

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JONATHAN CORBETT,

Petitioner,

v.

TRANSPORTATION SECURITY
ADMINISTRATION,

Respondent.

No. 15-10757-A

**RESPONDENT'S POSITION REGARDING THE COURT'S
JURISDICTIONAL QUESTION OF 3/13/2015**

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:

Corbett, Jonathan

Swingle, Sharon

/s/ Sharon Swingle
Sharon Swingle
Counsel for Respondent

Respondent Transportation Security Administration (TSA) submits this response to the Court's jurisdictional question issued March 3, 2015, which asks "whether the petitioner seeks review of an 'order issued' by an administrative agency" subject to review in the court of appeals under 49 U.S.C. § 46110(a).¹ As we next explain, this Court has jurisdiction under § 46110(a).

The petition for review challenges the lawfulness of an international security interview program, pursuant to which airlines flying to the United States pose certain questions to passengers before permitting them to board. The petition also challenges the designation of the program as Sensitive Security Information pursuant to 49 U.S. § 114(r)(1)(C) and 49 C.F.R. Part 1520.

A United States commercial airline that wishes to offer scheduled

¹ The petition for review that was served on the Department of Homeland Security by the court of appeals did not arrive until March 20, 2015, and the court did not send a copy of its order requesting briefing on the jurisdictional issue or any correspondence to the government. Accordingly, litigation counsel for the Transportation Security Administration (TSA) learned about the order only shortly before the due date for this response. Should the Court wish for additional briefing on the jurisdictional question beyond this response, the government respectfully requests additional time to respond.

passenger air transport service in, from, or into the United States must have a security program approved by TSA. *See* 49 C.F.R. § 1544.1(a)(1), 1544.101(a)(1). The security program must, *inter alia*, “[p]rovide for the safety of persons and property traveling on flights provided by the aircraft operator against acts of criminal violence and air piracy, and the introduction of explosives, incendiaries, or weapons aboard an aircraft.” 49 C.F.R. § 1544.103(a)(1). The airline is required to “use the measures in its security program to prevent or deter the carriage of any weapon, explosive, or incendiary” on a passenger’s person or property, and “must ensure that each individual entering a sterile area at each preboard screening checkpoint for which it is responsible” has been screened for this purpose. 49 C.F.R. § 1544.201(a), (b). The airline is required to deny entry and “must refuse to transport” an individual who does not consent to search and inspection. 49 C.F.R. § 1544.201(c).

The specific screening practices to be employed by the air carrier are set out in the air carrier’s approved security program. As relevant here,

TSA has issued an “Aircraft Operator Standard Security Program (AOSSP)” that incorporates TSA-approved screening protocols. *See* <http://www.tsa.gov/stakeholders/commercial-airlines> (last accessed Mar. 26, 2015). The AOSSP is designated as Sensitive Security Information under 49 C.F.R. Part 1520, and has not been publicly released. However, it is correct that, as the petition for review contends, the AOSSP sets out the requirements for air carrier screening of passengers at foreign airports before those passengers are admitted to the secure area of the aircraft and transported to the United States.

As this Court has previously held, a challenge to airport checkpoint screening procedures mandated by a TSA security program challenges a TSA “order” that falls within the exclusive review of the court of appeals under 49 U.S.C. § 46110. *Corbett v. United States*, , 458 Fed. Appx. 866, 2012 WL 603801 (11th Cir. Feb. 27, 2012); *see also Gilmore v. Gonzales*, 435 F.3d 1125, 1132-1133 (9th Cir. 2006) (holding that a TSA-issued security directive to airlines requiring them to conduct certain screening of

passengers is an “order” subject to review under § 46110). That principle also governs here.

Furthermore, TSA’s final determination that certain information contains SSI is itself a final agency “order” that this Court may have jurisdiction to review under 49 U.S.C. § 46110. *See, e.g., Lacson v. U.S. Dep’t of Homeland Sec.*, 726 F.3d 170, 173-177 (D.C. Cir. 2013). If this Court determines there is jurisdiction to review petitioner’s challenge to the international security interview program, the administrative record in this matter will contain the relevant portions of the policy setting forth the parameters of the program. As part of that process, respondent will identify with specificity the portions that constitute SSI and cannot be publicly disclosed. Should petitioner challenge respondent’s designations, TSA would issue a final order under § 46110. Until such time, however, it appears that petitioner’s challenge to the SSI designation of the AOSSP is not properly before this Court.

CONCLUSION

This Court has jurisdiction over the petition for review under 49
U.S.C. § 46110(a).

Respectfully submitted,

/s/ Sharon Swingle

SHARON SWINGLE

(202) 353-2689

Sharon.Swingle@usdoj.gov

Attorney, Appellate Staff

Civil Division, Rm. 7250

United States Department of Justice

950 Pennsylvania Avenue, N.W.

Washington, D.C. 20530

MARCH 2015

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2015, I filed and served the foregoing Respondents' Position Regarding the Court's Jurisdictional Question of 3/13/2015 by filing it with the Court and serving it on the following party by electronic delivery:

Jonathan Corbett
382 NE 191 St. #86952
Miami, FL 33179
jon@professional-troublemaker.com

/s/ Sharon Swingle

Sharon Swingle
Counsel for Respondents