

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE ELECTRONIC PRIVACY INFORMATION CENTER,
Petitioner

**PETITION FOR A WRIT OF MANDAMUS
TO ENFORCE THIS COURT'S MANDATE**

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July 17, 2012

* Mr. Butler has applied for admission to the District of Columbia bar, which is pending. He is a member in good standing of the California Bar.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Petitioner certifies as follows:

A. Parties and Amici

The Electronic Privacy Information Center (“EPIC”), along with 29 other privacy, consumer rights, and civil rights organizations, filed a 553(e) petition with the Department of Homeland Security (“DHS”) on April 21, 2010; EPIC is the Petitioner in this Court. The Secretary of the Department of Homeland Security, Janet Napolitano, is the Respondent. The Competitive Enterprise Institute (“CEI”) has indicated to Petitioner that it intends to file an *amicus curiae* brief, on behalf of several organizations, in support of Petitioner with this Court this week.

B. Rulings Under Review

Petitioner seeks a writ of mandamus to order the Secretary of the DHS to issue a proposed rule and receive public comments regarding the Transportation Security Administration’s use of Whole Body Imaging (“WBI”) technology for primary screening at US airports, as per this Court’s prior order in *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. July 15, 2011). In the alternative, Petitioner asks the Court to vacate the agency rule under which it maintains the WBI program until the agency is in compliance with the requirements of the APA. Before the Department of

Homeland Security, the proceeding is styled “Petition for Suspension of TSA Full Body Scanner Program” pursuant to 5 U.S.C. § 553(e).

C. Related Cases

This petition for writ of mandamus follows from EPIC’s previous action in this Court, in which the Court found that the agency failed to undertake notice-and-comment rulemaking as required by law and ordered the agency “promptly to proceed” to cure this defect upon remand. *See EPIC v. DHS*, 653 F.3d at 11.

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CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Petitioner Electronic Privacy Information Center makes the following disclosure:

EPIC is a District of Columbia corporation with no parent corporation, and there is no publicly held company with a 10% or greater ownership interest in EPIC.

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SUMMARY

On July 15, 2011, this Court held that the Department of Homeland Security “failed to conduct notice-and-comment rulemaking” when the agency chose to deploy Whole Body Imaging (“WBI”) devices as the primary screening technique at U.S. airports. In doing so, the Court observed that “few if any regulatory procedures impose directly and significantly on so many members of the public.” *EPIC v. DHS*, 653 F.3d 1, 6 (D.C. Cir. 2011). The Court declined to vacate the rule because that “would severely disrupt an essential security operation,” but the Court made clear that “we do nonetheless expect the agency to act promptly on remand to cure the defect in its promulgation.” *Id.*

One year has passed since this Court’s order, and almost two and a half years since EPIC and a broad coalition of organizations petitioned the Secretary for a rule following the agency’s decision to substitute “body scanners” as the primary screening technique in U.S. airports. During this time, radiation experts, Members of Congress, travel associations, experts in travel security, and many members of the public have expressed their opposition to the agency program. Only a handful of countries in the world have adopted this technology for airport screening.

This Court has recently granted a Writ of Mandamus where an agency, subject to remand, failed to make a timely determination as required by the Court. *In re People's Mojahedin Org. of Iran*, 680 F.3d 832 (D.C. Cir. 2012) (hereinafter

PMOI). The Secretary in *PMOI* had “not merely failed to . . . respond to the petitioner,” she had failed to respond to this Court’s remand mandate. *Id.* at 838. The practical consequence was to remove the agency’s conduct from review. “[T]he delay has the effect of nullifying [the Court’s] decision while at the same time preventing [Petitioner] from seeking judicial review.” *Id.*

The time has 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.

JURISDICTION

This Court may issue writs of mandamus pursuant to 28 U.S.C. § 1651. It has jurisdiction to issue a writ in this case because this Court has exclusive jurisdiction to review orders “with respect to [the TSA’s] security duties and powers.” 49 U.S.C. § 46110(a). The Circuit courts have “exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the [TSA] to conduct further proceedings.” 49 U.S.C. § 46110(c); *Tooley v. Napolitano*, 556 F.3d 836, 840-41 (D.C. Cir. 2009). This Court also has mandamus authority to effectuate its prior rulings. *See PMOI*, 680 F.3d at 837; *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026 (D.C. Cir. 1983).

