

**Evaluative Argument: Are TSA Sexual Pat Down Searches Good for Democracy?
- (MLA 7th Ed. Citing, Rogerian structure)**

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April 3, 2011

Submitted: Writing 2010, Spring 2011

[1] On October 28, 2010, the Department of Homeland Security (DHS) and John S. Pistole, Administrator for Transportation Security Administration (TSA) announced increased airline passenger screening procedures. The TSA is DHS's subdivision responsible for domestic air travel security. (DHS, *Increased Security*, n. pag.; Pistole, *Why We Need*, n. pag.). Pistole adopted the new screening procedures just a few months after being appointed the new TSA Administrator (Pistole, *Why We Need*, n. pag.). Many Americans were uncomfortable both with how the new search practices were adopted with little notice before the busy Thanksgiving holiday travel season, and with the intrusiveness of new pat down practices that include touching a passenger's sex organs.

[2] The new screening procedures presents two options to passengers. First, a boarding passenger may submit to a police search via digital imaging that renders realistic images of their nude torsos. Alternatively, they may submit to an optional intrusive pat down that includes an officer touching the passenger's genitals (Pistole, *Why We Need*, n. pag.; Pistole, *Testimony*, n. pag.). If the imaging scanner fails to fully resolve a person's body, then the passenger must submit to a pat down search (Pistole, *Why We Need*, n. pag.). Given the two options, ninety-nine percent of all passengers choose digital imaging (*id*). Nonetheless, a random number of passengers are selected and subjected to genital touching pat downs without the option of digital imaging (*id*). Leaving a pat down screening line without completing a genital touching search is a crime (49 C.F.R. 1540.107). About three percent of all passengers are subjected to the new enhanced pat down searches (*id*). In 2009, domestic airlines enplaned about 704 million passengers (U.S. Census Bureau, *Table 1072*, n. pag.). If Administrator Pistole's pat down rate is correct, Americans annually have their genitals touched by TSA police officers about 21 million times.



[3] Travelers in a TSA screening line who complain about the new more intrusive pat downs can be subjected to significant criminal and civil penalties, or those passengers who complain about the searches risk being put on the TSA’s “watch list,” which effectively bars them from domestic air travel. Passengers can submit a grievance to the TSA through its Travel Redress Injury Program, but the only response required by TSA regulation is that the agency will send the passenger a letter explaining why the TSA conducted an intrusive search (49 C.F.R. 1560; DHS, *Traveler Redress*, n. pag.).

[4] In a November 2010 letter to Pistole, Congressman Rush Holt described the public’s initial outrage, which was fueled in part by a viral YouTube cell phone video in which a TSA behavioral spotting officer frisked a three year-old girl while her parents were threatened with arrest for protesting the action (Rush, 2-3). This opposition subsided as the public and Congress began to accept the necessity of both digital strip searching and sexually intrusive pat downs (Rockefeller, n. pag.; Pistole, *Testimony*, n. pag.). Many people were swayed by the conventional wisdom that only a guilty person needs to be concerned about being searched by police; the innocent have nothing to hide. Passenger Anthony Giovingo’s response was typical, “I have nothing to hide, so what’s the problem?” (Lieb).

[5] The dangerous and the guilty do exist amongst the air traveling public. The primary benefit of TSA passenger screening is intercepting firearms. In 2006, the TSA intercepted about 1,400 firearms from about 770 million boarding passengers, or a rate of about 0.000002 firearms per passenger boarding (U.S. Census Bureau, *Table 534*, n. pag.). Two persons wearing improvised bombs actually made it on to flights out of approximately 5.6 billion United States air travel system passenger enplanements between 2002 and 2009 (U.S. Census Bureau, *Table 1072*, n. pag.; see Pistole, *Why We Need*, n. pag.). One early attempt involved a failed “shoe bomb,” and a second 2009 attempt involved explosives hidden in underwear (*id.*) Both events occurred in the smaller, functionally-isolated U.S. international flight system. International flights to or from the United States comprise only about 21 percent of all U.S. air travel passenger enplanements



(U.S. Census Bureau, *Table 1072*, n. pag.; *Bureau of Transportation Statistics*, 6).

