ARTICLE

THE RISKS POSED TO NATIONAL SECURITY AND OTHER PROGRAMS BY PROPOSALS TO AUTHORIZE PRIVATE DISPARATE IMPACT CLAIMS UNDER TITLE VI

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Congress may consider an amendment to Title VI of the Civil Rights Act of 1964, which would permit private disparate impact discrimination lawsuits to be filed against entities receiving federal financial assistance. However, unlike Title VII of the same Act, Title VI does not contain a national security exception. This article addresses the potential impact of the proposed amendment on national security programs administered by federally subsidized entities. Particular emphasis is given to the airports, airlines, and private screening companies that administer the nation's post-9/11 security measures. Finally, the Article discusses how the disparate impact claims authorized by the amendment may frustrate legislatively enacted policies such as welfare reform and English language programs.

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I. Introduction

Recent proposals in Congress would amend Title VI of the Civil Rights Act of 1964 so as to authorize private lawsuits against programs administered by entities receiving federal financial assistance on the grounds that such programs have a "disparate impact" on a covered group, even when such programs are neutral on their face. This Article explores how such lawsuits could adversely affect national security and other legislatively enacted policies, such as federal welfare reform and state and local English language initiatives.

This Article begins by summarizing the evolution of disparate impact discrimination as a legal claim. It analyzes the national security exception to such claims in the employment provisions of Title VII of the Civil Rights

Act of 1964 and the lack of such an exception in Title VI, which prohibits discrimination by entities receiving federal financial assistance. The Article then discusses *Alexander v. Sandoval*, the 2001 Supreme Court decision holding that private disparate impact claims could not be brought under Title VI, and recent efforts in Congress to statutorily authorize such claims.

The Article then elaborates on the impact such statutory amendments would have on national security, particularly in regard to aviation security. The Article does so by analyzing the aviation security roles played by entities that receive federal financial assistance, namely airports, airlines, and private screening companies, and discusses how such entities' administration of post-9/11 national security policies—including the use of terrorist watch lists—inevitably produces disparate impacts on certain covered groups. The Article proceeds to discuss current litigation that challenges those national security policies and examines how Title VI disparate impact claims would further expose federally subsidized entities to liability for carrying out security measures. The Article then addresses the increased role courts would play in managing and supervising these entities if the proposed Title VI claims were authorized.

Finally, the Article discusses how private Title VI disparate impact claims could subject other government programs—such as federal welfare reform and state and local English language policies—to lawsuits in which courts could prohibit their implementation, or order significant changes in their administration, to the detriment of elected legislatures and democratic government.

II. An Overview of Title VI, Title VII, and Disparate Impact Claims

A. A Short History of Title VII and Disparate Impact Claims

Title VII of the Civil Rights Act of 1964 was designed to protect individuals from intentional employment discrimination on the basis of race, color, religion, sex, or national origin.[1] As historians Stephan and Abigail Thernstrom have described its genesis, "Title VII was initially conceived to protect individuals against intentional discrimination—what was called 'disparate treatment.' In other words, plain old-fashioned bias."[2]

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[1] *See* 42 U.S.C. § 2000e-2(a) (2000) ("It shall be an unlawful employment practice for an employer–(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

[2] Stephan Thernstrom & Abigail Thernstrom, America in Black and White 425 (1997).

The Senate floor managers of Title VII, Senators Clifford Case (R-NJ) and Joseph Clark (D-PA), made clear that Title VII only prohibited intentional discrimination and did not require statistical parity based on race, religion, or national origin. In their exhaustive memorandum distributed prior to Senate debate on the bill, the senators wrote, "[t]here is no requirement in Title VII that an employer maintain a racial balance in his work force."[3] This interpretation was reiterated by Senator Hubert Humphrey (D-MN), who said, "[i]f [a] Senator can find in Title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there."[4]

Over time, however, Title VII's prohibition of disparate *treatment* also came to cover employers' actions that resulted in a disparate *impact* on covered groups, even if those actions were the result of facially neutral policies which were applied without any intent to discriminate. Alfred W. Blumrosen, the Equal Employment Opportunity Commission's[5] first Chief of Compliance, employed "[c]reative administration"[6] to draft regulations under which Title VII would be interpreted "liberally."[7] Under such regulations, Title VII would come to be interpreted to ban not just intentional discrimination but also practices that disproportionately and adversely affected the numerical representation of a covered group within an employment sector, even if such a practice was neutral by its terms and motivated by no ill will.[8] As the Thernstroms have explained, Title VII came to protect covered groups "not simply against formal barriers or malicious intent;" rather, it came to enforce "racially proportionate results"[9] as well.

The Supreme Court ultimately approved claims based on disparate impact in *Griggs v. Duke Power Co.*[10] In that case, the Court struck down, as a violation of Title VII, a company's requirement of a high school degree or a

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[3] 110 CONG. REC. 7213 (1964).

[4] 110 CONG. REC. 7420 (1964).

[5] Title VII also created the Equal Employment Opportunity Commission (EEOC) to draft regulations governing the administration of its provisions. *See* 42 U.S.C. § 2000(e)-4 (2000).

[6] ALFRED W. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 53 (1971) (stating that "[c]reative administration converted a powerless agency operating under an apparently weak statute into a major force for the elimination of employment discrimination").

[7] *Id.* at 58 (stating that "[t]he objective was to maximize the effect of the statute [Title VII] on employment discrimination without going back to the Congress for more substantive legislation"). Blumrosen later admitted that such regulations did not "flow from any clear congressional grant of authority." Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 95 (1972).

[8] In 1968, the Chairman of the EEOC, Clifford Alexander, described how "[w]e . . . here at EEOC believe in numbers. . . . [O]ur most valid standard is in numbers. . . . The only accomplishment is when we look at all those numbers and see a vast improvement in the [employment] picture." HERMAN BELZ, EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION 28–29 (1991) (quoting Clifford Alexander).

[9] THERNSTROM & THERNSTROM, *supra* note 2, at 429.

[10] 401 U.S. 424 (1971).

sufficient score on a standardized test as a condition for employment or promotion where such test, while not designed with a discriminatory intent but not required as a "business necessity," yielded disparate employment results based on race. Delivering the opinion of the Court, Chief Justice Burger wrote that in enacting Title VII, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[11] As a result, "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[12]

Courts, following EEOC guidelines, have strictly construed the phrase "business necessity," holding that "the practice must be essential, the purpose compelling."[13] As the Court later refined the business necessity test in *Albemarle Paper Co. v. Moody*,[14] it also became clear that even if an employer could prove a direct link between the test employed and performance in the particular job that was the subject of the test, the employer could still lose a disparate impact suit if the claimant could show that an alternate test with a less pronounced racial disparity could be employed.[15]

In his concurrence in *Albemarle*, Justice Blackmun expressed reservations about how these precedents could encourage employers to institute quota systems to avoid disparate impact lawsuits. He wrote, "I fear that a too-rigid application of the EEOC guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection."[16]

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[11] *Id.* at 432 (emphasis in original).

[12] *Id.* at 431. The Thernstroms have written that, as a result of this interpretation, "[e]mployers had to be prepared to prove the indispensability of any method they used to sift job applicants if more blacks than whites were adversely affected." THERNSTROM & THERNSTROM, *supra* note 2, at 431.

[13] Williams v. Colo. Springs, Colo. Sch. Dist., 641 F.2d 835, 842 (10th Cir. 1981); *see also* Nash v. Consol. City of Jacksonville, 895 F. Supp. 1536, 1545 (M.D. Fla. 1995), *aff'd*, 85 F.3d 643 (11th Cir. 1996) ("Business purpose must be sufficiently compelling to override *any* racial impact.") (emphasis added).

[14] 422 U.S. 405 (1975).

[15] *See id.* at 425 (stating that the Court held in *Griggs* that "Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets the 'burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question'") (quoting *Griggs*, 401 U.S. at 432). The *Albemarle* Court continued, explaining,

> This burden arises, of course, only after the complaining party or class has . . . shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. If an employer does then meet the burden of proving that its tests are job related, it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.

Id. (internal citations and quotations omitted).

[16] 422 U.S. at 449 (Blackmun, J., concurring).

The Court addressed Justice Blackmun's fears several years later in *Wards Cove Packing Co. v. Atonio*.[17] In that decision, the Court relaxed the business necessity standard so that courts would thenceforward engage in merely "a reasoned review of the employer's justification for his use of the challenged practice [such that] there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster."[18] Congress, however, responded two years later by overturning *Wards Cove* in the Civil Rights Act of 1991,[19] requiring an employer "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[20] The legislative history of that provision states that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.* . . . and in the other Supreme Court decisions *prior to Wards Cove Packing Co., Inc. v. Atonio* . . . ."[21]

Congress thereby restored the meaning of "business necessity" under Title VII to what it had been prior to *Wards Cove*.

B. Title VII and Its National Security Exception

When it enacted the Civil Rights Act of 1964, Congress thought it important to protect national security programs from Title VII lawsuits. Consequently, Title VII includes an explicit statutory exception that precludes its application to employment in jobs that are "subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any executive order of the President."[22] As described in

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[17] 490 U.S. 642 (1989).

[18] *Id.* at 659.

[19] Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2(k) (2000)).

[20] *Id.*, 105 Stat. at 1074.

[21] Interpretative Memorandum, 137 CONG. REC. 28,680 (1991) (emphasis added; internal citations omitted). Congress intended this interpretation to be dispositive. In the Congressional Findings set forth in the Civil Rights Act of 1991, Congress provided that "[n]o statements other than the interpretive memorandum appearing at 137 CONG. REC. S15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act . . . ." Pub. L. No. 102-166, § 105(b), 105 Stat. at 1075 (codified at 42 U.S.C. § 1981 (2000) note).

[22] 42 U.S.C. § 2000e-2(g) (2000). That provision provides in its entirety as follows:

> (g) National security. Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if–(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any

the EEOC Compliance Manual, this provision "is an affirmative defense to a charge of discrimination."[23]

This exception has been applied to protect national security policies from claims that such policies have a disparate impact. In *Molerio v. F.B.I.*,[24] for example, the court relied on the statutory exception to uphold the FBI's refusal to hire a Cuban-American because he could not obtain the requisite security clearance for the job. Specifically, he had relatives in Cuba and the agency generally attached special weight to the fact that the applicant "had relatives residing in any foreign country controlled by a government whose interests or policies are hostile to or inconsistent with those of the United States."[25] Molerio claimed the FBI's policy was discriminatory and had a disparate impact on applicants of Cuban ancestry. The court, however, relying on the national security exception in the statute, dismissed the disparate impact claim, stating "the mere fact that such requirements impose special disabilities on the basis of connection with particular foreign countries is not alone evidence of discrimination."[26]

The EEOC recognizes in its compliance manual that, under this statutory exception, it does not have the authority to review the substance of the decisions behind security clearance determinations, or a security requirement itself, even if they are allegedly based on national origin.[27]

National security decisions of the Executive Branch are thus statutorily protected from second-guessing by courts and private litigants under Title VII. However, that is not the case under Title VI.

C. Title VI

Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin . . . be subjected to discrimination under any program or activity receiving Federal financial assistance."[28] The purpose of this provision was summarized by President John F. Kennedy, who said "[s]imple justice requires that public funds . . . not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color, or national origin] discrimination."[29] Title

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Executive order of the President; and (2) such individual has not fulfilled or has ceased to fulfill that requirement.

[23] EQUAL EMPLOYMENT OPPORTUNITY COMM'N, NO. N-915-041, POLICY GUIDANCE ON THE USE OF THE NATIONAL SECURITY EXCEPTION CONTAINED IN § 703(G) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED (1989).

[24] 749 F.2d 815 (D.C. Cir. 1984).

[25] *Id.* at 823.

[26] *Id.*

[27] *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, DIRECTIVES TRANSMITTAL NO. 915.003, COMPLIANCE MANUAL, § 13-III(B)(1) (2002) ("[T]he Commission may not review the substance of a security clearance determination or the security requirement, even if it is allegedly based on national origin.").

[28] 42 U.S.C. § 2000d (2000).

[29] 109 CONG. REC. 11,161 (1963).

VI applies to federal contractors and other entities receiving federal financial assistance the same anti-discrimination standards that Title VII applies to employers.

In *Alexander v. Choate*,[30] the Supreme Court clarified that while the Title VI statute itself prohibited only *intentional* discrimination, "actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI."[31] Private individuals thus brought lawsuits to enforce agency disparate impact regulations,[32] asking courts to provide injunctive relief[33] and countermand policies covered by Title VI that had a disparate impact on protected classes.

Such a regime prevailed until a few months prior to the 9/11 terrorist attacks, when the Court held in *Alexander v. Sandoval*[34] that there is no private right of action to enforce disparate impact regulations.[35] Consequently, since the Court's decision in *Sandoval*, there have been no private disparate impact claims brought over national security programs and policies—only federal agencies themselves have been able to bring disparate impact claims under Title VI.[36]

That may all change, however, if Congress enacts current statutory proposals to amend Title VI so as to allow private lawsuits asserting disparate impact claims.

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[30] 469 U.S. 287 (1985).

[31] *Id.* at 293. In that case, the Court assumed for purposes of deciding the case that the agency's disparate impact regulations were valid. However, one question left unanswered by the Court was whether, if Title VI only prohibits intentional discrimination, an agency can implement regulations prohibiting disparate impact without going beyond what it is authorized to do under Title VI.

[32] *See* Note, *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774, 1774 (2003).

[33] Monetary damages, however, are not available under Title VI. *See* Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 602 (1983) ("[I]njunctive relief should be granted as a remedy for unintended violations passed pursuant to [Congress's] spending power" but that "compensatory [monetary] relief . . . is not available as a private remedy for Title VI violations not involving intentional discrimination.").

[34] 532 U.S. 275 (2001) (decided April 24, 2001).

[35] *See id.* at 293 ("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists."). Section 602 of the Civil Rights Act of 1964 authorizes federal agencies "to effectuate the provisions of [§ 601 of Title VI] . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1 (2000).

[36] Not surprisingly, since the terrorist attacks of 9/11, no executive agencies, to the author's knowledge, have prosecuted entities involved with implementing the executive branch's own national security policies.

D. Recent Proposals to Amend Title VI to Allow Private Disparate Impact Claims

Recent congressional proposals would amend Title VI to codify the right of individuals to bring private disparate impact claims. H.R. 5129, the Civil Rights Act of 2008, introduced in the 110th Congress, would amend Title VI to add the following text to 42 U.S.C. § 2000d:

> (b)(1)(A) Discrimination (including exclusion from participation and denial of benefits) based on disparate impact is established under this title only if–
> (i) a person aggrieved by discrimination on the basis of race, color, or national origin (referred to in this title as an "aggrieved person") demonstrates that an entity subject to this title (referred to in this title as a "covered entity") has a policy or practice that causes a disparate impact on the basis of race, color, or national origin and the covered entity fails to demonstrate that the challenged policy or practice is related to and necessary to achieve the nondiscriminatory goals of the program or activity alleged to have been operated in a discriminatory manner; or
> (ii) the aggrieved person demonstrates (consistent with the demonstration required under title VII with respect to an "alternative employment practice") that a less discriminatory alternative policy or practice exists, and the covered entity refuses to adopt such alternative policy or practice.[37]

Such a proposal would allow private lawsuits to challenge government programs and policies based simply on their disparate impact on covered groups.[38] H.R. 5129, and its Senate companion, S. 2554,[39] do not contain any exception for national security programs as is found in Title VII. By providing blanket authorization for private disparate impact claims by statute, such proposals would also deny federal agencies the ability to promulgate regulations that carve out exceptions to such claims. Such exceptions could include protecting national security programs, or to alter disparate impact provisions as necessary to meet national security or other needs. Such proposals conse-

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[37] Civil Rights Act of 2008, H.R. 5129, 110th Cong. (2008) (providing that "(B)(i) With respect to demonstrating that a particular policy or practice causes a disparate impact as described in subparagraph (A)(i), the aggrieved person shall demonstrate that each particular challenged policy or practice causes a disparate impact, except that if the aggrieved person demonstrates to the court that the elements of a covered entity's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as 1 policy or practice.").

[38] In contrast, those bringing claims of discrimination under the Equal Protection Clause and 42 U.S.C. § 1981 must show that the discrimination was intentional, not merely that a given activity had a disparate impact based on race. *See* Washington v. Davis, 426 U.S. 229, 240 (1976) (holding that plaintiff must prove intentional discrimination).

[39] *See* Civil Rights Act of 2008, S. 2554, 110th Cong. (2008).

quently leave national security programs and policies open to private lawsuits brought under disparate impact theories in which a claimant, in order to prevail, need only show that some "less discriminatory alternative policy or practice exists,"[40] even if the programs and policies challenged were determined to meet the Title VI equivalent of "business necessity."[41]

III. The Impact on National Security of Allowing Private Disparate Impact Claims Under Title VI: the Example of Aviation Security

A failure to enact an exception for national security policies under any statutory authorization of private disparate impact claims will threaten to obstruct crucial national security programs that rely at least in part on determinations that will have a disparate impact based on national origin or other protected categories.

A. National Origin Discrimination and National Security Policies After 9/11

Both Title VI[42] and Title VII[43] prohibit discrimination based on "national origin." The definitional section of the EEOC's guidelines provides that "[t]he Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national group."[44] The EEOC Compliance Manual also provides the follow-

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[40] *Id.* at Sec. 102(b)(1)(A)(ii).

