

**NATIONAL SECURITY ENTRY-EXIT
REGISTRATION SYSTEM: EFFECTIVE TOOL
AGAINST TERRORISM OR UNNECESSARY
INFRINGEMENT ON CONSTITUTIONAL RIGHTS?**

**Joshua Rubin
King Scholar Senior Seminar Paper
Spring 2003**

NATIONAL SECURITY ENTRY-EXIT REGISTRATION SYSTEM: EFFECTIVE TOOL AGAINST TERRORISM OR UNNECESSARY INFRINGEMENT ON CONSTITUTIONAL RIGHTS?

Joshua P. Rubin *

I. INTRODUCTION.....	2
II. BACKGROUND.....	4
A. Immigration Statistics on Nonimmigrant Admissions.....	4
B. Creation of the Department of Homeland Security.....	6
C. NSEERS / Special Registration Program Description.....	8
1. <i>Registration Upon Entry Into the United States</i>	8
2. <i>Compliance Interviews Between 30 and 40 Days</i>	10
3. <i>Change of Status</i>	10
4. <i>Departure Registration</i>	10
5. <i>"Call-In" Interviews</i>	11
6. <i>Penalties for Non-Compliance</i>	12
D. Historical Development of NSEERS.....	13
1. <i>Basis for Special Registration</i>	13
2. <i>Pre-September 11th Special Registration</i>	15
E. Special Registration Timeline.....	17
1. <i>June 6, 2002 – Announcement of New Rule</i>	17
2. <i>June 13, 2002 – Proposed Rule</i>	18
3. <i>August 12, 2002 – Final Rule</i>	19
4. <i>September 6, 2002 – First Notice</i>	20
5. <i>September 11, 2002 – Program Begins</i>	20
6. <i>November 6, 2002 – Notice</i>	21
7. <i>November 15, 2002 – Compliance Interviews Begin</i>	21
8. <i>November 22, 2002 – Second Notice</i>	22
9. <i>December 18, 2002 – Third Notice</i>	22
10. <i>January 16, 2003 – Forth Notice</i>	22
11. <i>February 19, 2003 – Deadlines Extended for Group Three and Four</i>	23
III. ANALYSIS.....	24
A. Balance Between Security and Individual Civil Liberties	24
B. Opposition to NSEERS.....	25
1. <i>Effectiveness of NSEERS</i>	25
2. <i>Whether Special Registration Violates Constitutional Due Process Rights</i>	28
3. <i>Does NSEERS Constitute Racial Profiling?</i>	29
4. <i>Arbitrary INS Officer?</i>	33
5. <i>Possible Administrative Burden</i>	34
6. <i>Inconvenience Caused by NSEERS</i>	36
7. <i>Inappropriate Detentions Under Special Registration</i>	37
C. Recommendations for Special Registration Program.....	39
IV. CONCLUSION.....	41

* Associate – Beauchamp, Kelly, Whipple, Zick, Keyes & Hulewicz PLLC; B.A., 2000, *with Honors*, Michigan State University; J.D., 2003, *summa cum laude*, Dean Charles H. King Fellow, Michigan State University – Detroit College of Law.

INTRODUCTION

The United States of America is often described as “a nation of immigrants.”¹ In fact, the United States has a proud tradition of accepting and welcoming in foreigners from around the world. This generous open door policy has allowed approximately thirty-five million foreigners (“nonimmigrants”)² to visit the United States annually.³ Until recently, this massive flow of nonimmigrants into and out of the country progressed without much resistance from the United States’ immigration laws. That is, until September 11th arrived.

The vicious acts of September 11th have changed many aspects of the United States.⁴ Since that date, the United States has urgently endeavored to defuse the emerging threats of savage terrorists. For example, the United States, in conjunction with the aviation industry, has sought out ways to make air travel safe again.⁵ Chemists have stockpiled medicines in order to defend against the threat of bioterrorism. The Government has created a color – coded alert level meter that warns people of the risk of potential terrorist threats. Finally, the United States’

¹ Doris M. Meissner, The 2002 Randolph W. Throver Symposium on Immigration Law: Assessing New Immigration Enforcement Strategies and the Criminalization of Migration: Keynote Address Protecting Borders and Liberty in the Post 9-11 Era, 51 EMORY L.J. 977 (2002).

² A “nonimmigrant” is an alien who seeks temporary entry to the United States for a specific purpose. The alien must have a permanent residence abroad (for most classes of admission) and qualify for the nonimmigrant classification sought. The nonimmigrant classifications include: foreign government officials, visitors for business and for pleasure, aliens in transit through the United States, treaty traders and investors, students, international representatives, temporary workers and trainees, representatives of foreign information media, exchange visitors, fiancés of U.S. citizens, intracompany transferees, NATO officials, religious workers, and some others. Most nonimmigrants can be accompanied or joined by spouses and unmarried minor (or dependent) children. Bureau of Citizenship and Immigration Services, Glossary and Acronyms, available at <http://www.immigration.gov/graphics/glossary3.htm> (last visited March 13, 2003).

³ See U.S. Immigration and Naturalization Service, *Statistical Yearbook of the Immigration and Naturalization Service, 2001*, p. 125, U.S. Government Printing Office: Washington, D.C., 2003.

⁴ According to a recently released Washington Post-ABC News poll, most Americans agree that their country has permanently changed in the aftermath of the worst terrorist attack in the country's history.

⁵ Shortly after the attacks, President Bush sought to privatize airport security, establish a \$500 million fund to make access to and operation of airplane's cockpit area more secure, and increase the number of armed air marshals flying anonymously among passengers. See U.S. Department of State – International Information Programs, *Facts Sheet: White House on Aviation Security*, available at <http://usinfo.state.gov/topical/pol/terror/01092702.htm> (last visited February 1, 2003).

Government experienced the most extensive reorganization since the 1940's when it created the Department of Homeland Security ("DHS").⁶

The U.S. Immigration and Naturalization Service ("INS"), an agency that was absorbed into the DHS, became a crucial player in our Nation's safety after September 11th when it developed several new programs aimed at protecting the United States from terrorism. These INS changes focused primarily on ways of monitoring individuals in order to identify and keep out potential terrorist. For example, the INS created the Student and Exchange Visitor Information System ("SEVIS"), which is responsible for maintaining accurate and current information on nonimmigrant students, exchange visitors, and their dependents.⁷ The INS also implemented the "Absconder Apprehension Initiative," which locates, apprehends, interviews, and deports (removes) alien fugitives known as "absconders."⁸ Finally, the INS implemented the National Security Entry-Exit Registration System ("NSEERS").⁹ NSEERS, the main focus of this paper, will surely transform the flow of nonimmigrants into and out of the United States.¹⁰

The NSEERS special registration program's main purpose is to better track those individuals entering the country for temporary periods of time. The program, which was introduced by the U.S. Department of Justice ("DOJ"), carries out its purpose by requiring certain nonimmigrant aliens to make specific reports to the INS upon arrival; approximately thirty days after arrival; every twelve months after arrival; upon certain events, such as change of

⁶ See Stanley Mailman & Stephen Yale-Loehr, *Immigration in a Homeland Security Regime*, 8 *Bender's Immigr. Bull.* 1 (January 15, 2003).

⁷ See Bureau of Citizenship and Immigration Services, *Student and Exchange Visitor Program*, available at <http://www.immigration.gov/graphics/services/tempbenefits/sevp.htm> (last visited March 13, 2003).

⁸ The INS has defined "Absconders" as aliens who, though subject to a final order of removal, have failed to surrender or otherwise comply with the order. Deputy Attorney General Releases: Internal Guidance For 'Absconder' Apprehension, 79 No. 8 Interpreter Releases 261 (Feb. 18, 2002).

⁹ The acronym "NSEERS" and the term "special registration" refer to the same program and will be used interchangeably throughout this paper.

¹⁰ The NSEERS program is developing rapidly and will continue to be updated. Readers are cautioned to update the information in this paper because the NSEERS rules are subject to change on a daily basis.

address, employment or school; and at the time they leave the United States.¹¹ It is predicted that the above requirements will, in effect, allow the Government to identify and dispel terrorists.

The goal of this paper is to provide a critical analysis of the newly implemented NSEERS program. A critical analysis of NSEERS is important for two separate reasons. First, NSEERS addresses the growing concern surrounding the increasingly threatened security of the United States. Second, NSEERS affects the liberties of individuals within the United States' borders. As a result, this new registration program, which has created a great deal of controversy and debate, is worthy of review and analysis.

This review and analysis of NSEERS contains two main parts. Part I will discuss various background issues related to the United States' war on terrorism. These background issues include: immigration statistics, the development of the Department of Homeland Security, a description of the NSEERS program, a description of the historical development of Special Registration, and an explanation of the Special Registration timeline. Part II will provide an analysis of the Special Registration program. This analysis will include a discussion of how well the NSEER program balances security and individual liberties. In addition, the analysis section will present the differing viewpoints surrounding several NSEERS issues. After that, this author will suggest recommendations for the future of NSEERS.

