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Representative Mike Rogers, Chair
U.S. House of Representatives
Subcommittee on Transportation Security
311 Cannon House Office Building
Washington, D.C. 20515

Representative Sheila Jackson Lee
Ranking Member
Subcommittee on Transportation Security
311 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Rogers and Ranking Member Jackson Lee,

Thank you for holding the hearing on "TSA's Recent Scanner Shuffle: Real Strategy or Wasteful Smokescreen?" on November 15, 2012. The Electronic Privacy Information Center ("EPIC") is grateful for your continued interest in this issue.

We are writing this letter to follow up on several issues that arose during that hearing. In particular, given recent disclosures regarding the agency's practice we believe funding for the body scanner program should be suspended until public rulemaking is completed.

TSA Contradicted Earlier Statements About the Reason it is Moving Backscatter X-Ray Scanners to Smaller Airports

As Chairman Rogers explained at the hearing, TSA recently unplugged and boxed up "91 backscatter machines, worth 14 million taxpayer dollars, to its storage warehouse in Texas."[1] Originally, TSA announced it was moving the x-ray backscatter scanners to smaller airports, which was widely reported.[2] TSA indicated that this was because the

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[1] *TSA's Recent Scanner Shuffle: Real Strategy or Wasteful Smokescreen?: Before the Subcomm. on Transportation Security of the H. Comm. on Homeland Security*, 112th Cong. (2012) (statement of Rep. Mike Rogers, Chairman, Subcomm. of Transp. Sec.) [hereinafter *Rogers Statement*].

[2] Michael Grabell, *TSA Removes X-Ray Body Scanners from Major Airports*, ProPublica, Oct. 19, 2012 ("TSA spokesman David Castelveter said. 'It's being done strategically. We are replacing some of the older equipment and taking them to smaller airports. That will be done over a period of time.'"), http://www.propublica.org/article/tsa-removes-x-ray-body-scanners-from-major-airports; Jason Keyser, *Government Replaces Body Scanners at Some Airports*, AP, Oct. 25, 2012, http://bigstory.ap.org/article/government-replaces-body-scanners-some-airports-0; Darren Booth, *Major Airports to Remove Invasive X-ray, Body Scanners*, CNBC, Oct. 23, 2012 ("TSA spokesperson Sterling Payne said in an email to CNBC.com that, 'As part of an effort to maximize the efficiency and deployment of Advanced Imaging Technology (AIT), TSA is strategically moving smaller, faster AIT units to busier

millimeter wave devices could process passengers at a faster rate. However, it has now come to light that all the backscatter scanners have been moved to a warehouse.[3] The explanation from the TSA witness for this discrepancy is not satisfactory.

> **Rep. Rogers:** Now I -- you know, it was announced two or three weeks ago, thereabouts, that TSA was going to move these [backscatter scanners] to smaller airports, and now that's changed. What happened? What happened with the software upgrade that was supposed to be done? Or were you all expecting to do a software upgrade before you put them in the smaller airports?

> **Mr. Sanders:** We made a decision in May of this year to do a redeployment -- as I said, to provide the most effective and efficient solution. In the May through July timeframe the systems were undergoing operational testing and evaluation, which completed at the end of July. Then there was a period where a systems evaluation report, as well as a letter of assessment is written by DHS test and evaluation group, and we were expecting to start the redeployment of those eight AIT systems, the general-use millimeter wave -- or the general use backscatter systems to smaller airports starting in October through the end of the year.[4]

When John Sanders, TSA's Assistant Administrator, Office of Security Capabilities was asked directly how long the 91 x-ray backscatter scanners are going to be stored in warehouses, Mr. Sanders responded, "Sir, at this point I cannot answer that."[5] The TSA website has failed to explain the contradiction between TSA's announcement that it is moving backscatter machines to smaller airports and the revelation that the machines are all being moved to warehouses.

TSA Testimony Calls Attention to the Failure to Add Privacy Protecting Software to Backscatter Scanners

Despite TSA's lack of explanation to the public for why the x-ray backscatter scanners were moved to a warehouse, the House Hearing did provide some clarity on the issue. The TSA could not redeploy the backscatter x-ray scanners because the tests of the privacy-enhancing software update failed and were potentially manipulated by Rapiscan.

> **Rep. Rogers**: When did TSA first discover that the backscatter AIT vendor might have manipulated the operational test?

> **Mr. Sanders:** I wouldn't say, sir, that we have any evidence that documents that they absolutely did.

