SUBJECT: Criminal offense for certain intrusive touching by government agent

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Gallego, Aliseda, Burkett, Carter, Zedler

0 nays

4 absent — Hartnett, Christian, Y. Davis, Rodriguez

WITNESSES: No public hearing

BACKGROUND: Penal Code, sec. 39.03 establishes a criminal offense for official oppression. Public servants acting or purporting to act in their official capacity, or taking advantage of this actual or purported capacity, commit a class A misdemeanor (up to one year in jail and/or a maximum fine of $4,000) if they:

- intentionally subject another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that they know is unlawful;
- intentionally deny or impede another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing their conduct is unlawful; or
- intentionally subject another to sexual harassment.

Penal Code, sec. 1.07(41) defines public servant, which includes officers, employees, or agents of government.

DIGEST: HB 41 would expand the crime of official oppression to make it an offense if a public servant acting under the color of the person's office, without probable cause to believe someone had committed an offense:

- performed a search without effective consent in order to grant 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 caused physical contact with the other person when the actor knew or reasonably should have believed that the other person would regard the contact as offensive or provocative.

Consent would be considered effective only if, immediately before a search, the public servant verbally described the area of the other person to be searched and the method to be used in the search and received express consent for the search from the person to be searched or the parent or guardian of the person to be searched.

For the offense described by HB 41, the definition of public servants would be expanded to include:

- officers, employees, or agents of the United States or of a U.S. branch, department, or agency, or other persons acting under contract with a branch, department, or agency of the United States to provide security or law enforcement service; and
- any other person acting under color of federal law.

These public servants would have a defense to prosecution for the offense described by HB 41 if they 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.

In the prosecution of an offense described by HB 41 involving a public servant acting under color of federal law, if the validity of the bill was challenged on the grounds of unconstitutionality, preemption, or sovereign immunity, the attorney general, with consent of the appropriate local county or district attorney, would have to take any action necessary to defend the bill. The attorney general could make any legal argument considered appropriate, including that the bill constituted a valid exercise of:

- the state's police powers;
- the liberty interests of the people secured by 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 states that it would have to be construed as enforceable up to but no further than the maximum possible extent that was consistent with

federal constitutional requirements, even if that construction was not readily apparent, as such constructions are authorized only to the extent necessary to save the bill from invalidation by a court.

HB 41 would take effect on the 91st day after the last day of the legislative session.

SUPPORTERS SAY:

HB 41 is needed to rein in public officials, especially those working for the federal Transportation Security Administration (TSA), who abuse their power by performing overly intrusive pat down searches that violate constitutional rights. These rights to be free from unreasonable searches are protected under both the U.S. Constitution's Fourth Amendment and Art. 1, sec. 9 of the Texas Constitution. Texas legislators have a responsibility to uphold and protect these individual rights.

Currently, travelers can be forced to undergo an unreasonable and humiliating invasive search of their entire body because either they choose not to go through a high-tech scanner or other detector or they are targeted for a random pat-down search. Men and women have reported that TSA employees have reached inside their pants, skirts, and underwear to touch breasts, genitals, and buttocks. One senior Texan reported that after objecting to an invasive search, her boarding pass was confiscated, and she had to drive from Austin to El Paso.

In other circumstances, this type of search by law enforcement officers can occur only with probable cause that someone has committed a crime or with consent. The TSA performs these searches without such requirements, treating innocent travelers like criminals. Persons refusing these humiliating searches could be prohibited from flying or subject to fines, with some being forced to submit to these invasive searches before they can fly even when they would have preferred a scan.

HB 41 would address this issue by making it a crime for TSA officials and other public officials to perform invasive searches unless there was probable cause to believe someone had committed an offense or the person had given consent. These reasonable standards would preserve individuals' constitutional rights. While only 3 percent of passengers currently are searched through a pat-down, the rights of all should be protected.

HB 41 would not hamper legitimate security measures, so the federal government would have no reason to shut down Texas airports. There is no legitimate security reason to grope someone's private parts or reach inside their underwear to touch their private parts. The TSA would not be prohibited from using other screening methods, such as scanners, metal detectors, explosive-sniffing dogs, hand-held wands, or pat downs done in a way that did not violate HB 41. If about 97 percent of travelers currently do not go through pat downs, the TSA should be able to screen, without violating the federal and state constitution, those remaining for whom there is no probable cause to believe a crime has been committed or those who withhold consent.

