

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 04-15736

JOHN GILMORE,

Plaintiff-Appellant,

v.

JOHN ASHCROFT, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. CV-02-03444-SI

Honorable Susan Illston, United States District Court Judge

APPELLANT JOHN GILMORE'S EXCERPT OF RECORD

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APPELLANT JOHN GILMORE'S EXCERPT OF RECORD INDEX

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JUL 18 2002

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NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA

9 JOHN GILMORE,

10 Plaintiff,

11 vs.

C 02 3444
Case No. _____

SI
ADR

COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF

12 JOHN ASHCROFT, in his
13 official capacity as
14 Attorney General of the
15 United States, ROBERT
16 MUELLER, in his official
17 capacity as Director of the FEDERAL
18 BUREAU OF INVESTIGATION,
19 NORM MINETA, in his
20 official capacity as Secretary
21 of Transportation, JANE F. GARVEY,
22 as Administrator of the Federal
23 Aviation Administration, JOHN W.
24 MAGAW, in his official capacity as chief
25 of the Transportation Security
26 Administration, TOM RIDGE, as his official
27 capacity as chief of the OFFICE OF
28 HOMELAND SECURITY, UAL
CORPORATION aka UNITED AIRLINES,
SOUTHWEST AIRLINES,
DOES I-XXX,

Defendants.

PRELIMINARY STATEMENT

1. Plaintiff John Gilmore is a United States citizen concerned that the climate of
fear that currently pervades American society is eroding long- standing constitutional rights. Today,
he files this lawsuit because he believes persons have a right to travel by air without the government
requiring that they relinquish their anonymity. No security threat is as important as the threat to

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1 American society caused by erosion of the right to travel, the right to be free from unreasonable
2 searches, and the right to exercise First Amendment rights anonymously.

3 2. On July 4, 2002, Plaintiff tried to fly to Washington, DC to petition the government for
4 redress of grievances and to associate with others for that purpose. He was stopped because he
5 refused to identify himself before boarding the flight.

6 3. When he asked the airline officials why, they told him the government required that the
7 airlines ask for ID, but they could point him to no law or regulation to support their demand. That
8 is because no such regulation has been published. For the first time in this Nation's history, the US
9 government is using secret regulations to restrict First, Fourth and Fifth Amendment rights.

10 4. Plaintiff contends that any regulation that limits his ability to travel anonymously within
11 the United States is unconstitutional. Similarly, any regulation that impacts his ability to associate
12 and petition for redress anonymously is unconstitutional. Any regulation that requires that he be
13 subjected to a more intrusive search than other travelers - based solely upon his request for
14 anonymity - is unconstitutional.

15 5. The unconstitutionality is compounded because the law is secret. Despite the secret
16 nature of the law, plaintiff has been informed and believes that the airlines have been mandated by
17 the federal government to inform air travelers that the law requires them to show identification -- a
18 statement which is not true.

19 6. Another aspect of this secret law is that when faced with air travelers without ID who
20 insist on their right to travel anonymously, the federal government has instructed the airlines to
21 either refuse to allow said traveler to board the airplane, or to label the traveler as a "selectee" and
22 to conduct a more intrusive search.

23 7. Plaintiff objects to any requirement that he produce any government-issued document,
24 whether it contains his identity or not, as a precondition of exercising his constitutional right to live
25 or travel within the United States. Such "internal passports" are anathema to a free society.

26 8. Finally, another result of conditioning the right to travel with forced identification is the
27 government's plan to create huge, integrated databases by mingling criminal histories with credit
28 records, previous travel history and much more, in order to create dossiers on every traveling

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1 citizen. Also, Plaintiff has evidence that the government-created "No Fly" watchlist has already
2 begun to morph into a generalized "enemies list". This problem is compounded by the governments'
3 broad definition of "suspected terrorist." As stated on the FBI's web site, "there is no single
4 definition of terrorism."

5 9. In times of great public fear and outrage it is the duty of the courts to uphold and protect
6 individuals' constitutional rights. For this reason, Plaintiff today asks this court to tell the
7 government that "secret law is an abomination" and will not be tolerated in a free
8 society. Plaintiff asks the court to declare that requesting identification from travelers who are not
9 suspected of being a threat to airport security violates their First, Fourth, and Fifth Amendment
10 rights and must be discontinued.

11 12 JURISDICTION AND VENUE

13 10. This case arises under the United States Constitution and the laws of the United
14 States, and presents a federal question within this Court's jurisdiction under Article III of the
15 federal Constitution, 5 U.S.C. Sec. 552a, and 28 U.S.C. Secs. 1331, 1343, and 1361.

16 11. The Court has the authority to grant declaratory relief pursuant to the Declaratory
17 Judgment Act, 28 U.S.C. Sec. 2201 et seq.

18 12. Venue is proper in this district under 28 U.S.C. Sec. 1391(e).

19 20 PARTIES

21 13. Plaintiff JOHN GILMORE is a United States citizen who resides in San Francisco,
22 California.

23 14. Defendant ATTORNEY GENERAL JOHN ASHCROFT heads the United States
24 Department of Justice (DOJ), which is the agency of the United States government responsible for
25 enforcement of federal criminal laws. The DOJ vetted the secret regulations and found them
26 constitutional. Mr. Ashcroft is sued in his official capacity.

27 15. Defendant ROBERT MUELLER is the director of the Federal Bureau of Investigation
28 (FBI). The FBI maintains a "No Fly watchlist" and transmits this list to the Transportation Security

1 Agency. The airlines are required to check their passenger lists against this No Fly watchlist.

2 16. Defendant NORM MINETA is the Secretary of the Department of Transportation
3 (DOT). DOT is a cabinet-level executive agency of the United States responsible for implementing
4 and administering transportation programs on behalf of the United States government. The DOT
5 houses the FAA and the TSA and is the Agency ultimately responsible for approving all travel
6 security directives. .

7 17. Defendant JANE F. GARVEY, Administrator of the Federal Aviation Administration
8 (FAA). FAA is an independent federal agency that regulates air travel. The FAA has issues secret
9 security directives that require passengers to identify themselves.

10 18. Defendant JOHN W. MAGAW, Undersecretary of Transportation for Security, is the
11 head of the Transportation Security Administration (TSA), responsible for transportation security
12 nationwide in all modes. The authority to regulate airport security was transferred to the TSA from
13 the FAA on November 19, 2001, when the TSA was established. The role of the TSA is to
14 implement the provisions of the Aviation and Transportation Security Act (P.L. 107-71), signed by
15 President Bush on November 19, 2001.

16 19. Defendant TOM RIDGE, Assistant to the President for Homeland Security, is the head
17 of the Office of Homeland Security (OHS), created on October 8, 2001 to develop and coordinate
18 the implementation of a comprehensive national strategy to secure the United States from terrorist
19 threats or attacks. Part of OHS' mission is to "coordinate efforts to protect transportation systems
20 within the United States, including railways, highways, shipping, ports and waterways, and airports
21 and civilian aircraft, from terrorist attack."

22 20. Defendant UAL CORPORATION is the holding company for United Airlines, a
23 Delaware corporation with its principal place of business in Chicago, Illinois.

24 21. Defendant SOUTHWEST AIRLINES is a Delaware corporation with its principal
25 place of business in Dallas, Texas.

26 **STATEMENT OF FACTS**

27 22. Upon information and belief, Plaintiff alleges that Defendants have collectively caused
28 the issuance and enforcement of secret transportation security directives requiring that airlines

1 demand travelers reveal their identity before they are permitted to board an airplane.

2 23. The FAA's stated position on its website as of Friday, June 07, 2002 is that "When
3 checking in for travel, a government-issued ID (federal, state or local) with photograph is
4 required." The TSA's position on its website as of July 2, 2002 is "bring a government-issued photo
5 ID. (If you have photo identification for your children, please bring those as well.)."

6 **Plaintiff's recent experiences in attempting to fly without presentation of ID**

7 24. On July 4, 2002, Plaintiff John Gilmore went to Oakland International Airport
8 with paper tickets, in his own name, to fly to Baltimore-Washington International Airport. The
9 purpose of this trip was to petition the government for redress of grievances - specifically, the
10 requirement for airline travelers to provide identification.

11 25. The Plaintiff presented his tickets at the Southwest check-in line and was issued a boarding
12 pass by the airline clerk. Plaintiff was asked for his identification, and he declined politely. He was
13 informed that he could not fly without identification. Plaintiff continued to decline, and asked whether
14 the demand was based on governmental law or an airline policy. The airline clerk said, "I'm not sure.
15 I think it's an FAA security requirement." Plaintiff asked if there was any way to avoid having to show
16 identification. The clerk told him "Yes, there is. It's not absolutely necessary for travel. If you would
17 rather be screened, you will be screened at the gate when you board the aircraft if you do not wish to
18 show ID." The clerk tore up the boarding pass, printed out another one with a checkerboard pattern
19 on it, and stapled it to the Plaintiff's ticket.

