HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 31 w/CS Student Financial Assistance
SPONSOR(S): Kravitz
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1760

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Higher Education (Sub)	6 Y, 0 N	Tilton	Bohannon
2) Education K-20	13 Y, 10 N w/CS	Tilton	Bohannon
3) Judiciary		Jaroslav	Havlicak
4) Education Appropriations (Sub)			
5) Appropriations			

SUMMARY ANALYSIS

This bill prohibits any funds from general revenue, the lottery, or financial aid fee revenues to be used to provide scholarships, fellowships, grants, loans, tuition or fee waivers, or other financial assistance, to any student who has been admitted to the United States temporarily for a specific purpose in either the F-1 or M-1 visa categories, who is enrolled in a Florida public postsecondary educational institution and who is a citizen of any country that has been identified by the United States Department of State as terrorist or supporting terrorism. A student's country of citizenship is to be determined at the time of the student's enrollment. Once a student has been determined ineligible under this provision, the student remains ineligible for such financial assistance while the student is enrolled at a public postsecondary institution unless the student's country of citizenship is removed from the State Department's list of identified countries.

The 2001 annual *Patterns of Global Terrorism* report, released by the U.S. State Department in May 2002, designates seven governments as state sponsors of international terrorism: namely, those of Iran, Iraq, Syria, Libya, Cuba, North Korea and Sudan.

The provisions of the bill do not apply to a nonresident of the state who is eligible to apply for residence under the federal Cuban Adjustment Act of 1966

The fiscal impact of the bill is indeterminate. The bill requires that the amount of student financial assistance provided during fiscal year 2001-2002 by Florida public postsecondary institutions to such students from the specified funds must be reallocated by the institutions to eligible students who are both U.S. citizens and Florida residents. The Department of Education reports that during fiscal year 2001-2002 state universities and public community colleges used $308,717 in funds from general revenue, the lottery, and financial aid fee revenues to provide financial assistance to 822 students classified by state universities and public community colleges as nonresident aliens from the seven countries that the U.S. Department of State has designated as state sponsors of international terrorism. Information regarding the extent to which these students meet the definition of nonresident alien as specified in the CS adopted by the Education K-20 Committee was not available at the time this bill analysis was prepared.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[x]	N/A[]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[]	No[x]	N/A[]
4. Increase personal responsibility?	Yes[]	No[]	N/A[]
5. Empower families?	Yes[]	No[x]	N/A[]

For any principle that received a "no" above, please explain:

The provisions of this bill may increase administrative duties, such as regulation and monitoring, with respect to the disbursement of funds for financial assistance at Florida public postsecondary institutions.

This bill may limit opportunities for individuals or families by eliminating sources of financial assistance that might otherwise have been received.

B. EFFECT OF PROPOSED CHANGES:

Student Visas

The federal Immigration and Nationality Act ("INA") governs the admission of all people to the United States. Under the INA, a nonimmigrant is essentially defined as someone admitted to the United States temporarily for a specific purpose.[1] People who are coming to the United States to pursue full-time academic or vocational studies are usually admitted in one of two nonimmigrant categories: the F-1 category includes academic students in colleges, universities, seminaries, conservatories, academic high schools, other academic institutions, and in language training; the M-1 category includes vocational students.

According to the Immigration and Naturalization Service ("INS") website,[2] foreign students seeking to study in the U.S. may enter under an F-1 or M-1 visa provided they meet the following criteria:

- The student must be enrolled in an "academic" educational program, a language-training program, or a vocational program;
- The school must be approved by the INS;
- The student must be enrolled as a full-time student at the institution;
- The student must be proficient in English or be enrolled in courses leading to English proficiency;
- The student must have sufficient funds available for self-support during the entire proposed course of study; and
- The student must maintain a residence abroad which he or she has no intention of giving up.

