

# NSEERS:

## THE CONSEQUENCES OF AMERICA'S EFFORTS TO SECURE ITS BORDERS

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## **PREFACE**

On behalf of the American-Arab Anti-Discrimination Committee (ADC), the Center for Immigrants' Rights (Center) at the Pennsylvania State University's Dickinson School of Law prepared a white paper on the National Security Entry-Exit Registration System (NSEERS or "special registration").<sup>1</sup> The white paper provides a legal and policy analysis of the NSEERS program, and recommendations for a new administration. In conducting the research, students at the Center interviewed immigration attorneys who have represented individuals impacted by the NSEERS program; and advocates and policymakers who have spoken or written about the NSEERS program in the larger context of United States immigration and counterterrorism policies after September 11, 2001. In addition, the Center examined governing statutes, regulations and statistics issued by the Department of Homeland Security (DHS). Finally, the Center reviewed previous reports by advocates and non-governmental organizations regarding the NSEERS program, and more than forty related federal court decisions.

The American-Arab Anti-Discrimination Committee (ADC), which is nonpartisan and nonsectarian, is the largest membership organization in the United States dedicated to protecting the civil rights of Arab-Americans. ADC was founded in 1980 by former Senator James Abourezk to combat racism, discrimination, and stereotyping of Americans of Arab descent. With headquarters in Washington, D.C., and offices in New Jersey, Massachusetts, Michigan, and California, ADC has 38 local chapters and members across the nation. Through its Department of Legal Services, ADC offers counseling in cases of discrimination and defamation and selected impact litigation in the areas of immigration. ADC also coordinates its efforts closely with local, state and federal government agencies in facilitating open lines of

communication with the Arab-American community. In the wake of September 11, 2001 (9/11), ADC has had a visible presence in the struggle against increasing government encroachment into the lives of both Arab American and Muslim citizens and immigrants. Working in conjunction with other non-profit organizations, research and policy institutions, ADC has voiced strong opposition to government programs that profile based on ethnicity, nationality or religion.

The Center for Immigrants' Rights is a new clinic at the Pennsylvania State Dickinson School of Law whose mission is to represent immigrants' interests through legal excellence, advocacy, education, and collaboration with key stakeholders and the community. The Center teaches law students the skills necessary to be effective immigration advocates and attorneys, primarily through organizational representation, where students work on innovative advocacy and policy projects relating to U.S. immigration policy and immigrants' rights. Students build professional relationships with government and nongovernmental policymakers, academics, and individuals. Students acquire essential practical and substantive knowledge of immigration lawyering and advocacy through project specific work, weekly classes, readings, reflection papers, and "case rounds."

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version of this paper: Nadine K. Wettstein, Director of the American Immigration Law Foundation's Legal Action Center; Melissa Frisk, Senior Attorney at Maggio & Kattar, P.C.; Kerri Sherlock Talbot, Associate Director for Advocacy at the American Immigration Lawyers Association; Nancy Morawetz, Professor of Clinical Law at the New York University School of Law, and Malea Kiblan, an immigration attorney at Kiblan Law Offices, P.C.. ADC and the Center also thank Sin Yen Ling, Staff Attorney Asian Law Caucus, for taking time from her busy schedule to discuss the early days of special registration; Edward Alden, Senior Fellow at the Council on Foreign Relations and noted author of Closing of the American Border, for his spirit and in-depth of knowledge about the intersections of security and immigration; and Mary L. Sfasciotti, Esq., who contacted the Center and shared the compelling story of a client who is struggling to support his family after being determined to be in willful violation of special registration. ADC and the Center also thank Priya Murthy Esq., Policy Director at South Asian American Leaders for Tomorrow; Rashida Tlaib, Representative in the Michigan House of Representatives; Jesse Moorman, attorney at the Human Rights Project; and Benjamin Johnson, Executive Director of the American Immigration Law Foundation.

## EXECUTIVE SUMMARY

The National Security Entry-Exit Registration System (NSEERS) program was implemented as a counterterrorism tool in the wake of September 11, 2001. The NSEERS program required certain non-immigrants to register themselves at ports of entry and local immigration offices for fingerprints, photographs and lengthy questioning. The most controversial aspect of the NSEERS program was a “domestic” component that solicited registrations from more than 80,000 males who were inside the United States on temporary visas from Muslim-majority countries. In September 2003, of the more than 80,000 individuals who complied with call-in registration, 13,799 were referred to investigations and received notices to appear, and 2,870 were detained.<sup>2</sup> Many non-immigrants subjected to the NSEERS program did not understand the details of the program, as the rules were unclear and public outreach and notice were insufficient.

NSEERS’s initial mission was to keep track of non-immigrants and prevent terrorist attacks. However, interviews with immigration attorneys representing individuals impacted by NSEERS and policy advocates, and a review of multiple reports and federal court decisions reveal that the NSEERS program was unsuccessful as a counterterrorism tool.

Many of the individuals who legally challenged the NSEERS program entered the United States lawfully, diligently complied with the NSEERS program, were predominantly male and Muslim, and had an immigration violation such as overstaying a visa that came to the attention of the immigration agency after complying with NSEERS. Moreover, many individuals impacted by NSEERS do not appear to have terrorism charges or criminal histories. Notably, many of these individuals have meaningful family, business and cultural ties to the United States.

Indeed, more than seven years after its implementation, NSEERS continues to impact the Arab-American community. Impacted individuals include those who are married to United States citizens or meaningfully employed in the United States. Well-intentioned individuals who failed to comply with NSEERS due to a lack of knowledge or fear have been denied “adjustment of status” (green cards), and in some cases have been placed in removal proceedings under the theory that they “willfully” failed to register. This scenario has torn apart Arab-American families because of the real implications of having a parent or spouse without a legal status.

NSEERS has also raised a number of public policy questions. Public outcry, governmental criticism of the program, and judicial challenges demonstrate that the program has not necessarily benefited the United States’ domestic and foreign policy. Today, the United States is at a critical and historic juncture: a new Administration presents an opportunity to restore America’s character, and reexamine and overhaul ill-conceived policies implemented in the last eight years. With this in mind, this white paper offers the following recommendations to the Obama Administration:

1. The Administration should terminate the NSEERS program and repeal related regulations.
2. Individuals who did not comply with NSEERS due to lack of knowledge or fear should not lose eligibility for or be denied a specific relief or benefit, to which they are otherwise



eligible. Similarly, the Administration should provide relief to individuals who were placed in removal proceedings because of their participation in NSEERS.

3. The Administration should allow individuals impacted by NSEERS, who have been removed, to return to the United States, should they have a basis for re-entering the United States. Special consideration should be given to individuals with immediate family members living in the United States and/or those with pending benefits applications.
4. The Administration should eliminate programs that target people based on ethnic origin, race, nationality, religion and/or gender. The Administration should insure that agencies adhere to a standard of individualized suspicion.
5. Upon termination of the NSEERS program, the Administration should issue a formal apology to foreign visitors subject to the NSEERS program, in order to rectify the impression left on many affected communities impacted by the special registration program. The apology should be issued through a press release and a formal letter posted on the website of the Department of Homeland Security. The government should clarify that ethnic origin, race, nationality, religion and/or gender alone are not a sufficient basis of criteria for identifying terrorists.
6. With transparency being a pillar of the current Administration, DHS should release the number of terrorists identified through the NSEERS program and related data, in order to assess the government's professed success of the program.

## INTRODUCTION

*Times of crisis are the true test of democracy. Our nation still bears the scars of an earlier crisis when our government went too far by detaining Japanese, German, and Italian Americans based on their race, ethnicity, or national origin. We should not repeat these painful mistakes.*

-- Letter from Senator Russell Feingold, Senator Edward Kennedy and Representative John Conyers, December 23, 2002.

In the wake of the September 11, 2001 terrorist attacks on the United States, the American government declared a war against terrorism, and the “prevention of another terrorist attack” became the primary focus of the George W. Bush Presidency.<sup>3</sup> A reexamination of immigration laws and controls was inevitable in light of the fact that each of the 19 terrorists was foreign-born and entered the United States with a temporary valid tourist or student visa.<sup>4</sup> What ensued were efforts by the United States government to virtually close the borders following the terrorist attacks, and put in place measures targeted primarily towards immigrants from Arab or Muslim nations.<sup>5</sup> Within less than one year of the 9/11 attacks, the Department of Justice (DOJ) detained hundreds of non-citizens in connection with a 9/11 investigation- hereinafter called the September 11 detainees.

According to the DOJ’s Inspector General, detainees were pursued and arrested through a variety of methods, including anonymous tips made by people who were “suspicious of Arab and Muslim neighbors who kept odd schedules.”<sup>6</sup> The Inspector General also revealed that many of the September 11 detainees were denied a fair process or access to the courts and were subject to harsh conditions of confinement.<sup>7</sup> Beyond the 9/11 investigation, the government issued dozens of immigration policies for reasons of “national security.” For example, the DOJ issued a memorandum requiring immigration judges to close all hearings related to individuals detained



in the course of the 9/11 investigation; instituted programs to “interview” thousands of Arab and Muslim men living in the United States for information; issued a proposed rule to “clarify” the requirement that every non-citizen report his change of address to the agency within 10 days of moving or else face criminal and civil charges, including deportation; and issued regulations authorizing the former Immigration Naturalization Services (now Department of Homeland Security) to detain any non-citizen for 48 hours for an unspecified “additional reasonable period of time” before charging the person with an offense.<sup>8</sup>

Many of these policies targeted immigrants from Arab and South Asian countries with Muslim-majority populations.<sup>9</sup> Critics have argued that the government’s use of immigration law through such policies as a counterterrorism tool after September 11, 2001 failed to make the nation safer; discriminated against individuals based on nationality and religion; and modified the character of this nation.<sup>10</sup> The National Security Entry-Exit Registration System (NSEERS or “special registration”)<sup>11</sup>, the subject of this white paper, is one practice where immigration law was used as a counterterrorism tool. The NSEERS program, which was rolled out in June 2002, required certain non-immigrants to register themselves at ports of entry and local immigration offices. The most controversial aspect of the NSEERS program was a “domestic” component that solicited registrations from more than 80,000 males who were inside the United States on temporary visas from Muslim-majority countries. In September 2003, of the more than 80,000 individuals who complied with call-in registration, 13,799 were referred to investigations and received notices to appear, and 2,870 were detained.<sup>12</sup> Many non-immigrants subjected to the NSEERS program did not understand the details of the program, as the rules were unclear and public outreach and notice were insufficient.

Despite the “suspension” of certain aspects of the NSEERS program in December 2003, many individuals and families continue to be impacted. Some individuals affected by NSEERS are unable to obtain meaningful and legal employment to support their families.<sup>13</sup> Mr. Abdul-Karim Nasser is one of those individuals. Mr. Nasser, a native of Morocco, came to the United States as a visitor in 2001, and fell in love with and married Patricia Amy Stewart, an American citizen.<sup>14</sup> They have three young children, all of whom were born in the United States. Mr. Nasser stated in his complaint that he was not aware of the requirement for registration. According to Mr. Nasser’s complaint, “at all times relevant hereto, Plaintiff in good faith attempted to comply with the special registration requirements of the NSEERS program established by the Attorney General which consisted of multiple and confusing notices published in the Federal Register expanding the class of affected foreign citizens and nationals, changing the deadlines for compliance and listing varying periods of admission.”<sup>15</sup> Ms. Stewart filed an immediate relative petition on her husband’s behalf on February 5, 2002, and on that same date Mr. Nasser filed an application for adjustment of status and work authorization.<sup>16</sup>

Pursuant to his pending adjustment, Mr. Nasser appeared at a local DHS office on June 3, 2003 for the processing of his employment authorization application. Despite being called in to process his work authorization, at no point did DHS advise Mr. Nasser that he needed to register under NSEERS.<sup>17</sup> On January 19, 2006, Mr. Nasser underwent special registration as a condition of his pending application for adjustment of status.<sup>18</sup> On March 21, 2006, Nasser was denied adjustment of status and was found to have “willfully” violated NSEERS.<sup>19</sup> This has left Mr. Nasser in the difficult position of being ineligible to work because he has no legal status in

the United States,<sup>20</sup> and has harshly impacted him and members of his immediate family.<sup>21</sup>

The government's practice of profiling communities based largely on national origin and religion through NSEERS and other law enforcement programs endures. In September 2008, Immigration and Customs Enforcement (ICE) released hundreds of records on "Operation Front Line," a secret government program designed to "detect, deter, and disrupt terrorist operations" leading up to the 2004 Presidential election through the 2005 Presidential inauguration.<sup>22</sup> As described by the joint statement from Yale Law School and ADC, "[a]ccording to Department of Homeland Security statistics, citizens from Muslim-majority countries were 1,280 times more likely to be targeted by Operation Front Line than citizens from other countries. Moreover, 76 percent of those investigated were men."<sup>23</sup> The findings further reveal that NSEERS was one of the databases utilized to identify targets for Operation Front Line.<sup>24</sup> In a related complaint filed on February 26, 2009 with the DHS's Office for Civil Rights and Civil Liberties, ADC stated, "[s]imilar practices [to Operation Frontline] burgeoned in the post 9-11 era, and resurfaced in spite of the rather null level of success and effectiveness in finding terrorists or those connected to terrorism. The National Security-Entry Exit Registration System (NSEERS), commonly known as "special registration," was another practice where immigration law was used as a counterterrorism tool with no real success. Similar to previous practices, the end result of NSEERS was the deportation of thousands of individuals, with not a single individual being charged with a terrorism related crime. Similarly with Operation Frontline, not a single individual was charged with terrorism related crimes."<sup>25</sup>

