IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Jonathan Corbett Petitioner v. Transportation Security Administration, Respondent	**No. 15-_____** **MOTION TO STAY ORDER**

Jonathan Corbett, *pro se* Petitioner, hereby moves the Court to enjoin the Transportation Security Administration from certain unconstitutional and/or improperly promulgated search procedures as described herein under Fed. R. App. P., Rule 18, 28 U.S.C. § 2342, and/or 49 U.S.C. § 46110(c).

I. BACKGROUND

In or around October 2010, the Transportation Security Administration ("TSA") began implementation of an "order[1]" that allowed the use of "body scanners" as primary screening. A "body scanner" is any device that uses electromagnetic radiation to produce an image of the unclothed surface of a human subject, whether or not the image created is reviewed by a human or by a computer algorithm. This includes technology that the TSA has dubbed, "Advanced Imaging Technology" (AIT), "Whole Body Imaging" (WBI), "Millimeter Wave Scanners,"

[1] All references to an "order" are as defined by 49 U.S.C. § 46110.

and "Backscatter X-Ray Scanners." The TSA, since implementation, has made this program optional for all travelers, allowing anyone who does not want to use, or cannot use, the body scanners to opt for a physical "pat-down" search instead. A request for this alternative screening is known as an "opt-out."

Many challenges were filed against this program in federal district and appellate courts across the country. *See*, for example, *Blitz v. Napolitano*, 700 F.3d 733 (4th Cir. 2011); *Roberts v. Napolitano*, 798 F. Supp. 2d 7 (D.C. Cir. 2011); *Durso v. Napolitano*, 795 F. Supp. 2d 63 (D.C. Cir. 2011); *Redfern v. Napolitano*, 727 F.3d 77 (1st Cir. 2013). As best Petitioner can uncover, all were dismissed on jurisdictional, time, and/or mootness grounds, except two that reached the merits. In *Corbett v. TSA*, 767 F.3d 1171 (11th Cir. 2014), the Court, in a 2-1 split, noted that his claim was time-barred, but issued an "in the alternative ruling" that it would find the body scanners to be constitutional notwithstanding the petition being out of time. In *EPIC v. D.H.S.*, 653 F.3d 1 (D.C. Cir. 2011), the challenge was largely whether the TSA followed the Administrative Procedures Act (APA) in issuing the order, but that petitioner also discussed, and the court also rejected, a constitutional challenge, while granting the petition on its APA challenge.

In all of these challenges, including Petitioner's previous challenge in this circuit, Respondent argued that the fact that use of the body scanners was optional, and that passengers were given an alternative, was a significant factor to weigh

heavily in favor of the constitutionality of the order. However, on December 18th, 2015, the TSA released a Privacy Impact Assessment that indicated that the agency would only offer an opt-out procedure for the body scanners at its discretion; that is, that it may make use of the body scanners mandatory as it wishes. Exhibit A. The TSA has not published a notice of the new rule in the Federal Register, nor has it provided an opportunity for public comment on its new rulemaking.

II. PROCEEDINGS BEFORE THE AGENCY

It should be noted that the order challenged was decided upon in secret without any notice to Petitioner. Petitioner was thus precluded from any proceedings in front of the agency, and therefore, Fed. R. App. P 18(a)(2)(A)(i) (impracticability of moving first before the agency) is completed. Additionally, it should be noted that, pursuant to Fed. R. App. P 18(a)(2)(B)(iii), while Petitioner can and does include the public Privacy Impact Assessment discussed *supra* as an attachment to this petition, it is likely that Petitioner also challenges an internal version of the order that is non-public because it constitutes Sensitive Security Information. 49 C.F.R. § 1520, 6 U.S.C. § 114. Respondent can provide the Court with a copy of this order, which, upon belief, will be the revised "Screening Checkpoint Standard Operating Procedures."

