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Foreign Students v. National Security: Will Denying Education Prevent Terrorism?

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FOREIGN STUDENTS v. NATIONAL SECURITY: WILL DENYING EDUCATION PREVENT TERRORISM?

Of all the civil rights for which the world has struggled and fought for 5,000 years, the right to learn is undoubtedly the most fundamental. . . The freedom to learn. . . has been bought by bitter sacrifice. And whatever we may think of the curtailment of other civil rights, we should fight to the last ditch to keep open the right to learn, the right to have examined in our schools not only what we believe, but what we do not believe; not only what our leaders say, but what the leaders of other groups and nations, and the leaders of other centuries have said.

—W.E.B. DuBois

I. INTRODUCTION

The events of September 11th, 2001¹ opened America's eyes to many things, including the alarming fact that terrorists live, work, and

1. See Serge Schmemmann, *U.S. Attacked; President Vows to Exact Punishment for 'Evil,'* N.Y. TIMES, Sept. 12, 2001, at A1.

During the morning of September 11, 2001, four commercial airplanes were hijacked by terrorists armed with knives and box cutters. Two of the jetliners rammed into each of New York's World Trade Center towers, the third jetliner crashed into the Pentagon. The passengers on the fourth plane, which was also headed for a target in Washington D.C., raised a riot and the plane crashed near Pittsburgh, Pennsylvania. Both of the towers in New York City toppled in a storm of ash, glass, and smoke. In all, 266 people perished in the four planes and thousands died in the three buildings.

Within an hour of the attacks, the United States was on a war footing. The military was put on the highest state of alert, National Guard units were called out in Washington and New York and two aircraft carriers were dispatched to New York harbor. President Bush remained aloft in Air Force One, following a secretive route, while his wife and daughters were evacuated to a secure, unidentified location.

The repercussions of the attacks swiftly spread across the nation. Air traffic across the United States was halted and international flights were diverted to Canada. Borders with Canada and Mexico were closed. Federal buildings across the country were shut down. Major skyscrapers, Disney theme parks, the Golden Gate Bridge, and United Nations headquarters in New York, were evacuated. New York, the financial capital of the world, was closed down. Thousands of workers, released from their offices in Lower Manhattan but with no way to get home except by foot, set off in vast

study here, waiting for orders to strike, and there may be no way to completely eradicate the existing threat. Since September 11th, one thing has become apparent: there is now heightened distrust of foreigners. However, prior to September 11th, the most notorious domestic terrorists were United States citizens.² The September 11th attacks will make it extremely hard for all foreigners, not just the ones from terrorism-supporting Middle East countries, which are already “red flagged,” to claim a piece of the “American Dream.”³ This will result in far fewer visas for the millions who come each year to the U.S. to study, work or visit.⁴

This country has always been a melting pot, especially welcoming immigrants from those nations with governments that violate civil rights, are repressive, and even torture and murder their own citizens in the name of religion or political loyalties.⁵ U.S. is a tolerant nation and its policies reflect that.⁶ That is all true unless something goes wrong and fingers start pointing.⁷ Following the September 11th tragedy, because one of the hijackers came to the U.S. on a student visa, some of those fingers pointed at foreigners, specifically foreign students.⁸

streams, down the avenues and across the bridges. The area around the World Trade Center resembled a desert after a terrible sandstorm. Parts of building, crushed vehicles, and the shoes, purses, umbrellas and baby carriages of those who fled lay covered with thick, gray ash, through which weeping people wandered in search of safety, each with a story of pure horror.

2. Ted Kaczynski, the “Unabomber” killed three people and injured 29 others, working alone in a Montana shack with homemade explosives. Subsequently, Timothy McVeigh blew up 168 people with ‘nothing fancier than a truck filled with chemical fertilizer’. See Michael Fumento, *Anthrax Anxiety*, NATIONAL REVIEW ONLINE, Oct. 15, 2001.

3. See Maggie Mzamara, *Newsline America: American Dream Now Hard for Foreigners*, THE FINANCIAL GAZETTE, Nov. 1, 2001.

4. See *id.*

5. See *id.*

6. See *id.*

7. See *id.*

8. Hani Hanjour was one of the suicide pilots of American Airline Flight 77 which crashed into the Pentagon. He had entered the country on a student visa and enrolled at an Oakland, California college in November 2000 for an English language course, but had failed to show up. Officials estimate that 245,000 foreign students have entered the United States this year (2001) to pursue a course of study. Between 1999 and 2000, the State Department issued 3,370 visas to students from nations on the United States’ terrorism watch list. See *Senator Feinstein Urges Major Changes in U.S. Stu-*

International students make great sacrifices to come to the U.S.⁹ They leave their homes and often their families, including spouses and children, to seek a better education in the U.S.; visa regulations do not allow dependents of students to accompany them.¹⁰ The quality of educational institutions in the United States draws students from all over the world. These students should now be prepared for strict and intrusive government monitoring of student movements once they arrive in the “land of the free.”¹¹

This Note discusses the problems posed by Immigration and Naturalization Service’s (“INS”) implementation of the Student Exchange Visitor Information System (“SEVIS”), which will monitor foreign students throughout their stay in the United States. Part II of this Note illustrates how foreigners have been discriminated against throughout history and how SEVIS will monitor foreign students and exchange visitors. Part III of this Note will explain why even though SEVIS is not unconstitutional, its implementation is bad policy and is not an effective tool for fighting terrorism. Furthermore, this section will illustrate that the Family Educational Rights and Privacy Act (“FERPA”) should apply to foreign students and offer them the same protection it does for U.S. students. Part IV will prove that because diversity is needed and sought by U.S. universities, it is a compelling governmental interest. Finally, this note concludes by describing the dangerous effects that SEVIS will have on the United States’ educational system.

II. MONITORING OF FOREIGN STUDENTS AND DISCRIMINATION AGAINST FOREIGNERS

A. *INS Implements Monitoring Software*

In response to growing international terrorism and to ensure the integrity of the U.S. immigration system, the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) was passed in

dent Visa Program (Sept. 27, 2001), at <http://www.senate.gov/%7Efeinstein/releases01/stvisas1.htm>. See also Schmemmann, *supra* note 1.

9. See *Tracking International Students in Higher Education – Policy Opinions and Implications for Students Joint Hearing Before the Subcomm. on Select Education and the Subcomm. on 21st Century Competitiveness of the Comm. on Education and the Workplace*, 107th Cong. 1st Sess. 64-67 (2001) [hereinafter *Tracking Int’l Students*] (testimony of Julia Beatty, President, U.S. Student Association), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:80215.pdf.

10. See *id.*

11. See *id.*

1996.¹² Section 641(c) of IIRIRA directed the INS to establish a nationwide electronic system to collect information relating to all foreign students and exchange program participants.¹³ The impetus for this legislation was an allegation that a terrorist involved in the 1993 bombing of the World Trade Center had originally entered the United States on a student visa.¹⁴ A 1994 memo to the Department of Justice (DOJ) from FBI Director Louis Freeh, outlined a perceived risk of terrorism in the United States.¹⁵ The memo said that one potential source of terrorists is "those who enter on student visas and do not abide by their terms."¹⁶ The INS determined that institutions' reporting procedures and systems in place were no longer sufficient to adequately provide the information necessary or the quality of service required to efficiently and effectively manage the programs administering non-immigrants using F, M, or J visas.¹⁷ Mechanisms for tracking when and how people leave this country were virtually nonexistent.¹⁸ If people leave by plane, sometimes the airlines pass that information on to the government; sometimes they do not.¹⁹ Furthermore, section 641(c) of IIRIRA, requires all post-secondary schools and exchange visitor programs to provide information on nationals of all countries by

12. See Press Release, Teachers of English of Speakers of Other Languages (TESOL), *TESOL Joins Battle In Opposing CIPRIS* (May 29, 2001), at <http://www.tesol.org/assoc/articles/0105-cipris.html> (explaining the reason for implementing IIRIRA).

13. See Illegal Immigration Reform And Immigrant Responsibility Act § 641(c) (1996). See also NAFSA: Association of International Educators Public Policy and Government Relations Department, *NAFSA Urges Congress To Repeal Section 641 Of IIRIRA*, at http://www.nafsa.org//content/PublicPolicy/NAFSAontheIssues/CIPRIS_issue_brief.pdf (accessed Oct. 27, 2001).

14. Ed Timms & Jayne Noble Suhler, *Security Worries Putting Spotlight on Student Visas; U.S. Wants Better Monitoring*, THE DALLAS MORNING NEWS, Sept. 20, 1998, at 1A (showing that Eyad Ismoil, who was convicted of driving the explosive-laden van in the 1993 World Trade Center bombing, entered the United States on a student visa).

15. See Andrew J. Prazuch, *The 1996 Immigration Act: Foreign Students and Scholars*, 74 NO. 10 INTERPRETER RELEASES 453, 454 (1997).