## LEGAL AUTHORITY AND ANALYSIS

### *Statutory Foundation for NSEERS*

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, Public Law 110 (IIRAIRA).<sup>26</sup> Section 110 of the IIRAIRA introduced the concept of an electronic “entry and exit data system” that integrates arrival and departure information required under the law in an electronic format and in a Department Of Justice or Department of State database, including those databases used at ports of entry and consular offices.<sup>27</sup> In 2000, the Data Management Improvement Act of 2000 amended section 110 of the IIRAIRA which, among other things, clarified that the new entry and exit system should not be construed to permit the United States government to impose any new documentary or data collection requirements and created a taskforce made up of governmental and private industry representatives to review the establishment of an entry and exit system.<sup>28</sup>

After 9/11, Congress revisited the entry and exit system, and as part of the USA PATRIOT Act,<sup>29</sup> incorporated a “Sense of Congress” that stated, “[i]n light of the terrorist attacks perpetrated against the United States on September 11, 2001, it is the sense of the Congress that the Attorney General, in consultation with the Secretary of State, should fully implement the integrated entry and exit data system for airports, seaports, and land border ports of entry, as specified in section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act [...] with all deliberate speed and as expeditiously as practicable.”<sup>30</sup> In developing the entry and exit system, the USA PATRIOT Act further required the United States government to focus on (1) the utilization of biometric technology; and (2) the development of tamper-resistant documents readable at ports of entry. Furthermore, the legislation required that entry and exit

data be interfaced with law enforcement databases “for use by Federal law enforcement to identify and detain individuals who pose a threat to the national security of the United States.”<sup>31</sup>

The entry and exit system was addressed again in 2002, with the passage of the Enhanced Border Security and Visa Entry Reform Act of 2002.<sup>32</sup> This legislation requires the Attorney General and the Secretary of State to, among other things, (1) implement, fund, and use a technology standard under section 403(c) of the USA PATRIOT ACT in United States ports of entry and at consular posts abroad; (2) establish a database containing the arrival and departure data from machine-readable visas, passports, and other travel and entry documents possessed by aliens; and (3) make interoperable all security databases relevant to making determinations of admissibility under the immigration statute.<sup>33</sup>

In order to carry out its mandate, Congress placed the responsibility of developing an entry and exit registration system into the hands of the DOJ. According to the DOJ, the NSEERS program served as “the first step toward the development of a comprehensive entry-exit system applicable to virtually all foreign visitors.”<sup>34</sup> However, the NSEERS program as initiated by DOJ is quite different from the program initially proposed by Congress via statute, because the NSEERS program targeted visitors from Muslim-majority countries and went beyond tracking the arrivals and departures of non-citizens.

While the NSEERS program itself was publicly featured as a component of a comprehensive entry and exit system, the statutory foundation for the program has also been linked to section 263 of the Immigration and Nationality Act (INA).<sup>35</sup> The statutory provision

contained within section 263 of the INA contains a specific provision on the registration of special groups. Under the INA, the Attorney General is permitted to require registration for several classes of non-immigrants including (1) alien crewmen, (2) holders of border-crossing identification cards, (3) aliens confined in institutions, (4) aliens under order of removal, (5) aliens who are or have been on criminal probation or criminal parole within the United States, and (6) aliens of any other class not lawfully admitted to the United States for permanent residence.<sup>36</sup> None of these classifications allow for the selective enforcement of registration and mistreatment of non-immigrants based on national origin or religion. Notably, the NSEERS program has been held by many courts to be consistent with the scope of INA section 263.<sup>37</sup> In his public remarks announcing the NSEERS program, former Attorney General John Ashcroft stated that

[t]he responsibility to establish the National Security Entry-Exit Registration System is already contained in U.S. law. Some of the provisions date to the 1950s; others were added by Congress in the 1990s. Congress has mandated that, by 2005, the Department of Justice build an entry-exit system that tracks virtually all of the 35 million foreign visitors who come to the United States annually. This registration system is the first crucial phase in that endeavor and will track approximately 100,000 visitors in the first year.<sup>38</sup>

### *Stages of NSEERS*

The NSEERS program was implemented in two stages: first through registration at designated ports of entry (POE), and second through a domestic or call-in registration. POE registration focused on the tracking of certain non-immigrants entering and leaving the country.<sup>39</sup> Those required to register at POE included: all nationals of Iran, Iraq, Libya, Sudan and Syria; nonimmigrant aliens whom the State Department determines to present an elevated national security risk, based on criteria reflecting current intelligence; and aliens identified by INS inspectors at the port of entry, using similar criteria.<sup>40</sup> Individualized criteria were laid out in an

INS memorandum to assist inspecting officers with making determinations of whether a non-immigrant should be subject to special registration.<sup>41</sup> The factors identified in the memorandum were: 1) whether the person has made unexplained trips to any of the several listed countries, 2) whether the person has previously overstayed an authorized period of admission, or 3) whether “the nonimmigrant alien’s behavior, demeanor, or answers indicate that the alien should be monitored in the interest of national security.”<sup>42</sup> When registering at a designated POE, individuals are fingerprinted, photographed, and subject to extensive questioning.<sup>43</sup> In addition to registering, the government mandated that all individuals - who register under NSEERS and remain in the United States for thirty days or more – to notify the government of any change of address, employment or school.<sup>44</sup> Non-immigrants who registered under the POE registration requirements need to complete a departure check when they leave the country.<sup>45</sup> Previously, POE registrants were also required to report to a local immigration office for a “30 day” interview if they remained in the United States for more than thirty days, and also for an annual interview if they remained in the United States for more than one year.<sup>46</sup>

The second stage of NSEERS, domestic or call-in registration, was the most controversial part of the program.<sup>47</sup> It was implemented by former Attorney General John Ashcroft on November 6, 2002 through publication in the Federal Register.<sup>48</sup> Distinct from POE registration, “call-in” registration was limited to certain males who were nationals and citizens of twenty-five countries who were admitted and last entered the United States as a non-immigrant.<sup>49</sup> Call-in registration was rolled out in four stages through publication in the Federal Register.<sup>50</sup> Non-immigrant males from Iran, Iraq, Libya, Sudan, and Syria made up the first group subject to call-in registration.<sup>51</sup> The second group of registrants subject to call-in comprised non-immigrants



from Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen.<sup>52</sup> Under the third group, registration was required of non-immigrants from Saudi Arabia and Pakistan.<sup>53</sup> Finally, the fourth group required to register was comprised of non-immigrants from Bangladesh, Egypt, Indonesia, Jordan, and Kuwait.<sup>54</sup> Notably, individuals from the aforementioned countries who were not subject to call-in registration included females, United States citizens, lawful permanent residents, non-immigrants on diplomatic “A” or “G” visas, certain asylum applicants, and those already granted asylum.<sup>55</sup> Ironically, individuals who entered the United States without inspection were not required to register as they did not meet the government’s requirement of having been last admitted as a non-immigrant visa holder.<sup>56</sup>

As part of call-in registration, non-immigrants were subject to a series of processing requirements. For example, at special registration interviews, individuals were asked for their passports, other forms of identification, proof of residence, and proof of employment or matriculation.<sup>57</sup> Additional information was required of different non-immigrants based on their immigration status and responses to questions. For instance, some people were asked for a copy of their lease or rental agreement, utility bill, and any other proof of residence.<sup>58</sup> Those on employment-based visas were asked for payroll stubs and a copy of their employment contract.<sup>59</sup> Finally, individuals on student visas were asked for their class schedule, official notification of grades, class or yearbook picture, student identification card, and evidence of participation in extracurricular activities.<sup>60</sup> According to the government, the list of verifying documents could be expanded. After registrants provided the immigration officer with the necessary documentation, the officers would ask the registrants numerous questions under oath.

Previously, call-in registrants who remained in the United States for more than one year after the date they registered were required to appear for an annual interview.<sup>61</sup>

In 2003, the NSEERS program was transferred from the Department of Justice to the Department of Homeland Security. Effective March 1, 2003, INS ceased to exist and the immigration functions formally held by INS were delegated under the Homeland Security Act of 2002 to three bureaus in the newly created Department of Homeland Security (DHS).<sup>62</sup> The three bureaus include: the Immigration and Customs Enforcement (ICE), the Citizenship and Immigration Services (CIS) and Customs and Border Portal (CBP).<sup>63</sup>

#### *Penalties for Failure to Comply*

There are several penalties associated with the NSEERS program.<sup>64</sup> For example, if a designated person fails to comply with NSEERS after admission, he will be considered to have failed to maintain status under section 237(a)(1)(C)(i) of the Immigration and Nationality Act.<sup>65</sup> An exception applies if the individual can show that his failure to register was “reasonably excusable or not willful.”<sup>66</sup> Notably, there is a “presumption of inadmissibility” for “[a]ny nonimmigrant subject to special registration who fails, without good cause, to be examined by an inspecting officer at the time of his or her departure and to have his or her departure recorded by the inspecting officer.”<sup>67</sup> According to the regulations, such individuals shall “be presumed to be inadmissible [upon re-entry] under, but not limited to, section 212(a)(3)(ii) of the Immigration and Nationality Act, as a person whom the Secretary of Homeland Security has reasonable grounds to believe, based on the alien’s past failure to conform with the requirements for special registration, seeks to enter the United States to engage in unlawful activity.”<sup>68</sup> In addition, there

are criminal consequences for non-compliance with NSEERS. A failure to register can result in misdemeanor charges. The statute provides that anyone required to apply for registration who “willfully fails or refuses” to register “shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed \$1000 or be imprisoned, not more than six months, or both.”<sup>69</sup>

Although the official call-in of males from the listed countries provided in the Federal Register has been “suspended,” non-immigrants who did not comply with any aspect of domestic or POE registration requirement are still required to report for registration and are subject to the penalties for failure to register. Specifically, the interim rule states, “[t]his rule does not change any of the penalties for failing to comply with the special registration provisions. Moreover, this rule does not excuse any prior failure to comply with special registration provisions.”<sup>70</sup> Furthermore, although the interim rule suspended the automatic 30-day and annual re-registration requirements,<sup>71</sup> the rule did not amend procedures for special registration at POE or departure registration, thus leaving many aspects of the NSEERS program intact. Additionally, DHS explicitly reserved the right to notify individuals whenever additional reporting is required.<sup>72</sup> The interim regulation also permits the DHS Secretary to “impose such special registration, fingerprinting, and photographing requirements upon nonimmigrant aliens who are nationals, citizens, or residents of specified countries or territories (or a designated subset of such nationals, citizens, or residents) who have already been admitted to the United States or who are otherwise in the United States.”<sup>73</sup> Arguably, this provision provides the DHS with authority to re-ignite call-in registration in the future.

### *Concerns over NSEERS*

DHS reasoned that suspending the special registration program was appropriate in light of the deployment of United States-Visitor and Immigrant Status Indicator Technology (US-VISIT).<sup>74</sup> The suspension rule itself stated, “[a]s DHS develops the larger system mandated by Congress, to be called US-VISIT, it will integrate the NSEERS registration currently in use.”<sup>75</sup> According to former Attorney General Ashcroft and ICE, NSEERS was meant to be temporary until the government had a chance to fully launch US-VISIT.<sup>76</sup> US-VISIT was promoted as requiring all non-immigrants regardless of the country of residence to be subject to registration requirements such as biometric scans, photographs and fingerprinting.<sup>77</sup> Notably, there were a number of statements made by former Undersecretary for Border and Transportation Security in DHS, Asa Hutchinson, and former Homeland Security Secretary, Tom Ridge, that NSEERS would be phased out and replaced by US-VISIT.<sup>78</sup> In announcing the interim rule, former Undersecretary Hutchinson stated, “[t]oday’s announcement that the domestic NSEERS interview requirement will be phased out is another important step forward by the Department of Homeland Security to maintain the integrity and security of our nation’s immigration systems. [...] This change will allow us to focus our efforts on the implementation of US-VISIT while preserving our ability to interview some visitors when necessary.”<sup>79</sup> Despite these earlier statements and the implementation of US-VISIT, NSEERS remains alive and well.

