Tracking Immigrants in the United States: Proposed and Perceived Needs to Protect the Borders of the United States

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Tracking Immigrants in the United States: Proposed and Perceived Needs to Protect the Borders of the United States

It is often stated that the United States is a nation of immigrants. Despite this truth, the country’s leaders often have questioned the wisdom of maintaining a country that is open to immigration. The debate concerning the proper methods to track immigrants once they have entered the United States is ongoing. At several critical moments in the United States’s history, immigration policies have been scrutinized and modified.

Most recently, the commercial airplanes that crashed into the World Trade Center, the Pentagon, and a field in Pennsylvania on September 11, 2001, have drawn attention to the nation’s immigration policy. Of the nineteen terrorist hijackers, all were believed to have entered the United States legally, and many had been residing in the United States for a significant period of time. At least three of the nineteen hijackers had overstayed their authorized period of time in the United States and should have been deported. However, since there was not a significant tracking policy in place, nothing was done to deport the individuals.

The horrific events of September 11, 2001, directed attention to current immigration policies and created significant discussion.

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1 See Peter Brimelow, Time to Rethink Immigration?, in IMMIGRATION: DEBATING THE ISSUES 33, 38 (Nicholas Capaldi ed., 1997).
2 See id. at 45–47.
4 See Brimelow, supra note 1.
5 See, e.g., Ragavan, supra note 3.
6 Id.
8 See Ragavan, supra note 3.
on how they should be shaped to increase effectiveness. Representative F. James Sensenbrenner, Chairman of the House Judiciary Committee, which oversees the Immigration and Naturalization Service (INS), had a strong negative reaction to the role of the INS as it related to the terrorist attacks. He stated, "[t]he INS is so dysfunctional it's time to scrap it. The INS does not enforce the law either for those aliens who don't belong here or those aliens who legally come here and want to obey that law." The September 11th attacks certainly indicated that the INS system, as it was currently operating, had to undergo a major renovation.

After the INS approved visa extensions for two of the September 11th hijackers almost six months after the two men had died in the terrorist attacks, many shared Sensenbrenner’s belief that the INS failed to do its job. In response to the visa extension, President George W. Bush ordered an investigation into the blunder, calling the INS action “inexcusable” and a “wake-up call” for INS leaders. Infuriated that document mismanagement resulted in such a tremendous blunder, Attorney General John Ashcroft said: “Individuals will be held responsible for any professional incompetence that led to this failure, and inferior INS quality-control mechanisms will be reformed.”

In response to the attacks on September 11, 2001, the Justice Department is seeking to deport approximately 6,000 men of Middle Eastern origin who have ignored deportation orders. The orders were given because the men, most of whom have expired visas, are in the United States illegally.

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9 Id.
10 Id. at 16.
11 Id.
14 Id.
16 See id.
Based on the 2000 census, the Census Bureau reported that 114,818 Middle Eastern men and women are in the United States illegally.\textsuperscript{17} Census officials have estimated that 8.7 million illegal immigrants were in the country in 2000, twice the number residing in the United States in 1990.\textsuperscript{18}

Officials are concerned not only with the high number of people who are choosing to stay in the United States illegally but also with potential terrorist attacks that could result from a lax immigration policy.\textsuperscript{19} Steven A. Camorata, research director at the Center for Immigration Studies, stated,

\begin{quote}
[w]hile the vast majority of illegals from the Middle East are not terrorists, the fact that tens of thousands of people from that region and millions more from the rest of the world can settle in the United States illegally means that terrorists who wish to do so face few obstacles.\textsuperscript{20}
\end{quote}

One of the major areas of immigration policy identified for evaluation is the practice of tracking immigrants once they have legally entered the United States. This article explores the organization of the current immigration policy and examines whether a more aggressive system of tracking immigrants is necessary to protect the best interests of the United States.

The first part of this comment will present an overview of the current INS system.\textsuperscript{21} The second part of this comment will discuss immigration practices and concerns since September 11th. Also, the second part will examine the legislation and policies the United States created in response to the terrorist attacks, and it will examine the heightened concern for tightening immigration controls.\textsuperscript{22} This comment will conclude that the technology and

\textsuperscript{17} Id.

\textsuperscript{18} Id.

\textsuperscript{19} See Ragavan, supra note 3, at 23. Classified intelligence reports sent to government policymakers in the summer of 2002 estimate that as many as 5,000 people in the United States, most of whom are Middle Eastern men, are suspected of either being or supporting al Qaeda terrorists. Bill Gertz, 5,000 in U.S. Suspected of Ties to al Qaeda, WASH. TIMES, July 11, 2002, at A1.

\textsuperscript{20} Marquis, supra note 15.

\textsuperscript{21} See infra notes 24–63 and accompanying text.

\textsuperscript{22} See infra notes 64–267 and accompanying text.
intelligence is available to make effective tracking a reality, but more dollars and attention are needed before the INS and the United States can handle any necessary tracking plans or devices.23

I. A Brief Overview of the INS and Current U.S. Immigration Policy

The most obvious goal of the United States’s immigration policy is to determine how many non-citizens will be allowed to enter the United States each year.24 Also, the INS has been responsible for determining which persons will be allowed to enter the country based on criteria such as nationality, employment status, and family relations.25

As a sovereign nation, the United States has a fundamental right to control its borders and determine who the citizens of the nation are, as well as who can reside in the country and seek employment.26 Historically, the United States has had a generous immigration policy.27 Currently, immigrants are eligible for status as legal residents and can stay and work by receiving an immigration visa.28

Immigration policy is a charged, political issue because it allows for immigration preferences and is inherently discriminatory.29 The stated U.S. immigration policy has always been geared to what is in the nation’s best interest.30 The notion of what is in the nation’s best interest has changed over time to include admission policies that are based on diversity purposes, national origin, family reunification, employment needs, and

23 See infra notes 268–294 and accompanying text.


25 See id. at 28. For a brief history of the predominant immigration acts in U.S. history, see id. at 21–29.


27 See id.

28 Id.

29 See id. Immigration policy is inherently discriminatory: regardless of the immigration procedures being used, some individuals will be left out because they do not meet certain criteria or particular standards. Id.

30 Id. at 61.
humanitarian concerns.\textsuperscript{31}

Realizing that there was a need for the nation to have a comprehensive immigration policy, an immigration office was created in 1864.\textsuperscript{32} For the next four years, a Commissioner of Immigration was appointed to regulate the transportation and settlement of "emigrants."\textsuperscript{33} However, none of the regulations created had any effect on the separate immigration boards and organizations that were formed in each of the states.\textsuperscript{34} The position lasted only four years, when the law was repealed and matters concerning immigration were left entirely to the states.\textsuperscript{35}

In 1891, Congress passed a new Immigration Act that placed immigration concerns back within federal control.\textsuperscript{36} The new Superintendent of Immigration was under the auspices of the Secretary of the Treasury.\textsuperscript{37} In 1903, the Bureau of Immigration moved to the Department of Commerce and Labor.\textsuperscript{38} The naturalization branch of the immigration service began when Congress passed the Naturalization Act of 1906.\textsuperscript{39} The actual responsibilities and organization of the immigration and naturalization offices continued to fluctuate until 1940 when the current INS office was moved to the Department of Justice for the purpose of providing more effective control over aliens during a period of increasing international tension.\textsuperscript{40}

When the United States began a system of immigration control, it was based on nationality and ethnic considerations. Since the Immigration and Nationality Amendments of 1965, the immigration policy has shifted to one that places an emphasis on

\textsuperscript{31} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} See id.
family reunification, needed skills, and recognition of refugees.\textsuperscript{41} The 1965 Amendments established "permanent annual 'preferences' for a limited number of skilled and unskilled immigrants coming to the United States to perform jobs for which no U.S. workers were readily available."\textsuperscript{42}

The Immigration Act of 1990 brought more sweeping changes, encouraging diversity of immigrants by admitting individuals from countries that are underrepresented in the United States and increasing the number of immigrants who are allowed to enter for employment purposes.\textsuperscript{43} The last major change in the immigration policy came in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which focused on removing immigrants from the United States who were within the borders of the United States illegally.\textsuperscript{44}

\textsuperscript{41} Id.


\textsuperscript{43} Id.

