Noncitizen Students and Immigration Policy Post-9/11

IHELG Monograph

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IHELG

20TH ANNIVERSARY

1982-2002
Noncitizen Students and Immigration Policy Post-9/11

Victor C. Romero

I. Introduction

My task is to describe the post-9/11 world for noncitizen students and scholars in light of recent federal legislation. Specifically, I want to focus on three laws, two already enacted and one pending in Congress: the USA Patriot Act of 2001, the Border Commuter Student Act of 2002, and the proposed Student Adjustment Act, currently pending. In all three, we see Congress trying to walk the fine line between providing fair access to postsecondary education to noncitizen students and guarding against the possibility that such institutions are being used as a springboard for terrorist activity, knowing, for example, that a few U.S. flight schools were training grounds for several of the 9/11 hijackers.

II. The USA Patriot Act of 2001

The USA Patriot Act (Uniting and Strengthening America by Providing Appropriate Tools Require to Intercept and Obstruct Terrorism Act) of 2001 has been reviewed primarily for its expansion of the Attorney General’s powers to detain and investigate alleged terrorists, both citizen and noncitizen, but has received much less attention from legal scholars for its effects on U.S.

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1 Professor of Law, Penn State-The Dickinson School of Law. (C) 2002 Victor C. Romero. I thank Prof. Michael Olivas and my research assistant, Jen DeMichael, for their help with this talk, which was delivered at the Immigration Law Section program of the Association of American Law Schools Annual Meeting on Jan. 4, 2003.

colleges and universities. Apparently concerned that six of the nineteen 9/11 terrorists were believed to have studied at flight schools in the U.S., Congress included within the Patriot Act several provisions designed to facilitate government access to information on possible terrorist activity on campus. While provisions involving government monitoring of on-campus use of information technology and laboratories for possible biological and environmental hazards\(^3\) affect both citizens and noncitizens, I want to focus more specifically on two provisions that are most likely to impact international students: Section 507, which allows the government access to student records in certain situations,\(^4\) and Section 416, which requires schools to more closely monitor certain foreign students.

A. Section 507: Disclosure of Student Information

Section 507 amends the Family Educational Rights and Privacy Act (FERPA), a law that generally withholds federal funding from educational institutions that disclose a student’s education record without either the student’s or parent’s\(^5\) consent. FERPA does, however, allow disclosure under certain circumstances, for example, in the case of a health or medical emergency. Section 507 of the Patriot Act provides yet another exception to FERPA by allowing the Attorney General or his designee access to student records pursuant to an *ex parte* court order in connection with a terrorism investigation. In addition, educational institutions complying with such orders need not record this disclosure, nor may they be held liable for records produced in good faith compliance with such

\(^3\)See Nicole Rivard, *USA Patriot Act: How to be Response Ready*, University Business, May 2002, at 43, 45.

\(^4\)Similar to Section 507 is 508, which allows the government access to student information from the National Center for Education Statistics, pursuant again to an *ex parte* court order. While this might implicate foreign nationals, it has yet to come into play.

\(^5\)If the student is under 18. See generally Letter from LeRoy Rooker, Director, Family Compliance Office, U.S. Dept. of Education, *Recent Amendments to FERPA Relating to Anti-Terrorism Activities*, Apr. 12, 2002, at 1 ("Rooker Letter").
Although this provision could potentially affect both foreign and U.S. students, the FBI has both pre- and post-the Patriot Act sought information from colleges and universities on international students only. In the weeks following the September 11 attacks, the FBI asked colleges and universities for information on their foreign students, around 200 of which chose to comply. Some in Congress believe that Section 507 was specifically written to require the FBI to first seek a court order before approaching universities with such a request.

Apparently, the FBI did not get the message. Section 507 notwithstanding, the Washington Post reported last week that the FBI had issued a new request for personal information on all foreign students and faculty at colleges and universities nationwide. The request asks for the “names, addresses, telephone numbers, citizenship information, places of birth, dates of birth and any foreign contact information” for all teachers and students who are non-U.S. citizens. The FBI plans to compare any information collected with the Justice Department’s Foreign Terrorist Tracking Task Force database.

