# Chapter 10 – Screening for Security

## 9/11 issues

### What were the Black September hijackings in 1970? (Not in the book, look it up)

### What lesson did not we not learn from those hijacking that made 9/11 possible?

### Were some of the 9/11 hijackers identified as suspicious by airport security?

### What did security do?

### Why did they hold the checked baggage of the suspects on 9/11?

### What false assumption was that based on?

### What about knives?

### What airline behavioral policy made the hijackings possible, given the failure to correct the engineering problems identified by Black September?

## Checkpoint Searches

### What was the first checkpoint law?

### What is the rationale for border searches?

### What is the adlaw rationale for passenger searches from the Davis case?

## United States v. Cotterman, 709 F.3d 952 (Cir9 2013)

### Child porn crossing the border.

### Did they need reasonable suspicion to search his laptop?

### What did they look at for reasonable suspicion?

### What if he had been a muslin going to a religious conference in Mexico?

### Notes

#### What do you think of the implied consent argument that by flying you are agreed to the search?

##### Is this like a pervasively regulated business?

#### Prior to 9/11, what was the assumption about the right to search if you choose to not board the plane?

##### Is that always true now?

##### What is the rationale in Skipwith?

#### What about virtual strip searches?

##### There is a challenge to these based on a failure of TSA to conduct a proper rulemaking to define procedures

#### MacWade v. Kelly United States District Court, Southern District of New York, 2005 2005 WL 3338573, aff’d, 460 F.3d 260 (2d Cir. 2006)

##### Where is the search being done?

##### What are they searching?

##### What is the state's interest that justifies the search?

##### (From the full case) What are the safeguards the court recognizes?

###### How are the passengers notified?

Signs in the subway

###### Where are persons searched?

Second, inspections are conducted at openly viewable, fixed checkpoints relatively close to subway entrances by uniformed police officers.

###### How are persons selected for searching?

Random

Why?

###### What is the alternative for persons who do not want to be searched?

Walk away

What is the cost to the persons who do not to be searched?

What do you think the police are going to do if someone chooses to walk away?

###### How long do the searches take?

Fourth, the searches are limited in scope and duration.

###### What are the practical differences between airline and subway searches?

#### What about searches of persons entering government buildings?

##### Are these allowed?

##### How intrusive can they be?

##### What about the new low power scattering x-ray that can see through your clothes?

## Identification and Watch-Listing

### Gilmore v. Gonzales United States Court of Appeals, 435 F.3d 1125 (CIR 9 2006)

#### What happens if you do not want to show an id to fly?

#### Can the airline demand an id before it lets you board?

#### How is this different?

#### What is your alternative if you do not want to comply?

#### Why doesn't this violate the constitutional right to travel?

#### Why does the court say this is not a penalty?

## Ibrahim v. Department of Homeland Security United States Court of Appeals, 669 F.3d 983 (Cir9 2012)

### Legal alien could not fly, allowed to fly the next day, not allowed back in.

### Did she even have standing to contest being excluded?

### No fly lists

#### Do the courts award damages for persons who are wrongly detained?

#### What if you miss your flight?

#### Does the airline refund your ticket or rebook you?

### Watch Lists

#### One of the things that happens when you get tagged during data mining is that you get put on watch lists and get heighten scrutiny by law enforcement.

##### Does this have constitutional implications?

##### Should you be able to contest it?

### What are the standards for challenging being put on government high scrutiny lists, like child molester lists?

#### What is the United States Supreme Court's "stigma plus" test?

#### What did the perverts are US (internet sites with sex offenders, like frat boys who mooned someone) cases tell us about the nature of the plus?

### The identification issue

#### A primary problem with watch lists is that there are usually many people with each name on the list, sometimes hundreds.

#### What information do you need to make the list specific to an individual?

#### How secure are current ids such as driver licenses?

#### What does the Real ID Act require?

#### Is TSA a federal agency?

#### Does this mean you will need a Real Id for getting onto a plane?

#### How much do you trust the states to really verify the underlying info?

#### If electronic access is provided to all states, how long before it is on the internet?

#### What are the implications of public access to the information?

#### What are the issues with national ID cards?

#### Why have they been resisted by both the right and the left?

#### What info would they need to be really secure?

#### What about making them remotely readable like tags on shipping crates?

#### What issues would you worry about with remote reading tags?

#### Would you have to carry the ID at all times?

#### Who could ask you for it?

#### Could you be stopped without specific suspicion and asked for you ID?

## What does reasonable suspicion really mean?

### Last class we talked about whether suspicion of pornography could justify admitting evidence of drugs.

### Now we get to behavioral profiling.

## Profiling

### Farag v. United States, 587 F. Supp. 2d 436 (EDNY 2008)

#### What happened to plaintiffs?

#### What triggered this altercation?

#### How did the court describe Farag?

#### Why is this troubling?

#### What kind action did they bring?

#### What do defendants claim as their defense?

#### What suspicious conduct did the government point to?

#### What suspicious things did they do when confronted by the armed men?

#### Were plaintiffs arrested?

#### What is the legal test for probable cause to arrest?

#### Is this an objective or subjective standard, i.e., does the court access the officer’s state of mind?

#### Why does the court think the plaintiffs actions were seen to be suspicious?

#### What part of the defendant’s evidence did the court find most troubling?

#### Was being nervous in the circumstances suspicious?

#### Can ethnicity serve as a probable cause factor?

##### Does the 4th ban racial profiling?

##### What does?

##### What did the court uphold in *Rajah v. Mukasey*?

##### Why is this different from a probable cause case?

##### What is the general rule for analyzing a factor used in the probable cause analysis?

##### When is race clearly allowed?

##### What about being black in the wrong neighborhood?

###### What else will be necessary in these cases?

##### What about looking Mexican near the border?

##### What about statistical correlations between race and crime?

##### What is the Korematsu case and what does it stand for?

###### Has it ever been overruled?

##### Did the court accept the special sensitivity caused by 9/11?

##### Did the court grant summary judgment on the qualified immunity claim?

## Notes

### What does the DOJ guidance allow race to be used for?

### Must we ignore the information that most of the recent attacks against the US involved young Arab men?

### When did the court say that religious profiling was OK?

#### *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007)

### What is behavioral profiling?

### How can it be a mask for racial or ethnic profiling?

### What did one study show about who was being identified with behavioral profiling?

### Why is the flight attendant talking to passengers as they enter the plane?

#### What about the uneducated poor or persons who are not accustomed to flying?

### What does Israel do?

### Would that be tolerated in the US?

## Checkpoints

### When can you screen at a checkpoint based on race?