Case No. 15-10757

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JONATHAN CORBETT,
Petitioner

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent

Petition for Review of a Decision of the
Transportation Security Administration

BRIEF OF PETITIONER JONATHAN CORBETT

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CERTIFICATE OF INTERESTED PARTIES

Petitioner Jonathan Corbett certifies that the following is a complete list of the trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations known to him that have an interest in the outcome of this case as defined by 11th Circuit Local Rule 26.1-1:

- Jonathan Corbett (Petitioner)

- Sharon Swingle, Jaynie Lilly, Benjamin Mizer, and Wildredo Ferrer (Counsel for Respondent)

- The TSA, its employees, and directors, including Michael Keane

- All airlines covered by the TSA's Aircraft Operator Standard Security Plan (AOSSP)

- All individuals who travel from foreign countries into the United States

STATEMENT REGARDING ORAL ARGUMENT

Petitioner Jonathan Corbett respectfully requests oral arguments to provide the Court more clarity than can be, or has been, provided in writing, and requests that oral arguments be assigned to the Court's satellite office in Miami, Fla..

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STATEMENT OF JURISDICTION

Any person with "a substantial interest" in an order "with respect to [the TSA's] security duties and powers" may "apply for review of the order by filing a petition for review in … the court of appeals of the United States for the circuit in which the person resides…" 49 U.S.C. § 46110(a). The Circuit courts have "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the [TSA] to conduct further proceedings." 49 U.S.C. § 46110(c); *see also Corbett v. United States*, 458 Fed. Appx. 866 (11th Cir. 2012), *cert. denied*.

Petitioner challenges a TSA rule that requires airlines in certain circumstances to "interview" passengers before permitting them to fly. Respondent has stated that this rule is a part of the TSA's "Aircraft Operator Standard Security Procedures" (AOSSP), a TSA "order" for the purposes of § 46110. Based on a review of the record filed by the TSA, Petitioner concurs.

Petitioner is a frequent flyer, having flown no less than 150,000 miles on over 100 flights over the course of the past 2 years and intends to continue this level of travel. It is therefore a near certainty that Petitioner will encounter the effects of the disputed TSA rule in the future, and therefore Petitioner has the "substantial interest" required by § 46110(a).

Section 46110(a) contains a 60 day time limit for challenges. This Court has ruled that the time limit is non-jurisdictional. *Corbett v. TSA*, 767 F.3d 1171 (11th Cir. 2014). It also contains a clause that allows a court to accept a claim after the 60 day time limit if there are "reasonable grounds" for the delay.

The order in question originated from a policy decision made many years prior, but it is, and has always been, "Sensitive Security Information" (SSI), which means that the order was never released to Petitioner, nor any other member of the general public. 49 C.F.R. § 1520, 6 U.S.C. § 114. Petitioner first became aware of the order when it was applied to him on December 25th, 2015, and filed this challenge on February 23rd, 2015, sixty days later. It should also be noted that while the written order itself was issue in years past, the way the order was applied to Petitioner was an "alternative methodology" that came about more recently. *See* Admin. Record, Keane Declaration, AR 592. Resultantly, it is appropriate to apply the "reasonable grounds" clause of § 46110 or otherwise permit equitable tolling of the statute to the point at which a petitioner has notice of the order and to take notice that Petitioner did file his petition within 60 days of coming upon notice of the order.

Petitioner also asks the Court to review whether the designation of certain documents as SSI was appropriate. SSI designations are also orders of the TSA, and therefore the Court has jurisdiction over them as described above.

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STATEMENT OF THE ISSUES

1. Whether the Transportation Security Administration ("TSA")'s international security interview program is permissible under the Fifth Amendment to the United States Constitution.
2. Whether the TSA appropriately designated certain portions of the administrative record as Sensitive Security Information.

STATEMENT OF THE CASE

I. Course of Proceedings in the Agency

By 1997, the Federal Aviation Administration (FAA) had issued security directives to airlines regarding a "profiling" procedure. Admin. Record, FAA Security Directive 95-06C, AR 1. The original directive was modified several times by the FAA between the 1997 security directive and 2001. Admin. Record, AR 11 – AR 75. After the events of September 11th, 2001, Congress established the Transportation Security Administration (TSA), which took over the role of aviation security from the FAA in 2002. The TSA continued the profiling procedure, with periodic modifications, culminating in the currently effective Aircraft Operator Standard Security Procedures (AOSSP), Change 27A. Admin. Record, AOSSP Change 27A, AR 529. This procedure can be succinctly described in its present form as the TSA's "international security interview program" (ISIP).

The Administrative Record ends with a declaration by a current TSA director, Michael Keane, who illuminates the motivation behind the ISIP. Admin. Record, Keane Decl., AR 586. Mr. Keane alleges that in 1986, a Jordanian national was hired by the Syrian government to blow up an airliner owned by Israeli airline El Al, and attempted to do so by hiding explosives in his girlfriend's bag. According to Mr.

Keane, the girlfriend was interviewed by El Al before the flight, which uncovered and defeated the plot. *Id*.

There are no proceedings in front of the agency to which Petitioner was entitled to participate, and Petitioner has never had an opportunity to present evidence, utilize any form of discovery, or otherwise challenge the agency's position before the agency. The TSA has designated the AOSSP as Sensitive Security Information, and all previous versions of the policy were similarly designated. Therefore, Petitioner has not been on notice of the agency's order until actually encountering the ISIP last December.

