IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NICHOLAS GEORGE,	)	
	)	
Plaintiff,	)	
	)	**No. 2:10-cv-586 (EL)**
v.	)	
	)	**Electronically Filed**
WILLIAM REHIEL, *et. al.*,	)	
	)	
Defendants.	)	

INDIVIDUAL FEDERAL DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S CONSTITUTIONAL CLAIMS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the individual federal defendants hereby move to dismiss the complaint on the grounds that it fails to state a claim upon which relief can be granted. A memorandum of law has been filed in support of this motion and a proposed order tendered for the Court's convenience.

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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Dated: October 5, 2010

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MEMORANDUM IN SUPPORT OF
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INTRODUCTION

This Motion to Dismiss is filed pursuant to Federal Rule of Civil Procedure 12(b)(6) on behalf of the individual federal defendants, Doe Defendants 1 through 5, for actions allegedly taken during an airport stop and subsequent questioning. Mr. George filed this Amended Complaint ("the Complaint") on August 13, 2010, bringing individual capacity claims against Doe Defendants 1, 2, and 3 (collectively, "TSA defendants") and Doe Defendants 4 and 5 (collectively, "JTTF defendants").[1] He also brings individual capacity claims against Defendants William Rehiel and Edward Richards of the Philadelphia Police, and state law tort claims for false arrest, false imprisonment, battery and false light against the United States under the Federal Tort Claims Act ("FTCA").[2]

As to these five individual federal defendants, plaintiff Nicholas George brings causes of action under the Fourth and First Amendments of the Constitution (Claims for Relief I and III). The individual federal defendants are entitled to qualified immunity on both constitutional claims against them. Accordingly, the First and Third Claims for Relief should be dismissed as a matter of law.

RELEVANT FACTS[3]

On August 29, 2009, plaintiff Nicholas George arrived at Philadelphia International Airport. He was scheduled to fly to Ontario International Airport in California on Southwest

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[1]While the complaint avers that one of the JTTF defendants was a Homeland Security Officer, both Doe Defendant 4 and 5 have been identified by the FBI as deputized to the Joint Terrorism Task Force. Docket No. 17 (expedited discovery filed under seal).

[2]The United States is filing a Motion to Dismiss concurrently herewith.

[3] For purposes of the Motion to Dismiss only, all facts as alleged in the complaint are accepted as true. *See Pinker v. Roche Holdings Ltd.*, 292 F.3d 261, 374 n. 7 (3d Cir. 2002).

Airlines, where he would begin his senior year at Pomona College. Mr. George checked in, received his boarding pass, and proceeded to the security screening area, where he passed through the metal detectors. He was then asked to step aside and wait for additional security screening. *See Compl.* ¶¶ 16-22.

Doe Defendants 1 and 2, both TSA officers, performed the additional security screening. They asked Mr. George to step into the secondary screening area, a glass enclosure next to the metal detector, where he was asked to empty his pockets. His pockets contained a set of handwritten cards containing Arabic words on one side and English translation on the other. *Compl.* ¶ 24.[4] While some of the words on the flashcards were innocuous, the cards also contained the words "bomb," "terrorist," "kidnapping," "explosion," "an attack," "battle," "day after tomorrow," "to kill," "to target," and "to wound." In addition, Mr. George had traveled to Jordan, Sudan, Ethiopia, and Malaysia. *Compl.* ¶ 25, 70.

Doe Defendant 1 or 2 then contacted their supervisor, Doe Defendant 3. *Compl.* ¶ 29. According to the complaint, Doe Defendant 3 arrived some minutes later and questioned Mr.

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[4]A copy of the "flashcards" recovered from Mr. George's pockets is attached to the United States' Motion to Dismiss at Appendix A and incorporated by reference. In reviewing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court may consider the allegations of the complaint, as well as documents attached to or specifically referenced in the complaint without converting the motion into a motion for summary judgment. *See, e.g. Pittsburgh v. W.Penn Power Co.*, 147 F.3d 256, 259 (3d Cir. 1998); *In re Burlington Coat Factory Sec. Litig.* 114 F.3d 1410, 1426 (3d Cir. 1997); *Pension Benefit Guar. Corp. v. White Consolidated Indus.*, 998 F.2d 1192, 1196-97 (3d Cir. 1993); *Langman Engineering and Environmental Services, Inc. v. Greenwich Insurance Company*, No. 07-2983, 2008 WL 940803 (D.N.J. April 7, 2008); *see also* 5B Charles Alan Wright & Arthur Miller, Federal Practice & Procedure, Civil, § 1357 (3d ed. 2004 & 2010 Supp.). Thus, the Court may consider these flashcards without converting the present motion to a motion for summary judgment because Mr. George repeatedly references the existence of the flashcards, states that he was detained "solely because he passed through an airport screening checkpoint with a set of Arabic-English flashcards[,]" and his contention that he was using these cards to "study Arabic" forms the basis of his First Amendment retaliation claim. *See, e.g., Compl.* ¶ 1, 24, 26, 83.

George regarding the cards and a book on American foreign policy found in his carry-on bag. Mr. George claims he told Doe Defendant 3 that they were language flashcards that he used because he was studying Arabic in college. *Compl.* ¶ 40. The complaint states that after approximately fifteen minutes of questioning by Doe Defendant 3 - questioning which Mr. George characterizes as "hostile and aggressive," *Compl.* ¶ 37 - defendant Officer Rehiel of the Philadelphia Police Department arrived, placed Mr. George in handcuffs, and led him to the airport police station. *Compl.* ¶¶ 42-43. He was informed that he was being taken "for extra screening." *Compl.* ¶ 46. Mr. George, however, states that he was "handcuffed and arrested by Officer Rehiel at approximately 2:20 in the afternoon." *Compl.* ¶ 49. At the airport police station, he was placed in a holding cell while "the Philadelphia police officers . . . called various federal and state agencies including the [Joint Terrorism Task Force] . . . in order to arrange for Mr. George to be interrogated while in custody." *Compl.* ¶ 63.

