

Leiden University

The Muslim Terrorist on American soil

A study into the racial profiling of Arabs, Muslims and Middle Easterners post-9/11

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Introduction

Recently elected President Donald Trump made harsh statements regarding policy goals and insults towards his rival candidate Hillary Clinton, minority groups, and women. Opponents of Trump as president of the United States (US) criticized him for his behavior towards and statements on women and Muslims, belittling them as minority groups (Bixby, The Guardian). On December 7th, 2015, Trump called for ‘... a total and complete shutdown of Muslims entering the United States, until our countries representatives can figure out what the hell is going on. We have no choice.’ He claims that the Muslim population does not support the American democratic system, that they have no sense of reason, and that they have no respect for human life (Pilkington, The Guardian). Statements like these highlight the backlash that not only Muslims, but also Arabs and those who appear to be Arab, have experienced since the attacks on September 11th, 2001. After 9/11, Muslims and Arabs suffered from increased levels of scrutiny, being stared at, harassed, and discriminated against by the American public. Hate crimes towards Muslims severely increased, rising from 28 incidents in 2000 to 481 incidents in 2001 (Federal Bureau of Investigation, “Hate Crime Statistics 2000” 7; Federal Bureau of Investigation, “Hate Crime Statistics 2001” 9). A survey from only a few days after the 9/11 attacks showed that 43 percent of the Americans were now more suspicious of people whom they believed were Arab, and 35 percent said they lost trust in the Arabs living in the US (Peek 67). The public as well as the government increasingly express feelings of fear and/or hatred towards Muslim and Arab groups in the US through racism. This thesis will show that the Bush Administration racially profiles Arabs, Muslims and Middle Easterners through its counterterrorism policies in the aftermath of the 9/11 attacks. The focus will be on two specific case studies, the USA Patriot Act and the National Security Exit Entry Registration System (NSEERS), showing in what ways Arabs, Muslims and Middle Easterners have been racially profiled in the name of heightened national security.

This research focuses on Arabs, Muslims and Middle Easterners, for they are connected to the terrorist profile that was constructed after the 9/11 attacks. Because Arab and Middle Eastern men from the Al Qaeda terrorist network carried out the 9/11 attacks in the name of Islam, the socially constructed and widely accepted enemy central to the war on

terror became the Muslim terrorist of Arab or Middle Eastern descent (Harris, “Flying While Arab” 9; Selod and Embrick 650; Sekhon 119-120; Naber 38). Thus, the thesis will focus on the racial profiling of the terrorist identity, those who appear Arab, Muslim or Middle Eastern. In the early- to mid-20th century, most race scholarship focused on black-white relations that came forward through Colonialism, for it was then that a racial hierarchy was established (Shih 1359). In that period, race was thought to be inherently physical, meaning that people were divided based on biological characteristics, such as skin color or facial features (Omi and Winant 10; Garner and Selod 12). Many scholars contested this idea, among who Frantz Fanon was key. Fanon regarded race as a historical construct, without any fixed meaning (Kane 358). Omi and Winant build upon this idea by arguing that ‘racial and ethnic categories are constantly forming, evolving, and being maintained in society ...’ (qtd. in Selod and Embrick 645). Robert Miles adds to this debate by stating that the existing black-white binary based on physical characteristics was not established by natural selection, rather that these characteristics were historically and culturally selected. Miles argues that the division of people based on physical characteristics was socially constructed, adding that ‘race’ is a socially imagined reality rather than a biological one (Miles 71).

Regarding race as a social construct based not only on physical characteristics allows for a new form of racism, ‘cultural racism’. This encompasses physical differences as well as cultural traits, such as language, clothing and religion (Selod and Embrick 645). This definition of racism allows us to study racism as a hierarchy based on both race and religion, in which Islam is our focus. Discrimination of Islam has largely been left out of the academic debate on racism, for Muslims have for long been racially classified as ‘white’ in the American society, until the 9/11 attacks (Selod and Embrick 646; Shih 1357). Prior to the 9/11 attacks, scholars of Islam started to write about the increasing anti-Muslim attitude in American society, arguing that ‘Islamophobia’ was a real phenomenon, included in the Oxford English Dictionary since 1997 (Peek 36). Post-9/11 academics focus on the ‘Othering’ processes that Arabs, Muslims and Middle Easterners increasingly faced since the attacks, which rejected them as ‘whites’ and classified them in a new racial category. Terrorism studies is a relatively young body of research and only a small part focuses on the consequences that counterterrorism measures might have for Arabs, Muslims and Middle Easterners. Consequently, this thesis will focus on these consequences to show that the Bush Administration partakes in racial profiling, a practice that the government condemned before the 9/11 attacks.

To be able to study the extent to which Arabs, Muslims and Middle Easterners are discriminated against in the US, the theory of racialization will be used. Robert Miles has used earlier ideas by Frantz Fanon and Michael Banton to establish an enhanced definition of racialization, which is the following; ‘the existence of a social process in which human subjects articulate and reproduce the ideology of racism and engage in the practice of racial discrimination, but always in a context that they themselves have not determined’ (qtd. in Murji and Solomos 10). Despite the fact that this definition has suffered criticism from several scholars, this is the definition that will be used throughout the thesis for it helps us understand ideological processes behind the security policies formed by the government in the wake of 9/11 that will be analyzed. The context that will be used to research racialization in practice is that of racial profiling, which is defined as; ‘... *the use of race or ethnicity, or proxies thereof, by law enforcement officials as a basis for judgment of criminal suspicion*’ (Glaser 3). In a counterterrorism context, racial profiling is seen as a practice of law enforcement officials using racial, religious or ethnic stereotypes, ‘usually involving those perceived to be Arab, Muslim, Sikh, or South Asian’, as a counterterrorist effort (Swiney 8).