II. Statement of the Facts

A. How the ISIP Works

The TSA has designated certain airports as "extraordinary locations." Admin. Record, AOSSP Change 27A, AR 567. The Administrative Record defines "extraordinary locations" as those "requiring extraordinary security measures." *Id.* The Administrative Record does not appear to[1] explain how an airport earns a

[1] Petitioner's copy of the Administrative Record is heavily redacted, and the Court has rejected his motion to compel the government to furnish him with a non-redacted copy after conducting a standard background check and obtaining a non-disclosure agreement. *See* Order, October 1st, 2015. Therefore, statements indicating the absence of something in the Administrative Record are to the best of Petitioner's ability based on the materials he has.

designation of "extraordinary location," but since the ISIP was applied to Petitioner at London Heathrow airport (LHR), we may conclude that such locations are not, for example, airports in countries that are state sponsors of terror, but rather are merely large transportation hubs.

When a passenger arrives at an airport such as LHR, they are subject to security screening in a manner similar to that conducted by the TSA as they enter the secure area of the airport. However, for passengers traveling to the United States, the TSA mandates that the airlines[2] hold passenger in a separate secure area (a "hold area") for a second screening, including but not limited to an interview under the ISIP. Admin. Record, AOSSP Change 27A, AR 568. The interview consists of a check of documentation for "critical signs," and then a discussion with the passenger which may elicit from the passenger "suspicious signs" or "positive signs," and will additionally enquire as to whether the passenger has been in control of his or her belongings since packing them ("mandatory baggage control questioning")[3]. *Id*. at AR 569 – 573; *see also* Admin. Record, Keane Decl., AR 589 – AR 591. Critical signs must be resolved by law enforcement, whereas suspicious signs may be resolved by the interviewer, but

[2] When discussing "airlines," Petitioner is referring to all airlines subject to the AOSSP. Upon belief, this is at least every U.S.-based airline that flies from foreign countries into the United States, and includes American Airlines, Delta Air Lines, and United Airlines, the three largest airlines in the world by revenue.

[3] Petitioner does not challenge mandatory baggage control questioning, nor a review of passenger documentation. Such questioning and review do not appear to Petitioner to implicate Fifth Amendment rights in the way that the remainder of the ISIP, which asks passengers to describe their whereabouts, motives, and so forth, does.

should they not be able to be resolved by the interviewer, law enforcement will similarly be summoned to resolve them. Admin. Record, Keane Decl., AR 590 – AR 591. A passenger who successfully "resolves" his or her issues with law enforcement may board the plane after being subject to "selectee screening." *Id*. A passenger whose issues cannot be resolved will be denied boarding. *Id*. at AR 591. Refusing to participate in the interview process, *e.g.*, by insisting on one's right to remain silent, is considered a "suspicious sign." *Id*.; *see also* Admin. Record, AOSSP Change 27A, AR 570. Similarly, one who does not refuse but cannot complete the interview (*e.g.*, because of a language barrier or disability) is subject to similar designation. Admin. Record, AOSSP Change 27A, AR 568. A passenger may not provide or use a third-party interpreter. *Id*.

"Selectee screening" involves additional searches of the passenger and his or her belongings. This must include many of the following: a hand-held metal detector search, a walk-through metal detector search, a pat-down, a test for explosive traces on passenger and/or his property, x-ray screening of his property, and emptying and re-packing the passenger's bags. *Id.* at AR 573, AR 574.

The AOSSP specifies some level of annual training required for the security staff conducting interviews. *Id*. at AR 515 – AR 517. However, there does not seem to be a minimum training period of time, and the training described in the AOSSP could conceivably be completed in less than a day. *Id*.

The Administrative Record does not allege that the ISIP program, running in what is presumed to be dozens of airports for the last 18 years, has identified any actual terrorists or foiled any terror plots. It also does not allege that any studies, testing, or other quality control procedures have been undertaken.

B. ISIP's Predecessor Program

The ISIP was modeled after the profiling program run by El Al, the national airline of Israel. Admin. Record, Keane Decl., AR 588. It is worthwhile for the Court to understand how and why El Al operates its security program to consider the implications of running such a program under American law.

Airport security run by El Al is focused on finding "bad people" (those who intend to commit terrorism) as opposed to the American system which focuses on finding "bad objects" (the means by which one could commit terrorism). Thus, to fly on Delta from Atlanta to Miami, your bags will be x-rayed, your body will be searched for metal (via a metal detector) or otherwise (via a body scanner or pat down)[4]. However, to fly from New York to Tel Aviv on El Al, security starts as you walk into the airport[5]. While in line to check-in, security will ask you for your passport and

[4] Security Screening. Transportation Security Administration. https://www.tsa.gov/travel/security-screening

[5] "Unfriendly Skies Are No Match For El Al." USA Today. http://usatoday30.usatoday.com/news/attack/2001/10/01/elal-usat.htm

documents and begin to interview you immediately. Interviewers have a list of passengers in advance, and are already aware of every passenger's criminal history, watch list status, and so forth, and are prepared in advance to speak with passengers who raise additional suspicion based on this advance research. Interviews are frequently done repeatedly to ensure that the traveler does not change his or her story.