[6] Most Americans have accepted the new increased security measures, but Americans should pause and think about how these increased security measures undermine our basic principles of privacy, fairness, efficiency and openness in government. Americans should be less concerned about *what* procedures were adopted and should consider *how increased security measures were adopted*. Administrator Pistole was legally authorized to adopt the new October policies without prior approval from the president, or cabinet, and without consultation with the American public. (49 C.F.R. 1540.107). The TSA’s “Submission to Screening and Inspection” regulation only vaguely requires passengers to submit to a “screening and searching of his or her person” (*id*). The TSA Administrator alone has the discretionary power to decide what a reasonable screen and search are. (Pistole did consult with both the president and cabinet secretary prior to announcing the increased security measures.)

[7] Pre-boarding searches are generally considered lawful by the courts. Two federal appeals courts have upheld the constitutionality of broad screening of passengers by magnetometer searches followed by frisking for passengers who fail the magnetometer wand test, as long as the search method is minimally intrusive (Lombard, 354; Mock, 233). A “digital strip search” followed by a sexually intrusive pat down are search practices that extend those prior court rulings, but that extension still has not been tested in the courts.

[8] Pistole’s decision was lawful. But was how Pistole reached his decision good governance? Most Americans share some basic values about what is good government and about how government should relate to citizens. How the TSA came to adopt its “digital strip search” and sexual contact pat down practices is an example how things go wrong when governmental agencies depart from those basic values.

[9] One of those common American values about good government is that government agencies should be open, transparent and fair. Those values are embodied in two laws: the federal Freedom of Information Act (FOIA) and the rulemaking provisions of the Administrative Pro-



cedures Act (APA) (5 U.S.C. Sec. 552; 5 U.S.C. Sec. 553; Davis and Pierce, Sec.s 6.7, 7.11 and 9.5). Under those laws, because governmental operations agencies can be subjected to scrutiny by ordinary citizens, agencies have a strong incentive to be fair and equitable in its activities.

[10] TSA practices, like the intrusive pat downs adopted in October 2010, fail this transparency standard. Administrator Pistole successfully exploited an ambiguity in the “screening and search” regulation when adopting the new heightened security procedures. He based his decision on unidentified and partially classified tests of TSA screening procedures (Pistole, *Why We Need*, n. pag.); see Office of Inspector General, *Newly Deployed*. In February 2011, refusing to identify specific study results, Pistole told Congress how he “considered several reports from the Government Accountability Office (GAO), DHS’s Office of Inspector General (IG), and TSA’s Office of Inspection, all of whom have performed a significant amount of covert testing of TSA’s operations. One of the most significant findings of the covert testing was that pat downs were not thorough enough” (Pistole, *Testimony*, n. pag.). In the 2007 publicly available GAO report mentioned by Pistole, during covert tests of TSA checkpoints, the GAO was able to smuggle simulated improvised explosive devices past screeners (Mock, 223-225). Other than the GAO Report, the specifics of information that Pistole relied upon is unknown. The Electronic Privacy Information Center (EPIC), a public interest group, is currently pursuing litigation that, in part, may result in the release of the shielded documents on which Pistole based his decision (EPIC).

[11] Pistole’s practice of classifying information about TSA projects as secret is part of a larger agency pattern. For example in 2008, the TSA stopped reporting the number of passengers who have prohibited items confiscated or the nature of those items (U.S. Census Bureau, *Table 534*, fn. 9). As a result, although taxpayers foot the bill, taxpayers have little idea of whether TSA expenditures are effective in preventing attempted terrorist attacks or to what extent ordinary Americans are inconvenienced or injured by the agency’s screening practices.

[12] Sometimes the level of TSA secrecy calls the agency’s credibility into question. In De-



ember 2010, a TSA employee inadvertently posted an outdated but classified TSA passenger screening handbook in a public area of its website (CBS Evening News; United States Transportation Safety Administration, p. 4-17). Under the pre-October 2010 TSA practice, the secret TSA manual indicated that persons would be patted down by an officer running their hands over a passenger's stomach, back and front of their legs, and arms. That "secret" fact was known to millions of Americans who have passed through TSA screening points.

