration Services, *US Student Visas—Apply for Temporary Residence in the U.S. Through a Student Visa*, available at <http://www.usais.org/studentvisas.html> (last visited Oct. 7, 2002) (copy on

must also be proficient in English or enrolled in courses that will lead to proficiency.<sup>31</sup> In addition, students must prove that they have sufficient funds available for self-support while in the United States and that they will return home after completing their course of study in the United States.<sup>32</sup> Once approved for a student visa, students must attend school full time and maintain a residence abroad.<sup>33</sup>

The requirements for obtaining a visa to work in the science or engineering fields are also quite stringent.<sup>34</sup> Temporary work visas are available to foreigners already in the United States on other non-immigrant visas, including a student visa.<sup>35</sup> For example, a student can apply for a temporary work visa if the student wants to remain in the United States to work after the expiration of his student visa.<sup>36</sup> However, regardless of whether the foreign citizen is applying for the temporary work visa prior to or during U.S. residency, the applicant must meet several requirements. First, the applicant must obtain a U.S. university degree or its equivalent.<sup>37</sup> Second, the applicant must have a job offer in the United States that relates to this degree or equivalency.<sup>38</sup> Next, the offered job position must require at least a university degree, and the offered wages must be the greater of

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file with *The Transnational Lawyer* (listing the requirements for becoming a foreign academic student in the United States).

31. *Id.*

32. *Id.*; see also Maggio, et al., *supra* note 29, at 869 (noting that a primary reason applicants are denied a non-immigrant visa is lack of money; if applicants do not have sufficient funds, they will not be able to return home. *Id.* Because of this requirement, if the INS has any concern about the applicant remaining illegally in the United States after the term of the visa has expired, it will refuse to issue the non-immigrant visa. *Id.*

[M]any consuls employ the three suit rule . . . [w]hen you apply for a visa you must present a photograph . . . you also, in most countries must appear at the consulate in person. If the man standing before the consul has a different suit in the visa application photograph and a third suit in the passport, he's got three suits, and that means he's got the one word that means that you will be issued a non-immigrant visa, "money."

*Id.* Consequently, the financial situation of a foreign student applying for a student visa has a tremendous impact on whether the student will be approved for a student visa. *Id.*

33. See Johnson, *supra* note 2, at 440 (commenting that students must attend school full time because they are not allowed to work while in the United States on a student visa); see also U.S.A. Immigration Services, *supra* note 30, available at <http://www.usais.org/studentvisas.html> (noting that the student must be enrolled full time at a university in order to meet the requirements for a student visa).

34. See Maggio, et al., *supra* note 29, at 881 (defining the terms of the H visa for the business immigration practitioner).

35. See Dunbar, *supra* note 19, available at <http://www.mndaily.com/article.php?id=264&year=2002> (describing how the timeline for students to make a change to their visa has increased from a few weeks to four months in the aftermath of September 11, 2001).

36. See Maggio, et al., *supra* note 29, at 874 (explaining that the process is called a "change of status"). The "change of status" allows non-immigrants an opportunity to obtain a different non-immigrant visa while still in the United States in order to avoid penalties for overstaying the terms of their original visa. *Id.*

37. *Id.* at 881-84 (defining what is meant by the term "equivalent"). If an applicant has a degree from a four or five year foreign university, that degree will probably be considered equivalent to a U.S. university bachelor degree. *Id.* In other circumstances, professional work experience in a specialty field will also be considered equivalent. *Id.* Credentials evaluation services review the applicant's credentials and determine whether the applicant's foreign degree or work experience are similar enough to a U.S. university education to be equivalent. *Id.*

38. *Id.* at 881.

either the prevailing wage in the area where the position is located or the actual wage paid to others with similar jobs in the company.<sup>39</sup> Finally, the foreign worker must not bring down other wages in the area as a result of taking the offered position.<sup>40</sup> Therefore, simply having a job offer in the United States is insufficient to obtain a temporary work visa.

The screening process that determines whether an applicant meets the requirements for obtaining and maintaining a visa has historically been very lax.<sup>41</sup> Typically, young, inexperienced, and overworked visa officers in overseas offices are only permitted two or three minutes to interview each applicant and are often pressured to approve a high percentage of applications for fear of offending the host country.<sup>42</sup> However, the requirements for obtaining a temporary work visa are more stringent than for a student visa, thus making it more difficult to obtain. As a result, the student visa system is abused more frequently by foreigners who enter the United States with a student visa yet never enroll in school.<sup>43</sup>

Student visas are very attractive to young, unmarried male terrorists trying to enter the United States. These individuals would probably be denied a tourist visa because their motivation for entering the United States would be questionable.<sup>44</sup> In order to qualify for a tourist visa, the foreigner must overcome a presumption that they are intending to permanently remain in the United States.<sup>45</sup> To rebut this presumption, the applicant must prove that the purpose of the trip is for business, pleasure, or medical treatment.<sup>46</sup> The applicant must also indicate plans to remain in the United States for only a limited time and the existence of a foreign residence abroad to which the applicant will return after visiting the United States.<sup>47</sup> Therefore, it is easier to comply with the requirements for obtaining a

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39. *Id.* at 882 (explaining that the actual wage is the wage paid by the employer to other individuals with similar experience and qualifications). There are several ways to determine the prevailing wage and the actual wage. *Id.* The prevailing wage may be computed by the State Employment Security Agency (SESA) with a written request from the potential employer or by a published wage survey that includes the specific specialty occupation. 20 C.F.R. § 655.731(b)(3)(iii)(B) (2001).

40. Maggio, et al., *supra* note 29, at 882 (declaring that legislation codifying this requirement was enacted several years ago). It was designed to ensure that the employment of foreign workers will not harm American workers or undercut their wages, as foreign workers are typically willing to work for reduced wages. *Id.*; see also Lenni Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 227 (2002) (indicating that it is necessary to place the burden on the U.S. employer to qualify each position separately before the company can employ foreign labor).

41. Johnson, *supra* note 2, at 439.

42. See Mark Krikorian & Steven Camarota, *How Did the Terrorists Get in?*, S.F. CHRON., Sept. 19, 2001, at A19 (suggesting that determining whether to grant non-immigrant visas should be a position that Foreign Service officers actually sign up for rather than a "dreaded rite of passage" for inexperienced officers).

43. Andrew Mollison, *Student Visas Don't Track Terrorists*, ATLANTA J. & CONST., Nov. 1, 2001, at A13 (explaining that 3761 students from countries that are considered sponsors of terrorism entered the United States with a student visa in 2000).

44. Krikorian, *supra* note 20, available at <http://www.cis.org/articles/2002/foreignstudents.html>.

45. INS, *Business or Pleasure Visitors*, available at <http://www.ins.gov/graphics/services/tempbenefits/BusPleasure.htm> (last visited Feb. 23, 2003) (copy on file with *The Transnational Lawyer*).

46. *Id.*

47. *Id.*



student visa because there is no presumption for the applicant to overcome. Once a potential terrorist is able to enter the United States on a student visa, he has a good chance of finding a wife and obtaining a green card.<sup>48</sup> A green card is very attractive to terrorists because it allows more freedom once in the United States.<sup>49</sup>

Historically, there has been no system in place to monitor whether foreign students actually comply with visa requirements once in the United States.<sup>50</sup> The INS was aware of the problems in the student visa system prior to September 11, 2001, but nothing was done to eliminate them.<sup>51</sup> The first evidence of a problem in the student visa system was discovered in the 1970s when terrorists seized the U.S. Embassy in Tehran<sup>52</sup> and the INS was unable to determine how many Iranian students were in America at the time.<sup>53</sup> However, Congress did not enact measures to help monitor foreigners in the United States until it was discovered that one of the terrorists who bombed the World Trade Center in 1993 was in the United States on a student visa and his affiliation with terrorist organizations went undetected.<sup>54</sup> This time Congress took action to implement a foreign student monitoring system by enacting the IIRIRA.<sup>55</sup>

#### A. Background: Congressional Response to Deficiencies in the Student Visa Program

Almost thirty years after identifying the deficiencies in tracking foreign students within the United States, Congress passed a law requiring the INS to

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48. Krikorian, *supra* note 20, available at <http://www.cis.org/articles/2002/foreignstudents.html>.

49. *Id.* A green card allows for the holder to travel freely throughout the country. *Id.* It signifies permanent resident status. Maggio, et al., *supra* note 29, at 876.

