

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Jonathan Corbett
Petitioner

No. 15-_____

v.

PETITION FOR REVIEW

Transportation Security Administration,
Respondent

Jonathan Corbett, *pro se* Petitioner, hereby petitions the Court for a review of one or more orders of the Transportation Security Administration (“TSA”) that, for the first time, *require* travelers to pass through their “body scanners¹” *without* the right to “opt-out” and receive alternate screening.

As the Court may be familiar, Petitioner is one of several across the country who challenged the constitutionality of the TSA’s body scanner program when the program was put into front-line use in October 2010. *Corbett v. TSA*, 767 F.3d 1171 (11th Cir. 2014). This Court, after hearing significant argument between Petitioner and Respondent over proper jurisdiction, eventually ruled in a 2-1 split as follows: 1) that the body scanner was implemented using an “order” of the TSA,

¹ “Body scanner” refers to any device that uses electromagnetic radiation to produce an image of the 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,” and “Backscatter X-Ray Scanners.”

which makes jurisdiction in this Court proper pursuant to 49 U.S.C. § 46110, 2) that Petitioner's challenge was time-barred by that statute because he did not meet the 60 day filing requirement, and 3) that "in the alternative," the body scanner program is constitutional. *Id.*

The order that Petitioner challenged did not require passengers to undergo screening using the body scanners, and Respondent made significant arguments before this Court and others that the option of undergoing a pat-down search instead of a body scan was a factor the courts should consider towards finding the program constitutional. However, on December 18th, 2015, the TSA has now issued a new order, modifying the program to make the body scanners mandatory as it pleases. Petitioner now timely challenges this new order, the constitutionality of which has not been passed upon by this, or any, court with the new requirement making body scanner screening mandatory.

Additionally, the new order is in conflict with the Administrative Procedures Act, 5 U.S.C. § 553, which "require[s] an agency to publish notice of a proposed rule in the Federal Register and to solicit and consider public comments upon its proposal." *EPIC v. D.H.S.*, 653 F.3d 1, 5 (D.C. Cir. 2011). In that case, where a civil liberties organization challenged the TSA's initial implementation of the body scanners, the Court of Appeals ruled that "the TSA has advanced no justification

for having failed to conduct a notice-and-comment rulemaking” and ordered the TSA to do so. *Id.* at 8.

Now over 4 years later, the TSA has taken comments, but has failed to respond to the comments and publish a rule regarding the original implementation of the body scanners (without the provision making them mandatory). Instead, the TSA has now decided that they are issuing a new order, enhanced with a mandatory use provision, and once again has failed to provide an opportunity for comments.

The TSA has been granted extreme latitude by courts across the country, and yet it still fails to follow the few rules that have been set for it. Petitioner asks the Court to hold the TSA accountable by setting aside an unconstitutional order issued in willful violation of the rules set by the Administrative Procedures Act.

Dated: Miami, Florida
December 24th, 2015

Respectfully submitted,

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