AAAE Airport Law Workshop
TSA Legal Update
Seattle, Washington

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The TSA Story

- TSA was created in the aftermath of 9/11 to oversee security for all modes of transportation

- In Nov. 2001, President Bush signed the Aviation and Transportation Security Act (ATSA) into law requiring screening conducted by federal officials, 100% checked baggage screening, expansion of the Federal Air Marshal Service, and reinforced cockpit doors

- Federalization of security operations was completed by the end of 2002

- TSA became part of the Department of Homeland Security in March 2003, making up a quarter of the DHS workforce

TSA Created in Response to 9/11

Pre 9/11

- Private Sector Screeners
- FAA oversaw safety and security for civil aviation and regulated airports and air carriers

Post 9/11

- TSA tasked with responsibility to screen passengers and checked baggage (federal screeners)
- Initially part of DOT; shifted to DHS under Homeland Security Act of 2002

Evolution of Threats to Aviation

1970 - 1980s

Hijackings for hostages using guns, knives, and grenades.

Threat

Hiding bombs in electronics, attacks on the public side of airports, and insider threats.

Responses

Enhanced Accessible Screening, Public Area Security Summit, review flight school vetting, accelerating deployment of Computed Tomography.

Pre -2000 → 2000s → 2010s → 2020s

Threat

Hijackings not for hostages but using planes as weapons; bombs using unique methods of concealment (shoes, underwear, soft drinks).

Responses

Advanced Imaging Technology, liquids ban, using intelligence to identify higher risk passengers for enhanced screening.

Threat

The COVID-19 Pandemic presented a novel public health threat to the traveling public; increased cybersecurity threats to aviation and critical infrastructure.

Responses

Mask mandate, travel restrictions, and changes to the TSA checkpoints. Cybersecurity requirements in Security Programs and recommendations in Information Circulars.

Guiding Principles

OUR MISSION

Protect the Nation's transportation systems to ensure freedom of movement for people and commerce.

OUR VISION

An agile security agency, embodied by a professional workforce, that engages its partners and the American people to outmatch a dynamic threat.
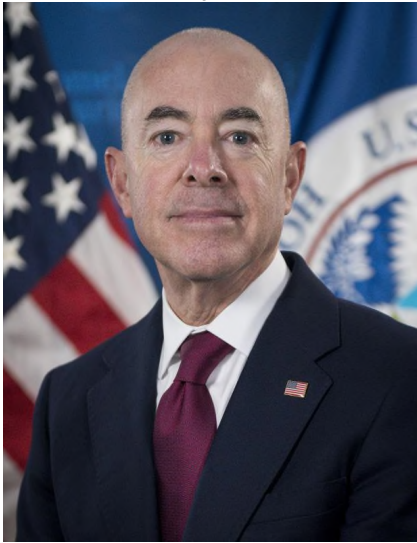
OUR VALUES

Integrity

Respect

Commitment

Leadership at DHS and TSA

Department of Homeland Security (DHS)

Alejandro Mayorkas – Secretary

John K. Tien – Deputy Secretary

Jonathan Meyer – General Counsel

Jennifer Daskal – Deputy General Counsel

Transportation Security Administration (TSA)

David P. Pekoske – Administrator

Stacey Fitzmaurice – Deputy Administrator (Acting)

Holly Canevari – Chief of Staff

Austin Gould – Operations Support (Acting)

Darby LaJoye – Security Operations

Julie Scanlon – Enterprise Support

Tirrell Stevenson – Law Enforcement/Federal Air Marshal Service

Select TSA Authorities

<u>Aviation and Transportation Security Act (ATSA),</u> P.L. 107-71 (Nov. 19, 2001).	➤ TSA's Mission: Oversee security in any mode of transportation regulated by DOT ➤ Includes TSA's emergency powers
Transportation Regulatory Authority – 49 U.S.C. 114	➤ Outlines TSA Administrator's responsibilities ➤ Provides authority to ensure adequacy of airport security measures
Screening – 49 U.S.C. 44901	➤ TSA "shall provide for the screening of all passengers and property" ➤ Screening "shall be carried out by a Federal Government employee"
Foreign Airport Security – 49 U.S.C. 44905; 44907	➤ TSA assesses security measures maintained at foreign airports with flights to the United States.
Background Checks – 49 U.S.C. 114(f)(12)	➤ Required for personnel with access to secure areas of the airport (ex. SIDA badge)
Secured Area and Perimeter Access – 49 U.S.C. 44903(g)-(h)	➤ TSA is charged with the regulation of secured area access control and airport perimeter access security