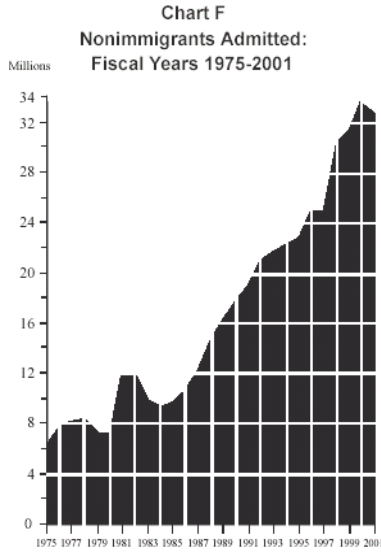
BACKGROUND

A. Immigration Statistics on Nonimmigrant Admissions

The United States admitted more than 32.8 million¹² nonimmigrants during fiscal year 2001.¹³ The 32.8 million nonimmigrants that were admitted in 2001 actually represents a

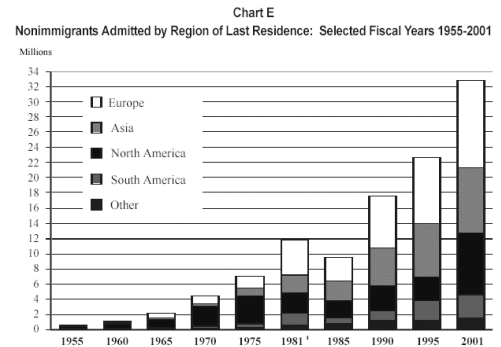
¹¹ See Notice of Information Collection Under Review, National Security Entry-Exit Registration System, 68 Fed. Reg. 10,035 (March 3, 2003).

¹² Due to multiple entries each year of some aliens (especially among certain categories such as students) and the method of data collection, nonimmigrant admission data represent arrival events rather than individuals.



decrease of nearly 866 thousand (2.6%) since the year 2000. This decrease, which was mainly the result of the September 11 attacks, was the first annual decrease since the early 1980s. Moreover, preliminary data indicates an approximate 14% decline in nonimmigrant admission for the year 2002.¹⁴ Although in decline, the number of nonimmigrants present in the United States still represents a large portion of society. However, the number of nonimmigrants that are currently subject to Special Registration represents a small percentage of the approximate 33 million total nonimmigrants that enter the United States yearly.¹⁵

Administering the flow of nonimmigrants into and out of the country through the various ports of entry is a big job. The job is big mainly because of the immense size of the United States. The U.S. shares a 5,252-mile border with Canada and a 1,989-mile border with Mexico. These land borders contain a combined total of more than 300 international land-based ports of entry. In addition, the U.S. contains 95,000 miles of coastline and navigable waterways and a global transportation network with over 300 seaports, 429 commercial airports, and several hundred thousand miles of highways and railroads.¹⁶



¹³ See U.S. Immigration and Naturalization Service, *supra* note 3 at 125.

¹⁴ See *id.* at 122-23.

¹⁵ See Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 40,581 (June 13, 2002).

B. Creation of the Department of Homeland Security

As indicated above, the creation of the DHS signified the U.S. Government's most significant reorganization in over fifty years.¹⁷ In December of 2002, President Bush signed into law the Homeland Security Act of 2002.¹⁸ With this reorganization, more than twenty federal agencies, including the INS, fall under the DHS. The agencies under the DHS now have the security of our nation as their primary mission. Understanding this reorganization is helpful because it co-exists with the implementation of the Special Registration program.

Led by Secretary Tom Ridge, the mission of the DHS is: 1) to prevent terrorist attacks within the United States, 2) to reduce America's vulnerability to terrorism, and 3) to minimize the damage and recover from attacks that do occur. This mission will be carried out by the DHS's five main divisions: 1) Border and Transportation Security ("BTS"), 2) Information Analysis and Infrastructure Protection, 3) Emergency Preparedness and Response, 4) Science and Technology, and 5) Management.

Part of the DHS's reorganization plan was the creation of various new bureaus under the BTS.¹⁹ These new bureaus, which actually take the place of the INS, include the "Bureau of Customs and Border Protection" ("BCBP"), the "Bureau of Immigration and Customs Enforcement" ("BICE"), and the "Bureau of Citizenship and Immigration Services" ("BCIS").²⁰

The BTS will contain two main bureaus to protect the various ports of entry. First, the Bureau of

¹⁶ See The Department of Homeland Security, *Border Reorganization Fact Sheet*, available at <http://www.immigration.gov/graphics/publicaffairs/factsheets/btsreorg.pdf> (last visited February 18, 2003).

¹⁷ The last major reorganization occurred soon after the Second World War when President Harry Truman proposed uniting our military forces under a single entity, now the Department of Defense, and creating the National Security Council to bring together defense, intelligence, and diplomacy.

¹⁸ See Pub. L. No. 107-296, 116 Stat. 2135.

¹⁹ See The Department of Homeland Security, *supra* note 16.

²⁰ The Bureau of Citizenship and Immigration Services, a separate bureau that was created by the Homeland Security Act, will allow the Department to greatly improve the administration of benefits and immigration services for applicants by focusing exclusively on immigration and citizenship services.

Customs and Border Protection will bring together the once separate border agencies.²¹ This new Bureau will consist of approximately 30,000 employees, including 17,000 inspectors in the Agricultural Quarantine Inspection program, the INS inspection services, and the Border Patrol and the Customs Service (including canine enforcement officers). In addition, the Bureau of Immigration and Customs Enforcement (“BICE”) will refocus homeland security inspection and investigation functions. This Bureau will bring together the enforcement and investigation arms of the Customs Service, the investigative and enforcement functions of the INS, and the Federal Protective Services. This reorganization involves approximately 14,000 employees, including 5,500 criminal investigators, 4,000 employees for immigration and deportation services, and 1,500 Federal Protective Service personnel that will focus on the mission of enforcing the full range of immigration and customs laws within the interior of the United States. The air and marine enforcement functions of the Customs Service will also be part of the BICE. Thus, these two new Bureaus will break down barriers of communication, provide a direct line of authority to the DHS’s headquarters, and give homeland security employees a clear mission.²²

The reorganization was implemented when the agencies moved to the DHS on March 1, 2003. The full integration of the new agencies will be a collaborative effort undertaken over the next few months between employees, stakeholders, and the DHS senior leadership.²³ Thus, the implementation of the NSEERS program co-exists with this massive reorganization of the Federal Government.

²¹ The Immigration and Naturalization Service and Border Patrol (Department of Justice), the United States Customs Service (Department of Treasury), and the Animal and Plant Health Inspection Services (Department of Agriculture).

²² See The Department of Homeland Security, *supra* note 16.

²³ See *id.*

C. NSEERS / Special Registration Program Description

NSEERS is a program that the DOJ developed in order to better protect the United States against terrorism. Increased protection is accomplished by implementing Special Registration procedures that will enable the United States Government to more effectively track nonimmigrants that enter the United States every year.²⁴ As currently implemented, NSEERS requires only a small percentage of the approximately 35 million nonimmigrants that enter the U.S. – and some nonimmigrants already in the U.S. – to register with, and provide certain information to, the BICE. This registration and information gathering operation occurs either at a port of entry or a designated BICE District Office in accordance with the Special Registration procedures. Special Registration procedures also require additional in-person interviews at a BICE office and notifications to the BICE of changes of address, employment, or school status.²⁵ In addition, nonimmigrants will have to use specially designated ports when they leave the country and report in person to a BCBP officer at the port on their departure date.²⁶

There are three main components to the NSEERS' tracking system. These three components include: 1) the fingerprinting and photographing of aliens entering the U.S. at a port of entry, 2) the periodic registration of aliens who stay in the United States thirty days or more, and 3) the existence of exit control to help the BICE remove aliens who overstay their visas.

1. *Registration Upon Entry Into the United States*

Persons deemed subject to NSEERS, either due to nationality or because they are suspect under the inspectors' discretionary criteria, will be asked to undergo the registration process at the port of entry *upon each entry*, even if they are a frequent traveler (such as an H-1B petroleum

²⁴ See Immigration and Naturalization Service, *Special Registration: Your Portal to Information on Special Registration Procedures for Certain Nonimmigrants*, available at <http://www.immigration.gov/graphics/shared/lawenfor/specialreg/index.htm> (last visited March 11, 2003).

