UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROBERT GRAY, Petitioner, v. TRANSPORTATION SECURITY ADMINISTRATION, Respondent.	)	Docket No. 05-2024

MEMORANDUM IN OPPOSITION TO PETITIONER'S EMERGENCY MOTION FOR INTERIM RELIEF PURSUANT TO 49 U.S.C. § 46110

Respondent, the Transportation Security Administration ("TSA"), submits this memorandum in opposition to petitioner Robert Gray's Emergency Motion for Interim Relief Pursuant to 49 U.S.C. § 46110, in which petitioner alleges that TSA has placed him on the "No Fly List" in retaliation for his filing of a lawsuit against TSA in federal district court and a petition for review in this Court, thereby preventing him from traveling by air or working as a pilot in the airline industry.

Petitioner's motion should be denied. First, for the reasons set forth in the materials which we are moving to file ex parte and in camera,[1] petitioner cannot establish good cause or irreparable

[1] Because public disclosure of the identity of individuals on the No Fly List or the specific criteria used to determine which individuals should be included on the list would compromise the safety and security of airline passengers, TSA's regulations expressly prohibit the disclosure of the contents of Security Directives, as well as the selection criteria to be used in screening airline passengers. See Declaration of Lee S. Longmire ("Longmire Decl.") ¶¶ 8, 10. TSA therefore can neither confirm nor deny on the public record that petitioner (or anyone else) has been placed on the No Fly List. See Gordon v. FBI, 2005 WL 1514078, at * 4 (N.D. Cal. June 23, 2004) ("The watch lists were developed and are maintained for a law enforcement purpose. Requiring the government to reveal whether a particular person is on the watch lists would enable criminal organizations to circumvent the purpose of the watch lists by determining in advance which of their members may be questioned."). The Government therefore is simultaneously moving for leave to file the relevant

harm that would warrant the granting of his emergency motion for interim relief. This is particularly so in view of the extraordinary nature of relief that petitioner is requesting -- an injunction that would direct TSA to remove him from a security watch-list, an action which no court of which we are aware has taken. In these circumstances, and because 49 U.S.C. § 46110(c) mandates that deference be given to the agency's factual findings under the substantial evidence standard, this Court should not take any action until it has had the opportunity to review the classified administrative record on which the Government relied in making any assessment that might implicate petitioner, which we will be providing to the Court, under seal in, short order. We anticipate filing these materials with the Court no later than two weeks from today, once all necessary materials have been obtained from relevant agencies, a determination has been made as to the highest level of classification at issue, and all security arrangements have been resolved.

Petitioner also has failed to demonstrate that he is likely to succeed on the merits. Petitioner's claim is flawed at the outset because, as the classified administrative record will reveal, it is not TSA but another agency within the Government that makes the determination that an individual poses or is suspected of posing a risk to airline safety, and therefore should be placed on a security watch-list, including the No Fly List. The classified administrative record also will establish that any action taken by TSA (or other agencies of the Govenment) was not retaliatory, and the availability of ex parte, in camera review provides petitioner all the process he is due inasmuch as substitute procedural safeguards are impracticable, and given the classified and sensitive security information at issue.

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information under seal for ex parte, in camera review.

Finally, the remaining equitable factors weigh strongly against entry of the requested injunction. The overwhelming public interest in preventing further terrorist attacks using airplanes as deadly weapons counsels against the entry of any injunction that would direct TSA to remove a name from a security watch-list, at least until such time as this Court has had the opportunity review the classified administrative record.

STATUTORY AND REGULATORY BACKGROUND

Following the terrorist attacks of September 11, 2001, Congress established the TSA as an agency within the United States Department of Transportation, and transferred much of the responsibility for civil aviation security from the Federal Aviation Administration ("FAA") to the TSA. See Aviation and Transportation Security Act ("ATSA"), Pub. L. No. 107-71, 115 Stat. 603 (November 19, 2001); codified at 49 U.S.C. §§ 114(d), (f); Declaration of Lee S. Longmire ("Longmire Decl.") ¶ 3. Pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, § 15023, 116 Stat. 2135, TSA was transferred from the Department of Transportation to the Department of Homeland Security, effective March 1, 2003.