Select TSA Authorities

Airport Security Program – 49 U.S.C. 44903(c)	➤ Airport operators are required to maintain an air transportation security program and must provide "a law enforcement presence and capability" that "is adequate to ensure the safety of passengers"
Federal Air Marshal Service (FAMS) – 49 U.S.C. 44917	➤ Air Carriers are required to provide seating on any flight to a FAM
National Emergencies – 49 U.S.C. 114(g)	➤ TSA Administrator responsible for coordinating all domestic transportation, including "transportation-related responsibilities of other departments and agencies"
Visible Intermodal Prevention and Response (VIPR) Teams – 6 U.S.C. 1112	➤ TSA Administrator may develop "to augment the security of any mode of transportation at any location"
Surge Capacity Force – 6 U.S.C. 711	➤ Employees may be deployed (led by FEMA) in the aftermath of a catastrophic event to help support response and recover efforts

Select TSA Authorities

Cybersecurity Authority – 49 U.S.C. 44912(b)	➤ Requires TSA to "review threats to civil aviation, with a particular focus on…the disruption of civil aviation service, including by cyber attack"
Security Directives and Information Circulars – 49 CFR 1542.303	➤ Provides a regulatory standard for issuing SDs and ICs when TSA determines that additional airport security measures are necessary to respond to a threat
TSA Amendments to Airport Security Programs – 49 CFR 1542.105	➤ Allows TSA to amend a security program based on safety and the public interest; sets forth procedures for amendment

Sensitive Security Information (SSI)

	SSI is information that, if publicly released, would be detrimental to transportation security. 49 CFR part 1520
SSI Requirements	<u>You Must – Lock Up all SSI</u>: Store SSI in a secure container, such as a locked file cabinet or drawer. <u>You Must – Destroy SSI When No Longer Needed</u>: Destruction of SSI must be complete, to preclude recognition or reconstruction of the information. <u>You Must – Mark SSI</u>: Even when only a small portion of a document contains SSI, every page of the document must be marked as SSI.
Covered Persons	Only covered persons, such as Airport and Aircraft operators and Indirect Air Carriers, are authorized to access SSI.
Requests for SSI	Refer to TSA for guidance to ensure proper protection of SSI.
Unauthorized Disclosure of SSI	Report to TSA or applicable agency.

Current TSA Priorities

- ➤ **Cybersecurity**

- ➤ **Securing Airports and Commercial Aviation from Terrorism Threats**

- ➤ **Countering Threats of Unmanned Aircraft Systems (UAS)**

- ➤ **Supporting TSA Workforce**

Cybersecurity – Evolving Threat

Evolving Threat Environment

- **Criminal Cyber Activity**: Ransomware and other malicious cyber attacks from organized criminal groups pose a significant threat to transportation infrastructure
- **Geopolitical Context:** Russian military actions in Ukraine further increased cybersecurity threats
  - ➢ **Apr. 20, 2022**: Joint Cybersecurity Alert, Russian State-Sponsored and Criminal Cyber Threats to Critical Infrastructure (https://www.cisa.gov/uscert/ncas/alerts/aa22-110a)
- **Threat to Aviation**
  - ➢ Since at least Feb. 2020, Russian state-sponsored cyber actors conducted a campaign against a wide variety of U.S. targets, including dozens of government and aviation networks

