



[4410-05P]

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 552

[BOP-1162-F]

RIN 1120-AB62

Searches of Housing Units, Inmates, and Inmate Work Areas: Use of X-ray Devices - Clarification of Terminology

AGENCY: Bureau of Prisons, Justice.

ACTION: Final Rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) clarifies that body imaging search devices are "electronic search devices" for routine or random use in searching inmates, and are distinguished from medical x-ray devices, which require the inmate's consent, or Regional Director approval, for use as search devices.

DATES: This rule is effective on [insert date 30 days after publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Sarah Qureshi, Office of

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SUPPLEMENTARY INFORMATION:

In this document, the Bureau finalizes its regulation on searches of inmates using x-ray devices and technology (28 CFR part 552, subpart B). We change this regulation to clarify that body imaging search devices are "electronic search devices" for routine or random use in searching inmates, and are distinguished from medical x-ray devices, the use of which require the inmate's consent, or Regional Director approval, for use as search devices. We published a proposed rule on this subject on February 14, 2014 (79 FR 8910). We received a total of twenty comments on the proposed rule. Three comments were generally in favor of the proposed changes. Eleven comments were copies of the same form letter. We respond below to the issues raised by that form letter and the remaining six comments.

The electronic devices that the Bureau uses are unsafe or will cause harm to inmates.

Fifteen comments (including the eleven form letters) were concerned that the electronic devices used by the Bureau, particularly those which use x-ray technology, will be harmful

to inmates. Another commenter stated that the use of x-ray technology as intended by the Bureau is so unsafe that it "is a clear violation of human rights."

The x-ray technology used for searches by the Bureau employs a very low level of radiation. Radiation is measured in units called "sieverts." A person scanned by a Bureau body scanner would receive only 0.25 sieverts and can be scanned up to 1000 times a year. For context, a scan from this machine is equal to eating two and a half bananas (the potassium in bananas emit radiation). Sleeping next to someone exposes you to .05 sieverts, because we all have minerals in our bones that emit radiation. Also, people living in areas of high elevations are exposed to almost 5 times (1.2 sieverts) as much radiation as one scan from a Bureau body scanner, because there is more cosmic radiation at high elevations. An airplane flight from New York to Los Angeles exposes a human body to 40 sieverts of radiation. Again, the Bureau's x-ray technology scanners employ only .25 sieverts, so low a level of radiation as to be safe.

Further, the Bureau requested an independent study ("Radiation Protection Report") of its pilot program use of the "Radpro SecurPass" technology. The review, conducted in 2012, was generated and peer reviewed by radiological physicists

holding Certified Health Physicist credentials and board certification of the American Board of Radiology in Diagnostic Radiology. The Report concluded that the average effective reference dose was 0.233 sieverts, which is representative of the maximum possible radiation dose for the machine to one person for one scan. The Report concluded that the system may be operated at that dose level up to 1000 times per year while maintaining the recommended safe radiation dose.

The use of electronic search devices described in the proposed rule is also within established inmate search procedures. There is no impact it will have on the federal inmate population which is not already present. The proposed rule clarified that body x-ray imaging search devices are "electronic search devices" for routine or random use in searching inmates. This change does not affect physical contact with inmates or require disrobement. Other than increased effectiveness at identifying contraband through the use of new minimally invasive hand-held technology, there exists no actual or perceivable difference between already-in-use electronic search devices and the proposed x-ray search device. In fact, the use of the technology will cut down the frequency and need for more invasive searches of the type that inmates seek to

avoid.

Further, prisoners, visitors, and staff have diminished Fourth Amendment protections in a correctional setting under the constellation of rules created by Bell, Hudson, and Turner. In Bell v. Wolfish, 441 U.S. 520 (1979) and Hudson v. Palmer, 468 U.S. 517 (1984), inmates brought challenges to searches of their person and cells, respectively. The Bell court noted prisons are uniquely dangerous environments, and held that the interest in keeping out contraband outweighed inmate privacy concerns. Similarly, the Hudson court found prison cell searches are categorically reasonable since a prisoner's expectation of privacy must always yield to the paramount interest in institutional security. Turner v. Safley, 482 U.S. 78 (1987) created a new standard: when a prison regulation impinges on the constitutional rights of an inmate, staff member, or visitor, the regulation is valid if it is reasonably related to legitimate penological interests.