III. LEGAL STANDARD

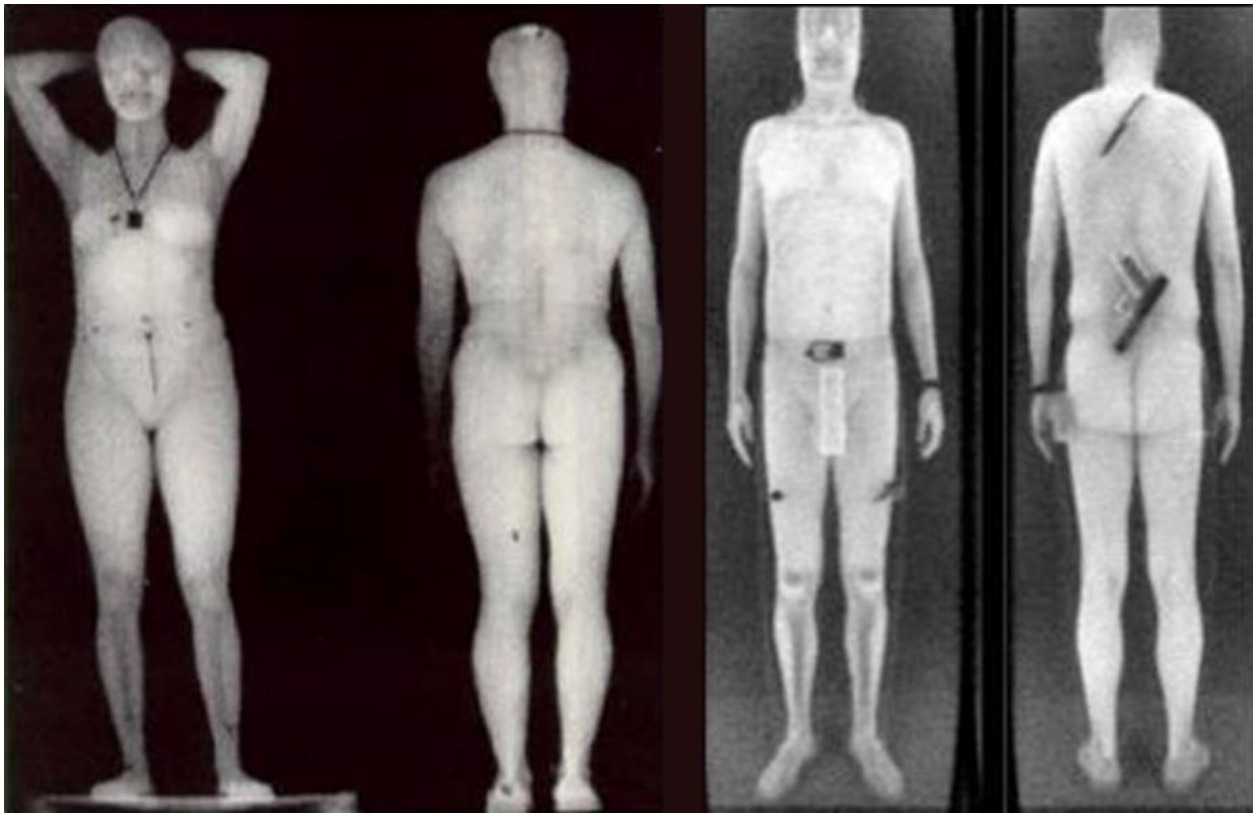
The test for determining a motion for stay pending review is long settled: the Court must consider: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), *citing with approval Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986); *see also Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008).

A strong showing towards some parts of the test can balance a more modest showing on others. For example, if Petitioner shows a "likelihood of irreparable injury and that the injunction is in the public interest," an "injunction is appropriate when a [petitioner] demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the [petitioner's] favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134, 1135 (9th Cir. 2011).

IV. ARGUMENT

A. Petitioner is Likely to Succeed On The Merits

The TSA's body scanner implicates significant privacy concerns because it allows the TSA to create an image of a passenger's unclothed body. "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *York v. Story*, 324 F.2d 450 (9th Cir. 1963). When the image created is output to a computer screen, the output is similar to the following image generated circa 2011 (and we may presume that in the last 4 years, the TSA has only improved upon the resolution of these images):



The current body scanners in use by the TSA do not presently output the image to a computer screen, instead relying on a computer algorithm to evaluate the images. This does not change the fact that the image is created in the first place, even if it is (in theory) never reviewed by a human, and it still remains possible to program TSA body scanners to display, save, e-mail, and print these images.

For many travelers, conditioning one's right to fly on the creation of such images is a significant intrusion onto their body. For some of those travelers, they may be concerned about embarrassing scars, deformities, body piercings, feminine hygiene products and the like, while others simply do not want the government's eyes on their unclothed body regardless of their condition. Some travelers are uncomfortable lifting, or cannot lift, their arms in the pose required by the TSA (an "arms above the head" with bent elbows posture), or cannot even stand to walk through the scanner, or feel that the pose is humiliatingly submissive. Some travelers have religious prohibitions on the imaging of their bodies, especially images that create an unclothed view, while to others this would be triggering of PTSD, perhaps from an earlier rape trauma. Therefore, millions of travelers each year[2] use the TSA's "opt-out" procedure.