²⁵ See *id.*

engineer who travels often on business).²⁷ An alien subject to Special Registration will immediately be directed to secondary inspection when they present themselves at a port of entry. At secondary inspection, they will be fingerprinted (two fingers) and photographed. The fingerprints are then run against the IAFIS Database of Known Terrorists and the INS IDENT database (to determine if the alien had previously entered the United States under a different name).²⁸ While the fingerprints are being processed, the alien will be asked to provide detailed information about his planned stay in the United States and his past history in his home country. He must also provide current contact information so the BICE can reach the alien at any time. The DOJ's release on the program claims the entire process at secondary inspection will take five to ten minutes.²⁹

A nonimmigrant alien appearing before a BCBP officer for Special Registration must provide a variety of information at the port of entry. The registrant must: (1) answer questions under oath; (2) present the following information: (i) travel documents, including a passport and the Arrival-Departure Record (Form I-94) issued upon arrival, and any other forms of government-issued identification; (ii) proof of residence, such as title to land or a lease or rental agreement; (iii) proof of matriculation at an educational institution (if applicable); (iv) proof of employment (if applicable); and (v) such other information as is requested by the immigration officer; and (3) be fingerprinted and photographed.³⁰

Once a person has been processed into NSEERS the first time, his or her computerized record and fingerprint identification number will be utilized by the BCBP as an informational

²⁶ *See id.*

²⁷ *See* Ashcroft Announces Entry Exit System, 7 *Bender's Immigr. Bull.* 13, 803 (July 1, 2002).

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See* INS Adds To List Of Special Registration Countries; Extends Deadline for Group 1 and 2 Aliens, 80 No. 3 *Interpreter Releases* 81 (January 20, 2003).

foundation of sorts for future entries, so that a person will purportedly not have to go through the entire registration interview upon each entry, only a truncated version.³¹

2. Compliance Interviews Between 30 and 40 Days

A person registered under NSEERS will be given an instruction packet. The information packet explains that the nonimmigrant, if remaining in the U.S. more than thirty days, must report between the 30th and 40th day to the BICE office having jurisdiction over his or her location to submit to a "compliance interview." At this interview, the BICE will determine whether the person is complying in all material respects with his or her visa requirements and overall with the information offered at the port of entry registration. If applicable, proof of residence (such as a rental contract) or proof of employment (such as a letter from his employer) must be presented to the BICE. The same information is required again at a one-year compliance interview.

3. Change of Status

Anytime a Special Registrant's address, employment, or school within the United States changes, he or she must notify the BICE, by mail, of the change. This change of status must be made on a Form AR-11.

4. Departure Registration

That same packet handed to the entering traveler at the port of entry also provides guidance on the "de-registration" required of each individual when departing the United States. The points of departure that are set up to handle de-registration are still limited, and a listing of available points of departure from the U.S. is part of the entry NSEERS packet. Failure to report departure will bar an individual from re-entering the United States.

³¹ *See id.*

5. "Call-In" Interviews

Perhaps the most extensive and far-reaching program is the newly implemented system of "call-in" interviews. Certain foreigners in the United States in some longer-term nonimmigrant status, who have not traveled recently, are also required to report to the BICE for such a "call-in" interview, even when they have not traveled. The classes of aliens subject to the call-in segment of special registration are known as "Domestic Registrants."³²

Domestic Registrants are certain nonimmigrant aliens who were admitted to the United States prior to the inception of the new registration program, have since remained, and who, when designated by the Attorney General, must report to a BICE office to be registered. This process is required so the BICE can gather the same information that may have been collected at the port of entry had those aliens arrived after the effectiveness of NSEERS.

Only nonimmigrants from certain countries listed in the Federal Register are subject to call-in interviews. As of January 16, 2003, all males age 16 and over, who have been in the United States since September 30, 2002, and who are citizens or nationals of the following countries must register with the BICE under the Special Registration regulations: 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.

Citizens and nationals of Iran, Iraq, Libya, Sudan, and Syria must have complied with the special registration requirement by December 16, 2002. Per the DOJ's Notice of November 22, citizens and nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, Oman,

³² U.S. Department of Justice: Immigration and Naturalization Service, *Statement of Johnny N. Williams Before the Senate Committee on Finance Regarding Combating Terrorism: Protecting the United States*, (January 30, 2003), available at <http://www.immigration.gov/graphics/aboutus/congress/testimonies/2003/Williams.pdf> (last visited March 18, 2003).

Qatar, Somalia, Tunisia, United Arab Emirates and Yemen must have complied by January 10, 2003. Saudis and Pakistanis had from January 13, 2003 until February 21, 2003 to comply.

6. *Penalties for Non-Compliance*

The penalties for non-compliance of the NSEERS program are quite severe for those nonimmigrants that willfully fail to follow the established guidelines. This section discusses some of the various penalties a nonimmigrant may be subjected to.

An alien who willfully fails to appear for the call-in registration and/or comply with the applicable special registration requirements after appearing for a call-in interview is deportable under section 237(a)(1)(C)(i) of the Act for failure to maintain nonimmigrant status. In addition, an alien who fails to appear for the call-in registration prescribed by the FR Notice is deportable pursuant to section 237(a)(3)(A) of the Act, unless the alien establishes, to the satisfaction of the Attorney General, that such failure was reasonably excusable or was not willful.³³

An alien who registered pursuant to the call-in and later fails (without good cause) to comply with the departure registration requirement will be subject to a presumption of future inadmissibility to the United States under section 212(a)(3)(ii) of the act, as an alien whom the Attorney General has reasonable grounds to believe, based on the alien's past failure to conform with Special Registration requirements, seeks to enter the United States to engage in unlawful activity.³⁴

An alien who willfully fails or refuses to make an application for registration or to be fingerprinted may be subject to criminal prosecution pursuant to section 266(a) of the Act and

³³ See Robert A. Wallis, Special Registration of Certain Nonimmigrant Aliens Already Admitted to the United States, INS Memorandum For District Directors Central Division (November 27, 2002).

³⁴ See *id.*

shall, upon conviction thereof, be fined not to exceed \$ 1,000 or be imprisoned not more than six months, or both.³⁵

An alien who fails to provide the information requested in the FR Notice may be subject to criminal prosecution pursuant to section 266(b) of the Act and shall, upon conviction thereof, be fined not exceed \$ 200 or be imprisoned not more than thirty days, or both.³⁶

An alien may be allowed to register late if evidence establishes that the failure to comply with the FR Notices was reasonably excusable or not willful. If the evidence does not adequately support the alien's claim that the failure to apply for Special Registration by the deadline was reasonably excusable or not willful, the alien should be referred for initiation of removal proceedings.³⁷ Thus, the penalties for failing to comply with NSEERS can be severe.

D. Historical Development of NSEERS

Contrary to popular belief, the concept of Special Registration is not new. In fact, the concept of applying Special Registration procedures to certain nonimmigrant aliens developed prior to September 11. This section will begin by explaining portions of the Immigration and Nationality Act (“Act”) that provide the authority for Special Registration regulations. After that, this section will explain the historical development of Special Registration prior to September 11.

1. *Basis for Special Registration*

Several important sections of the Act provide the authority for Special Registration. To begin, section 262(a) of the Act provides that:

It shall be the duty of every alien ... in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.*

221(b) of this Act [8 USCS § 1201(b)] or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days.³⁸

Additionally, section 263(a) of the Act, 8 U.S.C. 1303(a), provides that the Attorney General may:

prescribe special regulations and forms for the registration and fingerprinting of ...aliens of any other class not lawfully admitted to the United States for permanent residence.³⁹

Furthermore, section 265(b) of the Act, as amended, 8 U.S.C. 1305(b), provides the following:

The Attorney General may in his discretion, upon ten days notice, require the natives of any one or more foreign states, or any class or group thereof, who are within the United States and who are required to be registered under this subchapter, to notify the Attorney General of their current addresses and furnish such additional information as the Attorney General may require.⁴⁰

Thus, the Act originally required all aliens to register and be fingerprinted;⁴¹ however, prior to September 11th, the regulations at 8 CFR 264.1(e) contained general provisions waiving the requirement of fingerprinting for many nonimmigrant aliens. Accordingly, almost all nonimmigrant aliens were admitted to the United States without being either fingerprinted or photographed.⁴² Consequently, the pre-September 11th Special Registration requirements were extremely narrow and limited. Thus, the NSEERS program can be seen as an initiative that does the following: 1) puts registration and fingerprinting requirements back in place for certain nonimmigrants and 2) broadens the Special Registration requirement for those nonimmigrants.

³⁸ 8 U.S.C. § 1302(a) (1996).

³⁹ 8 U.S.C. § 1303(a) (1996); Registration and Monitoring of Certain Nonimmigrants From Designated Countries, 67 Fed. Reg. 57,032 (September 6, 2002).

⁴⁰ 8 U.S.C. § 1305(b) (1996).

⁴¹ See U.S. Department of State, International Information Programs, *Fact Sheet: National Security Entry-Exit Registration System* (June 5, 2002), available at <http://usinfo.state.gov/topical/pol/terror/02060509.htm> (last visited March 11, 2003).

⁴² See Registration and Monitoring of Certain Nonimmigrants From Designated Countries, *supra* note 39 at 57,032.