[1] *See* 8 U.S.C. § 1101(a)(15) (defining "immigrant" to mean any alien except for those in a series of categories of nonimmigrants).
[2] http://www.immigration.gov. INS was recently redesignated the Bureau of Citizenship and Immigration Services, and moved from the Justice Department to the Department of Homeland Security. *See* Pub. L. 107-296, 116 Stat. 2135.

State Sponsors of Terrorism

Under Title 22 U.S.C. §§ 2371 and 2780, the U.S. Secretary of State is authorized to designate countries that have repeatedly provided state support for international terrorism. This list of designations is included in the State Department's annual *Patterns of Global Terrorism* report, transmitted to the Speaker of the U.S. House of Representatives and the U.S. Senate Committee on Foreign Relations to comply with Title 22 U.S.C. § 2656f(a), and publicly released in unclassified form. The most recent such report, in May 2002, designates seven governments as state sponsors of international terrorism: namely, those of Iran, Iraq, Syria, Libya, Cuba, North Korea and Sudan.

Cuban Adjustment Act

The Cuban Adjustment Act of 1966 ("CAA")[3] provides for a special procedure under which Cuban nationals or citizens, and their accompanying spouses and children, may obtain a haven in the U.S. as lawful permanent residents. The CAA gives the U.S. Attorney General the discretion to grant permanent residence to Cuban nationals or citizens seeking adjustment of status if they have been present in the U.S. for at least one year after admission or parole and are admissible as immigrants. Their applications for adjustment of status may be approved even if they do not meet the ordinary requirements for adjustment of status under section 245 of the INA.[4] Since the caps on immigration do not apply to adjustments under the CAA, it is not necessary for the alien to be the beneficiary of a family-based or employment-based immigration visa petition.

Proposed Changes

This bill prohibits any funds from general revenue, the lottery, or financial aid fee revenues to be used to provide scholarships, fellowships, grants, loans, tuition or fee waivers, or other financial assistance to any nonresident alien student who is enrolled in a Florida public postsecondary educational institution and who is a citizen of any country that has been identified by the U.S. State Department as terrorist or supporting terrorism. This bill defines the term "nonresident alien," to mean a nonimmigrant student who:

- is not a citizen or national of the U.S.;
- has been admitted to the U.S. temporarily for a specific purpose in either the F-1 or M-1 visa categories; and
- is admitted for duration of status and does not have the right to remain in this country indefinitely.

A student's country of citizenship is to be determined at the time of the student's enrollment. Once a student has been determined ineligible, the student remains ineligible for such financial assistance while the student is enrolled at a public postsecondary institution unless the student's country of citizenship is removed from the State Department's list of identified countries.

This bill specifies that its provisions do not apply to a nonresident of the state who is eligible to apply for residence under the CAA.

[3] Pub. L. 89-732, 80 Stat. 1161 (reproduced as a historical note to Title 8 U.S.C. § 1255).
[4] Section 245 of the INA, currently codified as Title 8 U.S.C. § 1255, governs adjustment of status from nonimmigrant alien to legal permanent resident, and generally requires a petitioner to have a familial or employment basis to seek the adjustment.

This bill further requires that the amount of state-funded student financial assistance provided during fiscal year 2001-2002 by Florida public postsecondary institutions to such students must be reallocated by the institutions to eligible students who are both U.S. citizens and Florida residents.

The Department of Education reports that during fiscal year 2001-2002 state universities and public community colleges used $308,717 in funds from general revenue, the lottery, and financial aid fee revenues to provide financial assistance to 822 students classified by state universities and public community colleges as nonresident aliens from the seven countries that the U.S. Secretary of State has designated as state sponsors of international terrorism.

C. SECTION DIRECTORY:

Section 1. Creates an unnumbered section to prohibit certain funds from being used to provide financial assistance to certain students.

Section 2. Creates an unnumbered section to require redirection of certain funds by institutions to eligible students who are both U.S. citizens and Florida residents.

Section 3. Creates an unnumbered section to provide that the bill does not apply to persons eligible to apply for residence under the Cuban Adjustment Act of 1966.