Cybersecurity Policies for Airports

- **Two ASP National Amendments in Effect**
  - ➢ **Jan. 10, 2022:** TSA-NA-21-05
    - o **Requirements:** Designate Cybersecurity coordinators; Report cybersecurity incidents to TSA via CISA
  - ➢ **July 31, 2022:** TSA-NA-22-01
    - o **Requirements:** Conduct Cybersecurity assessment; Develop and apply remediation measures to close any identified gaps; Develop a Cybersecurity Incident Response Plan
- **Third ASP National Amendment Proposed**
  - ➢ **August 11, 2022:** Proposed amendment issued
    - o **Requirements:** Implement TSA-approved Cybersecurity Implementation Plan; Create a Cybersecurity Assessment Program

Key Screening Elements

Before the Airport: Pre-Screening

After Check-In: Screening Begins in Queue

At the Checkpoint: Screening Technology

In the Plane: Cargo Screening

Before the Airport: Pre-Screening

Risk-Based Security (RBS) Premises

➢ Majority of passengers are low risk, some suspected of being high risk

➢ Passengers who voluntarily provide more information can be better evaluated for risk

➢ Expediting trusted travelers improves security by allowing TSA to focus on unknown and higher risk/watchlisted travelers

Sorting Passengers Based on Known Information

➢ Known and Trusted Travelers – expedited screening (may leave on shoes, light outerwear, and belt, and keep laptop and 3-1-1 liquids in carry-on bag; may be screened with WTMD instead of AIT)

➢ Unknown Travelers – standard screening (generally screened with AIT when available)

➢ Higher Risk Travelers – enhanced screening (AIT screening mandatory; other additional procedures)

Secure Flight

Secure Flight Passenger Data (SFPD) – 49 CFR Part 1560
- Collected by air carriers; transmitted to TSA up to 72 hours before flight
- Consists of (at a minimum) name, DOB, gender, itinerary

TSA Prescreening
- Matching against Federal government watch lists, including Terrorist Screening Center (TSC) No-Fly and Selectee Lists (49 U.S.C. 44903(j)(2))
- Passenger-specific risk assessments (PIA Update, September 4, 2013)

Boarding Pass Printing Result
- TSA sends Secure Fight pre-screening results back to air carrier
- Carriers print results on boarding passes
  - No-Fly matches denied boarding
  - Selectee matches designated for enhanced screening
  - TSA Pre✓® passengers designated for expedited screening

TSA Pre✓®

TSA Pre✓®

- Voluntary provision of biographic and biometric information and completion of criminal history background and watchlist checks
    - ➢ Members are eligible to receive expedited screening at checkpoints & TSA is able to focus resources on passengers more likely to pose a threat

Current Airport and Airline Participation

- TSA Pre✓® in place at 200+ airports
- 80+ participating domestic and international air carriers
- 500+ enrollment centers

Picture Source: https://www.tsa.gov/news/press/releases/2019/09/09/tsa-prer-enrollment-offered-sioux-falls-regional-airport-one-week

At the Checkpoint: Checkpoint Screening Technologies

Computed Tomography (CT)
- Enables 3D imaging platform for enhanced visual interpretation and image manipulation versus 2D X-ray imaging.
- Allows upgrades to automatically detect a broader range of threats.
- CPSS fits all checkpoint footprints; Full-size CPSS combines CT with an Automated Screening Lane capability.

Automated Screening Lanes (ASL)
- Permits multiple passengers to divest simultaneously and uses automated conveyor belts to return the bins back to the front of the queue; increases screening efficiency by up to 40%.
- Carry-on items that trigger an alarm can be diverted to a threat resolution area.

Advanced Technology X-ray
- X-ray systems that screen carry-on items and provide automated threat detection capabilities for a wide range of threats; may be integrated with ASLs.

Explosives Trace Detection (ETD)
- Detects explosive threats on passengers and/or concealed in carry-on items.
- Permits TSOs to screen for explosives residue on passengers and bags.

Advanced Imaging Technology (AIT)
- Detects a wide range of metallic and nonmetallic threats using millimeter wave technology to safely screen passengers without physical contact for threats that may be concealed under clothing.