2. *Pre-September 11 Special Registration*

On January 16, 1991, the DOJ published a Final Rule in the Federal Register that required the registration and fingerprinting of Iraqi and Kuwaiti nonimmigrants that applied for admission to the United States.⁴³ This Final Rule was the result of possible threats caused by the United States' involvement in the Middle East surrounding the Gulf War. This requirement was removed on December 23, 1993, when the DOJ published an Interim Rule in the Federal Register.⁴⁴

At the same time, the DOJ added a new paragraph (f) to 8 CFR 264.1. That new paragraph, which added the provision for the registration and fingerprinting of certain nonimmigrants of specific countries designated by the Attorney General, stated the following:

Notwithstanding the provisions included in paragraphs (e)(1) and (e)(2) of this section, the Attorney General 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.⁴⁵

The DOJ's reason for implementing this new rule was their anticipation of future political situations that may elevate security concern, which would again necessitate the registration and fingerprinting of certain nonimmigrants.

Less than five years later, the DOJ decided to exercise its authority under paragraph (f) of 8 CFR 264.1. On July 21, 1998, the Attorney General required nonimmigrant aliens from Iran, Libya, Iraq, and Sudan to be photographed and fingerprinted by the INS at the port of entry

⁴³ See *Registration and Fingerprinting of Certain Nonimmigrants Bearing Iraqi and Kuwaiti Travel Documents*, 56 Fed. Reg. 1566 (January 16, 1991). The requirement was promulgated in response to the United States' condemnation of Iraq's invasion of Kuwait, United States' sanctions against Iraq, and the theft of thousands of Kuwaiti passports during the occupation of Kuwait by Iraq, all of which heightened the potential for domestic anti-United States terrorist activities. *Requirement for Registration and Fingerprinting of Certain Nonimmigrants*, 63 Fed. Reg. 39,109 (July 21, 1998).

⁴⁴ See *Removal of the Requirement for the Registration and Fingerprinting of Certain Nonimmigrants Bearing Iraqi and Kuwaiti Travel Documents*, 58 Fed. Reg. 68,024 (Dec. 23, 1998). This requirement was removed because the Department felt that it was no longer necessary due to changes in the political environment and the decrease in the need to collect this information.

where the aliens applied for admission to the United States.⁴⁶ Thus, nonimmigrants from Iran, Libya, Iraq, and Sudan were already subject to a limited set of Special Registration requirements prior to the implementation of NSEERS.

The next phase in the evolution of Special Registration was the development of the current NSEERS program. Various elements of NSEERS were given a trial run prior to the program's official commencement. During a five-month pilot program, Attorney General Ashcroft reported that a "quick fingerprint" check at the border takes approximately three minutes and that the results have been very promising. The INS received an average of sixty-seven hits per week and apprehended over 1,400 individuals from January through May of 2002.⁴⁷ These 1,400 wanted criminals were arrested during the fingerprint check as they tried to enter the United States. Therefore, the pilot program seemed to be an indication of the possible success of a wide scale NSEERS program.

The present day NSEERS program apparently is the "crucial first phase" in the Congressionally mandated requirement that the DOJ track virtually all of the 35 million visitors present in the United States each year. Initially, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which mandated the development of an automated entry-exit control system to record the entry and departure of every non-citizen arriving in the United States.⁴⁸ More recently, Congress expressed its intent in the USA PATRIOT Act that the DOJ implement this entry-exit system in order to provide greater protection for the United States and better ensure that aliens fulfill their responsibilities under

⁴⁵ *Id.*

⁴⁶ See Requirement for Registration and Fingerprinting of Certain Nonimmigrants, *supra* note 43. This rule was a combination of two prior published rules that required members of Iran, Iraq, Libya, and Sudan to be photographed and fingerprinted.

⁴⁷ See U.S. Department of State, *supra* note 41.

⁴⁸ See Illegal Immigration and Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") enacted as Division C of Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 641, 110 Stat. 3009, 3009-704 (1997).

United States' immigration laws. In fact, Congress directed that the new program be fully up and running "with all deliberate speed and as expeditiously as practicable."⁴⁹ The NSEERS program has been described by Attorney General Ashcroft as the first step toward the development of a comprehensive entry-exit system applicable to virtually all foreign visitors. The DOJ hopes to track 100,000 visitors during the first year of the program.⁵⁰ The deadline for the comprehensive NSEERS program has been set for the year 2005.

E. The Special Registration Timeline

NSEERS, as a continuously evolving program, has brought forth several specific dates that are worth noting. In many cases, these dates became crucial for the Domestic Registrants to take note of. As a result, it is helpful to have an understanding of how the Special Registration timeline has developed since the program's commencement. This section will identify and discuss the key dates that make up the evolution of the NSEERS program.

1. *June 6, 2002 – Announcement of New Rule*

On June 6, 2002, Attorney General John Ashcroft announced a proposed regulation requiring the Special Registration of "foreign visitors who may pose a national security concern."⁵¹ The program started with visitors from Syria, Iran, Iraq, Libya, and Sudan⁵² seeking to gain admission into the United States.⁵³

The fact that Ashcroft himself announced the proposed immigration regulation was said to be a strong indicator of the importance of this program to the DOJ.⁵⁴ In his announcement,

⁴⁹ Pub. L. No. 107-56, 115 Stat. 272, at § 414(a)(1)(A) (Oct. 26, 2001).

⁵⁰ See Ashcroft Announces Entry Exit System, *supra* note 27.

⁵¹ *Id.*

⁵² All five of these countries have been designated by the Department of State as state sponsors of terrorism. See Registration and Monitoring of Certain Nonimmigrants From Designated Countries, *supra* note 39.

⁵³ See Ashcroft Announces Entry Exit System, *supra* note 27.

⁵⁴ See *id.*

Ashcroft stated that "[t]his system will expand substantially America's scrutiny of those foreign visitors and it will provide a vital line of defense in the war against terrorism."⁵⁵

2. June 13, 2002 – Proposed Rule

On June 13, 2002, the Attorney General published a Proposed Rule in the Federal Register that explained the DOJ and the INS's intention of broadening the Special Registration requirements and monitoring of certain nonimmigrants. Under the Proposed Rule, Special Registration and monitoring would be broadened to include the following:

- 1) Nonimmigrant aliens from selected countries specified in notices published in the Federal Register,
- 2) Individual nonimmigrant aliens who a State Department Consular Officer (outside the U.S.) designates as needing closer monitoring, and
- 3) Individual nonimmigrant aliens who an INS inspection officer (at a port of entry) designates as needing closer monitoring.

It was made clear that the requirement to register with the INS would not apply to U.S. citizens, lawful permanent residents (green card holders), refugees, asylum applicants, asylum grantees, and diplomats or others admitted under "A" or "G" visas.⁵⁶ Thus, only a small percentage of the more than 35 million nonimmigrant aliens who enter the United States each year would initially be subject to Special Registration.

The regulations set out to require certain nonimmigrant aliens to make specific reports to the INS upon the following time and events: upon arrival; approximately thirty days after arrival; every twelve months after arrival; upon a change of address, employment, or school; and at the

⁵⁵ *Id.*

⁵⁶ Special Call-In Registration Procedures For Certain Nonimmigrants, *Questions and Answers*, available at http://www.immigration.gov/graphics/shared/lawenfor/specialreg/CALL_IN_ALL.pdf (last visited March 11, 2003).

time they leave the United States.⁵⁷ Thus, the Proposed Rule expanded the existing Special Registration rule to require that these designated nonimmigrant aliens provide more detailed and frequent information to ensure that they comply with the conditions of their visas and admissions.

The rationale behind the newly proposed rule was that the United States' immigration system contained weaknesses. Specifically, the INS did not have adequate information on the activities and whereabouts of nonimmigrant aliens.⁵⁸ As a result, the INS could not effectively determine if nonimmigrant aliens followed their stated plans or if they remained in the U.S. beyond their authorized period of stay. Thus, the Special Registration requirements were designed to be an effective mechanism to ensure that nonimmigrants complied with their visas and admissions.

3. *August 12, 2002 – Final Rule*

The DOJ published its Final Rule regarding Special Registration on August 12, 2002, in the Federal Register.⁵⁹ The Final Rule adopted the Proposed Rule without substantial change. The Final Rule also announced an effective date of September 11, 2002 – exactly one year after the attacks.

With the Federal Register publication, Attorney General John Ashcroft in effect announced that the INS would implement the first phase of NSEERS, at selected ports of entry throughout the United States, on September 11, 2002. The first phase of NSEERS was scheduled to include an initial 20-day period for testing and evaluating the system at selected

⁵⁷ See Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584 (August 12, 2002) (to be codified at 8 C.F.R. pt. 264).

