

TESTIMONY OF JONATHAN CORBETT
REGARDING H.B. 80

PREPARED FOR THE TEXAS HOUSE OF REPRESENTATIVES
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I. BACKGROUND & PERSONAL INTEREST

My name is Jonathan Corbett, and I am a U.S. citizen over the age of 18 residing in the State of Florida. I attended Rensselaer Polytechnic Institute, a leading engineering and science university in New York and presently own a technology consulting firm. My work has included designing and deploying technology solutions – including imaging devices – for the largest non-federal counterterrorism agency in the country: the New York Police Department’s Counterterrorism Bureau.

I am also a “frequent flyer,” having flown on hundreds of flights since the TSA’s inception shortly after the terror attacks of September 11th, 2001. Since the TSA began use of “nude body scanners¹” and “enhanced pat-downs²” in 2010, I have been at the forefront of those seeking to petition their government to end both practices, having filed the first federal lawsuit seeking review of the constitutionality on November 16th, 2010³. I have been ejected from TSA checkpoints on three occasions for merely refusing to allow a government employee to touch my genitals⁴. I have also used my technical and security background to study aviation security, and on March 7th, 2012, I published research documenting that the TSA’s new invasive procedures make our skies *more* vulnerable to terrorism, not less⁵. My research was covered by international media, and presented my findings to members of the United States Congress on May 22nd, 2012⁶.

In addition to my first-hand experience, as a result of my work, I have heard from thousands of individuals affected by TSA abuse: by e-mail, by phone, by letter, and in person. These communications are often time heartbreaking, from stories of how grandchildren will never see grandparents or Disney World because parents do not want government hands in the pants of their children, to stories of searches that meet the legal definition of rape. I have also spoken candidly with several TSA employees who have detailed their knowledge of TSA abuse and the ineffectiveness of the present invasive security procedures⁷. It is based on my

¹ A “nude body scanner” is a device that creates an image of a traveler beneath his or her clothing by use of electromagnetic radiation. The image may be reviewed manually by a human or via an automated system. The TSA has referred to this technology as “Whole Body Imaging” and “Advanced Imaging Technology.”

² An “enhanced pat-down,” which the TSA now, in true Orwellian-form, refers to as a “standard pat-down,” involves the touching of the traveler’s genitals, buttocks, and breasts through clothing, as well as placing the hands of the searcher inside the waistband of the traveler’s pants.

³ *Corbett v. United States*, 10-CV-24106 (S.D.F.L.)

⁴ <http://tsaoutofourpants.wordpress.com/?s=kicked+out>

⁵ <http://tsaoutofourpants.wordpress.com/2012/03/06/1b-of-nude-body-scanners-made-worthless-by-blog-how-anyone-can-get-anything-past-the-tsas-nude-body-scanners/>

⁶ <http://tsaoutofourpants.wordpress.com/2012/05/05/jonathan-corbett-to-present-nude-body-scanner-failures-to-congress-file-us-supreme-court-petition-on-may-22nd/>

⁷ <http://tsaoutofourpants.wordpress.com/2012/04/10/tsa-admits-1b-nude-body-scanner-fleet-worthless/>

experience as a technical and security expert, as a frequent flyer, as a civil rights advocate, and as the recipient of the first-hand accounts of others that I provide this testimony to you today.

II. TSA ABUSE AT THE CHECKPOINT

The most common scenarios of TSA abuse at security checkpoints across the nation are as follows:

A. NUDE BODY SCANNERS

The original nude body scanners implemented by the TSA created graphic images of the nude body of travelers. These images are reviewed by TSA screeners, and these screeners each look at the naked bodies of thousands of children, the elderly, and everyone in between on a daily basis. This virtual strip-search is conducted as primary screening – meaning without any suspicion that the traveler is dangerous.

The use of nude body scanners is justified by the TSA as necessary for the detection of non-metallic explosives, and the TSA may only lawfully search travelers for items that present a hazard to aviation security – *not* for evidence of generalized criminality unrelated to aviation security⁸. While the TSA is in the process of “upgrading” its nude body scanners to function without human review of the images, the fact of the matter remains that every inch of a traveler’s body is being searched without suspicion, and that this search is entirely unnecessary and ineffective for this purpose.

My first-hand research in 2012 aimed to demonstrate exactly this point. Utilizing a flaw that is similar to the blind spots in car mirrors that any driver is familiar with, I was able to take a metallic case through a nude body scanner without being detected by TSA screeners. I did so twice: at two different airports, through two different types of scanners, and both time while on video. While my metallic case was empty, it could easily have been filled with explosives or other bomb components.