The thesis will focus on two counterterrorism policies, the USA Patriot Act and the National Security Exit Entry Registration System (NSEERS), to show in what ways Arabs, Muslims and Middle Easterners suffer from racial profiling by government officials. In these policies there is a link to racialization for they establish a concrete socially constructed meaning to the representations of Arabs, Middle Easterners and Muslims (Cainkar, “Thinking Outside the Box” 57). It is necessary to research this topic, for there is a lack of concrete academic research on discrimination of Arabs, Muslims and Middle Easterners by the government, which plays upon the current situation with Donald J. Trump as the new president of the US. The statements he made during his presidential campaign about a ban on all Muslims to enter the country show the discriminatory processes that divide the American society further. The thesis will be structured as follows; chapter one will give an overview of the history of racial profiling and shows what it is in essence. Chapter two will give an analysis of the USA Patriot Act, showing in what way Arabs, Muslims and Middle Easterners are targeted. In the last chapter NSEERS will be analyzed, followed by the practical and legal implications of this policy.

Chapter 1

The use of racial profiling as a law enforcing tool

Since the 1990s, the Muslim community in the US has grown vastly with nearly 40 percent (Peek 37). The increased visibility of Islam, through the emergence of mosques and Islamic schools, together with negative presentations in the news media and movies created a backlash towards Muslims and Arabs in American society (Peek 59-63; Alsultany 2). The already existing stereotypes from the media in combination with the 9/11 attacks increased hostility and fear among the American public. Additionally, there are several key markers that differentiated Arabs, Muslims and Middle Easterners from other groups in American society, such as the hijab for women, dark facial hair for men, traditional clothing and ethnic sounding names. After the 9/11 attacks, a common enemy was constructed for the war on terror, based on the identities of the terrorists that performed the attacks. These men were Muslim and Middle Eastern, which has led to the stereotyping of all Arabs, Muslims and Middle Easterners as possible terrorists. In order to heighten national security, several policies have been created that can be deemed as racially profiling those that are similar to the terrorist profile. However, before the 9/11 attacks, racial profiling was seen as an unjust act, so what has changed? This chapter will give an overview of the history of racial profiling and focus on its essence, looking at its causes and consequences. It will then focus on racial profiling in a counterterrorism context, laying emphasis on discriminative practices towards Muslims. It will give an overview of the public debate that currently exists on whether racial profiling is the right tool in achieving certain goals, such as to heighten national security.

Historical overview

Racial profiling as a tool to increase national security after 9/11 in the US is not something new. After World War I, Eastern Europeans residing in the US were deported without specific reason, other than their ethnicity or race. During World War II Japanese Americans were subjected to racial profiling, which led to detention in so-called “internment camps” (Fiala 55). A more recent example of racial profiling comes from the War on Drugs from the 1970s onward, targeting mostly African Americans and Hispanics. “Driving While Black” was a familiar slogan in that time, referring to traffic policing where people were stopped based on race or ethnicity. These arrests were made based on The Drug Courier Profile, created by the Drug Enforcement Administration (DEA) and part of Operation

Pipeline, which was constructed to make identification of drug perpetrators more easily for police officers (Fiala 55; Harris, “Racial Profiling Revisited” 38).

From the 1990s onwards, racial profiling became the center of public debate when data became available that proved that racial profiling was a real phenomenon (Harris, “Racial Profiling Revisited” 38). Law enforcement officials immediately condemned as a tool to apprehend perpetrators. However, in 1996 in *Whren v. U.S.* the Supreme Court officially condoned the use of race or ethnicity by the police, as long as other factors were identified as justifications for police intervention. This meant that intervention based on race was legally justified when race was not the sole factor to intervene, but one among several factors such as gender or language (Harcourt 6; Harris, “Racial Profiling Revisited” 38; Johnson 71-72). Nevertheless, in 1999, President Bill Clinton argued that racial profiling is ‘morally indefensible’, ‘deeply corrosive’, and stated publicly that ‘It is wrong, it is destructive and it must stop’ (Glaser 3). It was recognized as a form of institutional discrimination that several states tried to eliminate through anti-profiling legislature (Harris, “Flying While Arab” 9). Public polling data showed that before the 9/11 attacks almost 60 percent of all Americans regarded racial profiling as an unfair practice that should be eliminated (Harris, “Racial Profiling Revisited” 36; Johnson 67). After the 9/11 attacks, President Bush publicly stated that he condemned racial profiling and instructed his officials not to use this as a tool to apprehend possible perpetrators, however, when it comes to national security there seems to be an exception. Polls showed that around the same percentage as before the attacks, around 60 percent, saw racial profiling acceptable in airport security, and found it even necessary ‘as long as the group profiled consisted of Arabs, Muslims, and other Middle Easterners’ (Harris, “Racial Profiling Revisited” 36; Glaser 3). Several scholars argue that after the 9/11 attacks racial profiling has become a ‘necessity’, a necessary tool in counterterrorism measures and ensuring national security (Glaser 11-12; Ramirez et al. 1195; Harris, “Racial Profiling Revisited” 36; Fiala 54-55). Can racial profiling in this context be justified?

The essence of racial profiling

Historically, racial profiling was used as a tool to make the pool of possible suspects for a crime smaller, based on criminal profiling and the creation of a specific criminal identity. However, this type of criminal profiling has developed from being merely an investigatory tool to solve known crime cases into a projective strategy, now used to find perpetrators without a pre-existing crime (Glaser 44-45). This shift from a post- to pre-crime

focus is what is now known as racial profiling, where crimes have not yet been committed and the perpetrators are still unknown. According to Glaser, racial profiling is currently causing law enforcement officials to look for possible perpetrators by “looking for a larger number of needles that might or might not exist” (25). Through actuarial methods, law enforcement officials try to assess who is most likely to perform a certain crime, based on the characteristics of the known, already apprehended perpetrators. These perpetrators are used to establish predictive profiles to see what future perpetrators could look like. Formal racial profiling was established when the perceived correlations between ethnicity and a certain crime became standardized, of which the correlation between religion or nationality and terrorism is a current example. Formal racial profiling is an explicit instruction to use race or ethnicity in judgments of criminal suspicion. However, this type of racial profiling is unusual in practice, for most law enforcement officials have condemned the practice publicly and officially (Glaser 26). This seems to suggest that most racial profiling today is informal, and cannot be traced back to the official guidelines and practices. Law enforcement officials engage in this practice of discrimination either knowingly or unknowingly in individual cases.