The bill would make sure that individuals consenting to a search had full information about the type of search to which they were consenting. Consent would be considered effective only if the method of search and the areas to be searched were described and express consent were given.

HB 41 would not conflict with or preempt federal law or interfere with the TSA's legal responsibilities because no federal law requires the inappropriate touching of travelers' genitals or an intrusive search without probable cause. Federal law authorizes searches for legitimate security reasons within the bounds of the Constitution, and this bill would not prevent that. HB 41 would not prohibit thorough searches, even those described by HB 41, if there were probable cause or consent.

The bill would give public officials a defense to prosecution if a search was done under an explicit and applicable grant of federal statutory authority consistent with the federal constitution. This means criminal prosecution under HB 41 could occur only if there were inappropriate touching with no authorization under a federal law consistent with the U.S. Constitution.

HB 41 would apply not just to TSA officials in airports, but to searches by other public servants granting access to public buildings or transportation. No public official should perform invasive, unconstitutional searches.

The state should not let threats by the federal government to cancel flights stop it from protecting travelers' constitutional rights.

OPPONENTS SAY:

HB 41 could unconstitutionally interfere with the federal responsibility to protect the flying public and could have unintended consequences, including jeopardizing public safety and the cancelling of flights by federal authorities. TSA agents performing pat downs are working within the scope of their federal responsibilities under laws and rules that require them to ensure that we are safe when we travel, and their conduct should not be criminalized.

Safety must be the primary concern with air travel, and searches are a reasonable, necessary part of current safety procedures. Since September 11, 2001, all Americans know that travel, although an everyday event, can be dangerous. Terrorists reportedly have been developing well concealed explosives made of non-metals. Something that may feel like a grope could be a way to feel for explosive devices, which have gotten smaller and harder to detect. The 2009 Christmas Day plot, in which a passenger tried to set off plastic explosives sewn into his underwear so they would be unlikely to be detected and the attempted destruction of an airplane with explosives hidden in a shoe illustrate the importance of thorough searches by federal officials.

Current airline security procedures are designed to ensure the safety of all travelers, and Texas should not try to micro-manage or interfere with how federal officials perform safety screening. Terrorists come in all shapes, ages, and genders, and because some travelers are chosen at random to be searched, some grandmothers and others who appear non-threatening will be searched. Pat-downs – including random ones – are a necessary part of airline security and are adjusted based on intelligence reports.

In a letter to Texas officials, the U.S. attorney for the Western District of Texas raised several issues with a similar bill filed during the regular session. He stated that the bill could conflict with federal law and that it would threaten with state criminal prosecution TSA staff carrying out security measures required under federal law and regulations. He also stated that under the U.S. Constitution's supremacy clause, Texas does not have authority to enact laws that conflict with federal law or to regulate federal agents or employees in the performance of their duties.

There are other ways to deal with concerns about the actions of TSA officials. Travelers' whose constitutional rights are violated can bring suit, and violations of federal law or regulations can be prosecuted under federal law. Proposed changes to federal laws or regulations governing

federal employees should be brought before federal agencies or Congress. State officials should work with Congress to enact changes instead of trying to regulate federal employees through state criminal law.

HB 41 is so broadly written that it would apply to all public servants granting access to public buildings or transportation and could threaten safety and security in those buildings. For example, the bill could cover sheriffs or others handling courthouse security who could be hampered in their efforts to detect weapons or other contraband.

HB 41 could have serious, negative consequences for Texas. The U.S. attorney said in his letter that if the bill considered during the regular session were enacted, the TSA would seek a stay of the statute and unless or until one was granted, it likely would be required to cancel flights for which it could not ensure safety. The Legislature should take this letter seriously and not provoke an unnecessary conflict with federal officials acting within their clear authority concerning airline security.

NOTES:

The House passed a similar bill, HB 1937 by Simpson, by 138-0 during the regular session, but it died in the Senate.

The companion bill, SB 29 by Patrick, is scheduled for a public hearing by the Senate Transportation and Homeland Security Committee on June 27.