

THE QUIET SKIES PROGRAM: A CONSTITUTIONAL VIOLATION OR A
MATTER OF NATIONAL SECURITY?

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I. INTRODUCTION

The Transportation Security Administration (TSA) was developed in response to the September 11th terrorist attacks when then-President Bush signed the Aviation and Transportation Security Act.¹ The Act required TSA to oversee security in all forms of transportation.² Since then TSA has evolved in response to various terrorist threats that have occurred.³ For example, in March 2010, TSA formally installed hundreds of “full-body scanners” to detect non-metallic weapons explosives that could be concealed under layers of clothing.⁴ This installation was in response to the “Underwear Bomber,” who was a member of Al-Qaeda attempting to detonate an explosive concealed in his underwear in December 2009.⁵

In March 2017, under the Trump Administration, TSA implemented new procedures for screening measures at overseas airports for passengers who have flights to the United States.⁶ Those additional measures include heightened screenings of personal electronic devices, expanded canine screenings, additional preclearance locations, increased security protocols around aircraft, and passenger areas and deployment of advanced technology.⁷ In July 2017, those enhanced screening measures were implemented on domestic flights. TSA began employing newer and stronger domestic screening procedures for carry-on items, requiring travelers to place all electronics larger than a cell phone in bins for X-ray screening.⁸

After 9/11, individuals of Middle Eastern descent, particularly Muslims, experienced targeted racial and ethnic profiling by newly-empowered TSA agents who had little to no

¹ *Transportation Security Timeline*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/timeline> (last visited July 2017) [hereinafter *Timeline*].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Timeline*, *supra* note 1.

⁷ *Id.*

⁸ *Id.*

oversight.⁹ The agents were advised to secure the United States airports and flights in the wake of the terrorist attacks but there was an absence of systematic oversight over those agents,¹⁰ Muslims who chose to question the validity of the searches and seizures were looked at as causing a disturbance or “being uncooperative.”¹¹ Today, there appears to be a resurgence of Islamophobia in relation to air travel.

Throughout President Trump’s campaign for presidency he referred to what he now calls the “Travel Ban” as a “Muslim Ban,”¹² and on September 24, 2017, President Trump signed the final version of his travel ban after struggling to do so due to disapproval within courts and the public over his first two versions.¹³ The Supreme Court of the United States upheld the ban in a 5-4 ruling, blocking travel to the United States from six predominantly Muslim countries and North Korea. Additionally, it prohibited certain Venezuelan government officials from entering the United States.¹⁴

A further evolution of TSA security is a controversial surveillance program called “The Quiet Skies Program.”¹⁵ The current state of the program requires federal air marshals to follow selected travelers and report observed behavior if it is “suspicious.”¹⁶ However, the program provides no guidance on what merits “suspicious” behavior, giving the air marshals broad discretion which has led to constitutional challenges.¹⁷ The broad discretion and potential for variation among the air marshals could prove to be problematic. The subjective nature of the monitoring could lead to racial and ethnic profiling.

⁹ Iqbal Akhtar, *Race and Religion in the Political Problematization of the American Muslim*, 44 PS: POL. SCI. & POL., 768, 770 (2011).

¹⁰ *Id.*

¹¹ *Id.*

¹² Amrit Cheng, *Trump’s Lawyers Say the Muslim Ban Has No Bias, But His Tweets Show Otherwise*, AM. CIV. LIBERTIES UNION (Nov. 30, 2017, 3:00 PM), <https://www.aclu.org/blog/immigrants-rights/trumps-lawyers-say-muslim-ban-has-no-bias-his-tweets-show-otherwise>.

¹³ *Timeline of the Muslim Ban*, AM. CIV. LIBERTIES UNION OF WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> (last visited June 26, 2018).

¹⁴ *Id.*

¹⁵ Jana Winter, *Welcome to the Quiet Skies*, BOS. GLOBE (July 28, 2018), <http://apps.bostonglobe.com/news/nation/graphics/2018/07/tsa-quiet-skies/>.

¹⁶ Jana Winter & Jenn Abelson, *TSA Says It No Longer Tracks Regular Travelers As If They May Be Terrorists*, BOS. GLOBE (Dec. 15, 2018, 8:08 AM), <https://www.bostonglobe.com/news/nation/2018/12/15/curtains-quiet-skies-passenger-surveillance/2lRAv2AwjGpUcgq08mHaPM/story.html>.

¹⁷ *Id.*

This note will discuss the First Amendment challenges to the selection of the travelers to be monitored under the Quiet Skies Program. TSA stated that the individuals are chosen based on an analysis of terrorist travel trends, trade and associations, and if those individuals share similar trends.¹⁸ The trends do not necessarily have to be similar to known terrorists; they could be similar to a suspected terrorist or an individual “affiliated” with someone on a watchlist.¹⁹

The note will also discuss the Fourth Amendment and whether the premise underlying the Quiet Skies program, surveilling individuals who have not committed a crime with no probable cause and no warrant, is a violation of the Fourth Amendment. The Fourth Amendment protects against unreasonable searches and seizures and requires that all searches and seizures that are supported by a warrant are based on probable cause.²⁰ In order to be consistent with the Fourth Amendment, the federal air marshals must have probable cause to surveil travelers for suspicious behavior.

There are exceptions to the Fourth Amendment’s requirement for probable cause to engage in a search. This note will discuss whether any of those exceptions can apply under the Quiet Skies program. The first exception is whether the program could be looked at under the Terry “stop and frisk” exception. This allows an officer to engage in a “stop and frisk” administrative search of an individual for an assault weapon without probable cause, if the officer has reasonable suspicion that the individual possesses a weapon.²¹ Next, the Fourth Amendment allows for an exception for exigent circumstances. Securing the airways for domestic and international fliers could potentially be looked at as exigent circumstances. Examples of the exigent circumstances exception include when there is a danger to others or the officer²², the automobile exception²³, and when there is a potential for the destruction of evidence.²⁴

This note will next discuss the potential Fifth Amendment violations that have occurred under the Quiet Skies Program. The

¹⁸ Winter, *supra* note 15.

¹⁹ *Id.*

²⁰ U.S. CONST. amend. IV.

²¹ Terry v. Ohio, 392 U.S. 1, 30 (1968).

²² Welsh v. Wisconsin, 466 U.S. 740, 753 (1984).

²³ California v. Acevedo, 500 U.S. 565, 573 (1991).

²⁴ United States v. Banks, 540 U.S. 31, 38 (2003).

Fifth Amendment's Due Process Clause states no citizen shall be "deprived of life, liberty or property without due process of law."²⁵ It requires that the United States government equally protect the rights of every citizen. Under the Quiet Skies program, the majority of travelers selected to be monitored by the air marshals have the following characteristics: a national origin from Muslim-majority countries, their ethnicities are either Arab or Middle Eastern, they travel to Muslim-majority countries, they know or are learning Arabic, they attend mosques, they wear typical Muslim dress, they engage in Muslim prayer, they have affiliations with Muslim associations, and they have made donations to Muslim charities.²⁶ If those factors are the reasons those travelers are being selected for enhanced surveillance, those United States citizens are being subjected to treatment as second-class citizens, violating the Fifth Amendment's Equal Protection Clause.

Lastly, this note will discuss the deference given to the Executive Branch in matters of national security and immigration. The level of deference with regards to those issues may make it so the Quiet Skies program is legal because it is a matter of national security, and because the Executive is doing his job of protecting the United States from outside threats.

II. RESURGENCE OF ISLAMOPHOBIA DURING DONALD TRUMP'S 2016 PRESIDENTIAL CAMPAIGN

During President Donald Trump's campaign for presidency, he used his platform to legitimize an anti-Islamic rhetoric which gave rise to a resurgence of Islamophobia.²⁷ Then-candidate Trump frequently called for a ban on Muslims entering the United States. After the San Bernardino terrorist attack, he called for a "total and complete shutdown" of the country's borders to Muslims.²⁸ In his statement released to the press after the attack, he said there was such a strong hatred among Muslims around the world towards Americans that a shutdown of the borders to Muslims was necessary until the problem was better understood, and that

²⁵ U.S. CONST. amend. V.

²⁶ Complaint for Injunctive and Declaratory Relief and Damages at 136, *el Ali v. Sessions*, (D.Md. 2018) (No. 8:18-cv-02415-PX).

²⁷ Dale Sprusansky, *Identifying and Rectifying the Root Causes of Islamophobia*, THE WASH. REP. ON MIDDLE EASTERN AFF., June/July 2017, at 51.

²⁸ Ed Pilkington, *Donald Trump: Ban all Muslims Entering US*, THE GUARDIAN (Dec. 7, 2015, 7:27 PM), <https://www.theguardian.com/us-news/2015/dec/07/donald-trump-ban-all-muslims-entering-us-san-bernardino-shooting>.