⁵⁸ See *id.*

⁵⁹ See *id.*

ports of entry. After that, all remaining ports of entry - including land, air, and sea - would have the new system in place.⁶⁰

4. *September 6, 2002 – First Notice*

The DOJ published its first notice in the Federal Register on September 6, 2002.⁶¹ In this notice, the Attorney General ordered the following: All nonimmigrant aliens who are nationals or citizens of Iran, Iraq, Libya, Sudan, or Syria, or who a consular officer or an inspecting officer has reason to believe are nationals or citizens of such countries,⁶² and who are applying for admission to the United States in a nonimmigrant category other than under section 101(a)(15)(A) or 101(a)(15)(G) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(A) or (G)), shall be subject to the registration requirements in 8 CFR 264.1(f)(3), (5), (6), (8), and (9), as amended. All such nonimmigrant aliens subject to Special Registration shall be advised of the provisions of 8 CFR 264.1(f), and their obligations to comply with those provisions, when admission is granted.⁶³

This notice, in effect, applied the expanded requirements to nonimmigrant aliens from the then existing list of designated countries (Iran, Iraq, Libya, and Sudan). This notice also expanded the list of designated countries to include nonimmigrant aliens from Syria.

5. *September 11, 2002 – Program Begins*

The first phase of NSEERS commenced as a pilot program at selected ports of entry on September 11, 2002, the anniversary of when terrorist attacked the United States. For twenty

⁶⁰ See Department of State, *Information About the New NSEERS Program*, available at <http://www.usembassy.si/Consular/nseers.htm> (last visited February 17, 2003).

⁶¹ See Registration and Monitoring of Certain Nonimmigrants From Designated Countries, *supra* note 39.

⁶² This authority is necessary because a review of travel documentation occasionally raises questions regarding the actual nationality or citizenship of a particular nonimmigrant alien. For example, an alien may be a dual national or citizen of one of the designated countries as well as another country for which he or she presents documents. *See id.*

⁶³ *See id.*

days, the program was tested and evaluated at the selected ports of entry. After that, the program was extended to all land, air, and sea ports of entry on October 1, 2002.

6. November 6, 2002 – Notice

On November 6, 2002, the DOJ published a notice in the Federal Register requiring nonimmigrant aliens from Iran, Iraq, Libya, Sudan, or Syria to appear before, register with, and provide requested information to the INS.⁶⁴ This notice was set to become effective on November 15, 2002. Nonimmigrants from the above countries were required to register if they: 1) are males age 16 or older (born on or before December 2, 1986), 2) entered the United States on or before September 30, 2002, and 3) will remain in the country after the registration deadline. The registration deadline for Group 1 was set at December 16, 2002.

The November 6 notice, in effect, signaled the beginning of the call-in portion of the NSEERS program. This first round of call-in interviews began on November 15 and ended on the December 16, 2002, deadline. Furthermore, it was only to apply to males, age 16 or older, from the above countries that were inspected and last admitted to the United States on or before September 10, 2002. Lastly, only individuals who were to remain in the United States until at least December 16, 2002, needed to comply.

7. November 15, 2002 – Compliance Interviews Begin

On November 15, 2002, the INS implemented the system of compliance interviews for aliens from Iran, Iraq, Libya, Sudan, or Syria who entered the U.S. prior to the September 11 start to SNEERS. Thus, these compliance interviews constituted the beginning of the call-in component of NSEERS.

⁶⁴ See Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 67,766 (November 6, 2002).

8. *November 22, 2002 – Second Notice*

On November 22, 2002, the DOJ published a notice in the Federal Register that added thirteen additional countries to the list of required Domestic Registrants.⁶⁵ These thirteen countries included the following: Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen (“Group 2”). This notice was set to become effective on December 2, 2002. Nonimmigrants from the above countries were required to register if they: 1) are males age 16 or older (born on or before December 2, 1986), 2) entered the United States on or before September 30, 2002, and 3) will remain in the country after the registration deadline. The registration deadline for Group 2 was set at January 10, 2003.

9. *December 18, 2002 – Third Notice*

On December 18, 2002, the DOJ published a notice in the Federal Register that required certain nonimmigrant aliens from Pakistan and Saudi Arabia (“Group 3”) to register with the INS.⁶⁶ This notice was set to become effective on January 13, 2003. Nonimmigrants from the above countries were required to register if they: 1) are males age 16 or older (born on or before January 13, 1987), 2) entered the United States on or before September 30, 2002, and 3) will remain in the country after the registration deadline. The registration deadline for Group 3 was set at February 21, 2003.

10. *January 16, 2003 – Forth Notice*

On January 16, 2003, the DOJ published a notice in the Federal Register that required certain nonimmigrant aliens from Bangladesh, Egypt, Indonesia, Jordan, or Kuwait (“Group 4”)

⁶⁵ *See id.*

⁶⁶ *See* Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 77,642 (December 18, 2002).

to register with the INS.⁶⁷ This notice was set to become effective on February 24, 2003.

Nonimmigrants from the above countries were required to register if they: 1) are males age 16 or older (born on or before February 24, 1987), 2) entered the United States on or before September 30, 2002, and 3) will remain in the country after the registration deadline. The registration deadline for Group 4 was set at March 28, 2003.

The DOJ also extended the deadline for Group 1 and Group 2.⁶⁸ Under the extension, individuals in Group 1 and Group 2 were required to register between January 27, 2003, and February 7, 2003. Thus, the DOJ will consider registration within these time periods to have been made in a timely fashion.

11. February 19, 2003 – Deadline Extended for Group 3 and 4

On February 19, 2003, the DOJ published a notice in the Federal Register that extended the deadline for the Domestic Registrants in Group Three and Group Four.⁶⁹ This Notice, in effect, amended the two previous Notices that required individuals of Group Three and Group Four to register by February 21, 2003, and March 28, 2003, respectively. This Notice changed the dates on which the registration periods close, thus permitting the affected nonimmigrant aliens more time to register. The Notice permits nonimmigrant aliens of Pakistan or Saudi Arabia, who are required to register under the Notice published on December 18, 2002, at 67 FR 77642, to timely register on or before March 21, 2003. The Notice also permits nonimmigrant aliens of Bangladesh, Egypt, Indonesia, Jordan, or Kuwait, who are required to register under the Notice published on January 16, 2003, at 68 FR 2363, to timely register on or before April 25, 2003. This Notice made no other substantive changes to the registration requirements.

⁶⁷ See Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2,363 (January 16, 2003).

⁶⁸ See Permission for Certain Nonimmigrant Aliens From Designated Countries to Register in a Timely Fashion, 68 Fed. Reg. 2,366 (January 16, 2003).

As displayed above, the Special Registration timeline is quickly and continuously evolving. The program presently contains many important dates for nonimmigrants to take note of. Other important dates, announced by means of the Federal Register, will surely be announced in the near future.

ANALYSIS

A. Balance Between Security and Individual Civil Liberties

The development of NSEERS promotes several important national security objectives. It allows the United States to run the fingerprints of aliens seeking to enter the U.S. or aliens already present in the United States against a database of known terrorists. It also enables the BICE to determine instantly whether such an alien has overstayed his/her visa. Finally, it enables the BICE to verify that aliens are living where they said they would live and doing what they said they would be doing while in the United States. In effect, the program's objectives help to further ensure that aliens are not violating immigration laws.⁷⁰

Although the above positives exist, the NSEERS program has generated a great amount of controversy and opposition. Not surprisingly, many civil rights groups have come forward to argue that the program violates individual civil liberties. The program even has members of Congress asking questions. For example, several prominent members of Congress have been requesting the following documents and materials in their attempt to gain information on NSEERS: documents used in the creation of NSEERS; documents assessing the effectiveness of the NSEERS program as a tool to enhance national security; documents used to determine the scope of the NSEERS program, including the countries selected and the gender, age, and immigration status of those aliens required to specially register under the program; information

⁶⁹ See Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 8,046 (February 19, 2003).

regarding future plans to expand NSEERS; materials explaining whether the DOJ consulted with other federal agencies in the development of NSEERS; memorandum concerning policy directives or guidance issued to officials about implementation of NSEERS, including the role of the Federal Bureau of Investigation (FBI) in conducting background checks of persons subject to special registration; documents explaining why certain INS district offices detained aliens with pending adjustment of status applications pursuant to NSEERS; and materials explaining how information gathered during interviews of aliens subject to Special Registration will be stored, used, or transmitted to other agencies.⁷¹ The next section will discuss several different viewpoints that oppose the implementation of Special Registration.

B. Opposition to NSEERS

As indicated above, the DOJ's final regulation on Special Registration was published on August 12, 2002, in the Federal Register. In addition to announcing the final regulation, the announcement contained the DOJ's response to fourteen separate comments that it received regarding the proposed regulation.⁷² This section will describe the various opposing viewpoints as well as the INS's response to such opposition. Following each viewpoint will be an analysis of how strong each particular argument is.

1. *Effectiveness of NSEERS*

Some opponents to Special Registration argue that the program will not even be effective. For example, one commenter argued that the rule will not change terrorist or criminal methods because: 1) they will either comply fully, and registration will not prevent them from committing terrorist or criminal acts at any time; or 2) they will comply upon entry, but "go underground,"

⁷⁰ See Johnny N. Williams, *Combating Terrorism: Protecting the United States*, (January 30, 2003).

