IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Jonathan Corbett Petitioner v. United States Department of Homeland Security, Respondent	**No. 12-_____** **MOTION TO TRANSFER TO DISTRICT COURT**

Jonathan Corbett, *pro se* Petitioner, hereby moves this Court to transfer proceedings to the United States District Court for the Southern District of Florida[1] as per 28 U.S.C. § 2347(b)(3), or alternatively as implied by 49 U.S.C. § 46110 or under 28 U.S.C. § 1651.

I. BACKGROUND

In or around October 2010, the Transportation Security Administration ("TSA") began implementation of a secret order requiring the inspection of the genitals, breasts, and buttocks of everyday travelers seeking to pass through airport security checkpoints across this nation. This search was ordered for use as primary screening, meaning that the search is the first in the line of TSA inspections and is

[1] This venue is appropriate because it is the venue in which Petitioner resides.

performed with neither suspicion nor as a later part of a search program that "escalates in intrusiveness."

The order has not been released publicly[2], but it is clear through the TSA's own public admissions that it has two distinct components: 1) the "nude body scanner[3]" component, which involves devices that create images of a person without his or her clothing using x-rays or other radiation for inspection by either a TSA screener or an automated system, and 2) the "pat-down" component, a police frisk-style search that requires TSA screeners to use their hands to physically touch the genitals, buttocks, and breasts of the traveler being searched. While the TSA is still in the process of implementing this order and therefore many travelers will still find themselves proceeding through the tried-and-true metal detectors, a consistently increasing percentage are required to submit to the genital inspection program, presently to the tune of at least 100,000 individuals *daily*.

This petition seeks to have this Court declare both components of the TSA's genital inspection program unconstitutional under the Fourth Amendment to the U.S. Constitution. In order to pass constitutional muster, checkpoint stops must be evaluated against a three-pronged test most clearly described in *Illinois v. Lidster*,

[2] The SOP is alleged by the TSA to constitute "Sensitive Security Information." See 49 U.S.C. 114, 40119.

[3] Nude body scanners have been given a plethora of names, which include Whole Body Imaging (WBI), Advanced Imaging Technology (AIT), Backscatter X-Rays (BKSX), and Millimeter Wave Devices (MMW). This petition refers to all such designated devices and any similar devices.

540 U.S. 419, 427 (2004). Additionally, suspicionless, "administrative searches" such as those ordered by the TSA must be evaluated against a stricter standard limiting their scope, as articulated in *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007). The TSA's genital inspection program can pass neither of these tests.

II. CASE HISTORY

Petitioner originally filed an action seeking review of the genital inspection program on November 16th, 2010, in the United States District Court for the Southern District of Florida. *Corbett v. United States*, 10-CV-24106 (S.D.F.L). This case was dismissed because that Court found that the genital inspection program was component of a TSA "order," and 49 U.S.C. § 46110 had divested the district courts of jurisdiction, with jurisdiction instead proper in this Court. Petitioner appealed that decision to this Court, which affirmed the ruling, and the U.S. Supreme Court refused *certiorari*. *Corbett v. United States*, 458 Fed. Appx. 866 (11th Cir. 2012), *cert. denied*, (collectively with district court proceedings, "*Corbett I*").

The appeals in *Corbett I* largely raised due process concerns because unlike most orders covered by § 46110, the genital inspection program was proceeded by no hearings, no public comment period, and was not even known to the public until well after it was issued. As a result, neither Petitioner nor any other party has ever

had an opportunity to gather and present evidence, call witnesses, or otherwise receive the *de novo* proceedings that due process demands. However, this Court, in affirming the dismissal of *Corbett I*, assured Petitioner that this Court can indeed afford him the due process to which he is entitled, and specifically noted that if a petition were filed in this Court, the Court may "transfer certain cases to a district court" to resolve questions of fact if the district court is better suited to do so. *See Corbett I*, Circuit Court Opinion, p. 8.

III. ARGUMENT

A. Genuine Issues of Fact Must Be Resolved

Both the *Lidster* and the *Aukai* tests require facts to be established before this Court may rule on the law.