It is a system that openly embraces racial, ethnic, and religious profiling. Travelers are identified as low-risk if they are Israeli or otherwise Jewish. Travelers are identified as high-risk if they are Arabic or otherwise Muslim. All other travelers are assigned an intermediate risk level. Those with a higher risk category are automatically segregated and hand-searched, while those with a low risk will encounter a relatively short interview. A wrong answer can result in a strip search, refusal to allow carry-ons, or denied boarding[6].

Interviewers are well-trained. As Israel has compulsory military service, its interviewers generally have a military background[7]. Training in the Israeli military means extensive concentration on counterterrorism. Interviewers who fail frequent random testing are immediately fired. In many countries, interviewers have diplomatic

[6] "U.S. Couple With Jewish Roots Didn't Expect El Al's Inquisition." Haaretz. http://www.haaretz.com/israel-news/u-s-couple-with-jewish-roots-didn-t-expect-el-al-s-inquisition.premium-1.493585

[7] "What Israeli Airport Security Can Teach the World." The Huffington Post. http://www.huffingtonpost.com/daniel-wagner/what-israeli-airport-secu_b_4978149.html

immunity[8], and in all countries they understand that they may ask whatever they would like without fear of allegations of discrimination and that travelers who do not answer will not be allowed to fly.

C. The Hindawi Affair

Mr. Keane testified that the impetus for implementation of the ISIP was an attempted bombing of an El Al flight in 1986 by one Nezar Hindawi. Admin. Record, Keane Decl., AR 588. This attempted bombing was a significant international scandal that was well-reported. Mr. Hindawi placed plastic explosives in the bag of his fiancée, allegedly without her knowledge, with a timing device that would have detonated the bomb while the plane was in the air. *Id*. Petitioner and Mr. Keane agree thus far.

Next, Mr. Keane asserts that "[a] crucial step in the detection of this plot was the fact that El Al officials questioned the passenger about her baggage…" *Id*. at AR 588, AR 589. The Israeli government begs to differ. "No suspicious signs were revealed during her questioning… *In the check of her baggage*, suspicious signs came to light[9]."

[8] "El Al flights to Johannesburg may come to an end over security personnel dispute." Homeland Security News Wire. http://www.homelandsecuritynewswire.com/el-al-flights-johannesburg-may-come-end-over-security-personnel-dispute

[9] Israeli Security Agency. Anne-Marie Murphy Case (1986). https://www.shabak.gov.il/English/History/Affairs/Pages/Anne-MarieMurphyCase.aspx. *Emphasis added*.

The Administrative Record provides no other evidence of Mr. Keane's claim beyond his assertion.

D. ISIP's Domestic Counterpart: The SPOT Program

The TSA runs a domestic program that is nearly identical to the ISIP. Known as "Screening Passengers by Observation Techniques," or "SPOT," the program involves having TSA screeners interview passengers, most frequently while in line at the security checkpoint, resulting in the selection of passengers for additional screening who seem suspicious[10]. The TSA has operated SPOT since 2007[11].

TSA staff operating as part of the SPOT program carry the title, "Behavior Detection Officer." In addition to the approximately 2 weeks of training that all new TSA screeners undertake, BDOs typically have been promoted to the position after significant experience on the front lines of TSA checkpoints and are given significant additional training. SPOT is also well-funded, costing the taxpayer over $900 million to date.

Despite the additional experience and training that SPOT interviewers receive, and significant government funding provided, the program has, like the ISIP, thus far

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[10] To the best of Petitioner's knowledge, the SPOT program does not go beyond selecting passengers for additional screening, *i.e.*, there is no concern of denied boarding, summoning of law enforcement (unless actual criminal behavior is uncovered), *etc.*, thus explaining why Petitioner challenges ISIP and not SPOT.

[11] "TSA Should Limit Future Funding for Behavior Detection Activities." Government Accountability Office. http://www.gao.gov/products/GAO-14-159

identified 0 terrorists, despite the fact that many terrorists are known to have passed through SPOT-enabled airports[12]. Congress' Government Accountability Office has slammed the program, noting that "peer-reviewed, published research we reviewed did not support" the techniques used in SPOT, that a validation study conducted by TSA parent agency Department of Homeland Security itself "does not demonstrate the effectiveness of the SPOT behavioral indicators, and concludes that the TSA "should limit funding for future behavior detection activities."

The TSA parent agency's own inspector general agrees that SPOT has not been shown to be effective using any reliable methods. The inspector general testified before Congress, "[W]e have deep concerns that the current program is both expensive and ineffective. In 2013, we audited the SPOT program and found that TSA could not ensure that passengers were screened objectively[13]."

E. Petitioner's Encounter with the ISIP

On December 25th, 2014, Petitioner arrived at London Heathrow[14]. Petitioner was ticketed to fly that day from LHR to John F. Kennedy Airport (JFK) in Queens, New York, on American Airlines. Upon entering an airport lounge operated by AA, a

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[12] "Efforts to Validate TSA's Passenger Screening Behavior Detection Program…" Government Accountability Office. http://www.gao.gov/products/GAO-10-763

[13] "Statement of John Roth, Inspector General, U.S. D.H.S." https://oversight.house.gov/wp-content/uploads/2015/05/IG-Roth-Testimony-Bio.pdf

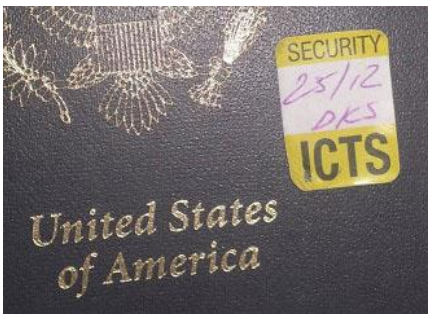
[14] See Exhibit A, Declaration of Jonathan Corbett.

man at a podium, later determined to be a security contractor hired by American Airlines, asked to see Petitioner's passport and began asking questions of him.

