



Sound Off On TSA Nude Body Scanners!

Federal agency accepting comments on security procedures

By: Bob Unruh – March 28, 2013

Remember Miss USA Susie Castillo being reduced to tears by federal agents inspecting her body to make sure she was not a terrorist? How about the eight-month-old infant patted down physically by a federal agent, also making sure the infant wasn't wielding a weapon?

How about your own experience with the nude body imaging technology or the hands-on patdowns delivered by the federal Transportation Security Administration?

Now's your chance to tell them what you think.

The government has announced an open comment period, available online at www.regulations.gov, for Americans to comment on the rules that guide the TSA in establishing which X-ray machines to use on you, and which passengers to choose for enhanced inspections.

The comment period is being required by a federal court that concluded the agency failed to follow proper rule-making procedures when it jumped forward with the X-ray machines, hands-on patdowns and other security measures.

The issue has brought a strongly negative response from many Americans, including lawmakers in Texas who threatened to put federal TSA inspectors under the analysis of local prosecutors looking for reasons to file assault charges.

At that time, however, U.S. Attorney John E. Murphy asserted that federal agents must be allowed to touch people when and how they want, or the federal government might shut down air traffic in Texas.

Read the TSA's plans.

"The proposed [Texas] legislation would make it unlawful for a federal agent such as a TSO to perform certain specified searches for the purpose of granting access to a publicly accessible building or form of transportation," he told Texans at the time. "That provision would thus criminalize searches that are required under federal regulations in order to ensure the safety of the American public."

Perhaps among the most dramatic expressions of concern came from Castillo, who was reduced to tears by federal agents ensuring she was not a terrorist.

Castillo produced a viral video describing her experience at the Dallas-Fort Worth Airport.

“I mean, she actually... touched my vagina,” Castillo said through her tears. “They’re making me ... choose to either get molested ... or go through this machine that’s completely unhealthy and dangerous. I don’t want to go through it, and here I am crying.”

In a commentary at the Tenth Amendment Center by Connor Boyack with Brian Roberts and Michael Boldin, the organization supported plans to address the traveling public’s concerns.

“Castillo isn’t the only person who would be protected under this Texas legislation. All other innocent travelers would likewise be shielded. That includes the six year old girl who made the headlines last month for being groped by a TSA agent (an action which the TSA defended as being alright since it ‘followed the current standard operating procedures’), as well as the eight-month-old infant subjected to a pat down while cradled in the arms of her mother.”

The comment period, which allows people to tell Washington just what they think of the nude X-rays and intimate pat-downs, is a result of legal action by the Electronic Privacy Information Center, which sued to force the agency to follow the rules.

EPIC noted in its case, “the federal appeals court for the DC Circuit found that the agency unlawfully deployed body scanners in U.S. airports. In a proposed two-sentence change to the agency’s extensive regulations, the TSA seeks to grant itself authority to continue to deploy Nude Body Scanners (‘NBS’) without establishing privacy safeguards. EPIC, which brought the successful challenging to the TSA program, is urging public comment on the agency proposal. EPIC is recommending that the TSA adopt more effective screening procedures. If the TSA continues with Nude Body Scanner program, EPIC said the agency should make clear the right of individuals to opt-out as well as require privacy filters for all devices.”

In its online announcement about the comment period, federal officials said they want to “clarify that the TSA may use advanced imaging technology to screen individuals at security screening checkpoints.”

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They also mounted a strong defense of their actions in imposing the imaging process on the American public. Deploying tens of thousands of agents at costs of billions of dollars, the agency screens "nearly two million passengers each day."

"Effective technology is an essential component of TSA's arsenal of tools to detect and deter threats against our nation's transportation systems," the government explains. It also reveals that no passenger ever is required to submit to nude body imaging, and the alternative is an intimate physical patdown by a TSA officer.

"The image is not an image of the individual passenger, but a generic outline that indicates where the anomaly is detected. ... Once the image is reviewed and any anomalies are resolved, the image is deleted. This process usually takes less than a minute," it explains.

Hundreds of the machines have been installed, although those by one brand name are being removed because of their emissions.

The agency says the nude body imaging machines have found a three-inch pocket knife, packets of powder, a syringe full of liquid and a plastic dagger.

