



Civil Liberties Impact Assessment
for the
**Screening of Passengers by Observation
Techniques (SPOT) Program**

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INTRODUCTION

The Aviation and Transportation Security Act (ATSA) (Pub. L. 107-71, 115 Stat. 598) (2001) created the Transportation Security Administration (TSA), giving the TSA Administrator authority to carry out the provisions of chapter 449 of Title 49 of the United States Code relating to civil aviation. This includes responsibility for supervision of screening passengers and property at airports, and authority to receive, assess, and distribute intelligence information related to transportation security. The TSA Administrator was further directed under Section 1611 of *The Implementing Recommendations of the 9/11 Commission Act of 2007* (Pub. L. 110-53) ("the 9/11 Commission Recommendations Act") to "provide advanced training to transportation security officers for the development of specialized security skills, including behavior observation and analysis ... in order to enhance the effectiveness of layered transportation security measures."

The TSA Screening of Passengers by Observation Techniques (SPOT) program was developed by the TSA Office of Security Operations as a non-intrusive means to observe and analyze passengers' behavior to identify potentially high risk individuals. The program employs TSA trained Behavior Detection Officers (BDOs) to screen travelers for behaviors and involuntary physiological factors ("behaviors") that may demonstrate stress, fear, or deception, which are indicators of possible hostile intent. Individuals who exhibit these behaviors may be referred for secondary screening at the checkpoint. Referrals are based solely on the specific observed behaviors,¹ and not an individual's apparent race, ethnicity or religion. BDOs are trained to engage travelers in casual conversation to determine whether an individual's behaviors present a higher risk or if they have a non-threatening origin. TSA conducts the SPOT screening program in approximately 161 airports throughout the United States. At the end of fiscal year 2008, TSA had trained over 2,300 BDOs to operate the program.

The DHS Office for Civil Rights and Civil Liberties' (CRCL) role is to ensure that the TSA SPOT program polices and procedures comply with constitutional, statutory, regulatory, and other legal and policy requirements; are consistent with our tradition of individual liberties; and adhere to the DHS's statutory mission to ensure that civil liberties are not diminished by programs aimed at securing the homeland. 6 U.S.C. § 111(b)(1)(G); 6 U.S.C. § 345 (a)(3-4); and, 42 U.S.C § 2000ee-1(a).

CRCL conducted this civil liberties impact assessment (CLIA) using the same methodology applied in satisfying the 9/11 Commission Recommendations Act requirements for assessment of civil liberties

¹ TSA BDOs are trained to identify behaviors based on a standardized list of factors. The factors are assigned point values based on the degree to which a particular factor may indicate evidence of stress, fear, or deception. Individuals who exhibit clusters of identified behaviors from the list of factors on the SPOT scorecard, and whose total point value exceed an identified threshold may be referred to secondary screening or to a law enforcement officer (LEO) referral.

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impacts. This CLIA, however, was not mandated by statute but was instead requested by the then-TSA Administrator, Assistant Secretary Kip Hawley. TSA prepared this CLIA in coordination with the DHS Office of General Counsel and the DHS Privacy Office, and complements the Privacy Office's Privacy Impact Assessment (PIA) dated October 5, 2008 (prepared by TSA and the DHS Privacy Office). The TSA Office of Security Operations and the TSA Office of Civil Rights and Liberties provided CRCL background material regarding the SPOT program policies, procedures, and training.

Scope of this Civil Liberties Impact Assessment (CLIA)

This assessment analyzes how TSA BDOs observe, assess, and report on civil aviation travelers within the non-sterile regions and sterile checkpoint areas of airports. Our assessment is limited to an analysis of the TSA SPOT passenger observation procedures. This assessment does not evaluate any other TSA security screening or checkpoint activities, and it does not address the legal status of secondary screening or other law enforcement or security activities within the airport security team's multi-layered approach to security in general. Further, this assessment does not evaluate the activities of other Federal, State, and local agencies or private sector entities that may help comprise the security team at airports.

In conducting this assessment, CRCL relied on program documents;² interviews and briefings with TSA; information published by TSA; Congressional testimony; outside reports; and, observation of BDOs in action. While conducting this assessment, CRCL consulted with the DHS Office of General Counsel and the DHS Privacy Office.

TSA SPOT Program's Activities and Authorities

The SPOT program is premised on scientific behavioral research which has found that individuals under stress commonly display objectively observable clusters of behaviors and involuntary physiological reactions, and that these factors taken together often are strongly correlated with stress, fear, or in some cases deception.³ When clusters of factors are present, it may correlate with possible hostile intent or other attributes that cause the individual to pose a higher risk to aviation safety than other members of the traveling public. The presence of a cluster of factors does not always indicate terrorist or other criminal activity, but it frequently indicates an anomaly, and those engaged in

² Program documents reviewed include the following TSA Directives: TSA MD 1100.73-J, Employee Responsibilities and Conduct; Standards of Ethical Conduct for Employees of the Executive Branch; TSA Standards of Conduct; SPOT Standard Operating Procedures; SPOT training course material; and, the TSA Job Analysis Tool.

³ For purposes of this CLIA, this research was accepted as accurate.

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terrorist or other criminal activity are more likely than the general traveling public to display clusters of these factors.

The list of factors was derived from medical studies of autonomic responses to stress, fear, and deception; forensic evidence of terrorist behavior prior to attacks or other terrorist activity; peer-reviewed studies; psychology textbooks; and the expert opinion of highly experienced scientists and law enforcement personnel. Each factor is assigned a point value based on the correlation between the presence of that behavior and the degree to which the behavior is associated with terrorism or other malevolent acts. Point values are reviewed and upgraded or downgraded as new information about the significance and relevance of a factor comes to light.

