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Legal Issues

The Airport Security Safety Act directs the FAA to develop and implement better airport security technology. However, legal issues and challenges could arise from approval by the FAA of the use of new and more invasive passenger screening technologies under consideration. In this chapter, the panel specifically reviews the challenges that have been raised against screening technologies currently used in airports or against the introduction of similar screening and searching technologies and procedures in other contexts. The discussion focuses on the nature of these challenges, the identity of the challengers, and the judicial responses. For purposes of the review, the panel assumes that the screening devices and the personnel operating them both function effectively.

The panel identified two principal types of legal challenges in the area of passenger screening: (1) the violation of the rights of an individual, as guaranteed under the Fourth Amendment to the U.S. Constitution, and (2) injury (real or perceived) to the person or to legal interests resulting from the passenger screening process. The first type is generally referred to as an unconstitutional search. Tort¹ claims of privacy or personal injury constitute the second type of legal challenge. Each of these issues is addressed below.

In general, under the U.S. Constitution and federal and state laws, courts have upheld the right of the FAA to institute airline passenger screening procedures, even when those procedures reveal more than just the presence or absence of dangerous materials or threat objects. However, the legal problems associated with the implementation of procedures that are more intrusive than the current ones must be addressed. According to the President's Commission on Aviation Security and Terrorism, "the more security measures are imposed, the more fundamental freedoms are restricted" (PCAST, 1990). Even as this report was being written, stricter and more invasive security measures were being imposed as a result of a higher threat level (Phillips, 1995).

The material in this chapter briefly outlines and indicates the types of legal issues that have been raised. Particular legal

arguments will vary according to the jurisdiction and to the factual scenario. Details of particular arguments and cases are summarized in appendix C.

UNCONSTITUTIONAL SEARCH

The Fourth Amendment to the U.S. Constitution is the most obvious context in which the legality of airport security searches is determined. Like airport security searches, the role of the Fourth Amendment is to balance privacy and law enforcement. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" by stipulating that any search conducted must be made on reasonable grounds. In addition to the reasonableness of the grounds, the courts commonly weigh three aspects of a search to determine whether the search is reasonable: the degree of intrusiveness of the search procedure; the magnitude and frequency of the threat; and the sufficiency of alternatives to conducting a search. Courts also consider the effectiveness of the search in reducing the threat and whether sufficient care has been taken to limit the scope of the search as much as possible, while still maintaining this effectiveness.

The analysis of a Fourth Amendment challenge involves two threshold issues: (1) whether there is a search or seizure, and (2) whether the search or seizure is done by the government. (These two concepts are discussed in more detail in appendix C.) If no search or seizure occurred, or if it was done by a private entity,² then it is not necessary to determine whether it was reasonable under the Fourth amendment. In such cases, the requirements of the amendment simply do not apply (see *Dow Chemical Co.*, 1986; *Lebron*, 1995).³

Once it has been determined that a search has been done by the government, the Fourth Amendment requires that the search must either have been supported by a warrant or that

¹A tort is a wrongful act for which a civil monetary award may be assessed.

²Some circuits hold that "the government's involvement in promulgating the FAA guideline to combat hijacking is so pervasive as to bring any search conducted pursuant to that program within the reach of the Fourth

Amendment" (*United States v. Ross*, [9th Cir. 1994]). Other circuits hold that airline searches constitute private conduct (*United States v. Morgan*, [6th Cir. 1985]). No universal agreement has been reached as to whether airport searches are performed by the government or by private entities.

³A brief description of many cases cited is contained in appendix C.