[41] Prior to the Supreme Court's *Sandoval* decision, Attorney General Janet Reno issued a memorandum that made clear that under Title VI covered entities, in order to avoid disparate impact claims, would have to show the equivalent of "business necessity," which was defined as requiring that "policies and practices must be eliminated unless they are shown to be necessary to the program's operation and there is no less discriminatory alternative." *See* Memorandum for Heads of Departments and Agencies That Provide Federal Financial Assistance from Attorney General Reno re: "Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964" (July 14, 1994), *available at* http://www.usdoj.gov/ag/readingroom/impactstandard.htm ("This Administration will vigorously enforce Title VI. As part of this effort, and to make certain that Title VI is not violated, each of you should ensure that the disparate impact provisions in your regulations are fully utilized so that all persons may enjoy equally the benefits of federally financed programs. Enforcement of the disparate impact provisions is an essential component of an effective civil rights compliance program. . . . Frequently discrimination results from policies and practices that are neutral on their face but have the effect of discriminating. Those policies and practices must be eliminated unless they are shown to be necessary to the program's operation and there is no less discriminatory alternative.").

[42] 42 U.S.C. § 2000d (2000).

[43] 42 U.S.C. § 2000e-2(a) (2000).

[44] 29 C.F.R. § 1606.1 (2008). This broad definition provides that "national origin" is not limited to an individual's own origin, but also extends to places that are not considered countries. *See* Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d

ing description of Title VII's prohibition of "national origin" discrimination: "Title VII prohibits employment discrimination against any national origin group, including larger ethnic groups, such as Hispanics and Arabs, and smaller ethnic groups, such as Kurds or Roma (Gypsies)."[45]

Since 9/11, in contexts involving immigration policy, the federal government appears to have adopted policies that rely, at least on some level, on some form of determination related to national origin.[46] Following the 9/11 attacks, the Justice Department sought to interview thousands of men who entered the United States from other countries during a particular period of time. The federal government also called for the registration of non-immigrant visa holders from countries it "identified with terrorism,"[47] and law enforcement officials questioned non-immigrant visa holders from those countries.[48] The Department of Homeland Security (DHS) also instituted a policy subjecting asylum seekers from certain countries considered dangerous to mandatory detention "prior to" or "while they awaited their" asylum proceedings.[49] Federal authorities also detained people with connections to countries "identified with terrorism,"[50] arguing that the government should

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1117 (9th Cir. 1998) (holding that discrimination based on tribal affiliation may constitute national origin discrimination, based upon EEOC regulation 29 C.F.R. § 1601.1 (1991)); Pejic v. Hughes Helicopters, Inc., 840 F.2d 667 (9th Cir. 1988) (finding Serbia relevant for national origin purposes, even though Serbia had ceased its independent existence long before the litigation and long before the plaintiff was born); Janko v. Ill. State Toll Highway Auth., 704 F. Supp. 1531 (N.D. Ill. 1989) (stating that "gypsies" are entitled to protection); *see also* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 27, § 13-II (A) ("National origin discrimination includes discrimination because a person (or his or her ancestors) comes from a particular place. The place is usually a country or a former country, for example, Colombia or Serbia. In some cases, the place has never been a country, but is closely associated with a group of people who share a common language, culture, ancestry, and/or other similar social characteristics, for example, Kurdistan.").

[45] EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 27, § 13-II (B).

[46] *See generally* Mariano-Florentino Cuéllar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9, 14–15 (2003).

[47] *See* Kevin Freking, *INS Move to Register Illegal Aliens Raises Stir*, ARK. DEMOCRAT GAZETTE, Mar. 3, 2003, at 1 (noting that the head of the Division of Transportation and Border Security, Asa Hutchinson, had explained that "registration eventually will apply to all visa holders, and it made sense to start with aliens from countries that have been 'identified with terrorism.'").

[48] *See DOJ Orders Incentives, 'Voluntary' Interviews of Aliens to Obtain Info on Terrorists; Foreign Students, Visa Processing Under State Department Scrutiny*, 78 INTERPRETER RELEASES 1816, 1817–19 (2001); *see also* U.S. GEN. ACCOUNTING OFFICE, GAO-03-459, HOMELAND SECURITY: JUSTICE DEPARTMENT'S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001, at 5 (2003) [hereinafter GAO-03-459] (describing requests made by the Justice Department that prosecutors and investigators arrange interviews with individuals who "fit certain characteristics relating to . . . [the] country that issued [the] passport").

[49] *See* WHITE HOUSE, FACT SHEET: OPERATION LIBERTY SHIELD (2003), http://www.whitehouse.gov/news/releases/2003/03/20030317-9.html ("Asylum Detainees–Asylum applicants from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated will be detained for the duration of their processing period. This reasonable and prudent temporary action allows authorities to maintain contact with asylum seekers while we determine the validity of their claim.").

[50] Following the 9/11 attacks, the federal government detained nearly a thousand people. *See* Josh Meyer, *Dragnet Produces Few Terrorist Ties*, L.A. TIMES, Nov. 28, 2001, at Al. The largest number of people in the dragnet were from Pakistan and Egypt. *See* AMNESTY INTERNA-

especially scrutinize people that come from those regions where al-Qaeda is known to operate.[51] As described by the Government Accountability Office, the Justice Department's "rationale in selecting these characteristics was that their demographic similarity to the terrorists would make them more likely to reside in the same communities or be members of the same social groups and, therefore, more likely to be aware of suspicious activity."[52]

In June 2003, the Justice Department released its official "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies."[53] The guidance is premised with the statement that

> "Racial profiling" at its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.[54]

However, in the subsection that addresses "National Security and Border Integrity," and air transportation security in particular, the guidance speaks to exceptions, stating

> In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation's borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.[55]

TIONAL, USA: AMNESTY INTERNATIONAL'S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA (2002), http://www.amnesty.org/en/library/info/AMR51/044/2002. The Immigration and Naturalization Service then announced a program to pursue non-citizens who violated the terms of their student visas, focusing exclusively on students from nations with alleged links to terrorism: Iran, Iraq, Sudan, Pakistan, Libya, Saudi Arabia, Afghanistan, and Yemen. *See* James Sterngold & Diana Jean Schemo, *10 Arrested in Visa Cases in San Diego*, N.Y. TIMES, Dec. 13, 2001, at B1.

[51] *See* Viet Dinh, *Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 403 (2002) ("The names of approximately 5000 individuals that were sent to the ATTFs [Anti-Terrorism Task Forces] . . . are those who we believe may have information that is helpful to the investigation or to disrupting ongoing terrorist activity. The names were compiled using common-sense criteria that take into account the manner, according to our intelligence sources, in which Al Qaeda traditionally has operated. Thus, for example, the list includes individuals who entered the United States with a passport from a foreign country in which Al Qaeda has operated or recruited; who entered the United States after January 2, 2000; and who are males between the ages of 18 and 33.").

[52] GAO-03-459, *supra* note 48, at 7.

[53] U.S. DEP'T OF JUSTICE, CIV. RIGHTS DIV., GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (2003), *available at* http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm.

[54] *Id.* at 1. Racial profiling—the invidious use of race (or national origin) to subject certain groups, but not others, to adverse treatment under policies based on a raw dislike for the groups that have been singled out—is clearly wrong, as the Guidelines make clear.

[55] *Id.* at 2.

The guidance then points to a Sixth Circuit decision in which profiling based on race is condemned, but only when race constitutes the "sole" basis for the profile.[56]

The guidance also cites the Supreme Court's decision in *United States v. Armstrong*, in which the Court stated that impermissible selective enforcement based on race occurs when the challenged policy has "a discriminatory effect *and* . . . [is] motivated by a discriminatory purpose."[57] Under such a standard, policies that have a disparate impact alone do not violate the Constitution. The guidelines also suggest that "general [law] enforcement responsibilities should be carried out without *any* consideration of race or ethnicity."[58] However, such an absolute prohibition on the consideration of race or ethnicity does not apply to "the prevention of catastrophic events or harm to the national security."[59]

Returning specifically to situations such as airline screening, the guidance states:

> Since . . . on September 11, 2001, the President has emphasized that federal law enforcement personnel must use every legitimate tool to prevent future attacks, protect our Nation's borders, and deter those who would cause devastating harm to our Nation . . . . "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)).
>
> The Constitution prohibits consideration of race or ethnicity in law enforcement decisions in all but the most exceptional instances. Given the incalculably high stakes involved in such investigations, however, Federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, and other relevant factors to the extent permitted by our laws and the Constitution.[60]

The guidelines then reference two examples in which considerations of ethnicity would be appropriate regarding efforts to prevent terrorist attacks:

> *Example*: The FBI receives reliable information that persons affiliated with a foreign ethnic insurgent group intend to use suicide

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[56] *Id.* (citing United States v. Avery, 137 F.3d 343, 354–55 (6th Cir. 1997) ("A person cannot become the target of a police investigation solely on the basis of skin color. Such selective law enforcement is forbidden. . . . If law enforcement adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred.").

[57] *Id.* (citing United States v. Armstrong, 517 U.S. 456, 465 (1996)) (emphasis added).

[58] *Id.* at 3.

[59] *Id.*

[60] *Id.* at 8.

> bombers to assassinate that country's president and his entire entourage during an official visit to the United States. Federal law enforcement may appropriately focus investigative attention on identifying members of that ethnic insurgent group who may be present and active in the United States and who, based on other available information, might conceivably be involved in planning some such attack during the state visit.
>
> *Example*: U.S. intelligence sources report that terrorists from a particular ethnic group are planning to use commercial jetliners as weapons by hijacking them at an airport in California during the next week. Before allowing men of that ethnic group to board commercial airplanes in California airports during the next week, Transportation Security Administration personnel, and other federal and state authorities, may subject them to heightened scrutiny. Because terrorist organizations might aim to engage in unexpected acts of catastrophic violence in any available part of the country (indeed, in multiple places simultaneously, if possible), there can be no expectation that the information must be specific to a particular locale or even to a particular identified scheme.[61]

Such policies, of course, would necessarily have a disparate impact on members of the relevant ethnicity.[62]

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[61] *Id.* at 9.

[62] If disparate impact standards were to apply in such situations, once a disparate impact was shown by the plaintiff, the government would then bear the burden of establishing the defense of "business necessity," or a similar concept, which requires a very demanding showing, as discussed previously. *See supra* notes 10–12 and accompanying text. The government may not be able to establish this defense under such a high standard, and, even if it could, doing so would of course take significant time and resources. Further, congressional proposals would allow plaintiffs to succeed on their disparate impact claims if they showed only "(consistent with the demonstration required under title VII with respect to an 'alternative employment practice') that a less discriminatory alternative policy or practice exists, and the covered entity refuses to adopt such alternative policy or practice." *See supra* notes 37–40 and accompanying text. Such proposals, if enacted into law, would have to be read in the context of the Civil Rights Act of 1991, which statutorily overrode the Supreme Court's decision in *Wards Cove*. *See supra* notes 19–21 and accompanying text. Part of the *Wards Cove* decision, which discussed the employment context but which has been interpreted to also apply outside the employment context, *see supra* note 41, provided that "any alternative practices which [plaintiffs] offer up . . . must be equally effective as [defendants'] chosen hiring procedures in achieving [defendants'] legitimate employment goals. Moreover, '[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals.'" Wards Cove, 490 U.S. at 661 (citations omitted). Also, the Court in *Wards Cove* held that courts were to defer to an employer's judgment regarding whether a proposed alternative practice would be as effective as the challenged practice. *See id.* ("Courts are generally less competent than employers to restructure business practices; consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative selection or hiring practice in response to a Title VII suit.") (quotations and citations omitted). Congress appeared to reject this holding as well in the Civil Rights Act of 1991. *See* William Gordon, *The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study*, 44 HARV. J. ON LEGIS. 529, 541 (2007). Consequently, current con-

Presumably the need to include elements that relate to ethnicity or national origin in national security policies derives, at least in part, from the assessments of risk formulated by U.S. intelligence agencies. The Office of the Director of National Intelligence's July 2007 National Intelligence Estimate regarding "The Terrorist Threat to the U.S. Homeland" constitutes an authoritative evaluation of risks of terrorism within the U.S. government. That document repeatedly emphasizes the threat posed by regional groups with relatively defined ethnic compositions.[63]

As recently summed up by Attorney General Michael Mukasey, "[s]o far as focusing investigations, we investigate where the threat is coming from. The threat is coming from Islamist extremism. It's not coming from Calvinism . . . . We'd be out of our minds not to mention the waste of resources to look everyplace simply in the name of being [politically] correct."[64]

Indeed, commentators on all sides of the political spectrum have stated that national origin must factor into national security policies at some level, especially in the context of airline safety.[65]

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gressional proposals to amend Title VI to allow disparate impact claims, when read with the Civil Rights Act of 1991, would allow disparate impact claimants to prevail even if the alternative practices they proposed were more costly and less effective than the challenged practice, and a court would not have to defer to the defendant's judgment regarding whether a proposed alternative practice would be as effective as the challenged practice.

[63] OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, NATIONAL INTELLIGENCE ESTIMATE: THE TERRORIST THREAT TO THE US HOMELAND (2007). As the Estimate states:

> We assess that al-Qa'ida will continue to enhance its capabilities to attack the Homeland through greater cooperation with regional terrorist groups. . . .
>
> We assess Lebanese Hizballah, which has conducted anti-U.S. attacks outside the United States in the past, may be more likely to consider attacking the Homeland over the next three years if it perceives the United States as posing a direct threat to the group or Iran.
>
> We assess that the spread of radical–especially Salafi–Internet sites, increasingly aggressive anti-U.S. rhetoric and actions, and the growing number of radical, self-generating cells in Western countries indicate that the radical and violent segment of the West's Muslim population is expanding, including in the United States.

The Estimate then references "other, non-Muslim terrorist groups," but states that the harm caused by such groups "is likely to be on a small scale." *Id.* Generally, the instances of terrorist group suicide bombings have dramatically increased since 2001. *See* Robin Wright, *Since 2001, a Dramatic Increase in Suicide Bombings*, WASH. POST, April 18, 2008, at A18 ("Suicide bombers conducted 658 attacks around the world last year . . . . The large number of attacks—more than double the number in any of the past 25 years—reflects a trend that has surprised and worried U.S. intelligence and military analysts. More than four-fifths of the suicide bombings over that period have occurred in the past seven years, the data show. The bombings have spread to dozens of countries on five continents, killed more than 21,350 people and injured about 50,000 since 1983 . . . . 'Increasingly, we are seeing the globalization of suicide bombs, no longer confined to conflict zones but happening anywhere,' said Mohammed Hafez of the Naval Postgraduate School in Monterey, Calif. . . . . He calls the contemporary perpetrators 'martyrs without borders.' . . . The sources who provided the data to the *Washington Post* asked that they not be identified because of the sensitivity of the tallies.").

[64] Editorial, *Attorney General Gets Emotional in Calling for Surveillance Powers*, N.Y. SUN, Mar. 28, 2008, available at http://www.nysun.com/editorials/mukaseys-emotion/73772/.

[65] *See, e.g.*, Stephen J. Ellmann, *Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV. 675, 697 (2002–2003) ("Does . . . racial profiling simply make[ ] no sense? The answer,

Some of these same commentators have pointed out that the use of national origin criteria at some level is justified in the context of efforts to prevent terrorism because such a policy is more akin to the government's use of a particular suspect's description rather than bias against an entire group motivated by racial animus. Professor R. Richard Banks, for example, has explained:

> In the antiterrorism context, hundreds of known terrorists, predominantly Arab or Muslim men, are sought by law enforcement authorities. Thousands of others are suspected of supporting or having information about terrorist activity. Efforts to find these individuals that begin with a description may nonetheless appear to many to be racial profiling. The search for terrorists cannot be as temporally or geographically limited as suspect description reliance in ordinary law enforcement. The terrorist threat is ongoing nationwide, and much of the intelligence information on which antiterrorism agents rely is likely not specific as to time or place. Imagine a process in which airline security personnel subject those passengers who match some key aspects of a description of a known terrorist—for example, name and nationality—to additional questioning. This sort of investigation might well be viewed as racial profiling. It would likely result in the investigation of thousands of innocent Arabs and Muslims and could further the stigmatization of the entire group as potential terrorists. On the other hand, it might also be viewed simply as an effort to prevent any known terrorists from boarding an airplane within or to the

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probably, is no. For we also know that Al Qaeda is . . . a Muslim organization, drawing a great many of its members and adherents from Middle Eastern states . . . ."); Stuart Taylor, Jr., *The Skies Won't Be Safe Until We Use Commonsense Profiling*, 34 NAT'L J. 754, 754–55 (2002) ("While the politically correct approach to profiling still seems to be an article of faith in many quarters, some liberals (along with many conservatives) are talking sense. One is Rep. Barney Frank, D-Mass., perhaps the smartest civil libertarian in Congress. During a March 6 debate at Georgetown University Law Center, Frank forthrightly asserted that airline security profiles should take account of national origin. . . . Frank also stressed: 'I do think that at this point, [national] origin would be part of it. . . . In certain countries, people are angrier at us than elsewhere.'"); Stuart Taylor, Jr., *Politically Incorrect Profiling: A Matter of Life or Death*, 33 NAT'L J. 3406, 3406–07 (2001) ("For the foreseeable future, the shortage of high-tech bomb-detection machines and the long delays required to search luggage by hand will make it impossible to effectively screen more than a small percentage of checked bags. The only real protection is to make national origin a key factor in choosing those bags. . . . [N]ational-origin profiling may be the only way (in the short term) to avoid hundreds or thousands of deaths. . . ."); Jonathan Turley, *Use Profiling Judiciously*, L.A. TIMES, Jan. 4, 2002, at B13 ("[W]ith more than 40 million people traveling each month by air, profiling may not only be necessary but inevitable in the fight against terrorism."); James Q. Wilson & Heather R. Higgins, *Profiles in Courage*, WALL ST. J., Jan. 10, 2002, at A12 ("In just a few seconds, a screener must decide whether to pat down a person who is hurrying to a plane. Trained properly, these screeners must be able to notice some bits of behavior or body language that may be a tip-off . . . . But not all terrorists are basket cases. And for many of those serving as the country's final line of defense against terrorism in the skies, physical features may be all they have to go on.").