(b)(3) 49 U.S.C. § 114(r)
(b)(3) 49 U.S.C. § 114(r)

The BDOs are specially trained Transportation Security Officers (TSOs). Selection for the BDO course is competitive. Candidates may qualify with one year of experience performing multi-faceted security or related work (e.g. TSO, private industry security officer, law enforcement officer, etc.). Prospective candidates are evaluated on experience, education, awards, training, and self-development related to the position. BDO candidates also must pass a structured interview to determine if they possess the core competencies needed to successfully perform BDO work.

Behavior detection is a learned skill requiring a high degree of attention to detail, good judgment, and situational awareness. The training is rigorous with an approximate 10% percent course failure rate. Candidates in BDO training and performing behavioral detection on the job are evaluated on their ability to objectively and consistently identify factors and other indicators, to quantify the factors properly, and to react appropriately. Great emphasis is placed on achieving uniform application of the SPOT standards, including uniform recognition of the factors, uniform scoring, and uniform recitation of the SPOT factors observed in the approximately 161 airports that have SPOT programs. Travelers get the benefit of the doubt if their reactions or behaviors are ambiguous; a central axiom of the program is that "if you are not sure, then it did not happen." The SPOT factors provide the BDOs with a method to articulate objective facts about a traveler they believe may warrant further inspection. In the event that a BDO refers the traveler to a law enforcement officer for additional inspection, these articulable facts could help a law enforcement officer establish a reasonable, articulable basis for investigative action.

BDOs operate at and within the secure areas of airports. They are trained to closely observe the general flow of travelers and the environment to develop a baseline of travelers' behavior and

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reactions at a particular point in time, which in turn permits them to observe unusual behaviors and involuntary reactions (the factors or "behaviors"). For instance, a traveler displaying indicators of an extremely high stress level in a calm crowd is unusual and may merit heightened scrutiny, but a traveler displaying the same stress factors within a highly stressed crowd would be in conformity with "normal" behavior for that crowd.

(b)(3) 49 U.S.C. § 114(f)
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Travelers exhibiting clusters of factors above the baseline level are assigned a point score based on the total number of indicators present and the scoring weight of each factor. Most travelers deviating from baseline behavior will only have one or two factors present and will receive a minimal score. These travelers are allowed to proceed without scrutiny beyond BDO observation, likely unaware that their reactions and behavior have been closely observed by the BDOs.

While in the checkpoint queue, travelers are unobtrusively engaged by the BDOs in a conversational manner in a brief, non-custodial encounter. BDOs are trained to elicit information (b)(3) 49 U.S.C. § (b)(3) 49 U.S.C. § 114(f) to explain or resolve the presence of factors. The brief questioning that takes place during SPOT screening during this time is entirely optional for travelers. Travelers may decline to engage in conversation with the BDOs. For most travelers though the brief conversation with the BDO will explain and resolve the factors to the BDO's satisfaction and thereby eliminate the need for referral to SPOT referral screening for further inspection of the travelers' person and property. However, once they are in the checkpoint area, no travelers are permitted to leave until all additional TSA personal and property screening procedures (which are not the subject of this assessment) are completed.

Passengers with a mid-range score are referred to SPOT referral screening once they pass into the initial TSA checkpoint. SPOT referral screening occurs after the traveler enters the screening area, and is performed by BDOs and other TSOs. Such screening may include the use of hand-held magnetometer (metal detector) or similar administrative search of the person (such as a pat-down), coupled with a thorough examination of their personal property, per normal TSA secondary screening procedures. A BDO referral is one of several reasons that additional screening may be applied.

Travelers whose cluster of observed factors (b)(3) 49 U.S.C. § 114(f) relative to the baseline are similarly questioned by BDOs in an unobtrusive and non-custodial brief encounter. In addition, a law enforcement officer (LEO) referral is made; one of the law enforcement agencies with jurisdiction over that particular airport is contacted and notified that the passenger may pose a heightened risk to security. By statute, BDOs do not have law enforcement powers and are not trained in all the tasks that may be necessary to deal with a traveler who may pose a heightened risk to security. Upon LEO arrival, the BDOs articulate to the LEO the cluster of factors observed along with any other relevant

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facts. The LEO may use that factual information as a basis to determine whether law enforcement action is appropriate, or may choose not to act. The decision is entirely within the LEO's discretion. Of the travelers referred to secondary screening by BDOs, approximately 25% of those referrals include an LEO referral.

BDO unit organization is distinct from the general TSO workforce. Wherever the BDO program is active, the BDOs are in a segregated unit, typically reporting directly to a senior TSA officer within the airport, such as an Assistant Federal Security Director (AFSD). BDO supervisors apply discipline in the same manner as other TSA supervisors utilizing the flexibility provided by the Aviation Transportation Security Act (ATSA, P.L. 107-71) to promptly correct or discipline BDOs with performance deficiencies.

SPOT program managers stated to CRCL that disciplinary actions involving BDOs typically do not involve performance of the BDO function, but generally involve routine workplace issues such as tardiness, absence without leave (AWOL), or administrative deficiencies. The SPOT program managers noted that the ability to flexibly correct and discipline errant BDOs is an important control and oversight tool for the program. In one instance, a BDO performance deficiency led a traveler to complain to TSA headquarters. By the time the complaint was reported to TSA headquarters, the BDO had already been disciplined by his supervisor. SPOT program management viewed the available personnel management measures as a key to maintaining good discipline and oversight over the BDO workforce.

