

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE ELECTRONIC PRIVACY INFORMATION)
CENTER, et al.,)
)
 Petitioners,)
)
 v.) No. 10-1157
)
 JANET NAPOLITANO, in her official capacity)
 as Secretary of the United States Department of)
 Homeland Security, et al.,)
)
 Respondents.)
_____)

**REPLY TO OPPOSITION TO EMERGENCY MOTION FOR
INJUNCTIVE RELIEF**

On July 2, 2010, petitioners filed an Emergency Motion for Stay of an Agency Rule, asking this court to enjoin respondents’ decision to make Full Body Scanners the primary means of airport screening in the United States.

Respondents cannot escape the essential facts of this case: the agency decided to undertake, without public comment, a security screening program that involves the capture of the naked images of millions of individuals in violation of federal statutes and the U.S. Constitution. See Exhibit 1. Nor can respondents ignore the growing public opposition to its intrusive and controversial program.¹

¹ “Backlash Grows Against Full-body Scanners in Airports,” USA Today, July 13, 2010, at 1A (Exhibit 2).

Respondents do not dispute that air travelers are subject to the program; and documents produced by the agency, obtained by EPIC, establish the harm alleged. There is no real dispute about the likelihood of harm. Moreover, the violations of federal statutes and the Fourth Amendment continue as long as the agency is permitted to operate the program for primary screening. Indeed, the specific act that requires emergency relief is the agency's decision to make body scanners the primary airport screening program in the United States, thereby subjecting millions of travelers to intrusive, invasive, suspicionless searches.²

I. EPIC's Emergency Motion Should be Granted

Respondents have sought from the outset of this program to avoid public scrutiny and judicial review. The agency simply presses forward, sends out press releases, posts a blog entry, and does as it wishes.

In contrast, petitioners have pursued every opportunity to obtain relevant information, encourage public comment, and make clear the agency's statutory and constitutional obligations. Most significantly, when petitioners became aware of the agency's fundamental change in screening practices, it wrote immediately to the Secretary to urge a public rulemaking on the sweeping proposal.

² In fact, the agency is publicizing its aggressive deployment of these devices as this motion is being filed. "DHS: Secretary Napolitano Announces Additional Recovery Act-Funded Advanced Imaging Technology Deployments," July 20, 2010, available at http://www.dhs.gov/ynews/releases/pr_1279642622060.shtm.

In its opposition, respondents blithely assert that the controversial screening procedure, once present in a few airports as part of a pilot project, can be suddenly deployed in all US airports for primary screening without triggering any obligations under the Administrative Procedures Act. Under this “boiling frog” theory of administrative authority, the agency could also require all air travelers to strip naked without triggering any regulatory or judicial scrutiny. Or perhaps as respondents intimate, Mot. Opp’n at 10-11, it could require all subway passengers and all individuals present at public meeting places to undergo full body scans.

The agency’s efforts to evade judicial review are replete throughout its opposition. The agency reiterates its position that “there is no rule at issue here.”

But the relevant portion of the APA states that a "rule:"

means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . .

Obviously, the decision to make Full Body Scanners the primary airport screening technology is a substantial change in agency practice. It is the single most significant change in air traveler screening in the United States since the creation of the agency. Yet, while the agency has undertaken hundreds of rulemakings on everything from Aircraft Repair Station Security, Docket No. TSA-2004-17131, Nov. 12, 2009, to butane lighters and transportation worker identity documents, Docket Nos. TSA-2006-24191 (469 pages for the Final Rule), the agency

concludes that subjecting all air travelers to one of the most intrusive digital search techniques ever conceived does not trigger any §551(4) obligations, even after two petitions to conduct such a rulemaking have been presented to the agency.

