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Legal Sidebar

Alien Registration Requirements: Obama Administration Removes Certain Regulations, but Underlying Statutory Authority Remains

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In a final rule issued and effective on December 23, 2016, the Department of Homeland Security removed regulations that the Executive had relied upon in implementing the National Security Entry-Exit Registration System (NSEERS) after the September 11, 2001 terrorist attacks. These regulations had authorized the imposition of "special registration, fingerprinting, and photographing requirements" upon certain aliens who are citizens or nationals of countries designated by notice in the Federal Register. In essence, the regulations provided a "turnkey" system, whereby the Executive could potentially subject particular aliens to so-called "special registration" requirements by issuing a Federal Register notice (i.e., without further rulemaking). Some had called for the Obama Administration to dismantle this system, which others continued to support, out of concern that a future administration could use it to create a registry that targeted religious or racial minorities. However, despite the Obama Administration's action, the statutory authority under which the removed regulations were promulgated remains in effect and could potentially be used to impose new, NSEERS-like requirements in the future.

This Sidebar briefly surveys the legal authorities that underlay the implementation of NSEERS, as well as the authorities that remain available to the Executive notwithstanding the recent rule change.

NSEERS and Its Implementation

NSEERS was a multi-part initiative, which called for certain "nonimmigrant aliens" from designated countries to register at ports of entry and within the interior of the country, a process that included being fingerprinted, photographed, and interviewed. These aliens were also required to provide immigration authorities with certain information about their presence in the United States (e.g., changes of address and employment), and to depart the United States through designated ports of entry. As used here, the term "nonimmigrant aliens" generally encompassed aliens admitted to the United States pursuant to one of the various "lettered" visas (e.g., F visas for students). Lawful permanent residents (LPRs), refugees, asylees, and applicants for asylum were excluded, as were aliens admitted under valid A visas (diplomats or foreign government officials) and G visas (employees of designated international organizations).

When it promulgated the regulations announcing NSEERS in June 2002, the George W. Bush Administration cited various authorities for the program. Key among these authorities were previously "existing regulations" at 8 C.F.R. § 264.1(f), which, at that time, provided that "the Attorney General [later, Secretary of Homeland Security] may designate, by a comprehensive public notice in the FEDERAL REGISTER, that certain nonimmigrants of specific countries are required to be registered and fingerprinted upon arrival in the United States." The Bush Administration also cited several provisions of the Immigration and Nationality Act (INA), including:

- ***INA § 214(a),*** which provides that the admission of "nonimmigrant aliens" to the United States "shall be for such time and under such conditions" as the Secretary of Homeland Security may prescribe;
- ***INA § 215(a),*** which makes it unlawful for aliens to enter or depart the United States "except under such

reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;" and

- ***INA § 265(a),*** which directs that "[e]ach alien required to be registered" must notify immigration officials in writing of any change of address within 10 days and furnish, along with this notice, "such additional information" as the Secretary of Homeland Security may require.

Subsequently, relying on the regulations at 8 C.F.R. § 264.1(f), the Bush Administration issued a series of notices in the Federal Register that generally designated male nonimmigrant aliens,16 years of age or older, from some two dozen countries for special registration. All but one of these countries has been described as "predominantly Muslim" (e.g., Iran, Iraq, Libya, Syria). The other designated country was North Korea.

Obama Administration's Actions and Their Legal Significance

All 25 countries were later removed from NSEERS as the result of a 2011 notice in the Federal Register (which also noted the Executive's reliance upon other methods, besides registration, to screen aliens for security risks). However, the regulations at 8 C.F.R. § 264.1(f), under which these countries had been designated, remained in effect until the Obama Administration removed the regulations on December 23, 2016. The removal of these regulations effectively disassembled the framework that the Bush Administration had relied upon in implementing NSEERS in the way that it did (i.e., by designating countries through Federal Register notices). However, the statutory authority under which these regulations were initially promulgated remains in effect and could permit the Executive to promulgate the same or similar regulations in the future. This statutory provision, INA § 263(a), expressly authorizes the Executive to "prescribe special regulations and forms"—separate and apart from the general registration and fingerprinting requirements set forth in INA § 262—for six categories of aliens. Five of these categories are specific and encompass only: (1) alien crewmen; (2) holders of border-crossing identification cards; (3) aliens "confined in institutions" within the United States; (4) aliens under order of removal; and (5) aliens who are or have been on criminal probation or parole within the United States. However, the sixth category under INA § 263(a) is broader than the others and includes "aliens of any other class not lawfully admitted to the United States for permanent residence." This statutory language has been construed by the U.S. Court of Appeals for the Second Circuit (Second Circuit) as permitting the "nationality-based distinctions" among nonimmigrant aliens employed in NSEERS. It could potentially also be construed even more broadly to encompass other aliens who are not lawful permanent residents, such as refugees. (The Executive could potentially also point to other provisions of the INA, beyond INA §§ 262-263, as authorizing the imposition of registration requirements upon aliens.)

It should also be noted that federal courts have previously rejected the argument that the imposition of special registration requirements upon aliens based upon their nationality necessarily runs afoul of the constitutional guarantee of equal protection. In 1980, the U.S. Court of Appeals for the District of Columbia Circuit rejected such a challenge to the special registration requirements imposed on "nonimmigrant post-secondary school students" from Iran during the Iranian Hostage Crisis on the grounds that "classifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis." Subsequently, at least one federal court of appeals relied upon similar logic in rejecting an equal protection challenge to NSEERS. In the Second Circuit decision previously noted, the court opined that the "most exacting level of scrutiny that we will impose on immigration legislation is rational basis review" and concluded that NSEERS withstood such review because it represented a "plainly rational attempt to enhance national security." The Second Circuit further rejected the argument that the NSEERS was "motivated by an improper animus toward Muslims," in part, because Muslims from non-designated countries were not subject to the special registration requirements, while non-Muslims from designated countries were. Other courts reviewing equal protection challenges to NSEERS did not determine what level of review should apply, instead holding that they lacked jurisdiction to hear these challenges. These courts did so because they viewed the challenges as essentially raising selective prosecution as a defense to removal proceedings, a claim that is generally seen to be foreclosed by the Supreme Court's 1999 decision in *Reno v. Arab-American Anti-Discrimination Committee*. As a result, if a future administration were to reestablish an NSEERS-like program for aliens, judicial precedent could make certain challenges to such a program more difficult, although challengers could seek to distinguish future programs from earlier ones in some way.

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