> United States. As long as antiterrorism agents only question those who match some aspect of the description of a specific terrorist suspect, one might decline to view this investigation as racial profiling . . . .[66]

And Professor Jonathan Turley has also stated, "the profiling of some categories of Arab travelers is tied to a single defined crime and an established nexus between certain groups and the current threat."[67] The Department of Justice itself has noted that a general terrorist threat is ongoing nationwide and, of necessity, much of the information on which the government must and does rely is not specific, at least as to time, place, or method.[68]

B. Citizenship Under the Civil Rights Act of 1964 and National Security Policies After 9/11

At least one federal judge has explained that the government should have even more leeway to consider national origin in its national security

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[66] R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201, 1209–10, 1215–16 (2004).

[67] Turley, *supra* note 65 ("The suggestion that the questioning of Arab travelers is based on mere ethnic prejudice is absurd. All 19 of the September hijackers were young Arab men. The vast majority of Al Qaeda members and Taliban fighters are Afghan or Arab men. All 22 people on the FBI's most wanted terrorist list are Muslims and virtually all are Arab. This may have something to do with the fact that the cause for the hatred spawning this terrorism is centered in the Middle East and steeped in Islamic fanaticism. The reluctance to use a profile at airports for terrorism seems designed to satisfy modern sensibilities at the cost of actual security.").

[68] *See* CIV. RIGHTS DIV., *supra* note 53, at 9 ("Because terrorist organizations might aim to engage in unexpected acts of catastrophic violence in any available part of the country (indeed, in multiple places simultaneously, if possible), there can be no expectation that the information must be specific to a particular locale or even to a particular identified scheme.").

Even before 9/11, the Second Circuit Court of Appeals upheld as constitutional a police investigation that involved the questioning of large numbers of blacks in a small town predominantly populated by whites, based on a victim's description of a black assailant. In *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000), the court described the police investigation in question as follows: "The people in Oneonta are for the most part white . . . . On September 4, 1992, shortly before 2:00 a.m., someone broke into a house just outside Oneonta and attacked a seventy-seven-year-old woman. The woman told the police who responded to the scene that she could not identify her assailant's face, but that he was wielding a knife; that he was a black man, based on her view of his hand and forearm; and that he was young, because of the speed with which he crossed her room . . . . Then, over the next several days, the police conducted a "sweep" of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts. More than two hundred persons were questioned during that period . . . . " *Id.* at 334. The court rejected claims brought by those who were investigated, concluding that "[t]o state a race-based claim under the Equal Protection Clause, a plaintiff must allege that a government actor intentionally discriminated against him on the basis of his race . . . . [Those investigated] were not questioned solely on the basis of their race. They were questioned on the altogether legitimate basis of a physical description given by the victim of a crime . . . . Without additional evidence of discriminatory animus, the disparate impact of an investigation such as the one in this case is insufficient to sustain an equal protection claim . . . ." *Id.* at 337–39 (citations omitted).

policies when it comes to noncitizens. Seventh Circuit Judge Richard Posner has written:

> I suspect that the optimal policy is to subject more U.S. citizens of apparent Middle Eastern origin or Muslim religious identity to intensive screening than other citizens, but to subject enough of the other citizens to the same intensive screening so that the (lightly) profiled group does not feel markedly discriminated against . . . . My view with regard to profiling noncitizens is different. Noncitizens are not expected to be loyal to the United States and so the concern with alienating them by profiling is less acute. No foreigner expects to be treated identically to a citizen.[69]

Yet even though noncitizens may have significantly reduced claims to being excluded from national security programs based in part on national origin, such noncitizens, for the following reasons, would likely be able to challenge such programs if private disparate impact claims were allowed under Title VI.

Noncitizens have already been held to be protected under Title VII. While Title VII's employment protections "shall not apply to an employer with respect to the employment of aliens outside any State,"[70] Title VII's employment protections have been held to apply to noncitizens when employment policies have had the effect of discriminating based on national origin.

In *Espinoza v. Farah Manufacturing Co.*,[71] the Supreme Court addressed the claim that Title VII protects all individuals from unlawful discrimination, whether or not they are citizens of the United States.[72] The Court held that Title VII only prohibited discrimination based on noncitizenship if that determination was made by national origin.

The Court

> agree[d] that aliens are protected from discrimination under the Act [Title VII]. That result may be derived . . . from the use of the term 'any individual' in § 703. . . The question posed in the present case, however, is not whether aliens are protected from illegal discrimination under the Act, but what kinds of discrimination the Act makes illegal. Certainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin—for example, by hiring aliens of Anglo-Saxon

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[69] Posting of Richard Posner to Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2005/01/comment_on_prof.html (Jan. 23, 2005, 20:05 EST).

[70] 42 U.S.C. § 2000e-1(a) (2006).

[71] 414 U.S. 86 (1973).

[72] *Id.* at 95.

background but refusing to hire those of Mexican or Spanish ancestry.[73]

Similarly, Title VI protects every "person" in the United States,[74] and the United States Code provides that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, *as well as individuals* . . ."[75] Consequently, the word "person" in Title VI would be interpreted to include individuals, and to also include noncitizens within its protections under *Espinoza*. Federal courts, following *Espinoza*, have found for noncitizen plaintiffs making Title VII claims of disparate impact based on national origin.[76]

IV. Terrorist Watch Lists and Airline Passenger Screening: the Role of Commercial Airlines and Private Screeners

Title VI, if amended to allow private disparate impact lawsuits, would prohibit the use of national origin, regarding both noncitizens and citizens, in national security programs administered by entities that receive federal financial assistance. In the context of aviation security, airport operators, com-

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[73] *Id.* The Code of Federal Regulations also provides that "Title VII of the Civil Rights Act of 1964 protects all individuals, both citizens and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin." 29 C.F.R. § 1606.1(c) (2007); *see also id.* § 1606.5(a) ("[W]here citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by [T]itle VII."); Equal Employment Opportunity Comm'n, *supra* note 27, § 13-I ("Title VII's protections extend to all workers in the United States, whether born in the United States or abroad and regardless of citizenship status."). The EEOC's Guidance Manual also refers to "the settled principle that undocumented workers are covered by the federal employment discrimination statutes . . . ." Equal Employment Opportunity Comm'n, Directives Transmittal No. 915.002, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under the Federal Employment Discrimination Laws Compliance Manual § 13-III(B)(1) (2002).

[74] 42 U.S.C. § 2000d (2006) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[75] 1 U.S.C. § 1 (2006) (emphasis added).

[76] *See, e.g.*, Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064 n.4 (9th Cir. 2004) ("[Defendant] has conceded . . . that Title VII applies to discrimination against undocumented aliens on one of the protected grounds: race, sex, national origin, etc. . . . The parties' stipulation is consistent with what we have long assumed to be the law of this circuit."); EEOC v. Tortilleria "La Mejor," 758 F. Supp. 585, 590 (E.D. Cal. 1991) (holding that "the protections of Title VII were intended by Congress to run to aliens, whether documented or not, who are employed within the United States"); Anderson v. Zubieta, 180 F.3d 329, 340 (D.C. Cir. 1999) (quoting Espinoza v. Farah Mfg. Co., 414 U.S. 86, 93 (1973)) (finding, regarding "plaintiffs' claims of pretext and disparate effect," that "the overwhelming majority of those who receive[d] the [challenged] pay differential are whites of non-Panamanian origin" and that "[i]f, as *Espinoza* proclaimed, Title VII truly does 'prohibit[ ] discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin,' then courts must afford plaintiffs an opportunity to prove such a purpose or effect").

mercial airlines, and private screening companies receive federal financial assistance, and they are integrally involved in the federal aviation security program. As set out below, such entities would be subject to litigation for their roles in implementing national security policies if private disparate impact claims were authorized under Title VI.

A. Terrorist Watch Lists

Prior to 9/11, the Federal Aviation Administration administered a program called the Computer Assisted Passenger Precreening System ("CAPPS"), which was created to identify passengers who should be subject to special security measures.[77] Ten out of the nineteen hijackers on 9/11 were identified by the CAPPS system for special screening, but such screening did not result in their prevention from boarding.[78]

Since 9/11, agencies within the Departments of Homeland Security, Justice, and State, as well as state and local law enforcement organizations and the intelligence community, have implemented enhanced procedures to collect and share information about known or suspected terrorists who pose a threat to homeland security and to track their movements. As part of that effort, these agencies use a terrorist watch list, which contains records with identifying or biographical information—such as name and date of birth—of foreign and United States citizens with known or reasonably suspected links to terrorism.[79]

Pursuant to Homeland Security Presidential Directive 6,[80] the Terrorist Screening Center ("TSC") was established to develop and maintain the federal government's consolidated terrorist watch list and to provide for the use of watch list records during security-related screening processes.[81] The TSC receives the vast majority of its information about known or appropriately suspected terrorists from the National Counterterrorism Center (NCTC), which compiles information on international terrorists from a wide range of executive branch departments and agencies, such as the Department of State, the CIA, and the FBI.[82] The center consolidates this information into a sensitive but unclassified watch list and makes records available as appropriate

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[77] *See* THE 9/11 COMMISSION REPORT 1 (2004), *available at* http://govinfo.library.unt.edu/911/report/911report.pdf.

[78] *Id.* at 1, 451 n.2.

[79] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-110, TERRORIST WATCH LIST SCREENING: OPPORTUNITIES EXIST TO ENHANCE MANAGEMENT OVERSIGHT, REDUCE VULNERABILITIES IN AGENCY SCREENING PROCESSES, AND EXPAND USE OF THE LIST 1-2 (2007) [hereinafter GAO-08-110].

[80] *See* THE WHITE HOUSE, HOMELAND SECURITY PRESIDENTIAL DIRECTIVE/HSPD-11, SUBJECT: COMPREHENSIVE TERRORIST-RELATED SCREENING PROCEDURES (2004), *available at* http://www.biometrics.gov/Documents/Homeland%20Security%20Presidential%20Directive%20_%20HSPD-11_%20Comprehensive%20Terrorist-.pdf.

[81] GAO-08-110, *supra* note 79, at 2.

[82] *Id.* at 3.

for a variety of screening purposes. The Transportation Security Administration directs airlines to use portions of the TSC's watch list to screen the names of passengers to identify those who may pose threats to aviation.[83]

According to the Government Accountability Office, NCTC and the FBI rely upon standards of reasonableness[84] in determining which individuals are appropriate for inclusion on the TSC's consolidated watch list.[85] Based on these standards, the number of records in the TSC's consolidated watch list has increased from about 158,000 records in June 2004 to about 755,000 records in May 2007.[86] The 755,000 names on the list, however, are greater than the number of individuals on the list, as many suspected terrorists go by many different aliases.[87]

From December 2003 through May 2007, screening and law enforcement agencies encountered individuals who were positively matched to

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[83] *Id.* at 3.

[84] A standard of reasonableness is based on a government agent's particularized and objective basis for suspecting that an individual is dangerous, considering the totality of circumstances known to the government agent at that time. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 30 (1968); United States v. Price, 184 F.3d 637, 640–41 (7th Cir. 1999). According to NCTC procedures, NCTC analysts are to review all information involving international terrorists using a "reasonable suspicion" standard to determine whether an individual is appropriate for nomination to TSC for inclusion on the watch list. NCTC defines reasonable suspicion as information, including facts, rational inferences from those facts, and the experience of the reviewer, that is sufficient to cause an ordinarily prudent person to believe that the individual under review may be a known or appropriately suspected terrorist. *See* GAO-08-110, *supra* note 79, at 20.

[85] GAO-08-110, *supra* note 79, at 7 ("In general, individuals who are reasonably suspected of having possible links to terrorism—in addition to individuals with known links—are to be nominated. To determine if the suspicions are reasonable, the National Counterterrorism Center and the FBI are to assess all available information on the individual. According to the National Counterterrorism Center, determining whether to nominate an individual can involve some level of subjectivity. Nonetheless, any individual reasonably suspected of having links to terrorist activities is to be nominated to the list and remain on it until the FBI or the agency that supplied the information supporting the nomination, such as one of the intelligence agencies, determines the person is not a threat and should be removed from the list. Moreover, according to the FBI, individuals who are subjects of ongoing FBI counterterrorism investigations are generally nominated to the list. If an investigation finds no nexus to terrorism, the FBI generally is to close the investigation and request that the Terrorist Screening Center remove the person from the watch list. Because individuals can be added to the list based on reasonable suspicion, inclusion on the list does not automatically prohibit an individual from, for example, obtaining a visa or entering the United States. Rather, when an individual on the list is encountered, agency officials are to assess the threat the person poses to determine what action to take, if any.").

[86] *Id.* at 8

[87] *Id.* at 8 n.10. Also, more than 100,000 records have been removed from the watch list since TSC's creation. *Id.* at 24; *see also* Leonard Boyle, *Who's on the Watch List?*, WASH. POST, July 17, 2008, at A21 ("[The terrorist watch list's] size corresponds to the threat . . . . Even the minuscule percentage of people involved in terrorist activities can equal large numbers. There are slightly more than 1 million records on the watch list, which correspond to approximately 400,000 individuals. The vast majority of those individuals aren't in the United States right now. . . . Of the individuals on the terrorist watch list, approximately 95 percent are not American citizens or legal residents; the number of U.S. persons is relatively minute.").

watch list records approximately 53,000 times.[88] The number of positive matches to the terrorist watch list has increased each year, from 4876 during the first ten-month period of TSC's operations, to 19,887 during fiscal year 2006.[89]

The GAO concluded that the use of the watch list has enhanced the government's counterterrorism efforts in two ways. First, use of the watch list has helped federal, state, and local screening and law enforcement officials obtain information to make better-informed decisions when they encounter an individual on the list as to the threat posed and the appropriate response or action to take, if any. Second, information collected from watch list encounters is shared with agents conducting counterterrorism investigations and with the intelligence community for use in analyzing threats.[90]

B. The Role of Commercial Airlines and Private Screeners Under Aviation Security Programs

The No Fly[91] and Selectee[92] lists are compiled by TSC and forwarded to TSA, which distributes the lists to air carriers. The air carriers themselves use the lists in identifying individuals who either should be precluded from boarding an aircraft or should receive additional physical screening prior to boarding a flight.[93] TSA requires that U.S. aircraft operators use these lists to screen passengers on all of their flights and that foreign air carriers use these lists to screen passengers on all flights to and from the United States.[94] TSA distributes the watch lists to the private air carriers, which are generally downloaded into the air carriers' computer reservation systems, and the air carriers use the lists to screen passengers against them prior to boarding.[95] TSA also issues Security Directives that include instructions to air carriers

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[88] *See* GAO-08-110, *supra* note 79, at 8.

[89] *See id.* at 25.

[90] *Id.* at 8.

[91] Persons on the No Fly list are deemed to be a threat to civil aviation or national security and therefore should be precluded from boarding an aircraft. Passengers who are a match to the No Fly list are to be denied boarding unless subsequently cleared by law enforcement personnel in accordance with TSA procedures. The Homeland Security Council criteria contain specific examples of the types of terrorism-related conduct that may make an individual appropriate for inclusion on the No Fly list. *See id.* at 34–35.

[92] Persons on the Selectee list are also deemed to be a threat to civil aviation or national security but do not meet the criteria of the No Fly list. Being on the Selectee list does not mean that the person will not be allowed to board an aircraft or enter the United States. Instead, persons on this list are to receive additional security screening prior to being permitted to board an aircraft, which may involve a physical inspection of the person and a hand-search of the passenger's luggage. *Id.* at 35.

[93] *Id.* at 34.

[94] *See id.*

[95] *See* WILLIAM J. KROUSE AND BART ELIAS, TERRORIST WATCHLIST CHECKS AND AIR PASSENGER PRESCREENING 5 (Congressional Research Service Mar. 1, 2007).

regarding the security procedures to be followed when individuals identified on the No Fly List attempt to board commercial aircraft.[96]

Under a program called Secure Flight, TSA plans to take over from aircraft operators the responsibility for comparing identifying information on airline passengers against watch list records.[97] However, the GAO has reported and TSA has acknowledged significant challenges in developing and implementing the Secure Flight program.[98] Consequently, the airlines themselves will likely continue to compare the lists and require that certain passengers receive additional screening for the indefinite future.[99] In any event, the planned Secure Flight program would still require the private air carriers, based on the results of list comparisons, to provide a passenger with normal screening, to require the passenger to undergo additional screening and be met by law enforcement, or to be denied boarding entirely and be met by law enforcement.[100] The air carriers would also be required to collaborate with TSA in implementing the screening process, as the air carriers' "participation is essential to ensuring that passenger and terrorist watch list data are collected and transmitted for Secure Flight operations."[101]

Beyond the air carriers, private companies are substantially involved with conducting the heightened screening that is required for those flagged by the terrorist watch lists.

