UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Jonathan Corbett, Plaintiff v. United States of America, Defendant	**10-CV-24106 (Cooke/Bandstra)** **PLAINTIFF'S OPPOSITION MEMORANDUM TO DEFENDANT'S MOTION TO DISMISS**

I. SUMMARY

Defendant United States of America, in its Motion to Dismiss with accompanying memorandum ("Deft.'s Mem."), argues that this Court has no jurisdiction because Plaintiff Jonathan Corbett is challenging an "order" of the TSA, for which Congress has designated the Courts of Appeals as the sole forum for such challenges in 49 USC § 46110. However, the policies challenged by the Plaintiff ("the Policies") are not an order by any reading of the statute, case law, or Congressional intent, and with good reason: considering them as such would infringe on Plaintiff's due process rights.

The question before the court is whether this action is an appeal of a specific order issued by the TSA as defined by 46 USC § 46110, whereby the Court of Appeals would have jurisdiction, or rather it is a broad constitutional challenge to the policies of the TSA, whereby the district courts have jurisdiction. *Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994)[1]. For the

[1] Deft's Mem., p. 19, footnote 16, argues that *Mace* is not persuasive in this circuit because *Gaunce v. deVincentis* (708 F.2d 1290 [7th Cir. 1983]) was cited by this circuit in *Green v. Brantley* (981 F.2d 514 [11th Cir. 1993]) in a manner which allegedly contradicted it. However, this argument is patently absurd in light of *McNary v. Haitian Refugee Center* (498 U.S. 479, 497 [1991]), in which both the 11th Circuit and the US Supreme Court affirmed the "broad constitutional challenge" doctrine. Indeed, *Gaunce* did not claim that district courts were lacking jurisdiction for broad constitutional challenges, but rather that the case at hand did not constitute a broad constitutional challenge. This case does.

succeeding reasons, this action falls in the latter category, and the Defendant's motion to dismiss must be denied.

II. STANDARD OF REVIEW

For the purposes of a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1), "the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged by in the complaint as true" *Sinaltrainal v. Coca-Cola Company*, 578 F.3d 1252, 1260 (11th Cir. 2009).

Deft.'s Mem., though it accompanies a motion to dismiss solely based on lack of jurisdiction under F.R.C.P. 12(b)(1), makes many disputed assertions that are irrelevant to the question of jurisdiction, including: discussions on issues of standing, justifications for implementation of the Policies (including alleged intent of Congress), assorted statements of "fact," *etc*. Plaintiff has ignored these superfluous discussions for the purposes of this document, as when considering a F.R.C.P. 12(b)(1) motion, the only relevant issue at hand is jurisdiction.

III. ARGUMENT

A. THE TSA PROCEDURES ARE NOT AN ORDER BECAUSE THEY ARE INTERNAL DIRECTIVES

A statement by an administrative agency that a policy constitutes an order has no legal effect; instead, the Court must interpret whether or not agency policy constitutes an order. *Sierra Club v. Skinner*, 885 F.2d 591 (9th Cir. 1989) ("the FAA's characterization of its own action is

not determinative"). Even when Plaintiff and Defendant agree on jurisdiction, courts are still obligated to determine that fact *sua sponte* if there is a possibility that jurisdiction may not exist. *Green v. Brantley*.

The Defendant claims that the Policies are established by an internal document known as the "Standard Operating Procedures" ("SOP"). *See* Deft.'s Mem., p. 1. The Defendant describes the SOP as a document which "sets forth in detail the mandatory procedures that TSA screening officers must apply when screening passengers at all airport checkpoints, and which passengers must follow prior to boarding an aircraft." *Id.*

The SOP is claimed to be "sensitive security information" as per 49 CFR § 15 and is therefore not released to the public. Rather, as the name "Standard Operating Procedures" may suggest, it appears this document is intended to be a guide for the TSA's own employees to follow while screening passengers[2]. Essentially, it is an employee handbook, and has no binding effect on passengers, such as the Plaintiff. Indeed, how could it, when passengers haven't the option to read it? Any court would summarily dismiss any case, including criminal actions as well as actions for civil penalties, based upon an individual violating a "secret law."