\textsuperscript{44} See, e.g., Federation for American Immigration Reform, \textit{Illegal Immigration Reform and Immigrant Responsibility Act}, at http://www.fairus.org/html/03206010.htm (last visited Nov. 3, 2002) (on file with the North Carolina Journal of International Law and Commercial Regulation). INS judges are currently lobbying Congress to be moved out from under the direction of the Department of Justice. Cheryl W. Thompson, \textit{Immigration Judges Seek Independence From Justice Dept.}, \textit{WASH. POST}, Feb. 1, 2002, at A9. The judges are frustrated by the lack of control they are given in determining the immigration cases they hear and in determining the verdict that they give. \textit{Id.}

According to officials, it is unlikely that the INS judges will be moved from the Department of Justice umbrella. \textit{Id.} The judges' lobbying was in part prompted by Attorney General John Ashcroft's announcement in February 2002 that he plans to reduce the panel of judges who hear immigration appeals to one single judge. \textit{Id.}

Ashcroft's goal is to eliminate the backlog of immigration cases because reviews by a single judge can occur more quickly, as the current appeal process may take up to seven years. Associated Press, \textit{Ashcroft to Reduce Appeals Judges, Speed Deportation Orders}, at http://www.usbc.org/info/everything/0202reduceappealsjudges.htm (Feb. 6, 2002) (on file with the North Carolina Journal of International Law and Commercial Regulation). There is currently a backlog of 56,000 immigration cases. \textit{Id.}

Ashcroft also anticipates cutting the number of judges hearing these cases to eleven, down from twenty-three. \textit{Id.}

Ashcroft complained that some immigration attorneys have been intentionally filing appeals to the board to delay the immediate deportation of their clients. \textit{Id.}

The new rules have been submitted to the Federal Register for the comment period. \textit{Id.}

Senator Ted Kennedy, chairman of the Senate Judiciary Immigration Committee, reacted by stating that he was "seriously concerned about the attempt to further reduce an immigrant's right to seek review of his or her case before an appellate judge." \textit{Id.}

Other
Critics argue that the U.S. immigration policy is failing because there is no nationally stated objective for immigration. As the number of illegal immigrants in the United States has grown to approximately ten million individuals, there are four million foreign-born persons legally living in the United States who are waiting for the INS to clarify their residency status. George J. Borjas, a public policy professor at Harvard’s School of Government, faults the United States for not placing enough weight on the economic potential of immigrants in setting immigration policy. Currently, one of the most likely methods for gaining entry into the United States is by relative sponsorship. The immigrants that have been allowed into the United States through this system have earned less and are more dependent on government aid than native-born Americans.

The United States gains illegal immigrants in one of two ways. First, illegal immigration occurs when people seeking entry into the United States find that they are ineligible for immigrant or nonimmigrant visas and manage to cross the U.S. border anyway. Illegal immigration also occurs when legal immigrants overstay the time limits of their visas and manage to evade detection and deportation. In response to the concerns that the United States is being flooded with illegal immigrants, the INS critics of the proposed plan believe that the single judge appeal system will make it more difficult to win appeals and will curtail immigrants' civil liberties. Id.


Id.

Id.

Id.

Id. In 1998, statistics showed that immigrants earned 23% less, on average, than native born Americans and 20% of immigrants were receiving some form of government aid. Id. Only 13% of American born individuals were receiving government aid in 1998. Id. Borjas argues that the United States should adopt a policy similar to that of Canada, New Zealand, or Australia. Id. All of these countries award points to visa applicants based on specific characteristics, and determine a level that all immigrants must pass. Id. All three nations consider age, education level, and English proficiency as factors in their immigration formula. Id. Family connections are considered as well, but they are only one of the variables. Id.

Scanlan, supra note 42, at 92.

Id.

Id.
The INS has continually worked to increase border control and document fraud, among other tactics.\textsuperscript{53}

The President's Fiscal 2002 Immigration Budget, released in April 2001, requested a 10\% increase over the agency's funding for 2001.\textsuperscript{54} The 2002 proposed budget requested $5.1 billion.\textsuperscript{55} The 2003 budget, released in February 2002, requested a total of $6.3 billion.\textsuperscript{56} The 2003 budget requested over 2,200 new positions, 1,790 of which would be for additional border enforcement personnel.\textsuperscript{57}

The INS has an enormous job. According to Census 2000 figures, the United States is accepting immigrants at a faster rate than at any time since the 1850s.\textsuperscript{58} The presence of immigrants has increased 57\% since 1990, accounting for 11.1\% of the nation's population.\textsuperscript{59} The agency processes more than six million green cards and citizenship applications each year as well as 100,000 refugee admissions and 65,000 asylum cases.\textsuperscript{60} Concurrently, the agency conducts enforcement operations that result in more arrests per year than any other law enforcement agency in the world.\textsuperscript{61} All of this is done with a current staff of

\textsuperscript{53} \textit{OVERVIEW, supra} note 32.


\textsuperscript{55} \textit{Id.}


\textsuperscript{57} \textit{Id.}

\textsuperscript{58} Stephen Dinan, \textit{Immigration Growth of '90s at Highest Rate in 150 Years}, \textit{WASH. TIMES}, June 5, 2002, at A3.

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} Ragavan, \textit{supra} note 3. In the months following September 11, 2001, the applications for U.S. citizenship surged. Mary Beth Sheridan, \textit{Citizenship Applications Up Sharply Since September 11, Anxiety, Allegiance Spur New Requests}, \textit{WASH. POST}, Jan. 20, 2002, at A1. The INS reported that 145,765 people applied for citizenship in October and November 2001, up 61\% from the same period in 2000. \textit{Id.} While some of the rush may be due to the upcoming increase in application fees, the INS believes that it is also tied to a sense of vulnerability and patriotism of foreign residents. \textit{Id.}

\textsuperscript{61} Ragavan, \textit{supra} note 3. Yearly, the agency has approximately 50,000 criminal
35,000 and is managed with an aging computer system. In fact, the agency is predominately paper-based. For example, the INS accepts paper visitor entry cards that may take weeks to enter into the database, if they are entered at all. The responsibilities of INS continue to increase. However, if the INS remains in its current state, then it cannot meet all of the demands that are being placed on it. Major renovation and reorganization is essential.

II. Immigration Post-September 11th

Shortly after September 11th, Washington officials scrutinized the nation's immigration policies and decided they needed a change. On September 11, 2001, the House of Representatives was scheduled to vote on a piece of legislation referred to as "245(i)." This pro-immigration legislation would have allowed illegal aliens to adjust their status without leaving the United States.

If passed, the legislation would allow people who live in the United States in violation of immigration laws to receive green cards from local INS offices, rather than requiring them to travel abroad and seek the necessary papers at consular offices. For investigations, more than one million arrests, 300,000 court cases, and 175,000 deportation hearings, resulting in 1,200 deportations each week. Id.

62 Id.
63 Id.
64 Despite the heightened fear of terrorists among foreign visitors after September 11, 2001, a federal study after the attacks found that U.S. immigration officials were failing to consistently check terrorist watch lists against the passport information from foreign visitors entering the United States without visas. Associated Press, Developments in the Sept. 11 Attacks, 2002 WL 11686060, at http://www.westlaw.com (last visited Nov. 3, 2002) (on file with the North Carolina Journal of International Law and Commercial Regulation).

66 Id.
67 Id. The 245(i) amnesty has been extended twice before. Joseph A. D’Agostino, Bush Is Still Pushing 245(i) Amnesty, HUMAN EVENTS, May 20, 2002, at http://www.humaneventsonline.com/articles/05-20-02/dagostino.htm (on file with the North Carolina Journal of International Law and Commercial Regulation). The White House estimates that up to 200,000 illegal aliens could be eligible to receive green cards via 245(i), most of whom are from Mexico. Id. President Bush and most congressional Democrats favor the amnesty. Id. House Minority Leader, Dick Gephardt, spoke out against Republican attacks on 245(i), stating, “[i]t is disappointing to see that in spite of
several months, it was believed that 245(i) would be buried indefinitely. But, due in large part to his Mexican ties, President Bush has once again been pushing for the reinstatement of 245(i), and many members of Congress are in agreement. While the legislation will likely be brought up and passed, the immigration debate in Washington has shifted from one that is dominated by questions of access to one of control.

As an initial response to the perceived terrorist threat, President George W. Bush issued an Executive Order establishing the Office of Homeland Security on October 8, 2001. The mission of the Office of Homeland Security is “to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks.”

In carrying out its mission, the Office of Homeland Security is to coordinate its efforts with executive departments and agencies, state and local governments, and any necessary private entities. The Executive Order specifically mentions the need for this new department to facilitate the exchange of information among the agencies and offices that relate to immigration.

One of the major objectives of the Office of Homeland Security is to ensure that all intelligence-gathering organizations have the technological capabilities they need to adequately coordinate their efforts, thereby better protecting the United States. The language in the order may be interpreted to

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68 See Miller, supra note 65 (“To the extent that the amnesty measure survives at all, it will downshift into a guest-worker program for agriculture, whose advocates feel compelled to speak in terms of what they call ‘food security’.”).

69 D’Agostino, supra note 67.

70 Miller, supra note 65. In negotiations and talks with Mexico, the current White House administration is still speaking favorably about 245(i) and making indications that the administration will continue to work for passage of 245(i). D’Agostino, supra note 67.


