

Testimony of Jeffrey A. Rosen
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U.S. Department of Transportation
Before the
Subcommittee on Transportation, Treasury, and General Government
Committee on Appropriations
United States Senate
June 24, 2004

My name is Jeffrey A. Rosen, and I am the General Counsel of the Department of Transportation (DOT). I am pleased to have the opportunity to testify today about the Department's compliance and enforcement efforts to ensure that the civil rights of air travelers are respected by the airlines that we regulate. I understand from Chairman Shelby's invitation letter that the Committee is interested in examining the Federal government's policies regarding the ability of an airline to deny transport or require subsequent security screening to an individual who may be deemed unsafe or dangerous.

In that regard, I have been told of statements about a purported policy of DOT "to fine airlines if they have more than two young Arab males in secondary questioning because that's discriminatory." (This statement was made by Secretary Lehman of the National Commission on Terrorist Attacks Upon the United States in questioning Condoleezza Rice, the National Security Advisor to the President, and was repeated in certain media articles in the Philadelphia Daily News and elsewhere.) At the outset, I want to lay that issue to rest once and for all: the Department of Transportation has never had any such policy. Likewise, the Department has never fined an airline on the ground that it subjected multiple individuals of a particular race or ethnicity to additional security screening.

In discussing this issue, it would be useful first for the Committee to recall the respective roles and responsibilities of the governmental and private sector entities that play a role in airline security and related issues. First is the Department of Homeland Security's Transportation Security Administration (TSA), which Congress has tasked with developing airline security requirements as well as hiring, training, deploying, and managing the security screener workforce at commercial airports across the country, a responsibility once borne by the air carriers. In addition, TSA's Office of Civil Rights and the Department of Homeland Security's Office for Civil Rights and Civil Liberties have authority to investigate discrimination complaints from passengers who allege they have been discriminated against by TSA screening personnel. TSA assumed responsibility for civil aviation security on February 17, 2002.

Second are the airlines, which are responsible for implementing transportation security procedures mandated by the Federal government and continue to be major partners in the effort to improve security. Under Federal law, 49 U.S.C. § 44902, a carrier may properly refuse to transport a passenger that presents a safety or security risk. Prior to a passenger boarding an aircraft, the decision to refuse to transport the passenger because of safety or security reasons may be made by any airline staff designated by the carrier as having that authority. Under FAA rules, 14 CFR 91.3, the pilot in command of the aircraft is the final authority as to the operation of that aircraft, including any decision to refuse to transport a passenger.

Third is DOT's Office of the General Counsel, which has the responsibility to investigate security-related complaints alleging discriminatory treatment by air carrier personnel (e.g., pilots,

flight attendants, gate agents or check-in counter personnel) pursuant to the specific statutory provisions in Title 49 that prohibit discrimination in air transportation. Whereas generally civil rights matters are handled by the Justice Department, Congress has conferred upon DOT administrative authority for civil rights enforcement activities concerning aviation. Within DOT, the Deputy General Counsel and the Assistant General Counsel for Aviation Enforcement and Proceedings have been delegated the authority to investigate and pursue enforcement cases against airlines, including those involving unlawful discrimination. To ensure impartiality, the neither the General Counsel nor the Secretary directly participate in the commencement or litigation of these administrative proceedings, but pursuant to the Department's regulations, the General Counsel serves as the legal advisor to the Secretary in enforcement cases that ultimately may have to be decided by the Secretary (or his delegate) after an adjudicatory hearing.

DOT's responsibility in this regard is set out in Federal law. Although an airline has the legal authority to refuse to transport an individual that it decides is unsafe, Federal law prohibits any airline decision to refuse to transport, whether it be the decision of the pilot or other airline staff such as a gate agent, that is based on the person's race, color, national origin, religion, ethnicity, or sex. A number of Federal statutes administered by DOT specifically prohibit discrimination by air carriers. The most specific and most recently adopted provision, 49 U.S.C. § 40127, states that "an air carrier or foreign air carrier may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry." That provision was enacted on April 5, 2000, in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21). Another provision that has been in effect for decades and was originally part of the Civil Aeronautical Board's authority since 1938, 49 U.S.C. § 41310,

prohibits “an air carrier or foreign air carrier” from subjecting anyone to “unreasonable discrimination” on flights between the U.S. and foreign points. A different long-standing statute since 1938, 49 U.S.C. § 41702, requires that U.S. carriers provide “adequate interstate air transportation”, which has been interpreted within DOT to prohibit invidiously discriminatory practices on the part of U.S. carriers generally in their interstate operations.

In the months following the September 11, 2001 terrorist attacks, DOT provided the airline industry with four separate guidance documents to assist in complying with Federal laws prohibiting discrimination against individuals because of their race, color, religion, ethnicity, or national origin. These guidance documents described fully the Department’s policies with respect to nondiscrimination in the screening process prior to the takeover of that responsibility by TSA. Nowhere in any of these guidance documents on this subject is an instruction to airlines to refrain from subjecting multiple individuals of the same ethnicity to secondary screening. All of the Department’s guidance on this subject is available on the Department’s website at <http://airconsumer.ost.dot.gov/>.