[13] Another shared American value about good government is that government should be an efficient steward of the taxpayers' money. The APA is designed to assure that agencies make significant policy decisions through public rulemaking, and the FOIA allows citizens to obtain information necessary to determine if existing programs are ineffective or can be run more efficiently by other means. The new TSA heightened security practices also fail this efficiency standard. Although hidden based on security and secrecy concerns, sometimes information about the inner workings of TSA programs does reach the public through governmental audit reports and Congressional hearings. In October 2009, the U.S. General Accountability Office (GAO) found that the TSA failed to adopt basic risk-benefit analysis when it considered various technological screening alternatives (GAO, *Checkpoint Screening*, "Highlights"). In May 2010, the GAO examined techniques that specially trained TSA behavioral officers use to identify potential terrorists. The GAO found that the facial and body movement cues applied by TSA officers have never been validated (GAO, *Behavioral Detection*, "Highlights"). No one knows if the the TSA's terrorist "spotting" and pat down techniques actually work, including the TSA. As Representative Holt noted, for decades Israel has had a minimally intrusive passenger screening program that operates in a more hostile environment than that faced by the United States (Rush, 2-3). In short, TSA secrecy, like most governmental secrecy, is a breeding ground for waste and inefficiency in public expenditures.

[14] A third American value about good governing is that once the government wrongs an individual, the injured citizen should have adequate redress to correct that injury and the



government should respond fairly to that citizen's request for redress. TSA redress regulations fail this standard. Under TSA regulations, persons put on a watch-list or who feel that they have been inappropriately touched by a TSA officer have no redress other than to receive a letter from the TSA explaining why the agency took the action. (49 C.F.R. 1560; DHS, Traveler Redress Injury Program, n. pag.). Injured citizens have no right to judicial review of the TSA's actions in court (49 C.F.R. 1560).

[15] Finally, basic American values include that a good government must respect the privacy of its citizens. But, what is privacy? In the United States, privacy has become to mean "the right to enjoy life the right to be let alone" (Warren and Brandeis, 1). A person has the highest expectation of the right to privacy in the right to be free of invasions of their body and their home. The right to the integrity of a person's body is the highest sphere of the right of privacy, and sexual assault, which "occurs when someone touches any part of another person's body in a sexual way, even through clothes, without that person's consent," is one of the most severe violations of that right (National Center for Victims of Crime, *see* U.C.A. Sec. 76-6-5-404). Although the new intrusive TSA pat downs may be excused by the courts and lawmakers from being classified as a sex crime, any air passenger who has gone through the new pat down knows the procedure feels like they are being sexually violated.

[16] Under this view of privacy, as a person leaves the vicinity of their home in which they have highest right to privacy and engages in commerce, they are deemed to increasingly to give up their expectation of privacy. Thus, in the air travel context, a passenger buying a ticket to travel on a commercial airline is deemed to have implicitly and voluntarily consented to intrusive of police searches in exchange for the convenience of air travel (Lombard, 354, Mock, 233). Even when implied consent doctrine is used to justify air passenger pre-boarding searches, courts require police to use the most minimally invasive but effective method of search (Lombard, 355, Mock, 236). Privacy also means reputation privacy, that is the right to control information about one's reputation. The U.N. Charter on Human Rights, to which the United



States' subscribes, provides that no person shall be "subjected to arbitrary interference with his privacy, . . . nor to attacks upon his honor and *reputation*. Everyone has the right to the protection of the law against such interference or attacks" (General Assembly of the United Nations, Art. 12, emphasis added). In the reputation protection view, privacy is a right that an individual carries with them into all settings and that does not diminish in a commercial or government enforcement setting (*see* Solove).

[17] Under both definitions, TSA practices fall short of adequately protecting a traveler's right to privacy. The implied consent model assumes that passengers have other transportation alternatives, *i.e.* - reaching their destination by auto or train travel. In the western United States, with its longer travel distances, there is no practical alternative form of ground travel. Unlike the eastern United States, where inter-city travel distances are shorter and train travel options exists, in the West, the implied consent theory has little currency. As noted above, if a TSA passenger complains, the TSA can digitally tag the passenger as suspicious in its watch-list database without the right of passenger redress. Whether touching millions of Americans' genitals each year actually intercepts improvised explosives better than less-intrusive magnetometer wand searching and non-sexual pat downs remains unproven (GAO, *Behavioral Detection*, "Highlights").