Congress has ordered the Assistant Secretary for TSA[2] to "prescribe regulations to protect passengers and property on an aircraft * * * against an act of criminal violence or aircraft piracy." 49 U.S.C. § 44903(b). Pursuant to this authority, the government has promulgated regulations that

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[2] Although the statute references the Under Secretary of Transportation for Security, effective August 19, 2003, the TSA amended its regulations, 49 C.F.R. chapter XII, to reflect the title change of the "Under Secretary of Transportation for Security" to the "Administrator of the Transportation Security Administration," as part of its move from the Department of Transportation to the Department of Homeland Security. See TSA Transition to Department of Homeland Security; Technical Amendments Reflecting Organizational Changes, 68 Fed. Reg. 49718 (Aug. 19, 2003). This title has more recently changed from "Administrator of the Transportation Security Administration" to the "Assistant Secretary for TSA." See Longmire Decl. ¶ 3.

require each aircraft operator to adopt a "security program" approved by the TSA which must "[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. §§ 1544.101(a) and 1544.103(a)(1). The regulations also provide that the TSA may issue a "Security Directive" when it determines that "additional security measures are necessary to respond to a threat assessment or a specific threat against civil aviation." 49 C.F.R. § 1544.305(a).

By statute, the Assistant Secretary must "provide for the screening of all passengers and property * * * that will be carried aboard a passenger aircraft * * *." 49 U.S.C. § 44901(a) (emphasis added); see 49 C.F.R. §§ 1544.201-1544.213. The Assistant Secretary is required to prescribe regulations requiring an air carrier to "refuse to transport – [] a passenger who does not consent to a search * * * establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance." 49 U.S.C. § 44902(a); see 49 C.F.R. §§ 1540.107 and 1544.201(c). By operation of law, "[a]n agreement to carry passengers or property in air transportation * * * is deemed to include an agreement that the passenger or property will not be carried if consent to search for [these] purpose[s] * * * is not given." 49 U.S.C. § 44902(c). Subject to implementing regulations, the statute also permits an air carrier to "refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." 49 U.S.C. § 44902(b).

Congress also has mandated the use of a "passenger prescreening system" to identify passengers who might pose a risk to civil aviation, and to ensure that those identified are adequately screened. The statute requires the government to "ensure that the Computer-Assisted Passenger Prescreening System, or any successor system (i) is used to evaluate all passengers before they board

an aircraft; and (ii) includes procedures to ensure that individuals selected by the system and their carryon and checked baggage are adequately screened." 49 U.S.C. § 44903(j)(2).

Congress additionally has directed the Assistant Secretary to establish procedures for notifying appropriate officials "of the identity of individuals" who are "known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline passenger safety * * *." 49 U.S.C. § 114(h)(2). The Under Secretary (now Assistant Secretary) also is charged with establishing "policies and procedures" which require air carriers "to identify individuals on passenger lists who may be a threat to civil aviation or national security" and when such an individual is identified, to prevent him or her "from boarding an aircraft" or to "take other appropriate action * * *." Id. § 114(h)(3).

The TSA has implemented these provisions through a series of Security Directives and Emergency Amendments that require air carriers to check their employee lists and passenger lists against a list of individuals (the "No Fly List") who are barred from boarding an aircraft. See Longmire Decl. ¶ 7. The No Fly List is updated continually, and the TSA requires that air carriers monitor it closely. Id. From time to time, TSA revises the procedures prescribed by these Security Directives and issues new Security Directives that supersede those previously issued. Id.