The Aviation and Transportation Security Act of 2001 ("ATSA"), while initially federalizing most screening functions, authorized the TSA to permit five airports—one in each size category—to obtain their passenger and bag-

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[96] *See* Green v. Transp. Sec. Admin., 351 F. Supp. 2d 1119, 1127 (W.D. Wash. 2005); *see also* 49 U.S.C. § 114(h)(1)–(3) (2006) (requiring TSA to "establish policies and procedures requiring air carriers [to] prevent the individual [who may pose a risk to transportation or national security] from boarding an aircraft, or to take other appropriate action with respect to that individual"); U.S. DEP'T OF HOMELAND SEC., PRIVACY OFFICE, REPORT ASSESSING THE IMPACT OF THE AUTOMATIC SELECTEE AND NO FLY LISTS ON PRIVACY AND CIVIL LIBERTIES AS REQUIRED UNDER SECTION 4012(B) OF THE INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004, at 4, 6 (2006) ("At present, the matching of airline passenger names against No-fly and Selectee lists for domestic flights is performed by the airlines. Airlines are required to notify TSA of matches to the No-fly and Selectee lists. Passengers who are matches to the Selectee list receive additional security screening before being permitted to board . . . . If an individual feels that he or she has been unfairly denied boarding or singled out for screening, he or she can contact TSA's Office of Transportation Security Redress (OTSR), the DHS Privacy Office, or DHS Office for Civil Rights and Civil Liberties (CRCL).").

[97] GAO-08-110, *supra* note 79, at 41.

[98] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-864T, AVIATION SECURITY: MANAGEMENT CHALLENGES REMAIN FOR THE TRANSPORTATION SECURITY ADMINISTRATION'S SECURE FLIGHT PROGRAM 2 (2006) [hereinafter GAO-06-864T].

[99] *See* Eric Lipton, *U.S. Official Admits to Big Delay in Revamping No-Fly Program*, N.Y. TIMES, Feb. 21, 2007, at A17 ("The federal takeover of checking passenger names against terrorist watch lists, a top priority for aviation officials since the 2001 terrorist attacks, is not expected to be complete until 2010, more than five years behind schedule, a top Department of Homeland Security official acknowledged . . . .").

[100] *See* GAO-06-864T, *supra* note 98, at 7.

[101] *Id.* at 10.

gage screening from TSA-certified private screening companies.[102] Interested airports applied to the TSA, and the agency selected San Francisco, Kansas City, Rochester, Jackson Hole, and Tupelo as what became known as the "PP5" airports.[103]

The ATSA also created an "opt-out" provision under which airport operators have since been able to apply to the Screening Partnership Program ("SPP") to use private screeners.[104] Today, private contractor screeners are in place at twelve airports across the country, where they assume responsibility for passenger checkpoint and baggage security screening operations.[105]

The program creating the PP5 sought to determine whether outsourcing this function could produce results as good as or better than those directly provided by federal TSA screening. Congress asked the GAO to assess the performance of screening at the PP5 airports, and the GAO concluded that, even though "TSA has provided the private screening contractors with little opportunity to demonstrate innovations and achieve efficiencies,"[106] the results "indicate that, in general, private and federal screeners performed similarly."[107]

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[102] *See* 49 U.S.C. § 44919 (a), (d) (2006) ("The Under Secretary shall establish a pilot program under which, upon approval of an application submitted by an operator of an airport, the screening of passengers and property at the airport . . . will be carried out by the screening personnel of a qualified private screening company under a contract entered into with the Under Secretary. . . . From among applications submitted[,] the Under Secretary may select for participation in the pilot program not more than 1 airport from each of the 5 airport security risk categories, as defined by the Under Secretary.").

[103] *See* WILLIAM J. KROUSE & BART ELIAS, TERRORIST WATCHLIST CHECKS AND AIR PASSENGER PRESCREENING, CONG. RES. SERV. 5 (2006).

[104] *See* 49 U.S.C. § 44920(a) (2006) ("On or after the last day of the 2-year period beginning on the date on which the Under Secretary transmits to Congress the certification required by section 110(c) of the Aviation and Transportation Security Act, an operator of an airport may submit to the Under Secretary an application to have the screening of passengers and property at the airport . . . carried out by the screening personnel of a qualified private screening company under a contract entered into with the Under Secretary.").

[105] *See* Transp. Sec. Admin., Screening Partnership Program, http://www.tsa.gov/what_we_do/optout/index.shtm (last visited Sept. 26, 2008). So far under the SPP, the following private screening contracts have been awarded: FirstLine Transportation Security, Inc., for the Gallup Municipal Airport and the Roswell Industrial Air Center, New Mexico; Trinity Technology Group for Charles M. Schulz-Sonoma County Airport, California; Raytheon Technical Services for Key West International and Florida Keys Marathon Airports, Florida; U.S. Helicopter Corporation and McNeil Security Inc., for the East 34th Street Heliport in Manhattan, New York; Covenant/Lockheed Team for San Francisco International Airport (SFO), California; McNeill Security, Inc., for Greater Rochester International Airport, New York; Trinity Technology Group, Inc., for Tupelo Regional Airport (TUP), Mississippi; FirstLine Transportation Security, Inc., for Kansas City International Airport (MCI), Mississippi; Jackson Hole Airport Board for the Jackson Hole Airport (JAC), Wyoming; Covenant/Lockheed Team for the Sioux Falls Regional Airport (FSD), South Dakota. *Id.*

[106] NORMAN J. RABKIN, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-505T, TESTIMONY BEFORE THE SUBCOMMITTEE ON AVIATION, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, HOUSE OF REPRESENTATIVES: AVIATION SECURITY: PRIVATE SCREENING CONTRACTORS HAVE LITTLE FLEXIBILITY TO IMPLEMENT INNOVATIVE APPROACHES 6 (2004).

[107] *Id.* at 13–14. The GAO also found that TSA "has allowed [private screening contractors] to implement some airport-specific practices. Flexible practices implemented by private screening contractors include screening candidates before they are hired through the assess-

The TSA itself "has acknowledged that one of its key challenges . . . will be designing appropriate criteria for the potential expansion of contract screening,"[108] and one recent report recommended that "screening functions should be devolved to each individual airport," meaning "each airport could decide to meet the requirements either with its own workforce or by hiring a TSA-approved screening contractor."[109] In fact, that is the model that predominates in Europe,[110] where, as the GAO found in a 2001 study, screening responsibility is placed most often with the airports, who then hire private companies to conduct screening operations.[111]

Recent reports predict that the TSA will be gradually reduced in size as private contractors increasingly take over screening functions at more and more airports.[112]

C. The Current and Future Roles of Other Private Entities in National Security Programs

Far beyond the airlines and private screening companies that already implement the results of terrorist watch list comparisons, the GAO has also recommended that other parts of the private sector utilize terrorist watch list records.[113] In addition, the interagency memorandum of understanding that implements HSPD-6 also required the Secretary of Homeland Security to

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ment centers, hiring baggage handlers in order to utilize baggage screeners more efficiently, and, during the initial hiring, selecting screener supervisors from within rather than relying on the decisions of TSA's hiring contractors. These practices have enabled the private screening contractors to achieve efficiencies that are not currently available . . . at airports with federal screeners." *Id*. at 2.

[108] *Id.* at 3.

[109] ROBERT W. POOLE, JR., REASON FOUND., AIRPORT SECURITY: TIME FOR A NEW MODEL (2006), Executive Summary.

[110] *See id.* at 12 ("[B]eginning in the 1980s, European airports began developing a performance contracting model, in which government set and enforced high performance standards and airports carried them out—usually by hiring security companies, but occasionally with their own staff. Belgium was the first to adopt this model in 1982, followed by the Netherlands in 1983 and the United Kingdom in 1987 . . . . The 1990s saw a new wave of conversions to the public-private partnership model, with Germany switching in 1992, France in 1993, Austria and Denmark in 1994, Ireland and Poland in 1998, and Italy, Portugal, Spain, and Switzerland in 1999.").

[111] *See* Gerald L. Dillingham, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-1162T, TESTIMONY BEFORE THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, U.S. SENATE, AVIATION SECURITY: TERRORIST ACTS DEMONSTRATE URGENT NEED TO IMPROVE SECURITY AT THE NATION'S AIRPORTS 9 (2001) ("In Belgium, France, and the United Kingdom . . . which either hire screening companies to conduct the screening operations or, as at some airports in the United Kingdom, hire screeners and manage the checkpoints themselves.").

[112] *See* Sara Kehaulani Goo, *Air Security Agency Faces Reduced Role*, WASH. POST, Apr. 8, 2005, at A11 ("The agency [TSA] will probably become just a manager of airport security screeners—a responsibility that itself could diminish as private screening companies increasingly seek a comeback at U.S. airports. The agency's very existence, in fact, remains an open question, given that the legislation creating the Department of Homeland Security contains a clause permitting the elimination of the TSA as a 'distinct entity' after November 2004.").

[113] *See* GAO-08-110, *supra* note 79, at 47 ("[T]here are additional opportunities for using [terrorist watch list] records in the private sector.").

establish necessary guidelines and criteria to govern the mechanisms by which private sector entities can access the watch list and initiate appropriate law enforcement or other governmental action, if any, when a person submitted for query by a private sector entity is identified as a person on the watch list.[114] And according to DHS's Office of Infrastructure Protection and Infrastructure Partnerships Division, employees in some parts of the private sector are already being screened against watch list records. These include employees who have access to the protected or vital areas of nuclear power plants, and individuals who transport hazardous materials.[115]

As the use of the watch lists expands, so will issues related to their effect on variously defined civil liberties.[116] That would include issues related to their disparate impact on covered groups, if private disparate impact lawsuits are authorized.

V. National Origin and the Transliteration Problem

One chief source of disparate impacts based on national origin in the use of terrorist watch lists derives from inevitable transliteration problems in the translation of foreign names.

There were less than twenty individuals on the No Fly list on 9/11.[117] Since then, the number of records in the Terrorist Screening Center's consolidated watch list has increased to about 755,000 records as of May 2007.[118]

Because terrorist watch list screening involves comparisons based on names and dates of birth, there is always the potential to generate misidentifications given that two or more people may have the same or similar

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[114] *See* The White House, Homeland Security Presidential Directive/Hspd-6, Subject: Integration and Use of Screening Information (2003), *available at* http://www.dhs.gov/xabout/laws/gc_1214594853475.shtm#1 ("The Secretary of Homeland Security shall develop guidelines to govern the use of [terrorist watch list] information to support . . . private sector screening processes that have a substantial bearing on homeland security."); *see also* GAO-08-110, *supra* note 79, at 47. The Screening Coordination Office (SCO) of the DHS "has drafted initial guidelines to govern the use of watch list records to support private-sector screening processes and is in the process of working with federal stakeholders to finalize this document." Letter from Steven J. Pecinovsky, Director, DHS GAO/OIG Liaison Office, to Eileen Larence, Director, Homeland Security and Justice Issues, U.S. Governmental Accountability Office (Sept. 4, 2007), at 1 (App. V to GAO-08-110, *supra* note 79, at 77).

[115] GAO-08-110, *supra* note 79, at 48. The office also indicated that several components of the private sector are interested in screening employees against watch list records or expanding current screening. *Id.*

[116] *See* U.S. Dep't of Homeland Sec., *supra* note 96, at iii ("The questions of relevance of the selection criteria, the amount of actual data contained on the lists, and the impact on privacy and civil liberties must be routinely considered going forward if the use of the No-fly and Selectee lists is expanded to other modes of transportation beyond aviation.").

[117] *See* Nat'l Comm'n on Terrorist Attacks Upon the United States, Staff Statement no. 3, The Aviation Security System and the 9/11 Attacks 6 (2004), *available at* http://www.911commission.gov/staff_statements/staff_statement_3.pdf (last visited Sept. 26, 2008).

[118] *See* GAO-08-110, *supra* note 79, at 8. But again, the 755,000 names on the list, however, are greater than the number of individuals on the list, as many suspected terrorists go by multiple aliases. *See id.* at 8 n.10.

names. Hundreds of millions of individuals, including international travelers, airline passengers, and visa applicants, are screened against the terrorist watch lists every year.[119] While the number of persons misidentified during terrorist watch list screening "likely represents a small fraction of the total screenings," the number of misidentifications "may be substantial in absolute terms."[120]

The difficulty in transliteration of foreign names accounts, in large part, for a disproportionate number of misidentifications of travelers of certain national origins. As the 9/11 Commission noted, "Islamic names often do not follow the Western practice of the consistent use of surnames. . . . Further, there is no universally accepted way to transliterate Arabic words and names into English."[121]

As described by the DHS Privacy Office:

> [A] potential misidentification issue arises because names from other languages that appear on the No-fly and Selectee lists may be written in different ways. There are many algorithms for matching words in computer databases, and many of them are designed specifically for matching names. Matching algorithms fall into two broad classes: orthographic algorithms, which compare strings of letters without regard to sound, and phonological algorithms, which compare strings of letters on the basis of phonetic representation. Both classes of algorithms are useful in matching of passengers against the lists, but each algorithm produces a different set of matches and all algorithms have significant error rates.[122]

This dynamic will inevitably lead to disparate impacts on individuals based on national origin.[123] Yet while the 9/11 Commission noted the transliteration problem, it still found that a name matching system "will always be useful."[124]

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[119] Domestic airline flights within the United States alone carried 658 million passengers during 2005. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-1031, TERRORIST WATCH LIST SCREENING: EFFORTS TO HELP REDUCE ADVERSE EFFECTS ON THE PUBLIC 13 (2006).

[120] *Id.* at 12.

[121] THE 9/11 COMM'N REPORT, *supra* note 77, at 27 note; *see also LAS Applauds 9/11 Commission's Findings on the Role of Names in Tightening Border Security*, BUS. WIRE, Aug. 19, 2004, *available at* http://www.allbusiness.com/crime-law/criminal-offenses-misc-hijacking/5203753-1.html ("Waleed Al-Shehri, one of the hijackers on American Airlines Flight 11, could have legitimately Romanized his name as Oualid Chihri.").

[122] *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 96, at 12-13.

[123] Kip Hawley, the chief of the Transportation Security Administration, has said that identity mistakes "come up a lot in the Muslim community." Thomas Frank & Mimi Hall, *Identity Plan To Ease Air Travel*, USA TODAY, Apr. 27, 2008, at A1.

[124] *See* THE 9/11 COMM'N REPORT, *supra* note 77, at 565 n.40 ("Among the more important problems to address is that of varying transliterations of the same name. For example, the current lack of a single convention for transliterating Arabic names enabled the 19 hijackers to vary the spelling of their names to defeat name-based watchlist systems and confuse any po-

The authorization of private disparate impact claims challenging the use of such lists would threaten their continued use, certainly in a form in which false positives are preferred over false negatives.[125]

Such authorization would also threaten the use of similar lists in other transportation contexts. As the DHS Privacy Office has explained, "[i]f the use of No-fly and Selectee lists is expanded to modes of transport other than air and cruise ships, the number of individuals being screened will increase significantly and, therefore, the number of matching errors could also increase. . . . According to the Bureau of Transportation Statistics, a component of the Department of Transportation, there were 83 air carriers in the US in 2002 but approximately 6,000 transit systems that operate buses, rail systems, ferry boats and other modes of passenger transport."[126] Most security regarding such other forms of transportation would be provided by state and local governments, or private entities, many or most of which would receive some form of federal assistance.[127] These groups would thus be cov-

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tential efforts to locate them. While the gradual introduction of biometric identifiers will help, the process will take years, and a name match will always be useful.").

[125] As described by the DHS Privacy Office:

> System designers must perform a trade-off between false positives and false negatives generated by a system–as one type of error decreases, the likelihood of the other type tends to increase, because a correlation tends to exist between these two types of errors. In other words, if a system is designed to minimize false negatives, it will produce a larger number of false positives, and vice versa. In terrorist screening systems, false negatives are potentially very costly in terms of lives that might be lost and in terms of economic damage resulting from acts of terrorism. However, there are very few individuals on watch lists compared to the number of individuals who are matched against these lists, so a system that is very sensitive to false negatives has the potential to produce a large number of false positives. For example, let us say that a system is 99.9 percent effective in doing its matches. With approximately 1.8 million passengers flying in the United States daily, the 99.9 percent accuracy rate would produce 1,800 errors per day.

U.S. DEP'T OF HOMELAND SEC., *supra* note 96, at 11 & n.32.

The TSC now reviews the watch lists more frequently for errors, but there will still be an emphasis on over-inclusion rather than under-inclusion. *See* Audrey Hudson, *Airport Watch Lists Now Reviewed Often*, WASH. TIMES, Apr. 11, 2008, at A1 ("The Terrorist Screening Center (TSC) now will automatically review nearly 500,000 names on its watch list that are frequently matched during airport screenings and other law-enforcement encounters with the general public and remove those names that don't belong to actual suspects. . . . Under new rules called the Terrorist Encounter Review Process (TERP), records of frequently encountered individuals will be reviewed, even if no formal redress requests are filed. . . . Glenn A. Fine, Justice Department inspector general, reported last fall that the TSC watch list contained some incomplete or obsolete information and recommended that inaccurate names be removed [but warned that] 'Even a single omission of a terrorist identity or an inaccuracy in the identifying information contained in a watch-list record can have enormous consequences.'").