72 Id.

73 Id.

74 Id.

75 Id.

Id.
encompass a need for the INS to have an updated and technologically sophisticated method for keeping track of immigrants in the United States, particularly those who are believed to have any possible terrorists ties or relations.\textsuperscript{76}

On October 17, 2001, before the Senate Judiciary Committee, Subcommittee on Immigration, James W. Ziglar, the Commissioner of the Immigration and Naturalization Service, testified regarding effective immigration controls to deter terrorism.\textsuperscript{77} In his address, he responded to the Executive Order of the President. In his remarks, Commissioner Ziglar stated:

If we are to meet the challenges of the future, we need to make changes at the INS and we are in the process of making those changes. The structure of the organization and the management systems that we have in place are outdated and, in many respects, inadequate for the challenges we face. Our information technology systems and related processes must be improved in order to ensure timely and accurate determinations with respect to those who wish to enter our country and those who wish to apply for benefits under our immigration laws. The management restructuring of the INS is on its way – a mandate the President and the Congress have given me – and the improvement of our information technology systems is moving ahead and can be accomplished with the help and support of Congress.\textsuperscript{78}

President George W. Bush responded to the need to improve U.S. immigration by issuing a Presidential Directive to improve immigration policies and practices and make it more difficult for terrorists to enter and remain in the United States.\textsuperscript{79} Through the

\textsuperscript{76} Id. The Office of Homeland Security is given the responsibility to "facilitate collection" of terrorist threats. Id. In order for the INS to report this type of information to the Office of Homeland Security in a timely manner, a more updated computer system needs to be put into place. Id.


\textsuperscript{78} Id.

Homeland Security Council, the President intends to create a foreign terrorist tracking task force.\textsuperscript{80} The task force will coordinate Federal programs that are “designed to: (1) deny entry into the U.S. of aliens associated with, suspected of being engaged in or supporting terrorist activity; and (2) locate, detain, prosecute, or deport any such aliens already present in the United States.”\textsuperscript{81} The Presidential Directive also orders a thorough review of student visa policies and calls for better coordination of immigration and customs policies between the United States, Canada, and Mexico.\textsuperscript{82}

The Directive instructs the agencies to work together to meet the necessary initiatives.\textsuperscript{83} The document “directs the Attorney General and Secretary of the Treasury to enhance the investigative and intelligence analysis capabilities of the INS and the Customs Service, and to increase INS and Customs special agent personnel assigned to Joint Terrorism Task Forces.”\textsuperscript{84} It instructs “the Office

\begin{flushleft}
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id. The initial description of the job of the director of the Office of Homeland Security included the responsibility of coordinating the efforts of “all the agencies in the intelligence community.” Richard K. Betts, \textit{Fixing Intelligence}, 81 FOREIGN AFF. 43, 55 (2002). This responsibility of coordinating is the exact function that the office of Director of Central Intelligence (DCI) was created for in the National Security Act of 1947. Id. The office of DCI was to oversee and coordinate planning and resources among the intelligence activities of the military services, the State Department, and the Central Intelligence Agency. Id. As the intelligence community has grown, the DCI has remained the official in charge of coordinating all of their functions. Id. The DCI has always been limited by the authority of the Secretary of Defense and many outside the ‘inner circle’ of the intelligence community do not realize the true position that the DCI holds. Id. Referring to the DCI official as the ‘Director of the CIA,’ is misleading as it leads to the conclusion that the DCI is only an agency head of the CIA. Id. Knowing this, the question arises of whether the job created for Tom Ridge as the Director of Homeland Security will prove to be more effective in coordinating the efforts of the intelligence community. Some have called for the President to act as the chief coordinator of homeland defense because Ridge’s position provides him with only advisory capacity. Michael Killian, \textit{Report On Terror Urges U.S. to Reshape Response Tactics}, Chi. Trib., Jan. 9, 2002, at 10. Ridge has no formal authority over the Coast Guard, the FBI, the Federal Emergency Management Agency, the INS, or several other agencies who deal with terrorism concerns. Id.
\end{flushleft}
of Science and Technology Policy to work with the Attorney General and the Director of Central Intelligence to make recommendations on advanced technology that could be used to aid immigration enforcement." Critically, the Directive also instructs the “Office of Management and Budget to work with the Attorney General, the Secretary of State, the Secretary of the Treasury and the Assistant to the President for Homeland Security to develop a budgetary plan” so that all of these directives can be financially supported. Looking at its development a year later, the Homeland Security Office has begun to take a shape all its own.

President Bush’s interest and dedication to immigration policy appears to be extending well into 2002 and well beyond the confines of the relationship that may exist between terrorism and immigration. The President’s proposed budget requests a 23% increase in the INS’s budget for 2003. However, all of the President’s directives hinge on whether Congress will choose to fund the initiatives that he has proposed.

Not only was the Office of Homeland Security created in response to September 11th, but Congress also responded to the attacks with the USA PATRIOT Act. On October 26, 2001, President Bush signed the USA PATRIOT Act into law. The USA PATRIOT Act was Congress’s first response to the terrorist threat facing the United States after September 11th. The bill was considered to be a rush job by some, making sweeping changes to

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85 White House, supra note 79.
86 Id.
87 Mike Allen, Bush Cites Domestic Priorities for 2002: Health, Immigration Top President’s List, WASH. POST, Jan. 1, 2002, available at www.usbc.org/info/everything/0102domesticpriorities.htm. From his comments in Texas, the President made it clear that the government will continue to use immigration laws aggressively for the purpose of interrogating and detaining foreign nationals who might have information about terrorists. Id. Bush stated:

We’re looking at our immigration policies. We’re looking at border policies, both with Canada and with Mexico. And we’ll continue doing what we’re doing now, which is any time we get a lead, we’re going to disrupt – we’re going to bring them in and give them a chance to protect Americans. Id.

88 Ragavan, supra note 3.
many areas of law, including current law enforcement and surveillance powers.\textsuperscript{90}

This rush job has consequently precipitated the need of several other bills to clean-up and re-address some of the same issues encompassed by the USA PATRIOT Act. The USA PATRIOT Act is 342 pages long and makes changes to over fifteen different statutes.\textsuperscript{91} The Act addresses immigration issues, with a strong slant toward curbing terrorism by adding law enforcement within the boundaries of the United States.\textsuperscript{92}

When Congress convened in January 2002, members were expected to have immigration and security matters high on their agendas.\textsuperscript{93} Before adjourning in 2001, the House unanimously passed a new security bill sponsored by Representative James Sensenbrenner (R-Wis.) and Senator Edward Kennedy (D-Mass.).\textsuperscript{94} The pre-conference legislation passed the House by a voice vote and “was poised to pass the Senate before adjournment in December.”\textsuperscript{95} However, the Senate vote was postponed after a member protested that the bill was too large a concern to be considered so quickly.\textsuperscript{96}

The legislation later won passage in the Senate on April 19, 2002, by a vote of 97 to 0.\textsuperscript{97} The bill was then quickly followed by a House vote accepting the minor changes in the legislation made

\textsuperscript{90} Electronic Frontier Foundation, EFF Analysis of the Provisions Of The USA PATRIOT Act That Relate To Online Activities (Oct. 31, 2001), at www.eff.org/Privacy/Surveillance/Terrorism_militias/20011031_eff_usa_patriot_analysis.htm (on file with the North Carolina Journal of International Law and Commercial Regulation).

\textsuperscript{91} Id.


\textsuperscript{94} Id.

\textsuperscript{95} Stephen Dinan, Approval Seen on Visa Rules; Senate Bill Includes Shared Agency Data, WASH. TIMES, Jan. 15, 2002, at A4.

\textsuperscript{96} Id.

\textsuperscript{97} Robert Pear, Bill on Border Security and Immigration Passes in House, N.Y. TIMES, May 9, 2002, at A34.
by the Senate by a vote of 411 to 0. As enacted, the legislation will greatly tighten the U.S. border and will increase governmental control over immigration. In discussing the bill, Representative Sensenbrenner stated:

The September 11th terrorist attacks vividly illustrate how acutely vulnerable our immigration system is to exploitation by those aliens who wish to harm Americans. This legislation makes needed changes to our immigration laws such as requiring new biometric visas and strengthening the foreign student tracking system. Such efforts will have a real impact in fighting terrorism and preventing exploitation of our immigration laws in the future.

The new law, entitled the Enhanced Border Security and Visa Entry Reform Act of 2002, encompasses a wide variety of concerns regarding immigration that have been discussed after September 11th. The Border Security legislation addresses and expands on a number of the issues that were raised and proposed in the USA PATRIOT Act and further develops some of the initial responses that were in the USA PATRIOT Act. As a whole, the Enhanced Border Security and Visa Entry Reform Act is very similar to the Presidential Directive issued on October 29, 2001.

