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

IN RE: ELECTRONIC PRIVACY INFORMATION CENTER,	)	
Petitioner.	)	**No. 12-1307**

REPLY TO RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

The question before the Court is whether the substantial agency delay, subsequent to the decision in *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011), supports the issuance of a writ of mandamus. For reasons set out in the Petition, the government's failure in opposition to set a fixed date for publication of the NPRM, as well as the prospect that the agency will seek further delay, EPIC respectfully asks the Court to require the Secretary to begin the rulemaking within 60 days or to vacate the rule on which the agency relies.

ARGUMENT

1. The DHS' opposition fails to set out a date by which a Notice of Proposed Rulemaking ("NPRM") will be published in the Federal Register so that the public may comment on the controversial airport screening program. This does not comply with the order of this Court to "act promptly on remand to cure the defect

in its promulgation." *EPIC*, 653 F.3d at 8 (citing *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150–51 (D.C. Cir. 1993)). The DHS offers only that "it is expected that the process of finalizing the AIT Rulemaking documents" will be completed before the end of February 2013. Resp. Opp'n at 2. But the central concern of petitioners, and the crux of this Court's order, are "[sections] 553(b) and (c) of the APA, which generally require an agency to publish notice of a proposed rule in the Federal Register and to solicit and consider public comments upon its proposal." *EPIC*, 653 F. 3d at 4 (citing *U.S. Telecomm. Ass'n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005)). Until the proposed rule is published in fact the public is denied this right.

2. The DHS makes the remarkable claim that petitioner "offers no basis whatsoever for its assertion that TSA has delayed in implementing this Court's mandate." Resp. Opp'n at 2. The DHS itself has offered a myriad of reasons for delay – what it is has described as "inherent obstacles to issuance of an NPRM," *id.* at 9 – including "competing regulatory obligations," *id.,* "unforeseen lack of resources," *id.,* "unique challenges to completion of the NPRM," *id.,* "fast-paced changes and developments regarding the AIT program," Decl. of John P. Sammon ("Sammon Decl.") ¶ 10, the "deliberative, complex, and sophisticated" nature of the rulemaking process, Resp. Opp'n at 8, "personnel losses," *id*. at 2, and

consideration of "classified information," Decl. of James S. Clarkson Supp. Resp. Opp'n to Pet'rs Mot. to Enforce the Court's Mandate ("Clarkson Decl.") ¶ 17.

According to the Clarkson declaration, the "TSA does not have a full complement of economists available to conduct the analyses required in connection with the multiple proposed regulations being promulgated by the agency." Clarkson Decl. ¶ 19. According to the Sammon declaration, "REA [Regulatory and Economic Analysis Division] suffered significant personnel losses, including the departure of the two lead economists assigned to this effort," Sammon Decl. ¶ 15. The TSA is also "constantly testing its screening procedures . . . in both laboratory and in operational settings." *Id*. ¶ 10.

Each one of these rationales not only provides evidence of unreasonable delay subsequent to this Court's remand, but could also provide the basis for future delay. Understandably, this Court has rejected similar arguments in the past. Regarding ratemaking, the Court said "theories may change; new information may become relevant; one proceeding may have to take account of another. But there must be some reasonably prompt decisionmaking point . . ." *MCI Telecomm. Corp. v. FCC*, 627 F.2d 322, 340-41 (D.C. Cir. 1980).

3. The DHS characterization of *PMOI*, in which this Court recently granted a mandamus petition, does not give sufficient weight to the obligations of the Secretary of State, the complexity or sensitivity of the subject matter, or the fact

that decision required a final determination by the Secretary whereas the order sought by EPIC would merely begin the NPRM process. *See* Resp. Opp'n at 7, 8. The Foreign Terrorist Organization ("FTO") revocation process is a complex, inter-agency process that necessarily involves consideration of sensitive and classified materials. In order to delist an FTO, the Secretary must make a litany of fact-intensive determinations based on national security, intelligence, economic, and foreign affairs factors. *See e.g.* 8 U.S.C. §1189(a)(1)-(6), 8 U.S.C. §1182 (a)(3)(B)(i)(IV), 18 U.S.C. §2339(a)(1). The relevant statute also instructs the Secretary of State to consult with the Attorney General and Secretary of the Treasury, 8 U.S.C. §1189(d)(4), seek information from consular officers and the Secretary of Homeland Security, 8 U.S.C. §1182(a)(3)(B)(i)(II) and (a)(3)(B)(vi), and give notice to Congressional leaders, 8 U.S.C. §1189(a)(2)(A)(i), prior to publication of a FTO designation in the Federal Register. *Id*. at § 1189(a)(2)(A)(ii).

This Court recently ordered the Secretary of State to comply with its order to determine a petitioner's FTO status within four months. *In re People's Mojahedin of Iran ("PMOI")*, 680 F.3d 832, 838 (D.C. Cir. 2012). The Court's decision to issue a writ in that case took into account the complex nature of the Secretary's FTO determination. Yet the Court found that mandamus relief was warranted due to the unreasonable nature of the Secretary's delay given the agency's inaction

after an order from the Court, which had the effect of preventing substantive judicial review of the action.

4. The government has barely committed to stage three of what the Office of Management and Budget ("OMB") describes as a nine-stage process to final agency action subject to judicial review. Office of Information and Regulatory Affairs, Office of Management and Budget, U.S. General Services Administration, *Regulatory Map*.[1] The Sammon declaration does not even commit the agency to provide the public with the opportunity for comment by the end February 2013. And even if the NPRM were to be published by that time, almost 20 months after the Court's order, months, perhaps years, would pass before the agency rule would be final and subject to judicial review.