Initially, the questions seemed to be queries about the flight Petitioner intended to take (*e.g.*, "Where are you going?"). However, the questions progressed into personal questions unrelated to the flight at hand (*e.g.*, "Why were you traveling?"). Petitioner asked the security contractor if answering these questions was necessary, and the security contractor replied in the affirmative.

Petitioner refused to answer the question posed, and the security contractor returned Petitioner's passport and directed him to the lounge staff, who allowed Petitioner to proceed into the lounge.

However, the security contractor did not place a sticker on Petitioner's passport, as he would have had Petitioner successfully completed the interview. A passenger lacking a sticker who approaches the gate is sent to another security contractor to be interviewed.



A sticker indicating that a traveler has completed a security interview.

Stickerless, Petitioner, upon reaching the gate for his departure, was asked to speak with another man at a podium, who did not seem to have any way of knowing, and upon belief, did not know, about the earlier interview attempt. However, this second security contractor did not require Petitioner to answer any personal questions

not directly related to his flight, and therefore Petitioner was given a sticker and was permitted to fly. It appears, therefore, that the questions asked vary significantly based on the individual asking them, and the intensity of the questions asked of travelers is "luck of the draw" based on which interrogator they happen to be directed to and the interrogator's current disposition.

After being cleared to fly, Petitioner contacted American Airlines by e-mail to complain about the security procedures. The airline informed Petitioner that the procedures he encountered were "controlled by DHS/TSA." Petitioner then contacted the TSA by e-mail to verify that the program was their requirement. TSA informed Petitioner that "American Airlines is required to conduct a security interview of passengers prior to departure to the United States from an overseas last point of departure airport. If a passenger declines the security interview, American Airlines will deny the passenger boarding. The contents of the security program and the security interview are considered Sensitive Security Information (SSI) under Title 49 CFR 1520 and its contents are not for public disclosure."

SUMMARY OF ARGUMENT

The TSA has issued an order that will punish those who seek to exercise their right to remain silent, or are unable to communicate in the correct language, in order to implement an unproven-at-best, discredited-at-worst, screening idea from nearly 20 years ago that was based on a screening program implemented by a foreign airline that openly conducts screening using ethnic and religious profiling. This screening disproportionately impacts racial minorities and those with disabilities, and strict scrutiny should be applied to declare that the Fifth Amendment cannot comport with this failed policy that has, over the last two decades, ensnared exactly zero terrorists.

ARGUMENT

I. Remaining Silent During a Security Interview Will Result In Discretionary, If Not Mandatory, Denied Boarding, In Addition to Selectee Screening

Attorneys for the government insist in court that the AOSSP and ISIP do not *require* the denial of boarding to a traveler who refuses to answer questions during an interview. Letter to the Court, May 12th, 2015. However, a reasonable reading of the Administrative Record, combined with Petitioner's experience, make it clear that such a consequence is likely, if not mandatory when the ISIP is strictly followed as written.

TSA Director of Aviation Michael Keane's declaration states that "[n]othing … requires the airline to deny boarding to a passenger who refuses to cooperate in the interview process." Admin. Record, Keane Decl., AR 592. However, immediately before that, Mr. Keane states the following on page AR 591:

1. Refusing to speak during an ISIP interview is considered a "suspicious sign" that "must be resolved."
2. A suspicious sign may be resolved by the interviewer, but if they cannot be resolved, law enforcement will be summoned to intervene.
3. "[A] passenger would be denied boarding … if the passenger exhibited a sign that could not be resolved by local law enforcement authorities."

Mr. Keane provides no further details regarding what "resolution" entails, nor does any other portion of the redacted Administrative Record. But, if the "suspicious sign" is that a traveler does not answer questions, would the "resolution" not be that the traveler answers the questions? How else is local law enforcement supposed to "resolve" a passenger's refusal to answer questions? Under this very natural reading of the word "resolve," it seems mandatory that boarding be denied unless the passenger begins talking.

Under a more strained reading that "resolution" may happen without the passenger answering questions, it seems clear that law enforcement will be summoned and, at least, given the *discretion* to deny boarding to a passenger who refuses to speak. While the TSA is not generally responsible for the actions of foreign law enforcement, it certainly must accept some responsibility when it requires that an airline call the police, tell them that a passenger is exhibiting "suspicious signs," and puts the onus on foreign law enforcement to determine that the passenger is safe to fly. There is a vast difference between the obvious fact that foreign law enforcement may decide to detain someone pursuant to their country's laws versus a situation where the TSA has required law enforcement to give their affirmative blessing to the enplanement of a passenger presented to them as "suspicious." There is no indication anywhere in the Administrative Record, nor within common experience, to determine that law enforcement in each "extraordinary location" where the ISIP exists is in any way

trained or prepared to deal with such a situation, and a reasonable expectation would be that a law enforcement officer would not be willing to accept the risk of "clearing" a passenger that the TSA deems suspicious when he has no basis in his or her training or experience to do so. The effect of such a policy is a significant risk of denial of boarding.

