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

IN RE: ELECTRONIC PRIVACY INFORMATION CENTER,	)	
Petitioner.	)	No. 12-1307

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

For the reasons set forth below, the government hereby opposes the petition for a writ of mandamus to enforce this Court's mandate of September 21, 2011, in *Electronic Privacy Information Center v. Department of Homeland Security*, No. 10-1157.

The Electronic Privacy Information Center, together with other petitioners, filed a petition for review in this Court to challenge the use by the Transportation Safety Administration of Advanced Imaging Technology ("AIT") as a primary screening mechanism at airport checkpoints. In *Electronic Privacy Information Center v. Department of Homeland Security*, 653 F.3d 1(D.C. Cir. 2011) (*EPIC*), the Court rejected petitioners' substantive challenges, but held that the Transportation Security Administration ("TSA") should address the use of AIT in notice-and-comment rulemaking and remanded for the agency to promptly undertake that process.

The Court's mandate issued in September 2011. Petitioner has now filed its third request for mandamus relief, asserting unreasonable delay in complying with the Court's mandate. But charges of delay, even when made early and often, do not establish an entitlement to a writ. As set out in the attached Declaration of John P. Sammon ("Sammon Decl."), the Assistant Administrator for the Office of Security Policy and Industry Engagement, TSA has already passed the first major milestone to initiation of the notice-and-comment period with the submission of the documents necessary for publication of a notice of proposed rulemaking ("NPRM") to the Department of Homeland Security ("DHS") for its review. *See* Sammon Decl. ¶ 13. Once DHS completes its review, which it has likewise committed to expediting, only review and approval by the Office of Management and Budget ("OMB") will be necessary before the notice-and-comment period may begin. *Id.* at ¶ 24. It is expected that the process of finalizing the AIT Rulemaking documents for publication of the NPRM will be complete by or before the end of February 2013. *Id.*

Petitioner offers no basis whatsoever for its assertion that TSA has delayed in implementing this Court's mandate. On the contrary, as the Sammon Declaration demonstrates, TSA has been keenly aware of the importance of implementing the Court's directive, and has given high priority to the AIT rulemaking. Despite "significant personnel losses" in the group of economists within TSA charged with

completing the regulatory analysis, *id.* at ¶ 15, the agency began on the heels of the Court's ruling the process of preparing the documents necessary for notice-and-comment rulemaking, and has devoted almost all of the staff available to conduct the required economic analysis to its expedited completion, even going so far as to hire contract consultants to accelerate its completion despite unforeseen personnel losses, *id.* at ¶¶ 14-15. In preparing the proposed rule, TSA has addressed significant developments in AIT technology that have a major impact on the privacy concerns stressed in the *EPIC* petitioners' lawsuit. In particular, TSA has addressed the development of Automated Target Recognition ("ATR") technology, which enhances privacy protection in the screening process. *See id.* at ¶ 10.

Thus, there has been no unreasonable delay in complying with this Court's mandate, much less the type of egregious delay that would warrant exercise of the Court's mandamus powers. Further, while simultaneously expediting the initiation of a notice-and-comment period regarding its AIT program, TSA has taken substantial steps to address the privacy concerns discussed in the Court's opinion.

STATEMENT

1. Petitioners filed a petition for review in July 2010 together with a motion to enjoin the use of AIT as a primary screening method at airport checkpoints pending this Court's review. The Court denied the motion, and, after briefing and oral

argument, issued its decision on July 15, 2011. The Court rejected all of of the petitioners' substantive challenges under the Fourth Amendment, the Video Voyeurism Prevention Act, 18 U.S.C. § 1801, the Privacy Act 5 U.S.C. § 552a, the privacy protections in the Homeland Security Act, 6 U.S.C. § 142(a)(1), (4), and the Religious Freedom Restoration Act, 42 U.S.C. § 2000b *et seq.*). *EPIC*, 653 F.3d 1. The Court concluded, however, that TSA should address the use of AIT through notice-and-comment rulemaking pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, and "remand[ed] this matter to the agency for further proceedings." *EPIC*, 653 F.3d at 8; *see also id.* at 3, 11. The Court further held that "[b]ecause vacating the present rule would severely disrupt an essential security operation, however, and the rule is, * * * otherwise lawful, we shall not vacate the rule, but we do nonetheless expect the agency to act promptly on remand to cure the defect in its promulgation." *Id.* at 8 (citation omitted); *see also* Judgment, July 15, 2011 (ordering in pertinent part that "the rule be remanded to TSA for prompt proceedings, in accordance with the opinion of the court filed herein this date"). The Court also rejected petitioner's request to "enjoin the Agency Rule until DHS undertakes a formal 90-Day rulemaking procedure[.]" Pet. Opening Br. (final version) in No. 10-1157, 39.