There are legitimate concerns over the remaining components of the NSEERS program and its effects, which -over time- have greatly impacted individuals, families and communities. For instance, spouses of U.S. citizens have been denied lawful permanent resident (green card) status as a matter of discretion based on a “willful” failure to register for NSEERS.<sup>80</sup> Notably,

whether the government has met the requisite “willfulness” before charging and removing individuals for “willfully” failing to register is unsettled. While “willfulness” requires that a decision be “knowing and voluntary,” it is unclear practically speaking whether the government has provided enough facts to make a finding of “willful failure” in every instance where an individual has been sanctioned for non-compliance with NSEERS.<sup>81</sup> According to one attorney, “[u]nder the circumstances of this [NSEERS] program, possibly with the exception of foreign students, there was simply insufficient notice to those affected to make a finding of willfulness.”<sup>82</sup>

A related concern is the lack of awareness by the public and affected communities about the NSEERS rule and remaining requirements. One immigration attorney notes, “when NSEERS came into effect, there was no systematic notice given; the exception being the foreign students, since the responsibility of alerting the students of registration procedures fell on the school.”<sup>83</sup> In fact, many non-immigrants were either not aware of special registration or were too afraid to register and in some cases believed the law was not applicable to them.<sup>84</sup> In one instance, an Arab Christian man contacted the ADC because he did not register during the call-in registration period and is now facing possible removal for failure to register.<sup>85</sup> He was mistakenly under the impression that special registration is only required for *Muslim* non-immigrant males.<sup>86</sup>

Another related concern is whether the government’s release of special registration requirements through publication in the Federal Register constitutes adequate notice. Most people do not read the Federal Register, and even if someone happens to peruse it, he might have a difficult time understanding the numerous requirements, notices and deadlines. Furthermore,

the American Civil Liberties Union has argued that the type of notice given was inconsistent with the legal requirements for notice under the Administrative Procedure Act and did not constitute legally sufficient assurance that actual notice, or for that matter, constructive notice had been given to registrants.<sup>87</sup> Although constructive notice requires that notice be provided so that the matter at the bare minimum is brought to the attention of the individual it is directed towards, the requirements as posted by the Federal Register did not meet this standard.<sup>88</sup> Moreover, the media and some of DHS's own officers advertised that NSEERS had ended. In newspapers across the country, reports were also made that NSEERS was abolished.<sup>89</sup>

Meanwhile, public interest groups and community-based organizations, such as the Asian American Legal Defense Fund, National Lawyers Guild, American Civil Liberties Union, American Immigration Lawyers Association, and American-Arab Anti-Discrimination Committee attempted to educate affected communities about the program.<sup>90</sup> Testifying before the House Judiciary Committee, Mr. James Zogby stated that, "due to inadequate publicity and INS dissemination of inaccurate and mistranslated information, many individuals who were required to register did not do so. Many who were required to register in the call-in program were technically out of status due to long INS backlogs in processing applications for permanent residency."<sup>91</sup> Government officials have even noted that during the first year of call-in registration, notices sent out were at times inaccurate and there were mistranslations of the Arabic language.<sup>92</sup> Moreover, the government itself has noted that there were problems with the dissemination of special registration requirements and proceeded to reprint notices. Clearly, the government's dissemination of notice regarding the NSEERS requirements was inadequate.<sup>93</sup>

### *Legal Challenges in Courts*

Since its inception in 2002, there have been a number of legal challenges brought to the federal courts by petitioners detained and/or placed under removal proceedings as a result of the special registration program. Petitioners have raised legal challenges based on constitutional, statutory and regulatory grounds. In many of these cases, courts have held that the power to remedy the hardships caused by NSEERS rests in the hands of the political arms of the Executive and Legislative Branch.<sup>94</sup>

Many of the NSEERS cases reviewed for this white paper involve individuals who were appealing removal decisions from the Immigration Judge (IJ)<sup>95</sup> and Board of Immigration Appeals (BIA).<sup>96</sup> While the courts have held that noncitizens are entitled to equal protection of the law under the Fifth Amendment of the Constitution,<sup>97</sup> nearly every Circuit Court of Appeals has found that the NSEERS program did not violate the Equal Protection Clause.<sup>98</sup> Similarly, many federal courts of appeals have rejected claims of selective enforcement based on national origin concluding that the NSEERS program lacked the requisite “outrageousness” to meet the *Reno* standard (limiting selective prosecution claims to “the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome.”)<sup>99</sup> Instead, many courts have held that, with regards to NSEERS, judicial deference to the Executive Branch is “especially appropriate.”<sup>100</sup> Courts have further found that the NSEERS program did not violate the Fourth, Fifth, and Sixth Amendments of the Constitution.<sup>101</sup> Moreover, many courts have cited to the registration statute to conclude that the Attorney General has broad powers to design programs such as NSEERS.<sup>102</sup> Such cases have



further concluded that the NSEERS program serves a legitimate objective of tracking nationals from certain countries to “prevent terrorism.”<sup>103</sup>

While the Courts have consistently ruled that the NSEERS program did not violate the Constitution, five critical observations about these cases should be noted as the Executive Branch and Legislature consider the program’s future. Moreover, these observations help demonstrate the failure of NSEERS to remain truthful to its original mission. First, to the extent that the courts conclude that “preventing terrorism” is a legitimate purpose served by the NSEERS program, the analysis by the 9-11 Commission, security experts, select members of Congress, select former and current members of DHS, and publicly available information seem to conclude the contrary.<sup>104</sup> Individuals who are likely to comply with registration requirements are not those who threaten our national security and evade our laws. As reported by the New York Times, “James W. Ziglar, who was commissioner of the Immigration and Naturalization Service before it was subsumed into the Department of Homeland Security, said he and members of his staff had raised doubts about the benefits of the special registration program when Justice Department officials first proposed it. He said he had questioned devoting significant resources to the initiative because he believed it unlikely that terrorists would voluntarily submit to intensive scrutiny.”<sup>105</sup> Mr. Ziglar continued, “[t]o my knowledge, not one actual terrorist was identified. But what we did get was a lot of bad publicity, litigation and disruption in our relationships with immigrant communities and countries that we needed help from in the war on terror.”<sup>106</sup> Meanwhile, the government has reasoned, “[w]e have caught suspected terrorists under NSEERS. While they may not be charged with terrorism grounds of inadmissibility or removability, that is not an indication of whether terrorists were caught. A non-immigrant

visitor, who overstays a visa, is present without inspection, commits a crime or fraud is just as removable under those grounds as terrorism grounds.”<sup>107</sup> The purpose of NSEERS was to help discover suspected terrorists; however, most of the cases involved visa overstays, and none of the individuals involved with these cases were charged with terrorism-related crimes. One critic of special registration noted, “[i]ts goals have been contradictory: gathering information about non-immigrants present in the United States, and deporting those with immigration violations. Many non-immigrants have rightly feared they will be detained or deported if they attempt to comply, so they have not registered.”<sup>108</sup>

Second, a review of the cases is essential to understanding who was affected by the NSEERS program. A review suggests that most of the individuals who legally challenged the NSEERS program entered the United States lawfully, diligently complied with the NSEERS program, were predominantly male and Muslim, and had an immigration violation such as overstaying a visa that came to the attention of the immigration agency after complying with NSEERS.<sup>109</sup> For example, Kandamar was a native and citizen of Morocco who overstayed his B-2 visitor visa and duly registered.<sup>110</sup> Imtiaz Ali is a native and citizen of Pakistan who overstayed his visitor visa and complied with the NSEERS program.<sup>111</sup> Karayama Hadayat is a native of Indonesia who overstayed his B-2 visa and registered with the NSEERS program. Notably, Hadayat had a family immigration petition pending at the United States Citizenship Immigration Service.<sup>112</sup> Abu Hasan Mahmud Parvez is a native and citizen of Bangladesh who entered the United States on a diplomatic visa, and thereafter applied for and was granted student status.<sup>113</sup> Parvez married a Bangladeshi woman and together they had a United States citizen son.<sup>114</sup> Parvez was placed in removal proceedings after complying with the NSEERS

program.<sup>115</sup> Muhammad M. Mana Ahmed is a native and citizen of Yemen who entered the United States on a B-2 visa.<sup>116</sup> He overstayed his visa, and had a family immigration petition pending at the United States Immigration Services.<sup>117</sup>

Third, the factual histories of the individuals identified above suggest that the immigration agency did not, as a practical matter, focus their scarce resources on high-risk individuals. Many individuals impacted by the NSEERS program do not appear to have terrorism charges or criminal histories. Notably, many of these individuals had meaningful family, business and cultural ties to the United States. In November 2000, former INS Commissioner Doris Meissner issued an important memo on prosecutorial discretion, a terminology that refers to an officer's decision to refrain from or exercise enforcement. According to the memo, "[t]he 'favorable exercise of prosecutorial discretion' means a discretionary decision not to assert the full scope of the INS' enforcement authority as permitted under the law. Such decisions will take different forms, depending on the status of a particular matter, but include decisions such as not issuing an NTA [...]."<sup>118</sup> The memo also identifies several factors that officers should consider when determining whether to enforce the law against a particular individual, such as length of residence in the United States, criminal history, humanitarian concerns, whether the alien is likely to be eligible for future relief, cooperation with law enforcement, among other factors.<sup>119</sup> Recognizing that targeted enforcement is also cost-effective, the 2000 memo also identifies the objective of "effective management of limited government resources."<sup>120</sup> Since this time, the agency has issued a number of memos specific to the NSEERS program.<sup>121</sup>

A review of the Meissner memo suggests that former INS officers failed to exercise the

most basic of prosecutorial discretion by making a decision to arrest and place into removal proceedings thousands of individuals who voluntarily complied with the NSEERS program, had no criminal history and to the contrary had strong equities, such as family members living in the United States. Meanwhile, since the inception of special registration, attorneys across the country, often working pro bono, have worked tirelessly to defend well-meaning registrants placed in removal proceedings. In a majority of NSEERS cases, the government has penalized visa overstayers harshly.<sup>122</sup> Moreover, that nearly every individual identified was Muslim and male should be morally and socially troubling.

Fourth, even if one were to agree with the courts that a nationality and gender based registration program is Constitutional, the Executive's policy moving forward should not rest on the bare Constitutional minimum. The United States government has an important decision to make about what kind of America it wants to be. Ostracizing and profiling people have never been a sound method for preserving democracy and it will not secure the borders of the United States. Many have stated that “[t]here is a value in Entry-Exit but it has to be respectful of some general rights—equal protection and profiling is no way to go about initiating this entry-exit program.”<sup>123</sup> Greg Nojeim, formerly of the American Civil Liberties Union, said it best when he stated before the U.S. Commission on Civil Rights, “I think it goes to who we are as a nation, what our values are, how we’re going to balance freedom and security over the long haul, not for the period that our troops are in Afghanistan or in Iraq.”<sup>124</sup>

Fifth, although the DOJ advised registrants that “[they] may be represented at [their] own expense by the legal counsel of [their] choice” during registration proceedings,<sup>125</sup> the American

Immigration Lawyers Association, the New York Advisory Committee to the U.S. Commission on Civil Rights and Members of Congress noted ICE officers' refusal to grant individuals access to their attorneys during special registration interviews and questioning.<sup>126</sup> Interestingly, one practitioner noted that "when some components of NSEERS were suspended, and during late registration, there were places such as the Washington D.C. District Office where ICE officers still would not allow attorneys to attend the registrant's interviews, although they allowed access to counsel during the earlier actual periods of registration."<sup>127</sup> While the INA does not guarantee appointed, paid representation in an immigration proceeding,<sup>128</sup> Fifth Amendment due process rights may be violated by denial of the right to obtain legal counsel.<sup>129</sup> The regulations also confirm that individuals have a right to be represented by counsel at examinations by immigration officers, such as the NSEERS special registration: "[W]henever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney."<sup>130</sup>

## **POLICY**

The notion that simply by aggressively enforcing immigration laws you would catch terrorists -I think -is wrong. I think you will catch immigration violators, people whose visas have lapsed. The idea that you should just look at all young men from Muslim countries is ridiculous. Al-Qaeda are intelligent people. If you create a profile, what they are going to do is find people that do not fit the profile. There is no national profile that offers the kind of protection that we need. What we need is good intelligence.

-- Telephone Interview with Alden, Edward, Senior Fellow, Council on Foreign Relations (Oct. 24, 2008).<sup>131</sup>

The special registration program has raised a number of public policy questions. Public outcry, governmental criticism of the program, and judicial challenges demonstrate that the program has not necessarily benefited the United States. Organizations such as the American Immigration Lawyers Association, Migration Policy Institute, National Immigration Forum, American-Arab Anti-Discrimination Committee, Asian American Legal Defense Education Fund, Iranian-American Bar Association, Arab American Institute, Rights Working Group, the Lawyers Committee for Human Rights (now Human Rights First), have criticized the NSEERS program and documented increased profiling and discriminatory treatment towards Arabs, South Asians and Muslims.<sup>132</sup> According to a report by the American Immigration Law Foundation, rather than drawing communities together and encouraging a shared community responsibility, government projects such as NSEERS only serve to further alienate a community that is needed to truly win “the war on terrorism.”<sup>133</sup> For years, legal practitioners, civil rights, religious, immigration and civil liberties organizations, as well as affected communities called for a repeal or complete termination of the NSEERS program through administrative, legislative and judicial means but with very little success.<sup>134</sup>

### *Profiling as a Counterterrorism Tool*

Policymakers and security experts have argued that NSEERS failed to meet the stated objective of preventing terrorism. In an interview with Benjamin Johnson, he noted that “[t]he assumption that the countries identified in the program have a monopoly on terrorism...is an assumption that is really incorrect and in terms of the community is really destructive.”<sup>135</sup> According to Mr. Johnson, “[t]he border should not be your first line of defense; it should be your last. ...NSEERS should be refocused. We ought to take away profiling.”<sup>136</sup>