The TSA can choose to directly regulate passengers, but it must do so via public regulations within the extent of its authority given to it by Congress. The Defendant cites several examples of how the TSA has done this so far. *See Deft.'s Mem*, p. 2. It is true that passengers can be held accountable for failing to submit to screening before entering a sterile area of an airport. *See* 49 CFR § 1540.105(a)(2). However, the manner of the screening is not described in

[2] Towards the end of 2009, the TSA accidentally published a full copy of its SOP on a public portion of the Internet. Though this is obviously an outdated version that does not detail the Policies, as they were not in effect at the time, the Plaintiff's presumptions on the contents of the SOP are not simply blind conjectures, but rather based on insight gleaned from this older copy of the SOP. The Plaintiff would be happy to file this document at the Court's request.

detail in any federal regulation, and nowhere in the Federal Register will one find a regulation discussing nude body scanners or manual genital probing of the general public.

This is for good reason, of course. Before a regulation can be adopted, there is a period for public comment, for research as to potential effects, and a variety of other requirements. This process creates an administrative record, which shall be discussed later in this memorandum. More relevantly, however, is that such a regulation would have prompted public – and likely Congressional – outcry so strong as to impair the TSA from being able to implement such a regulation. Indeed, as it is, the TSA has seen plenty of public and Congressional outcry[3] after its introduction of the Policies, however the adage that "it is easier to seek forgiveness than permission" applies.

The TSA cannot circumvent the typical channels for regulation by publishing secret documents and expect them to carry the weight of federal regulations. Instead, the effects of the SOP on passengers are indirect. That is, they serve to dictate to TSA screeners what they should do in the process of the screening of passengers. Then, when a passenger approaches a security checkpoint, the TSA screener he or she encounters will, ideally, behave in the manner dictated by the SOP. If this passenger refuses to follow the instructions of the TSA screener, he or she may be in violation of relevant federal regulations, but he or she cannot be charged with a violation of the SOP.

This immediately disqualifies the Policies from being considered a final order for the purposes of 49 USC § 46110 for two reasons. The first is that a policy cannot be considered a final order unless it "imposes an obligation, denies a right, or fixes some legal relationship."

[3] Including: a lawsuit in nearly every circuit, at least 2 bills in Congress, dozens of state and local governments introducing legislation to prohibit the Policies, coordinated protests such as "National Opt-Out Day," the ire of Pilots' unions, flight attendants' unions, the ACLU, and frequent flyer groups, *etc*.

Crist v. Leippe, 138 F.3d 801, 804 (9th Cir.1998); *Mace v. Skinner; Atorie Air v. F.A.A.*, 942 F.2d 954, 960 (5th Cir. 1991). *See also C. & S. Air Lines v. Waterman Corp*, 333 U.S. 103, 113 (1948), Deft's Mem., p. 11, 12. It is clear that it is not the Plaintiff who is obliged by the SOP. It is also not a third party who is obliged by the SOP. Rather, it is the Defendant dictating *to itself* how it will act. The Defendant argues to the contrary (*See* Deft.'s Mem., p. 12, "[t]he Screening Checkpoint SOP sets forth the rules which airline passengers must follow"), however in light of the fact that it is TSA screeners who read the SOP, and it is passengers who are prohibited from reading the SOP, this argument has no rational basis. The SOP dictates to TSA screeners, and TSA screeners dictate to the passengers; the SOP does not dictate directly to passengers.

The second is that it has been held that "[c]haracteristics indicating finality include providing a 'definitive' statement of the agency's position, having a 'direct and immediate' effect on the day-to-day business of the complaining parties, having the 'status of law,' and carrying the expectation of 'immediate compliance with [its] terms.'" *Southern California Aerial Advertisers' Association v. F.A.A.*, 881 F.2d 672, 675 (9th Cir. 1989); *Federal Trade Commission v. Standard Oil*, 449 U.S. 232, 239 (1980).