This argument comports with Petitioner's personal experience. Security in the airport told him that answering questions was mandatory and refused to clear him by affixing a sticker to his passport when he did not answer the questions he was asked. The first interviewer apparently broke the AOSSP's policy requiring him to "resolve" suspicious signs by allowing Petitioner to walk away without either resolving Petitioner's non-compliance or seeking law enforcement intervention. Petitioner only boarded his plane because he was allowed a "second try," in contradiction of the policy, and the interviewer on the second try did not care to demand his answer of any personal questions[15].

[15] In its initial documents in this case, the TSA makes much ado that Petitioner did manage to make his flight without law enforcement intervention. To be clear, Petitioner is alleging that the only reason he was allowed to board his flight is that both interviewers were not actually doing their jobs to the full extent required by the AOSSP. The first screener failed to take resolution steps and the second screener failed to ask more than a cursory question about his intended destination before clearing Petitioner.

This argument also comports with the TSA's communication with Petitioner after the incident wherein it told him that in the event that a passenger does not comply with the interview, the airline "will deny the passenger boarding."

Any suggestion that the effect of the ISIP will not be to deny boarding to passengers who refuse to speak is solely a post-hoc explanation by the government's attorneys, when, in practice, the interviewers label the interview as mandatory, the TSA's own customer service team directly stated that denied boarding would result, and when TSA Director of Aviation Michael Keane writes a declaration that the policy does not "require" denial of boarding but neglects to explain the obvious conclusion that passengers are likely to encounter denied boarding as a result of following the procedures in the real world.

II. Petitioner Has Fundamental Statutory, Constitutional, and International Law Rights To Travel and to Re-Enter the United States

The federal judiciary has recognized a fundamental right to travel since at least 1823. *Corfield v. Coryell*, 6 F. Cas. 546 (Circuit Court, E.D. Penn., 1823) ("The right of a citizen of one state to pass through, or to reside in any other state … may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental").

This proposition was approved by the U.S. Supreme Court two decades later and is still quoted with approval in this century. *Smith v. Turner*, 48 U.S. 283 (1849); *Duffy v. Meconi*, 395 F. Supp. 2d 132 (D. Del., 2005). "[T]he right is so important that it is 'assertable against private interference as well as governmental action … a virtually unconditional personal right, guaranteed by the Constitution to us all.'" *Saenz v. Roe*, 526 U.S. 489 (1999) (*citing Shapiro v. Thompson*, 394 U.S. 618, 643 (1969)); *see also Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996) (right of travel included in list of "fundamental rights").

While much of right to travel case law discusses travel between states, there is ample case law that specifically confirms that the right is extended to international travel. "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment … Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, … may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." *Aptheker v. Secretary of State*, 378 U.S. 500, 505, 506 (1964) (*citing Kent v. Dulles*, 357 U.S. 116, 125, 126 (1958)).

Cases regarding the right to international travel generally involve the government's attempt to refuse to allow one to leave the country. In these cases, some restrictions, when the government presents a compelling national security reason, have

been allowed to proceed[16]. *Id*. (denying restriction in current instance but discussing other situations where restrictions are justified). However, cases where a citizen seeks not to leave, but to re-enter, have uniformly upheld the right of a citizen to return home. "[T]he right to return to the United States is inherent in American citizenship." *Fikre v. FBI*, 23 F. Supp. 3d 1268, 1280 (D. Or., 2014) (*citing Nguyen v. I.N.S.*, 533 U.S. 53, 67 (2001) (citizenship in the United States includes "an absolute right to enter its borders.")). Citizens "have the right to return to this country at any time of their liking." *Newton v. I.N.S.*, 736 F.2d 336, 343 (6th Cir. 1984).

Any argument that denying access to a flight to the border is different from denying access to the country once the citizen reaches the country has similarly met rejection from the courts. "[A] U.S. citizen's right to reenter the United States entails more than simply the right to step over the border after having arrived there. ... At some point, governmental actions taken to prevent or impede a citizen from reaching the boarder [*sic*] infringe upon the citizen's right to reenter the United States." *Mohamed v. Holder*, 995 F. Supp. 2d 520, 536, 537 (E.D. Va., 2014).

[16] Many of these cases come from a time when the U.S. Supreme Court permitted restrictions on those associating with Communist organizations. Given that in the present day the Court would clearly distance itself from approving restrictions on political speech in the way it did in the 1960s, it seems likely that the Court would be more skeptical of any such restrictions.

Such an argument cannot be saved by saying that Petitioner could "take a boat." "While the Constitution does not ordinarily guarantee the right to travel by any particular form of transportation, given that other forms of travel usually remain possible, the fact remains that for international travel, air transport in these modern times is practically the only form of transportation, travel by ship being prohibitively expensive." *Ibrahim v. D.H.S.*, 2012 U.S. Dist. LEXIS 180433 (N.D. Cal., 2012); *see also Mohamed* at 528. Respondent has, in past cases, put forth the "contention that international air travel is a mere convenience in light of the realities of our modern world," but "[s]uch an argument ignores the numerous reasons that an individual may have for wanting or needing to travel overseas quickly such as the birth of a child, the death of a loved one, a business opportunity, or a religious obligation." *Latif v. Holder*, 28 F. Supp. 3d 1134, 1148 (D. Or., 2014). Further, the question is not whether the TSA has effectively *denied* Petitioner access to the country, but whether the order *implicates*, or *burdens*, Petitioner's access to the country.

