

FAA-1999-5536-11

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Date: 4/20/99 11:12 PM
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To: 9-NPRM-CMTS
Priority: Normal
Subject: Public comment on Docket No. FAA-I 999-5336

99 MAY -4 AM 11:22
MAY 1999 A 10:02

I would like to comment on the proposed rule on "Security of Checked Baggage on Flights Within the United States", proposal to amend 14 CFR Part 108, Page 19220, Docket No. FAA-1999-5336, in multiple capacities as a citizen, a frequent airline passenger, a law student and as a student of (arguably a minor scholar on) privacy issues, especially informational privacy.

To provide legal effect to this proposed rule would be a tragedy, both for personal privacy and for public trust in government, as well as a step toward tyranny and away from racial, religious, and economic equality.

The most disturbing implication of the proposed rule is the functional requirement that airlines implement the computer-assisted passenger screening (CAPS) system. Because bag matching is considered expensive and impractical, as is (compared to CAPS) the screening of every single bag, this rule provides a false choice, and airlines will have no real option but to implement CAPS. In addition, both bag matching and EDS are to "initially" be based on passenger screening, CAPS must anyway be implemented. The remainder of this comment is directed to the problems with this application of the rule.

This comment also assumes that physical baggage search involving opening of luggage can or would be a result of any identification of a passenger as a danger under CAPS. First, passengers have already been singled out, either under CAPS or randomly (due to FAA secrecy, it is impossible to know which), in various situations. For evidence of this, see the ACLU website, at <http://www.ACLU.org/congress/complaint_results.html>. Additionally, security measures tend to lead to more security measures, and if the CAPS system is implemented, it would reduce the cost of choosing passengers to subject to physical search, leading to a more favorable situation for the enactment of an actual requirement that physical search occur.

This rule should not be enacted for the following reasons:

1. The criteria for subjecting passengers to additional scrutiny under the CAPS system (hereinafter referred to as "Criteria") are secret. This regulation thus imposes penalties -- the restriction of the right to interstate travel -- based on information which is not disclosed to the passenger. This means that potential passengers, who would, in a market with free information, choose an alternate means of transportation, or act to reduce their potential harm from search. For example, a person may need to transport embarrassing personal articles, or, more disturbingly, confidential documents. If that person were aware of their status as likely search subjects, they could choose to choose a different mode of transportation, or choose different modes of transport for their sensitive articles. This would not increase security risks at all, since "dangerous" passengers would either be deterred from flying, or would enter and be searched. Rather, it would prevent both under-deterrence -- and the resulting embarrassment, refusal to subject to search and subsequent economic loss from inability to fly, and over-deterrence -- the taking of more inefficient modes of transportation by people inaccurately afraid of being subject to search.

2. The Criteria are sheltered from the political process. Again, as a result of the secrecy of the Criteria, there is no way for the democratic system to provide feedback on the Criteria themselves. If they were open

to public scrutiny:

-Accusations of racism and other complaints, based on speculation as to

the likely contents of the Criteria, would be either exposed as true, and remedied, or exposed as false, and nullified.

-Society, rather than simply a few people in the FAA, could judge the utility of each individual Criterion. The expertise of sociologists, psychologists, the political process and the 'marketplace of ideas' could determine which Criteria were likely to be related to likelihood to engage in terrorist activity.

-Society could make a more precise choice along the liberty/security axis.

Rather than being forced to either accept (by doing nothing) or reject (by electing legislators willing to curtail FAA power) the CAPS system in its entirety, society could choose, even if specific Criteria were likely to increase safety, to accept the additional risk in exchange for furthering important social goals of, for example, freedom of religion, conscience, and racial equality.

3. The CAPS system deprives passengers of their property without due process, violating the Fifth and Fourteenth Amendments to the United States Constitution.

-Some passengers are placed in a different legal position -- being required to subject themselves to search before flying -- from other passengers, based on status, possibly including constitutionally suspect classes such as race and religion, and most likely including based on Constitutionally protected behavior like travel (for example, to the Mideast region) and group affiliations. This violates the equal protection and due process guarantees of the Constitution.

-Passengers who refuse to subject to a search are deprived of their property interest in legally purchased airline travel. They may also, under some possible implementations of CAPS, be deprived of a property interest in their luggage. They are also deprived of a liberty interest given to other passengers, in their right to have their baggage secure. They are also deprived of an interest in having their personal information subjected to higher scrutiny (the removal of 'privacy by obscurity.'). Finally, they are subject to state-inflicted embarrassment and delay by being singled out, even without physical search. All of this is both status based, in violation of substantive due process guarantees, and done without procedural due process -- no trial, warrant, or other checks on the exercise of state power.

-How is it possible to have a system that isolates threats that does not identify people isolated, even when a small percentage are random, as threats? This puts the lie to the claim that this system will not stigmatize passengers.

4. Both by the secrecy of the Criteria, and the search process itself, it will tend to decrease public trust in government, and reduce the perceived legitimacy of state power, as well as creating conflict and hostility between the public and airport personnel. The fact that the Criteria are secret, in addition to "chilling" constitutionally protected travel, as well as a constitutionally protected speech against the government for fear of retaliatory search that can not be opposed using the criteria, will also cause the public to distrust the government for maintaining unjustified secrets from its citizens.