Two Joint Terrorism Task Force ("JTTF") Officers, Doe Defendants 4 and 5, arrived approximately two hours later. Doe Defendants 4 and 5 inspected Mr. George's carry-on luggage, then brought him to an interview room. *Compl.* ¶ 64. They asked questions about his personal and educational background, his religious and political beliefs, and whether he had met any persons "overtly against the U.S. government" while traveling overseas. *Compl.* ¶¶ 70, 71. Mr. George also states that Doe Defendant 4 or 5 asked him if he knew why he was being held, and called him a "f—ing idiot" when he replied that he did not." *Compl.* ¶ 69. After approximately thirty minutes, they informed him that they had determined that he was not a threat and that he was free to leave. *Compl.* ¶¶ 67, 73. According to Mr. George, he was released about seven p.m., approximately five hours after his initial screening by the TSA defendants. *Compl.* ¶ 74.

Mr. George returned to the airport terminal. Because he had missed his flight, he was rescheduled on a flight the following day. *Compl.* ¶ 80.

ARGUMENT

The individual federal defendants, Doe Defendants 1 through 5, move to dismiss the First and Third Claims for Relief pursuant to Federal Rules of Federal Procedure 12(b)(6). These claims, which seek damages for alleged violations of the First and Fourth Amendments under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), are subject to dismissal because Mr. George has failed to state a claim upon which relief can be granted.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When considering such a motion, a court should assume to be true only the complaint's well-pleaded factual allegations, setting aside its legal conclusions. *See id.* Conducting a plausibility inquiry is a "context-specific task" that "requires the reviewing court to draw on its judicial experience and common sense." *Id*. at 1950 (internal citation omitted). Where the facts as presented by the plaintiff do not "permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – that the pleader is entitled to relief," and the dismissal motion should be granted. *Id*. (*citing* Fed. R. Civ. P. 8(a)(2)).

Applying these principles to the complaint, Mr. George has not pled facts sufficient to give rise to the plausible inference of either a First or Fourth Amendment violation and his First and Third Claims for Relief should be dismissed accordingly.

I. Qualified Immunity Bars Mr. George's Claims.

Mr. George's First and Third Claims for Relief should be dismissed because the individual federal defendants are protected by qualified immunity. Qualified immunity shields government officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also In re City of Phila. Litig.*, 49 F.3d 945, 961 (3d Cir. 1995). The Supreme Court has provided a two-part inquiry for the analysis of a qualified immunity defense. *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009); *Curley v. Klem*, 499 F.3d 199, 206-08 (3d Cir. 2007). The first inquiry asks whether the facts alleged, viewed in the light most favorable to the plaintiff, show that the official's conduct violated a constitutional right. *Saucier v. Katz,* 533 U.S. 194, 201 (2001) (*abrogated by Pearson v. Callahan*, 129 S. Ct. 808 (2009)); *Wright v. City of Phila.*, 409 F.3d 595, 600 (3d Cir. 2005). The second asks whether the constitutional right the official is accused of violating was "clearly established" under the circumstances at the time of the alleged violation. *Saucier*, 533 U.S. at 201; *Wright* 409 F.3d at 600. If the answer to either question is no, qualified immunity attaches and the inquiry ends.[5] Qualified immunity is intended to shield officials from the harassment of litigation as much as the fear of damages. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) . It thus provides "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Accordingly, the Supreme Court has repeatedly stressed that qualified

[5]While in the past courts were required to consider the question of whether a constitutional violation had occurred before turning to the "clearly established" prong, it is now the case that courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 129 S. Ct. at 818.

immunity defenses should be resolved at the earliest possible stage of litigation. *See*, *e.g.*, *Hunter v. Bryant*, 502 U.S. 224 (1991) (*per curiam*); *Anderson*, 483 U.S. at 638 (1987); *Mitchell,* 472 U.S. at 524; *Wright* 409 F.3d at 599.

The qualified immunity defense raises a high bar, protecting government officials from suit unless they are "plainly incompetent or . . . knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see also McLaughlin v. Watson*, 271 F.3d 566, 570 (3d Cir. 2001) (*quoting Malley*, 475 U.S. at 341). To determine whether the official could have reasonably believed that his or her conduct was lawful, courts "examin[e] the state of the law at the relevant time," and the the "information available to the defendants in the case." *Good v. Dauphin County Soc. Serv.*, 891 F.2d 1087, 1092 (3d Cir. 1989); *see also Anderson*, 483 U.S. at 641; *Patterson v. Armstrong County Children and Youth Services*, 141 F.Supp.2d 512, 529 (W.D.Pa. 2001). The court must examine the existence and parameters of the right allegedly violated "in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. Thus, a plaintiff asserting the violation of a constitutional right in the *Bivens* arena must define the right allegedly violated not as a general proposition, but "in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. Further, the test asks whether reasonable officials, not judges or constitutional scholars, could have thought the alleged conduct was permissible under the Constitution. *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Therefore, courts reviewing an assertion of qualified immunity must make "accommodation for reasonable error." *Hunter*, 502 U.S. at 229 (internal citation omitted).