⁷¹ See Senate Omnibus Appropriations Bill Passes With NSEERS Funding Cut; New Bills Introduced, 80 No. 5 Interpreter Releases 152 (February 3, 2003). Similar information was requested by Sen. Kennedy, Sen. Feingold, and Representative Conyers, Jr. in a letter addressed to the Attorney General in December 2002.

enter without inspection, or use proxies.⁷³ Several commenters contended that NSEERS would not have acquired the required information on several individuals currently involved in certain notorious cases.⁷⁴ At the same time, the commenter claimed that the rule does not mitigate visa fraud or immigration document fraud. This commenter concluded that fingerprinting, photographing, and periodically interviewing a person, whether citizen or alien, cannot predict or deter future terrorist or criminal behavior. One commenter also suggested that it was more important to deny the visa in the first place than attempt to monitor the individual once in the United States.⁷⁵

Other groups argue that the NSEERS program's ineffectiveness stems from its poor implementation.⁷⁶ For example, the ACLU has described the program as "nothing short of a disaster."⁷⁷ This disaster is argued to be the result of the INS' announcement of these new requirements in confusing and complicated notices in the Federal Register. The ACLU also claims that the officials did not appropriately or adequately publicize the new requirements and did not immediately translate the notices into all appropriate languages.⁷⁸ As a result, the ACLU argues that the program was so haphazardly initiated that it did not allow enough time for individuals to learn of the requirements and register. They also point out that the INS did not even bother to provide a registration facility in every state. It is under these circumstances that officials set the restrictive deadline for registration at one month.

⁷² See Registration and Monitoring of Certain Nonimmigrants, *supra* note 57 at 52,584.

⁷³ *Id.*

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ ACLU and Coalition of Immigrants' Rights Groups "Register Discontent" with Government's Immigrant Registration Program, Joint Statement by Donna Lieberman, Executive Director, New York Civil Liberties Union and Dalia Hashad, Arab, Muslim and South Asian Advocate, American Civil Liberties Union (January 10, 2003) available at <http://www.aclu.org/SafeandFed.Reg.ee/SafeandFed.Reg.ee.cfm?ID=11555&c=206> (last visited February 22, 2003).

⁷⁷ *Id.*

⁷⁸ *See id.*

Similarly, the American Immigration Lawyers Association (“AILA”) has expressed their negative views regarding the implementation of NSEERS. The AILA’s opinion is that NSEERS is marked by confusion, a lack of information and coordination, and is creating fear among the country's immigration communities.⁷⁹ AILA director, Jeanne Butterfield, has recently suggested that the INS does not have sufficient resources to register everybody under NSEERS.⁸⁰ In addition, Mr. Butterfield pointed out that centers throughout the country are following different procedures and giving distinct information depending on their location.⁸¹

Despite the above criticisms, NSEERS does seem to be doing some good. As of January 23, 2003, NSEERS has led to the identification and apprehension of seven suspected terrorists.⁸² In addition, the NSEERS program has led to the apprehension or denied admission, of more than 330 aliens at the ports of entry who present law enforcement threats due to felony warrants or prior criminal or immigration violations rendering them inadmissible.⁸³ These individuals would have entered the country had NSEERS not been in place. Thus far, 26,334 individuals have been registered through the domestic enrollment program and 2,776 of those individuals have been charged with status violations. Eighty-four of these individuals remain in custody and twenty-one have serious criminal histories. Among these individuals are an alien from a state sponsor of terrorism who was here illegally and had been convicted three times of assault with a deadly weapon and an alien from a state sponsor of terrorism who was here illegally and had been convicted twice of child molestation. In addition, a Saudi Arabian flight student in Florida was

⁷⁹ See Rebeca Logan, *Worries Mount Over "Special Registration" of Immigrants*, No. 37, Vol. 16; Pg. 1, El Mensajero (March 12, 2003).

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See Kris Kobach, National Security Entry-Exit Registration System (NSEERS) Foreign Press Center Briefing, (January 17, 2003), available at <http://fpc.state.gov/16739.htm> (last visited March 18, 2003).

⁸³ See *id.*

apprehended when he attempted to evade the 30-day reporting requirement. Since that time, he has been placed in removal proceedings.

Although it contains flaws, the positive benefits of the NSEERS program outweigh the less than perfect way it has been implemented. It is obvious that the INS has made numerous mistakes while it struggled to make this new program work. But as most people know, the process of change is not easy. As time passes, the new Bureaus under the DHS should be able to work the kinks out of this program so that it becomes an effective means of combating terrorism.

2. *Whether Special Registration Violates Constitutional Due Process Rights*

Some challengers to the Special Registration program have raised due process arguments. Currently, the main notification provided to individuals subject to the call-in portion of Special Registration is by means of the Federal Register. As a result, individuals argue that the program provides insufficient notice to those Special Registrants who are already located in the United States. One even went so far as stating that publication in the Federal Register, as constituting public notification of a requirement, is a legal fiction.⁸⁴

The DOJ made several responses to the suggestion that the notice provided to Special Registrants violates due process. First, the DOJ suggests that publication in the Federal Register unequivocally constitutes sufficient notice for due process purposes under 44 U.S.C. § 1507. That section states that publication in the Federal Register “is sufficient to give notice of the contents of the document to a person subject to or affected by it.”⁸⁵ Thus, notice by means of the Federal Register is sufficient as a matter of law.

In addition to publication, the DOJ is taking steps to publicize its action relating to immigration matters. For example, the DOJ plans on publicizing Special Registration

⁸⁴ See Registration and Monitoring of Certain Nonimmigrants, *supra* note 57 at 52,584.

⁸⁵ 44 U.S.C. § 1507 (1996).

requirements in additional fora in order to give extra notice to those already in the United States. The DOJ's stance seems to be that these requirements go above and beyond what is required because it is the individual's responsibility to know the law.⁸⁶

The DOJ has also attempted to accommodate those individuals who may not have timely known of the program. The INS has decided to allow additional time for all the groups to register. The notice explains that some of those aliens remained unaware of the requirements and that, as an "act of grace" and one that is within the Attorney General's discretion, Attorney General John Ashcroft has decided to permit them an additional opportunity to register.⁸⁷

Although satisfactory under law, notice by Federal Register alone would not be a fair way to implement Special Registration. With this understanding, the DOJ has gone above and beyond their legal obligation and taken steps to get the word out about Special Registration requirements. In addition, the news publicity, civil rights group advocacy, and community meetings surrounding Special Registration have contributed to satisfactory notice under the program. Thus, the DOJ is not violating individual constitutional due process rights by implementing NSEERS.

3. *Does NSEERS Constitute Racial Profiling?*

One of the biggest criticisms of NSEERS is its apparent tendency to discriminate against certain ethnic groups. The racial profiling concern, which permeates law enforcement in general, has many groups speaking out against Special Registration. Specifically, many groups have alleged that the Special Registration rules target specific minority ethnic groups and

⁸⁶ See Registration and Monitoring of Certain Nonimmigrants, *supra* note 57 at 52,584.

⁸⁷ The two notices that extended the deadline for groups 1 and 2 are located at 68 Fed. Reg. 2,363-66 (January 16, 2003) and 68 Fed. Reg. 2,366-67 (Jan. 16, 2003). INS Adds To List Of Special Registration Countries, *supra* note 30.

members of specific religions, i.e., Arabs and Muslims.⁸⁸ For example, some groups describe the DOJ's implementation of NSEERS as "[t]he latest in the government's series of ill-conceived and discriminatory policies."⁸⁹ Others have suggested that the new rules "will further stigmatize innocent Arab and Muslim visitors ... who have committed no crimes and pose no danger to us."⁹⁰ The AILA, another group that strongly opposes Special Registration, recently blasted the DOJ in a press release for forging ahead without consulting Congress on an "ill-conceived plan that would rely on secret criteria and racial profiling."⁹¹ Thus, it is important to scrutinize Special Registration to ensure that racial profiling is not being used in an impermissible way.

The DOJ's response to the above racial discrimination allegations is simple. The rules provide that a specific alien may be subject to special registration if intelligence information indicates that the individual, while qualified for a visa, warrants closer attention. This determination will be made with pre-established criteria. These criteria are based on intelligence regarding the activities and behavior patterns of terrorist organizations, not on racial, ethnic, or religious stereotypes. The DOJ strongly disagrees with the implication that it would develop or apply such criteria in an invidious manner on the basis of race, religion, or membership in a social group.⁹²

The DOJ also points to case law to justify its use of criteria that may disproportionately affect members of certain ethnic or religious groups. In the Final Notice, the DOJ pointed out that Congressional enactments and regulations concerning immigration have historically drawn

⁸⁸ See Registration and Monitoring of Certain Nonimmigrants, *supra* note 57 at 52,584.

⁸⁹ ACLU and Coalition of Immigrants' Rights Groups "Register Discontent" with Government's Immigrant Registration Program, Joint Statement by Donna Lieberman, Executive Director, New York Civil Liberties Union and Dalia Hashad, Arab, Muslim and South Asian Advocate, American Civil Liberties Union (January 10, 2003) available at <http://www.aclu.org/SafeandFed.Reg.ee/SafeandFed.Reg.ee.cfm?ID=11555&c=206> (last visited February 22, 2003).