As adopted, the Border Security Act of 2002 will greatly alter the process of tracking immigration in the United States as well as alter the way that Americans view immigration. The INS estimates that the Border Security Act of 2002 will cost $1.2 billion in the first year of implementation and $3.2 billion over three years. Since the Border Security Act of 2002 will greatly

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98 Id.
99 Id.
102 Congressional Research Service query on H.R. 3525 (on file with the North Carolina Journal of International Law and Commercial Regulation).
103 White House, supra note 79.
104 Robert Pear, A Nation Challenged: Domestic Security; Senate Passes Bill to
affect U.S. immigration policy and procedure, it is important to look at the specifics of the legislation. Nevertheless, the

effectiveness of the new law depends entirely on whether Congress appropriates adequate resources for implementation.105

A. INS Personnel – More People to Do More Work

The Border Security Act of 2002 begins by authorizing budget appropriations for hiring and training additional governmental personnel.106 This personnel increase allows for at least 200 new full-time INS inspectors and associated support staff during the years of 2003 through 2006, well over the amount authorized by the USA PATRIOT Act.107 Likewise, the legislation calls for an additional 200 INS investigators and 200 additional Customs Service Inspectors.108

The Border Security Act of 2002 also provides for increased salaries for Border Control agents and inspectors, for inspections assistances, and for certain support staff.109 In increasing the pay for Border Control agents as well as investigators, the hope is that the quality of the work will increase. The Border Security Act of 2002 also provides additional monies for training agents and inspectors.110 With the increased responsibilities of the inspectors specified within the Act, for immigration processes to occur in a manner that is remotely timely, it is essential that the work force be substantially increased.

The Border Security Act of 2002 created the demand for these positions, but the funding for those jobs is not yet secure.111 The

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107 Id.
108 Id.
109 Id. Tom Ridge, Director of Homeland Security, has made border security one of his main priorities. Mike Allen & Bill Miller, Bush Proposes Tracking System for Noncitizens, WASH. POST, Jan. 26, 2002, at A11, available at http://www.usbc.org/info/everything/0102trackingsystem.htm. His goal is to tighten safeguards but also keep commerce flowing smoothly. Id. This will be a difficult balance to reach because approximately 1.4 million people and 360,000 vehicles cross the U.S. border daily. Id.
111 Id.
funding will depend on increased yearly appropriations to fulfill the statute. President Bush’s proposed bill includes a $2.1 billion increase in border security, bringing the total spent on border security to $10.7 billion.

As there are an estimated three million foreigners in the United States who have overstayed their visas, additional personnel is critical for tracking down and deporting these individuals. The INS has been faulted for not tracking people who enter the country on legal visas, for not adequately patrolling the U.S. borders, and for not deporting individuals who have expired visas. With additional personnel and other provisions incorporated in the Border Security Act of 2002, this cumbersome job should become more manageable.

Currently, many cities are finding that local INS offices lack the funds needed to track down immigrant fugitives. In Houston, more than twenty deportation officers share a total of four cars to search for immigrants who have fled after receiving deportation orders. With such a tremendous shortage of vehicles in which to search for known fugitives, officers find it nearly impossible to do their job. Prior to September 11, 2001, Congress and the American public seemed fairly ambivalent to immigration policies. While Americans may have said that they supported deportation, the reality of observing families being split and experiencing damage to local businesses often quelled the argument that deportation should be actively used. These opinions may have changed post September 11th, as more Americans are focusing on a need to feel safe.

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112 Id.
113 Allen & Miller, supra note 109.
114 Cheryl W. Thompson, Reorganization, Anti-Terrorism Effort Keeping INS Chief Busy, WASH. POST, Jan. 21, 2002, at A15.
115 Id.
117 Id.
118 Id.
119 Id.
120 Id.
121 Id.
Commissioner Ziglar has regularly made statements that the INS staff has done a tremendous job rising to the challenges they have faced post September 11th.\textsuperscript{122} In congressional testimony, Commissioner Ziglar explained that INS has faced incredible hiring and retention challenges over the last several years.\textsuperscript{123} Based on the House bill and the President's fiscal year 2002 budget request, the INS will hire and train 3,000 to 3,500 new employees.\textsuperscript{124} Commissioner Ziglar explained that while it is wonderful to be given resources to hire new personnel, the INS is having difficulty finding enough qualified personnel to fill all of the positions.\textsuperscript{125} To help address the problem, the Commissioner asked that Congress lift the current ceiling on overtime compensation and overtime hours, and he also asked that Congress help the INS provide recruitment bonuses.\textsuperscript{126} Congress responded by including a provision that raised salaries for Border Patrol agents and inspectors, but there is no provision raising the overtime hours ceiling.\textsuperscript{127} This provision is a step towards helping the INS attract and retain the additional inspectors and agents that are needed.

In November 2001, Attorney General Ashcroft announced a plan to restructure the INS so that it could meet its directives.\textsuperscript{128}


\textsuperscript{123} Id.

\textsuperscript{124} Id. In April 2002, the INS announced a need to hire 8,500 employees by September 30, 2002. Stephen Barr, Split Up or Not, INS to Hire 8,500 Employees by Fall, WASH. POST, Apr. 26, 2002, at B2. The INS is recruiting 744 Border Patrol agents to fill new positions, and up to 2,000 agents to replace employees who quit or moved to other positions within the agency. Id. The INS has lost many employees to the higher pay scales of the newly created Transportation Security Administration for work as sky marshals. Id.

\textsuperscript{125} Recruitment and Retention, supra note 122.

\textsuperscript{126} Id.


The goal of the restructuring plan was to make the INS more accountable, improve customer service, and foster cooperation with law enforcement agencies.\(^{129}\) In his announcement, Attorney General Ashcroft stated, "President Bush is concerned that the INS has been hindered by the current structure of the agency to perform its responsibilities of welcoming new immigrants and protecting our borders by enforcing immigration laws."\(^{130}\) The restructuring plan as proposed "fulfills the President’s goals of improving the agency and helping our nation by creating a stronger, more efficient INS."\(^{131}\) The plan separated the enforcement and service functions of the INS while maintaining a single agency leader.\(^{132}\) According to the plan, the Bureau of Immigration Services would process applications for naturalization, green card renewals, asylum requests, and immigration petitions.\(^{133}\) Also, the Bureau of Immigration Enforcement would be developed to supervise border patrols, investigations, and intelligence.\(^{134}\) As designed, the plan is expected to cost $100 million and add 500 positions to the INS.\(^{135}\) These projections are in addition to the other provisions that have been called for by Congress.\(^{136}\) With the support of Congress, the restructuring was set to begin immediately and to be completed by the end of fiscal year 2003.\(^{137}\)
Despite these efforts, Congress and the Bush administration have made it difficult for INS restructuring to begin because of other proposed restructuring suggestions. In addition to the authorized restructuring within the INS, implemented by Commissioner Ziglar and Attorney General Ashcroft, other proposals recommend that the INS be divided, with Border Control merging with the Treasury Department’s Customs Service. Congress also proposed plans to abolish the INS, replacing it with separate bureaus for enforcement and immigration services. Yet another congressional proposal suggests combining the INS with the Office of Homeland Security.  

President Bush announced his intention to create a Department of Homeland Security on June 6, 2002. Included in the President’s proposal is the incorporation of the INS into the Department of Homeland Security. While Congress is reviewing the President’s proposal, the INS is continuing with its planned restructuring, dividing the department into two new bureaus, one focusing on immigration services and the other on immigration law enforcement. An Office of Transition and Restructuring has been formed, with Acting Deputy Commissioner

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139 Id. In April 2002, the House of Representatives voted (405-9) to abolish the INS and create two new bureaus, one to handle immigration services and one to handle the law enforcement issues related to immigration. Stephen Dinan, House Votes to Abolish INS in Sweeping Reform, WASH. TIMES, Apr. 26, 2002, at A1. During the debate, House members referred to the INS as the “Incompetent and Negligent Service” or as an agency for “Ignoring National Security.” Id. One of the members who voted against the measure, Melvin Watt (D-N.C.) explained his position stating, “[y]ou’ve got one inefficient, unproductive INS now. It seems to me what you’re going to end up with is two inefficient agencies.” Id. Watt further explained that the problem with the INS is not structural, rather it is that too much funding goes to enforcement and too little goes to administration and services. Id.