The flaw that I exposed is one of many inherent in using imaging technology to attempt to detect explosives, cannot be easily remedied, and to the best of my knowledge, still exists today. This means that anyone can easily pass through any TSA nude body scanner with a firearm, explosive, or any other weapon. My research matches studies conducted by the Government Accountability Office and the TSA itself, which show an abysmal failure rate for

⁸ While the U.S. Constitution protects us from search without cause, the “administrative search doctrine” (under which the TSA operates) allows limited searches for specific security reasons. Thus, a search at the airport intended to find explosives is legal, while a search intended to find drugs is not.

TSA screening when tested covertly. The TSA still uses nude body scanners not because they improve security, but because they are too embarrassed that they wasted, by some estimates, about \$1 billion on their nude body scanner program.

There are indeed effective means of securing our skies from non-metallic explosives, and foremost on that list are explosive trace detection systems. The TSA has offered no explanation as to why they chose an expensive, invasive, ineffective technology instead of significantly cheaper, non-invasive, highly effective explosive trace detection.

B. ENHANCED PAT-DOWNS

At the heart of H.B. 80 is an attempt to end the TSA's enhanced pat-down program, which puts government hands on the genitals, buttocks, and breasts of thousands of children, the elderly, and everyone in between on a daily basis. However, it is important to note that the enhanced pat-down program goes hand-in-hand with the nude body scanner program. The nude body scanners have a false-positive rate that has been estimated at anywhere from 40% - 75%, and when an "anomaly" is found on a nude body scan, a pat-down is used to resolve it. Without pat-downs, the scanners cannot continue because there would be no way to deal with the constant barrage of false-positives.

The government makes much ado about the nude body scanners being an "optional" technology. But, when the "option" is to accept the virtual strip-search, or accept the physical sexual assault of the enhanced pat-down, it becomes clear that there really is no option.

C. ABUSE SPECIFIC TO CHILDREN, THE ELDERLY, AND WOMEN

While the TSA abuses all passengers, certain passengers are more likely to experience discrimination by the TSA. Children, the elderly, and women are three groups that are particularly affected by TSA abuse.

Children are affected by the enhanced pat-down procedure beyond the effects that would be felt by an adult. Because children are constantly learning and do not understand rationales for aviation security procedures, the effect of being subjected to a government employee touching their genitals is *conditioning* to accept sexual abuse⁹. The outrage of parents and medical professionals has led to the TSA allegedly adopting less-rigorous pat-downs for children. However, in practice, this alleged policy update is not uniformly observed.

Children are further affected by the forced separation of parents and children. From the perspective of a parent, the TSA treats children exactly as if they were a suitcase: no contact may be made between parent and child until the screening of both parties is complete. On

⁹ <http://www.rawstory.com/rs/2010/12/01/airport-patdowns-grooming-children-sex-predators-abuse-expert/>

many occasions, the TSA has demanded significant physical distance between parent and child, resulting in distress for both parties.

The TSA also routinely violates the elderly. Around the turn of the year, the TSA was the subject of a scandal by three female seniors who were strip searched (literally, not virtually) by TSA employees “in the back room¹⁰.” The TSA admitted wrong-doing in the encounter, and this was just one high-profile example of the abuse of those who deserve to be protected.

Finally, women in particular have been the target of TSA abuse. TSA screeners have been reported by hundreds of women to have targeted them for nude body scanners because of physical appearance, or pat-downs because they were wearing a skirt¹¹. TSA screeners have been reported to make comments about the appearance of women as they undergo physical searches, and have even made up code words to alert other screeners to the attractiveness of female travelers¹². TSA screeners have stood by and gawked as females are physically searched. And TSA screeners have discriminated against mothers bringing breast milk through security checkpoints¹³. These represent some of the many abuses that women flyers encounter on a daily basis.

It should be noted that some women face particular trauma when encountering TSA procedures. Rape survivors commonly have Post Traumatic Stress Disorder, which may be triggered by the government-sponsored checkpoint groping. In at least one instance, a rape survivor’s PTSD triggered by TSA abuse landed her in the hospital¹⁴.

D. ABUSE SPECIFIC TO THE DISABLED

Another group that encounters specialized TSA abuse is the disabled. Unlike virtually any other agency or business, the TSA does not comply with ADA-mandated rules requiring the provision of reasonable accommodations. Instead, disabled travelers frequently wind up embarrassed, injured, or finding alternate travel arrangements to avoid the TSA altogether.

Particularly egregious reports of TSA abuse of the disabled include breaking a man’s urostomy bag (repeatedly), forcing travelers with prosthetic legs to remove their prosthesis and

¹⁰ <http://www.nydailynews.com/news/national/lenore-zimmerman-85-hurt-strip-search-tsa-agents-jfk-airport-article-1.986198>

¹¹ <http://www.theblaze.com/stories/2010/11/19/woman-calims-tsa-agent-reached-up-skirt-and-violently-frisked-her/>

¹² <http://www.flyertalk.com/forum/practical-travel-safety-issues/1147497-tso-saying-heads-up-got-cutie-you.html>

¹³ <http://www.nowpublic.com/world/tsa-outrage-phoenix-airport-tsa-breast-milk-harassment-video-2731512.html>

¹⁴ <http://rt.com/usa/tsa-rape-room-wife-179/>

hop through metal detectors, demanding explanations for medications, strip searches, and general lack of respect for the special needs of these people¹⁵.