Lidster is a three-pronged test designed to determine whether a checkpoint stop comports with the Fourth Amendment. The three prongs are "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Lidster* at 427.

Each prong itself may have many sub-components. In order to determine the gravity of the public concerns served by the search, in this particular instance,

the Court must consider fact-based questions including but not limited to the following:

1. How likely is it that a terrorist will target air travel in the future?
2. How much damage would likely be inflicted on the public should a terrorist attack be successful?
3. Can a small non-metallic explosive[4] actually bring down an airplane?

To determine the degree to which the genital inspection program advances the public interest, the Court must consider fact-based questions including but not limited to the following:

1. How effective is the genital inspection program at detecting non-metallic explosives?
2. Are there other, more effective methods that will accomplish the same aims?
3. Since a terrorist could hide an explosive from the genital inspection program by inserting it into a body cavity, is there any deterrent value at all?
4. Even if the genital inspection program does deter air terrorism, does it actually make the public any safer? (For example, if a terrorist realizes that

[4] The sole justification put forth by the TSA in support of their decision to implement the genital inspection program is that metal detectors cannot detect small explosive devices that lack metallic components. However, there is a lack of evidence to support that a small, non-metallic explosive device of the type that the program searches for is powerful enough to cause the demise of a commercial jetliner.

he cannot blow up 150 passengers on an airplane and instead blows up 150 passengers on a train, has the public's interest actually been served?)

5. What is the risk of cancer associated with the exposure to radiation produced by nude body scanners? What is the risk of transference of pathogens via the genital pat-down? Is it possible that more Americans will die due to the genital inspection program causing cancer and spreading disease than could possibly be saved by any terror deterrence the program might have?
6. Are travelers replacing air travel with car travel because of the intrusiveness of TSA searches? If so, since air travel is significantly safer than car travel, are more Americans dying on the roads than could possibly be saved by any terror deterrence the program might have?

Finally, to determine the severity of the interference with individual liberty, the Court must consider fact-based questions including but not limited to the following:

1. Would a reasonable member of the general public, if given the details of the intensity of TSA searches, find the searches offensive, undignified, humiliating, and/or disgusting?
2. What have been the effects on the general public? Have people experienced psychological or physical trauma as a result of the genital inspection

program? Have there already been "cancer clusters" and incidences of TSA-transmitted pathogens?

3. What is the severity of the potential health-related issues associated with genital inspection program, as described above?
4. Are there other, less invasive methods that will accomplish the same aims?

Because TSA searches are suspicionless searches forced upon the general public in the midst of exercising their constitutional right to travel, *Aukai*, as well as many other courts, have placed more stringent requirements on TSA searches. *Aukai* requires that "(1) the search is 'no more extensive or intensive than necessary, in light of current technology, to detect the presence of weapons or explosives;' (2) the search 'is confined in good faith to that purpose;' and (3) a potential passenger may avoid the search by choosing not to fly." *United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (*en banc*); *see also U.S. v. Fofana*, 620 F.Supp.2d 857 (S.D.O.H. 2009); *George v. Rehiel et. al*, No. 10-586, Order (D.E. #43, Oct. 28, 2011) (E.D.P.A.).

Many questions of fact (some overlapping with those required to evaluate the *Lidster* test and others not) arise when considering the *Aukai* test, including but not limited to the following:

1. Is the genital inspection program necessary to detect weapons or explosives? Are there less invasive but equally or more effective alternatives?

2. Is the genital inspection program useful for the detection of weapons or explosives?
3. Did the TSA implement the genital inspection program in good faith, or were there ulterior motives?
4. Does the TSA's implementation of the genital inspection program allow travelers to avoid the search by electing not to fly?

The sixteen questions listed above only address *some* of the facts that will be in dispute in relation to this petition. These are *not* questions of law, and Petitioner as of yet has never had an opportunity to gather evidence (*a la* discovery) or present evidence.