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airports and moving the larger units to airports with less passenger volume.'"),
http://www.cnbc.com/id/49517858/Major_Airports_to_Remove_Invasive_X_ray_Body_Scanners.
[3] *See Rogers Statement.*
[4] Transcript: *TSA's Recent Scanner Shuffle: Real Strategy or Wasteful Smokescreen?: Before the Subcomm. on Transportation Security of the H. Comm. on Homeland Security*, 5, 112th Cong. (2012) (transcript available in LexisNexis Database) [hereinafter *Scanner Shuffle Hearing Transcript*].
[5]*Scanner Shuffle Hearing Transcript* at 10.

Rep. Rogers: But my understanding is that you suspect it.

Mr. Sanders: We have information that -- we have contacted the manufacturer to ask for additional information so that we can look into the matter further.[6]

In light of this potential manipulation of testing results, Mr. Sanders was asked to explain how the results could possibly be manipulated:

Rep. Rogers: I understand that, but my question is this. If the vendor's not doing an evaluation, a third party is, how could the vendor manipulate the results? Even assuming that that happened, how could they? If there's a third party, the vendor wouldn't have any ability to manipulate them, would they?

Mr. Sanders: No, sir, they would not have. Once the operational test and evaluation begins, the system is under configuration control and there is no opportunity for the vendor to make any changes to the system. Again, at the beginning of the program, before something gets underway, we might believe that the system is in one configuration when it's not in that particular configuration.

At this point we don't know what has occurred and as I've said, we have contacted the vendor and we are working with them to get to the bottom of it to see if there's any --[7]

The dialogue between Chairman Rogers and Mr. Sanders continued, and Mr. Sanders explained that TSA expected the privacy software to work, but because it failed TSA could not deploy the backscatter machines at smaller airports due to privacy concerns.

Rep. Rogers: When you all made the announcement y'all were going to move these to smaller airports, was it your expectation to move them to the smaller airports with the current software configuration?

Mr. Sanders: No sir, it was our --

Rep. Rogers: It was only if you could upgrade the software to the stick-man image?

Mr. Sanders: Yes, sir. That is correct.

Rep. Rogers: And you really thought it was going to be able -- you were going to be able to do that?

Mr. Sanders: Yes, sir, we did.

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[6] *Scanner Shuffle Hearing Transcript* at 6.
[7] *Scanner Shuffle Hearing Transcript* at 6.

Rep. Rogers: And you didn't know at that time that you made the announcement that it was not possible.

Mr. Sanders: No, sir. We had every belief that the contractor would be able to meet their commitments and provide the ATR and we would have it in the field.[8]

As indicated above, Mr. Sanders told the Committee that the DHS was not aware of the problems with the privacy software upgrade for the backscatter machines prior to pulling them from major airports. DHS initially claimed it was removing backscatter scanners from major airports to place them in smaller airports. In reality, DHS had to remove the backscatter scanners and place them in storage because of the failure of the privacy software that was being tested. TSA's website currently contains no explanation for the failure of the privacy software for backscatter scanners.

DHS Claimed that it Did Not Underestimate the Privacy Concerns of the Public

Despite two petitions from a broad coalition of organizations to Secretary Napolitano,[9] a national protest, thousands of complaints, and a court order from the D.C. Circuit Court of Appeals to undertake public rulemaking;[10] TSA claims that it did not underestimate the privacy concerns of the public:

Rep. Rogers: Would you agree that DHS and TSA underestimated the privacy concerns with AIT machines when that technology was moved into the marketplace?

Mr. Cantor: No, I don't think so. We understood from the outset that many people would find this technology uncomfortable, and that's why the department took its responsibility to protect the privacy of each and every passenger very seriously. We deployed AIT only after we were fully confident it would work in an operational environment and with the appropriate privacy safeguards in place.[11]

TSA did not think the privacy concerns of the public warranted public comment on the initial implementation of the body scanner program, and despite a subsequent court order over a year ago to implement notice-and-comment rulemaking, TSA still has not undertaken a public rulemaking.

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[8] *Scanner Shuffle Hearing Transcript* at 6-7.
[9] *See, e.g.*, Letter from EPIC and thirty-three organizations to Sec'y Janet Napolitano, U.S. Dep't of Homeland Sec. (May 31, 2009), http://epic.org/privacy/airtravel/backscatter/Napolitano_ltr- wbi-6-09.pdf; Letter from EPIC and twenty-nine organizations to Sec'y Napolitano and Chief Privacy Officer Callahan, U.S. Dep't of Homeland Sec. (Apr. 21 2010), http://epic.org/privacy/airtravel/backscatter/petition_042110.pdf.
[10] *EPIC v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1 (D.C. Cir. 2011).
[11] *Scanner Shuffle Hearing Transcript* at 12.

