

Court orders TSA to justify year-long defiance of the law

TSA has refused to explain and take public comments on body-scanning policies.

by [Timothy B. Lee](#) - Aug 2 2012, 5:10pm EDT

For over a year, the Transportation Security Administration has ignored a court order requiring it to engage in a formal rule-making process regarding body-scanning machines at airports. On Wednesday, the Court of Appeals for the DC Circuit [granted a request](#) by the Electronic Privacy Information Center to compel the TSA to explain its actions.

Critics of the full-body scanners have questioned whether the machines protect the [health](#) and [privacy](#) of travelers, and whether the machines will [prove effective](#) at stopping terrorists. Ordinarily, those concerns would be raised during the formal rule-making process that federal agencies are required to conduct before they establish new regulations.

The TSA appears to believe these requirements do not apply to them. So in 2010, the Electronic Privacy Information Center [filed a lawsuit](#) challenging the use of the scanners. In July 2011, the DC Circuit agreed with EPIC that the TSA needed to begin a formal rule-making process, as the law requires.

When the one-year anniversary of that order rolled around, the TSA appeared to have completely ignored the court. So EPIC asked the court to compel the TSA to begin the rulemaking process. On Wednesday, the court [ordered the agency](#) to explain its actions by the end of August.

Requiring the TSA to follow the formal rule-making procedure is important, because one of the essential steps in that process is the solicitation of public feedback. American travelers will have the opportunity to voice their concerns about the TSA's policy, and the agency will be required to respond to those concerns. Given that so many of the TSA's policies are shrouded in secrecy, forcing the TSA to explain its policies will be a much-needed source of transparency. And if the rationale for using the machines is as flimsy as some critics charge, perhaps the exercise will cause the agency to re-consider the decision to use them.

In an op-ed for Ars last month, Jim Harper of the Cato Institute (Disclosure: I'm a Cato adjunct scholar) [explained](#) his "[Require the Transportation Security Administration to Follow the Law](#)" petition, which calls on President Obama to order the TSA to comply with the court's order. It now has almost 17,000 signatures. The White House has committed to formally respond to any petition that reaches 25,000 signatures. If you think the TSA should obey the law, you might want to add your signature.

Update: A previous version of this story suggested EPIC was seeking to compel the TSA to explain its actions. Mark Rotenberg of EPIC emailed the following correction:

We are not asking the TSA to explain the delay; EPIC is petitioning the DC Circuit to compel the DHS to begin a rulemaking in 60 days or suspend ("vacate") the program.

The court has this week ordered the DHS to answer our petition. I don't think they want excuses either.

We regret the error.