B. This Court Has the Authority to Transfer to the District Court

In its order affirming *Corbett I*, this Court noted that 28 U.S.C. § 2347(b)(3) permits this Court to transfer proceedings to a district court. This statute allows the Court to:

> ...transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

The government objected to the Court's opinion that § 2347(b)(3) can be applied to orders of the TSA. *See Corbett I*, Motion for Clarification. The Court declined to rule on the government's objection, declaring it irrelevant to the proceedings at hand. However, 28 USC § 2341(3)(B) makes clear that the statute applies to orders of "the Secretary of Transportation" and the administrator of the TSA is the "Under Secretary of Transportation for Security." Respondent has admitted the same in *Corbett I* in invoking 49 USC § 46110, which also defines its applicability as to the "Under Secretary of Transportation for Security," and Respondent is estopped from arguing otherwise here.

Regardless, 28 U.S.C. § 2347(b)(3) is but one source of authority for this Court's power to transfer this case to a district court. This Court can also imply the same authority from 49 USC § 46110, which requires actions to be originated in this Court, but does nothing to prevent this Court from exercising its authority, when the interest of justice so dictates, to utilize the district courts for their superior fact-finding resources. On the contrary, it should be noted that 49 USC § 46110(c) invites this Court to "tak[e] other appropriate action when good cause for its action exists." This is especially appropriate in this instance, where due process concerns require the Court to read authority to conduct proper fact finding tools into the statute, for failure to do so may render the statute unconstitutional as applied. "[W]here 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).

Finally, this Court may also derive its authority from the All Writs Act, 28 U.S.C. § 1651. This statute, which provides that this Court "may issue all writs necessary or appropriate in aid of their respective jurisdictions," aligns well with a situation in which asking for district court intervention would result in a reasonable determination of facts while hearing this petition solely according to appellate procedure may result in fact deficiency serious enough as to curtail due process. See *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), *citing* Harris v. Nelson, 394 U.S. 286, 299, 89 S. Ct. 1082, 1090-91 (1969) ("recognizing that courts may rely on their authority under the All Writs Act 'in issuing orders appropriate to assist them in conducting factual inquiries.'").

C. This Court Should Utilize Its Authority to Transfer

Since it is undisputed that no proceedings of any kind (of which Petitioner or any member of the public may have participated) have been held at the agency level – or at any level – this Court is left with the task of not only determining facts, but ensuring that Petitioner's right to marshal facts is accommodated. There exists three options for doing so: remanding to the agency, attempting fact finding

in this Court via ad-hoc discovery orders or the appointment of a special master, or engaging the assistance of the district courts.

Remanding to the agency is impossible in this circumstance. The genital inspection program stems from an order contained within a document that by law cannot be released to the public. The TSA, quite reasonably, does not and cannot hold public hearings on such documents. There exists no procedure for holding such a proceeding. They similarly do not and cannot deal with discovery demands – again, no procedure exists.

Beyond that, the core of Petitioner's challenge is outside of the agency's area of expertise. That is, the TSA's core area of expertise is (allegedly) security, not constitutional law, and the agency is therefore unable to hold a hearing that aims to address constitutional challenges. "Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Public Utilities Comm'n v. United States*, 355 U.S. 534, 539 (1958); *see also* *Johnson v. Robinson*, 415 U.S. 361 (1974). As the subject matter is outside of the TSA's area of expertise, it would be both improper and futile to direct the TSA to hold proceedings, and such proceedings would amount to no more than the fox guarding the hen house.

This Court may also be tempted to engage in fact finding itself. However, the Federal Rules of Appellate Procedure do not accommodate fact finding. The

word "discovery" does not even exist within the appellate procedure, and although this Court has the authority to order any fact finding it so chooses, essentially this Court would be forced to make up the rules as it goes along, exponentially increasing length and uncertainty of litigation. Perhaps the only section of the appellate procedure that could possibly accommodate is the appointment of a special master as per Fed. R. App. P. Rule 48, but even then, this offers no advantage and many disadvantages (most notably, that there is still no formal process as found in the Fed. R. Civ. P.) in comparison to a district court transfer.

