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RACE, IMMIGRATION, AND THE DEPARTMENT OF HOMELAND SECURITY

VICTOR ROMERO*

Before I begin, I would like to thank Peter and Maureen¹ for thinking of me and inviting me to participate. This is a rare thing for me because usually when I attend these symposia, I am one of many academics on panels, but today I am the only academic on this morning's panels and so this is a fun and new experience for me.

I teach Immigration Law and Constitutional Law at Penn State, and my research lies at the intersection of these two disciplines, focusing primarily on immigrant rights. Today, I want to talk about race and the new immigration system established under the Department of Homeland Security (DHS) in March 2003. Specifically, I want to examine what effect this new system might have on race relations in the U.S.

At the outset, let me be clear about two quick points: First, while I will be focusing on racial issues, I do not want to suggest that race is at the heart of everything with respect to immigration and for that reason, I highly recommend Kevin Johnson's new book called *The Huddled Masses Myth*,² which talks about race alongside other forms of oppression within the immigration context, such as gender and sexual orientation. Second, and no less important, I am reluctant to talk too long because I know I

* Professor of Law, Penn State University, The Dickinson School of Law. E-mail: vcr1@psu.edu. Many thanks also to Dean Phil McConaughay for his support of this and many other projects; and to my family in the Philippines and to Corie, Ryan, and Julia for their constant love and good humor. These remarks are an actual transcript of the author's comments at the St. John's Journal of Legal Commentary Symposium on Feb. 27, 2004.

¹ Then-Research & Symposium Editor Peter LePiane invited me to participate at the suggestion of his wife Maureen, an attorney who is quite knowledgeable about race and immigration issues. I am most grateful to them both.

² KEVIN R. JOHNSON, *THE HUDDLED MASSES MYTH: IMMIGRATION & CIVIL RIGHTS* (Temple Univ. Press, 2003) (discussing the social hierarchy that immigration policy reflects).

am the last speaker before lunch and that is always a precarious position to be in. Therefore, I will try to make my remarks brief and then have you ask me questions.

Here is the major point that I want to make: With the new immigration system there is good news and there is bad news. The good news is that at long last, after years of enduring criticism, the federal government has gotten the structure of the immigration system right. It has divided the service and the enforcement parts of the immigration system and separated those out.³ And this is good news because no longer will one agency, the former Immigration and Naturalization Service (INS), be responsible for both processing entry documents (the service function) and prosecuting immigration violations (the enforcement function). You need not be an immigration expert to appreciate why such a system was schizophrenic – the same agency that was in charge of welcoming immigrants was also tasked with deporting them. Not only was this a poor conceptual arrangement, but the practice and implementation of this system was similarly flawed. And so, many hailed Congress's decision to finally separate the service and enforcement functions as a wise first step toward a more coherent immigration system.

The bad news is that to the extent that the nation's immigration powers will be placed under the Department of *Homeland Security* suggests to me that any existing racial stereotypes regarding immigrants will be perpetuated rather than diminished. Put simply, post-9/11, the age-old stereotype of the foreign, Arab terrorist has been rekindled, and placing our immigration functions under the auspices of an executive department charged with "homeland security" reinforces the idea that immigrants are terrorists.

To support this view, I'd like to spend the remainder of my time focusing on two issues: First, I want to take a brief look at our constitutional immigration history to try to help us understand why race and immigration have been so inextricably intertwined in our legal culture. And second, I want to examine the recent National Security Entry, Exit, and Registration System

³ See Michelle Mittelstadt, *INS Is No More as Duties Fall to Homeland Security*, THE DALLAS MORNING NEWS, Mar. 1, 2003, at 20A (noting how the service and enforcement parts of the INS had been separated into different branches upon the creation of the Department of Homeland Security).

(“NSEERS”) program as an example of the kind of problematic initiative that racializes immigration, perpetuating the stereotype of the “immigrant as terrorist.”

Let me talk about immigration and naturalization within a constitutional immigration context first. If we think for a moment about the founding of this nation and about our Constitution, it appears clear that the Founders established a system that would benefit folks like themselves: white, male, wealthy owners of land.⁴ Indeed, the original, unvarnished Constitution arguably enshrined the institution of slavery.⁵ Leading critical race theorist and pioneer Derrick Bell describes the pro-slavery portions of the document as the Founder’s “constitutional compromise” – that the North allowed for the continued enslavement of a whole race of people despite the words of Thomas Jefferson’s “Declaration of Independence” that “all men are created equal.”⁶ Thus, in our nation’s original charter, the federal Constitution, a compromise was struck between the rights of certain individuals and the rights of others on the basis of race.