BACKGROUND

A. Statutory Background

Under the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq*, the agency is required to publish notice of a proposed rule in the Federal Register and to solicit and consider public comments upon its proposal. *See* 5 U.S.C. § 553(b) and (c); *EPIC*, 653 F.3d at 5. The required publication “shall be made not less than 30 days before” the effective date of the substantive rule. 5 U.S.C. § 553(d). After conducting notice-and-comment rulemaking, the agency is required to “adopt a concise general statement of [the] basis and purpose” of their final rule. 5 U.S.C. § 553(c). Once the agency rule becomes final, it is subject to judicial review under the APA, 5 U.S.C. §§ 701-706, which provides that a court may “set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ...” 5 U.S.C. § 706(2).

B. EPIC’s Petition for a Rulemaking

In April 2009, the Secretary made a determination that Whole Body Imaging (“WBI”) would be used for primary screening at US airports. The action was undertaken without explicit statutory authority and without publishing a proposed rule as required by 5 U.S.C. § 553(b).

In May 2009, Petitioner EPIC and more than 30 organizations sent a letter to the Secretary in which they objected to the use of WBI as a primary means of screening passengers and requested a public rulemaking. *See* EPIC Letter; App. 38.

On June 19, 2009 the Secretary responded with a letter to the organizations, but ignored the request for a rulemaking. *See* 2009 TSA Letter; App. 41.

On April 21, 2010, EPIC and 29 other privacy, consumer protection, and civil liberties organizations sent a formal petition to the Secretary, pursuant to 5 U.S.C. § 553(e), requesting suspension of the WBI program pending a public rulemaking. The Petition stated:

Although the TSA failed to conduct a formal rulemaking, it is clear that the TSA has established a rule mandating the use of body scanners at airport checkpoints as primary screening. EPIC petitions the TSA to repeal that rule, and suspend the Full Body Scanner program.

EPIC Petition at 1; App. 43. On May 28, 2010, the Secretary responded, but again refused to initiate a rulemaking. *See* 2010 TSA Letter; App. 52.

On July 15, 2011, this Court held that “the TSA has advanced no justification for having failed to conduct a notice-and-comment rulemaking.” *EPIC*, 653 F.3d at 8. The Court remanded the rule to the Secretary with instructions “promptly to proceed in a manner consistent with [the Court’s] opinion.” *Id.* at 12.

C. Proceedings Following Remand

Because of the urgency of this matter and the broad impact of the agency’s conduct on American air travelers, EPIC has filed two motions to enforce this Court’s order since on the judgment on July 15, 2011. EPIC filed the First Motion

to Enforce the Court's Mandate on October 28, 2011 and the Second Motion to Enforce on December 23, 2012. The Court ruled against EPIC in both instances, but a year has now passed since the Court's original Order, and the agency continues to ignore this Court's Order.

In the past year, the agency has proceeded with many regulatory actions, but it has not issued any public notice of a proposed rule or schedule to release a proposed rule regarding the WBI program, nor has it indicated that it intends to. On February 13, 2012, the agency published the "Unified Agenda of Federal Regulatory and Deregulatory Actions" pursuant to the Regulatory Flexibility Act, 5 U.S.C § 602. *See* Department of Homeland Security, Semiannual Regulatory Agenda, 77 Fed. Reg. 7960 (Feb. 13, 2012). This agenda included descriptions and details of more than 15 scheduled agency matters, but no mention of a schedule for the preliminary rule related to the WBI program. *Id.*

