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**FREEDOM TO TRAVEL USA**

**(<http://fttusa.org>)**

**Response to TSA NPRM Document ID TSA-2013-0004-0001**



**” If Tyranny and Oppression come to this land, it will be in the guise of fighting a foreign enemy.”**

**- James Madison**

**“Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety”**

**- Benjamin Franklin**

**“Never doubt that a small group of thoughtful, committed people can change the world. Indeed, it is the only thing that ever has.”**

**- Margaret Mead**

**“Freedom To Travel USA” is a group of US citizens who are concerned about the actions of the Transportation Security Administration (TSA). We live all across the United States and are of many different political persuasions. We could comfortably live our lives without worrying about the TSA, but the TSA represents a federal agency that is, every day, violating the rights embodied in the US Constitution for which hundreds of thousands of Americans have died. If the TSA is not confronted now, the United States in which our children are growing up will be a more unpleasant place.**

**We hope you read this document with an open mind, arrive at the same conclusions we have, and join us in restoring our rights and our dignity while traveling.**

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## Executive Summary

The intent of this document is to provide Freedom To Travel USA's public response to the TSA NPRM Document ID TSA-2013-0004-0001. The Notice of Public Rule Making was forced on the TSA by Court Order ([http://epic.org/privacy/body\\_scanners/EPIC v DHS Decision 07 15 11.pdf](http://epic.org/privacy/body_scanners/EPIC_v_DHS_Decision_07_15_11.pdf)).

**Freedom To Travel USA (FTTUSA)** has deep awareness and expertise about the TSA's unconstitutional Nude Body Scanners and the criminal pat downs which are an integral part of the Nude Body Scanner program. Our organization has supported cancer victim Sharon Cissna on her trip to a state legislature convention, given a briefing at Capitol Hill, and presented oral arguments just recently, in April 2013, to the 1<sup>st</sup> Circuit Court of Appeals in a rarely granted Amicus appearance concerning the TSA's Nude Body Scanner program.

In response to its unlawful deployment of Nude Body Scanners (NBS), the TSA has proposed the following addition to the Federal Code of Regulations (FCR):

*Proposed Addition in § 1540.107, add paragraph (d) to read as follows:*

*(d) The screening and inspection described in (a) may include the use of advanced imaging technology. For purposes of this section, advanced imaging technology is defined as screening technology used to detect concealed anomalies without requiring physical contact with the individual being screened.*

Freedom To Travel USA's evaluation shows the suggested rule is **useless, unnecessary, and unresponsive to the Court order**. It **fails to protect the Constitutional rights of Americans** and **does not adequately address or prevent the abuses which have unarguably occurred ALREADY** since the Nude Body Scanners and criminal pat downs have been deployed unlawfully for over two and half years now.

## Conclusions

Our **conclusions** are that the proposed TSA rule is...

- ✓ **Useless and unnecessary** because the TSA already has the authority to conduct screening generally and it ALREADY has no current prohibition against using technology without requiring physical contact. The Walkthrough Metal Detectors (WTMDs) do not make physical contact and have been widely used for decades.
- ✓ **Unresponsive to the Court order** because the proposed NPRM rule does not address Nude Body Scanners in the submitted change for the FCR. The submitted documents do discuss the current Nude Body Scanner technology, but the proposed rule change **does not address scanners specifically**. The NPRM also does not address any proposed limits on the technologies, for example, such as the use of ATR software which was a legislative change initiated by Congress.

The proposed rule ignores this current Congressional restriction on the defined “advanced imaging technology”; as written, is wholly inadequate to meet the Court’s order.

- ✓ Violating Americans’ inalienable rights as protected by the United States Constitution’s 4<sup>th</sup> Amendment because the TSA is conducting dragnet, administrative searches **without detecting weapons, explosives, or incendiary devices at the end of the initial search.**

Quite simply, the proposed “concealed anomalies” wording is **too broad and unreasonable.** Even when using the “ATR” technology, which does not display the nude images, this technology CANNOT identify what exactly it “thinks” it found. **At the end of the ATR search, there is ZERO identification that a weapon or explosive was found. There is ALWAYS a secondary search based on any number of reasons that a person’s outline does not conform to a vague and unspecified “normal”.** The Nude Body Scanner ATR search is an **entirely new level of search never before performed in the United State of America** ; essentially, the Nude Body Scanner’s search **falsely establishes** suspicion for further searching because it cannot, by current definition, positively identify objects it is supposed to be searching for! According to the TSA documents in the NPRM, the scanner deployment already existing affects **HUNDREDS OF MILLIONS OF AMERICANS – EACH YEAR.**

**It is unreasonable to accept a search which has a 0% success rate at identifying objects which the search is intended to find, while simultaneously “identifying” millions upon millions of false positives.**

- ✓ Violating all Americans’ PRIVACY and especially profiling the medically disabled because ALL of the deployed scanner technology – AIT with and without ATR – leads to millions of secondary searches each year due to false positives and detecting “concealed anomalies” which are NOT weapons, explosives, or incendiary devices.