Beyond the realm of constitutional law, Petitioner has rights to travel established by acts of Congress and in sources of international law. "A citizen of the United States has a public right of transit through the navigable airspace." 49 U.S.C. § 40103(a)(2). "Everyone has the right to leave any country, including his own, and to return to his

country." Universal Declaration of Human Rights[17], Article 13, § 2. "No one shall be arbitrarily deprived of the right to enter his own country." International Covenant on Civil and Political Rights, Article 12, § 4[18].

Based on the foregoing sources of constitutional, statutory, and international law, and the interpretation by the courts thereof, it is clear that the TSA has implicated the "fundamental rights" of Petitioner to travel and to re-enter his home country.

III. The Appropriate Standard for Review is Strict Scrutiny

Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (*citation omitted*). It is applied to government actions that restrict fundamental rights. *Reno v. Flores*, 507 U.S. 292 (1993). It is also applied to government actions that disparately affect racial and other "suspect" classes. *Bass v. Bd. of County Comm'rs*, 256 F.3d 1095 (11th Cir. 2001) ("all racial classifications, imposed by whatever federal, state, or local government actor, must be

[17] The UDHR is a declaration that was adopted by the United Nations General Assembly in 1948. The charter to the United Nations, which is binding on all member states including the United States, protects "fundamental freedoms" and "human rights," and the UDHR was adopted for the purpose of defining those terms.

[18] The ICCPR is a treaty adopted by the United Nations General Assembly in 1966 and ratified by the United States Senate in 1992.

analyzed by a reviewing court under strict scrutiny," *citing Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

Petitioner's challenge implicates a clearly established fundamental right, as discussed above, and also relates to discrimination against minorities, *infra*. As such, it is appropriate to apply strict scrutiny to review of the TSA's order. *See also Mohamed* at 531 (inquiry into whether there were "less restrictive means" indicates court rejected rational basis review in favor of strict scrutiny).

IV. The Administrative Record Fails to Show a Rational Basis for ISIP, Let Alone Meet The Requirements of Strict Scrutiny

The Administrative Record consists of 593 pages: 585 pages are copies of the documents that implemented the ISIP, and 8 pages of a declaration by TSA Director of Aviation Michael Keane. Of the 585 pages before the declaration, not one of them discusses why the government implemented the program, how it decided on the details of the program, what research it did while designing the program, or any review on whether or not the program was working.

The 8 page declaration, created by Mr. Keane after, and as a direct response to, the filing of this lawsuit, cannot properly be said to constitute a part of the Administrative Record, but rather is an appendix to it. An administrative record is

supposed to include all of the documents that are related to the agency's order, not an opportunity for a post-hoc explanation or testimony of agency leaders. The Court should refuse to consider the 8 pages written by Mr. Keane as a part of the Administrative Record, and instead consider it as additional evidence submitted separately.

Notwithstanding, the 8 pages attempt to discuss why the government implemented the program, but still fail to discuss how it decided on the details of the program, what research it did while designing the program, or any review on whether or not the program was working. Further, the attempt at discussing the "why" – a foreign terror attack that was thwarted by an interview – is rebutted by the government that conducted the interview, which claims that the interview did not actually assist with the uncovering of the plot.

Therefore, it cannot be said that there is a "rational basis" for the ISIP. The impetus for the program was false. The effectiveness of the program is apparently unreviewed. The planning of the program was apparently done without any paperwork beyond the document that requires the airline to take action. The training standards are minimal and significantly less than that of SPOT, which has also caught 0 terrorists. In short, after 18 years of running the ISIP, the government cannot provide any defense for the program whatsoever.

The Administrative Record in this case is notably different than the records produced for other petitions that this Court has denied. In *Corbett v. TSA*, 767 F.3d 1171 (11th Cir. 2014), a challenge to the TSA's nude body scanner program that had run for only a few years, the TSA produced thousands of pages across 5 volumes. Included in them were technical specifications, testing results, privacy impact assessments, and the like, much of which was Sensitive Security Information, and some of which was even classified. In the instant case, no such documents were filed, and there exists no classified portion of the record. Simply, the TSA is operating the ISIP because of a knee-jerk reaction to an event that happened in 1986 – that didn't even happen the way the TSA thought – without any kind of meaningful review for the last 18 years.

Since this order is subject to strict scrutiny, the government must go further than show that the ISIP rationally addresses a government interest. It must show that the interest is compelling and that the ISIP is narrowly tailored to addressing that compelling government interest.

Petitioner will not waste the Court's time on whether the interest is compelling and concedes, for the purposes of the instant case, that the TSA has a compelling interest in directing security operations in foreign countries to reduce the risk of air terrorism on flights to the United States. However, the Administrative Record demonstrates no "narrow tailoring" – or any tailoring whatsoever. The government

does not explain why it feels that summoning law enforcement to the scene will improve their ability to weed out terrorists. It is highly unlikely that law enforcement in a foreign nation has more information on the passenger than the TSA already does via its Secure Flight program[19], or than other components of the Department of Homeland Security, such as U.S. Customs and Border Patrol, already have. The record does not show that these foreign police officers have any training related to the identification. The record instead shows a policy that has a great likelihood of resulting in harassment, delays, and denied boarding for passengers who do not, or cannot, answer questions. The record does not show that any efforts have been made to reduce the privacy impact of the program, nor that a privacy impact assessment was ever conducted. The record does not show that any training is done to minimize the personal information asked for by the interviewers. The record shows nothing in regards to any tailoring.