In keeping with this principle, the Supreme Court has stated that an appropriate starting point for a qualified immunity analysis is to define the claimed right with specificity. *See, e.g.*, *Brousseau v. Haugen*, 543 U.S. 194, 200 (2004) (question is whether Fourth Amendment jurisprudence clearly established that it was a violation for officers to shoot "'a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight'") (internal citation omitted); *Wilson*, 526 U.S. at 615 ("[T]he appropriate question is the objective inquiry whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed."); *Conn v. Gabbert*, 526 U.S. 286, 291 (1991) (relevant question is whether Fourteenth Amendment case law clearly establishes that "use of a search warrant by government actors violates an attorney's right to practice his profession"); *see also Mitchell,* 472 U.S. at 535 (holding that the "decisive fact is not that [the defendant's] position turned out to be incorrect, but that the question was open at the time he acted."). Mere citation to a constitutional provision is inadequate, as the Constitution's text is "cast at a high level of generality," such that its application to particular facts will clearly establish a governing rule only in "obvious" cases. *Brousseau*, 543 U.S. at 194, 199 (2004) (internal citation omitted). The Third Circuit has consistently honored this mode of inquiry, stating that, for purposes of deciding whether a right is clearly established, "the right in question should be defined in a particularized and relevant manner, rather than abstractly." *Doe v. County of Centre, Pa.,* 242 F.3d 437, 454 (3d Cir. 2001) (internal citation omitted).

Here, Mr. George has failed to allege facts sufficient to support the inference of a constitutional violation on behalf of the individual federal defendants. That alone is sufficient to

warrant qualified immunity. Even assuming that Mr. George has alleged a constitutional violation, the federal defendants are entitled to qualified immunity because the constitutional rights invoked by Mr. George are not clearly established, and the defendants acted reasonably under the circumstances.

A. The Complaint fails to state a Fourth Amendment violation.

Mr. George's First Claim for Relief should be dismissed as to the Doe Defendants 1 through 5 because he has failed to allege facts that could plausibly constitute a violation of his Fourth Amendment rights. The narrative told by Mr. George reveals first that the TSA defendants' decision to question him and refer the matter to local law enforcement was reasonable, and that the JTTF defendants who questioned and released Mr. George acted appropriately. In addition, Mr. George has failed to allege facts showing that the individual federal defendants personally participated in either the supposed arrest or, indeed, the majority of his detention. Because no Fourth Amendment violation is alleged, the First Claim for Relief should be dismissed.

1. The Complaint does not establish a Fourth Amendment violation by the TSA defendants.

The pleading standard established in *Ashcroft v. Iqbal* requires the plaintiff to allege facts sufficient to allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 129 S. Ct. at 1949 (*citing Twombly*, 550 U.S. at 556). The Court made clear that personal participation in the alleged misconduct is necessary, as "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.* at 1949. Thus, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 1948. Likewise, the Third Circuit has stated that "in a multi-defendant case, the district court should analyze the *specific conduct* of

each Defendant with respect to the constitutional right at issue." *Estate of Smith v. Marasco*, 318 F.3d 497, 511 (3d Cir. 2003) (citation and quotation marks omitted). Accordingly, the claims against the individual federal defendants may only go forward if Mr. George has sufficiently stated that each of them personally participated in the alleged Fourth Amendment violation.

The Complaint makes clear that the TSA defendants were responsible for conducting an administrative search of Mr. George that lasted for, at most, the 45 minute period before the Philadelphia Police Department defendants arrived to take him into custody. The initial secondary screening took approximately 30 minutes, after which Jane Doe 3 arrived and questioned Mr. George for another 15 minutes regarding the flashcards and his travel in the Middle East. At that point, defendant Rehiel arrived, placed Mr. George in handcuffs, and took him for additional security screening - or, as the Complaint states, "Mr. George was handcuffed and arrested by Officer Rehiel at approximately 2:20 in the afternoon." *Compl.* ¶ 49. Thus, for purposes of evaluating personal participation under *Iqbal*, Mr. George has only alleged that the TSA defendants participated in the initial security screening and questioning.[6]

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[6]Even in the 45 minutes where Mr. George alleges that the TSA defendants were present, few actions are directly attributed to any individual defendant. Doe Defendant 1 is alleged to have asked Mr. George to empty his pockets; he is also said to have inspected the cards, led Mr. George to another screening area. *Compl.* ¶¶ 23, 27, 28-30, 41.The only act specifically ascribed to Doe Defendant 2 is inspecting Mr. George's bag and flashcards. *Compl.* ¶ 27. The other acts allegedly taken by these two defendants are not attributed to one or the other, but to both jointly. For instance, Mr. George alleged that either Doe Defendant 1 or 2 made small talk about the recent Phillies game, swabbed his cell phone to test for explosives, and made a phone call. *Compl.* ¶ 28-30. These few acts are insufficient to establish personal participation in a constitutional violation pursuant to *Iqbal*. Doe Defendant 3 is likewise mentioned in only a few paragraphs, *see Compl*. ¶¶ 6, 33-41. Mr. George alleges that she "continued his detention and turned him over to Defendant Rehiel to be handcuffed, arrested, jailed, and further interrogated." *Compl.* ¶ 6. However, Mr. George does not plead or allege that Doe Defendant 3 ever personally participated in these acts, or requested that Defendant Rehiel undertake them. Nor is it pled that she has the power to direct the actions of the Philadelphia Police or JTTF, and indeed, it is clear from TSA regulations that the TSA defendants do not have that power. *See* n. 7 *infra.*