America “cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life.”²⁹

Prior to the San Bernardino attack in December 2015, Paris was attacked in November 2015 by members of ISIS, who killed at least one-hundred and thirty innocent individuals.³⁰ Candidate Trump responded to these attacks by calling for heavy surveillance of mosques within the United States and the shutdown of some as well.³¹ He stated that he “would hate to do it, but it’s something that you’re going to have to strongly consider because some of the ideas and some of the hatred – the absolute hatred is coming from these areas [the mosques].”³² He went on to say how the hatred is embedded in the religion and said the “hatred is beyond belief. The hatred is greater than anybody understands . . . And . . . it’s not like, what, you think that they think we’re great people? It’s already there. It’s a very, very sad situation.”³³

Candidate Trump surrounded himself with individuals who supported his anti-Islamic rhetoric, including the CEO of his campaign and later White House Chief Strategist Steve Bannon, Attorney General Jeff Sessions, the CIA Director Mike Pompeo, and National Security Advisor Michael Flynn.³⁴ Michael Flynn described Islam as a “political ideology” hiding behind a notion that it is a religion.³⁵ Flynn has compared Islam to “a malignant cancer” and tweeted that a fear of Muslims is a “rational” fear to have.³⁶ Steve Bannon stated that Islam is “the most radical religion in the world” and that practicing members have created “a fifth column here in the United States.”³⁷ A fifth column is “a group of secret

²⁹ *Id.*

³⁰ *Paris Victims Remembered*, N.Y. TIMES (Nov. 20, 2015), <https://www.nytimes.com/interactive/2015/11/20/world/europe/Paris-terror-victims-list.html>.

³¹ Jenna Johnson, *Donald Trump Would ‘Strongly Consider’ Closing Some Mosques in the United States*, WASH. POST (Nov. 16, 2015, 10:04 AM), https://www.washingtonpost.com/news/post-politics/wp/2015/11/16/donald-trump-would-strongly-consider-closing-some-mosques-in-the-united-states/?utm_term=.65129df5da89.

³² *Id.*

³³ *Id.*

³⁴ See Sprusansky, *supra* note 27, at 51; Anthony Zurcher, *What Trump Team Has Said About Islam*, BBC NEWS (Feb. 7, 2017), <https://www.bbc.com/news/world-us-canada-38886496>.

³⁵ Zurcher, *supra* note 34.

³⁶ *Id.*

³⁷ *Id.*

sympathizers or supporters of an enemy that engage in espionage or sabotage within defense lines or national borders.”³⁸ Jeff Sessions described part of Islam as being “a toxic ideology” and noting that the toxic ideology was “hopefully very small within Islam” but stated that the Administration needed to identify a way to figure out which Muslims identify with the violent jihadist approach.³⁹

When Mike Pompeo was announced as Rex Tillerson’s replacement as CIA Director, there was backlash due to Pompeo’s ties to individuals and groups that promote a worldview considering Islam to be a political ideology rather than a religion seeking to infiltrate the United States and other Western countries and impose Shariah law.⁴⁰ When Pompeo was a congressman, he arranged for a group called Act for America (ACT) to speak on Capitol Hill.⁴¹ ACT protests the construction of mosques and textbooks that include information about Islam, and it promotes “anti-Shariah” bills in state legislatures.⁴² ACT’s founder states that “the purest form of Islam” is behind the terrorist attacks, not “radical Islam. It’s what Islam is at its core.”⁴³ President Trump was surrounded by “yes-men” who supported his ideology of anti-Islam and encouraged policies that promoted measures to be taken accordingly, including increasing border control through the implementation of the Quiet Skies program.

When candidate Trump became President Trump, his anti-Muslim rhetoric became less harsh and his promise for a “Muslim ban” evolved into a “travel ban” that he had to propose three times before it successfully passed. The upheld travel ban placed travel restrictions on Iran, Libya, Syria, Yemen, Somalia, North Korea, and Venezuela.⁴⁴ Chief Justice John Roberts wrote for the majority and stated that President Trump had broad statutory authority to make national security judgments in the sphere of immigration.⁴⁵

³⁸ *Fifth Column*, MERRIAM-WEBSTER ONLINE DICTIONARY (2019), <https://www.merriam-webster.com/dictionary/fifth%20column>.

³⁹ Zurcher, *supra* note 34.

⁴⁰ Laurie Goodstein, *Pompeo and Bolton Appointments Raise Alarm Over Ties to Anti-Islam Groups*, N.Y. TIMES (Apr. 6, 2018), <https://www.nytimes.com/2018/04/06/us/pompeo-bolton-muslims.html>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Trump v. Hawaii*, 138 S. Ct. 2392, 2405-06 (2018).

⁴⁵ *Id.* at 2407-08.

III. ISLAMOPHOBIA IN THE AIRPORT

Muslim-Americans are subject to excessive searches by TSA agents whether they are discreetly placed on the Quiet Skies watchlist or explicitly given the label of a potential terrorist. Muslim travelers report that they are being stopped for a highly-invasive secondary inspection search nearly three times as often as other Americans while traveling.⁴⁶ Thirty percent of Muslim travelers report to being subjected to secondary screenings, including having their electronic devices searched, compared to twelve percent of other travelers.⁴⁷

a. Rejhane Lazoja

Rejhane Lazoja filed a Complaint in the United States District Court for the District of New Jersey on August 23, 2018 for the treatment she received at Newark Liberty International Airport.⁴⁸ Upon her arrival she was questioned, searched, and taken to a small, windowless room.⁴⁹ Her cellphone was seized and it contained images of her without her headscarf. According to her religious beliefs, such images could not be seen by men who were not family.⁵⁰ U.S. Customs and Border Protection agents returned her cell phone 130 days after it was seized, but they still possessed all of the electronic data on her cell phone when the Complaint was filed, which was over 150 days after her encounter at the Newark Liberty International Airport.⁵¹ The Complaint alleged that the agents never articulated a reasonable suspicion for seizing the cell phone, nor did they state a reason for probable cause, or produce a warrant to search or seize her phone or personal data.⁵²

On October 31, 2018, the Magistrate Judge held that the Government was to delete “any copies of Plaintiff’s data in its possession.”⁵³ Lazoja’s attorneys were obviously pleased with the

⁴⁶ Naaz Modan, *CAIR-NY, CAIR-NJ Settle Challenge to Trump Administration’s ‘Digital Muslim Ban’ Cellphone Seizure*, COUNCIL ON AM. ISLAMIC REL. (Oct. 31, 2018), https://www.cair.com/press_releases?page=2.

⁴⁷ *Id.*

⁴⁸ Plaintiff’s Brief in Support of Motion for Return of Property Under Federal Rule of Criminal Procedure 41(g) at 1, *Lazoja v. Nielsen*, (D.N.J. Aug. 23, 2018) (No. 2:18-cv-13113).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 2.

⁵² *Id.*

⁵³ Stipulation of Dismissal with Prejudice, *Lazoja v. Nielsen*, (D.N.J. Oct. 31, 2018) (No. 2:18-cv-13113-SDW-LDW).

outcome and said the “settlement brings us one step closer to the day when Americans can travel with the peace of mind that our rights will be respected.”⁵⁴ They described Ms. Lazoja’s case as a novel case because it was the “first in the country to secure the deletion of illegally seized data” and said that her case “sets a precedent whereby in the future, if there’s a case where a phone is taken and data is copied, we can bring this type of motion.”⁵⁵

U.S. Customs and Border Protection (CBP) says the purpose for reviewing the information on the electronic devices of travelers is to:

“help detect evidence relating to terrorism and other national security matters. . . . They can be vital to risk assessments that otherwise may be predicated on limited or no advance information about a given traveler or item, and they can enhance critical information sharing with, and feedback from, elements of the federal government responsible for analyzing terrorist threat information.”⁵⁶

During the 2017 fiscal year, the CBP searched 30,200 devices, which was an approximately 60% increase from the previous fiscal year, where they searched 19,051 electronic devices.⁵⁷ If the phone is protected by a password, like Ms. Lazoja’s, the Officer cannot force her to unlock it but can “detain the device pending a determination as to its admissibility, exclusion, or other disposition.”⁵⁸ The directive says that if after reviewing the copied information on the electronic device “there exists no probable cause to seize the information,” then the “CBP will retain no copies of the information.”⁵⁹

Ms. Lazoja had to fight to ensure that no copies of her information were retained to protect her privacy. However, her fight

⁵⁴ Hannan Adely, *Civil Rights Win: Feds Delete Data Taken from Phone Seized at Newark Airport*, APP. (Oct. 31, 2018, 9:55 PM), <https://www.app.com/story/news/local/culture/2018/10/31/customs-and-border-patrol-delete-data-newark-airport-iphone-seizure-case-civil-rights-win/1841173002/>.

⁵⁵ *Id.*

⁵⁶ U.S. CUSTOMS AND BORDER PROTECTION, CBP DIRECTIVE NO. 3340-049A, BORDER SEARCH OF ELECTRONIC DEVICES, at 1 (Jan. 4, 2018).

⁵⁷ Adely, *supra* note 54.

⁵⁸ U.S. CUSTOMS AND BORDER PROTECTION, *supra* note 56, at 6.

⁵⁹ *Id.* at 10.

has set a precedent that other individuals can use to prevent CBP agents from holding onto their information in the future.

b. Zainab Merchant

Ms. Zainab Merchant, a U.S. citizen, is a graduate student in international security and journalism at Harvard University.⁶⁰ She is the founder and editor of *Zrights Studios*, a multimedia site that posts about current affairs, politics, and culture.⁶¹ She is also the mother of three young children.⁶² A letter from the American Civil Liberties Union (ACLU) to the Department of Homeland Security (DHS) on behalf of Ms. Merchant describes how Ms. Merchant has been subjected to invasive searches, questioning, and detention by the TSA and CBP every time she has traveled since September 2016, which has raised serious constitutional questions.⁶³

In both September and December of 2016, Ms. Merchant was subjected to extensive pat-downs and questioning that lasted hours by agents and took place in a separate room.⁶⁴ In September, the officers detaining her told her she and her family were permitted to leave because the officers received the call from Washington D.C. that they were waiting for..⁶⁵ In March of 2017, Ms. Merchant was questioned directly about her Muslim faith, and was asked if she supported ISIS or if she was aware of anyone who did.⁶⁶ She replied she did not and that if she knew of anyone who did she would of course report it to the police.⁶⁷ After being allowed to leave the inspection area, Ms. Merchant then reached her boarding gate where she was subjected to another pat-down before being allowed to board her flight.⁶⁸ Ms. Merchant had a layover in Newark and officers were waiting for her there. The officers checked her boarding pass and told her she would have to go through security all over again, causing her to miss her flight because it took over an

⁶⁰ Letter from Hugh Handeyside, Senior Staff Attorney, American Civil Liberties Union Foundation, to John V. Kelly, Acting Inspector Gen., Dep't of Homeland Security (Aug. 14, 2018) (on file with author).