16. See *id.*

17. See *Student And Exchange Visitor Program*, at <http://www.sevp.net/sev-program.htm> (accessed Nov. 2, 2001) (detailing the ineffectiveness of institutions' reporting procedures).

18. See Evan P. Schultz, *Is Open Immigration Now Part of Our Past?*, LEGAL TIMES, Nov. 12, 2001, at 50.

19. See *id.*

January 1, 2003.²⁰ However, the target date for releasing the web-interactive part of the system is July 1, 2002.²¹

The SEVIS (formerly CIPRIS²²) program is a reengineered student and exchange visitor process designed to track international students and exchange visitors who are present in the U.S. in F, M, and J status.²³ The INS hopes to convert what is currently a manual procedure into an automated process.²⁴ This manual procedure is extraordinarily complicated, very paper-intensive and very, very slow.²⁵ According to the INS, this change is expected to improve data collection and reporting, enhance customer service, facilitate compliance with regulations, and help the INS better monitor school and exchange programs.²⁶ The development of SEVIS to date has been done in partnership with the INS, the Department of State (DOS), Consular Affairs Office and Exchange Visitor Program (formerly USIA), the Department of Education (DOEd), and school and exchange visitor experts.²⁷

SEVIS is an internet-based system that allows undergraduate and graduate institutions to electronically file information about the status

20. See Illegal Immigration Reform and Immigrant Responsibility Act § 641(c) (1996).

21. See *SEVIS Implementation Update* (Feb. 4, 2002), at <http://www.nafsa.org/content/ProfessionalandEducationalResources/ImmigrationAdvisonResources/sevpupdate2.htm> (standing for, Student Exchange Visitor Informaiton System) [hereinafter *SEVIS*].

22. CIPRIS was the name assigned to the now-completed pilot project, which tested the concepts, associated with new data collection and reporting methods. Utilizing the lessons learned from the pilot, the INS is currently in the process of nationally implementing the student/exchange visitor data collection and reporting system. The SEVIS refers to this new national program, which replaces CIPRIS. See INS, *SEVP—Frequently Asked Questions Student Exchange Visitor Program*, at <http://www.ins.usdoj.gov/graphics/services/tempbenefits/SEVPqa.htm> [hereinafter *SEVP*] (accessed Nov. 2, 2001).

23. See INS, *The Coordinated Interagency Partnership Regulating International Students (CIPRIS)*, at <http://www.ins.udoj.gov/graphics/services/cipris/nafsa200.htm> [hereinafter *Coordinated Interagency Partnership*] (revised Nov. 2000).

24. See *id.*

25. See Dan Eggen & Cheryl W. Thompson, *Hijackers Visa Fiasco Points Up INS Woes; System Fails So Often it's Not Even Expected to Work, Immigration Experts Say*, WASHINGTON POST, Mar. 17, 2002, at A20 (quoting Terry Hartle, senior vice president at the American Council on Education).

26. See *SEVP*, *supra* note 22 (indicating the goals of the program).

27. See *Coordinated Interagency Partnership*, *supra* note 23 (illustrating the driving forces behind the program).

of their foreign students directly to the INS.²⁸ Schools and exchange visitor programs already collect student and exchange visitor data to comply with the existing Code of Federal Regulations (C.F.R.), particularly 8 C.F.R. § 214.3(g).²⁹ However, section 641(c) of IIRIRA mandates that the INS establish electronic reporting of this data, wherever feasible.³⁰ Thus, SEVIS will automate the manual data collection process that schools and exchange visitor programs are already utilizing to gather information on their students, scholars, and exchange visitors.³¹

Furthermore, Congress mandates that this program be self-funding, and section 641(e) of IIRIRA gives INS the delegated authority to determine a fee to be paid by international students and exchange visitors.³² The fees are to be collected when the student or scholar first registers, enrolls, or transfers into a program of study at an institution.³³ After setting the proposed fee at \$95, INS received over 4,000 comments to the proposed regulation, with the most frequently cited concern being the language in section 641(e) of IIRIRA,³⁴ which required that an approved institution of higher education and a designated exchange visitor program collect and remit the fee to the

28. See *Scientific Freedom & National Security, The National Commission on Terrorism Report: Impact on Foreign Students and Minorities*, at <http://www.aaas.org/spp/scifree/agenda.htm> [hereinafter *Scientific Freedom & National Security*] (accessed Oct. 26, 2001) (explaining the way the program will work).

29. See 8 C.F.R. § 214.3(g)(2) (1983).

The designated school official must make the information and documents required by this paragraph available to and furnish them to any Service officer upon request. The information and documents which the school must keep on each student are as follows: (i) Name; (ii) Date and place of birth; (iii) Country of citizenship; (iv) Address; (v) Status, i.e., full-time or part-time; (vi) Date of commencement of studies; (vii) Degree program and field of study; (viii) Whether the student has been certified for practical training, and the beginning and end dates of certification; (ix) Termination date and reason, if known; (x) The number of credits completed each semester; (xi) A photocopy of the student's I-20 ID Copy.

30. See *SEVP*, *supra* note 22 (demonstrating the mandates of section 641(c) of IIRIRA). R

31. See *SEVP*, *supra* note 22 (illustrating the collection process). R

32. See *Illegal Immigration Reform And Immigrant Responsibility Act (IIRIRA) § 641(e)* (1996). See also *SEVP*, *supra* note 22 (explaining the funding for the program). R

33. See *CIPRIS, Foreign Student Fee Collection System Issue Summary*, at http://www.ace.net.edu/washington/letters/2000/01january/cipris_summary.html (accessed Jan. 10, 2000).

34. See *SEVP*, *supra* note 22 (showing concern for the proposed fee). R

Attorney General.³⁵ In response, the INS worked with Congress and the DOS to introduce legislation, which transferred the fee collection responsibility from host schools and exchange programs to the INS.³⁶ This legislation was attached to The Visa Waiver Permanent Program Act, and was signed into law by President Clinton on October 30, 2000.³⁷ The INS is currently in the process of finalizing an interim fee rule.³⁸

Pursuant to the INS proposal, there will be two ways for foreign students to pay the fee required for the visa.³⁹ The first is to pay over the Internet using a credit or debit card.⁴⁰ The second way is for applicants who lack access to the Internet or a credit card.⁴¹ These applicants may pay in U.S. currency by check or money order using regular mail delivery, requiring several weeks to obtain confirmation or payment receipt.⁴² The students will not be able to start their education programs until they receive such confirmation or payment receipt, which by INS's own estimates will take several weeks.⁴³

Since 1993, the INS has manually collected information on foreign students as mandated by 8 C.F.R. § 214.3(g)(2).⁴⁴ SEVIS was introduced partly to ease the processing of information that was already backlogged at INS offices.⁴⁵ INS wanted SEVIS to provide it with information relating to student visas, specifically the dates that visas expire or dates that students no longer attend an institution, thus, terminating their student visas.⁴⁶ INS officials estimate that 40 to 50 percent of

35. See *SEVP*, *supra* note 22 (describing prior section 641(e) of IIRIRA).

36. See *CIPRIS Program Update: INS Will Collect F/M/J Fee Beginning in 2001*, at <http://www.shusterman.com/cipris-dos.html> (accessed Oct. 26, 2001).

37. See *id.*; See also Pub. L. No. 106-396 (2000).

38. See *SEVP*, *supra* note 22 (explaining the current state of the fee rule).

39. See Letter from Terry W. Hartle, Senior Vice President, American Council on Education, to Kevin D. Rooney, Acting Commissioner of INS (April 4, 2001), available at <http://www.acenet.edu/washington/letters/2001/04april/cipris.html> [hereinafter Letter to INS].

40. See *id.*

41. See *id.*

42. See *id.*

43. See *id.*

44. See Nara Frost, *INS Can Monitor Foreign Students*, BAYLOR UNIVERSITY WIRE, Oct. 3, 2001.

45. See Kate Zernike & Christopher Drew, *A Nation Challenged: Student Visas; Efforts to Track Foreign Students are Said to Lag*, N.Y. TIMES, Jan. 28, 2002, at A1.

46. See *id.*

R

R

all illegal immigrants in the country have overstayed their visas.⁴⁷ However, INS has not been processing the information that has been supplied to it by the institutions.⁴⁸ It is an undisputed fact that once in the country, there is little, if any, communication between educational institutions and the United States government about the whereabouts and activities of most foreign students.⁴⁹

B. The Federal Government Has Routinely Discriminated Against Foreign Students and Non-citizens

In the land that proudly proclaims its immigrant heritage, the Supreme Court, over the years, has consistently allowed Congress and the executive branch of the federal government the right to admit, exclude, or banish non-citizens on any basis they chose including race, sex, and ideology.⁵⁰ As Justice Paul Stevens put it in 1976, "in the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."⁵¹ Although virtually any regulations with regard to immigrants and aliens have been tolerated if made by the federal government, similar activities by state governments have been carefully scrutinized, and frequently rejected, by different majorities of the Supreme Court.⁵²

According to current standards of constitutional analysis, governmental classifications which discriminate and make certain distinctions on the basis of national origin are subject to the strict standard of judicial scrutiny imposed by the equal protection clauses of the Fifth and Fourteenth Amendments.⁵³ However, during the Iranian crisis, the

47. See Sandra Peddie & Eden Laikin, *Entrance-Exit Trackers, Database for Student Visas are Back in Favor*, THE SEATTLE TIMES, Oct. 18, 2001, at A3.