140 Id.


142 Id.

143 Id.
Mike Becraft leading it.\textsuperscript{144}

\textit{B. Improvements in Technology and Infrastructure}

To provide for improvements in technology associated with border security, the Border Security Act of 2002 authorizes the appropriation of an additional $150 million to the INS and the U.S. Customs Service.\textsuperscript{145} This sizeable appropriation should allow the INS to make significant headway toward implementing an interagency electronic database, machine readable visas with biometric identifiers, and a computer system for monitoring foreign students.\textsuperscript{146} There are currently three main technology projects being focused on in the INS: (1) the Enterprise Architecture, which was mandated by Congress in October 2000; (2) the Student Exchange Visitor Information System (SEVIS); and (3) the Data Management Improvement Act of 2000.\textsuperscript{147} The Enterprise Architecture is the "long-term, strategically oriented approach to accomplishing the information-driven aspects of the INS mission."\textsuperscript{148} The SEVIS system is designed to provide quick and easily accessible information on all foreign nationals who have student visas.\textsuperscript{149} Under the Data Management Improvement Act, the INS is required by Congress to develop an integrated entry-exit data collection system that is completely automated.\textsuperscript{150} The INS is also expanding immigration inspectors' access to the National Crime Information Center (NCIC), specifically to identify criminal aliens in advance of their arrival.\textsuperscript{151}

Commissioner Ziglar has placed the technology deadlines of Congress among his top priorities.\textsuperscript{152} However, he has been quick

\begin{footnotesize}
\textsuperscript{144} Id.
\textsuperscript{146} See id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\end{footnotesize}
to note that technology is not a panacea to secure the nation’s borders. The Commissioner testified before a Senate committee, noting that “technology must be coupled with a strong intelligence and information gathering and distribution system if we are to leverage our resources and maximize our capabilities. That will require seamless cooperation among the many government agencies.”

C. Interagency Information Sharing

The Border Security Act of 2002 provides interim measures for agencies and law enforcement to coordinate their information. The interim plan requires federal law enforcement agencies and the intelligence community to share with the Department of State and the INS any information relevant to the admissibility and deportability of aliens. The Border Security Act of 2002 also calls for a report to be submitted to Congress identifying the law enforcement and intelligence information needed by the Department of State and the INS for screening immigrants. Based on the data received in this report, Congress directs the President to submit a Coordination Plan that would require federal law enforcement agencies and the intelligence community to continue to work with the INS and the Department of State. The information gained in this coordinated plan is restricted to determining “whether to issue a visa to an alien or to determine the admissibility or deportability of an alien to the United States.”

The Border Security Act of 2002 also calls for an integrated law enforcement and intelligence data system. The INS will be required to integrate all current databases and data systems which

153 Id.
154 Id.
156 Id.
157 Id.
158 Id.
159 Id.
160 Id. § 202.
process or contain information on aliens.\textsuperscript{161} The INS database will be part of a larger, integrated data system that will provide current and immediate access to information stored in the databases of any federal law enforcement agencies and intelligence agencies that may be relevant to issuing a visa or admitting or deporting an alien.\textsuperscript{162} Access to information in the data systems “shall be readily and easily accessible” under the Border Security Act of 2002, to consular officers issuing visas, to any federal official determining whether an alien should be deported or admitted into the United States, and to any federal law enforcement or intelligence officer who is responsible for identifying or investigating aliens.\textsuperscript{163}

The Border Security Act of 2002 calls for this integrated electronic data system to have the capacity to compensate for disparate name formats among the databases and to search on a linguistically sensitive basis.\textsuperscript{164} In addition, six months after the implementation of the Border Security Act of 2002, the President must submit a report to Congress on the progress of the requirements for the integrated law enforcement and intelligence electronic data system.\textsuperscript{165} The Border Security Act of 2002 also establishes a Commission on Interoperable Data Sharing to be formed no less than one year after the USA PATRIOT Act is enacted,\textsuperscript{166} thus by October 26, 2002.\textsuperscript{167} The Commission is

\textsuperscript{161} Id. § 202(a)(1).

\textsuperscript{162} Id. § 202(a)(2).

\textsuperscript{163} Id. § 202(a)(5). In 1999, Congress ordered the INS and the FBI to merge the fingerprint files of each department to ensure that FBI suspects do not slip through cracks that may exist in border enforcement. Karen Gullo, Associated Press, Dec. 14, 2001, at http://www.usbc.org/info/everything2001/1201fingerprint.htm (on file with the North Carolina Journal of International Law and Commercial Regulation). The Justice Department released a statement in December 2001 that the project would not be completed for several more years. Id. The cost of the project is expected to be between $1.2 billion and $1.9 billion. Id. The Border Security Act of 2002 reiterates a need for the INS and FBI to move forward on this project, but the slow pace of the project thus far indicates that it will be years before any effective inter-agency fingerprinting data system is in place. See id.

\textsuperscript{164} Border Security Act of 2002, § 202 (b).

\textsuperscript{165} Id.

\textsuperscript{166} Id. § 203.

\textsuperscript{167} Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56,
responsible for monitoring the system and providing oversight as needed.\textsuperscript{168} A focus of the Commission is to ensure that the data is not being misused in any way, that they are secure, and that the data and the system are being maintained and updated as needed.\textsuperscript{169}

The provisions set forth in the Border Security Act of 2002 will significantly alter the methods used for tracking immigrants.\textsuperscript{170} Before the Border Security Act of 2002 passed, the INS began moving forward with its own initiatives, as well as in response to the President’s Directive, to coordinate with other agencies. In December 2001, Commissioner Ziglar announced the names of 314,000 foreign nationals who have remained in the United States despite the issuance of deportation orders.\textsuperscript{171} In his announcement, Commissioner Ziglar stated that those individuals would be entered into the FBI crime database so that police could help identify them.\textsuperscript{172} Simply entering those names into the current database could take at least a year.\textsuperscript{173} The current plan is to first focus on locating Arab and Muslim men who have overstayed their visas.\textsuperscript{174} Of the 314,000 individuals who are deportable due to expired visas, 6,000 of them are men from the Middle East and South Asia.\textsuperscript{175} With a plan to integrate the databases of all the agencies, all visa information could be immediately accessible to police officers who may encounter an immigrant during their routine work day. By coordinating the work of these agencies, the government is making better use of agency resources.

While local law enforcement agencies are generally supportive of this initiative to share information, there is concern that local

\begin{footnotes}
\item 169 \textit{Id.}
\item 170 \textit{See supra} notes 88–163 and accompanying text for explanation; \textit{see also infra} notes 174–260 and accompanying text for explanation.
\item 171 \textit{Cf. Thompson, supra} note 128, at A15.
\item 172 \textit{Id.}
\item 173 \textit{Id.}
\item 175 \textit{Id.}
\end{footnotes}
law enforcement officers are overburdened by being asked to help
the FBI and the INS to locate the 314,000 deportable
immigrants.\textsuperscript{176} Some police officers and immigration attorneys
have claimed that the enforcement orders issued to local law
enforcement are "eroding the precarious balance of trust" between
law enforcement and the communities they patrol.\textsuperscript{177} As an effect
of the deportation orders, immigration counselors are finding that
they may counsel illegal immigrants not to call local police when
trouble erupts even though police service is needed.\textsuperscript{178} The advice
not to call police is given because those immigrants are not legally
in the United States.\textsuperscript{179} With this situation, the police are unable to
accurately perform their job because they have been given
additional responsibilities that create conflict within their
communities.

\textbf{D. Visa Issuance}

The Border Security Act of 2002 calls for the Secretary of
State to provide the INS with an electronic version of visas
issued.\textsuperscript{180} Thus, the visa file would be available to inspectors at
U.S. ports of entry before the alien arrived at that location.\textsuperscript{181} With
this information, the INS must develop an integrated entry and exit
data system to track aliens as they enter and exit at the ports of
entry.\textsuperscript{182} To aid in this process, the Border Security Act of 2002
proposes to have in place by October 26, 2004, "machine-

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{175}
\item CNN International: \textit{Q&A Early Afternoon} (CNN television broadcast, Jan. 10,
2002), at 2002 WL 5589563 (on file with the North Carolina Journal of International
Law and Commercial Regulation).
\item Jack Chang, \textit{Local Police Asked to Crack Down on Illegal Immigrants: Federal
Officials Seek A Hand From Many Regional Agencies to Help Enforce Immigration
\item Id.
\item Id.
\item Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security
amended at 8 U.S.C. § 1201(a)). Currently, visa issuance is controlled through the
Secretary of State's Office. Cassio Furtado, \textit{Powell Defends Department, Admits Visa
Errors Occurred}, MIAMI HERALD, July 12, 2002, at 10A. Under the proposed legislation
for the Department of Homeland Security, the oversight for visa issuance would be
transferred from the State Department to the Department of Homeland Security. \textit{Id.}
\item Border Security Act of 2002.
\item Border Security Act of 2002.
\end{enumerate}
\end{footnotesize}
readable, tamper-resistant visas and other travel and entry
documents that use biometric identifiers.\footnote{183} The Border Security
Act of 2002 also provides that necessary technology be put in
place to make the best use of the biometric identifiers.\footnote{184}

Attorney General Ashcroft announced in August 2002 that the
first phase of the National Security Entry Exit Registration System
(NSEERS) would be implemented at selected ports of entry on
September 11, 2002.\footnote{185} By October 2002, all remaining ports of
entry were to have the new system.\footnote{186} Under NSEERS, a small
percentage of entering foreign visitors will be fingerprinted and
their fingerprints will be matched against a database of known
criminals and terrorists.\footnote{187} The hope is that the new system will
stop criminals and terrorists at U.S. borders.