50. James V. Grimaldi et al., *Losing Track of Illegal Immigrants*, WASH. POST, Oct. 7, 2001, at A1 (arguing that the INS does not have a system to track over a half million foreign students in the United States, even though these students have been considered a security risk for 20 years).

51. Johnson, *supra* note 2, at 438 (explaining that the flaws in the student visa system were not corrected due to either successful lobbying efforts or simply because Congress did not take any action as a result of international pressure).

52. *See Iran to Open Former U.S. Embassy to Public*, PEOPLE'S DAILY, Sept. 3, 2001, available at [http://english.peopledaily.com.cn/200109/03/eng20010903\\_79145.html](http://english.peopledaily.com.cn/200109/03/eng20010903_79145.html) (copy on file with *The Transnational Lawyer*) (recounting that on November 4, 1979, several hundred radical Islamic students climbed over the embassy's walls and held staff members hostage for 444 days). The event severed Tehran-Washington ties and led the United States to sanction the Islamic Republic. *Id.*; see also Hedges, *supra* note 10 (explaining that the INS was unable to provide a list of Iranian students who were still in the United States on student visas when the Embassy was seized in Tehran, Iran).

53. Johnson, *supra* note 2, at 441.

54. *See* Krikorian & Camarota, *supra* note 42 (noting that Congress responded to the failure to track foreign students after learning that the driver of the van carrying the explosives involved in the first World Trade Center bombing entered the United States on a student visa and then breached the terms of his visa by dropping out of school).

55. Fact Sheet, INS, Student Exchange and Visitor Information System (SEVIS): Final Rule Implementing SEVIS (Dec. 11, 2002), at [http://www.immigration.gov/graphics/publicaffairs/factsheets/02.12.FINALRU\\_FS.htm](http://www.immigration.gov/graphics/publicaffairs/factsheets/02.12.FINALRU_FS.htm) (copy on file with *The Transnational Lawyer*); see also NAFSA: Association of International Educators, *Issue Brief: International Student Monitoring* (Jan. 2002), available at [http://www.nafsa.org/content/publicpolicy/waf3a\\_on\\_the\\_issues/monitoring.html](http://www.nafsa.org/content/publicpolicy/waf3a_on_the_issues/monitoring.html) (last visited Jan. 23, 2003) [hereinafter NAFSA: *Issue Brief*] (copy on file with *The Transnational Lawyer*).

establish a system to monitor foreign students.<sup>56</sup> The IIRIRA required the INS to implement this tracking system by 2003.<sup>57</sup> The system was pilot tested in 1997, but as a result of lobbying efforts by the International Association of Educators, the system was never enforced.<sup>58</sup> Because the plan required international students attending American universities to pay a ninety-five dollar fee to finance the system,<sup>59</sup> lobbyists successfully argued that the plan would “stigmatize international students and impose an undue financial burden on them.”<sup>60</sup> Accordingly, the problems with the foreign student visa program resulting from the inability to track foreign students continued.

The September 11, 2001 attacks on the United States once again illustrated the need for a tracking system to monitor foreign students. One of the terrorists involved, Hani Hanjour, entered the United States with a student visa, yet he never enrolled in school, and wandered undetected throughout the United States.<sup>61</sup> In response to learning this information, Congress enacted legislation to solve the deficiencies in the U.S. foreign student visa program and immigration policy.<sup>62</sup> Specifically, the USA PATRIOT Act<sup>63</sup> reinstated the tracking system established in the IIRIRA.<sup>64</sup> Under section 641 of the IIRIRA, the INS is required to collect current information from schools relating to non-immigrant foreign students during the course of their stay in the United States.<sup>65</sup> SEVIS implements this section by allowing the INS to monitor foreign students using a computer database that maintains current information on each student.<sup>66</sup> Through SEVIS, the INS will be able to ensure that foreign students arrive in the United States, enroll and attend classes at a university, and properly maintain their legal status while in the country.<sup>67</sup> The Border Security Bill<sup>68</sup> further strengthens and clarifies

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56. Johnson, *supra* note 2, at 441.

57. NAFSA: *Issue Brief*, *supra* note 55, available at [http://www.nafsa.org/content/publicpolicy/waf3a\\_on\\_the\\_issues/monitoring.html](http://www.nafsa.org/content/publicpolicy/waf3a_on_the_issues/monitoring.html).

58. Johnson, *supra* note 2, at 441.

59. Hedges, *supra* note 10.

60. See Johnson, *supra* note 2, at 441 (explaining why the student tracking system was never enforced).

61. *Id.* at 440-41 (suggesting Hanjour was “able to remain in the United States even though he never enrolled in the California school to study English . . . because the INS had no system in place to monitor and track him after he entered the United States”).

62. *House Science Committee Explores Restrictions on International Students and Faculty*, 79 No. 43 INTERPRETER RELEASES 1641 (2002) (explaining that the USA PATRIOT Act and the Border Security Bill strengthened the IIRIRA).

63. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C., 22 U.S.C., 31 U.S.C., 42 U.S.C., 50 U.S.C.).

64. *Illegal Immigration Reform and Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009-546.

65. Press Release, *supra* note 15, available at [http://www.ins.gov.graphics/publicaffairs/newrels/02.12/finalrul\\_nr.htm](http://www.ins.gov.graphics/publicaffairs/newrels/02.12/finalrul_nr.htm).

66. *Id.*

67. *Id.* (describing how SEVIS will help track foreign students).

68. *Enhanced Border Security and Visa Entry Reform Act of 2001*, Pub. L. No. 107-173 (amending 8 U.S.C. § 1372).

the foreign student monitoring program by requiring each university to report the failure of a foreign student to enroll in classes within thirty days of the registration deadline and adding reporting requirements for foreign applicants trying to obtain a student visa.<sup>69</sup>

It is increasingly difficult for law enforcement officials to effectively track foreigners once they are in the United States because so many of them enter the country on non-immigrant visas.<sup>70</sup> Consequently, it has remained relatively easy for terrorists to enter the United States and remain undetected, despite not complying with the terms of their visas.<sup>71</sup> The foreign student monitoring system, reinstated by the USA PATRIOT Act and the Border Security Bill, may be one of the solutions to the problem of tracking foreigners.

### B. The USA PATRIOT Act of 2001

Less than six weeks after the terrorist attacks of September 11, 2001, the USA PATRIOT Act was signed into law.<sup>72</sup> The legislation tightened laws on student visas, imposed stricter penalties on those who overstay their visas, and granted the federal government additional wiretapping and surveillance authority.<sup>73</sup> Although the USA PATRIOT Act affects many institutions, the Act's impact on American academic institutions is important for two reasons. First, the Act affects the federal privacy rights of foreign students by allowing the government greater access to private student information and activities that would otherwise be available to law enforcement only with student consent.<sup>74</sup> Second, the Act impacts universities by requiring that they report additional data

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69. Press Release, *supra* note 15, available at [http://www.ins.gov.graphics/publicaffairs/newrels/02.12/finalrul\\_nr.htm](http://www.ins.gov.graphics/publicaffairs/newrels/02.12/finalrul_nr.htm).

70. See Symposium, *Immigration in the Post 9-11 Era*, 40 BRANDIES L.J. 851, 854 (2002) (explaining why the fight against terrorism should be focused on preventing it before terrorists enter the country); see also Johnson, *supra* note 2, at 427 (noting that the number of non-immigrants increased from 11.7 million in 1981 to 31.5 million in 1999).

71. Johnson, *supra* note 2, at 448-49 (suggesting that a lack of a foreign student monitoring system may not have been the only flaw in U.S. immigration policy). Evidence from the September 11, 2001 attacks indicates that there were severe weaknesses in the national security and intelligence infrastructure. *Id.* In other instances, federal agencies failed to share intelligence information about potential terrorists with each other. *Id.* For example, two of the September 2001 hijackers were on the FBI's list of suspected terrorists, but still were able to obtain a pilot's license and a commercial driver's license that permitted the transportation of hazardous material. *Id.* Finally, federal agencies did not act on warnings from reliable sources about the terrorist attacks. *Id.* Flight schools in Minnesota and Arizona reported suspicious behavior of several students to the appropriate federal agencies, but the agencies did not take the warnings seriously. *Id.* Specifically, when the Arizona flight school reported that one of its students did not meet the enrollment requirement of speaking English, the Federal Aviation Administration recommended that they get him a tutor. *Id.*

72. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C., 22 U.S.C., 31 U.S.C., 42 U.S.C., 50 U.S.C.).