Needless to say, the legality of the FBI’s request has been questioned by some. In a letter to Attorney General John Ashcroft, Senators Ted Kennedy and Patrick Leahy questioned whether the request complied with the Patriot Act, since it was not pursuant to a court order in connection with a terrorism investigation. In response to the request, the Association of American College Registrars and Admissions Officers advised its 10,000 members that they might be legally liable if they disclosed information not pursuant to a valid court order or subpoena. The FBI disagrees. FBI spokesman Bill Carter told the Post that its position was that the agency could request the

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information, but that the colleges need not comply with the request.

The international reaction to this most recent FBI request is similarly mixed. Malaysia’s largest student organization decried the request as another example of the American government’s post-9/11 anti-terrorism paranoia; the president of the organization suggested that the U.S. contact the Malaysian embassy directly should it find evidence of individual wrongdoing rather than issuing a blanket request. In contrast, Malaysia’s Education Bureau chief Dr. Adham Baba found the creation of an FBI database useful so that the home authorities would be able to track their students abroad. In addition, Dr. Baba was surprised at the students’ objection to such a request given that they were required to reveal such information to the U.S. State Department when applying for their visas in the first instance.\footnote{Malaysia’s Biggest Student Association Slams U.S. “Phobia,” IRNA On-Line, Dec. 27, 2002 (available at http://www.irna.com/en/head/021227125633.ehe.shtml).}

This seemingly cavalier attitude toward potential privacy breaches is shared by some international students here who come from nations where such information is generally known by law enforcement agencies.\footnote{Scott Carlson and Andrea L. Foster, Colleges Fear Anti-Terrorism Law Could Turn Them into Big Brother, Chronicle of Higher Educ., Mar. 1, 2002.} Other students, however, have expressed genuine fear that any follow-up questioning by U.S. authorities based on the information gathered might lead to their permanent detention, conjuring up stories of not-so-benign “visits” by police in their home countries.

While I agree with the FBI that nothing in Section 507 of the Patriot Act prevents the FBI from asking for a voluntary disclosure of student record information, FERPA also likely creates liability for unconsented disclosures. Notwithstanding foreign students’ differing opinions on the privacy right issues involved, colleges and universities should be concerned about losing federal
funding should they violate FERPA by disclosing student information without first obtaining student consent or requiring a court order. While some institutions might understandably be sympathetic to the FBI’s concerns about maintaining accurate databases on foreign students in light of the ongoing war against terrorism, they should also realize that improper disclosures might lead to losses in federal funding.

**B. Section 416: Monitoring of Foreign Students through SEVIS**

Unlike their disclosures to the FBI, colleges and universities obtain the consent of all F-1, J-1, and M-1 student visa holders to disclose certain immigration-related information when these students apply for their visas. For example, the I-20 form signed by F-1 students contains the following consent notice: “I authorize the named school to release any information from my records which is needed by the INS pursuant to 8 C.F.R. § 214.3(g) to determine my nonimmigrant status.”

Moreover, under Section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the Attorney General, in consultation with the State and Education Departments, is authorized to collect information from colleges and universities on all foreign students. Failure to comply forfeits a school’s ability to further enroll international students.

Section 416 of the Patriot Act was enacted to fill in the gaps left open by previous legislation by: (1) requiring that IIRIRA’s monitoring system be fully funded and operational by this past January 1, 2003; (2) collecting specific information on the date and port of entry of all foreign students and scholars; and (3) expanding the types of schools subject to this monitoring system to include air flight schools, language training schools, and other vocational institutions.

On December 11, 2002, INS issued its final rule implementing SEVIS, the Student and

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9Rooker Letter (USDOE), supra.
Exchange Visitor Information System designed to put Section 416 into action. The primary innovation behind SEVIS is that it is an Internet-based system which allows U.S. educational institutions and exchange program sponsors the opportunity to share information about international students, exchange visitors, and their dependents.\(^\text{10}\) The final rule requires that schools keep records for the following visa holder categories and their dependents: F-1 (students), M-1 (vocational students), and J-1 (exchange students and faculty).\(^\text{11}\) In the fact sheet accompanying the issuance of its final SEVIS rule, the INS touted the following as improved measures to maintain updated information on foreign students and scholars: 1) schools will be required to report a student’s failure to enroll; 2) SEVIS will allow for electronic transmission and exchange of information; and 3) SEVIS will facilitate the creation of a more accurate database though the expedient release of requirement changes, better dissemination of student information updates, closer monitoring of schools, and the like.\(^\text{12}\) Authorized schools must comply with SEVIS by this coming January 30, 2003.