ARGUMENT

This Court should issue a writ of mandamus directing the Secretary of the DHS to publish a proposed rule and accept public comments within 60 days or, in the alternative, to vacate the agency's rule which has allowed it to deploy airport body scanners for more than two years without complying with the requirements of the APA. Congress has explicitly directed agencies to publish a substantive rule "not less than 30 days before its effective date." 5 U.S.C. § 553(d). This Court held

that the agency's deployment of WBI technology as the primary screening technique in U.S. airports, which the Court determined began in the spring of 2010, constituted such a rule. The Court remanded to the agency with the explicit order to "act promptly." One year later the agency has not published a rule or accepted public comment, actions necessary to make a final, reviewable agency decision. This Court should act to remove the WBI program from this "administrative limbo." *PMOI*, 680 F.3d at 837 (D.C. Cir. 2012).

**I. THE AGENCY'S FAILURE TO EFFECT THIS COURT'S MANDATE
POSES RISKS TO TRAVELER SAFETY AND FRUSTRATES THE
INTENT OF CONGRESS AND THE WILL OF THIS COURT**

This Court's consideration of a mandamus petition "starts from the premise that issuance of the writ is an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act." *PMOI*, 680 F.3d at 836 (citing *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008)). "It is, of course, undisputed that the Secretary has a 'clear duty' to respond to this Court's remand." *Id.* In the case of a mandamus petition based on agency inaction, this Court must consider whether "the agency has unreasonably delayed the contemplated action." *Id.* This Court will analyze a claim of unreasonable agency delay under the 'hexagonal' standard outlined in *Telecomms. Research & Action Ctr. v. FCC*, 750 F.3d 70, 79 (D.C. Cir. 1984) (*TRAC*):

- (1) The time agencies take to make decisions must be governed by a rule of reason;
- (2) where Congress has provided a timetable or other

indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’

In re United Mine Workers of Am. Int’l Union, 190 F.3d 545, 549 (D.C. Cir. 1999) (quoting *TRAC*, 750 F.2d at 80) (quotation marks omitted). See *PMOI*, 680 F.3d at 836-37. In each case, the Court must consider “whether the agency’s delay is so egregious as to warrant mandamus.” *Id.* at 837 (citing *Core Commc’ns*, 531 F.3d at 855). Specifically, in *PMOI*, this Court found it “decisive” that the Secretary “failed to heed [this Court’s] remand.” *Id.* at 837.

This Court has issued numerous writs of mandamus compelling agency action under these factors. See, e.g., *PMOI*, 680 F.3d 832, 838 (D.C. Cir. 2012) (Secretary of State Foreign Terrorist Organization designation); *In re Core Commc’ns, Inc.*, 531 F.3d 849, 861-62 (D.C. Cir. 2008) (FCC exclusion of ISP from reciprocal compensation under Telecommunications Act); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 414 (D.C. Cir. 2004) (formal consultation with FERC under ESA regarding the effect of hydropower operations on fish species); *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (Coast Guard regulations required by the Oil Pollution Act); *Radio-Television News Directors*

Ass'n v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000) (vacating inappropriate FCC rules); *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (deadline for OSHA rulemaking on cadmium exposure standards).

The *TRAC* factors compel mandamus here, as the Secretary's unreasonable delay fails to heed this Court's remand order to "act promptly," circumvents the rulemaking deadline established by Congress, imposes significant health risks on millions of travelers, and evades judicial review in defiance of the Administrative Procedures Act.

A. The Secretary's Failure to Issue a Rule Violates This Court's Clear Order to "Act Promptly"

This Court ordered the agency to "act promptly" to cure the defects in the promulgation of its WBI rule. *EPIC*, 653 F.3d at 11. The Court's Order did not define what it means to "act promptly," nor do the federal rules or other cases within this Circuit. However, this Court routinely enforces APA obligations by "compel[ling] agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). At a minimum, the Court's July 15, 2011 Opinion requires the agency to conduct notice-and-comment rulemaking without "unreasonable delay." The agency has failed to do so. This Court recently found that a twenty-month delay was unacceptable and ordered the agency to comply with the Court's order within four months. *PMOI*, 680 F.3d at 838. In this matter, it has been more than three years since the change in agency practice that gave rise to the EPIC Petition.

