



ELECTRONIC PRIVACY INFORMATION CENTER

Statement for the Record of

Marc Rotenberg, President, EPIC
Ginger P. McCall, Director, EPIC Open Government Project
Jeramie Scott, EPIC National Security Fellow

"TSA's Recent Scanner Shuffle:
Real Strategy or Wasteful Smokescreen?"

Before the

House Committee on Homeland Security
Subcommittee on Transportation Security

November 15, 2012
311 Cannon House Office Building

Mr. Chairman and Members of the Subcommittee. Thank you for holding this hearing and for the invitation to EPIC to submit a statement for the record. The Electronic Privacy Information Center (“EPIC”) is a non-partisan research organization, focused on emerging privacy and civil liberty issues. For the last several years, EPIC has devoted considerable attention to the problems with the Transportation Security Administration’s (“TSA”) airport screening procedures. In the course of this work, we have uncovered a great deal of information that we believe will be of interest to the Subcommittee on Transportation Security.

This statement summarizes several of our major findings, as well as the recent decision from the D.C. Circuit Court of Appeals in *EPIC v. DHS*, which held that the agency failed to undertake a public rulemaking as required by law. We believe that if the agency had pursued the public comment process at the outset, the decision to deploy backscatter x-ray devices could have been averted, taxpayer dollars saved, privacy and health risks avoided, and more effective techniques to safeguard air travel developed.

The Public Concerns About Airport Screening Procedures

In the aftermath of 9-11, it was clear that steps needed to be taken to improve aviation security. However, not all measures developed were equally effective. Protecting cockpits on commercial aircraft was critical. But many of the devices developed for screening passengers, such as the “puffer” devices, proved ineffective. Among the most controversial was the deployment of Whole Body Imaging (“WBI”) devices, designed to reveal the air traveler stripped naked.

In 2005, EPIC published the first report that examined the privacy and health impacts of the TSA's proposed body scanner technology.¹ Since that time we have organized public conferences, received complaints from the traveling public, and worked with other organizations that share our concern about this program.²

EPIC has also pursued Freedom of Information Act (“FOIA”) cases to learn more about the body scanner devices. We believe it is essential to assess the actual operation of the devices. When we say that there are ongoing privacy risks to American travelers and that the TSA has not done enough to safeguard privacy, we are not speculating. We are

¹ EPIC, "Spotlight on Surveillance: Transportation Agency's plan to X-Ray Travelers Should Be Stripped of Funding" (June 2005), <http://epic.org/privacy/surveillance/spotlight/0605/>.

² See, e.g., EPIC, "Whole Body Imaging Technology and Body Scanners ('Backscatter' X-Ray and Millimeter Wave Screening)," <http://epic.org/privacy/airtravel/backscatter/>; EPIC, "EPIC v. DHS (Suspension of Body Scanner Program)" http://epic.org/privacy/body_scanners/epic_v_dhs_suspension_of_body.html; EPIC, "EPIC v. Department of Homeland Security – Body Scanners" http://epic.org/privacy/airtravel/backscatter/epic_v_dhs.html; and EPIC, "The Stripping of Freedom: A Careful Scan of TSA Security Procedures" (Public Conference) (Jan. 6, 2011), <http://epic.org/events/tsa/>. EPIC also maintains a webpage where travelers can fill out a Body Scanner Incident Report (http://epic.org/bodyscanner/incident_report/).

pointing to facts about the devices that are known to the TSA, which the agency has been reluctant to discuss with Congress or the American public.

Following two FOIA lawsuits against the agency, EPIC received the TSA's Procurement Specifications for body scanners.³ The Procurement Specifications provided specific stipulations made by the agency for the vendors L3 and Rapiscan, which showed: (1) TSA required the body scanners to have the capability to store, record, transmit images of the naked human body, (2) that the machines were not designed to detect powdered explosives, and (3) that the privacy filters could be turned off.⁴

In the Spring of 2009, when we became aware that the TSA was planning to deploy the body scanner for primary screening in US airports, we worked with a broad range of organizations and respectfully petitioned Secretary Napolitano to postpone the planned deployment until the public was given the opportunity to express its views on this dramatic change in agency procedure.⁵ We asked the Department of Homeland Security ("DHS") to suspend the body scanner program while conducting "a rulemaking process to receive public input on the agency's use of 'Whole Body Imaging' technologies."⁶ While DHS began to aggressively deploy full body scanners, EPIC received no response to our initial petition. In spring of 2010, EPIC submitted a second petition to Secretary Napolitano and DHS Chief Privacy Officer Mary Ellen Callahan and urged DHS to suspend the body scanner program in light of questions about the effectiveness of body scanners, traveler complaints, privacy risks, and religious objections.⁷

EPIC v. DHS

³ TSA Office of Security Technology System Planning and Evaluation, *Procurement Specification for Whole Body Imager Devices for Checkpoint Operations*, Sept. 23, 2008 ("TSA Procurement Specifications Document"), available at http://epic.org/open_gov/foia/TSA_Procurement_Specs.pdf.