V. Forcing a Traveler to Speak or Face Potential Denied Boarding Violates The Fifth Amendment

The Fifth Amendment provides Americans with the "right to remain silent." U.S. Const., Amend. V. This right is available to citizens in custodial settings (*e.g.*, in

[19] "Secure Flight." United Airlines. https://www.united.com/web/en-US/content/travel/airport/id/secure.aspx

the back room of a police precinct[20]), in non-custodial settings (*e.g.*, when testifying before Congress[21]), and any other fora where a person is being asked to potentially incriminate themselves by the government or its representatives (*e.g.*, on a tax form filed with the IRS[22]).

The ISIP is nothing less than the government, through the use of private security contractors it forces airlines to hire, interrogating members of the public to determine if they are in the process of conducting criminal activity. Petitioner has the absolute right to refuse to participate in such an interrogation. Attempting to tie Petitioner's right to re-enter the country to his willingness to answer questions posed by the government or its surrogates would necessarily negate either his Fifth Amendment right to remain silent, his Fifth Amendment right to travel, or both.

To be clear, Petitioner is not challenging the government's right to request that he identify himself or display his travel documents. Petitioner is also not challenging the government's right to ask if he has had control over his bags since they were packed, as such a question is neither intended nor likely to incriminate the traveler, but rather is genuinely deigned to ask for the passenger's assistance in promoting aviation security. Beyond that, questions such as, "What were you doing in Country X?"

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[20] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[21] *Watkins v. United States*, 354 U.S. 178 (1957).
[22] *United States v. Argomaniz*, 925 F.2d 1349 (11th Cir. 1991)

"Where will you stay in Country Y?" "Who did you see in Country Z?" are not intended to identify the traveler or elicit his or her assistance to prevent the unwitting introduction of dangerous items, but rather to trick the passenger into incriminating his or herself. This is the heart of Petitioner's challenge.

VI. ISIP Is Based On Discrimination, Can Only Function With Discrimination, and Does Discriminate Against Protected Classes

It is undisputed by El Al and the Israeli government that the interview program they conduct is integrated with ethnic and religious profiling. No reasonable argument can be made that the El Al program, if implemented by the government within the United States, would be anything but blatantly unconstitutional on First Amendment freedom of religion grounds as well as Fifth Amendment equal protection grounds.

Nearly 20 years ago, the U.S. government so admired El Al's interview program that it created the ISIP. However, it failed to realize that El Al's interview program only works because blatant discrimination is legal in Israel, and such discrimination is integral to the program. The situation in Israel is such that terror attacks of some kind are a constant occurrence, and they are almost unanimously perpetrated by Arabic Muslims[23]. Israel does not fear attacks from "homegrown" terrorists the way we do in

[23] "Suicide and Other Bombing Attacks in Israel Since the Declaration of Principles (Sept 1993)." Israel Ministry of Foreign Affairs.

the United States, perhaps because the people in Israel are a homogenous group not struggling to integrate different cultures side-by-side as we are proud to do in the United States. This allows El Al to narrow their focus to a small subgroup of travelers that they feel are "high risk" and require significant attention, and allows them to make their interview program effective.

Not only does the U.S. version, ISIP, do no such narrowing of the list, and is therefore the proverbial search for a needle in a haystack, it has a much larger haystack to start. Nearly 240,000 people entered the United States by air each day in 2012[24]. In contrast, nearly 17,000 people entered Israel that year, only 6,800 of which were foreigners[25], and assuredly only a tiny fraction of that 6,800 were Arabic or Muslim passengers who received the "full treatment" of their interview program.

The Administrative Record fails to discuss whether the government ever considered whether or not the ISIP could be effective absent discrimination. The situation is made worse by the fact that the Administrative Record makes clear that

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http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/suicide%20and%20other%20bombing%20attacks%20in%20israel%20since.aspx
It should be noted that this list only describes successful attacks.

[24] "Total Passengers on U.S Airlines and Foreign Airlines…" U.S. Dept. of Transportation. http://www.rita.dot.gov/bts/press_releases/bts016_13

[25] "Periodic Report for the Year 2014." El Al. https://www.elal.com/en/About-ELAL/About-ELAL/Investor-Relations/PublishingImages/Financial_Information/2014/Financial_Reports/AnnualReport2014EN.pdf

passengers who do not speak a common language with the interviewer will be singled out for additional screening or resolution[26]. Admin. Record, AOSSP Change 27A, AR 568. The passenger may not provide an interpreter, nor may another traveler in the area serve as one. *Id*. It is obvious that this policy will disparately affect non-Americans, as well as the poor (*i.e.*, those not able to access education to learn English). Likewise, passengers unable to communicate due to a disability such as deafness or muteness will receive the same treatment. The imposition on these groups is not justified by any benefit provided by ISIP.

VII. The Continued Designation of Documents Aged by Two Decades as Sensitive Security Information Should Be Vacated

Finally, Petitioner asks the Court to review the TSA's determination that certain documents within the Administrative Record constitute Sensitive Security Information (SSI). SSI is sensitive but unclassified information that relates to trade secrets, would be an unwarranted invasion of privacy, or, as relevant here, would be detrimental to transportation security if released. 49 C.F.R. § 1520.5(a).