The general Fourth Amendment standards that apply in the context of administrative stops and searches at an airport are well-established. *See, e.g., United States v. Hartwell,* 436 F.3d 174 (3d Cir. 2006)*; United States v. Aukai*, 497 F. 3d 955, 960-61 (9th Cir. 2007) (en banc); *United States v. $557,993.89 in US Funds*, 287 F.3d 66, 87 (2d Cir. 2002); *United States v. Cyzewski*, 484 F.2d 509, 513 (5th Cir. 1973); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000); *Chandler v. Miller*, 520 U.S. 305, 323 (1997). Because TSA's function at airports is to ensure the safety of airline travelers,[7] – rather than law enforcement – challenges to its conduct at checkpoints are evaluated not under the usual circumstances of reasonable suspicion or probable cause applicable in the law enforcement context, but rather under a standard that assesses whether there is "a favorable balance between 'the gravity of the public concerns served by the [search], the degree to which [it] advances the public interest, and the severity of the interference with individual liberty.'" *Hartwell*, 436 F.3d at 179-180 (*quoting Illinois v. Lidster*, 540 U.S. 419, 427 (2004)); *see also O'Connor v. Ortega*, 480 U.S. 709, 719 (1987). Because "there can be no doubt that preventing terrorist attacks on airplanes is of paramount importance," and "absent a search, there is no effective means of detecting which airline passengers are likely to hijack an airplane,"

[7]TSA is "responsible for security in all modes of transportation[,]" 49 U.S.C. § 114(d), and is statutorily charged with developing and executing airport screening search procedures. *See* 49 U.S.C. § 44901(a). TSA is generally responsible for creating "regulations to protect passengers and property on an aircraft . . . against an act of criminal violence or aircraft piracy." 49 U.S.C. § 44903(b). It is the responsibility of TSA agents like Doe Defendants 1, 2, and 3 to enforce these regulations by conducting security screening and securing passenger safety. In addition, TSA is responsible for requiring each operator of an airport to "establish an air transportation security program that provides a law enforcement presence and capability at each of those airports that is adequate to ensure the safety of passengers" through the use of "qualified State, local, and private law enforcement personnel." 49 U.S.C. § 44903(c). Thus, when confronted with a potential passenger who presents security concerns, TSA security personnel are required to contact law enforcement to investigate further.

the Third Circuit has held that airport screening searches, like the secondary search conducted by Doe Defendants 1 and 2, are constitutionally permissible. *Hartwell*, 436 F.3d at 179-80; *see also* 49 U.S.C.A. § 44901; 49 C.F.R. § 1540.107. The primary and secondary screening to which potential passengers may be subject are analyzed "as a single search under the administrative search doctrine" and not as "two separate searches." *Hartwell*, 436 F.3d at 177-78. At this juncture, the passenger no longer retains the right to leave rather than submit to the search. *See Hartwell*, 436 F.3d at 181 n. 12 ("As several courts have noted, a right to leave once screening procedures begin would constitute a one-way street for the benefit of a party planning airport mischief and would encourage airline terrorism by providing a secure exit where detection was threatened") (internal quotation marks and citations omitted); *Aukai*, 497 F.3d at 960 (stating that airport screening does not depend on consent).[8] Thus, the fact that a minimally invasive search escalates after a lower level of screening disclosed a reason to conduct a more probing search does not render the actions of TSA employees conducting that search unconstitutional. *See Id.* at 180; *Cf. also*, *United States v. Lopez-Pages*, 767 F.2d 776, 778-79 (11th Cir. 1985) ("Additional searches outside the perimeter of the security area are permissible if, in the exercise of their professional judgment, [the authorities'] reasonable suspicions [have] not been allayed by the routine security check.'") (internal quotations and citations omitted).

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[8]Even assuming that the questioning here could only pass muster under the Fourth Amendment standards applicable to law enforcement activities, the TSA defendants' questioning was reasonable in light of the circumstances viewed as a whole. When facts giving rise to reasonable suspicion are revealed, the fact that the individual facts presented to the officer may have alternative innocent explanations is irrelevant. *See United States v. Sokolow*, 490 U.S. 1, 10 (1989); *see also United States v. Respress*, 9 F.3d 483, 487-88 (6th Cir. 1993) (citing *Illinois v. Gates*, 462 U.S. 213, 243-45 (1983) ("When facially innocent actions taken together create bona fide suspicions, probable cause may arise.") (internal citation omitted). Because circumstances must be viewed as a whole, even innocent facts, taken together, may form the basis for reasonable suspicion. *See Sokolow*, 490 U.S. at 10.

The actions Mr. George attributes to Doe Defendants 1 through 3 were consistent with TSA regulations and their responsibility to maintain the front line of airport security against terrorist attacks. Mr. George does not (and could not) challenge the administrative search that led to the discovery that he: (1) carried cards with words like "terrorist," "bomb" and "kidnapping" through security screening; and (2) had recently traveled through Syria, Jordan, Sudan, and Malaysia. Not only was their decision to call in law enforcement officials at that juncture reasonable, once these facts were revealed it may well have been unreasonable to simply wave Mr. George onto the airplane rather than contacting appropriate authorities. Further, the manner of investigation employed by Doe Defendants 1, 2, and 3 was unintrusive, consisting of simply questioning Mr. George for a longer period than he felt he should be questioned (even if the questioning was "hostile" as alleged). This was a basic investigation under the airport security rubric that interfered with Mr. George's liberty interests to a minimal degree.[9] Considering the gravity of the TSA defendants' concern – the prevention of terrorist attacks – and the circumstances with which they were confronted, it cannot be said that the 45 minute screening and questioning that the TSA defendants participated in constituted a Fourth Amendment violation.