⁴ TSA Procurement Specifications Document at 5 (stating "[w]hen in Test Mode, the WBI: shall allow exporting of image data in real time; . . . shall provide a secure means for high-speed transfer of image data; [and] shall allow exporting of image data (raw and reconstructed)"); Several reports and articles reach a similar conclusion. *See, e.g.*, Leon Kaufman and Joseph Carlson, An Evaluation of Airport X-ray Backscatter Units Based on Image Characteristics, *Journal of Transportation Security*, <http://springerlink.com/content/g6620thk08679160/fulltext.pdf>; GAO, "Aviation Security: TSA Is Increasing Procurement and Deployment of the Advanced Imaging Technology, but Challenges to This Effort and Other Areas of Aviation Security Remain" (Mar. 17, 2010), <http://www.gao.gov/assets/130/124207.pdf>.

⁵ Letter from EPIC and thirty-three organizations to Secretary Janet Napolitano, U.S. Dep't of Homeland Security (May 31, 2009), http://epic.org/privacy/airtravel/backscatter/Napolitano_ltr-wbi-6-09.pdf.

⁶ *Id.*

⁷ Letter from EPIC, et. Al. to Secretary Napolitano and Chief Privacy Officer Callahan, U.S. Dep.t of Homeland Security (Apr. 21 2010), http://epic.org/privacy/airtravel/backscatter/petition_042110.pdf.

Following the Secretary's failure to respond to either of our petitions calling for public rulemaking, EPIC filed a lawsuit against DHS in the D.C. Circuit Court of Appeals. In the suit, we argued that the airport body scanner program violated several privacy laws, the Administrative Procedure Act, and the Fourth Amendment. We said that the Department of Homeland Security “has initiated the most sweeping, the most invasive, and the most unaccountable suspicionless search of American travelers in history.”⁸

The D.C. Circuit Court of Appeals ruled that the TSA failed to undertake the required notice-and-comment rulemaking when the agency chose to make body scanners the primary screening method at U.S. airports.⁹ The Court ordered TSA to “act promptly” in conducting a notice-and-comment rulemaking.¹⁰ Since that decision in July of 2011 we have sought to have the agency comply with the Order of the court.

With respect to the other claims, the D.C. Circuit Court of Appeals determined that there was no substantive violation of privacy rights because “[n]o passenger is ever required to submit to an AIT[Advanced Imaging Technology] scan.” The Court expressed further concern about the agency’s conduct:

Signs at the security checkpoint notify passengers they may opt instead for a patdown, which the TSA claims is the only effective alternative method of screening passengers. A passenger who does not want to pass through an AIT scanner may ask that the patdown be performed by an officer of the same sex and in private. Many passengers nonetheless remain unaware of this right, and some who have exercised the right have complained that the resulting patdown was unnecessarily aggressive.

EPIC, 653 F.3d at 3.¹¹ Even with this clear determination from the court, we continue to receive complaints from passengers that they are not told they can opt-out or that they receive overly aggressive pat-downs when they do.

The Risk of More Widespread Deployment of Whole Body Imaging Devices

EPIC pursued additional efforts regarding the development of mobile body scanners, the use of body scanners at courthouses, and the radiation risks presented by backscatter x-ray body scanners. Additionally, EPIC continued to push for TSA to do the court ordered notice-and-comment rulemaking in the face of persistent delay by the agency.

⁸ Opening Br. For Petitioners EPIC Chip Pitts, Bruce Schneier, and Nadhira Al-Khalili, *available at* http://epic.org/EPIC_Body_Scanner_OB.pdf.

⁹ *EPIC v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 8 (D.C. Cir. 2011).

¹⁰ *Id.*

¹¹ The Court further stated “any passenger may opt-out of AIT screening in favor of a patdown, which allows him to decide which of two options for detecting a concealed, nonmetallic weapon or explosive is least invasive.” *EPIC*, 653 F.3d at 10.

