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MANDATE ISSUED SEPTEMBER 21, 2011

No. 10-1157

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

THE ELECTRONIC PRIVACY INFORMATION CENTER,
CHIP PITTS, and BRUCE SCHNEIER
Petitioners,

v.

JANET NAPOLITANO, in her official capacity as Secretary of the U.S. Department of Homeland Security and
MARY ELLEN CALLAHAN, in her official capacity as Chief Privacy Officer of the U.S. Department of Homeland Security, and
THE U.S. DEPARTMENT OF HOMELAND SECURITY
Respondents.

PETITIONERS' MOTION TO ENFORCE THE COURT'S MANDATE

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GLOSSARY

DHS	U.S. Department of Homeland Security
EPIC	Electronic Privacy Information Center
WBI	Whole Body Imaging
TSA	Transportation Security Administration
APA	Administrative Procedure Act

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Exhibit 2…….June 19, 2009 Letter from the Transportation Security Administration

Exhibit 3…….April 21, 2010 Petition to the Department of Homeland Security Requesting Stay of Agency Rule

Exhibit 4…….May 28, 2010 Letter from the Transportation Security Administration

Exhibit 5…….July 15, 2011 Decision of the Court of Appeals for the District of Columbia Circuit

INTRODUCTION

Petitioners move to enforce this Court's mandate – requiring Respondents to "act promptly" to comply with this Court's decision and "cure the defect in its promulgation" of the rule requiring the use of whole body imaging as primary screening for air travelers. As set forth below, Respondents have delayed for more than two years since the change in agency practice that gave rise to the original petition requesting a public rulemaking. The time for delay has passed, and Respondents must, as this Court ordered, "act promptly" to seek public comment.

On July 15, 2011, this Court granted in part the Electronic Privacy Information Center ("EPIC"), Chip Pitts, and Bruce Schneier's Petition for Review in the present case. This Court held that implementation of the Whole Body Imaging ("WBI") program by Respondent Transportation Security Administration ("TSA"), a Department of Homeland Security ("DHS") component, was a substantive, legislative rule subject to the notice and comment requirements of 5 U.S.C. § 553 (2006). This Court stated that "few if any regulatory procedures impose directly and significantly upon so many members of the public" as TSA's airport screening procedures. *EPIC v. DHS*, 653 F.3d 1, 8 (D.C. Cir. 2011). The public is entitled, as a matter of law, to comment on this program.

JURISDICTION

This Court's power to enforce a prior mandate to an agency in response to a motion to enforce has been firmly established. *See Office of Consumers' Counsel v. FERC,* 826 F.2d 1136, 1140 (D.C. Cir. 1987); *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984). The DHS has no power to act contrary to "the letter or spirit of the mandate construed in the light of the opinion of" this Court. *City of Cleveland, Ohio v. Fed. Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977); accord *Coal Employment Project v. Dole*, 900 F.2d 367, 368 (D.C. Cir. 1990). This Court has made clear that it has the authority to "grant relief enforcing the terms of its earlier mandate." *Int'l Ladies' Garment Workers' Union*, 733 F.2d at 922. "A party always has recourse to the court to seek enforcement of its mandate." *Office of Consumers' Counsel*, 826 F.2d at 1140.

FACTUAL BACKGROUND

Petitioners' Motion to Enforce the Court's Mandate in this matter asks the Court to set a prompt schedule, 45 days, for the Respondent DHS to comply with the Court's order and initiate formal rulemaking for its WBI program. The TSA implemented the WBI program prior to the initiation of this matter, but failed to make public the text of the rule or its date, and failed to solicit public comment.[1]

[1] The first public note of the change in TSA policy appeared in an April 6, 2009 newspaper article. Joe Sharkey, "Whole-Body Scans Pass First Airport Tests," N.Y. TIMES, Apr. 6, 2009 at B6 ("In a shift, the Transportation Security

I. EPIC's Petition for Formal Rulemaking; DHS's Refusal to Initiate

As the Court noted, "[i]n May 2009 more than 30 organizations, including the petitioner EPIC, sent a letter to the Secretary of Homeland Security, in which they objected to the use of AIT as a primary means of screening passengers." *EPIC*, 653 F.3d at 4. EPIC and the groups ceased using WBI for primary screening pending a "public rulemaking." *Id.* On June 19, 2009 the "TSA responded with a letter addressing the organizations' substantive concerns but ignoring their request for rulemaking." *Id.*