⁹⁰ *Id.*

⁹¹ Ashcroft Announces Entry Exit System, *supra* note 27.

⁹² See Registration and Monitoring of Certain Nonimmigrants, *supra* note 55 at 52,584.

distinctions on the basis of nationality and related criteria. Furthermore, the political branches of the government have traditionally had plenary authority in the area of immigration law.⁹³

In the context of immigration and nationality laws, the Supreme Court has also "underscore[d] the limited scope of judicial inquiry."⁹⁴ For example, the Supreme Court has stated that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. Moreover, "the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."⁹⁵ Congress's "inevitable process of line drawing" in the immigration context is therefore given great deference.⁹⁶ The substantive decision to relax requirements for only specified nationals, while excluding all others, is among those political decisions that are "wholly outside the concern and competence of the Judiciary."⁹⁷ When the Executive Branch exercises authority delegated by Congress in the immigration area, a court will not "look behind the exercise of that discretion."⁹⁸ As in *Fiallo*, the Attorney General must make compromises involving "the inevitable process of line drawing," [whereby] Congress has determined that certain classes of aliens are more likely than others to satisfy national objectives without undue cost, and [it] granted preferential status only to those classes."⁹⁹ "Congress regularly makes rules that would be unacceptable if applied to citizens."¹⁰⁰ Thus, the distinctions drawn by the rules are appropriate under case law in the context of law and national security.¹⁰¹

⁹³ See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Mathews v. Diaz*, 476 U.S. 67, 80-82 (1976).

⁹⁴ *Fiallo*, 430 U.S. at 792.

⁹⁵ *Id.*

⁹⁶ *Id.* at 795 n.6.

⁹⁷ *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring).

⁹⁸ See *Fiallo*, 430 U.S. at 794-95 (citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972)).

⁹⁹ *Fiallo*, 430 U.S. at 795 n.6.

¹⁰⁰ *Mathews*, 476 U.S. at 80.

¹⁰¹ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (holding that Mexican appearance was one relevant factor in, but alone not enough to justify, finding reasonable suspicion to conduct a stop to investigate whether occupants of a car are illegal immigrants).

With that said, the fact is that all of the twenty-five countries except one, North Korea, are predominantly Muslim. As a result, many Muslims in the United States, and overseas, feel as if the Muslim immigrant community is being targeted.¹⁰² This disparity is even more pronounced when one considers that, while the program is leading to the arrest and detention of many Arab and Muslim individuals, none of these men have been charged with terrorism-related offenses.¹⁰³ Thus, many question whether the real intention of the INS is to round up Arab and Muslim nonimmigrants in order to detain and possibly deport them.

In response to the above racial discriminatory allegations, the INS asserts that Special Registration is based solely on nationality and citizenship, not on ethnicity or religion. The INS indicates that individuals from over 130 separate countries have been required to register. As a result, the extensive number of countries subject to NSEERS “basically defeats the argument that this is discriminatory.” Instead, “[t]his has to do with national security.”¹⁰⁴ In fact, the INS is congressionally mandated to track all of the estimated 35 million nonimmigrants, no matter what country they’re from, by the year 2005. Thus, there are some facts that suggest that NSEERS is not racially motivated.

At this point in time, the INS may well be close to crossing the line of impermissible racial profiling and discrimination with their current practices under NSEERS. However, it

¹⁰² See Corine Hegland, *INS Registration Spurs Muslim Activism*, Vol. 35, No. 7 The National Journal (February 15, 2003).

¹⁰³ See Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?*, 51 Emory L.J. 1059 (2002). Individuals charged with terrorism-related offenses include Zacharias Moussaoui, a French citizen, who was arrested in August 2001 in Minnesota. In addition, Richard Reed, a British citizen, was arrested in December 2001, while attempting to detonate a bomb on a transatlantic airliner. Shekhar Bhatia & Karen Rockett, *Shoe Bomb Terror on U.S. Jet; Fighter Jets Intercept*, Sunday Mirror, Dec. 23, 2001, at 1. In September 2002, six U.S. citizens, arrested near Buffalo, New York, were charged with providing material support to Osama bin Laden and al-Qaeda. Criminal Complaint, *United States v. Al-Bakri* (W.D.N.Y. 2002) (No. 02-M-108) available at <http://news.corporate.findlaw.com/hdocs/docs/terrorism/usal-bakri091302cmp.pdf>; Criminal Complaint, *United States v. Goba* (W.D.N.Y. 2002), available at <http://news.corporate.findlaw.com/hdocs/docs/terrorism/usgoba091302cmp.pdf>.

¹⁰⁴ Teresa Mask, *New Foreigner Registration Law Troubles Muslim Leaders*, Arlington Heights Daily Herald, A1 (January 10, 2003).

seems very logical to begin a comprehensive Special Registration program with the group of nonimmigrants who pose the greatest threat to the United States' national security. With that said, however, the Attorney General and the DHS should begin to continuously add non-Arab and Muslim countries to its list of nations subject to NSEERS.

4. *Arbitrary INS Officer?*

Several individuals may fall within the NSEERS program at the discretion of an Immigration Officer at a port of entry. The DOJ's final regulation provides that the following individuals are subject to Special Registration: "nonimmigrant aliens who meet pre-existing criteria, or who a consular officer or the inspecting officer has reason to believe meet pre-existing criteria, determined by the Attorney General or the Secretary of State to indicate that such aliens' presence in the United States warrants monitoring in the national security interests, as defined in section 219 of the Act (8 U.S.C. 1189), or law enforcement interests of the United States." Thus, any person who a BCBP inspector at a port of entry has reason to believe "meets pre-existing criteria, as determined by the Attorney General," can fall under Special Registration requirements even if they are not a citizen or national of a listed country.

The controversy surrounding the preexisting criteria provision is that it is arguably too discretionary and uncertain. In fact, the DOJ has not been totally forthcoming with the criteria that are currently being used. However, some reports indicate that the following criteria are used to determine whether an individual should be subject to Special Registration: The nonimmigrant alien 1) has made unexplained trips to certain troublesome countries, 2) has engaged in other travel, not well explained by the alien's job or other legitimate circumstances, 3) has previously overstayed in the United States on a nonimmigrant visa, and monitoring is now appropriate in the interest of national security, 4) meets characteristics established by current intelligence updates

and advisories, 5) is identified by local, state or federal law enforcement as requiring monitoring in the interest of national security, 6) displays behavior, demeanor, or answers that indicate the alien should be monitored in the interest of national security, or 5) provides information that causes the immigration officer to reasonably determine that the individual requires monitoring in the interest of national security.¹⁰⁵

The discretionary nature of the NSEERS program clearly poses no problem to the validity of Special Registration. BICE inspectors are simply applying intelligence-based criteria to identify aliens who may pose an elevated national security risk, and registering them in the system.¹⁰⁶ These intelligence-based criteria are obtained from an extensive and impressive intelligence gathering operation that is continuously updated. These extensive criteria, which are carefully based in intelligence, are sure to aid in the identity and capture of savage terrorist.

5. Possible Administrative Burden

Another concern surrounding NSEERS is the possible administrative burden that will be caused by its implementation. The DOJ estimates that it will have to collect information on approximately 140,000 special registrant under the current regulations in the first year.¹⁰⁷ Furthermore, each informational gathering session will take approximately thirty minutes.¹⁰⁸ Other reports estimate that the current average processing time for registration at the port of entry is only eighteen minutes.¹⁰⁹ Thus, the NSEERS program entails an estimated burden of 70,000 hours to be used for the collection of information.

¹⁰⁵ See Virginia Tech Graduate School, Special Registration under NSEERS, available at <http://www.issso.grads.vt.edu/NSEERS.htm> (last visited March 14, 2003).

¹⁰⁶ See U.S. Department of Justice, *Attorney General's Remarks Implementation of NSEERS* (November 7, 2002), available at http://www.usdoj.gov/ag/speeches/2002/110702agremarksnseers_niagarafalls.htm (last visited March 14, 2003).

¹⁰⁷ See Notice of Information Collection Under Review, *supra* note 11, at 10035.

¹⁰⁸ See *id.*

¹⁰⁹ See Johnny N. Williams, *supra* note 70.