The TSA Misled the Public About Body Scanner Capabilities

Mr. Sanders and Mr. Cantor, in their prepared statement, asserted that "[o]nce an officer clears an individual, the image is no longer viewable or stored in the system. ATR-enabled units are not capable of storing or printing the generic image produced during screening."[12] The agency has made the same claim before,[13] but this statement is misleading. The agency claims that *after* an individual is screened, the image created by the body scanner ceases to be viewable or stored, but the agency also claims that the ATR-enabled body scanners *cannot* store the image it produces during screening.[14]

TSA's claim is incoherent yet a similar claim is made on the TSA's website on AIT privacy. TSA claims "[a]dvanced imaging technology cannot store, print, transmit or save the image, and the image is automatically deleted from the system after it is cleared by the remotely located security officer."[15] Contrary to TSA's confusing claim, an image created by the body scanner cannot be deleted if it was never stored to begin with.

Notwithstanding the inconsistent agency claim about whether body scanners do in fact store images during the screening process, to suggest that ATR-enabled body scanners are "not capable of storing or printing the generic image" is confusing. Documents obtained by EPIC make clear that the devices are capable of storing and transmitting images because the agency required this functionality as part of its own procurement specifications.[16] The capability to store and print images may or may not be disabled through the current software, but the body scanners still have the capability to store and print images.

An additional confusion created by TSA's claim that "ATR-enabled units are not capable of storing or printing the generic image produced during screening," is its reference to only the "generic image."[17] Little explanation is provided about the passenger-specific images traditionally created by body scanners. In their prepared statement, Mr. Sanders and Mr. Cantor assert that "ATR software upgrades enhance passenger privacy by eliminating passenger-specific images."[18] The agency makes the same claim in its Privacy Impact Assessment: "The use of ATR software will reduce the

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[12] *TSA's Recent Scanner Shuffle: Real Strategy or Wasteful Smokescreen?: Before the Subcomm. on Transportation Security of the H. Comm. on Homeland Security*, 112th Cong., 5 (2012) (statement of John Sanders, Assistant Adm'r, Office of Sec. Capabilities, Transp. Sec. Admin. and Jonathan R. Cantor, Acting Chief Privacy Officer, U.S. Dep't of Homeland Sec.) [hereinafter *Joint statement*].

[13] *Terrorism and Transportation: Before the Subcomm. on Transportation Security of the H. Comm. on Homeland Security*, 112th Cong. (2011) (statement of John S. Pistole, Administrator, Transp. Sec. Admin.) ("As with current AIT software, ATR-enabled units deployed at airports are not capable of storing or printing the generic image.").

[14] *See Joint statement* at 5.

[15] TSA, AIT: Privacy, http://www.tsa.gov/travelers-guide/ait-privacy (last visited Nov. 26, 2012).

[16] TSA Office of Security Technology System Planning and Evaluation, *Procurement Specification for Whole Body Imager Devices for Checkpoint Operations*, Sept. 23, 2008, *available at* http://epic.org/open_gov/foia/TSA_Procurement_Specs.pdf.

[17] *Joint Statement* at 5.

[18] *Id*. at 3.

impact to individual privacy by eliminating the image of each individual's body that is generated by the millimeter wave and x-ray technologies."[19]

The TSA fails to fully explain what it means to eliminate passenger-specific images. It is not clear whether the passenger-specific image is still created but the use of it is eliminated from the Transportation Security Officer's ("TSO") screening process as only the generic image is used for the actual screening by the TSO or does the ATR-enabled body scanners somehow completely eliminate the creation of the passenger-specific images despite still scanning passengers' whole body? TSA should use the utmost clarity in describing the operation of privacy-evasive technology so the public can make a well-informed decision.

TSA Testimony Highlights the Hundreds of Millions of Taxpayer Dollars TSA Has Spent and Will Spend on Body Scanners Without Fully Addressing Public Concerns

TSA has spent hundreds of millions of taxpayer dollars on flawed body scanning technology. The problem will get worse. Mr. Sanders indicated that the agency is planning to buy more devices, though he could not tell the committee how much the TSA plans to spend.

> **Rep. Davis:** Well, let me ask you, to date, how much money has been invested in AIT machines? And how much will we need to invest before TSA gets to its target deployment numbers?
>
> **Mr. Sanders:** To date, we have spent about $140 million on AIT equipment. About 100 million (dollars) of that is for the millimeter wave system and about $40 million is for the general use backscatter systems.
>
> With regards to your question on how do we -- how much additional money will we have to spend, I can't answer that question right now. It is something that we are looking at.[20]

The TSA recently awarded $245 million worth of contracts to three contractors.[21] These new contracts combined with the money already spent on body scanners put the total program cost at roughly $385 million. According to a Government Accountability Office report, the total spent by TSA on research, acquisition, and deployment of