48. See Zernike & Drew, *supra* note 45.

49. See Timme & Suhler, *supra* note 14 (illustrating the lack of communication between institutions and the government).

50. See *infra* notes 57-71 and accompanying text.

51. See *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

52. See Leonard Dinnerstein, *The Supreme Court and the Rights of Aliens*, at <http://www.apsanet.org/CENnet/thisconstitution/dinnerstein.cfm> (accessed Nov. 17, 2001).

53. Prior to 1938, the Supreme Court upheld discriminatory classifications against challenges to the equal protection clause as long as they met the criteria of minimum rationality. See, e.g., *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Southern Ry. v. Greene*, 216 U.S. 400 (1910); *Gulf, Colo. & S.F. Ry. v. Ellis*, 165 U.S. 150 (1897). Upon review of socioeconomic regulations, the Court determined that government restrictions that differentiate people based on national origin need only have a reasonable and nonarbitrary basis in order to survive judicial review. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-

United States Court of Appeals for the District of Columbia Circuit upheld a discriminatory law directed at a political minority of specific national origin under a minimum rationality standard of review.⁵⁴

Aliens in the U.S. have received discriminatory treatment during periods of economic depression and political unrest.⁵⁵ The restrictions placed on Iranian Students were a direct result of diplomatic politics.⁵⁶

79 (1911). Under the standard of minimum rationality, a discriminatory action will be invalidated only if it rests “on grounds wholly irrelevant to the achievement of the State’s objective” or if it is unsupported by “any state of facts [that] reasonably may be conceived to justify it.” *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961).

The Supreme Court first acknowledged a second level of equal protection analysis in 1938. In *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938), the Court said that discrimination against “discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” This strict scrutiny standard is set off whenever discrimination is directed against a ‘suspect class’ or when fundamental rights are abridged. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Since the first address of the ‘suspect class’ theory, the Court has further defined the criteria that characterize a ‘suspect class’. While one of the factors is political underrepresentation, the Court also looks carefully at classifications which are based on “an immutable characteristic determined solely by the accident of birth,” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), or which affect groups that have been “subjected to a history of purposeful unequal treatment.” *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Pursuant to the strict scrutiny standard, the government must make a dual showing. First, a compelling state interest. See *Graham v. Richardson*, 403 U.S. 365 (1971); *Oyama v. California*, 332 U.S. 633, 640 (1948). Second, the use of the classification must be necessary to the accomplishment of the state interest. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

The Supreme Court has also indicated that a third level of review, intermediate scrutiny, may be applicable to equal protection challenges when the rights affected are important in nature but not deemed fundamental, or when sensitive, though not suspect, criteria are used as a basis for a discriminatory classification. Intermediate review utilizes a number of judicial techniques to invalidate a challenged restriction, although generally this standard involves a sliding scale of review corresponding to the gravity of the discrimination. See generally *San Antonio Indep. School Dist.*, 411 U.S. at 70 (1973) (Marshall, J., dissenting).

54. See *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *rehearing en banc denied*, 617 F.2d 750, *cert denied*, 446 U.S. 957 (1980).

55. Mary McGowan, *Narenji v. Civiletti: Equal Protection and the Iranian Crisis*, 31 CATH. U.L.REV. 101, 108 (1981).

56. With its atmosphere of permanent crisis and flashes of ethnic hostility, the Iranian hostage affair provided another instance of executive action that threatened to invade individual constitutional liberties. The immigration crackdown against Iranian students illustrates the dangers posed by executive action during a period of heightened emotion. On November 13, 1979, shortly after American Embassy personnel were taken hostage in Tehran, Attorney General, Benjamin Civiletti, issued a regulation requiring university students of Iranian nationality to submit special proof of their contin-

In *The Japanese Restriction Cases*,⁵⁷ the Supreme Court established a heightened standard of review for laws discriminating on the basis of national origin.⁵⁸ In *Korematsu v. United States*, the Court abandoned the rational basis test for ancestral classifications.⁵⁹ The Court held that the exclusion order was constitutional because the war with Japan produced an "apprehension . . . of the gravest imminent danger to the public safety."⁶⁰

In contrast to the strict standard of review compelled by national origin discrimination in equal protection analysis, discrimination against aliens triggers heightened review only when a state classification is involved.⁶¹ Time after time, the Supreme Court has deferred to

ued eligibility for student visa status; failure to comply would subject the students to deportation. The regulation was ostensibly intended to exert diplomatic pressure on the Iranian government. In *Narenji*, the District of Columbia Circuit upheld the regulation against a challenge based on the equal protection component of the fifth amendment's due process clause. *Narenji*, 617 F.2d at 745. The regulation in *Narenji* raised serious problems because no explicit congressional authorization existed for special enforcement action against aliens of a specified nationality. The Attorney General asserted authority under a general provision of the Immigration and Nationality Act that directed him to administer and enforce the Act and to establish such regulations and perform such other acts, as he deems necessary for carrying out his authority under the Act. *Id.*

The District of Columbia Circuit reversed the district court in an opinion that conceded a broad scope to presidential authority in the area of immigration. The court found that the executive action was adequately authorized by the general statutory grants of enforcement power to the Attorney General. The court also found that the regulation did not violate due process because distinctions based on nationality may be drawn in the immigration field by the Congress or the Executive, so long as such distinctions are not wholly irrational they must be sustained. In finding that the regulation had a rational basis, the court extended substantial deference to presidential fact-finding abilities and conceded a measure of inherent presidential authority in this area. Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX.L.REV. 785, 853-56 (1984).

57. See *Korematsu*, 323 U.S. at 214; *Hirabayashi v. United States*, 320 U.S. 81 (1943).

58. See *Korematsu*, 323 U.S. at 214; *Hirabayashi*, 320 U.S. at 320.

59. *Korematsu*, 323 U.S. at 214. The Court sustained the wartime exclusion of persons of Japanese ancestry from designated West Coast military areas. However, the court declared that:

It should be noted, to begin with, that all legal restrictions which curtail the rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Id.

60. *Id.* at 218.

61. See *Graham*, 403 U.S. at 365.

the federal government when reviewing federal alienage classifications, requiring only a rational basis for such restrictions.⁶² In cases involving discrimination against illegitimates,⁶³ membership in political parties,⁶⁴ and rights of American citizens to the free exchange of political views,⁶⁵ the Court has declined to review alienage distinctions made by the political branches of the federal government. This relaxed analysis has prevailed since 1889, when the Supreme Court decided *The Chinese Exclusion Case*.⁶⁶

The *Chinese Exclusion case* clearly established Congress's plenary power to exclude aliens from the United States.⁶⁷ *Fong Yue Ting v. U.S.* augmented that power with the power of deportation.⁶⁸ *Nishimura Ekiu v. U.S.* tolerated an act of Congress for the exclusion of aliens.⁶⁹ The Court followed the rationale that the United States as a sovereign and

62. See *Mathews*, 426 U.S. at 67.

63. See *Fialo v. Bell*, 430 U.S. 787 (1977).

64. See *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

65. See *Kliendienst v. Mandel*, 408 U.S. 753 (1972).

66. THOMAS A. ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 198 (West Publishing Co., 4th ed. 1998) (discussing *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), the *Chinese Exclusion Case*). The Court upheld the right of Congress to deny reentry to a Chinese laborer temporarily out of the United States. This case answered the question whether Congress could exclude aliens from the United States. The Chinese exclusion laws not only prevented new Chinese laborers from entering the United States, but also prohibited the return of Chinese who had been residents of the United States and had left with certificates valid under the 1882 and 1884 laws. *Id.*

67. *Id.*

68. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). A 6-3 majority declared that aliens remained "subject to the power of Congress to expel them, or to order them to be removed and deported from the country whenever in its judgment their removal is necessary or expedient for the public interest" and "the power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." *Id.* at 713-714.

69. *Nishimura Ekiu v. United States*, 142 U. S. 651 (1892). The Court, in sustaining the action of the executive department, putting in force an act of congress for the exclusion of aliens, said:

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate or through statutes enacted by Congress. *Id.*

independent nation is vested by the Constitution with the entire control of international relations, along with all the powers necessary to maintain that control, and to make it effective.⁷⁰ Pursuant to the Constitution, there has developed an elaborate body of immigration law which gives Congress practically unlimited authority to decide who may enter the United States and under what conditions they may remain.⁷¹

III. FERPA SHOULD APPLY TO FOREIGN STUDENTS BECAUSE IMPLEMENTATION OF SEVIS IS BAD POLICY AND WILL NOT STOP TERRORISM

The implementation of INS monitoring program, SEVIS, violates the rights of foreign students and is not an effective tool in the battle against terrorism.⁷² The implementation of SEVIS is expanding the INS's powers, not merely automating the current process of collecting student and exchange visitor data.⁷³ The SEVIS program is not unconstitutional, but is in contradiction with FERPA and singles out foreign students for anti-terrorism measures.⁷⁴

70. U.S. CONST. art. I, § 8, cl. 4 (stating “[t]he Congress shall have the power to establish a uniform rule of naturalization”); *see also* U.S. CONST. art. I, § 9, cl. 1 (stating “[t]he migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight”).