STATEMENT OF FACTS

Petitioner, a permanent legal resident who holds a British passport, alleges that, since 1997, he has worked as a pilot for a number of domestic airlines, flying small commercial aircraft. See Verified Amended Complaint ¶¶ 1, 9, Gray v. TSA, Civil No. 05-11445 DPW (D. Mass.). Petitioner alleges that, on November 3, 2004, he filed an online application with TSA seeking authorization to obtain flight training on larger aircraft from CAE SimuFlite. Id. ¶ 12 & Exhibit A. In an

electronic mail message dated December 16, 2004, TSA stated that it was unable to further process petitioner's application and would not grant final approval for him to receive flight training due to derogatory information. Id. ¶¶ 13-14 & Exhibit B.

Thereafter, in an electronic mail message to petitioner dated January 27, 2005, TSA, through Tim Upham, Office of Transportation Vetting and Credentialing, informed petitioner that he was denying petitioner's request to receive flight training. Id. ¶¶ 20-21 & Exhibit C. In particular, the electronic mail message informed petitioner that, based upon materials available to TSA which Mr. Upham had personally reviewed, petitioner was found to "pose a threat to aviation or national security," and therefore was ineligible to receive flight training pursuant to 49 C.F.R. § 1552.3. Id. ¶ 21 & Exhibit C. The electronic mail message further informed petitioner that he could appeal this determination by serving upon TSA a written reply or a written request for releasable materials upon which TSA's determination was based, within 30 days of service of the determination. Id. & Exhibit C. The electronic mail message further informed petitioner that TSA does not disclose classified information and reserves the right not to disclose other information that did not warrant disclosure or which was protected from disclosure by law. Id. ¶ 23 & Exhibit C.

On February 22, 2005, petitioner, through counsel, replied to the January 27, 2005 denial by letter. Id. ¶ 28 & Exhibit D. In the letter, petitioner's counsel disputed TSA's determination and requested all documents or data upon which the determination was based. Id. ¶ 29 & Exhibit D. By letter dated March 24, 2005, TSA enclosed several documents that it was authorized to release and upon which the determination to deny petitioner flight training was based. Id. ¶ 30 & Exhibit E. The letter further stated that TSA had made redactions in the documents for privileged information. Id. ¶ 31 & Exhibit E. By letter dated March 31, 2005, TSA enclosed an additional document that

it was authorized to release and upon which the determination to deny petitioner flight training was based. Id. ¶ 35 & Exhibit F.

By letter dated April 1, 2005, petitioner, through counsel, formally appealed and/or challenged the sufficiency of TSA's response to his request for documents and information. Id. ¶ 44 & Exhibit G. By letter dated April 14, 2005, TSA responded to petitioner's counsel's letter dated April 1, 2005, and stated that the documents provided on March 24 and 31, 2005, constituted "all of the documents upon which the determination in this matter was based that TSA is authorized to release." Id. ¶ 45 & Exhibit H. The letter further provided that petitioner could appeal TSA's denial of his request for flight training, and that any such appeal must be filed no later than April 24, 2005. Id. & Exhibit H.

By letter dated April 14, 2005, petitioner, through counsel, provided formally appealed TSA's denial of his request for flight training. Id. ¶ 46 & Exhibit I.. In the appeal, petitioner's counsel referenced his letter of February 22, 2005; suggested that this case "may well be an instance of confusion of identities;" and objected to the procedure whereby petitioner was assertedly "precluded from learning the most basic information concerning the basis for the adverse action taken against him." Id. Exhibit I.

By letter dated May 11, 2005, TSA, through Rodney W. Turk, Assistant Administrator, Office of Transportation Vetting and Credentialing, denied petitioner's appeal. Id. ¶ 47 & Exhibit J. In the letter, Assistant Administrator Turk stated that: "After personally reviewing the denial and other information and materials available to TSA, I have determined that Mr. Gray poses a security threat and the denial of Mr. Gray's flight school training was appropriate." Id. Exhibit J.

Petitioner filed simultaneous actions in this Court (No. 05-2024) and the United States District Court for the District of Massachusetts (Civil No. 05-11445 DPW), alleging violations of his rights to due process, as well as violations of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, and the Privacy Act, 5 U.S.C. § 552a, in connection with the denial of permission to take flight training.

