

January 13, 2016

Representative Jason Chaffetz, Chairman
Representative Elijah Cummings, Ranking Member
U.S. House of Representatives Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

RE: TSA Unlawful Screening of Airline Passengers

Dear Chairman Chaffetz and Ranking Member Cummings:

We are writing to you regarding the TSA's recent claim that it can mandate whole body scanning for airline passengers.¹ We also write regarding the agency's continued refusal to issue a final rule, setting out its legal authority to conduct airport screening.²

We are representative of leading civil liberties, human rights, and non-profit organizations, across the political spectrum. Many of us previously petitioned the DHS Secretary to conduct a public rulemaking on the use of airport body scanners after the agency *sua sponte* decided to make a pilot project into a national program of electronically strip searching airline travelers.³ That petition provided the basis for the lawsuit, *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011), in which a federal appeals court held that the TSA had failed to conduct a public rulemaking as required by the Administrative Procedure Act.

The D.C. Circuit, relying on the government's representation,⁴ also concluded that there was no Fourth Amendment violation, because as Judge Ginsburg explained for the court, "any passenger may opt-out of AIT screening in favor of a patdown, which allows him to decide which of the two options for detecting a concealed, nonmetallic weapon or explosive is least invasive."⁵

The Court ordered the agency to "act promptly" to conduct a public rulemaking.⁶ But the TSA has still not issued a final rule more than four years after the D.C. Circuit's ruling. Now,

¹ U.S. Dep't of Homeland Sec., DHS/TSA/PIA-032(d), TSA Advanced Imaging Technology (Dec. 18, 2015), *available at* <https://www.dhs.gov/sites/default/files/publications/privacy-tsa-pia-32-d-ait.pdf>.

² *See* Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287 (proposed Mar. 26, 2013).

³ Petition to DHS Secretary Janet Napolitano and Chief Privacy Officer Mary Ellen Callahan (Apr. 21, 2010), https://epic.org/privacy/airtravel/backscatter/petition_042110.pdf.

⁴ Brief for Respondents DHS *et al.* at 4 ("At all times, TSA's policy has presented AIT as an optional screening procedure, from which passengers may opt out in favor of a physical pat-down.").

⁵ *EPIC v. DHS*, 653 F.3d 1, 10 (D.C. Cir. 2011).

⁶ *Id.* at 8.

incredibly, the agency is claiming new authority to require travelers to undergo whole body screening in blatant disregard of the opinion of the federal appellate court.⁷

We urge you to convene a hearing as soon possible to assess the agency's conduct. Already travelers within the United States are being subject to unlawful searches.⁸ This hearing is especially important because TSA orders are not currently subject to judicial review as are other government actions.⁹

We also ask you to:

- Suspend funding for whole body scanners until the public rulemaking has been completed;
- Require the TSA to publish all de facto regulations including § 46110 orders;
- Require the TSA to evaluate the cost (including lost time to passengers) of screening procedures using whole body scanners; and
- Amend § 46110 to ensure that TSA orders are subject to judicial review as are other government actions.¹⁰

Thank you for your consideration of our views. We would be pleased to work with you and your staff to help safeguard the privacy rights of travelers.

Sincerely,

American-Arab Anti-Discrimination Committee (ADC)

American Civil Liberties Union

Bill of Rights Defense Committee/Defending Dissent Foundation

Center for Digital Democracy

⁷ Christopher Elliot, "What the TSA's new body-scanner rules mean for you," Washington Post, Dec. 30, 2015, https://www.washingtonpost.com/lifestyle/travel/what-the-tsas-new-body-scanner-rules-mean-for-you/2015/12/30/f739e922-a4f5-11e5-9c4e-be37f66848bb_story.html

⁸ *Sai v. Neffenger*, No. 15-2356 (1st Cir. filed Nov. 12, 2015). See <http://s.ai/tsa/legal/46110/>.

⁹ See 49 U.S.C. § 46110 (originally enacted in the Federal Aviation Act of 1958, Pub. L. 85-726, 72 Stat. 731, 795) (specifying that a person "with a substantial interest in an order issued by the Secretary of Transportation," including TSA orders, "may apply for review of the order by filing a petition for review" in a U.S. Court of Appeals). See also Shaina N. Elias, *Challenges to Inclusion on the "No-Fly List" Should Fly in District Court: Considering the Jurisdictional Implications of Administrative Agency Structure*, 77 Geo. Wash. L. Rev. 1015 (2009).

¹⁰ § 46110 should be amended to allow litigation in district court.

Center for Financial Privacy and Human Rights
Competitive Enterprise Institute
Constitutional Alliance
Consumer Action
Consumer Federation of America
Consumer Watchdog
Council on American-Islamic Relations (CAIR)
Cyber Privacy Project
DownsizeDC.org, Inc.
Electronic Frontier Foundation
Electronic Privacy Information Center
Liberty Coalition
Liberty Guard
National Center for Transgender Equality
National Security Counselors
National Workrights Institute
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