IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JONATHAN CORBETT,	)	
Plaintiff-Appellant,	)	
v.	)	No. 11-12426
UNITED STATES OF AMERICA,	)	
Defendant-Appellee.	)	

MOTION OF DEFENDANT-APPELLEE THE UNITED STATES TO CLARIFY OPINION

INTRODUCTION

On February 27, 2012, the Court issued its decision in this case, affirming the district court's dismissal of the plaintiff's lawsuit for lack of jurisdiction under 49 U.S.C. § 46110. The United States does not seek to alter or amend the judgment of this Court. However, the United States respectfully suggests that statements in the Court's decision that a court of appeals may remand a case to the Transportation Safety Administration (TSA) under 28 U.S.C. § 2347(c) are incorrect. As we explain in greater detail below, TSA is not an "agency" within the meaning of § 2347. Although a court of appeals has the power to supplement the record if appropriate or to order TSA to supplement the agency record to include additional evidence, that

power arises under 49 U.S.C. § 46110(c) and decisional law, rather than 28 U.S.C. § 2347(c). Accordingly, the United States moves the Court to clarify its opinion to prevent any misinterpretation or misapplication by the lower courts or other courts of appeals.

STATEMENT

Plaintiff-appellant Jonathan Corbett brought this action seeking to enjoin TSA from using advanced imaging technology (AIT) scanners and pat-down procedures to screen passengers at airport checkpoints. Slip opinion (Slip op.) at 2-3. Corbett claimed that TSA's use of these screening methods constituted unreasonable searches under the Fourth Amendment. *Id.* at 2.

The district court dismissed the action under 49 U.S.C. § 46110, holding that it lacked subject matter jurisdiction over Corbett's claim because he was challenging a TSA "order," for which judicial review was available exclusively in the court of appeals. *See* Slip op. at 4.

This Court affirmed. The Court recognized that "[t]he term 'order' in § 46110 is construed broadly," and that it applies to the Screening Checkpoint Standard Operating Procedures (SOP) issued by TSA because the SOP imposes obligations on air passengers, who "must comply with the security screening procedures set forth in the SOP or they will not be allowed to fly." Slip op. at 5, 8.

DISCUSSION

The United States believes that the Court's disposition of this appeal is correct, and — with one limited exception — the Government agrees with the Court's analysis and reasoning. However, the Government believes that the Court's decision should be modified to make clear that a court of appeals's authority to remand to an agency for additional factfinding or to supplement the agency record arises not under 28 U.S.C. § 2347, but instead under 49 U.S.C. § 46110 and decisional law.

Neither the United States nor Corbett cited or discussed 28 U.S.C. § 2347 in their briefs on appeal. Although a court of appeals has authority under 28 U.S.C. § 2347 to order an "agency" to conduct additional factfinding or to take additional evidence, for purposes of that statutory provision, "agency" is limited to the specific agencies named in 28 U.S.C. § 2341(3). That section defines "agency" for purposes of Title 28, Chapter 158 to mean a specified group of federal agencies. TSA is not among the agencies specified. Accordingly, TSA does not come within the scope of § 2347. *See Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 193-94 (7th Cir. 1986) (rejecting the argument that the Federal Aviation Administration is an "agency" within the meaning of 28 U.S.C. § 2347(b)).[1]

---

[1] The government cited 28 U.S.C. § 2347 in a reply brief filed in district court in support of the proposition that a court of appeals may supplement the record as necessary. *See* Plaintiff's Record Excerpts, Tab 5, at 9-10. Upon further reflection, (continued...)

However, the fact that 28 U.S.C. § 2347 does not apply to TSA does not undermine the soundness of this Court's conclusions that judicial review is available solely in the court of appeals, and that application of 49 U.S.C. § 46110 to dismiss Corbett's action comports with due process. If the court of appeals determines in a case in which the petitioner has sought review under 49 U.S.C. § 46110 that the agency record is inadequate or omits relevant evidence, the court has the power to supplement the record, or to order the agency to supplement the record under 49 U.S.C. § 46110(c). *See Camp v. Pitts*, 411 U.S. 138, 142-143 (1973); *American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008); 49 U.S.C. § 46110(c) (authorizing the court of appeals to "order the * * * [TSA Administrator] * * * to conduct further proceedings").

The government is concerned that the Court's citation of and reliance on 28 U.S.C. § 2347, rather than 49 U.S.C. § 46110, has the potential to confuse the lower courts in applying the Court's ruling. In addition, the Court's statements, made without the benefit of briefing on the issue, could lead to misapplication of 28 U.S.C. § 2347 by other courts of appeals. There are at least two pending appeals in which the question whether that provision applies to TSA has been raised in the briefing.

---

[1](...continued)
however, the government concluded that § 2347 does not apply to TSA, and therefore did not cite that statute in its briefing in this Court.

See Roberts v. Napolitano, Nos. 11-5226 & 11-5228, Brief for the Defendants-Appellees 40 & n.9 (D.C. Cir. filed Feb. 2, 2012); *Redfern v. Napolitano*, No. 11-1805, FRAP 28(j) Letter for Defendants-Appellees (1st Cir. filed Mar. 1, 2012).

Accordingly, the government respectfully requests that this Court amend its decision to clarify that the authority of the court of appeals to order further factfinding by an agency or to supplement the agency record arises not under 28 U.S.C. § 2347, but instead under 49 U.S.C. § 46110 and decisional law such as *Camp v. Pitts*, 411 U.S. 138, 142-143 (1973), and *American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008). The relevant portions of the Court's decision are at pages 8, 9, and 10.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court clarify its decision as set out herein.

Respectfully submitted,

DOUGLAS N. LETTER
(202) 514-3602
Douglas.Letter@usdoj.gov

SHARON SWINGLE
(202) 353-2689
Sharon.Swingle@usdoj.gov
Attorneys, Appellate Staff
Civil Division, Rm. 7250
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

MARCH 2012

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2012, I filed and served the foregoing Motion of Defendant-Appellee the United States to Clarify Opinion by sending it to the Court and to the following party by overnight delivery, postage prepaid:

Jonathan Corbett
2885 Sanford Ave., SW, #16511
Grandville, MI 49418-1342
jcorbett@fourtentech.com
(646) 316-4524

Sharon Swingle
Counsel for United States

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that, to the best of her knowledge, the following constitutes a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal:

Bandstra, Ted E.

Cooke, Hon. Marcia G.

Corbett, Jonathan

Ferrer, Wilfredo A.

Grauman, Jesse

Letter, Douglas N.

Mead, Joseph W.

Moore, Hon. K. Michael

Schraibman, Sandra M.

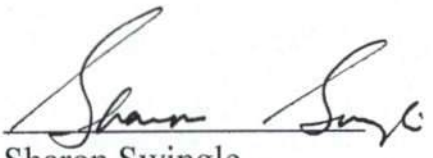
Schultz, Anne R.

Swingle, Sharon

Turnoff, William

Wells, Carlotta P.

West, Tony



Sharon Swingle
Counsel for the United States