EPIC, 653 F.3d at 4. (“In May 2009 more than 30 organizations, including the petitioner EPIC, sent a letter to the Secretary of Homeland Security, in which they objected to the use of AIT as a primary means of screening passengers.”).

This Circuit’s inquiry into what constitutes “unreasonable delay” under the APA turns on the facts of each case. “There is no *per se* rule as to how long is too long to wait for agency action.” *In re Core*, 531 F.3d at 855 (citing *In re Am. Rivers*, 372 F.3d at 419).

That issue cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part, as we have said, upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency.

Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1102 (D.C. Cir. 2003).

In *Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984) (*TRAC*), this Circuit “outline[d] six factors relevant to the analysis.” *Id.* at 80. “Those factors are not ironclad, but rather are intended to provide useful guidance in assessing claims of agency delay.” *In re Core*, 531 F.3d at 855 (internal quotations omitted). The court may find that an agency has unreasonably delayed action even in the absence of bad faith. *Id.* (noting “the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.”).

The “most important” factor requires that “the time agencies take to make decisions must be governed by a ‘rule of reason.’” *Id.* Reason dictates that when, as here, an agency fails to respond to the Court’s remand, the agency “has effectively nullified [the Court’s] determination.” *Id.* at 856. Such failure to act is particularly unreasonable when the court held the agency rules unlawful but remanded the matter “without vacatur le[aving] those rules in place.” *Id.* Further, this Circuit has recognized the “Court’s own interest in seeing that its mandate is honored.” *Id.* at 860.

It has been a year now since the Court issued its opinion instructing the agency to “promptly” undertake its rulemaking and “[a] reasonable time for agency action is typically counted in weeks or months, not years.” *In re Am. Rivers*, 372 F.3d at 419 (quoting *Int'l Chem. Workers Union*, 958 F.2d at 1149). In *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000), this Circuit held a nine-month agency delay to be unreasonable. *Id.* at 272 (stating “if these circumstances do not constitute agency action unreasonably delayed, it is difficult to imagine circumstances that would”). In *Antone v. Block*, 661 F.2d 230 (D.C. Cir. 1981), this Circuit noted a ten-month delay can be unreasonable. *Id.* at 234.

In *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535 (S.D.N.Y. 2009), the District Court held that the DHS’s two-and-a-half year delay on a

§553(e) petition was unreasonable as a matter of law. *Id.* at 541. The court stressed that, “given the gravity of problems” outlined in the petition, it was “unreasonable for DHS to take years to decide whether it intends to commence rulemaking,” and it ordered the DHS to make a decision within 30 days. *Id.*

Petitioner in this case has also waited nearly two-and-a-half years since the filing of a formal §553(e) petition with the DHS. And the impact and scope of the agency’s conduct in this matter is at least as significant as it was in *Families for Freedom*.

The agency improperly initiated the WBI program more than three years ago, and ought to have embarked on the notice and comment rulemaking at least 30 days prior to that implementation. *See* 5 U.S.C. § 553(d). One year after this Court ordered the agency to begin the rulemaking required by law, the agency has still failed to publish a rule. This inaction is a clear failure on the part of the agency to “heed [this Court’s] remand.” *PMOI*, 680 F.3d at 837. Mandamus is especially appropriate in a case such as this one where the agency’s delay involves a failure to respond to this Court’s own order remanding the case for further proceedings. *In re Core*, 531 F.3d at 856.

B. The Secretary’s Failure to Review the WBI Program Imposes Significant Health Risks and Prevents Much-Needed Public Comment for an Ineffective Program

An important consideration for mandamus relief is “the nature and extent of the interests prejudiced by delay.” *TRAC*, 750 F.2d at 80. It is especially important when “health and human welfare are at stake.” *Id.* These factors favor granting mandamus relief here, where delay in conducting public rulemaking allows WBI health risks to go unresolved and frustrates the opportunity for the agency to receive independent, expert opinion.

