

I. Issue: Detention, Interrogation, and Search of Travelers

II. Reporting Organizations: The Identity Project (PapersPlease.org)¹ and the Consumer Travel Alliance (ConsumerTravelAlliance.org)

The Identity Project (IDP), <<http://www.PapersPlease.org>>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed by demands for identification. IDP is a program of the First Amendment Project, a nonprofit organization dedicated to protecting rights protected by the First Amendment to the U.S. Constitution and international human rights treaties.

The Consumer Travel Alliance (CTA), <<http://www.consumertravelalliance.org>>, is a nonprofit, nonpartisan organization that works to provide consumers an articulate and reasoned voice in decisions that affect travel consumers. CTA is one of the member organizations of the Consumer Federation of America.

III. Issue Summary

Travelers in the U.S. are subject to arbitrary, suspicionless, warrantless, extrajudicial detention, interrogation, and search of their persons and property at checkpoints in airports and other transportation facilities and along roads.

Searches at airports are among the most intrusive, far exceeding what is necessary or proportionate. Routine searches of travelers are conducted using "advanced imaging technology" which generates an image of the traveler, through their clothes, as though naked. The size and shape of the genitals are clearly visible.²

Failure to "consent" to this virtual strip-search, or failure to respond or unsatisfactory response to questioning by Transportation Security Agency (TSA) "Behavior Detection" staff, typically results in "selection" for an "enhanced pat-down", in which TSA staff or contractors feel between the traveler's legs firmly enough to feel "resistance" to their fingers pressing against the traveler's genitals.

Victims of torture or other sexual or physical abuse are among those most likely to find these body searches traumatic and in many cases intolerable. Air travel is the only means of travel to, from, and between many U.S. territories. These searches make it psychologically impossible for some people to travel, and exert a chilling effect on the exercise of rights to travel, assembly, and association.

There has been no public fact-finding proceeding with respect to the TSA's use of

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2 EPIC, "Body Scanner FAQ", <http://epic.org/privacy/body_scanners/body_scanner_faq.html>.

body scanners and "enhanced pat-downs" (groping of travelers' genitals, buttocks, and breasts), despite numerous complaints. In July 2011, a Court of Appeals ordered the TSA to "promptly" conduct a rulemaking on its use of body scanners, including notice and an opportunity for public comment, but to date no such rulemaking has begun and the Court has imposed no sanctions on the TSA.³

U.S. law requires travelers to "cooperate" with "screening procedures". But all TSA procedures are secret, and no publicly-disclosed laws or regulations define what travelers are required or forbidden to do or submit to at TSA checkpoints.⁴

The Supreme Court has upheld the denial of jurisdiction to U.S. District Courts (trial courts) to hear challenges to TSA procedures.⁵ Only appellate courts can hear such cases, but they have no fact-finding procedures and no trial record to review.⁶ Courts of Appeal have relied on secret evidence submitted by the government, which the plaintiff traveler was unable to see or rebut.⁷

TSA and U.S. Customs and Border Protection (CBP) "Visible Intermodal Prevention and Response" (VIPR) teams claim similar authority for warrantless, suspicionless detention, interrogation, and search of train, bus, and ferry passengers, and all travelers on public streets and highways.

U.S. laws and regulations allow warrantless, suspicionless searches of travelers and vehicles anywhere within 100 miles of any external boundary of the U.S.⁸ The majority of the U.S. population lives within 100 miles of the U.S. perimeter.⁹ Searches within these areas are not limited to people or vehicles who have crossed or intended to cross the border. Many permanent "border control" checkpoints are located on routes which are parallel to, but do not intersect, U.S. borders.¹⁰

Searches of people and property at checkpoints at airports and near borders are not limited to searches for evidence of violations of customs, immigration, or aviation security laws. Papers can be read and/or copied, and the titles of the

3 EPIV v. DHS, <http://epic.org/privacy/body_scanners/epic_v_dhs_suspension_of_body.html>.

4 The Identity Project, "TSA releases list of SOPs -- but says they're all secret" (December 7, 2010), <<http://papersplease.org/wp/2010/12/07/tsa-releases-list-of-sops-but-says-theyre-all-secret>>.

5 Corbett v. United States, 458 Fed. Appx. 866 (11th Cir. 2012), cert. denied October 1, 2012.

6 See petition for Circuit Court review and related motion to transfer to District Court for fact-finding at <<http://tsaoutofourpants.wordpress.com/2012/11/16/new-petition-tsa-removes-91-body-scanners>>.