[18] Many feel that sexual pat down searches on domestic flights are reasonable because given that billions of Americans will fly domestically over the next five years, the only acceptable level of attempted bombings is zero. As noted above, statistically the odds of an improvised bomb getting through the pre-2010 system is almost nill. Given that perfection is always an unattainable goal and the pre-October 2010 system had a good performance track record, it is time to temper that view with some realism. Perhaps there are many more secret reports of other attempted bombers, but with the overreaching veil of TSA secrecy, the public's right to participate in governmental decision making is frustrated. Other Americans freely acknowledge that they are simply scared to death by the threat of air travel terrorism. Americans collectively



decided by enacting various federal statutes to give extraordinary powers to a transportation czar who could act swiftly and decisively. But like many decisions based on strong emotion instead of reason, such those adopted in the wake of 9-11, a person's first reaction often overreaches, and later, he or she finds that they need to reevaluate their earlier choices.

[19] Are TSA sexual pat down searches good for American democracy? Each of the 700 million U.S. air travelers who stand in TSA screening lines annually has to decide that question for themselves. Was Pistole's October 2011 decision good governance? Basic American values are violated when any single government representative like Pistole can decide at his or her sole discretion that 21 million Americans should have their genitals touched each year by police officers. Before exercising his discretionary power, Pistole and the TSA could have launched a national debate on whether citizens wanted a less intrusive, less costly but equally effective passenger screening system or the more intrusive practices actually adopted. Pistole and the TSA could have allowed Americans to debate the option of simply leaving a screening line if they are faced with a genital pat down. But Pistole, using vague authority given under an obscure regulation, took that choice away from millions of Americans by springing mandatory sexual pat down searches on the American people just before the busy Thanksgiving holiday travel season. By any measure, any single newly-appointed government Officer having such power challenges the definition of democracy. How Pistole implemented his decision setting a new balance between privacy and security for all Americans seriously departed from many cherished values about good governance. Americans should take pause and reconsider whether that is the type of democracy that they want for our country.



Works Cited

- 5 U.S.C. Sec. 552, “Public Information; Agency Rules, Opinions, Orders, Records, and Proceedings.” 2010 as amended. Print.
- 5 U.S.C. Sec. 553, “Rulemaking.” 2010 as amended. Print.
- 49 C.F.R. 1540.107, “Submission to Screening and Inspection.” 2008. *Ecfr*. Web. 19 Feb. 2001.
- 49 C.F.R. 1560, Subpart C, “Passenger Redress.” 2008. *Ecfr*. Web. 20 Feb. 2011.
- Bureau of Transportation Statistics, U.S. Department of Transportation. Press Release BTS15-10. “Summary of 2009 Traffic Data for U.S. and Foreign Airlines: Total Passengers Down 5.3 Percent from 2008.” March 29, 2010. *BTS*. BTS. Web. 24 Feb. 2011.
- CBS Evening News. “Unredacted TSA Manual Leaked Online.” *CBS Evening News*. CBS Evening News. 8 Dec. 2009. Web. 19 Feb. 2011
- Davis, Kenneth Culp, and Richard J. Pierce, Jr. “The Many Advantages of Rules and Rule-making.” *Administrative Law*. New York: Little, Brown & Co., 1994. Vol. I, Sec. 6.7. 260-61. Print.
- . “What Process Is Due?”. *Administrative Law*. New York: Little, Brown & Co., 1994. Vol II, Sec. 9.5. 43-47. Print.
 - . “Why Are Agencies Reluctant to Act by Rulemaking?”. *Administrative Law*. New York: Little, Brown & Co., 1994. Vol. I, Sec. 7.11. 362-65. Print.
- Electronic Privacy Information Center. Complaint (July 2010) and Amended Complaint (Feb. 2011) in *EPIC v. The Department of Homeland Security*, Case No. 09-02084 (RMU) (D.D.C. Filed Nov. 9, 2009). *EPIC*. EPIC. Web. 18 Feb. 2011.
- General Assembly of the United Nations. “The Universal Declaration of Human Rights.” New York: United Nations, 1948. *UN*. UN. N. pag. Web. 19 Feb. 2011.
- Holt, Rush Rep. Letter to John S. Pistole, Administrator, Transportation Security Administration. 19 Nov. 2010. *U.S. House Rep.*. U.S. House Rep. Web. 19 Feb. 2011.
- Lieb, Jeffrey. “Controversy Over Pat-downs, Body Scans, Lands at DIA.” *The Denver Post*, 18 Nov. 2010. N. pag. *Denver Post Online*. Denver Post. Web. 25 Feb. 2011.
- Lombard, Étienne (student). “Bombing Out: Using Full-Body Imaging to Conduct Airport Searches in the United States and Europe Amidst Privacy Concerns.” *Tulane J. of In-*



tern'l and Comparative Law 19.1 (2010): 337-68. Print.