On September 16, 2005, Gray filed a Verified Amended Complaint in district court and moved for a preliminary injunction, alleging that, on or about September 6, 2005, TSA placed his name on the No Fly List, thereby retaliating against him for the filing of the underlying lawsuit in violation of the First Amendment, and violating his rights to due process. See Verified Amended Complaint ¶¶ 62, 65-70. On September 21, 2005, the district court (Woodlock, J.) denied the motion for a preliminary injunction, determining, *inter alia*, that it lacked jurisdiction to consider the questions raised in petitioner's motion until this Court had ruled on Gray's petition for review.

On September 21, 2005, Gray filed the instant Emergency Motion for Interim Relief Pursuant to 49 U.S.C. § 46110.

STANDARD OF REVIEW

28 U.S.C. § 46110(c) provides, in pertinent part, that:

> When the petition [for review] is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists.

The only statutorily-imposed limitation on the court's broad ability to "affirm, amend, modify, or set aside" an agency order is a mandated deference to an agency's factual findings: "Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive." 49 U.S.C. § 46110(c).

In the somewhat related context of adjudicating a motion for an injunction pending appeal, this Court considers the same factors as those governing the entry of a preliminary injunction; namely, (1) whether the moving party has demonstrated a likelihood of success on the merits; (2) whether the moving party has demonstrated the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest. See Air Line Pilots Ass'n v. Guilford Transp. Indus., Inc., 399 F.3d 89, 95 (1st Cir. 2005); see also Largess v. Supreme Judicial Court for the State of Massachusetts, 373 F.3d 219, 224 (1st Cir. 2004) (denying requested injunction pending appeal on ground that plaintiffs' "showing so far made as to likelihood of success * * * is not sufficient to justify interim relief"). Although courts ordinarily consider each of these factors, the first is paramount. As this Court has emphasized, "[t]he *sine qua non* of this four-part inquiry is likelihood of success on the merits; if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." New Comm Wireless Servs., Inc. v. SpringCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002).

ARGUMENT

I. PLAINTIFF HAS FAILED TO ESTABLISH GOOD CAUSE OR IRREPARABLE HARM THAT WOULD WARRANT ENTRY OF THE REQUESTED INJUNCTION

Petitioner cannot establish good cause or irreparable harm sufficient to warrant entry of the requested injunction. First, the information which we are moving to file under seal for ex parte and in camera review substantially undercuts petitioner's claim of irreparable harm. This harm must be balanced against the extraordinary nature of the relief that he is requesting -- an injunction that would direct TSA to remove him from a security watch-list -- an action which no court of which we are aware has taken. In view of the fact that TSA has determined that petitioner poses a threat to aviation or national security in connection with the related denial of his request to receive flight training, any interest that petitioner possesses "pales in significance to the government's security interests in preventing pilots from using civil aircraft as instruments of terror." Jifry v. FAA, 370 F.3d 1174, 1183 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 1299 (2005). As the Supreme Court has noted, "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)).

Moreover, because 49 U.S.C. § 46110(c) mandates that deference be given to an agency's factual findings under the substantial evidence standard, this Court should not take any action until it has had the opportunity to review the classified administrative record on which the Government relied in making any assessment that might implicate petitioner, which we will be filing under seal and in short order. As this Court has explained, "substantial evidence is conducted on the record as a whole," Penobscot Air Services, Ltd. v. FAA, 164 F.3d 713, 718 (1st Cir. 1999), and includes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 477 (1951) (internal quotation marks omitted).[3] Although the reviewing court must take into account contradictory evidence in the record, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 522, 523 (1981) (internal quotation marks omitted).