[2] The TSA has stated that the opt-out rate is less than 2% of passengers, which would calculate to 14,000,000 passengers annually …

The alternative "opt-out" screening, whereby a TSA screener runs his or her hands along the traveler's body over clothing, is not generally thought of as "pleasant," but is an important alternative for many travelers who cannot or do not want to participate in the body scanner program. The new TSA order now seeks to remove the opt-out at the TSA's discretion, thus forcing passengers into the scanner whether they like it or not. This requirement is especially odious because passengers do not retain the right to discontinue screening and leave the checkpoint without flying. The TSA issues civil enforcement penalties[3] of up to $11,000 for passengers who fail to complete screening once begun, meaning a passenger who learns mid-search that opt-outs will not be allowed today cannot avoid that search by electing not to fly.

Regardless of whether or not eliminating the opt-out procedure tips the balances from "constitutional" to "unconstitutional," it is clear that the issue is one of significant public importance and therefore is prime for notice & comment rulemaking. As the D.C. Circuit explained regarding the original body scanner order that included the right to opt-out:

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https://www.federalregister.gov/articles/2013/03/26/2013-07023/passenger-screening-using-advanced-imaging-technology#citation-61

[3] "Enforcement Sanction Guidance Policy." Transportation Security Administration. https://www.tsa.gov/sites/default/files/enforcement_sanction_guidance_policy.pdf

> "[T]he change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking. Indeed, few if any regulatory procedures impose directly and significantly upon so many members of the public. Not surprisingly, therefore, much public concern and media coverage have been focused upon issues of privacy, safety, and efficacy, each of which no doubt would have been the subject of many comments had the TSA seen fit to solicit comments upon a proposal to use AIT for primary screening."

EPIC at 6 (*internal citation omitted*). The same reasoning applies here where the TSA has made a sweeping change by making its optional body scanner program mandatory. Yet the TSA has, once again, failed to provide notice of its proposed rulemaking in the Federal Register or begin – let alone complete – the process of soliciting and reviewing comments as required by 5 U.S.C. § 553(b) and (c).

But not only has the TSA failed to give notice or engage in notice & comment rulemaking for this new order, it still has not completed such rulemaking for the older order as it was ordered to by the D.C. Circuit in 2011. *See EPIC*. The TSA has gone so far as to solicit comments for the older order and received over 5,500 comments from the public in 2013, but two years after receiving the comments (after asking for them 3 years late), it has not responded to them or issued a rule.

It may be with good reason that the TSA is having trouble putting together a response: over 95% of the comments are vehemently opposed to the program – many commenters clearly feeling angry, betrayed, and abused – and these are responses to the program *with* the opt-out option.

It is beyond arbitrary and capricious for the TSA to issue a new rule that gives the public more of what they hate when they have not even finished responding to the comments tearing apart the older rule. Quite simply, there is no security reason that demands that the TSA implement this new rule right now, without first going through the appropriate APA processes, and if there is, they must explain it to the Court here and now. Otherwise, they must do what the law says the must do: publish the proposed change in the Federal Register, ask for comments, and thoughtfully consider and respond to those comments. This is what the American people deserve, and what Congress has written.

B. Petitioner and the Public Will Be Injured Without a Stay

Petitioner is a frequent flyer, having flown no less than 150,000 miles on over 100 flights over the course of the past 2 years and intends to continue this level of travel. Petitioner opposes the use of the body scanners for various reasons, has regularly opted out of being scanned by them, and intends to continue to do so. Petitioner has a reasonable fear that the TSA may decide to "force" him into being scanned at the checkpoint under pain of $11,000 civil penalty. Exhibit B.

Petitioner submits that the body scanners are unconstitutional, and constitutional injuries are generally considered irreparable. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). For example, "[t]he loss of First Amendment

freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Klein v. City of San Clemente*, WL 3152381, at *8 (9th Cir. 2009) (*quoting Elrod v. Burns*, 427 U.S. 347 (1976)). However, Petitioner also has the right to be subject only to rules created in accordance with the law. If the TSA's new rule has been created without legal authority, as is the case here where the agency has failed to take the requisite steps before promulgating the order, its use on Petitioner would constitute an injury similar to a Fourth Amendment violation.