POTENTIAL CIVIL LIBERTIES IMPACTS

Impact on Particular Groups or Individuals

Because the SPOT program entails a variety of government actions affecting individuals, the activities considered include the observation and analysis of individual's behaviors by TSA BDOs, the collection, assessment, processing and sharing of personal information within TSA and with other Federal, State, and local officials; and search and seizure activities predicated on BDO observations and referrals.

Fourth and Fourteenth Amendment Issues

The TSA is directed to provide "security in all modes of transportation," "including—carrying out chapter 449 (49 U.S.C. § 44901 et seq.) relating to civil aviation security" 49 U.S.C. § 114(d). In turn, 49 U.S.C. § 44901(a) directs TSA to "provide for the screening of all passengers and property ... that will be carried aboard a passenger aircraft." That section further directs that such screening "shall take

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place before boarding.” *Id.* Congress also directed TSA to “provide advanced training to transportation security officers for the development of specialized security skills, including behavior observation and analysis” in order to enhance the effectiveness of layered transportation security measures.” *9/11 Commission Recommendations Act*, at § 1611. The general activities of the SPOT program, which are in furtherance of TSA efforts to screen passengers and their property before boarding are expressly authorized by Congress, but the legal inquiry does not end there. Because interactions between TSA and the public at large are government actions affecting individual rights, the Fourth Amendment and Fourteenth Amendments to the United States Constitution are implicated in some BDO activities.

The BDOs perform three distinct activities relating to travelers that merit consideration under the Fourth Amendment. They observe travelers passing into and through the secure areas in an airport observing typical crowd behavior and looking for individuals displaying clusters of factors associated with stress, fear or deception that are out of the ordinary. They briefly engage some travelers in a non-custodial encounter based on clusters of factors as described above. This engagement may include law enforcement participation. Finally, the BDOs may refer some travelers for SPOT referral and may make a request for law enforcement intervention if the BDO cannot resolve the observed factors or if the traveler displays deceptive behavior or misconduct.

The mere physical, visual observation of travelers does not raise significant questions under the Fourth Amendment because there is no expectation of privacy that would curtail mere visual observation of individuals in public by the government. “[W]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection.” *California v. Greenwood*, 486 U.S. 35, 41 (1988). Because there is no expectation of privacy protecting travelers from mere visual observation, BDO observation is not a search within the meaning of the Fourth Amendment. *See Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (holding “official conduct that does not ‘compromise any legitimate interest in privacy’ is not a search subject to the Fourth Amendment”).

Nor does a BDO’s brief encounter with travelers comprise a seizure that would trigger Fourth Amendment protections. Whether an encounter with the government amounts to a seizure is a fact sensitive question that takes into account the totality of the circumstances. *See Michigan v. Chesternut*, 486 U.S. 567 (1988). An individual is seized only if “a reasonable person would have believed that he was not free to leave.” *Id.* at 573 (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). In *Mendenhall*, the Court held that:

a person is ‘seized’ only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is

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imposed is there any foundation whatever for invoking constitutional safeguards.

Id. at 553.

The Court further held:

As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.

Id. at 554.

BDO policy and training stresses the non-custodial nature of BDO encounters with the traveling public. As a formal matter, the traveler is always free to decline to talk with the BDO, and doing so by itself would not increase or decrease the traveler's score. As previously noted, most travelers who speak with the BDOs will resolve the identified factors to the BDO's satisfaction eliminating the need for a referral to secondary screening. However, for those travelers who decline to talk to the BDO and are referred by the BDO to secondary screening the referral is based solely on the aggregate sum of the factors identified by the BDO, and not whether the traveler did or did not speak to the BDO. Consequently, solely declining to speak with a BDO will not make a traveler more likely to be subjected to secondary screening or a LEO referral. The style of questioning used – conversational, non-intimidating elicitation – is aimed specifically at avoiding the impression of a coercive, stressful environment in which the traveler does not feel free to not speak to the BDO. A reasonable person is unlikely to feel they are under arrest or seized in these circumstances.

BDOs may refer the traveler for SPOT referral screening which will be conducted once the traveler passes into the initial TSA screening checkpoint; or if the traveler is inside the area secured by the checkpoint when observed, then a secondary search will be conducted pre-boarding at the request of the BDO.⁴ The nature of the BDO-traveler interaction changes once the travelers enter a TSA security

⁴ Roughly 75% of the referrals for secondary search result from an unresolved, mid-level score based on the factors exhibited by travelers. In the remaining cases, sufficient factors are present to result in an unresolved high score, which in turn causes the BDOs to contact a law enforcement officer (LEO) member of the airport security team, who then determine whether to intervene based on the BDOs' recitation of the factors observed, and other information. While BDOs may request LEO intervention, the LEO questioning is based only in part on the BDO recommendation. The LEO choice to intervene is strictly within the LEO's discretion. Because an LEO responding to a BDO request is subject to independent

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screening checkpoint because such travelers may not depart until TSA has completed the screening process. See *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (*en banc*) (upholding TSA policy prohibiting those who enter the secure area from leaving without completing the screening process). Such restriction on movement constitutes a seizure within the meaning of the Fourth Amendment; it is a "governmental termination of freedom of movement." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990). Because the travelers are not free to depart and the BDOs may trigger a search of their person and property, this activity is almost certainly subject to the Fourth Amendment.