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. In 2010, top radiation experts expressed their concern about the airport screening program in a letter to Dr. John P. Holdren, the Assistant to the President for Science and Technology. Drs. John Sedat, David Agard, Marc Shuman, & Robert Stroud, *Letter of Concern to Dr. John P. Holdren, Assistant to the President for Science and Technology*, April 6, 2010. The experts called for further evaluation of the WBI technology, and identified several groups of people particularly endangered by the radiation produced by backscatter scanners. *Id.* at 2 (citing heightened risks to “older travelers,” a portion of female travelers who are “especially sensitive to mutagenesis-provoking radiation leading to breast cancer,” “HIV and cancer patients,” “children and adolescents,” and “pregnant women.”).¹

¹ Available at <http://www.npr.org/assets/news/2010/05/17/concern.pdf>.

As Dr. Agard and the other experts explained, the true extent of the risk “can only be determined by a meeting of an impartial panel of experts that would include medical physicists and radiation biologists at which all of the available relevant data is reviewed.” *Id.*

Columbia Professor Dr. David Brenner has stated that the dose of radiation delivered by WBI machines would be particularly risky for children and members of the population with a genetically higher sensitivity to radiation. David Brenner, *Congressional Biomedical Research Caucus: Airport Screening: The Science and Risks of Backscatter Imaging* (Coalition for the Life Sciences 2010).² Experts have also reported that body scanners may emit up to twenty times the reported amount of radiation. *Id.*

The Inter-Agency Committee on Radiation Safety said, “pregnant women and children should not be subject to scanning.” Jonathan Tirone, *Airport Body Scanning Raises Radiation Exposure, Committee Says*, Bloomberg, Feb. 5, 2011.³ The report of the European Commission called for a similar exception for pregnant women and children, stating “[s]pecial considerations might also be called for when it comes to passengers that are especially sensitive to ionizing radiation, primarily pregnant women and children.” Comm’n to the European Parliament,

² Available at <http://blip.tv/file/3379880>.

³ Available at <http://www.bloomberg.com/apps/news?pid=20601209&sid=aoG.YbbvnkzU>

Communication on the Use of Security Scanners at EU Airports 16 (June 15, 2010).⁴

These radiation risks underscore the importance of public notice-and-comment rulemaking. Still, the agency has yet to allow a proper independent assessment of the radiation risks presented by the machines. Mike Ahlers, *Airport Body Scanners: Are They Safe?*, CNN (June 11, 2012).⁵

Additionally, given the mounting evidence that the WBI machines are ineffective, the public should be given the opportunity to weigh the costs and benefit of the WBI machines in comments to the agency. The TSA's own Procurement Specifications indicate that the WBI machines were not designed to detect powdered explosives, a primary justification for the program.⁶ Subsequent studies by both the GAO and independent experts confirmed this significant design weakness.⁷ And a report from the DHS Inspector General, published after the filing of EPIC's Second Motion to Enforce the Court's Mandate, found several

⁴ Available at http://ec.europa.eu/transport/air/security/doc/com2010_311_security_scanners_en.pdf.

⁵ http://articles.cnn.com/2012-06-11/travel/travel_airport-scanners_1_medical-physics-research-taly-gilat-schmidt-backscatter?_s=PM:TRAVEL.

⁶ Available at: http://epic.org/open_gov/foia/TSA_Procurement_Specs.pdf.

⁷ Spencer Hsu, *GAO Says Airport Body Scanners May Not Have Thwarted Christmas Day Bombing*, Washington Post, March 18, 2010, available at www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031700649.html; Alan Levin, *Study: Body Scanners Effectiveness Limited*, USA Today, Dec. 28, 2010, available at http://travel.usatoday.com/flights/2010-12-27-bodyscan27_ST_N.htm.

vulnerabilities in the program.⁸ As a result, the DHS Inspector General’s Office made eight recommendations to TSA.

