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A DEMOGRAPHIC THREAT? PROPOSED RECLASSIFICATION OF ARAB AMERICANS ON THE 2020 CENSUS

*Khaled A. Beydoun**

INTRODUCTION

“Arab Americans are white?” This question—commonly posed as a demonstration of shock or surprise—highlights the dissonance between how “Arab” and “white” are discursively imagined and understood in the United States today.

These four words also encapsulate the dilemma that currently riddles Arab Americans. The population finds itself interlocked between formal classification as white, and de facto recognition as nonwhite.¹ The Office of Management and Budget (OMB), the government agency that oversees the definition, categorization, and construction of racial categories,² currently counts people from the Middle East and North Africa (MENA) as white.³ The United States Census Bureau (Census Bureau), the agency responsible for collecting and compiling demographic data about the American people, adopts these definitions and classifications for the administration of its

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1. “Arab Americans” are citizens of the United States who trace their ancestry back to the “Arab World.” The “Arab World” presently encompasses nations in the Middle East and North and East Africa where Arabic is commonly spoken. In addition to its fluid linguistic boundaries, the “Arab World” is also a designation that refers to the twenty-three states that are members to the Arab League.

2. The Office of Management and Budget (OMB) and the U.S. Census Bureau are the principal actors that “construct” *per se* definitions of race and racial categories. The administrative making of race illustrates how “[r]aces are not biologically differentiated groupings but rather social constructions.” IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* xiii (1996).

3. *Revisions to the Standards for the Classification of Federal Data on Race & Ethnicity*, OFFICE OF MANAGEMENT AND BUDGET (October 30, 1997), http://www.whitehouse.gov/omb/fedreg_1997standards [<http://perma.cc/28YV-VN2X>].

decennial census.⁴ Since the racially restrictive “Naturalization Era,”⁵ Arab Americans have been legally classified as white.⁶

Within the context of the pronounced and protracted “War on Terror,”⁷ the OMB and Census Bureau may be the only two government entities that still identify Arab Americans as white. Heightening state surveillance of Arab Americans, combined with still escalating societal animus,⁸ manifests a shared public and private view of the population as not only nonwhites, but also “others,”⁹ “terrorists,”¹⁰ and “radicals.”¹¹

Although not a new phenomenon, the association of Arab American identity with subversion, warmongering, and terrorism intensified after the September 11th terrorist attacks.¹² Fourteen years later, broadening antiterror policing coupled with emergent “preventative counter-terrorism” initiatives,¹³ or Countering Violent Extremist (CVE) policing, signals that suspicion of Arab American identity is still trending upward. And perhaps, is yet to reach its apex.

4. U.S. CENSUS BUREAU, ABOUT RACE (2013), <http://www.census.gov/topics/population/race/about.html> [http://perma.cc/VG9T-3WLS]. U.S. CONST. art. I § 2, cl. 3 mandates that the Census be administered every ten years.

5. Naturalization Act of 1790, ch. 3, 1 Stat. 103, 103, *repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

6. Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29 (2014).

7. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (holding that military tribunals created by the Bush administration violated the law); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that a U.S. citizen held as an “enemy combatant” has a right to a hearing to challenge that designation); see also *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (providing a legal justification to carry the War on Terror forward beyond enactment of the PATRIOT Act). These cases, along with the sweeping legislation and reforms that followed 9/11, initiated the international and domestic war against terrorism, hereinafter referred to as the “War on Terror.”

8. JOHN TEHRANIAN, *WHITWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY* 3 (2009).

9. Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259 (2004).

10. See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 300 (2002).

11. Amna Akbar, *Policing “Radicalization”*, 3 UC IRVINE L. REV. 809, 814 (2013).

12. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

13. Akbar, *supra* note 11, at 812–13. See also Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 127 (2012) (“[C]ounter-radicalization conforms to the preemptive logic of counterterrorism, which focuses on strategies that minimize the risk and intensity of future terrorist attacks.”).