Likewise, the other two million people who travel through TSA checkpoints in the United States on a daily basis also deserve to be subject only to constitutional, lawfully created rules, and they too would be subject to injury. Should the Court not enjoin the TSA from enforcing its new illegal rule, 23 people per second will be subject to it. Thus, it is also in the public interest to enjoin the rule.

C. Respondent Will Not Be Injured By a Stay

The TSA, as a government organization, obviously can face no injury by an order asking it to hold off on modifying its procedures, that it has been using without issue for the last 5 years now, until the Court can determine if proper procedures were followed and whether the update to the order tips the scales towards making the body scanner program unconstitutional. The government can

have no interest other than the public interest. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010)

V. CONCLUSION

Petitioner believes that Respondent has issued an order that is unconstitutional in light of the change from allowing an opt-out of a digital strip search in favor of making that search mandatory. But, the Court need not reach that question now: the Court need merely recognize that the issue is one of great public importance that is subject to the Administrative Procedures Act's notice & comment rulemaking requirement. On those grounds, Petitioner asks the Court to stay the TSA's order removing the opt-out option until the merits of this case can be resolved or until the TSA completes notice & comment rulemaking.

Dated: Miami, Florida
December 24th, 2015

Respectfully submitted,

_____

Jonathan Corbett
Petitioner, Pro Se
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Exhibit A

Privacy Impact Assessment Update
for

TSA Advanced Imaging Technology

DHS/TSA/PIA-032(d)

December 18, 2015

Contact Point
Jill Vaughan
Assistant Administrator
Office of Security Capabilities
OSCCommunications@dhs.gov

Reviewing Official
Karen L. Neuman
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Abstract

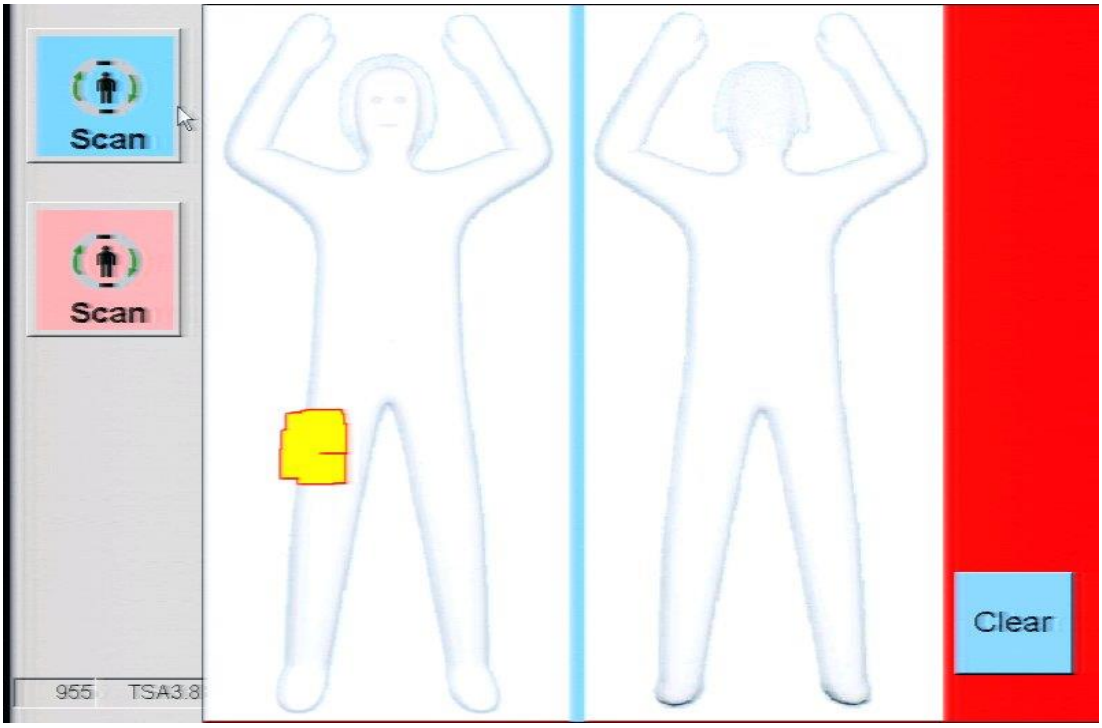
The Transportation Security Administration (TSA) has deployed Advanced Imaging Technologies (AIT) for operational use to detect threat objects carried on persons entering airport sterile areas. AIT identifies potential threat objects on the body using Automatic Target Recognition (ATR) software to display the location of the object on a generic figure as opposed to displaying the image of the individual. TSA is updating the AIT PIA to reflect a change to the operating protocol regarding the ability of individuals to opt 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. TSA does not store any personally identifiable information from AIT screening.

