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Vessel security program upheld

Dennis L. Bryant

And

Captain Charles D. Michel, USCG

Chief, Office of Maritime & International Law, USCG Headquarters

On November 29, 2006, the U.S. Court of Appeals for the Second Circuit ruled that the random screening of carry-on baggage and vehicles boarding a public passenger ferry conducted in accordance with a U.S. Coast Guard-approved security plan was constitutional. The Court determined that the screenings set forth in a security plan, mandated by the Maritime Transportation Security Act of 2002 (MTSA), were minimally intrusive and reasonably efficacious in serving the government's special need to deter a transportation security incident.

The case involved two persons who regularly utilized the Lake Champlain ferry to commute between Grand Isle, Vermont, and Plattsburgh, New York. They, along with all other passengers on the ferry, were subject to random screening of their carry-on baggage and vehicles when boarding the ferry. Notices were posted at the ferry landing and on the ferry advising persons of the screening protocol and giving persons the opportunity to decline to utilize the ferry. Plaintiffs did not allege that they were screened on anything other than a random basis.

Following the horrific terrorist attacks of September 11, 2001, Congress enacted the MTSA which directed the US Coast Guard to assess vessels to determine those types that pose a high risk of being involved in a transportation security incident. The agency was then directed to identify weaknesses in passenger and cargo security protection systems relating to those vessels. Finally, the Coast Guard was specifically authorized to require the owners and operators of vessels that it believes may be involved in a transportation security incident to prepare and implement a security plan for deterring such an incident to the maximum extent practicable.

The Coast Guard's detailed assessment on the record found that vessels displacing more than 100 gross register tons or licensed to carry more than 150 passengers presented a high risk of being involved in a transportation security incident. The agency then promulgated regulations requiring each such vessel to conduct a security assessment to examine and evaluate the vessel and its operations taking into account possible threats, vulnerabilities, consequences, and existing protective measures, procedures, and operations. The security assessment was then to be used by

E-mail

dennis.l.bryant@gmail.com

Internet

<http://brymar-consulting.com/>

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<http://marinelink.com/en-US/magazines/Archive.aspx?MID=3>

the owner or operator to develop a security plan to ensure application of security measures designed to protect the vessel.

While the vessel security regulations establish very specific performance standards, broad latitude is allowed in the actual methods to be utilized by owners and operators in achieving them. The general rule is that the security plan must provide for the screening of persons, baggage (including carry-on items), personal effects, and vehicles for dangerous substances and devices, as well as checking the identification of any person seeking to board the vessel. Owners and operators of passenger vessels are permitted to replace identification checks and passenger screening requirements with alternative, but equivalent, measures including inspecting selected areas prior to embarking passengers and implementing security patrols and/or installing closed-circuit television monitors.

Several industry trade organizations, including the Passenger Vessel Association (PVA), worked with the Coast Guard to develop alternative security programs. These programs, designed to address situations common to certain classes of vessels, can be utilized by vessels meeting that profile if the security assessment demonstrates that the program provides an equivalent level of security. The Lake Champlain ferry involved in this litigation had adopted the PVA alternative security program with the approval of the Coast Guard.

The ferry's security plan required foot and bicycle passengers to open their carry-on items and present them for visual inspection. Car passengers were required to open their trunks or tailgates so that the attendant could visually inspect the car's interior. On occasion, attendants would ask the driver to open the car's windows to permit a visual scan of the interior.

Plaintiffs sought injunctive and declaratory relief, alleging that the Lake Champlain ferry company's policy of requiring passengers to submit to such random screening before boarding the ferry violated their Fourth Amendment rights. Under the Fourth Amendment to the Constitution, persons have the right to be secure against unreasonable searches and seizures. Even though the screenings here were conducted by a private entity, they were done so at the instigation of the federal government; thus the Constitutional standard applied.

The Court first examined the nature of the privacy interest involved. After reviewing relevant cases and distinguishing both searches at the border and at airports, the Court concluded that the privacy interest of persons in their carry-on luggage and items in the trunks of their vehicles are undiminished merely because they are riding on a ferry. However, persons have a diminished expectation of privacy regarding portions of a vehicle that may be viewed from outside the vehicle, such as through the windows.

Having determined that the passengers had a reasonable expectation of privacy in the areas to be screened and that no warrant, suspicion, or probable cause existed, the Court then analyzed the screening under the "special needs" test for suspicionless searches. The first issue with regard to the special needs test is nature of the intrusion. In this case, the Court found that the screening was short and minimally intrusive, being limited to brief visual inspections.

Because all persons wishing to board the ferry were screened, there was little likelihood of improper targeting. Notice was clearly posted and persons were fully advised of the screening. While the Court agreed that other techniques (such as magnetometers) could have been utilized to reduce the degree of intrusion, the ferry owner was not required to install such devices and the Fourth Amendment does not require employing the least intrusive means. The test is whether the means utilized were sufficiently unintrusive so as to be constitutional.

The second prong of the special needs test requires examination of the nature and immediacy of the governmental concern. The government's special need must relate to an interest important enough to justify the particular activity and there must be a close and substantial relationship between the degree of intrusiveness and the governmental need. Further, the government's asserted "special need" must not be identical with law enforcement needs, but rather go beyond them. The Court agreed that preventing or deterring large-scale terrorist attacks against the mass transportation system constitutes a special need. It then concluded that expert determinations by the Coast Guard at the national level, based on explicit Congressional delegation of legislative authority, are entitled to significant deference (specifically, *Chevron* deference). The Coast Guard is not required to show that the Lake Champlain ferry is subject to a specific threat of terrorist attack. Rather, the agency is only required to show that its assessment that large vessels and vessels carrying large numbers of passengers are subject to a significant risk of attack is reasonable.

Finally, the Court examined the efficacy of the screening. It noted that the choice between reasonable alternatives remains with the government officials who have a unique understanding of, and responsibility for, maximizing limited public resources. The inquiry at this stage involves only the question of whether the screening is a reasonable method of deterring the prohibited conduct. While the Court agreed with plaintiffs that the screenings at the ferry were probably not optimally effective, the test does not require that the screening be the most effective measure. The Court found that the screening protocol instituted by the ferry company with the approval of the Coast Guard was minimally intrusive and was a reasonable method of deterring terrorist attacks. Therefore, despite the plaintiff's privacy expectations, the Court ruled that the government's undisputedly important special need to protect ferry passengers and crew from terrorist attacks fully justified the screening.

The Coast Guard's maritime security program reaches further than screening of the belongings of persons boarding ferries and other passenger vessels. The program is concerned with the security of the vessel itself, the crew, the cargo, as well as port facilities and waterways. While this case was limited to the complaint filed by two passengers on a ferry traversing Lake Champlain, the exhaustive analysis undertaken by the Court is equally applicable to other aspects of the program. Clearly the Court was impressed with the very specific authority granted to the Coast Guard by Congress and the effort undertaken by that agency to develop and implement a flexible, yet effective program. The message for the maritime industry is that the Coast Guard's implementation of MTSA satisfies the Fourth Amendment and that the interests of industry are best served by working with the Coast Guard to tailor the program so as to provide reasonable

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deterrence against terrorism while minimizing any adverse impact on commerce and the commuting public.

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