71. *See* U.S. CONST. art. I, § 8, cl. 4; *see also* U.S. CONST. art. I, § 9, cl. 1.

72. *See* Editorial, *Foreign Students Boost National Security; Keeping Our Universities Open to the World is Vital to Winning Hearts and Minds*, PITTSBURGH POST-GAZETTE, Jan. 9, 2002, at A11.

73. *See SEVP*, *supra* note 22 (demonstrating the mandates of section 641(c) of IIRIRA).

74. Pursuant to the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(g) (1974):

(a)(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. When a student turns 18 or enters college, the rights under FERPA transfer to the student.

(a)(3) For the purposes of this section the term “educational agency or institution” means any public or private agency or institution which is the recipient of funds under any applicable program.

(a)(4)(A) For the purposes of this section, the term “education records” means, those records, files, documents, and other materials which — (i) contain information directly related to a student; and (ii) are maintained

A. FERPA Protects Foreign Students

FERPA, also known as the Buckley Amendment, is a federal law designed to protect the privacy interests of students with respect to educational records that contain information about individual students.⁷⁵ FERPA requires that any school or institution that receives federal funds for education may not release school records or any other personally identifiable information without the prior consent of the student.⁷⁶ FERPA does not differentiate between the medium of storage or the method of transmission.⁷⁷ There is no legal difference between the level of protection afforded to physical files over those that are stored or transmitted electronically or any other form.⁷⁸ Therefore, the education records that can be transmitted through SEVIS are covered by FERPA.

by an educational agency or institution or by a person acting for such agency or institution.

(a)(5)(A) For the purposes of this section the term “directory information” relating to a student includes the following: the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(a)(6) For the purposes of this section, the term “student” includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b)(4B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information.

(b)(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any Federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program.

75. See generally Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 620-22 (1997).

76. See FERPA, 20 U.S.C. § 1232(g) (outlining the requirements of the act).

77. See David A. Banisar, *Privacy of Educational Records* (Jan. 1994), at <http://www.epic.org/privacy/education/school.html> (illustrating that the FERPA does not differentiate between electronic and physical files).

78. See *id.*

FERPA was enacted “to protect such individuals’ rights to privacy by limiting the transferability of their records without their consent.”⁷⁹ However, the INS has taken the position that “laws that protect students’ privacy do not apply to international students.”⁸⁰ This position is not supported in the language of FERPA.⁸¹ Even though FERPA does not mention foreign students, it does not exclude them and it is not limited to students who are U.S. nationals or permanent residents.⁸² International students have limited privacy rights under FERPA, however, more intrusive laws will create programs that would provide governmental agencies with background information without forcing the United States Attorney General to obtain a subpoena, as was previously required to release student information.⁸³

FERPA was adopted “after some discussion on the floor, but without public hearings or committee study and reports.”⁸⁴ Congress offered no opportunity to those affected by the Act to be heard on the merits of FERPA prior to its enactment.⁸⁵ Although there is no full legislative history for FERPA, one informative piece of legislative history, referred to as the Joint Statement in Explanation of Buckley/Pell Amendment⁸⁶ (“Joint Statement”) provides significant insight into the intent behind the Act. The Joint Statement begins with the purpose of the Act, which is to “protect individuals’ right to privacy by limiting the transferability of their records without their consent.”⁸⁷ The statement continues with “an individual has a right of privacy to information that an institution keeps on him, particularly when the institution may make important decisions affecting his future, or may transmit such personal information to parties outside the institution.”⁸⁸

79. See Daggett, *supra* note 75.

80. See Eyleen Schmidt, INS spokeswoman, *quoted in* Sarah McClellan, *International Students Past Subject of INS Searches*, TEXAS CHRISTIAN UNIVERSITY WIRE, Oct. 26, 2001.

81. See FERPA, 20 U.S.C. § 1232(g).

82. See *id.* at (g)(a)(6) (stating “[t]he term student includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution”).

83. See Schmidt, *supra* note 80.

84. See Daggett, *supra* note 75, at 620.

85. See Page Johnson, *Managing Student Records: The Courts and the Family Educational Rights and Privacy Act of 1974*, 79 ED. L. REP. 2 (1993).

86. 120 CONG. REC. 39,862 (Dec. 13, 1974) (statement of Sen. Buckley and Sen. Pell).

87. *Id.*

88. *Id.*

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In the Higher Education Act of 1992, FERPA was amended to create an exception for records collected by a law enforcement unit for “law enforcement purposes.”⁸⁹ Records falling under this provision are therefore, not subject to the requirements of FERPA.⁹⁰ Unfortunately, the only way that foreign students’ records, through SEVIS, will fit into the law enforcement purposes exception is if the INS begins to target foreign students as potential terrorists.⁹¹ The INS is doing precisely that by implementing SEVIS.⁹² The number of foreign students is very small when compared with the total number of non-immigrant aliens who cross the United States borders each year.⁹³ Foreign students represent only 1.8 percent of the 31 million non-immigrant aliens who obtained visas and entered the United States in 1999.⁹⁴ They also represent only a small portion - about 3.5% - of the total United States higher education enrollment.⁹⁵ Yet, the INS is targeting the foreign student community as potential terrorists because one of the hijackers of the September 11th attacks entered the U.S. on a student visa.⁹⁶

The foreign students are entitled to rights under FERPA as they are practically the same as United States students. They attend the same schools, sit in the same classes, and even pay higher tuition than American students.⁹⁷ They are entitled to the same rights and should not be labeled as potential terrorists.⁹⁸ The foreign students have “educational records” and these records need to be protected by FERPA.⁹⁹ Contrary to the legislative intent of FERPA, the government, by imple-

89. See Higher Education Amendments of 1992, Pub. L. No. 102-325, tit. XV, pt. H, § 1555(a), 106 Stat. 448 (1992) (to be codified at 20 U.S.C. § 1232g(a)(4)(B)(ii)).

90. See *id.*

91. See Anne E. Kornblut, *Proposed U.S. Watch On Foreign Students Sparks Controversy*, THE BOSTON GLOBE, June 6, 2000, at A1.

92. See *id.*

93. See 1999 Statistical Yearbook of the INS, at <http://www.ins.gov/graphics/aboutins/statistics/99yrtemp.htm> (providing the most recent available data from the INS).

94. See *id.*

95. See Higher Education and National Affairs American Council on Education, *Attacks Raise New Concerns About Foreign Student Visas* (Sept. 24, 2001), at <http://www.acenet.edu/hena/issues/2001/09-24-01/foreign.students.cfm> (discussing the percentage of foreign students).

96. See Hanjour, *supra* note 8; see also Schmemmann, *supra* note 1.

97. See Editorial, *Foreign Students are Valuable*, THE DAILY OKLAHOMAN, Jan. 30, 2002.

98. See Kornblut, *supra* note 91.

99. See FERPA, 20 U.S.C. § 1232(g).

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menting SEVIS, is not giving foreign students the choice to reveal their records to a third party.¹⁰⁰

Because students' information will be automatically entered into the SEVIS database at the time they apply for a student visa, foreign students will not have control over the access to their information.¹⁰¹ However, according to FERPA, educational information cannot be transferred to a third party without express permission from the student.¹⁰² However, because of SEVIS, foreign students do not have to give permission to access their information, because information is taken from them as soon as they are approved to attend a school in the United States.¹⁰³ Furthermore, the supply of information does not end with the application process.¹⁰⁴ When the students arrive in the United States their information and private records will continue to be accessed by the INS.¹⁰⁵ By allowing this practice, the government is expressly classifying foreign students as potential and/or suspected terrorists.¹⁰⁶

B. SEVIS Is Not an Effective Tool for Fighting Terrorism

By allowing the implementation of SEVIS, Congress is "overreaching," by expanding the power of the INS.¹⁰⁷ SEVIS will also monitor the students' activity on campus, from criminal activity to major fields of study.¹⁰⁸ Furthermore, the system will also monitor any changes in majors and "red flag" certain courses of study, such as nuclear physics.¹⁰⁹ If a foreign student enrolls to pursue a literature degree and

100. 120 CONG. REC. 39,862.

101. See Valarie H. McPherson, *Ramifications of New Anti-Terror Law*, NEW JERSEY LAWYER, THE LAW AND MORE, Dec. 10, 2001, at 7.