20 26. Plaintiff went through the x-ray security line at Terminal 2. Plaintiff cleared the security
21 line, and went to Gate 14 at Terminal 1. At the front of the line, Plaintiff encountered Reggie Wauls,
22 an apparent Southwest employee, who asked Plaintiff for his identification. Plaintiff declined politely.
23 Mr. Wauls asked if Plaintiff could show him even a credit card. Plaintiff declined, and asked if the
24 requirement was based on governmental law or airline policy. Mr. Wauls replied that it was a
25 governmental law, and brought into the conversation Cathy Westcott, another apparent Southwest
26 employee. Ms. Westcott informed Plaintiff that he had to show a government-issued picture ID or he
27 could not board the plane. When Plaintiff again declined, she took his ticket to the counter, and
28 another traveler boarded the plane in place of the Plaintiff.

1 27. Kenneth Wicks, a customer service supervisor, was summoned by these employees. Mr.
2 Wicks had several conversations with the Plaintiff, and stated to him "because you told us you have
3 an ID but you refuse to show it, we did not board you". Plaintiff responded, "Do you mean that if I
4 had left it at home, I could fly?" Mr. Wicks stated, "I didn't say that. It would be a different
5 situation." Plaintiff asked him "Is this a government requirement, or Southwest's?" Mr. Wicks
6 responded, "It's the airline's."

7 28. Plaintiff then went to the San Francisco airport, and entered the terminal of United Airlines
8 in order to purchase a ticket. While in line at ticket counter 30, Plaintiff saw a metal sign fastened to
9 the front of the desk of airline clerk Pam Pettit. The sign begins "A Notice From the Federal Aviation
10 Administration" and includes the sentence "PASSENGERS MUST PRESENT IDENTIFICATION
11 UPON INITIAL CHECK-IN".

12 29. Plaintiff told Ms. Pettit that he wanted to purchase a ticket to fly to Washington, D.C..
13 When she asked for his ID, Plaintiff politely declined. Ms. Pettit informed the Plaintiff that he had to
14 show "federal ID" at the ticket counter, at security, and when boarding. Plaintiff said, "If I don't show
15 ID, I can't fly? Even if I am willing to be searched?" Ms. Pettit said, "That's right. It is an FAA
16 requirement that I ask for ID. Do you have an ID?" Plaintiff responded, "Yes. But it's Independence
17 Day. It's a good time to exercise some freedom." Ms. Pettit responded, "So you have an ID, you just
18 don't want to show it." Plaintiff responded, "Yes." Plaintiff asked if there was any way to fly without
19 an ID. Ms. Pettit said that she needed to call a service director. She talked privately with a Mr.
20 Darquas by phone for a few minutes, and then turned back and said, "You must have an ID. Please
21 step aside so that I can help the next passenger." Plaintiff did so.

22 30. Plaintiff returned to Ms. Pettit a few minutes later and asked her if she could tell him what
23 actual law or regulation requires ID. United service director Elias Ali emerged a few minutes later and
24 repeated the request for ID. Plaintiff replied, "I have an ID, I just don't want to show it. What is the
25 actual regulation that requires it?" Ali replied, "If you have a ticket on United, you are allowed to
26 travel, but you become selected for secondary screening." Plaintiff replied, "Can I get a copy of the
27 regulation?" Ali left to see if that was possible. Ground security chief Kevin Kane eventually arrived.
28 He said, "You are required to have an ID", but could not identify any government law that required

1 it, and left to "research it". Plaintiff then spoke with James Coleman, another member of United
2 security. Mr. Coleman told the Plaintiff that "if you don't have photo ID, you can have two pieces of
3 non-picture ID, one of which is issued by the government." He also told the Plaintiff that if one had
4 two pieces of non-picture ID, then that person would be a "selectee" and be searched more intensively.
5 He described the search as a "pretty close wandling", plus putting one's bags through a more intense
6 machine than the X-Ray machine. He pointed at a big machine in the terminal behind himself, marked
7 "CBX". (CBX is an explosives detection system)

8 31. Mr. Kane returned, and corrected his earlier statements. He stated that it is possible to fly
9 without ID, and it involved being a "selectee". This involves an intense search of one's person and
10 one's bags: Going through the magnetometer and being wanded, a light patdown search of one's
11 body, including one's legs. Removal of shoes is required. Bags put through a CAT-scan machine.
12 Then being searched again at the gate, plus having the bag searched by hand. Plaintiff said that this
13 sounded like what Mr. Coleman had described for people who had two pieces of ID but no picture.
14 Mr. Coleman stated that the search was more intense than that.

15 32. Plaintiff said that he would not agree to having his bag searched by hand. Mr. Kane then
16 said that Plaintiff could not fly without ID. Plaintiff repeated his inquiries about the applicable law or
17 regulation. Mr. Kane replied that he did not know.

18 33. Later, Mr. Coleman told Plaintiff that there were security directives, but that he could not
19 show them to the Plaintiff. He stated that these directives are from TSA to United. He also stated
20 that these directives are revised as often as weekly, and are transmitted orally rather than in writing.
21 Mr. Coleman also stated that these orally transmitted rules are different in different airports, resulting
22 in varying enforcement and a major training problem, when airline employees are trained in the local
23 procedures in one place and then interact with the public in other locations.

24 34. Since Plaintiff is unwilling to show ID, and he is equally unwilling to be the subject of a
25 more intrusive search than travelers who do not insist on maintaining their anonymity, he has been
26 unable to fly since September 11, 2001. Plaintiff is also informed and believes and hereby alleges that
27 similar requirements have been placed on travelers who use passenger trains by the government
28 defendants, and that similar requirements are being instituted for interstate bus travel.

1 Government and airline policy regarding the privacy of travelers

2 35. All of the government defendants named in this action participate in the Technical Support
3 Working Group (TSWG), an interagency federal group with origins back to the early 1980s, with the
4 mission of conducting a national interagency research and development program to combat terrorism,
5 primarily through rapid research and development and prototyping. The TSWG identifies a
6 requirement, and then tries to field that technological capability as quickly as possible. Plaintiff is
7 informed and believes and hereby alleges that the other government defendants named in this complaint
8 participate in the work of the TSWG, and that the policies being implemented on the Plaintiff in this
9 action is the work of these government defendants .

10 36. Plaintiff is informed and believes and hereby alleges that the "selectee" criteria originated
11 in the early 1990s program known as "CAPPS" (Consumer Assisted Passenger Prescreening System),
12 which was developed in the early 1990s by Northwest Airlines to spot potential hijackers by examining
13 a limited amount of data. The information gathered included such details as whether a ticket was paid
14 for in cash, whether it was one-way, and how long before the date of departure it was purchased. This
15 system "profiles" people to determine which bags and people are searched more intensively.

16 37. On September 18, 1996, SD96-05 went into effect, after its issuance during August, 1996.
17 SD96-05 is the most recently known version of a FAA Security Directive requiring people without ID
18 be selectees, as described in CAPPS. The FAA has refused to make the terms of this security directive
19 public, based on 49 USC 40119(b), which states that the FAA administrator may prescribe regulations
20 as he considers necessary to prohibit disclosure of any information obtained or developed in the
21 conduct of security or research and development activities if (s)he concludes that disclosure would be
22 detrimental to the safety of persons traveling in air transportation.

23 38. However, plaintiff is informed and believes and hereby alleges that the FAA rule in 1996
24 was, like now, to require air carriers to request identification in order to match the identity of the
25 traveler with the name on the ticket; to require two pieces of identification, one of which must be from
26 a governmental authority; and that the FAA required air carriers to apply "alternative security
27 measures" prior to boarding travelers with no ID. The FAA had no requirement that a traveler present
28 a photo ID in order to travel, apparently because of the Supreme Court's ruling in Jensen v. Quaring.

1 472 U.S. 478 (1985), which holds that the government cannot compel a person who has religious
2 objections to be photographed for a driver's license.

3 39. After September 11, 2001, FAA increased the use of CAPPs to include all travelers.
4 Reliable media sources report that the CAPPs II program will also be applied to all travelers.

5 40. CAPPs II will not only examine travel booking and payment information but it will also
6 be much more tightly integrated with lists of terrorists and criminals that are kept by global and
7 domestic law-enforcement agencies. In addition, CAPPs II will pull in data from banks, credit-
8 reporting agencies, and other companies that aggregate personal information, including but not limited
9 to Experian, Acxiom (ACXM), and ChoicePoint.

10 41. The new CAPPs II system will most likely be involved at every step a traveler takes. "A
11 next-generation version would be enabled at all points of traveler processing: booking, ticketing,
12 check-in, security screening, and aircraft boarding," Jim Dullum, managing director of Electronic Data
13 Systems (EDS), testified before a panel of U.S. senators in April.

14 42. Plaintiff also believes that the government defendants, among others, have created and
15 maintained control over various "watch lists, including an FBI watch list of approximately 180 persons
16 linked to the 9/11/01 terrorists (Guardian, 9/19/01) and a far larger "No Fly" watch list of people
17 believed to be a "threat to civil aviation" as described in the Aviation and Transportation Act signed
18 into law on 11/19/01. Plaintiff objects to the unregulated use of such lists because he believes history
19 teaches that granting the government unlimited control over an "enemies list" will inevitably result in
20 abuse.