Although it is clear that the Fourth Amendment is applicable to secondary searches, it is not clear which Fourth Amendment standards apply. The Supreme Court has not directly ruled on the constitutional status of checkpoint and secondary searches, though it has on three separate occasions in *dicta* cited air transportation security searches as examples of searches that ought to be subject to the administrative search reasonableness inquiry, and lower courts have generally treated such searches as administrative searches.⁵

Administrative Searches

Secondary screening searches have many of the characteristics of administrative searches. Like administrative searches, secondary searches are intended "to prevent the development of hazardous conditions," in this case preventing acts of terrorism or other violence on air carriers. See *Board of Educ. v. Earls*, 536 U.S. 822, 828 (2002) (citing *Von Raab*, 489 U.S. at 667-68). Like other administrative searches, the government's "need to discover such latent or hidden conditions" which could cause great harm is present, *Von Raab*, 489 U.S. at 668, and practical considerations make obtaining a warrant (which must be based on particularized suspicion) impracticable. *Id.* at 656 (upholding warrantless drug tests to detect drug use by train operators).⁶ The threat posed by terrorist

duties of legal compliance, and because the process by which LEOs determine a course of action is generally outside of TSA control, a legal analysis of LEO response in these circumstances is beyond the scope of this CLIA.

⁵ See *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (stating in *dicta* "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'--for example, searches now routine at airports..."); *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000) (stating that the holding of the case "does not affect the validity of ... searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute"); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989) (stating that lower courts have applied Supreme Court precedents on administrative searches and found airport searches to be reasonable). Additionally, lower courts have applied similar tests. See e.g. *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (*en banc*); *United States v. Hartwell*, 436 F.3d 174 (3d Cir. 2006); and, *Torbet v. United Airlines*, 298 F.3d 1087 (9th Cir. 2002).

⁶ See also *Earls*, 536 U.S. 822 (upholding drug tests to deter and detect drug use by student athletes, another latent hazard); *Sitz*, 496 U.S. 444 (upholding suspicionless stops and searches of drivers to detect and deter intoxicated driving); and,

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groups is demonstrably hazardous and severe, while their clandestine nature makes their threat appear to be the type of latent or hidden threat that administrative searches are meant to detect.

Another key feature of administrative searches and secondary searches is that they are suspicionless; they are not "related to the conduct of criminal investigations." *Earls*, 536 U.S. at 829. Instead, these searches equally burden all those selected for search, law breaker and law abiding alike. Individuals may be referred for secondary search at random, due to travel itinerary, during periods of heightened threat causing all passengers to be searched identically, or when a traveler does not show identification. None of these factors give rise to particularized suspicion. A BDO referral does not comprise suspicion of involvement in a crime, only that behavioral and physiological factors relating to stress, fear, and sometimes deception are present, the factors do not in and of themselves give rise to particularized suspicion of involvement in a crime.

The final similarity between administrative searches and secondary searches is that the TSA's security "mission would be compromised if it were required to seek search warrants" to conduct routine searches on all U.S. air travelers each day, which would greatly hamper air travel. *See Von Raab*, 489 U.S. at 667. The threats TSA seeks to counter include individuals with bad intent, and weapons or other dangerous instrumentalities that pose a threat to safety or would help wrongdoers commit terrorist acts or other violence. The individuals who pose a threat to security may include terrorists, criminals, and the intoxicated or aberrantly behaving individuals. They may hide weapons, explosives or other dangerous contraband in their baggage. While an individual may be visibly aggressive or display other obvious evidence of bad intent, most of these threats will be latent or hidden and generally hard to detect without a search of personal property, or at least a brief encounter with law enforcement or security personnel.⁷ Because these threats are hard to detect, it would be difficult or impossible for TSA to employ a particularized suspicion standard in determining whom to stop. A weapon or bomb hidden inside a suitcase does not give rise to suspicion because it cannot be observed; similarly an individual with plans to do harm does not obviously display evidence of those plans. The TSA's statutory mission of providing aviation security would be difficult or impossible without the ability to search and briefly question travelers.

Thus it appears that courts would likely evaluate a BDO's determination that a traveler should undergo secondary screening and the subsequent search as an administrative search.

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (upholding border searches as reasonable government activities aimed at preventing the smuggling of contraband and illegal immigration).

⁷ TSA does not contend that the presence of a cluster of stress, fear or deception factors necessarily establish reasonable suspicion or probable cause. It contends only that the presence of multiple factors above and beyond the baseline at that time and place may signal heightened risk.

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The courts do not evaluate administrative searches under the familiar framework of *Terry v. Ohio*, 392 U.S. 1 (1968), and other suspicion-based pillars of Fourth Amendment search and seizure law. Instead, administrative searches are subject only to a reasonableness test which requires a court to “balance the individual’s privacy expectations against the government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.” *Sitz*, 496 U.S. at 449-50. In *Sitz*, the Court examined police checkpoints aimed at deterring and detecting individuals driving under the influence of alcohol (DUI). All motorists were subjected to a brief stop and, if probable cause developed, a motorist would be referred for a field sobriety test. The Court held that the brief initial DUI checkpoint stop, objectively considered, was a minimal intrusion on individual rights. The stops lasted 30 or 45 seconds, some questions were asked, and the individual was free to go if probable cause supporting a field sobriety test was not found. Compared to the gross public hazard posed by drunk drivers, the Court felt that the government’s minimally intrusive actions were reasonable. The reasonableness of the DUI checkpoint stops was buttressed by the fact that the police followed objective guidelines for conducting the stop, and all motorists were subject to a similar degree of scrutiny in the initial stop. *Id.* at 453.