The secondary searches violate ALL Americans’ privacy because they often involve criminal pat downs which are **coerced touching of female breasts, vulvae (female external sex organs), penises, testicles, and buttocks.** This unwanted touching is **a criminal act in ALL 50 states** when performed in any other context by anyone, including truly authorized law enforcement staff.

Make no mistake – this is coerced touching as a traveler does not know if they will be subject to a criminal pat down before they start airport screening. Then, when the screening starts, there are possible legal penalties (administrative fines or possible arrest) for avoiding pat downs, in addition to the real threat to one’s freedom to travel within the United States, a freedom defined in the 5<sup>th</sup> Amendment’s use of the word “liberty” in several court cases. The right to traverse the airspace is also embodied in the FCR.

Another violation of American’s privacy is that those with medical conditions such as

mastectomy patients, diabetics, colostomy patients, amputees, and other medical issues are “profiled” at a higher (100%) rate for further secondary screening when compared to those without medical issues.

### **HISTORICAL RECORD OF PRIVACY VIOLATION OF PASSENGERS WITH MEDICAL CONDITIONS**

The proposed TSA NPRM Rule has already been active and used in the United States for two and a half years so we can measure its effectiveness. Freedom To Travel USA respectively submits the following two incidents, out of many thousands of documented complaints (ACLU, EPIC, TSA Complaint Forms, and Google Searchable on the Internet) since the proposed rule has been in effect.

*Beginning Time Line Incident: LATE 2010*

[http://www.huffingtonpost.com/2011/02/24/rep-sharon-cissna-tsa\\_n\\_827934.html](http://www.huffingtonpost.com/2011/02/24/rep-sharon-cissna-tsa_n_827934.html)

This State Representative received a sexual assault pat down AFTER going through a Nude Body Scanner. Her mastectomy scar was the apparent threat that required further investigation. When she encountered the SAME situation, she decided to take a stand. Reading the article from February, 2011, one will see that she already had the same experience 3 months earlier, in late 2010. The article also relates over 1,000 complaints by passengers.

*Ending Time Line Incident: MAY, 2013 DURING THIS PUBLIC COMMENTING PERIOD!*

<http://www.kens5.com/news/Woman-with-prosthesis-claims-TSA-agent-made-her-feel-uncomfortable-210892231.html>

This cancer victim had her false breast examined and touched after going through a Nude Body Scanner. **Her private medical condition was forcibly revealed** by an AIT screening.

**Privacy is more than looking at naked pictures** by voyeuristic TSA agents. It is also invaded by the most invasive inch-by-inch searches of one’s body, no matter how it is done, whether through physical contact or not! Privacy is also invaded by being forced to share personal secrets that are not otherwise observable in public – especially sensitive medical and transgender issues.

**It is OBVIOUS that the TSA implementation of the proposed rule results in invasion of privacy since the “anomalies” continually detected millions of times a year lead to invasion of privacy and criminal acts in all 50 states.**

**It is OBVIOUS the TSA implementation of the proposed rule has ALREADY repeatedly violated privacy through suspicionless Nude Body Scanners – for the ENTIRE TIME of their existence.**

### ***Freedom To Travel USA –Reasons For Changes To The Proposed Rule***

Because we contend **any primary screening, without reasonable, articulable suspicion, which examines the entire body of a passenger is unconstitutional**, Freedom To Travel USA suggests a more restrictive PREFERRED rule which actually addresses the Nude Body Scanners as requested by the Court.

We are also suggesting a MINIMUM ALTERNATIVE change to the proposed NPRM rule to bring it closer to previous Court decisions and accepted administrative search doctrine. The critical principles and reasons for the suggested rule or any changes are as follows:

a) **Better alignment with previously approved administrative searches under the 4<sup>th</sup> Amendment**

The current reality of the NPRM rule is that the TSA has implemented the most invasive, general searches of any travelers at any time in our country's history, affecting hundreds of millions of Americans each year. As we documented, the molestation and criminal pat downs – direct results of the implementation of AIT – have led to thousands of invasions of privacy.