21 43. Plaintiff is informed and believes that the "No Fly" list was created by the FBI and TSA,
22 among others, and has already been used to prevent twenty Milwaukee protesters from attending a
23 D.C. protest in April, 2002 when one of their group allegedly had a name that matched with a name
24 on the list (Progressive, 4/27/02), and to harass citizens such as Johnnie Thomas, a woman who has
25 the misfortune of sharing her name with a man who is in jail for allegedly murdering his wife and
26 children. The Thomas case demonstrates that the "No Fly" list is used for general law enforcement
27 purposes rather than an aviation security purpose.

28 44. Furthermore, Plaintiff believes that this problem is compounded by an unclear, and thereby

1 easily abused, definition among these defendants of a "terrorist". Although the FBI has its own
2 definition of terrorism, its own website admits that "there is no single definition of terrorism".

3 45. In the wake of the events of September 11, 2001, the Office of Homeland Security was
4 created on October 8, 2001, for the purpose of developing and coordinating the implementation of a
5 comprehensive national strategy to secure the United States from terrorist threats or attacks. Part of
6 OHS' mission is to "coordinate efforts to protect transportation systems within the United States,
7 including railways, highways, shipping, ports and waterways, and airports and civilian aircraft, from
8 terrorist attack."

9 46. On November 19, 2001, the Transportation Security Administration (TSA) was created
10 to implement the provisions of the Aviation and Transportation Security Act (P.L. 107-71), signed by
11 President Bush on November 19, 2001. The law states that "if the undersecretary determines that a
12 regulation or security directive must be issued immediately in order to protect transportation security,
13 the undersecretary shall issue the regulation or security directive without providing notice or an
14 opportunity for comment and without prior approval of the secretary." Usually, government
15 regulations are subject to review by career civil servants, agency outsiders, and the Office of
16 Management and Budget. Notice is then placed in the Federal Register, and the public typically gets
17 30 to 60 days for comment.

18 47. The new law also empowers Magaw to "establish policies and procedures requiring air
19 carriers to use information from government agencies to identify individuals on traveler lists who may
20 be a threat to civil aviation and, if such an individual is identified, to notify appropriate law enforcement
21 agencies and prohibit the individual from boarding an aircraft."

22 48. On February 1, 2002, it was reported in the Washington Post that federal aviation
23 authorities and technology companies will soon begin testing a vast air security screening system
24 designed to instantly pull together every traveler's travel history and living arrangements, plus a wealth
25 of other personal and demographic information. The Washington Post also reported on May 29, 2002
26 that leading financial services firms have formed a private database company that will compile
27 information about criminals, terrorists and other suspicious people, for use in screening new customers
28 and weeding out those who may pose a risk. (Washington Post, May 29, 2002, "Financial Database

1 To Screen Accounts Joint Effort Targets Suspicious ctivities", <http://www.washingtonpost.com/wp->
2 [dyn/articles/A30027-2002May29.html](http://www.washingtonpost.com/wp-dyn/articles/A30027-2002May29.html)). Plaintiff believes that these news reports refer to the CAPPS
3 II system.

4 49. Business Week reported in June 2002 that "Travelers could soon find themselves checked
5 against a manifest that includes not only their name and seat assignment *but also the photograph from*
6 *their driver's license or passport*. Or they could be scrutinized by facial-recognition systems designed
7 to rout out known terrorists during boarding. No one objects to catching bad guys, of course, but such
8 data-centric methods could scoop up a lot of others in the process. They might identify people who
9 have routine relationships with terrorists – folks who merely live in the same building or attend the
10 s a m e p l a c e o f w o r s h i p . " [http://www.](http://www.businessweek.com/technology/content/jun2002/tc2002065_2255.htm)
11 [businessweek.com/technology/content/jun2002/tc2002065_2255.htm](http://www.businessweek.com/technology/content/jun2002/tc2002065_2255.htm)

12 50. Ironically, in the midst of all these preparations, it is well-known throughout law
13 enforcement that fake identification is a common ruse, and is routinely used in order to obtain
14 government-issued identification that is every bit as fake. The New York Times, May 20, 2002
15 "Foreigners Obtain Social Security ID With Fake Papers",
16 www.nytimes.com/2002/05/20/national/20FRAU.html?todayshadlines. The nineteen people who are
17 believed to have hijacked airplanes on September 11, 2001 were all vetted and approved by the same
18 ID checks that are used today. The demand for ID was ineffective in preventing air piracy, both
19 because IDs can be easily faked and because of the impossibility of accurately identifying honest
20 individuals who may become future criminals.

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1 CAUSES OF ACTION

2 First Cause of Action

3 Vagueness in Violation of the Due Process Clause of the Fifth Amendment of the United
4 States Constitution

5 51. PLAINTIFF incorporates by reference the allegations in Paragraphs 1-50, above.

6
7 52. The Scheme is unconstitutionally vague, in violation of the Due Process Clause of
8 the Fifth Amendment because it is vague, being unpublished, and thus provides no way for ordinary
9 people or reviewing courts to conclusively determine what is legal.

10 A secret regulation is void for vagueness on its face, because people are denied access to its
11 content. Because the regulation is secret, people have no notice as to what is required to comply
12 with it. Similarly, such a scheme vests standardless discretion in the hands of its enforcers, because
13 the legal authority for the scheme is secret.

14 53. The Defendants have not, and cannot, give sufficient notice to the public as to what
15 is required to exercise their right to travel in order to cure the fact that the law is secret.

16 54. The secret nature of the regulation encourages arbitrary and discriminatory
17 enforcement.

18 55. The Airline Defendants told the plaintiff three different stories: That government-
19 issued ID was an FAA requirement; a TSA requirement; and airline policy. The Scheme cannot
20 constitutionally be applied because it is a secret law.

21 Second Cause of Action

22 Violation of the Right to Be Free from Unreasonable Searches and Seizures in Violation of
23 the Fourth Amendment of the United States Constitution

24 56. PLAINTIFF incorporates by reference the allegations in Paragraphs 1-55, above.

25 57. The Scheme unconstitutionally seizes and searches citizens who are not suspected of
26 being a threat to airport security.

27 58. Request for ID is a search subject to Fourth Amendment limitations. A government or
28 airline official demanding ID is state action. A government or airline official demanding a more

1 intrusive search as described above in exchange for dropping the demand for ID is also state action.

2 59. The Scheme searches every traveler - however, the Constitution outlaws general
3 warrants. Suspicionless searches are not allowed for general law enforcement purposes, and have
4 only been allowed in extremely limited contexts, even in airports and in motor vehicles. In addition,
5 Plaintiff believes that his ID information has been placed inside a federal database and commingled
6 with other data, without the permission or the consent of the Plaintiff, which constitutes an
7 unconstitutional seizure.

8 Third Cause of Action

9 Violation of the Right to Travel in Violation of the Due Process Clause of the Fifth 10 Amendment of the United States Constitution

11 60. PLAINTIFF incorporates by reference the allegations in Paragraphs 1-59. above.

12 61. Freedom to travel at home without unreasonable governmental restriction is a
13 fundamental constitutional right of every American citizen and is subject to strict scrutiny.

14 62. The Scheme burdens the right to travel within the United States.

15 63. The Scheme is unconstitutional because the Government has not demonstrated that it is
16 necessary to achieve a compelling government purpose and it is not the least restrictive means of
17 achieving that purpose

18 Fourth Cause of Action

19 Violation of the Right to Travel and Associate Anonymously in Violation of the First and 20 Fifth Amendment of the United States Constitution

21 64. PLAINTIFF incorporates by reference the allegations in Paragraphs 1-63, above.

22 65. Both the right to travel and the right of free association are fundamental constitutional
23 rights of US persons, and subject to strict scrutiny.

24 66. Anonymity of association is protected by the fundamental right of free association.

25 67. The Scheme unconstitutionally burdens the right to travel and associate anonymously
26 within the United States. The government has not demonstrated that it is necessary to achieve a
27 compelling government purpose, nor that it is the least restrictive means of achieving that purpose.
28

1 Fifth Cause of Action

2 Violation of the Right to Petition the Government for Redress of Grievances in Violation of
3 the First Amendment of the United States Constitution

4 68. PLAINTIFF incorporates by reference the allegations in Paragraphs 1-67, above.

5 69. The right to petition the government for redress of grievances is a fundamental
6 Constitutional right, subject to strict scrutiny. The right to Petition is burdened by requiring Pet-
7 itioners to identify themselves, and by preventing Petitioners from traveling to where the seat of
8 government is located.

9 70. The Scheme unconstitutionally burdens the right to Petition the government for
10 redress of grievances.

11 Sixth Cause of Action

12 Violation of the Right to Equal Protection in Violation of the Fifth
13 Amendment of the United States Constitution

14 71. PLAINTIFF incorporates by reference the allegations in Paragraphs 1-70, above.

15 72. The Scheme unconstitutionally burdens the right for equal protection of all citizens
16 who seek anonymity, by creating an invidious classification of "anonymous travelers", and
17 arbitrarily forcing this entire class of citizens to endure a higher degree of intrusive searches without
18 good cause than those endured by other citizens.

19 Seventh Cause of Action

20 5 USC 552a – Freedom of Information Act

21 73. PLAINTIFF incorporates by reference the allegations in Paragraphs 1-72, above.