In this case, to enable this Court to perform its reviewing responsibility under section 46110(c), we will be filing, under seal, the classified administrative record on which the Government relied in making any threat assessments regarding the petitioner. This Court's ex parte, in camera review of this material strikes a proper balance between petitioner's interests in vindicating his rights, and the Government's interests in protecting classified information and defending sensitive decisions that implicate national security, as well as the overwhelming public interest in preventing further terrorist attacks using airplanes as deadly weapons. This procedure also is consistent with Congressional intent, as evidenced by the recent enactment of 49 U.S.C. § 46111, which expressly provides for such review when the Federal Aviation Administration revokes a citizen's pilot certificate (49 U.S.C. § 46111(e)). Because petitioner's motion has been filed on an emergency basis, we have been unable to complete the administrative record, determine the highest level of classification at issue, and make all necessary security arrangements by today's date, but anticipate filing these materials with the Court under seal no later than two weeks from today, once all these issues have been resolved.

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[3] This Court has also held that, in applying substantial evidence review under section 46110(c), "we may be guided by the same principles that courts have applied to substantial evidence review under the APA." Penobscot Air Services, 164 F.3d at 718 n.1.

At bottom, in view of the national security concerns that are implicated by petitioner's motion, and because this Court cannot accord the statutorily-mandated deference to the agency's factual findings until it has had the opportunity to review the classified administrative record, this Court should defer a ruling on petitioner's motion until the Government is able to file the classified administrative record with the Court, which we anticipate will be done in short order.

II. PLAINTIFF HAS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

A. First Amendment Retaliation Claim

Petitioner's primary argument on the merits is that, "[b]ased upon the record before this Court, it is exceedingly likely that Gray will be able to establish that the filing of the Complaint and the Petition was, at a bare minimum, a 'substantial' or 'motivating' factor in TSA's retaliatory decision to place him on the No-Fly List." Pet. Mem. at 8. As a threshold matter, petitioner's claim fails at the outset because, as the classified administrative record will reveal, it is not TSA but another agency within the Government that makes the determination that an individual poses or is suspected of posing a risk to airline safety, and therefore should be placed on a security watch-list.

In addition, the test outlined by the Supreme Court in First Amendment retaliation cases requires that petitioner show "that [his] conduct was constitutionally protected, and that this conduct was a 'substantial factor' [or] * * * a 'motivating factor'" driving the allegedly retaliatory decision and, even then, that TSA would be able to defeat a finding of liability by showing that they "would have reached the same decision * * * even in the absence of the protected conduct." Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). Hence, the merits of this claim,

too, will rise and fall on the basis of the classified administrative record, which will demonstrate that any action taken by the Government was for legitimate purposes, and was not retaliatory.

B. Due Process Claim

Petitioner also cannot show that he is likely to succeed on the merits of his Due Process claim. To begin with, TSA afforded petitioner sufficient notice and the opportunity for a hearing in connection with the denial of his request for flight training. TSA provided petitioner notice of the denial; afforded him the opportunity to request releasable materials upon which TSA's determination was based; afforded him the opportunity to appeal and/or challenge the sufficiency of TSA's response to his request for documents and information; and afforded him the opportunity to appeal the denial of his request for flight training. Although petitioner complains that he was not afforded the opportunity to review all of the documents upon which TSA made that determination, courts have upheld TSA's authority to withhold such documents as detrimental to transportation safety. See, e.g., Jifry, 370 F.3d at 1182 ; Chowdhury v. Northwest Airlines Corp., 226 F. Supp.2d 608, 610-15 (N.D. Cal. 2004).

Nor has petitioner shown that he is likely to succeed on the merits of his due process claim in connection with his alleged placement on the No Fly List. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Dickson v. Office of Personnel Management, 828 F.2d 32, 41 (D.C. Cir. 1987) ("[D]ue process is a flexible concept, tailored to provide a meaningful opportunity to be heard, but satisfied by no fixed formula."). The "fundamental requirement" of due process is a meaningful opportunity to be heard. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Generally, in determining whether administrative procedures are constitutionally adequate, courts weigh three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

It also is well established that post-deprivation process is constitutionally sufficient when it is impracticable to provide pre-deprivation process. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). Determining whether a post-deprivation hearing satisfies the requirements of due process entails "an examination of the competing interests at stake, along with the promptness and adequacy of later proceedings." United States v. James Daniel Good Real Property, 510 U.S. 43, 53 (1993). Thus, a reviewing court should balance the private interest affected, the risk of erroneous deprivation of that interest, and the likely value of additional safeguards, against the government's interest. Id.

In this case, in view of the Government's immense security interest in protecting against security risks posed by airmen -- particularly viewed in the wake of the September 11 attacks -- ex parte, in camera review of the record is all the process that petitioner is due, inasmuch as substitute procedural safeguards are impracticable given the classified and sensitive security information at issue. See Jifry, 370 F.3d at 1183. In circumstances where advance notice would impinge on security interests of the United States, an agency may provide notice after the action is taken, see Holy Land Found. for Relief & Development. v. Ashcroft, 333 F.3d 156, 163 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004); National Council of Resistance of Iran v. Dept. Of State, 251 F.3d 192, 208 (D.C. Cir. 2001), the notice provided by the agency need not include classified information,

see Holy Land Foundation, 333 F.3d at 163; and the agency may do so even where the entity may argue that its "opportunity to be heard was not meaningful [because] the Secretary relied on secret information to which they were not afforded access." People's Mojahedin Org. of Iran v. State Department, 327 F.3d 1238, 1242 (D.C. Cir. 2003). And, contrary to petitioner's assertions, due process does not require the Government to delay action in circumstances where such delay could harm the Nation's security interests. See Holy Land Foundation, 333 F.3d at 163; National Council of Resistance of Iran, 251 F.3d at 208. See generally Mathews, 424 U.S. at 333-34 (holding that due process "'is not a technical conception with a fixed content unrelated to time, place and circumstances,'" but rather "'is flexible and calls for such procedural protections as the particular situation demands.'").

III. THE OTHER EQUITABLE FACTORS WEIGH AGAINST ENTRY OF THE REQUESTED PRELIMINARY INJUNCTION

A consideration of the remaining equitable factors also weighs against entry of the requested injunction. Congress has mandated that the TSA establish procedures for notifying airline security officers of the identity of individuals known to pose, or suspected of posing, a risk of air piracy or terrorism, or a threat to airline or passenger safety, see 49 U.S.C. § 114(h)(2), and TSA has done so by issuing Security Directives and Emergency Amendments which direct air carriers to implement specific security procedures and to take specific security measures with respect to a group of individuals who are identified on the No Fly List. See Longmire Decl. ¶¶ 7-8.

Hence, assuming the truth of petitioner's assertion that he has been placed on the No Fly List, an injunction that would require TSA to remove him from any relevant Security Directives would be in the teeth of a determination that petitioner poses or is suspected of posing a risk to

airline safety. Id. ¶ 9. Any such injunction would harm the United States and would be inimical to the public interest. See Jifry, 370 F.3d at 1183; Bl(a)ck Tea Society v. City of Boston, 378 F.3d 8, 15 (1st Cir. 2004) (holding that "making public safety a reality" is a valuable factor to consider in balancing hardships and weighing the public interest); Holy Land Foundation for Relief & Development v. Ashcroft, 219 F. Supp.2d 57, (D.D.C. 2002) (proposed injunction to unblock assets would injure the Government and harm the public interest given the strong interest in curbing the escalating violence in the Middle East and its effects on the security of the United States and the world), aff'd, 333 F.3d 156 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004). Indeed, the inherent gravity of that act, and the injury that arises "any time [the government] is enjoined by a court from effectuating statutes enacted by representatives of its people," New Motor Vehicle Board v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in Chambers), itself counsels against entry of the requested injunction.

CONCLUSION

For all of these reasons, this Court should deny petitioner's request for emergency injunctive relief injunction or, in the alternative, defer consideration of petitioner's motion until it has had the opportunity to review the classified administrative record.

Respectfully submitted,

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