29 November 2010

The Honorable Patty Murray
U.S. Senate
Washington, DC

VIA FACSIMILE: 202-224-0238

I believe that TSA has engineered a bait-and-switch with the whole body imaging (WBI) technology and is derelict by not having performed either a cost-benefit analysis or a privacy assessment.

When the first backscatter x-ray screening unit was installed in Phoenix, the New York Times reported it would be used “to replace the traditional pat-down.” In other words, it would be used if someone flunked the walk-through metal detector or if there was a reason to suspect a passenger was high-risk.

Fast forward two years. In May 2009, 24 privacy and civil liberties groups, including the Electronic Privacy Information Center (EPIC), asked DHS to “conduct “a 90-day formal public rulemaking process to receive public input on the agency’s use of ‘Whole Body Imaging’ technologies.” The agency did not. Instead, it announced in early 2010 a plan to install an additional 1,000 WBI machines in U.S. airports. A rule was made, just not formally.

In March 2010, the Chicago Tribune reported that the TSA chief at Chicago’s O’Hare Airport (ORD) said she believed whole body scanning would become mandatory. The TSA blog team quickly denied such plans when asked about it on Twitter.

Then on November 1, 2010, TSA changed the rules. It’s either pat-down or whole body scan, if you are diverted from the walk through metal detectors. According to CNN, at the end of October 2010, there were 189 backscatter units and 152 millimeter-wave machines in more than 65 U.S. airports. TSA anticipates that there will be 1,000 units in operation at the end of 2011.

Although the Supreme Court hasn't evaluated airport screening technology, the U.S. Court of Appeals for the 9th Circuit ruled in 2007 that "a particular airport security screening search is constitutionally reasonable provided that it 'is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives.' "

However, TSA has failed to conduct a cost-benefit analysis of WBI systems. Nor have they conducted a privacy assessment.

From March 2010 GAO Report:

> "[I]t remains unclear whether the AIT would have detected the weapon used in the December 2009 incident based on the preliminary information GAO has received. . . . In October 2009, GAO also recommended that TSA complete cost-benefit analyses for new passenger screening technologies. While TSA conducted a life-cycle cost estimate and an alternatives analysis for the AIT, it reported that it has not conducted a cost-benefit analysis of the original deployment strategy or the revised AIT deployment strategy, which proposes a more than twofold increase in the number of machines to be procured."

According to EPIC, "courts have required that airport security searches be minimally intrusive, well-tailored to protect personal privacy, and neither more extensive nor more intensive than necessary under the circumstances to rule out the presence of weapons or explosives."

But TSA has performed no such comprehensive privacy assessment.

This is a poster child for the morass that is the military-industrial-congressional complex, with a dash of executive branch pocket-padding on the side (Michael Chertoff's lobbying for the very firm he helped fund when he was head of DHS).

It's past time for Congress to actually provide oversight on TSA. It's long past time for the Senate to act: the House acted last year (Transportation Security Administration (TSA) Authorization Act of 2009).

Sincerely,

Kathy E. Gill