22 74. Section 552a1 of the Freedom of Information Act requires the publication of
23 substantive rules of general applicability adopted as authorized by law, and statements of general
24 policy or interpretations of general applicability formulated and adopted by the agency; and each
25 amendment, revision or repeal of the foregoing. Except to the extent that a person has actual and
26 timely notice of the terms thereof, a person may not in any manner be required to resort to, or be
27 adversely affected by, a matter required to be published in the Federal Register and not so
28

1 published.

2 75. The FAA and/or TSA "security directives", the CAPPS I & II regulatory schemes, and
3 similar regulations contain substantive rules of general applicability which apply to every person in
4 the United States who travels by airplane. Any other regulations enforced by the Defendants that
5 affect the Constitutional rights of travelers are also substantive rules of general applicability and
6 therefore cannot be enforced. These regulations have not been published in the Federal Register,
7 and therefore Plaintiff cannot in any manner be adversely affected by these regulations, rules,
8 directives or other documents that affect the rights of any member of the general public.

9 **REQUEST FOR RELIEF**

10 Good cause having been shown, PLAINTIFF requests the following relief:

11 1. Declare that requiring an individual to identify themselves before or during travel within
12 the United States violates the First, Fourth, and Fifth Amendments of the United States
13 Constitution;

14 2. Declare that the Government Defendants have no power to enforce regulations that
15 have not been published, pursuant to the First and Fifth Amendment and 5 USC 552a;

16 3. Enjoin the Defendants, and all persons acting in concert with them, from "requesting"
17 or demanding that individuals identify themselves as a condition of travel;

18 4. Enjoin the Defendants, and all persons acting in concert with them, from discriminating
19 in any fashion against individuals who do not voluntarily identify themselves.

20 5. Enjoin the Airline Defendants from promulgating or enforcing airline policies,
21 regulations, or tariffs substantially similar to the federally created policies struck down in this case;

22 6. Enjoin the Government Defendants from issuing any future regulation that conditions
23 travel within the United States on relinquishment of identity;

24 7. Enjoin the Government Defendants from collecting information identifying (or tending
25 to identify) U.S. domestic travelers.

26 8. Enjoin the Airline Defendants from providing information to the Government, without
27 probable cause or reasonable suspicion that a crime has been committed, that would identify (or
28 tend to identify) U.S. domestic travelers.

1 9. Ordering the Government Defendants to cease enforcement of all rules, directives or
2 other documents that affect the rights of any member of the general public as described in this
3 complaint, due to failure to publish in the Federal Register pursuant to FOIA..

4 10. Award Plaintiff costs and fees pursuant to 28 U.S.C. Sec. 2412; and

5 11. Grant Plaintiff such other and further relief as the Court deems just and proper.

6 Dated: July 18, 2002

7 15/
8 _____
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10 Attorney for Plaintiff
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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 JOHN GILMORE,
13

Case No. C-02-3444 SI

14 Plaintiff,

vs.

PLAINTIFF'S CONSOLIDATED OPPOSITION
TO DEFENDANTS' MOTIONS
TO DISMISS

15 JOHN ASHCROFT, in his
official capacity as
16 Attorney General of the
United States, ROBERT
17 MUELLER, in his official
capacity as Director of the FEDERAL
18 BUREAU OF INVESTIGATION,
NORM MINETA, in his
19 official capacity as Secretary
of Transportation, JANE F. GARVEY,
20 as Administrator of the Federal
Aviation Administration, JOHN W.
21 MAGAW, in his official capacity as chief
of the Transportation Security
22 Administration, TOM RIDGE, as his official
capacity as chief of the OFFICE OF
23 HOMELAND SECURITY, UAL
CORPORATION aka UNITED AIRLINES,
24 SOUTHWEST AIRLINES,
DOES I-XXX,

Date: January 17, 2003
Time: 9:00 am
Dept: Hon. Susan Illston

25
26 Defendants.
_____/

27 ///

28 ///

Plaintiff's Consolidated Opposition
to Defendants' Motion to Dismiss

00017

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1 **PRELIMINARY STATEMENT**

2 "Free movement by the citizen is of course as dangerous to a tyrant as free expression of
3 ideas or the right of assembly and it is therefore controlled in most countries in the interests of
4 security. That is why riding boxcars carries extreme penalties in Communist lands. That is why the
5 ticketing of people and the use of identification papers are routine matters under totalitarian
6 regimes, yet abhorrent in the United States." Aptheker v. Secretary of State, 378 U.S. 500, 519
7 (1964) (Douglas, J. concurring).

8 The facts of this case are deceptively simple. Plaintiff John Gilmore, a U.S. citizen, was not
9 allowed to board commercial aircraft at two airports because he refused to show identification
10 ("ID") and refused to consent to a more intense security screening based on his refusal to show ID.
11 He wishes to travel anonymously. Since then, he has not attempted any domestic travel by air,
12 water, train, or intercity bus, because of the posted ID requirements, the above experience, and a
13 previous experience being arrested at the San Francisco airport for refusing to show ID.

14 At the heart of this case lie two complex questions: (1) Are domestic travelers presently
15 required by law to show identification papers upon demand? And, if so, (2) Is that requirement
16 constitutional?

17 The first question may seem odd. After all, Plaintiff was not permitted to fly by Southwest
18 Airlines because he would not show his ID and anyone who has traveled by air for the last several
19 years probably believes that he or she must show a government-issued photo ID to board an
20 airplane. Amtrak and Greyhound's web pages indicate that ID is now required to board trains and
21 buses as well. At San Francisco International Airport, and probably every other commercial airport
22 in the United States, signs say that "PASSENGERS MUST PRESENT IDENTIFICATION UPON
23 INITIAL CHECK-IN."

24 But Defendants cannot identify a published law or regulation that requires it. A spokesman
25 for the Transportation Security Administration (TSA) has stated that "[t]he actual presentation of
26 ID by passengers is not required. Refusal to allow passengers to board or not board the aircraft is
27 at the discretion of the airline."

28 So what must Plaintiff do in order to fly commercially? The fact is, we just don't know -

1 because the government refuses to publish the pertinent rules. There is very little case law about
2 secret laws, because our government has seldom been brazen enough to try enforcing one.

3 This "secret law" situation forces Plaintiff and other air travelers who do not wish to show
4 ID to guess at what the law is, and means that their freedom to travel is subject to the discretion of
5 airlines who may or may not be following federal law or standards - thus creating unconstitutional
6 vagueness. On information and belief, the complaint alleges that "the airlines have been mandated
7 by the federal government to inform air travelers that the law requires them to show identification"
8 (§ 5). Plaintiff contends that Defendants must abandon these secret rules.

9 The second question flows from the first. If in fact federal law requires Plaintiff to show ID
10 (or consent to a more intrusive body and luggage search solely because he refuses to show ID - as
11 he was told by United Airlines) in order to travel, is that requirement constitutional? This question
12 implicates three three constitutional rights: freedom of travel, anonymity, and freedom from
13 unreasonable search.

14 Citizens have a fundamental right to travel. Governments may condition an individual
15 method of travel, but there are restrictions to the conditions that can be made. Defendants now
16 seek to impose conditions on all methods of mechanized travel. These conditions would involve
17 giving up other constitutionally protected rights.

18 The right to not identify oneself has been upheld in many First Amendment contexts,
19 including press (McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Talley v. California
20 362 U.S. 60 (1960)); association (NAACP v. Alabama, 357 U.S. 449 (1958)) and speech
21 (Watchtower Bible, et al. v. Village of Stratton, 122 S. Ct. 2080 (2002)). It has been upheld in the
22 context of travel and the Fourth Amendment (Lawson, infra). Defendants now arrogate the power
23 to outlaw or condition all anonymous travel except by foot.

24 Under Ninth Circuit law, government ID requests are a search under the Fourth
25 Amendment. (Lawson, infra). But airport searches are strictly limited to the purpose of detecting
26 weapons or explosives. (United States v. Davis, infra) A person's willingness to show ID is
27 unrelated to whether one has a weapon or a bomb, however, and Defendants have not suggested
28 that the ID requirement furthers the purpose of searching for guns or bombs. Indeed, Defendants

1 concede that the purpose of the ID requirement is to allow airline security to "determine whether
2 the passenger is among those individuals known...or suspected of posing...a threat." (Federal
3 Defendants' MPA at 25, internal quotes omitted). Defendants concede that the ID requirement is
4 designed primarily to enable airline security to check whether a person is on a list of suspects.

5 Defendants claim that they do not "require" ID because travelers may "consent" to a more
6 intrusive search. But forcing travelers to choose between showing ID and being searched more
7 intensely in order to exercise their right to travel is unconstitutional. See Frost Trucking Co. v.
8 Railroad Comm'n, 271 U.S. 583, 594 (1926) ("If the state may compel the surrender of one
9 constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all."

10 The ID cards produced by domestic travelers is used to check them against a No-Fly List
11 prepared by the FBI. A TSA official has stated that these individuals have been deemed "threats to
12 aviation" and may not fly under any circumstances. An FBI official has stated that another tool
13 used is a "Watch List", which includes political activists and other individuals who are suspected to
14 have engaged in criminal activity.

