



Written by [Raven Clabough](#) on December 28, 2015

Ambiguous New TSA Rule Makes Body Scanners “Mandatory”

While the American people were distracted with holiday plans, the Transportation Security Administration quietly introduced new rules that ban travelers from opting out of the agency’s controversial “naked body scanners,” seemingly capitalizing on heightened concerns about terror. Critics contend that the changes are just the latest example of constitutional violations at the hands of the TSA and have vowed to fight.



Since their introduction to airports in 2007, the body scanners have been the subject of intense controversy for a variety of reasons, ranging from privacy concerns over the essentially naked images the machines capture to health problems resulting from the amount of radiation to which travelers are exposed.

In the past, travelers were permitted to opt out of the body scanners in lieu of the equally controversial enhanced pat downs, which involve hand-sliding gestures over private parts; however, the new DHS protocol removes that option for certain travelers.

Earlier this month, the Department of Homeland Security released a [Privacy Impact Assessment Update for TSA Advanced Imaging Technology](#), in which updates were made to the Advanced Imaging Technology (AIT) protocols used by the TSA at airports. That document includes a clause that now mandates that passengers go through the naked body scanners at the discretion of TSA agents.

The document reads, “TSA is updating the AIT PIA [Privacy Impact Assessment] to reflect a change to the operating protocol regarding the ability of individuals to opt-out of AIT screening in favor of physical screening.... While passengers may generally decline AIT screening in favor of physical screening, TSA may direct mandatory AIT screening for some passengers.”

However, the document does not elaborate about what conditions could compel agents to force passengers into the scanners, simply that the mandatory screening would be “warranted by security considerations in order to safeguard transportation security.”

Marc Scribner, research fellow at the Competitive Enterprise Institute (CEI), [opines](#) that the TSA’s new protocol leaves passengers even more confused about their rights than they were before.

“It wasn’t clear before what the policy was. Now it’s even less clear,” Scribner said. “I don’t know if they could have done anything worse.”

Fred Cate, an Indiana University law professor, voiced similar concerns about the confusion that the policy change creates.

“Anything that adds more complexity likely weakens security,” Cate explained. “Almost anywhere else in government or industry, if you don’t do things by the rules, it’s something people can complain about. Here if you don’t do something by the rules, they just say you don’t know what the rules are or we can’t tell you.”



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Critics argue that the TSA should not be able to adopt rules such as this one without a formal rulemaking process, which would allow the public the opportunity to comment.

The Competitive Enterprise Institute [filed suit](#) against the TSA in 2011 to force the organization to go through formal rulemaking procedures in order to continue using the body scanners. The D.C. Circuit Court of Appeals ordered the TSA to “promptly” open a rulemaking procedure and produce a final rule; however, four years later no such rule has been established.

Engineer and anti-TSA activist Jonathan Corbett has filed suit against the TSA to restore the opt-out. In honor of the Christmas season, he gift-wrapped his lawsuit for the TSA and delivered his petition on Christmas Day. Corbett’s [blog](#) foretold his plans:

Expertly wrapped in holiday cheer, the TSA shall receive on Friday a petition that asks the U.S. Court of Appeals for the 11th Circuit to consider: 1) whether the body scanner program is constitutional when the option to opt-out is removed, and 2) whether the TSA must engage in “notice & comment rulemaking” before making such a change. You all may remember that in 2013, the TSA “invited” (after being forced to by the Court of Appeals as a result of EPIC’s lawsuit) the public to submit comments regarding the nude body scanner program. Over 5,500 of us replied, and well over 95% of the comments were in opposition. The TSA still hasn’t responded to those comments, but yet feels that it can remove the opt-out procedure without again asking the public or considering our feelings regarding the scanners even with the opt-out option.

The TSA defends its protocol change by contending that it “improves threat detection capabilities for both metallic and nonmetallic threat objects.”

But any claims that the scanners can catch weapons hidden in clothes that a pat-down might not catch have been disproved numerous times.

In 2012, Corbett exposed the futility of the TSA body scanners by getting past them with items banned by the federal agency. He posted evidence of the scanners’ failures in a video on YouTube that features him carrying a metal case that is away from his body in his side pocket, observing, “Yes that’s right, if you have a metallic object on your side, it will be the same color as the background and therefore completely invisible to both visual and automated inspection.”

A 2012 paper published by University of California physics professors Leon Kaufman and Joseph Carlson in the *Journal of Transportation Security* also found that the body scanners could easily be fooled. Citing a variety of data, the writers made some surprising revelations, including:

It is very likely that a large (15-20 cm in diameter), irregularly-shaped, cm-thick pancake with beveled edges, taped to the abdomen, would be invisible to this technology — ironically because of its large volume, since it is easily confused with normal anatomy.

The paper added, “It is also easy to see that an object such as a wire or a box-cutter blade, taped to the side of the body, or even a small gun in the same location, will be invisible.”

Earlier this year, the body scanners, as well as TSA security agents, came under fire once again for their shortcomings after an undercover DHS security inspector general investigation found that the scanners and TSA agents were both missing banned items a staggering *95 percent of the time*.

But according to Ludwig von Mises Institute chairman and CEO Lew Rockwell, focusing on the TSA’s ability to secure the airports misses the point entirely. “The DHS airport scam has nothing to do with security or ‘terror,’” he [blogged](#). “It’s about militarization, propaganda, spending, and getting us used



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to obeying every government order, no matter how outrageous. So, it's been almost a complete success."

The latest protocol change is further proof of that. The TSA's decision to deny passengers the ability to opt out of the body scanners was made unilaterally by an unelected, unconstitutional agency, without debate or public comment.

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