Section 4. Provides an effective date of July 1, 2003.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   See FISCAL COMMENTS.

2. Expenditures:

   See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See FISCAL COMMENTS.

D. FISCAL COMMENTS:

The fiscal impact of this bill is indeterminate. This bill requires that the amount of student financial assistance provided during fiscal year 2001-2002 by Florida public postsecondary institutions to such students from the specified funds must be reallocated by the institutions to eligible students who are both U.S. citizens and Florida residents. The Department of Education reports that during fiscal year 2001-2002 state universities and public community colleges used $308,717 in funds from general

revenue, the lottery, and financial aid fee revenues to provide financial assistance to 822 students classified by state universities and public community colleges as nonresident aliens from the seven countries that the U.S. State Department has designated as state sponsors of terrorism. Information regarding the extent to which these students meet the definition of nonresident alien as specified in the CS adopted by the House Committee on Education K-20 was not available at the time this bill analysis was prepared.

This bill may limit opportunities for individuals or families by eliminating sources of financial assistance that might otherwise have been received. However, the required reallocation of funds might also provide additional opportunities for other students.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   Federal Foreign Affairs Power

   The Constitution of the United States allocates various powers in the field of foreign policy to Congress[5] or to the President,[6] and specifically denies some such powers to the states.[7] However, federal power over, and state exclusion from, the conduct of foreign relations is broader than these provisions. As the U.S. Supreme Court explained in *United States v. Pink*,[8] "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively."[9]

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[5] *See* Art. I, s. 8, U.S. Const. ("Congress shall have Power To . . . regulate Commerce with foreign Nations, . . . establish an uniform Rule of Naturalization . . . define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . declare War, grant Letters of Marque and Reprisal, . . . raise and support Armies, . . . provide and maintain a Navy . . . [and] provide for calling forth the Militia to . . . repel Invasions[.]")

[6] *See* Art. II, s. 2, U.S. Const. ("The President shall be Commander in Chief of the Army and Navy of the United States, . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . . [and] by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls[.]") *See also* Art. II, s. 1, U.S. Const. ("The executive Power shall be vested in a President of the United States of America.") Courts have held that, because this executive "vesting clause" does not use the phrase "herein granted," as does the Congressional vesting clause of Article I, the executive power it refers to and grants is not necessarily limited to those powers later enumerated in the rest of Article II: in particular, it includes many of the "attributes of external sovereignty," which are a source of some of the President's primacy over Congress and especially over the judiciary in the conduct of foreign policy. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

[7] *See* Art. I, s. 10, U.S. Const. ("No State shall enter into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; . . . without the Consent of Congress, lay any Imposts or Duties on Imports or Exports . . . . keep Troops, or Ships of War in time of Peace. . .or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.")

[8] 315 U.S. 203 (1942).

[9] *Id.* at 233. *See also Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.") *See generally* Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832 (1989). *But see generally* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

As an implication of this general principle, "even in [the] absence of a treaty" or federal statute, a state may violate the federal constitution by "establish[ing] its own foreign policy."[10] Indeed, to condition the application of state law on the character of a foreign country's political system has been held "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[11] It is possible that a court could find that some provisions of this bill do attempt to do this, and thus are unconstitutional.

However, it is also possible that a court would find this bill's provisions are not subversive of the federal foreign affairs power. This power is, in fact, "rarely invoked by the courts,"[12] in part because state law does not conflict with it merely by causing "some incidental or indirect effect in foreign countries."[13] Moreover, the fact that this bill frequently incorporates federal law may make it less susceptible to attack on this basis, since arguably none of its policies clash with those being pursued by the federal government.