15 The ID requirement is also the backbone of the profiling system called CAPPS
16 (Computer-Assisted Passenger Prescreening System), in force at many commercial airports since
17 1997. Since Sept. 11, 2001, plans have been made for a much more privacy-invasive system called
18 CAPPS II that will use the data from one's "required" ID to search government passport and DMV
19 databases to find one's social security number. It will then search tax, credit, criminal, driving,
20 banking and dozens of other databases, with the assistance of John Poindexter's "Total Information
21 Awareness" program at DARPA. After gleaning more than 1000 items of data to examine
22 personal travel habits, a threat assessment score is created using secret criteria. The score will
23 determine if you can travel and whether you are waved on your way or strip-searched.

24 Accordingly, Plaintiff contends that the ID requirement violates his right to travel without
25 showing "identification papers," and that he has adequately stated injuries that are traceable to
26 secret law, CAPPS, and the No-Fly and Watch Lists.

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STATUTORY AND REGULATORY BACKGROUND

CAPPS

Since December 31, 1997, Congress has authorized the use of a passenger prescreening system to identify the luggage of passengers who might pose a risk to civil aviation, and to ensure that it is adequately screened. Between 1997-2001, the screening method was to identify individuals through a 25 item hijacker profile. Since the passage of P.L. 107-71 (Airline Transportation Security Act) on November 19, 2001, section 49 USC 44903(i) now states that it can also be used to "evaluate all passengers" and "includes procedures to ensure that individuals selected by the system and their carry-on and checked baggage are adequately screened". On November 25, 2002, the Homeland Security Bill was signed into law, expanding the US government's authority and capacity to monitor its own citizens.

Southwest's contention that: "the passenger is never forced to show his or her identification" or that "the passenger can consent to a more thorough search prior to boarding" as an option to showing identification, is misleading. (Southwest's MPA, page 6).

No known statutes or regulations are known to safeguard the procedures by which the collection of information from databases is used to determine a threat assessment score. Nor is anything known on how the CAPPS threat assessment score is maintained, whether it is as a single number, accompanied by a dossier or whether an entire database is created for each individual. Nor are there any safeguards known to Plaintiff to prevent the information in the CAPPS database from being provided to any other governmental agency or private party.

NO-FLY AND WATCH LISTS

A spokesperson for the TSA has admitted the existence of a No-Fly List, prepared by the FBI. There is also an FBI-prepared "Watch List" provided to TSA for monitoring the travel behavior of "suspicious" individuals. A purpose of Defendants' ID requirement is to cross-check these lists with the passengers' names and other data. 49 U.S.C.114 governs administrative procedures to manage all individuals believed to be a "threat to civil aviation".

SECRET LAW

49 USC §40119(b) provides that the FAA Administrator may prescribe secret regulations as

1 considered necessary to prohibit disclosure of any information obtained or developed in conduct of
2 security or research development activities if (s)he concludes that disclosure would be detrimental
3 to safety of persons traveling in transportation.

4 49 USC §114 - Procedures for management of those individuals believed to be a "threat to
5 civil aviation", with no notice and comment period for regulations or security directives.

6 49 USC §44902(b) provides that an air carrier can refuse to transport a passenger or
7 property the carrier decides is, or might be, inimical to safety.

8 These statutes are the apparent authority for the security directives and secret regulations
9 that created the "demand for ID" such as SD 96-05 ("airlines required to request ID" - the
10 "internal passport"), as well as CAPPs, the No-Fly List, and the Watch List.

11 ARGUMENT

12 I. THE LEGAL STANDARD FOR 12(b)(6) MOTIONS

13 A ruling that Plaintiff has failed to state a claim under 12(b)(6) may be granted only in
14 extraordinary circumstances. United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir.
15 1981). Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is
16 entitled to relief". The party bringing a 12(b)(6) motion has the burden to show that Rule 8(a)(2)
17 has not been met. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3rd Cir. 1991) The
18 court's role at the 12(b)(6) stage is not to evaluate the strength or weakness of claims. Jacobson v.
19 Hughes Aircraft Co. (9th Cir. 1997) 105 F.3d 1288, 1292. A Plaintiff's brief may always be used
20 "to clarify allegations in her complaint whose meaning is unclear." Pegram v. Herdrich (2000) 530
21 U.S. 211, 230, fn. 10. "New" facts in Plaintiff's opposition must be considered to determine if to
22 grant leave to amend or to dismiss with or without prejudice. Orion Tire Corp. v. Goodyear Tire &
23 Rubber Co. (9th Cir. 2001) 268 F.3d 1133, 1137.

24 II. STANDING

25 A. LEGAL STANDARD

26 For standing, a litigant must show: [1] that he personally has suffered some actual or
27 threatened injury as a result of the putatively illegal conduct of the Defendant . . . [2] that the injury
28 "fairly can be traced to the challenged action" and [3] [that the injury] "is likely to be redressed by a

1 favorable decision." Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976).

2 Plaintiff asserts multiple discrete injuries, caused by the CAPPS program and the No-Fly and Watch
3 List, which are based on their "ID requirement" and redressable by a favorable decision.

4 **B. STANDING TO CHALLENGE THE IDENTIFICATION REQUIREMENT**
5 **IS CONCEDED BY DEFENDANTS**

6 Federal Defendants state that "(P)laintiff" was allegedly prevented from boarding two aircraft
7 because he refused to produce any form of identification at the request of Defendants Southwest
8 and United, and because he refused to consent to a hand search of his baggage. Complaint 24-34",
9 and that "the airlines acted pursuant to unpublished regulations and/or security directives issued by
10 the FAA and the TSA, Complaint, (paragraphs) 23, 25, 33, 37-39, -- allegations that are sufficient
11 on a motion to dismiss." (Emphasis added) Defendant United Airlines incorporates this same
12 statement by reference. As shown below, the demand for identification is inescapably intertwined
13 with the CAPPS program, the No-Fly and Watch list, thereby providing Plaintiff standing to
14 challenge each program.

15 **1. PLAINTIFF HAS PERSONALLY SUFFERED INJURY AS A RESULT OF**
16 **DEFENDANTS' ACTIONS**

17 On July 4, 2002, Plaintiff was injured by the loss of his right to travel within the United
18 States (see Lawson, Albarado, Section V): a demand for ID that violated the Fourth Amendment,
19 (Lawson, Martinelli, Casey, Section VI), all based on secret law that violates due process (see
20 Lopez, Satellite, Holmes, Section VII).

21 This present action stems from Plaintiff's attempts to fly to DC on July 4, 2002 to petition
22 for redress to the US government. Since that date, Plaintiff has also been deprived of his first
23 amendment rights "to enter into certain intimate human relationships" and "the right to associate
24 for the purpose of engaging in those activities protected by the First Amendment - speech,
25 assembly, petition for the redress of grievances..." Roberts v. United States Jaycees, 468 U.S.
26 609, 617-618 (1984); City of Dallas v. Stanglin, 490 U.S. 19, 25-26 (1989):

27 Plaintiff is a board member and investor in a New York corporation that has board meetings
28 several times a year that he has not been able to attend, and has suffered economic injury as a
result. U.S. v. (SCRAP), 412 U.S. 669, 686 (1973) ("identifiable trifle" sufficient) Plaintiff has

1 family obligations on the East Coast that cannot be met.. Plaintiff has been asked to speak at a
2 conference on Travel Data and Privacy in New York in April 2003, which he does not believe he
3 will be able to attend due to his inability to fly. (Also see Section VIII, infra).

4 Plaintiff is chilled by a "realistic fear of prosecution" (see Bykofsky v. Borough of
5 Middletown, 389 F. Supp. 836, 841 (1975), unlike the Laird plaintiffs, as he was previously
6 arrested in 1996 for refusing to comply with the ID requirement at SFO. Plaintiff fears "implied
7 consent" to either a search or detention once he places his bag on the x-ray conveyor belt - as was
8 decided in the recent case of Torbet v. United Airlines, 298 F. 3d 1087, 1089 (9th Cir. 2002) - and
9 he does not want to be arrested again for failing to display ID when exercising his right associated
10 with travel.

11 Defendants' ID requirement is for the purpose of running CAPPs, the No-Fly List, and the
12 Watch List, and provides Plaintiff with standing to challenge these programs. Plaintiff also
13 challenges SD 96-05 ("airlines required to request ID" - the "internal passport") and all other
14 secret directives and regulations that created the ID requirement. These asserted injuries place his
15 constitutional issues in a "concrete factual context conducive to a realistic appreciation of the
16 consequences of judicial action." Valley Forge Christian College, 454 U.S. 464, 472 (1982).

17 **2. PLAINTIFF'S INJURY CAN BE FAIRLY TRACED TO THE**
18 **CHALLENGED ACTIONS OF THE NAMED DEFENDANTS**

19 Defendants have conceded that the airlines acted pursuant to unpublished regulations
20 requiring ID and that Plaintiff has standing to sue FAA and TSA. The airlines misled the
21 passengers by stating that the ID requirement was "mandatory" when it was not. DOJ vetted the
22 secret regulations and security directives listed above and improperly found them to be
23 constitutional. DOT houses these two agencies and is ultimately responsible for approving all
24 travel security directives. OHS is in charge of coordinating a comprehensive national strategy to
25 protect transportation systems. FBI prepared the No-Fly and Watch List, and provided them to
26 TSA. All of these organizations work together through the auspices of the Technical Support
27 Working Group as part of the mission to implement the ID requirement. Complaint, 14-19, 35.