Members of the public who feel they have been the subject of discriminatory actions or treatment by air carriers potentially may bring a private civil rights action in the courts for damages and injunctive relief under 42 U.S.C. § 1981 which prohibits discrimination in the making and enforcement of all contracts, including contracts to fly on commercial air carriers. In addition, or alternatively, they may file a complaint with DOT’s Aviation Enforcement Office pursuant to the specific provisions of Title 49 that I discussed earlier.

Between September 11, 2001, and May 30, 2004, the DOT's Aviation Enforcement Office received 221 complaints involving allegations of security-related civil rights violations, a significant increase from prior years. Most of these complaints alleged that an individual was unlawfully selected for additional security screening prior to boarding at the security checkpoint or the gate area. Of those 221 complaints, 70 involved allegations that passengers were removed from flights or denied boarding because, or primarily because, the passengers are, or were perceived to be, of Arab, Middle Eastern, or South Asian descent and/or Muslim. In most of the removal and denied boarding cases DOT's Aviation Enforcement Office received, it determined that a carrier did not violate the law or that there was insufficient evidence to conclude that a carrier was in violation of the law. However, the office did find evidence of what appeared to be civil rights violations in 18 post-September 11 complaints, such as a situation where a passenger was denied boarding by an airline despite having been approved by a Federal law enforcement officer for boarding. As a result, the Office instituted more in-depth investigation of several major air carriers based on these complaints. Prior to September 11, 2001, there were only a few complaints filed with the Department asserting that a passenger was denied boarding or removed from a flight and none of these incidents involved a violation of the civil rights laws DOT enforces.

Generally, the Department's Aviation Enforcement Office pursues informal enforcement action (e.g. asks the carrier to change its policy or procedure or warns the carrier about potential formal enforcement action if similar complaints continue to be received) when it believes that an airline policy or procedure unlawfully discriminates or is not in compliance with the law in other respects. However, if the Office concludes that informal action would not solve the problem, it

may issue a cease and desist order and assess civil penalties. However, the Aviation Enforcement Office can only take such action through a mutually-agreed settlement of a case or after an adjudicatory proceeding -- an oral evidentiary hearing on the record before an administrative law judge from DOT's Office of Hearings, at which the airline may present evidence and cross-examine witnesses in order to defend itself, if it chooses to do so.

Within the last seven months, the Aviation Enforcement Office has concluded investigations of numerous complaints by passengers against four major carriers to resolve allegations that the passengers were *removed from or denied boarding* on flights following the September 11, 2001, terrorist attacks because of their perceived ethnic and/or religious background. In each of the four investigations, the Office concluded that there was credible evidence that, but for the passengers' ethnicity or religion or perceived ethnicity or religion, some passengers would most likely not have been removed. For example, as I mentioned, in some incidents, Federal law enforcement officers cleared the passengers before the flight departed, but the flight crew would not allow the individuals to re-board that flight. Instead, they placed the individuals on the very next flight without additional security screening.

DOT's Aviation Enforcement Office concluded its investigations of the complaints against these four carriers with mutually-agreed settlements whereby those carriers did not admit any discriminatory conduct, but agreed to refrain from future violations of Federal anti-discrimination statutes and to provide civil rights training to their employees. Under the settlement agreements, the airlines were not "fined" for, nor instructed to refrain from, subjecting multiple individuals of the same ethnicity to secondary security screening. To the contrary, the

Aviation Enforcement Office has never sought to fine an airline for having “more than two young Arab males in secondary questioning,” notwithstanding the fact that a number of complaints raising this issue have been received.

The laws that are relevant to these issues are not foolish or misguided. It has been asserted by some that aviation security is somehow undermined by screening individuals who are not male, who are not Middle Eastern, but who may be senior citizens or children. But within the last two months, the Attorney General of the United States and the Director of the FBI warned Americans in a national press conference of "a clear and present danger to America" by al Qaeda during this summer. In his remarks, Attorney General John Ashcroft reported that “al Qaeda attracts Muslim extremists among many nationalities and ethnicities.” Attorney General Ashcroft also indicated that “al Qaeda is seeking recruits who can portray themselves as native Europeans”, and who will travel with families to defeat our security measures. President Bush spoke publicly about “the unfairness of racial profiling”, and in September 2002 stated his “profound belief that no American should be judged by appearance, by ethnicity, or by religious faith.” Secretary Mineta and other Administration officials know that current security practices not only comply with the law, but are in fact are designed to follow the President's clear and emphatic directive to his Administration -- protect the American people from the threat of terrorism.

There need not be any inconsistency between our Nation's longstanding civil rights laws and the security of our national air transportation system, which has been and remains a priority for DOT. Since the tragic events of September 11, security measures implemented at airports and by airlines have been greatly improved. DOT initiated and the Department of Homeland

Security has continued and strengthened a comprehensive, layered strategy for aviation security incorporating intelligence, screening, regulation, inspection, enforcement, and education.

Secretary Mineta and the entire Department of Transportation remain fully committed to all the security measures necessary to protect our country.