[126] *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 96, at 13.

[127] According to the Department of Justice: "[r]ecipients of DOJ assistance include, for example: Police and sheriffs' departments" and "[o]ther entities with public safety and emergency service missions." 67 Fed. Reg. 41455, 41459 (Apr. 29, 2002). Further, "[c]overage [under Title VI] extends to a recipient's entire program or activity, i.e., to all parts of a recipient's operations. This is true even if only one part of the recipient receives the Federal assistance." *Id.*

ered under Title VI and any amendment to it that would authorize private disparate impact claims.

A. Federal Financial Assistance and Coverage Under Title VI

The statutory language, implementing regulations, agency guiding documents and Supreme Court precedent strongly suggest that if disparate impact lawsuits were authorized under Title VI, a large variety of entities that receive federal financial assistance would be subject to lawsuits when they help implement national security policies, even when such policies are facially neutral and not motivated by any discriminatory animus. Such entities would include those serving aviation security functions, including private screening companies, private air carriers, airports, and state and local entities.

Title VI does not apply to the federal government.[128] However, it does apply to state, local, or municipal agencies, and also to private entities.[129] In 1988, Congress enacted the Civil Rights Restoration Act of 1987,[130] to broadly define covered "programs and activities" under Title VI. Under that Act, the term "program or activity" means all of the operations of:

> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government . . .
> (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—
> (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
> (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation . . .
> any part of which is extended Federal financial assistance.[131]

As the Department of Justice's Title VI Legal Manual states: "[t]he clearest example of Federal financial assistance is the award or grant of money."[132]

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[128] *See* U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL 20 (2001).
[129] *See id.*
[130] Pub. L. No. 100-259, 102 Stat. 28 (1988).
[131] 42 U.S.C. § 2000d-4a (2006). *See also* 28 C.F.R. § 42.102(f) (2007) (defining "recipient of financial assistance").
[132] U.S. DEP'T OF JUSTICE, *supra* note 128, at 10; *see also* 28 C.F.R. § 42.102(c) (Title VI covers entities that receive grants and loans of federal funds).

Regarding passenger and baggage screening by private screening companies, such companies contracting with the government are funded by the TSA with federal dollars.[133]

Regarding the airlines, immediately following the 9/11 terrorist attacks, the Air Transportation Safety and System Stabilization Act[134] provided federal funds to the airlines to protect the industry financially and assure that the United States had a viable air transportation system in the longer term.[135] As the Department of Justice determined, "[f]unds provided to ensure the continued operation of a corporation are assistance to the entity 'as a whole,' and thus all operations of the entire corporation are subject to Title VI."[136]

If at any time following a future terrorist attack Congress grants private airlines additional direct federal subsidies, claims for disparate impact based on national origin could be brought challenging the actions taken by such airlines pursuant to national security policies, certainly at the time such subsidies were received,[137] and even much later, as entities can be covered under Title VI even when the federal financial assistance they received was minimal and received through very small grants separated over a long period of time. At least one court has found that an entity was covered under Title VI when the alleged discriminatory conduct occurred before or after the defen-

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[133] *See, e.g.*, Pub. L. No. 110-161, 121 Stat. 1844, 2052 (2007) (appropriating, under the subheading "Transportation Security Administration, Aviation Security," "[f]or necessary expenses of the Transportation Security Administration related to providing civil aviation security services pursuant to the Aviation and Transportation Security Act (Public Law 107-71; 115 Stat. 597; 49 U.S.C. § 40101 note) . . . of the total amount made available under this heading, not to exceed $3,768,489,000 shall be for screening operations . . ."); *see also* POOLE, *supra* note 109, at 17 ("Under current law, passenger and baggage screening are paid for by the TSA, whether provided by its own workforce or by TSA-certified contractors. This funding would presumably continue under devolution [programs that place screening functions in private hands].").

[134] Pub. L. No. 107-42, 115 Stat. 230 (2001).

[135] *See* 49 U.S.C. § 40101 note (Supp. I 2001) ("(a) IN GENERAL.—Notwithstanding any other provision of law, the President shall take the following actions to compensate air carriers for losses incurred by the air carriers as a result of the terrorist attacks on the United States that occurred on September 11, 2001: (1) Subject to such terms and conditions as the President deems necessary, issue Federal credit instruments to air carriers that do not, in the aggregate, exceed $10,000,000,000 and provide the subsidy amounts necessary for such instruments in accordance with the provisions of the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.). (2) Compensate air carriers in an aggregate amount equal to $5,000,000,000 for—(A) direct losses incurred beginning on September 11, 2001, by air carriers as a result of any Federal ground stop order issued by the Secretary of Transportation or any subsequent order which continues or renews such a stoppage; and (B) the incremental losses incurred beginning September 11, 2001, and ending December 31, 2001, by air carriers as a direct result of such attacks.").

[136] U.S. DEP'T OF JUSTICE, *supra* note 128, at 38 (providing the following example: "[f]ederal financial assistance to the Chrysler Company for the purpose of preventing the company from going bankrupt would be an example of assistance to the corporation 'as a whole'").

[137] *See* Huber v. Howard County, Md., 849 F. Supp. 407, 415 (D. Md. 1994), *aff'd without opinion*, 56 F.3d 61 (4th Cir. 1995), *cert. denied*, 516 U.S. 916 (1995) (holding that Title VI covers claims of discriminatory conduct that occurred when defendant received federal financial assistance).

dant received federal financial assistance through less than a dozen one-to-three-day training programs over the course of approximately twelve years.[138] Some airlines that fly to small airports also receive direct federal subsidies on an ongoing basis.[139]

Department of Transportation regulations also explicitly reference the applicability of Title VI to airline policies regarding access to facilities by "frequent users."[140] The same regulations make clear that such a provision is only meant to "illustrate" the types of activities to which Title VI would apply, "without being exhaustive,"[141] and consequently it could be implied that Title VI applies to airline access policies generally.

Regarding airport operators, the Supreme Court has stated that airport operators receive federal financial assistance through various grants. In *United States Department of Transportation v. Paralyzed Veterans of America*,[142] the Court stated:

> Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against handicapped persons in any program or activity receiving federal financial assistance. The United States provides financial assistance to airport operators through grants from a Trust Fund created by the Airport and Airway Development Act of 1970. . . . In [a later] 1982 Act Congress authorized disbursements from the Trust Fund for the Airport Improvement Program (AIP). Under AIP airport operators submit project grant applications for 'airport development or airport planning.'[143]

The Court also recognized that "§ 504 had been modeled after Title VI of the Civil Rights Act of 1964,"[144] and stated that "Title VI is the congressional model for subsequently enacted statutes prohibiting discrimination in

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[138] *See* Delmonte v. Dep't of Bus. and Prof'l Regulation, 877 F. Supp. 1563, 1565–66 (S.D. Fla. 1995).

[139] *See* Thomas Frank, *Subsidies Keep Small-Airport Flights in the Air*, USA TODAY, Dec. 30, 2007, at A1 ("Each day, about 3,000 passengers enjoy mostly empty, heavily subsidized flights, financed by a 30-year-old program that requires the government to guarantee commercial air service to scores of small communities that can't support it themselves. The Department of Transportation (DOT) pays a few small airlines $110 million a year total so they can profitably carry as few as four passengers per day to nearby hubs, often for rock-bottom fares. . . . [T]he subsidies have expanded in recent years, thanks to strong backing from Congress, airlines and airports. Two weeks ago, lawmakers allocated another $110 million for 2008, rejecting proposed DOT cuts. . . . Many routes began receiving subsidies as airlines faced huge losses after the Sept. 11, 2001, terrorist attacks.").

[140] *See* 49 C.F.R. pt. 21 app. C(a)(vi) (2007) ("Access to facilities maintained at the airport by air carriers or commercial operators for holders of first-class transportation tickets or frequent users of the carrier's or operator's services may not be restricted on the basis of race, color, or national origin.").

[141] *Id.* pt. 21 app. C(a) (2007).

[142] 477 U.S. 597 (1986).

[143] *Id.* at 599, 604–05 (citations omitted).

[144] *Id.* at 600.

federally assisted programs or activities. We have relied on case law interpreting Title VI as generally applicable to later statutes."[145]

State and local law enforcement that help implement national security policies also receive a large variety of federal assistance.[146]

All of these entities could be sued by individuals for disparate impact under Title VI for their involvement with aviation security programs, if such claims were authorized.

B. Recent Litigation Regarding Airline Passenger Screening

Complaints filed with the DHS Office of Civil Rights and Civil Liberties ("CLCR") have contained allegations of the purported misuse of national origin criteria.[147] Many similar complaints have already materialized into lawsuits against airlines and airports,[148] even without the statutory authorization of private disparate impact claims.

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[145] *Id.* at 600 n.4; *see also* U.S. DEP'T OF JUSTICE, *supra* note 128, at 21–22 ("Airport operators are recipients of Federal financial assistance pursuant to a statutory program providing funds for airport construction and capital development.").

[146] *See, e.g.*, 67 Fed. Reg. 41455, 41459 (Apr. 29, 2002); U.S. DEP'T OF JUSTICE, *supra* note 128, at 14 ("Another common form of Federal financial assistance provided by many [federal] agencies is training by Federal personnel."); *see also* Delmonte v. Dep't of Bus. and Prof'l Regulation, 877 F. Supp. 1563 (S.D. Fla. 1995) (finding that city police department received federal financial assistance when city department sent several police officers to training at the FBI Academy at Quantico without cost to the city).

[147] *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 96, at 7 ("Some complaints alleged that officers have asked travelers questions about their religion and national origin, whether one traveler knew anyone at his mosque who hates Americans or disagrees with current policies, targeted a traveler for additional screening because she wore traditional Muslim attire and told another traveler that he and his wife and children were subjected to body searches because he was born in Iraq, is Arab, and Muslim.").

[148] *See, e.g.*, Gray v. Southwest Airlines, Inc., 33 F. App'x 865 (9th Cir. 2002) (involving a claim of race-based profiling after luggage selected for search); Kalantar v. Lufthansa German Airlines, 276 F. Supp. 2d 5 (D.D.C. 2003) (concerning a claim of racial and national origin discrimination based on refusal of boarding pass); Ahmed v. American Airlines, Inc., 2003 WL 1973168 (W.D. Tex. Apr. 15, 2003) (involving a claim of racial, ethnic, and religious discrimination when passengers not allowed to board flight); Chowdhury v. Northwest Airlines Corp., 226 F.R.D. 608, 614 (N.D. Cal. 2004) (concerning a claim of discrimination because of race and national origin when refused permission to board).

A lawsuit has also been filed against the TSA by plaintiffs who:

> [A]llege they are innocent passengers with no links to terrorist activity, but have names similar or identical to names on the No-Fly List. Plaintiffs allege that when they travel by air, they are mistakenly identified by airport personnel, often in full view of co-workers and the general traveling public, as individuals whose names actually appear on the No-Fly List. As a result, Plaintiffs allege that airline personnel subjected them to enhanced security screening, including physical pat-downs, wanding, and physical searches of luggage.

Green v. Transp. Sec. Admin., 351 F. Supp. 2d 1119, 1122 (W.D. Wash. 2005). The lawsuit was brought even though "[t]o date, no named Plaintiff has missed a flight or been subjected to enhanced screening for more than one hour." *Id.*

Plaintiffs in these suits have generally not been successful in litigating their claims[149] because the plaintiffs seek discovery regarding the methods that produce the watch lists in order to demonstrate they are intentionally discriminatory. Yet, such methods are protected under regulations issued by TSA under a federal statute that protects "sensitive security information."[150]

However, were private disparate impact claims regarding national security programs to be authorized, plaintiffs would not—as they do now—have to show any intentional discriminatory motivations behind the creation of such lists. Rather, they would only have to show a disparate impact following the implementation of the list, leaving it to either the airlines, the screeners, or the government to prove that the policy producing the list is "necessary" to achieve a "nondiscriminatory goal" of the program or allowing the plaintiff to show that any "less discriminatory alternative policy or practice exists."[151] Consequently, there would likely not be a need for the plaintiff to discover sensitive security information to prove disparate impact.

On the other hand, congressional proposals also provide that:

> With respect to demonstrating that a particular policy or practice causes a disparate impact . . . the aggrieved person shall demonstrate that each particular challenged policy or practice causes a disparate impact, except that if the aggrieved person demonstrates to the court that the elements of a covered entity's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as 1 policy or practice.[152]

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[149] *See* Linda L. Lane, *The Discoverability of Sensitive Security Information in Aviation Litigation*, 71 J. AIR L. & COM. 427, 427 (2006) ("For many, denial of access to Sensitive Security Information results in dismissal of their claims.").

[150] *See* 49 U.S.C. § 114(s)(1) (Supp. 2005) ("[T]he Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would —(A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) be detrimental to the security of transportation."). TSA promulgated federal regulations mirroring these standards. *See* 49 C.F.R. § 1520.5(a)-(b) (2007). The DHS Office of Civil Rights and Civil Liberties has stated that:

> "[s]ince the existence of No-fly and Selectee lists became public in October 2002, the media have reported allegations that individuals are being put on these lists because of their political beliefs or activities or because of their race, religion or national origin. CRCL has received complaints containing similar allegations. . . . To date, the Department has not found that any of the allegations could be substantiated. It is important to understand that the criteria cannot be made public without compromising intelligence and security or inviting subversion of these lists by individuals who will seek ways to adjust their behavior to avoid being identified as a threat to aviation. Thus, the success of this antiterrorism tool depends in part on the confidentiality of the protocols for inclusion on a No-fly or Selectee list."

See U.S. DEP'T OF HOMELAND SEC., *supra* note 96, at 9.

[151] *See* Civil Rights Act of 2008, H.R. 5129, 110th Cong. § 102(b)(1)(A)(i)–(ii).

[152] *Id.* § 102(b)(1)(B)(i).

As a result, even if the plaintiff perceived a need to discover sensitive security information regarding one part of a larger national security program, and the government successfully sought to protect that information from discovery, the government would have thereby made the challenged practice "not capable of separation for analysis." In doing so, the plaintiff would be allowed to prove disparate impact by having the court analyze the larger national security policy as "1 policy or practice," in which case any disparate impact could be proven based on the policy's disparate impact results, and the plaintiff would not need to discover the sensitive security information in the first place.

Under either scenario, air carriers and private screening companies would likely lose a private lawsuit brought under a disparate impact theory, and the government would find its national security programs potentially weakened by courts.[153]

VI. Defects in Current Liability Protections for Private Screeners, Commercial Airlines, and Airport Operators

As described below, some protections from lawsuits currently exist for private screeners, commercial airlines, and airport operators, but none would protect such entities from disparate impact claims.

A. The Shqeirat ("Flying Imams") Case and the Legislative Response

Recently, a lawsuit challenged the reports of suspicious behavior made by private airline passengers on the grounds that those reports, and the actions taken in response, discriminated based on national origin.

In *Shqeirat v. U.S. Airways, Inc.*,[154] six imams sued U.S. Airways and the Metropolitan Airports Commission alleging claims under 42 U.S.C. § 1983 that a "custom or policy caused the deprivation of [a] right protected by the Constitution or federal law" in their treatment as they sought to board an airline.[155] They also sued on the grounds that the airport authorities "violated the Fourteenth Amendment's Equal Protection Clause by arresting Plaintiffs 'on the basis of their race, religion, and[ ] national origin . . . .'"[156]

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[153] Such proposals, in connection with the authorization of private disparate impact claims regarding national security policies, would allow courts to countermand decisions made by the TSA regarding the methods it deems appropriate to compiling effective terrorist watchlists. Under existing law, after TSA issues a final order regarding what constitutes "sensitive security information," a plaintiff can file "a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." 49 U.S.C.A. § 46110(a) (West 2007).

[154] 515 F. Supp. 2d 984 (D. Minn. 2007).

[155] *Id.* at 993.

[156] *Id.* at 996.

The plaintiffs included Muslims of Jordanian-Arab origin, Egyptian-Arab origin, Albanian origin, and Syrian-Arab origin.[157]

The case illustrates that many aviation security decisions rest ultimately with the airlines themselves,[158] indicating that the airlines would be the subject of private disparate impact claims if such claims were authorized to challenge national security programs. Indeed, the court in *Shqeirat* ultimately allowed the case to proceed because of the alleged interaction between the airline and law enforcement authorities.[159]

The case also illustrates how courts can hold private entities to very stringent standards when such entities are engaged in implementing national security programs. For example, in *Shqeirat* the case was allowed to proceed against the airline even though the court assumed for purposes of decision that the captain of the airline relied on the following: "(1) a passenger's note alleging that Plaintiffs prayed loudly at the gate and made anti-U.S. comments, (2) Plaintiffs' dispersed seating arrangement, (3) a flight attendant's observations that two of the Plaintiffs had asked for seatbelt extensions but only one seemed to need one, (4) a flight attendant's observation that [one of the plaintiffs] moved from first class to coach to talk to [another plaintiff] during the delay, and (5) information from a U.S. Airways employee that Plaintiffs' passenger name records ("PNRs") indicated that three of the Plaintiffs were traveling on one-way tickets."[160] The court allowed the case

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[157] *Id.* at 988.