The characteristics above came about because judicial review statutes like 49 USC § 46110 were designed to send appeals of quasi-judicial[4] agency actions directly to the appellate level to avoid duplicative fact-finding. *Suburban O'Hare Commission v. Dole*, 787 F.2d 186, 195 (7th Cir. 1986). In such instances, there was an agency action taken against an individual or

[4] Defendant notes that proceedings need not be "formal" to qualify as an order. *See* Deft's Motion to Dismiss; *Aerosource Inc. v. Slater*. However, the proceedings do require some procedure, as per several requirements throughout Title 49, Chapter 461. In *Aerosource*, there was a specific complaint against a specific party, fact gathering was done, notice was provided to the party, the party had an opportunity to respond, *etc*. This contrasts to the instant matter where none of the above occurred.

a definite group as a result of administrative proceedings. The most common relevant example found in case law is action taken against a license (such as a pilot's license). Such an action would be considered an order under 49 USC § 46110, as the order directly applies to the party imposed upon, affects his or her daily business, and requires immediate compliance.

The case law is exhausting in support the fact that only individualized proceedings, as opposed to a broad policy, can be treated as orders under 49 USC § 46110. See *Boniface v. D.H.S.*, 613 F.3d 282 (D.C. Cir. 2010) (Appeal of denial of Boniface's request for waiver from individual TSA threat assessment following significant adjudicative proceedings); *Scherfen v. D.H.S.*, No. 08-1554, 2010 WL 456784 (M.D. Pa. Feb. 2, 2010) (Removal from terrorist watch list); *Ibrahim v. D.H.S.*, 538 F.3d 1250 (9th Cir. 2008) (Individual placed on "No-Fly" list and refused redress [held 49 U.S.C. § 46110 inapplicable on other grounds]); *Zoltanski v. F.A.A.*, 372 F.3d 1195 (10th Cir. 2004) (Appeal from civil penalty proceeding); *Tur v. F.A.A.*, 104 F.3d 290, 292 (9th Cir. 1997) (FAA revocation of Tur's "airman certificate" after hearings and appeal to NTSB); *Foster v. Skinner*, 70 F.3d 1084 (9th Cir. 1995) (Suspended pilot certificate); *Mace v. Skinner* (F.A.A. mechanic's certificate revocation proceeding); *Green v. Brantley* (Revocation of Designated Pilot Examiner certificate); *Atorie Air, Inc. v. F.A.A.*, 942 F.2d 954, 955 (5th Cir. 1991) ("[A] principal operations inspector of the FAA, advised Atorie that it was in violation of federal aviation safety regulations" and subject to certificate revocation); *Southern California Aerial Advertisers' Association v. F.A.A.* (Adjustment of airspace usage rights after significant public proceedings, "FAA initiated an intensive review"); *City of Alexandria v. Helms*, 728 F.2d 643, 645 (4th Cir. 1984) ("In accordance with its regulations, the FAA prepared an environmental assessment of the test which it published on May 31, 1983, and distributed to 200 people, including the Alexandria City Manager. Public comment on the assessment was

received... and a response to that comment was published..."); *Gaunce v. deVincentis* ("F.A.A. sent notice to appellant informing her of the proposed revocation of her Airman Certificate"); *New York v. F.A.A.*, 712 F.2d 806 (2nd Cir. 1983) (Denying the amendment of an operating certificate); *Aerosource, Inc. v. Slater*, 142 F.3d 572, 578 (3d Cir. 1998) (Plaintiff's repair work was reported as faulty); *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309 (1981) (Complaint regarding F.A.A. limits on takeoffs/landings among several airlines at specific airports, "The notice requested public comments…"); *Nevada Airlines, Inc. v. Bond*, 622 F.2d 1017, 102 (9th Cir. 1980) ("On May 23, 1980, the air carrier operating certificate of Nevada Airlines, Inc., was revoked"). Even each and every case cited by the Defendant is in accord[5], and the fact remains that no circuit has ever held the SOP to be an "order[6]."