II. Respondents' Fourth Amendment Analysis is Not Persuasive

The TSA's cursory discussion of the Fourth Amendment does nothing to rebut petitioner's claim. Mot. Opp'n at 5-6. Petitioners do not dispute that the TSA's screening protocols may be considered "administrative searches," see, e.g., NTEU v. Von Raab, 489 U.S. 656 (1989), but that does not end the inquiry. The administrative search doctrine merely holds that the government may undertake certain searches without a warrant or individualized suspicion. Courts still must consider a variety of factors including (1) the nature of the privacy interest involved; (2) the character and degree of the governmental intrusion; and (3) the nature and immediacy of the government's needs, and the efficacy of its policy in addressing those needs. U.S. v. Hartwell, 436 F.3d 174, 180 (3d Cir. 2006); U.S. v. Aukai, 497 F.3d 955, 962 (9th Cir. 2007).

Most importantly, in cases reviewing airport screening procedures, courts have established a graduated standard. The searches upheld in Hartwell and Aukai, "were minimally intrusive. They were well-tailored to protect personal privacy, escalating in evasiveness only after a lower level of screening disclosed a reason to conduct a more probing search." Hartwell, 436 F.3d at 180. Accord, Aukai, 497

F.3d. at 962 (“Like the Third Circuit, we find these search procedures to be minimally intrusive.”).

Courts have also expressed significant concern about strip searches, particularly of young children. As the Supreme Court stated recently, “The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.” Safford Unified School District v. Redding, 129 S. Ct. at 2633, 2643 (2009) (ruling impermissible a search that required a 13-year old girl to remove her outer clothes, pull her undergarments from her body, and expose her breasts and pelvic area to two school officials).

The search in Safford took place in a high school and not an airport, but individualized suspicion was present. The Court concluded “the content of the suspicion failed to match the degree of intrusion.” 129 S. Ct. at 2642. As in Safford, young girls subject to Full Body Scans will be observed in a state of undress and will be similarly degraded. But unlike the search in Safford, body scanners rely on photographic equipment and make possible the permanent capture of the child’s naked image. The privacy claim here is even more compelling.

Regarding the risk that such image capture could occur – the harm alleged here – respondents’ representations are refuted by the TSA’s own documents. Prior to this proceeding, petitioners undertook extensive FOIA litigation to obtain

documents detailing the capabilities of the Body Scanners, including operational requirements and technical specifications. (See Exhibit 3, Exhibit 4). As petitioners noted earlier, Emer. Mot. At 1-2, in the design specifications, the TSA required that the devices be able to store and transmit images.

The TSA subsequently stated it “would” not use this capability in “operational settings,” but there is nothing that prevents the TSA from deploying the capability it required the vendors to provide. Letter from TSA Acting Administrator Gail D. Rossides, to Hon. Bennie G. Thompson, Feb. 24, 2010.³ In fact, in related litigation, respondent is currently withholding from petitioners more than 2,000 images captured by the devices in the possession of the agency. The agency does not dispute their existence. And stories have already appeared about the collection of photographic images of those subject to Full Body Scanners. “Airport worker given police warning for 'misusing' body scanner,” Guardian (UK), May 24, 2010 (“The police have issued a warning for harassment against an airport worker after he allegedly took a photo of a female colleague as she went through a full-body scanner at Heathrow airport.”) Respondents are well aware of the risk that images may be captured by operators with cell phones and digital cameras and have adopted procedures to reduce this risk. But of course, such

³ The TSA also states the devices installed in airports cannot store images and then explains “that all images are deleted from the system after they are reviewed by the remotely located operator.” Id. at 3. One wonders how something that is not stored can subsequently be deleted.

devices are easily concealed and it is almost unimaginable that some operators will not take advantage of the technology for their own ends. See, e.g., “LAX Tops Nation In Stolen, Missing Luggage Items,” CBS News, Nov. 7, 2008 (Two LAX employees “say there are organized rings of thieves, who identify valuables in your checked luggage by looking at the TSA x-ray screens, then communicate with baggage handlers by text or cell phone, telling them exactly what to look for.”)