The fact that the program was not having the professed success the government promised made it extremely difficult for the public to believe that NSEERS was a well-founded program. Most people could not understand the government’s formula for selecting the countries subjected to the NSEERS program.<sup>137</sup> According to Edward Alden, “there was no evidence the program was working.”<sup>138</sup> Similarly, Juliette Kayyem, a terrorism expert who is currently serving as Assistant Secretary for Intergovernmental Programs at the Department of Homeland Security, questioned the government’s ability to combat terrorism through the NSEERS program and noted early on that, “the pure accumulation of massive amounts of data is not necessarily helpful, especially for an agency like the INS that already has problems keeping track of things.”<sup>139</sup> Kayyem referred to special registration as basically “an immigration sweep” and stated that “the idea that [NSEERS] has anything to do with security, or is something the government can do to stop terrorism, is absurd.”<sup>140</sup> Meanwhile, in response to a congressional inquiry about the number of terrorists identified through the NSEERS program and related data, DHS responded that the numbers of NSEERS charged with a terrorism-related ground of removal is classified and unavailable to the public.<sup>141</sup>



### *Congressional Action*

In a series of letters dated from December 2003 through January 2007, members of Congress have raised serious questions concerning NSEERS with DHS.<sup>142</sup> These letters question the effectiveness of the NSEERS program and its impact on both local communities and foreign allies. On December 23, 2002, Senators Russell Feingold, Edward M. Kennedy, as well as Representative John Conyers, Jr. wrote a letter to former Attorney General Ashcroft expressing “grave doubts about whether the INS’s implementation of NSEERS had struck a proper balance between securing our borders on the one hand and respecting civil liberties of foreign students, businesspeople, and visitors who have come to our nation legally on the other hand.”<sup>143</sup> The letter included a very compelling story about a sixteen-year-old boy admitted into the United States on a student visa. The young boy “was separated from his pregnant mother by CIS officers, even though he is seeking permanent residency to be able to join his mother, who is a permanent resident, and stepfather, who is a US citizen.”<sup>144</sup> The story of this teenager is very familiar among individuals targeted by special registration and many have voiced their disappointment with the government’s handling of the issue. In the letter, Members of Congress urged Attorney General Ashcroft “to suspend further implementation of the National Security Entry-Exit Registration System...until Congress and the Department [could] conduct a complete and thorough review.”<sup>145</sup>

Some members of Congress also introduced legislation to address the NSEERS program. The Civil Liberties Restoration Act (CLRA) was developed in 2003 as a response to growing concerns over the wave of federal immigration policies instituted after 9/11. The CLRA was

introduced concurrently in the Senate and House of Representatives in 2004 and reintroduced in the House in 2005.<sup>146</sup> One section of the CLRA terminates the regulations associated with NSEERS and further enables those placed in removal proceedings as a consequence of complying with the program to have their cases “administratively closed,” if they were placed in removal proceedings solely for failure to comply with NSEERS requirements or if they complied with NSEERS and either had a pending application for an immigration benefit or were eligible to apply for such a benefit.<sup>147</sup> The CLRA provision specifically excludes such relief for individuals who fall under the security or criminal-related grounds of inadmissibility or deportability.<sup>148</sup>

The legislation also provides individuals who received a final notice of removal with the opportunity to reopen their cases and apply for relief if they are otherwise eligible for such relief.<sup>149</sup> The CLRA includes “Sense of Congress” language on prosecutorial discretion in which Congress lays out the responsibility of DHS to uphold the law while at the same time to take into consideration factors to consider when deciding to enforce the law against a non-immigrant.<sup>150</sup> Notably, section 302(c) of the CLRA lays out factors DHS must consider when exercising discretion, including: immigrants status; length of residence in the United States; criminal history; humanitarian concerns; likelihood of achieving enforcement goals by other means; eligibility for other relief; community attentions; and DHS resources.<sup>151</sup> In June 2005, the House Judiciary Committee’s Subcommittee on Immigration, Border Security, and Claims held an oversight hearing on four provisions found in the CLRA.<sup>152</sup> At the hearing, Representative Marty Meehan raised the issue of NSEERS and mentioned his outstanding request to DHS for a list of individuals impacted by NSEERS with pending applications for adjustment. He identified the sections in CLRA that would terminate the NSEERS program, provide relief for certain

individuals who complied and were placed in removal proceedings, and codify the existing DHS memo on prosecutorial discretion.<sup>153</sup> The CLRA was never enacted into law.

### *Beyond the Border*

It is inevitable that the domestic policy, even of a sovereign nation, will significantly impact its policy abroad. When making decisions at home, the United States must take notice of the impact those decisions will have on its relations with other nations. The impact of NSEERS on foreign policy is striking. A Staff Monograph from the National Commission on Terrorist Attacks Upon the United States (9-11 Commission) reveals that “[t]here was significant opposition to the NSEERS program from some U.S. government officials, who feared the program would offend countries that were U.S. allies in the global war on terror. State personnel we interviewed said that NSEERS did harm our relations with foreign countries whose citizens were subject to its registration requirements. FBI Director Mueller said it came at a cost. Documents we reviewed, including correspondence from foreign countries’ representatives, indicate that some foreign governments were strongly opposed to having their nationals subject to NSEERS registration.”<sup>154</sup> In response, “[o]n March 31, 2003, ... the White House sent out a ‘global message’ on NSEERS from the Homeland Security Council to the executive secretaries of State, Justice, Homeland Security, the National Security Council, the Office of Management and Budget, the White House Domestic Policy Council, the Office of the Vice President, and the President’s Chief of Staff. The purpose of this message was ‘to explain responsibilities and ramifications of NSEERS to foreign governments’ and avoid misunderstandings with foreign partners.”<sup>155</sup> Clearly, American domestic policy affects its relationship with foreign allies. Therefore, it is essential to the American interest that those relationships be strengthened and maintained.

NSEERS and other programs that target the Arab, South Asian and Muslim communities for heightened scrutiny have been well publicized abroad, feeding a growing perception that Arab, South Asian and Muslim visitors are not welcomed in the United States. As a result, programs implemented after September 11, 2001, have caused a significant decrease in the number of people that travel to the United States.<sup>156</sup> The Travel Industry Association, which works closely with the United States government, has stated that the United States continues to struggle “to regain the millions of travelers we have lost since 9/11.”<sup>157</sup> In conversations with Edward Alden, Senior Fellow at the Council of Foreign Relations, he noted that because of NSEERS, “traveling to the United States continues to be unnecessarily humiliating [for] some foreign nationals from Muslim countries, who are seeking entry to work, study, and for other limited purposes.”<sup>158</sup> It is important that the government recognizes that NSEERS and other post 9/11 policies alienate groups of non-immigrants whose admission the United States actually seeks to advance. In fact, there are INA categories which promote the admission of non-immigrant professionals, students, athletes, and individuals of “extraordinary abilities and achievements.”<sup>159</sup> Temporary visas do play an important role in a healthy immigration system that contributes to a dynamic and fluid economy, and the grant of temporary visas demonstrates that the United States wants to promote immigration.

### *Stories*

There are many stories of students and professionals impacted by NSEERS. Dr. Fiaz Bhora is a Muslim and native of Pakistan who initially came to the United States through a training program reserved for foreign surgeons of extraordinary talent. By 2000, Dr. Bhora was

selected as “one of just 120 surgeons in the United States selected each year to train in cardiothoracic surgery.”<sup>160</sup> In July 2002, upon completing his residency program, Dr. Bhora returned to his home in Karachi, Pakistan to await his work visa approval. In the spring of 2003, however, Dr. Bhora found himself in an unfortunate situation. “Expecting it would take him no more than 30 days to receive a new visa and return to Los Angeles to take up his position”<sup>161</sup> as a member of the UCLA faculty, Dr. Bhora waited over seven months for the American Consulate in Islamabad, Pakistan to determine whether he would be granted readmission to the United States. Instead of performing operations on the hearts of humans, Dr. Bhora became a victim of NSEERS.<sup>162</sup> In an article discussing Dr. Bhora’s situation, “[t]oday, every time [Mr. Bhora] leaves the country, he must do so through certain airports where he can ‘check out’ with U.S. border officials. He went on holiday with his wife last year to Costa Rica, and when he returned he was pulled aside into secondary inspection while the officer emptied his wallet, writing down the names and numbers from every scrap of paper.” Dr. Bhora recounted, “He knew I was a cardio-thoracic surgeon who had left for a week on vacation, but it was as though I was entering the country for the first time.”<sup>163</sup>

United States colleges and universities attract some of the world’s most talented individuals for training. For example, Mr. D was a 19 year-old athlete from Algeria, who came to the United States on [a] student visa to play tennis at Western Michigan University.”<sup>164</sup> As a foreign student, Mr. D was subject to NSEERS as a condition for study in the United States.<sup>165</sup> Due to a car accident, he complied one day past the deadline for Algerian Nationals to special register. Although documents were available to show the circumstances of the one day delay, the local CIS office charged the student with failure to comply with NSEERS and placed him in

removal proceedings. Being distraught by this experience, the student finished up the semester and returned to Algeria.<sup>166</sup>

### *Yusef's Story*<sup>167</sup>

*When the domestic NSEERS was first implemented in November 2002, I was an undergraduate student at a public university in the middle of the United States. In the beginning, the implementation of the program did not elicit much talk or buzz on my campus since there were simply not many students from the countries listed under Group 1. It was not until the implementation of Groups 2, 3, and 4 that the impact of the program started to settle in since the registration impacted a greater number of students. The foreign Arab and Muslim students were puzzled by the nature and structure of the program, since they knew they were law-abiding residents, excelling in their classes, and had not committed any wrongdoing. Some were even wondering if the registration was only a preview of a bigger plan that would include rounding the registrants and interning them in camps. All Arab and Muslim students at my school registered, since they did not want to jeopardize their studies. Most importantly, they knew that they had nothing to hide or be afraid of.*

*NSEERS had a chilling effect on the level of activism and freedom of speech among these students. The perception that foreign students do not enjoy rights in the US became a reality with the registration, and the students felt they were treated as suspects. Many Arab and Muslim students became reluctant to join rallies or demonstrations for Palestine, to participate in peaceful protests against the war in Iraq, and to continue the outreach efforts made after 9/11 in local churches and high schools. The registrants were genuinely worried they were being tracked down by the US government, and so felt that any level of peaceful activism may taint them. I felt this self-censorship was reminiscent of what these students had probably faced in their home countries, and they certainly did not expect that this would be the case in America, specifically because of the values and principles that the United States was founded upon.*

*The International Student Office (ISO) on campus reached out to the student 'registrant population' and offered to drive the students in vans to the INS office in Fort Mine- an hour drive from campus. I signed up for a van scheduled to depart on January 24, 2003. A week before registration, I got all of the necessary documents ready, and placed them in a file, as if I was attending a job interview. I went to Banana Republic to buy a black turtleneck sweatshirt, and a pair of "fashionable jeans." I probably wanted to look American, and convey to the officers that I am really just an undergraduate student, with the very same aspirations of a 21-year-old American. I may have been born and raised in a country listed under NSEERS, but that does not mean that I am any different from my American peers at school.*

*In the early morning on that cold January day, 10 to 12 students gathered around the van,*

*and were waiting for Jane, the ISO advisor. During the one-hour drive, the atmosphere in the van was electrifying and tense: there were some nervous laughs here and there, but the mood was definitely not joyful. Our advisor tried to lighten up the situation by telling us that it will be fine, to which many of us responded: “yes, of course.” I think we were trying to remain calm, but were probably nervous deep inside, in spite of the fact we knew we had done nothing wrong, and had heard about the procedures to take place at the INS office. We also felt safe that we had Jane, an American, with us, and her presence meant a lot to the students. When we got to the INS office, what struck me was the sudden diversity. The room included students from neighboring cities attending community colleges. I had not seen such a big concentration of individuals who look Middle Eastern and speak Urdu and Arabic—all in a governmental building in a small town in Middle America!*

*We registered our names at the front desk, and waited to hear the immigration officers call our names before having the much-dreaded interview. We would wish one another “best of luck” when we went inside. There was also a sign of relief when the interview is over. I then heard my name, and proceeded to the room. The officer was a lady in her early 40s. I sat down, and she requested to see my official school transcripts, a letter from the school stating that I am in good standing, my course schedule for the semester, my rental/lease agreement, any utility bills, my passport, I-20, and I-94. She then asked me about my address overseas, my parents’ names—who live overseas—, their addresses and dates of births. After incorporating all of this info into the database, she took my fingerprints, and a picture. When the interview was over, she assigned me a Finger Identification Number (FIN) and wrote it down on my I-94. At that point, I felt that I was reduced to a mere number, the infamous FIN, and that I was branded. The fingerprinting would later be implemented across the board to anyone coming in into the US, but then, it was only implemented to NSEERS registrants. I left the room, and the other students and Jane were anxiously waiting outside, wanting to hear what transpired inside. Most students got asked similar questions. Jane then reminded us that we would need to re-register a year after that date.*

*I went back to classes the next day, and did not talk about my experience with my classmates. I do regret not having been vocal about it, so that the student body would be informed about what foreign students from particular countries were going through. At least, in my campus, there seemed to have been a deafening silence on the subject, as if it never happened. Personally, it was not until a few years later when I attended law school that the NSEERS topic was brought up again. During my immigration law class, and immigration legal clinic, both professors were going over the registration program, and I would then provide the class with my personal experience. To my shock, none of my classmates had heard about it. To their shock and dismay, they could not understand why I had to go through such registration, because they viewed me as one of “them.”*

*To this day, I wonder about the value, if any, that my personal info contributed to the government databases. The government was clearly after the wrong folks. Some of these folks*

*were international students, who have made it to the Dean's and Chancellor's lists, who have contributed to the diversity in their schools, who have broadened the horizons of their fellow American classmates and professors by enriching class debates with a different point of view on things, and by challenging and breaking stereotypes. NSEERS dashed the aspirations that foreign students had of being assimilated into the United States, since they were targeted and viewed as the "other," simply because they came from another country and that is in spite of their very similar aspirations and dreams for the future as the average Janes and Joes.*

-Yusef, March 22, 2009



## CONCLUSION AND RECOMMENDATIONS

The compelling stories and plights of those affected by NSEERS underscore the disparate impact special registration has had on United States domestic and foreign relations, and affected families and communities. In particular, the call-in registration included the explicit targeting of communities for heightened scrutiny. Using immigration law as a counterterrorism tool with racial profiling tactics has failed in the past, and continues to fail. Despite repeated assurances from the Department of Homeland Security that such policies are no longer used, the government continues to profile based on nationality and religion, the most recent example being Operation Frontline. NSEERS has also raised a number of public policy questions. Public outcry, governmental criticism of the program, and judicial challenges demonstrate that the program has not necessarily benefited the United States' domestic and foreign policy. Today, the United States is at a critical and historic juncture: a new Administration presents an opportunity to restore America's character, and reexamine and overhaul ill-conceived policies implemented in the last eight years. With this in mind, this white paper offers the following recommendations to the Obama Administration:

1. The Administration should terminate the NSEERS program and repeal related regulations.
2. Individuals who did not comply with NSEERS due to lack of knowledge or fear should not lose eligibility for or be denied a specific relief or benefit, to which they are otherwise eligible. Similarly, the Administration should provide relief to individuals who were placed in removal proceedings because of their participation in NSEERS.
3. The Administration should allow individuals impacted by NSEERS, who have been removed, to return to the United States, should they have a basis for re-entering the United States. Special consideration should be given to individuals with immediate family members living in the United States and/or those with pending benefits applications.