So what causes racial profiling if everyone seems to agree that it is an unfair and unjust practice? Glaser argues that stereotyping is the main source for racial profiling, whether it is constituted through actuarial methods or cognitive errors (43). He defines a stereotype as; “... *a belief about a trait being disproportionately possessed by members of a particular social group*” (55). The use of stereotyping when making a judgment has discriminatory effects, especially if those judgments come from people in higher power positions. Nevertheless, stereotyping should not be deemed as something negative, for then it becomes more difficult to see it as something you yourself are involved in, making it harder to change racially biased thinking in a person. Stereotyping is a passive and invisible process, in which people often unintentionally engage (Glaser 43-44). These stereotypes can arise through empirical research, such as studies showing that certain minority groups are more often involved in certain criminal acts, or more informally through news media. Stereotyping serves several functions, which are to rationalize inequalities, to boost group- or self-esteem, and as cognitive shortcuts, allowing a person to make a judgment without having to consider all the information necessary to make a just judgment (Glaser 56-57). These shortcuts, or heuristics, are ways to constitute fast and efficient thinking, and are used unconsciously (Harris, “The Danger of Racialized Perceptions” 154). Biases in thinking are identified as errors in heuristics, when fault judgments are made systematically in certain situations. Harris

argues that one of these errors is the suspicion heuristic, which encompasses the feeling of uncertainty when seeing an unknown person of a certain ethnical grouping, such as African American or Middle Eastern, and connecting the sight of this person with negative associations of the group he or she belongs to. The feeling of danger when seeing a stranger often occurs unconsciously, creating a bias against certain groups based for example on ethnicity (Harris, "The Danger of Racialized Perceptions" 155-156). Stereotyping can thus be seen as one of the root causes for racial profiling and are important to consider when looking at counterterrorism measures.

One of the main problems of racial profiling is that it can become a self-fulfilling prophecy, for it looks only at certain characteristics in a perpetrator with the possibility of missing whole classes that do not fall within the known description. When looking at crimes of terrorism, there seems to be a selection bias when establishing criminal profiles. These acts of terror, such as airplane hijackings, are infrequent incidents leading to a small sample of perpetrators, which is unrepresentative for making a generalizable criminal profile. This leads to an overrepresentation of minority groups among known perpetrators, creating a misrepresentation of future criminals based on ethnicity or religion. The problem with profiling of this kind is that those being profiled, often minority groups, will be arrested disproportionately based on this profile, leading to an overrepresentation of these groups in the criminal justice system. This shows the self-fulfilling nature of racial profiling, where certain minority groups are represented more due to and because of profiling (Glaser 44-47).

Racial profiling has mostly been justified through the idea that it is an effective and efficient strategy in apprehending perpetrators. Another common justification of racial profiling is its deterrent effect on its targets, for they reconsider committing a crime when there is an increased risk of captivity. The problem with this theory of deterrence in racial profiling is that there is no increase in enforcement, but merely a shift of focus from one group to another (Glaser 96-97). Another consequence of racial profiling is distrust towards law enforcement officials and the government as a whole. According to Ramirez et al., groups that are being targeted through racial profiling are less willing to report crimes, provide information, or serve as witnesses in a trial (1196; Harris "Racial Profiling Revisited 37). When considering the war on terror this is even more problematic because counterterrorism measures rely on intelligence and information that law enforcement officials collect by interviewing people with possible connections to terrorist networks. These people are most likely part of Arab or Muslim communities that are targeted through racial profiling.

Furthermore, racial profiling alienates the groups that it targets from the dominant society, polarizing groups within a society (Harris “Racial Profiling Revisited” 41).

Violation of civil rights and liberties

After the 9/11 attacks, the American public’s willingness to give up civil rights and liberties in the name of national security has increased, as a result of a strong feeling of individual and collective vulnerability. The level of threat apparent in a society plays upon anxiety and is another crucial element that influences the willingness of people to let the government violate civil rights and liberties, especially in the war on terror (Jamal 118-119). On a national level, racial profiling shows implications with domestic civil rights, with the First and Fourth Amendment in particular. The First Amendment of the US Constitution protects the basic civil rights and liberties of citizens, such as Freedom of Speech, Freedom of Press and Freedom of Religion. Racial profiling infringes on these rights, especially in the war on terror, for Muslims, Arabs and Middle Easterners cannot freely express themselves through speech or religion. Suspects in the war on terror are being judged on everything a person says or the religion they adhere to.

Additionally, judges rely on the Fourth Amendment that gives protection against unreasonable searches, and the Fourteenth Amendment that guarantees equal treatment. A violation of the Fourth Amendment was denied in the *Whren v. U.S.* case for the Amendment distinguishes between the use of race exclusively or one of several factors. Through this, many cases of racial profiling can be denied. In the context of the Fourteenth Amendment, judges distinguish between intentional and unintentional discrimination, based on evidence of specific discrimination and statistics. Here as well, many cases are found not to infringe on this Amendment for racial profiling is often seen as an unintended act. This suggests that constitutional challenges to racial profiling have often failed because of specific legal distinctions set out in laws (Harcourt, “Rethinking Racial Profiling” 1278).

On an international level, racial profiling interferes with human rights, such as the right to be free from discrimination. The United Nations has set up a committee to protect citizens from racial profiling by their government, the United Nations Committee on the Elimination of Racial Profiling (CERD). This Committee, together with the Inter-American Commission on Human Rights, has stated that all counterterrorism measures should be free of racial profiling and should not target Muslims, Arabs or Middle Easterners (Harcourt, “Is Racial Profiling an Effective Counterterrorist Measure” 7). However, in practice it is shown

that this right can be neglected in certain circumstances. Furthermore, racial profiling infringes on the right for Equal Protection, which is an anti-discrimination principle protecting people from unequal treatment, for instance based on race or ethnicity. The problem with this right is that there needs to be evidence of specific intent to discriminate in a case of racial profiling, which is often non-existent for most racial profiling is informal. Moreover, a case of racial profiling can be legally justified if there is sufficient governmental interest, which is often the case when it comes to terrorism (Harcourt, "Is Racial Profiling an Effective Counterterrorist Measure" 8). This shows that it is hard to prove a case of racial profiling as a violation of civil rights and liberties, for the legal definitions are broad and vague and there exist diversions to make a case legally justifiable.

Flying While Arab

The pre-9/11 'Driving While Black' slogan to represent the racial profiling of African Americans and Hispanics in the War on Drugs is now replaced by the post-9/11 catchphrase 'Flying While Arab' (Fiala 54). In 1999, the Gallup poll showed that the American public deems racial profiling as wrong, but with the shock of the 9/11 attacks a shift in public opinion occurred, regarding racial profiling as necessary in order to prevent future terrorist attacks from happening. Of the respondents, 66 percent approved profiling based on ethnicity, especially those of Arab or Middle Eastern descent, even respondents from minority groups who had been subject to racial profiling themselves (Glaser 132; Fiala 54). A Zogby poll conducted in 2002 found that 81 percent of the Arab and Muslim Americans felt their community was being profiled (Jamal, 115). However, it is important that we do not look at possible suspects' appearance to prevent future terrorist attacks from happening; law enforcement should look at people's actions instead. In other words, suspicious behavior is a more effective manner of apprehending future perpetrators than appearance based on ethnicity or religion, for this gives a larger pool of possible suspects (Harris, "Flying While Arab" 13). Furthermore, profiling based on race or religion negatively influences the government's counterterrorism measures for law enforcement officials do not focus on the actual target (Kleiner 112-113).

In conclusion, racial profiling is not a new phenomenon, but has existed since the beginning of the twentieth century. Originally, racial profiling emanated from criminal profiling, which is based on the establishment of a specific criminal identity to assist law enforcement officials in identifying and apprehending perpetrators. In the war on terror

context, these profiles are used to identify possible suspects of terrorism, based on stereotypes that arose after the 9/11 attacks about terrorists. Racial profiling is problematic for it targets a large part of the population, Arabs, Muslims and Middle Easterners, based on a non-generalizable profile. This leads to alienation and increasing polarization within in the American society, for racial profiling interferes with the civil rights and liberties of the individuals that it targets. The following two chapters will focus on two case studies to show that the Bush Administration used racial profiling as a tool to identify and apprehend suspects of terrorism, the USA Patriot Act and the NSEERS, even though the president publicly condemned racial profiling as a whole.

Chapter 2

Investigating terrorism

After the 9/11 attacks, the Federal Bureau of Investigation (FBI) initiated its largest investigation in US history in order to find out what actually happened on 9/11, known as the Pentagon/Twin Towers Bombing Investigation (PENTTBOM). This resulted in the mass detainment of Arabs, Muslims and Middle Easterners based on their names, appearances, and religion (Cainkar, "Thinking Outside the Box" 54; Wong 168). The detainees were treated harshly, were placed in total isolation, subject to physical and verbal abuse, and information about their whereabouts were restricted. In total 726 individuals were apprehended and detained, of whom only three percent was released within three weeks, while most of the detainees were released in 80 days and 25 percent was released after three months or more (Wong 187-188). This is only one example of government action after the 9/11 attacks that targeted specific groups in American society, another example of racial profiling through government action can be seen in the USA Patriot Act of 2001. The Act gave government officials and security agencies extensive authority to fight terrorism domestically and internationally (Ahmadi 53).

One of the problems with legislation established in response to national crises is that it tends to subordinate civil rights and liberties in order to calm the nation down. The USA Patriot Act is one example of such legislation, with as its main objective heightening domestic security to make the public feel safer in the country they live in. This policy's main problem is that it targets one smaller part of the population, namely those who are associated with terrorism. Arabs, Muslims and Middle Easterners have been subject to discrimination by the government through the USA Patriot Act, through mass arrests, detainment, secret searches and deportation (Naber 38). It is important to look at the ways in which government officials racially profile minority groups, for its consequences are socially and politically damaging. Racial profiling instigates alienation, distrust of police and law enforcement, and negative associations with the government (Ramirez et al. 1196; Harris "Racial Profiling Revisited 37). This second chapter will give a more in-depth analysis of a counterterrorism measure taken after 9/11, the USA Patriot Act. It will show that the USA Patriot Act can be regarded as a form of racial profiling, by analyzing the Act itself and by looking into one example of a change in policies that resulted from it. The chapter will look at the legality of the Act and its practice and the complications that arose after its initiation.

What does the USA Patriot Act entail in practice

On October 26 2001, the Bush Administration initiated the USA Patriot Act, its full name Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism. The main goal of this act was to intercept and obstruct terrorism, by authorizing the CIA and the FBI to use new evidence-gathering procedures to prosecute suspected terrorists (Ahmadi 1; Sekhon 118; Wong 162). This policy allowed intelligence gathering through secret searches and wiretaps from suspects without a probable cause, merely a possible connection to terrorism due to the suspect's ethnicity or religion. The people targeted by this policy were predominantly Arabs, Muslims and Middle Easterners, both citizens and non-citizens (Arab American Institute 18; Peek 91; Selod and Embrick 650; Sekhon 126). In Section 102, the Patriot Act states that the American government condemns discrimination against Arab and Muslim Americans, and that "Arab Americans, Muslim Americans, and Americans from South Asia play a vital role in our Nation and are entitled to nothing less than the full rights of every American" (USA Patriot Act 5). What is controversial however, is that in practice this policy does not protect the civil rights and liberties of Arabs, Muslims and Middle Easterners, but in fact infringes upon them. The specific mentioning of these groups of people and their rights in the Act shows that there are implications with the Act in practice for its targets. The Act amends existing legislation in the field of foreign intelligence surveillance, criminal offenses, national security, immigration and even banking. Small yet explicit changes have been made in the language in the existing legislature, giving whole new meanings to the statutes (Michaels 33). This also shows that the scope of the Act is large, for it encompasses many different political and legislative segments of government.