Respondents’ claim that the images may not be readily identified, at least at this point in time, does not diminish the significant privacy interest established when an individual knows that their naked image may be disclosed to others. As Judge Posner explained in North Western Memorial Hospital v. Ashcroft, 362 F.3d 923 (2004), regarding the limitations of removing identifying information from a medical record:

Even if there were no possibility that a patient's identity might be learned from a redacted medical record, there would be an invasion of privacy. Imagine if nude pictures of a woman, uploaded to the Internet without her consent though without identifying her by name, were downloaded in a foreign country by people who will never meet her. She would still feel that her privacy had been invaded.

Id. at 929. Even as an administrative search in US airports after 9-11, it is not reasonable to subject all air travelers to devices that can capture and record images of them stripped naked as the initial screening procedure.

III. Video Voyeurism Act

On further review of the agency's conduct, petitioners believe that respondents are also in violation of the Video Voyeurism Prevention Act of 2004. That Act specifically prohibits the intentional "capture [of] an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy," 18 U.S.C. §1801 (2010). The "private area of the individual" is defined as "the naked or undergarment clad genitals, pubic area, buttocks, or female breast of that individual." 18 U.S.C. §1801 (b)(3) These "private areas" are routinely captured by Full Body Scanners as numerous images demonstrate. See, e.g., Exhibit 1.

The Act permits an exception for "any lawful law enforcement, correctional, or intelligence activity," 18 U.S.C. §1801(c), but because a body scanner search is unlawful under the Fourth Amendment, as set out above, this exception would not apply. Significantly, the Act seeks to protect individuals whose private images may be captured in public places. See, H.R. Rep. No. 108-504, at 3 (2004). The Act explicitly defines "circumstances in which the individual has a reasonable expectation of privacy" as those "in which a reasonable person would believe that a private area of the individual would not be visible to the public, regardless of whether that person is in a public or private place." 18 U.S.C. §1801(b)(5)(B). Exhibit 1 makes clear that this standard is met.

IV. RFRA Claim

The TSA contends that the Full Body Scanner does not substantially burden an individual's exercise of religion. Mot. Opp'n 8-9. That view is not shared by many travelers with sincerely held religious beliefs. In fact, the Dubai International Airport, the largest airport in the Arab world, announced recently that it would not deploy Full Body Scanners. "Dubai Airport rejects full body scanners," Dubai.com, July 17, 2010, ("Dubai Airport authorities have rejected the use of controversial full body scanners at the Emirates' airports as they violate ethical principles relevant to Islamic culture.") Thus TSA must fall back on its argument that the FBS program, even though it imposes a substantial burden on religious exercise, is necessary to further a compelling interest. Again, the agency makes a unilateral decision, without regard to public opinion or judicial review.

V. The Body Scanner Program is Not Optional

Respondents say that the Full Body Scanner program is not mandatory since travelers, the agency claims, have a pat-down search option. But the Schneier declaration and numerous air traveler complaints make clear that the option exists in press releases only. Emer. Motion at 4-5. Respondents present attachments depicting signage they say is widely available regarding the pat-down option, but respondents would not even permit petitioners to gather photographic evidence at airports that would demonstrate the inadequacy of the pat-down alternative.

Nonetheless, EPIC has obtained numerous statements from travelers who were not told of the pat-down option. Id. This is sufficient to establish petitioner's claim.

VI. Conclusion

Petitioners do not object to the use of Full Body Scanners in all circumstances. In fact, body scanners may be a preferred technique for secondary screening where circumstances require a more careful examination of particular passengers. Scanners may also be preferable for passengers with prosthetics and other devices that routinely trigger magnetometers. See Tobias W. Mock, "The TSA's New X-Ray Vision: The Fourth Amendment Implications of 'Body-Scan' Searches at Domestic Airport Security Checkpoints," 49 Santa Clara L.Rev. 213, 251 (2009) ("Though impermissible as a primary search, body-scans do have a constitutionally appropriate place in the airport security system.")

