



## CENTER FOR APPLIED CYBERSECURITY RESEARCH

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INDIANA UNIVERSITY  
Pervasive Technology Institute

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*Distinguished Professor,  
C. Ben Dutton Professor of Law,  
and Director*

November 22, 2010

The Honorable Jay Rockefeller  
United States Senate  
531 Hart Senate Office Building  
Washington, DC 20510

The Honorable Kay Bailey Hutchison  
United States Senate  
284 Russell Senate Office Building  
Washington, DC 20510

Chairman Rockefeller and Ranking Minority Member Hutchison:

I write regarding the TSA's new full-body pat-down policy. I appreciate the courageous stand you have taken in requiring Administrator Pistole to justify this new policy, and I urge you to continue close scrutiny of the agency's conduct. I write not only to offer my praise, but support as well.

I am a Distinguished Professor and the C. Ben Dutton Professor of Law at the Indiana University Maurer School of Law and I direct two centers: the Center for Applied Cybersecurity Research and the Center for Law, Ethics, and Applied Research in Health Information. I have an extensive background in security and privacy law, I was a member of the National Academy of Sciences Committee on Technical and Privacy Dimensions of Information for Terrorism Prevention and Other National Goals, and I hold a TS-SCI clearance from the Department of Homeland Security.

As you know, the new TSA policy requires full-body pat-downs of travelers picked at random and of any traveler who refuses to be X-rayed or presents anything "anomalous," such as a knee brace, a pacemaker, or a prosthetic limb. This policy poses a number of serious issues:

- Intrusive searches often don't work. They have been repeatedly shown to miss potential explosives and other contraband. A TSA agent, wearing gloves, searching through clothes, just isn't likely to find a thin wafer of plastic explosives secreted under an arm, against the small of the back, between the legs, or on the soles of the feet.
- This is especially true of the searches triggered by the presence of medical devices. Hand searches are simply incapable of determining whether or not the "anomalous" device presents a risk. For example, I am a diabetic on an insulin pump—a tiny device strapped to my waist that provides life-sustaining insulin. Despite the fact that the device causes no alarm, the agent searches me head to toe, including a careful pat-down of my genitals (as if somehow my genitals have become suspicious because I use an insulin pump), but at the

end of the search has no better idea than he did at the beginning whether the pump is loaded with insulin or high-tech explosives. The search is the very definition of “security theater”—it looks like the agency is doing something, but it accomplishes nothing. The same is true with most other medical devices. After agents finish feeling the breasts of a woman with an implant, they have no better idea whether the implant is filled with liquid explosives or silicone. The same is true with prosthetic limbs and urostomy bags.

- In fact, the new search policy may reduce security because intensive searches of passengers who have done nothing to warrant suspicion distract TSA agents from real threats.
- The new search policy violates long-held social and legal norms about personal privacy—norms that have long resisted allowing surveillance cameras in changing rooms and bathrooms. Even though such searches might detect wrong-doing, we reject them on the basis that the “solution” is worse than the “problem.” With the TSA’s new policy, the searches are unlikely to detect wrong-doing; they aren’t a “solution” at all.
- Again, the impact is often greatest on passengers with medical devices, who, under the new policy, are always subject to the intrusive searches. Since the new policy went into effect on October 26, the press has carried daily, often heartbreaking, reports of breast cancer survivors required to display prosthetic breasts, veterans required to take off prosthetic limbs, and patients having urostomy bags manhandled in public so that urine soaks the traveler. Targeting travelers with medical devices seems especially cruel. It is a fine way to greet a veteran who has lost a limb in the service of his or her country or a cancer survivor who has fought a long and disabling war against a horrible disease to say “we appreciate your sacrifice, and now we are going to delay and embarrass you every time you fly.”
- The new policy is demoralizing for TSA agents. They often comment about this. As one TSA agent in Indianapolis put it to me last week, said “you wouldn’t believe what we have to put up with from Washington. If those bureaucrats would spend even 15 minutes in the field, they would quickly realize how silly many of their policies are.”
- The new policy is only the most recent example of a series of intrusions that the TSA claimed were “absolutely necessary” to protect security, only to quietly recant them when it was shown that they did not work. Recall passenger profiling, bans on nail clippers and eyelash curlers, expensive air puffers to detect explosive residue, planeside searches of passengers—all of which the agency insisted were “necessary” and all of which have now been abandoned.
- The TSA also has a long history of ill-informed and ill-targeted security programs, and disingenuous dealings with Congress and the American public.
  - This is the agency that tried to match passengers against terrorist watch lists with such poor data that it ended up wrongly detaining hundreds of innocent people (including the late Senator Ted Kennedy), yet all the while refused to provide a redress program for Americans erroneously identified as posing a threat.