2. The Complaint does not allege a Fourth Amendment violation by the JTTF Defendants, Does 4 and 5.

The facts as put forth by Mr. George also establish that there was no Fourth Amendment violation by the JTTF defendants. According to Mr. George, the personal participation of Doe

[9]While the fact that Mr. George was handcuffed may be relevant for determining whether he was arrested for Fourth Amendment purposes, neither the TSA defendants nor the JTTF defendants took part in that action. Mr. George states as much in his Complaint, alleging that he was "handcuffed and arrested by Officer Rehiel at approximately 2:20 in the afternoon." *Compl.* ¶ 49. Thus, for purposes of analyzing whether the five individual federal defendants "arrested" Mr. George, it is immaterial.

Defendants 4 and 5 in the incident was minor. He states that "the Philadelphia police officers had called various federal and state agencies including the JTTF and the [Philadelphia Police Department's Homeland Security Unit] in order to arrange for Mr. George to be interrogated while in custody." *Compl*. ¶ 63. He also alleges that upon arriving at the airport police station the JTTF defendants "searched [his] carry-on items," *compl.* ¶ 64, and "asked him a large number of questions about his personal and educational background, his religious and political beliefs, his prior travels, and other personal matters." *Compl.* ¶ 69. Mr. George also takes issue with the language used by one of the defendants. *Compl.* ¶ 69. After 30 minutes, Doe Defendant 4 or 5 concluded the interview with Mr. George by stating that "The police call us to evaluate whether there is a real threat. You are not a threat." *Compl.* ¶ 73. Thus, the JTTF defendants' participation consisted of "prolonging" his detention for "approximately 30 minutes" after they arrived at the airport to interrogate him. *Compl.* ¶ 9.

The Fourth Amendment "serves as a bulwark, protecting individual liberty from arbitrary invasions by state actors....Whether a search or seizure is constitutionally reasonable is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Denson v. United States*, 574 F.3d 1318, 1338-39 (11th Cir. 2009) (internal citations and quotation marks omitted); *see also United States v. Colon*, 250 F.3d 130, 134 (2d Cir. 2001). The 30 minute detention and questioning that Doe Defendants 4 and 5 participated in constituted an extension of the airport search; thus, it was part of the same "event" for Fourth Amendment purposes and should be evaluated for reasonableness under the airport security standard. As discussed *supra*, once an airport search has given TSA personnel a reason to

conduct a more probing search, they may investigate until that airport security concern is resolved, and enlist the help of law enforcement if necessary.

The JTTF defendants' response - like that of the TSA defendants - was eminently reasonable in the situation Mr. George describes. Mr. George presented himself at the airport, where he knew he would be subject to an administrative search before being permitted to board the airplane. During the course of that search, the TSA defendants discovered that he possessed cards stating, among other things, "bomb" and "terrorist" and "explosion." Coupled with his travel in the Middle East, it was reasonable for the TSA defendants to notify law enforcement.[10] Any actions taken by the Philadelphia police aside, Doe Defendants 4 and 5 went to the airport police station, questioned Mr. George, determined that there was no reason to arrest or further detain him, and secured his release. These facts show only that John Doe 4 and 5 acted in accordance with their duties as law enforcement agents - and indeed based on the cards alone, such actions would not have been unreasonable even had plaintiff not traveled to the Middle East.[11] At no point did John Doe 4 or 5 subject Mr. George to a physical search of any kind, and their questioning lasted only long enough for them to determine that Mr. George did not pose a threat. These facts, as presented by the complaint, do not plausibly give rise to the inference of a

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[10]As discussed *infra*, it is also of no moment that Mr. George believes that his flashcards and travel could be innocently explained. Just as the use of ambiguous language does not foreclose the possibility that an individual is making a threat for purposes of criminal liability, *see United States v. Cothran*, 286 F.3d 173, 175-76 (3d Cir. 2002), the fact that a set of circumstances is open to multiple interpretations does not foreclose airport security personnel or law enforcement from investigating further.

[11]Mr. George repeatedly takes umbrage with the fact that he "was not free to leave." *Compl.* ¶ 30, 41, 66. As the Third Circuit made clear in *Hartwell*, once the airport screening procedure began, he had no constitutional right to leave until any suspicions he aroused had been allayed. 436 F.3d at 181 n. 12.

Fourth Amendment violation on behalf of the JTTF defendants. Accordingly, their actions were reasonable and no constitutional violation has been alleged.

B. The Complaint fails to state a First Amendment violation.

In his Third Cause of Action, Mr. George claims that his detention and search "on the basis of the flashcards and the book . . . infringed on [Mr. George's] freedom of speech and constituted unconstitutional retaliation in violation of clearly established rights guaranteed by the First and Fourteenth Amendments to the United States Constitution." *Compl.* ¶ 83. However, under the standard articulated in *Ashcroft v. Iqbal*, Mr. George's factual allegations fail to establish a First Amendment retaliation claim as to the individual federal defendants.

To establish a First Amendment retaliation claim, an individual must show that "the government took action against him in retaliation for his exercise of First Amendment rights." *Anderson v. Davila*, 125 F.3d 148, 160 (3d Cir. 1997). To prove the claim in the Third Circuit, the court has held that an individual must show that: (1) he or she engaged in a protected activity; (2) that the government responded with retaliation; and (3) that the protected activity was the cause of the retaliation. *Id.* at 161. Under the requisite pleading standard, a defendant claiming a First Amendment claim must allege sufficient facts to allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S. Ct. at 1949 (internal citation omitted). When a complaint "pleads fact that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (*quoting Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 557 (2007)).