Petitioners object to respondents' decision to make Full Body Scanners the primary means of screening in US airports. That decision disregarded the Fourth Amendment, as well as federal laws that ensure agency accountability and help safeguard privacy and religious freedom. Respondents have broad authority to undertake screening of travelers at airports in the United States, but it is not unbounded. Petitioners respectfully urge this court to grant the Emergency Motion for Stay of the Agency Rule.

Respectfully submitted,

/s/ Marc Rotenberg

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Dated: July 20, 2010

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 20th day of July, 2010, he caused one copy each of the foregoing Reply to Opposition to Emergency Motion for Injunctive Relief to be filed electronically with the Court via the Court's CM/ECF system, and also deposited four copies, to be delivered to the Clerk of the Court, in the U.S. Mail, postage pre-paid. Service will be made automatically upon the following CM/ECF participants:

Douglas Letter
John S. Koppel
Attorneys, Appellate Staff
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NBA fines Cavaliers owner \$100,000

Commissioner reacts to Gilbert's outburst, James' TV spectacle, 1C

Dan Gilbert: Remarks "imprudent."

USA TODAY

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The latest storm for Gibson

Tape recordings allegedly featuring threats against his ex-girlfriend raise new questions about actor, 1D

Mel Gibson: Police are reviewing tapes.

Tuesday, July 13, 2010

Newsline

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First lady Michelle Obama: by Ric Feld, AP

A boost for the Gulf Coast

First lady touts region in Fla. visit, 2A
Federal government issues revised moratorium on deep-sea drilling, 2A



Swiss say no to Polanski extradition

Authorities blame U.S. Justice Department for decision to free film director, 8A



Jennifer Weiner on pain, growth

Fly Away Home is an entertaining take on a political wife's renewal. Book review, 1D

Green revamp for Empire State Building

New York City's tallest structure is removing, retrofitting and replacing 6,500-plus windows. 3A

Three are dead in New Mexico shooting

Man in dispute with girlfriend fires on her workplace, wounds four, kills two and himself. 3A

Money: Hospital mergers growing

Deals leave some hopeful about improved facilities, others concerned about care for the poor. 1B

Sports: NCAA brackets reconfigured

Officials institute play-in game changes in 68-team Division I men's basketball tournament. 1C

Life: Connick is Broadway-bound

Piano-playing crooner says developing a relationship with an audience is a lot like dating. 1D
Assistance urged for dementia caregivers. 5D

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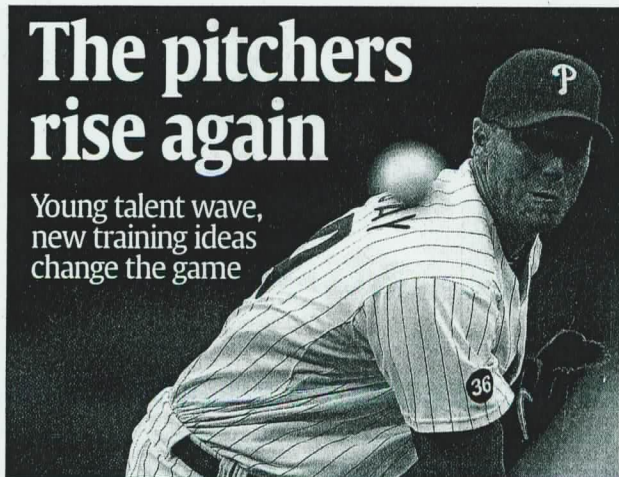
8 pages in Sports

All-Star Game guide

Jimenez, Price take the mound ■ AL, NL lineups, stats
Inside the NL's slump ■ Why Angel Stadium is a favorite

The pitchers rise again

Young talent wave, new training ideas change the game



By Matt Stocum, AP

Perfection strikes twice: The Phillies' Roy Halladay pitched a perfect game May 29, the second in the majors that month — and the first time in 130 years there have been two in one season.

By Paul White
USA TODAY

Some of baseball's most prolific sluggers filled three hours of prime-time television Monday in the All-Star Home Run Derby, the game's annual salute to power and offense.

