



TSA Fails to Comply With Year-Old ‘Nude’ Body-Scanner Court Order

By [David Kravets](#) | July 16, 2012 | 3:13 pm

It’s been a year following a federal appeals court decision setting aside a constitutional challenge trying to stop the government from using intrusive body scanners across U.S. airports.

But the U.S. Court of Appeals for the District of Columbia Circuit’s decision on July 15, 2011, also ordered the Transportation Security Administration “[to act promptly](#)” and hold public hearings and publicly adopt rules and regulations about the scanners’ use, which it has not done.

The three-judge appellate court, which is one stop from the Supreme Court, said that the Transportation Security Administration breached federal law in 2009 when it formally adopted the Advanced Imaging Technology (AIT) scanners as the “primary” method of screening. The judges — while allowing the scanners to be used — said the TSA violated the Administrative Procedures Act for failing to have a 90-day public comment period, and ordered the agency to undertake one.

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.

[Jim Harper](#), the director of information policy studies at the Cato Institute, has started a [White House petition](#) to force the TSA to promptly follow the law. By government policy, if the petition gets 25,000 signatures, the President Barack Obama administration is obligated to publicly respond. The petition is halfway there.

“The public deserves to know where the administration stands on freedom to travel, and the rule of law. While TSA agents bark orders at American travelers, should the agency itself be allowed to flout one of the highest courts in the land? If the petition gets enough signatures, we’ll find out,” Harper [said](#).

The TSA has told the court in documents that it is “committed to significantly expediting the AIT rulemaking process and has placed this proposed rule [among its highest priorities](#),” (.pdf) and that it has already gotten the ball rolling internally.

Lorie Dankers, a TSA spokeswoman, said in an e-mail that the announcement of the public comment process “will be published in the Federal Register next year.”

To be sure, even if the TSA complied with the court’s order, we doubt that the government would abandon the scanners’ use.

But, then again, complying would bring the issue front and center, and perhaps the TSA might begin altering course and decide the scanners aren’t [effective](#), [safe](#) or that they breach the privacy rights of passengers. Consider that, after the court’s decision, the TSA began moving toward displaying to screener technicians broad, [generic outlines of passengers](#) instead of taking virtual nude shots.

Under the Administrative Procedures Act, agency decisions like the TSA’s move toward body scanners must go through what is often termed a “notice and comment” period if their new rules would substantially affect the rights of the public — in this case, air passengers. The Environmental Protection Agency often undertakes “notice and comment” periods for proposed pollution regulations.

But the court did not penalize the TSA for its shortcomings. The TSA argued to the court in March that a public comment period would thwart the government’s ability to respond to “ever-evolving threats.”

Judge Douglas Ginsburg, writing for the majority last year, said the TSA must allow for the 90-day notice-and-comment period because of the new “substantive obligations” on airline passengers, which include intrusive pat-downs on passengers who refuse to go through the scanners.

“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 of 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](#). (.pdf)

“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.”