When agency hearings have been altogether foregone, when holding new hearings is an impossibility, and when substantial questions of fact exist that will require more than "a few affidavits" from the parties (in this case, significant discovery of the variety likely to require court intervention[5] as well as perhaps dozens of witnesses), transfer to the district court best utilizes judicial resources, affords due process, and is in the interest of justice.

It should also be noted that this case raises issues of significant public importance, which is all the more reason why this case deserves the most thorough fact finding process that this Court may afford. The genital inspection program has

[5] It is anticipated that there will be significant disputes as to what is releasable and what is not, in light of the potential for the government to claim that any documents that may be beneficial to the Petitioner's case constitute SSI.

brought about no less than half a dozen federal lawsuits[6], threats of fines[7] and even arrest of travelers who have refused to participate[8], national scale protests[9], condemnation by countless lawmakers and legislative bodies at all levels of government[10], and even Presidential attention[11]. Affecting 2 million travelers

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[6] Most of these lawsuits have been dismissed on jurisdictional grounds, as was *Corbett I*, and as such, the merits of these cases have never been heard. *See*, for example, *Blitz v. Napolitano*, No. 11-2283 (4th Cir. 2011), *pending*; *Roberts v. Napolitano*, 10-CV-1966, 2011 WL 2678950 (D.D.C., July 7th, 2011); *Durso v. Napolitano*, 10-CV-2066, 2011 WL 2634183 (D.D.C. July 5th, 2011); *Redfern v. Napolitano*, 10-CV-12048, 2011 WL 1750445 (D. Mass., May 9th, 2011);

[7] For example, in November 2010, passenger John Tyner refused to allow the TSA to touch his genitals, and was threatened with a fine of $11,000. *See* "TSA Investigating 'Don't Touch My Junk' Passenger," Wired Magazine, November 16th, 2010, http://www.wired.com/threatlevel/2010/11/tsa-investigating-passenger/

[8] For example, in July 2011, passenger Andrea Abbott was arrested for "disorderly conduct" after refusing to allow the TSA to touch her teenage daughter's genitals. See "Mom jailed for raging on TSA agents over daughter's pat down; didn't want girl's 'crotch grabbed,'" NY Daily News, July 13th, 2011, http://articles.nydailynews.com/2011-07-13/news/29788651_1_tsa-agents-nashville-airport-nashville-police

[9] For example, in November 2010, the "National Opt-Out Day" protest occurred in dozens of airports across the country. See "How Your TSA Pat-Down Will Look On Opt-Out Day," Gothamist, November 22nd, 2010, http://gothamist.com/2010/11/22/photos_what_your_tsa_pat-down_will.php

[10] For example, the legislature of the State of Texas was set to outlaw invasive pat-downs before the TSA threatened to shut down all flights to the state; Alaska State Rep. Sharon Cissna was molested by TSA over her prosthesis following breast cancer surgery; U.S. Rep. Rand Paul was detained for over 1 hour at a TSA checkpoint; U.S. Rep. John Mica (a TSA authorization sponsor in 2002) referred to the agency as "the little bastard child I created," *etc., ad nauseum*. *See* generally, "Some states want TSA to ease up," USA Today, May 13th, 2011, http://usatoday30.usatoday.com/news/nation/2011-05-12-invasive-tsa-pat-down-groping-law_n.htm

daily, TSA inspection is perhaps the most common interaction that a U.S. citizen may have with the federal government, and yet here we are with a case of first impression for this Court now two years and 1.4 billion passengers later.

IV. CONCLUSION

It is high time that this controversy receive full judicial review, and for the foregoing reasons, fact finding in the district court is the most prudent step towards that objective. Petitioner therefore requests that this Court transfer the proceedings to the United States District Court for the Southern District of Florida.

Dated: Miami, FL
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Respectfully submitted,

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[11] See "Obama, Clinton ask TSA to make body screening less invasive," International Business Times, November 22nd, 2010, http://www.ibtimes.com/obama-clinton-ask-tsa-make-body-screening-less-invasive-247986