"Nearly a year later," *id.,* on April 21, 2010, EPIC and 30 organizations sent a formal § 553(e) petition to DHS Secretary Napolitano and Chief Privacy Officer Mary Ellen Callahan, requesting suspension of the TSA's WBI program pending further review and public rulemaking. On May 28, 2010, the TSA responded to the petition and asserted that it was not required under the APA to initiate rulemaking procedures related to the WBI program.

II. This Court's July 15, 2011 Decision

On July 15, 2011, this Court held that the DHS's decision to implement the WBI program for primary airport screening was a legislative rule subject to APA notice and comment requirements, and that the DHS "has advanced no justification

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Administration plans to replace the walk-through metal detectors at airport checkpoints with whole-body imaging machines — the kind that provide an image of the naked body.")

for having failed to conduct notice-and-comment rulemaking." *EPIC*, 653 F.3d at 8. This Court rejected the various DHS arguments that its decision fell within the three categories of exempted rules in 5 U.S.C. § 553(b)(3)(A) (2006) (notice and comment requirements do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."). First, this Court found that the DHS's decision to implement the WBI program was a substantive rule and not a "procedural rule" (meaning "rules of agency organization, procedure, or practice"). 652 F.3d at 6. Second, this Court found that the DHS's decision was not an "interpretive rule" because it "effects a substantive regulatory change." *Id.* at 6-7 (citation omitted). Finally, this Court found that the DHS's decision was not a "general statement of policy" because it would be "absurd" to argue that a "passenger is not bound to comply with the set of choices presented by the DHS when he arrives at the security checkpoint." *Id.* at 7.

The implementation of the WBI program was, as this Court recognized, a rule requiring formal APA rulemaking procedures. The Court remanded the rule to the TSA with instruction "promptly to proceed in a manner consistent with [the Court's] opinion." *Id.* at 12. Rather than comply with this Court's unambiguous order, the DHS has continued to delay formal rulemaking.

III. This Court's September 12, 2011 Decision

On September 12, 2011, this Court denied EPIC's petition for rehearing and rehearing en banc in this case, and finalized its prior decision. At this point more than two years had passed since the DHS first instituted its WBI program without conducting formal rulemaking. Nearly two months had passed since this Court's decision, which clearly established that the DHS's implementation of the WBI program was a rule subject to the APA's formal rulemaking requirements. During the entire course of EPIC's petition process, the DHS has refused to undertake the formal rulemaking procedures that, as this Court held, are required by law. The DHS has continued to drag its heels even after this Court's unambiguous mandate was issued.

IV. This Court's September 21, 2011 Mandate

On September 21, 2011, this Court issued a mandate to the United States Department of Homeland Security "promptly to proceed in a manner consistent with" the Court's July 15th decision. The DHS has not contested, requested a stay from, or otherwise challenged the mandate before this Court. This Court's decision made clear to the DHS that it was required to "cure the defects" of its rulemaking procedures, but the DHS has failed to do so promptly.

ARGUMENT

I. Legal Standard

A motion to enforce the court's mandate is appropriate where "an administrative agency plainly neglects the terms of a mandate." *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984). A court should grant a motion to enforce the court's mandate "when a prevailing plaintiff demonstrates that a defendant has not complied with a [mandate] entered against it, even if the noncompliance was due to misinterpretation…." *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.D.C. 2004) *aff'd sub nom. Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24 (D.C. Cir. 2005). Where an agency decision is remanded to the agency, the court will determine whether the agency adequately complied with the court's order. *Id.* (citing *Sec. & Exch. Comm'n v. Hermil, Inc.,* 838 F.2d 1151, 1153 (11th Cir. 1988)). The court has a strong interest in "seeing that an unambiguous mandate is not blatantly disregarded by parties to a court proceeding." *Int'l Ladies' Garment Workers' Union*, 733 F.2d at 922.