Introduction

Under the Aviation and Transportation Security Act (ATSA),[1] TSA is responsible for security in all modes of transportation, and must assess threats to transportation, enforce security-related regulations and requirements, and ensure the adequacy of security measures at airports and other transportation facilities. TSA has deployed AIT for operational use to detect threat objects carried on persons entering airport sterile areas.[2] AIT identifies potential threat objects on the body using ATR software to display the location of the object on a generic figure as opposed to displaying the image of the individual. TSA currently uses AIT equipped with ATR to quickly, and without physical contact, screen passengers for prohibited items including weapons, explosives, and other metallic and non-metallic threat objects hidden under layers of clothing. ATR software identifies objects on the body and highlights the location of the object with bounding boxes on a generic figure.[3] ATR eliminates the need for a remote image since it is a generic image that can be presented on a monitor connected to the AIT and co-located with the officer assisting the screened individual. The individual will undergo physical screening if ATR alarms for the presence of an object.

[1] Pub. L. 107-71
[2] "Sterile area" is defined in 49 CFR 1540.5 and generally means an area of an airport with access limited to persons who have undergone security screening by TSA.
[3] For additional information, *see* DHS/TSA/PIA-032 TSA Advanced Imaging Technology and associated updates, *available at* www.dhs.gov/privacy.

A sample image from a system using ATR appears below:



Storage of images

The AIT devices at airports do not have the ability to store images..[4] The ATR generic image is maintained on the monitor only for as long as it takes to resolve any alarms. The AIT equipment does not generate or retain an underlying image of the individual.

What to expect

Because the ATR software replaces the individual's image with that of a generic figure, the monitor will be co-located with the individual being screened. The screening officer will view both the individual and the ATR image. If there is an alarm, the physical screening will target the location indicated by the ATR software. If there are multiple alarms, the individual may receive a full screening.

[4] Initial versions of AIT were manufactured with storage functions that TSA required manufacturers to disable prior to installation at the airport. Current versions of the software installed at airports do not include any storage function to disable, and eliminate the need to perform the disabling of the storage function.

Reason for this Update

TSA is updating the AIT PIA 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 as warranted by security considerations in order to safeguard transportation security.

Fair Information Practice Principles (FIPPs)

The Privacy Act of 1974 articulates concepts of how the federal government should treat individuals and their information and imposes duties upon federal agencies regarding the collection, use, dissemination, and maintenance of personally identifiable information. Section 222(2) of the Homeland Security Act of 2002 states that the Chief Privacy Officer shall assure that information is handled in full compliance with the fair information practices set out in the Privacy Act of 1974 and shall assure that technology sustains and does not erode privacy.

In response to this obligation, the DHS Privacy Office has developed a set of Fair Information Practice Principles (FIPPs) from the underling concepts of the Privacy Act that encompass the full breadth and diversity of the information and interactions of DHS. The FIPPs account for the nature and purpose of the information being collected in relation to DHS's mission to preserve, protect, and secure. Given the particular technologies and the scope and nature of their use, TSA used the DHS Privacy Office FIPPs PIA template.

1. Principle of Transparency

Principle: DHS should be transparent and provide notice to the individual regarding its collection, use, dissemination, and maintenance of personally identifiable information (PII). Technologies or systems using PII must be described in a SORN and PIA, as appropriate. There should be no system the existence of which is a secret.

TSA has published information on AIT technologies on its website (www.TSA.gov), and published an original PIA on AIT in January 2008 with subsequent updates reflecting operational or technology changes.[5] In 2013, TSA published a Notice of Proposed Rule Making on the use of AIT in screening operations which received more than 5500 comments from the public. TSA expects to publish its Final Rule in 2016. This PIA update reflects TSA's continued transparency on its use of AIT.

[5] For all TSA Privacy Impact Assessments, please visit http://www.dhs.gov/privacy-documents-transportation-security-administration-tsa.

2. Principle of Individual Participation

Principle: DHS should involve the individual in the process of using PII. DHS should, to the extent practical, seek individual consent for the collection, use, dissemination, and maintenance of PII and should provide mechanisms for appropriate access, correction, and redress regarding DHS's use of PII.

