



Written by [Jack Kenny](#) on October 2, 2012

High Court Won't Hear Fourth Amendment Challenge to TSA Procedures

The U.S. Supreme Court on October 1 [rejected the appeal](#) of a Michigan resident who claimed the use of body-imaging scanners and pat-down procedures by Transportation Security Administration agents at airports throughout the country violate airline passengers' privacy rights protected by the Fourth Amendment to the U.S. Constitution. On the first day of its new term, the court refused without comment to consider the appeal of Jonathan Corbett, who publishes a blog called "TSA Out of Our Pants!" Corbett's suit had been dismissed by the U.S. District Court in Southern Florida in a ruling upheld by the 11th Circuit Court of Appeals in Atlanta, Georgia.



The use of advanced imaging technology was implemented by the TSA within a year of a foiled attempt by a passenger from Nigeria to set off an explosive device hidden in his underwear just before his plane landed in Detroit on Christmas Day, 2009. The federal agency, created in response to the terrorist attacks of September 11, 2001, ordered use of the scanners at airports throughout the nation in October of 2010. The devices allow screeners to see through the clothing of passengers and have been denounced as "nude-body scanners" by travelers who complain of invasions of privacy. Some passengers have also charged that the radiation used by the machines poses a health risk, a claim the TSA has denied.

Those who refuse to be checked by the scanner, or whose imaging indicates an unidentified object on their persons, must undergo an enhanced pat-down procedure, which has resulted in complaints of security agents touching people's private parts and, in some cases, allegations of agents reaching into clothing apparently in search of banned items. Those who refused to be either scanned or patted down are not allowed to fly.

Corbett filed his suit in district court in November 2010, claiming the procedures are unreasonable searches under the Fourth Amendment because they are conducted without a warrant and without probable cause to believe a passenger is engaged in or plotting illegal activity. Corbett, who has represented himself in the suit and the appeals, also claimed there are other, more effective and less invasive methods available for screening passengers. He sought relief for himself and other passengers and the reimbursement of his legal fees.

The District Court dismissed the case, based on a federal law that gives appeals courts original jurisdiction over challenges to TSA's Standard Operational Procedures, called SOP. The appeals court in February of this year affirmed the lower court's ruling. The three-judge panel did not judge the merits of the complaint, but ruled, "The District Court did not err in dismissing Corbett's complaint for lack of jurisdiction."



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Corbett also claimed a denial of due process, asserting that the lack of an administrative record or fact-finding by the TSA had deprived him of the opportunity to gather and present evidence to support his claims. But the appeals court said it has the authority to mandate a hearing “where one is required by law” or to “transfer certain cases to a district court, or [to] order an agency to take additional evidence and counterevidence.... Thus, a court of appeals would be able to address Corbett’s concern that the administrative record would be incomplete or lacking evidence opposing the SOP.”

On September 25, the U.S. Court of Appeals for the District of Columbia gave the TSA [another six months](#) to comply with an already 14-month-old order to “promptly” hold public hearings on the use of the scanners. The court’s original order for the hearings was issued on July 15, 2011. On August 1 of this year, the court ordered the TSA to explain why it had not complied. The agency said it was having staffing problems and was awaiting approval from its parent agency, the Department of Homeland Security, of the release of public documents related to the 2009 decision to employ the scanners.

The TSA had also argued to the court that a public comment period would hinder the government’s ability to respond to “ever-evolving threats.” The agency said, however, it expects to publish by the end of February a notice in the Federal Register that it is taking public comments and would be holding public hearings on the matter. The court gave TSA until the end of next March to comply with the court order and begin holding hearings.

Upon learning that the Supreme Court had rejected his appeal, Corbett expressed on his [blog](#) his disappointment that his complaint will not be heard by “the kind of court with a jury, discovery, witnesses, etc. — and must instead be fought in the U.S. court of Appeals.” But he promised to file a new complaint with the 11th Circuit Court within 30 days.

“The good news is the fight is not over,” he wrote.

Photo of United States Supreme Court building



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