E. THEFT

Although not entirely relevant to H.B. 80, theft is an issue that plagues the TSA. Hundreds of screeners have been fired for theft, and undercover investigations both by the media and the TSA itself show this to be a problem that is not going away.

F. BULLYING INTO SUBMISSION

To some extent, the TSA relies on the consent of travelers in order to continue to conduct its searches. That is, the TSA cannot go into random homes and conduct a search, but rather, they depend on a traveler to present him or herself at a checkpoint¹⁶.

However, beyond the obvious possibility that refusing to cooperate with screening will result in being denied access to one's flight, the TSA threatens, extorts, and sometimes uses force to "persuade" travelers to relinquish their rights. On three separate occasions in 2011, I was asked to consent to a TSA screener touching my genitals through clothing as part of their enhanced pat-down search. On two of these occasions, local law enforcement was summoned to add "muscle" to the TSA's demand that I comply with their intrusive search. On one of these occasions, I was threatened with forcible search, arrest, and fines. On all three of these occasions, I was ejected from the checkpoint and was unable to board my flight.

My experience was hardly unique. In November 2010, passenger John Tyner coined the phrase, "Don't touch my junk!" when asked to submit to a genital search, after which he was threatened with fines and ejected from the checkpoint¹⁷. In July 2011, Andrea Abbott refused to allow her daughter to be groped by TSA screeners; law enforcement was summoned and she was arrested for daring to raise her voice in defense of her daughter¹⁸.

For every instance of TSA bullying that makes the news there are many, many more such encounters, and many of these have been communicated to me personally. But, perhaps more troubling is the number of people who are too afraid to stand up to the TSA and simply accept the sexual assault put forth by the TSA to avoid confrontation, especially in light of the known bullying tendencies of the TSA.

¹⁵ <http://www.examiner.com/article/tsa-agent-nearly-bursts-cancer-patient-s-urostomy-bag-again>

¹⁶ This "consent" is not particularly voluntary because it is extorted by threatening to deny a traveler the right to travel. Travelers must either "consent" or lose their jobs, forfeit opportunities to see family, etc.

¹⁷ <http://www.utsandiego.com/news/2010/nov/14/tsa-ejects-oceanside-man-airport-refusing-security/>

¹⁸ <http://www.tennessean.com/article/20110713/NEWS01/307130115/Police-charge-mother-Nashville-airport-altercation>

III. TSA ABUSE OF THE COURTS

The TSA abuses the federal court system to insulate itself from judicial review by various means:

A. 49 U.S.C. § 46110

This jurisdictional statute requires that challenges to TSA “orders” be heard in the U.S. Court of Appeals, rather than in U.S. District Court. Virtually anything the TSA writes down has been interpreted by the courts to be an “order,” even though a reading of the statute in context makes clear that it was intended only to channel appeals of administrative proceedings (*i.e.*, adverse actions imposed by the TSA after review by an administrative law judge, or similar).

The effect of this is profound: cases heard in the district courts offer a plaintiff the right to discovery, a jury trial, witnesses, and a plethora of other due process features. Cases before the appellate courts offer a petitioner none of the above as-of-right. Further, there is no right to appeal a decision made by the appellate court: one’s only option is to petition that court to re-hear, or to petition the U.S. Supreme Court to take up the case, both of which grant a tiny fraction of such petitions.

B. IMMUNITY

When confronted in court for blatant violations of civil rights, the TSA has often been successful in claiming *qualified immunity* and *sovereign immunity*.

Qualified immunity allows government officials a free pass if they “were not on notice” that such conduct was unlawful. This immunity was intended to protect officials forced to make quick judgments in situations where even competent lawyers could disagree about whether their actions were legal. However, in practice, this creates an impossible barrier: unless the U.S. Court of Appeals for the relevant circuit, or the U.S. Supreme Court, has addressed the conduct before and declared it to be illegal, or the conduct is so obviously a violation of the law that there can be no question, immunity will be applied. This problem is compounded by the fact that often times courts will declare that qualified immunity applies *without* actually declaring the underlying conduct to be illegal. The result of this is the Courts of Appeals and Supreme Court *never* rule particular conduct to be illegal, and it can be repeated *ad nauseum*.