Mock, Tobias W (student). "The TSA's New X-Ray Vision: The Fourth Amendment Implications of 'Body-Scan' Searches at Domestic Airport Security Checkpoints." *Santa Clara Law Rev.* 49.1 (2009): 213-51. Print.

Nat'l. Center for Victims of Crime. "Sexual Assault - Definition." *Nat'l. Center for Victims of Crime.* 2008. *NCVC.* NCVC. N. pag. Web. 19 Feb. 2011.

Office of the Inspector General, U.S. Department of Homeland Security. *Evaluation of Newly Deployed and Enhanced Technology and Practices at the Passenger Screening Checkpoint (Unclassified Version).* Washington, D.C.: TSA, Mar. 2010. *DHS.* DHS. Web. 19 Feb. 2011.

Pistole, John S. (U.S. Transportation Safety Administration). Letter to Editor. "Why We Need TSA's Security Measures." *USA Today*, 23 Nov. 2010. N. pag. *USA Today Online.* USA Today. Web. 19 Feb. 2011.

Pistole, John S. (U.S. Transportation Safety Administration). "Testimony of Transportation Security Administrator John S. Pistole before the House Committee on Homeland Security, Subcommittee on Transportation Security: Hearings on Terrorism and Transportation Security: TSA Oversight held Feb. 10, 2011." 2011. *U.S. House Rep.* U.S. House Rep. N. pag. Web. 19 Feb. 2011.

Rockefeller, John D. IV. "Statement of Chairman Senator John D. Rockefeller IV to U.S. Senate Committee on Commerce, Science and Transportation Committee: Hearing on Oversight of Transportation Security Administration Held Nov. 17, 2010." 2010. *U.S. Senate.* U.S. Senate. N. pag. Web. 19 Feb. 2011.

Solove, Daniel J. "I've Got Nothing to Hide" and Other Misunderstandings of Privacy." *San Diego Law Rev.* 44 (2007):745-45. Print. *SSRN.* Web. 17 Feb. 2011.

United States Census Bureau. "Table 534. Prohibited Items Intercepted at U.S. Airport Screening Checkpoints 2004-2008." *United States Statistical Abstract*, 2009 Ed. Washington D.C.: GPO. 2009. *U.S. Census Bureau.* U.S. Census Bureau. N. pag. Web. 19 Feb. 2011.

U.S. Census Bureau. Table 1072. U.S. Scheduled Airline Industry - Summary 1995 to 2009. *United States Statistical Abstract*, 2011 Ed. Washington D.C.: GPO. 2011, *U.S. Census Bureau.* U.S. Census Bureau. N. pag. Web. 19 Feb. 2011.

U.S. Department of Homeland Security. "DHS Statement on Increased Security Precautions." Press Release ed. Washington, D.C., 29 Oct. 2010. *DHS.* DHS. No. pag. Web. 19 Feb.



2011.

. “49 C.F.R. Parts 1540, 1544, and 1560 Secure Flight Program; Final Rule.” 73(209) Fed. Reg. 64018-64066. Washington, D.C.:GPO, 28 Oct. 2008. *TSA*. TSA. Web. 20 Feb. 2011.

“DHS Traveler Redress Inquiry Program (DHS TRIP).” *DHS*. DHS. No pag. Web. 19 Feb. 2011.

U.S. General Accountability Office. *Aviation Security: DHS and TSA Have Researched, Developed, and Begun Deploying Passenger Checkpoint Screening Technologies, but Continue to Face Challenges*. GAO Rep. 10-128. Washington, D.C.: GAO, Oct. 2009. *GAO*. GAO. Web. 19 Feb. 2011.

. *Aviation Security: Efforts to Validate TSA’s Passenger Screening Behavior Detection Program Underway, but Opportunities Exist to Strengthen Validation and Address Operational Challenges*. GAO Rep. 10-763. Washington, D.C.: GAO, May 2010. *GAO*. GAO. Web. 19 Feb. 2011.

U.S. Transportation Security Administration. *Screening Management: Standard Operating Procedures (Version 3)*, May 2008. *CBS News Online*. CBS News. Web. 19 Feb. 2011.

Utah Code Anno. Sec. 76-5-404(1) (2010).

Warren, Samuel D. & Louis D. Brandeis. “The Right to Privacy.” 4 Harv. L. Rev. 193 (1890). Print.