Individuals undergoing screening using AIT generally will have the option to decline an AIT screening in favor of physical screening. Given the implementation of ATR and the mitigation of privacy issues associated with the individual image generated by previous versions of AIT not using ATR, and the need to respond to potential security threats, TSA will nonetheless mandate AIT screening for some passengers as warranted by security considerations in order to safeguard transportation security.

3. Principle of Purpose Specification

Principle: DHS should specifically articulate the authority which permits the collection of PII, to include images, and specifically articulate the purpose or purposes for which the PII is intended to be used.

TSA is responsible for security in all modes of transportation, including commercial aviation.[6] Congress directed TSA to conduct research, development, testing, and evaluation of threats carried on persons boarding aircraft or entering secure areas, including detection of weapons, explosives, and components of weapons of mass destruction.[7] AIT technologies are being used to identify prohibited items, particularly non-metallic threat objects and liquids secreted on the body. ATR software identifies the location of the potential prohibited item on a generic figure. Because of the greater privacy protections provided by a generic figure, the image monitor for ATR is co-located with the AIT so that the screening officer can view it.

4. Principle of Data Minimization

Principle: DHS should only collect PII that is directly relevant and necessary to accomplish the specified purpose(s) and only retain PII for as long as is necessary to fulfill the specified purpose(s). PII should be disposed of in accordance with DHS records disposition schedules as approved by the National Archives and Records Administration (NARA).

TSA does not collect PII with this technology. AIT with ATR does not generate an individual image but rather overlays the location of objects on a generic image.

[6] 49 U.S.C. § 114(d).
[7] 49 U.S.C. § 44912 note.

5. Principle of Use Limitation

Principle: DHS should use PII solely for the purpose(s) specified in the notice. Sharing PII outside the Department should be for a purpose compatible with the purpose for which the PII was collected.

TSA uses AIT solely for purposes of identifying objects that may be threat items. Once an alarm is resolved, the generic image is cleared from the screen, and therefore cannot be used for any other purpose or shared with anyone. Because there are no images to share, they cannot be used in any other context inside DHS or outside of the Department.

6. Principle of Data Quality and Integrity

Principle: DHS should, to the extent practical, ensure that PII, including images, is accurate, relevant, timely, and complete, within the context of each use of the PII.

The ATR generated image is accurate, timely, and complete and is directly relevant to the identification of threat objects. Potential threat items are resolved through a directed physical screening before the individual is cleared to enter the sterile area.

7. Principle of Security

Principle: DHS should protect PII, including images, through appropriate security safeguards against risks such as loss, unauthorized access or use, destruction, modification, or unintended or inappropriate disclosure.

AIT data is transmitted in a proprietary format to the viewing monitor, and cannot be lost, modified, or disclosed. TSA's decision not to retain images mitigates further data storage security issues.

8. Principle of Accountability and Auditing

Principle: DHS should be accountable for complying with these principles, providing training to all employees and contractors who use PII, including images, and should audit the actual use of PII to demonstrate compliance with these principles and all applicable privacy protection requirements.

No PII is generated by AIT using ATR.

Conclusion

AIT technology improves threat detection capabilities for both metallic and non-metallic threat objects, while improving the passenger experience for those passengers for whom a physical screening is uncomfortable. ATR software provides even greater privacy protections by eliminating the human image that appeared with previous AIT technologies.

Responsible Officials

Jill Vaughan
Assistant Administrator
Office of Security Capabilities

Approval Signature

Original signed copy on file with the DHS Privacy Office

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Karen L. Neuman
Chief Privacy Officer
Department of Homeland Security

Exhibit B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Jonathan Corbett Petitioner v. Transportation Security Administration, Respondent	**No. 15-_____** **DECLARATION OF JONATHAN CORBETT**

I, Jonathan Corbett, hereby declare under penalty of perjury as follows:

1. My name is Jonathan Corbett, I am over the age of 18, and I am, and always have been, a citizen of the United States.
2. I am a frequent flyer, having flown no less than 150,000 miles on over 100 flights over the course of the past 2 years.
3. I intend to continue this level of travel.
4. I oppose the use of the body scanners for privacy, efficacy, and other reasons.
5. I have regularly opted out of being scanned by them, and intend to continue to do so.
6. I fear that, absent a stay of the TSA's order the TSA may decide to "force" me into being scanned at the checkpoint by threatening an $11,000 civil penalty for failure to complete screening.

Dated: Miami, Florida
December 24th, 2015

Respectfully submitted,

_____

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