ARGUED ON MARCH 10, 2011; DECIDED ON JULY 15, 2011;
REHEARING AND REHEARING EN BANC DENIED ON SEPTEMBER 12, 2011; MANDATE ISSUED ON SEPTEMBER 21, 2011

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

ELECTRONIC PRIVACY INFORMATION CENTER, *ET AL.*,	)	
Petitioners,	)	
v.	)	No. 10-1157
JANET NAPOLITANO, in her official capacity as Secretary of the U.S. Department of Homeland Security, *ET AL.*,	)	
Respondents.	)	

OPPOSITION TO PETITIONERS' SECOND MOTION TO ENFORCE MANDATE

Respondents Janet Napolitano, *et al.*, hereby oppose petitioners' second motion to enforce this Court's mandate of September 21, 2011.

Petitioners Electronic Privacy Information Center ("EPIC"), *et al.*, filed their first motion to enforce the mandate of this Court within 37 days of the issuance of that mandate. This Court denied EPIC's motion on November 16, 2011. A little over a month later, EPIC has now filed a repeat motion, once more asking this Court to

enforce the mandate by ordering the Government to issue new rulemaking within a specified, short period. For the reasons set out below, this renewed motion should be denied, like its predecessor; no relevant facts have changed since the last denial, and EPIC ignores the point that the Government assured this Court just a short time ago that it is already committing its resources to expediting the rulemaking in this matter in accordance with the Court's mandate requiring "prompt proceedings" on remand.

REASONS FOR DENYING EPIC'S RENEWED MOTION

A. EPIC Presents No New Evidence.

EPIC's new motion is based on its contention that "recent developments" underscore the urgency of notice and comment rulemaking in this matter. *See* Petitioners' Second Motion to Enforce the Court's Mandate (" Mot. II") 2-7. None of the items identified by petitioners – from the alleged "mounting evidence" consisting of various preexisting reports and letters, *see id.* at 2-5, to the "strict new guidelines" adopted by the European Commission, *see id.* at 5-6 – justifies revisiting now this Court's November 16, 2011 order denying EPIC's first motion to enforce the mandate. Contrary to EPIC's claim, circumstances have not materially changed since the Court denied that motion.[1]

[1] EPIC asserts that new guidelines prohibiting the use of backscatter x-ray technology were adopted by the European Commission "subsequent to the Court's (continued...)

1. EPIC Has Not Identified or Presented a Body of "Growing Evidence."

EPIC's motion implies that a body of "growing evidence" has developed since this Court's denial of its prior motion regarding health concerns attendant to backscatter advanced imaging technology ("AIT") systems, or that the Transportation Security Administration ("TSA") failed to adequately test the safety of its backscatter system. Mot. II 2-3. In support, however, EPIC cites a single article that summarizes concerns that were generally available at the time EPIC filed the underlying petition for review – and were certainly well known by the time it filed the prior motion to enforce. Rather than constituting new evidence of a growing safety concern, the article actually summarizes various contributions to the discussion regarding safety that, according to the article, were made between 1998 and 2006, without developing any new considerations that have come to light since EPIC filed its initial motion to enforce the Court's mandate.[2]

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[1](...continued)
determination on Petitioner's [*sic*] First Motion to Enforce." Mot. II 5. The European Commission guidelines were issued on November 14, 2011, however, whereas this Court denied the first motion to enforce two days later, on November 16, 2011.

[2] One source quoted in the article, Dr. Rebecca Smith-Bindman, appears to draw on an article she published in the American Medical Association's Archives of Internal Medicine in late March 2011. The abstract of Dr. Smith-Bindman's article indicates that "using the only available models, the risk would be extremely small,
(continued...)

2. EPIC Misrepresents the Decision by European Regulators Regarding Backscatter Technology.

EPIC's presentation regarding a decision by European regulators on November 14, 2011 likewise misrepresents its significance. That decision, as reflected in the press release cited in EPIC's motion, does not purport to be based on "public comments and mounting evidence of [AIT] health risks" as EPIC asserts. Mot. II 5, citing http://europa.eu/raipd/pressReleasesAction.do?reference=IP/11/1343&format=HTML&aged=0&langauge=EN&guiLanguage=en). Rather, that press release – which signals the regulators' approval of AIT systems for use as a general matter and recommends that users follow the various protocols that TSA has already adopted in an effort to mitigate privacy concerns – offers no rationale for the decision regarding backscatter systems apart from an apparent policy choice to avoid any possible risk to health and safety, no matter how small.

Indeed, neither EPIC nor the press release points to a new study of the risks attendant to backscatter technologies that would have precipitated this decision. As such, the European regulators' decision constitutes one datum among many that may be considered once the comment period on the forthcoming rule begins, rather than

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[2](...continued)
even among frequent flyers," and that "there is no significant threat of radiation from the scans." http://archinte.ama-assn.org/cgi/content/abstract/171/12/1112 (last visited Jan. 12, 2012).

a new development that militates in favor of departing from the expedited rulemaking process in which TSA is already engaged.

B. EPIC Mischaracterizes TSA's Efforts to Comply With The Court's Mandate.

More critically, in response to EPIC's first motion asking this Court to force TSA to act by a particular date, respondents submitted the declaration of James C. Clarkson, a TSA official who oversees the regulatory process and analyses of various agency programs and regulatory actions.[3] That declaration provided the Court with the necessary backdrop concerning the complexity of TSA rulemaking, particularly in this matter, which involves both classified material and Sensitive Security Information.

