



Groups round on agency for failing to comply with law for over a year

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Several watchdog groups have joined forces to demand that the TSA comply with a now year old federal appeals court order to conduct a public comment process with regards to its use of so called naked body scanners.

[In July of 2011](#), The D.C. Circuit Court of Appeals ruled that the TSA had violated federal law by rolling out radiation firing body scanners in airports without soliciting public comment. The court noted that it would allow use of the scanners to continue, but that the TSA should "act promptly" to initiate the legally required notice-and-comment rulemaking procedure.

A unanimous three-judge panel ruled that the TSA's failure to provide notice and allow sufficient time for comment before adopting the technology as a primary passenger-screening tool was unlawful.

Specifically, the TSA's actions violated the [Administrative Procedure Act](#), which requires federal agencies to provide notice and opportunity for comment when implementing a rule that affects the rights of the public.

Judge Douglas Ginsburg found there was "no justification for having failed to conduct a notice-and-comment rulemaking," and said, "few if any regulatory procedures impose directly and significantly upon so many members of the public."

The TSA had argued that it "should not have to stop every five minutes for comment and rulemaking", and that it did not have the resources to do so in any case.

The Electronic Privacy Information Center (EPIC), which originally brought the case, has now filed a [mandamus petition](#) with the Court in Washington, DC to demand the beginning of a public comment process.

In the petition, EPIC notes that the agency's delay in acting poses risks to travelers, defies the Court's authority, and is flat out unlawful. EPIC asks the court to require that the TSA receive public comments within 60 days or that it suspend the body scanner program altogether.

EPIC has also [submitted](#) a Freedom of Information Act request to the TSA, in order to ascertain whether the agency has any intention of affording the public the opportunity to comment on the scanners.

EPIC has previously argued in court that body scanners are "invasive, unlawful, and ineffective," and that the TSA's deployment of the devices violated the U.S. Constitution and several other federal statutes. The rights group is pursuing a case to completely suspend use of the scanners in airports.

EPIC has received support for its action against the TSA from [The Competitive Enterprise Institute](#), which issued [a brief](#) that argues that the TSA's claims that it does not have the resources to comply with the public rulemaking process are entirely bogus:

"If the TSA is unable to manage its tremendous budget of nearly \$8 billion in a manner that enables the agency to follow well-established laws, this Court is obligated to exercise its authority to compel the agency to follow duly enacted laws." the brief reads.

"Curiously, the obstacles responsible for the TSA's delayed rule-making here do not appear to have forestalled the agency's aggressive deployment of AIT scanners in airports nationwide." it continues.

"This course of conduct is hardly indicative of an agency so starved for resources that it cannot comply with a straightforward judicial mandate within one year. Moreover, the TSA's purchase of hundreds of new scanners after this Court's July 2011 decision in EPIC suggests the agency intends to continue doing as it pleases without regard to public input or duly enacted laws."

CEI and EPIC have also been joined in their calls by The Electronic Frontier Foundation (EFF) and The Cato Institute.

Jim Harper, the director of information policy studies at the Cato Institute, has issued a petition to the White House on the matter.

"The public deserves to know where the administration stands on freedom to travel, and the rule of law." Harper [notes](#).

"While TSA agents bark orders at American travelers, should the agency itself be allowed to flout one of the highest courts in the land?" Harper adds.

The federal government has invested close to a billion dollars so far into a fleet of 800 scanners, and the TSA has outlined plans to buy nearly 1,000 more in the next two years.

The TSA is continuing to roll out more full body scanners in airports across the country despite the fact that a recent [Congressional report](#) concluded that the agency “is wasting hundreds of millions of taxpayer dollars by inefficiently deploying screening equipment and technology to commercial airports.”

Another recently discovered [Homeland Security report](#) noted that federal investigators have “identified vulnerabilities in the screening process” involving the scanners.

The reports provided a basis for renewed investigation of claims made in March by Engineer Jon Corbett who posted a video of himself demonstrating how the [body scanners can easily be bypassed](#).

The TSA initially responded to the revelations, describing Corbett as “some guy” who had launched a “crude attempt to allegedly show how to circumvent TSA screening procedures.”

The agency failed to even address the fact that Corbett had proven the body scanners could be easily defeated, and then it [threatened journalists not to cover the story](#).

Corbett has continued his efforts to expose flaws in the body scanner program by interviewing TSA whistleblowers who have admitted that the [scanners routinely fail](#) to pick up prohibited items such as knives, guns and powder designed to resemble explosive material. Corbett also recently testified in a congressional hearing on the scanners.

As we have previously noted, [multiple](#) other [security experts](#) have [gone on record](#) saying that the scanners are ineffective.

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