One element of increased authority that the USA Patriot Act granted, was that it allowed government officials to wiretap and perform secret searches without evidence of the suspects being involved in criminal activity (Ahmadi 53; Naber 38). "[The] USA Patriot Act enables the government to monitor, investigate, detain, and deport Muslims legally in the name of security, without rudimentary due process of the law and in gross violation of their rights" (Wong 1162-65). According to Attorney General John David Ashcroft, who served during the Bush Administration, the US could only win the war on terror through information control, complete awareness of the enemy's position and government actions should be performed in secrecy. The Freedom of Information Act passed in 2002 allowed the Bush Administration to keep most of its counterterrorism policies undisclosed, clearing the

government from public accountability and political consequences. Government officials thought secrecy was important for counterterrorism measures because of the ‘mosaic theory’, which holds that terrorists could use information on counterterrorism measures to their benefit in preparing future terrorist attacks. Nevertheless, the secrecy that existed around the USA Patriot Act and other counterterrorism policies is what made the public distrust the policies itself. Due to the lack of transparency, questions arose about the nature of government action in the war on terror (Herman 73; Hussain 1334-1335; Wong 174-175).

“Special Interest” removal proceedings

Building from this idea of a mosaic theory, Attorney General Ashcroft instructed Chief Immigration Judge Michael Creppy to issue a memorandum ordering increased secrecy on immigration court cases of detainees suspected of terrorism. He ordered the closing off of hearings considered to be of ‘special interest’ in the Immigration Court from the public, for they might hold classified information. The memorandum lacks any specific details on to which cases these special procedures apply and states that “a more detailed set of instructions will be forwarded” (Creppy 3). This seems to suggest that the Chief Immigration Judge did not establish any particular standards to determine which cases are of ‘special interest’, which allows cases with no link to terrorism whatsoever to be disclosed from the press and the public (Hussain 1335; Rivadeneira 845). Furthermore, only judges who are cleared may be present at the time of the hearing and are requested to discuss the cases with no one outside of the courtroom. Also, during the hearing no family, visitors or press may be present (Creppy 3-4; Hussain 1334). In response to this memorandum, the press filed lawsuits against Attorney General Ashcroft, stating that the memorandum violates the First Amendment right to access removal proceedings. In the federal court cases that followed, *Detroit Free Press v. Ashcroft* and *North Jersey Media Group v. Ashcroft*, the courts denied the press access to removal proceedings of approximately 100 detainees, of which some were held unlawfully. However, the Third Circuit federal court concluded that the First Amendment right did not apply to these cases, protecting the Attorney General’s initiative and the idea of ‘special interest’ (Cole 961-962; Rivadeneira 846). After this ruling, more lawsuits were filed by the Detroit Free Press and other parties of interest to prevent further closure of removal proceedings, which on April 3rd 2002 led to the ruling refraining the Justice Department from enclosing these cases based on the public right of access to such hearings (Rivadeneira 851-852).

Attorney General Ashcroft was able to establish this memorandum in cooperation with Michael Creppy, due to the amendments made to immigration policies through the USA Patriot Act, resulting in the detainment of Arabs, Muslim and Middle Easterners based on visa violations and a possible link to terrorist activity. In Section 411, the USA Patriot Act imposes ‘guilt by association’ on all non-citizens who seem to have a connection with “a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities” (USA Patriot Act 74). Under this Section, these non-citizens are not allowed to enter the country or are deported if they have already entered. Individuals can be deported on the basis of an innocent associational activity with a terrorist organization, without any relation to violence or terrorism specifically. This activity might be a donation to the organization a decade ago when the organization was not on any designated list (Sinnar 1424). This Section uses a broad definition of terrorist organization, allowing law enforcement officials to apply it to a large range of individuals; ‘... a group of two or more individuals, whether organized or not...’, and the amendments made by the USA Patriot Act will be applied to “action taken by an alien before, on, or after such date”, the date of enactment (USA Patriot Act 77; Cole 966; Sekhon 121). This suggests that any act that is deemed unlawful through the USA Patriot Act can be prosecuted, even those that occurred before the Act was endorsed.

Additionally, the USA Patriot Act gives the Attorney General the unprecedented power to detain non-citizens without a hearing and without any evidence that they pose a threat to national security. It is only necessary for the Attorney General to certify that he has ‘reasonable grounds to believe’ that it is necessary for the individual to be subject to indefinite ‘mandatory detention’ (Cole 971). This memorandum led to the targeting of specific groups within society, inhibiting them from a fair trial, a right provided through the Fifth Amendment. Under the Fifth Amendment, everyone has the right to due process of law, meaning that these non-citizens should be protected against unfair legal procedures and should be allowed a hearing (Sinnar 1427-1429). Every person should have the opportunity to hear the charges that are made against him and should be allowed to contest these charges (Sinnar 1455). Furthermore, the USA Patriot Act created a culture of secrecy in American counterterrorism policies, allowing these hearings to be disclosed from the press and the public. However, this secrecy was counterproductive in this case, for the press and the public demanded transparency based on their First Amendment right.