⁶¹ *Id.* at 1.

⁶² *Id.* at 1-2.

⁶³ *Id.*

⁶⁴ *Id.* at 2-3.

⁶⁵ Handeyside, *supra* note 60.

⁶⁶ *Id.* at 3.

⁶⁷ *Id.*

⁶⁸ *Id.* at 4.

hour.⁶⁹ In July of 2017, Ms. Merchant's laptop was seized for approximately thirty minutes.⁷⁰

On March 3, 2018, Ms. Merchant was traveling from Boston to Washington, D.C. for a speaking engagement. At Boston Logan airport she endured a particularly intrusive search.⁷¹ When she reached security, a female TSA officer asked, "Is this the selectee we were waiting for?"⁷² It hasn't been determined how the TSA officer knew Ms. Merchant was the traveler they were "waiting for." One of the TSA officers decided they wanted to take a "deeper look" at Ms. Merchant's groin area so they told Ms. Merchant they would need to conduct a private screening.⁷³ Ms. Merchant wanted to call in her attorney, and the TSA officers called in state troopers, stating that she was "resisting a private screening."⁷⁴ Ms. Merchant replied she was not resisting but wanted to know why the private screening was necessary.⁷⁵ Ms. Merchant said she felt she had no choice but to endure the private screening. She was led inside a room where the officer pat down her groin area prior to asking Ms. Merchant to open her pants.⁷⁶ She was horrified but did so, revealing a menstrual pad.⁷⁷ When the private screening was completed, Ms. Merchant tried to get the officer's name, but he covered his badge.⁷⁸ She eventually learned his name through another TSA officer.⁷⁹ The letter states that "Ms. Merchant has engaged in no illegal activity or conduct that could reasonably be interpreted as threatening to the security of the United States" and that she continues to request an explanation for why she is being subject to such treatment but receives little to no answers.⁸⁰

Ms. Merchant wrote "Am I being stopped because I am Muslim, or because my family once traveled to Iran to visit a holy shrine? Is it because of my criticism of U.S. policies on the multimedia website I run to raise awareness about injustices

⁶⁹ *Id.*

⁷⁰ Handeyside, *supra* note 60, at 4.

⁷¹ *Id.* at 5.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 5.

⁷⁵ Handeyside, *supra* note 60, at 5.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Handeyside, *supra* note 60, at 6.

around the world? Maybe it's all three.”⁸¹ It is unclear why Ms. Merchant is being subjected to excessive searches every time she visits the airport, including at both the TSA security checkpoint and the boarding gate. She has tried using the Department of Homeland Security's “redress” process to seek answers for these situations. Additionally, she has applied to TSA's PreCheck program, and the U.S. Customs and Border Protection's Global Entry program.⁸² She's even written to members of Congress, but all of her efforts in finding answers to why she has been targeted have failed.⁸³

The Quiet Skies Program has subjected predominantly Muslim-Americans to intrusive monitoring, and searches and seizures. In March 2018, the already-existing but, relatively speaking, minimally-invasive Quiet Skies program was enhanced in terms of the level of monitoring required from the federal air marshals.⁸⁴

IV. INVASIVENESS OF THE ORIGINAL QUIET SKIES PROGRAM

On July 28, 2018, the Boston Globe published an article uncovering the TSA's secret program that required extensive monitoring of domestic fliers who are not on any terrorist watchlist and are not suspected of any crimes.⁸⁵ The federal air marshals observe a fliers' behavior for any signs of fidgeting, use of computers, or if they have a “cold penetrating stare.”⁸⁶ Since the terrorist attacks on September 11th, federal air marshals have tracked subjects of the Federal Bureau of Investigations (FBI) and reported the information they obtained back to the FBI. However, the surveillance done under the Quiet Skies program is kept within the Quiet Skies program.⁸⁷ The only time information is shared with

⁸¹ Zainab Merchant, *The TSA Searches Me Every Time I Travel. I Think I Know Why.*, WASH. POST (Aug. 14, 2018, 5:29 PM), https://www.washingtonpost.com/opinions/i-may-have-to-quit-harvard--because-the-tsa-wont-stop-searching-me/2018/08/14/0dbdbb72-9a55-11e8-b55e-5002300ef004_story.html?utm_term=.b55b6108e93a.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Winter, *supra* note 16.

⁸⁵ Winter, *supra* note 15.

⁸⁶ Jana Winter, *TSA Admits 'Quiet Skies' Surveillance Snared Zero Threats*, BOS. GLOBE (Aug. 2, 2018, 9:25 PM), <https://www.bostonglobe.com/metro/2018/08/02/tsa-says-quiet-skies-surveillance-snared-zero-threats/dsCm4BG3pq8v3xhi01zhLI/story.html>.

⁸⁷ *Id.*

an outside law enforcement agency is if the air marshals observe “significant derogatory information.”⁸⁸

TSA launched the Quiet Skies initiative in 2012, but its efforts were dramatically increased in March 2018 when domestic fliers were included in the list of individuals to be monitored by federal air marshals.⁸⁹ According to an agency bulletin posted in May, the purpose of the Quiet Skies program is to “reduce the risk that unknown violent extremists pose to commercial aviation.”⁹⁰

Federal air marshals rely on fifteen rules to screen travelers to be selected to be surveilled under the Quiet Skies program. Part of the criteria include targeting individuals whose travel patterns or behaviors are similar to those of known or suspected terrorists, or people “possibly affiliated” with an individual on a watch list.⁹¹ After the individuals are chosen, the air marshals receive files on them containing their photographs and personal information.⁹² After receiving those files, the air marshals follow selected individuals on subsequent flights to see if those suspicions due to specific behaviors and travel patterns⁹³ are justified. The tracking includes taking notes on the flier’s behavior, such as whether the individual uses a phone, goes to the bathroom, chats with others, or changes clothes.⁹⁴ Other noted behaviors include facial flushing, strong body odor, exaggerated emotions, “Adam’s apple jump,” and more.⁹⁵

The air marshals also collect information on whether the “subject was abnormally aware of surroundings,” whether the traveler reversed or changed directions, boarded last, or observed the boarding gate area from afar.⁹⁶ The air marshals were to note if the traveler lost or gained weight, if he or she was balding or graying, if his or her hair was different from the information provided, and if the traveler had any visible piercings or tattoos.⁹⁷ They were also supposed to document whether the traveler slept during the flight, used the bathroom, possessed a computer, what

⁸⁸ *Id.*

⁸⁹ Winter, *supra* note 16.

⁹⁰ *Id.*

⁹¹ Winter, *supra* note 15.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Winter, *supra* note 15.

⁹⁷ *Id.*

class he or she sat in, if he or she engaged in “more than casual contact” with airport or airline employees, possessed any unusual items, and engaged with others.⁹⁸ After the flight, air marshals were to follow the traveler to see if he or she was picked up curbside by shuttle, taxi, bus, public transit, private vehicle, or if he or she obtained a rental car.⁹⁹

From March 2018 until August 2018, a total of 5,000 U.S. citizens had been closely monitored, and no citizen merited further surveillance or required reporting to an outside law enforcement agency.¹⁰⁰

V. RESPONSES TO THE QUIET SKIES PROGRAM

a. TSA Response

When the Boston Globe first published the article reporting on the Quiet Skies program in August of 2018, the TSA published a press release titled “Facts About the ‘Quiet Skies.’”¹⁰¹ In the press release, the TSA stated that the program had been inaccurately described as randomly selecting travelers for no reason and that random selection was not the case.¹⁰² The TSA analogized the program to a neighborhood police force being aware that there was an elevated threat and increasing their presence to ensure that the threat did not escalate.¹⁰³ TSA stated that Quiet Skies allows the Federal Air Marshal Service to more efficiently deploy law enforcement resources to focus on travelers that present an elevated risk to aviation security.¹⁰⁴ It stated that the air marshals use “risk-based, intelligence-driven scenario rules” to identify travelers who require enhanced screening.¹⁰⁵ TSA explicitly stated that the air marshals do not take into account race or religion, and it said that federal air marshals act in accordance with their training as law enforcement officers.¹⁰⁶ The press release concluded with a reminder that the Federal Air Marshal Service is the only federal

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Winter, *supra* note 16.