In *Iqbal,* Muslims detained in the wake of the September 11, 2001 terrorist attacks alleged that the Attorney General and FBI Director had violated their First Amendment rights by adopting a policy of "purposefully designating detainees 'of high interest' because of their race, religion, or national origin." *Id*. at 1951. In evaluating whether the allegedly disparate impact of the described policy could support an inference of discriminatory motive, the Court stated that "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* The Court noted that "[t]he September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group[,]" Al Qaeda's leader (Osama bin Laden) is himself an Arab Muslim, and the group is composed in large part of his Arab Muslim disciples. Thus, the Court concluded that "[o]n the facts respondent alleged the arrest[s] . . . were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that 'obvious alternative explanation' for the arrests and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.'" *Id.* at 1951-52 (internal citation omitted).

Existing case law makes clear that there is no First Amendment right to say or write "bomb" in an airport; indeed, an individual can in some circumstances be held criminally liable for doing so. For instance, in *United States v. Cothran*, 286 F.3d 173 (3d Cir. 2002), the Third Circuit affirmed the plaintiff's conviction for conveying false information and threats about

carrying an explosive device on an airplane in violation of 49 U.S.C. § 46507. There, the plaintiff called the airline ticket office and stated that "he was upset with U.S. Air for not letting him bring explosives on the plane, and that he wanted to blow a plane out at 35,000 feet." *Id.* at 175. The plaintiff then informed the ticket agent that he was joking. When he arrived at the airport for his flight, he was heard to say "don't tell me how to blow up a bomb." *Id.* He was arrested and convicted. The Third Circuit upheld his conviction, rejecting his argument that no rational person could believe that his threat was serious because "the use of ambiguous language does not preclude a statement from being a threat. A bad joke can fall within the scope of the statute." *Id.* at 175-76 (*quoting United States v. Fulmer*, 108 F.3d 1486. 1492 (1st Cir. 1997)). The Court also noted that "the airline industry is highly sensitive to bomb threats" and that a potential passenger should consider whether "his statement would be taken as a threat." *Id.* at 176.

In *United States v. Lit*, Criminal Action No. 04-6192, Civil Action No. 07-903, 2007 WL 1725199 (E.D.Pa. June 12, 2007), the petitioner placed a white shoebox in a men's bathroom in the Philadelphia airport. The shoebox had writing on it and two notes attached to it, stating "Al Quada Airport Device," "15 lbs C-4, 3 lbs TNT, 2 blast caps, 1 silent timer" and "Dear George W., get the fuck out of Iraq now. Be all gone by April 15 at noon est. George Washington, Saddam Hussein, Jesus II." *Id.* at *1. He pled guilty to threatening to use a weapon of mass destruction, planting a fake bomb, and malicious damage or destruction of a building. *Id.* The district court upheld his guilty plea in the face of petitioner's challenge that there was no lawful basis for his threat-based convictions despite the fact that the bomb and notes were clearly a hoax.

Under the *Iqbal* analysis, Mr. George's complaint fails to give rise to a plausible inference of a First Amendment violation. First, despite Mr. George's conclusory allegation that all five

federal defendants retaliated against him for studying Arabic by detaining and interrogating him, it is far more likely that the five federal defendants determined that Mr. George should be questioned because he presented himself at airport security with a series of violent, terrorism-related words written on cards in his pocket and extensive Middle East travel documented in his passport. While students of a foreign language may carry vocabulary cards as study aids, these cards were handwritten and bore words that, if uttered in an airport, should and do arouse the suspicions of any reasonable Transportation Security Agent. A reasonable law enforcement officer or airport employee charged with ensuring passenger safety would consider these two factors significant, at least to the point where further investigation would seem necessary and justified.[12] In light of this obvious and reasonable alternative explanation, Mr. George's allegation of retaliation does not reach the plausibility threshold.

In addition, Mr. George's claim substantively fails at the first prong of the three-part retaliation test because existing case law establishes that carrying flashcards with words like "bomb" and "explosion" through airport security is not a protected activity. *See United States v. Cothran*, 286 F.3d 173 (3d Cir. 2002)*; United States v. Lit*, 2007 WL 1725199 (E.D.Pa.). While

[12]Mr. George also alleges that he was "abusively interrogated" by Doe Defendants 3, 4, and 5. It is unclear, however, how the alleged hostility of the federal defendants constitutes a constitutional violation. Mr. George does not allege that any federal defendant touched him at any time, thus foreclosing any excessive force Fourth Amendment claim, nor was he charged with any crime, foreclosing any possibility of a Fifth Amendment self-incrimination claim. There simply does not exist a Fourth Amendment claim for "abusive" interrogation such as Mr. George describes - that is, questioning that is merely perceived as hostile or impolite by the listener. Nor is there a Fourth Amendment right to a friendly and polite airport security experience. In addition, Mr. George supports his claim of "hostile" treatment, in part, by stating that Doe Defendant 3 "held up Mr. George's flashcards and stated: 'do you see why these cards are suspicious?'" *Compl.* ¶ 39. Between the obvious alternative explanation for this question – that many of the cards bore violent and suspicious words - and the possibility that Doe Defendant 3 was hostile to Mr. George because he was studying a foreign language, the complaint's allegations in this regard are implausible.

the use of such words in airports or to airport personnel arises most often in the criminal context, the fact that one may be criminally charged for the use of such words, even when the use is clearly as a hoax, conclusively establishes the lack of First Amendment protection. *Cothran*, 286 F.3d 173 (3d Cir. 2002); *Lit*, 2007 WL 1725199; *see also United States v. Brahm*, 520 F.Supp.2d 619, 626 (D.N.J. 2007) (federal law criminalizing phony bomb threats and hoaxes not overbroad for First Amendment purposes because "[s]uch speech would be outside the protection of the First Amendment, similar to shouting fire in a crowded theater") (internal citations omitted). The fact that the words were written on cards rather than spoken is irrelevant for the protection analysis, as the *Lit* court found it of no moment that the threatening words were written on the shoebox rather than spoken. To the extent that it is relevant that the words were written on flashcards as a language study aid is relevant, it is clear that Doe Defendants 4 and 5 took those facts into account, as Mr. George was not criminally charged, but questioned and released. Accordingly, the Third Cause of Action should be dismissed because Mr. George has failed to allege a First Amendment violation.

