

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL S. ROBERTS :
3794 Douglass Avenue :
Memphis, TN 38111 :

and :

ANN POE :
2437 Marathon Lane :
Fort Lauderdale, FL 33312 :

Plaintiffs, :

v. :

JANET NAPOLITANO, in her official :
capacity as Secretary of Homeland Security :
U.S. Department of Homeland Security :
Washington, DC 20528 :

and :

JOHN S. PISTOLE, in his official capacity :
as Administrator of the Transportation :
Security Administration :
601 S. 12th Street :
Arlington, VA 20598 :

Defendants. :

Civil Action No.

JURY TRIAL DEMANDED

AMENDED COMPLAINT

Plaintiffs Michael S. Roberts and Ann Poe, by and through their attorneys, Drinker Biddle & Reath LLP, bring this action against defendants Janet Napolitano and John S. Pistole in their official capacities as Secretary of Homeland Security and Administrator of the Transportation Security Administration, respectively, and in support thereof aver as follows:

INTRODUCTION

1. Michael S. Roberts and Ann Poe (collectively, “Plaintiffs”) – two veteran commercial airline pilots – bring this action under the Fourth Amendment of the United States Constitution to enjoin the Department of Homeland Security (“DHS”) and the Transportation Security Administration (“TSA”) (collectively, “Defendants”) from continuing to unlawfully have their agents use whole body imaging (“WBI”) technology and newly-implemented enhanced pat-down procedures as airport security screening measures in the absence of individualized, probable cause.

2. Plaintiffs together have nearly 40 years of piloting experience and more than 20,000 hours of combined flight time. As American pilots, Plaintiffs are deeply concerned with airline security. At the same time, however, Plaintiffs are unwilling to undergo unnecessarily invasive and degrading practices merely in the name of security if doing so would violate constitutionally protected rights. TSA’s agents currently utilize two types of screening procedures: one type for on duty pilots and another for all other passengers and crew. Under both types of screening procedures, TSA’s agents engage in unreasonable searches and seizures.

3. As for all non-pilots, on October 29, 2010, the TSA implemented new guidelines requiring the TSA’s agents to perform a more intrusive security screen. These guidelines, which are part of TSA’s Security Checkpoint Standard Operating Procedures (“SOP”), require that TSA agents use WBI scanners, where available, and enhanced pat-downs as primary means of screening in airports throughout the United States.¹ Where deployed, WBI scanners are the true first line of screening. This technology allows a TSA agent to see beneath an individual’s clothing and view a graphic and detailed visual image of a person’s body, including the contours

¹ Plaintiffs have not read the SOP, as Defendants have classified it as Sensitive Security Information and made it unavailable to the public. All knowledge of the SOP and its contents is derived from Defendants’ pleadings in this and other cases.

of his or her genitals. If an individual refuses to undergo this screening method, she may select an alternative screening option, the enhanced pat-down. Under the newly implemented enhanced pat-down, a TSA agent slides his or her hands over an individual's breasts, buttocks, groin, and inner thighs, and inserts his or her fingers *inside* the entire circumference of the pants' waistband. These same enhanced pat-downs are also used to screen passengers who set off traditional walk-through metal detectors in airports that still utilize them.

4. Airline pilots are not immune from this regime. Rather, as reflected by November 13, 2010 SOP, which was a revision to the SOP implemented on October 29, 2010, pilots may also be forced to undergo WBI scanning and enhanced pat-downs in order to fly. Pursuant to the SOP, uniformed pilots traveling on U.S. air carrier business are to undergo a modified screening procedure under which they must first enter a walk-through metal detector. If a uniformed pilot sets off the metal detector's alarm, she must then undergo a traditional pat-down. If the traditional pat-down does not reveal the reason for the alarm, however, the pat-down procedures are escalated. If airport security is still unable to determine the reason for the alarm after escalating to an intermediary-degree pat-down, a pilot will be forced to undergo an enhanced pat-down in order to fly. Thus, any pilot who sets off a walk-through metal detector alarm because of a medical device or implant will *always* be required to undergo the enhanced pat-down.