In the instant matter, none of the aforementioned characteristics actually apply. The alleged "order" does not have a person or group to which it applies. If one was to accept the Defendant's assertion, which is in essence that they can issue an order against the general public, their jurisdictional argument still fails because one cannot "expect immediate compliance" when one does not even disclose the details of what compliance means to the person or group to which

[5] Only the Ninth Circuit has recognized an exception to the notice requirements of § 46105, but that exception is no help to the Defendant here. In Gilmore v. Gonzales, the court held that "security directives" issued under 49 U.S.C. § 114(l)(2) are final orders because the statute explicitly allows directives to be issued "without providing notice or an opportunity for comment." 435 F.3d 1125, 1131 (9th Cir. 2006). The Defendant's attempt to turn this narrow exception based on explicit statutory text into a general rule is irrelevant to the question of what constitutes an order. *See* Deft.'s Mem., p. 13. The holding in Gilmore depended, rather, on the specific text of § 114(l)(2), and it does not apply to SOPs issued under 49 U.S.C. §§ 44901(a), 44902(a), and 114(e). The provisions authorizing the issuance of SOPs do not contain a comparable exemption from the notice requirements as does the provision authorizing the issuance of security directives. *See also* Deft.'s Mem, which cites many cases involving "security directives," yet the SOP is never described as a security directive, and can't be since it is issued under completely different statutes.

[6] Defendant cites *Thomson v. Stone*, 05-CV-70825(DT), 2006 WL 770449 (E.D. Mich., Mar. 27, 2006), however this District Court erred in assuming the SOP was issued by security directive rather than under the above noted statutes. *Supra*, footnote 5. This position has been accepted by no Court of Appeals.

it applies, and secret guidelines also do not carry the "status of law" (again, a passenger who "disobeyed the SOP" could only be charged with interfering with the TSA screener, not with "disobeying the SOP" – there exists no such charge). If one was to reject the Defendant's assertion that the SOP directly affects the general public, and rather accept that it is an internal guideline (SOP dictates to TSA, TSA dictates to passengers, but SOP does not directly dictate to passengers) as Plaintiff herein suggests, its effect on the Plaintiff is no longer "direct and immediate," there certainly can be no "immediate compliance" with rules that are not served or published, it still carries no "status of law," and still fails to be an order under 49 USC § 41160.

B. THE TSA PROCEDURES ARE NOT AN ORDER BECAUSE THERE EXISTS NO ADMINISTRATIVE RECORD

As discussed in the preceding section, the intent of judicial review statutes like 49 USC § 46110 was to send appeals of quasi-judicial agency actions directly to the appellate level to avoid duplicative fact-finding. To that end, it has been repeatedly held, including by this circuit and the Supreme Court, that an administrative record is required to support an order; otherwise jurisdiction instead lies in the hands of the district courts to conduct fact-finding. *McNary v. Haitian Refugee Center* (jurisdictional statutes permissible "only in circumstances where district court factfinding would necessarily duplicate an adequate administrative record"); *Green v. Brantley, City of Alexandria v. Helms*, at 646; *Merritt v. Shuttle, Inc.*, 245 F.3d 182 (2d Cir. 2001); *Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973).

Though the Defendant points out that the court in *Aviators for Safe & Fairer Reg., Inc. v. F.A.A.* (221 F.3d 222, 225 [1st Cir. 2000]) noted that a "single letter" may suffice as an

administrative record, it was certainly not the court's determination that a single letter would suffice in all circumstances. For example, where a single letter may show that a pilot's error deserves the ordering of a sanction, significantly more research would be required to order that thousands of people per day should be digitally strip searched and manually molested in the name of security. Instead, *Aviators* was merely trying to suggest that there exists no minimum page count required for a record; rather the court must independently judge if the record is adequate to review the particular claim.

The Defendant, in its motion to dismiss, laughably suggests that the SOP itself may contribute to the administrative record. *See* Deft.'s Mem., p. 13, footnote 12. The notion that a rulebook could possibly count as evidence or fact gathering cannot be given serious consideration.

It is unclear what administrative record may exist, if any, to support the Policies. The TSA mentions "other documents" and a "comprehensive" record without any attempt at describing them. *Id.* However, what is clear is that the administrative record contains no facts presented by the Plaintiff nor any other affected party. Defendant concedes this ("…documents created and reviewed by the TSA"). *Id.* This is not through the failure of the Plaintiff to put forth evidence, but rather because there exists no process by which the Plaintiff may have done so.

An administrative record in which only one side gets to present evidence is purely a farce. In the proceedings against a pilot's license, for example, the pilot is allowed a hearing in front of an administrative law judge where he or she may call witnesses, present documents, and meaningfully contribute to the administrative record. *See Green v. Brantly*, at 519. This is the situation for which Congress intended 49 USC § 46110, as the administrative record contains all

the evidence required for the appellate court to provide review. Indeed, the "agency record must be adequate enough to support judicial review" in order for an appellate court to do so. *Id.* Where the record is inadequate, the district court retains jurisdiction.

Also telling is the absence of any sort of administrative appeals process. "Because the administrative appeals process does not address the kind of procedural and constitutional claims respondents bring in this action, [limited judicial review by statutory provision] is not contemplated by the language of that provision." *McNary v. Haitian Refugee Center*. Garden-variety "orders" nearly always have a means by which they may be appealed up the chain of command within the agency. F.A.A. license revocations, for example, can be challenged in front of the full National Transportation Safety Board (NTSB). *Foster v. Skinner*, at 1086. Here, there exists no one within the TSA to hear the Plaintiff's grievances, as no order was ever issued against the Plaintiff. There is no record to appeal, and nothing an administrative law judge could review beyond making sure that the Policies actually do exist and were applied as written. Plaintiff and Defendant stipulate that the Policies exist and are being applied all across the country; the question instead is whether they are constitutional.

Lastly, having made no showing of an administrative record whatsoever in any documents filed in this action to date, the Defendant's motion to dismiss is more properly heard as a motion for summary judgment if and when the Defendant can show an adequate administrative record exists.

C. IF THE TSA PROCEDURES ARE CONSTRUED AS AN ORDER UNDER 49 USC § 46110, PLAINTIFF'S DUE PROCESS RIGHTS WILL BE ABRIGED

Judicial review provisions that have the practical effect of foreclosing constitutional claims from meaningful judicial review are unconstitutional, and thus reading a jurisdictional statute in such a manner is to be avoided. *Free Enterprise Fund v. Public Company Accounting Oversight Board,* 130 S. Ct. 3138, 3151 (2010)*; McNary v. Haitian Refugee Center; Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993). In choosing between the plausible constructions of the relevant jurisdictional statute, 49 USC § 46110, this court is "obligated to construe the statute to avoid constitutional questions that would be presented by a broad construction." *United States v. Hersom*, 588 F.3d 60, 67 (1st Cir. 2009). "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000).

Though many courts have allowed the term "order" to be read expansively[7], Defendant, in its memorandum, argues for a virtually unlimited construction of the term "order." In fact, it would be difficult to conceive of a decision that Defendant could make that would not qualify as an order in their view.

Such a construction has significant advantage to the Defendant: it makes them the sole determiner of fact in any situation it chooses. All that would be required would be to write a policy down without a period for public comment. Since the Defendant has argued that a policy itself can constitute an administrative record, it need not go any further (though if it wanted, it

[7] In light of *Free Enterprise Fund*, it is plausible that the Courts of Appeal have indeed read the statute more expansively than the Supreme Court would presently affirm. Notwithstanding, the construction the Defendant is asking for is far more expansive than any of the circuit courts have ever allowed.

could retain any "expert" of its choosing to support its finding with no opposing views permitted).

However, this significant advantage to the Defendant would come at significant harm to the constitutional rights of the Plaintiff. Should this Court construe that 49 USC § 46110 allows for a policy to be considered an "order" even when the aggrieved party has no opportunity to contribute to any sort of fact finding process whatsoever, to that extent, 49 USC § 46110 abridges the Plaintiff's 5th Amendment right to due process and is unconstitutional. Exclusive appellate court jurisdiction "is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims" because appellate courts "lack the fact finding and record-developing capabilities of a federal district court." *McNary v. Haitian Refugee Center* at 497.