[158] *See id.* at 989 ("In the jetway, the MAC [Metropolitan Airport Commission] police officers ordered Plaintiffs to face the wall and place their hands above their heads to be searched and handcuffed . . . . Shqeirat asked the officer to explain the situation, but the officer responded, 'I do not know. This is the airline's call and not our call.' ").

[159] *See id.* at 999 ("Plaintiffs allege U.S. Airways 'was acting under the color of state law when [MAC], under the direction of U.S. Airways, deprived Plaintiffs of their [federal] rights . . . .' Plaintiffs also allege U.S. Airways and MAC 'acted in concert' to violate Plaintiffs' federal rights . . . [T]he Amended Complaint sufficiently alleges that U.S. Airways and MAC jointly violated Plaintiffs' constitutional rights in violation of § 1983.").

[160] *Id.* at 1004; *see also* Debra Burlingame, *On a Wing and a Prayer*, WALL ST. J., Dec. 6, 2006, at A16 ("Initial media reports of the incident did not include the disturbing details about what happened after [the imams] boarded US Airways flight 300 . . ."); *Audrey Hudson, How the Imams Terrorized an Airliner*, WASH. TIMES, Nov. 29, 2006, at A1 ("Muslim religious leaders removed from a Minneapolis flight last week exhibited behavior associated with a security probe by terrorists and were not merely engaged in prayers, according to witnesses, police reports and aviation security officials . . . . Passengers and flight attendants told law-enforcement officials the imams switched from their assigned seats to a pattern associated with the September 11 terrorist attacks and also found in probes of U.S. security since the attacks—two in the front row first-class, two in the middle of the plane on the exit aisle and two in the rear of the cabin. 'That would alarm me,' said a federal air marshal who asked to remain anonymous. 'They now control all of the entry and exit routes to the plane.' A pilot from another airline said: 'That behavior has been identified as a terrorist probe in the airline industry.' . . . According to witnesses, police reports and aviation security officials, the imams displayed other suspicious behavior. Three of the men asked for seat-belt extenders, although two flight attendants told police the men were not oversized. One flight attendant told police she 'found this unsettling, as crew knew about the six [passengers] on board and where they were sitting.' Rather than attach the extensions, the men placed the straps and buckles on the cabin floor, the flight attendant said . . . . 'They should have been denied boarding and been investigated,' Mr. MacLean said.")

to proceed even in those circumstances, stating that although "U.S. Airways's decision to remove Plaintiffs from Flight 300 was not arbitrary and capricious [,] U.S. Airways may still be liable under 42 U.S.C. § 1983 for claims arising out of Plaintiffs' arrest and detention."[161]

The plaintiffs in the lawsuit eventually dropped their claims against the private citizens who alerted authorities to suspicious behavior, but the airlines and the airport remain defendants in the case.[162]

Public concern with the lawsuit resulted in the enactment of a provision in federal law that would provide qualified immunity to individual transportation system employees and law enforcement officials who take "reasonable" action "in good faith" to respond to suspicious activity.[163] However, this provision does not apply to protect airlines, private screening companies, or airports as corporate entities, or state or local police departments.[164] Consequently, such entities remain exposed to lawsuits under current law,

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The district court opinion in the case describes other details. *See Shqeirat*, 515 F. Supp. 2d at 994 ("Officer Wingate and Federal Air Marshal Steven Grewenow boarded Flight 300 and spoke with the reporting passenger. According to the passenger: 'He witnessed six Middle Eastern males in the gate area praying and chanting in an Arabic dialect. They chanted the words Allah, Allah, Allah. He then eavesdropped into their conversation and overheard them mention Sad[d]am and heard them curse about the U.S. involvement. He watched them position themselves together facing a certain direction and pray again in a group. He watched them board the plane and they took a mysterious seating arrangement throughout the plane. He stated two were seated in the front of the plane, two were seated in the middle, and two were seated in the rear of the plane' . . . Other MAC police officers arrived to assist Officer Wingate. Federal Air Marshal Grewenow and MAC Police Officer Wingate 'agreed the seating configuration, the request for seatbelt extensions, the prior praying and utterances about Allah and the U.S. in the gate area . . . was suspicious.' Officer Wingate contacted F.B.I. Agent Cannizzaro and informed him of the incident. Agent Cannizzaro requested that MAC police detain Plaintiffs so he could interview them. Plaintiffs and their luggage were subsequently removed from the plane, searched, and then transported to the MAC Airport Police Department Police Operations Center.") (citations omitted).

[161] *Shqeirat*, 515 F. Supp. 2d at 1005.

[162] *See id.* at 990–91; Audrey Hudson, *Imams Drop Lawsuit Against 'Doe' Passengers; Claim Still Targets Airline for Muslims' Removal from Flight*, WASH. TIMES, Aug. 23, 2007, at A1.

[163] Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1206, 121 Stat. 266, 388 (2007) (codified at 6 U.S.C. § 1104(a)(1)).

[164] 6 U.S.C.A. § 1104 (West 2008) ("(a) Immunity for Reports of Suspected Terrorist Activity and Suspicious Behavior.–(1) In General.–Any person who, in good faith and based on objectively reasonable suspicion, makes, or causes to be made, a voluntary report of covered activity to an authorized official shall be immune from civil liability under Federal, State, and local law for such report. (2) False Reports.–Paragraph (1) shall not apply to any report that the person knew to be false or was made with reckless disregard for the truth at the time that person made that report. (b) Immunity for Response.–(1) In General.–Any authorized official who observes, or receives a report of, covered activity and takes reasonable action in good faith to respond to such activity shall have qualified immunity from civil liability for such action, consistent with applicable law in the relevant jurisdiction . . . . The term 'authorized official' means – (A) any employee or agent of a passenger transportation system or other person with responsibilities relating to the security of such systems; (B) any officer, employee, or agent of the Department of Homeland Security, the Department of Transportation, or the Department of Justice with responsibilities relating to the security of passenger transportation systems; or (C) any Federal, State, or local law enforcement officer."). Persons found immune under these provisions are also granted attorneys' fees and costs. *See id.* § 1206(c) ("Attorney Fees and Costs.–Any person or authorized official found to be immune from civil liability

and their exposure would probably expand significantly under any authorization of private disparate impact claims.

B. Limits on Tort Liability Would Not Prohibit Disparate Impact Claims

One impediment to the more rapid transfer of screening functions to the private sector relates to concerns with obtaining adequate protection from excessive liability.[165]

Such concerns, insofar as they relate to potential tort liability, have been largely addressed by Congress. Protection from tort liability can be obtained by private screening companies under the SAFETY Act,[166] which was passed as part of the Homeland Security Act of 2002 to provide private entities implementing anti-terrorism programs with protection from excessive liability for alleged failures of their products or services following a terrorist attack.[167]

However, the SAFETY Act only prohibits liability in cases where a terrorist attack has already occurred.[168] Consequently, the SAFETY Act would not apply to protect private or other entities from disparate impact claims brought against their implementation of a national security program. Similarly, 49 U.S.C. § 44920 limits the liability of airport operators for damages related to their decision to hand over screening functions to private entities, but that provision also would not protect airport operators from disparate impact claims brought against their implementation of an aviation security program.[169]

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under this section shall be entitled to recover from the plaintiff all reasonable costs and attorney fees.").

[165] *See* Chris Strohm, *TSA Ready for Private Screening, But Airports Aren't Biting,* GOV'T EXECUTIVE, Aug. 18, 2005, http://www.govexec.com/dailyfed/0805/081805c1.htm ("The government is ready to let private contractors take over passenger and baggage screening at the nation's airports, but most air facilities intend to keep federal screeners unless they are given better incentives to switch, according to government and industry officials . . . . Airports are worried about what kind of liability they might have if they opt out . . . .").

[166] 6 U.S.C. § 442 (2006).

[167] *See generally* Paul Taylor, *We're All in This Together: Extending Sovereign Immunity to Encourage Private Parties to Reduce Public Risk,* 75 U. CIN. L. REV. 1595, 1608–17 (2007) (discussing the SAFETY Act's liability protections for private entities).

[168] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-166, AVIATION SECURITY: PROGRESS MADE TO SET UP PROGRAM USING PRIVATE-SECTOR AIRPORT SCREENERS, BUT MORE WORK REMAINS 13 n.22 (2006) ("According to DHS, the SAFETY Act does not limit liability for harm caused by anti-terrorism technologies when no act of terrorism has occurred.").

[169] 49 U.S.C. § 44920(g) (Supp. 2005). ("Notwithstanding any other provision of law, an operator of an airport shall not be liable for any claims for damages filed in State or Federal court (including a claim for compensatory, punitive, contributory, or indemnity damages) relating to . . . (2) any act of negligence, gross negligence, or intentional wrongdoing by–(A) a qualified private screening company or any of its employees in any case in which the qualified private screening company is acting under a contract entered into with the Secretary of Homeland Security or the Secretary's designee."). That provision also provides that:

> [N]othing in this section shall relieve any airport operator from liability for its own acts or omissions related to its security responsibilities, nor except as may be provided by the Support Anti-Terrorism by Fostering Effective Technologies Act of

Consequently, current law would not provide for private screening companies, commercial airlines, or airport operators protection from any authorized private disparate impact claims. The entities involved with aviation security are already worried about their exposure to tort liability, and are seeking protection from such liability under the SAFETY Act.[170] For this reason, exposing those same companies to private disparate impact claims when they were not engaging in any activity that constitutes intentional discrimination would of course greatly aggravate their concerns, and likely further discourage their essential participation in aviation security programs.

C. Federal Standards for Private Security Screeners: Criminal Background Checks, English Proficiency, and Citizenship

If disparate impact claims were authorized under Title VI in private lawsuits against entities engaged in national security programs, such lawsuits could be brought not only regarding the disparate effects of such programs on third parties, but also regarding such entities' own hiring criteria. Again, that is because while Title VII contains an exception for national security programs, Title VI does not, and Title VI prohibits covered entities from discriminating "under any program or activity receiving Federal financial assistance."[171]

The Aviation and Transportation Security Act provides that any private security company that assumes screening responsibilities must meet the same criteria federal screeners meet.[172] These criteria include requirements that screeners be proficient in English,[173] subject to a criminal background check,[174] and American citizens.[175]

> 2002 shall it relieve any qualified private screening company or its employees from any liability related to its own acts of negligence, gross negligence, or intentional wrongdoing.

Id.

[170] *See* U.S. GOV'T ACCOUNTABILITY OFF. GAO-06-166, *supra* note 168, at 4 ("While none of the private screening contractors we interviewed stated that the lack of this additional coverage would preclude their participation in the SPP, all four stated that some form of SAFETY Act coverage was an essential supplement to their commercial liability insurance policies.").

[171] 42 U.S.C. § 2000d (Supp. 2005).

[172] *See id.* § 44920(c) ("A private screening company is qualified to provide screening services at an airport under this section if the company will only employ individuals to provide such services who meet all the requirements of this chapter applicable to Federal Government personnel who perform screening services at airports under this chapter . . . .").

[173] *See id.* § 44935(f)(1)(C) (Supp. 2005) ("The individual [screener] shall be able to read, speak, and write English well enough to–(i) carry out written and oral instructions regarding the proper performance of screening duties; (ii) read English language identification media, credentials, airline tickets, and labels on items normally encountered in the screening process; (iii) provide direction to and understand and answer questions from English-speaking individuals undergoing screening; and (iv) write incident reports and statements and log entries into security records in the English language.").

[174] *See id.* § 44935(e)(2)(B) ("The Under Secretary shall require that an individual to be hired as a security screener undergo an employment investigation (including a criminal history

These three criteria may themselves provide multiple bases for litigation under any authorized private disparate impact causes of action—these criteria combined render approximately twenty-five percent of those who were formerly employed as screeners ineligible to work as federal or private screeners.[176]

1. English Proficiency

Regarding the English proficiency requirement, current EEOC disparate impact regulations, which would be substantially replicated by statutory amendments allowing private disparate impact claims, require a litigable, fact-specific inquiry into whether English proficiency is actually "necessary" for any given position.[177] Whether the English proficiency requirement is truly "necessary" for every aspect of a screening program—in the opinion of any given judge—would consequently be subject to potential litigation. The standard for showing a "business necessity" for hiring criteria in the Title VII context can potentially be quite demanding.[178]

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record check) . . . ."). Applicants convicted of one or more of 28 general felony crimes within the previous ten years are not eligible to serve as screeners under 49 U.S.C. § 44936(b) (Supp. 2005) and 49 C.F.R. § 1542.209(d) (2007).

[175] *See* 49 U.S.C. § 44935(e)(2)(ii) (Supp. 2005) ("Notwithstanding any provision of law, those standards shall require, at a minimum, an individual . . . (ii) to be a citizen of the United States or a national of the United States . . . .").

[176] *See* Andrew Hessick, *The Federalization of Airport Security: Privacy Implications*, 24 WHITTIER L. REV. 43, 53 (2002).

[177] *See* EEOC COMPLIANCE MANUAL, *supra* note 27, § 13-V(B)(1) ("Generally, a fluency requirement is permissible only if required for the effective performance of the position for which it is imposed. Because the degree of fluency that may be lawfully required varies from one position to the next, employers should avoid fluency requirements that apply uniformly to a broad range of dissimilar positions. As with a foreign accent, an individual's lack of proficiency in English may interfere with job performance in some circumstances, but not in others . . . . [T]he employer should not require a greater degree of fluency than is necessary for the relevant position.").

[178] *See* Dothard v. Rawlinson, 433 U.S. 321 (1977). The Supreme Court rejected an employer's height and weight criteria for hiring prison guards, holding that discriminatory requirements must "be shown to be necessary to safe and efficient job performance." *Id.* at 331 n.14. The employer had argued that the criteria served as a proxy for strength, an essential quality for employment. The Court rejected this argument, holding that while strength may be an essential quality, the employer had not specified the amount of strength necessary or demonstrated any correlation between the height and weight criteria and the necessary amount of strength needed for good job performance. *Id.* at 331–32. This result caused one court to remark, "*Dothard* is particularly noteworthy because the Court rejected an employer's common-sense argument that prison guards must be relatively strong to justify criteria that roughly measured strength." El v. Se. Pa. Transp. Auth., 479 F.3d 232, 240 (3d Cir. 2007).

In contrast, while fourteen states have statutes prohibiting discrimination against ex-convicts by public employers and five of those states include protection for private employment, "[m]ost [of those statutes] require employers to consider whether there is a rational, reasonable, direct or substantial relationship between the crime for which the applicant was convicted and the work he or she wishes to perform." NATIONAL HIRE NETWORK, EMPLOYMENT STANDARDS THAT ENCOURAGE THE EMPLOYMENT OF QUALIFIED PEOPLE CRIMINAL HISTORIES (2005), *available at* http://www.usdoj.gov/olp/pdf/employmentstdssumary.pdf. Such standards are much lower by their terms than the business "necessity" defense outlined by the Supreme Court.

2. Criminal Background Checks

Regarding the criminal background check requirement, as one treatise has pointed out,

> Although none of the federal discrimination laws specifically prohibit discrimination in employment on the basis of criminal record, requiring a clean criminal record may have a disparate impact on classes protected by Title VII who tend to have higher arrest and conviction rates than others. . . . Because blacks and Hispanics are arrested in numbers disproportionate to their representation in the population, the effect of such a policy is to exclude a disproportionate number of black and Hispanic applicants or employees.[179]

Disparate impact claims have since been asserted in challenges to employment policies that exclude job applicants with conviction records because they have a disparate impact based on race.[180]

Rae T. Vann, General Counsel to the Equal Employment Advisory Council, has remarked on "the security-conscious environment in which employers—particularly federal government contractors—are now operating, which sometimes seemingly conflicts with good faith efforts to minimize the potential negative impact on some protected groups."[181] That conflict will only be intensified, as criminal background checks have become increasingly important after 9/11.

That is certainly true regarding criminal background checks for screeners at airports,[182] who are now subject to much more rigorous background

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[179] HR SERIES: FAIR EMPLOYMENT PRACTICES § 4:23 (West 2008); *see also* Jocelyn Simonson, *Rethinking "Rational Discrimination" Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL'Y 283, 284 (2006). ("Because two-thirds of inmates in United States prisons are African American or Latino, the widespread denial of jobs to individuals with criminal records disproportionately affects these minority groups.").

[180] *See, e.g.*, Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1295, 1298 (8th Cir. 1975) (striking down such a policy regarding railroad employment on the grounds that it rejected blacks at a rate two and a half times that of whites and rejecting defendant's claim that such a policy was necessary to prevent cargo theft). A closely divided Eighth Circuit denied Missouri Pacific's petition for rehearing en banc, and three judges stated in disapproval, "In effect, the present case has judicially created a new Title VII protected class—persons with conviction records." *Id.* at 1300. And as one commentator has pointed out, "African Americans are represented in the ex-offender population even more disproportionately [today] than they were when *Green* was decided in 1975." Simonson, *supra* note 179, at 293.

[181] Statement of Rae T. Vann, General Counsel, Equal Employment Advisory Council, before the U.S. Equal Employment Opportunity Commission (May 16, 2007), *available at* http://www.eeoc.gov/abouteeoc/meetings/5-16-07/vann.html.