¹⁰¹ Bob Burns, *Facts About the “Quiet Skies”*, TRANSP. SEC. ADMIN., (Aug. 22, 2018), <https://www.tsa.gov/blog/2018/08/22/facts-about-%E2%80%9Cquiet-skies%E2%80%9D>.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Burns, *supra* note 101.

law enforcement agency operating solely to protect the United States aviation system.¹⁰⁷

b. American Civil Liberties Union (ACLU) Response

The American Civil Liberties Union requested more information on how the Quiet Skies program targets the individuals it chooses to surveil.¹⁰⁸ It requested this information because, based on what was revealed about the program, individuals may be targeted due to their associations, which is protected under the First Amendment.¹⁰⁹ The request from the ACLU further stated that by TSA subjecting fliers “who are not reasonably suspected of any wrongdoing to extensive surveillance,” TSA unnecessarily retained personal information on innocent activity and invaded the fliers’ privacy.¹¹⁰ Some of the records requested by the ACLU included those concerning how travelers are selected to be monitored, how behavior detection techniques are used in monitoring travelers, what is done with the information concerning the selected travelers, training of the employees involved regarding profiling, the number of individuals monitored since January 1, 2016, and their races, ethnicities, and/or national origins.¹¹¹

TSA stated that it uses the program to “reduce the risk on airplanes by identifying passengers deemed to be higher risk according to certain travel patterns and other intelligence-based factors.”¹¹² It also stated that it does not consider race or religion when choosing which individuals to target, and that the federal air marshals are trained law enforcement officers who observe travelers in accordance with their training to avoid profiling on that basis.¹¹³ According to an internal TSA bulletin revealed by the Boston Globe, the purpose of the Quiet Skies program is to reduce the number of threats by “unknown or partially known terrorists; and to identify and provide enhanced screening to higher risk travelers before they board aircraft based on analysis of terrorist travel trends, trade and associations.”¹¹⁴ TSA acknowledged in its internal bulletin that the targeting of individuals was to be based

¹⁰⁷ *Id.*

¹⁰⁸ See Handeyside, *supra* note 60, at 1.

¹⁰⁹ *Id.* at 8.

¹¹⁰ Letter from Hugh Handeyside, Senior Staff Attorney, American Civil Liberties Union Foundation, to Whom It May Concern at 2 (Aug. 20, 2018).

¹¹¹ *Id.* at 4-5.

¹¹² Burns, *supra* note 101.

¹¹³ *Id.*

¹¹⁴ Winter, *supra* note 15.

on whether or not they shared similar travel trends with terrorists, tradecraft with terrorists, or associations with terrorists.¹¹⁵ The screening process appears to be broad, because the flier does not have to share similar travel habits with known terrorists. Habits of suspected terrorists, or people “possibly affiliated” with someone on a watchlist is enough.¹¹⁶

c. The Council on American-Islamic Relations’ (CAIR)
Response

On August 8, 2018, the Council on American-Islamic Relations filed a Complaint for injunctive and declaratory relief and damages in the United States District Court for the District of Maryland on behalf of twenty plaintiffs, all of which are American-Muslims targeted by the Quiet Skies program.¹¹⁷ The Complaint states that TSA’s Quiet Skies program relies on the “hunches of federal officials, rank profiling, and vulgar guilt-by-association practices.”¹¹⁸ The twenty plaintiffs represented and targeted by the Quiet Skies program have never been arrested, charged, or convicted of any terrorism-related offenses.¹¹⁹ One of the plaintiffs, Mr. Mutasem Jardaneh, was on the watchlist and endured an invasive search at the Michigan-Canada border; he fell subject to the Quiet Skies program at the Detroit Metropolitan Airport.¹²⁰ At the TSA checkpoint, the scanner indicated a red light when his boarding pass was scanned and Mr. Jardaneh was led to another line for a more thorough screening.¹²¹ After his intense screening and while walking towards his gate, Mr. Jardaneh noticed two air marshals following him throughout the airport.¹²² He was searched yet again before being allowed to board the aircraft.¹²³ Once he was on the airplane the two air marshals sat on each side of him and monitored him throughout the flight.¹²⁴ The Complaint alleges that the treatment described and endured by each of the twenty plaintiffs is a violation of the Fifth Amendment of the Constitution’s guarantee of Equal Protection.¹²⁵ The Complaint states that as a

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Complaint at 1, *el Ali v. Sessions*, No. 18-cv-Hon. (D. Md. Aug. 8, 2018).

¹¹⁸ *Id.* at 6.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 65.

¹²¹ *Id.* at 66.

¹²² Complaint at 1, *el Ali*, (D. Md. Aug. 8, 2018).

¹²³ *Id.* at 66-67.

¹²⁴ *Id.*

¹²⁵ *Id.* at 135.

matter of policy and official practice the TSA considers the following characteristics when targeting individuals on the watchlist:

National origination from Muslim-majority countries, ethnic origination as Arab or Middle Eastern, travel to Muslim-majority countries, travel on religious pilgrimages, learning Arabic, attending mosques, zakat donations to Muslim charities, the wearing of typical Muslim dress, the frequency of Muslim dress, the frequency of Muslim of prayer, affiliations with Muslim organizations, and associations with other Muslims.¹²⁶

By targeting the plaintiffs and other similarly situated Americans on the watchlist, the Complaint alleges that the defendants have treated them like second-class citizens and have therefore violated the Equal Protection Clause.¹²⁷

The Complaint also alleges that the defendants violated the Fourth Amendment when TSA seized and confiscated watch-listed travelers' electronic devices, which TSA would not return for weeks or months.¹²⁸ The Fourth Amendment of the Constitution states; "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ." ¹²⁹ The agents would upload the contents of the electronic devices onto their computers and download the personal information with what the Complaint alleges, no reasonable suspicion or probable cause or warrant for their searches or seizures.¹³⁰

The Complaint also alleges a violation of the plaintiffs' First Amendment rights. The First Amendment of the Constitution states; "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹³¹ The Complaint alleges that the warrantless searches and seizures of the electronic devices and the details of the personal information, including the plaintiffs' associations and affiliations, impose a substantial burden on their First Amendment

¹²⁶ *Id.* at 136.

¹²⁷ Complaint at 137, *el Ali*, (D. Md. Aug. 8, 2018).

¹²⁸ *Id.* at 139.

¹²⁹ U.S. CONST. amend. IV.

¹³⁰ Complaint at 139, *el Ali*, (D. Md. Aug. 8, 2018).

¹³¹ U.S. CONST. amend. I.

rights to expression and association.¹³² The CAIR has been an active voice on behalf of American-Muslims and in seeking to enforce their rights.

VI. FEDERAL AIR MARSHALS RESPONSE

The air marshals involved in the program are not all comfortable with the departure from what their old job required of them and what this new invasive program is forcing them to do. One air marshal was assigned to follow a young executive from a major company and said that the executive's "crime apparently was she flew to Turkey in the past."¹³³ One air marshal texted another colleague, "What we are doing [in Quiet Skies] is troubling and raising some serious questions as to the validity and legality of what we are doing and how we are doing it."¹³⁴ At the end of May, an air marshal followed a working Southwest Airlines flight attendant and was unhappy with doing so, he wrote "[C]annot make this up" to one of his colleagues.¹³⁵ He received a reply from another air marshal saying "jeez we need to have an easy way to document this nonsense. Congress needs to know that it's gone from bad to worse."¹³⁶ The president of the Air Marshal Association, John Casaretti, stated that "the American public would be better served if these [air marshals] were instead assigned to airport screening and check in areas so that active shooter events can be swiftly ended, and violations of federal crimes can be properly and consistently addressed."¹³⁷

VII. TSA'S RESPONSE TO THE BACKLASH TOWARDS THE QUIET SKIES PROGRAM

In December 2018, Agency officials reported to the Boston Globe that Federal Air Marshals were directed to no longer document the behaviors they were previously required to report; including whether travelers were fidgeting, going to the bathroom during the flight, or having a "cold, penetrating stare."¹³⁸ The TSA

¹³² Complaint at 141, *el Ali*, (D. Md. Aug. 8, 2018).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *TSA's Quiet Skies May Sound Creepy, But There's Logic To It – If It's Done Right*, WASH. POST, (July 31, 2018, 7:35 PM) https://www.washingtonpost.com/opinions/tsas-quiet-skies-may-sound-creepy-but-theres-logic-to-it-if-its-done-right/2018/07/31/4cc77836-94dc-11e8-80e1-00e80e1fdf43_story.html?noredirect=on&utm_term=.0f690de4ed48.

¹³⁸ Winter, *supra* note 16.

is not entirely shutting down the Quiet Skies program though, they will continue to monitor travelers who have not been suspected of any crimes, but the federal air marshals who are monitoring those travelers will not collect as many details about them.¹³⁹ The President of the Air Marshal Association, John Casaretti, told the Boston Globe that “The TSA must start targeting passengers based on fully developed intelligence as required by the Strengthening Aviation Security Act of 2018, and stop assigning missions based on a single data point, such as the country visited while traveling. Quiet Skies missions are degrading the health and readiness of our already overworked [air marshals], while squandering the talents of these highly trained agents.”¹⁴⁰

The Strengthening Aviation Security Act of 2018 requires the Federal Air Marshal service to use a risk-based strategy when deciding how to allocate their resources between domestic and international flights.¹⁴¹ The bill requires that the Federal Air Marshal Service ensure that the seating arrangements of the federal air marshals on aircrafts are done in a risk-based manner so that the air marshal is in a position where he/she is best able to respond to threats to aviation security.¹⁴² The bill has only been introduced and read twice and referred to the Committee on Commerce, Science and Transportation but has not yet been passed.¹⁴³

Consistent with the bill if it were to become law would be to reduce the monitoring required done by the air marshals, or just terminating the Quiet Skies program altogether. Currently, air marshals are to submit observational details of the travelers they are monitoring only if they observe the passenger do something “suspicious.”¹⁴⁴ The TSA did not define, nor did they provide any guidance to air marshals as to what “suspicious” activity actually means.¹⁴⁵ Federal air marshals are given full discretion to follow individuals who have done nothing wrong and decide whether they are acting suspiciously based on what they deem abnormal behavior.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Strengthening Aviation Security Act, H.R. 4467, 115th Cong. (2018).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Winter, *supra* note 16.