In the context of balancing the security benefits to the overwhelmingly documented invasions of privacy – just as newsworthy in May, 2013 as they were newsworthy back in late 2010 – we submit the following facts on the effectiveness of identifying non-metallic liquid and powder bomb threats:

- **FACT 1:** The number of discovered non-metallic bombs carried by suicidal airline passengers on US domestic flights SINCE the AIT Nude Body Scanners were implemented: **Zero**

- **FACT 2:** The number of fatalities caused by airline passengers with working non-metallic bombs on US domestic flights in the LAST 50 YEARS (and the 47 years BEFORE AIT): **Zero**

- **FACT 3:** The GLOBAL number of fatalities caused by airline passengers with working non-metallic bombs - covering 402,800,813 commercial flights and 34,487,566,845 passengers - in the entire world since 1980: **Two**

(SOURCE: Manual curation of data from [www.iata.org](http://www.iata.org), [www.bts.gov](http://www.bts.gov), <http://aviation-safety.net> )

In essence, **the introduction of AIT has NOT measurably increased security** (due to AIT) as there has been **no change** in the rate of airline passenger non-metallic bombings on US domestic flights when compared to the 47 year period prior to AIT deployment.

Because the whole intent of the AIT Nude Body Scanners is to stop suicidal airline passengers with working non-metallic bombs on US domestic flights, the documented, nearly immeasurable risk dictates there should be a strong interest in maintaining the rights of individuals. The NPRM does not take any reasonable analysis of the risk into its wording.

**The TSA has never found one passenger with intent to kill other passengers, and has never found one instance of non-metallic explosives with AIT, and has never identified one instance of preventing a viable working non-metallic bomb with AIT.** Yet, the currently deployed AIT technologies under this NPRM has substantially impacted millions of Americans by forcing hundreds of millions of inch-by-inch body searches, a substantial subset of which have led to many privacy violations. Simply put, those with medical issues are unusually singled out as the “**sacrificial lambs**” under the AIT technologies deployed under this NPRM rule already. And, many able-bodied Americans have also found themselves subjected to gross violations and criminal pat downs as a result of the Nude Body Scanner introduction.

b) **Better alignment with other search technologies’ effectiveness**

The current wording of “anomalies” is completely misleading. The NPRM documents talk about what Congress has authorized in the following:

**FROM TSA NRPM DOCUMENT (Section C):** “The Secretary of Homeland Security shall give a high priority to developing, testing, improving, and deploying, at airport screening checkpoints, equipment that detects nonmetallic, chemical, biological, and radiological weapons, and explosives”

**The main problem with the AIT currently deployed as would be officially permitted WITHOUT CHANGE to the NPRM rule is that it detects....NOTHING.**

A stopped watch is right twice a day. That is better than the current AIT scanners, with ATR technology, which **cannot identify** any “nonmetallic, chemical, biological, and radiological weapons” when their search is complete. There is ALWAYS a further search.

For example, the AIT Nude Body Scanners do NOT detect explosive materials; they just use software to find “anomalies”, which are mathematically-determined discrepancies to some assumed parameter of what the human body looks like. And, when the scanners identify something real, it often leads to more PRIVACY INVASIONS such as exposure of medical conditions (mastectomy scars, prosthetics (breast or limb), medical devices (colostomy bags, insulin pumps, back braces), and unusual sex organ characteristics as has been reported.

Contrast this with Walkthrough Metal Detectors (WTMDs). They nearly always find metal – which is the goal of their search. There may be a secondary screening to identify what kind of



metallic object was identified, but WTMDs identify a metal object. They don't overwhelmingly "alarm" at a high rate on non-metallic objects, or medical devices, or colostomy bags, or false breasts. No reasonable person would put up with WTMDs that always alarmed on paper, rubber bands, or plastic buttons.

Or, consider blood alcohol tests. They are highly correlated with finding the blood alcohol level and nothing else. They don't first identify the possible presence of AIDS, Hepatitis, or Leukemia and depend on a secondary test to measure blood alcohol levels. In short, they find what they are looking for at nearly 100% effectiveness.