In the present case, the government’s interest in preventing terrorist and other criminal exploitation of the air transportation system and other violence aboard flights is both non-trivial and well-settled. In the wake of a series of well-publicized hijackings in the early 1970s, Judge Friendly described the government’s interest in air security as addressing the risk of “jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane.” *United States v. Edwards*, 498 F.2d 496, 500 (2nd Cir. 1974). In *Edwards*, the court ultimately held that suspicionless searches in response to “that danger alone meets the test of reasonableness.” *Id.*

At the same time, an expectation of freedom from government search of the person and effects at airports is probably not objectively reasonable, especially in light of the September 11, 2001 attacks and the subsequent heightened security environment. Airport luggage searches were not uncommon prior to those attacks and individuals choosing to travel by air today are generally aware of heightened air transportation security efforts, which may have served to erode what expectations of privacy existed in the air transportation context. See *United States v. Hartwell*, 436 F.3d 174, 181 (3d Cir. 2006) (“It is inconceivable that Hartwell was unaware that he had to be searched before he could board a plane.”) Although the traveling public is likely unaware of the technical details of TSA activities, it seems generally well known that certain Federal database checks may result in a personal search, or that some individuals may be referred to secondary screening for various reasons, including random selection, and that the detection of metal or contraband on the person may result in more detailed searches. It is unlikely, therefore, that travelers have enjoyed a substantial, reasonable expectation of privacy and freedom from search at airports for several decades, and the intrusive but

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necessarily heightened security environment after September 11, 2001, has likely eroded any expectation that may have remained.

The intrusion on the individual resulting from a search during a SPOT referral by BDOs is likely to be held reasonable because it is the same level of intrusion to which all other travelers may be subjected. A BDO referral is simply a neutral method of selecting individuals for a type of search that could be conducted for various reasons, or at random. The danger addressed by these secondary searches is grave; and, while undergoing a secondary search is potentially very inconvenient, the searches respond directly to the threats posed by terrorists and other criminals, while the intrusion posed by such searches has long been treated as necessary and reasonable by the courts. The SPOT program's Standard Operating Procedures contain objective factors that apply to all travelers, thus reducing the possibility of BDOs improperly exercising their authority. TSA is striving to refine the system, ensure consistent application of the behavioral detection standards and to reduce the number of referrals to secondary screening.

Some have expressed concern that although the SPOT program purports to target terrorists, individuals involved in other forms of lawbreaking have been apprehended during searches conducted as a result of BDO referral. CRCL believes that as long as the underlying administrative search was reasonable and lawful, a court is likely to hold that incidental discovery of evidence of crimes other than terrorism is permissible, based on the Supreme Court's holding in *Illinois v. Lidster*, 540 U.S. 419 (2004). In *Lidster*, the Court found that the underlying investigative stop was reasonable, and as a result the evidence of driving under the influence (DUI) that incidentally surfaced during the stop was admissible. The Court so held despite the fact that the initial suspicionless stop was not part of a DUI enforcement activity but was more in the nature of a courtesy checkpoint. Moreover, illegal items found in "plain view" during a warrantless search, such as the search of an airline passenger's luggage for weapons or explosives, may be turned over to the police and subsequently used as evidence. See, e.g., *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 81-83 (2d Cir. 2002) (law enforcement properly seized large number of money orders without a warrant because the officers viewed the objects from a lawful vantage point (i.e., the officers did not violate "the Fourth Amendment in arriving at the place from where they could see" the objects) and it was "immediately apparent that the objects were connected with criminal activity").

plain-view seizure of valid because airport security screeners permitted to search briefcase for weapons were not required to ignore evidence of crimes).

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SPOT Factors and the Fourteenth Amendment

The final legal question in this CLIA inquiry relates to whether the factors relied upon by the BDOs are compliant with the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. The suspect classifications of race, ethnicity and religion are not included as factors within the SPOT program's list of factors and behaviors, and BDOs are instructed in training and in the SPOT program policy against relying on those factors in making a determination to speak with travelers or refer them to secondary search.⁸ In fact, all the factors employed by the BDOs are likely subject only to rational basis review, (b)(3);49 U.S.C. § 114(r)

(b)(3);49 U.S.C. § 114(r)



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(b)(3);49 U.S.C. § 114(r)

Influence of Government

TSA's role in coordinating, receiving and distributing intelligence information regarding transportation security with other Federal, State, local and private sector entities also has civil liberties implications. There are instances, however, where this information sharing with State, local and airline personnel is both lawful and appropriate, such as addressing specific threats to airports, obtaining suspicious activity reports from private individuals, creating incident response plans that incorporate the aviation industry, as well as other State and local efforts. The U.S. Constitution, however, acknowledges a delicate balance between the Federal Government and the people, and between the Federal Government and the States, to prevent the accumulation of excessive power in the Federal Government. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). To ensure this balance remains, it is important to clearly articulate TSA's roles and responsibilities regarding information sharing generated by the SPOT program with other Federal, State, local and private entities.

When considering these roles and responsibilities, a conflict of law may arise between the Federal, State and local entities civil liberties protections. The information generated, collected and shared as a result of the SPOT program resides on two Federal systems, the TSA standalone SPOT database and

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the Tactical Information Sharing System (TISS). Because the SPOT information is maintained in a Federal system, it continues to be protected by Federal law. Additionally, the TSA Privacy Office has prepared separate PIAs for each of these systems and both systems are covered under TSA's Privacy Act Systems of Records Notices (SORNs). TSA may grant access to these systems to authorized Federal, State and local officials who are in turn bound by applicable Federal laws and regulations regarding information sharing and protection. Additionally, internal TSA policies also protect the integrity and confidentiality of these data systems. TSA employees, including BDOs, are further bound by TSA Management Directive (MD) No. 3700.4 "Safeguarding Sensitive Personal Information" which specifically prohibits the disclosure of official information without proper authority; and that prohibition extends to accessing or querying information for other than official business.