Responses to the USA Patriot Act

Many people's first reactions to the USA Patriot Act were that it was a policy necessary to heighten national security. People were willing to give up some civil rights and liberties in exchange for a decreasing risk at another terrorist attack. However, Arabs, Muslims and Middle Easterners have had to give up a considerably larger share of their civil rights and liberties, but many Americans viewed this as a necessary sacrifice in the war on terror. The increased investigative tools that government officials could use against Arabs, Muslims and Middle Easterners and their possible detainment and deportation has created a culture based on fear in American society, in which they should be cautious not to be in the wrong place at the wrong time (Wong 193). The American Civil Liberties Union (ACLU), the National Council of La Raza, the National Asian Pacific American Legal Consortium (NAPALC) and major Arab American and Muslim American organizations showed immediate concern about the 'guilt by association' principle of the USA Patriot Act. Japanese Americans support the Arab and Muslim American organizations in their fight for civil rights in the name of solidarity for communities identified as 'the enemy'. The Japanese American organization traces this back to the internment camps after WWII, stating that the US government has not yet learned its lesson (Arab American Institute 18).

Conclusion

The USA Patriot Act can be seen as an example of racial profiling for it targets Arabs, Muslims and Middle Easterners as possible suspects of terrorism. The Act has led to increased surveillance, detainment and deportation of possible suspects of terrorism, which mostly are individuals of Arab descent or who are Muslim. In Section 102, the Act states that all Arab Americans and Muslim Americans "... are entitled to nothing less than the full rights of every American", already implying that Arab Americans and Muslim Americans are different from 'every American'. The racial profiling of these groups is justified through the idea that intelligence gathered by interrogating and investigating these persons will help the government prevent future terrorist attacks. However, in practice it entails the investigating and interrogating of large numbers of people without any link to terrorism but shared ethnicity or religious beliefs. An important part of the USA Patriot Act is its reliance on secrecy, based on the idea of a 'mosaic theory'. Terrorists could use information on counterterrorism measures to their benefit when planning a future terrorist attack, therefore secrecy around these measures is required. What is important to note is that this secrecy decreases transparency in

government action, which makes the public and the press wary. Lack of transparency creates distrust of the government, as can be seen in the removal proceedings that were concealed from the public and the press. In these removal proceedings Arabs and Muslims were called to court and often deported. The Creppy memorandum that initiated the closed hearing led to the targeting of specific individuals in American society, violating their Fifth Amendment right to have a fair trial. The combination of the USA Patriot Act and the secrecy that it allowed for has led to the targeting of Arabs, Muslims and Middle Easterners in the US and created a culture of fear and distrust towards the government.

The next chapter will go further by analyzing a second case study in order to show in what ways government officials racially profile Arabs, Muslims and Middle Easterners in counterterrorist measures to heighten national security. The second case study will focus on racial profiling through a program initiated in 2002 in cooperation with the Immigration and Naturalization Service (INS), called the National Security Exit Entry Registration System (NSEERS), or more commonly known as the Special Registration Program.

Chapter 3

The risk of deportation

One of the policies the INS initiated in the name of the war on terror was the Absconders Act, which allowed government officials to track down and deport six thousand non-citizens of Middle Eastern descent. Through this act, the government specifically targeted individuals from Middle Eastern countries who were only two percent of the total amount of absconders living illegally in the US. The government justified its actions through this act by stating that other groups of absconders would be next, however this was not the case (Cainkar, "Thinking Outside the Box" 54). These changes in immigration policies were also justified for several public polls had shown that 60 percent of the public favored a reduction in the number of immigrants from Muslim countries in the US (Cainkar, "Thinking Outside the Box" 59). After investigating the 9/11 attacks, the Federal Bureau of Investigation concluded that the terrorists performing the attacks were visitors admitted to the US on valid nonimmigrant visas. What came to light through these investigations was that the organization handling immigration at that time, the Immigration and Naturalization Service (INS), did not have an effective system to monitor immigrants and nonimmigrants. These revelations instigated a series of adjustments in US immigration laws under the Bush Administration (Lohmeyer 140). In the war on terror, the INS became a key player in obstructing terrorism and in apprehending its suspects. At first, the main objective of the INS was to monitor individuals in order to detect suspects of terrorist activity and keep them off American soil (Rubin 3).

In June 2002, the Department of Justice initiated a call-in program, which was designed to collect data of all non-citizens that wanted to enter or had already entered the US. The program came out under the name National Security Exit Entry Registration System (NSEERS), but is also often called the Special Registration Program. The program's main tools were preventive detention and deportation to prevent future terrorist attacks from happening. This last chapter will go into the essence of this program and its consequences for non-citizens with a Middle Eastern background. This chapter will be similar to the former one, and will show that NSEERS is a federally established program that racially profiles Arabs, Muslims and Middle Easterners. The chapter will set out the goals and purposes of NSEERS, followed by an analysis of its legal implications. The chapter will end with an overview of the responses from the communities who suffered from this program.

Essence of the Program

The main goal of NSEERS was to collect data of all nonimmigrant males over the age of 16 visiting the US from twenty-four Arab and/or Muslim countries and North Korea through registration upon entrance or exit of the US. The program labeled these visitors as 'nonimmigrant aliens' or 'enemy aliens', in which the US Code's definition of alien was used; "any person not a citizen or national of the United States" (8 USCA; Wahab Twibell 444). At the initiation of the program, the Department of Justice announced that the Call In would apply mainly to non-citizens from Iran, Iraq, Libya, Sudan and Syria, although those with elevated security risk of other nationalities would be registered as well (Immigration Policy Center 4; Jachimowicz and McKay; Lohmeyer 140). From November 2002 onwards, thirteen other countries were added to the list of those who needed registering; Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates and Yemen. From December 2002, Pakistan and Saudi Arabia were added to the list and from January 2003 also nationals of Jordan, Kuwait, Bangladesh, Egypt and Indonesia were called in (Cainkar, "Special Registration" 83-85; Jachimowicz and McKay). The program was supposed to expand its reach to non-citizens from all countries in the world, however it remained the registration of males over 16 of only these twenty-five countries (Selod and Embrick 650; Cainkar, "Thinking Outside the Box" 55).