5. Despite this detailed screening protocol for pilots, the TSA has specifically reserved the ability to subject pilots "to random screening and other layers of security," which may include WBI scanning and enhanced pat-downs. *See* Press Release, Transp. Sec. Admin., TSA Announces New Alternate Security Screening for Pilots (Nov. 19, 2010) (attached as Ex. 1). Moreover, the TSA may amend the SOP at any moment, as stated by Lee Kair, TSA's Assistant Administrator for Security Operations (noting "[t]he SOP is revised as necessary - and often upon

short notice”), and as evidenced by the fact that it has modified the SOP on at least two occasions in the last year *See* Declaration of Lee R. Kair, ¶ 12 (attached as Ex. 2). Taken together, the current screening procedures effectively permit the TSA to arbitrarily utilize all screening methods – including WBI scanners and enhanced pat-down – at TSA’s and its employees’ sole choosing and discretion.

6. Although it is well established that subjecting airline travelers to limited searches designed to detect weapons and explosives is consistent with the Fourth Amendment, it is equally well established that such searches must be reasonable. The new full-body scanning and enhanced pat-down screening regime implemented by the Defendants – as it applies to both common air passengers and airline pilots – fails to meet this standard and is thus violative of the Fourth Amendment. It forces passengers who wish to fly to choose between two disagreeable options: submit to a virtual strip search, or suffer the indignity of allowing an unknown agent to literally place his or her hands in your pants. Even pilots, TSA’s “trusted partners who ensure the safety of millions . . . everyday,” may be forced to undergo one or both of these degrading practices. *See* Press Release, Transp. Sec. Admin., *supra* (Ex. 1).

7. Given their high regard for their own Fourth Amendment rights and privacy interests, both Mr. Roberts and Ms. Poe have refused to be subjected to these unlawful searches, whether they be in the context of air passenger or pilot screenings. As a direct result, both Mr. Roberts and Ms. Poe had no other choice but to refrain from working, and both are no longer able to travel for business or leisure in their non-pilot capacities. Although Mr. Roberts has since returned to work after months without pay, he has done so with the constant threat of being subjected to a random enhanced pat down, which, were it to occur, would prevent Mr. Roberts from working. As for Ms. Poe, she is unable to even work because she is forced to endure an

enhanced pat down as a *de facto* first line of screening as she will always alarm the walk through metal detector.

PARTIES

8. Plaintiff Michael S. Roberts is a pilot for ExpressJet Airlines, Inc., which is based in Houston, Texas, and a frequent traveler. Because of his unwillingness to undergo WBI scanning or enhanced pat-down procedures, Mr. Roberts made the difficult choice to take an unpaid administrative leave. A father of six children, Mr. Roberts is a United States Citizen who resides in Memphis, Tennessee.

9. Plaintiff Ann Poe, a First Officer pilot on the Boeing 777, is one of the first 100 women commercial airline pilots in the United States. Distinguished with a Type rating on the 777, Ms. Poe has been in the airline industry for well over 35 years and, as a pilot for Continental Airlines, regularly flies large commercial airliners to various destinations across Europe and Asia. Prior to the implementation of the new security measures, Ms. Poe frequently traveled for both business and leisure purposes. Ms. Poe is a United States Citizen who resides in Florida.

10. Defendant Janet Napolitano is the Secretary of the Department of Homeland Security (“DHS”), the governmental body which oversees the Transportation Security Administration (“TSA”). As head of the DHS, Secretary Napolitano has authority over TSA policies, procedures, and practices relating to airline and airport security measures, including those challenged in this lawsuit. Defendant Napolitano is sued in her official capacity.

11. Defendant John S. Pistole is the Administrator of the Transportation Security Administration. As the TSA Administrator, Mr. Pistole has authority over TSA policies, procedures, and practices relating to airline and airport security measures, including those challenged in this lawsuit. Defendant Pistole is sued in his official capacity.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because Plaintiffs' claim for relief arises under the Constitution of the United States.

13. Venue is appropriately vested in this Court pursuant to 28 U.S.C. § 1391(b) and 28 U.S.C. § 1391(e), as the District of Columbia is a judicial district in which at least one defendant resides, and because a substantial part of the acts or omissions giving rise to the claims herein occurred in the District of Columbia.