¹⁴⁵ *Id.*

The director of the Federal Air Marshal Service, David Kohl, gave an interview with the Boston Globe and refused to describe any criteria air marshals used as guidance for what merits “suspicious” activity.¹⁴⁶ The only description of suspicious behavior he provided was “something that would raise the hair on the back of your neck as a law enforcement officer. If there’s nothing, there’s nothing. We’re not going to follow passengers from curbside to checked baggage areas when there’s no observation that would lead us to say there’s more than a normal traveling passenger.”¹⁴⁷

VIII. POTENTIAL CONSTITUTIONAL VIOLATIONS TO THE QUIET SKIES PROGRAM

a. First Amendment Violations

The First Amendment of the United States Constitution provides that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.”¹⁴⁸ The right of association derives from the guaranteed freedom of speech, assembly, and petition; “It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech...it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”¹⁴⁹ In *NAACP*, Alabama sought compulsory disclosure of a list of the NAACP’s members within their state.¹⁵⁰ The Court held that the “compelled disclosure” of a list of members associated with NAACP that Alabama sought from the petitioner was likely to adversely affect the “petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate. . . .it may dissuade members to withdraw. . . . and dissuade others from joining. . . .”¹⁵¹

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ U.S. CONST. amend. I.

¹⁴⁹ *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

¹⁵⁰ *Id.* at 453.

¹⁵¹ *Id.* at 462-63.

The monitoring under the Quiet Skies program occasionally results in the seizure of the possessions of the travelers who were being followed. One of the typical possessions seized includes the cell phone and as stated earlier, one of the targets who was monitored had her cell phone seized.¹⁵² As noted, this seizure was critical because the cell phone included photographs of her without her headscarf.¹⁵³ Practicing Muslim women, like Ms. Lazoja wear a headscarf according to her religious beliefs and believe she is not to be seen without her headscarf unless it is by a man in her family or her husband.¹⁵⁴ Her handing over her cell phone to the federal air marshal is compulsory disclosure that could violate her freedom to associate in the same way they did in *NAACP*. The reason a court may consider it so is because although it would be evident she is a practicing Muslim from her external appearance, i.e., the headscarf, the disclosure of those photographs to the federal air marshals would be forcing her to act out of conformity with a potentially firmly held religious belief. She has the right to advocate the belief that no man is to see her without her headscarf besides family and her husband and compelling the disclosure of her cell phone and those photographs could potentially violate that First Amendment right.

If there were a male flier who was a practicing Muslim that was surveilled under the Quiet Skies program and a federal air marshal demanded the disclosure of his cell phone which contained information that would reveal his religion to any person who searched through it, his right to association would also be violated if the phone was searched. The individual is likely aware that the compulsory disclosure to a TSA agent is likely to have an adverse effect on him, and it may deter him from pursuing that religious belief which he has the First Amendment right to pursue.

In the complaint filed by the CAIR, it is alleged that the federal air marshals searched the electronic devices of the individuals they followed and gathered intelligence from their devices including “communications, expressions, social media activities, and associations.”¹⁵⁵ The Complaint alleged that TSA is going to use that information to single out similarly situated

¹⁵² Lazoja, *supra* note 48, at 1.

¹⁵³ Complaint at 1, Lazoja, No. 2:18-cv-13113 (2018).

¹⁵⁴ Lazoja, *supra* note 48, at 1.

¹⁵⁵ Complaint at 141, el Ali, (2018).

individuals including the family, friends, coworkers, and other associates to place as a target for the Quiet Skies program.¹⁵⁶

The gathering of that intelligence appears to be a direct violation of those individuals' freedom to associate with different memberships and groups. Compelling access to that data without a warrant and using that data to expand TSA's investigation into individuals who are just associated with an individual is highly invasive. Especially if the initial individual being followed is only followed because he or she traveled to a Muslim-dominated country in the past, or studied Arabic, or was originally from a Muslim country, or wore Muslim dress.

The fact that the majority of individuals targeted to be followed are chosen based off a single data point, i.e., they are a practicing Muslim, they attend mosque, they wear Muslim dress or engage in Muslim prayer implies that the Quiet Skies program's invasive monitoring is abridging Muslim-American's freedom of religion. Muslim-Americans should have the right to participate in air-travel without being subject to enhanced screenings and extensive monitoring.

b. Fourth Amendment Violations

The Fourth Amendment provides the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."¹⁵⁷ The legality of the Quiet Skies program is often questioned under the Fourth Amendment due to its highly intrusive surveilling of individuals whom TSA has stated are unsuspected of committing a crime.¹⁵⁸ Rather, they are selected because they either share a similar travel trend, trade, or association with a known or suspected terrorist or someone "possibility affiliated" with someone on a watchlist.¹⁵⁹

The first step to an analysis of a Fourth Amendment violation is to ask whether a search and seizure even took place. To answer this question, two other questions must be answered positively; first, did the person exhibit a subjective expectation of

¹⁵⁶ *Id.*

¹⁵⁷ U.S. CONST. amend. IV.

¹⁵⁸ Winter, *supra* note 16.

¹⁵⁹ *Id.*

privacy? Second, does society deem that expectation of privacy as reasonable?¹⁶⁰ In *Katz v. United States.*, Justice Harlan established that two-part test in the concurrence, but in the majority the Court held that the Fourth Amendment protects people, not places and individuals have a reasonable expectation of privacy in public places.¹⁶¹ The officers in *Katz* failed to obtain a search warrant from a neutral magistrate and the Court held that searches conducted “without prior approval by judge or magistrate, are per se unreasonable. . . .”¹⁶²

In *Bond v. United States*, the Supreme Court applied the Harlan two-step test after a border patrol officer boarded a bus, squeezed guests’ bags, felt a brick-like substance in the bag of Bond, and requested to search his bag.¹⁶³ Bond consented to the search and the officer found a “brick” of methamphetamine.¹⁶⁴ Bond moved to suppress the evidence arguing that it was an unreasonable search and seizure.¹⁶⁵ The Court’s answer to the first question of the Harlan test was that Bond “sought to preserve privacy by using an opaque bag and placing that bag directly above his seat.”¹⁶⁶ The Court’s answer to the second question was that bus passengers reasonably expect that other bus passengers or employees may move his or her bag for one reason or another, but the individual “does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner.”¹⁶⁷ As a result of society recognizing the bus passenger’s subjective expectation of privacy as reasonable, the border patrol officer’s search of his bag in an exploratory manner without a warrant was a violation of the Fourth Amendment.¹⁶⁸

Analogizing the Quiet Skies program to the facts of *Bond*, society would recognize a travelers’ subjective expectation of privacy that they will not be exposed to enhanced screenings, extensive monitoring, and searches and seizures of their belongings. Airplane travelers place their luggage under the airplane in opaque luggage and expect it to be handled by airline employees, but do not expect

¹⁶⁰ *Katz v. United States.*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).

¹⁶¹ *Id.* at 351-52.

¹⁶² *Id.* at 357.

¹⁶³ *Bond v. United States.*, 529 U.S. 334, 335-36 (2000).

¹⁶⁴ *Id.* at 336.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 338.

¹⁶⁷ *Id.* at 338-39.

¹⁶⁸ *Bond*, 529 U.S. at 339.

it to be searched in an exploratory manner, similar to *Bond*. If a court were to answer both questions in the affirmative, then the monitoring and searches and seizures of the targeted individuals is per se unreasonable without a search warrant as established in *Katz*. If a court granted a per se violation of the Fourth Amendment, then TSA would need to establish that the surveillance and seizures of the belongings of the targeted individuals without a warrant is permissible because it fits within an exception to the Fourth Amendment requirements for a search warrant.

i. Seized Cell Phones

Depending on the level of governmental interest TSA has over the data within the cell phones seized under the Quiet Skies program, the data collected may be inadmissible in a court of law due to the high level of protection the Court has placed on them. In *Carpenter v. United States*, the Court held that the warrantless search of a cell phone for GPS records of an individual was a violation of the Fourth Amendment.¹⁶⁹ The Court analogized the cell phone to a “feature of human anatomy” and said that it tracks nearly every movement of the owner therefore officers need to obtain a warrant before searching it.¹⁷⁰

In *Riley v. California*, the Court held that warrantless searches of cell phones seized as incident to arrest was a violation of the Fourth Amendment.¹⁷¹ The Court held that although there may be a strong governmental interest in obtaining the data on the cell phones to warn officers of potential future crimes or of other co-criminals, the data still is not to be considered a threat to officer safety and officers still are required to obtain a warrant to search it.¹⁷² The Court emphasized the privacy rights of individuals and their cell phones including how the phone is comparable to a minicomputer due to its “immense storage capacity” and how the information stored on an individual’s cell phone can be reconstructed to convey his or her life.¹⁷³ However, the Court was careful to not make its holding absolute. The Court provided examples of the exigent circumstances requirement to the Fourth Amendment where a cell phone may reasonably be searched without a warrant. These examples included situations where a

¹⁶⁹ *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (U.S. 2018).

¹⁷⁰ *Id.* at 2218.

¹⁷¹ *Riley v. California*, 573 U.S. 373, 403 (2014).

¹⁷² *Id.* at 387-88.