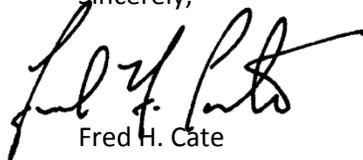
- The TSA also claimed it could not protect airplanes without profiling passengers, for which it sought authority to collect extensive sensitive personal information, only to later acknowledge that all it really needed was name, birthdate, and gender.
- The TSA sought to deploy backscatter X-ray machines that produce near-photographic quality images of nude passengers. In response to concerns by privacy advocates, the agency claimed it could not anonymize the images, which turned out not to be true, since European scanners today obscure the traveler's face. The TSA reluctantly followed suit.
- The TSA claimed it also needed photographic images of travelers' bodies to identify potential explosives, a claim that European security experts have again proved not true. In fact, European machines use stick-figure images which highlight in red suspicious areas, speeding up passenger handling and focusing agent attention on trouble spots.
- Then the TSA promised that its machines were not capable of storing the images, only to have 35,000 stored images leaked from one of the machines used by another federal agency.
- The TSA still has no good data on the long-term health effects of frequent travelers being repeatedly subjected to the radiation, but in response to concerns by pilots, it now appears the agency will exempt them. The rest of us will have to take our chances. Recent data suggests that even at 1/100th of the radiation produced by a dental X-ray, the new machines will kill more travelers over time than the terrorists did on 9/11.
- The TSA advocated for the deployment of high-tech X-ray machines on the basis that other methods (including pat-downs) would be less effective. TSA leaders assured the public that the new, expensive machines would detect even small amounts of explosives. The TSA's recent about-face suggests that the scanners aren't as effective as advertised. After all, they can be confused by a piece of paper or a wad of tissue in a pocket. So hundreds of millions of dollars later, TSA leaders have rolled out their new pat-down policy with the now-familiar claim that it is "necessary" and the promise that, despite the evidence to the contrary, this time the agency has found something that will work.
- The TSA has a long history of irrational policies. Recall that the agency used to require FBI and Secret Service agents to discard their nail clippers to fly, on the basis that those clippers could be used as a weapon, even though the agents were carrying firearms. Similarly, the agency has subjected pilots to the new pat-down policy, even though a pilot hardly needs a concealed explosive to do damage to a plane.
- The TSA also has a long history of non-responsiveness to the American public. It erroneously targeted travelers wrongly linked with entries on the terrorist watch list for three years, before finally putting in place a redress procedure at the request of the original Privacy and Civil Liberties Oversight Board. (You may remember that Congress reorganized that board and the President has yet to fill any slots on it.) Travelers who have complained to the TSA

about its new policy report have received no response. This has been my own experience as well.

The TSA has a difficult job and its agents in the field deserve our support and gratitude. However, since the agency's creation, the TSA leadership has done little to earn the public's respect or its trust. Its policies are handing the terrorists a victory they could not win on their own. As a result, the agency requires close and strong oversight. It apparently is not getting that from DHS or from the White House, and the absence of any members on the Privacy and Civil Liberties Oversight Board means the agency isn't getting any oversight there either. So it comes down to you and the Congress.

Again, I appreciate the extent to which you have filled that critical role already, and I urge you to continue doing so in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Fred H. Cate". The signature is fluid and cursive, with a prominent initial "F" and a long, sweeping underline.

Fred H. Cate  
Distinguished Professor,  
C. Ben Dutton Professor of Law,  
and Director