It should not surprise anyone that this creation of two separate nations based on racial privilege manifested itself in immigration law and policy as well. Since the late 1800s,⁷ the Supreme Court has held that Congress has virtually plenary power with respect to the admission and deportation of noncitizens.⁸ This means that Congress can place restrictions on the entry and exit of individuals who are not citizens of the United States, generally free from the interference of the courts because such decision making is essentially a political matter -- a matter for Congress with respect to policy⁹ and the executive with respect to enforcement.¹⁰

⁴ See generally Barbara Stark, *Deconstructing the Framers’ Rights to Property: Liberty’s Daughters and Economic Rights*, 28 HOFSTRA L. REV. 963, 967 (2000) (stating that property rights, in the minds of the framers, were limited to white men).

⁵ See Timothy S. Huebner, *Founding a Slaveholding Republic: Slavery and the Founders: Race and Liberty in the Age of Jefferson*, 37 TULSA L. REV. 387, 387 (2001) (book review) (proposing that the Constitution was pro-slavery).

⁶ DERRICK A. BELL, *AND WE ARE NOT SAVED*, 27-44 (Basic Books, Inc., 1987) (discussing the constitutional convention, slavery, and the compromises the Founders made).

⁷ See, e.g., *Chy Lung v. Freeman*, 92 U.S. 275, 275 (1875); *Chae Chang Ping v. United States*, 130 U.S. 581, 581 (1889).

⁸ See, e.g., *Galvan v. Press*, 347 U.S. 522, 530 (1954) (discussing Congress’s broad power over immigration).

⁹ See, e.g., *Chy Lung*, 92 U.S. at 280 (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations . . . belongs solely to the national government.”).

That makes a lot of sense to the extent that the migration of non-citizens impacts foreign relations. For instance, should we declare war on North Korea, restricting the movement of North Korean citizens into the U.S. might make sense from their perspective as well as ours.

The danger, of course, is that limited judicial review runs the risk of reinforcing stereotypes about who we presume is the citizen versus the noncitizen.¹¹ Generally, there is the presumption that United States citizens are either white or black -- either Caucasians or African Americans -- whereas presumptive non-citizens are Latina\os or Asians. There is a historical reason for these presumptions. Despite the advances in the protection of the newly-freed slaves secured by the post-Civil War amendments, our immigration law does not reflect a history of racial or ideological equality. The Chinese Exclusion Act cases reflect this as the Court created the plenary power doctrine against the background of racial discrimination against the "unassimilable" Chinese.¹² Similarly, during the 1950s there were exclusions based on ideology, specifically with respect to Communism, as well as restrictions based on national origin, which although racially neutral had a disproportionate effect upon people of color.¹³ It was not until 1965 that Congress eliminated the national origins quota system. Since then most immigrants have been from Latin America and Asia.¹⁴ Therefore, what we have is a mutually-

¹⁰ See, e.g., Shunta Latrice Vincent, *An Alternative to the Blanket Closure of "Special Interest" Deportation Hearings: Balancing the Press's Right to Access and the Government's National Security Interests*, 55 ALA. L. REV. 409, 410 (2004) (noting the power of the executive branch with regards to the enforcement of immigration laws).

¹¹ See generally David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 974-78 (2002) (discussing the singling out of Arabs and Muslims for deportation in the wake of the 9/11 attacks and the presumption of their noncitizen status); Susan Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Muslims and Arabs*, 58 N.Y.U. ANN. SURV. AM. L. 295, 300 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575 (2002); Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871, 877 (2003).

¹² See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5 (1995); Jan C. Ting, "Other Than a Chinaman": *How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 306 (1995); Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865-1965)*, 15 GEO. IMMIGR. L.J. 625, 626 (2001).

¹³ See Victor C. Romero, *On Élian and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 343, 348-367 (2000-01) (discussing development of plenary power doctrine and racially exclusionary immigration policy).

¹⁴ See *id.* at 369-370; Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigra-*

reinforcing system of racial prejudice reflected in both immigration policy and majoritarian sentiment.

Now, on to the second point: What does this history have to do with the new immigration system under the DHS? First, this racialized history of our immigration law and policy helps us understand more specific stereotypes, such as the Mexican illegal alien, or the inscrutable, clannish Asian immigrant, or the Arab terrorist. As in the Chinese Exclusion Act cases from the 1800s, immigration policy mirrors public perception, and vice-versa. Today, I am concerned that the current restructuring that places immigration under a department charged with *homeland security* will exacerbate the already negative stereotype of the Arab as terrorist.