On August 29, 2011, the last day of the period for seeking rehearing, petitioners sought en banc review. The Court denied the petition on September 12, 2011, and the mandate issued on September 21, 2011.

2. Five weeks after the issuance of the mandate, on October 28, 2011, the *EPIC* petitioners filed their first motion to enforce this Court's mandate. The Court denied EPIC's motion on November 16, 2011. Five weeks after the Court's order issued, on December 23, 2011, petitioners again asked the Court to enforce its mandate and to require issuance of a proposed rule by a date certain. The Court denied that motion on February 2, 2012.

EPIC has now essentially filed its third request for mandamus relief in the eleven months since the issuance of this Court's mandate.

REASONS FOR DENYING THE PETITION

1. Petitioner seeks a writ of mandamus to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1). The Court's consideration "'starts from the premise that issuance of the writ is an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act.'" *In re Core Commc'ns, Inc.*, 531 F.3d 849, 857 (D.C. Cir. 2008) (quoting *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000)). Because mandamus is an extraordinary remedy, however, the Court requires "similarly extraordinary

circumstances to be present before [it] will interfere with an ongoing agency process." *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 549 (D.C. Cir. 1999).

"'The central question in evaluating a claim of unreasonable delay' is 'whether the agency's delay is so egregious as to warrant mandamus.'" *Core Commc'ns*, 531 F.3d at 855 (quoting *Telecomms. Research & Action Ctr. v. FCC ("TRAC")*, 750 F.2d 70, 79 (D.C. Cir. 1984)). "'There is no per se rule as to how long is too long to wait for agency action,'" *id.* (quoting *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004)), and the "[t]he first and most important factor is that the time agencies take to make decisions must be governed by a 'rule of reason.'" *Id.* at 855 (quoting *TRAC*, 750 F.2d at 80)).[1]

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[1] In *TRAC*, the Court identified six to provide "useful guidance in assessing claims of agency delay." 750 F.2d at 80. The *TRAC* factors are:

> (1) the time agencies take to make decisions must be governed by a "rule of reason[]" ; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for the rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in

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In applying that rule of reason in *Core Communications*, the Court found a writ warranted when the Federal Communications Commission had been enforcing for seven years interim rules that were to last only three years, and the agency had not acted six years after the Court had held for the second time that the preferred legal justification was invalid. Similarly, in *In re People's Mojahedin of Iran*, 680 F.3d 832 (D.C. Cir. 2012) (*PMOI*), the Court issued a writ after concluding that "[w]e have been given no sufficient reason why the Secretary, in the last 600 days, has not been able to make a decision which the Congress gave her only 180 days to make." *Id.* at 838. On the other hand, the Court has also made clear that even a finding that the agency had violated a statutory deadline by some eight years "does not end the analysis. * * * Equitable relief, particularly mandamus, does not necessarily follow a finding of a [statutory] violation * * * ." " *United Mine Workers of Am. Int'l Union*, 190 F.3d at 551 (alteration in original) (quoting *In re Barr Labs., Inc.*, 930 F.3d 72, 74 (D.C. Cir. 1991)).

The Court has imposed fixed deadlines for agency rulemaking only in rare circumstances involving significantly egregious delays. *See, e.g., In re Am. Rivers*

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[1](...continued)
order to hold that agency action is 'unreasonably delayed.'"

Id. (internal citations omitted).

& Idaho Rivers United, 372 F.3d at 419 (a six-year delay in acting on a coalition of regulated organizations' petition to consult justified a 45-day deadline to comply). In contrast, the four-month deadline imposed in *PMOI* (which is the focus of petitioner's brief) involved a remand requiring three discrete actions for which sole responsibility was assigned to the Secretary of State, *see* 680 F.3d at 833-34 (discussing 8 U.S.C. § 1189(a)),[2] rather than a rulemaking, which entails a deliberative, complex, and sophisticated process that requires a series of reviews by different entities before completion, Sammon Decl. ¶¶ 7, 13, 14.