BACKGROUND

A. Advent and Use of Whole Body Imaging (“WBI”) Scanners

14. In the years between 2001 and 2009, most airports in the United States used a combination of walk-through metal detectors, metal-detecting wands, and traditional (or back-of-the-hand) pat-downs as primary traveler screening methods.

15. During the Spring of 2009, the DHS made a determination that Whole Body Imaging (“WBI”) scanners, which were previously only deployed for secondary screening in limited pilot projects, would be utilized in the future as the primary screening technique in U.S. airports.

16. Since that determination, the DHS has rapidly deployed, and continues to rapidly deploy, WBI scanners throughout U.S. airports. By the end of December 2010, 491 machines are scheduled to be deployed in the U.S. An additional 500 machines are scheduled to be deployed in 2011. On information and belief, WBI full-body scanners will become the primary means of screening at most U.S. airports by 2012.

17. The DHS and TSA have deployed two types of WBI scanning devices: those that use millimeter wave technology and those that use backscatter x-ray. No matter the type of

device used, the purpose and effect is the same: WBI scanners use technology that enables screeners to see beneath individuals' clothing and view a graphic and intrusive level of detail, including the contours of a person's genitalia. When an individual enters the full-body scanner, the device captures a detailed, rotating, three-dimensional image of an individual's unclothed body which is viewed in real-time by TSA personnel in another room.

18. Many have described use of WBI technology as a "virtual strip search." Not only does WBI technology expose the body as if it is unclothed, but on information and belief, it goes much further: WBI technology can expose evidence of mastectomies, menstruation, colostomy appliances, large scars, catheter tubes, penile implants and other internal prosthetic devices. On this level, the WBI scanning may be viewed as even more intrusive than a traditional strip-search.

19. Where utilized, these scanners are a first means of airport security for passengers flying out of U.S. airports. Pursuant to the November 13, 2010 changes to the SOP, uniformed pilots traveling on carrier business may also be forced to undergo WBI scanning as part of TSA's "random screening and other lays of security" specifically applied to these individuals. *See* Press Release, Transp. Sec. Admin., *supra* (Ex. 1).

B. Advent and Use of Enhanced Pat-Down Procedures

20. Under new TSA procedures, if a common passenger chooses to "opt out" of a WBI scan, that individual may select to undergo the so-called "enhanced pat-down." This is the sole alternative offered to individuals who decline to enter a WBI scanner. Additionally, in airports that do not use WBI devices (or do not use them exclusively), a passenger will be required to undergo an enhanced pat-down if she sets off the alarm on the walk-through metal detector.

21. Pursuant to the November 13, 2010 changes to the SOP, uniformed pilots traveling on carrier business may also be subjected to enhanced pat-downs under two scenarios. First, if a pilot sets off the alarm on the walk-through metal detector, and the reason for the alarm cannot be resolved through a traditional and intermediary pat-down, that pilot will be required to undergo an enhanced pat-down prior to boarding. Second, and more importantly, because the SOP provides for “random screenings and other layers of security,” any pilot may at any time be selected by any TSA agent to undergo more rigorous screening procedures, including the enhanced pat-down.

22. In late October 2010, the TSA first began conducting the new pat-downs. This new pat-down is significantly more invasive and intrusive than the former pat-down in that, among other things, the agent literally places his hands inside the traveler’s pants.

23. In most circumstances, this new form of pat-down replaces the TSA’s former back-of-the-hand pat-down procedure which had been in effect since at least 2002. Under the previous technique, a TSA agent would merely brush the back of his or her hand along the traveler’s clothing to feel for weapons or other contraband.

24. Under the new “enhanced pat-down” procedure, TSA agents use their palms and fingers to conduct a detailed inspection of a traveler’s entire body. On information and belief, the agent runs his or her open hands and fingers over most parts of an individual’s body including the breasts, and uses the back of the hands when touching the buttocks. Additionally, agents slide their hands all the way from the inner thigh up to the groin until the hand cannot venture any higher because it is literally stopped by the person’s groin.

25. As part of the enhanced pat-down, a TSA agent will also insert his fingers *into* an individual's pants and move his fingers, while still inside the pants, around the entire circumference of the waistband.