The AIT, permitted under the proposed NPRM rule, has already proved it is wholly inadequate to 'detect[s] nonmetallic, chemical, biological, and radiological weapons, and explosives' at the end of its search. **In fact, unlike any other search technology, it is a universal failure at identifying what it is supposed to find despite hundreds of millions of searches each year.**

**c) Better alignment with Americans' opinions**

Quite simply, a majority of Americans are against Nude Body Scanners and the associated criminal pat downs which result in invading privacy. From 2010, we measured a New York Times article comments section. The New York Times Op-Ed by Maureen Dowd (<http://www.nytimes.com/2011/04/20/opinion/20dowd.html>, NY Times, April 19th, 2011) generated many comments. Out of all the comments on this article, 61 out of 377 were Pro-TSA, which makes **83% against the current TSA procedures**. [NOTE: One of the authors of this document read every comment to arrive at the numbers]. Clearly, out of the people who care by voicing their opinion, there is an overwhelming majority AGAINST AIT for primary screening.

But, we don't have to depend on an early opinion to measure how Americans feel about this subject. Freedom To Travel USA **suggests the government COUNT UP THE OPINIONS – for and against – THAT ARE SUBMITTED FOR THIS NPRM**. That will give you the answer concerning the despicability of this wholly inadequate and unnecessary rule.

## ***Freedom To Travel USA –Suggested Changes To Proposed Rule***

**Freedom To Travel USA** suggests two alternatives to the proposed NPRM rule. We have provided template wording which can be easily fit into the FCR format by the appropriate government agency.

### **PREFERRED ALTERNATIVE**

The purpose of the preferred alternative is to clearly restrict the most invasive general search, using advanced imaging technology, ever offered for non-law enforcement purposes. It is modeled after legislation introduced by Rep. Rush Holt (D – New Jersey) and Rep. Jason Chaffetz (R - Utah) in 2011.

This rule preserves the idea of reasonable, articulable suspicion based on previous information prior to fully examining one’s body; this maintains some integrity of the 4<sup>th</sup> amendment. This is analogous, for example, to the Supreme Court ruling against a search of one’s house using thermal scanning unless there is prior suspicion. **The same concept should apply equally to one’s person, since there are no house-by-house, warrantless administrative searches for illegal weapons allowed by law in the United States.**

*Proposed Addition in § 1540.107, add paragraph (d) to read as follows:*

*(d) The screening and inspection described in (a) may **only** include the use of advanced imaging technology under the following conditions:*

*(1) ADVANCED IMAGING TECHNOLOGY.—Advanced imaging technology may not be used as a method of screening a passenger under this section unless—*

*(A) the National Academy of Sciences determines that the technology poses no threat to public health;*

*(B) the technology is equipped with a privacy filter or other privacy-protecting technology; and*

*(C) another method of screening, such as metal detection or explosive trace detection, demonstrates reasonable cause for utilizing advanced imaging technology to detect a possible threat to aviation security. “Reasonable Cause” as used herein is defined in the same manner, and shall carry the same legal restrictions, as for sworn Law Enforcement Officers.*

*(2) ENHANCED PAT-DOWN SEARCHES.—An enhanced pat-down search may not be used as a method of screening a passenger under this section unless another method of screening, such as metal detection or explosive trace detection, or use of advanced imaging technology in accordance with paragraph (1), demonstrates reasonable cause for utilizing advanced imaging technology to detect a possible threat to aviation security. “Reasonable Cause” as used herein is defined in the same manner, and shall carry the same legal restrictions, as for sworn Law Enforcement Officers.*

*(3) PROVISION OF INFORMATION.—A passenger for whom screening by advanced imaging technology is permissible under paragraph (1) shall be provided, prior to the utilization of such technology with respect to such passenger, information on—*

*(A) the operation of such technology;*

*(B) the image generated by such technology;*

*(C) privacy policies relating to such technology;*

*(D) the right to request an advanced pat-down search under paragraph (5); and*

*(E) the right to view the actual generated whole-body image of their person.*

*(4) PAT-DOWN SEARCH OPTION.—A passenger for whom screening by advanced imaging technology is permissible under paragraph (1) shall be offered an advanced pat-down search in lieu of such screening.*

*(5) PROHIBITION ON USE OF IMAGES.—An image of a passenger generated by advanced imaging technology may not be stored, transferred, shared, or copied in any form after the boarding determination with respect to such passenger is made.*

## **MINIMUM ALTERNATIVE**

The purpose of the minimum alternative is to “at the least” bring AIT to the same general effectiveness level as other technology searches. To be precise, AIT needs to identify specific threats at the end of its search – not just the presence of something with zero correlation to a threat characteristic.