It's about time the hitters got some attention. With two perfect games and a celebrated near-miss, two more no-hitters and diminished offense across baseball, this has been the Year of the Pitcher — at least up to the season's traditional halfway point marked by today's All-Star Game in Anaheim, Calif.

There's no consensus on a reason, but theories abound.

Baseball's stricter policy on performance-enhancing drugs — namely steroids and amphetamines — is widely seen as a factor, but it's more complex than that. The crackdown, in its sixth season, has taken place amid the arrival of



By Dino Vourmas, AP

Scoreboard says it all: The Athletics' Dallas Braden made history May 9.

a new generation of talented pitchers who have been trained with increasing sophistication. Some also say umpires have played a role with inconsistent strike zones that hitters say add another layer of guesswork — which pitches are strikes — on top of solving the talented young arms throwing those pitches.

Cover story

And then, there's the theory that suggests swings in the pitcher-hitter pendulum are part of the game's natural cycles.

"There was the era of home runs, what everybody used to call the steroid era," says former player Luis Gonzalez, who hit 354 homers in his 19-year career, including 57 for the Arizona Diamondbacks in 2001.

"Now, it's the pitchers' era. It's just one of those things you can't explain."

Please see COVER STORY next page ▶

Stores look to YouTube for help

Teen 'haul' videos star in back-to-school strategy

By Bruce Horowitz
USA TODAY

Show-and-tell shopping videos posted by teens on YouTube for fun are about to get a serious back-to-school commercial twist.

Today, J.C. Penney, one of the nation's largest retailers, will announce plans to turn a handful of these look-what-I-got-at-the-store teen videos — known as "hauls" — into a core component of its back-to-school marketing.

Penney joins several teen-oriented retailers, including Forever 21 and American Eagle, in exploring the use of hauls this fall to go for a bigger share of the \$50 billion Americans are expected to spend on back-to-school and back-to-college goods.



Hauler: Annie St. John shows off her J.C. Penney finds: a military-style hat and a necklace.

▶ J.C. Penney. The chain has a deal with six girls to create back-to-school haul videos. Each was pro-

Backlash grows vs. full-body scanners

Fliers worry about privacy, health risks

By Gary Stoller
USA TODAY

Opposition to new full-body imaging machines to screen passengers and the government's deployment of them at most major airports is growing.

Many frequent fliers complain they're time-consuming or invade their privacy. The world's airlines say they shouldn't be used for primary security screening. And questions are being raised about possible effects on passengers' health.

"The system takes three to five times as long as walking through a metal detector," says Phil Bush of Atlanta, one of many fliers on USA TODAY's Road Warriors panel who oppose the machines. "This looks to be yet another disaster waiting to happen."

The machines — dubbed by some fliers as virtual strip searches — were installed at many airports in March after a Christmas Day airline bombing attempt. The Transportation Security Administration (TSA) has spent more than \$80 million for about 500 machines, including 133 now at airports. It plans to install about 1,000 by the end of next year.

But the machines are running into complaints and questions here and overseas.

► The International Air Transport Association, which represents 250 of the world's airlines, including major U.S. carriers, says the TSA lacks "a strategy and a vision" of how the machines fit into a comprehensive checkpoint security plan. "The TSA is putting the cart before the horse," association spokesman Steve Lott says.

► Security officials in Dubai said earlier this month they wouldn't use the machines because they violate "personal privacy," and information about their "side effects" on health isn't known.

► Last month, the European Commission said in a report that "a rigorous scientific assessment" of potential health risks is needed before machines are deployed there. It also said screening methods besides the new machines should be used on pregnant women, babies, children and people with disabilities.

The U.S. Government Accountability Office said in October that the TSA was deploying the machines without fully testing them and assessing whether they could detect "threat items" concealed on various parts of the body. And in March, the office said it "remains unclear" whether they would have detected the explosives that Umar Farouk Abdulmutallab allegedly tried to detonate on a jet bound for Detroit on Christmas.

