



## **FEDS ANYTHING BUT TRANSPARENT ON 'NUDE SCANNERS'**

*By blocking public comment, TSA's invasive searches shielded from judicial review*

Bob Unruh | August 31, 2012

---

More than three years after installation of the infamous nude-image body scanners at U.S. airports, the federal government still has not instituted the required period of public comment, but Obama administration attorneys contend there's been no unreasonable delay.

The argument comes from [U.S. Justice Department attorneys Mark Stern and John Koppel in a brief opposing a request to start the rule-making process immediately.](#)

Privacy and health advocates have raised numerous concerns about the full-body scanners, which the Transportation Safety Administration began to widely implement in 2010.

In a case brought by the Electronic Privacy Information Center and dozens of other groups, the U.S. Court of Appeals in Washington ruled that while the screening would be allowed to go ahead, the Department of Homeland Security “failed to conduct notice-and-comment rulemaking” as required.

At the time, the court said, “Few if any regulatory procedures impose directly and significantly on so many members of the public.” The court ordered the government to “act promptly” on the routine process.

According to EPIC, a year has passed since that order for “prompt” action – and some two and a half years since the machines were first installed in the U.S. [The group went to court asking for a mandate for immediate action.](#)

Administration lawyers, however, responded that they now expect the process will be handled “by or before the end of February 2013.”

“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.

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 addressed the requirements of the Administrative Procedures Act and 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 the rule is issued, 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 rulemaking.” EPIC said the court right now should “remove the [scanner] program from this ‘administrative limbo.’”

“In the three years since EPIC’s original petition to the agency for a rulemaking so that independent experts might express their views on the agency program, scientific evidence strongly suggests that WBI machines pose health risks to travelers,” the EPIC court filing continued.

And at the same time, members of Congress have determined the machines are “ineffective,” it wrote.

The delays are especially egregious because they “shield” the agency actions from judicial review under the APA, EPIC said.

Administration attorneys contended, however, “There has been no ‘waiting’ and no ‘delay.’ Petitioner’s repeated mandamus petitions reflect a fundamental misunderstanding of the nature of notice-and-comment rulemaking and the time and resources required to develop a proposed rule.”

Not so, challenged EPIC.

“The WBI program was first implemented more than three years ago, yet the secretary has not issued any notice of the rule or accepted public comments. This court made clear ... that it may order the secretary to take action in response to its order within a date certain, or else set aside the unlawful action.”

Just weeks ago, 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 in recent months. 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.

The fight over the invasive TSA procedures has been raging for several years. The government agency has implemented “enhanced” security screenings that present two options: an X-ray that is a virtual strip search of a passenger and a pat-down that critics have likened to sexual assault in public.

Rep. Ron Paul, R-Texas, [earlier 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.

U.S. Attorney John E. Murphy asserted that federal agents must be allowed to touch people when and how they want.

“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 Miss USA Susie 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.”