*Proposed Addition in § 1540.107, add paragraph (d) to read as follows:*

*(d) The screening and inspection described in (a) may include the use of advanced imaging technology **under the restrictions in subparagraphs (1), (2), and (3)**. For purposes of this section, advanced imaging technology is defined as screening technology used to detect concealed **items** without requiring physical contact with the individual being screened.*

*(1) AIT cannot be a general search for identifying anomalies, but must instead search for **weapons, explosives, and incendiary items specifically***

*(2)The advanced imaging technology search **MUST** have a highly effective rate at specifically identifying the items for the search is intended.*

*(3) AIT cannot generate a high rate of false positives **OR** misidentification of “alarmed” items, such that a secondary screening reveals that specific item(s) searched for were not found*

## ***POST-NPRM Request for Legal Action To Restore America’s Freedoms***

We ask that all concerned legislators and citizens join **Freedom To Travel USA** ( <http://fttusa.org> ) in restoring freedoms in our great country and to stand up against the fear of terrorism, instead of helping terrorists “win” by changing the nature of America.

Our goals are to restore legal airline passenger security, reinforce our constitutional rights against warrantless, unreasonable searches, and promote dignified procedures for those with medical issues.

The elected officials sworn to uphold the United States Constitution should be strongly supportive of the freedoms that make America a great country, and should not be afraid to preserve these constitutional

rights as well as common decency for citizens. The **specific legislative goals** for airport security that we support and are asking you to support are:

- ✓ Provide for airline passenger screenings using **long-standing and effective legal means** which existed prior to strip search scanners and sexual assault pat downs, specifically magnetometer (metal detector) screening. We also support effective explosive detection technology, “bomb sniffing” dogs, and cargo screening for passenger flights.
- ✓ **Forbid primary screening strip searches** (including searches using Nude Body Scanners) of U.S. citizens, including children, except that law enforcement officers may perform strip searches under current legal authority and circumstances. This means no Nude Body Scanners that perform inch-by-inch searches of a traveler’s body.
- ✓ **Forbid physical searches** of U.S. citizens, including children, except that law enforcement officers may perform physical searches under current legal authority and circumstances. This means *no “TSA pat downs”*, which are criminal touching under ANY other circumstance, for primary screening.
- ✓ We are especially **concerned** that U.S. citizens who are in wheelchairs or with ‘medical metal’ – think of metal joint replacements (knee, hip, and surgery metal), artificial limbs, and similar medical issues - are currently profiled 100% of the time by strip search scanners and sexual assault pat downs. We propose a pre-flight clearance procedure be developed that will protect those with medical assistive devices from needing to violate their privacy rights in order to exercise their right to travel.

## **ADDENDUM: Comments From FTTUSA Media Kit**

FTTUSA has excerpted some background comments from our Media Kit, which was released prior to the Congress forcing the TSA to use ATR filters.

**NOTE:** The proposed rule under this NPRM would allow graphic, naked pictures.

### ***4<sup>th</sup> Amendment***

The United States Transportation Security Administration (TSA) formally announced, in November 2010, that it would move forward with an aggressive implementation of “pat-downs” and “full-body scans” using Advanced Imaging Technology (AIT), formerly called ‘whole body imaging’ (the original name was changed by the TSA after a couple of months in order to project a less intrusive connotation in their official documents.)

**NOTE:** We have promised not to use hyperbole, but please be aware that we will use the following terms as we feel they **EXACTLY describe** – no more and no less – the TSA procedures fairly and accurately.

**Strip Search Scanners** – these are what the TSA refers to as AIT scanners. From [www.merriam-webster.com](http://www.merriam-webster.com), the definition of “strip search” is “a search for something concealed on a person made after removal of the person's clothing”. The AIT scanners use technology to remove your clothing; no matter how convenient in terms of your time and effort, it is a strip search procedure and exposes your naked body to a government stranger.

**Sexual Assault Pat Down** – this is what the TSA refers to as “pat down”. Laws vary from state to state, but we have used one of our largest states, California, to define “sexual assault”. An excerpt from [http://www.ehow.com/about\\_6623976\\_definition-california-law-sexual-assault.html](http://www.ehow.com/about_6623976_definition-california-law-sexual-assault.html) is that “sexual assault is defined as a non-consensual sexual act. Sexual assault includes ..... unwanted touching on an intimate area of a person's body.” We do acknowledge that criminal sexual assault often includes intent of the perpetrator, but we hope that you would agree that anyone touching your intimate areas without your consent is inappropriate at the least.