Notably, Mr. Clarkson reported that TSA "has committed significant resources to comply with this Court's opinion. Given the importance of this issue, the agency has dedicated several economists, attorneys, and subject matter experts to provide the necessary background information, research, analysis, and general support required to engage in the rulemaking mandated by the Court." Clarkson Decl. ¶ 16. Mr. Clarkson further informed this Court that, "[i]n recognition of this Court's direction in the Opinion in this appeal, * * * ***TSA has committed to significantly expediting***

[3] EPIC has filed as attachments to its current motion a copy of respondents' earlier opposition and the Clarkson Declaration. Accordingly, respondents are not attaching that declaration here anew.

the AIT rulemaking process and has placed this proposed rule among its highest rulemaking priorities." *Id.* at ¶ 20 (emphasis added).

Mr, Clarkson further detailed for the Court the other important rulemaking responsibilities the agency is currently carrying out pursuant to various statutory requirements imposed in 2007, including:

- regulations concerning security training for frontline public transportation agency, railroad, and over-the-road bus employees;
- regulations to define security-sensitive materials;
- regulations to require railroads and over-the-road bus operators to produce security plans and vulnerability assessments;
- regulations to require implementation of security measures in aircraft repair stations; and
- regulations for conducting security background checks on frontline employees of public transportation companies and railroads.

See id. at ¶ 18.

Producing all of these regulations takes substantial agency time, resources, coordination, and staffing. Nevertheless, as noted above, TSA has already committed to this Court that it is expediting the rulemaking here. That commitment has not wavered.

In light of these assurances, the Court concluded two months ago that EPIC's initial motion to enforce the mandate did not merit relief. Indeed, as shown in respondents' initial opposition, the period that generally must pass before the Court grants a motion mandating action on a required rulemaking is considerably longer than EPIC posits. Thus, for example, this Court held unreasonable an "agency's failure – for six years – to respond to our own remand" to articulate a valid legal justification for the regulations at issue in a particular case. *In re Core Commc'ns , Inc.,* 531 F.3d 849, 856 (D.C. Cir. 2008). In that case, the initial decision issued in March 2000, and *five years later* the Court denied an initial request to order compliance "'without prejudice to refiling in the event of *significant additional delay*.'" *Id.* at 850 (emphasis added). In contrast, here EPIC has filed two such motions within less than six months of the underlying decision.

Furthermore, when the Court has agreed that action is required after the passage of mere months, the Court has done so in egregious situations such as that in *Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269, 271 (D.C. Cir. 2000) where the agency had deferred the petitioner's requested relief for a period "exceeding twenty years" from the date relief was initially sought, *see id.* at 270 – and even then, only after the agency acknowledged the need to act expeditiously on remand but nevertheless "failed to advise the court that it had acted, much less

commenced a proceeding and petitioners advised that no such action has been taken." *Id*. "In these extraordinary circumstances," after a delay of more than twenty years and an additional nine months of regulatory inaction, the Court held that immediate relief was warranted. *See id.* at 272. Similarly, the Court has held that a six-year delay in acting on a coalition of regulated organizations' petition to consult justified a 45-day deadline to comply. *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). In contrast to these decisions, TSA has already assured this Court that it began taking steps to comply with this Court's decision within days and is proceeding as expeditiously as possible. Clarkson Decl. ¶¶ 14, 16, 18, 20.

Undaunted by TSA's representations regarding its efforts to comply with this Court's opinion and the jurisprudence applicable to this sort of request, EPIC's second motion to enforce mischaracterizes the Clarkson Declaration, incorrectly suggesting that TSA expects the notice and comment rulemaking process here to take three years. That understanding is erroneous. Rather, ¶ 20 of the Clarkson Declaration indicates that "on average" the notice-and-comment rulemaking process at the Department of Homeland Security takes three years. But Mr. Clarkson further emphasized in that same paragraph that the Government is committed to expediting the process here, with the agency devoting substantial resources to that end. *See also id.* at ¶ 16.

Consequently, while the Clarkson Declaration described the average duration for the rulemaking process, Mr. Clarkson stated unequivocally that the Government has accelerated the process here. Thus, in light of this Court's order, TSA has made this matter ***not*** the average one, which takes three years.

In sum, as TSA has already explained, the agency is fully engaged in utilizing its finite resources to carry out its myriad simultaneous responsibilities, while meeting this Court's mandate in this matter on an expedited basis. In making its repeat motions here, EPIC has shown a naive understanding of how serious and complicated Federal Government rulemaking works. The agency charged by Congress with carrying out the law with respect to both this matter and other important transportation security issues is expertly attempting to fulfill its numerous missions with the tools provided by Congress.

The relief sought by EPIC demands that this Court put itself in the place of the TSA Administrator and reorder the agency's priorities, without any indication that the agency has been in any way dilatory in its response to this Court's directive. Given the fact that the agency has already made clear that it heard and understands this Court's prior ruling and is working in an expedited manner to carry out that ruling, EPIC's latest motion advances no justification to overturn the agency's implementation plan and substitute EPIC's preferred remedy, and necessarily

disregards the competing demands on TSA's capabilities previously identified in Mr. Clarkson's Declaration. Such unfounded repetitive motions needlessly consume the resources of the Court and the parties, while distracting the agency from its task and thereby hindering accomplishment of the very outcome petitioners seek.

CONCLUSION

For the foregoing reasons, petitioners' motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2012, I caused the foregoing Response in Opposition to Petitioners' Second Motion to Enforce Mandate to be filed electronically with the Court via the Court's CM/ECF system, and also caused four copies to be delivered to the Clerk of the Court by hand delivery on that same date. On the same date, service will also be made automatically upon the following CM/ECF participants:

Marc Rotenberg, Esquire (CM/ECF participant)
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