C. Pilot Michael Roberts was Denied to Fly on October 15, 2010

26. On Friday, October 15, 2010, Michael Roberts – who was dressed in his pilot's uniform at the time – attempted to pass through the security checkpoint at Memphis International Airport (“MEM”) as part of his regular commute to work. As of this date, the SOP had not been amended to include the current procedures applied to pilots. Rather, as of October 15, 2010, pilots were treated just as passengers are treated today.

27. Mr. Roberts is very familiar with MEM and this particular checkpoint as he lives in Memphis and flies in and out of that city, for both work and leisure, on a regular basis. In fact, Mr. Roberts has passed through this same security checkpoint approximately once per week for the last four and one-half years, or well over 200 times.

28. After Mr. Roberts loaded his carry-on bags onto the X-ray scanner belt that Friday morning, a TSA agent asked Mr. Roberts to remove his shoes and enter the WBI scanner, which had just recently been deployed at MEM. Prior to October 15, Mr. Roberts had never seen a WBI scanner at MEM.

29. Mr. Roberts responded that he did not wish to participate in the full-body imaging. For Mr. Roberts, permitting unknown government officials to see what is private to almost everyone else in the world was an overly intrusive assault on his personal privacy rights and liberties.

30. The TSA agent then directed Mr. Roberts through the metal detector which, at the time, was still in place at the security checkpoint. Mr. Roberts passed through the metal detector

without triggering the alarm or giving any other reason for suspicion, just as he had done countless times in the past.

31. Not finished, the TSA agent then called out to her colleagues and reported on her hand-held radio that they had an “opt-out.” Mr. Roberts was informed that, despite passing through the metal detector without reason for concern, he would have to go through a stringent pat-down. Mr. Roberts declined, feeling that this so-called alternative was not a valid alternative at all: the option of having one’s entire body groped by an agent was no better than being seen unclothed by an agent.

32. The second agent and a third agent informed Mr. Roberts that he would have to be patted down or go through the WBI scanner, or else he would be unable to fly. Mr. Roberts asked the agents whether he was suspected of concealing something dangerous (despite passing through the metal detector without alarm). The agents responded that they were just doing their job.

33. After Mr. Roberts and the TSA agents reached an impasse, airport police were summoned. Mr. Roberts was asked to leave. Mr. Roberts complied with the agents’ request and, as a result, was unable to report for work on October 15, 2010.

34. Although pilot screening procedures have changed since October 15, 2010, Mr. Roberts would be required to undergo either a WBI scan or enhanced pat-down if he chose to fly when not piloting. Moreover, based on the TSA’s ability to randomly require pilots to undergo more stringent screening measures, and its ability to alter the SOP at any time, Mr. Roberts runs the risk of being forced to undergo such procedures every time he passes through an airport security checkpoint, which is multiple times per week.

35. Mr. Roberts believes that the TSA's program of using WBI scanners and enhanced pat-down procedures, as currently implemented, is an infringement on his civil rights and liberties. Because of this belief, Mr. Roberts will not allow the TSA to subject him to a WBI scan or enhanced pat-down, and, as a result, Mr. Roberts would not be permitted to pass through the checkpoint if selected for such screenings prohibiting him from working.

36. Because of his unwillingness to enter the WBI scanners or undergo an enhanced pat-down, Mr. Roberts had no choice but to take an unpaid administrative leave from work. As a direct result, Mr. Roberts' family health insurance policy offered through his company was discontinued. Although Mr. Roberts has returned to work and resumed his benefits, he constantly fears that he will be subjected to a random WBI scan or enhanced pat-down, as authorized by the SOP, which will prevent him from working.

37. Outside of his role as a pilot, Mr. Roberts had previously traveled on a regular basis by himself and with family members for professional reasons (including training and conferences) and leisure. Mr. Roberts, who must fly to Houston as a passenger once or twice each year for work-related events, will be unable to make this trip should he be required to subject himself to a WBI scan or enhanced pat-down. Thus, the inability to fly to Houston puts Mr. Roberts' job at risk.