Checkpoint Screening Technologies

Credential Authentication Technology (CAT)
- ➤ Verifies passenger IDs at airport security screening checkpoints, and detects and alerts the TSO of any ID that appears to be fraudulent and/or expired.

Enhanced Metal Detector
- ➤ Detects potentially dangerous metallic threats to aviation security.

Bottled Liquids Scanner
- ➤ Differentiates dangerous liquids and compounds from common, benign substances carried by passengers.

Boarding Pass Scanner
- ➤ Reads a passenger's boarding pass and displays the passenger's name, flight information, and risk status to the Travel Document Checker.

Chemical Analysis Device
- ➤ Screens unknown liquid and solid (including powder) materials.

Travel Document Checker

Travel Document Checker (TDC)

- TSA verifies passenger identity and determines designated level of screening
  - ➢ Identity Verification (49 U.S.C. § 114(e) & (f))
  - ➢ TSOs must have specialized document examination training (9/11 Commission Act § 1611)

Credential Authentication Technology (CAT)

- Enables near real-time ID verification, cross-checking of passenger ID & reservation data, and Secure Flight data;
- CAT devices with a camera and self-service functionality are being deployed and tested at various airports throughout the country

Facial Recognition Technology

- Photos taken at TSA checkpoint are compared to photos the passenger has already provided to government
- If no match, TSA uses standard identity verification procedures

Facial Recognition Technology Pilots

DTW Airport
- CAT-2 scan authenticates the identity document and passenger identity without the need for TSO involvement (unless there is a no-match);
- This technology compares the passenger's live photo to a pre-staged gallery of photos previously provided to the government for travel purposes (ex. passport) that will then indicate the level of security screening for the passenger.
  - ➤ Passengers may opt-in (consent) to participate

ATL Airport
- Above pilot expanded to ATL checkpoint and bag-drop;
- For the bag-drop pilot, TSA PreCheck® Passengers flying directly to or from an international destination may participate in a biometric recognition process for checking baggage
  - ➤ TSA & CBP are jointly providing this optional, end-to-end biometrics experience

REAL ID Act of 2005

REAL ID Act of 2005

- Sets minimum requirements for secure issuance and production of state-issued driver's licenses and identification cards (DL/ID)
- Currently, TSA does not accept DL/ID from noncompliant states that do not have an extension (all states compliant, have extension, or under review)

Upcoming Enforcement Deadline

- **May 3, 2023 every commercial air traveler will need a REAL ID-compliant DL/ID, or another acceptable form of identification, for domestic air travel;** list of acceptable IDs available at tsa.gov
- REAL ID Act allows states and territories to issue both REAL ID-compliant cards and noncompliant cards
- REAL ID compliant cards generally marked with star in upper portion of card

Real ID Compliant Card Example

LEO Support for Checkpoint Screening

Deployment of Law Enforcement Officers (LEOs)
- LEOs shall be "at each airport security screening location to ensure passenger safety and national security" (49 U.S.C. 44901(h))

Airport operator responsibility
- Required to provide LEO presence (49 U.S.C. 44903(c))
  - ➢ LEOs can be state, local, or private
  - ➢ Uniformed LEOs must be provided "in the number and manner adequate to support" each checkpoint (49 CFR. 1542.215(a)(2))

Administrator's authority to ensure LEO presence
- May designate any Federal employee as a LEO (49 U.S.C. 114(p))
- May deputize state or local LEOs to carry out any Federal airport security duty, 49 U.S.C. 44922 (currently using to deputize canine teams)

Reimbursable Screening Services Pilot Program

Background

- Provides TSA authority to establish 8 pilot program locations to provide passenger screening services outside of primary passenger screening terminals through FY '23 (Consolidated Appropriations Act, 2019, sec. 225, as amended by the Consolidated Appropriations Act, 2021, sec. 223)
  - ➤ Pilots conducted pursuant to reimbursement agreement with public or private entity, regulated by TSA

