Written by **Becky Akers** on July 20, 2011

Legal Abracadabra: Why the TSA's Sexual Assaults Are "Constitutional"

If you aren't already convinced that judicial robes cloak the biggest set of fools and tyrants outside Congress, a decision last week from the DC Court of Appeals should finish the job.

At issue was the Transportation Security Administration's (TSA) carcinogenic porno-scanners at the nation's airports — contraptions so evil that the TSA has repeatedly, constantly lied about their dangers to both our health and modesty as passengers who submissively shed their shoes and bag their liquids revolt against this final indignity.

When the porno-scanners invaded concourses around the country last summer, the Electronic Privacy Information Center (EPIC) sued the Feds for "screen[ing] airline passengers by using advanced imaging technology [the TSA's euphemism for 'porno-scanners'; the agency used to call them 'whole-body imagers,' but that apparently contained too much truth and not enough jargon] instead of magnetometers. [EPIC] argue[s] this use of AIT violates various federal statutes and the Fourth Amendment to the Constitution of the United States…"

Oh, indeed. The Fourth is exceedingly clear about the conditions government must meet before it may search — so clear that even judges can comprehend it. Without "probable cause" and a warrant specifically describing the "place to be searched and the persons or things to be seized," our right to be free from this insult "*shall not be violated*…" [Emphasis added. And note that while government may "seize" persons, it may search only "places": the Founders so feared the power groping bestows that they completely removed our bodies from the equation.]

I'm sure you can guess how the court's three bozos ruled. Unanimously, no less.

But what else would we expect, given the second half of EPIC's request: it "argue[d] this use of AIT … should have been the subject of notice-and-comment rulemaking before being adopted."

Here EPIC references the shadowy but awesomely powerful regime that accounts for almost all the

despotism afflicting us: administrative law.

Most Americans despise the hordes of bureaucracies "eat[ing] out our substance," but they don't appreciate the extent to which these agencies and the rules by which they impose new legislation on us — "administrative law" — tyrannize the country. This decision affords an outstanding example: exactly 4 paragraphs of its 18 pages discuss and then dispatch the Fourth Amendment; much of the rest explains why, according to administrative law, the TSA may continue pushing us into its patently unconstitutional porno-scanners.

Although a handful of bureaucracies have cursed us from the beginning (the Post Office even received Constitutional blessing), they multiplied faster than rats in the early twentieth century after Congress declared it could "delegate" legislating to bureaucracies. Of course, the Constitution never allows any such arrangement –— but by then, the Progressives spawning the agencies openly mocked the founding document. They derided its "inefficiency" and deliberately consolidated the powers it had so carefully spread among three branches of government: agencies could write a law, enforce it, and judge both it and those accused of violating it.

You need not be intimately familiar with the era's history to predict that bureaucratic whim, dictatorship, and injustice quickly dominated aspects of life previously off-limits to government. To quiet rebellious Americans, Franklin Roosevelt signed the Administrative Procedures Act (APA). It prescribed a uniform method by which agencies would legislate — though they designate their laws "regulations" the better to fool us. But consistent or not, tyranny is tyranny.

The APA also provided "relief" for folks whom bureaucratic action "harms." How? The victim appeals to the agency, which determines the justice of his complaint. I haven't found statistics on the number of times agencies have ruled against themselves, but I'd bet the farm the figure's lower than a politician's morals.

There are several other "reliefs" as well, among them an agency's obligation to solicit the public's opinion before it issues a new law. Nothing says it has to *comply* with that opinion, however.

Contrast this with the Constitution's iron-clad protection from such abuses as the porno-scanner: the government may not under any conditions search "places" without a warrant — and certainly not a human being. But under administrative law, government can proceed as it pleases so long as it seeks the public's views first.

Indeed, administrative law is nigh magical in its ability to whitewash anything an agency does, no matter how unconstitutional or heartless. For instance, Our Rulers dub the warrantless searches agencies conduct — whether the TSA's perverts at the airports or the EPA's charlatans trespassing in a factory — "administrative searches." This supposedly differentiates them from "criminal" ones and — get this —invalidates the Constitution's restrictions. That's because government searches us for our own good, to keep us safe or the environment clean, and the Constitution's protections would thwart this benevolence. Never mind that the EPA can bankrupt companies with fines mounting into the millions of dollars, or that passengers caught with drugs have gone to jail (in fact, the DC Court of Appeals reminds us that "screening passengers at an airport is an 'administrative search' because the primary goal is not to determine whether any passenger has committed a crime but rather to protect the public from a terrorist attack" and refers us to *United States v. Aukai*. Either the judges didn't read the case or they're masters of irony: Daniel Aukai was a passenger imprisoned after the TSA's goons found his methamphetamine –—and the bench upheld his sentence).

Meanwhile, courts obligingly invent "interests" for the State in safe skies or clean water, then actually, seriously pretend that said interest trumps our rights. And this entire farce depends on two fallacies: that Congress may delegate legislating and that bureaucratic action is sacrosanct so long as the agency claims its wickedness helps it fulfill Congress' order. The spurious doctrine of delegation is the needle's eye admitting the camel of totalitarianism.

Like other organizations devoted to "civil liberties," EPIC comes out of the Progressive tradition that hatched the bureaucratic dynasty: its primary concern is "fair" and "just" government, not freedom from it. And so the TSA's refusal to request the public's comments on its porno-scanners before deploying them outrages it.

The Court agreed. It admonished the TSA to beseech those comments — as though we haven't been screeching them since last fall. And it dismissed the Constitutional objections out of hand; they carry no weight because administrative law supersedes the Fourth Amendment. "Finally, due to the obvious need for the TSA to continue its airport security operations without interruption, we remand the rule to the TSA but do not vacate it": in other words, while the TSA fulfills the sham of listening to our concerns, it may continue irradiating and ogling us.

Administrative law allowed George W. Bush to foist the TSA on us in the first place, even though "controlling aviation and its passengers" appears nowhere among the Constitution's enumerated powers. (In 1926, the Feds "delegated" an authority over the industry they didn't possess via the Air Commerce Act; hence, courts never question the constitutionality of the TSA or the scores of other bureaucracies leeching off aviation. They consider only whether agencies have violated some provision of the APA.) Administrative law has protected the TSA as it molests children and tortures dying grandmothers. And now administrative law permits grown adults in black dresses to contend with perfectly straight faces that governmental pedophilia and sexual assault are Constitutional.

Were I the Constitution, I'd challenge administrative law to a duel for such slander.