Mobile Body Scanners

The use of body scanner technology has expanded beyond air travel to include use at other venues and the use of mobile scanning technology. In March 2010, the DHS released a “Surface Transportation Security Priority Assessment,” which detailed the agency's plans to conduct risk assessments and implement new body scanner technology in America's surface transportation system.¹² In 2006 and again in 2009, body scanner technology was tested on Port Authority Trans-Hudson New York/New Jersey train riders. Moreover, mobile body scanners traditionally used in the warzones of Afghanistan and Iraq, have now been deployed on U.S. streets.¹³

In response to a 2010 Freedom of Information Act request and subsequent lawsuit, EPIC obtained documents from the DHS indicating that the agency has spent millions of dollars developing and acquiring mobile body scanner technology to be used in surface transit and other high occupancy venues.¹⁴ According to the documents obtained by EPIC, the federal agency plans to expand the use of these systems to monitor crowds—peering under cloths and inside bags away from airports.

Scanners in Courthouses

In another example of body scanners being used outside the context of airport security, EPIC filed a FOIA request with the United States Marshalls Service to obtain information about the agency's use of full body scanners for courthouse security. EPIC pursued the case in federal court, and has obtained acknowledgement by the U.S. Marshalls Service that a single machine has stored “approximately 35,314 images” of the full body scans of courthouse visitors over a six month period.¹⁵

Notice-and-Comment Rulemaking

After the D.C. Circuit Court of Appeals’ 2011 ruling mandating that the TSA “promptly” undertake notice and comment rulemaking,¹⁶ a year passed without agency action. EPIC then urged the Court to require the Secretary of Homeland Security to begin a public comment process or suspend the program.¹⁷ The agency subsequently replied

¹² TSA, Surface Transportation Security Priority Assessment, *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/STSA.pdf.

¹³ Andy Greenberg, *Full-Body Scan Technology Deployed in Street-Roving Vans*, FORBES, Aug. 24, 2010, <http://www.forbes.com/sites/andygreenberg/2010/08/24/full-body-scan-technology-deployed-in-street-roving-vans/>.

¹⁴ DHS, "Privacy Impact Assessment for the Rail Security Pilot Study Phase II at PATH" (July 12, 2006), *available at* http://epic.org/privacy/body_scanners/EPIC_Body_Scan_FOIA_Docs_Feb_2011.pdf.

¹⁵ EPIC Press Release, *Documents Reveal that Body Scanners Routinely Store and Record Images*, Aug. 3, 2010, http://epic.org/press/EPIC_Body_Scanner_Press_Release_08_03_10.pdf.

¹⁶ *EPIC.*, 653 F.3d 1 (D.C. Cir. 2011).

¹⁷ EPIC's Petition for a Writ of Mandamus to Enforce This Court's Mandate, July 17, 2012, *available at* http://epic.org/privacy/body_scanners/EPIC-Petition-for-Writ-of-Mandamus.pdf.

that it will “finalize documents” by February 2013.¹⁸ The D.C. Circuit Court of Appeals’ then laid out a firm deadline for the TSA, stating that it expects the agency to publish the rule before the end of March 2013.¹⁹

Rejection of Body Scanners Outside the United States

The United States remains one of the very few countries in the world that subjects air travelers to body screening technology and perhaps the only country that continues to use backscatter x-ray devices. The European Union, and the 27 member countries it represents, rejected the use of backscatter x-ray devices at airports.²⁰ Additionally, the European Union adopted strict operational and technical requirements for the use of body scanners generally.²¹ The additional conditions include, for example, not linking the image to the screened person, informing passengers of the conditions under which the scanning takes place, and giving passengers the right to opt out.²²

Conclusion

The TSA’s decision to remove the backscatter x-ray devices from major airports in the United States lends considerable support to the objections that EPIC and others have raised about the airport screening program. Perhaps if the agency had undertaken the public rulemaking when many organizations and air travelers asked them to do so, money would have been saved and risks to health, privacy, and religious interests of travelers diminished.

Still, the Subcommittee should press the agency to begin the public comment process. Travelers have the right to express their views about the agency program.

¹⁸ Resp’t Resp to Opp’n to Pet. For Writ of Mandamus at 2 (Aug. 30. 2012), *available at* http://epic.org/privacy/body_scanners/DHS-Response-in-Opposition.pdf.

¹⁹ United States Court of Appeals for the District of Columbia Circuit Court Order (Sept. 25, 2012), *available at* http://epic.org/privacy/body_scanners/DC-Cir-Mandamus-Order.pdf.

²⁰ European Commission Press Release, *Aviation Security: Commission Adopts New Rules on the Use of Security Scanners at European Airports*, Nov. 14, 2011, http://europa.eu/rapid/press-release_IP-11-1343_en.pdf.

²¹ *Id.*

²² *Id.*