73. See Johnson, *supra* note 2, at 449-50 (detailing the provisions of the USA PATRIOT Act).

74. See *infra* notes 76-88 and accompanying text (describing how student privacy rights are affected by the USA PATRIOT Act).

on foreign students to the INS through SEVIS.<sup>75</sup> The effect of the Act on the number of foreign students attending U.S. graduate institutions is particularly relevant because it may have a negative impact on enrollment. It is possible that students will be deterred from entering the United States because a wider variety of private student information can now be revealed to law enforcement without the student's consent.

### *1. Federal Privacy Rights of Foreign Students*

The federal privacy rights of foreign students are altered with the implementation of the USA PATRIOT Act.<sup>76</sup> Prior to the enactment of the USA PATRIOT Act, the National Education Statistics Act required the federal government to collect identifiable student information such as grades, courses, family information, and medical records.<sup>77</sup> However, in accordance with the Family Education Records and Privacy Act,<sup>78</sup> educational records were held in strict confidence and could only be accessed with student consent in order to protect student privacy.<sup>79</sup> The USA PATRIOT Act amends the Family Education Records and Privacy Act to allow law enforcement agencies to access this information by certifying that it is relevant to an authorized investigation or prosecution.<sup>80</sup> The USA PATRIOT Act does not require the consent of the student being investigated nor does it permit judicial review to determine whether allowing law enforcement officials access to the information will harm the student.<sup>81</sup>

The USA PATRIOT Act also affects students' privacy by increasing the federal government's authority to wiretap and seize digital and telephone communications.<sup>82</sup> If law enforcement authorities suspect that a person is engaging in computer fraud or abuse in order to commit terrorist activities, law

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75. See *infra* notes 89-107 and accompanying text (explaining how SEVIS will aid the INS in monitoring foreign students).

76. USA PATRIOT Act § 507.

77. H. Peter Del Bianco, Jr. & F. Mark Terison, *Is Big Brother Watching Out for Us?*, 17 ME. B.J. 20, 26 (2002); see also Seth Rosenfield, *Looking Back, Looking Ahead: A Nation Remembers Patriot Act's Scope, Secrecy Ensnare Innocent, Critics Say*, S.F. CHRON., Sept. 8, 2002, available at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle.archive/2002/09/08/MN30478.DTL> (copy on file with *The Transnational Lawyer*) (explaining how the USA PATRIOT Act altered the rights of foreign students).

78. 20 U.S.C. § 1232g(j)(3) (1974), amended by USA PATRIOT Act; see also U.S. Dep't of Education, *Family Education Rights and Privacy Act (FERPA)*, available at <http://www.pd.gov/offices/om/fpcoll/ferpal> (last visited Mar. 22, 2003) (copy on file with *The Transnational Lawyer*).

79. Rosenfield, *supra* note 77, available at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle.archive/2002/09/08/MN30478.DTL>.

80. *Id.* at 27; see also USA PATRIOT Act § 507 (codified at 20 U.S.C. § 1232g(j) (2001)).

81. USA PATRIOT Act § 507; see also Jon Garon, *The Electronic Jungle: The Application of Intellectual Property Law to Distance Education*, 4 VAND. J. ENT. L. & PRAC. 146, 166-67 (2002) (explaining that the university is immune from a suit for compliance with the order as long as they disclose the information in good faith).

82. Garon, *supra* note 81, at 166.

enforcement authorities can place a wiretap on a student's computer.<sup>83</sup> In addition, law enforcement authorities can seize private telephone messages, faxes, e-mails, and other documents as long as they obtain a warrant.<sup>84</sup> Furthermore, subpoenas may be issued authorizing the seizure of a broader range of records, including names, connection records, IP addresses, and methods of payment for Internet service.<sup>85</sup> In addition, the USA PATRIOT Act authorizes voluntary disclosure of information by universities that would be necessary to protect the rights or property of the university as an Internet service provider. Finally, the university may voluntarily disclose information to law enforcement if the information was inadvertently obtained and appears to pertain to the commission of a crime.<sup>86</sup>

These provisions of the USA PATRIOT Act will have a significant impact on academic institutions. The Act will likely dissuade foreign students from coming to the United States due to decreased privacy rights, leading fewer students to enroll in science and engineering programs. However, the provisions concerning privacy are not the only provisions that academic institutions have to consider, for the Act also requires universities to computerize their foreign student records by implementing SEVIS.<sup>87</sup> SEVIS is the electronic database that will be used by the INS and universities to track and monitor foreign students.<sup>88</sup>

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83. *Id.* at 166 (explaining that the USA PATRIOT Act grants federal agents the additional authority to obtain a wiretap); *see also* USA PATRIOT Act § 202 (setting forth how authorities can wiretap student computers).

84. Garon, *supra* note 81, at 166 (noting that in order to seize telephone messages, more stringent wiretap authority was required); *see also* Rosenfield, *supra* note 77 (quoting John Podesta, professor at Georgetown University Law Center, on the possibility that all pay phones in a neighborhood may be tapped if there were suspected terrorists in the area).

85. *See* Garon, *supra* note 81, at 166 (asserting that increased access to records allows the federal government to more readily track student activity on university systems).

86. *Id.* at 166 n.275. This is allowed if the Crime Control Act of 1990 requires disclosure or if the university reasonably believes that not disclosing the information will result in imminent death or bodily harm. *Id.* Prior to the enactment of the USA PATRIOT Act, the academic institution could operate its network without infringing on the federal privacy rights of the students. *Id.* The institution could disclose electronic records with the express or implied consent of either the sender or the intended recipient of the communication. *Id.* With the increased discretion offered by the Act, "an academic institution could theoretically undertake any investigation if a staff member [reasonably] thought that he or she needed to protect the institution's rights or property." *Id.* at 167.

87. INS, *Student and Exchange Visitor Information System (SEVIS)*, Dec. 11, 2002, available at [http://www.immigration.gov/graphics/publicaffairs/factsheets/02.12FINALRU\\_FS.htm](http://www.immigration.gov/graphics/publicaffairs/factsheets/02.12FINALRU_FS.htm) (last visited Mar. 12, 2003) (copy on file with *The Transnational Lawyer*) (describing how SEVIS implements the IIRIRA and what universities must report to the INS about foreign students).

88. *Homeland Security: Tracking International Students in Higher Education—Progress and Issues Since 9-11: Hearing Before the House Subcomm. on 21st Century Competitiveness and the House Subcomm. on Select Educ., Comm. on Educ. and the Workforce*, 107th Cong. (2002) (statement of Glenn A. Fine, Inspector General, U.S. Dep't of Justice), available at <http://www.usdoj.gov/oig/testimony/092402.htm> (last visited Jan. 30, 2003) [hereinafter *Homeland Security Hearing*] (copy on file with *The Transnational Lawyer*) (describing how SEVIS will help solve many of the tracking problems the INS had with foreign students).

## 2. *The Student and Exchange Visitor Information Program (SEVIS)*

The INS is responsible for many tasks pertaining to the issuance of student visas and for monitoring whether or not students comply with the terms of the student visa.<sup>89</sup> First, the INS is responsible for determining which schools are eligible to receive foreign students.<sup>90</sup> Second, the INS must keep track of when foreign students enter and exit the country, monitor whether students are complying with the terms of their visas while in the country, and facilitate the removal of foreign students once their visa term ends.<sup>91</sup> Historically, the INS has not handled these responsibilities adequately. The INS does not have accurate information on which schools are eligible to receive student visas, let alone on how many foreign students are in the United States or if these students are here legally.<sup>92</sup>

SEVIS will help the INS fulfill its responsibilities. To illustrate this, a school must fill out a Petition for Approval of School for Attendance by Nonimmigrant Students, the I-17 form provided by the INS in order to be certified to accept foreign students.<sup>93</sup> The school must operate as a “public educational institution by federal, state, or local government” and must be “accredited by a nationally recognized accrediting agency” in order for the INS to approve the form.<sup>94</sup> If the school is accredited and has accepted the foreign student, the school must issue the student an I-20 form containing information about the school and the prospective student.<sup>95</sup> The student then takes this form to the local consulate, where the student is interviewed and the application reviewed before the student is granted a student visa.<sup>96</sup> Unfortunately, INS investigators and administrators believe prevalent fraud exists in the use of the I-20 form.<sup>97</sup> The forms are particularly easy to counterfeit because they do not have adequate security

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89. *Id.* (explaining the INS duties for issuing students visas).