II. DHS Has Failed to Act Promptly and Comply with the Court's Mandate

The DHS did not respond to this Court's July 15th decision by promptly issuing a notice of proposed rulemaking and soliciting public comments. Instead, the DHS took no action. Even after this Court issued the mandate on September 21st, the agency has given no indication that it intends to "proceed in a manner

consistent with" the Court's decision. Clearly such inaction is not consistent with the "letter or spirit," *City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977), of this Court's mandate, which called for "the [DHS] to act promptly." *EPIC*, 653 F.3d at 8. The DHS's delay highlights its continuing unwillingness to engage the public in its formal rulemaking process as required by law. Nothing in the Court's July 15th decision suggests that it has excused the DHS on remand from complying with the APA's basic guarantee of notice and an opportunity for comment before the issuance of a final rule. *See* 5 U.S.C. § 553(b) (2006).

A party always has recourse to the court to seek enforcement of its mandate." *Office of Consumers' Counsel v. F.E.R.C.*, 826 F.2d 1136, 1140 (D.C. Cir. 1987). EPIC seeks enforcement of the mandate against the DHS, including an order requiring the DHS to publish a proposed rule and engage in the public comment process within 45 days, or to justify its failure to do so. *See, e.g., Bldg. & Const. Trades Dept. AFL-CIO v. Dole,* No. 86-1359, 1989 WL 418934 (D.C. Cir. Oct. 30, 1989) (ordering OSHA to comply within 45 days or to explain its inaction to the court and the parties).

The lack of response to this Court's unambiguous order should be recognized, and the DHS should be afforded no further leeway in the rulemaking process required by the APA. If the DHS refuses to "cure the defect in its

promulgation" then its actions must be set aside, or the APA requirements must be otherwise enforced by this Court.

A. DHS Has Not Conducted Formal Rulemaking As Required by Law

The Administrative Procedure Act ("APA") generally requires "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 5 (referring to 5 U.S.C. § 553(b) and (c)). As this Court made clear in its July 15, 2011 decision, the DHS has "advanced no justification for having failed to conduct notice-and-comment rulemaking." *Id.* at 8. The DHS denied EPIC's original petition for rulemaking under §553, relying on its interpretation of the APA requirements. *Id.* at 5. This Court found that the DHS's denial was based on "plain errors of law" and remanded to the agency for further proceedings. *Id.* at 5, 8. The DHS has not conducted further proceedings or otherwise complied with this Court's order.

In *Chrysler Corp. v. Brown*, the Supreme Court noted that "courts are charged with maintaining the balance: ensuring that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA." *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (citing H.R.Rep. No. 1980, 79th Cong., 2d Sess., 16 (1946)). The Court emphasized that "regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in the Act." *Id.* This Court has endeavored in

the past to ensure that agencies do not "make a mockery of the provisions of the APA with impunity…." *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 758 (D.C. Cir. 1987) *aff'd*, 488 U.S. 204 (1988). This Court should not allow the DHS to "make a mockery" of its mandate and the APA by failing to publish a proposed rule and to solicit public comments, which it is clearly capable of doing.

The DHS has published more than seventy notices related to more than twenty proposed rules ("NPRM") since the July 15, 2011 Order. This is all the more remarkable considering the far-reaching impact of the airport screening program on the American public, as noted by the Court in its opinion, *id*. at 8, as compared with the matters in which the agency seeks public comment. For example, on August 3, 2011, the DHS published a NPRM seeking comment on the agency's ammonium nitrate security program. Notice of Proposed Rule, 76 Fed. Reg. 46907 (Aug. 3, 2011). On September 8, 2011, the DHS published a proposed rule seeking comment on the treatment of aliens subject to EB-5 petitions. Notice of Proposed Rule, 76 Fed. Reg. 59927 (Sept. 28, 2011). Clearly the DHS is capable and willing to engage in formal rulemaking procedures in other contexts. However, in contravention of this Court's order, DHS has not initiated formal rulemaking procedures for the WBI rule. Instead, it has committed $44.8 Million more in agency resources to expand the WBI program, which this Court identified was procedurally defective. *TSA Announces $44.8 Million for Additional Advanced*

Imaging Technology at U.S. Airports, Transportation Security Administration, Press Release, Sept. 7, 2011.[2]

B. DHS Has Not Solicited Public Comment, Even After This Court Recognized That Few Programs Impose so "Directly and Significantly Upon" the Public

This Court routinely affirms the important purpose of the APA's public comment requirement. *See, e.g,. Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process."). It is especially important to solicit public comments where agency action imposes "directly and significantly upon so many members of the public" as this Court recognized the WBI program does in this case. *EPIC*, 653 F.3d at 8. The DHS has had ample opportunity over the past two years since it chose to make WBI the primary screening technique to publish a rule and solicit public comments, but it has refused to do so.