Sovereign immunity stems from the days where kings ruled the land and “the king can do no wrong.” The federal government is immune from suit unless it waives sovereign immunity, which it has on several occasions. One of those occasions is the Federal Tort Claims Act, 28 U.S.C. § 2674. However, this waiver only allows intentional torts for claims such as assault, battery, and false arrest when the federal actor is “is empowered by law to execute searches,

to seize evidence, or to make arrests for violations of Federal law¹⁹.” And, of course, despite the fact that a TSA screener exists for the purpose of executing searches, the courts have carved, out of thin air, an exception for TSA screeners, reasoning that since TSA screeners only conduct voluntary searches, those searches do not count for the purposes of the FTCA.

C. ESTOPPEL

Estoppel is the doctrine that one cannot argue one position in one court and then the opposite position in another. However, I have read through a vast collection of TSA legal arguments, and it is truly shocking to find that the Department of Justice will argue whatever argument it finds necessary to win the case, rather than to argue in the interest of justice.

For example, in 2011, the TSA found itself in the Court of Appeals in a case which challenged a TSA “order²⁰.” The TSA attempted to escape appellate jurisdiction by arguing that the policy document in question was not an order, alleging that the document was “a general statement[] of policy” that “does not impose any rights and obligations.” That same year the TSA argued in one of my lawsuits that that same exact document was “a definitive statement of agency policy” that “affects the rights of travelers.” So far, no court of which I am aware, including the courts in the two cases mentioned, has held the TSA accountable for their legal doublespeak.

IV. BENEFITS OF H.B. 80

H.B. 80 has the potential to solve many of the issues presented herein:

1. The language of the bill explicitly forbids the TSA’s enhanced pat-down procedure.
2. Removal of the enhanced pat-down procedure will indirectly require the removal of nude body scanners.
3. The language of the bill explicitly forbids the TSA’s separation of parent and child.
4. Elimination of the enhanced pat-down and nude body scanners will limit the potential for the abuse of women and special needs groups by making screening more straightforward and hands-free.
5. Similarly, the TSA’s bullying problem will be limited since its repertoire of threats will be significantly limited. The language of the bill explicitly forbids certain types of threats.
6. The use of 49 U.S.C. § 46110 is irrelevant in a criminal prosecution.

¹⁹ 28 U.S.C. § 2680(h)

²⁰ *EPIC v. DHS*, No. 10-1157

7. Qualified immunity is irrelevant in a criminal prosecution, and the clarity of the text of H.B. 80 makes qualified immunity significantly a significantly more challenging defense to a civil action.
8. Sovereign immunity is irrelevant in a criminal prosecution.

VI. LIMITATIONS OF H.B. 80

The primary limitation of H.B. 80, and any state-level law restricting TSA abuse is that the government will challenge such a law in court as pre-empted by federal law. However, H.B. 80 is well-crafted and its severability clause requires the courts to look through the bill inch by inch, rather than summarily throw it aside.

I believe that the state's exercise of its police power is the best argument for curtailing TSA abuse. The state has the unquestionable right to define crimes and punishment, and I believe the state can make a strong argument that H.B. 80 is not an aviation security bill, but a general criminal statute.

Attached to this bill must be Texas' commitment to defend the law in court. In 2011, this state was close to passing a similar bill, which lost its support after the federal government threatened to, essentially, make Texas a no-fly zone by cancelling all flights to and from airports in the state²¹. This threat will be made again, and I urge you to consider that this is entirely an empty threat.

I also urge you to consider that even if parts of H.B. 80 are struck down, it is *still* worth passing. TSA abuse in this country is a serious issue, and all of us need to do our part to curb it. As a state legislator, you have the ability to take a stand against the abuse of your people and the rest of the American people, and doing so will bring great attention to the issue. It is through awareness that we can generate change in the federal government, and even if the courts strike down your law, they cannot strike down the awareness that you have generated.

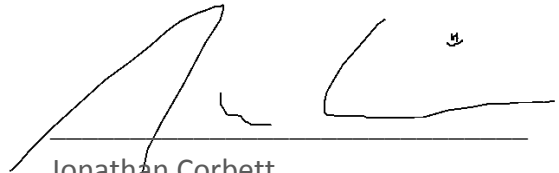
²¹ <http://tenthamentcenter.com/2011/05/24/feds-issue-threat-no-fly-zone-for-texas/>

V. CONCLUSION

Based on the above, I urge you, as representatives of the free people of the State of Texas, to pass H.B. 80.

I thank you for your consideration of my testimony, and I offer myself as available to answer any questions you may have.

I affirm the accuracy of this testimony to the best of my knowledge.

A handwritten signature in black ink, appearing to read 'Jonathan Corbett', is written over a horizontal line. The signature is stylized and cursive.

Jonathan Corbett

382 N/E. 191st St., #86952

Miami, FL 33179

E-mail: jcorbett@fourtentech.com