Congressional Foreign Commerce Power

Article I, section 8 of the United States Constitution grants Congress the power to "regulate Commerce with foreign Nations[.]" This power is Congress's exclusive domain, in which states have even less freedom to act than with respect to the regulation of interstate commerce.[14] Courts hold state or local laws to be unconstitutionally in conflict with the Congressional foreign commerce power if they impair the federal government's ability to speak with "one voice" internationally.[15] In those cases where state or local laws with international effect have been found valid, this has usually been because Congress had an opportunity to examine the specific issue and either acquiesced in, or affirmatively granted, the states' authority to do so.[16]

It not clear whether a court would even hold that this bill's provisions effect foreign commerce; however, if a court did so hold, it could be argued that Congress's authorization for the State Department to designate state sponsors of terrorism is a sufficient basis for states to act upon in the way this bill does. Conversely, it could also be argued that this bill conflicts with the policy underlying the State Department's grant of visas to such students as this bill affects and thus prevents the federal government from speaking with one voice, and thus violates Congressional power over foreign commerce.

Equal Protection

Both the Fourteenth Amendment to the United States Constitution and Article I, section 2 of the Florida Constitution guarantee the equal protection of the laws to "persons," not only to citizens. This bill may raise constitutional concerns under these provisions.

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[10] *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).
[11] *Id.* at 432.
[12] *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739, 752 (9th Cir. 2001). Despite this statement by the Ninth Circuit, however, exactly how rarely the federal foreign affairs power is a basis for finding state legislation unconstitutional in those cases where it actually arises may be an open question. Although the Supreme Court has not done so in more than 30 years, other courts have. *See, e.g.*, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (striking down the Massachusetts Burma Law, Mass. Gen. Laws ch. 7, §§ 22G-22M and 40F ½, which forbade state contracting with companies that did business in or with Burma); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986) (invalidating an Illinois statute which excluded South African coins from otherwise applicable state tax exemptions).
[13] *Clark v. Allen*, 331 U.S. 503, 517 (1947).
[14] *See Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).
[15] *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 328 (1994).
[16] *See id*; *Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. 1 (1986); *Gerling Global Reinsurance*, *supra*.

While Congress may, in light of its plenary power over immigration,[17] generally make classifications based on citizenship as long as they are not arbitrary and unreasonable,[18] state or local laws which do so are subject to strict scrutiny: i.e., such laws must seek to advance a compelling governmental interest and must be narrowly tailored to advancing that interest.[19] It is possible that a court could find multiple provisions of this bill to be subject to strict scrutiny because:

- This bill classifies students by national origin into citizens of countries (the U.S. and most of the world) whose citizens are eligible for aid versus citizens of countries whose citizens are not eligible for aid (those on the State Department list);

- This bill classifies students whose countries are on the State Department list by national origin into those who are nonetheless eligible for aid because they are exempt under the CAA, and those who are not; and

- This bill classifies students by national origin into U.S. citizens (who are eligible to receive the reallocated state funds that would become available due to the effects of this bill), and non-U.S. citizens (who are ineligible for such funds despite their countries of origin not being on the State Department list).

Conversely, some state and local classifications based on citizenship have not been held subject to strict scrutiny, although this has primarily been in the field of public employment.[20] However, even if a court were to subject any of this bill's provisions to strict scrutiny, this would not necessarily prove fatal, as overcoming strict scrutiny is not impossible but merely difficult and rare.[21]

Unlawful Delegation

Article II, section 3 of the Florida Constitution provides: "No person belonging to one branch [of state government] shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The Florida Supreme Court has ruled that this separation-of-powers provision prevents the Legislature from delegating legislative power.[22] The power to legislate is defined as "involv[ing] the exercise of discretion as to the content of the law, its policy, or what it shall be[.]"[23]

Pursuant to this restriction, the Legislature may not proactively adopt in advance or otherwise attempt to incorporate federal law that is not yet enacted, because this would be a delegation of its legislative power to the federal government.[24] Thus, the countries whose citizens or nationals would be denied state financial resources under this bill would be those on the State Department's list of state sponsors of terrorism as of this bill's effective date, and would not automatically change based on any subsequent modifications of that list. The effect of this might also be to make the provision of this bill inoperative that allows students to become eligible for state aid again if their country of citizenship is removed from the State Department list inoperative.