D. Pilot Ann Poe was Denied to Fly on November 4, 2010

38. At approximately 12:30 PM on Thursday, November 4, 2010, Continental Airlines pilot Ann Poe arrived at the Fort Lauderdale-Hollywood International Airport ("FLL") as she had done many times in the past. Ms. Poe lives in the FLL area, and flies in and out of that airport on a regular basis. As of November 4, 2010, the SOP had not been amended to

include the current procedures applied to pilots. Rather, as of that date, pilots were treated just as common passengers are treated today.

39. Ms. Poe was scheduled to fly approximately 300 passengers and crew to Mumbai, India. Wearing her Continental pilot uniform, Ms. Poe approached the security checkpoint.

40. On this day, the agents at the FLL security checkpoint were screening travelers via WBI scanners as well as traditional walk-through metal detectors. Travelers could choose which line (and which screening device) to enter.

41. Ms. Poe chose to enter the walk-through metal detector. Upon entering, Ms. Poe – who has an artificial hip – triggered the metal detector’s alarm, just as she had repeatedly done in the past.

42. Based on past experience, Ms. Poe anticipated that a TSA agent would run a metal-detecting wand around her body to determine the location of the metal, and thereafter allow her to pass through the checkpoint. Ms. Poe was quite familiar with this routine and did not anticipate any deviations from the norm.

43. Ms. Poe asked that a female agent perform the wand. A female agent walked over and told Ms. Poe that, as a result of new regulations, TSA was no longer wand air travelers (even though several wands were visible and in the area). Instead, she explained, Ms. Poe would have to be frisked.

44. The TSA agent explained that she would touch Ms. Poe’s breasts, buttocks and pelvic area, and run her hands up Ms. Poe’s thighs until her hands could not go any further.

45. Ms. Poe told the TSA agent that the frisking she described was tantamount to molestation, and politely refused the enhanced pat-down. She asked to speak with a supervisor.

46. A supervisor that Ms. Poe recognized from previous security screenings arrived and informed Ms. Poe that she would have to go through the enhanced pat-down or, in the alternative, go through the WBI scanner.

47. Ms. Poe again refused. She informed the supervisor that she was concerned about the radiation risk associated with WBI scanners and believed that the violation of medical privacy was too great. Ms. Poe, like many individuals with internal prosthetics or implants, prefers to keep her medical condition a private matter.

48. Ms. Poe informed the supervisor she would consent to a wandling, as she had done many times in the past. The supervisor said TSA was no longer wandling individuals.

49. Ms. Poe asked the TSA personnel to call Continental's head of security, the chief pilot's office, and the base manager. A FLL manager arrived soon thereafter and offered to be a witness to the pat-down, which she suggested, could occur in a private room. Ms. Poe explained that use of a witness or a private room made no difference: the point is she would be molested regardless.

50. TSA personnel, after swabbing Ms. Poe's hands and carry-on bags, refused to allow Ms. Poe to pass through security and escorted her out of the airport.

51. Ms. Poe was emotionally traumatized by this two-hour long ordeal. She left the airport sick to her stomach, fatigued, and emotionally drained.

52. Although the policies have since changed with respect to pilots, Ms. Poe – given her unique medical circumstance – will *always* be required to undergo either a WBI scan or enhanced pat-down, regardless of whether she is flying as a uniformed pilot. As a pilot, Ms. Poe will always set off the alarm on the walk-through metal detector. Because the reason for alarm will not be resolved by a traditional pat-down, Ms. Poe will only be able to gain clearance if she

undergoes an enhanced pat-down. Whereas, under former procedures, Ms. Poe would be wanded with a hand-held metal detector to localize the source of the metal, Ms. Poe and other pilots like her must currently undergo a rigorous and unnecessary full-body pat-down that never even identifies the location of the alarm-triggering material.

53. Likewise, when not piloting, Ms. Poe will always be required to enter a WBI scanner, or in the alternative, pass through a walk-through metal detector and then be required to undergo an enhanced pat-down. For individuals with medical implants like Ms. Poe, there is no escaping the TSA's violative practices and the WBI scan or alternative pat-down become a *de facto* first line of screening.

54. Ms. Poe objects to the TSA's program of using WBI scanners and enhanced pat-downs, as currently implemented, both with respect to uniformed pilots and common passengers. In her eyes, the pat-down is a physical molestation and the WBI scanner is not only intrusive, degrading and potentially dangerous, but poses a real and substantial threat to medical privacy. Given her objections, Ms. Poe cannot fly out of any airport, as she will always be subjected to either a WBI scan or enhanced pat-down.