The primary function of intelligence information sharing between TSA and other Federal, State, local and private entities is to facilitate the flow of information to predict security threats, warn stakeholders, and take action to mitigate risks to transportation security. CRCL will continue to provide guidance to DHS and TSA on SPOT passenger screening information sharing initiatives to ensure civil liberties protections are clearly expressed in applicable policies and procedures.

NOTICE AND REDRESS

A process of redress is an important procedural safeguard because the manner in which TSA implements and operates SPOT assessments, and the way in which personal information collected as a result of the SPOT program is accessed, used, modified, and shared between TSA, other Federal, State, local and private entities may impact civil liberties. If an individual believes his or her civil liberties have been violated by a TSA BDO conducting SPOT assessments there are several avenues of redress ranging from informal to formal procedures.

While at the airport, individuals who feel the SPOT screening was not conducted in a professional manner may immediately request to speak to a TSA screening supervisor. TSA SPOT standard operating procedures require a TSA SPOT Screening Manager to be on duty for each shift where SPOT screening is being conducted. Additionally, TSA deploys TSOs informally as customer service representatives within the security screening checkpoint to proactively assist travelers and address specific complaints or concerns. Individuals may also file a complaint directly with TSA Headquarters by email or writing to the address shown below. In addition to responding to concerns or complaints, the TSA Contact Center provides proactive traveler information including a Frequently Asked Questions link for travelers on the TSA public website. The website address is http://www.tsa.gov/travelers/customer/editorial_1029.shtm. The website also is viewable in Spanish.

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Address for mailing complaints:

Transportation Security Administration
Director, Office of Civil Rights and Liberties
601 South 12th Street – West Tower, TSA-6
Arlington, Virginia 22202
Attn: External Programs Division

Address for electronic inquiries and complaints: TSA-ContactCenter@dhs.gov.

In addition to the TSA Contact Center, DHS Headquarters maintains a separate online portal for travelers to submit complaints and concerns. The DHS Traveler Redress Inquiry Program (DHS TRIP) is a central DHS website to address concerns or complaints regarding situations where travelers believe they have faced screening problems at ports of entry or they have been unfairly or incorrectly identified for additional screening. Completed DHS Traveler Inquiry forms and any supporting attachments may be emailed to the following address: TRIP@dhs.gov. Alternatively, forms may be mailed to the following address:

DHS Traveler Redress Inquiry Program (TRIP)
601 South 12th Street, TSA-901
Arlington, Virginia 22202-4220

An individual may file a complaint with the DHS Officer for Civil Rights and Civil Liberties, by e-mailing a complaint to civil.liberties@dhs.gov or mailing a complaint to the following address:

U.S. Department of Homeland Security
Office for Civil Rights and Civil Liberties
Review and Compliance Unit
Mail Stop #0800
Washington, D.C. 20528

An individual may also file a complaint with the DHS, Chief Privacy Officer, by e-mailing a complaint to privacy@dhs.gov or mailing a complaint to the following address:

U.S. Department of Homeland Security
Chief Privacy Officer

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Washington, D.C. 20528

An individual may file a complaint with the DHS Office of Inspector General (OIG), by emailing a complaint to DHSOIGHOTLINE@dhs.gov or mailing a complaint to the following address:

U.S. Department of Homeland Security
Attn: Office of Inspector General, Hotline
Washington, D.C. 20528

Since 2006, when the TSA SPOT pilot program began, CRCL has received 53 formal complaints or informal inquiries regarding alleged civil liberties issues arising from TSA passenger screening operations at airports. Of those 53 complaints, only 2 involved allegations arising out of conduct of SPOT BDOs. These complaints involved allegations of unprofessional and rude conduct in questioning a passenger and her accompanying family members, and racial bias in selecting an individual for additional questioning. The complaint involving allegations of racial profiling was closed after an investigation found no evidence to support the allegation. However, the BDO involved in the complaint was subsequently removed from the SPOT program for failure to follow standard operating procedures which require BDOs to operate in pairs and, because the BDO was in training, to consult with a SPOT supervisor prior to referring an individual for secondary screening. The other complaint was retained by CRCL for investigation and remains open.

Civil Remedies

Beyond the above outlined redress procedures, 42 U.S.C. § 1983 provides civil remedies. The Supreme Court has held 42 U.S.C. § 1983 allows an individual to bring a civil suit against a Federal officer for damages stemming from a constitutional violation. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Butz v. Economou*, 438 U.S. 478 (1978). CRCL, based on information provided by TSA, is unaware of any prior or pending civil suits involving alleged constitutional violations by TSA officials regarding SPOT screening operations.

SAFEGUARDS AND RECOMMENDATIONS

The primary safeguards against abuse of governmental powers in the execution of the SPOT program are substantive and meaningful day-to-day operational procedures and policies; rigorous employee training; and appropriate supervisory, agency, and Congressional oversight.

Procedural Safeguards and Recommendations

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TSA has taken a proactive role in establishing procedural, review, and oversight safeguards by inviting CRCL to attend the SPOT training course, and to consult and interview SPOT program officials and training instructors. CRCL believes TSA has promulgated sufficient and significant internal standard operating procedures and policy directives to safeguard against the potential for civil liberties abuses. The detailed SPOT SOP and additional TSA administrative and management directives control the day-to-day operational activities of SPOT officers, preventing SPOT BDOs from making the kind of impromptu decisions that can lead to civil liberties abuses. The SPOT SOP and TSA Directives demonstrate TSA's zero tolerance policy for invidious discrimination or abuse in any form.