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[17] *See* Art. I, s. 8, U.S. Const. ("Congress shall have Power To . . . establish an uniform Rule of Naturalization[.]")
[18] *See Mathews v. Diaz*, 426 U.S. 67 (1976).
[19] *See Bernal v. Fainter*, 467 U.S. 216 (1984).
[20] *See, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwick*, 441 U.S. 68 (1979). It should be mentioned that the classifications at issue in these cases only distinguished between U.S. citizens and non-U.S. citizens, not among non-U.S. citizens based on specific country of origin.
[21] *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131 (1986) (allowing a state ban on importation of live baitfish to survive strict scrutiny under the Commerce Clause); *Buckley v. Valeo*, 424 U.S. 1 (1976) (allowing some campaign finance restrictions to survive strict scrutiny under the First Amendment but striking down others).
[22] *See Avatar Development Corp. v. State*, 723 So.2d 199 (Fla. 1998); *Board of Architecture v. Wasserman*, 377 So.2d 653 (1979).
[23] *State ex rel. Taylor v. City of Tallahassee*, 177 So. 719, 720-21 (Fla. 1937). *See also B. H. v. State*, 645 So.2d 987 (Fla. 1994); *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260 (Fla. 1991).
[24] *See State v. Welch*, 279 So.2d 11 (Fla. 1973); *Brazil v. Division of Administration*, 347 So.2d 755 (Fla. 1st DCA 1977).

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Sections 1 and 3 of this bill may arguably conflict with each other. Cuba is currently on the State Department's list of state sponsors of terrorism, and so its citizens or nationals would be denied state financial resources under Section 1; however, Section 3 provides that the bill does not apply to nonresidents eligible to apply for residence under the CAA. Under the usual canons of statutory construction, the specific prevails over the general;[25] thus, one might expect Section 3 to govern where it is applicable. However, Section 1 begins with the phrase, "[n]otwithstanding any other provision of law to the contrary," which may negate this canon of construction. If so, the two sections might be irreconcilable, the result of which is unclear.

The last sentence of Section 1 of this bill provides that "if a student's country of citizenship is removed from the United States Department of State list of identified countries, such student shall become eligible for student financial assistance pursuant to the provisions of this section." However, Section 1 does not, by itself, provide any financial assistance to be "pursuant to."

It is unclear exactly how many people, if any, the exemption in Section 3 would actually apply to. Since the overwhelming majority of Cuban citizens or nationals in the United States are not here under F-1 or M-1 visas, they would be unaffected by this bill regardless of the exemption.

It is worth noting that there may well be other countries that are state sponsors of international terrorism, but that are not included on the State Department's list for reasons of diplomatic policy.

This bill's effective date may not provide enough time for universities to put its provisions into effect.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 24, 2003, the House Subcommittee on Higher Education recommended a strike-all amendment that more narrowly defines the group of students who will not be eligible for assistance as nonimmigrant students who are not citizens or nationals of the United States, who have been admitted to the United States temporarily for a specific purpose in either the F-1 or M-1 visa categories, and who do not have the right to remain in this country indefinitely. The amendment also specifically excludes nonresidents of the state who are eligible to apply for residence under the CAA. Finally, the amendment directs the institutions to reallocate the funds spent for assistance in 2001-2002 to students within the institution who are both U.S. citizens and Florida residents rather than allocating these funds to the Bright Futures Scholarship Program. The subcommittee then recommended this bill favorably.

On April 7, 2003, the House Committee on Education K-20 adopted the strike-all amendment recommended by the Subcommittee on Higher Education and then reported this bill favorably with a committee substitute.

[25] *See Starr Tyme, Inc. v. Cohen*, 659 So.2d 1064 (Fla. 1995); *State v. Parsons*, 569 So.2d 437 (Fla. 1990); *Adams v. Culver*, 111 So.2d 665 (Fla. 1959).