This spring, leading Members of Congress, responsible for assessing aviation security techniques, also found the WBI machines to be “ineffective.” Susan Stellin, *Plot Raises Questions About Airport Security*, N.Y. Times, May 14, 2012, at B8.⁹ In May 2012, Members of the House Transportation and Infrastructure Committee and the Oversight and Government Reform Committee sharply criticized the agency for spending hundreds of millions of dollars on technology that they said had not been properly tested. *TSA Oversight Part IV: Is TSA Effectively Procuring, Deploying, and Storing Aviation Security Equipment and Technology? Joint Hearing Before the H. Comm. on Oversight and Government Reform and the Comm. on Transportation and Infrastructure*, 112th Cong., May 9, 2012.¹⁰ A report released by the two committees that day called the WBI machines “ineffective.” Staff of the House Transp. and Infrastructure Comm.

⁸ Gov’t Accountability Office, *TSA Penetration Testing of Advanced Imaging Technology* (Nov. 2011), available at: http://www.oig.dhs.gov/assets/Mgmt/OIG_SLR_12-06_Nov11.pdf; David Kravets, *Homeland Security Concedes Airport Body Scanner ‘Vulnerabilities’*, Wired – Threat Level (May 7, 2012), available at: <http://www.wired.com/threatlevel/2012/05/body-scanner-vulnerabilities/>.

⁹ Available at <http://www.nytimes.com/2012/05/15/business/plot-raises-questions-about-airport-security.html>.

¹⁰ Available at <http://oversight.house.gov/hearing/tsa-oversight-part-iv-is-tsa-effectively-procuring-deploying-and-storing-aviation-security-equipment-and-technology/>

and the Oversight and Gov't Reform Comm., Joint Majority Staff Report, 112th Congress, *Airport Insecurity: The TSA's Failure to Effectively Procure, Deploy and Warehouse Its Screening Technologies*, May 9, 2012.¹¹ Members of Congress who are privy to classified reports about the machines, including one issued in January by the Government Accountability Office, have expressed strong disappointment about the effectiveness of the machines. Susan Stellan, *Plot Raises Questions About Airport Security*, N.Y. Times, May 14, 2012, at B8. Representative John L. Mica, chairman of the House Transportation Committee, said in an interview that he had been briefed on the latest scanner tests and found the results so disappointing that he had asked the Appropriations Committee not to approve future purchases of the machines. *Id.* "Unfortunately, the performance hasn't improved," he said. "It's at such a poor level we need dramatic changes in the whole program." *Id.*

C. The Secretary's Inaction Defies the APA Statutory Deadlines and Prevents Judicial Review

Here the agency's delay is particularly unreasonable because it shields the agency's actions from judicial review under the APA. As with other substantive rules, the final agency determination regarding the WBI program will be subject to APA review, and can be set aside if a court finds it to be "arbitrary, capricious, an

¹¹ Available at <http://oversight.house.gov/wp-content/uploads/2012/05/5-9-2012-Joint-TSA-Staff-Report-FINAL.pdf>.

abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(a). However, the APA only provides for review of “final agency action,” 5 U.S.C. § 704, and this Court has made clear that “[t]he interest in postponing review is powerful when the agency position is tentative.” *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Comm’n*, 324 F.3d 726, 732 (D.C. Cir. 2003). Because the agency has not yet conducted a rulemaking process or published its rule regarding the WBI program, it has provided no basis for judicial review. By avoiding a final rule, the agency has effectively ‘maintained’ the current WBI program while precluding interested groups such as EPIC from seeking judicial review. This Court recently provided mandamus relief for similar agency inaction in *PMOI*. See 680 F.3d at 837.

The agency’s delay in issuing a rule and accepting public comment regarding the WBI program is also unreasonable because it frustrates the statutory deadlines set out by Congress in the APA. The “time agencies take to make decisions must be governed by a rule of reason.” *TRAC*, 750 F.2d at 80. Where Congress has “provided a timetable or other indication of the speed with which it expects the agency to proceed in enabling the statute,” that statute “may supply content for this rule of reason.” *Id.* The strict timetable provided by the APA “manifests Congress’s intent that the Secretary act promptly” similar to the deadline this Court reviewed in *PMOI*. See 680 F.3d at 837. In light of the

importance of APA procedures and the “relative brevity” of the 553(b) deadline, the Secretary’s twelve-month failure to act “plainly frustrates the congressional intent and cuts strongly in favor of granting [the] mandamus petition.” *Id.*