To further mitigate any SPOT BDO's potential observational bias or abuse of discretion, the SPOT SOP requires that BDOs always operate in pairs and not individually. A supervising officer is also required to be in the security check point processing area at all times to provide real-time monitoring of all BDOs and TSOs, and the screening area is monitored by video cameras. Any SPOT referral for secondary screening or LEO intervention must always first be reviewed by the onsite SPOT Supervisor.⁹ SPOT supervisors also are responsible for ensuring all SPOT team members maintain the applicable certification in accordance with TSA training and certification policy requirements.

Additional safeguards against potential civil liberties abuses are found in the *Standards of Ethical Conduct for Employees of the Executive Branch* (5 C.F.R. Part 2635 (the "Standards")), TSA Directive No. 100.73-5, August 16, 2006 "Employee Responsibilities and Conduct" (the "Directive"), and the TSA Civil Rights Policy Statement dated September 30, 2008. These publications reinforce that TSA employees must maintain a high standard of personal integrity, honesty, and action to sustain the traveling public's trust and confidence. The Directive outlines specific prohibited behaviors regarding safeguarding personal information, the disclosure of official information, and accessing law enforcement data systems for other than official use. The TSA Civil Rights Policy Statement specifically addresses the potential abuses of bias-motivated conduct stating that TSA will:

- Fully comply with all applicable Federal laws and Executive Orders concerning civil rights and civil liberties protections.
- Enforce a zero-tolerance policy for any form of harassment in the workplace and in the treatment of the public we serve.
- Review and analyze, with the public's civil liberties considered, how our policies and operations impact the programs and services we provide.

⁹ As noted in the Redress section of this assessment, a BDO in training was removed from the SPOT program for failure to check with the onsite supervisor before referring an individual for secondary screening.

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CRCL believes that while the SPOT program has significant administrative and procedural safeguards, there are SPOT program features, in particular the identified list of SPOT behaviors and the associated scoring of these behaviors, which may be amended or changed as the program evolves and therefore may require a periodic civil rights and civil liberties review update. As previously discussed, the BDO's SPOT reports, which are uploaded daily into the TSA SPOT database, identify the list of factors and score which formed the basis of the BDO's referral of a traveler to secondary screening. The TSA Office of Security Operations stated to CRCL that the SPOT report information is used to produce both administrative and intelligence reports as well as to study behavioral factor trend analysis. TSA SPOT managers also noted that these reports help track the frequency and efficacy of identified behavior factors. The reports can show trends which may identify potential security risks by traveler, by airport, by region and reporting officer. These reports also track the type and frequency of the behavioral factors identified the BDO in the SPOT reports.

TSA advised CRCL that since the SPOT program was implemented no factors have been removed from the SPOT criteria and that one additional factor has been added. Because of the potential for inclusion or removal of additional factors, which may or may not have civil liberties implications, CRCL recommends that TSA adopt as part of the SPOT standard operating procedures that that the addition or removal of SPOT factors require the prior review of the TSA Office of Civil Rights and Liberties and the TSA Office of Chief Counsel.

TSA SPOT managers also identified to CRCL instances where the Joint Terrorism Task Force (JTTF) through SPOT generated information in the TISS was able to aid in the arrest of known or suspected criminals and terrorists. The JTTF did not, however, identify to TSA SPOT officials the particular information that led to an arrest or the individual that was detained. CRCL concurs with TSA that feedback from other Federal agencies such as the JTTF of "good catches" based on SPOT program information would both improve the efficacy of the program and improve morale and *esprit de corps* for BDOs to understand how their work is instrumental in supporting transportation security initiatives and the war against terrorism. CRCL concurs with TSA's position and would urge the TSA Administrator to take steps to secure feedback from JTTF and other Federal agencies in the intelligence and national security law enforcement communities in order to improve the quality of the criteria used in the SPOT program.

Overall, CRCL believes TSA management directives, standard operating procedures, and employee responsibilities and conduct directive provide sufficient guidance and direction to avoid the abuse of official discretion, particularly personal bias in the conduct of official duties. CRCL, OGC, and the Privacy Office will continue to work with the TSA Office of Security Operations in conjunction with the TSA Privacy Office and the TSA Office of Civil Rights and Liberties as they review and develop

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both existing and new procedures as necessary to address civil liberties issues as they arise regarding the SPOT program.

Training

TSA has a comprehensive training program for all TSA TSOs including BDOs. Within TSA, the Office of Technical Training (OTT) is responsible for centralized leadership and direction of all TSA training programs. Prospective SPOT students, who are current TSOs with a minimum of one year experience, receive advanced training from TSA SPOT certified instructors. SPOT training includes four days of classroom instruction followed by three days "on the job training" at a participating airport. Students must pass the classroom portion of training before being allowed to continue on to the on the job training portion of the program. Students who successfully graduate from the program are assigned to participating airports as SPOT trainees under the direct supervision of a TSA BDO Transportation Security Manager. To be certified as a BDO SPOT team member the individual must successfully complete the SPOT certification and recertification programs in addition to completing a document and identification verification course. BDOs are required to maintain certification in screening checkpoint explosives trace detection and proper physical search procedures. If any BDO fails to complete two 8-hour shifts within a 30-day period, the SPOT team member must complete the SPOT recertification course before resuming SPOT team duties.