Purpose

- Addresses industry interest to provide different locations for security screening services
  - ➤ *e.g.*, dedicated terminals or off-airport passenger screening
- Creates opportunities for innovative solutions to serve niche needs that are not easily accommodated by typical airport terminal screening
  - ➤ e.g., screening of celebrities or persons with security details whose presence in the terminal may be disruptive

Rap Back

Legal Requirements and Program Operations Improving Aviation Worker Vetting

- **Statutory Requirement**: *FAA Extension, Safety, and Security Act of 2016,* Section 3405(b) requires TSA to fully implement Rap Back
- **Real-time Notification**: Rap Back improves criminal vetting by providing real-time notification of new criminal activity (arrests, convictions, some warrants) without submitting new fingerprints
- **Enrollment**: Airport/airline "enrolls" individual in Rap Back when submitting fingerprints to FBI; FBI returns any new criminal history for those prints to airport/airline

Implementation Status for Airports, Passenger and All Cargo Airlines

- **Final Security Program Amendments**
  - ➢ As of March 29, 2022, covered airports and airlines had to begin enrolling (1) new employees in Rap Back; and (2) existing employees in Rap Back as their ID media comes up for renewal
  - ➢ As of April 9, 2022, *all* 311 Airport Operators required to implement Rap Back met this requirement, resulting in over ***1M active subscriptions***
  - ➢ By March 29, 2024, *all* airport and airline employees must be enrolled in Rap Back

Unmanned Aircraft Systems (UAS)

UAS Threat to Airports

- From January 2019 - September 13, 2022, 3,908 UAS incidents were reported to TSA's Transportation Security Operations Center (TSOC) affecting all modes of transportation (91% related to aviation)
  - ➢ So far in 2022, there have been 26 occurrences when an aircraft was caused to take evasive action, 2 involving commercial aircraft
  - ➢ Airports have fully suspended operations 3 times in the past several years; in 2021, airports partially halted operations over 30 times
- Notable UAS incidents at airports in U.S. and abroad
  - ➢ **July 2022:** Illegal UAS activity caused a ground stoppage at Reagan National Airport flying within 400 feet of the runway
  - ➢ **Jan. 2019**: EWR was closed for 1 hour and 25 minutes due to UAS sightings at 3,500 feet in the flight path approach to the airport.
  - ➢ **Dec. 2018**: LGW was shut down for 36 hours due to a disruptive UAS in the vicinity of the airport
  - ➢ **Feb. 2018:** UAS flies within 100 feet of a Frontier Airline inbound to LAS taking pictures and video

UAS – cont.

TSA UAS Detection Testbeds
- **Statutory Requirement**: 6 U.S.C. § 124n requires DHS and DOJ to conduct research, testing, training, and evaluation of C-UAS equipment to determine capability and utility prior to use
- In coordination with DHS Science & Technology and the FAA, TSA conducting testbeds at **MIA** (August 2021) and **LAX** (August 2022) to validate UAS detection most suitable for an airport environment (validating and verifying their performance against vendor claims)
- TSA will share in-progress assessment results, best practices, and lessons learned with federal and international partners, state and local law enforcement, and industry, as appropriate

FAA Testing at Airports
- **Statutory Requirement**: *FAA Reauthorization Act of 2018*, Section 383 requires FAA to test and evaluate technologies and systems that could detect *and mitigate* potential safety risks posed by UAS at and near airports
- FAA ensuring the technology does not adversely impact or interfere with the safe and efficient operation of the National Airspace System; testing 10 technologies/systems at 5 airports (ACY, LCK, SYR, HSV, SEA)

TSA Proposed UAS Incident Reporting Policy
- **Proposed Requirements**: Aircraft and Airport Operators will be required to report UAS incidents to Federal Security Directors; issued for review Jan. 28 - March 14, 2022; expected publication this Fall

Supporting our Workforce

The Secretary of Homeland Security identified three areas for further improvement for the screening workforce:

Collective Bargaining Agreement

Expanding collective bargaining, to more closely mirror the rights and benefits that are provided under Chapter 71 of the United States Code.

