

March 2, 2017

The Honorable Jason Chaffetz, Chairman  
The Honorable Elijah Cummings, Ranking Member  
U.S. House Committee on Oversight and Government Reform  
2157 Rayburn House Office Building  
Washington, DC 20515

## RE: Hearing on “Transparency at TSA”

Dear Chairman Chaffetz and Ranking Member Cummings:

We write to you regarding the upcoming hearing on “Transparency at TSA” that will be held on March 2, 2017. We welcome your continued leadership on transparency at TSA and look forward to opportunities to work with you and your staff.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.<sup>1</sup> Among our most significant undertakings was the litigation that led to the removal the backscatter x-ray devices from U.S. airports. Those devices were ineffective, invasive, and unlawful. In *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011), the DC Circuit Court of Appeals held that the agency failed to conduct a public rulemaking as required by law and must also ensure that passengers are given the opportunity to opt-out if they so choose. Nonetheless, the agency has issued a final rule that takes away the opt-out option.<sup>2</sup>

We are continuing our litigation against the TSA.<sup>3</sup> However, our case has been made substantially harder due to the agency’s refusal to release information that it has designated as “sensitive security information” (SSI). The use of this designation by the TSA has been roundly criticized by this Committee.<sup>4</sup> And now the agency, having issued an unlawful rule, is seeking to hide its decision making behind this cloak of secrecy.

We are also trying to determine why US travelers, returning to the United States, are now subject to eye scanning at US airports.<sup>5</sup> The legal basis for the program remains unclear as are the safeguards for these personal biometric identifiers.

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<sup>1</sup> See *About EPIC*, EPIC.org, <https://epic.org/epic/about.html>.

<sup>2</sup> *Passenger Screening Using Advanced Imaging Technology*, 81 Fed. Reg. 11,364 (Mar. 3, 2016).

<sup>3</sup> *EPIC v. TSA*, No.16-1139 (D.C. Cir. 2016).

<sup>4</sup> Joint Staff Report, Committee on Oversight and Government Reform, *Pseudo- Classification of Executive Branch Documents: Problems with the Transportation Security Administration’s Use of the Sensitive Security Information (SSI) Designation*, May 29, 2014, <https://oversight.house.gov/report/joint-staff-report-pseudo-classification-executive-branch-documents-problems-transportation-security-administrations-use-sensitive-security-information-designation/>.

<sup>5</sup> *EPIC FOIA: EPIC Seeks Information about Airport Eye Scans of U.S. Travelers* (Mar. 2, 2017), <https://epic.org/2017/03/epic-foia-epic-seeks-informati-1.html>.

EPIC has also opposed the planned implementation of the REAL ID Act.<sup>6</sup> Recently, the TSA has indicated that they will no longer accept non-REAL ID compliant drivers licenses and identification cards to board airplanes.<sup>7</sup> Several states continue to oppose the implementation of the REAL ID Act which remains an unfunded, government mandate.<sup>8</sup> The TSA policy will make it practically impossible for residents from these states to board planes.<sup>9</sup> The TSA has failed to show why such a drastic change in airport protocol is necessary

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/ Marc Rotenberg  
Marc Rotenberg  
EPIC President

/s/ Caitriona Fitzgerald  
Caitriona Fitzgerald  
EPIC Policy Director

/s/ Kim Miller  
Kim Miller  
EPIC Policy Fellow

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<sup>6</sup> *National ID and the REAL ID Act*, EPIC, [https://epic.org/privacy/id\\_cards/](https://epic.org/privacy/id_cards/).

<sup>7</sup> *TSA to Notify Travelers of Upcoming 2018 Real ID Airport Enforcement – Signs at Airports to Inform Travelers of ID Requirements at Security Checkpoints*, DHS, Dec. 12, 2016, <https://www.dhs.gov/news/2016/12/12/tsa-notify-travelers-upcoming-2018-real-id-airport-enforcement>.

<sup>8</sup> Andrea Noble, *Several States Square Off With Homeland on Real ID Law*, Washington Times, Oct 13, 2016, <http://www.washingtontimes.com/news/2016/oct/13/real-id-law-facing-backlash-from-states-refusing-t/>.

<sup>9</sup> REAL ID Nonparticipation Act, 2012 Pa. ALS 38; 61-5-128, MCA (Legislative finding and direction to state agency not to implement REAL ID Act).