28 The logic behind the ID requirement is to determine a traveler's true name, to see if it

1 matches a name on the No-Fly List or Watch List, as well as for a CAPPS profile. (Federal
2 Defendants MPA, p. 25) Hence, Plaintiff's injuries are "fairly traceable" to these programs. Also,
3 unlike Laird v. Tatum, 408 U.S. 1 (1972), the Plaintiff is a direct target of all these programs – he
4 has been told by Defendant Southwest that cannot fly unless he submits to providing his identity.
5 Due to the "serious intrusion on personal security" suffered by Plaintiff, he suffered a 4th
6 Amendment injury as described in Lawson, supra; Martinelli, supra; Carey, supra.

7 **3. PLAINTIFF'S INJURY IS LIKELY TO BE REDRESSED BY A**
8 **FAVORABLE DECISION**

9 In accordance with Warth v. Seldin, 422 U.S. 490, 504 (1975), Plaintiff has "allege(d) facts
10 from which it reasonably could be inferred that . . . there is a substantial probability [that the
11 asserted injury would end] if the court affords the relief requested". Plaintiff's injuries would be
12 redressed if he was not forced to provide his name.

13 **III. THE DISTRICT COURT HAS JURISDICTION**

14 Defendants are trying to pigeon-hole this case into an inappropriate appellate procedure
15 reserved for the review of administrative actions in which all parties were involved. As Plaintiff
16 was neither a party to the rule making process nor able to participate in its secretive creation, the
17 review of its enforcement by the appellate court is inappropriate. No record of administrative fact
18 finding and procedure does not exist for an appellate court to review on appeal. The District Court
19 has jurisdiction as Plaintiff's claim involves broad constitutional challenges to agency actions.

20 **A. PLAINTIFF WAS NOT A PARTY TO AN ADMINISTRATIVE ACTION**
21 **RESULTING IN AN ORDER**

22 Administrative orders "may be reviewed by the Courts of Appeals, providing adequate
23 administrative record has been compiled by agency." Sima Products Corp. v. McLucas, 612 F.2d
24 309 (7th Cir. 1980) The appellate court's "function is not to weigh evidence or to evaluate
25 witness's credibility." Sorenson v. National Transp. Safety Bd., 684 F.2d 683 (9th Cir. 1982).
26 "Judicial review of agency decisions is generally limited to review of the administrative record."
27 Oregon Natural Resources Counsel v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997). 49 USCS §
28 46110 (c) reads "[T]he [appellate] court has exclusive jurisdiction to affirm, amend, modify, or set
aside any part of the order... Findings of fact by the Secretary, Under Secretary, or Administrator,

1 if supported by substantial evidence, are conclusive." Here, there has been no administrative
2 hearing or finding of fact involving plaintiff. The administration has provided no record for the
3 appellate court to review for abuse of discretion.

4 Further, an administrative court would not have had original jurisdiction to adjudicate this
5 matter as it is a review of a rule-making proceeding and not an adjudication. The NTSB does not
6 have jurisdiction over challenges to FAA regulations of general application, even though such
7 regulations may have substantial effects on individuals. See Air Line Pilots Association
8 International v. Quesada, 276 F.2d 892, 897-98 (2d Cir. 1960), cert. denied, 366 U.S. 962, 6 L.
9 Ed. 2d 1254, 81 S. Ct. 1923 (1961). The FAA action challenged here is clearly rule-making, not
10 adjudication. Watson v. National Transp. Safety Bd., 513 F.2d 1081, 1082 (9th Cir. 1975)

11 The term "order" has "never has been interpreted to include all agency actions. The term
12 "order" implies a formal agency mandate issued at the culmination of some regular agency
13 proceeding." Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1079 (1976)

14 An examination of the related statutes confirms that view. For example, 49 USCS § 46105
15 (b) reads: "An order of the Secretary, Under Secretary, or Administrator shall include the findings
16 of fact on which the order is based and shall be served on the parties to the proceeding and the
17 persons affected by the order." Similarly, 49 USCS § 44106 (d)(1) reads: "A person whose
18 certificate is revoked by the Administrator under subsection (b) of this section may appeal the
19 revocation order to the National Transportation Safety Board. The Board shall affirm or reverse the
20 order after providing notice and a hearing on the record." The statutory scheme of appellate court
21 jurisdiction envisions a written order entered on the record with appropriate notice to the parties.

22 Nor does the case law suggest a different result. The leading case is United Gas Pipe
23 Line v. FPC, 181 F.2d 796 (D.C. Cir. 1950). There the court of appeals was asked to review an
24 order of the Federal Power Commission. Recognizing the fact that the statute granted a party
25 aggrieved by an "order" of the Federal Power Commission the right to seek review in the court of
26 appeals. The court stated that review in the court of appeals presupposed the need for "a record
27 fully encompassing the issues." 181 F.2d at 799. In the absence of such a record, appellate courts
28 were recognized to have "no intelligible basis for decision" and were without "authority to directly

1 review the Commission's action." *Id.* at 799. And although the requirement of an actual hearing has
2 been questioned by many courts (see, e.g., Deutsche Lufthansa Aktiengesellschaft v. CAB, 479
3 F.2d 912, 915-16 (1973)), the requirement of the need of a record for review has survived. Indeed,
4 "(i)t is the availability of a record for review and not the holding of a quasi judicial hearing which is
5 now the jurisdictional touchstone." *Id.* at 916. There is no record involving Plaintiff's claim for the
6 appellate court to review.

7 Secret directives that affect the constitutional rights of citizens without a record for review
8 are plainly not "orders" of the FAA or TSA within the meaning of 49 U.S.C. § 46110.

9 **B. THE DISTRICT COURT HAS JURISDICTION TO HEAR BROAD
10 CONSTITUTIONAL CHALLENGES TO ADMINISTRATIVE ACTIONS**

11 Statutory appellate court jurisdiction to review agency actions or procedures do not
12 preclude the district court's jurisdiction over "general collateral challenges to unconstitutional
13 practices and policies." Mace v. Skinner, 34 F.3d 854,859 (9th Cir.1994) citing McNary v. Haitian
14 Refugee Center, Inc., 498 U.S. 479 at 492 (1991) Appellate court exclusive jurisdiction to review
15 agency actions is limited to "see if they comport with the procedural dictates set out in the
16 applicable regulations." Mace, 34 F.3d at 858. The appellate courts do not possess original
subject matter jurisdiction.

17 Similarly, the exhaustion of administrative remedies becomes much less likely to be required
18 when the agency "lacks institutional competence to resolve the particular type of issue presented,
19 such as the constitutionality of a statute." Mace, 34 F.3d at 860 n.5 citing McCarthy v. Madigan,
20 503 U.S. 140, 147-148 (1992). "[A] district court has subject matter jurisdiction over broad
21 constitutional challenges to FAA practices because the Federal Aviation Act, 49 U.S.C.A. §§40101
22 - 49105 (1995), provides no remedy for such claims." Foster v. Skinner, 70 F.3d 1084, 1088 (9th
23 Cir.1995).

24 Defendants state that Plaintiff lacks standing to make a claim except upon the "narrow"
25 issue of the identification requirement, and then mischaracterize Plaintiff's constitutional challenge
26 to it as "narrow" without the benefit of any legal analysis. Plaintiff's multiple and complex
27 constitutional claims surrounding the issue of the identification requirement is broad using any
28 accepted interpretation of the word. Plaintiff's other broad constitutional claims on agency actions,

1 for which the court determines he has standing no matter how "narrow" the claim may be, also
2 provide for district court subject matter jurisdiction.

3
4 **IV. AN IDENTIFICATION REQUIREMENT DOES NOT MEET THE
CONSTITUTIONAL TEST IMPOSED ON AIRPORT SCREENING**

5 The standards used to determine the constitutionality of airport searches is that the
6 "screening process is no more extensive than necessary, in light of the current technology, to detect
7 the presence of weapons or explosives, that it is confined in good faith to that purpose, and that
8 potential passengers may avoid the search by electing not to fly." United States v. Davis, 482 F.2d
9 893, 913 (9th Cir. 1973). The Hon. Jack Weinstein has emphasized that the procedure instituted
10 to detect hijackers "survives constitutional scrutiny only by its careful adherence to absolute
11 objectivity and neutrality. When elements of discretion and prejudice are interjected it becomes
12 constitutionally impermissible." United States v. Lopez, 328 F. Supp. 1077, 1098 (1971).

13 The identification requirement is not directed at detecting the presence of weapons or
14 explosives. Knowing the identity of a person does not achieve this goal. The ID requirement is
15 designed to use "lists" of people sought by law enforcement or politically disfavored. Statistics
16 involving past "problematic vs. nonproblematic departure and destination points" are objective and
17 do not target individuals. But searches that include personal names lose objectivity, and subject
18 people to unreasonable suspicion. A No-Fly rule aimed at a specific person is a bill of attainder,
19 unless there is an associated warrant or a conviction. The airport security screening procedure has
20 become a dragnet for law enforcement, rather than a safety procedure for travel. Such a system
21 ignores the Davis standard that requires the focus on weapons and explosives.