The INS will use the estimated 70,000 hours to collect a variety of information. Nonimmigrant aliens subject to Special Registration will be fingerprinted, photographed, and questioned extensively. The nonimmigrant alien will be required to provide the following routine information: name; passport country of issuance and number; identification and description of a second form of positive identification (e.g., driver's license and number); date of birth; country of birth, nationality and citizenship; height; weight; color of hair; color of eyes; address of residence in the United States and in country of origin; telephone number(s) in the United States and in country of origin; the names, addresses, and dates of birth for both parents; points of contact in the alien's country of origin; name and address of school or employer in the United States (if applicable); name and address of former school or employer in country of origin; intended activities in the United States; and any e-mail addresses.¹¹⁰ The regulations also require that such nonimmigrant aliens provide the following information at certain intervals: an additional form of photographic identification (e.g., driver's license); proof of tenancy at the listed residential address (e.g., rental contract, mortgage); proof of enrollment at a school or other authorized educational institution where applicable; and/or proof of employment where applicable.¹¹¹

Although estimates have been made, the exact administrative burden of collecting the above information under the NSEERS program is still very unclear. As a result, the DOJ has solicited written comments and/or suggestions on the information collection process in order to further evaluate aspects of the program, including its possible administrative burden.¹¹² The DOJ asked that the public and affected agencies make their comments or suggestions with regard

¹¹⁰ See Registration and Monitoring of Certain Nonimmigrants, *supra* note 15 at 40581.

¹¹¹ See *id.*

¹¹² See Notice of Information Collection Under Review, National Security Entry-Exit Registration System, 68 Fed. Reg. 10035 (March 3, 2003).

to one or more of the following four points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.¹¹³

It is vital that the DOJ fully and accurately establish what the administrative burden surrounding the NSEERS program will be. It is clear that the DOJ has begun to take steps to evaluate the burden, as evidenced by their request for comments and suggestions regarding the program. The DOJ must carefully scrutinize this information to ensure that the possible administrative burdens do not outweigh the benefits that the NSEERS program provides to the United States.

6. Inconvenience Caused by NSEERS

The Special Registration program, particularly the call-in requirements, will no doubt cause a substantial inconvenience in people's lives. Although the average processing time for registration at the port of entry is only eighteen minutes,¹¹⁴ individuals may have to spend substantial amounts of time traveling to various ports of entry or waiting in line to comply with call-in or compliance interviews.

¹¹³ *See id.*

¹¹⁴ *See* Johnny N. Williams, *supra* note 68.

In addition to travel, one commenter suggested that interval reporting is problematic because nonimmigrant might have difficulty obtaining the necessary information requested by NSEERS. For example, as the States are making it increasingly difficult, if not impossible, for some nonimmigrants to obtain driver's licenses or identification cards, some aliens may find that an alternative form of identification is not available. The commenter suggested proof of tenancy is often impossible because "short-term visitors (such as students touring for the summer) often travel around the United States, with no set address as they stay in hostels or camp;" in other cases aliens may not have established proof of tenancy in their names if they are staying with relatives or friends. Another commenter suggested that nonimmigrants sponsored by a charity, such as for a speaking tour, be permitted to use the charity's address.

Although substantial inconveniences may exist, the vital importance of NSEERS justifies every minute, hour, and day that nonimmigrants will have to spend in the process of registering. The opportunity to visit this great Nation is more than enough incentive to abide by the Special Registration requirements without complaining about being burdened.

7. Inappropriate Detentions Under Special Registration

One of the more serious concerns caused by Special Registration is the detention of aliens who are subject to NSEERS. Reports indicate that over 600 arrests were made of persons who showed up to register during the first two rounds, but were found to be in violation of immigration laws. Hundreds were reportedly turned away because of overload and there were numerous anecdotal reports of detentions, some brief, creating panic in Arab immigrant communities and widespread concern among immigrant advocates. For example, Dalia Hashad, an attorney with the American Civil Liberties Union, called the program "a racist, ineffective and discriminatory process....It's an excuse to round up Arab and South Asian men and throw them

out of the country." In addition, Judy Golub, a spokeswoman for the American Immigration Lawyers Association, expressed concerns about "the chaos, the mass arrests and the lack of consistency in detaining people." Meanwhile, an INS official admitted that "[m]any people may have misunderstood or been misinformed about the ramifications" of the program. However, "[b]etween the publicity and the protests, there really shouldn't be any more excuses," the official said.¹¹⁵

A large-scale debacle in Los Angeles didn't help that the perception that NSEERS is used to detain nonimmigrants. More than seven hundred men, most of whom were Iranian, overwhelmed the INS office there on the last day of registration. The office responded by handcuffing five hundred and fifty-three of the men and detaining them. The Muslim Public Affairs Council, which had worked with the INS before the December deadline to educate Muslims and encourage them to cooperate, responded to the arrests by protesting and launching a human-rights monitoring project for subsequent registration deadlines.¹¹⁶ Although initially shocking, the above incident has this author questioning whether these Iranian nationals intentionally waited until the last day in order to overwhelm the INS office. If so, their uncooperative behavior surely prevents them from complaining about the way they were treated.

Representatives of the DOJ have also indicated that many of the discussions involving detentions have generated a great deal of misinformation.¹¹⁷ So far, approximately 26,334 individuals had been registered in the domestic portion of the NSEERS program. Thus far, the total number that were detained for any period of time, and this would indicate the number of

¹¹⁵ INS Adds To List Of Special Registration Countries, *supra* note 30.

¹¹⁶ See Corine Hegland, *INS Registration Spurs Muslim Activism*, Vol. 35, No. 7 The National Journal (February 15, 2003)

¹¹⁷ See Kobach, Kobach Press Briefing on NSEERS, 8 *Bender's Immigr. Bull.* 277 (February 2003).

people who are here illegally, is 1,169. Now, the total number of people detained at present is 164.¹¹⁸

Another thing to consider regarding detention is the fact that many of them are only on a temporary basis. For example, many of the nonimmigrants detentions occurred while it is determined that the person is here illegally and has committed immigration violations. As a result, it makes sense in those cases to run an extra background check, to check FBI watch lists, and to check the additional FBI databases that aren't done immediately. Consequently, these individuals would be temporarily detained while those checks were being done. And if there was a long line of people, that detention might be for a few hours, or in a limited number of cases, overnight. In many cases, individuals are not removed to a holding facility; they are just temporarily kept at the office while the extra background checks are being done.¹¹⁹

C. Recommendations For Special Registration Program

The United States of America has a clear interest in protecting itself, it's citizens, and it's visitors from the despicable and cowardly acts of terrorists. This right to protect itself undoubtedly includes the right to collect information on, and closely monitor individuals who, come to this great County to visit. Although this right exists, the United States must be careful not to utilize immigration laws in order to implement discriminatory and unfair policies. This section will discuss various issues relating to special registration that should be closely scrutinized as the program evolves in the coming years.

First, NSEERS should not be used as a deporting mechanism. Special Registration (or other future programs) should not detain or deport people who have a claim to legal status. Some BICE offices are detaining and deporting people who are technically out of status, often

¹¹⁸ *See id.*

¹¹⁹ *See id.*

due to BICE delays and inefficiencies. In some offices, such as Los Angeles, large numbers of registrants have been detained. Some of these people have approved family or employment petitions and are eligible to adjust their status in the U.S. It makes no sense from security or economic perspectives to target people who eventually will be granted lawful status because they have applications pending for lawful permanent status, have been issued employment authorization documents, or otherwise are eligible for lawful status. Thus, the BICE must make sure in the future that it is not inappropriately detaining individuals under the authority of the Special Registration program.

Second, the BICE must continue to publicize the NSEERS requirements in a way that individuals will become fully aware of them. For example, the BICE must adequately publicize program requirements, must initiate effective outreach programs, and hold harmless those who did not register because they did not know about the program. The BICE also needs to do a better job of effectively disseminating information about the program. Dissemination and outreach is especially crucial given the drastic consequences for not registering and the fact that two other registration deadlines loom. The BICE also must take responsibility for inadequately publicizing this program and its requirements by granting waivers for those who did not register for the program because they had no knowledge of it or because of the fear engendered by the mass arrest of registrants in some offices.

Lastly, the BICE must uniformly implement Special Registration in the future. Some recent evaluations have indicated that BICE district offices have adopted widely disparate practices to implement Special Registration. For example, some District offices have been allowing attorneys to represent registrants, while others have not. Various District offices have announced different procedures for persons out of status who have a pending, valid application

for permanent residence. In addition, each district office appears to be following different policies regarding documentation. Finally, there seems to be a wide degree of discretion from office to office on procedures ranging from fingerprinting to interview questions.

The BICE must make sure that it is implementing uniform procedures in their district offices. They must also make sure that these procedures make sense. This objective should not be too difficult if a good communication system between District offices is established.

CONCLUSION

The recently implemented NSEERS program was designed to protect the United States from the emerging threats of terrorism. With this mission in mind, an analysis of NSEERS is vital to our country because this program involves two important aspects of our society – National Security and Individual Liberty. While America is an open and generous society that welcomes visitors from foreign countries, it is essential that the government know who is entering and exiting our borders. As a result, the U.S. Government should be allowed to more closely monitor those individual who may pose an increased security threat. At the same time, the procedures used to increase security must not impermissibly infringe upon the individual liberties afforded individuals who reside in the country. Currently, it seems as if the NSEERS program is in need of further evaluation and adjustment. Such evaluation and adjustment must be made while keeping in mind the delicate balance between national security and individual liberty.