4. The Administration should eliminate programs that target people based on ethnic origin, race, nationality, religion and/or gender. The Administration should insure that agencies adhere to a standard of individualized suspicion.
5. Upon termination of the NSEERS program, the Administration should issue a formal apology to foreign visitors subject to the NSEERS program, in order to rectify the impression left on many affected communities impacted by the special registration program. The apology should be issued through a press release and a formal letter posted on the website of the Department of Homeland Security. The letter should explain that the NSEERS program has been terminated and the reasons for the complete suspension of the program. The government should clarify that ethnic origin, race, nationality, religion and/or gender alone are not a sufficient basis of criteria for identifying terrorists.
6. With transparency being a pillar of the current Administration, DHS should release the number of terrorists identified through the NSEERS program and related data, in order to assess the government's professed success of the program.

## TABLE OF AUTHORITIES

LAW	TITLES	EFFECTIVE DATE
<b>TITLE 8, CODE OF FEDERAL REGULATIONS PROVISIONS</b>		
8 C.F.R. Part 264.1	Registration and fingerprinting	Dec. 2, 2003
8 C.F.R. 264.1(f)	Registration, fingerprinting, and photographing of certain non-immigrants	Sept. 11, 2002
<b>INA PROVISIONS</b>		
INA § 261	8 U.S.C. 1301 Aliens seeking Entry; Contents	Oct. 24, 1988
INA § 262	8 U.S.C. 1302 Registration of Aliens	Apr. 01, 1995
INA § 263	8 U.S.C. 1303 Registration of Special Groups	Sept. 30, 1996
INA § 264	8 U.S.C. 1304 Forms of Registration and Fingerprinting	Sept. 30, 1996
INA § 265	8 U.S.C. 1305 Notices of Change of Address	Oct. 24, 1988
INA § 266	8 U.S.C. 1306 Penalties	Sept. 30, 1996
<b>KEY LEGISLATION PROVISIONS</b>		
IIRIRA or IIRAIRA	Illegal Immigration Reform and Immigrant Responsibility Act of 1996.	Sept. 30, 1996

USA Patriot Act of 2001	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001.	Oct. 26, 2001
DMIA	INS Data Management Improvement Act of 2000	Jun. 15, 2000
EBSVERA	Enhanced Border Security and Visa Entry Reform Act of 2002	May. 14, 2002

## **RESOURCE PAGE**

### **AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE**

**[HTTP://WWW.ADC.ORG/](http://www.adc.org/)**

NSEERS Resource Information Center

[http://www.adc.org/index.php?id=3077&no\\_cache=1&sword\\_list%5B%5D=nseers](http://www.adc.org/index.php?id=3077&no_cache=1&sword_list%5B%5D=nseers)

ADC & Yale Law School Joint Press Release Available at <http://www.adc.org/PDF/frontline.pdf>

“According to the records, ICE launched Operation Front Line (“Operation Front Line I”) in May 2004 to identify foreign nationals, both known and unknown to the U.S. government, who pose an elevated risk to national security. Operation Front Line I supported the government-wide Department of Homeland Security Interagency Security Plan that remained in effect through the Presidential Inauguration in January 2005. Pursuant to the initiative, ICE Headquarters analyzed data from immigration databases—including the National Security Entry-Exit Registration System (NSEERS), Student and Exchange Information System (SEVIS), and the United States Visitor and Immigrant Status Indicator Technology program (US-VISIT)—to identify persons with possible issues related to national security and immigration violations. ICE Headquarters then generated leads for ICE field offices to further develop violations and eventually remove persons in violation. From May 2004 to February 24, 2005, ICE investigated a total of 291 Operation Front Line I cases, resulting in 60 arrests.”

### **CONSTITUTION PROJECT**

**[HTTP://WWW.CONSTITUTIONPROJECT.ORG/](http://www.constitutionproject.org/)**

The Use and Abuse of Immigration Authority as Counterterrorism Tool: Constitutional and Policy Considerations

[http://www.constitutionproject.org/pdf/Immigration\\_Authority\\_As\\_A\\_Counterterrorism\\_Tool.pdf](http://www.constitutionproject.org/pdf/Immigration_Authority_As_A_Counterterrorism_Tool.pdf)

The Constitution Project’s Liberty and Security Committee initiated this report in 2008 which offers an analysis of immigration initiatives and reforms instituted by the federal government following September 11<sup>th</sup>. The report takes the reader through the constitutional implications of these programs and the effects of governmental policies on the deterrent of immigration. In particular, the Liberty and Security Committee focus on the implications of post 9/11 immigration policies and counterprograms tools on the free exercise of First Amendment rights and the Safeguards of the Fifth Amendment.

The paper documents the implementation of the National Security Entry-Exit Registration System (NSEERS), or “Special Registration,” in which “more than 80,000 noncitizens living in the United States were subject to special registration. Of these, 2,783 were detained for some period, and 13,400 were placed in deportation proceedings because of alleged visa violations. Many of those removed were individuals awaiting priority dates for family reunification. At the end of the interview process, the administration claimed to have identified eleven terrorism

‘suspects.’ To this day, however, none of those registered has been convicted of a terrorist crime.”

Recommendations:

“Adopt legislation or regulations requiring that DHS may not selectively target foreign nationals for deportation or other immigration enforcement on the basis of race, ethnicity, religion, or political association or ideology.”

#### **MIGRATION POLICY INSTITUTE**

**[HTTP://WWW.MIGRATIONPOLICY.ORG/](http://www.migrationpolicy.org/)**

DHS and Immigration: Taking Stock and Correcting Course

By Doris Meissner and Donald Kerwin February 2009

The full report is available at [www.migrationpolicy.org/pubs/DHS\\_Feb09.pdf](http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf)

The Migration Policy Institute published this comprehensive report assessing the performance of the immigration agencies within the Department of Homeland Security. In the report, authors include a section summarizing the intersection of counterprograms tools and immigration policies by DHS through programs such as the National Security Entry-Exit Program and the contradictory effect these tools have had on efforts to secure the borders while maintaining open doors.

“NSEERS has been widely criticized, not only by leaders of Muslim and Arab communities, but by the 9/11 Commission, congressional leaders, and independent experts. The reasons are familiar: it was ineffective in producing terrorism-related convictions; cost dearly in foreign relations terms; misdirected precious counterterrorism resources; and deeply alienated important immigrant communities in the United States whose cooperation is critical in countering terrorism.

Recommendations:

DHS must embrace its commitment to the policy of Secure Borders/Open Doors in practice. To that end, and with NSEERS and US-VISIT being essentially duplicative, DHS should end NSEERS, the post-9/11 special registration requirements for travelers from designated Middle Eastern countries.

New visa controls, intelligence and information-sharing, and US-VISIT have eclipsed NSEERS. Moreover, nonimmigrant aliens from any country may be registered on an individual basis if they meet criteria established by the Homeland Security Secretary or are referred by a consular officer or immigration inspector in the interest of law enforcement or national security.

NSEERS did not have any discernible impact on security, is now redundant, has alienated important immigrant communities, and has contributed to weakening the international standing of the United States. Most importantly, it continues to symbolize an approach that treats immigration solely as a security vulnerability. NSEERS information should be incorporated into

US-VISIT and the remaining aspects of the program terminated. Given the program's discriminatory nature, DHS should exercise case-by-case prosecutorial discretion to terminate removal proceedings against the nearly 14,000 individuals who were placed in proceedings because of their participation in NSEERS. Similar discretion should apply to those charged with NSEERS violations.

Finally, DHS must broaden its vision of national security to recognize that healthy, welcoming immigration policies and procedures strengthen the nation's true national security."

**LIBERTY & SECURITY TRANSITION COALITION**  
**[HTTP://2009TRANSITION.ORG/LIBERTY-SECURITY/](http://2009transition.org/liberty-security/)**

Liberty and Security: Recommendations for the Next Administration and Congress

"The National Security Entry and Exit Registration System (NSEERS), launched in 2002, required non-citizens from "countries of interest" (a list comprised almost exclusively of Middle Eastern and North African nations or those with a majority-Muslim populations) to register with the then-INS. Thousands complied but others were too afraid to come forward, even if they were lawfully present and had no reason to fear suspicion. Many people affected by NSEERS have U.S. citizen family members, long employment histories in the United States, or pending immigration applications.

**Proposed Solutions**

The Administration should:

1. Rescind the NSEERS regulations and terminate the program.
2. Prohibit registration programs or other similar schemes based on criteria that can be used as a proxy for targeting individuals on the basis of race, religion, national origin, or ethnicity.
3. Ensure that those who did not register or did not register properly under NSEERS are not denied the opportunity to apply for immigration status or relief from deportation if otherwise eligible."

**OBAMA-BIDEN TRANSITION PROJECT**

**[HTTP://WWW.DSL.PSU.EDU/CENTERS/IMMIGRANTS/IMMIGRATION\\_POLICY\\_TRANSITION\\_BLUE PRINT.PDF](http://www.dsl.psu.edu/centers/immigrants/immigration_policy_transition_blue_print.pdf)**

Immigration Policy Transition Blueprint: Document produced by an outside party and submitted to the Obama-Biden Transition project.

"Initiated soon after 9/11, the National Security Entry and Exit Registration (NSEERs) program required noncitizens from "countries of interest" (a list comprised almost exclusively of Middle Eastern nations or those with a majority-Muslim population) to register with the then-INS. The NSEERs program provided little to no information in identifying terrorists and the program hindered law enforcement in some cases by alienating communities that have a strong interest in preventing terrorist acts and solving crimes.

Recommendations:

- Rescind the NSEERS regulations and prohibit similar tracking schemes that encourage

selective targeting on the basis of race, ethnicity, national origin, religion, political association, or ideology.

- Ensure that those who did not register or did not register properly under NSEERS are not denied the opportunity to apply for immigration status or relief from removal solely on the basis that they failed to register.
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## ENDNOTES

<sup>1</sup> For purposes of this paper, the terms “NSEERS” and “special registration” will be used interchangeably.

<sup>2</sup> Immigration and Customs Enforcement, *Changes to the National Security Entry/Exit System*, December 1, 2003, <http://www.ice.gov/pi/news/factsheets/nseersFS120103.htm>.

<sup>3</sup> EDWARD ALDEN, *THE CLOSING OF AMERICAN BORDERS* 9 (HarperCollins) (2008).

<sup>4</sup> Muzaffar A. Chisti et al., *America’s Challenge: Domestic Security, Civil Liberties, and National Unity After September 11*, MIGRATION POL’Y INST., June 30, 2003, available at [www.migrationpolicy.org/pubs/Americas\\_Challenges.pdf](http://www.migrationpolicy.org/pubs/Americas_Challenges.pdf). See also, DANIEL GRISWOLD, CATO HANDBOOK ON POLICY 652 (6th ed. 2004), available at [http://www.cato.org/pubs/handbook/hb109/hb\\_109-65.pdf](http://www.cato.org/pubs/handbook/hb109/hb_109-65.pdf).

<sup>5</sup> EDWARD ALDEN, *THE CLOSING OF AMERICAN BORDERS* 5 (HARPERCOLLINS) (2008).

<sup>6</sup> Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387 (2007), (citing to Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (2003), available at <http://www.usdoj.gov/oig/special/0306/index.htm>).

<sup>7</sup> *Id.*; see also, Muzaffar A. Chisti et al., *America’s Challenge: Domestic Security, Civil Liberties, and National Unity After September 11*, MIGRATION POL’Y INST., June 30, 2003, available at [www.migrationpolicy.org/pubs/Americas\\_Challenges.pdf](http://www.migrationpolicy.org/pubs/Americas_Challenges.pdf).