22 Plaintiff believes that the airlines have been mandated by the federal government to inform
23 air travelers that the law requires them to show identification. (Complaint, ¶ 5). Defendants must
24 abandon these rules.

25 **V. A REQUIREMENT FOR IDENTIFICATION IS NOT A MINOR RESTRICTION
26 ON THE RIGHT TO TRAVEL**

27 **A. AIR TRAVEL IS A FUNDAMENTAL RIGHT**

28 "[Freedom] to travel throughout the United States has long been recognized as a basic right

1 under the Constitution." United States v. Guest, 383 U.S. 745, 758 (1966). A "fundamental right"
2 Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 903 (1986). A law that requires ID
3 burdens the right to travel, as it is one of the "cherished liberties that distinguish this nation from so
4 many others." Gomez v. Turner, 672 F.2d 134, 143 n. 18 (D.C. Cir. 1982); and must be necessary
5 to further a compelling state interest." Laws that burden that right must be necessary to further a
6 compelling state interest. Soto-Lopez, supra. 476 U.S. at 905. "These amenities have dignified
7 the right of dissent and have honored the right to be nonconformists and the right to defy
8 submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence."
9 Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972). Even with a compelling state
10 interest, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties
11 when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960).

12 **B. APPROVED ID IS NOW REQUIRED TO TRAVEL DOMESTICALLY BY
AIR, RAIL, WATER AND BUS**

13 Government-issued ID is now required to commercially travel domestically by air, rail,
14 water and bus within the United States. This is akin to an internal passport to travel for United
15 States citizens. To argue that Plaintiff's right to travel has not been substantially infringed because
16 he has other modes of interstate transportation (Southwest MPA, p. 13) ignores reality.

17 Defendants' reliance on Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999) is unfounded, as
18 public transport by common carriers now require ID. Application of the Miller standard would
19 permit the government to condition the right to travel by forcing Plaintiff to waive other rights.
20 Miller relies on Monarch Travel Servs. Inc. v. Associated Cultural Clubs, Inc., 466 F.2d 552 (9th
21 Cir. 1972) which found that financial burdens on a single mode of transportation are not sufficient
22 to implicate the right to interstate travel. However, Monarch did not address an industry and
23 nation wide government sanctioned requirement for the production of ID, applied to all major
24 modes of public transportation, as a prerequisite to carriage. Miller also relies on Berberian v. Petit,
25 374 A.2d 791 (1977), which differentiated denial of a driver's license from being "prevented from
26 traveling ... by common carrier." (Miller, supra at 1206). In contrast, Plaintiff is being denied
27 interstate carriage by common carrier airlines.

28 **C. AIR TRAVEL IS A NECESSITY**

1 "[I]t would work a considerable hardship on many travelers to be forced to utilize an
2 alternative form of transportation, assuming one exists at all." United States of America v.
3 Albarado, 495 F.2d 799, 807 (2nd Cir. 1974). It is "often a necessity to fly on a commercial
4 airliner, and to force one to choose between that necessity and the exercise of a constitutional right
5 is coercion in the constitutional sense." Id. At 807. Also see United States v. Kroll, 481 F.2d 884,
6 886 (8th Cir. 1973). In City of Houston v. FAA, 670 F.2d 1184, 1198 (5th Cir. 1982), the court
7 conceded that a ban on using a particular airport "might well give rise to a constitutional claim".
8 The Ninth Circuit in Davis stated that "a restriction that burdens the right to travel too broadly and
9 too indiscriminately cannot be sustained.". Id. at 912. There are growing numbers of air travelers
10 who commute between San Francisco and Los Angeles on a daily basis. It is no less a necessity for
11 the Plaintiff to visit his family, his company, and his representatives in Congress.

12 D. LESS RESTRICTIVE MEANS EXIST

13 Defendants' secret directives are unconstitutional unless Defendants can show that they are
14 the least restrictive means available to accomplish their compelling state interest, and that they
15 actually do further their compelling state interest.

16 The abuse of discretion, permitted under the current secret security directive, can easily be
17 narrowed by either eliminating it or publishing it. A published directive would be less restrictive
18 because it would enable citizens to know what their rights under the directive are and to challenge
19 officials who attempted to deny those rights. Alternatively, the government could merely publish a
20 clear regulation stating what forms of identification will be accepted.

21 TSA claims that the ID requirement is optional today - but does not address whether the
22 travelers are properly informed of this option. It also accompanies that claim with purported secret
23 requirements that airlines must infringe the Fourth Amendment by searching travelers without ID
24 more intensively than other travelers. Each airline has its own set of requirements that they generate
25 for TSA approval, which are also kept secret. Elimination of secret rules would provide a less
26 restrictive means to clarify the law.

27 In Britain, air carriers have discretion on whether to conduct ID checks. The dominant
28 carrier, British Airlines, does not check identification within England despite having been the target

1 of terrorists attacks for decades resulting from England's conflict with Northern Ireland . It is less
2 intrusive and within the realm of reasonableness for the U.S. to adopt the British rule.

3 Armed air marshals are now flying as passengers. Cockpit doors have been strengthened.
4 Physical searches have been intensified. Passengers and crew are now advised to resist any hostile
5 takeover. Even the decision giving guns to pilots makes more sense than giving the government
6 the power to declare "open season" on its citizens.

7 Plaintiff has raised plausible but less restrictive means to effectively achieve the same
8 objective. The Davis holding does not give the government discretion to continue ratcheting up its
9 intrusions on the Fourth Amendment until there is no possibility of violent conflict on airplanes.

10 **VI. DEFENDANTS VIOLATE DUE PROCESS BY EXERCISING STANDARDLESS
DISCRETION TO ENFORCE A SECRET LAW**

11 In striking down a law that required people to show "credible and reliable" ID on demand,
12 the Supreme Court held that void-for-vagueness doctrine requires that a law be drafted "with
13 sufficient definiteness that ordinary people can understand what conduct is prohibited and in a
14 manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson,
15 461 U.S. 352, 357 (1983); Delaware v. Prouse, 440 U.S. 648, 662-663 (1979), (no right for police
16 to conduct random or arbitrary seizures to check a motorist's ID, as "to allow this action would
17 create a 'grave danger' of abuse of discretion."); Village of Hoffman Estates et al. v. Flipside, 455
18 U.S. 489, 499 (1982) (more stringent vagueness test in First Amendment cases).

19 "Traditional concepts of due process incorporated into administrative law preclude an
20 agency from penalizing a private party for violating a rule without first providing adequate notice of
21 the substance of the rule." Satellite Broadcasting Co., Inc. v. F.C.C., 824 F.2d 1, 3 (C.A.D.C.
22 1987). Defendants' claim that the consequence of noncompliance "is not a penalty at all" (Federal
23 Defendants' MPA, p. 13) is nonsense. Plaintiff was previously arrested in 1996 for refusing to
24 show ID upon demand by an airport security officer.

25 The airline employees could not articulate which forms of ID were required, the
26 consequences, or its source. The consequences include being subject to intrusive searches,
27 detainment and questioning by authorities, denial of the right to travel, and potential arrest.

28 The Kolender court held that a legislature must establish minimal guidelines to govern law

1 enforcement. Otherwise, a law may permit "a standardless sweep [that] allows policemen,
2 prosecutors, and juries to pursue their personal predilections." Id. at 358. There is not even a
3 published regulation in this case that provides minimal standards.

4 As to when a passenger can be ejected for "safety reasons", the 9th Circuit standard is
5 whether the airline exercised its discretion reasonably based on all the information available when
6 the decision was made. Cordero v. Cia Mexicana de Aviacion, 681 F.2d 669, 672 (9th Cir. 1982)
7 (protester wrongfully labeled as "violent" and not allowed to fly).

8 The vagueness also encompasses the selection of travelers for different degrees of
9 searching. Absolute discretion in a government agency is "an intolerable invitation to abuse".
10 Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968) The Holmes court
11 rejected a New York City public housing allocation plan based on a "scoring system", and noted
12 that it would discriminate if "some applicants, but not others, are secretly rejected by the Authority,
13 are not thereafter informed of their ineligibility, and are thereby deprived of the opportunity to seek
14 review of the Authority's decision." Id. at 265.

15 Travelers such as Plaintiff face a similar predicament under the secret CAPPS scoring
16 scheme. The system selects some travelers "randomly" for intrusive searches, providing cover for
17 any non-random searches ordered by officials with unbridled discretion. Such a program is
18 unconstitutional unless it adheres to "absolute objectivity and neutrality" and avoids "elements of
19 discretion and prejudice." U.S. v. Lopez, 328 F. Supp 1077 (E.D.N.Y. 1971). An ID requirement
20 based on vague and secret "security directives" makes it difficult to know whether any guidelines to
21 law enforcement exist. Even citizens who display government-approved photo ID can still be
22 detained because they have names that "resemble" names on a "no-fly" list, or because they have
23 engaged in protests or acts of civil disobedience in the past and have therefore been earmarked as
24 "selectees". Such elements cannot withstand constitutional scrutiny.