This Court already granted the DHS substantial leeway when it declined to vacate the WBI program on remand. *Id.* at 8. This Court should not allow the DHS to interpret this temporary relief as carte blanche to ignore the requirements of the APA and to deny the public comment process required by law. This Court has

[2] Available at http://www.tsa.gov/press/releases/2011/0907.shtm.

already informed DHS that "the change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking." *EPIC*, 653 F.3d at 5. The DHS has so far refused to solicit or otherwise avail itself of public comments related to its WBI program.

C. DHS Has Not Acted Promptly as Ordered by This Court

The Court's July 15, 2011 Opinion requires the agency to "promptly … initiate notice-and-comment rulemaking" concerning the agency's rule implementing whole body imaging technology for primary screening. Jul. 15, 2011 Memorandum Opinion at 18; Jul. 15, 2011 Judgment (ordering "the rule be remanded to TSA for *prompt proceedings*, in accordance with the opinion of the court filed herein this date.") (emphasis added).

The Court's July 15, 2011 Opinion does not define "promptly." Nor do the Federal Rules of Appellate Procedure or the D.C. Circuit Rules. The Merriam-Webster dictionary defines "promptly" as "performed readily or immediately." *Promptly Definition*, MERRIAM-WEBSTER DICTIONARY (online ed. 2011).[3] The caselaw of this Circuit does not define "promptly" in the context of court orders requiring agencies to comply with APA obligations. However, this Court routinely enforces APA obligations by "compel[ling] agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (2006). At a minimum, the Court's July

[3] Available at http://www.merriam-webster.com/dictionary/promptly.

15, 2011 Opinion requires the DHS to conduct notice-and-comment rulemaking without "unreasonable delay." *Id*.

This Circuit's inquiry into what constitutes "unreasonable delay" under the APA turns on the facts of each case. "There is no *per se* rule as to how long is too long to wait for agency action." *In re Core Communications, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (*citing In re American Rivers & Idaho Rivers United,* 372 F.3d 413, 419 (D.C. Cir. 2004)).

> That issue cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part, as we have said, upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency.

Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1102 (D.C. Cir. 2003).

In *Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984) ("TRAC"), this Circuit "outline[d] six factors relevant to the analysis." *Id*. at 80. "Those factors are not ironclad, but rather are intended to provide useful guidance in assessing claims of agency delay." *Core Communications*, 531 F.3d at 855 (internal quotations omitted). The court may find that an agency has unreasonably delayed action even in the absence of bad faith. *Id*. (noting "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.")

The "most important" factor requires that "the time agencies take to make decisions must be governed by a 'rule of reason.'" *Id*.[4] Reason dictates that when, as here, an agency fails to respond to the Court's remand, the agency "has effectively nullified [the Court's] determination." *Id*. at 856. Such failure to act is particularly unreasonable when the court held the agency rules unlawful but remanded the matter "without vacatur le[aving] those rules in place." *Id*. Further, this Circuit has recognized the "Court's own interest in seeing that its mandate is honored." *Id*. at 860.

"Although there is no *per se* rule as to how long is too long to wait for agency action, a reasonable time for agency action is typically counted in weeks or months, not years." *Am. Rivers and Idaho Rivers United,* 372 F.3d 413, 419 (D.C. Cir. 2004) (Henderson, J.) (*quoting Int'l Chem. Workers Union,* 958 F.2d 1144, 1149 (D.C. Cir. 1989)) (*citing Midwest Gas Users Ass'n. v. FERC,* 833 F.2d 341, 359 (D.C. Cir. 1987)). In *Radio-Television News Directors Ass'n v. F.C.C.*, 229 F.3d 269 (D.C. Cir. 2000), this Circuit held a nine-month agency delay to be unreasonable. *Id*. at 272 (stating "if these circumstances do not constitute agency action unreasonably delayed, it is difficult to imagine circumstances that would). In *Antone v. Block*, 661 F.2d 230 (D.C. Cir. 1981), this Circuit noted a ten-month

[4] Other factors include: statutory timetables; delays that impact human health; competing agency priorities; and the nature of the interests prejudiced by delay.

delay "in implementing food stamp program reforms" can be unreasonable. *Id*. at 234 (citing *Rios v. Butz*, 427 F.Supp. 534 (N.D. Cal. 1976).