Let me be clear that I agree with the idea of seeking to balance the nation's interest in homeland security against individual civil liberties, and that often, this is a difficult balance to strike. But to the extent that all future immigration policy will be created under the rubric of "homeland security," I wonder whether officials will err on the side of exclusion or deportation at the margin. Put differently, if the government is not sure whether a non-citizen they encounter is a terrorist, it may deport or exclude her,¹⁵ or worse yet, it may detain her in facilities under conditions usually reserved for the most hardened criminals.¹⁶

Let me close this discussion with just one example of a recent immigration policy that perpetuates the "Arab terrorist" stereotype: the National Security Entry-Exit Registration System (NSEERS),¹⁷ which is being phased out in favor of the more race-neutral, technology-dependent U.S. Visitor and Immigration

tion Law: A New Look at the Immigration and Nationality Act of 1965, 75 N.C. L. REV. 273, 333 (1996).

¹⁵ I wonder as well whether deportation and exclusion are the correct strategies to employ with respect to a suspected noncitizen terrorist. Would not the government want to prosecute the suspect under U.S. criminal law rather than for an immigration violation since releasing him into the world would leave him free to strike another day? See generally Victor C. Romero, *Decoupling "Terrorist" from "Immigrant": An Enhanced Role for the Federal Courts Post-9/11*, 7 J. GENDER, RACE & JUST. 201 (2003).

¹⁶ See generally MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* (Univ. of California Press, 2004) (providing a thorough and revealing account of the abuses suffered by immigration detainees before and after 9/11).

¹⁷ See Kathryn Lohmeyer, Note and Comment, *The Pitfalls of Plenary Power: A Call For Meaningful Review of NSEERS "Special Registration,"* 25 WHITTIER L. REV. 139, 140 (2003) (criticizing institution and expansion of the National Security Entry-Exit Registration System (NSEERS), enacted after September 11th).

Status Indication Technology (US-VISIT) system.¹⁸ NSEERS was implemented a year after September 11, the purpose of which was threefold. First, it was supposed to make sure that when noncitizens entered the country at a port of entry such as an airport, they were fingerprinted and required to disclose personal information to U.S. authorities. Second, noncitizens already in the country were required to register to make sure that the U.S. government could keep tabs on them. And third, noncitizens exiting the U.S. were supposed to fill out documents to make sure that they had, in fact, left the country.¹⁹

It is the second part -- the registration part -- which has received the most attention in the media and in the scholarly literature²⁰ because it applied to a limited class of noncitizens. Only male, nonimmigrant visa holders over the age of sixteen who were from a list of twenty-five countries were required to register.²¹ In light of the millions of noncitizens who are present in the U.S. already, this is an extremely small and limited pool of persons.

I appreciate that the NSEERS registration policy was not created out of whole cloth. There was a certain logic to it -- taking a look at the profile of the 9/11 hijackers, all were Middle Eastern males of a certain age.²² Still, is it fair to subject an entire group

¹⁸ See *id.* at 142 (announcing “[i]n April 2003, DHS Secretary Ridge announced that the first phase of such a program (the U.S. Visitor and Immigration Status Indication Technology system, known as US-VISIT) was to be implemented by the end of the calendar year and ultimately replace NSEERS”).

¹⁹ See Louise Cainkar, *Special Registration: A Fervor for Muslims*, 7 J. ISLAMIC L. & CULTURE 73, 79 (2003) (listing requirements of NSEERS program).

²⁰ *Id.* at 79; Lohmeyer, *supra* note 17, at 140; Mustafa Bayoumi, *The Fingerprinting Follies*, MILWAUKEE J. SENTINEL, Jan. 27, 2004, at 11A (noting discriminatory effect of NSEERS and US-VISIT); George Lardner, Jr., *Congress Funds INS Registration System but Demands Details*, WASH. POST, Feb. 15, 2003, at A18 (describing the “widespread fear and confusion” associated with NSEERS).

²¹ See Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 648 (2003) (discussing registration requirements of NSEERS); see also *US-VISIT: Questions & Answers* (U.S. Dept. of Homeland Security), at *5, available at http://www.dhs.gov/interweb/assetlibrary/veryFINALRevised_FAQs12-31-2003.pdf (last visited March 29, 2004) (listing “call in” countries as Iran, Iraq, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan, and Kuwait).