90. *Id.*

91. *Id.*

92. *Id.* (suggesting that the INS does not have detailed or accurate information about foreign students in the United States).

93. See *House Immigration Subcommittee Reviews SEVIS Implementation; Other Activity*, 79 No. 37 INTERPRETER RELEASES 1424 (2002) (noting that as of September 17, 2002, over 2000 schools were in various stages of authorization).

94. INS, *Temporary Benefits USINS: Student Visas*, available at <http://www.ins.gov/graphics/services/tempbenefits/StudVisas.htm> (last visited Jan. 11, 2003) (copy on file with *The Transnational Lawyer*) (explaining that the form must also be signed by an officer of the university who has the authority to sign contracts and that the petitioning school must submit a certificate indicating it is licensed, approved, or accredited); see also *Homeland Security Hearing*, *supra* note 88, available at <http://www.usdoj.gov/oig/testimony/092402.htm> (describing past INS procedures for ensuring that schools are properly certified to enroll foreign students). The INS inspectors who are in charge of approving and re-certifying schools are typically not very thorough in their review of the school application, and they rarely visit the school before or after approval.

*Id.*

95. *Homeland Security Hearing*, *supra* note 88, available at <http://www.usdoj.gov/oig/testimony/092402.htm>.

96. See Krikorian, *supra* note 20, available at <http://www.cis.org/articles/2002/foreignstudents.html>.

97. *Homeland Security Hearing*, *supra* note 88, available at <http://www.usdoj.gov/oig/testimony/092402.htm> (describing the problems with the current process of tracking I-20 forms).

features.<sup>98</sup> In addition, students are typically accepted to more than one school, making it likely that they will receive many unneeded I-20 forms. This makes it easy for foreigners who have not been accepted to a university but want to obtain a student visa to use the unneeded forms.<sup>99</sup> Moreover, many schools no longer certified to issue the forms may still have copies of blank I-20s that could be fraudulently obtained.<sup>100</sup> SEVIS will help solve these problems because only schools with access to the database will now be able to create I-20s, and any unused I-20 forms will be invalidated so as to not be fraudulently used.<sup>101</sup>

SEVIS will also aid schools in data collection on foreign students and allow the INS to pinpoint exactly when and where students enter the United States.<sup>102</sup> Schools will input information about foreign students directly into the SEVIS database or into its own system that is capable of uploading the data to SEVIS.<sup>103</sup> This method makes the information on foreign students current and instantaneously accessible to the INS.<sup>104</sup> Ultimately, SEVIS is designed to decrease the possibility that terrorists entering the country on a student visa may unlawfully remain in the United States, whether on a U.S. campus or elsewhere.<sup>105</sup>

In 2002, the Border Security Bill amended the foreign student monitoring program to even further limit the possibility of terrorists entering and remaining in the United States.<sup>106</sup> This legislation imposed additional reporting requirements on universities regarding foreign students, and it heightened the burden on foreign students by mandating the report of personal information to the INS when

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98. *Id.*

99. *Id.*

100. *Id.* In addition, anyone with adequate funds can buy their way into the United States because there are over 73,000 schools certified to admit foreign students. Krikorian, *supra* note 20, available at <http://www.cis.org/articles/2002/foreignstudents.html>. For instance, in China, \$10,000 buys forged letters of recommendation, false evidence of economic support, and a professional actor to do the interview at the United States Consulate. *Id.* In India, \$800 guarantees an I-20 form and a list of schools where the student will be enrolled. *Id.*

101. *Homeland Security Hearing*, *supra* note 88, available at <http://www.usdoj.gov/oig/testimony/092402.htm> (explaining that although the INS currently has a database to record information about the status of foreign students and schools authorized to receive foreign students, the information is incomplete, unreliable, and inaccurate). With SEVIS, if a school is no longer certified to issue I-20 forms, the INS will invalidate its SEVIS password so that it will no longer be able to issue I-20 forms. *Id.* This will make fraudulent or expired forms more difficult to use. *Id.*

102. *Id.*

103. *Id.* (describing the implementation of SEVIS to monitor foreign students).

104. *Id.* (explaining that with this information, INS investigators will be able to identify students who have been in the United States longer than typical degree programs require).

105. *Id.*

106. NAFSA: Summary, *supra* note 17, available at <http://www.nafsa.org/content/publicpolicy/nafsaontheissues/kennedyfeinsteinsummary.htm> (suggesting that the Border Security Bill gives greater direction to the integrated entry and exit system established by the 1996 law IIRIRA). Such direction includes: using a specific technology standard and technologies that facilitate cross border movement, creating a database for compiling arrival and departure data, and making all security databases involved in determining the admissibility of aliens interoperable. *Id.*

applying for a student visa.<sup>107</sup> The Bill will affect universities in a couple of ways. First, it mandates that universities collect and update information on SEVIS. Additionally, the number of foreign students at universities will likely decline since students may be reluctant to apply for a student visa given the additional reporting requirements.

*C. The Enhanced Border Security and Visa Entry Reform Act of 2001*

The Border Security Bill requires the Attorney General, in consultation with the Secretary of State, to monitor information reported in SEVIS by universities and the INS about foreign students.<sup>108</sup> First, as a prerequisite for visa approval, consular officers must verify the student's acceptance documentation by an approved educational institution and the transmittal of this documentation.<sup>109</sup> Second, the Attorney General must check whether the student was actually approved for and issued a visa.<sup>110</sup> Next, they must confirm that the foreign student entered the United States, the educational institution was notified that the foreign student entered the United States, and the student actually registered and enrolled in classes.<sup>111</sup> Finally, any other relevant act by the student, including school transfers and termination of enrollment, must be reported.<sup>112</sup>

The Border Security Bill also imposes a heightened burden on foreign students to report personal information to the INS.<sup>113</sup> Prior to the enactment of the Border Security Bill, students were only required to report limited information such as their current U.S. address, their proposed course of study, and the date and port of their entry.<sup>114</sup> In accordance with the Bill, students must now provide additional information to the consulate when submitting a visa application. Such information includes the student's address abroad, names and addresses of immediate family, names of people who can verify the applicant's personal information, and any prior work history, including the names and addresses of employers.<sup>115</sup> Furthermore, the Bill requires the academic institution or visitor exchange program to report the

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107. Enhanced Border Security and Visa Entry Reform Act of 2001, Pub. L. No. 107-173, § 501 (amending 8 U.S.C. § 1372).

108. *Id.*

109. *Id.* § 501(a)(3)(A)-(B); see also Charlotte Stichter, *Homeland Security Meets Immigration: A Review of Recent Governmental Activity and Pending Legislation*, 10-02 IMMIGR. BRIEFINGS 1 (Oct. 2002) (commenting that the Border Security Bill continued many of the themes reflected in the USA PATRIOT Act). These themes include greater information sharing, an interoperable electronic data system, a foreign student tracking system, and limitations on visa issuance for persons coming from countries known to sponsor terrorism. *Id.*

110. Enhanced Border Security and Visa Entry Reform Act of 2001 § 501(a)(3).

111. *Id.*

112. *Id.*

113. *Id.* § 501(b).

114. 8 U.S.C. § 1372(C)(1)(a)-(h) (2002), amended by Enhanced Border Security and Visa Reform Act of 2001 (setting forth the data that the Attorney General must collect from the foreign student).

115. Enhanced Border Security and Visa Reform Act of 2001.



status of the foreign student to the INS.<sup>116</sup> In doing so, the institution must first notify the INS within thirty days of the registration deadline if the foreign student does not enroll in or begin classes.<sup>117</sup> Second, the Bill requires the Attorney General to collect additional information about the students, including where they entered the country, their date of enrollment in an academic program, the degree or field of study being pursued, and if applicable, the date and reason for termination of study.<sup>118</sup> Finally, the academic institution must periodically report to the Attorney General regarding the status of the foreign student in compliance with the reporting requirements.<sup>119</sup> According to the Bill, failure to comply with these requirements may result in the termination, suspension, or limitation of the institution's approval to receive foreign or exchange students.<sup>120</sup> Although both the USA PATRIOT Act and the Border Security Bill are designed to help prevent terrorism and strengthen security in the United States, opponents of both Acts are concerned about the impact they will have on both foreign students and universities.

