



## **Surprise: TSA hasn't held court-ordered public hearings on scanners, junk-touching**

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**by Mary Katharine Ham**

As an occasional-to-frequent flier, I was pretty attuned to the news story in 2010 when the Transportation Security Administration suddenly decided that letting them see naked pictures of you or put their hands in your pants was a prerequisite to flight. I enjoyed the public backlash if for no other reason than it was refreshing to see a bunch of citizens draw a line with the federal government, thereby making other apolitical citizens at least think about what rights they should reasonably give up when walking into a screening line. So often, these things go unremarked upon.

These days, as the backscatter machines become more prevalent, I opt out. It's not so much for any worries about the backscatters, though I don't think they or their operators should be blindly trusted, as it is a desire that the TSA agent involved suffer the slight delay and humiliation that comes with a public feeling up along with me. That, and I've discovered that if you opt out, because you're not technically done with your screening process, the TSA agent intent on groping you has to carry your bags and bins for you to the screening area. It seems like the least they can do, and I like a little valet with my TSA.

Now, it's been more than a year since the uproar over the scanners. At the time, the [Electronic Privacy Information Center went to court](#) demanding that the government be blocked from using the scanners, on constitutional grounds. A federal appeals court rejected the constitutional arguments 3-0, but also said the TSA violated federal law when it implemented new search guidelines without a public comment period and public

hearings. The TSA argued it didn't have to do public comments or hearings because it's reacting to evolving threats. From a *Wired* report on the court's ruling:

Judge Douglas Ginsburg, writing for the majority, said the TSA must allow for the 90-day notice-and-comment period because of the new "substantive obligations" on airline passengers.

"It is clear that by producing an image of the unclothed passenger, an AIT scanner intrudes upon his or her personal privacy in a way a magnetometer does not. Therefore, regardless whether this is a 'new substantive burden,' the change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking, Ginsburg wrote.

"Indeed, few if any regulatory procedures impose directly and significantly upon so many members of the public. Not surprisingly, therefore, much public concern and media coverage have been focused upon issues of privacy, safety, and efficacy, each of which no doubt would have been the subject of many comments had the TSA seen fit to solicit comments upon a proposal to use AIT for primary screening."

[The court ordered the TSA to do a public comment period and hearings "promptly."](#)

A year later, the government has yet to hold those hearings. And the appellate court has twice denied motions from the Electronic Privacy Information Center, which brought the case, to order the TSA to get going.

The TSA did start displaying outlines of passengers instead of the more explicit pictures it was formerly seeing.

A Cato Institute scholar has started a [WhiteHouse.gov](#) petition to get a White House response on TSA's feet-dragging. It takes 25,000 signatures to compel a White House response, according to, well, the White House (for whatever that's worth). [Sign onto it if you'd like to try to make them answer.](#) Though I suspect there's a problematic correlation between those who are suspicious of body scanners and those who do not wish to "create an account" on a White House website.

Now, think back to every TSA outrage you've heard about in the past year— the tiny children terrorized, the elderly women decolostomized— and remember the federal agency's constant refrain: "Trust us. Our consummately professional screeners are just here to keep you safe."

Then, [there's this](#). No comment.

A silly flashback video to my ire of the time: