JOHN PISTOLE: "WHAT I THINK IS APPROPRIATE IN TERMS OF PRIVACY"

This entire interview between TSA Director John Pistole, James Fallows, and Jeffrey Goldberg is worth reading. But I'm particularly interested in what Pistole says about his role in finding the appropriate balance between security and privacy.

> **James Fallows**: I'd like to start with a question both Jeff and I have raised, which is the whole question of the balance between security, on the one hand, and liberty and privacy concerns, on the other. **Is it TSA's job to set that balance? Or how do you think that balance is set?**
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> **John Pistole**: The way I view it is for TSA to develop the security protocols that afford the best security, while recognizing that there is a balance. The best security would be something way beyond what we're doing.
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> **Jeffrey Goldberg**: The best security would be to just not allow people on planes. That's perfect security.
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> **Pistole**: That's "risk elimination." And we're not in the risk-elimination business, we're in risk mitigation, informed by the latest intelligence, informed by our friends [in the intelligence agencies], and informed by the results of our covert testing.
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> Those things inform judgments and actions and then we take that information – **I take that information** – and then ask the experts how can we address these threats? They come up with different things based on all the information they have, and then they

> make a recommendation, and then **it's up to me to say, OK, does that exceed what I think is appropriate in terms of privacy?**
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> **So that's my responsibility**. To say, does this give us security, without violating something that would be a Fourth Amendment issue? [my emphasis]

According to Pistole, it's up to him—his responsibility—to determine what the appropriate balance between privacy and security.

Now, I appreciate that, at some level, it is up to him. He's in charge of TSA and he's got to make the final decision whether to implement (or discontinue) a controversial scanning technology.

But it's not up to him.

It's up to the entities that review counterterrorism techniques for their civil liberties and privacy impact. Specifically it's up to the Privacy and Civil Liberties Oversight Board, which is mandated by Congress to do the following:

> (1) analyze and review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties; and
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> (2) ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism.

The PCLOB never got fully off the ground after it was passed in 2007. More appallingly, Obama hasn't even nominated anyone to the board.

Absent review by the PCLOB, Department of

Homeland Security is required to conduct a Privacy Impact Assessment, which it appears not to have done either. And Pistole should know that these reviews should take place, since Bennie Thompson reminded him of the fact several weeks ago.

> In the absence of an Executive branch level Privacy and Civil Liberties Oversight Board that would evaluate decisions such as this, it was crucial that the Department of Homeland Security's Privacy Officer and Office for Civil Rights and Civil Liberties thoroughly evaluate and publish written assessments on how this decision affects the privacy and civil rights of the traveling public. To date, the Department has not published either a Privacy Impact Assessment (PIA) nor a Civil Liberties Impact Assessment (CLIA) on the enhanced pat down procedures. Without a published PIA or CLIA, we cannot ascertain the extent to which TSA has considered how these procedures should be implemented with respect to certain populations such as children, people with disabilities, and the elderly. By not issuing these assessments, the traveling public has no assurance that these procedures have been thoroughly evaluated for constitutionality.

There is a means to conduct an independent review of where the line between privacy and security is—or at least there's supposed to be, even if Obama refuses to fulfill that mandate.

I'm sure it's nice for Obama and Pistole that, rather than having an independent board review gate grope before it gets implemented, Pistole just took it on himself to decide whether it's constitutional and appropriate or not.

But that's not how it's supposed to work.