### III. MAJOR CRITICISMS OF THE USA PATRIOT ACT AND THE ENHANCED BORDER SECURITY AND VISA ENTRY REFORM ACT OF 2001

The USA PATRIOT Act and Border Security Bill are meeting resistance from U.S. university officials.<sup>121</sup> Their concerns stem from amendments to the federal privacy rights held by foreign students and the additional burdens SEVIS creates on academic institutions.<sup>122</sup> A legitimate issue has been raised regarding whether academic institutions will be negatively impacted by these Acts due to the possibility that decreasing privacy rights for foreign students may deter students from wanting to study in the United States. Another legitimate concern surrounds the issue of whether the increased burden to report information about foreign students will render universities less willing to accept foreign students.

#### A. *The Clash Between Student Privacy and National Security*

The USA PATRIOT Act allows the Attorney General to subpoena a broad range of student records from academic institutions without any notice to the

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116. *Id.* § 501(a)(4).

117. Rosemary Jenks, *The Enhanced Border Security and Visa Entry Reform Act of 2001*, CENTER FOR IMMIGR. STUD., at <http://cis.org/articles/2002/back502.html> (last visited Oct. 6, 2002) (copy on file with *The Transnational Lawyer*) (defining the additional reporting requirements established by the Act).

118. *Id.*

119. *Id.*

120. Enhanced Border Security and Visa Entry Reform Act of 2001; see also *Homeland Security Hearing*, *supra* note 88, available at <http://www.usdoj.gov/oig/testimony/092402.htm> (noting in order to be certified to receive foreign students, a school must fill out an I-20 form from the INS). This form contains information about the school and prospective student. *Id.*

121. See *infra* notes 134-51 and accompanying text (providing an in depth discussion of university officials' concerns).

122. *Id.*

student and without judicial review of the student's civil rights.<sup>123</sup> Civil liberty proponents suggest that this increased infringement on foreign students' privacy is subject to abuse, with the potential to harm innocent students by allowing law enforcement agencies access to private student information based on minimal evidence that the information is relevant to an investigation.<sup>124</sup> Evidence suggests that there is no connection between increased access to student communications on the Internet granted by the USA PATRIOT Act and greater security for the United States from terrorist activity like that of September 11, 2001.<sup>125</sup> Instead, it is argued that law enforcement agencies had notice of suspicious behavior prior to the attacks.<sup>126</sup> Even under the disclosure laws prior to September 11, 2001, this behavior should have been investigated so that it may have been prevented.<sup>127</sup> Consequently, many critics of the USA PATRIOT Act believe its infringements on privacy are unnecessary.<sup>128</sup> The critics argue that the Act ultimately undermines "traditional civil liberties that we all hold dear."<sup>129</sup>

The additional reporting requirements may also leave universities with inconsistent federal mandates requiring protection of student privacy and participation in the investigatory processes required by the Act.<sup>130</sup> Universities will have to comply with obligations to protect student privacy and honor subpoenas issued by the Attorney General to turn over education records relevant to a criminal investigation or prosecution.<sup>131</sup> This can particularly be a problem for universities lacking guidelines that establish what types of activities will require voluntary disclosure and which university officials are available for advice in uncertain situations.<sup>132</sup> However, without imposing voluntary reporting

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123. See Del Bianco & Terison, *supra* note 77, at 26-27 (expressing concerns with the Act because of infringements on student privacy rights); see also Rosenfield, *supra* note 77, available at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle.archive/2002/09/08/MN30478.DTL> (explaining how the Act amended the Family Education Records and Privacy Act).

124. Del Bianco & Terison, *supra* note 77, at 26 (emphasizing that "[w]hen the changes in federal law dealing with student records privacy are combined with other information-sharing provisions . . . it becomes clear that highly personal student information will be transmitted to many federal agencies in ways likely to harm innocent students' privacy"). Although law enforcement agencies need a court order to obtain the information, they only need to certify to a judge that the records are relevant to an investigation, thus leaving no room for judicial review. *Id.* The Civil Liberties Union argues that this procedure may lead to "fishing expeditions that violate student privacy or investigations based on racial profiling." Rosenfield, *supra* note 77, available at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle.archive/2002/09/08/MN30478.DTL>.

125. Bianco & Terison, *supra* note 77, at 27.

126. *Id.*

127. *Id.*

128. See *id.* (advocating that there is no need for the powers granted by the USA PATRIOT Act).

129. *Id.*

130. See Garon, *supra* note 81, at 166 (suggesting the provisions of the USA PATRIOT Act dealing with student privacy only incorporate universities because they generate digital and telephone communications to which law enforcement agencies want greater access).

131. *Id.* at 166-67 (explaining how the USA PATRIOT Act does not specify how to determine whether disclosure of information is necessary to protect the rights or property of a university). This may lead to the disclosure of information in some circumstances and not in others depending on the judgment call of the staff member who discovers the information. *Id.*

132. *Id.* at 167 (emphasizing that universities allowing student taught classes or Internet classes need to

requirements on universities, the potential for terrorist activities making their way onto university campuses increases.<sup>133</sup> In addition to the criticisms about amending students' federal privacy rights, the system may simply impose too many burdens on universities, making them less likely to accept foreign students altogether.

*B. Complying with the SEVIS Requirements: Too Much to Ask of U.S. Universities?*

The foreign student monitoring system imposes many burdens on universities.<sup>134</sup> First, the new visa requirements for foreign students cause many delays in the application process.<sup>135</sup> These delays interfere with classes and university research projects. Second, complying with SEVIS is very expensive for universities.<sup>136</sup> Taken together, the delays and economic concerns negatively impact graduate programs.

*1. Delays in the Application Process*

Since the new security rules are slowing the application process for student visas, many foreign students are not receiving their visas in time to begin classes.<sup>137</sup> It is now possible for the application process to take up to two years.<sup>138</sup>

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take the provisions of the Act especially seriously). Such classes could easily be used as a cover for criminal or terrorist activity over the Internet with excuses that the criminal or terrorist postings were simply part of the course curriculum. *Id.* As a result, well-intentioned educational systems may easily offer the credibility and effectiveness terrorists need in order to create a front for their activities. *Id.*

133. *See id.* (explaining that a university will always respond to a bomb threat on campus, but it is questionable whether it would respond to the situations previously not covered by the voluntary disclosure requirements of the Act).

134. *See infra* notes 137-51 and accompanying text (explaining how delays and expenses in complying with SEVIS will impact universities).

135. Alice Thomas, *New Checks Burdening Universities*, COLUMBUS DISPATCH, Aug. 20, 2002, available at 2002 WL 25411528.

136. NAFSA: *Issue Brief*, *supra* note 55, available at [http://www.nafsa.org/content/publicpolicy/waf3a\\_on\\_the\\_issues/monitoring.html](http://www.nafsa.org/content/publicpolicy/waf3a_on_the_issues/monitoring.html).

137. Thomas, *supra* note 135.

138. *Id.* (explaining that due to a backlog on visa applications, some applicants have been waiting for months even though the INS has approved their petition for a visa). This process generally only takes 100 days. *Id.*; see also Christopher Marquis, *Visa Backlog Hits Research, Business Security Checks Delaying Applications*, N.Y. TIMES, Oct. 13, 2002, at A7 (asserting that the backlog is not just affecting applicants for student visas). For example, consider a hypothetical situation presented by an immigration lawyer in order to explain the problem with visa backlogging. Benson, *supra* note 39, at 222. Mae Cheng, a top international foreign exchange student from China at Cal Tech, wishes to begin her employment with a computer software company (CSI) in California immediately following graduation. *Id.* However, her student visa only authorizes her to work for 12 months after graduation and Ms. Cheng has been offered a permanent position. *Id.* at 221. Assuming Ms. Cheng qualifies, her best choice is to change her visa status to a temporary work visa and then apply for permanent residence. *Id.* at 224. However, with the visa backlog, it is quite possible that Ms. Cheng's temporary work visa will expire before she is issued permanent residence or a green card. *Id.* As a result, she may be forced to relocate to a CSI office abroad, if there is one, or take a leave of absence from CSI and go back to China so as not to risk becoming an illegal alien. *Id.*

Consequently, the delays in the visa application process are costing colleges hundreds of dollars per student.<sup>139</sup> Because at least half of some graduate programs, particularly the sciences, are made up of foreign students, a decreased number of foreign students will result in both a financial and an academic disaster as universities may have to discontinue certain programs for lack of sufficient students and funding.<sup>140</sup> In addition, universities will lose a substantial amount of revenue from foreign students because the students end up not coming to the United States at all.<sup>141</sup> For example, the University of Akron reported that attendance at the orientation session was down thirty percent despite having the same number of foreign applicants as the previous year.<sup>142</sup> This illustrates how the delays in the application process are potentially affecting both foreign students and universities.

## 2. Expenses for Universities

Complying with SEVIS has also created economic concerns for U.S. universities.<sup>143</sup> The foreign student monitoring system is an unfunded statutory mandate, and all the costs of complying with its requirements are borne by the university.<sup>144</sup> Because SEVIS requires the university to collect and report a significant amount of additional information for each foreign student, large schools are finding it necessary to purchase software packages to help collect this data.<sup>145</sup> Smaller schools, however, are expressing mixed feelings over the additional burden of data collection required by the Act.<sup>146</sup> Although smaller schools will have

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139. Thomas, *supra* note 134; see also Austin T. Fragomen, Jr. & Steven C. Bell, *Student Visas Again Under Scrutiny: What to Expect*, IMMIGR. BUS. NEWS & COMMENT, Nov. 1, 2001, available at 2001 WL 1306169 (arguing that there are four things standing in the way of students applying for student visas). First, the fees for obtaining a visa are too high and many students may not be able to afford them. *Id.* Second, many students do not have credit cards to make payments over the Internet, which is the easiest method to pay for a student visa. *Id.* Third, even if the students do have a credit card, they do not have access to the Internet. *Id.* Finally, to get a cashier's check through the mail may take months, which may be too long to begin classes on time. *Id.*

140. Fragomen & Bell, *supra* note 139.

141. *Id.*

142. See Thomas, *supra* note 135 ("We were probably down 30 percent this fall, as far as orientation, and we had the same number of applicants."); see also Dunbar, *supra* note 19, available at <http://www.mndaily.com/article.php?id=264&year=2002> (indicating that delays in the processing of student visa applications have decreased enrollment in the science departments).

143. NAFSA: *Issue Brief*, *supra* note 55, available at <http://www.nafsa.org/content/publicpolicy/NAFSAontheIssues/monitoring.html>.

144. *Id.* (noting that because the funding for the foreign student monitoring system is in the hands of universities, the cost will be borne by American students who will ultimately receive fewer educational benefits as a result). Universities will have to find the money for SEVIS somewhere. *Id.*

145. See Thomas, *supra* note 135 (explaining that Ohio State University and the University of Cincinnati "will spend \$100,000 tracking foreign students this year" and that software packages collecting data on foreign students cost over \$25,000). In addition, John Hopkins University has estimated costs of up to \$500,000 based on IT hours. Deno Curris, *Homeland Security: Tracking International Students in Higher Education Progress & Issues Since 9-11*, available at <http://www.aascu.org/leadership/testimony/092402.htm> (last visited Mar. 12, 2003) (copy on file with *The Transnational Lawyer*). This figure does not include future training, software licenses, staffing, and other attendant maintenance costs. *Id.*

146. See Curris, *supra* note 145, available at <http://www.aascu.org/leadership/testimony/092402.htm> (suggesting that small schools will have a more difficult time collecting data). But see Susan Sachs, *Under Fire, I.N.S. Begins Rolling Out a New Database to Track Foreign Students*, N.Y. TIMES, June 22, 2002, at B2 (asserting that small schools will have an easier time collecting data).

less data to collect on foreign students because they have fewer students overall,<sup>147</sup> they do not have the financial resources to purchase software packages or hire additional workers to enter the data into the system.<sup>148</sup> These schools will have to rely on current personnel to collect the additional data.<sup>149</sup>

The economic impacts and delays in the visa application process for foreign students concern many U.S. university officials because graduate programs have historically relied on a significant number of foreign students.<sup>150</sup> Even more troubling than the impact of application delays on foreign students and universities is the impact such delays will have on U.S. foreign relations with other countries. Foreign students from these countries who are negatively impacted by the delays will remember their experience, affecting the students' future diplomatic dealings with the United States.<sup>151</sup> Thus, it seems clear that the heightened level of scrutiny facing foreign students applying for student visas raises serious issues for U.S. graduate programs and possibly future foreign relations.

### C. *The Impact on Graduate Programs in the United States*

Because foreign students are now required to divulge highly personal information and there is a severe backlog on visa applications, foreign students will be less likely to want to study in the United States.<sup>152</sup> Although the full impact of the USA PATRIOT Act and the Border Security Bill will not be apparent until November 2003, when the 2002 figures for foreign student enrollment will be available, it is possible to theorize about the potential impact these Acts will have on graduate institutions.<sup>153</sup> For example, according to seventy-nine universities there was an eight percent drop in the number of foreign scholars from the Fall of 2001 to the Fall of 2002 and a twenty-one

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147. Sachs, *supra* note 145.

148. Curris, *supra* note 145, available at <http://www.aascu.org/leadership/testimony/092402.htm>.

149. *Id.* But see Sachs, *supra* note 146 (noting that Robert Hunter, Dean of Enrollment Services at TCI College of Technology in Manhattan, acknowledges that because the school has fewer foreign students than larger universities, the impact of complying with the requirements of the foreign students monitoring system will not be large).

150. Dunbar, *supra* note 19, available at <http://www.mndaily.com/article.php?id=264&year=2002> (quoting Luis Bartolomei, University of Minnesota Student Legal Service immigration attorney: "The increased scrutiny might have negative consequences for the University . . . 'what will happen is that these international students will start going other places.'"). Of the 2475 students enrolled on the University of Minnesota's campus in Spring 2002, 1856 were international students. *Id.* In the 2000-2001 academic year, there were 547,867 foreign students studying in the United States, totaling approximately 3.8% of enrollment in U.S. colleges and universities. NAFSA: Association of International Educators, *Important Data on International Education Exchange to and from the United States*, at <http://www.nafsa.org/content/PublicPolicy/DataonInternationalEducation/FactSheet.htm> (last visited Jan. 1, 2003) (copy on file with *The Transnational Lawyer*).

151. Dunbar, *supra* note 19, available at <http://www.mndaily.com/article.php?id=264&year=2002>.

152. *Id.*

153. Alia Ibrahim, *Foreigners' Enrollment Stays Steady; Some Decline Reported in Mideastern Students*, WASH. POST, Oct. 12, 2002, available at 2002 WL 101067769 (theorizing that a decline or even a flat trend in the enrollment of foreign students will indicate a drop in foreign student enrollment as it has consistently been on the rise in recent years).

percent loss of foreign students admitted to physics programs. These statistics may indicate that the number of foreign students coming to the United States is on a decreasing trend.<sup>154</sup> Because the total number of foreign students has increased each year, the current figures showing a decline in enrollment indicate that the increased burden of the USA PATRIOT Act and the Border Security Bill may be the cause.<sup>155</sup>

Even though the United States attracts half of the total number of foreign students who study abroad, competition has increased with countries such as Great Britain, Canada, and Australia.<sup>156</sup> Because the USA PATRIOT Act and the Border Security Bill tend to discourage foreign students from coming to the United States, it does not seem likely students will continue to flock to the United States. For those foreign students who choose to study in other countries because they do not want to comply with the heightened reporting requirements or wait for visa application approval, there is not much that can be done. However, the visa requirements embody the very spirit of the foreign student monitoring system; thus, it is not likely they will be amended in the near future.<sup>157</sup> Consequently, graduate programs in science and engineering fields at universities relying on a significant number of foreign students to fill their programs<sup>158</sup> will suffer because they will be unable to meet the enrollment requirements for these programs. In addition, the increased financial burden on universities approved to accept foreign students will also be problematic.<sup>159</sup>

A decrease in the number of foreign students will not only affect U.S. universities, but also the U.S. economy. Foreign students contribute to the economy in a variety of ways. First, foreign students often work at universities as teaching and research assistants or in scientific laboratories.<sup>160</sup> Hundreds of foreign students are recruited to work on research projects in math, physics, and engineering. The delay in visa approval is causing many of these projects to die.<sup>161</sup> Second, foreign students pay over 7.9% of all tuition received by U.S.

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154. Linda K. Wertheimer, *Denial of Student Visas Leads to Brain Drain from University Research*, DALLAS MORNING NEWS, Nov. 24, 2002, available at 2002 WL 102886311. There was also a loss of 70 Iranian students from a total of five universities who were participating in an energy partnership exploration program with an Iranian Oil Company. *Id.* In addition, Texas A&M University declared a loss of almost one-third of its petroleum engineering students and Texas Christian University reported an approximate 40% decrease in foreign student enrollment. *Id.*

155. Ibrahim, *supra* note 153.

156. *Id.* (explaining that in the past few years, other English speaking countries have been actively recruiting foreign students).