EPIC's information page on the controversy contains a history of the organization's fight for the agency to follow the government's own regulations.

WND has reported multiple times on the dispute, recently when EPII contested TSA's continuing use of the machines.

"Airline passengers who go through the backscatter X-ray devices are still subject to observation, as if they were naked, by TSA officials. Questions about the recording and storage of the unfiltered images ... remain unanswered," the filing said about the TSA program launched in 2010 to install the invasive scanners.

U.S. Justice Department attorneys Mark Stern and John Koppel have argued in the case brought by EPIC and others that the agency has had difficulties to overcome in complying with a court order from a year ago to act promptly.

"TSA has been keenly aware of the importance of implementing the court's directive, and has given high priority to the ... rulemaking," the attorneys said recently. They blamed "personnel losses" in the agency for the time frame and said "almost all of the staff available to conduct the required economic analysis" had been assigned to the project.

“There has been no unreasonable delay in complying with the court’s mandate, much less the type of egregious delay that would warrant exercise of the court’s mandamus powers,” they wrote.

EPIC argued for the agency to meet the requirements of the Administrative Procedures Act. The group said the time had come for the “court to end the agency’s unreasonable delay, and to set a date certain for the agency to issue a proposed rule or, in the alternative, to vacate the rule on which the agency relies.”

Once a rule is final, there are various challenges that are possible, including “judicial review under the APA ... which provides that a court may set aside agency action ... found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” EPIC argued.

EPIC noted the administration decided in April 2009 to use the body scanners and set the decision in motion “without explicit statutory authority and without publishing a proper rule as required.”

The court decision in July 2011 said “the TSA has advanced no justification for having failed to conduct a notice-and-comment rule-making.”

Earlier this summer, the director of information policy studies at the libertarian Cato Institute launched a petition drive to force action.

The petition, which later was taken down by the White House, had sought to “require the Transportation Security Administration to follow the law.”

The security procedures being ramped up by the TSA have made headlines. An agent groped a member of Congress and another patted down a hysterical 4-year-old. Several passengers staged protests by stripping nude for their TSA security check.

A separate challenge to the use of the enhanced procedures also has been beaten back by a federal appeals court, based on a “secret” order from the TSA. It was Judge Henry H. Kennedy Jr. who cited the undisclosed document in rejecting a complaint from passengers and pilots that the TSA invaded their privacy and violated their rights by demanding pat-down inspections or full-body scans.

The government, insisting that the “secret” order contains “sensitive security information,” has refused to make public the document outlining the procedures, according to John Whitehead, president of the Rutherford Institute.

Institute attorneys had argued that since the TSA “order” has remained “secret,” there has been no opportunity for the public to comment on it, and “passengers and pilots are not only being deprived of their Fourth Amendment rights, but also their due process right to a fair hearing on their challenge to the secret TSA policy.”

Whitehead said the ruling is a dark cloud.

“This ruling does not bode well for attempts to ensure transparency in government or efforts to safeguard Americans against virtual strip searches and other excessive groping

of our bodies by government agents, especially when there's no suspicion of wrongdoing," he said.

"When civil liberties are tossed out the window – by government agents or by the courts – we all lose. No American should be forced to undergo a virtual strip search or be subjected to such excessive groping of the body as a matter of course in reporting to work or boarding an airplane when there is no suspicion of wrongdoing," he said.

Former Rep. Ron Paul, R-Texas, had proposed a change in the law that would specify that screeners are "not immune from any U.S. law regarding physical contact with another person, making images of another person, or causing physical harm through the use of radiation-emitting machinery on another person."

"It means they are not above the laws the rest of us must obey," he wrote at the time.

On the state level, Texas fell narrowly short of moving forward with a bill that would have required "probable cause" for agents to act against a passenger. While the plan was under consideration, the federal government threatened to close down air traffic to and from the state.

The lawsuit that prompted the comment period came after EPIC sued in the District of Columbia Circuit Court of Appeals to challenge the TSA's unilateral decision to make body scanners the primary screening technique in U.S. airports.

Three frequent air travelers joined EPIC in the lawsuit. The petitioners brought claims under the Administrative Procedure Act, the Privacy Act, the Video Voyeurism Prevention Act, the Religious Freedom Restoration Act, and the Fourth Amendment.