



TSA sharply curtails ability to opt out of electronic body screening at airports

New TSA guidelines will still allow some people to waive full-body scans while others will be forced to undergo check ‘as warranted by security considerations’

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The Transportation Security Agency has ended a policy that allows any passenger to opt out of an electronic screening, under a new directive issued last week.

In a report issued quietly on 18 December – days before one of the busiest travel periods of the year – the US travel security agency said some passengers will still be allowed to opt out of the full-body electronic screening and go through a physical search instead. But some may now be forced to undergo the electronic screening by airport security.

“Passengers undergoing screening will still have the option to decline an AIT screening in favor of a physical screening,” said TSA spokesman Mike England, in a statement to the Guardian.

“However, some passengers will still be required to undergo AIT screenings as warranted by security considerations in order to safeguard transportation security.”

The screening, called “advanced imaging technology”, permits the agency to identify nonmetallic images and liquids. It’s unclear what will prompt TSA agents to decide which passengers should receive a mandatory electronic screening. According to the report issued earlier this month: “While passengers may generally decline AIT screening in favor of physical screening, TSA may direct mandatory AIT screening for some passengers.”

The TSA does not store any personally identifiable information obtained through the screening, the report stated.

Jim Harper, a senior fellow at the Cato Institute, said the electronic screening achieves the “function of the strip search, without exposing the person to the cold”.

“There’s some tradeoffs,” Harper told the Guardian, “but it’s analogous to a strip search.”

The ramifications of the TSA’s policy shift will be unknown for some time, Harper said, as it will depend on “whatever increment society will tolerate”.

“This is going to be at the discretion of TSA agents,” he said. “If they never use it, nothing ever happens, but it declared more power. They may start to use it – and if people really get mad at them, they’d back off.”

In June, the TSA was sued by the Competitive Enterprise Institute, a Washington DC-based libertarian think tank, asking a court to enforce a 2011 order that required the agency to produce a final rule about the use of AIT scanners. The order stemmed from a lawsuit filed by Electronic Privacy Information Center that sought to halt the use of electronic scanners at airports.

Harper said the agency has been issuing “non-regulatory directives” that command “what’s supposed to happen in airports”.

“This is not the process the government set out for the TSA to use,” he said. “So they’re making it up as they go along.”

The TSA said in the Competitive Enterprise Institute case that it expects to publish a final rule by 3 March, “barring unexpected delays”.

When a final order is enacted, Harper said, that would set the stage for a judicial challenge on the constitutional merits of electronic screenings at the airport.

“We could have it out,” he said. “And we could see whether this increment on the regulation, or the regulation as a whole, was actually a rational regulation. There’s been plenty of evidence out there that the machines don’t work really well; that it’s easy to game the machines.”

He added: “For me, it’s just surprising that this agency, which has already been ordered to adhere to the law is continuing to issue these extra-legal directives.”