In *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535 (S.D.N.Y. 2009), the District Court for the Southern District of New York held that the DHS's two-and-a-half year delay on a §553(e) petition was unreasonable as a matter of law. *Id.* at 541. The court stressed that "given the gravity of problems" outlined in the petition, it was "unreasonable for DHS to take years to decide whether it intends to commence rulemaking," and it ordered DHS to make a decision within 30 days. *Id.* This Court has recognized the importance of the screening procedures at issue in this case, given their unique impact on the public at large. *EPIC*, 653 F.3d at 8.

Here, the DHS has delayed the formal rulemaking procedures necessary to "cure the defects" in its WBI rule for an unreasonable amount of time. The DHS has refused to publish a rule and solicit comments during the more than two years since the substantial change in agency action that gave rise to EPIC's first petition regarding the WBI program. The DHS has not taken any action for more than three months to "proceed in a manner consistent" with this Court's July 15, 2011 Opinion. The DHS has failed to act even though this Court remanded the matter without vacating the challenged rule. The DHS has not responded or complied with this Court's September 21, 2011 mandate, and has effectively nullified the Court's

decision. The DHS has even failed to abide by its own promise to "stand ready, willing and able to meet any reasonable … schedule the Court sets." Opposition to Emergency Motion for Injunctive Relief at 3, *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011) (No. 10-1157). This Court should find that the DHS has failed to "act promptly" in this case, and should require that the DHS publish in the Federal Register and solicit public comments within 45 days.

III. DHS Has Not Justified Its Failure to Initiate Formal Rulemaking

The APA provides a number of exclusions and exceptions to the formal rulemaking requirements under § 553(b), but the DHS has failed to justify its lack of formal rulemaking under any exception. As this Court held in its July 15, 2011 decision, the DHS decision to implement the WBI program was a substantive legislative rule, not a "procedural rule," "interpretive rule," or "general statement of policy." *EPIC*, 653 F.3d at 6-8. Furthermore, the DHS has failed to justify its lack of formal rulemaking under the "good cause" exception, 5 U.S.C. § 553(b)(B) (2006). If it was the agency's intent to invoke the "good cause" exception, it should have done so promptly to provide an opportunity for the parties to brief that claim before this Court. Indeed, the Court expressly refused to grant the agency's request that it "make clear that on remand, TSA is free to invoke the APA's 'good cause' exception" to notice- and-comment rulemaking," noting simply that the Court has "no occasion to express a view upon this possibility other than to note

we do not reach it." *EPIC*, 653 F.3d at 8. To allow the agency to now assert that exception would be to reward it for failing to act promptly in response to the order of the Court.

Even after this Court substantial alleviated the DHS's regulatory burden by not vacating the WBI rule, the DHS has not complied with this Court's order to "act promptly on remand to cure the defect in its promulgation." The DHS has not cured its defects, and any justification offered at this late juncture should be seen as a further attempt by the DHS to unjustly delay the public comment process required by law.

CONCLUSION

Because the DHS has violated this Court's order and the APA by implementing the WBI program without formal rulemaking, the Court should order the DHS to publish a proposed rule in the Federal Register within 45 days and to engage in the public comment process.

Respectfully submitted,

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Dated: October 28, 2011

RULE 32(A) CERTIFICATE

I hereby certify that the foregoing Motion to Enforce the Court's Mandate complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type-style requirements of Rule 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the 20-page limit of Rule 27(d)(2).

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 28th day of October, 2011, he caused one copy each of the foregoing Motion to Enforce the Court's Mandate to be served by ECF and US Mail on the following:

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