7 Gilmore v. Gonzales, 435 F.3d 1125 (9th Cir. 2006), cert. denied January 8, 2007, <<http://www.papersplease.org/gilmore>>.

8 8 U.S.C. § 1357(a)(3), as implemented by regulations at 8 C.F.R. § 287.1(a)(1) and 8 C.F.R. § 287.1(a)(2).

9 American Civil Liberties Union, "Are You Living in a Constitution Free Zone?" (December 15, 2006), <http://www.aclu.org/national-security_technology-and-liberty/are-you-living-constitution-free-zone>.

10 See e.g. the documentation of these checkpoints and searches at <<http://www.checkpointusa.org>>.

books carried by travelers can be recorded.¹¹ Searches often target illegal drugs or other general law enforcement purposes unrelated to travel safety or security.

Rather than treating travel as a protected activity (as claimed in Paragraph 251 of the U.S. Fourth Periodic Report), the U.S. treats travel – whether on public rights-of-way or by common carrier – as an inherently suspicious activity that justifies warrantless, suspicionless dragnet searches. Searches, seizures, and questioning of travelers have been subjected to reduced, not heightened, scrutiny by U.S. courts.

IV. U.S. Government Report

The U.S. Fourth Periodic Report does not mention any of the U.S. government's programs for checkpoints, searches, seizures, or questioning of travelers, despite complaints that they violate U.S. obligations pursuant to the ICCPR.

Paragraph 251 of the U.S. Fourth Periodic Report claims that, "governmental actions affecting travel are subject to ... heightened judicial review", but does not mention the exclusion of TSA procedures from U.S. District Court jurisdiction.

Paragraphs 321-335 of the U.S. Fourth Periodic Report discuss the rules for searches pursuant to the Fourth Amendment to the U.S. Constitution, but do not mention the exceptions to the Fourth Amendment for "administrative" searches at airports or near the U.S. perimeter.

V. Legal Framework

ICCPR Article 12: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.... Everyone shall be free to leave any country, including his own..... No one shall be arbitrarily deprived of the right to enter his own country."

ICCPR Article 17: "No one shall be subjected to arbitrary or unlawful interference with his privacy.... or correspondence."

ICCPR Article 21: "The right of peaceful assembly shall be recognized."

ICCPR Article 22: "Everyone shall have the right to freedom of association with others."

General Comment No. 27: Freedom of movement (Art. 12): "It is not sufficient

¹¹ Ellen Nakashima, Washington Post, "Collecting of Details on Travelers Documented" (September 22, 2007), <<http://www.washingtonpost.com/wp-dyn/content/article/2007/09/21/AR2007092102347.html>>.

that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures ... must be appropriate to achieve their protective function; [and] they must be the least intrusive instrument amongst those which might achieve the desired result.... States should ensure that ... reasons for the application of restrictive measures are provided.... The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity."

VI. Recommended Questions

(1) Does the U.S. believe that travel by common carrier or along a public right-of-way is a sufficient basis for detention, interrogation, or search? Does the U.S. believe that travel is inherently suspicious or indicative of unlawful intentions?

(2) Other than by being arrested, and challenging the legality of their arrest, how can travelers determine what they are required or forbidden to do, or to submit to, at airport, TSA, or other government checkpoints?

(3) Do the provisions of 49 USC § 40101 and 40103 recognizing the "public right of transit through the navigable airspace", and requiring agencies to consider this right in rulemaking, effectuate Article 12 of the ICCPR? Would failure to consider this right in rulemaking provide a basis for judicial review by a U.S. court of a rule alleged to infringe rights guaranteed by Article 12 of the ICCPR?

VII. Suggested Recommendations

(1) U.S. District Courts should be given jurisdiction to hear challenges to TSA rules, orders, and procedures, including causes of action for alleged violations by the TSA and/or its contractors of U.S. obligations pursuant to the ICCPR.

(2) TSA rules, orders, policies, or procedures which prescribe what travelers or other individuals are required or forbidden to do should be made public.

(3) Consistent with the status of travel as an activity specially protected by the ICCPR, detention, search, or seizure of travelers should be permitted only on the basis of at least the level of particularized suspicion which would be required in the case of a non-traveler, and subject to at least the same rights of judicial review. Travel should not be used as a factor justifying reduction of rights.

(4) Policies, practices, and procedures for detention, interrogation, or search of travelers should be evaluated in accordance with the criteria for substantive necessity and procedural due process in General Comment No. 27.