

The Identity Project

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What is to be done about the TSA?

from the Identity Project blog, November 17, 2010:
<http://papersplease.org/wp/2010/11/17/what-is-to-be-done-about-tsa>

We're pleased and excited to see the spontaneous outpouring of grassroots outrage at the latest TSA "Standard Operating Procedures", which offer would-be air travelers a Hobson's choice between forms of submission to secret rules, illegitimate authority, and invasion of personal privacy.

TSA wants us to choose between a virtual strip-search (x-ray or similar photography through your clothes, with the as-though-naked high-resolution photos viewed by a TSA agent or rent-a-cop out of your sight somewhere in a little porno booth in the bowels of the airport), versus vigorous manual groping of your entire body with special attention to your genitals and breasts.

We're equally pleased and excited to see that outrage move beyond mere complaint to direct action and resistance, primarily by those "opting out" of both the "whole body imaging" and the groping, and calling on others to do the same.

We thank those who are taking action, even what we think may be ineffective or insufficient action, against TSA's excesses. The public's frustration with TSA's ever-escalating demands was bound to explode eventually, and we hope that time has truly come. We just hope that the results will move us in the direction of real reform, rather than "concessions" that leave us worse off than before, or band-aids followed by more excesses after the public calms down.

For many years, TSA has been writing its own laws, in secret, in the form of "Security Directives" to airlines and "Standard Operating Procedures" for TSA employees and contractors. We've requested the directives and procedures that purport to say what travelers are required or prohibited from doing. That's our right under the Freedom of Information Act (FOIA). To date, TSA has either refused our requests outright or ignored them. For months, until they were caught by the Associated Press, the most senior FOIA and "privacy" officer for DHS gave direct orders to the TSA not to provide us with any responses without express prior permission from DHS headquarters.

"Get photographed as though naked or get groped" isn't the only new TSA imposition. This month, apparently, TSA issued more secret orders to airlines as part of its illegal Secure Flight passenger surveillance and control scheme. The airlines have begun threatening to cancel reservations and deny transportation to paid and ticketed would-be passengers who haven't

provided the airlines (and thus the TSA) with their “full name”, gender, and date of birth. No law requires passengers to do so, but TSA is trying behind the scenes to force airlines to refuse to carry people who don't.

So what is to be done? Real reform of TSA procedures would include:

- No more secret laws. TSA has to publish its rules and procedures like every other agency. Any unpublished rule cannot be enforced against citizens. Then the public would have early notice of rules like “You have to either be photographed nude, or groped”. And a flood of negative comments on such proposed rules might dissuade the agency, energize Congress to intervene, or allow a court challenge to be brought — before TSA molests a million more people a day in airports across the country.
- No more groping travelers. Assaults on innocent travelers in a way that the law of almost every state defines as sexual battery should not be the new standard for Federally-approved suspicionless searches.
- No more suspicionless searches. We are in more danger from physical sexual attack by TSA employees than we are from secret bombers. Terrorism is a minor problem. Drunk drivers are more of a danger to travelers than terrorists. Heart disease kills far more people every week than terrorism did in its worst year. Mandatory heart checkups in lines at the airport would do far more to keep us all alive than mandatory searches. But neither checkups nor searches can be forced on the citizens of a free country. Millions have fought for our freedom; we should not let the government ignore the basic human rights that our families fought to obtain and keep.
- No more secret blacklists or secret “no-fly” orders. The TSA can't bar “certain people” from flying by secret, extra-judicial administrative orders. If the TSA thinks someone is guilty of something, arrest them and give them their day in court to confront their accusers and defend themselves before a jury, with a presumption of innocence. If TSA can't arrest them, because they haven't committed a crime, then it must leave them (and the rest of us) alone.
- No more secret surveillance lists. TSA's “selectee list” is much larger than the no-fly list. It is how a lot of people end up “randomly” searched every time they go through an airport. Again, if TSA has evidence of a crime, arrest them; otherwise, treat every traveler equally.
- No more lying to the public. TSA claims its searches are random when they aren't. It claims their machines can't store nude photos when they can. It claims ID is required when it isn't. The history of TSA is a history of lying to the public. Congress should make sure it is both a crime and a tort (fraud) for a TSA employee or contractor to lie to a member of the public.

- No more identity checkpoints. Free countries don't demand that citizens produce their "papers" in order to move around. No more warrantless interrogations (under penalty of denial of travel) or demands for information.
- Restore the right to assemble and the right to travel. Neither the TSA nor any government agency has the right to prevent us from moving around in our own country. If they don't have cause to arrest us, then we're presumed innocent and we're free to move around the airports, the planes, the train stations, the trains, and the country.