This Essay argues that the establishment of a standalone MENA American box on the next U.S. Census may erode Arab American civil liberties by augmenting the precision of government surveillance and monitoring programs. The proposed reclassification of Arab American identity is not simply a moment of racial progress but, I argue, a mechanism that evidences the state's interest in obtaining more accurate "macro and micro demographic data" about Arab Americans.¹⁴ By illuminating the causal state interests facilitating reform and reclassification, I highlight how more precise and extensive demographic data—collected and compiled with a MENA American box on the U.S. Census form—expands the reach of federal and local antiterror and counter-radicalization policing amid the fluid yet evermore fierce War on Terror.

I. THE PROPOSED MENA AMERICAN BOX FOR THE 2020 CENSUS

The U.S. Census Bureau currently estimates that the Arab American population is 1.5 million.¹⁵ However, this figure is believed to be far smaller than the actual population of Arab Americans. The Arab American Institute's (AAI) internal polling estimates the population of Arab Americans to be more than two times the size of the Census Bureau figure, at 3,665,789.¹⁶ Hassan Jaber, Executive Director of the Arab Community Center for Economic and Social Services (ACCESS)—the premier Arab American social services organization in the United States—estimates that the "true number might be closer to almost 6 million."¹⁷ While profiled as pariah and policed as threat, this population is legally classified as white.

The law has designated Arab Americans as white for seventy-one years. The proposed MENA box would materially reform the per se classification and conception of Arab American identity. First, the proposal would redact

14. See generally William Seltzer & Margo Anderson, *The Dark Side of Numbers: The Role of Population Data Systems in Human Rights Abuses*, 68 SOC. RES. 481 (2001).

15. MARYAM ASI & DANIEL BEAULIEU, UNITED STATES CENSUS BUREAU, ARAB HOUSEHOLDS IN THE UNITED STATES: 2006–2010, 1 (2013), <http://www.census.gov/prod/2013pubs/acsbr10-20.pdf> [<http://perma.cc/GGX6-BUVH>]. The Arab Households Survey estimates that, as of 2010, the United States was home to 500,000 Arab American households. *Id.* at 2.

16. ARAB AM. INST. FOUND., NAT'L ARAB AM. DEMOGRAPHICS (2012), http://b3cdn.net/aai/44b17815d8b386bf16_v0m6iv4b5.pdf [<http://perma.cc/26AH-E5N2>] ("The population who identified as having Arabic-speaking ancestry in the U.S. Census grew by more than 72% between 2000 and 2010.").

17. Haya El Nasser, *Arabs, Hispanics Seeking Better U.S. Census Recognition*, AL JAZEERA AMERICA (Dec. 17, 2013, 2:00 PM) <http://america.aljazeera.com/articles/2013/12/17/arabs-hispanics-seekingbetteruscensusrecognition.html> [<http://perma.cc/XX5K-CMTU>].

“Middle East and North Africa” from the preexisting White category.¹⁸ Second, it would shift these geographic designations into a standalone MENA American category, as one of eight options an applicant may choose from while filling out the 2020 U.S. Census.¹⁹

Third, the proposed MENA American designation, like its seven counterparts, would be supplemented with a fillable box, allowing the applicant to “print specific ethnicities” that fall within the broader (racial or ethnic) classification.²⁰ This would allow applicants to identify along new ethnic or racial terms, and in addition, specify which subgroup or nationality they belong to. Therefore, Arab American applicants would be able to write in “Arab American” or “Moroccan American,” for instance, into the fillable box, thereby articulating their identities in the fashion and form they see fit, in addition to identifying broadly as MENA American.