102. See FERPA, 20 U.S.C. § 1232(g).

103. See McPherson, *supra* note 101. After applying and being accepted to a U.S. school, "the educational institution sends a Form I-120 to the student, which the student presents at a U.S. embassy or consulate for a visa." See *id.* SEVIS implements a tracking system of students once they have been approved for a visa, prior to entering the U.S. See *id.*

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104. See Letter to the Editor, *Keeping Tabs on Foreign Students*, N.Y. TIMES, Feb. 4, 2002, at A22.

105. See *id.*

106. See Kornblut, *supra* note 91.

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107. See Letter to the Editor, *supra* note 104.

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108. See Prazuch, *supra* note 15 (illustrating the government's desire to track students as long as they continue to study in the United States).

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109. See *Scientific Freedom & Nat'l Security*, *supra* note 28 (explaining how SEVIS will monitor certain major fields of study).

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then switches their major to nuclear physics, the move will be monitored by the school as well as immigration officials.¹¹⁰ SEVIS should be limited to that information which is relevant to the INS; it should be used only to confirm that the student is still attending school.¹¹¹ The SEVIS program is excessively intrusive and the INS is not using the program to provide a service to the schools, as mandated by section 641(c) of IIRIRA, but to track terrorists.¹¹²

INS is not an agency that tracks terrorists and this power should not be delegated to them.¹¹³ Currently, schools are required to provide INS with the “current academic status” of a student, a definition that hinges on whether the student is attending school full time.¹¹⁴ The INS will redefine that term to include which major field of study the student is enrolled in.¹¹⁵ None of the acts mandate that institutions provide INS with the major of the students or provide the INS with the new major that the student changes to.¹¹⁶ The system that was introduced to automate the reporting process is being used as a tool to invade the privacy of foreign students, by accessing their information without consent and labeling them as potential terrorists.¹¹⁷ The government needs to stop placing additional burdens on foreign students, as they try to improve their lives through education.¹¹⁸ The government needs to address the problems of inefficient administration instead of implementing solutions that will not combat terrorism.

There is a need for better administrative procedures and monitoring of international students studying in the United States, and implementing SEVIS would do little to reduce terrorism and ensure national security.¹¹⁹ It would be like looking for a “needle in a haystack.”¹²⁰ To

110. See *Scientific Freedom & Nat'l Security, The National Commission on Terrorism Report: Impact on Foreign Students and Minorities*, at <http://www.aaas.org/spp/scifree/agenda.htm>.

111. See Ka Leo, *Electronic Tracking of Foreign Students a Cause for Concern*, HAWAII UNIVERSITY WIRE, Mar. 8, 2002.

112. See *Scientific Freedom & Nat'l Security*, *supra* note 28.

113. See *Scientific Freedom & Nat'l Security*, *supra* note 28.

114. See 8 C.F.R. § 214.3(g)(2) (defining “current academic status and indicating current reporting procedures required by the INS).

115. See Kornblut, *supra* note 91.

116. See Kornblut, *supra* note 91.

117. See Kornblut, *supra* note 91.

118. See *Tracking Int'l Students*, *supra* note 9.

119. See Editorial, *supra* note 72.

120. Michael Hedges, *Delays Hurt Foreign-Student Tracking; System Meant to Find Those Misusing was Stalled by Group of Senators*, THE HOUSTON CHRONICLE, Oct. 7, 2001, at A16.

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focus so much attention on such a small minority of nonimmigrants in the country will do little to improve national security.¹²¹ There is no reason to single out foreign students, who are already closely monitored by the universities, when millions of people illegally enter the United States each year.¹²² Monitoring the students will not help national security, as the SEVIS system requires documenting a foreign student as long as he/she is enrolled, and not after he/she graduates or drops out.¹²³ To monitor students outside the institutional boundaries will require a tremendous task force and the INS lacks the personnel to accomplish this.¹²⁴ INS currently has fewer than 5,000 inspectors to evaluate people at ports of entry and only about 2,000 intelligence officers to find people who overstay their visas or break the law while in the United States.¹²⁵ It will be very hard to monitor foreign students because the agents are “focused in a lot of different directions.”¹²⁶ Even in big cities, the immigration service typically assigns only one person to work on visas with colleges and myriad other schools offering subjects like computer, language, and flight training.¹²⁷ Catching immigrants who overstay their visas has been a “very very low priority and it should be a low priority.”¹²⁸

In March of 2002, a bureaucratic blunder made the INS a laughingstock, showcasing the agency’s weakness at a time when it already was under severe criticism after the September 11th attacks.¹²⁹ The INS approved student visas for the September 11th terrorists to study at Huffman Aviation, before their terrorist associations came to light.¹³⁰ On March 11, 2002, exactly six months after the terrorist attacks in New York and Washington, Huffman received the paperwork informing the men that their visas had been approved.¹³¹ The mistake

121. See Editorial, *supra* note 72.

122. See *id.*

123. See *id.*

124. See Zernike & Drew, *supra* note 45.

125. See Peddie & Laikin, *supra* note 47 (illustrating the lack of personnel in the INS’ task force).

126. See Zernike & Drew, *supra* note 45.

127. See *id.*

128. See Jack Kelly, *Bureaucracy, Complacency Aided Plotters*, PITTSBURGH POST GAZETTE, Sept. 30, 2001, at A18 (quoting Doris Meissner, INS commissioner during the Clinton administration).

129. See Tamara Lytle, *Congress Lambastes INS Chief; The Commissioner Answered for the Dead Terrorists’ Visas*, ORLANDO SENTINEL, Mar. 20, 2002, at A1.

130. See *id.*

131. See *id.*

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was another embarrassing gaffe for an agency that has long been criticized in Congress for sloppy management and inept record keeping and for being unable to control the borders or keep track of foreigners in the U.S. legally or illegally.¹³² “This shows the complete incompetence of the INS to enforce our laws and protect our borders.”¹³³ “This kind of thing happens all the time to people who aren’t terrorists, but then it’s not news. The very fact that this falls through the cracks tells you that they do not really own their own data, or have much control over what happens to it.”¹³⁴

INS officials have little grasp of the foreign student population, including how many are taking classes illegally or out of status.¹³⁵ Embarrassed by issuing visas to dead hijackers, the agency is struggling to prove it can reliably track anyone.¹³⁶ However, the INS has also failed to keep track of schools authorized to accept foreign students.¹³⁷ Although INS is supposed to review the schools every two years, the authorized list contains institutions that dissolved years ago, in one case, more than a decade ago.¹³⁸ As a result of these “blunders,” President Bush will likely accept a proposal from his domestic defense advisers to merge parts of the embattled INS and the Customs Service into a new agency that would exert firmer control over who and what enters the country.¹³⁹

These problems must be addressed at its roots, before students come to the United States. Each United States consulate sets its own interview policies and procedures for issuing student visas, prompting the practice of “consulate shopping” for less stringent application pro-

132. See David Johnston, *A Nation Challenged: The Hijackers; 6 Months Late, I.N.S. Notifies Flight School of Hijackers’ Visas*, N.Y. TIMES, Mar. 13, 2002, at A16.

133. See Rodney Crouther, *‘We Did it Right’; Six Months After the Sept. 11 attacks, a Venice Flight School Where 2 Hijackers Trained Received Their INS Student Visa Approval Forms, Providing the School Did Everything it Was Supposed To*, SARASOTA HERALD TRIBUNE, Mar. 13, 2002, at A1 (quoting Rep. James Sensenbrenner).

134. See Eggen & Thompson, *supra* note 25 (quoting Mark Krikorian, executive director of the Center for Immigration Studies). R

135. See Eggen & Thompson, *supra* note 25. R

136. See Abraham McLaughlin, *INS Reaches for High-Tech Silver Bullet*, CHRISTIAN SCIENCE MONITOR, Mar. 18, 2002, at 2.

137. See Robert Becker & Ray Gibson, *INS Student Visa System in Disarray; U.S. Loses Track of Schools; Some No Longer Exist*, CHI. TRIB., Mar. 17, 2002, at 1C.