55. Despite Ms. Poe's need to support both herself and her elderly mother, as well as her passion for flying, Ms. Poe has not flown since this incident. Ms. Poe, a gifted veteran pilot, will continue to take off work as long as the existing regulations are in place. She is concerned that if the existing regulations stay in place, she will never be able to fly a commercial aircraft again.

56. Prior to TSA's implementation of its most recent security measures, Ms. Poe frequently traveled by air as a passenger for business and leisure. However, as a direct result of

Defendants' practices Ms. Poe will be unable to fly for planned vacations and has already been forced to cancel at least four trips.

COUNT I

United States Constitution Fourth Amendment

57. Plaintiffs hereby incorporate each of the allegations above as if set forth herein at length.

58. Plaintiffs are entitled to judicial relief under 5 U.S.C. § 702, as they have suffered and are suffering a legal wrong because of the actions of an agency or an agent or employee thereof.

59. In the last year, Defendants have implemented a sea change in airport screening measures. They have abrogated effective and privacy-protecting measures such as walk-through metal detectors, metal-detecting wands, and back-of-the-hand pat-downs, and put in their place virtual strip searches and crude full-body pat-downs. Today, the modern air traveler in the United States is forced to choose between the lesser of two evils, neither of which should be constitutionally protected. Even pilots, TSA's "trusted partners," are not immune from this regime, as they may be subjected to random screenings at the will of the TSA, who also may amend its policies at any moment. What is worse is that pilots such as Ann Poe, who suffer from medical conditions, are effectively forced to undergo enhanced pat-downs each and every single time they fly.

60. The Fourth Amendment protects individuals from unreasonable searches and seizures.

61. The TSA's use of WBI scanners and enhanced pat-downs on air travelers constitutes both a government-imposed search and seizure.

62. These screening methods require that, in order to fly, a passenger must either allow an unknown government agent to view them nude, or alternatively, allow an unknown government agent to perform an intimate and heavy-handed pat-down of one's most sensitive and private areas. Likewise, pilots too must undergo these screening procedures on certain occasions (as is the case with random screenings) or all of the time (as is the case for pilots with medical implants). Regardless of which of the two screening methods are applied, and regardless of whether they are applied to individuals in pilot or passenger capacities, individuals' privacy rights, civil liberties, and freedoms are compromised by such intrusive and overreaching searches and seizures.

63. Given the profane, degrading, intrusive, and indecent nature of these searches, they are patently unreasonable and violative of the Fourth Amendment.

64. Both Michael Roberts and Ann Poe have elected to refrain from these unconstitutional searches, and as a result, Mr. Roberts was, and Ms. Poe was and is, unable to earn a livelihood in their chosen profession. Likewise, both are unable to travel for other business reasons or leisure. While Mr. Roberts and Ms. Poe greatly value airline security, both agree that such an infringement on our civil rights and liberties should not be permitted merely in the name of security.

PRAYER FOR RELIEF

WHEREFORE, Michael Roberts and Ann Poe respectfully request that this Court enter judgment in their favor and against the Defendants. Further, Michael Roberts and Ann Poe respectfully request that this Court enter an order granting the following relief:

(a) Permanently enjoining Defendants from continuing to use either WBI scanning technology or enhanced pat-downs as a means of screening for air travelers in the United States when Defendants have no reasonable suspicion to conduct such searches;

(b) Declaring that the Defendants' policy of utilizing WBI scanning technology or enhanced pat-downs, or both, as a means of screening for air travelers in the United States when Defendants have no reasonable suspicion to conduct such searches, is a violation of the Fourth Amendment to the United States Constitution;

(c) Requiring Defendants to make reasonable accommodations for screening individuals with medical implants like Ms. Poe;

(d) Awarding Michael Roberts and Ann Poe their costs and reasonable fees and expenses of their attorney pursuant to 28 U.S.C. § 2412; and

(e) Awarding Michael Roberts and Ann Poe all such other equitable relief this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all claims that can be so tried.

Dated: March 17, 2011

Respectfully submitted,

/s/ John D.V. Ferman

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