Biometric identifiers are used to compare the features of the
individuals applying for a visa to individuals appearing at a port of
entry.\footnote{188} Biometric technologies use a unique physical feature,
such as fingerprints, the image of a retina or iris, hand geometry,
or even face shape.\footnote{189} The Border Security Act of 2002 requires
biometric identifiers on all visas that American consulates grant to
foreign travelers as well as for passports issued by the twenty-nine
nations for which the United States has waived most visa
requirements.\footnote{190}

\footnote{183} Border Security Act of 2002, § 303(b)(1).
\footnote{184} Border Security Act of 2002, § 303(b).
\footnote{185} Department of Justice, Attorney General Ashcroft Announces Implementation of
the First Phase of the National Security Entry-Exit Registration System, Aug. 12, 2002,
\footnote{186} Id.
\footnote{187} Id. All aliens from Iran, Iraq, Libya, Sudan, Syria, or who are otherwise
considered a national security risk, who are visiting the United States for more than
thirty days will be fingerprinted and checked against the databases. \textit{Id.}
\footnote{188} Jonathan Peterson, Digital Images Will Verify Identity of Visitors in U.S., L.A.
\footnote{189} Id.
\footnote{190} Id. The legislation adds the caveat that any country that chooses to ignore the
new rule will be removed from the visa waiver programs. Enhanced Border Security and
\section{Vol. 28}
unusual for the United States to dictate passport security standards in other countries;
Biometric identifiers are not a new concept in U.S. immigration policy. "IDENT", a biometric identification system, was first piloted by the INS in California in 1995. By the summer of 1996, IDENT was implemented at thirty-four sites along the U.S.-Mexican border. IDENT includes a database with thousands of criminal alien records. Within the first few months of operation, the system proved to be effective, identifying over 3,000 criminal aliens who were attempting to enter the United States. By October 1, 2001, biometric identifier visas, laser visas (Form DSP-150), were being implemented at every entry/exit site on the U.S.-Mexican border. The newest version of the laser visa, also known as DSP-150, has been enhanced and now has photo and machine-readable information.

however, the forcefulness is due to the recent episodes of passport forgery by terrorists. Peterson, supra note 188. Germany is also considering whether to encode passports with biometric identifiers. Id. German officials have stated that they have no problem with the direction that U.S. passport policy is going because Germany is anticipating taking the same course of action. Id. There are other reasons for the visa waiver policy to come under scrutiny which make it surprising that the events of September 11 were necessary to attract attention to the problems involved. Jeff Goodell, How to Fake a Passport, N.Y. TIMES MAGAZINE, Feb. 10, 2002, at 44–49. For instance, in Belgium, Italy, and several other nations, stolen passports are a growing and substantial problem. Id. at 44–49. A U.S. Justice Department Official testified before a Senate committee in October 2001 that during a review of a random sample of 1,067 passports that were stolen from visa-waiver countries, ten percent of those passports had been used to successfully enter the United States. Id. at 49. Only half of the stolen passports were accounted for in the INS database of passports. Id. In July 2002, news of an alleged visa fraud scam in Qatar was released which reportedly allowed at least seventy people to enter the United States illegally, three of whom later lived with two of the September 11th hijackers. Furtado, supra note 180.

192 Id. at 219.
193 Id.
194 Id.
195 Id.
197 Id. The biometric identifiers were originally mandated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Id. Procedures for
While the initial push to include biometric identifiers in border security legislation was spurred by the attacks on September 11, 2001, the push to put into place more sophisticated means of identifying foreign travelers was further spurred by the confusion of the identity of Richard Reid, the Briton accused of smuggling a shoe bomb onto a Miami-bound airplane.\textsuperscript{198} However, even visas with biometric identifiers are not a panacea.\textsuperscript{199} If a traveler were to establish a false identity and then obtain a passport and other documents, a biometric system would likely not identify him as an imposter.\textsuperscript{200} The advanced technology would only confirm that the individual at the port of entry is the same person that applied for the passport.\textsuperscript{201}

There is also criticism that tamper-proof documents for foreign travelers that include photos and fingerprints invade privacy.\textsuperscript{202} The real fear is that the identification system will be required for all U.S. citizens eventually.\textsuperscript{203} Groups, such as the National Council of La Raza, a Latino advocacy group, have expressed concern that the biometric identifiers will be connected to databases, such as those of the INS, that have a history of being flawed and out-of-date.\textsuperscript{204}

The Border Security Act of 2002 goes one step further and provides that no nonimmigrant visa will be issued to an alien who is from a country that sponsors terrorism.\textsuperscript{205} An alien from a

\textsuperscript{198} Peterson, supra note 188.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Id.
\textsuperscript{204} Id.
terrorist-sponsoring nation can only be issued a visa if the Secretary of State, in consultation with other heads of the U.S. government, determines that the alien is not a threat to the safety or security of the United States.\footnote{Id. See infra note 222 for a listing of the countries currently considered to be sponsors of terrorism.}

\textit{E. Admission and Inspection of Aliens}

As part of its efforts to create a comprehensive and effective immigration policy, the Border Security Act of 2002 ordered a feasibility study for a North American National Security Program.\footnote{Border Security Act of 2002, § 401.} The study will include investigations into whether pre-clearance and pre-inspection policies would be advantageous to the security and travel between Canada, the United States, and Mexico.\footnote{Id.} The study is to be reported on within one year.\footnote{Id.}

The Border Security Act of 2002 also requires commercial vessels and aircrafts to provide the Attorney General with electronic passenger manifests before arrival to or departure from the United States.\footnote{Id. § 402.} By January 1, 2003, carriers will be required to electronically transfer the following information on each person listed on a manifest to an immigration officer: complete name, date of birth, citizenship, sex, passport number and country of issuance, country of residence, U.S. visa number, date and place of issuance, alien registration number, and U.S. residence address.\footnote{Id. § 402(c).}

In the recent past, the Immigration and Nationality Act required all airport customs inspections to be completed within forty-five minutes of arrival.\footnote{Id. § 403.} The Border Security Act repeals that provision and places no time restriction for inspections.\footnote{Id.} The forty-five minute time limit for inspections of international flights was originally established to respond to tourism industry pressure.\footnote{Ragavan, supra note 3.} The Border Security Act of 2002 reflects the concern...
that such hasty inspections create an atmosphere that is ripe for failure and mistake.\textsuperscript{215} All in all, the increased level of scrutiny is making foreign nationals and visitors nervous about what the immigration system may become.\textsuperscript{216} In contrast, many Americans are reacting positively to the immigration changes, expressing that the tighter security measures provide a sense of safety within U.S. borders.\textsuperscript{217}

\textbf{F. Foreign Student and Exchange Visitors}

The Border Security Act of 2002 expands current law related to tracking foreign students in the United States. The Border Security Act of 2002 requires that all foreign students and exchange students have a visa.\textsuperscript{218} The Act directs the Attorney General to establish an electronic means to monitor and verify all student visas.\textsuperscript{219} In addition, all institutions of higher education are required to report any failure on the part of an alien to enroll or commence participation in classes or study within thirty days after the deadline for registration to the INS.\textsuperscript{220} The Border Security Act of 2002 also requires the INS to increase the amount of information that they maintain on all foreign students who are given visas.\textsuperscript{221}

The Border Security Act of 2002 also places a restriction on the distribution of student visas, or nonimmigrant visas of any kind, to individuals who are from countries that are considered by the U.S. State Department to be state sponsors of terrorism.\textsuperscript{222} On a case-by-case basis, the State Department determines whether individual students applying from these nations pose any type of

\textsuperscript{215} \textit{Id.}
\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} Border Security Act of 2002, §501.
\textsuperscript{219} \textit{Id.} § 501(a)(3).
\textsuperscript{220} \textit{Id.} § 501(c)(1)(D).
\textsuperscript{221} \textit{Id.} § 501(a)(2).
\textsuperscript{222} \textit{Id.} § 306. The countries that are currently considered to be state sponsors of terrorism are Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. Rebecca Trounson, \textit{Response to Terror; Student Visas; College Officials Back Visa Reform}, L.A. TIMES, Dec. 4, 2001, at A12.
threat to the United States.\textsuperscript{223}

The Border Security Act of 2002’s plan for tracking students who are studying in the nation’s universities and colleges and other schools of higher learning is not a new concept. In 1979, following the hostage-taking incidents at the U.S. Embassy in Tehran, the INS registered all Iranian students present in the United States.\textsuperscript{224} In 1982, the INS proposed regulations to monitor foreign students studying in the United States.\textsuperscript{225} The information gathered about each student was to be collected by an automated data system.\textsuperscript{226} While the data system was being created, to make sure that the students did not violate their visa time limits, schools were required to report, via paper, to the INS when students arrived for their course of study and when they left.\textsuperscript{227} The schools complained that they were being asked to act as counselors to the foreign students and policemen for the INS.\textsuperscript{228} In part due to this tension, the INS plan for tracking the foreign students in the 1980s was not effectively put into place.\textsuperscript{229} Congress raised the issue in 1996, resulting in the enactment of CIPRIS, the Coordinated Interagency Program Regulating International Students, which required the INS to develop a student tracking system.\textsuperscript{230} But once


\textsuperscript{225} Id.