II. A MOMENT OF RACIAL PROGRESS OR RISING PERIL?

“Why now?” is a question surrounding the timing of the proposed reform. Arab Americans have lobbied for a distinct racial, or ancestral, classification since the 1980s.²¹ Deemed “one of the grand prizes in the politics of identity,” Arab American communities, organizations, and stakeholders have long striven for the existential, political, legal, and economic benefits that a standalone box on the U.S. Census form would bring.²² Previous reform and reclassification efforts, however, were denied by the Census Bureau, which reaffirmed the administrative position that Arab Americans were white. These earlier attempts at reform indicate that, during that time, government interest in maintaining Arab Americans as “white by law” conflicted with community efforts for reform and reclassification.²³

18. U.S. CENSUS BUREAU, 2015 NATIONAL CONTENT TEST OPERATIONS UPDATE: PREPARATIONS FOR THE 2020 CENSUS 15 (2014), https://www.census.gov/content/dam/Census/newsroom/press-kits/2014/20141006_2020opbrief_slides.pdf [<http://perma.cc/87BM-6523>].

19. *Id.* at 17. The other seven options would include White; Hispanic, Latino or Spanish origin; Black or African American; Asian; American Indian or Alaska Native; Native Hawaiian or Other Pacific Islander; some other race or ethnicity. An applicant is not limited to selecting just one box but may select all of those that apply to her identity.

20. *Id.* at 17. The current proposed language posits: “Print specific ethnicities, for example, Lebanese, Iranian, Egyptian, Syrian, Moroccan, Algerian, etc.”

21. Randa Kayyali, *U.S. Census Classifications and Arab Americans: Contestations and Definition of Identity Markers*, 38 J. ETHNIC & MIGRATION STUD. 1299, 1304–07 (2013).

22. Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701 (2003).

23. See generally LOPEZ, *supra* note 2.

But closer cooperation between Arab American stakeholders and the Census Bureau in recent years signals a prospective “interest convergence” between a once misaligned community and government aims.²⁴ Beginning in 2013, the Census Bureau and Arab American groups renewed discussions, resulting in tentative acceptance and ongoing testing for the standalone MENA American category.²⁵ This momentum reflects shifting state interests that point toward the likely adoption of the MENA American box on the 2020 U.S. Census form.²⁶

Momentum toward the legal reclassification of Arab American intersects with expansion of the state’s antiterrorism surveillance, prevention,²⁷ and policing capacities. President Obama’s administration enhanced government suspicion of Arab, MENA, and Muslim Americans—communities that often but not always overlap. The National Security Administration (NSA) carried forward its surveillance powers,²⁸ and pilot CVE programs extended federal policing tools to local law enforcement in Boston, Minneapolis, and Los Angeles in 2014—to be followed by additional cities in the coming years.²⁹

The Suspicious Activity Reporting (SAR)³⁰ and CVE programs not only supplement NSA surveillance steered by the Department of Homeland

24. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 525–26 (1980). See SpearIt, *Economic Interest Convergence in Downsizing Imprisonment*, 75 U. PITT. L. REV. 2 (2014), for a succinct summary of interest convergence theory: “At its core, the theory suggests that understanding African-American advancement in the United States is inextricable from analysis of the value to Whites . . . Bell argues that Black advancement is a by-product of advancing White interests.” *Id.*

25. Testing and discussion about the structure, language, and scope of the proposed MENA American was still very fluid at the time this Essay was drafted.

26. Jens Manuel Krogstad, *Census Bureau Explores New Middle East/North Africa Ethnic Category*, PEW RESEARCH CENTER (Mar. 24, 2014), <http://www.pewresearch.org/fact-tank/2014/03/24/census-bureau-explores-new-middle-eastnorth-africa-ethnic-category/> [<http://perma.cc/BX49-4X68>].

27. As articulated by Akbar, “the preventative framework—where the government aims to prevent future terrorism—now defines the counterterrorism programs at home and abroad.” Akbar, *supra* note 11, at 810.

28. See Shayana Kadidal, *NSA Surveillance: The Implication for Civil Liberties*, 10 ISJLP 433 (2014).

29. Akbar, *supra* note 11, at 845–68 (examining the new radicalization policing tactics used by federal and local law enforcement).

