



TSA flouts the law on body scanners

By ROBERT L. CRANDALL AND MARC SCRIBNER

For more than five years, the Transportation Security Administration has been deploying full-body imaging scanners in our nation's airports. About 700 scanners have been deployed in nearly 190 airports nationwide. While the agency keeps installing these devices - which most people agree intrude on our privacy - there are real doubts whether these are actually making anybody safer. Yet because TSA failed to solicit public comments about the scanners - in violation of federal law - the agency is flying blind. In 2010, the Electronic Privacy Information Center sued the Department of Homeland Security, TSA's parent department, to compel TSA to solicit public and expert input. In July 2011, the D.C. Circuit Court of Appeals ordered TSA to "promptly" begin a rulemaking to allow for legally required public comments.

A year later, TSA, has not even begun the process. The law empowers courts to compel agency action when it is "unreasonably delayed." TSA says it does not have the resources to begin this public comment process. But it has a discretionary budget larger than that of the entire federal judiciary and a staff larger than those of the Departments of State, Labor, Energy, Education, and Housing and Urban Development combined. This supposed lack of capacity has not prevented TSA from opening new proceedings on far less important matters, adding many more body scanners at airports nationwide, and launching the new PreCheck program for frequent fliers during the last year. On July 17, EPIC petitioned the court to enforce its mandate. Two days later, the Competitive Enterprise Institute filed an amicus brief supporting EPIC's petition, along with the National Association of Airline Passengers, Electronic Frontier Foundation and six other organizations.

This rulemaking is the only way to determine whether TSA's air travel security regime is worth its huge costs and adverse effects on the public's well-being. Several independent analyses have found that TSA's use of these machines would be economically wasteful even if they worked as well as TSA claims, but may actually make us less safe.

Ohio State University professor John Mueller has done a thorough analysis of U.S. air travel security. He found that even assuming the scanners are capable of detecting body-borne explosives, the likelihood of a terrorist carrying out such an attack is so low that the massive annual cost of deploying and using these machines outweighs any security benefit and could be much better allocated elsewhere.

But TSA's security procedures are not merely ineffective: They may be endangering the public's health and driving consumers to far more hazardous forms of transportation. Medical experts have raised genuine concerns about repeatedly exposing frequent flyers to potentially harmful radiation.

In addition, three Cornell University economists found that the agency's onerous screening rituals have led many people to abandon short-haul flights - New York to Washington, for instance - and take to the road instead.

Yet the agency has still not allowed the public to comment on its most invasive - and unpopular - security measure to date.

This is unacceptable, especially as TSA continues deploying body scanners. According to Rep. John Mica, R-Fla., co-author of the law creating TSA, a classified Government Accountability Office study found that the explosive detection rates are unacceptably low. "If we could reveal the failure rate, the American public would be outraged," Mica said at a March 2011 hearing.

Experience with "puffer" explosive detection machines shows how TSA's exuberance in adopting unproven screening technologies without consulting the public and independent experts can waste time and money, and be unnecessarily intrusive. After spending \$36 million purchasing the devices, TSA found them to be ineffective and removed them. They now sit unused in a Texas warehouse. That was a bargain compared to the \$500 million TSA expects to spend on body scanners. The longer TSA delays in complying with the public comment requirement, the more likely they will continue to set bad security policy.

The court should promptly find in EPIC's favor and require TSA to open a rulemaking on these full-body imaging machines within 60 days. If the court fails to act, TSA will be able to continue to evade judicial review, leaving the public with no meaningful recourse.

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