157. NAFSA: *Issue Brief*, *supra* note 136, available at <http://www.nafsa.org/content/publicpolicy/NAFSAontheIssues/monitoring.html> (summarizing the foreign student monitoring system). "[The system] will strengthen the security of our borders, secure our visa entry system, and enhance our ability to deter potential terrorists." *Id.*

158. See Krikorian, *supra* note 20, available at <http://www.cis.org/articles/2002/foreignstudents.html> (citing George Borjas as stating that some grades and programs are substantially comprised of foreign students).

159. Thomas, *supra* note 135.

160. See Krikorian, *supra* note 20, available at <http://www.cis.org/articles/2002/foreignstudents.html> (noting various ways foreign students contribute to U.S. universities).

161. Wertheimer, *supra* note 154 (explaining that one-third of doctoral students previously admitted to the University of Texas are no longer there, consequently, there are not enough researchers to work on projects).

universities. Foreign students spend billions of additional dollars every year in the United States on fees, housing, living expenses, and consumer goods, spending \$1.6 billion in California alone.<sup>162</sup> Finally, many foreign students remain in the United States to work in the science and engineering fields after graduation.<sup>163</sup> Almost twelve percent of information technology jobs were unfilled in 2001; in order to fill these positions, employers hire foreigners.<sup>164</sup> Therefore, the United States needs foreign students and specialty workers to fill these job positions.

To do this, the United States has developed the H-1B visa program, allowing foreign workers to come into the country on a non-immigrant visa to work in specialty occupations. In 1999, approximately twenty-five percent of H-1B visa holders were enrolled as graduate students in U.S. universities.<sup>165</sup> Because a significant number of foreign students studying at U.S. universities remain in the country to work in the high-tech industry, the fact that fewer foreign students are actually entering the United States will have an impact on the available number of foreign workers.<sup>166</sup> If there are fewer students willing or able to come to the United States to study, high-tech industries will be negatively affected as they may be unable to fill positions even with the increased number of H-1B visa applications available. Consequently, it is crucial to keep foreign students coming to the United States.

Foreign students create diversity on U.S. campuses, promote international ties, stimulate research, and contribute to the economy.<sup>167</sup> Prohibiting foreign students from studying in the United States at all is not a viable option, even as an attempt to prevent terrorism.<sup>168</sup> Nevertheless, after the September 11, 2001

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162. Schemo, *A Nation Challenged*, *supra* note 5 (noting that the largest number of foreign students reside in California, where the Institute of International Education estimated that the 74,281 foreign students spent nearly \$1.6 billion in the last academic year). New York has the second largest amount of foreign academics, with 58,286 students spending \$1.3 billion. *Id.* Since foreign students are not eligible for common forms of financial aid, they are forced to pay full tuition as compared to the 84% of Americans at private universities who receive financial aid. *Id.* In addition, foreign students are charged higher tuition rates than out of state residents at state universities. *Id.*; see also Diana Jean Schemo, *A Nation Challenged: Immigration; Senate Bill Would Stiffen Controls over Visas*, N.Y. TIMES, Dec. 6, 2001 [hereinafter Schemo, *Immigration*] (stating that under proposed legislation, non-immigrants will be allowed to enter the United States if the Secretary of State, through extensive background checks on each and every applicant, determines that the non-immigrant will not pose a threat to U.S. national security). In the 2000-2001 academic year, approximately 3761 citizens of foreign nations considered sponsors of terrorism attended American universities. *Id.*

163. See Cervantes & Guellec, *supra* note 21 (commenting that foreign students are employed in many of America's technology based jobs).

164. Simone M. Schiller, *Does the United States Need Additional High-Tech Work Visas or Not? A Critical Look at the So-Called H-1B Visa Debate*, 23 LOY. L.A. INT'L & COMP. L. REV. 645 (2001).

165. Cervantes & Guellec, *supra* note 21.

166. *Id.*

167. See Curris, *supra* note 145, available at <http://www.aascu.org/leadership/testimony/092402.htm> (pointing out the benefits of international students).

168. Schemo, *A Nation Challenged*, *supra* note 5 (commenting that foreign students are "critical to the globalization efforts of our campuses; they promote stronger ties between the United States and home nations of visitors, who often become civic and economic leaders; they build American's education and scientific preeminence; and they even provide revenue to offset our nation's negative balance of payments.").

attacks, Dianne Feinstein, a Democratic Senator from California, proposed a six-month moratorium on the issuance of student visas.<sup>169</sup> However, university officials successfully lobbied against Feinstein's proposal on the grounds that advanced research programs would suffer from a lack of diversity in the classroom that is offered by foreign students.<sup>170</sup> In light of the lobbyist efforts, Feinstein compromised by withdrawing the proposal in exchange for the reinstatement of the foreign student monitoring system and the performance of more extensive background checks on visa applicants.<sup>171</sup> Subsequently, the foreign student monitoring system was designed to help rectify the problem of terrorists entering the United States on a student visa by developing new standards for granting visas to all foreign citizens applying for a student visa.<sup>172</sup> However, even with these new standards codified in the USA PATRIOT Act and Border Security Bill, the foreign student monitoring system is far from perfect as evidenced by the impact the implementation of the system will have on U.S. universities.

#### IV. PROPOSED SOLUTIONS

Despite the criticisms of the USA PATRIOT Act and the Border Security Bill, there is still potential for success. Cornell University and several other organizations have proposed solutions to help improve the problems associated with the Acts.<sup>173</sup> Cornell University has provided a template on how to establish guidelines to minimize the potential for infringement on federal student privacy rights.<sup>174</sup> In addition, the National Association for Foreign Student Advisors

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169. *Id.*

170. *Id.* (stating that “[u]niversity officials . . . invoked the lofty values of international education: spreading democracy, promoting knowledge and forging ties with future leaders abroad.”). “The clash illustrated a more prosaic, pressing side to [the universities’] concern: the growing financial and intellectual dependence of universities on students from overseas for graduate programs in the sciences, engineering and math.” *Id.*

171. Schemo, *Immigration*, *supra* note 162 (providing comments from Senator Feinstein’s office). “Currently, the State Department does not perform extensive background checks for students coming from Syria or Sudan.” *Id.* Only an “intermediate background check” is currently performed on students from Iran, and a more extensive background check is performed on students from Iraq and Libya. *Id.*

172. *See id.* (explaining that the legislation mandates extensive background checks on every applicant where the government failed to conduct them in the past because the applicant was not viewed as a terrorist threat); *see also* Krikorian & Camarota, *supra* note 42 (arguing that “[e]stablishing a computerized system to track entries and exits from the United States should not even be a subject of debate”). “There are no technological obstacles, merely a lack of will and funding.” *Id.*; *see also* *Homeland Security Hearing*, *supra* note 88, available at <http://www.usdoj.gov/oig/testimony/092402.htm> (suggesting the tracking systems will help prevent terrorism). *But see* Bianco & Terison, *supra* note 77, at 27 (illustrating the irony of the USA PATRIOT Act, as there is no connection between the terrorist attacks and the increased powers of the Act); *see also* Symposium, *supra* note 70, at 855 (suggesting that although the foreign student monitoring system is important and necessary, it is not the solution to preventing terrorism in the United States). Stopping terrorism is an issue for law enforcement. *Id.*

173. *See infra* notes 175-96 and accompanying text (describing the Cornell University guidelines of voluntary disclosure for student information and the recommendations of the National Association for Foreign Student Advisors to help speed up the visa application process and lessen the economic impact of complying with SEVIS).

174. Garon, *supra* note 81, at 167-68 (explaining the Cornell approach).



("NAFSA") has made recommendations on how to improve the visa backlog and fund the foreign student monitoring program. Taken together, these recommendations may help lessen the impact on universities and the high tech workforce in an effort to make the implementation of the USA PATRIOT Act and the Border Security Bill easier.