The program consisted of three key components to enhance inspection and registration of certain visitors to the US with a nonimmigrant status. The first component encompassed systematic checks in order to establish a large database with information on all nonimmigrant visitors. The INS collected this data through fingerprinting and photographing upon entering the US. The second component of NSEERS held that registrants had to register once more between the thirtieth and fortieth day of arrival to the US to confirm that they complied with the requirements of their visas (Lohmeyer 143; Swiney 17). Furthermore, this second component allowed for a "Call-In" registration, which gave Attorney General Ashcroft the authority to require nonimmigrant visitors already residing inside the US to register at an INS office. The Attorney General deemed this "Call In Registration" as essential for it allowed the government to collect data about individuals who might still be inside the country without the government noticing them. The third and last component that the Special Registration Program existed of, held that all nonimmigrant visitors should leave the US via selected ports of entry, to monitor and record their departure (Lohmeyer 143-144). Those who were in

violation with visa requirements, failed to register or were indicated as a threat to national security were taken into Immigration Service detention, of which a large part was deported.

The government held that the main purpose of this program was administrative; the program was used to monitor non-citizens whose residence in the US became an interest of national security. The program required fingerprinting, photographing, registering and questioning, and any link to criminal activity or an inconsistency in immigration status could lead to arrest, detainment and/or deportation (Cainkar, "Thinking Outside the Box" 56; Swiney 17). By June 2003, 82,880 persons living in the US had been specially registered. Of these, 13,434 were placed in removal proceedings for visa violations, all of them cleared of terrorism or terrorist connections. Arabs and Muslims who overstayed their visas comprise of less than one percent of the total number of overstayed visas, which is estimated at around 3.2 to 3.6 million people. NSEERS led to the apprehension of seven suspected terrorists, a small number when compared to the total amount of individuals that registered (Cainkar, "Post 9/11 Domestic Policies" 246; Cainkar, "Thinking Outside the Box" 56; Martin and Martin 334). Many detainees claimed they were treated unjustly while in detention, stating that law enforcement officials withheld information from them about the charges that were made against them and that they did not have the possibility to hire a lawyer while the officials investigated them (Lohmeyer 140). The INS could no longer keep up with the programs scope, so the Department of Homeland Security stepped in to revise the program. The main objective of the NSEERS was changed and the program became: 'a pilot project focusing on a smaller segment of the nonimmigrant alien population deemed to be of risk to national security' (Cainkar, "Thinking Outside the Box" 56-57; Martin and Martin 334). This last objective shows that the government views Arabs, Muslims and Middle Easterners as a small group to be of national security interest. In other words, the program can be seen as a form of racial profiling targeting only a small segment of the world, mainly Arabs, Muslims, and Middle Easterners.

Legal implications of this program

The Special Registration procedure that NSEERS initiated in the aftermath of 9/11 was not a completely new phenomenon. During the 1980s, the Carter Administration established a similar system in response to the Iranian Hostage Crisis that demanded the registration of Iranian students enrolled in American universities and colleges (Lohmeyer 157). Both programs can easily be justified on the basis of national security, arguing that the

programs amended immigration laws and policies in such a way that it heightened national security by collecting data about nonimmigrant visitors willing to enter the US. However, what is more difficult to apprehend is that these programs use immigration laws and policies selectively to single out certain individuals with a particular ethnicity, in NSEERS from one of the twenty-five designated countries (Lohmeyer 160). This alien classification relies on stereotyping, given the fact that twenty-four out of the twenty-five countries are Arab or Islamic. This shows that the program is made to target only a certain part of the nonimmigrant visitors that come to the US, mainly those that are similar to the terrorist profile created after the 9/11 attacks. When looking at the legality of the NSEERS and its practices, it should be noted that nonimmigrant visitors that reside inside the US do not enjoy the same rights as US citizens (Lohmeyer 152). However, an individual of that status does have the right to due process and equal protection upon entering the US. By withholding relevant information about the charges made against a person in detainment and not allowing him/her to hire a lawyer, these protections are violated. Nonetheless, due to the Plenary Power doctrine, the American government is allowed to “limit judicial review of constitutional challenges to a wide range of federal programs regulating immigration and naturalization”, a doctrine that has often been used to justify alterations in immigration laws and policies after the attacks of 9/11 (Lohmeyer 152-154). This doctrine eliminates the possibility of judicial review of such policies, denying any form of judicial scrutiny.

It can be said that NSEERS is a program created by federal government that established classifications differentiating between nonimmigrant visitors on the sole basis of ethnicity, purposely singling out certain groups over others. Lohmeyer argues that these classifications should be subject to some form of judicial scrutiny, but through the Plenary Power doctrine judicial review is disregarded and therefor NSEERS’ constitutionality need not be checked. This lack of judicial review clashes with the system of checks and balances that is fundamental to the American political system. The program resulted in a culture of fear, domestically and internationally, with countries worldwide warning their citizens about visiting the US for the risk of being detained and deported (Lohmeyer 179).

Responses to the Program

The Special Registration Program has played upon the already existing culture of fear that prevails among Muslims, Arabs and Middle Easterners, and many are left in doubt what their future in the US will look like. The detention of hundreds of registrants in California, of

mostly Iranian heritage, sparked national protest, for those who voluntarily participated in the government's program were handcuffed and led off to jail, treated as prisoners (Cainkar, "Thinking Outside the Box" 55). Three thousand Pakistanis have fled from the US to Canada, for they did not deem the US as safe when NSEERS was in place. Canada condemned the efforts of the US to amend its immigration policies to target Arabs and Muslims. Because of its anti-discriminative view, Canada became a refuge for Arabs, Muslims and Middle Easterners residing in the US (Wahab Twibell 438-439).

On an international level, NSEERS has increased tensions between the US and Arab and Islamic communities over the world by initiating the program without prior notice. Intelligence gathering is a key component in increasing national security, and is more effective when cooperation with such communities runs smoothly, but the program further challenges this (Martin and Martin 335). This seems to limit the effectiveness of the US' efforts to apprehend terrorists and combat terrorism. Additionally, Khurshid Mahmud Kasuri, the foreign minister of Pakistan, argued that the list made by the NSEERS Program was unfair and states that Pakistanis should not be registered when entering the US, for the country takes part in combatting Al Qaeda and the Taliban. The Program has sparked anti-American sentiment among Pakistanis, who are the biggest group of non-citizens visiting the US. Several other countries, Indonesia and Bangladesh among others, have advised their citizens to limit travel to the US, to avoid difficulty with the American immigration offices. The Program has created a climate of fear, for foreigners risk being arrested and detained when registering with the Immigration and Naturalization Service (James, New York Times).