<sup>8</sup> See, e.g., Prepared Statement: Carlina Tapia Ruano, First Vice President American Immigration Lawyers Association, Hearing before the House Committee on The Judiciary, Reauthorization of the USA Patriot Act, Jun. 10, 2005.

<sup>9</sup> In this white paper, “Arab, Muslim and South Asian countries” and “Arab and South Asian countries with Muslim-majority populations” will be used interchangeably.

<sup>10</sup> See e.g., Muzaffar A. Chisti et al., *America’s Challenge: Domestic Security, Civil Liberties, and National Unity After September 11*, MIGRATION POL’Y INST., June 30, 2003, available at [www.migrationpolicy.org/pubs/Americas\\_Challenges.pdf](http://www.migrationpolicy.org/pubs/Americas_Challenges.pdf); *Targets of Suspicion: The Impact of Post-9/11 Policies on Muslims, Arabs and South Asians in the United States*, American Immigration Law Foundation’s Immigration Policy Center, May 31, 2004; *Special Registration: Discrimination and Xenophobia as Government Policy*, Asian American Legal Defense and Education Fund, Immigration Policy Center, November 30, 2003; *Assessing the New Normal: Liberty and Security for the Post-September 11 United States*, Human Rights First, September 30, 2003; *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, Human Rights Watch, August 31, 2002; and *Terrorism and the Government’s Response: Broad Initiatives Do Not Make Us Safer*, National Immigration Forum, November 30, 2003.

<sup>11</sup> The structure of the program is detailed in the Legal Authority and Analysis Section; see *infra* pp. 12-27.

<sup>12</sup> Immigration and Customs Enforcement, *Changes to the National Security Entry/Exit System*, December 1, 2003, <http://www.ice.gov/pi/news/factsheets/nseersFS120103.htm>.

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<sup>13</sup> Saurav Sarkar and Sin Yen Ling, *AALDEF, Special Registration: Discrimination and Xenophobia as Government Policy* 22-23 (2004) [http://www.aaldef.org/articles/2004-01-01\\_133\\_AALDEFspecialR.pdf](http://www.aaldef.org/articles/2004-01-01_133_AALDEFspecialR.pdf).

<sup>14</sup> Plaintiff's First Amended Complaint, *Nasser v. Chertoff*, Case no. 07 C 1781; *see also*, Permission for certain nonimmigrant aliens from designated countries to register in a timely fashion, 68 Fed. Reg. 2366 (Jan. 16, 2003). (On January 16, 2003, the Department of Homeland Security in an effort to register as many Arab and Muslim non-immigrant males already present in the United States as possible reopened call-in registration between January 27, 2003 and February 7, 2003. The target focus of this call-in was to register anyone who had not already submitted to special registration. There were eighteen of the twenty-five countries on the list, including Morocco, Mr. Nasser's native country).

<sup>15</sup> Plaintiff's First Amended Complaint, *Nasser v. Chertoff*, Case no. 07 C 1781.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.* (The original complaint filed to the court contains an Exhibit B, as proof that Mr. Nasser was not informed about special registration by INS personnel).

<sup>18</sup> *Id.* (No access to Exhibit C which was filed with the amended complaint).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 8; *see also*, Saurav Sarkar and Sin Yen Ling, *AALDEF, Special Registration: Discrimination and Xenophobia as Government Policy* 22-23 (2004), [http://www.aaldef.org/articles/2004-01-01\\_133\\_AALDEFspecialR.pdf](http://www.aaldef.org/articles/2004-01-01_133_AALDEFspecialR.pdf).

<sup>22</sup> Joint Press Release, American-Arab Anti-Discrimination Committee and Yale Law School, ICE Target Immigrants From Muslim Majority Countries Prior to 2004 Presidential Election, (Oct. 20, 2008) <http://www.adc.org/PDF/frontline.pdf> (last visited: February 27, 2009).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (ADC National Executive Director Kareem Shora remarked, "We are disappointed to see that despite all the reassurances made by DHS officials in the past four years; the records released demonstrate that DHS's enforcement efforts during the 'October Plan' (Operation Front Line) targeted immigrants from Muslim-majority countries. [...] When seventy-nine percent of the foreign nationals in this random sample released thanks to Yale Law School's efforts come from Muslim-majority countries, we know that our initial efforts to obtain this information were potentially denied for reasons other than those publicly stated").

<sup>25</sup> Letter from American-Arab Anti-Discrimination Committee, Letter/Complaint and Request for Investigation into Operation Frontline, to Timothy Keefer, Acting Officer, Office for Civ. Rights and Civil Liberties (February 26, 2009), <http://www.adc.org/PDF/frontlinecomplaint.pdf>.

<sup>26</sup> *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009.

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<sup>27</sup> *Id.*

<sup>28</sup> Data Management Improvement Act of 2000 (DMIA), Pub. L. No. 106-215.

<sup>29</sup> The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT ACT) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>30</sup> *See id.* (enacting legislation to deter and punish terrorist acts, and to enhance law enforcement investigatory tools).

<sup>31</sup> *Id.*

<sup>32</sup> *See* Enhanced Border Security and Visa Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543.

<sup>33</sup> *Id.* § 301.

<sup>34</sup> Press Release Attorney General Ashcroft Announces Implementation of the First Phase of the National Security Entry-Exit Registration System, August 12, 2002  
[http://www.usdoj.gov/opa/pr/2002/August/02\\_ag\\_466.htm](http://www.usdoj.gov/opa/pr/2002/August/02_ag_466.htm) □

<sup>35</sup> Immigration Nationality Act (INA), Pub. L. No. 82-414 (codified at 8 U.S.C. §1101 *et seq.*) (2006). (Created by The McCarran-Walter Act of 1952).

<sup>36</sup> INA § 263, 8 U.S.C. § 1303 (2008) (Registration of special groups).

<sup>37</sup> *See, e.g., Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008); *Kandamar v. Gonzales*, 464 F.3d 65 (1st Cir. 2006).

<sup>38</sup> <http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm> Press Release, Attorney General Prepared Remarks on the National Security Entry-Exit Registration System, June 6, 2002. *See also* 67 Fed. Reg 52584 (Aug. 2002). *For current language see* Registration, fingerprinting, and photographing of certain nonimmigrants 8 C.F.R. § 264.1(f) (2008).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *See* Memo from Williams, Ex. Assoc. Comm. Field Operations, on “Standard Operating Procedures for Alien Registration, HQ/INS 70/28 (Sept. 30, 2002) at 2-3, (published on AILA InfoNet at Doc. No. 03043053).

<sup>42</sup> *Id.*

<sup>43</sup> 67 Fed. Reg 52584 (Aug. 2002). *see also* Registration, fingerprinting, and photographing of certain nonimmigrants, 8 C.F.R. § 264.1(f) (2008).

<sup>44</sup> Obligation to provide updated information, 8 C.F.R. § 264.1(f)(5) (2008).

<sup>45</sup> 67 Fed. Reg 52584 (Aug. 2002). *For current language see* Registration, fingerprinting, and photographing of certain nonimmigrants 8 C.F.R. § 264.1(f) (2008).

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<sup>46</sup> Immigration and Customs Enforcement, [Special Registration Procedures for Individuals Registered at a Port of Entry](http://www.ice.gov/doclib/pi/specialregistration/srindividuals.pdf) <http://www.ice.gov/doclib/pi/specialregistration/srindividuals.pdf>

<sup>47</sup> “Domestic” and “call-in” registration will be used interchangeably in this white paper.

<sup>48</sup> 67 Fed. Reg. 70525 (Nov. 22, 2002).

<sup>49</sup> See 67 Fed. Reg. 67766 (Nov. 6, 2002); 67 Fed. Reg. 70526 (Nov. 22, 2002); 67 Fed. Reg. 77642 (Dec. 18, 2002); and 68 Fed. Reg. 2363 (Jan. 16, 2003).

<sup>50</sup> *Id.*; see also Candida Harty, *Current Development: Executive Branch Developments: National Security Entry-Exit Registration System: New Registration Requirements for Certain Non-Immigration Aliens*, 17 GEO. IMMIGR. L.J. 189, 189-191 (2002). Under INA § 263, 8 U.S.C 1303, the Attorney General is authorized to prescribe special registrations and forms for the registration and fingerprinting of special groups of non-immigrants.

<sup>51</sup> 67 Fed. Reg. 66765-68 (Nov. 6, 2002); 68 Fed. Reg. 2366-67 (Jan. 16, 2003).

<sup>52</sup> 67 Fed. Reg. 70525-28 (Nov. 22, 2002); 68 Fed. Reg. 2366-67 (Jan. 16, 2003).

<sup>53</sup> 67 Fed. Reg. 77642-44 (Dec. 18, 2002); 68 Fed. Reg. 8046-48 (Feb. 19, 2003).

<sup>54</sup> 68 Fed. Reg. 2363-65 (Jan. 16, 2003); 68 Fed. Reg. 8046-48 (Feb. 19, 2003).

<sup>55</sup> Notice by Former Attorney General John Ashcroft, pursuant to 8 CFR 264.1(f); see 67 Fed. Reg. 52584 (Feb. 13, 2003) *available at* <http://www.uscis.gov/propub/ProPubVAP.jsp?dockey=45f662a9cf318f238b72708d8c339fe6>; see also ICE.gov, <http://www.ice.gov/pi/specialregistration/archive.htm> (Listing of Call-in Groups 1-4 and who must register) (last visited Feb. 15, 2009).

<sup>56</sup> ICE.gov, Special Call-In Registration Procedures For Certain Nonimmigrants [http://www.ice.gov/doclib/pi/specialregistration/CALL\\_IN\\_ALL.pdf](http://www.ice.gov/doclib/pi/specialregistration/CALL_IN_ALL.pdf) (last visited Feb. 15, 2009).

<sup>57</sup> *Id.*; see also 8 C.F.R. § 264.1(f)(4).

<sup>58</sup> ICE.gov, Special Call-In Registration Procedures For Certain Nonimmigrants [http://www.ice.gov/doclib/pi/specialregistration/CALL\\_IN\\_ALL.pdf](http://www.ice.gov/doclib/pi/specialregistration/CALL_IN_ALL.pdf) (last visited Feb. 15, 2009); see also 8 C.F.R. § 264.1(f)(4).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See e.g., ICE.gov, Special Call-In Registration Procedures For Certain Nonimmigrants [http://www.ice.gov/doclib/pi/specialregistration/CALL\\_IN\\_ALL.pdf](http://www.ice.gov/doclib/pi/specialregistration/CALL_IN_ALL.pdf) (last visited March 27, 2009).

<sup>62</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2153, *available at* [http://www.dhs.gov/xlibrary/assets/hr\\_5005\\_enr.pdf](http://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf).

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<sup>63</sup> For a brief review of the reorganization of the immigration agency, *see* Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 UNIV. OF MEMPHIS L. REV. 853 (2008); *see also*, ICE (<http://www.ice.gov/>), CIS (<http://www.uscis.gov/portal/site/uscis>), and CBP (<http://cbp.gov/>).

<sup>64</sup> *See, e.g.*, Department of Homeland Security, Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67578 (Dec. 2, 2003). Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 67766 (Nov. 6, 2002) (“A willful failure to comply with the requirements of this Notice constitutes a failure to maintain nonimmigrant status under section 237(a)(1)(C)(i) of the Act”).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* 8 C.F.R. § 264.1(f)(8)(ii) (2008).

<sup>68</sup> *Id.* Pursuant to 8 C.F.R. § 264.1(f)(8)(iii) (2008), this presumption may be overcome by making a showing of “good cause” for failure to register at departure or if the alien is not inadmissible under § 212(a)(3)(A)(ii) of the Act.

<sup>69</sup> INA § 266(a); 8 U.S.C. § 1306(a) (2008) (Penalties).

<sup>70</sup> Department of Homeland Security, Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67578 (Dec. 2, 2003).

<sup>71</sup> *Id.*

<sup>72</sup> *Id. see also*, 8 C.F.R. § 264.1(f)(3) (2008)

<sup>73</sup> *Id. see also*, 8 C.F.R. § 264.1(f)(4) (2008)

<sup>74</sup> 69 Fed. Reg. 468 (2008).

<sup>75</sup> Department of Homeland Security, Suspending the 30-day and annual interview requirements from the special registration process for certain non-immigrants; Interim Rule, 8 C.F.R. § 264, <http://edocket.access.gpo.gov/2003/03-30120.htm> (Vol. 68, Number 231) (Dec. 2, 2003).

<sup>76</sup> *See* Factsheet “Changes to National Security Entry-Exit Registration System” (Dec. 1, 2003), <http://www.ice.gov/pi/news/factsheets/nseersFS120103.htm>; *see also* Factsheet US-VISIT program (May. 19, 2003), <http://www.ice.gov/pi/news/factsheets/visit051903.htm>.

<sup>77</sup> 69 Fed. Reg. 53318 (Aug. 31, 2004).

<sup>78</sup> Press Release: NSEERS 30-day and Annual Interview Requirements to be Suspended (Dec. 1, 2003), [http://www.dhs.gov/xnews/releases/press\\_release\\_0306.shtm](http://www.dhs.gov/xnews/releases/press_release_0306.shtm).