[182] *See* OFF. OF INSPECTIONS, EVALUATIONS, & SPECIAL REVIEWS, DEP'T OF HOMELAND SEC., A REVIEW OF BACKGROUND CHECKS FOR FEDERAL PASSENGER AND BAGGAGE SCREENERS AT AIRPORTS, OIG-04-08, at 7 (2004) ("As an essential first step in planning background checks [for screeners], agencies evaluate how much risk to the efficiency of the federal service or to the national security is involved in a job position. . . . Risk determinations are based on two assessments. First, the agency assigns a suitability designation; this reflects the degree to which an unsuitable employee could harm the efficiency of federal service. Second, the

check standards than were required for screeners previously.[183] It will also be true regarding other private entities that are increasingly relying on criminal background checks after 9/11.[184] The Attorney General's Report on Criminal History Background Checks describes the increased prevalence of criminal background checks today,[185] and points out that "there are certain crimes that will be relevant to the vast majority of jobs, including crimes of violence, such as murder, rape, robbery, and assault; and dishonesty crimes, such as theft, burglary, embezzlement, forgery, and fraud."[186]

The Report also describes many of the federal statutes that already authorize access to criminal background records or require background checks for certain industries, stating:

> These laws seek to promote public safety and national security by either authorizing access to a check by certain industries or affirmatively regulating an industry or activity by requiring background checks and risk assessments by government agencies. They include authority for discretionary checks by federally insured or chartered banking institutions, the nursing home industry, the securities industry, public housing authorities, and nuclear facilities. Since the terrorist attacks of September 11, 2001, Congress has also required criminal history background checks and security screening in a number of contexts with an eye toward preventing terrorism, including checks on persons seeking employment as airport screeners or unescorted access to certain areas at airports, hazardous materials endorsements on their commercial drivers licenses, access to restricted biological agents and toxins, access to nuclear facilities and port facilities, or visas and passports. Federal law also requires background checks and screening of aliens seek-

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agency assigns a security designation; this reflects the degree of damage to national security that an employee in a certain position could cause.").

[183] *Id.* at 14 ("This process set a more rigorous background check standard than had been in place for screeners. Before TSA established a screener workforce, only the fingerprint check was required."). Private contractors play a role in the background check process for screeners generally, subject to "oversight" by TSA. *See id.* at 50.

[184] *See* LAB. POL'Y ASS'N, LPA BACKGROUND CHECK PROTOCOL: ACHIEVING THE APPROPRIATE BALANCE BETWEEN WORKPLACE SECURITY AND PRIVACY 9 (2003) ("Of the many human resource consequences of September 11, 2001, one of the most significant has been a heightened sensitivity of employers to better knowing whether those who work for them do not pose a threat to their co-workers, their customers, and the public at large.").

[185] OFF. OF THE ATT'Y GEN., U.S. DEP'T OF JUST., ATT'Y GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 38 (2006) ("[M]any private employers are very interested in access to FBI criminal records to help evaluate the risk of hiring or placing someone with a criminal record in particular positions."). The number of requests for non-federal criminal history checks has increased in recent years. *See id.* at 139 ("Prior to FY 2001, the FBI processed an average of less than 7 million non-criminal justice requests per year. The FBI processed in excess of 9 million non-criminal justice fingerprint cards in FY 2005.").

[186] *Id.* at 51.

> ing entry or exit from the United States or flight school training within the United States.[187]

Many employers using criminal background checks, now and in the future, may well receive federal financial assistance and would thus be subject to private disparate impact claims if such claims are authorized by Congress.

Even worse, such employers would be placed by such claims in the following dilemma: they would have to avoid both criminal background check policies that might have a disparate impact and also defend against claims that they did not sufficiently vet employees. Such claims could be brought under the existing tort liability doctrine of "negligent hiring," which subjects employers to liability if they fail to gather and act on relevant information indicating someone was a dangerous fit for a given position.[188]

3. Citizenship Requirement

Regarding the citizenship requirement, as one commentator has pointed out

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[187] OFF. OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, *supra* note 185, at 19–20. Federal laws authorizing access to FBI-maintained criminal history information for certain industries and purposes include: 5 U.S.C. § 9101 (2006) (relating to federal government national security background checks); 7 U.S.C. §§ 12a, 21(b)(4)(E) (2006) (relating to commodity futures trading industry); 8 U.S.C. § 1105 (2006) (relating to visa issuance or admission to the United States); 15 U.S.C. § 78q(f)(2) (2006) (relating to securities industry); 28 U.S.C. § 534 note (2006) (relating to federally chartered or insured banking industry); *id.* § 534 note (2006) (relating to nursing and home health care industry); 42 U.S.C. § 5119a (Supp. 2005) (relating to providing care to children, the elderly, or disabled persons); *id.* § 2169 (Supp. 2005) (relating to nuclear utilization facilities (power plants)); *id.* § 13041 (Supp. 2005) (relating to federal agencies and facilities contracted by federal agencies to provide child care); *id.* § 13726 (Supp. 2005) (relating to private companies transporting state or local violent prisoners); *id.* § 1437d(q) (Supp. 2005) (relating to public housing and section 8 housing); 46 U.S.C. §§ 70101 note, 70105, 70112 (Supp. 2005) (relating to seaport facility and vessel security); 49 U.S.C. §§ 44935–44936 (Supp. 2005) (relating to aviation industry); *id.* § 44939 (Supp. 2005) (relating to flight school training); *id.* § 5103a (Supp. 2005) (relating to issuance and renewal of HAZMAT-endorsed commercial driver license); Pub. L. No. 108-458, § 6402 (2004) (relating to private security officer employment); Pub. L. No. 107-188, §§ 201, 212 (relating to handling of biological agents or toxins).

[188] *See* NAT'L CONSORTIUM FOR JUST. INFO. & STAT., REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 65-67 (2005) ("Courts in the majority of States recognize the theory of negligent hiring, under which employers may be held liable for actions of their employees that are outside the scope of their employment. The doctrine applies in cases where an employer fails to exercise proper care in selecting and retaining employees; that is, the employer knew, or should have known, that an employee poses a threat to coworkers, customers, or the general public . . . . [C]onducting a thorough pre-employment background check has become increasingly important in protecting an employer from potential liability for negligent hiring . . . . [C]ourts have also held that performance of an adequate or industry-accepted background check can insulate an employer from a negligent hiring claim."); *see also* ASIS INT'L, PREEMPLOYMENT BACKGROUND SCREENING: GUIDELINE 11 (2006).

> Thousands of the private airport security workers [on September 11, 2001] were not even eligible to be hired by the TSA, because of new qualifications that ATSA had established for the positions. One qualification that excluded many workers was that security workers were required to be United States citizens. This had an especially large impact on the unionized security workers, because unions had achieved much of their organizing success with immigrant workers.[189]

It is also likely that a citizenship requirement will have a disproportionate effect on Hispanics, as Hispanics began to constitute about one half of all migrants entering the United States by the year 2000.[190]

VII. Allowing Private Disparate Impact Claims Under Title VI: the Potential Impact on Welfare Reform and English Language Programs

Private disparate impact claims under Title VI could be used to challenge a broad array of federal programs, well beyond those related to national security. Prior to the Supreme Court's decision in *Sandoval*, private disparate impact claims were brought to challenge municipal transportation policies.[191] Were private disparate impact claims to be authorized again, still other programs could be subject to challenge.[192] Two examples of such programs are welfare reform and English language policies.

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[189] Michael Hayes, *Improving Security Through Reducing Employee Rights*, 10 IUS Gentium 48, 53 (2004).

[190] *See* Samuel P. Huntington, *The Hispanic Challenge*, Foreign Pol'y, Mar./Apr. 2004, at 30–45.

[191] A private disparate impact claim was brought challenging the decision of the Los Angeles County Metropolitan Transportation Authority (MTA) to raise bus fares serving predominantly minority communities and the MTA's allocation of funds to rail systems to the alleged detriment of minority bus riders. *See* Labor/Cmty. Strategy Ctr. v. L.A. County Metro. Transp. Auth., No. 94-05936-TJH, slip op. at 1 (C.D. Cal. Sept. 21, 1994). The district court enjoined the MTA from raising bus fares on the grounds that plaintiffs were likely to succeed in their claim that the proposed bus fare increase violated disparate impact regulations under Title VI, and the case was later settled after the MTA agreed to alter its transportation policies. *See* Olatunde C.A. Johnson, *Disparity Rules*, 107 Colum. L. Rev. 374, 395 (2007); *see also* New York Urban League, Inc. v. New York, 71 F.3d 1031 (2d Cir. 1995) (noting that riders of the New York City Transit Authority subway and bus system, the majority of whom are protected minority group members, had a private cause of action under Title VI).

[192] For example, a recent case brought in Florida under a provision in that state's constitution shows how a disparate impact claim could be brought against state and local schools regarding disparate graduation rates. *See* Don Jordan & Christina DeNardo, *ACLU Sues School Over Poor Graduation Rates*, Palm Beach Post, Mar. 19, 2008, at 7B ("Low graduation rates in Palm Beach County show the school district has failed its students, especially minority children, by not providing a 'uniform, efficient, safe, secure and high-quality education,' according to a lawsuit filed Tuesday by the American Civil Liberties Union.

> The lawsuit addresses a topic never before challenged in the courts. . . . The suit alleges that the district is violating students' rights to a high-quality education as outlined in the state constitution. . . . While more than 80 percent of white students graduated on time in the county

A. Welfare Reform

In 1996, Congress passed comprehensive welfare reform in the form of the Personal Responsibility and Work Reconciliation Act ("PRWRA"). PRWRA replaced a prior federal entitlement program for poor families with a block grant program called Temporary Assistance for Needy Families ("TANF"). Under the reforms, eligible families can only receive TANF aid for five years, and certain TANF recipients are required to participate in work activities. PRWRA gives states the flexibility to: (1) set their own eligibility criteria; (2) limit grants based on family size; (3) determine the grounds for exemptions from work activities; and (4) determine how and under what circumstances to sanction recipients who fail to comply with work and other requirements.[193]

Under current law, state agencies must comply with Title VI in the administration of TANF.[194] If Congress were to statutorily codify the right of private litigants to bring disparate impact claims under Title VI, individuals and groups could file Title VI complaints to alter the administration of the program. Such complaints could allege disparate impact based on race or national origin.

Such a case was compiled by the U.S. Commission on Civil Rights in a document entitled "A New Paradigm for Welfare Reform: The Need for Civil Rights Enforcement," in which the Commission stated:

> Passage of [PRWRA] in 1996 was intended to drastically transform public assistance in the United States. With it, a new emphasis was established to move public assistance recipients from welfare to work. . . . The Commission has evaluated the 1996 law. . . . [P]eople of color are disproportionately affected by public assistance policies . . . . Evidence suggests that people of color and language minorities are often disparately affected by welfare rules and restrictions. For example, states with higher percentages of Hispanic and black recipients at the time of welfare reform were more likely to adopt shorter time limits, family caps on benefits, and stronger sanctions than states with lower percentages of minority recipients. Whites are less likely than other former recipients to leave welfare for administrative reasons, such as not following program rules, administrative mistakes, or reaching time limits on benefits. . . . Nationally, whites leave the rolls at faster rates than minorities, and thus make a faster transition to work. . . .

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last year, only about 55 percent of black students and 64 percent of Hispanic kids did, according to state statistics.").

[193] *See* Personal Responsibility and Work Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. §§ 7, 8, 20, 21, 25, 42).

[194] *See* 42 U.S.C.A. § 608(d) (West 2007) ("Nondiscrimination provisions–The following provisions of law shall apply to any program or activity which receives funds provided under this part: . . . (4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.).").

> The decline in welfare rolls has been 25 percent for whites, 17 percent for African Americans, and 9 percent for Hispanics. . . . The provisions adopted disproportionately affect people of color . . . and those with limited English proficiency.[195]

Following the 1996 welfare reforms, other research showed that blacks and other minorities came to comprise a greater percentage of the welfare rolls than previously and were less likely to leave welfare than whites.[196] The Urban Institute similarly found that, prior to the 1996 reforms, blacks and Hispanics tended to remain on welfare for longer periods of time, and therefore would be more significantly affected by the time limits imposed by welfare reform, as data suggested to them that forty-one percent of black recipients and fifty-one percent of Hispanic recipients, while only twenty-seven percent of white recipients, would be forced off the rolls by time limits.[197] Still other research has pointed to differential results regarding minority TANF recipients in which minorities receive sanctions for violations of program rules at higher rates than white recipients who commit similar violations.[198]

B. English Language Programs

As the U.S. labor force has grown more ethnically diverse, the number of workers who are not native English speakers has increased dramatically. In 2000, approximately 45 million Americans (17.5% of the population) spoke a language other than English in the home. Of those individuals, approximately 10.3 million (4.1% of the total population) spoke little or no English, an increase from 6.7 million in 1990.[199] Between 1980 and 2000,

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[195] U.S. COMM'N ON CIV. RIGHTS, A NEW PARADIGM FOR WELFARE REFORM: THE NEED FOR CIVIL RIGHTS ENFORCEMENT 1, 3, 5 (2002), *available at* http://www.usccr.gov/pubs/prwora/welfare.htm.

[196] *See, e.g.*, ELIZABETH LOWER-BASCH, U.S. DEP'T OF HEALTH & HUMAN SERV., TANF "LEAVERS," APPLICANTS, AND CASELOAD STUDIES: PRELIMINARY ANALYSIS OF RACIAL DIFFERENCES IN CASELOAD TRENDS AND LEAVER OUTCOMES fig.1 (2000), *available at* http://aspe.hhs.gov/hsp/leavers99/race.htm#fig1.

[197] *See* Steve Savner, *Welfare Reform and Racial/Ethnic Minorities: The Questions to Ask*, 9 POVERTY & RACE 3, 4 (2000).

[198] *See, e.g.*, DEP'T OF WORKFORCE DEV., STATE OF WIS., WISCONSIN WORKS (W-2) SANCTIONS STUDY 10–11 (2004), *available at* http://www.dwd.state.wi.us/DWS/w2/pdf/SanctionsFinalReport.pdf; REBECCA GORDON, APPLIED RESEARCH CTR., CRUEL AND USUAL: HOW WELFARE "REFORM" PUNISHES POOR PEOPLE 5, 33–34 (2001), *available at* http://www.arc.org/pdf/285cpdf.pdf; SCHOLAR PRACTITIONER PROGRAM OF THE DEVOLUTION INITIATIVE, W.K. KELLOGG FOUNDATION, RACIAL AND ETHNIC DISPARITIES IN THE ERA OF DEVOLUTION: A PERSISTENT CHALLENGE TO WELFARE REFORM 5–6, 23, 35 (2001) (finding that after federal changes in welfare policy African Americans constitute a larger share of the welfare population and spend longer periods on welfare than whites; describing survey data from Wisconsin that shows higher percentages of blacks have had food stamp benefits reduced or cut; and discussing disparities in use of preemployment tests as condition of employment).

[199] These figures are for individuals five years of age or older and are derived from the following publications: U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS Tbl. 27, U.S. Census Bureau, Nativity, Citizenship, Year of Entry,

the population of the United States grew by about twenty-five percent, but the number of Americans who spoke a language other than English at home nearly doubled.[200] The 2000 Census has also predicted that, by 2044, a majority of people residing in the United States will speak a language other than English, though not necessarily to the exclusion of English.[201]

In efforts to encourage all Americans to learn a common English language, about half of the states have made English their official language.[202]

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and Language Spoken at Home, http://www.census.gov/prod/cen1990/cp2/cp-2-1.pdf; U.S. Census Bureau, tbl.35, Age by Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over: Census 2000, http://factfinder.census.gov/servlet/DTTable?ds_name=d&geo_id=d&mt_name=CAS_C2SS_EST_G2000_P035&_lang=en.

[200] *See* HYON B. SHIN, U.S. CENSUS BUREAU, LANGUAGE USE AND ENGLISH SPEAKING ABILITY 2000, at 2 (2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-29.pdf (basing findings on census data compiled in 1980, 1990, and 2000).

[201] *See* JAMES CRAWFORD, NAT'L ASS'N FOR BILINGUAL EDUC., MAKING SENSE OF CENSUS 2000 (2005), *available at* http://www.nabe.org/research/demography.html.