TSA spokeswoman Kristin Lee says the agency completed testing at the end of last year and is "highly confident" in the machines' detection capability. She also says their use hasn't slowed screening at airports and that the agency has taken steps to ensure privacy and safety.

The TSA is deploying two types of machines that can see underneath clothing: One uses a high-speed X-ray beam, and the other bounces electromagnetic waves off a passenger's body.

Passengers can refuse screening by the machines and opt for screening by a metal detector and a pat-down search by a security officer, the TSA says.

Concerns of frequent fliers

Some opt for pat-downs, 4B

Business Travel

Every Tuesday



How it works: Dave Couts, a program analyst for the Transportation Security Administration, demonstrates how to stand in a new body-scanning machine at Sky Harbor International Airport in Phoenix. Some fliers are uncomfortable being scanned by the machines.

By Matt York, AP

▶ Scanner backlash is growing, 1A

Debate rages over full-body scans

Fliers complain of added security time, privacy issues, radiation fears

By Gary Stoller
USA TODAY

Frequent business traveler Melissa Wilson refuses to be screened by the government's new full-body imaging machines at airport security checkpoints.

She says she noticed before a recent flight from Houston that the machines increased screening time up to five minutes per passenger. The equipment also enables the government to "strip-search" passengers without probable cause, and the long-term effects of radiation emitted are unknown, she says.

"I've been screened zero times, and that number will remain zero," says Wilson, a management consultant from Palm Beach Gardens, Fla.

Faced with a choice of getting screened by the machines or screened by a metal detector and a pat-down search by a security agent, Wilson and many frequent fliers are choosing a pat-down as questions and opposition about the machines grow. A survey of members of USA TODAY's Road Warrior panel of heavy travelers found more than half of 49 of them who've been screened at least once by the machines opposed them, with 35 saying they increased screening time.

The Transportation Security Administration, which has spent more than \$80 million for about 500 machines, says the criticism is unwarranted. It says the machines improve security, are no threat to passenger privacy or health, and were chosen over alternative screening procedures by more than 98% of passengers during airport tests.

Among the issues debated:

▶ **Processing times.** The TSA says it takes about 20 seconds to screen a passenger with the machines.

The International Air Transportation Association, which represents 250 of the world's airlines, disputes that. The group says it observed the new machines at Baltimore/Washington airport during the July 4 holiday weekend, and it took 50 to 70 seconds to screen a passenger.

Frequent flier Jim Zipursky of Omaha says it took 2½ to five minutes to screen him with the new machine before each of four recent flights from Omaha's airport. On previous flights, it took a minute or less to walk through a magnetometer, he says.

▶ **Privacy invasion.** Full-body machines violate the Fourth Amendment, which guards against unlawful searches and seizures, by subjecting travelers to an "invasive search" without any suspicion that they did anything wrong, the Electronic Privacy Information Center alleges in a July 2 lawsuit filed in a U.S. appeals court in Washington. The non-profit group was established to focus attention on civil liberties issues.

The group also says the machines perform digital strip searches that are incompatible with the teachings of some religious faiths.

Dubai airport security officials announced July 5 that the machines contradict Islam and wouldn't be installed

Airports with full-body scanners

Backscatter

Backscatter X-ray machines, which screen passengers with a high-speed X-ray beam, have been deployed to the following airports:

- ▶ Boston Logan
- ▶ Charlotte
- ▶ Chicago O'Hare
- ▶ Cincinnati/Northern Kentucky
- ▶ Columbus, Ohio
- ▶ Corpus Christi, Texas
- ▶ El Paso
- ▶ Fort Lauderdale-Hollywood, Fla.
- ▶ Gulfport-Biloxi, Miss.
- ▶ Kansas City, Mo.
- ▶ Laredo, Texas
- ▶ Lihue, Hawaii
- ▶ Los Angeles
- ▶ Omaha
- ▶ Phoenix
- ▶ San Jose



Backscatter: Scan result.