²² See, e.g., Dale Lezon, *A Winding Road to Justice: Truth Set Ex-Detainees Free in Terrorism Probe*, HOUSTON CHRON., Jan. 27, 2002, at p. 1 (describing profile links between hijackers and other terrorists); see also *U.S. to Track Visitors Deemed a Security Risk*, WASH. POST, June 6, 2002, at p. A1 (announcing implementation of NSEERS program); Jodi Wilgoren, *A Nation Challenged: The Interviews – Prosecutors Begin Effort to Interview 5,000, but Basic Questions Remain*, N.Y. TIMES, Nov. 15, 2001, at p. B7 (report-

of people to extra scrutiny – with the possibility of erroneous detention or deportation – just because a few perpetrated a heinous crime? As filmmaker Michael Moore suggests, if race and crime are in fact correlates, then society should be as receptive to a television program about white male corporate criminals (think of the Enron and Tyco scandals) as it is toward the Fox channel's long-running "Cops," which usually covers street crime by people of color.²³ Of course, we have yet to see such a novel program.

If you take a look at the government's web site on NSEERS, and peruse their "Frequently Asked Questions" (FAQ) section, one of the FAQs addressed is: "Why continue with any NSEERS activities? You have not caught any terrorists and you have just upset thousands of people based on their race and religion."²⁴ The government's response:

We have caught suspected terrorists under NSEERS. While they may not be charged with terrorism grounds of inadmissibility or removability, that is not an indication of whether terrorists were caught. A non-immigrant visitor who overstays a visa, is present without inspection, and commits a crime or fraud is just as removable under those grounds as terrorism grounds.²⁵

But there are grounds for being deported and not all of them are considered to be priorities by the government.²⁶ To the extent that the real reason for having programs like NSEERS is to help the government be more effective in its fight against terrorism,²⁷

ing commencement of Justice Dept. interview program, targeting young men with similar profiles to September 11th hijackers).

²³ See BOWLING FOR COLUMBINE (Metro-Goldwyn-Mayer 2002).

²⁴ See *FAQ: Changes to the NSEERS Process* (U.S. Dept. of Homeland Security) (Dec. 1, 2003), available at <http://www.ice.gov/graphics/news/newsrel/articles/NSEERSFAQ120103.pdf> (last visited March 29, 2004) (responding to criticism of NSEERS).

²⁵ *Id.*

²⁶ See Cainkar, *supra* note 19, at 97–98 (noting that out-of-status Arabs account for only small proportion of total undocumented persons in United States); see also President George W. Bush, *State of the Union Address* (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (last visited March 29, 2004) (proposing "temporary worker program" which would allow certain undocumented persons to remain in United States).

²⁷ *US-VISIT: Questions & Answers* (U.S. Dept. of Homeland Security), available at http://www.dhs.gov/interweb/assetlibrary/veryFINALRevised_FAQs12-31-2003.pdf (last visited March 29, 2004) (describing origins of US-VISIT and other homeland security measures following September 11th attack); *FAQ: Changes to the NSEERS Process* (U.S. Dept. of Homeland Security) (Dec. 1, 2003), available at <http://www.ice.gov/graphics/news/newsrel/articles/NSEERSFAQ120103.pdf> (last visited March 29, 2004) (outlining changes to NSEERS in attempt to make it more effective).

we have to ask ourselves whether relying on profile-based registry really roots out foreign terrorists in our midst or, as many suspect, disrupts the lives of otherwise productive, law-abiding individuals based on mere technicalities.

Fortunately, the government has not relied exclusively on questionable programs such as NSEERS. After 9/11, what the FBI started doing, which turned out to be more effective, was to begin to develop cooperative relationships with communities from which they believed potential terrorists might spring.²⁸ For example, they started developing relationships with the Muslim and Arab communities, visiting mosques and talking to people in the community. Of course, people in those communities are just as concerned about terrorism as everybody else, and so, developing these relationships was a more friendly, trust-building, and, ultimately, effective way of trying to get to achieve the same end.

I could go on, but I want to make sure that I adhere to my "campaign promise" to keep my remarks brief. I think I will stop there, thank you for your time and attention, and look forward to the question and answer period when we can chat a bit more. Thanks again.

²⁸ See, e.g., *Transcript: Speech of FBI Director Robert Mueller*, CHRISTIAN SCIENCE MONITOR, Jan. 16, 2004, at 25 (relating FBI's efforts to "reach out" to Muslim and Arab communities for assistance in combating extremism); Judith Cebula, *Area Muslims are Focusing on Safety; Leaders Meet with Law Enforcement and Distribute Kits of Tips, Legal Advice to Mosques*, INDIANAPOLIS STAR, March 19, 2003, at 6A (discussing FBI activities with area mosques, including developing positive relationships and undergoing sensitivity training with local Muslim leaders).