\textsuperscript{226} Id.

\textsuperscript{227} Kate Zernike & Christopher Drew, Efforts to Track Foreign Students Are Said to Lag, N.Y. TIMES, Jan. 28, 2002, at A1.

\textsuperscript{228} Id.

\textsuperscript{229} Id.

\textsuperscript{230} Tracking International Students in Higher Education, supra note 224. The 1996 legislation was passed following the first attack on the World Trade Center. Mark Bixler, War On Terrorism: Tracking Foreign Students Gains Renewed Interest – Once Stalled Project in Atlanta Being Developed by INS, ATLANTA J. & CONST., Jan. 7, 2002, at A5. In 1993, Eyad Ismoil, a Jordanian man who had entered the U.S. as a foreign student, drove a van of explosives into a parking garage in the World Trade Center. Id. While Ismoil did enroll in a university, he dropped out and the authorities failed to track him. Id.
again, universities and colleges resisted the restrictions placed on
them and their students, and CIPRIS has never been fully
implemented. In addition, the INS asked colleges to stop
sending them the paper copies of entry and exit times because the
INS did not have enough staff to deal with the reports.

The process of obtaining a student visa is fraught with
opportunities for fraud and misuse. Once a student is accepted
into a U.S. educational institution, he completes an INS Form I-20,
sent to him by the accepting school. The student then applies
for his student visa from the U.S. Embassy or Consulate with
jurisdiction over his place of permanent residence. A U.S.
Department of State consular officer reviews the application and
grants the student a visa if appropriate. The INS enters the
process when the student arrives at the U.S. border, with papers
and student visa in hand. If all documents are presented and
appear to be proper, the applicant is admitted to the United
States. The foreign student visa process is completely paper-
based and depends almost entirely on the movement of paper
forms. Throughout the student visa process, there are
opportunities to falsify documents, and additional I-20 forms can
be forged in order to obtain multiple visas. While some
information about each student is placed on CIPRIS, the INS
admits that the data system is out-of-date and insufficient for the
current needs of the INS.

231 Id.
232 Zernike & Drew, supra note 227.
233 Id.
234 Tracking International Students in Higher Education, supra note 224.
235 Id.
236 Id.
237 Id.
238 Id.
239 Id.
240 Zernike & Drew, supra note 227.
241 Id. CIPRIS has been so long in coming because its creation has been continually
delayed by funding issues, as well as opposition from some educational organizations.
Bixler, supra note 230. Most of the opposition focused on the fee ($95) that foreign
students were asked to pay for the tracking system and because the program singled out
foreign students. Id.
The need to improve the INS tracking of foreign students was apparent after September 11th, and consequently, much of the protest and opposition from the higher education community has dissipated. Two of the September 11th hijackers were then living in the United States on student visas. Mohamed Atta, believed to be the ringleader of the September 11th attacks, had switched his visa status to that of a student in 2000, indicating that he intended to stay in the United States to take flying lessons. Hani Hanjour, one of the other terrorists, had entered the United States in December of 2000 on a F-1 student visa. However, he never attended the school that he was admitted into the United States to attend. The school did not notify the INS that Hanjour did not arrive, and Hanjour quickly “melted into obscurity” as another illegal immigrant. The Border Security Act of 2002 requirement that schools report the names of students who do not report to school within thirty days of the enrollment period will help to alleviate this communication gap. However, it would be pointless to report the student’s absence if the INS does not have an adequate system in place to track the student.

Since September 11th, the INS has admitted that the agency does not know how many foreign students may have overstayed their visas and are thus in the United States illegally. The INS has not tracked these individuals. Of the 547,000 individuals

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242 Some of the opposition was quelled because Congress moved the requirement of the $95 fee that foreign students must pay for the tracking system as a collection responsibility of the INS rather than the college. Bixler, supra note 230.

243 Id.

244 Ragavan, supra note 3.

245 Id. Immigrants who are admitted with an F-1 visa are admitted for “duration of status.” Tracking International Students in Higher Education, supra note 224, at 4. Thus, the individual is considered to be in lawful nonimmigrant status for the entire time he is in the United States pursuing the course of study indicated. Id. The student can elect to stay in the United States to pursue another degree once the first course of study has been completed. Id.

246 Ragavan, supra note 3.

247 Id.


249 Ragavan, supra note 3.

250 Id.
who are in the United States with student visas, officials say that they do not know if these people are actually attending school. The INS's answer to the need to track foreign students, the Student and Exchange Visitor Information System (SEVIS), appears to meet the requirements of both the USA PATRIOT Act and the Border Security Act of 2002. All schools enrolling foreign students must implement SEVIS by January 30, 2003. The INS is on target to meet the January 1, 2003, deadline established by the USA PATRIOT Act for making SEVIS available to all schools enrolling foreign students. SEVIS should help alleviate these problems and help the INS know which individuals admitted into the United States for study are actually pursuing education, and which field of study they are pursuing.

251 Zernike & Drew, supra note 227.
253 Id.
254 Id. As of July 1, 2002, INS began accepting and reviewing school petitions for eligibility in SEVIS. Id. By September 11, 2002, 1,921 schools were in various stages of being approved for access to SEVIS. Id. As schools are still being cleared for access to SEVIS, the INS has established a toll-free line for schools to report a foreign student's failure to enroll. Id. Once all schools have access to SEVIS, such reporting will be done via SEVIS. Id. The INS is also responsible for reviewing all schools in SEVIS every two years to ensure compliance with record-keeping and reporting requirements of SEVIS. Id.
256 Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act of 2002), Pub. L. No. 107-173, § 501(a)(2)(G), 116 Stat. 543, 561 (2002) (codified as amended at 8 U.S.C. § 1372(c)(1)(G)); see John J. Miller, Border Lines – What To Do About Immigration After 9/11, NAT’L REV., Oct. 15, 2001, at 41. Mohamed Atta, one of the September 11th hijackers, legally had his immigration status switched from visitor to student, stating that he intended to take flying lessons in the United States. Ragavan, supra note 3, at 20. Atta used his flight training to crash a commercial jet into the World Trade Center. Id. at 17–20. It is believed that having a record that is monitored on a regular basis can help keep track of immigrants like Atta who switch their immigration status. Id. Several foreign students have expressed concern that the INS policies, as well as the FBI, have been targeting foreign students, particularly those from the Middle East.
G. International Cooperation

The Border Security Act of 2002 requires the Attorney General to submit an annual report on aliens who fail to appear after being released on their own recognizance, and the Department of State to retain nonimmigrant visa applications for seven years. The Border Security Act of 2002 also extends the deadline for the improvement of border crossing cards to the end of fiscal year 2002 and authorizes a study on the feasibility of annual non immigrant alien registration with the INS.

Furthermore, the Border Security Act of 2002 directs the Secretary of State and the Homeland Security Office Director to conduct a joint study on the feasibility of adopting measures to encourage Mexico, Canada, and visa waiver countries to develop data systems that would be compatible with the interoperable electronic data system required by the bill.

If Mexico and Canada agree to work with the United States to develop a registration system and data system such as the one proposed, it could greatly decrease the amount of tension that currently exists along the borders. However, the data systems will be extraordinarily expensive to create and maintain, so there will need to be a high degree of dedication from all parties. The study proposed by the Border Security Act of 2002 should help the U.S. government determine whether the type of international cooperation that has been proposed is a rational, economical, and reasonable proposition.

Canada has already proven to be incredibly responsive to the United States’ newfound security concerns. Since the September 11th attacks, Canada has overhauled its security

Raymond Thibodeaux, Foreign Students’ Concern Grows: Many Understand Investigation but Want Rights Protected, WASH. POST, Jan. 3, 2002, (PRINCE GEORGE’S EXTRA), at 3. Foreign students believe that the crackdown on foreign people studying in the United States will deter students from entering the United States to study. Id.

