

# **PRACTICE ADVISORY**

## **Incoming Trump Administration Considers Targeting Muslims for Special Registration:**

**Preliminary Questions and Answers by  
National Immigration Project of the National Lawyers Guild**

November 23, 2016

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### **Why is the National Immigration Project of the National Lawyers Guild coming out with this advisory now?**

The purpose of this advisory is to make clear that there is now no Special Requirement for Muslims to register despite rumors that may be circulating. In addition, this advisory discusses National Security Entry/Exit Registration System (NSEERS), which established a special registration program for interviewing, fingerprinting and photographing men and boys over the age of 16 in the U.S. who were nationals or citizens of 25 designated countries<sup>1</sup> or who traveled through those countries. NSEERS was indefinitely suspended as of April 28, 2011.<sup>2</sup>

### **Is it true that the Trump Administration will require Muslims to register who are not United States citizens?**

No one knows. There are rumors that the incoming Trump Administration will revitalize NSEERS. Although not explicitly a religious-based requirement, the United Nations' Committee on the Elimination of Racial Discrimination condemned NSEERS, as did civil

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<sup>1</sup> The countries on the list were: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. One could presume that South Sudan, which did not then exist as a country might be added to such a list.

<sup>2</sup> Removing Designated Countries From the National Security Entry-Exit Registration System (NSEERS), 76 Fed. Reg. 23830 (Apr. 28, 2011), <https://www.gpo.gov/fdsys/pkg/FR-2011-04-28/pdf/2011-10305.pdf>.

rights and immigrants' rights organizations, because the program was a pretext for targeted enforcement against Muslim men and boys. Of the 25 countries on the previous NSEERS list, only North Korea was not a Arab- or Muslim-majority country.

## **Did permanent residents have to register for the previous NSEERS program?**

No, NSEERS did not apply to permanent residents of the United States.

## **Had the U.S. ever done anything like this before NSEERS?**

U.S. history is replete with discriminatory enforcement of which NSEERS is a recent example.

In 1954, the U.S apprehended more than a million allegedly Mexican nationals under the disparagingly entitled "Operation W..back." In another shameful chapter in United States history, the Supreme Court in the case of *Korematsu v. United States*<sup>3</sup> upheld the internment during World War II of United States citizens of Japanese ancestry.

## **What was the legal authority for the previous NSEERS program?**

In addition to the other registration requirements under the law, there is a statute authorizing the Attorney General to create special registration programs.<sup>4</sup> The Attorney General also promulgated regulations to implement NSEERS.<sup>5</sup>

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<sup>3</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>4</sup> 8 U.S.C. § 1303(a), Registration of Special Groups:

(a) Notwithstanding the provisions of sections 1301 and 1302 of this title, the Attorney General is authorized to prescribe special regulations and forms for the registration and fingerprinting of (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, (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.

(b) The provisions of section 1302 of this title and of this section shall not be applicable to any alien who is in the United States as a nonimmigrant under section 1101(a)(15)(A) or (a)(15)(G) of this title until the alien ceases to be entitled to such a nonimmigrant status.

<sup>5</sup> 8 C.F.R. § 214.1

## **Would it be legal to impose a new special registration requirement?**

We think it would be illegal, but the reality is that it would be up to the courts to decide the legality of any program the Trump Administration implements. Also, it is a possibility that the Trump administration will simply resurrect the prior NSEERS program. It is impossible to assess the likelihood of success of any legal challenge without knowing what the actual program entails. That being said, past legal challenges to country-specific registration requirements have not met with success in the courts.<sup>6</sup> That does not mean, however, that future challenges to any proposed registration requirement would be unsuccessful because Donald Trump's statements arguably reveal that the true purpose of any registration requirement is actually profiling based on religion. In addition, creative movement lawyers may have new arguments that the earlier cases did not raise. Further, if the Trump Administration were to expressly base the requirement on religious grounds and eliminated the pretext behind a proposed registration requirement, the legal challenges would be even stronger than those past.

## **What were the possible immigration penalties for failure to comply with NSEERS' Special Call-In Registration?**

The Department of Homeland Security (DHS) notified certain affected individuals that failing to comply with the registration requirements made a person deportable under INA § 237(a)(3)(A) (failure to register and falsification of documents) unless the individual could prove that the failure was not willful or that it was reasonably excusable. The notices also stated that an individual who failed to comply with Special Call-in Registration was deportable under INA § 237(a)(1)(C)(i) because that individual failed to comply with the conditions of that person's immigration status.

## **Did DHS put anyone in proceedings based on NSEERS?**

Yes. DHS put more than 13,000 individuals in removal proceedings as a result of the Special Call-in registration requirement of NSEERS. DHS arrested many of those individuals during the Special call-in interview.

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<sup>6</sup> See, e.g., *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008) (rejecting equal protection, notice and comment, Fourth and Fifth Amendment and regulator violations challenges to NSEERS program); *But see Jean v. Nelson*, 472 U.S. 846, 857 (1985) (finding that discriminatory treatment of Haitians on the basis of race or national origin would violate a facially neutral INS parole statute).

## **Were there possible criminal penalties under NSEERS?**

There are general criminal penalties under INA § 266(a) for a noncitizen who has an obligation to register but willfully fails or refuses to register.<sup>7</sup> As with all criminal cases, the government must prove each element of the offense beyond a reasonable doubt.<sup>8</sup>

## **Should I do anything now?**

No, because no Special Registration program now exists. There is no reason to take any steps based on the possibility that something might happen in the future. In fact, contacting DHS at this point might be harmful. Joining the political efforts to defeat or temper the Trump Administration's plans might be the most effective thing someone could do.

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<sup>7</sup> The statute provides that:

Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed \$1,000 or be imprisoned not more than six months, or both.

INA § 266 (a); 8 U.S.C. § 1306(a).

<sup>8</sup> See, e.g., *Sandstrom v. Montana*, 442 U.S. 510, 520 (1979).