In contrast with the FBI’s access to student information, few are bothered by the INS’s access to similar information, to the extent that such information has already been voluntarily


\(^{11}\)For instance, schools must keep the following information for F-1 and M-1 students: name, date and place of birth, country of citizenship, current address where the student and his or her dependents reside; the student’s current academic status; date of commencement of studies; degree program and field of study; whether the student has been certified for practical training, and the beginning and end dates of certification; termination date and reason, if known; the documents referred to in paragraph (k) of this section; the number of credits completed each semester; and a photocopy of the student’s I-20 ID Copy. 8 C.F.R. § 214.3(g)(1).

disclosed by the international student upon applying for the relevant visa. A larger concern is how this information might be used. While no one quibbles with the idea that the INS should be able to strictly enforce the terms of a foreign student’s stay, a recent report alleging INS abuse suggests that some vigilance and oversight might be appropriate.

On December 27, 2002, the Associated Press reported that, although finally released on bond, at least six Middle Eastern students were detained for up to 48 hours because they were not taking enough college credits, which was a violation of their student visas.\textsuperscript{13} According to a University of Colorado official, one of their students was jailed because he was one hour shy of a full course load after the college had permitted him to drop a course. None of the students were charged with any other offense. The INS had found out about these students’ course loads when they showed up to register pursuant to the December 16 deadline imposed upon all males 16 or older holding nonimmigrant visas from Iraq, Iran, Syria, Libya, and Sudan.\textsuperscript{14} In response, Colorado State University has decided to hold classes run by an immigration lawyer to apprise international students of the law.\textsuperscript{15}

While the foregoing might more appropriately be a criticism of the special registration laws than of SEVIS and while it would be unfair to fault the entire INS for the acts of a few agents, last week’s arrests should cause some concern over how the INS plans to use the wealth of information it


will now have available via the SEVIS network.

III. The Border Commuter Student Act of 2002

One group of students that are not subject to the December 11 SEVIS final rule are part-time border commuter students. Unlike F-1 students who live across either the Mexican or Canadian borders and are pursuing their studies full-time at U.S. colleges and universities, part-time border students are not eligible for student visas, which the INS had intended to enforce this past fall semester. Approximately 2,300 such part-timers attended three Texas schools along the Mexican border – El Paso Community College, New Mexico State University, and the University of Texas at El Paso (UTEP) – at the time enforcement was discussed, affecting not just the students but certain university departments as well.\(^\text{16}\) UTEP spokeswoman Christian Clarke-Casarez estimated that their Mechanical and Electrical Engineering Department would suffer greatly, as it attracts many working professionals from nearby Juarez, Mexico.

In response, Congress passed and President Bush signed the Border Commuter Student Act of 2002\(^\text{17}\) which created new F-3 and M-3 categories of student visa holders, permitting them to take college courses part-time without having to enroll in a full degree program. Specifically, only Canadian or Mexican nationals who reside in their home country and commute to a U.S. school for full- or part-time course work are eligible.

Unlike the privacy and enforcement concerns over the Patriot Act’s provisions, the Border Commuter Student Act is a practical, workable, and narrow exception to the existing student visa

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\(^{17}\) Pub. L. 107-274 (H.R. 4967) (Nov. 2, 2002).
categories that strikes a fair balance between welcoming foreign students and maintaining national security. It would be fair to wager that the INS’s forthcoming rules implementing the use of these new part-time student visas will be similarly practical, recognizing the much smaller scale such oversight would entail.

IV. The Proposed Student Adjustment Act of 2001

Aside from full-time and part-time international students, one other group deserves our attention post-9/11, and that is undocumented students. Specifically, the issue that has been discussed in legal and academic circles over the past year\(^ {18}\) is the extent to which undocumented immigrants should qualify for financial assistance – either in the form of federal aid or in-state tuition – to attend post-secondary school.

While the Supreme Court’s twenty-year-old decision in Plyler v. Doe\(^ {19}\) mandates states to provide free primary and secondary education to undocumented children, there exists no equivalent constitutional requirement that undocumented high school graduates be offered a subsidized college education. Indeed, IIRIRA Section 505 prevents states from granting in-state tuition benefits to resident undocumented students unless it provides the same to out-of-state U.S. citizens.\(^ {20}\)

Over the past year, many stories have surfaced about high school valedictorians who have

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\(^{19}\)457 U.S. 202 (1982).