¹⁷³ *Id.* at 393-97.

suspect is texting an accomplice whom officers fear is preparing to detonate a bomb, or a child abductor may have information about the child's location on his phone.¹⁷⁴

A court viewing the searches of the individuals' cell phones under the Quiet Skies program would consider the weight of the privacy interests of those individuals and the potential exigent circumstances described in *Riley*. Although the federal air marshals are conducting the seizures of the cell phones in search of information to identify threats to aviation, TSA admitted that between March 2018 until August 2018, they surveilled 5,000 individuals and not one of those individuals merited further inspection.¹⁷⁵ Although air marshals could claim they are seizing the phones to identify any plans of terrorism or engagement with terrorism, there has been no success in their investigations. If TSA is continuously engaging in data collection of individuals who are not suspected of committing crimes but are still placed on this watchlist, yet the list has not merited any further inspection, then the privacy interests of the individuals subjected to the Quiet Skies program are likely to have been violated. If a court were to conclude that, they would find that the seizure of the cell phones does not fall within the exigent circumstance exception to the Fourth Amendment requirement of a warrant and the governmental interest of securing the national aviation system through cell phone monitoring does not outweigh the privacy interests of the owners of the cell phones.

1. Fourth Amendment Exceptions

a. Terry "Stop and Frisk" in the Context of the Quiet Skies Program

A *Terry* "stop and frisk" was established in *Terry v. Ohio*, when an officer patted down three men in search of an assault weapon, but the officer acted without probable cause when he engaged in the pat down.¹⁷⁶ The Court nevertheless held that the warrantless stop and frisk performed by the officer was reasonable.¹⁷⁷ The Court stated that a reasonably prudent officer is warranted to engage in a reasonable search for assault weapons when the officer believes that under the circumstances, his or her

¹⁷⁴ *Id.* at 402.

¹⁷⁵ See Winter, *supra* note 86.

¹⁷⁶ *Terry*, 392 U.S. at 1-2.

¹⁷⁷ *Id.* at 10.

safety or the safety of others is endangered regardless of the absence of probable cause.¹⁷⁸

Under the Quiet Skies program, the federal air marshals sometimes engage in stop and frisks of the travelers they are surveilling.¹⁷⁹ Ms. Lazoja, an individual discussed above, was *Terry* frisked as a result of her monitoring under the Quiet Skies program and her cell phone was confiscated.¹⁸⁰ The stop and frisk of any individual suspected of terrorist activity while in the airport is presumably for an assault weapon, a weapon of mass destruction or anything that could endanger the lives of others while on the aircraft. *Terry* held that officers need to act swiftly “predicated upon the on-the-spot” observation of the circumstances surrounding them.¹⁸¹ The Court balanced the governmental interests with the privacy interests of the individual and held that there is a need for a “narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual. . . .”¹⁸² The Court held that the scope of the search by the officer was reasonable because the Officer simply patted down the men and he did not go further until he felt weapons.¹⁸³ He never went further than a pat down of the individual who possessed no weapons, and did not conduct a general exploratory search for whatever evidence of criminal activity he could possibly find.¹⁸⁴

Applying *Terry* to Ms. Lazoja’s stop and frisk, it seems likely that any attempt to admit the evidence under that exception would fail. *Terry* only allows for an administrative pat down and nothing further and if no assault weapon is felt during the administrative pat. Beyond this cursory search, the officer performing the pat down cannot search further under *Terry*. If the officer has reason to believe no assault weapon is present then there is no threat to the officer or to other individuals, and the officer must stop searching the individual. The officer performing the pat down would also need reasonable suspicion to search further, and considering the intelligence-based factors used by TSA to select targets is based on

¹⁷⁸ *Id.* at 3.

¹⁷⁹ Complaint at 1, Lazoja, No. 2:18-cv-13113 (2018).

¹⁸⁰ *Id.*

¹⁸¹ *Terry*, 392 U.S. at 20.

¹⁸² *Id.* at 27.

¹⁸³ *Id.* at 29.

¹⁸⁴ *Id.* at 29-30.

arbitrary factors such as whether an individual traveled to a particular country,¹⁸⁵ reasonable suspicion doesn't seem to exist.

The extent to which a TSA 'pat down' is comparable to a *Terry* pat down is unknown, and TSA does not provide much guidance on the inquiry. The definition provided by TSA of what a pat down includes is "a physical inspection of the body of an aircraft passenger conducted in accordance with the Transportation Security Administration's standard operating procedure as described in the Transportation Security Administration's official training manual."¹⁸⁶ It is unclear what the procedure described in the TSA's official training manual is.

If the TSA agents are complying with *Terry* then the Court may expand the scope of the administrative pat downs that TSA agents are conducting to allow them to feel for more than just an assault weapon. A Court may consider allowing the pat down to search for anything that could comprise of a weapon of mass destruction. TSA has to be on alert for concealed, uncommon deadly weapons because there have been bombing attempts through items like plastic-explosives, the "Underwear Bomber," the "Shoe Bomber," and more.¹⁸⁷ All of the unique methods terrorists have used to create weapons to endanger the lives of travelers could possibly create a unique circumstance for a court to expand the scope of a *Terry* stop when the officer has reasonable suspicion to conduct one. The expansion of *Terry* pat downs to search for uncommon deadly weapons is highly unlikely due to how highly intrusive they would be and how much power they would give the agents.

Although unlikely, it could be argued that the *Terry* "stop and frisk" exception to the warrant requirement under the Fourth Amendment could be expanded to include *Terry* "surveillance" of individuals meriting "reasonable suspicion" of posing a threat to officers or others by possessing assault weapons, weapons of mass destruction, or engaging in terrorism. Considering the government interests as the Court did in *Terry*,¹⁸⁸ the government would be securing the airways, and preventing terrorism, and crime. The

¹⁸⁵ Winter, *supra* note 16.

¹⁸⁶ Transportation Security Administration Authorization Act, 111 H.R. 2200, Sec. 215. Limitations on use of Whole-Body Imaging Technology for Aircraft Passenger Screening. (I) (7) (A) (2009).

¹⁸⁷ *Timeline*, *supra* note 1.

¹⁸⁸ *Terry*, 392 U.S. at 22-23.

court would have to balance that against the individual's privacy interests as they did in *Terry*.¹⁸⁹ In this proposed situation the privacy rights of individuals would be violated on a significantly larger basis. The individuals selected to be surveilled under *Terry* "surveillance" would be monitored upon arrival to the airport all the way through their exit from their destination airport which is substantially more intrusive than an administrative pat down. The level of intrusiveness into an individual's privacy rights on the basis of reasonable suspicion under this proposed analogous situation would make it less likely a court would extend the *Terry* exception.

ii. Exigent Circumstances

When an officer encounters exigent circumstances, he or she does not need to obtain a warrant supported by probable cause to conduct a search and seizure and there is violation of the Fourth Amendment. There are a few possible situations of exigency that TSA may attempt to fit within the Quiet Skies program's potential Fourth Amendment unreasonable search and seizures. Exigent circumstances occur when there is the potential for the destruction of evidence.¹⁹⁰ There is also the automobile exception that is included within the exigent circumstances exception.¹⁹¹

In *United States v. Banks*, officers knocked and announced their presence at Bank's apartment, they waited fifteen to twenty seconds before they forcibly entered his apartment. (Cite) The officers seized incriminating evidence upon their entrance and Banks sought to have it suppressed at trial.¹⁹² The Court held that the officers' forceful entry was reasonable because the exigency matured after the fifteen to twenty seconds because Banks could easily flush away the disposable cocaine after becoming aware that the police would soon be entering his apartment.¹⁹³ Due to the exigency of the destruction of evidence the officers were facing, they were permitted to forcibly enter Banks' apartment and search it for the incriminating evidence they were looking for.¹⁹⁴

Federal air marshals within the Quiet Skies program monitor the selected targets from the point of their arrival at the airport, through TSA security, to the boarding gate, on the aircraft,

¹⁸⁹ *Id.* at 24-25.

¹⁹⁰ *Banks*, 540 U.S. at 38.

¹⁹¹ *Acevedo*, 500 U.S. at 579-80.

¹⁹² *Banks*, 540 U.S. at 33.

¹⁹³ *Id.* at 38.

¹⁹⁴ *Id.*

through baggage claim, to departure from the airport. It is not unreasonable to assume that the individuals being followed are aware of the air marshals who are observing their every move. Other individuals have been stopped by TSA agents and many Muslim-Americans face numerous security checkpoints at airports including by air marshals. If the targeted individuals are on alert that they are being followed, then the federal air marshal could attempt to argue that the exigency had ripened and a search was reasonable in order to prevent any destruction of potential evidence. The air marshal could argue that the target was aware of his or her presence and therefore, the target may have tipped off any co-conspirators causing a seizure of evidence, such as a cell phone, to be necessary to ensure no plots to engage in crime or terrorism are initiating. The air marshal may argue the seizure of any baggage is necessary to ensure no weapons are present. The air marshal may also attempt to argue that based on exigency and the potential destruction of evidence, it was necessary to search the person to ensure that he or she had no evidence on his or her body because there have been cases where individuals have possessed tiny weapons hidden on the body, such as the “Underwear Bomber” mentioned in the beginning of the note.¹⁹⁵

Whether a court would accept the argument that exigency is present because of a fear of destruction of evidence on the basis of the individual being aware he or she is being followed, depends on what the court considers when making its decision. The Supreme Court has been careful when deciding to extend the exigent circumstances exception. For example, in *Mincey v. Arizona*, the Court rejected the creation of a homicide exception to a warrantless search of a premises because of the slippery slope argument.¹⁹⁶ The Court rejected the idea that warrantless search of the scene is permissible because of the severity of the crime homicide, a line-drawing issue on what constitutes a severe crime would be created if they accepted that proposition.¹⁹⁷ The Supreme Court held in *United States v. Elkins* that police cannot “manufacture” exigent circumstances through unlawful or unreasonable actions and then attempt to use those circumstances to justify a warrantless search.¹⁹⁸ The officers must refrain from unreasonably tipping off

¹⁹⁵ *Timeline*, *supra* note 1.