<sup>79</sup> *Id.*

<sup>80</sup> *See, e.g.*, Email from Melissa Frisk, Maggio & Katter, P.C., to Shoba Sivaprasad Wadhia and Fahed Al-Rawaf “The fact remains, however, that immediate relatives of U.S. citizens are being denied

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adjustment of status as a matter of discretion where the only negative variable in their case is a visa overstay, unauthorized work and willful failure to register for NSEERS. As we know, the first two reasons listed are never cited as reasons to deny immediate relative cases where no other adverse factors exist.” (March 16, 2009) (on file with author); *see also* Memo from William R. Yates, Associate Director for Operations, “Legal opinion: Effect of failure to comply with NSEERS requirements, or other evidence of inadmissibility or deportability, on the adjudication of visa petitions (October 14, 2004) (on file with author)

<sup>81</sup> *See* Memo from Victor Cerda, ICE Acting Principal Legal Advisor, “Changes to NSEERS special registration program” (Jan. 8, 2004) (Published on AILA Doc. No. 06050512).

<sup>82</sup> Email from Malea Kiblan, Kiblan Law Office, to Amala Abdur-Rahman, Clinic Student Penn State Dickinson School of Law, Center for Immigrants’ Rights (Feb. 20, 2009) (on file with author).

<sup>83</sup> Telephone Interview with Malea Kiblan, Kiblan Law Office (Oct. 24, 2008).

<sup>84</sup> Telephone Interview with Sin Yen Ling, Staff Attorney Asian Law Caucus (Oct. 22, 2008).

<sup>85</sup> Interview with Fahed Al-Rawaf, Legal Advisor, American Arab Anti-Discrimination Committee (Oct. 2008).

<sup>86</sup> *Id.*

<sup>87</sup> Letter from ACLU to the Department of Justice on the “*Registration and Monitoring of Certain Non-immigrants*,” Program (NSEERS) (Apr. 2, 2003), *available at* <http://www.aclu.org/safefree/general/17380leg20030402.html> (“Summary of the registration rule, for example, did not mention the call-in component. Indeed, in the four pages of Federal Register text explaining the proposed rule, there was a single paragraph mentioning the possibility of call-in registration, and that paragraph did not clearly indicate what would comprise such registration.” Even the March 3, 2003 Federal Register notice does not make clear that the “[a]ffected public who will be asked or required to respond [...] includes individuals who were admitted before the institution of NSEERS.” 68 Fed Reg. 10034 (Mar. 3, 2003)).

<sup>88</sup> *See, e.g.*, Letter from Senators Richard Durbin, Russell Feingold and Edward Kennedy, United States Senate Committee of the Judiciary, to The Honorable Michael Chertoff, Secretary Department of Homeland Security (June 28, 2005) (On file with the Director for the Center of Immigrants’ Rights at Penn State University, The Dickinson School of Law).

<sup>89</sup> *See e.g., Homeland Security Ends Foreigner Registration Program*, USA TODAY, Dec. 1, 2003; *Registration of Muslims, Arabs halted; Homeland Security ends immigration program*, WASH. TIMES, Dec 2, 2003.

<sup>90</sup> *See e.g.*, American Immigration Lawyers Association (AILA) and the ACLU Immigrant Rights Project, Advisory, *Special Registration Has NOT Ended—Many Special Requirements Continue*, AILA InfoNet Doc. No. 03120441 (Dec. 4, 2003).

<sup>91</sup> Prepared Statement: James Zogby, Hearing Before The House Committee on The Judiciary, Reauthorization of the USA Patriot Act, Jun. 10, 2005.

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<sup>92</sup> Letter from Senators Richard Durbin, Russell Feingold and Edward Kennedy, United States Senate Committee of the Judiciary, to the Honorable Tom Ridge, Secretary of Homeland Security (Jan. 23, 2004) (On file with the Director for the Center of Immigrants' Rights at Penn State University, The Dickinson School of Law).

<sup>93</sup> *Id.*; *see also*, Comments by AILA on the Interim Rule Suspending NSEERS Re-Registration Requirements, AILA InfoNet Doc. No. 04020211 (Feb. 2, 2004).

<sup>94</sup> *Malik v. Gonzales*, 213 Fed. Appx. 173 (4th Cir. 2007) citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488 (1999). (Under 8 U.S.C.A. § 1252(g), courts have no jurisdiction "to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings ... under this chapter").

<sup>95</sup> An Immigration Judge presides over immigration court and makes decisions to determine whether an individual from a foreign country should be allowed to remain in the United States or be removed. *See* Immigration Court Practice Manual, Hearings Before Immigration Judges 55 (Apr. 2008), <http://www.usdoj.gov/eoir/vll/OCIJPracManual/Chap%204.pdf>.

<sup>96</sup> BIA is the administrative appellate body charged with reviewing decisions by IJs and in interpreting immigration statutes and regulation. *See* Immigration Court Practice Manual, Hearings Before Immigration Judges 101 (Apr. 2008), <http://www.usdoj.gov/eoir/vll/OCIJPracManual/Chap%206.pdf>.

<sup>97</sup> *See Hussain v. Kessler*, 505 F.3d 779 (7th Cir.2007); *Kandamar v. Gonzales*, 464 F.3d 65 (1st Cir. 2006); *Hadayat v. Gonzales*, 458 F.3d 659 (7th Cir. 2007); *Haswanee v. AG*, 471 F.3d 1212 (11 Cir. 2006); *Ali v. Gonzales*, 440 F.3d 678 (5th Cir. 2006); *Ahmed v. Gonzales*, 447 F.3d 433 (5th Cir. 2006); *Zerrei v. Gonzales*, 471 F.3d 342 (2nd Cir 2006); *Sarwar v. Attorney General*, 278 Fed. Appx. 222 (3rd Cir. 2008) (decision unpublished); *Lakhani v. Gonzales*, 162 Fed. Appx. 350 (5th Cir. 2007); *Malik v. Gonzales*, 213 Fed. Appx. 173 (4th Cir. 2007); *Daud v. Gonzales*, 207 Fed. Appx. 194 (3rd Cir 2006) (decision unpublished); *Khoja v. Gonzales*, 200 Fed. Appx. 302 (5th Cir. 2006) (decision unpublished); *Pirzada v. United States AG*, 164 Fed. Appx. 866 (11th Cir. 2006); *Tawfik v. Mukasey*, 2008 U.S. App. LEXIS 23143 (2d Cir. 2008) (decision unpublished); *Shaybob v. AG of the United States*, 189 Fed. Appx. 127 (3d Cir. 2006) (decision unpublished).

<sup>98</sup> *See e.g.* *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008); *Hadayat v. Gonzales*, 458 F.3d 659 (7th Cir. 2007) *Hussain v. Kessler*, 505 F.3d 779 (7th Cir.2007); *Ahmed v. Gonzales* 447 F.3d 433 (5th Cir. 2006); *Kandamar v. Gonzales*, 464 F.3d 65 (1st Cir. 2006); *Haswanee v. AG*, 471 F.3d 1212 (11 Cir. 2006); *Ali v. Gonzales*, 440 F.3d 678 (5th Cir. 2006); *Zafar v. United States AG*, 461 F.3d 1357 (11th Cir. 2006); *Butt v. Gonzales*, 201 Fed. Appx. 978 (5th Cir. 2006); *Lakhani v. Gonzales*, 162 Fed. Appx. 350 (5th Cir. 2007); *Mehr v. Gonzales*, 246 Fed. Appx. 211 (4th Cir. 2007)(decision unpublished); *Lalani v. Gonzales*, 215 Fed. Appx. 333 (5th Cir. 2007) (decision unpublished); *Daud v. Gonzales*, 207 Fed. Appx. 194 (3rd Cir 2006) (decision unpublished); *Khoja v. Gonzales*, 200 Fed. Appx. 302 (5th Cir. Tex. 2006) (decision unpublished); *Shaybob v. AG of the United States*, 189 Fed. Appx. 127 (3d Cir. 2006) (decision unpublished); *Pirzada v. United States AG*, 164 Fed. Appx. 866 (11th Cir. 2006).

<sup>99</sup> *See Reno v. ADC*, 525 U.S. 471, 491 (1999).

<sup>100</sup> *See Kandamar v. Gonzales*, 464 F.3d 65, 72 (1st Cir. 2006); *see also Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008); *Daud v. Gonzales*, 207 Fed. Appx. 194 (3rd Cir. 2006) (decision unpublished).

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<sup>101</sup> See *Sarwar v. Attorney General*, 278 Fed. Appx. 222 (3rd Cir. 2008) (decision unpublished); see also *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008); *Kandamar v. Gonzales*, 464 F.3d 65, 72 (1st Cir. 2006); *Ali v. Gonzales*, 440 F.3d 678 (5th Cir. 2006); *Zerrei v. Gonzales*, 471 F.3d 342 (2nd Cir. 2006); *Sewani v. Gonzales*, 162 Fed. Appx. 285 (5th Cir. 2006) (decision unpublished); *Tawfik v. Mukasey*, 2008 U.S. App. LEXIS 23143 (2d Cir. 2008).

<sup>102</sup> See, e.g. *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008); see also *Daud v. Gonzales*, 207 Fed. Appx. 194 (3rd Cir. 2006) (decision unpublished).

<sup>103</sup> See, e.g., *Kandamar v. Gonzales*, 464 F.3d 65, 74 (1st Cir. 2006) citing *Narenji v. Civiletti*, 1980 U.S. App. LEXIS 20952 (D.C. Cir. Jan. 31, 1980).

<sup>104</sup> See, e.g. Muzaffar A. Chisti *et al.*, *America's Challenge: Domestic Security, Civil Liberties, and National Unity After September 11*, Migration Policy Institute, (Jun. 30, 2003); Telephone Interview with Edward Alden, Bernard L. Schwartz Senior Fellow, Council on Foreign Relations (Oct. 24, 2008); *Immigrants and Minorities, Special Registration (National Security Entry-Exit Registration System)* [http://www.humanrightsfirst.org/us\\_law/immigrants/special\\_registration.htm](http://www.humanrightsfirst.org/us_law/immigrants/special_registration.htm) (last visited Jan. 11, 2009); "Program's Value in Dispute as a Tool to Fight Terrorism," Rachel L. Swarns, *The New York Times*, Dec. 21, 2004 available at <http://query.nytimes.com/gst/fullpage.html?res=950CE0DB1330F932A15751C1A9629C8B63&sec=&sp on=&page%20wanted=>; Letter from Senators Richard J. Durbin, Russell D. Feingold, Edward M. Kennedy, to the Honorable Micheal Chertoff, Secretary of Homeland Security (Jan. 3, 2007) (On file with the Director for the Center of Immigrants' Rights at Penn State University, The Dickinson School of Law); Letter from Senators Richard J. Durbin, Russell D. Feingold, Edward M. Kennedy, to the Honorable Micheal Chertoff, Secretary of Homeland Security (Jun. 28, 2005) (On file with the Director for the Center of Immigrants' Rights at Penn State University, The Dickinson School of Law); Letter from Senators Richard J. Durbin, Russell D. Feingold, Edward M. Kennedy, to the Honorable Tom Ridge, Secretary of Homeland Security (Jan. 23, 2004) (On file with the Director for the Center of Immigrants' Rights at Penn State University, The Dickinson School of Law); Press Release, Russell D. Feingold, *et al.*, *Senators and Congressman Demand Ashcroft Suspend INS Special Registration Letter to Ashcroft Suspend INS Special Registration Letter to The Honorable John Ashcroft* (Dec. 23, 2002) (reprint 2002),

<sup>105</sup> "Program's Value in Dispute as a Tool to Fight Terrorism," Rachel L. Swarns, *The New York Times*, Dec. 21, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=950CE0DB1330F932A15751C1A9629C8B63&sec=&sp on=&page%20wanted=>.

<sup>106</sup> *Id.*

<sup>107</sup> Factsheet Changes to NSEERS Process (Dec. 1, 2003), <http://www.ice.gov/pi/news/factsheets/NSEERSFAQ120103.htm>.

<sup>108</sup> Muzaffar A. Chisti *et al.*, *America's Challenge: Domestic Security, Civil Liberties, and National Unity After September 11*, MIGRATION POL'Y INST., June 30, 2003, available at [www.migrationpolicy.org/pubs/Americas\\_Challenges.pdf](http://www.migrationpolicy.org/pubs/Americas_Challenges.pdf).

<sup>109</sup> See *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008); *Hussain v. Kessler*, 505 F.3d 779 (7th Cir. 2007); *Bilal Tariq v. Kessler*, 505 F.3d 650 (7th Cir. 2007); *Parvez v. Keisler*, 506 F.3d 93 (1st Cir. 2007); *Haswanee v. Attorney General*, 471 F.3d 1212 (11 Cir. 2006); *Sarwar v. Attorney General*, 278 Fed.



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Appx. 222 (3rd Cir. 2008) (decision unpublished); *Imtiaz Ali v. Gonzales*, 440 F.3d 678 (5th Cir. 2006) (decision unpublished); *Nur Ali v. Gonzales*, 200 Fed. Appx. 294 (5th Cir. 2006) (decision unpublished).

<sup>110</sup> *Kandamar v. Gonzales*, 464 F.3d 65 (1st Cir. 2006).

<sup>111</sup> *Imtiaz Ali v. Gonzales*, 440 F.3d 678 (5th Cir. 2006).

<sup>112</sup> *Hadayat v. Gonzales*, 458 F.3d 659 (7th Cir. 2006).

<sup>113</sup> *Parvez v. Keisler*, 506 F.3d 93 (1st Cir. 2007).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Ahmed v. Mukasey*, 519 F.3d 579 (6th Cir. 2008).