30. “The Nationwide Suspicious Activity Reporting (SAR) Initiative (NSI) is a joint collaborative effort by the U.S. Department of Homeland Security, the Federal Bureau of Investigation, and state, local, tribal, and territorial law enforcement partners. This initiative provides law enforcement with another tool to help prevent terrorism and other related criminal activity by establishing a national capacity for gathering, documenting, processing, analyzing, and sharing SAR information.” NATIONWIDE SAR INITIATIVE,

Security (DHS), but those programs also expand the national security policing paradigm from a centralized DHS-steered model, to a community, local law enforcement-based approach.³¹ The MENA American box, if adopted, would enable the collection and compilation of precise and comprehensive demographical data about Arab Americans—communities acutely associated with radicalization and terrorism. If availed to DHS and local law enforcement, this data would intensify and expand the functional reach of antiterror surveillance and policing and, in turn, may further erode the civil liberties of Arab Americans.

Broadly perceived as a moment of racial progress, per se recognition and reform of MENA American identity must be examined within today's context of rising state suspicion, broadening surveillance, and emerging CVE programming.³² Upon closer inspection, the degree of progress spurred by the MENA American box may be mitigated by the prospective perils posed by it. In short, the MENA American classification may be a step forward with regard to extinguishing the per se erasure of Arab Americans,³³ but simultaneously, it is a step backward with respect to community surveillance, profiling, and policing.

III. DARK PRECEDENTS: THE USE OF CENSUS DATA TO PROFILE AND POLICE

Precedent establishes that the Census Bureau is likely to share statistical data with other government agencies, including DHS. The most vivid example is the Census Bureau's sharing of demographic data about Japanese Americans on the West Coast with the U.S. military, following Japan's bombing of Pearl Harbor on December 7, 1941. To carry forward the forced

<http://nsi.ncirc.gov/?AspxAutoDetectCookieSupport=1> [<http://perma.cc/UT3W-BB6X>] (last visited Apr. 2, 2015).

31. The post-9/11 collaboration by the FBI, Department of Justice and New York Police Department (NYPD) focusing on preventing terrorism spearheaded the new surveillance and policing model. See DEP'T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 11 (2006), <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf> [<http://perma.cc/774B-TVLB>]. The NYPD's Intelligence Division published a 2007 report, widely considered the most comprehensive report on CVE published by a police department. See MITCHELL D. SILBER & ARVIN BHATT, NYPD INTELLIGENCE DIV., RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT (2007), http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf [<http://perma.cc/9LD7-2GHB>].

32. Khaled A. Beydoun, *Boxed in or Boxed Out? The Proposed Middle-Eastern American Box to the 2020 U.S. Census*, RACE & L. PROF. BLOG (Mar. 27, 2015), <http://lawprofessors.typepad.com/racelawprof/2015/03/boxed-in-or-out-the-proposed-middle-eastern-american-box-to-the-2020-us-census.html> [<http://perma.cc/8Z67-4J6A>].

33. See generally Mezey, *supra* note 22.

migration and internment of Japanese Americans, the Census Bureau shared both macrodata and “mesodata” with the military.³⁴

“[T]he precedent and prospect of internment looms strong” in the minds of Arab Americans still today.³⁵ The intergovernmental sharing of Census data—particularly following the prospective adoption of the MENA American category—poses a range of immediate civil liberties concerns for Arab Americans, particularly after moments of national crisis, in which national security and the executive’s war power will set aside legal restrictions against disclosure of confidential data.³⁶

A more recent precedent involving Arab Americans also foreshadows potential misuse of demographic data collected through the MENA American box. Only three years after the 9/11 terrorist attacks, DHS’s possession of privileged Arab American Census data signaled the possibility that the agency used the data in connection to further Terror Surveillance Program (TSP) policing. In July 30, 2004, a *New York Times* exposé revealed that the Census Bureau, “[p]rovided specially tabulated population statistics on Arab-Americans to the Department of Homeland Security, including detailed information on how many people of Arab backgrounds live in certain ZIP codes.”³⁷ Census Bureau officials shared this data with Customs and Border Protection (CBP), the agency responsible for monitoring the United States’ border checkpoints.³⁸