Naturally, many US Citizens who value all of our rights – as enumerated in the United States Constitution - questioned these new procedures. They became alarmed that our 4<sup>th</sup> amendment rights were being infringed upon by the aggressive TSA policy.

To be clear, the 4<sup>th</sup> amendment is:

**“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”**

We do not expect you to go to law school and study thousands of pages of legal cases and opinions. However, it is important to clarify some of the history of airport security screenings, the legal cases behind it, some interesting analogies and facts on security risks, and the implications for maintaining and securing the basic rights of US citizens.

### ***History of Administrative Searches***

The idea of an “administrative search” has its genesis in the rights of cities to conduct searches necessary to promote public health and safety. For example, cities have traditionally been able to inspect dwellings to see if they conform to fire codes, for it is clear that dangerous conditions may lead to endangering the lives of others in the surrounding buildings. An often referenced case is ***Camara vs Municipal Court and City of San Francisco*** (<http://openjurist.org/387/us/523> ). The result of this case upheld that government can institute “administrative searches” as long as they are general schemes and it also said the defendant had the right to require an administrative warrant before his premises could be entered. Essentially, the public safety concerns supported the administrative search, and in this case the city STILL had a requirement to get a warrant because that did not substantially make it impractical to carry out inspections since most people agreed to inspections.

### ***History of Airport Screenings***

There was a time when United States airports did not have any substantial security screening processes. However, in the late 1960s, the incidences of hijackings increased substantially and alarmed the government, public, and aviation industry. We quote from a legal decision , ***United States vs Davis***, which we will explore in more detail:

“Between 1961 and 1968, hijackings of United States aircraft averaged about one per year. In 1968, however, the number rose to 18. In 1969 there were 40 attempted hijackings of United States aircraft, 33 successful.”

The government continued to refine screening requirements, and by 1972 the standard system we are familiar with was instituted and has been the backbone of our security ever since. Quoting again:

“On December 5, 1972, the FAA ordered that searches of all carry-on items and magnetometer screening of all passengers be instituted by January 5, 1973.”

### ***United States vs Davis***

In 1971, a passenger was arrested and fined for having a gun in his briefcase. The passenger argued that the gun was found illegally based on his circumstances. Eventually, this case (<http://openjurist.org/482/f2d/893/united-states-v-davis> ) made it to the United States Courts of Appeal, Ninth Circuit and has been an oft-cited case for transportation security. We invite you to read the link for details, and we have extracted the salient assertions from this lower-level (not Supreme Court) court ruling:

- The essential basis of airport screenings is based on an administrative search.
- The Ninth Circuit Court of Appeal stated:

” The essence of these decisions is that searches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched.

As we have seen, screening searches of airline passengers are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings. The essential purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all”

- The court was clear when it said: “It follows that airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft.” NOTE: The reason for this is that the search would be elevated to a criminal search and thus require a warrant; so the intent of the search cannot be to prosecute a crime. They further conclude “In sum, airport screening searches of the persons and immediate possessions of potential passengers for weapons and explosives are reasonable under the Fourth Amendment provided each prospective boarder retains the right to leave rather than submit to the search.”
- The court concluded about the right to travel: “This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”
- The Ninth Circuit Court also stated: “These doctrines dictate a critical examination of each element of the airport security program to make certain that neither the passenger's right to travel nor his right to personal privacy is burdened beyond the clear necessities of current circumstances.

As we have seen, however, the need for some limitations upon these rights is clear. In light of that need, a screening of passengers and of the articles that will be accessible to them in flight does not exceed constitutional limitations provided that the screening process is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives, that it is confined in good faith to that purpose, and that potential passengers may avoid the search by electing not to fly.”

- This particular case is about the current state of the proposed administrative search and the court offered: “To pass constitutional muster, an administrative search must meet the Fourth Amendment's standard of reasonableness.” Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.” *Camara v. Municipal Court*, supra, 387 U.S. at 536-537, 87 S.Ct. at 1735.

The need to prevent airline hijacking is unquestionably grave and urgent. The potential damage to person and property from such acts is enormous. The disruption of air traffic is severe. There is serious risk of complications in our foreign relations.”

### ***Discussion of United States vs Davis***

We have several comments about what was written by the lower court.

- 1) The idea of an administrative search arose originally from property searches. However, the warrantless search of a “person” has been carved out in several legal cases under the administrative doctrine, such as when preventing the spread of communicable diseases. We do not think the courts will overturn the administrative search doctrine as it applies to general security screenings.
- 2) We think the court contradicts itself when it says “screening searches of airline passengers are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, **to prevent the carrying of weapons or explosives aboard aircraft**, and thereby to prevent hijackings. The essential **purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them**, but to deter persons carrying such material from seeking to board at all”.