138. See *id.*

139. See David E. Sanger & Eric Schmitt, *A Nation Challenged; The Borders; Bush Leans Toward New Agency to Control Who and What Enters*, N.Y. TIMES, Mar. 20, 2002, at A1.

cedures.¹⁴⁰ The U.S. must require a uniform standard level of investigation.¹⁴¹ Furthermore, not every consulate even requires a potentially revealing interview.¹⁴² Moderately selective schools are typically more curious when screening domestic applicants and they, unlike the consulates, do not bear the same core function of ensuring national security.¹⁴³ Even if applicants are granted a visa, it does not ensure entrance to the United States.¹⁴⁴ At the border, the INS can still deny admittance.¹⁴⁵ However, this should not be the last line of defense. The INS needs to be in contact with the consulates and see whom they may want to exclude from the country.¹⁴⁶

There is no way the United States can construct a system through which no terrorist could slip into and continue to remain a free society. The FBI already has all the authority they need to follow people with criminal intent.¹⁴⁷ Adding the additional burden of tracking every foreign student in the United States is running a significant risk of civil liberties infringements.¹⁴⁸ The government can violate the rights of foreigners, and have done so throughout history, in the interests of national security.¹⁴⁹ This is hardly one of those situations. The government might as well start monitoring domestic students as we do have domestic terrorists who we have schooled.¹⁵⁰

What will implementing SEVIS accomplish besides deterring foreign students from attending institutions in the United States? The INS lacks the personnel to track suspected terrorists in the United States.¹⁵¹ Immigration officials said that it was unclear if they would be able to hire more enforcement agents.¹⁵² The extra resources that INS has received in recent years has gone toward tightening the Mexican

140. See Christopher C. Horner, *Outside View: Student Visa Re-Education*, UNITED PRESS INT'L, Nov. 9, 2001.

141. See *id.*

142. See *id.*

143. See *id.*

144. See *id.*

145. See *id.*

146. See Christopher C. Horner, *Outside View: Student Visa Re-Education*, UNITED PRESS INT'L, Nov. 9, 2001.

147. See *id.*

148. See *id.*

149. See *supra* notes 52-66 and accompanying text.

150. See Fumento, *supra* note 2, and accompanying text.

151. See Zernike & Drew, *supra* note 45.

152. See Kate Zernike & Christopher Drew, *A Nation Challenged: Student Visas; Efforts to Track Foreign Students are Said to Lag*, N.Y. TIMES, Jan. 28, 2002, at A1.

border.¹⁵³ Even if a terrorist is coming to the United States on a student visa, he or she will not appear on any of INS' "lists."¹⁵⁴ That is why the September 11th terrorists were able to make it into the country.¹⁵⁵ Terrorists come in under false names, passports, and visas which make it almost impossible to stop them at the border.¹⁵⁶ INS commissioner, James Ziglar, agrees that SEVIS will not make U.S. safe and free of terrorism.¹⁵⁷ Senator Orrin Hatch added that "change in the way we conduct our immigration business will not, by itself, prevent terrorist attacks from occurring."¹⁵⁸ That is why we need to improve our consulates because it is a lot harder to track terrorists once they do make it into the United States.¹⁵⁹

C. Lack of Constitutional Support

The aforementioned policy arguments are the only arguments that can be made against the implementation of SEVIS, as infringement of privacy arguments cannot label SEVIS unconstitutional. Richard S. Murphy defines privacy as the "control of information concerning an individual person."¹⁶⁰ Pursuant to *Whalen v. Roe*, the Constitution does not afford protection for the control over information.¹⁶¹ In an era of computer data banks, the existence and scope of this right is of obvious importance.¹⁶² However, thus far the Court has rarely addressed the issue directly.¹⁶³

In *Whalen*, the Court treated privacy as a more expansive right, one not only protecting autonomy in making intimate decisions but

153. See *id.*

154. See *Tracking Int'l Students*, *supra* note 9 (explaining how terrorists will never show up on any "suspected terrorist list").

155. See *Tracking Int'l Students*, *supra* note 9.

156. See *id.*

157. See Schultz, *supra* note 18 (stating "[t]here is no quick fix, technological or otherwise, to the problems we face").

158. See Evan P. Schultz, *Is Open Immigration Now Part of Our Past?*, *LEGAL TIMES*, Nov. 12, 2001, at 50.

159. See *id.*

160. See generally Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 *GEO. L.J.* 2381 (1996).

161. 429 U.S. 589 (1977).

162. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 806 (Aspen Publishers, Inc. 2001).

163. Although the Supreme Court has not yet used the right to privacy under the Due Process Clause to provide a right to control information, other constitutional provisions are relevant. For example, the Fourth Amendment limits the ability of the government to gather information about individuals, generally requiring a warrant based on probable cause before a person can be searched. *Id.*

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also the “interest in avoiding disclosure of personal matters.”¹⁶⁴ The Court in *Whalen* held that New York’s collection and storage of drug-prescription data, including the names and addresses of patients receiving drugs with a high potential for abuse,¹⁶⁵ did not threaten either confidentiality or autonomy.¹⁶⁶ The Court reasoned that the statutory safeguards to prevent dissemination of the potentially damaging information to the public adequately protected the individual’s interest in nondisclosure.¹⁶⁷ The Court deemed disclosure by the patients to the state an essential part of modern medical practice and thus, not an impermissible invasion of privacy.¹⁶⁸ The *Whalen* opinion suggests that the government’s duty to avoid public disclosure of personal information it stores may be rooted in the Constitution,¹⁶⁹ but statutory safeguards against public disclosure¹⁷⁰ permitted the Court to decline to determine the constitutionality of government publication of personal information.¹⁷¹

Therefore, pursuant to *Whalen*, the scheme set forth in SEVIS is constitutional. However, the Court did not reject the possibility that the right to privacy might be recognized in the future to include a right to control information.¹⁷² Anomalously, the Court concluded its

164. 429 U.S. at 599-600.

165. In *Whalen v. Roe*, doctors and patients challenged the constitutionality of the New York State Controlled Substance Act of 1972, N.Y. Pub. Health L. §§ 3300-3396, on grounds that its requiring computer storage of prescription data (including the identification of patient, physician, pharmacist, drug, and dosage) impaired patient’s rights to make private decisions autonomously ad to keep personal information confidential. 429 U.S. at 599-600.

166. *Id.* at 600.

167. *Id.* at 600-02. The Court also reasoned that because the state did not entirely prohibit the use of Schedule II drugs nor condition access to them on consent of third parties, the individual was not deprived of the right to decide, with the advice of a physician, to use the medication. *Id.* at 603.

168. *Id.* at 602.

169. *Id.* at 605. The Court equated the constitutionally protected “interest in avoiding disclosure of private matters” with “the right of an individual not to have his private affairs made public by the government.” *Whalen*, 429 U.S. at 599. The Court also acknowledged that the government’s duty to avoid unwarranted disclosure of personal information in some circumstances “arguably has its roots in the Constitution.” *Id.* at 605.

170. *Id.* at 593-95. The computer tapes are kept in a locked cabinet; when the tapes are in use, no terminals outside the computer room can read the information; and public disclosure of patients’ identifies is prohibited by the statute. *Id.* at 593-94.

171. *Id.* at 605-06.

172. *Id.*

opinion with a “word about issues we have not decided.”¹⁷³ SEVIS requires an unwarranted disclosure of information and in *Whalen*, the Court declined to address the constitutionality of unwarranted disclosure.¹⁷⁴ The Court found that the statute adequately protects confidentiality and declined to decide issues that unwarranted disclosure might raise.¹⁷⁵ In doing so, the Court seemed to eviscerate its prior recognition of a right to nondisclosure. The Court noted that the government’s duty to keep information private was only “arguably” constitutional.¹⁷⁶ Thus, the Court took away with one hand what it had already given with the other.¹⁷⁷ Therefore, although there is a strong argument that the Constitution should be interpreted to protect a right to control information, making SEVIS unconstitutional, there is far little support for such a right from the Supreme Court.¹⁷⁸

Aside from the privacy issue, SEVIS would also be found to be constitutional based on the lack of “academic freedom” afforded to the universities by the First Amendment.¹⁷⁹ In *Bakke*, Allan Bakke was ejected twice for admission to the Medical College of the University of California at Davis.¹⁸⁰ Bakke, a white male, challenged the two-track admissions program,¹⁸¹ which he claimed violated his rights under the

173. *Whalen*, 429 U.S. at 605.

174. *Id.* at 605-06.

175. “We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data – whether intentional or unintentional – or by a system that did not contain comparable security provisions.” *Id.* (opinion of Stevens, J.).

176. *Id.* at 605.

177. See Bruce E. Falby, *A Constitutional Right to Avoid Disclosure of Personal Matter; Perfecting Privacy analysis in J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981), 71 GEO. L.J. 219, 229 (1982).

178. CHEMERINSKY, *supra* note 162, at 808-9.

179. *Regents of University of California v. Bakke*, 438 U.S. 265, 312 (1978) (stating “academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment”).

180. *Id.* at 276.

181. Bakke applied to medical school in 1973 and 1974. *Id.* At issue was the medical school’s two-track admissions program which had a general admissions program and a special admissions program. *Id.* at 272. The special admissions program was directed at minorities and was designed to “increase the representation of ‘disadvantaged’ students in each medical school class.” *Id.* at 272-73. Sixteen out of one hundred places in the entry class were reserved for minorities in the special admissions program. *Id.* at 275. Unlike candidates in the general admissions program, candidates in the special admissions program did not have to meet the 2.5 grade point average cut-off, nor were they ever compared to candidates in the general admissions program. *Bakke*, 438 U.S. at 275. In each of the two years that Bakke was rejected, applicants in the special admissions

Equal Protection Clause of the Fourteenth Amendment by excluding him based on his race.¹⁸²

Justice Powell, writing for the plurality, cast the swing vote in *Bakke*.¹⁸³ He concluded that the medical school's special admissions program could not be upheld.¹⁸⁴ While applying strict scrutiny to an affirmative action program in higher education, Justice Powell found in *Bakke* that diversity was a compelling state interest that justified racial classification. Powell wrote that the attainment of a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education."¹⁸⁵ In doing so, the Court invoked the four essential freedoms of "academic freedom," which "though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."¹⁸⁶ These four essential freedoms include the freedom "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."¹⁸⁷ Because the medical school "invoked a countervailing constitutional interest, that of the First Amendment[,] . . . [it] must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission."¹⁸⁸ Powell went on to note that the interest in diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics, of which racial or ethnic origin is not a single, though important element.¹⁸⁹ Thus, the right of colleges and universities to select students who will contribute the most to the robust exchange of ideas is a countervailing consti-

program were admitted with significantly lower grade point averages, MCAT scores, and benchmark scores than Bakke. *Id.* at 277.