¹⁹⁶ *Mincey v. Ariz.*, 437 U.S. 385, 393 (1978).

¹⁹⁷ *Id.*

¹⁹⁸ *United States v. Elkins*, 300 F.3d 638, 655 (6th Cir. 2002).

suspects and instead use normal investigative measures to secure evidence under the exigent circumstances exception.¹⁹⁹

Returning to the Quiet Skies program, it is unlikely to fit it within the exigent circumstances exception to the Fourth Amendment requirement because of the program's lack of particularity and the potential for abuse this exception would have if established. If a court were to consider the slippery slope argument as the Supreme Court did in *Mincey v. Arizona*, exigency on the basis of the potential destruction of evidence would exist anytime an individual were aware he or she was being watched by an officer. This broad declaration would lead to the violations of individuals' privacy rights and potential abuse of the system. Officers and agents of TSA are always monitoring individuals in airports, not just under the Quiet Skies program. It cannot then become the case that exigency is established if the travelers they are surveilling become aware of that surveillance simply on that basis.

Although the Supreme Court held in *Elkins* that officers cannot "manufacture" exigent circumstances through unlawful or unreasonable measures, officers are still given broad discretion and there is potential for abuse. Officers could manipulate the system by placing an individual under surveillance and monitoring him or her in a manner so that the he or she becomes aware of the monitoring. To avoid being accused of manufacturing the exigent circumstances, officers would have to avoid making it obvious to the traveler that he or she was made aware on purpose. Once the officer is aware that the individual knows he or she is being monitored, the officer can claim exigency and search the individual without a warrant. Although such a scenario is prohibited under *Elkins*, if done carefully, an officer may be able to get away with it and abuse the system and violate privacy rights. Due to the potential for abuse and the broad violation of individual privacy rights, it seems unlikely that a court would hold that the Quiet Skies program's monitoring fits within the exigent circumstances exception of the potential destruction of evidence.

Exigency is also established under the automobile exception as described in *California v. Acevedo*.²⁰⁰ The Supreme Court stated that officers may search a vehicle "without a warrant if their search

¹⁹⁹ *Id.*

²⁰⁰ *Acevedo*, 500 U.S. at 579-80.

is supported by probable cause.”²⁰¹ In *Acevedo*, the officers had probable cause to believe that a paper bag in the trunk of the vehicle contained marijuana and because the paper bag was in the trunk of the car, the officer’s were allowed to search the paper bag and the trunk without a warrant.²⁰² The officers only had probable cause to believe that the marijuana was within the paper bag in the trunk, therefore a search of the entire vehicle would have been deemed unreasonable by the Court under the Fourth Amendment.²⁰³

The Court applied the automobile exception to mobile homes in *California v. Carney*.²⁰⁴ In that case the officers knocked on a mobile home door because of a tip and confirmation from a youth that Carney provided marijuana to the youth in exchange for sexual favors.²⁰⁵ The basis for the automobile exception is the mobility of automobiles which “creates exigency, such that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.”²⁰⁶ Although the mobile home possessed some attributes of a home, the Court held it clearly fell within the scope of the exception, the motor home was readily mobile.²⁰⁷ The application of the exception ensures that law enforcement officers are not unnecessarily hamstrung in their efforts of detecting and prosecuting criminal activity, and the legitimate privacy interests of the public are protected.²⁰⁸

The justifications for the automobile exception as described by *Acevedo* and *Carney* make it seem increasingly unlikely that the searches and seizures that occurred while on the aircraft could be justified by this exception. Although the airplane is readily mobile in the same way the automobile and mobile home are, there are fundamental differences between the three modes of transportation. The automobile and mobile home, which fall within the exception, are controlled by the individual who was subject to the unreasonable search and seizure. Those modes of transportation are only moved when the individual chooses to move them and the objects within them are predominantly the owner’s. Conversely, the aircraft is controlled by a pilot, there is a flight staff, and in order to

²⁰¹ *Id.* at 579.

²⁰² *Id.* at 580.

²⁰³ *Id.*

²⁰⁴ *California v. Carney*, 471 U.S. 386, 393 (1985).

²⁰⁵ *Id.* at 388.

²⁰⁶ *Id.* at 391.

²⁰⁷ *Id.* at 393.

²⁰⁸ *Id.* at 394.

get on the aircraft, individuals must pay for a ticket, drive to the airport, go through security checks, and then board the aircraft with several other passengers whose possessions are also on board. The final destination of the aircraft is controlled by the pilot and based on where the destination chosen by the individual's ticket purchase. The final destination of the automobile or mobile home is up to the driver. Although the automobile and aircraft seemed to have an analogous relationship, the fundamental differences between the aircraft and the automobile reveal the two do not share as close a relationship as initially conceived.

If the automobile exception were to apply to this situation a slippery slope argument would be created. All passengers of public transportation would potentially be subject to have their possessions searched if law enforcement had probable cause to conduct a search. That result would lead to a dangerous invasion of privacy on individual rights that the court would want to avoid. The fundamental differences between an airplane and the automobile and the slippery slope argument that would ensue if the automobile exception applied makes it unlikely that the automobile exception will cover the Quiet Skies program's searches and seizures.

Another reason the automobile exception is unlikely to apply to the Quiet Skies program is because officers need probable cause to search at least something in the bag or on the person. Based on the criteria described by TSA directors and federal air marshals, it appears unlikely that they would have probable cause to believe there is any reason to search their possessions or person. The criteria described states that they surveil individuals on the basis of a single data point which is insufficient to establish probable cause.

Under the Fourth Amendment analysis, it is clear that an unreasonable search and seizure has occurred under the Quiet Skies program because of the analysis of the traveler's subjective expectation of privacy and society's recognition of that expectation of privacy as in *Katz*. The courts will look at the cell phones seized as analogous to part of the human anatomy and will engage in a balancing test to determine whether the seizure of the phones was unreasonable. The court would have to find a compelling government interest to find the search reasonable, it would have to be something like an exigent circumstance that the individual was tipping off a co-conspirator or destroying evidence.

In terms of the exceptions to the Fourth Amendment, the Quiet Skies program is unlikely to fit within the *Terry* “stop and frisk” exception unless the officers have reasonable suspicion based on the circumstances confronting them and during the administrative pat down they felt what could be an assault weapon. If the officer had reasonable suspicion based on the monitoring they have engaged in, then the officer may conduct a *Terry* stop and if an assault weapon is felt they may seize the weapon. It could be argued that the scope of the pat down could be expanded in the airport setting for federal air marshals and TSA agents because of the unique situation they are in by dealing with terrorists who create uncommon deadly devices. If the scope of the pat down were expanded then the level of intrusiveness on the person would be increased, but a court may consider the governmental interest of securing the nation’s airways as more important.

The monitoring and searching of travelers within the Quiet Skies program is difficult to fit squarely within some of the exigent circumstances exceptions. First, grounding the search on the basis of the potential destruction of evidence is problematic because the reason this could potentially apply is if the officer argued the evidence was going to be destroyed because the target was aware he or she was being monitored. This would open up potential for individual privacy rights to be significantly violated because TSA agents are constantly surveilling and if at any time a person became aware of being monitored, an agent could claim exigency and it would be problematic and highly intrusive. This argument also leads to a potential for officers to wrongly “manufacture” exigent circumstances and then justify their search on that basis.

The Quiet Skies program does not fall within the automobile exception because of the fundamental differences between the automobile and the aircrafts used in the Quiet Skies program. It also does not fit within the automobile exception because probable cause is required to search any item within the automobile and based off of the criteria TSA uses to select their targets it is unlikely probable cause will be met.

c. Fifth Amendment Violations

The Fifth Amendment provides that no person shall “be deprived of life, liberty, or property without due proves of law. . . .”²⁰⁹ This language articulates the Fifth Amendment Due Process

²⁰⁹ U.S. CONST. amend. V.

Clause, which requires the equal protection of all United States citizens by the United States government. When analyzing a Fifth Amendment violation, the questions to ask include what is the level of scrutiny to be applied to the law in question and whether the law meets that level of scrutiny? The individuals claiming a violation of the Fifth Amendment are Muslim-Americans and they are claiming a violation on the basis of their religion by saying that the Quiet Skies program selection process treats them as second-class citizens. When the classification of the individual affects of a fundamental right of that individual, like the right to freedom of religion, or if the classification discriminates against a suspect class, such as a Muslim-American, then the standard of scrutiny is raised. The Quiet Skies program affects both a fundamental right and a suspect class therefore the level of scrutiny to be applied is strict scrutiny. When strict scrutiny applies, the government has the burden of showing the law in question is narrowly tailored to further a compelling government interest. Although strict scrutiny is a substantial burden for the government to meet, it is difficult to prove the classification that a law has a disproportionate impact on a class of persons, a court will only hold that if law-making body that enacted it did so for a discriminatory purpose. Statistical proof of a disproportionate impact can be combined with legislative intent to meet the proof of discriminatory purpose.