C. The complaint fails to allege a violation of a clearly established right.

Mr. George's constitutional claims against the federal defendants are barred because the rights he claims were violated are not clearly established. To overcome an assertion of qualified immunity, a plaintiff pleading the violation of a constitutional right must show not only that the right existed and was violated, but that the right was clearly established in the specific factual circumstances. If the plaintiff's allegations fail to state a claim of violation of clearly established law, "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell*, 472 U.S. at 526 (internal citation omitted).

For purposes of qualified immunity, a right must be clearly established at the time the alleged violation occurred. *See Wilson v. Layne,* 526 U.S. 603, 614 (1999) ("the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.") (*quoting Anderson*, 483 U.S. at 640). Specifically, the plaintiff must point to case law in a similar context that clearly established the right in question. *See Saucier*, 533 U.S. at 209 (a right cannot be clearly established if no case demonstrates a clearly established rule "prohibiting [a law enforcement officer] from acting as he did."). The Third Circuit has explained that, for a right to be clearly established, "there must be sufficient precedent at the time of the action, factually similar to the plaintiff's allegations, to put [the] defendant on notice that his or her conduct is constitutionally prohibited." *McKee v. Hart*, 436 F.3d 165, 171 (3d Cir. 2006) (internal quotation marks and citation omitted) (alteration in original). This inquiry requires the reviewing court to examine the specific factual circumstances confronting the defendant. *See, e.g., Harvey v. Plains Tp. Police Dept.*, 421 F.3d 185, 194 (3d Cir. 2005). If officers of reasonable competence could disagree on the issue, a right is not clearly established. *Davis v. Scherer*, 468 U.S. 183, 194 (1988). Courts should also consider the "closely related issue" of "whether the officer made a reasonable mistake as to what the law requires." *Carswell v. Borough of Homestead*, 381 F.3d 235, 242 (3d Cir. 2004), *cert. denied*, 546 U.S. 899 (2005). Finally, even if the officer's conduct is later deemed unlawful, the officer is nevertheless entitled to qualified immunity if the officer made an objectively reasonable decision. *Hunter*, 502 U.S. at 227 (1991).

1. The Fourth Amendment right asserted by Mr. George is not clearly established.

The federal defendants are entitled to qualified immunity because the Fourth Amendment right cited by Mr. George – to be free from questioning by airport security and law enforcement based on his possession of flash cards with suspicious words and his extensive Middle East travel -- is not clearly established. To the contrary, to the extent that the parameters of a domestic airline traveler's Fourth Amendment rights are clearly established, it is clear that the actions taken by the federal defendants fell well-within the boundaries of acceptable and constitutional behavior.

In Fourth Amendment analysis, an area of law in which "the result depends very much on the facts of each case," an officer cannot have fair notice if the extant cases do not "squarely govern." *Brousseau*, 543 U.S. at 201; *see also Saucier,* 533 U.S. at 205 (acknowledging that it is often "difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts."); *Conn v. Gabbert*, 526 U.S. 286, 292 (1999) (law is not clearly established where existing cases "all deal with a complete prohibition of the right to [practice one's profession], and not the sort of brief interruption which occurred" in the case at issue). The novel Fourth Amendment theory put forth by Mr. George has not been squarely addressed in case law, where the vast majority of airport search cases either discuss border searches, or address physical searches that led to the discovery of contraband, *see, e.g.*, *United States v. Sokolow*, 490 U.S. 1 (1989) (Drug Enforcement Agency agents had reasonable suspicion to suspect traveler was drug courier); *United States v. Coggins*, 986 F.2d 651, 652 (3d Cir. 1993) (reasonable suspicion supported investigative detention of suspected drug courier). In addition, the case law makes clear that, once suspicion is raised, even an intrusive physical search is reasonable. *See*, *e.g.*, *Bradley v. United States*, 299 F.3d 197, 204-05 (3d Cir. 2002) (not clearly

established that intrusive patdown search was other than routine); *Anderson v. Cornejo*, 199 F.R.D. 228, 258-59 (N.D.Ill. 2000) (finding no case where aggressive patdown search found to be non-routine); *Wyatt* v. *Slagle*, 240 F.Supp. 2d 931, 939 (S.D.Iowa 2002) ("balance between the need for a search and the invasion of personal rights which accompanies it weighs against the constitutionality of the search only if the search is conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interest.").

To the extent that the existing cases and statutes do clearly establish any Fourth Amendment rule, they also support the conclusion that the individual federal defendants acted constitutionally. As discussed *supra*, TSA officials have a statutory duty to maintain airport security, which they accomplish, in part, through administrative searches and identifying passengers who merit closer scrutiny. It is beyond dispute that the initial and secondary search of Mr. George by the TSA defendants was constitutionally sound. Further, it is clearly established that, upon being confronted with a passenger who raised security concerns, the TSA defendants were permitted to contact law enforcement to investigate further. This is so because TSA is responsible for requiring each operator of an airport to "establish an air transportation security program that provides a law enforcement presence and capability at each of those airports that is adequate to ensure the safety of passengers" through the use of "qualified State, local, and private law enforcement personnel." 49 U.S.C. § 44903(c). In fact, TSA is required to cooperate with law enforcement personnel in carrying out their duty to ensure passenger safety. 49 U.S.C. § 44903(c).