The agency’s delay in this case is also unreasonable because it inhibits much needed public comment on the WBI program. This Court routinely affirms the important purpose of the APA’s public comment requirement. *See, e.g., Connecticut Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530 (D.C. Cir. 1982) (“The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process.”). This Court has made clear that “[n]otice of the agency’s intention is crucial to ‘ensure that agency regulations are tested via exposure to diverse public comment, ... to ensure fairness to affected parties, and ... to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.’” *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 95 (D.C. Cir. 2010). Such notice is typically provided by the agency when it publishes a notice of proposed rule as required by law. *See* 5 U.S.C. § 553(b).

II. THIS COURT SHOULD SET A DATE CERTAIN FOR THE AGENCY TO UNDERTAKE A NOTICE AND COMMENT RULEMAKING

This Court has already recognized the importance of notice-and-comment rulemaking for the agency's WBI program as "few if any regulatory procedures impose directly and significantly upon so many members of the public." *EPIC*, 653 F.3d at 6. According to this Court, "the TSA's use of AIT for primary screening has the hallmark of a substantive rule and, therefore, unless the rule comes within some other exception, it should have been the subject of notice and comment." *Id.* This Court made clear that the WBI program does not fall within any of the exceptions sought by the agency. *See EPIC*, 653 F.3d at 6-8. Under the APA, notice should have been provided 30 days before the substantive rule was implemented. 5 U.S.C. § 553(d). 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 in *PMOI* 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. *See PMOI*, 680 F.3d at 838.

It is particularly important for the Court to set a date certain for agency compliance where here, as in *PMOI*, the Secretary "is failing to meet [*the Court's*] remand mandate [with] the effect of nullifying [*the Court's*] decision while at the same time preventing [*Petitioner*] from seeking judicial review." *Id.* The

Secretary has provided no sufficient reason for the delay in publishing a proposed WBI rule and accepting public comments. Petitioner’s prior motions to enforce have revealed that the agency continues to drag its heels, arguing that it must consider competing priorities. However, this Court made clear in *PMOI* that where “Congress undoubtedly knew the enormous demands placed upon the Secretary [but] nonetheless limited her time to act” regarding substantive rules under the APA, and where this Court has specifically instructed the Secretary to “act promptly,” the agency must not be allowed to delay any longer. *See PMOI*, 680 F.3d at 837. Accordingly, this Court should issue a writ of mandamus ordering the Secretary to publish a notice of the proposed WBI rule and accept public comment within 60 days, or else vacate the WBI program pending rulemaking.

III. IN THE ALTERNATIVE, THIS COURT SHOULD VACATE THE WBI PROGRAM, PENDING THE COMPLETION OF THE NOTICE AND COMMENT RULEMAKING

This Court already granted the agency substantial leeway when it declined to vacate the WBI program on remand. *EPIC*, 653 F.3d at 8. This Court should not allow the agency to interpret this temporary relief as *carte blanche* to ignore the requirements of the APA and to substantially delay the public comment process required by law. This Court has already informed agency that “the change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking.” *EPIC*, 653 F.3d at 5.

As the agency has operated this program under a substantive rule for more than two years without a rulemaking, the Court should vacate the agency rule under which it maintains the WBI program until the agency is in compliance with the requirements of the APA.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandamus directing the Secretary to undertake a public rulemaking within 60 days. In the alternative, the WBI program should be vacated.

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Dated: July 17, 2012

RULE 32(A) CERTIFICATE

I hereby certify that the foregoing Petition for Writ of Mandamus to Enforce the Court's Mandate complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type-style requirements of Rule 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the 30-page limit of Rule 21(d).

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 17th day of July 2012, he caused one copy each of the foregoing Petition for Writ of Mandamus and to Enforce the Court's Mandate to be served by commercial courier and electronic mail on counsel for Respondent listed below:

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