<sup>117</sup> *Id.*

<sup>118</sup> Memo from Doris Meissner, Ex. Assoc. Comm. Field Operations, INS Exercising Prosecutorial Discretion Mem. HQOPP 50/4 (Nov. 17, 2000). *available at* <http://www.bibdaily.com/pdfs/prosecutorial%20discretion.pdf>

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *See, e.g.*; Memo from Johnny Williams, Ex. Assoc. Comm. Field Operations, HQOPS 50/5.11, Supplemental Guidance for NSEERS Registrants (Jan. 2003)(published on AILA InfoNet at Doc. No. 02121241), <http://www.immigrationlinks.com/news/INS%20Guidance%20on%20Prosecutorial%20Discretion%20for%20NSEERS.pdf>. (The January 2003 memo instructs that if officers come across an NSEERS applicant who is out of status but has submitted an application for adjustment or otherwise has a benefit immediately available, then the immigration officer should utilize the factors outlined in the Meissner memo and decline to place the individual in removal proceedings if he appears to be immediately and prima facie eligible for the benefit and absent any other adverse factors).

<sup>122</sup> *See, e.g.*, Telephone Interview with Edward Alden, Bernard L. Schwartz Senior Fellow, Council on Foreign Relations (Oct. 24, 2008).

<sup>123</sup> Telephone interview with Benjamin Johnson, Executive Director of American Immigration Law Foundation (Oct. 23, 2008).

<sup>124</sup> Domestic Wiretapping In the War On Terror: Hearing before the U.S. Comm. on Civ. Rights, (2007) (Statement of Gregory T. Nojeim, American Civil Liberties Union).

<sup>125</sup> Special Call-In Registration Procedures for Certain Non-Immigrants (Nov. 26, 2002) [http://www.ice.gov/doclib/pi/specialregistration/CALL\\_IN\\_ALL.pdf](http://www.ice.gov/doclib/pi/specialregistration/CALL_IN_ALL.pdf).

<sup>126</sup> *See* American Immigration Lawyers Association Issue Paper, Access to Counsel (“Numerous reports

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from attorneys representing individuals subject to the NSEERS call-in registration program indicate that their clients were frequently denied access to counsel during interviews and questioning.”) <http://www.aila.org/content/default.aspx?bc=1019%7C25667%7C6796%7C17351%7C9161>; See New York Advisory Committee to the United States Civil Rights Commission, Civil Rights Implications of Post-September 11 Law Enforcement Practices in New York (“In New York City, many people required to go through special registration were denied access to counsel during critical stages of the registration process, particularly while interrogated by the investigations unit of the Bureau of Immigration and Customs Enforcement of the U.S. Department of Homeland Security, when they were most vulnerable.”) <http://www.usccr.gov/pubs/sac/ny0304/ch3.htm>; See ADC Press Release, Russell D. Feingold, *et al.*, Senators and Congressman Demand Ashcroft Suspend INS Special Registration Letter to The Honorable John Ashcroft (Dec. 23, 2002) (reprint 2002), <http://www.adc.org/index.php?id=1570> (“We are also concerned by reports that detainees have been denied access to counsel and are being held in deplorable conditions, including being deprived of food for more than 24 hours and being forced to sleep on cold floors.”); See also, Saurav Sarkar and Sin Yen Ling, Asian American Legal Defense Education Fund, *Special Registration: Discrimination and Xenophobia as Government Policy* 3, 25-26, 33 (2004).

<sup>127</sup> In Person Interview Malea Kiblan, Kiblan Law Office (Oct. 24, 2008)

<sup>128</sup> By statute, persons in removal proceedings have “the privilege of being represented,” but “at no expense to the Government.” INA § 292

<sup>129</sup> *Aguilera-Enriquez v. INS*, 516 U.S. 565, 568 (1975).

<sup>130</sup> 8 C.F.R. § 292.5(b) (2008)

<sup>131</sup> Telephone Interview with Edward Alden, Bernard I. Schwartz Senior Fellow, Council on Foreign Relations (Oct. 24, 2008).

<sup>132</sup> Muzaffar A. Chisti *et al.*, *America’s Challenge: Domestic Security, Civil Liberties, and National Unity After September 11*, Migration Policy Institute, (Jun. 30, 2003); National Immigration Forum, *Immigration Enforcement in the Wake of Immigration Reform’s Collapse* (2007); American-Arab Anti-Discrimination Committee, “*End of Shame of NSEERS*” Ad Campaign (2007); Saurav Sarkar and Sin Yen Ling, Asian American Legal Defense Education Fund, *Special Registration: Discrimination and Xenophobia as Government Policy* 22-23 (2004); Iranian-American Bar Association, *A Review of the Treatment of Iranian Nationals by the INS in Connection with the Implementation of NSEERS Special Registration Program* (2004); Arab American Institute; Rights Working Group, *Compilation of NSEERS Examples*; and the Lawyers Committee for Human Rights Now, *Human Rights First Immigrants and Minorities Special Registration (National Security Entry-Exit Registration System)*.

<sup>133</sup> American Immigration Law Foundation, *Targets of Suspicion: The Impact of Post 9-11 Policies on Muslims, Arabs, South Asians in the United States*, *Immigration Policy in Focus*, vol. 3, issue 2 (May 2004), available at <http://immigration.server263.com/images/File/infocus/Targets%20of%20Suspicion.pdf>.

<sup>134</sup> Muzaffar A. Chisti *et al.*, *America’s Challenge: Domestic Security, Civil Liberties, and National Unity After September 11*, Migration Policy Institute, (Jun. 30, 2003); National Immigration Forum, *Immigration Enforcement in the Wake of Immigration Reform’s Collapse* (2007); American-Arab Anti-Discrimination Committee, “*End of Shame of NSEERS*” Ad Campaign (2007); Saurav Sarkar and Sin Yen Ling, Asian American Legal Defense Education Fund, *Special Registration: Discrimination and*

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*Xenophobia as Government Policy* 22-23 (2004); Iranian-American Bar Association, *A Review of the Treatment of Iranian Nationals by the INS in Connection with the Implementation of NSEERS Special Registration Program* (2004); Arab American Institute; Rights Working Group, *Compilation of NSEERS Examples*; and the Lawyers Committee for Human Rights Now, *Human Rights First Immigrants and Minorities Special Registration (National Security Entry-Exit Registration System)*; *see also* Farhana Khera, President and Executive Director, Muslim Advocates, *Testimony Before U.S. Senate Comm. on the Judiciary, Subcomm. on the Constitution* (2008) (transcript available at <http://judiciary.senate.gov/hearings/>; *see also*, Kareem Shora, Legal Director, American Arab Anti-Discrimination Committee, *Testimony Before U.S. Commission on Civil Rights, Briefing Wire Tapping in the War on Terror*, (Mar. 9, 2007) (transcript available at <http://www.usccr.gov/calendar/trnsrpt/cm070309.pdf>).

<sup>135</sup> Telephone Interview with Benjamin Johnson, Executive Director AILF (Oct. 23, 2008).

<sup>136</sup> *Id.*

<sup>137</sup> Telephone Interview with Edward Alden, Bernard L. Schwartz Senior Fellow, Council on Foreign Relations (Oct. 24, 2008).

<sup>138</sup> *Id.*

<sup>139</sup> *Immigrants and Minorities, Special Registration (National Security Entry-Exit Registration System)* [http://www.humanrightsfirst.org/us\\_law/immigrants/special\\_registration.htm](http://www.humanrightsfirst.org/us_law/immigrants/special_registration.htm) (last visited Jan. 11, 2009).

<sup>140</sup> *Id.*

<sup>141</sup> Response Letter from Donald H. Kent, Asst. Secretary for Leg. and Intergovernmental Affairs, to Senator Richard J. Durbin, (Apr. 25, 2007). (On file with the Director for the Center of Immigrants' Rights at Penn State University, The Dickinson School of Law). (Requesting update on NSEERS program. Certain responses to questions are not contained within the letter due to law enforcement sensitivity).

<sup>142</sup> *Id.*; *see also* Letter from Senators Richard J. Durbin, Russell D. Feingold, Edward M. Kennedy, to the Honorable Micheal Chertoff, Secretary of Homeland Security (Jan. 3, 2007) (On file with the Director for the Center of Immigrants' Rights at Penn State University, The Dickinson School of Law); Letter from Senators Richard J. Durbin, Russell D. Feingold, Edward M. Kennedy, to the Honorable Micheal Chertoff, Secretary of Homeland Security (Jun. 28, 2005) (On file with the Director for the Center of Immigrants' Rights at Penn State University, The Dickinson School of Law); Letter from Senators Richard J. Durbin, Russell D. Feingold, Edward M. Kennedy, to the Honorable Tom Ridge, Secretary of Homeland Security (Jan. 23, 2004) (On file with the Director for the Center of Immigrants' Rights at Penn State University, The Dickinson School of Law); Response Letter from Pamela J. Turner, Asst. Sec. for Legislative Affairs, to Senator Richard J. Durbin, (2004) (On file with the Director for the Center of Immigrants' Rights at Penn State University, The Dickinson School of Law); Press Release, Russell D. Feingold, *et al.*, Senators and Congressman Demand Ashcroft Suspend INS Special Registration Letter to The Honorable John Ashcroft (Dec. 23, 2002) (reprint 2002), <http://www.adc.org/index.php?id=1570>.

<sup>143</sup> Press Release, Russell D. Feingold, *et al.*, Senators and Congressman Demand Ashcroft Suspend INS Special Registration Letter to The Honorable John Ashcroft (Dec. 23, 2002) (reprint 2002), <http://www.adc.org/index.php?id=1570>.

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See Civil Liberties Restoration Act, S.B. 2528/ H.R. 4591, 108<sup>th</sup> Cong. (2004); reintroduced in the House as H.R. 1502, 109<sup>th</sup> Cong. (2005).

<sup>147</sup> See Civil Liberties Restoration Act, H.R. 1502, 109<sup>th</sup> Cong. § 301 (2005).

<sup>148</sup> *Id.* § 301 (2005).

<sup>149</sup> *Id.* § 301 (2005).

<sup>150</sup> *Id.* § 302 (2005).

<sup>151</sup> *Id.* § 302 (2005).

<sup>152</sup> Shoba Sivaprasad Wadhia, *Immigration: Mind Over Matter*, 5 U. MD. L.J. ON RACE, RELIGION, GENDER & CLASS 201 (2005), *citing* to the House Judiciary Committee's Subcommittee on Immigration, Border Security, and Claims, which held an oversight hearing titled *Immigration Removal Procedures Implemented in the Aftermath of the September 11<sup>th</sup> Attacks*. (Transcript available at [http://commdocs.house.gov/committees/judiciary/hju22188.000/hju22188\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju22188.000/hju22188_of.htm)).

<sup>153</sup> *Id.*; *citing* to H.R. 1502, Section 303; *see also* Memorandum from Immigration and Naturalization Service to Regional Directors *et al.*, HQOPP 50/4 (Nov. 17, 2000), <http://www.bibdaily.com/pdfs/prosecutorial%20discretion.pdf> (*Exercising Prosecutorial Discretion*).

<sup>154</sup> National Commission on Terrorist Attacks Upon the United States, Staff Monograph, Crisis Management and Response Post-September 11 (Apr. 21, 2004), [http://govinfo.library.unt.edu/911/staff\\_statements/911\\_TerrTrav\\_Ch6.pdf](http://govinfo.library.unt.edu/911/staff_statements/911_TerrTrav_Ch6.pdf).

<sup>155</sup> *Id.*

<sup>156</sup> U.S. Department of State, “Non-Immigrant Visas Issued by Nationality, FY 1997-2006,” and Report of the Visa Office 2007, at [http://travel.state.gov/visa/frvi/statistics/statistics\\_1476.html](http://travel.state.gov/visa/frvi/statistics/statistics_1476.html).

<sup>157</sup> Travel Industry Association, “U.S. Economy Expected to Receive a Shot in the Arm from Visa Waiver Program Expansion,” *available at* <http://www.TIA.org/pressrec.asp?item=926> (last visited Dec. 6, 2008).

<sup>158</sup> Telephone Interview with Alden, Edward, Bernard L. Schwartz Senior Fellow, Council on Foreign Relations (Oct. 24, 2008).

<sup>159</sup> INA § 101(a)(15)(O)(i), 8 U.S.C. § 1101 et seq (2008). (Extraordinary abilities under the INA is defined as “aliens who have extraordinary abilities...in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television production a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in an area of extraordinary ability”).

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<sup>160</sup> EDWARD ALDEN, *THE CLOSING OF THE AMERICAN BORDER: TERRORISM, IMMIGRATION AND SECURITY SINCE 9/11*, 1 (HarperCollins) (2008).

<sup>161</sup> *Id.* at 3.

<sup>162</sup> *Id.*

<sup>163</sup> Edward Alden, *Immigration Control-Special Registration Special registration's Legacy*, New America Media-News Report, Oct 4, 2008, [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=d179e2311af82222f49e8e9299c83490](http://news.newamericamedia.org/news/view_article.html?article_id=d179e2311af82222f49e8e9299c83490) (last visited Jan. 11, 2009).

<sup>164</sup> National Security Entry-Exit Registration System (NSEERS) Individual Case Examples (Dec. 2002) (On File with the Director for the Center of Immigrants' Rights at Penn State University, The Dickinson School of Law).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> The names and locations are fictitious to preserve anonymity.