\(^{20}\)\"[Any noncitizen] who is not lawfully present in the United States shall not be eligible on the basis of residence within a State ... for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.\"
been effectively precluded from attending college because they were ineligible for state residency and hence, in-state tuition benefits. Indeed, in one infamous case, Congressman Tom Tancredo called for an INS investigation of one Jesus Apodaca, an honors student who could not afford to attend the University of Colorado because his undocumented status rendered him ineligible for residency.

Immigrant education rights activists have proceeded on both the federal and state fronts. At the federal level, bills in both houses stalled in the 107th Congress. Moreover, the Bush Administration has failed to take a position on this issue.\textsuperscript{21} One bill in particular, the proposed Student Adjustment Act of 2001, is worth examining in more detail: First proposed in the House of Representatives in May 2001, the Student Adjustment Act ("SAA") addresses the two primary bars to undocumented immigrants' enrollment in public colleges and universities -- undocumented status and poverty -- in three specific ways. First, the SAA repeals IIRIRA 505, returning to the states the unfettered power to determine residency requirements for in-state tuition benefits at public schools. Second, it permits undocumented students to adjust their immigration status to lawful permanent residence, provided they comply with certain age, character, educational, and residency requirements. And third, it allows adjusting immigrants the opportunity to apply for federal financial aid. In brief, the SAA allows undocumented immigrants the same opportunities for postsecondary education and post-college work as the law currently provides lawful permanent residents.

Notwithstanding the stalled progress on the congressional front, tireless advocates like

\textsuperscript{21}See DREAM Act News, MALDEF Legislative Update, December 2002.
our moderator, Professor Michael Olivas, have pushed for states to enact legislation qualifying undocumented students for state residency status, thereby rendering them eligible for tuition subsidies. Over the past few years, Texas, California, New York, and Utah have all passed legislation complying with IIRIRA Section 505 while allowing undocumented students to benefit from in-state tuition rates, the last three during this post-9/11 era. Others, including North Carolina, Washington, Minnesota, and Wisconsin, have also examined the issue recently. In the wake of this positive trend among the states, immigrants’ rights advocates simultaneously suffered a setback in Virginia. While there is no law that prohibits public colleges and universities from admitting undocumented persons, Virginia’s Attorney General issued a memorandum earlier this fall stating that, as a matter of policy, Virginia’s public institutions should not admit them because doing so would displace competing U.S. citizens or lawful permanent residents.  

Moreover, Virginia’s law precludes undocumented persons from possessing the requisite “domiciliary intent” to qualify for in-state tuition.

Overall, it is fair to say that progress on the hill has been slow, but building, while the states continue to be a positive venue for change, Virginia’s views notwithstanding. Perhaps not unexpectedly, advocates are pushing for passage of the federal Student Adjustment Act because it would provide uniform relief for all undocumented students regardless of their state of residency, as well as allowing for adjustment of their undocumented status so that they can work lawfully upon completion of their studies, something state legislation cannot do. Should the

\[22\text{See Memorandum from Alison P. Landry, Assistant A.G. of Virginia, re: Immigration Law Compliance Update, Sept. 5, 2002, at 5.}\]

\[23\text{Id.}\]
issue of amnesty for undocumented immigrants become viable once more, the SAA might be a first, conservative step in the right direction that should be attractive to federal legislators reluctant to favor a much broader bill. Unlike the blanket amnesty of 1986, the SAA is a limited, “earned” amnesty, providing much needed relief to undocumented persons who, by dint of their hard work and future promise, should become full members of our polity. Viewed this way, the SAA is a narrow exception to the general law against undocumented immigration, much like the recent Border Commuter Student Act of 2002 exempts part-time students from the strictures of the Patriot Act.

V. Conclusion

In sum, I take the positive trend toward postsecondary education benefits for undocumented students and the recent passage of the Border Commuter Student Act as healthy signs that we are beginning to understand the danger in the equation “foreign student equals international terrorist.” Yet, I remain wary of the abuse of executive power that might follow the acquisition of information about international students and scholars endorsed by the Patriot Act, especially in light of the barely week-old news reports from Colorado and Washington hinting at the same. Hopefully, once the executive branch is able to effectively establish and test its monitoring and registration requirements, it will be better able to guard against further overreaching. In the meantime, I hope that others – such as the educational institutions, advocacy groups, federal legislators, and state governments who work with noncitizen students – continue to explore creative ways to balance our need for national security against our role as a world leader in university education.