The Quiet Skies program is not expressly based on race but rather is based on TSA bulletins that have been disclosed to the public that the purpose of the program is to “reduce the risk that unknown violent extremists pose to commercial aviation.”²¹⁰ The program targets individuals based on analysis of terrorist trends, trades, and associations and it does not have to be known terrorists, it could be suspected terrorists or individuals potentially associated with a person on a watchlist.²¹¹ The result of TSA using that analysis technique to gather their intelligence to form the list of individuals selected to be targeted is that the individuals who have been selected are from predominantly Muslim-majority countries, their ethnic origin is Arab or Muslim, they have traveled to Muslim-majority countries, they are learning Arabic, they attend mosques, they wear Muslim dress, they engage in Muslim prayer, they affiliate with Muslim organizations, and they associate with other Muslims.²¹² Although the program appears to be facially neutral, it

²¹⁰ Winter, *supra* note 16.

²¹¹ See Winter, *supra* note 15.

²¹² Complaint at 136, el Ali, (2018).

appears to have disproportionate impact on Muslim-Americans. There have been requests for the lists of individuals who have so far been monitored by TSA²¹³ but TSA has not produced the information sought.

The fact that the government is required to meet the strict scrutiny standard weighs in favor of a successful Fifth Amendment claim for Muslim-Americans targeted by the Quiet Skies program. There have been other surveillance programs that air marshals have engaged in that have been less intrusive, involved other agencies, and the selection of the targets were based off more concrete terms, i.e., being on the terrorist watchlist.²¹⁴ The fact that marshals have engaged in other programs is evidence that the Quiet Skies program is not “narrowly tailored” and it is unclear what “compelling government interest” is being furthered. Although an executive has broad power when in terms of national security, that power is not absolute and individual privacy rights of the thousands of American citizens who have been monitored may be more important than a claim of a threat to national security. This is especially true where the evidence shows that the program’s monitoring has not resulted in the imprisonment of any potential terrorists or criminals whom are threats to the national security. If the government does not meet its burden of showing the Quiet Skies program meets the strict scrutiny standard, then it would violate the Fifth Amendment and therefore it would be unconstitutional.

IX. DEFERRING TO THE EXECUTIVE FOR MATTERS OF NATIONAL SECURITY

The President of the United States is granted broad powers around matters of national security. TSA is an agency under the Department of Homeland Security which is a cabinet within the U.S. Government, and the cabinet is supervised by the Executive branch of the U.S. government. Another role of the President is the Commander-in-Chief, he or she is given very broad authority by both Congress and the Court to deal with issues where conflict is occurring. After the September 11th attacks, Congress passed the Patriot Act almost unanimously resulting in a significant expansion of the executive branch, and empowering then-President Bush to

²¹³ See Handeyside, *supra* note 6, at 2.

²¹⁴ Winter, *supra* note 15.

act in a time of war.²¹⁵ Recently the powers of the executive in matters of national security were affirmed in *Trump v. Hawaii*.²¹⁶ The Court upheld the travel ban on the basis of President Trump's extensive power as Commander-in-Chief.²¹⁷ Chief Justice John Roberts wrote that whether President Trump's chosen method of addressing the perceived risk is justified from a policy perspective is "irrelevant to the scope" of his authority under the statute which he exercised his power.²¹⁸ Chief Justice Roberts went on to say that when the President "adopts a preventive measure...in the context of international affairs and national security he is not required to conclusively link all of the pieces in the puzzle" in order for courts to give weight to his conclusion.²¹⁹

There is a significant amount of power vested into the Executive even within the one statute that was used to support President Trump's travel ban. It states, "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. . . ."²²⁰ The language used in the statute implies broad discretionary power because of its subjective nature. The statute allows for the Executive to decide when the entry of aliens or a class of aliens would be detrimental to the interests of national security, and on that basis, the Executive has the power to suspend their entry or impose any restrictions the Executive deems appropriate. Although this statute appears to be providing an alarming amount of power to one individual, the Court nevertheless upheld it as valid in *Trump v. Hawaii*.²²¹

The Supreme Court giving deference to the Executive branch on matters of national security is not a new phenomenon. In fact, the concept can be traced back through the history of American jurisprudence. For example, in 1965 the United States shared a

²¹⁵ UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM (USA PATRIOT ACT) ACT OF 2001, H.R. 3162, (2001).

²¹⁶ *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (U.S. 2018).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ 8 U.S.C. § 1182 (f) (2018).

²²¹ *Trump*, 138 S. Ct. at 2415.

tumultuous relationship with Cuba and severed diplomatic ties with the country as a result of the Secretary of State refusing to validate passports for United States citizens to travel to Cuba.²²² In *Zemel v. Rusk*, a citizen of the United States challenged this prohibition arguing that he was entitled to travel to Cuba and that the Secretary of State's refusal to validate his passport was a violation of his constitutional rights.²²³ The Court justified the Secretary of State's refusal to grant a valid passport to Cuba through the interests of national security.²²⁴ The Court held that almost "every volume of United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect to subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs."²²⁵

The Quiet Skies program is a government program that had to have received authorization from the Executive branch due to TSA being under the umbrella of the Executive's authority. If challenged, the Executive branch will need to be able to point to a statute as a justification for the broad invasion of privacy the program engaged in. Under 49 USCS § 114 (I) (2)(A), the Administrator of the TSA who is the head of the TSA, is delegated broad discretionary power to determine "that a regulation or security directive" is necessary then the Administrator has the power to do so without providing notice or an opportunity for comment or without approval from the Secretary of Homeland Security, who is directly below the Executive.²²⁶ Recently though, the language of the statute was altered from "if the Administrator determines that a regulation or security must be issued immediately in order to protect transportation security, the Administrator shall issue it", instead to "if the Administrator determines that a regulation or security directive must be issued in order to respond to an imminent threat of finite duration, the Administrator shall issue" it.²²⁷ Here, the Administrator is granted broad subjective discretionary power in an analogous way to the

²²² *Zemel v. Rusk*, 381 U.S. 1, 3 (1965).

²²³ *Id.* at 4.

²²⁴ *Id.* at 16.

²²⁵ *Id.* at 17.

²²⁶ 49 USCS § 114 (I) (2) (A) (2018).

²²⁷ Transportation Security Administration Authorization Act, 111 H.R. 2200 Sec. 243 Issuance of Regulations and Security Directives Using Emergency Procedures. (a) (1) (A).

President and the justification can be found in protecting transportation security similar to how the President is justified to act to protect national security. The alteration of language by Congress appears to be a restriction placed on the powers of the Administrator, instead of immediately issuing the regulation or security directive that the Administrator determined was necessary, the new language allows for the issuance only if the Administrator's determination was in response to an imminent threat of finite duration.

The issuance of the Quiet Skies program would have to be viewed as a direct response to an imminent threat of a finite duration. President Trump's campaign rhetoric and his administration's strong beliefs that Islam is a political ideology rooted in hatred, rather than a religion peacefully practiced by many American citizens with the exception of some extremism, resulted in a resurgence of the fear of Muslims and Arab individuals. Upon taking office President Trump was faced with Islamic extremist threats from ISIS, a terrorist organization seeking to establish an Islamic state in Syria, Iraq and elsewhere that practices an extreme interpretation of the Koran.²²⁸ That threat combined with the shooting that occurred in San Bernardino, California²²⁹ and another one occurring at a nightclub in Orlando, Florida²³⁰ which were both claimed by ISIS members may be enough for an Administrator to believe there is a threat to aviation security and a program like the Quiet Skies is necessary to prevent danger to travelers. TSA has stated that the intelligence they were using to decide who to target evolved around terrorism and whether the individuals shared similar travel trends, trades, or associations with known or suspected terrorists or whether the individual was even affiliated with someone on a watchlist. The use of terrorism-related data points to develop a list of targets to follow could be evidence for a court that the Administrator was acting within his/her power to respond to an imminent threat of extremism within the country. It is unclear of whether the Quiet Skies program has a date set to no longer be in effect. Regardless, the Quiet Skies

²²⁸ CNN Library, *ISIS Fast Facts*, CNN WORLD (Jan. 21, 2019, 7:06 PM) <https://www.cnn.com/2014/08/08/world/isis-fast-facts/index.html>.

²²⁹ Michael S. Schmidt & Richard Pérez-Peña, *F.B.I. Treating San Bernardino Attack as Terrorism Case*, N.Y. Times (Dec. 4, 2015) <https://www.nytimes.com/2015/12/05/us/tashfeen-malik-islamic-state.html>.

²³⁰ Ralph Ellis et al., *Orlando shooting: 49 killed, shooter pledged ISIS allegiance*, CNN U.S. (June 13, 2016, 11:05 AM), <https://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/index.html>.

program may be legal due to the broad discretionary power the Executive is granted in matters of national security. Considering there was evidence that extremism was present within the country and internationally, a court may say the Administrator acted within his/her powers by implementing the Quiet Skies program and responding to what the Administrator believed was an imminent threat.

X. CONCLUSION

The trend of giving deference to the President in matters of national security is something that can be found throughout case law and legislative material and it is the heaviest factor weighing in favor of the Quiet Skies program being legal despite the constitutional concerns raised throughout this note. If TSA argues that the program is necessary to ensure the security of commercial fliers and national security, a court may defer to the president and his/her right to protect our aviation security. If the court ruled that way then they would be holding that the privacy interests of the American citizens that have been violated is outweighed by the governmental interest of securing the nation and its airways. A significant issue that weighs in favor of a successful constitutional violation claim is the fact that none of the monitoring has led to any prevention of terrorism or any discovery of previously unknown terrorists. The lack of results from the program would be evidence against the idea that there is an imminent threat present and therefore the program has been just a violation. Nevertheless, the Quiet Skies program will most likely be held valid because a court will defer to the Executive's authority in matters of national security and say that no constitutional violations occurred because the Administrator acted within his authority to implement the program, the lack of results is only an indication that the program is not required for an extended period of time.