TSA embeds constitutional law, civil rights, and civil liberties training in the TSO basic training courses, and the advanced SPOT BDO training. OTT and OCRL provided CRCL a list of courses and modules, not inclusive, which incorporate civil liberties training on issues regarding questioning travelers about their race, national origin, religion, or ethnicity. The identified modules and courses include:

- Professionalism and TSA Core Values
- Professionalism and Diversity
- Ethics, Integrity and Conduct
- Relationships with the Public
- Issues in the Performance of Official Duties
- Abuse of Authority, and
- Personal Conduct On and Off Duty, which includes the following training:
 - The First Three to Five Seconds: Arab and Muslim Cultural Awareness Training for Law Enforcement (Video)
 - Guidance Regarding the Use of Race for Law Enforcement Officers (Video)

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- On Common Ground: Sikh American Cultural Awareness (Video)
- Introduction to Arab American and Muslim Awareness Cultures for DHS Personnel (Video)

These courses ensure students gain an awareness of civil rights, civil liberties, and privacy issues involved in carrying out TSA's transportation security missions. TSA noted the BDO classroom training is extensively supplemented with training videos and practical exercises which identify civil rights and civil liberties issues. Training videos are used to demonstrate to students the types of scenarios they will encounter while performing their duties as a BDO. Airport demonstrations by the instructors emphasize the central tenet of the program to focus on specific identifiable behaviors and not an individual's apparent race, ethnicity or national origin. Students in turn participate in practical exercises acting as both a passenger and BDO to refine their observational skills.

CRCL independently supports DHS's commitment to the protection of civil rights and civil liberties through the development of training materials. This initiative, branded "Civil Liberties Institute," takes a proactive approach, helping DHS's front line officers integrate respect for civil liberties by teaching best practices for compliance with the Constitution, statutes, and departmental policies protecting individual rights

Disciplinary Procedures and Oversight

TSA has developed strict uniform procedures for receiving, processing, and investigating allegations of TSA employee misconduct. TSA employees and private individuals can report allegations of misconduct 24/7 to the DHS Inspector General, the TSA Office of Civil Rights and Liberties, the TSA Contact Center, and CRCL. Regardless of the method of receipt, all misconduct allegations are input in a secure electronic database and in accordance with DHS policies referred to the DHS-OIG for independent review and investigation. The OIG maintains the right of first refusal for any misconduct allegation involving a DHS employee. Allegations that are not accepted by the OIG for investigation are referred to CRCL. The TSA Office of Inspection (OI) maintains a cadre of experienced investigators to evaluate criminal and serious misconduct allegations involving TSA employees. Civil rights or civil liberties allegations may be referred for administrative inquiry to the TSA Office of Civil Rights and Liberties or the employee's supervisor.

Congressional Oversight

Congress has demonstrated a high interest in DHS and TSA transportation security activities at U.S. airports. Congressional interest expands beyond the SPOT program to a full range of airport

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transportation security issues beyond the scope of this assessment. TSA has kept Congress abreast of SPOT program developments. *See, e.g.*, 109 H. Rpt. 749, Jan. 2, 2007 (Judiciary Committee) (explaining that the Subcommittee staff received briefing on “the implementation of the Screening of Passengers by Observation Techniques (‘SPOT’) to screen possible terrorist and/or illegal behavior.”); 109 H. Rpt. 741, Jan. 2, 2007 (Committee on Homeland Security) (“Staff received a briefing from the Logan International Airport Security officer on the Screening Passenger Observation Techniques Program, which was developed and implemented at Logan Airport secure flight program.”) The following list highlights recent hearings and statements on specific airport transportation security issues:

- Statement of Kip Hawley, Assistant Secretary TSA before the United States Senate Committee on Commerce, Science and Transportation, January 17, 2008.
- Keynote Address of Kip Hawley, Assistant Secretary TSA to the International Air Transport Association (IATA) Security and Facilitation Forum, Washington, D.C., June 18, 2008.
- Statement of Kip Hawley, Assistant Secretary TSA before the United States House of Representatives Committee on Transportation and Infrastructure Subcommittee on Aviation, July 24, 2008.
- Address of Kip Hawley, Assistant Secretary TSA to FBI Transportation and Terrorism Conference, July 30, 2008.

Additionally, the Government Accountability Office (GAO) has produced several reports on issues regarding U.S. airport security activities and initiatives, and is in the process of reviewing TSA’s behavior detection programs, including the SPOT program.

Congressional testimony, questions for the record, and regular briefings are an additional layer of scrutiny to ensure TSA’s SPOT passenger screening policies and procedures comport with travelers’ civil rights and civil liberties. CRCL and TSA will continue to provide information and assistance to the various House and Senate committees to fulfill their oversight roles.

CONCLUSION

CRCL has determined TSA’s passenger screening operations at United States airports are unlikely to impact individual civil liberties in a substantial way. Existing TSA procedural and operational handbooks, directives, standards of conduct, and rigorous internal oversight safeguard

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TSA's SPOT operations against abuses of civil liberties. Any residual risk not mitigated by these factors is likely to be addressed by increased civil liberties awareness training, as well as heightened Congressional oversight and reporting requirements. CRCL will continue to work with TSA to address civil liberties issues and concerns identified in this assessment to help ensure that procedural safeguards are embedded in the TSA SPOT governing documents, policies, and procedures.

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Responsible Officials

Approval Signature Page

Timothy J. Keefer
Acting Officer for Civil Rights and Civil Liberties
U.S. Department of Homeland Security
[Original signed and on file with the DHS Office for Civil Rights and Civil Liberties]

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