To the extent that there is any case law addressing the facts that confronted the TSA and JTTF defendants on the day Mr. George attempted to cross security screening with the words "bomb" and "explosion" and "kidnapping" in his pocket and a passport replete with visas from

Middle East countries, it is in the criminal context and generally supports prosecution. *See Cothran*, 286 F.3d 173; *Lit*, 2007 WL 1725199; *Brahm*, 520 F.Supp.2d 619. Thus, the federal defendants are entitled to qualified immunity. According to "the state of the law at the relevant time and then to the information available to the defendants in the case[,]" *Good v. Dauphin County Soc. Serv.*, 891 F.2d 1087, 1092 (3d Cir. 1989), the federal defendants could and should have believed that their conduct was lawful. To the extent that the federal defendants were mistaken as to whether the combination of flashcards and Middle East travel should have sparked their suspicions, that mistake was reasonable in light of the established law and they should not be subject to suit.

2. The First Amendment right asserted by Mr. George is not clearly established.

In the context of this case, the First Amendment right at issue is not, as Mr. George might phrase it, the right to study a foreign language. *See Compl.* ¶ 62. Rather, the First Amendment right Mr. George is asserting is the right to be free from arousing suspicion in airport security personnel while passing through airport security with words like "bomb" and "explosion" in his pocket. Far from being clearly established, such a right is a novel proposition. Even outside the special security concerns attendant to airports and air travel, the First Amendment does not prevent law enforcement officers from formulating suspicions based on an individual's speech or actions.

Again, there is no First Amendment case law directly addressing the factual scenario facing the five federal defendants. That in itself is a clear indication that the right is not clearly established. Moreover, existing case law clearly indicates that an individual does not have the right to remain outside the attention of law enforcement when the individual is speaking or acting

in a manner that sparks suspicion in a reasonable officer's mind. *See, e.g. Cothram*, 286 F.3d 173; *Lit*, 2007 WL 1725199; *see also Yvette v. Bradley*, 164 F.Supp.2d 437, 450 (D.N.J. 2001) ("Unusual conduct, one's attitude, and unusual clothing of the type where contraband has previously been found are sufficient reasons for purposes of establishing reasonable suspicion") (internal citation omitted); *Garcia v. United States*, 913 F.Supp 905 (E.D.Pa. 1996) (detention and internal search of plaintiff by customs officers reasonable in light of plaintiff's nervousness and suspicious statements). Indeed, these cases, in which travelers are criminally charged for using threatening language in an airport, establish that TSA agents and law enforcement are required to take threats or suspicious statements seriously, even when they are "clearly a hoax."[13]

Courts have long recognized that subjecting federal officials to potential liability for doing their jobs only encourages future officials to hesitate before acting. *See Anderson*, 483 U.S. at 638 (citation omitted) (Individual capacity claims "entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."); *see also Pierson v. Ray*, 386 U.S. 547, 555 (1967) ("[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."). In the airport security context, as the Third Circuit has recognized, the potential consequences of such

[13]Nor is it clear that a *Bivens* remedy even exists for a First Amendment violation such as this. In *Ashcroft v. Iqbal*, the Court noted that it "assumed, without deciding" that the First Amendment claim was actionable under *Bivens* only because the defendants did not press the issue. 129 S. Ct. at 1948. The Court noted that, in at least one other instance, the Court has held that *Bivens* remedy is not available for a First Amendment violation. *Id.* (citing *Bush v. Lucas*, 462 U.S. 367 (1983) (no *Bivens* remedy for First Amendment retaliation claim brought by federal civil servant because agency remedy was available)).

hesitation can be unthinkable. *See Hartwell*, 436 F.3d at 179-80 ("there can be no doubt that preventing terrorist attacks on airplanes if of paramount importance") (internal citations omitted). We have learned through bitter experience that there are people in this world who will attempt to use an airplane as an instrument of mass destruction. The mission of the TSA and JTTF is to find those few terrorists among the millions of travelers who pass through our airports. It is inevitable that in the process of seeking that rare threat, those who protect us will, acting in total good faith, inconvenience, delay, or even embarrass innocent members of the traveling public. Mr. George's best case presents just that scenario. Given the suspicion that he justifiably caused in the minds of the defendants, their actions cannot be described as "unreasonable." Indeed, had TSA screeners allowed an individual with extensive travel in areas known to be terrorist training grounds who presented at screening with handwritten cards including incendiary words such as bomb, terrorism, and explosion, to pass *without* further inquiry, and the unthinkable happened, those screeners most certainly would have been investigated and, quite possibly, fired. Charged with ensuring the safety of thousands of passengers each day, the federal defendants should not be forced to second-guess their airport-security concerns for fear of civil liability. It is against just such a situation that qualified immunity is designed to guard.

CONCLUSION

For the foregoing reasons, this Court should dismiss the First and Third Claims for Relief with prejudice based on the individual federal defendants' entitlement to qualified immunity.

Dated: October 5, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NICHOLAS GEORGE,	)	
Plaintiff,	)	
v.	)	No. 2:10-cv-586-EL
WILLIAM REHIEL, *et. al.*,	)	
Defendants.	)	

ORDER

UPON CONSIDERATION of the Motion to Dismiss Plaintiffs' Complaint by the individual federal defendants, and the grounds stated therefor, it is on this _____ day of _____, 2010, hereby

ORDERED that said motion should be and hereby is granted; and it is

FURTHER ORDERED that all claims against John Doe 1, John Doe 2, Jane Doe 3, John Doe 4, and John Doe 5 are dismissed with prejudice.

_____
Senior Judge Edmund V. Ludwig