To avoid the invalidation of statutes that were well-intended by Congress and would only be unconstitutional under "expansive" readings, it is well established that courts are obligated "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." The Defendant has made no showing that Congress intended 49 USC § 46110 to be any more expansive than any other statute designed to direct appeals of quasi-judicial administrative actions past the district courts, save for the possible exemption for "security directives," which does not apply to the SOP and thus the instant matter (*supra*, footnote 5).

Indeed, the Defendant offers no good reason why the Court should adopt such a reading of the statute. There are many other statutes that use the term "order," and none can be found to imply the view of the Defendant. For example, 5 USC § 551(6) defines "order" as follows:

> (6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

The Defendant offers no good reason for expanding the definition of "order" beyond what we see in 5 USC § 551(6) (not to mention beyond the standards by courts such as *McNary*). The fact that Congress neglected to define "order" in Title 49 cannot be assumed, as Defendant suggests, to imply that Congress wanted the word to be interpreted as broadly as possible, especially in light of the constitutional issues raised by doing so.

In fact, reading 49 USC § 46110 in the context of the rest of Title 49, Chapter 461 paints precisely the opposite picture. Chapter 461 is entitled, "Investigations and proceedings," of which in the instant matter there were none. 49 USC § 46105(b) requires service of process on persons who are affected by orders, yet the Plaintiff was never served[8]. 49 USC § 46110 itself, in section (a), requires appeals by affected persons within 60 days, yet how could Congress have possibly intended this to apply to secret proceedings for which "affected persons" (of which the Defendant claims that Plaintiff is one) are never notified? Does the Defendant contend that the Plaintiff is now barred from submitting this case to the Court of Appeals because it has been more than 60 days? What happens if the TSA makes a secret order but does not enforce it for 60 days, such that no one finds out about it in time to appeal? This is all fantasy, of course, as the

[8] The fact that so many people would need to be served as to make service impossible does not save the Defendant. Where individual service is impossible, formal publication may function as an adequate substitute. *See Aviators*. However, not only was no attempt at either service or publication made, but deliberate attempts were made to keep the Policies secret as "SSI". *See* Deft.'s Mem, p. 4, footnote 1. While the statute does allow for emergency orders to go into effect before service, proceedings, including service, are required to occur immediately after. *See* 49 USC § 46105(c). To date, no attempts at service, publication, or proceedings have been made.

Policies are not an order and were never intended by Congress to be subject to 49 USC § 46110, but would be reality if the Defendant's arguments were adopted by the Court.

It is a core of our system of jurisprudence that "for every wrong, there is a remedy." "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. 137, 162 (1803). The Constitution codifies this in the 5th Amendment, which allows for no one to "be deprived of life, liberty, or property, without due process of law."

This axiom applies particularly to claims between a citizen and his or her government, and most especially government in the form of an administrative agency. "It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States." *United States v. Nourse*, 9 Pet. 8, 28-29 (1835).

This philosophy is not dead in modern times. In 1946, the Supreme Court decided Bell v. Hood, 327 U.S. 678, which held that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." In 1971, the Supreme Court decided Bivens v. Six Unknown Federal Narcotics Agents (403 U.S. 388 [1971]), which in essence held the government accountable for constitutional violations regardless of whether or not Congress had passed legislation allowing for such accountability.

The Supreme Court has also explicitly stated that due process rights require a review of *both* fact *and* law. "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Crowell v. Benson,* 285 U.S. 22, 60 (1932). Factual determinations are central to evaluating a 4th Amendment claim such as this one[9]. In reviewing the constitutionality of searches, the court must balance the intrusiveness of the search against the effectiveness of the search and the government's interest. Without independent facts, this balance is necessarily manipulated by the Defendant.

The circuit courts and the Supreme Court have also recognized this right as it specifically pertains to jurisdictional statutes, including the specific relevant statute here. *Mace v. Skinner* was one of the earlier courts to decide that "broad constitutional challenges" to orders covered by this specific statute are to be reviewed by the district courts as new claims rather than by the circuit courts as appeals. The Supreme Court confirmed this in *McNary*. Defendants seek to minimize the value of both *McNary* and *Mace*, but the Supreme Court re-iterated itself in *Thunder Basin Coal Co. v. Reich* (510 U.S. 200, 213 [1994]).