The first tabulation shared with CBP outlined the specific number of Arab Americans in 159 American cities with “1,000 or more persons of Arab

34. This set of data provides “statistical results presented at such a fine level of geographic disaggregation, whether in tabular or graphic form, that the result may be used in conducting field operations at the local level.” Seltzer & Anderson, *supra* note 14, at 485–86.

35. Khaled A. Beydoun, *Fred Korematsu: An Unsung “Muslim American” Civil Rights Hero*, THE ISLAMIC MONTHLY (Feb. 2, 2015, 12:05 PM), <http://theislamicmonthly.com/fred-korematsu-an-unsung-muslim-american-civil-rights-hero/> [<http://perma.cc/5VY5-WHD5>].

36. *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944) ([W]e are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.”).

37. Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, N.Y. TIMES (July 30, 2004), <http://www.nytimes.com/2004/07/30/politics/30census.html> [<http://perma.cc/7YRC-M558>].

38. U.S. CENSUS BUREAU, FREEDOM OF INFORMATION DOCUMENTS ON THE CENSUS, DEPARTMENT OF HOMELAND SECURITY OBTAINED ON ARAB AMERICAN FROM CENSUS BUREAU, <https://epic.org/privacy/census/foia/> [<http://perma.cc/3ANN-2YYE>] (last visited Aug. 30, 2015). See also Eric Lipton, *Panel Says Census Move on Arab-Americans Recalls World War II Internments*, N.Y. TIMES (Nov. 10, 2004), <http://www.nytimes.com/2004/11/10/politics/10census.html> [<http://perma.cc/R63M-DGSL>], for a discussion of the U.S. Census Bureau’s sharing of internal Arab American demographic data with DHS in 2004.

ancestry.”³⁹ The second tabulation broke down the Arab American population in over 500 zip codes by seven nationalities (Egyptian, Iraqi, Jordanian, Lebanese, Moroccan, Palestinian, and Syrian).⁴⁰

Indeed, the past sharing of confidential Arab American demographic data signals the likelihood that the same will happen if the proposed MENA American box is adopted in 2020. This possibility is made far more dangerous in light of the escalating and expanding War on Terror, and disproportionate suspicion and policing of Arab Americans.

CONCLUSION

Deemed white by law since 1944,⁴¹ Arab Americans may have the unprecedented opportunity to identify as MENA American and nonwhite on the 2020 U.S. Census. While touted as a moment of racial progress, the timing of the proposed 2020 Census Reform also raises serious concerns. This Essay unveils the converging government interest in establishing a standalone MENA American box, which, if implemented, will augment the precision of government surveillance and monitoring programs and further erode Arab American civil liberties.

With fewer than five years before the next Census, Arab Americans find themselves interlocked in another dilemma—the range of patent benefits attached to the proposed MENA American box and the latent dangers it is likely to pose. For a population *boxed out* for decades, closer scrutiny reveals that being *boxed in* may be an even more perilous position.

39. U.S. CENSUS BUREAU, PLACES WITH 10,000 OR MORE POPULATION AND WITH 1,000 OR MORE PERSONS OF ARAB ANCESTRY: 2000, https://epic.org/privacy/census/foia/tab_1.pdf [<http://perma.cc/N3XK-SB9S>] (last visited Aug. 30, 2015).

40. U.S. CENSUS BUREAU, PEOPLE OF ARAB ANCESTRY BY ZIP CODE TABULATION AREA: 2000, https://epic.org/privacy/census/foia/tab_2.pdf [<http://perma.cc/EFS3-TXLM>] (last visited Aug. 30, 2015).

41. Beydoun, *supra* note 6, at 66.