5. The DHS' opposition does not address at any point the significant health concerns about the Whole Body Imaging ("WBI") program raised in EPIC's petition. *See* Pet. at 12-16. These concerns are not speculative. Medical experts within the United States have repeatedly expressed concern about X-ray exposure, and the European Union has formally limited the use of backscatter X-ray devices,

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[1] Those nine steps are: (1) Agency initiatives; (2) Determining whether a rule is needed; (3) Preparing the proposed rule; (4) OMB's review of the proposed rule, if it is determined to be "significant"; (5) Publication of the proposed rule; (6) Public comments period; (7) Preparation of the final rule; (8) OMB's review of the final rule; and (9) Publication of the final rule. *See Id*. *Available at* http://www.reginfo.gov/public/reginfo/Regmap/index.jsp.

one of two categories of WBI, in EU airports. *See Id*. These are significant "interests prejudiced by delay" that implicate "health and human welfare." *Telecomm. Research & Action Ctr. v. FCC ("TRAC")*, 750 F.2d 70, 80 (D.C. Cir. 1984). The NPRM would provide the opportunity for independent experts to provide their views to the agency.

6. The Secretary's continuing focus on the delay in producing the economic analysis is also remarkable considering that the Government Accountability Office ("GAO") almost three years ago, and prior to the comment of this litigation, sought a cost-benefit analysis from the agency. *See* U.S. Gov't Accountability Office, GAO-10-484T, *Aviation Security: TSA Is Increasing Procurement and Deployment of the Advanced Imaging Technology, But Challenges to This Effort and Other Areas of Aviation Security Remain* 9 (2010). As the GAO explained: "In October 2009, GAO . . . recommended that TSA complete cost-benefit analyses for new passenger screening technologies . . . DHS concurred with our recommendation." *Id*. But "TSA ha[s] not conducted a cost-benefit analysis," despite the fact that the GAO stated "a cost-benefit analysis is important." *Id*.

7. The Secretary's narrow focus on the staffing resources available in a particular office within an subordinate branch of the TSA, which is itself a component of the DHS, is incorrect in light of this Court's requirement that one of the key factors to consider in determining delay are the "resources available to the

agency." *Mashpee Wampanoag Tribal Council, Inc. v. Norton,* 336 F.3d 1094, 1102 (D.C. Cir. 2003). The TSA has made an FY2013 budget request of $7.6 billion, and there were "52,269 full-time equivalent positions devoted to aviation security last year." *President's Budget Request for TSA for Fiscal Year 2013: Hearing before the Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 112th Cong. (2012) (testimony of John Pistole, Administrator, Transportation Security Administration); Jeff Plungis, *TSA Arrests Raise Questions of Who Screens the Screeners*, Bloomberg News (May 8, 2012).[2] The Secretary's FY2013 Budget is "$59.0 billion in total budget authority, $48.7 billion in gross discretionary funding, and $39.4 billion in net discretionary funding." Dep't of Homeland Sec., Budget in Brief 6 (2012).[3] And even as the Secretary delays publication of the NPRM, the DHS has invested hundreds of millions of dollars to purchase and deploy more WBI devices. See Joint Majority Staff Report, 112th Cong., *A Decade Later: A Call for TSA Reform* 17 (Nov. 16, 2011).

8. The "significance (and permanence) of the outcome," *Mashpee Wampaniag Tribal,* 336 F.3d at 1101, also weighs heavily upon the travelers who are subject to the agency's screening procedures. "Few if any regulatory

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[2] http://www.bloomberg.com/news/2012-05-08/tsa-arrests-raise-questions-of-who-screens-the-screeners.html.

[3] *Available at* http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf.

procedures impose directly and significantly upon so many members of the public." *EPIC*, 653 F3d. at 5. The agency has installed and deployed more than two billion dollars worth of devices in US airports that are specifically designed to examine the contours of an air traveler stripped naked.

9. The DHS' representations regarding the steps that it has taken to address privacy concerns are not the full story. *See* Resp. Opp'n at 3, 10. The "Automatic Target Recognition" technology has been installed on only one category of screening devices. Sammon Decl. ¶ 10. Airline passengers who go through the backscatter X-ray devices are still subject to observation, as if they were naked, by TSA officials. Questions about the recording and storage of the unfiltered images for both devices remain unanswered. The NPRM, which the agency has delayed, would help clarify these matters as well as many others.

10. It is not necessary for the Court to "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'" *In re United Mine Workers of Am. Int'l Union,* 190 F.3d 545, 549 (D.C. Cir. 1999) (quoting *TRAC,* 750 F.2d at 80) (quotation marks omitted). Critical however is the Court's order on remand and the impact of the agency's WBI program on the public. "[M]uch 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* 653 F.3d at 5. The DHS' delay is unreasonable in light of the scope of the program, the level of public concern, the agency's resources, this Court's order to "act promptly" more than a year ago, and the agency's reluctance to commit to a date to issue the NPRM.

11. If the Court decides not to grant the Petition that the Secretary begin the rulemaking within 60 days or suspend the program, EPIC respectfully urges this Court to order a date certain by which the Secretary must publish the NPRM in the Federal Register. Absent such a determination, EPIC and millions of air travelers will wait until the spring of 2013 for the possibility of "finalizing the AIT Rulemaking documents." *See* Sammon Decl. ¶ 23.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandamus directing the Secretary to undertake a public rulemaking within 60 days. In the alternative, the WBI program should be vacated.

Respectfully submitted,

/s/ Marc Rotenberg_____

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Dated: September 10, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September 2012, I caused the foregoing Reply to Response in Opposition to Petition for Writ of Mandamus to be filed electronically with the Court via the Court's CM/ECF system, and to be served electronically upon the CM/ECF participants listed below. I further certify that four copies will be delivered to the Clerk of the Court by hand delivery within two business days.

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