The "broad constitutional challenge" rule applies to the Plaintiff's action. Telling is that the Plaintiff is not seeking a personal exemption, but rather an injunction preventing the Defendant from proceeding with the Policies in general. It is difficult to imagine how one could make a complaint more broad than one that affects every traveller, has no association with individualized proceedings or decisions, calls into question a constitutional right, and requests relief broad enough to require an agency to change a significant part of its search program. A judgment for the Plaintiff would not simply prevent the Defendant from ordering the Plaintiff to

[9] Should the Court be unsure as to what relevant evidence the Plaintiff could discover and/or produce, the Plaintiff would be happy to detail that.

be strip searched and groped, but rather the judgment would prevent the Defendant from ever making such an order[10].

The Plaintiff is not attempting to argue that 49 USC § 46110 is unconstitutional on its face. When used as Congress intended – as a way to avoid duplicative fact finding after a quasi-judicial proceeding – judicial review statutes are useful and constitutional. Rather, the Plaintiff believes that the Defendant is attempting to use this statute beyond its intended purpose. "It is presumed that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review.'" *Free Enterprise Fund* at 3150. In the instant matter, the Plaintiff has had no opportunity to gather facts and present evidence. If the Defendant has its way and this motion to dismiss is granted, the Plaintiff will never have an opportunity to gather facts and present evidence.

In order to meaningfully claim the protection of the Constitution, however, individuals cannot be relegated to non-participation in a secret proceeding, wherein secret laws are passed by an agency whose findings of fact are entitled to extreme deference. The denial of the right to gather facts and present evidence is without a doubt a denial of meaningful judicial review and is therefore beyond the power granted to Congress by the Constitution, and cannot be upheld. Plaintiff urges the Court to construe 49 USC § 46110, and in particular the meaning of the term "order," in a way that allows the Plaintiff the due process he would be afforded in this District Court. However, should this Court find that it is not possible to define "order" in a way that allows the Plaintiff due process, the court must find the statute to be unconstitutional to that extent.

[10] As it pertains to passengers for which there is neither reasonable suspicion nor probable cause.

IV. CONCLUSION

The Defendant, through its TSA, wants to have it all ways: it wants to issue secret guidelines, without public comment, that directly apply to the general public, that escape meaningful judicial review with independent fact-finding. If this Court refuses jurisdiction of Plaintiffs' claims, it will give the TSA the green light to create these secret "orders," enacted in secret proceedings, where the Defendant finds whatever "facts" suit them. The District Courts will be barred from reviewing these facts, the appellate courts will give the facts deference, and affected persons will never be given opportunity to be heard. There can be no ambiguity[11]: for the foregoing reasons, such a scheme is beyond the intent of Congress, federal law, the US Constitution, and the core tenants of a free society, and the Defendant's motion to dismiss should be denied.

Dated: Miami, Florida

February 23rd, 2011

Respectfully submitted,

_____

Jonathan Corbett
Plaintiff, *Pro Se*
407 Lincoln Road, #11A
Miami Beach, FL 33139
E-mail: jcorbett@fourtentech.com

[11] Defendant asserts that if there is "ambiguity" as to whether or not this case should go to the Court of Appeals, it should go. *See* Deft.'s Mem., pp. 7, 19. However, "ambiguity" does not mean, "if the court isn't sure." Rather, the cited case law involved multiple related claims simultaneously presented, some of which belonged in the district court and some of which in the appellate court. This case does not.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Jonathan Corbett, Plaintiff v. United States of America, Defendant	**10-CV-24106 (Cooke/Bandstra)** **AFFIRMATION OF SERVICE**

I, Jonathan Corbett, declare under penalty of perjury that I have served a copy of the Plaintiff's Reply Memorandum to Defendant's Motion to Dismiss upon Defendant United States of America, whose address is:

Carlotta P. Wells
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW Room 7152
Washington, DC 20530

Dated: Miami, Florida

February 23rd, 2011

Respectfully submitted,

_____

Jonathan Corbett
Plaintiff, *Pro Se*
407 Lincoln Road, #11A
Miami Beach, FL 33139
E-mail: jcorbett@fourtentech.com