

SUBJECT: Offensive touching by federal agent a crime when accessing transportation

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 8 ayes — Gallego, Hartnett, Aliseda, Burkett, Carter, Christian, Y. Davis, Zedler

0 nays

1 absent — Rodriguez

WITNESSES: For — Jared Barger; Ricardo Bussell; Zachary Calvert; Russell Doyle; Heather Fazio, Texans for Accountable Government; Linda Greene; Charlotte Halbgewachs; Glenda Hawthorne; Claire Hirschkind; Mary Krenek; Janice Liverman; Taylor Metting; Julie Miller; Forrest Mims; Joseph Nielsen; Bradley Pierce; Deborah Stevens; Wesley Strackbein, TSATYRANNY.COM; Jim Stutsman, Libertarian Party Texas; Christopher Youngblood; (*Registered, but did not testify*: Kris Bailey; Katie Brewer; William Eckert; Ryan Haecker; Terri Hall, Texas TURF; Tony McDonald, Young Conservatives of Texas; Randy Peterson; Dana Schoebert; Dan Short; Travis Snavely; Mitchell Stein; Mark Vogt; Kevin Wright; Don Zimmerman, Travis County Republican Party)

Against — Jon Roland; Judith Shaw

On — Shane Attaway

BACKGROUND: According to the Penal Code, sec. 39.03 a public servant acting under his or her office commits a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) if he or she:

- intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he or she knows is unlawful;
- intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his or her conduct is unlawful; or
- intentionally subjects another to sexual harassment.

DIGEST:

CSHB 1937 would amend Penal Code sec. 39.03 to provide that a public servant would commit an offense if, while acting under his or her office and without probable cause, the public servant performed a search for the purpose of granting access to a publicly accessible building or form of transportation and intentionally, knowingly, or recklessly:

- touched the anus, sexual organ, buttocks, or breast of another person, including touching through clothing; or
- touched the other person in a manner that would be offensive to a reasonable person.

A public servant would include a U.S. officer, employee, or agent; anyone contracted to perform on behalf of a U.S. branch, department, or agency; or anyone acting under federal law. The public servant would have a defense to prosecution if he or she performed the search pursuant to and consistent with an explicit and applicable grant of federal statutory authority that was consistent with the U.S. Constitution.

The attorney general would have to take any action necessary to defend the bill if enacted and could make any legal argument considered appropriate, including that it constituted a valid exercise of:

- the state's police powers;
- the liberty interests of the people secured by the Ninth Amendment to the U.S. Constitution;
- the powers reserved to the states by the Tenth Amendment to the U.S. Constitution; or
- the rights and protections secured by the Texas Constitution.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2011.

SUPPORTERS  
SAY:

CSHB 1937 would stop the Transportation Security Administration (TSA) from treating innocent travelers like criminals. This bill could apply to federal agents who granted access to public buildings and other forms of transportation, but its main applicability would be to the TSA. Although lacking any probable cause to believe a person has committed a crime, the TSA gives each person a choice when flying: take the virtual strip search by high-tech scanner or take the unreasonable and humiliating invasive search of the person's entire body. Men and women have reported that

TSA employees have reached inside their pants, skirts, and underwear to touch breasts, genitals, and buttocks. Some are forced to submit to these invasive searches even when they would have preferred the scan.

Travel by flight is a common, everyday experience. But a person who refuses the humiliating search cannot fly and could be subject to fines or searched without consent anyway. One senior Texan objected vociferously to her invasive search, so her boarding pass was confiscated, and she had to drive home to El Paso. An 85-year-old veteran was told by a TSA agent that he had to take off his belt, and his pants fell down to his ankles. The freedom to travel should not come at the expense of dignity. These types of searches violate Sec. 9 of the Texas Bill of Rights and the Fourth Amendment of the U.S. Constitution.

Moreover, these overly invasive searches do not make us safer when we travel. The government claims that invasive searches make us safer, but how does it make us safer if every law-abiding grandmother in Texas is strip searched? The TSA should focus its efforts on what would make us safer, like training more dogs to sniff for explosives.

CSHB 1937 would not hamper legitimate security measures, because there is no legitimate security reason to grope someone's private parts or reach inside their underwear to touch their private parts. Federal law would not pre-empt this bill, because federal law does not authorize the inappropriate touching of people's genitals. Federal law authorizes searches for legitimate security reasons, and this bill would not prevent that. CSHB 1937 would rightly make it a crime for a TSA agent to search without probable cause in this demeaning, invasive, and unnecessary way.

**OPPONENTS  
SAY:**

CSHB 1937 would be preempted by federal law. Since September 11, 2001, all Americans know that travel, although an everyday event, can be dangerous. TSA agents are working within the scope of their federal responsibilities under rules that require them to ensure that we are safe when we travel. Trying to criminalize the behavior of federal agents for conduct that is within the scope of their employment would not stop them from doing searches and could have unintended consequences. If a state law enforcement officer arrested a TSA agent, the case would immediately be removed to federal court and dismissed, and the state officer could be charged with federal obstruction and interference charges for making the arrest.

CSHB 1937 would provide a defense to prosecution if TSA agents performed the search with an explicit and applicable grant of federal statutory authority, which the federal courts would no doubt interpret as being present. Something that may feel like a grope could really just be a way to feel for explosive devices, which have gotten smaller and harder to detect. Sadly, terrorists come in all shapes, ages, and genders, and each person should be searched thoroughly to ensure safety for all travelers. Dignity is trumped by safety.

**OTHER  
OPPONENTS  
SAY:**

CSHB 1937 has good intent, but criminalizing the actions of federal agents would be the wrong approach. A better approach would be to set up a grand jury process to hear complaints about when the federal government has exceeded its rightful powers.