[202] *See* ALA. CONST. art. I, § 36.01 ("English is the official language of the state of Alabama. The legislature shall enforce this amendment by appropriate legislation."); ARIZ. CONST. art. 28, § 4 ("Official actions shall be conducted in English."); CAL. CONST. art. 3, § 6 ("(b) English is the official language of the State of California."); COLO. CONST. art. 2, § 30a ("The English language is the official language of the State of Colorado. This section is self executing; however, the General Assembly may enact laws to implement this section."); FLA. CONST. art. 2, § 9 ("(a) English is the official language of the State of Florida. (b) The legislature shall have the power to enforce this section by appropriate legislation."); NEB. CONST. art. I, § 27 ("The English language is hereby declared to be the official language of this state, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denominational and parochial schools."); ARK. CODE ANN. § 1-4-117 (2008) ("The English language shall be the official language of the State of Arkansas."); GA. CODE ANN. § 50-3-100 (2006) ("The English language is designated as the official language of the State of Georgia."); IDAHO CODE ANN. § 73-121 (2008) ("English is hereby declared to be the official language of the state of Idaho."); IOWA CODE ANN. § 1.18 (2008) ("Except as otherwise provided . . . the English language shall be the language of government in Iowa."); 5 ILL. COMP. STAT. 460/20 (2006) ("The official language of the State of Illinois is English."); IND. CODE § 1-2-10-1 (1998) ("The English language is adopted as the official language of the state of Indiana."); KY. REV. STAT. ANN. § 2.013 (2006) ("English is designated as the official state language of Kentucky."); MISS. CODE ANN. § 3-3-31 (2002) ("The English language is the official language of the State of Mississippi."); MO. REV. STAT. § 1.028 (2000) ("The general assembly recognizes that English is the common language used in Missouri and recognizes that fluency in English is necessary for full integration into our common American culture for reading readiness."); MONT. CODE ANN. § 1-1-510 (2007) ("(1) English is the official and primary language of: (a) the state and local governments; (b) government officers and employees acting in the course and scope of their employment; and (c) government documents and records."); N.H. REV. STAT. ANN. § 3-C:1 (2003) ("The official language of the state of New Hampshire shall be English. English is designated as the language of all official public documents and records, and of all public proceedings and nonpublic sessions."); N.C. GEN. STAT. § 145-12 (2007) ("English is the common language of the people of the United States of America and the State of North Carolina."); N.D. CENT. CODE § 54-02-13 (2001) ("The English language is the official language of the state of North Dakota."); S.C. CODE ANN. §§ 1-1-696, 1-1-697 (2005) ("The English language is the official language of the State of South Carolina"; "Neither this State nor any political subdivision thereof shall require, by law, ordinance, regulation, order, decree, program, or policy, the use of any language other than English . . . ."); S.D. CODIFIED LAWS § 1-27-20 (2004) ("The common language of the state is English. The common language is designated as the language of any official public document or record and any official public meeting."); TENN. CODE ANN. § 4-1-404 (2005) ("English is hereby established as the official and legal language of Tennessee. All communications and publications, including ballots, pro-

Such policies that encourage a common language are arguably essential to mutual understanding between varied cultures coexisting in a single country.[203] They are also generally widely supported among immigrants.[204]

Regarding Title VI and English language policies, the *Sandoval*[205] case itself involved Alabama's English policy that required the state's driver's license examination process, including the written test, to be conducted in English.

In 1990, the State of Alabama amended its Constitution, declaring English its official state language.[206] Subsequently, the Alabama Department of Public Safety implemented a policy of administering driver's license examinations only in English.[207] Martha Sandoval, representing a class of non-English speakers, filed suit under Title VI, arguing that the policy "had the effect"[208] of discriminating against individuals because of their national origin in violation of DOJ's "disparate-impact"[209] regulations.

In *Sandoval*, the Supreme Court did not reach the issue regarding whether or not the English language policy at issue had the effect of discriminating on the basis of national origin.[210] However, the lower courts in *San-*

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duced by governmental entities in Tennessee shall be in English, and instruction in the public schools and colleges of Tennessee shall be conducted in English unless the nature of the course would require otherwise."); UTAH CODE ANN. § 63G-1-201 (West 2008) ("2. As the official language of this State, the English language is the sole language of the government, except as otherwise provided in this section."); VA. CODE ANN. § 1-511 (2008) ("English shall be designated as the official language of the Commonwealth. Except as provided by law, no state agency or local government shall be required to provide and no state agency or local government shall be prohibited from providing any documents, information, literature or other written materials in any language other than English."); WYO. STAT. ANN. § 8-6-101 (2007) ("(a) English shall be designated as the official language of Wyoming. Except as otherwise provided by law, no state agency or political subdivision of the state shall be required to provide any documents, information, literature or other written materials in any language other than English.").

[203] *See* Adeno Addis, *On Human Diversity and the Limits of Toleration, in* ETHNICITY AND GROUP RIGHTS 139 (Ian Shapiro & Will Kymlicka eds., 1997) ("[I]f democratic political communities are to sustain themselves over a long period of time the various cultural and ethnic communities have to engage each other in continuous and institutional dialogue rather than seeing each other as alien and strange. . . . [I]n my view if linguistic pluralism and shared deliberation cannot be reconciled then the latter will have to take precedent. At a minimum, a political community requires that ethnic and cultural communities be linguistically capable of communicating with each other.").

[204] *See* Jennifer Harper, *Immigrants Favor English as Official Language*, WASH. TIMES, Dec. 5, 2006, at A03 ("Nearly two-thirds of Hispanic adults–65 percent–favor making English the nation's official language, according to a survey released yesterday. 'More than three-in-four immigrants to the U.S. favored the legislation [making English the official language], as did nearly 60 percent of first-generation and 79 percent of second-generation Americans,' the survey from Zogby International found.").

[205] 532 U.S. 275 (2001).

[206] *Id.* at 278–79.

[207] *Id.* at 279.

[208] *Id.*

[209] *Id.* at 278.

[210] *See id.* at 279 ("We do not inquire here . . . whether the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin. The petition for writ of certiorari raised, and we agreed to review, only the question

doval did address the disparate impact claim against Alabama's Policy Order that stated "[i]t is the policy of the Director and the Driver License Division that all driver license examinations will be printed and administered in English."[211]

The district court found that "the Department [of Public Safety] receives millions of dollars in federal funds every year. Accordingly, the court finds . . . that the Alabama Department of Public Safety, which administers Alabama's driver's license examinations, is the recipient of federal funds within the meaning of Title VI."[212] It then concluded that "it is clear that the Department's English-Only Policy disproportionately impacts resident non-English speaking foreign nationals" on the grounds that "[o]f the non-English speakers in the State of Alabama, the majority are from foreign countries."[213] The district court then found that "the Defendants have failed to meet the threshold of proving that there exists a 'substantial legitimate justification' for the English-Only Policy," pointing out that Alabama's constitutional provision providing English as the official language of the state is no defense where "[t]he Supremacy Clause deprives the States of the power to pass laws that conflict with federal statutes," which in this case was Title VI.[214] The Eleventh Circuit agreed, and held that "[t]he district court's findings of fact establish that the English language policy for driver's license exams has a statewide disparate impact on Alabama residents of foreign descent."[215]

In light of these lower court assessments on the merits, were Congress to statutorily provide for a private disparate impact cause of action, a legal regime akin to that the lower courts had established in that case prior to the Supreme Court's decision in *Sandoval* would prevail. However, the Supreme Court in *Sandoval* explicitly rejected a private right of action to enforce disparate impact regulations.[216] Under the earlier decisions, state and local programs that implemented English language policies would be in jeopardy.

VIII. Conclusion: Private Disparate Impact Claims and Public Policy

As one commentator has described it,

> Title VI's breadth and its potential power derive from its application to a wide range of funding programs. . . . Because of its application to a broad array of regulatory contexts, Title VI disparate

posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the [DOJ disparate impact] regulation.").

[211] Sandoval v. Hagan, 7 F. Supp. 2d. 1234, 1285 (M.D. Ala. 1998).

[212] *Id*. at 1249–50.

[213] *Id*. at 1297.

[214] *Id*. at 1298–99.

[215] Sandoval v. Hagan, 197 F.3d 484, 508 (11th Cir. 1999).

[216] *See supra* note 35 and accompanying text.

> impact theory risks appearing like disparate impact theory uncabined, provoking judicial concerns about whether it would require the judiciary to broadly restructure social institutions . . . .[217]

One recent example of another side-effect of previous legal campaigns based on disparate impact claims is the current financial crisis. While there were many pressures on mortgage lenders to relax the standards under which loans were extended in the 1990's, one factor was the Clinton Administration Justice Department's aggressive pursuit of disparate impact claims. The Clinton Administration pursued those claims in the mortgage lending field as well,[218] making allegations that lenders' facially neutral credit criteria had a disparate adverse impact on the availability of mortgages to certain covered

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[217] Olatunde C.A. Johnson, *Disparity Rules,* 107 COLUM. L. Rev. 374, 393, 395 (2007).

[218] *See* Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 411–12 (1998) ("The federal agencies charged with enforcing the Fair Housing Act (FHA) and the ECOA [Equal Credit Opportunity Act of 1974] have adopted an aggressive approach to enforcement of the fair housing and fair lending laws in the last four years. In particular, the Department of Justice (DOJ) and the Department of Housing and Urban Development (HUD) have suggested interpretations of the case law that would impose a more rigorous standard of disparate impact liability on private party defendants such as lenders, insurers and landlords.") (citing Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,269 (April 15, 1994)); *see also* Stephen M. Dane, *Disparate-Impact Analysis in the Mortgage Lending Context*, 115 BANKING L.J. 900, 900–01, 903, 907, 908–09 (1998) ("Lenders relying on written standards and criteria in making decisions as to whether to grant a residential mortgage loan application run the risk of exposure to liability under the civil rights law doctrine known as disparate-impact analysis. . . . The concept of disparate impact is of particular significance to lenders, who often rely on written standards and criteria to decide whether to grant or deny a residential mortgage loan application. If those guidelines, policies, or practices operate to exclude racial minorities or other protected groups at a rate substantially higher than nonprotected categories of persons, the lender may be exposed to liability under several civil rights laws. . . . Let's take an example. A lender operating in the Philadelphia housing market has a policy of not extending loans for single-family residences valued at less than $45,000. Such a policy, if uniformly applied, would exclude 67 percent of the homes located in minority neighborhoods (defined as greater than 50 percent minority) in the Philadelphia area. In contrast, only 6 percent of the homes located in white neighborhoods (defined as less than 25 percent minority) would be affected. The policy has a substantial disparate impact on minority neighborhoods in Philadelphia. . . . Under precisely what conditions will a particular policy or practice be found to constitute a 'business necessity'? There is no clear answer to be found. But a review of the reported decisions under the Fair Housing Act reveals that very few fair housing defendants have ever been able to establish a business necessity in a disparate-impact case. . . . Several underwriting guidelines that are fairly common throughout the mortgage lending industry are at risk of disparate-impact analysis [including] creditworthiness standards. . . . "). Courts at the time had held that the Fair Housing Act prohibited lenders from employing practices that have a disparate impact based on race. *See* Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996); Steptoe v. Sav. of Am., 800 F. Supp. 1542, 1546–47 (N.D. Ohio 1992); Old West End Ass'n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100, 1105–06 (N.D. Ohio 1987); Thomas v. First Fed. Sav. Bank of Ind., 653 F. Supp. 1330, 1340 (N.D. Ind. 1987). At the same time, in order to alleviate disparate impacts in lending, the Federal Financial Institutions Examination Council suggested to lenders that, rather than focusing on credit history as defined in a credit report, such lenders should focus on evidence of a borrower's ability and willingness to repay a loan, including a record of regular payments for utilities and rent. *See* FED. FIN. INST. EXAMINATION COUNCIL, HOME MORTGAGE LENDING AND EQUAL TREATMENT: A GUIDE FOR FINANCIAL INSTITUTIONS 3 (1991), *available at* http://www.occ.treas.gov/ftp/bb/92-17a.txt.

groups, including those in low-income communities. The threat of such lawsuits pressured lenders to extend more mortgages to low-income communities so disparate impact lawsuits could be avoided. Economists have suggested that these relaxed lending standards were a prime cause of the current financial crisis because many loans were extended to people who could not reasonably be expected to be able to pay them back.[219] As the *Washington Post* editorialized, "the problem with the U.S. economy . . . has been government's failure to control systemic risks that government itself helped to create. We are not witnessing a crisis of the free market but a crisis of distorted markets. . . . [G]overnment helped make mortgages a purportedly sure thing in the first place."[220]

Under the Emergency Economic Stabilization Act[221] passed at the end of the 110th Congress, vast new areas of the private sector lending community have received and will be receiving federal financial assistance.[222] If disparate impact claims are authorized against entities that receive federal financial assistance under Title VI, then any entity that received federal financial assistance under the Act could also be subject to disparate impact claims that would pressure them to again implement lending policies similar to those that helped cause the current crisis.

While such an "uncabined" theory would be the result of a congressional authorization of private disparate impact claims, the Supreme Court, when it has analyzed disparate impact claims under constitutional principles, has rejected the invitation to create such claims on its own precisely on the grounds that such a theory would "raise serious questions" about so broad a spectrum of existing programs.

The Supreme Court, in *Washington v. Davis*,[223] made clear that it would not judge the constitutionality of an action solely by its outcome, as such would "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory and licensing statutes."[224] The

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[219] *See, e.g.*, Stan J. Liebowitz, *Anatomy of a Train Wreck: Causes of the Mortgage Meltdown*, *in* HOUSING AMERICA: BUILDING OUT OF A CRISIS (forthcoming 2009) (on file with author) ("[I]n an attempt to increase homeownership, particularly by minorities and the less affluent, an attack on underwriting standards was undertaken by virtually every branch of the government since the early 1990s. The decline in mortgage underwriting standards was universally praised as an 'innovation' in mortgage lending by regulators, academic specialists, GSEs, and housing activists. This weakening of underwriting standards succeeded in increasing home ownership and also the price of housing, helping to lead to a housing price bubble.").

[220] Editorial, *Is Capitalism Dead?*, WASH. POST, Oct. 20, 2008, at A14.

[221] Pub. L. No. 110-343, 122 Stat. 3765.

[222] Section 101(a)(1) of the Act, for example, provides that "[t]he Secretary [of the Treasury] is authorized to establish the Troubled Asset Relief Program (or 'TARP') to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and the policies and procedures developed and published by the Secretary." *Id.*

[223] 426 U.S. 229 (1976) (refusing to strike down as unconstitutional, based on a disparate impact analysis, a police department written personnel test, on the grounds that it excluded a disproportionately high number of blacks).

[224] *Id.* at 248.

Court clearly rejected the notion that "a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."[225]

Just a few years later, the Court stressed the need for judges to be tolerant of legislative generalizations that might unintentionally impact covered groups differently, stating:

> The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification. Most laws classify, and may affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.[226]

Statutory grants of private rights of action for disparate impact claims against private entities or state and local governments that cooperate in federal programs cut directly against this warning from the Court. They invite judges to interpose their own judgments under a sharp disparate impact standard, despite the fact that the judiciary is the branch with the least familiarity and expertise in national security policy.[227]

In the case of a statutory grant of private rights to bring disparate impact claims, courts would be placed in a position to trump basic investigative functions. They would be placed in a position to do so even though execu-

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[225] *Id.* at 242; *see also id.* at 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.").

[226] Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 271–72 (1979) (citations omitted).

[227] Michael Kirkpatrick, in a rebuttal to this article, generally claims that one need not fear unreasonable results from disparate impact discrimination claims because liability under disparate impact theories results only when the defendant cannot show that the practice serves a legitimate goal and that no less-discriminatory alternative is available, and not when proponents of national security policies can justify the challenged practices. However, a fundamental problem with proposals that expand disparate impact claims is that they leave it to courts and judges, who have no institutional expertise in national security programs, to make the determinations regarding their national security justifications and the sufficiency of alternative programs. *See, e.g.*, N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 219 (3d Cir. 2002) (citing "judges' relative lack of expertise regarding national security and their inability to see the [larger] mosaic"); Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 CAL. L. REV. 2203, 2203 (2007) ("[J]udges have relatively little experience with national security matters. . . . [J]udges are relative novices when it comes to assessing the possible implications of their decisions on national security."); Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2D 367, 372 (1999) (noting, regarding judgments involving national security, "The federal courts lack the information to make such judgments wisely. . . . [T]hey lack the political accountability that legitimates a claim to speak for the nation, and unlike the political branches, their decisions are not supposed to be influenced by 'consequences' or 'policy.'").

tive decisions regarding investigations should benefit from a level of restraint comparable to that enjoyed by legislative determinations when the "special province" of the executive is challenged.[228] As the Court reiterated when discussing the executive power to prosecute in *Wayte v. United States*,[229] courts' micromanaging investigative decisions involves significant costs because "[e]xamining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."[230]

One of the most powerful claims of any theory of democratic process is a preference for decision-making by elected officials over judicial review by one or a few unelected judges. Thomas Jefferson warned that:

> [T]he germ of dissolution of our Federal Government is in the constitution of the Federal judiciary; . . . working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped.[231]

Modern scholars have echoed this concern. As John Hart Ely has written, generalizations made by the legislature that are not motivated by improper bias cannot be "intelligibly evaluated [by courts] simply in terms of the number or percentage of false-positives they entail."[232] Courts should "ordinarily, and rightly, refus[e] to second-guess the legislative cost-benefit balance"[233] because to do otherwise would impose an "unbearable cost" on the policymaking process by requiring democracies to create "procedures for deciding every [issue] on its individual merits."[234]

Disparate impact claims, if authorized, would greatly expand the power of courts and private litigants to invalidate programs that are neutral on their face, and not motivated by bias, on the grounds that the results of such programs simply entail a disparate impact on covered groups. Such claims, if

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[228] In the context of prosecutorial discretion, the Court in *United States v. Armstrong*, 517 U.S. 456 (1996), stated that "[a] selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive. The Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws." *Id.* at 464 (citations and quotations omitted).

[229] 470 U.S. 598 (1985).

[230] *Id.* at 607.

[231] Letter from Thomas Jefferson to Charles Hammond (Aug. 18, 1821), in 15 THE WRITINGS OF THOMAS JEFFERSON 331–32 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903). Jefferson also lamented that federal judges' "power [is] the more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control." Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in 15 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 277.

[232] JOHN HART ELY, DEMOCRACY AND DISTRUST 156 (1980).

[233] *Id.*

[234] *Id.* at 155.

authorized under Title VI, could significantly hamper national security and other programs and involve the courts in efforts to countermand them in various ways, potentially limiting their effectiveness and eroding the authority of elected legislatures and democratic government.