5. Some of the "passenger history" Criteria may be based on previous interactions with the FAA, including constitutionally protected conduct. For example, resisting a search and yielding the right to travel, may be

recorded and used to subject a passenger to future searches, despite the constitutionally protected nature of the refusal to search. The same can be said to apply to speech critical of the government.

6. It is beyond question that this law subjects passengers to unreasonable search without a warrant, violative of the Fourth Amendment. It does not pass under any "checkpoint" exception to the Fourth Amendment, because it does not examine each person entering in a minimally intrusive manner. Rather, it selectively applies search Criteria based on status and behavior which do not constitute exceptions to the Fourth Amendment, and has the potential to be extremely intrusive. Thus, the Justice Department is incorrect in claiming that CAPS-based searches would be constitutional as an extension of current administrative searches, because they consider only the extent of the search, not the methods used to select search victims. At the same time, no probable cause (or lesser standards for specialized situations) can be demonstrated for any search under CAPS, because of the uncertainty of any status-based standards and the lack of individualized suspicion.

7. The CAPS Criteria may discriminate based on racial, religious, national, or political status. Racial discrimination may come about as a result of the increased fear of Arab-American terrorism (the very reason cited for the passage of the rule, in the "background" statement). Religious discrimination may come about as a result of fear of Muslims. National discrimination may come about as a result of a fear of certain types of foreigners, mainly Arabs and Irish. Political discrimination may be based on public opposition to FAA policies (such as the sending of this sort of comment) or membership in certain organizations (Arab-sympathetic or political fringe). Political qualifications are not cited as among the "civil liberties concerns" which would be subject to review in the CAPS system by the Justice Department (p. 19224). Since all the other relevant grounds for discrimination are (although age is a concern), this may indicate that political discrimination may take place. "Radical fundamentalist elements" are cited as a danger on page 19232, further indicating a chance of discrimination based upon constitutionally protected political opinions.

8. Even if there are no racial, religious, national, or political CAPS Criteria, this discrimination will not be reduced by the CAPS system, because discretion on the part of airport officials will still exist. An airport official would be able to single out a person with dark skin and claim they were selected "randomly", or pursuant to non-racial CAPS Criteria, and the person would have no ability to judge the truth or falsehood of this claim. Thus, secret criteria, by adding the perceived authority of criteria, while reducing the ability to check officials against the criteria, actually increase official discretion to discriminate.

-In addition, by facilitating the tracking of other possibly discriminatory information (such as national origin, past travel behavior, etc.), this rule actually increases the ability of individual officials to practice illegal discrimination.

9. On Page 19223, the proposed rule claims that, as a result of the world trade center bombing, the threat of airline terrorism has increased.

-A single incident of a threat to a building is insufficient evidence that the threats to airplanes have increased.

-It requires vastly different skills to bomb an United States domestic airplane flight than to bomb a building. To bomb an airplane a terrorist must produce smaller, more sophisticated weaponry, able to evade the

current security measures, and must be willing to risk or sacrifice his or her own life on the airplane in question. This weakens the correlation between airport and building terrorism.

-As the world trade center bombing was cited, planned by an Arab, rather than the Oklahoma bombing, or the actions of the Unabomber, planned and executed by Americans, this betrays the true racist fear of the rule proponents.

-On page 19231, the proposal admits that the airline bombings planned by the group in question would not have been prevented by the proposed system.

10. Bag matching, an alternative both more likely to increase safety (by requiring that anyone wishing to destroy an airplane must also destroy themselves) is rejected as involving high economic cost to airlines. This betrays a severe misplacement of priorities. The rulemakers are apparently willing to trade personal privacy for airline dollars. The FAA exists to serve the public, not airlines.

11. The claim (p. 19224) that CAPS information will not be retained is contradicted by the subsequent claim that CAPS information will be reviewed to determine whether bias exists, the claim on page 19227 that the FAA would have the power to require Air Carriers to disclose information on the operation of their CAPS systems. Thus, the various answers to civil liberties objections are mutually exclusive -- one can not both destroy and audit data. See proposed rule 108.12(h) for a clear manifestation of this contradiction.

12. It is impossible for passengers to file a complaint against discriminatory security procedures without being given enough information to determine what the security procedures in fact were.

13. The cost-benefit calculation (page 19228-19232) assumes that the rule will be effective in stopping terrorist acts. This, despite the admission that the only empirical information possessed, regarding a single conspiracy, shows that this system would not be effective to stop this attack. (See above, point nine). Is it possible that the FAA wishes not to trade liberty for security, but to trade liberty for nothing?

Please do not allow this regulation to gain legal force. Liberty must never be traded by security without the consent of the political system, yet this is what this rule would do. By exchanging the personal privacy of passengers for additional perceived safety without informing society exactly how this privacy will be sacrificed, and how much safety will be gained, the polis is being forced into a Faustian bargain against its will.

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