The Turner standard, with the fact-specific principles of Bell have been consistently used guidelines to reference for inmate body searches. The Supreme Court specifically invoked both cases as primary guidance in Florence v. Bd. of Chosen Freeholders of County of Burlington. The Court held it was

reasonable in a physical search to command "detainees to lift their genitals or cough in a squatting position." These procedures, similar to the ones upheld in Bell, are designed to uncover contraband that can go undetected by a patdown, metal detector, and other less invasive searches. 132 S. Ct. 1510, 1520, 182 L. Ed. 2d 566 (2012). Physical manipulation of an unclothed area, however, would not be permissible. Id. The non-contact electronic device search is precisely within the "less-invasive," non-controversial ambit described in Florence.

It is also important to note that the regulations will retain current language stating that use of any electronic device "does not require the inmate to remove clothing." 28 CFR § 552.11.

Bureau staff do not have adequate training to use new x-ray body scan technology.

One commenter was concerned that Bureau staff are not qualified to use new technology. This is not true. Policy accompanying the change to this regulation and the implementation of any new search device under these regulations will require training on the use of the devices. Operators Manuals for the technological devices will be required for all employees who operate the scanners. This training will be re-

implemented annually.

Implementation of the devices will be costly to the public.

One commenter felt that "the cost of instituting [body scanners would be] incredible." The scanning technology used by the Bureau is also routinely used in other public safety sectors (e.g. airport security, military, state jail security, etc.) and is not prohibitively expensive. The Bureau evaluated and tested several different types of whole body imaging devices, some acquired through surplus acquisition at no cost from other federal agencies. During the evaluation period, a significant amount of dangerous contraband (i.e., weapons, drugs and contraband cell phones), were detected with these devices and confiscated. Because the technology provides enhanced institution security, promotes staff and inmate safety, and ultimately increases the safety of the public, the return on investment for the cost of these devices is significant. In the Bureau's correctional judgment, the loss of life or serious injury, whether staff, inmate or a member of the public, is immeasurable and as such, the use of scanning technology to prevent such occurrences is reasonable and warranted.

For the aforementioned reasons, we now finalize the proposed rule published on February 14, 2014 (79 FR 8910), without change.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review" section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact upon a substantial number of small entities for the following reasons: This rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by ' 804 of the Small Business Regulatory Enforcement Fairness Act of 1996.

This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 552

Prisoners.

Charles E. Samuels, Jr.
Director, Bureau of Prisons

Accordingly, under rulemaking authority vested in the Attorney General in 5 U.S.C 301; 28 U.S.C. 509, 510 and delegated to the Director, Bureau of Prisons in 28 CFR 0.96, we amend 28 CFR part 552 as set forth below.

SUBCHAPTER C - INSTITUTIONAL MANAGEMENT

PART 552 - CUSTODY

1. The authority citation for 28 CFR part 552 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006-5024 (Repealed October 12, 1984, as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

2. Revise § 552.11(a) to read as follows:

§ 552.11 Searches of inmates.

(a) Electronic devices. Inspection of an inmate's person using electronic devices (for example, metal detector, ion spectrometry device, or body imaging search device) does not require the inmate to remove clothing. The inspection may also include a search of the inmate's clothing and personal effects. Staff may conduct an electronic device search of an inmate on a routine or random basis to control contraband.

* * * * *

3. Revise § 552.13 to read as follows:

§ 552.13 Medical x-ray device, major instrument, or surgical

intrusion.

(a) The institution physician may authorize use of a major instrument (including anoscope or vaginal speculum) or surgical intrusion for medical reasons only, with the inmate's consent.

(b) The institution physician may authorize use of a medical x-ray device for medical reasons and only with the consent of the inmate. When there exists no reasonable alternative, and an examination using a medical x-ray device is determined necessary for the security, good order, or discipline of the institution, the Warden, upon approval of the Regional Director, may authorize the institution physician to order a non-repetitive examination using a medical x-ray device for the purpose of determining if contraband is concealed in or on the inmate (for example: in a cast or body cavity). The examination using a medical x-ray device may not be performed if it is determined by the institution physician that it is likely to result in serious or lasting medical injury or harm to the inmate. Staff shall place documentation of the examination and the reasons for the examination in the inmate's central file and medical file.

(1) The Warden and Regional Director or persons officially acting in that capacity may not redelegate the authority to approve an examination using medical x-ray device for the purpose of determining if contraband is present. An Acting

Warden or Acting Regional Director may, however, perform this function.

(2) Staff shall solicit the inmate's consent prior to an examination using a medical x-ray device. However, the inmate's consent is not required.

(c) The Warden may direct searches of inanimate objects using a medical x-ray device where the inmate is not exposed.

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