



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II  
Attorney General

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

June 29, 2012

The Honorable Robert B. Bell  
Member, House of Delegates  
2309 Finch Court  
Charlottesville, Virginia 22911

Dear Delegate Bell:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You ask whether an individual or the Attorney General of Virginia may bring suit against the federal government claiming a violation of the Fourth Amendment for searches conducted at airports.

## Response

It is my opinion that Fourth Amendment protections are rights attaching to persons that can be asserted only by them either directly or through an association. It is further my opinion that the Attorney General lacks standing to bring such a claim on behalf of citizens of the Commonwealth.

## Applicable Law and Discussion

The Fourth Amendment of the United States Constitution prevents the government from conducting "unreasonable searches and seizures."<sup>1</sup> This restriction upon government is directed primarily to protection of individual and personal rights.<sup>2</sup> The protection is personal and only the one subject to an allegedly unconstitutional search and seizure may be heard to complain.<sup>3</sup> Moreover, the Commonwealth does not have standing to assert the constitutional rights of its citizens against the federal government,<sup>4</sup> including claims alleging a violation of the Fourth Amendment.

In *Bivens v. Six Unknown Agents of the FBI*,<sup>5</sup> "[the Supreme Court of the United States] held that a search and seizure that violates the Fourth Amendment can give rise to an action for damages against

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<sup>1</sup> U.S. CONST. amend. IV.

<sup>2</sup> *United States v. White*, 322 U.S. 694, 698 (1944).

<sup>3</sup> *Simmons v. United States*, 390 U.S. 377, 389 (1968) ("rights assured by the Fourth Amendment are personal rights, and [] they may be enforced . . . only at the instance of one whose own protection was infringed by the search and seizure.").

<sup>4</sup> *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

<sup>5</sup> 403 U.S. 388 (1971).

the offending federal officers even in the absence of a statute authorizing such relief<sup>6</sup> Nonetheless, although such *Bivens* claims have been permitted,<sup>7</sup> the merits of “search-and-seizure claims depend heavily upon their individual facts[.]”<sup>8</sup> Whether any person would possess a valid claim as a result of a search at an airport, therefore, would turn upon facts not provided. I note, however, that airport screening in general has survived challenge.<sup>9</sup>

### Conclusion

Accordingly, it is my opinion that Fourth Amendment protections are rights attaching to persons that can be asserted only by them either directly or through an association. It is further my opinion that the Attorney General lacks standing to bring such a claim on behalf of citizens of the Commonwealth.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II  
Attorney General of Virginia

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<sup>6</sup> United States v. Stanley, 483 U.S. 669, 678 (1987).

<sup>7</sup> *Bivens v. Six Unknown Agents of the FBI*, 403 U.S. 388 (1971).

<sup>8</sup> *Simmons*, 390 U.S. at 393. See *Ayeni v. Mottola*, 35 F.3d 680, 689 (2d Cir. 1994).

<sup>9</sup> Courts addressing the validity of such searches have upheld them based on both a determination of reasonability given a balance between the nature of the threat and the level of intrusion involved, see *United States v. Hartwell*, 436 F.3d 174 (3d Cir. 2006); *United States v. Skipworth*, 482 F.2d 1272 (5th Cir. 1973), and a finding that the passenger consented to such searches by electing to travel by air, see *United States v. De Angelo*, 584 F.2d 46 (4th Cir. 1978); *United States v. Allman*, 336 F.3d 555 (7th Cir. 2003).