182. Bakke also claimed violations of his rights under the Equal Protection Clause of the California Constitution and under Title VI of the Civil Rights Act of 1964. *Id.* at 278.

183. See Scott L. Olson, *The Case Against Affirmative Action in the Admissions Process*, 59 U. PITT. L. REV. 991, 993 (1997) (stating that "[d]espite the lack of a single opinion in *Bakke*, Justice Powell's opinion has generally been regarded as the Court's primary viewpoint.").

184. *Bakke*, 438 U.S. at 320 (opinion of Powell, J.). Justice Powell, however, based his decision on constitutional grounds. "The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment." *Id.*

185. *Id.* at 311-12.

186. *Id.* at 312.

187. *Id.* at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

188. *Id.*

189. *Bakke*, 438 U.S. at 315.

tutional interest. Powell stressed, however, the importance of viewing each student's application individually in order to determine its quality and quantity of diversity. Therefore, SEVIS will be found to be constitutional because "academic freedom" extends only to the choice of classroom curriculum, the appointment of faculty, and the freedom to select a student body that best serves the interests of higher education.¹⁹⁰

IV. DIVERSITY IN THE STUDENT BODY—A COMPELLING GOVERNMENTAL INTEREST

Because SEVIS is not unconstitutional, a statute like FERPA needs to protect foreign students. Because achieving diversity in an educational setting is a compelling state interest,¹⁹¹ there are additional policy reasons to protect foreign students. By implementing SEVIS, which will reduce the number of foreign students in the U.S., U.S. students will be deprived of association with a diverse student body.

In *Bakke*, Justice Powell determined that the University's only constitutionally permissible goal was the attainment of a diverse student body.¹⁹² He viewed the attainment of a diverse student body as an academic decision deserving of judicial deference because it fell within

190. *Id.* at 312 (citing *Sweezy*, 354 U.S. at 263).

191. *Id.* at 276.

192. *Id.* at 311-12. In his biography of Justice Powell, John C. Jeffries, Jr., discusses the origins of the *Bakke* opinion and the conflict that led to Justice Powell's reconciling the use of race-based preferences with the guarantees of the Equal Protection Clause. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR., AND THE ERA OF JUDICIAL BALANCE 475-76 (Macmillan Library Reference 1994). Jeffries gained insight from Bob Comfort, Justice Powell's law clerk, who contributed research and insight on the *Bakke* opinion. In discussing the constitutional permissibility of diversity as a compelling state interest, Jeffries notes that [a]s a justification for minority preferences, Comfort argued, diversity was better than compensation — better, because more limited. Compensation implied that all groups hurt in the past could now claim offsetting preferences. Diversity reached only those who currently remained unrepresented. Diversity cut against affirmative action for Asians or others who had made it on their own. Also, Comfort favored diversity because of the flexible way that such concerns traditionally had been dealt with: "When Harvard College receives applications from Idaho farmboys, it does not establish a separate admissions track for them. It does not insulate them from comparison with other applicants and guarantee them a number of safe seats. Instead, it takes the fact of geographical origin as one factor weighing in the farmboy's favor when he is compared against all other applicants. . . ." Race should be handled the same way. Since race was "simply one ingredient of educational diversity," it was "unnecessary to isolate racial minorities from comparison with other applicants." This, said Comfort, was the crucial defect in the Davis program. It was not that Allen Bakke fell short when compared to the minority admittees. "Rather, Bakke was not compared with them at all." *Id.*

the University's right of academic freedom.¹⁹³ Justice Powell noted that "[t]he freedom of a university to make its own judgments with regard to education includes the selection of its student body."¹⁹⁴ As a result, the Court permitted the University, as a separate autonomous entity, to rely on countervailing First Amendment guarantees of academic freedom to protect its right to make admission decisions.¹⁹⁵

Justice Powell cited *Keyishian v. Board of Regents*¹⁹⁶ for the proposition that diversity serves an academic interest because "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."¹⁹⁷ Because diversity in higher education is not susceptible to direct proof, courts must rely on the testimony of educators regarding

193. *Bakke*, 438 U.S. at 311-12.

194. *Id.* at 312.

195. *Id.* at 313. For a criticism of this view, see Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity"*, 1993 WIS. L. REV. 105 (1993). Professor Foster criticizes Justice Powell's reliance on the First Amendment as justification for the use of race-based criteria within the context of a "speech paradigm," which she defines as "whether First Amendment values are sufficiently promoted by the policies to justify the affirmative inclusion of historically excluded individuals." *Id.* at 121. She argues that this framework is flawed because it "ignores the broader equality concerns underlying the enactment of the policy at issue in that [Bakke] case." *Id.* at 122. As further explanation for her position, she notes: Powell could find no principled way, under a speech paradigm, that an institution could value one person's viewpoints or ideas over another person's viewpoints or ideas. Diversity, under a speech paradigm, is purely forward-looking in that the exclusive goal is to multiply the variety of viewpoints and ideas brought into an institutional setting. Unlike the traditional equality paradigm [which is defined as "whether past inequities, and their present effects, justify affirmative attention to differences such as race in the distribution of societal benefits and burdens"], a speech paradigm fails to acknowledge the social context in which differences, and viewpoints, exist. Hence, it does not take into account past inequities toward certain differences, and their present effects on persons possessing those differences, and thus on their viewpoints. Thus, a speech paradigm cannot justify differential treatment on the basis of characteristics such as race in distributing scarce social goods. *Id.* Professor Foster favors the alternative analysis set forth by the majority opinion in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which also used First Amendment principles to justify the need for diversity. Professor Foster argues: The majority, under the equality paradigm predominant in its other equal protection cases, retained its focus on historical inequities, and their present effects, in concluding that diversity was a sufficient justification for the race-conscious FCC policies at issue. What was clearly of paramount importance in justifying the FCC policies in *Metro Broadcasting* was that minority beneficiaries of the policies, and hence their viewpoints, were significantly under-represented because of historical exclusion of minorities in the broadcasting industry. Foster, *supra*, at 195.

196. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1966).

197. *Bakke*, 438 U.S. at 312-13 (quoting *Keyishian*, 385 U.S. at 603).

the benefits of diversity. Educators have witnessed firsthand the benefits that diverse student bodies bring to their educational institutions over time.¹⁹⁸ Such individuals are extremely knowledgeable about the learning process and the complexity of functioning inside and outside of the classroom.¹⁹⁹

The benefits of such diversity extend to all of the students in the classroom. Just as minority and underprivileged students can benefit from learning mainstream ideas and values, those students coming from an affluent background or those without diverse cultural knowledge can better understand and learn in a diverse environment.²⁰⁰ For those unfamiliar with minority cultures or ideas, diversity provides the opportunity to interact with and meet those from different backgrounds and value systems,²⁰¹ an experience all the more necessary for those entering the legal profession.²⁰² Students of all races and backgrounds benefit from a diverse student population, for the process of assimilation, rejection, and modification of a wide range of ideas constitutes the very definition of higher education.²⁰³

Diversity can mean anything from student body variety in race, class, gender, culture, physical disability, religion, or age,²⁰⁴ to differences in mindset and experience.²⁰⁵ While all forms of diversity are

198. See James A. Washburn, *Beyond Brown: Evaluating Equality in Higher Education*, 43 DUKE L.J. 1115, 1115 (1994) (declaring that integrated schools will better educate all of America's youth and give minority students wider contacts and greater self-confidence while suppressing the possibility of inferiority complex).

199. See *id.*

200. See Foster, *supra* note 195, at 138-39 (explaining the benefits to all viewpoints from an exchange of diverse ideas).

201. See Paul Brest & Miranda Oshige, *Affirmative Action For Whom?*, 47 STAN. L. REV. 855, 862-63 (1995) (presenting a comprehensive explanation of the intellectual and academic value of diversity for both minorities and other students).

202. See Leslie Yalof Garfield, *Squaring Affirmative Action Admissions Policies with Federal Judicial Guidelines: A Model for the Twenty-First Century*, 22 J.C. & U.L. 895, 914 (noting the benefits to "innocent third parties").

203. See Eulis Simien, *The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action*, 12 T. MARSHALL L. REV. 359, 369 (discussing the benefits of a diverse student body).