The oldest document in the Administrative Record will celebrate its 19th birthday next month, yet is still heavily redacted. This document, FAA Security Directive 95-

[26] The consequence is redacted.

06C, was sent to hundreds of airlines and was surely read by tens of thousands of people who work for those airlines. It appears that the TSA still considers this a secret almost 19 years later and has no plans to remove the SSI designation based on age.

Unlike the SSI designation, the U.S. government uses the "classification" system, established by Executive Order, to protect actual national security secrets, whereas SSI is used to protect purportedly sensitive information that thousands of people across the world need to know to do their jobs. For example, the 60,000+ workforce of the TSA all has access to SSI, as do the hundreds of thousands of private airport and airline workers that implement polices designated as SSI. But even classified information has an automatic declassification timeframe set at 25 years[27].

The Court should consider a similar requirement for SSI. Information that was SSI almost two decades ago is no longer truly secret, nor is it a guide to modern aviation security that a terrorist could use to defeat the security measures we have in place. The point is further made by noting that this document was produced well before the attacks of September 11th, 2001, and so clearly nothing in this document actually protected our aviation system even 14 years ago. Petitioner submits that the Court should consider a 10 year automatic "declassification" timeframe and invites Respondent to suggest a

[27] "Declassification Frequently Asked Questions." U.S. Department of Justice. http://www.justice.gov/open/declassification/declassification-faq

framework by which that could happen or an alternative automatic scheme by which aging SSI is released to the public.

CONCLUSION

Despite having 18 years to do so, the TSA has failed to accumulate any evidence whatsoever – whether in the form of empirical studies, the actual catching of a terrorist, or otherwise – that ISIP is a useful tool to protect against air terrorism. The only rationale asserted for the adoption of the program did not actually happen as asserted, and no substitute rationale has been suggested by the Administrative Record.

Instead, what we have is a program modeled after a system of religious and ethnic profiling used by a foreign nation that asks U.S. citizens to either forego their right to travel and right to return home or forego their right to remain silent. This the Constitution shall not stand.

Petitioner asks the Court to modify the TSA's order such that passengers who decline, or are unable, to speak are not subject to arbitrary "resolution" by interviewers or local authorities. Instead, the interview should terminate and the passengers should be screened as selectee passengers as defined by Section 11.5 of the AOSSP. The TSA should further be ordered to communicate the updated requirements to airlines forthwith.

Further, the TSA should be ordered to remove the SSI designation from significantly aged documents on an automatic basis, or to propose a scheme by which that result is accomplished.

Dated: Miami, Florida
December 21st, 2015

Respectfully submitted,

_____

Jonathan Corbett
Petitioner, *Pro Se*
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Miami, FL 33179
E-mail: jon@professional-troublemaker.com

CERTIFICATE OF COMPLIANCE

I, Jonathan Corbett, *pro se* Plaintiff in the above captioned case, hereby affirm that that this brief complies with Fed. R. App. P. 32(a) because it contains approximately 8,000 words using a proportionally-spaced, 14-point font.

Dated: Miami, Florida
December 21st, 2015

Respectfully submitted,

_____

Jonathan Corbett
Petitioner, *Pro Se*
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Miami, FL 33179
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NOTICE OF NO APPENDIX

For this petition, there were no proceedings before the agency (other than that described in the Administrative Record) nor any lower court, and therefore there is no appendix to this brief.

Dated: Miami, Florida
December 21st, 2015

Respectfully submitted,

_____

Jonathan Corbett
Petitioner, *Pro Se*
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Miami, FL 33179
E-mail: jon@professional-troublemaker.com

EXHIBIT A – DECLARATION OF JONATHAN CORBETT
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Jonathan Corbett Petitioner v. Transportation Security Administration Respondent	**No. 15-10757** **DECLARATION OF JONATHAN CORBETT**

I, Jonathan Corbett, hereby declare under penalty of perjury as follows:

1. My name is Jonathan Corbett, I am over the age of 18, and I am, and always have been, a citizen of the United States.
2. I have read the attached petition in full.
3. I confirm that the section titled Statement of Jurisdiction accurately describes my interest in the case; to wit, that I am a frequent flyer regularly engaging in international air travel, and that I plan to continue to do so in 2016.
4. I confirm that section under Statement of the Case, Section II(E), titled "Petitioner's Encounter with ISIP" is a true and accurate description, to the best of my recollection, of the events that occurred on December 25th, 2015, and immediately thereafter.

Dated: Miami, Florida
December 21st, 2015

Respectfully submitted,

_____

Jonathan Corbett
Petitioner, *Pro Se*
382 N.E. 191st St., #86952
Miami, FL 33179
E-mail: jon@professional-troublemaker.com

CERTIFICATE OF SERVICE

I, Jonathan Corbett, *pro se* Plaintiff in the above captioned case, hereby affirm that I have served Defendant United States of America this **Brief of Petitioner Jonathan Corbett** on December 21st, 2015, via electronic mail to:

1) Sharon Swingle, Sharon.Swingle@usdoj.gov
2) Jaynie Lilley, Jaynie.Lilley2@usdoj.gov

Dated: Miami, Florida
December 21st, 2015

Respectfully submitted,

_____

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