Millimeter wave devices

Millimeter wave devices, which screen passengers by bouncing electromagnetic waves off the body, have been deployed to the following airports:

- ▶ Albuquerque
- ▶ Atlanta Hartsfield-Jackson
- ▶ Baltimore/Washington
- ▶ Denver
- ▶ Dallas/Fort Worth
- ▶ Detroit Metro
- ▶ Fort Wayne, Ind.
- ▶ Indianapolis
- ▶ Jacksonville
- ▶ Las Vegas
- ▶ Miami
- ▶ Raleigh-Durham, N.C.
- ▶ Richmond, Va.
- ▶ San Francisco
- ▶ Salt Lake City
- ▶ Tampa
- ▶ Tulsa
- ▶ Reagan Washington National



Millimeter: Wave result.

there because of privacy concerns. Orthodox Jews and Pope Benedict XVI have also opposed the machines.

The TSA says it sets the machines to blur travelers' facial features and places employees viewing the images in a separate room. The agency says it doesn't store the images and deletes them after viewing.

▶ **Radiation.** Frequent flier Richard Hofrichter of Glen Allen, Va., says he's been screened by the full-body machines about 30 times this year, and he's worried about the cumulative effects of radiation.

TSA spokeswoman Kristin Lee says the machines that use high-speed X-rays emit a very low dose of radiation, equal to the amount received from the environment during two minutes in flight. Other machines that use electromagnetic waves that emit energy to scan passengers are "thousands of times less than what is per-

mitted for a cellphone," she says.

The TSA says machines that use X-rays were evaluated by the government and scientists who determined that the radiation doses for individuals being screened, operators and bystanders were well below the dose limits specified by the American National Standards Institute.

In April, however, four professors at the University of California-San Francisco, wrote a letter to John Holdren, President Obama's top science adviser, expressing "serious concerns" about "potential health risks" from the machines. The professors are experts in biochemistry, biophysics, X-ray imaging and cancer.

The radiation emitted by the scanners would be safe if it was distributed throughout the entire body, but the majority is absorbed by the skin and underlying tissue, the professors wrote. "The dose to the skin may be dangerously high," they said.

They told Holdren that "there is good reason to believe" the machines would increase the risk of cancer to children, the elderly, pregnant women and others prone to cancer.

Daniel Brenner, the director of Columbia University's radiological research center, says the machines emit very small doses of radiation to the skin. The risk to individuals may be small, Brenner says, but with hundreds of millions of passengers flying each year, "The population risk has the potential to be significant."

▶ **Ability to detect weapons and explosives.** The Government Accountability Office said in March that it "remains unclear" whether the machines would have detected the explosives in the underwear of a man who allegedly tried to blow up a Northwest Airlines jet bound for Detroit on Christmas Day.

Brian Sullivan and Steve Elson, two former Federal Aviation Administration security agents, say the machines are ineffective for finding explosives and preventing a terrorist from smuggling explosives on board an aircraft.

Billie Vincent, the FAA's former security director, says the machines "incrementally improve" on metal detectors if TSA agents alertly resolve identified threats. There are no screening technologies that "are 100% effective," he says.

TSA spokeswoman Lee says the agency is "highly confident" in the detection capability of full-body, or advanced, imaging technology. "While there is no silver-bullet technology, advanced imaging technology is very effective at detecting metallic and non-metallic threats on passengers, including explosives and powders," she says.

Passengers with concerns about the machines can instead request a pat-down search.

But some frequent fliers say TSA agents at airport checkpoints don't inform passengers that they have a choice.

Wilson, the frequent flier from Palm Beach Gardens, says she's "repeatedly seen" passengers directed to the full-body screening line without explanation or disclosure about the machines.

"Signage disclosing the nature and purpose of the equipment was frequently turned backward, so passengers could not see the information," she says. "The information was occasionally posted on the other side of the equipment where passengers could only see it after going through the machine."