A. *The Cornell Approach*

Institutions such as Cornell University have established guidelines for determining the types of incidents that will trigger disclosure of private student information and when academic administrators are authorized to disclose such information.<sup>175</sup> Although each university will have to make its own decisions about what activities will lead to voluntary disclosure, establishing guidelines similar to those of Cornell University will help assure foreign students that their private information will not be revealed through inconsistent standards.<sup>176</sup> For instance, under the Cornell approach, university officials will deal with similar situations in the same way and students will know up front the types of incidents that will trigger voluntary disclosure.<sup>177</sup> The guidelines instruct employees of Cornell's Office of Information Technologies to contact the policy adviser or the service coordinator if they are asked by law enforcement to disclose any information.<sup>178</sup> The policy adviser or service coordinator would then consult with university lawyers on whether the information must be legally disclosed.<sup>179</sup> Laying out specific procedures on how to respond to requests for disclosure of private student information will help monitor university employees. University employees are often too eager to please law enforcement agents without considering the possible legal ramifications of their actions. In addition, employees are often confused about which college officials to contact for advice on whether to disclose student information to law enforcement authorities.<sup>180</sup> Fortunately, Cornell University is not the only university establishing such guidelines.

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175. *Id.*

176. *Id.* (advocating that schools should monitor all courses to assure that they are well instructed and academically rigorous).

177. *Id.* at 167.

178. Scott Carlson & Andrea L. Foster, *Colleges Fear Anti-Terrorism Law Could Turn Them into Big Brother*, CHRON. OF HIGHER ED., Mar. 1, 2002, at A31, available at <http://communication.ucsd.edu/911/patriotact.htm> (copy on file with *The Transnational Lawyer*) (commenting that Cornell University has reviewed requests for student information since the implementation of the USA PATRIOT Act).

179. *See id.* (arguing that Cornell believes some requests for information may not be legally valid, and if such information is disclosed, the university may expose itself to liability for a violation of Fourth Amendment rights against abusive searches).

180. *See id.*

Virginia Commonwealth University and the University of Texas at Austin are also addressing similar concerns.<sup>181</sup> For example, officials at Virginia Commonwealth University have adapted the Cornell guidelines by discussing specific instances for when turning over data to the FBI would be required and when it would be voluntary.<sup>182</sup> In addition, the University of Texas at Austin has decided to determine whether or not to disclose private student information on a case-by-case basis.<sup>183</sup> However, until all universities accepting foreign students have adopted such guidelines, foreign students may not be as willing to apply for a student visa as they have in the past due to privacy concerns.<sup>184</sup>

### B. NAFSA Recommendations

The NAFSA has made several recommendations to help reduce the visa backlog, thus making students concerned with the delays in the application process more likely to apply for a visa.<sup>185</sup> It suggests the government identify applicants who will require special screening in order for other applications to be processed more quickly.<sup>186</sup> The NAFSA also recommends the INS set a realistic timeline for when applications will be approved so that universities can relay this information to the students.<sup>187</sup> Finally, Congress should provide agencies with adequate resources in order to allow visa officers more time with applicants during the screening process.<sup>188</sup>

In an effort to combat the economic concerns of university officials, the NAFSA proposes that the foreign student monitoring system should be funded with public money because it benefits the public.<sup>189</sup> It suggests the INS do a fee

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181. *Id.*

182. *Id.* (explaining that the University has discussed "training student workers not to readily provide private records to law-enforcement officials, and about whether reporting problems to the campus police" is a sufficient substitute for contacting the FBI, as well as explaining the difference between a search warrant and a subpoena).

183. *Id.*

184. See Marquis, *supra* note 138 (stating that Jonathan Ginsburg, a Virginia immigration lawyer, found that "[t]he cumulative effect of all these measures is to discourage people from coming here."). In addition, because State Department revenues from visa applications have fallen 30%, the Department is planning to raise non-immigrant visa application fees from \$60 to \$100. *Id.* But see Terry Hardy, *Attacks Don't Halt California Students' Urge to Travel*, SACRAMENTO BEE, Sept. 6, 2002, available at 2002 WL 26639227 (arguing that the longer wait period for visa applications and social security numbers has not impacted the number of foreign students entering the United States).

185. NAFSA: *International Educator Group*, *supra* note 19, available at <http://www.nafsa.org/content/whatsnew/PressReleases/visaproc111402.htm> (describing the steps the government and the INS should take to lessen the backlog).

186. *Id.*

187. *Id.*

188. *Id.*

189. NAFSA: *Issue Brief*, *supra* note 55, available at <http://www.nafsa.org/content/publicpolicy/NAFSAontheIssues/monitoring.html> (stating that The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 required foreign students to pay a fee to finance the monitoring system). However, there is no such provision in the Border Security Bill. *Id.* The Department of Defense Appropriations Act of 2002, however, provided \$36.8 billion for the system's start-up costs. *Id.* NAFSA suggests that the "monitoring system is a public good, and, as such, should be funded with public money." *Id.*

study that would lead to the promulgation of reduced fees. However, the NAFSA thinks the INS should work with universities to develop a more efficient and user-friendly data collection system.<sup>190</sup> Such a process will help alleviate the cost of software and the cost of training additional workers to enter data and use SEVIS.<sup>191</sup>

Clearly, there are going to be problems with implementing the foreign student monitoring system because the program requires such a major reform in how U.S. universities and the INS treat foreign students.<sup>192</sup> The recommendations proposed by the NAFSA will help make the transition to a foreign student monitoring system easier. Implementing the regulations will provide universities with information about the status of student visa applications so they can make changes and allowances for those students whose applications are backlogged and unable to make it to class in time.<sup>193</sup> Nevertheless, the number of foreign students entering the United States has already diminished.<sup>194</sup> Thus, graduate programs in the United States and the U.S. economy may suffer because of the increased burden on academic institutions, as many foreigners may be discouraged from coming to the United States.<sup>195</sup>

The goals of these Acts, however, represent an effort to strengthen national borders and prevent terrorism.<sup>196</sup> The obstacles they impose are not insurmountable. In light of the severity of the past terrorist attacks and the possibility of similar attacks in the future, the goals of the Acts continue to be relevant to U.S. security. Thus, Congress should continue to enforce the provisions of the USA PATRIOT Act and the Border Security Bill pertaining to the foreign student monitoring system as well as consider the NAFSA recommendations. In addition, universities should establish guidelines for determining which situations will trigger voluntary disclosure of private student information similar to those of Cornell University.

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190. *Id.*

191. *Id.*

192. NAFSA: Association of International Educators, *Bill Introduced to Repeal Foreign Student Tracking System*, available at <http://www.nafsa.org/content/WhatsNew/PressReleases/ciprisrepeal.htm> (last visited Jan. 28, 2003) (copy on file with *The Transnational Lawyer*) (commenting that even though the foreign student tracking systems improve the monitoring of foreign students, gaps still exist because there is currently no system to locate non-immigrants in the United States once it is determined that they have overstayed the terms of their visa). Therefore, the proposed legislation "directs the General Accounting Office to conduct a study to determine the feasibility of requiring every non-immigrant alien in the United States to provide the INS with current contact information." *Id.*

193. Thomas, *supra* note 135.

194. See *supra* notes 152-72 and accompanying text (explaining how the numbers of foreign students in the United States is decreasing).

195. Marquis, *supra* note 138. Since the effect of all the increased security measures is to discourage people, including terrorists, from coming to the United States, the next question is: "isn't this going to have an effect on the overall economy?" *Id.*

196. NAFSA: *Summary*, *supra* note 17, available at <http://www.nafsa.org/content/publicpolicy/nafsaonthissues/kennedyfeinsteinsummary.htm> (setting forth the goals of the USA PATRIOT Act and the Border Security Bill).

V. CONCLUSION

The USA PATRIOT Act and the Border Security Bill embody congressional efforts to fight terrorism and increase national security. Evidence has shown terrorists have consistently taken advantage of loopholes in the U.S. foreign student visa program in order to enter and remain undetected in the United States. These two pieces of legislation directly address this problem. Although enforcing the USA PATRIOT Act and the Border Security Bill will pose potential problems for U.S. universities and the U.S. economy, establishing the foreign student monitoring system represents a step in the right direction. Clearly, some sort of heightened security measures must be implemented in order to deter terrorists from entering the United States on student visas and never enrolling in school. The Cornell University Guidelines and the NAFSA recommendations to the criticisms of the Acts should be considered by universities and Congress in an effort to make the transition to implementing a foreign student monitoring system easier. Obtaining a student visa is going to be more cumbersome and difficult, but the goals of strengthening U.S. borders, securing the visa system, and deterring terrorists should be the first and foremost consideration for enacting legislation in order to prevent future disasters like those that occurred on September 11, 2001.

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