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[19] DHS, PRIVACY IMPACT ASSESSMENT UPDATE FOR TSA ADVANCED IMAGING TECHNOLOGY 5 (Jan. 25, 2011), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy-pia-tsa-ait.pdf.
[20] *Scanner Shuffle Hearing Transcript* at 8.
[21] Advance Imaging Technology – Second Generation (AIT-2), Solicitation Number: HSTS04-12-R-CT2011, *available at*
https://www.fbo.gov/index?s=opportunity&mode=form&id=4ece03b86905d57c220594a79fc0af5c&tab=core&_cview=1.

checkpoint screening technologies during the fiscal years of 2002 through 2008 exceeds $795 million.[22]

Hearing testimony shows that TSA continues to spend money on body scanners despite the amount of security equipment currently sitting in warehouses.

Rep. Davis: Mr. Sanders, let me just ask, do you know how much -- what the total dollar value is of security devices and machines that we have in storage?

Mr. Sanders: Yes, sir. It's roughly about $155 million that's in storage, waiting for redeployment or waiting to be disposed.[23]

Adding further concern to the TSA's spending is a 2010 National Academy of Sciences report which found that "DHS risk analysis capabilities and methods that are not yet adequate for supporting DHS decision making, because their validity and reliability are untested."[24] In other words, the agency has been unable to demonstrate the value, with risk analysis models, of the systems it has purchased.

Passengers Are Not Aware They Can Opt Out of Body Scans Contrary to DHS Testimony

Mr. Sanders and Mr. Cantor both stated that passengers can opt out of the body scan.[25] This is a critical right as the federal court explained in *EPIC v. DHS*.[26] However, passengers are rarely told about the opportunity to opt out and the agency does not make clear the consequences of not opting out. A recent TSA blog post about opting-out of body scanners failed to provide a single picture of an actual body scan that is seen by a TSO.[27] Such a picture, as seen below, is a crucial element to a traveler's decision as to whether or not to opt out. The option to opt out is meaningless if the agency fails to inform travelers that the devices will capture an image of the travelers stripped naked.

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[22] U.S. GOV. ACCT. OFFICE, AVIATION SECURITY: DHS AND TSA HAVE RESEARCHED, DEVELOPED, AND BEGUN DEPLOYING PASSENGER CHECKPOINT SCREENING TECHNOLOGIES, BUT CONTINUE TO FACE CHALLENGES 14 (2009), *available at* http://www.gao.gov/assets/300/297577.pdf.

[23] *Scanner Shuffle Hearing Transcript* at 11.

[24] NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMIES, REVIEW OF THE DEPT. OF HOMELAND SECURITY'S APPROACH TO RISK ANALYSIS 80 (2010).

[25] *Joint Statement* at 2.

[26] *EPIC v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1 (D.C. Cir. 2011).

[27] The TSA Blog, "Opting Out of Body Scanners," (Nov. 19, 2012), http://blog.tsa.gov/2012/11/opting-out-of-ait-body-scanners.html.
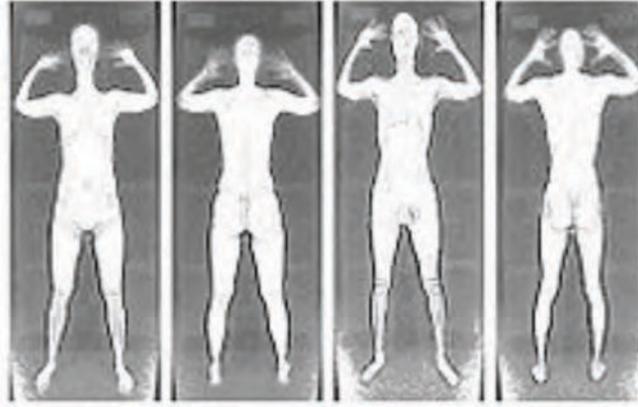
Backscatter X-Ray Scanner Image
(source: TSA)

EPIC's Recommendations

In light of the ongoing problems with the TSA's body scanner technology, continued public concerns, and the agency's failure to undertake the required rulemaking, EPIC makes the following recommendations to the Subcommittee:

- Suspend all funding for new body scanner devices and equipment until notice-and-comment rulemaking has been completed.

- Require TSA to make publicly available all results of tests performed on body scanners.

- Require TSA to make publicly available an accounting of the money spent on airport screening technology as well as an evaluation by the agency as to the effectiveness of these techniques.

Thank you for your consideration of our views. We would be pleased to answer any further questions the committee may have.

Sincerely,

/s/
Marc Rotenberg
Executive Director, EPIC

/s/
Ginger McCall
Director, EPIC Open Government Project

/s/
Jeramie D. Scott
EPIC National Security Fellow