258 Id. § 606.
259 Id. § 601.
260 Id. § 602(a)(1).
261 Id. § 603(a).
system, including coordinating military, intelligence, and law enforcement matters with Washington officials. The shift in Canadian policy is thought to be due, in part, to Canada's disdain for being viewed as a sanctuary for terrorists and to reassure the United States that terrorists are not exploiting Canadian immigration laws. In December 2001, the United States and Canada signed an agreement to coordinate visa policies so that people who are rejected from one nation will not be accepted into the other, to expand joint border patrols, and to use compatible technology on biometric travel documents. Also, Canada is issuing fraud-resistant cards for all permanent residents and is taking an active role in finding and deporting illegal immigrants and any suspected terrorists. Through these coordinated policies, leaders of the United States and Canada believe that North America is taking positive steps to track and detect terrorists and illegal immigrants.

III. Where Do We Go From Here?

What do all of these new, restrictive immigration policies mean for the United States? Is the nation of immigrants becoming a nation of isolationists? Or are the preventive measures necessary to provide security? Is the sense of security being provided a false one? Is security even the main reason behind the policy changes? Is the reshuffling of agencies the solution? The answers to all of these questions are still somewhat ambiguous, and in many ways, the nation remains divided.

The Border Security Act of 2002 sidesteps these issues, focusing instead on deporting individuals who are not legally in the country and monitoring the movement of those who are visiting the United States. However, debates concerning issues

263 Id.
264 Id. Canadian terrorist specialists have reported that at least fifty international terrorist groups, including al Qaeda, operate in Canada. Colin Nickerson, Terror Ties to Canada Highlight a U.S. Concern, BOSTON GLOBE, June 13, 2002, at A1.
265 Krauss, supra note 262.
266 Id.
267 Id.
of racial profiling have arisen.269 With the announcement that more than 300,000 deportable immigrants are in the United States, 6,000 of which are Arab and Muslim men, concern has been raised of undue racial profiling in the hunt for terrorists.270

Ibrahim Hooper, spokesman for the Council on American-Islamic Relations, stated, "[w]e would ask for enforcement of the law across the board and not just singling out people based on their religion or ethnicity."271 Statements from the Justice Department have defended the current action, stating that it is the department’s job to keep Americans safe, and that this priority includes focusing on individuals in the United States who are from countries with highly active Al-Qaeda networks.272 Currently, it appears that the many voices arguing that the racial profiling is unfair will have no effect on the Justice Department’s directive to deport illegal immigrants.

None of these provisions appear on their face to be outrageous, and most differ little as compared to what is done in other nations.273 However, with change there comes some element of fear. New laws and regulations often infringe on freedom, and many Americans have expressed concern that the new immigration policies will be extended, in some degree, to all Americans eventually.274

Specifically, there is concern that the new biometric identifier visas will lead to national identification (ID) cards that may invade

270 Id.
271 Id.
272 Id.
273 Saudi Arabia has begun to use a fairly comprehensive system of tracking and identifying visitors. Elaine Sciolino, Muslims Feel Sept. 11 Chill as Mecca Plays it Cautious, N.Y. TIMES, Feb. 5, 2002, at A1. With 1.5 million pilgrims descending on Mecca each year, and the many acts of terrorism and other violence that Saudi Arabia has faced in the past, the country has decided to increase their tracking policies on all visitors. Id. The Muslim visitors from abroad that come for the pilgrimage are chosen at random when getting off the plane to have their eyes digitally scanned and to be fingerprinted. Id. Upon leaving the country, the eye scans and fingerprints are matched to make sure that those leaving are who they claim to be. Id. The official goal is to prevent pilgrims from overstaying their visas. Id.
privacy. Reactions to tracking and to biometric identifiers seem to be all over the map. Of those who have been surveyed or interviewed, it is acceptable for the United States to track immigrants.

Some Americans believe that a national ID card would be an acceptable development. Some have said that they have nothing to hide or that they already have a driver's license and Social Security card, so one additional card is not a big imposition. Additionally, some say that the national ID card is acceptable if it is done to protect the American people and the American way of life. However, as more time passes since September 11, 2001, fewer Americans are speaking out in support of national ID cards. Moreover, there are a good many people who fear that the national ID card will be used to track Americans, infringing in larger and larger increments into the privacy that they enjoy and are ultimately trying to protect.

In most instances, the national ID card has been described as a card that would contain vital information, such as an ID number, a photograph, a fingerprint, a facial profile, an eye scan, and perhaps even DNA information, as well as a person's name, address, driver's license number, and Social Security number. Harvard professor and renowned civil rights scholar, Alan Dershowitz, while initially opposed to a national ID card, has recently come out in support of the concept, pointing out that "[t]he vast majority of Americans routinely carry a photo ID in their wallets and pocketbooks. These ID cards are issued by state motor vehicle

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275 Id.
277 Id.
278 Id.
280 Id.
bureaus and other public and private entities.\textsuperscript{282}

Proponents for the national ID card have also spoken out in support of a national database to house the information on the ID cards so that it could be readily accessible to state and federal agencies that need the information.\textsuperscript{283} With such a database and such a national ID card system, it seems likely that it would provide ample opportunity for the federal government to begin issuing driver’s licenses as well—thus creating a federalism problem.

Congress has recently considered legislation to establish a uniform system in which computer chips with fingerprints, eye scans, and other personal data would be embedded into state driver’s licenses.\textsuperscript{284} Numerous groups have spoken out in opposition to the legislation,\textsuperscript{285} and to date, there has been no further movement to establish a uniform driver’s license with a computer chip containing identifying information. Further, due to the incredible expense of creating a uniform system and of supplying all the card readers for the corresponding databases, notwithstanding the constitutional issues inherent in such a measure, it is unlikely that a national ID card will be implemented.\textsuperscript{286}

To address the seeming shift in philosophy from America being a nation that welcomes immigrants to a nation that closes its doors to immigrants, INS Commissioner Ziglar stated in a recent speech:

[The events of September 11] have profoundly changed the climate and culture in which INS and other agencies operate. I came to this job with the philosophy that the United States ought to welcome immigrants— to do everything within our power to

\textsuperscript{282} Id.

\textsuperscript{283} Id.

\textsuperscript{284} V. Dion Haynes, Congress Considers Rules to Retool Driver’s Licenses, CHI. TRIB., June 16, 2002, § 1, at 16.

\textsuperscript{285} Id. The American Civil Liberties Union, the Arab-American Anti-Discrimination Committee, the Citizens Committee for the Right to Keep and Bear Arms, and the Privacy Rights Clearinghouse have spoken out against the license proposal, fearing that such a measure could lead to the establishment of a national ID card. Id.

ensure that our country remains a beacon of hope and freedom for people around the world. Even in the face of deadly terrorist attacks, that belief not only is unshaken, it is stronger.287

The new immigration policies have startled Americans on many levels. Perhaps the most startling realization is how lax the U.S. immigration policy was before September 11th. Americans want to welcome others to the nation, but ideally, they also want to maintain boundaries for admittance. Through an effective screening process and by tracking immigrants while they are in the United States, Americans hope that some sense of safety and security will be restored. The Border Security Act of 2002 reflects this attitude, instituting sound, rational policy to protect our homeland without becoming isolationist – a goal that is worth striving for. The words of Commissioner Ziglar sum up this national feeling well:

Fear is something that we have always disdained. Courage is our signature. Taking risks on new people and new ideas fuels our drive to achieve and maintain a society that is the envy of all history. Practicing and protecting freedom has given wing to a reality about which men of yore could only have fantasized. If fear blinds our eyes to the new and the untried, and freedom is relegated to the ash heap of history, we will stumble into an abyss from which there is no return.288

It is essential that the United States not solely target immigrants to solve terrorism concerns within the nation’s borders; however, the threat that the United States is currently facing appears to come almost exclusively from individuals who arrive from abroad.289 Thus, concerns about U.S. immigration policy must be addressed in order to reduce the chance of terrorist attack in the future.290 In polls conducted shortly after the terrorist attack on the World Trade Center buildings, American citizens strongly supported an improved immigration system, viewing a

288 Id.
290 Id.
lax immigration policy as a vehicle for terrorism.\textsuperscript{291} Hence, the issue is a high priority for the American people, and American leaders must act prudently yet quickly to make the expensive changes needed in the INS and immigration policy.\textsuperscript{292} A complete revamping of the immigration system is critical.\textsuperscript{293} It will be a very costly endeavor, but the United States must make every effort to reduce the possibility of terrorist attacks in the future.\textsuperscript{294}

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\textsuperscript{291} ld.
\textsuperscript{292} ld.
\textsuperscript{293} ld.
\textsuperscript{294} ld.