Frankly, it is twisted logic to say the purpose of equipment to detect explosives is not to detect explosives, but to stop persons from having explosives. How else would one prevent the carrying of explosives unless one put in equipment to detect explosives? The actual effect is that you are still looking to detect explosives. Regardless of the express purpose, we do not believe weapons detection and explosive detection will be stopped.

- 3) The court reaffirms a passenger’s right to leave as an alternative. The TSA disagrees on when your consent to search is given. Our research on actual incidents shows inconsistency in written policy and practice. For example, the written policy is that you consent when you stand in a security line after having your boarding pass checked. Yet, Alaskan State Senator Sharon Cissna was allowed to leave the airport without completing a scanner strip search and subsequent sexual assault pat down, although she had entered a security line. She was not arrested , nor was she fined \$11,000 as is threatened by the TSA.



We do believe if you are in line for a metal detector for example, and then a Transportation Security Officer (TSO) asks you to go through a strip search scanner, you have the right to refuse and leave.

- 4) We agree with the right to travel. It should be noted that it can be argued that airline travel is a unique form of transportation which has grown to be a significant requirement to conduct business, to maintain physical relationships with family and relatives, and to go on leisure vacations. There is no alternative to covering significant distances in such a short time frame. For this reason, the restrictions on airplane travel should be **especially scrutinized** for impact to our citizens.
- 5) A main TSA argument put forth concerning strip search scanners is based on the 1973 lower court opinion which stated “...-screening...does not exceed constitutional limitations provided that the screening process is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives, that it is confined in good faith to that purpose...”

We think this bears some discussion. The original opinion is based ONLY on magnetometer technology which was available at the time of the decision. At no time was a strip search contemplated as the standard primary screening, despite the fact that an explosive like PETN had been around since the early 1900s and was used by the Germans as early as World War 1.

Apparently, the decision had been made decades ago to forego strip searches of airline passengers, despite the presence of non-metallic explosives. Is this because of the enhanced time to perform the physical search or the intrusion on privacy by forcing airline passengers to show their naked bodies to government strangers?

Regardless of the answer, the new strip search scanners are completely different technologies with a different level of intrusiveness from magnetometers.

- 6) What the TSA does not state, is the lower court also said: “These doctrines dictate a critical examination of each element of the airport security program to make certain that **neither the passenger's right to travel nor his right to personal privacy is burdened beyond the clear necessities of current circumstances.**”

The necessities of current circumstances were 33 successful hijackings out of 40 hijackings in one year. We will discuss today’s necessities based on non-metallic explosives in the RISKS sections. Clearly, we do have a right to travel and the lower court recognized a right to personal privacy.

- 7) Which leads us to what is probably the major issue concerning the “doctrine” of administrative searches. The reference to the Camara case said: ‘ “To pass constitutional muster, an

administrative search must meet the Fourth Amendment's standard of reasonableness." Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court*, supra, 387 U.S. at 536-537, 87 S.Ct. at 1735.'

There are really two parts to "carving out" the 4<sup>th</sup> Amendment. One is to measure the "need to search" and the other is to measure the "invasion" which the search entails. The former is the security risk, and the latter is the method of the search.

The assertion in the *Camara* case is that **even an administrative search must meet the standard of reasonableness**. The issue in the *Camara* case was that a gentleman had his private domicile searched without a warrant as we discussed earlier. The point is that if an administrative search is allowed to be conducted without a warrant, it must still meet the standards of the 4<sup>th</sup> amendment.

### ***NPRM Ignores Body Images, Yet TSA Scanners Are "Strip Searches"***

Our society has an expectation of privacy, especially of our bodies. This is why we wear clothing in public, why we break laws when we expose our bodies without clothing, and why TV stations are subjected to large fines for displaying nude bodies. Our teachers do not teach in the nude, our government does not make a government job contingent on working without clothes, and we have voyeurism laws against strangers viewing one naked without one's permission.

Furthermore, we teach our children to "not let strangers touch you" from an early age. Also, generally we do not share nude pictures of our children with strangers. There are laws against unwanted touching by strangers, especially touching of a sexual nature. Again, there is a well-established custom and expectation of privacy for ourselves and especially for our children.