It's up to the public to take action to bring about these changes. So far, the courts have done nothing to stop these abuses or hold the TSA accountable. John Gilmore, for example, sued the TSA in a case that went all the way to the doors of the Supreme Court, over their demand that we identify ourselves in order to move around in our own country. He lost. The issue that he asked the Supreme Court to review was whether an agency like TSA can make up secret rules, never publish them, and require the public to follow them. The Supreme Court declined to take the case.

As has been highlighted by their investigation and threat to impose an administrative fine on John Tyner (the man in the YouTube video who told them, "If you touch my junk, I'll have you arrested," and then turned around and left the airport), their secret rule is also that once you've put your stuff on the X-ray conveyor, you have "consented" to whatever kind of search they want to put you through. They may try to actively prevent you from leaving the TSA intimidation area if you decide you'd rather stay home than be subjected to their attentions. Or, if they can force you to identify yourself, they may let you go, but send you a later notice of an \$11,000 fine — as they threatened to do with Mr. Tyner. One court has already upheld them in enforcing this secret rule. Yet TSA is not a law enforcement agency and has no legal authority to detain anyone. That's why they have to call real cops when they want someone arrested.

We used to have a Fourth Amendment that protected our right not to be subjected to any of these searches when there is no reason to suspect us of any crime.

We used to have a Fifth Amendment that protected our right to remain silent. That would include when a common carrier, TSA agent, or rent-a-cop wants to know our name, date of birth, or gender, or other identifying information.

We used to have a First Amendment that protected "the right of the people... peaceably to assemble."

But every year that the public put up with increasingly intrusive deprivations of other people's rights to travel, assemble, or remain silent, the more Congress and the courts think that we don't care. Or, worse, they think that this police state is what the public wants. The Congress that has stood by while the TSA took over their role as lawmakers, and the courts that have shredded the First, Fourth, and Fifth Amendments, probably think they were only doing the public's bidding.

Have you told those who claim to represent you that you won't re-elect them if they don't rein in

the TSA? It's a bit late to do so now, after the election, but better late than never. Don't wait until after the next election. They won't care unless they know that you care enough about this issue for it to determine your vote.

“Opting out” for ourselves is a positive step. But unless our resistance goes further, opting out for ourselves, or objecting only when the TSA and its rent-a-cop minions cross our own boundaries, doesn't stop the real problem. It allows these warrantless, suspicionless searches, administrative “no-fly” orders, and secret watchlists to continue to be imposed on those less empowered, more vulnerable, or more intimidated. If we don't want the TSA to do this unto us, we need to object when they do it to anyone, to any degree. By the time they get to us, it may be too late to object.

Already, most people think there's no way to stop TSA from whatever outrageous behavior it dreams up — and if they are right, we're living in a dictatorship, not a democracy.

We encourage you to opt out, but we also encourage you to think about what else you can do. Let Congress know that you want them to act now to bring the TSA within the rule of law. Assert your rights in court against unreasonable searches and seizures. Assert your rights (including your right of lawful self-defense) against their assaults on you, your family, your children, and your rights.

Don't count on the courts to uphold your rights, and be aware of the risks you take. But make the goons at the airport aware that they, too, are taking risks. Most TSA checkpoint staff are not law enforcement officers and have no police powers. Despite the misleading “TSA” logos on their epaulets, checkpoint staff at some airports such as SFO are private contractors — not government employees at all.

Those who impose the “pointy end” of the TSA's illegitimate authority on the public risk personal liability for their actions. If they threaten you, they risk liability for assault. If they touch you, they risk liability for battery, perhaps sexual battery depending on how and where they touch you. If they detain you, they are making a citizens arrest, and risk liability for false arrest. If they force you to move from place to place, even so much as a step, they risk liability for kidnapping.

On our part, we're continuing to pursue our FOIA requests for TSA's secret rules and requirements. We are continuing to assist those who are trying to find out what's in the dossiers the DHS keeps about their travels, and to pursue our lawsuit against the DHS for withholding those records. We're continuing to support and publicize the cases of people who stand up to TSA. We were one of the parties to the petition to the TSA that forms the basis for EPIC's ongoing lawsuit against the virtual strip-searches. We'll continue to watch that case closely to see if the courts will finally hold that TSA's procedures and demands on travelers must, at least when there is a formal petition for them to do so, be adopted only after a public rulemaking whose outcome would be subject to judicial review.

In the end, it's up to you and what you do. The power of the people will decide.