- ✓ TSA has submitted a draft new Determination to the Secretary that expands TSA's labor framework.
- ✓ TSA is ready to implement the new Determination upon receipt of funding
- ✓ The President's FY23 budget provides funding

MSPB Rights

Providing appeal rights to the MSPB

- ✓ As of September 2021, through an agreement with TSA, MSPB now reviews adverse action appeals from the screening workforce.

Increased TSO Pay

Ensuring that TSA screeners are paid at a level that is no less than their counterparts on the General Schedule pay scale

- ✓ TSA has developed a pay equity plan for its workforce, which ensures their pay is comparable to their counterparts
- ✓ The President's FY23 budget includes funding to support this plan

Questions?

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APPENDIX

Litigation – Screening Challenges

All TSA screening falls under the ambit of the Fourth Amendment.

The U.S. Supreme Court has applied the Fourth Amendment to a wide range of searches that go beyond criminal law enforcement to meet administrative needs.

Airport searches do not need to be based on reasonable suspicion or probable cause.	*Chandler v. Miller*, 520 U.S. 305 (1997); *NTEU v. Von Raab*, 489 U.S. 656, 675 n.3 (1989)
Requirement for travelers to present identification does not violate First or Fourth Amendment.	*Gilmore v. Gonzalez*, 425 F. 3d 1125 (9th Cir. 2006)

Screening Challenges Cont'd

The choice to attempt entry into secure area triggers screening.	***U.S. v. Aukai***, 497 F.3d 955 (9th Cir. 2007) (en banc)
Passengers must complete screening once they begin.	***U.S. v. Hartwell***, 436 F.3d 174 (3rd Cir. 2006) ***Ramsingh v. TSA*** (D.C. Cir. July 15, 2022)
Random Screening is Permissible.	***U.S. v. Marquez***, 410 F.3d 612 (9th Cir. 2005)
AIT scans "are reasonable administrative searches because the governmental interest in preventing terrorism outweighs the degree of intrusion" on privacy.	***Corbett v. TSA***, 767 F.3d 1171 (11th Cir. 2014)

Litigation – Watchlist Challenges

Due process challenges to additional screening for selected higher risk passengers	
Government did not violate plaintiffs' procedural due process rights under the U.S. Constitution or the Administrative Procedure Act Relying heavily on testimony from TSA officials, the court held that the delays alleged by the plaintiffs at checkpoints and border crossings did not give rise to a protected liberty interests. The decision affirms the legality of government procedures.	***Elhady v. Kable***, 993 F.3d 208 (4th Cir. 2021)
Procedural due process challenge to inclusion on Selectee List failed because there is no constitutionally protected liberty interest in traveling without delay and that "delays of a few hours are not uncommon" and do not substantially interfere with rights to travel interstate or internationally.	***Abdi v. Wray***, 942 F.3d 1019 (10th Cir. 2019)
No protected constitutional interest harmed by the inconvenience of enhanced screening, which "can only be described as incidental or negligible" and amounts to no more than "delays many individuals are likely to experience at the airport."	***Beydoun & Bazzi v. Sessions***, 2017 WL 4001336 (6th Cir. 2017)

Litigation – No-Fly List Challenges

The Redress Process for U.S. Persons on No-Fly List: Constitutional	
The No Fly List criteria are not impermissibly vague. The revised redress process of U.S. Persons on the No Fly List is constitutionally sufficient (it provides notice of status and reasons for placement, an opportunity to respond, and review by TSA Administrator) Under the revised process, the TSA Administrator issues a final order maintaining or removing a traveler from the No Fly List, giving courts of appeals exclusive jurisdiction over substantive challenges to No Fly List determinations pursuant to 49 U.S.C.46110.	*Latif v. Sessions*, 2017 WL 1434648 (D. Or. 2017)
The criteria for placement on the No-Fly List are not unconstitutionally vague and comport with due process Due process does not require adversarial hearings for individuals on the No Fly List.	*Kashem v. Barr*, 941 F. 3d 358 (9th Cir. 2019)