204. See Note, *An Evidentiary Framework for Diversity As a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357, 1357 n.5 (1996); see also Robert A. Destro, *ABA and AALS Accreditation: What's "Religious Diversity" Got to Do With It?*, 78 MARQ. L. REV. 427, 427-28, 454 (1995) (providing discussion on role of religious diversity in law school admissions and accreditation).

205. See Frank H. Wu, *A Call for Class Action: The Remedy by Richard D. Kahlenberg*, LEGAL TIMES, June 24, 1996, at 78 (book review) (indicating that diversity of viewpoints is given short shrift in quest for academic diversity).

beneficial to the educational experience, racial diversity rises to the level of a compelling interest for several reasons. First, racial diversity exposes students to new perspectives, cultures and thoughts, allowing for a “cross-fertilization of ideas” that is necessary for positive and productive interpersonal relations in a modern, melting-pot society.²⁰⁶ Second, racial diversity aids in the reduction of the growing disparity in educational achievement between whites and the nation’s ever-growing minority population.²⁰⁷ Third, racial diversity is indivisible from any type of effective remedial affirmative action program or policy.²⁰⁸ Stated differently, racial diversity in higher education is a compelling governmental interest because “race, gender, and ethnicity are the most important issues we face as a society,”²⁰⁹ because student body diversity “has a direct, immediate, and positive . . . impact” on education,²¹⁰ and because society cannot afford an uneducated minority population.²¹¹ This last premise — that a society has a duty to educate all its members — is perhaps the most compelling evidence of the necessity of racial diversity in higher education.²¹²

Politicians have joined the media in failing to inform the public of the many benefits that international students and scholars bring to the U.S.; instead they have chosen to lead the public to believe that if the government would just tighten controls on international student and

206. See Barbara Bader Aldave, *Affirmative Action: Reminiscences, Reflections, and Rumination*, 23 S.U. L. REV. 121, 128 (1996) (contending that “those of us who interact with persons of diverse cultures and backgrounds will be largely immune to the stereotyping that can poison our attitudes toward each other and our relationships with each other”); see also Okechukwu Oko, *Laboring in the Vineyards of Equality: Promoting Diversity In Legal Education Through Affirmative Action*, 23 S.U. L. REV. 189, 205 (1996) (contending that student body diversity is desirable for purpose of exchanging views and sharing ideas).

207. See Note, *supra* note 204.

208. See *Hopwood v. Texas*, 861 F. Supp. 551, 571 (W.D. Tex. 1994) (stating that “without affirmative action, the law school would not be able to achieve . . . diversity”), *rev’d*, 78 F.3d 932, 946 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996); Cf. Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1631-32 (1990) (opining “social privileges are accorded based on race” and that privileges “will continue to be so allocated, unless members of society act affirmatively to change that status quo”).

209. Roger Abrams, *The Threat of Hopwood*, N.J. L.J., May 13, 1996, at 31.

210. *Id.*

211. See Barbara Bader Aldave & Al Kauffman, *Our Institutions Should Offer Equal Opportunity*, HOUS. CHRON., Mar. 28, 1996, at A41 (addressing consequences of race-neutral admissions in America).

212. See *id.*

scholar visas, “we would be much safer.”²¹³ “There are a few senators that feel they need to show they’re doing something, and this is an easy, very visible area.”²¹⁴ California Senator Dianne Feinstein suggested, after September 11th, the U.S. should cease granting student visas for six months.²¹⁵ She stated, “I have a concern that . . . students came in from terrorist-supporting states as Iran, Iraq, Sudan, Libya, and Syria.”²¹⁶ However, the September 11th terrorists came from Saudi Arabia and Egypt.²¹⁷ Following Feinstein’s logic should students from those countries be banned too? And why just students? Why not tourists? Business people? All Arabs? All Muslims? All immigrants? This thinking does not make sense, however, to a worried public it does.²¹⁸ “What happened on September 11th was not about immigrants or foreign students, it was about evil.”²¹⁹

A former U.S. Secretary of Education Richard W. Riley wrote, “[T]hese student ambassadors, who make lasting friendships in America and better understand our values and way of life, are the future world leaders with whom we will sit down to forge alliances around the globe.”²²⁰ Many Americans may be surprised to learn just how many foreign leaders have been educated in the U.S., among them: King Abdullah of Jordan; United Nations Secretary General Kofi Annan, from Ghana; Jacques Chirac, president of France; Vicente Fox, president of Mexico; Shimon Peres, former prime minister of Israel; and many others from more than 60 countries around the world.²²¹

Advanced industrial countries view foreign student programs as means of providing economic assistance to less developed regions.²²² Others view foreign students as an economic boon.²²³ In fact, tuition paid by foreign students contributes toward paying for American stu-

213. See Editorial, *supra* note 72 (describing the one sided description of foreign students). **R**

214. See Zernike & Drew, *supra* note 45 (quoting George Beers, Dean of International and Distance Education at Foothill College in Los Altos Hills, California). **R**

215. See Schultz, *supra* note 18. **R**

216. See *id.*

217. See *id.*

218. See *id.*

219. See *id.* (quoting INS Commissioner James Ziglar).

220. See *id.*

221. See *id.*

222. See Bryan P. Christian, *Workshop Report: Transatlantic Workshop on High Skilled Migration*, 14 GEO. IMMIGR. L.J. 907, 908 (2000)

223. See *id.*

dents.²²⁴ However, in February of 2001, Florida legislature failed to take note of this fact.²²⁵ Many foreign graduate students serve as research assistants, providing important labor in exchange for part of the cost of education.²²⁶ Corporations recruit heavily among foreign students, and the students themselves become productive and easily assimilated members of the host society.²²⁷

Educating foreign individuals ensures that current and future world leaders are exposed to the cultural, political, economic, and educational values of America.²²⁸ Secretary of State Colin Powell has stated, "I can think of no more valuable asset to our country than the friendship of future world leaders who have been educated here."²²⁹ The United States must find a way to achieve both the security objectives that ensure the protection of its citizens at home and the openness that assures its strong and effective leadership around the world.²³⁰ To sacrifice one at the expense of the other would be shortsighted and detrimental to our nation's strategic position in the world community.

224. See Editorial, *supra* note 97.

By law, foreign students are barred from receiving financial aid and loans, state or federal. Students at an undergraduate level have no means to fund their education other than personal resources (part-time jobs on campus, family, foreign governments or private sponsors). Graduate and post-graduate students can qualify to pay reduced tuition only if they contribute as a teaching or research assistant. No taxpayer money is ever used to help a foreign student with his or her education. As a best kept secret in the "educational industry," universities often go on road-shows overseas to recruit foreign students. They are a highly sought-after commodity. Why? Foreign students always pay out-of-state tuition. A figure that local students almost never bother to look at, out-of-state tuition is usually five times the tuition paid by in-state students or two times the real cost of that education. The excess money serves as financial aid for local students. See *id.*

225. See Joe Follick, *Florida House Panel Blocks Aid for Alien Students*, THE TAMPA TRIBUNE, Feb. 6, 2002. Saying they are apt to be tools of "terrorists" and "thugs", a House committee approved a bill that would deny state financial assistance to nonresident aliens attending Florida schools. However, it is already illegal for nonresident aliens to receive any financial assistance. See *id.*

226. See Christian, *supra* note 222. R

227. See *id.*

228. See Editorial, *supra* note 72. R

229. See *id.*

230. See Editorial, *Foreign Students Boost National Security; Keeping Our Universities Open to the World is Vital to Winning Hearts and Minds*, PITTSBURGH POST-GAZETTE, Jan. 9, 2002, at A11.

V. CONCLUSION

The implementation of SEVIS will reduce the number of foreigners coming to study in the United States. The idea of treating people as potential terrorists is not welcoming. These students may chose to study in England or Australia or any other country that wants them. The National Association of Foreign Student Advisors (NAFSA) predicts that between 15% and 30% of the English language program population will choose other English-speaking countries (primarily Australia, Canada, and England) if SEVIS moves forward.²³¹

The impending SEVIS regulations will have a disastrous effect by adding complexity to visa regulations and damaging United States' competitiveness for foreign students. Other countries will gladly take the \$12.3 billion that these students contribute to our economy.²³² The U.S. needs to act and it needs to act now. However, implementation of SEVIS will be short-sighted at best. But under no circumstances should the rights of foreign students be taken away. The U.S. cannot say no to education and it cannot say no to international understanding. If U.S. allows the September 11th attacks to shut the doors of the nation to international educational and cultural exchange, it will pay immeasurably in the loss of friendship, goodwill, and understanding around the world.²³³ The U.S. must determine our immigration policy by the Statue of Liberty and not by the ruins of Lower Manhattan. The continued commitment of the U.S. to support international educational and cultural exchange is essential in order to secure long-term victory in the war on terrorism.²³⁴

David Treyster

231. See Letter to INS, *supra* note 39.

232. See *id.*

233. See Editorial, *supra* note 72.

234. See *id.*

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