

# WHY THE STANDARD FOR TSA SCREENERS TO TOUCH YOUR BODY SHOULD BE “PROBABLE CAUSE” AND NOT “REASONABLE SUSPICION”

## *A Brief Overview*

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Texas and many other states are considering legislation to outlaw gropings by the TSA without probable cause. Some critics of the legislation (and even some supporters) have suggested that the standard required to perform those invasive searches should be “reasonable suspicion” and not “probable cause.” “After all,” they argue, “law enforcement officers are permitted to frisk people on the basis of reasonable suspicion, why can’t TSA screeners?” This paper briefly answers that question.

### “REASONABLE SUSPICION”

VS.

### “PROBABLE CAUSE”

#### MODERN JUDICIAL INVENTION

VS.

#### FUNDAMENTAL CONSTITUTIONAL PRINCIPLE

The phrase “reasonable suspicion” is not found in either the U.S. Constitution or the Texas Constitution. The phrase was first applied by the U.S. Supreme Court in 1968 in the case of *Terry v. Ohio*.<sup>1</sup> Until then, the lower standard had no place whatsoever in the Court’s Fourth Amendment jurisprudence.

Both the Fourth Amendment to the U.S. Constitution and Article 1, Section 9 of the Texas Constitution prohibit unreasonable searches and imply that searches made without “**probable cause**” are inherently unreasonable. “Probable cause” is *the* Constitutionally based standard.

#### PERMITTED ONLY FOR LESS INTRUSIVE SEARCHES

VS.

#### MORE INTRUSIVE SEARCH

In its decision in *Terry v. Ohio*<sup>1</sup>, the U.S. Supreme Court first permitted *limited* searches by law enforcement officers based upon reasonable suspicion. This is now commonly known as a “Terry Stop.” According to the Court’s decision, the search must be “*a limited search of the outer clothing for weapons*” which “*must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a ‘full’ search*” (emphasis added).

There is a reason why the new pat-down procedures at airports are called “**enhanced pat-downs**.”<sup>2</sup> The searches go up skirts, down pants, around breasts, and all over the private parts of travelers. “*Limited*” searches went out the window in 2010 with the advent of the new “enhanced” pat-downs.<sup>2</sup> Because the searches are more invasive, the standard required to perform them should not be lowered below the Constitutional standard of probable cause.

#### PERMITTED FOR MOBILE OFFICERS

VS.

#### TSA SCREENERS ARE STATIONARY

Law enforcement officers are in the field and must go to where the people are. Practically, they cannot carry around large metal detectors, nor can every officer be provided with an explosive-sniffing dog. As a result, it is more reasonable to hold them to a lower standard because their tools are more limited.

For those granting access to transportation and publicly accessible buildings, the people come to you. As a result, it is substantially easier to utilize large metal detectors, baggage scanners, and explosive-sniffing dogs. Because it is much easier to employ more effective tools to locate weapons, there is no reason to lower the bar below the Constitutional standard of probable cause.

#### PERMITTED BY HIGHLY-TRAINED OFFICERS

VS.

#### MINIMALLY-TRAINED GOVERNMENT SCREENERS

In most cases, law enforcement officers have gone through rigorous training over the course of many months. A significant portion of this training includes instruction in Constitutional law and how to safeguard the civil rights of citizens.

The inspector general for the Department of Homeland Security recently audited the TSA and found that its training procedures were well below its *own* standards.<sup>3</sup> Screener training consists of class work followed by on-the-job training under a supervisor. (*Side Note: Unfortunately, the on-the-job training often subjects some travelers to **two invasive pat-downs**: the supervisor performs the first pat-down, then turns the same traveler over to the trainee for a second pat-down.*)

<sup>1</sup> 392 U.S. 1 (1968)

<sup>2</sup> <http://blog.tsa.gov/2010/08/enhanced-pat-downs.html> <last accessed on June 15, 2011>

<sup>3</sup> <http://www.aclu.org/blog/technology-and-liberty/tsa-has-no-time-train-its-screeners> <last accessed on June 15, 2011>