2. Petitioner has identified no delay "so egregious as to warrant mandamus," *Core Commc'ns,* 531 F.3d at 857. Indeed, it has identified no delay at all and no reason for the Court to exercise its supervisory powers. As the the Declaration of James S. Clarkson ("Clarkson Decl.") previously established, TSA initiated the process necessary for a notice-and-comment period within days of this Court's opinion, and well before the mandate issued. Clarkson Decl. ¶ 14, App. 82. More recently, on August 3, 2012, TSA formally referred the proposed rule, as well as the

[2] This Court's opinion directed the Secretary of State to provide PMOI access to unclassified material relied on in support of the decision to maintain PMOI's listing as a Foreign Terrorist Organization, to "indicate in her administrative summary which sources she regards as sufficiently credible," and to "explain to which part of section 1189(a)(1)(B) the information she relies on relates." *PMOI*, 680 F.3d at 835 (internal quotations omitted).

supporting preamble and regulatory analysis, to DHS for its review. Sammon Decl. ¶ 13. DHS and TSA have, in the interest of continuing to expedite publication of the NPRM, actively consulted prior to and after this initial referral in an effort to advance the rulemaking to its next and final step before publication: referral to OMB for review and approval. *Id*. at ¶¶ 13, 23; *see also* Clarkson Decl. ¶ 12, App. 81. Crucially, "the process of finalizing the AIT Rulemaking documents so that the NPRM may be published is expected to be complete by or before the end of February 2013." Sammon Decl. ¶ 24. In short, given the efforts TSA has applied to date, in no way can the mere fact that the NPRM has not yet been published be described as "unreasonable delay," Pet. 8.

The Sammon Declaration recounts some of the inherent obstacles to issuance of an NPRM for public comment, as well as TSA's competing regulatory obligations, and the unforeseen lack of resources to accomplish these tasks. Sammon Decl. ¶¶ 7-20. Despite the unique challenges to completion of the NPRM, the "completion of the AIT Rulemaking's regulatory analysis in less than a year's time is the fastest that such an analysis for an NRPM of this magnitude has been completed," and "reflects the high prioritization that the agency accorded to this rulemaking effort." *Id*. at ¶¶ 21-22; *compare* Clarkson Decl. ¶ 20, App. 84 (stating that under normal circumstances, "the process within TSA that is necessary to issue a NPRM entails a

timeframe of approximately three years, with longer timelines for more complex rules"). This effort came at the expense of a competing congressionally mandated rulemaking priority, which TSA has not been able to advance while investing substantial resources to the expedited preparation of the NPRM as directed by this Court. Sammon Decl. ¶ 17.

In developing the proposed rule, moreover, TSA was required to address "fast-paced changes and developments regarding the AIT program," *id.* at ¶ 10. Indeed, the development of ATR technology in the period since this Court's remand order significantly enhances privacy protection in the screening process and is directly relevant to a discussion of the privacy concerns stressed in petitioners' lawsuit.

Petitioner does not advance its argument by declaring that the agency has "waited nearly two-and-a half years since the filing of a formal § 553 petition with the DHS." Pet. 11. TSA did not initiate notice-and-comment rulemaking prior to this Court's decision because on its good-faith belief that it was not subject to that requirement under the APA (a position that this Court held to be "substantially justified" in its order of February 15, 2012, denying the *EPIC* petitioners' application for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)). Furthermore, the Clarkson Declaration, filed in response to petitioner's first petition

for mandamus in November 2011, explained that TSA had already initiated the development of a proposed rule at that time.

In sum, there has been no "waiting" and no "delay." Petitioner's repeated mandamus petitions reflect a fundamental misunderstanding of the nature of notice-and-comment rulemaking and the time and resources required to develop a proposed rule. Petitioner has demonstrated no basis whatsoever for its demand for "a writ of mandamus directing the Secretary to undertake a public rulemaking within 60 days," or, alternatively, an order vacating "the [AIT] program," Pet. 21.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 2012, I caused the foregoing Response in Opposition to Petition for Writ of Mandamus to be filed electronically with the Court via the Court's CM/ECF system, and to be served electronically upon the CM/ECF participants listed below. I further certify that four copies will be delivered to the Clerk of the Court by hand delivery within two business days.

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