In the ([www.epic.org](http://www.epic.org)) EPIC vs DHS lawsuit, EPIC notes:

' "The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, in impelled by elementary self-respect and personal dignity," said the U.S. Ninth Circuit Court of Appeals in 1958. The law of privacy, according to a federal judge in California in 1976, "encompasses the individual's regard for his own dignity; his resistance to humiliation and embarrassment; his privilege against unwanted exposure of his nude body and bodily functions." Both courts were discussing dignity in prisons, even though other rights of privacy are not accorded inmates. '

Meanwhile, the TSA has tried to make strip search scanners a mandatory tool of airport screenings. The strip search scanners completely violate our expectations of privacy and customs and are applied to travelers who are not under arrest or even under the remotest suspicion. The TSA website describes the strip search scanners (<http://www.tsa.gov/approach/tech/ait/faqs.shtm>) as "...advanced imaging technology..screens passengers..for..threats..concealed under a passengers' clothing." The TSA clearly is

performing a search after removing your clothing, and in fact, they are “..highly confident in its detection capability.”

We agree with the TSA that they take images of your naked body. On April 15<sup>th</sup>, 2008 the TSA blog (<http://blog.tsa.gov/2008/04/first-significant-deployment-of.html>) suggested that “These images are friendly enough to post in a preschool. Heck, it could even make the cover of Reader’s Digest and not offend anybody.” Since that time, the TSA has made it clear the images are invasive to the point that “The officer who views the image is remotely located in a secure resolution room.” according to the TSA FAQ (Frequently Asked Questions). Although actual high-resolution photos have not been released, a sample low-resolution photograph is shown below from the EPIC vs DHS lawsuit discovery.



The actual detection capabilities highlighted by the TSA include the comment (<http://blog.tsa.gov/2010/03/advanced-imaging-technology-yes-its.html?commentPage=4>): “Using AIT, our officers are finding things like small packages of powder-based drugs hidden on the body. When I

say small, I mean that one packet was smaller than a thumb print.” So, the images we have obtained obviously are not at the quality level hinted at in the TSA statement.

One consequence of the graphic nature of the strip search scanner images is that a Miami TSA worker assaulted a co-worker after his coworkers made fun of the size of his genitalia after he walked through a strip search scanner during training (<http://www.nbcmiami.com/news/local/TSA-Fracas-After-Body-Scanner-Reveals-TMI-92971929.html> ). Another incident occurred in London ([http://news.bbc.co.uk/2/hi/uk\\_news/england/london/8584484.stm](http://news.bbc.co.uk/2/hi/uk_news/england/london/8584484.stm) )when a female security agent accidentally (NOTE: Apparently, the people using the scanners know they completely invade privacy) entered a scanner, and was subsequently harassed by a male coworker.

**Let there be no doubt about the intrusiveness of the strip search.**

The intrusive strip searches used by the TSA are not even allowed for police. The police may perform strip searches on prisoners, or in certain circumstances on people under arrest. There is some debate, even within the courts, on what offenses and in what conditions police may strip search people under arrest. For example, people under arrest for jaywalking, failure to pay a parking ticket, and other misdemeanors may not necessarily be strip searched. **One would think that a non-law enforcement agency could not use methods, which are prohibited to police, on people who are not under arrest.**

***Sexual Assault Pat Downs***

It is a little known fact that a passenger is not required to go through a strip search scanner – the TSA offers an “opt out” to have your person searched. As previously stated, this is not the “pat down” you might get at a sporting event where they touch your outer clothing to feel for prohibited items such as alcohol containers. Instead, the Transportation Security Officer (TSO) follows a secret procedure that has not been made public. We can assure you that the procedure includes having a TSO touch your genitals and breasts – if you searched your neighbors and your neighbors’ children this way for potential weapons when they visited your house, you would be arrested.

In another Supreme Court decision *Terry vs State of Ohio* (<http://openjurist.org/392/us/1/terry-v-state-of-ohio> ), the Supreme Court ruled that police are allowed to “frisk” potential suspects, even if not under arrest, based on the potential for an immediate threat of injury or death to a police officer. Under the administrative search doctrine, the TSA is asserting the government right to perform a “Terry frisk” without remotely reaching the relaxed 4<sup>th</sup> amendment standards that the Supreme Court carefully laid out in this decision. It is important to note that the Supreme Court justified the frisk method based on the fact that many officers were killed every year by people with hidden weapons. A police frisk should not be allowed by non-law enforcement government workers, especially using more relaxed standards than those which police must follow.