Conclusion

NSEERS was a program that required the registering of male nonimmigrant visitors from twenty-five countries, of which twenty-four were Arab or Islamic. Despite the fact that the Attorney General Ashcroft stated that the program would demand the registration of all nonimmigrant visitors from all over the world, remained NSEERS' focus on these particular countries. This shows that through this program the American government targeted a specific group that was only a small part of the entire group of nonimmigrant aliens, based on the idea that they might serve a risk to national security. However, when looking at the results of the program, only seven individuals were identified as suspects of terrorism and were successfully deported. All other 82,880 individuals residing in the US revealed no links to terrorism, but still a little over 13,000 of them were put into Immigration Service detention

and deported due to overstayed visas. Furthermore, many detainees believed that their civil liberties as a visitor to the US were violated while in detainment. However, this can be refuted when looking at the Plenary Power doctrine that disregards judicial review of immigration policies and their constitutionality in the name of heightened national security. Therefore, it is difficult to test NSEERS against its legality and constitutionality, but it is clear that the program is made to target mainly Arabs, Muslims and Middle Easterners, which is part of racial profiling.

Conclusion

Racial profiling is not a new phenomenon, it has been used as a tool by law enforcement officials since World War I, resulting in the detainment and deportation of groups with a certain ethnicity or religious belief. However, since the 1990s, racial profiling is seen as an unjust practice that infringes upon its target's civil rights and liberties and should be abolished as a practice in law enforcement. After the 9/11 attacks, racial profiling is seen as a tool necessary to apprehend terrorists and prevent future terrorist attacks from happening. Polls show that people think it is necessary for Arabs, Muslims and Middle Easterners to give up certain civil rights and liberties in order to heighten national security for all. President Bush has publicly condemned racial profiling as a strategy to apprehend suspects of terrorism, but in practice it is still used secretly or unknowingly.

Research has shown that stereotypes cause racial profiling, which in this case rests upon the stereotypes about a terrorist. After the 9/11 attacks, terrorists have been identified as Arab or Middle Eastern men that adhere to the Islam. This is also the profile that post-9/11 policies focus on, as can be seen in the USA Patriot Act and NSEERS. Law enforcement officials should be careful with racial profiling, for it can become a self-fulfilling prophecy. The terrorist profile created after the 9/11 attacks is not a generalizable one, for the occurrence of terrorist attacks is too low and uncommon. Thus, a just profile cannot be made. Additionally, racial profiling conflicts with several civil rights and liberties of the people it targets, mainly with the First and Fourth Amendments that encompass the Freedom of Speech, Freedom of Religion, Freedom of Press and Equal Treatment. However, it is very difficult for a case of racial profiling to be deemed unconstitutional, for it is deemed constitutional when the act of racial profiling is unintentional. Internationally racial profiling interferes with human rights, such as the right to be free from discrimination. Also for this right counts that it is deemed constitutional when there is a certain amount of government interest to perform an act of racial profiling. Therefore, it is very difficult to contest the government on racial profiling.

Even though it is a problematic tool in law enforcement, the Bush Administration does use racial profiling as a tool to apprehend terrorism suspects. The USA Patriot Act can be seen as a policy that targets Arabs, Muslims and Middle Easterners for it depends upon the terrorist profile. Even though it clearly states that Arab Americans and Muslim Americans should not be differentiated from the rest of the American public, in practice it does show some forms of racial profiling. The Act authorizes government officials to wiretap and

perform secret searches without any evidence of suspects being involved in terrorist activity, which seems to suggest that these suspects are often based upon their ethnicity and religious beliefs that could mean a link to terrorism. Furthermore, it allowed for increased secrecy around counterterrorism policies based on the mosaic theory. This secrecy led to the closing off of removal proceedings from the press and the public. Attorney General Ashcroft had the authority under the USA Patriot Act to detain non-citizens without a hearing and without any evidence that they posed a threat to national security, allowing him to deport individuals based on no clear suspicion, other than the common ethnicities and religious beliefs among those deported.

When looking at the Special Registration Program, clearer to see how it targets Arabs, Muslims and Middle Easterners. The Attorney General had established a list that demanded the registration of nonimmigrant visitors from twenty-five countries, of which twenty-four were Arab or Islamic. Even though the Attorney General had publicly announced that the program would require the registering of all nonimmigrant visitors in the future, this was in fact not the case. NSEERS was set up to monitor nonimmigrant visitors and to collect data through fingerprinting, photographing and interviewing to create one large database on who visits the US. The program relied on an alien classification to single out individuals of a certain ethnicity, mainly Arab or Middle Eastern, in order to prevent a future terrorist attack from happening. If people failed to register or were in violation with their visa requirements, they were put in Immigration Service detention, which has led to the deportation of a large number of registrants. Detainees claimed that their rights were violated for they were withheld information about their charges and weren't allowed a lawyer. What is problematic is that the programs constitutionality was not questioned due to the Plenary Power doctrine that limits judicial review on immigration policies. Both the USA Patriot Act and NSEERS have created a climate of fear and anxiety among Arabs, Muslims and Middle Easterners in the US, for their ethnicity and religious beliefs might lead to detention and deportation as suspects of terrorism. Racial profiling is an informal practice that is not officially used, but it should be kept in mind that it is a problematic practice that endangers the position of Arabs, Muslims and Middle Easterners in American society. Even though it is mostly done unofficially, racial profiling is a tool used by the Bush Administration in its counterterrorism measures, which has led to alienation and polarization, and it should be eliminated at a federal level.

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