25 **VII. THE IDENTIFICATION REQUIREMENT VIOLATES THE FOURTH
26 AMENDMENT**

27 **A. THE ID REQUIREMENT IS A "SERIOUS INTRUSION ON PERSONAL
28 SECURITY"**

An ID requirement constitutes a "serious intrusion on personal security" that is more serious

1 than a pat down search. Lawson v. Kolender, 658 F.2d 1362, 1367-68 (9th Cir. 1981) (aff'd on
2 other grounds, Kolender v. Lawson, 461 U.S. 352 (1983)). Kolender established a line of 9th
3 Circuit cases (Martinelli v. City of Beaumont, 820 F.2d 1491, 1494 (9th Cir. 1987); Carey v.
4 Nevada Gaming Board, 279 F.3d 873, 880 (9th Cir. 2000)) finding a 4th Amendment violation to
5 require a person to provide reliable identification upon police demand, even when there is a
6 reasonable suspicion of criminal activity. Ignoring twenty years of precedent, Defendants have
7 instituted a system that demands ID whether or not there is even reasonable suspicion, and far short
8 of probable cause:

9 "Police knowledge of the identity of an individual they have deemed 'suspicious' grants the police
10 unfettered discretion to initiate or continue investigation of the person long after the detention has
11 ended. Information concerning the stop, the arrest, and the individual's identity may become part of
12 a large scale data bank." Lawson, 658 F.2d at 1368.

13 Although the Supreme Court declined to resolve this issue in 1983, it held in Brown v.
14 Texas, 442 U.S. 47, 51-52 (1979) that a demand for ID by police must be based on reasonable
15 suspicion with objective criteria. Thus, the requirement that Plaintiff provide identification,
16 conducted by the airline Defendants at the behest of TSA, violates the Fourth Amendment under
17 either Lawson or Brown. "We believe that the serious intrusion on personal security outweighs
18 the mere possibility that identification may provide a link leading to arrest." Lawson, *supra*, at
19 1368.

20 The fourth amendment analysis does not change because of advances in technology. The
21 court held in Delaware v. Prouse, 440 U.S. 648, 663 (1979) that citizens were not shorn of their
22 4th Amendment rights because they "stepp(ed) from the sidewalks into their automobiles."

23 **B. DEFENDANTS CANNOT CONDITION THE EXERCISE OF THE RIGHT TO** 24 **TRAVEL ON THE RELINQUISHMENT OF 4TH AMENDMENT RIGHTS**

25 On airplanes, there must be a compelling state interest (Davis, *supra*, 482 F.2d at 912-913)
26 and "the government (cannot) properly argue that it can condition the exercise of the Defendant's
27 constitutional right to travel on the voluntary relinquishment of his Fourth Amendment rights.
28 Implied consent under such circumstances would be inherently coercive." United States v. Lopez,
328 F. Supp. 1077, 1093 (E.D.N.Y. 1971); *accord*, United States v. Meulener, 351 F. Supp. 1284,
1288 (CD Cal. 1972). The test is the reasonableness of the search, not consent to search. United

1 States v. Albarado, *supra*, 495 F.2d at 807.

2 The Lopez injunction about conditioning the right to travel on relinquishing the 4th
3 Amendment stems from cases such as Perry v. Sindermann, 408 U.S. 593 (1972) (coerced consent
4 violates the doctrine of unconstitutional conditions; the Government cannot condition the receipt of
5 a governmental benefit on waiver of a constitutionally protected right); Speiser v. Randall, 357 U.S.
6 513 (1958), (veterans tax benefit may not be conditioned on taking a loyalty oath) Frost Trucking
7 Co. v. Railroad Comm'n, 271 U.S. 583, 594 (1926) (on unconstitutional conditions, "it is
8 inconceivable that guarantees embedded in the Constitution of the United States may thus be
9 manipulated out of existence." Southwest Airlines cannot condition the right to board on an ID
10 requirement, nor can United condition boarding on a "more intrusive search".

11 **C. THE ADMINISTRATIVE SEARCH EXCEPTION AND THE SPECIAL
12 NEEDS DOCTRINE ARE NOT APPLICABLE**

13 **1. Gravity of the threat alone cannot justify abandoning the 4th Amendment**

14 The ID requirement can not justified by defining it as an "administrative search" (United
15 States v. Davis, 482 F.2d 893 (9th Cir. 1973) or pursuant to the "special needs" doctrine
16 (Indianapolis v. Edmond (2000) 531 US 32, 47-48, 121 S. Ct. 447, 457 ("Our holding also does
17 not affect the validity of border searches or searches at places like airports and government
18 buildings, where the need for such measures to ensure public safety can be particularly acute."))
19 The focus, of course, is on weapons and explosives - not ID cards.

20 The Indianapolis court held that:

21 "In determining whether individualized suspicion is required, we must consider the nature of
22 the interests threatened and their connection to the particular law enforcement practices at issue."
23 Id. at 42-43. Even though the government cited the "the severe and intractable nature of the drug
24 problem", the court held that "the gravity of the threat alone cannot be dispositive of questions
25 concerning what means law enforcement officers may employ to pursue a given purpose". Id. at 42.

26 Terrorism-related crimes undoubtedly inflict "social harms of the first magnitude," but the
27 "gravity of the threat alone" cannot justify abandoning the traditional protections of the Fourth
28 Amendment. The Supreme Court has refused to recognize Fourth Amendment exceptions based
on the seriousness of the crime under investigation. See, e.g., Flippo v. West Virginia, 528 U.S. 11,

1 13-14 (1999) (per curiam) (no "murder-scene" exception to warrant requirement); Richards v.
2 Wisconsin, 520 U.S. 385, 391-95 (1997) (refusing to recognize blanket exception to
3 knock-and-announce requirement in drug cases); Abel v. United States, 362 U.S. 217, 219-20
4 (1960) (applying Fourth Amendment to espionage case)

5 The standard is:

6 (1) "...where a Fourth Amendment intrusion serves *special governmental needs, beyond*
7 *the normal need for law enforcement*, it is necessary to balance the individual's privacy
8 expectations against the government's interests to determine whether it is impractical to require a
9 warrant or some level of individualized suspicion in the particular context." (Italics added). , as set
10 forth in National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989),

11 (2) "we examine the available evidence to determine the primary purpose of the checkpoint
12 program. While we recognize the challenges inherent in a purpose inquiry, courts routinely engage
13 in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive
14 governmental conduct from that which is lawful." Indianapolis, 531 F.2d at 46-47.

15 **2. Examination of the primary purpose reveals no significant governmental interest**

16 The Defendants claim that the primary purpose of the ID requirement is "the need to
17 prevent airline hijacking" and "detecting the weapons employed in airline terrorism". (Federal
18 Defendants' MPA, p. 19-20). The 9th Circuit has mandated that the two factors that must be
19 found in any reasonable airport screening search conducted to "prevent airline hijacking" and
20 "detect the presence of weapons and explosives". (United States v. Davis, 482 U.S. 893, 910
21 (1973) - such a search must be "no more extensive or intensive than necessary, in light of current
22 technology" and it must be "confined in good faith to that purpose". Torbet v. United Airlines,
23 298 F.3d 1087, 1089 (9th Cir. 2002)

24 **a. It is "more extensive or intensive than necessary, in light of current
25 technology", and reasonable alternatives exist**

26 Discovery will reveal whether mandatory government-issued photo identification tied in
27 with these programs is even a marginally useful law enforcement tool in locating weapons and
28 explosives. A "sleeper" terrorist with no criminal record can easily be activated bearing spotless
ID. A recent MIT study shows that the CAPPs analysis can be easily overcome if three dry runs

are conducted to determine who is selected. Government-approved photo ID is easily faked.

United States v. Dorsey, 641 F.2d 1213 (7th Cir. 1981) identifies cogent observations designed to lead to actual evidence. Factors which may be relevant in judging propriety of searches include "nervous or unusual conduct, tips from informants, loose clothing, travel itinerary, lack of employment, needle marks, information from traveling companions, inadequate luggage and evasive or contradictory answers." Nothing remotely akin to those methods used in CAPPs is mentioned here. And reasonable alternatives exist, as discussed elsewhere in this brief.

b. The ID requirement is not "confined in good faith" to the primary purpose, and no adequate safeguards exist

The deceptive ID "requirement", and the complete failure to provide due process protections for victims of CAPPs and the Watch and No-Fly Lists illustrates that the government is not acting in good faith. After discovery, Plaintiff maintains that the evidence will show that the privacy-invasive techniques of the ID requirement and profiling are the least likely to be effective. Less privacy-invasive techniques (see Section V.D, supra) are the most likely to be effective.

Because law enforcement involvement can always be construed to serve some broader social purpose, Defendants' view would immunize virtually any nonconsensual suspicionless search under the special needs doctrine by defining the search solely in terms of its ultimate goal, rather than immediate purpose. Given the primary purpose of the Torbet factors are to "prevent airline hijacking" and "detect the presence of weapons and explosives", this case simply does not fit within the closely guarded category of "special needs." Such an approach violates the 4th Amendment.

VIII. PLAINTIFF'S FIRST AMENDMENT RIGHTS ARE INTERTWINED WITH TRAVEL AND VIOLATED IN AN ID REQUEST PRIOR TO BOARDING

The ID request deprives Plaintiff of a host of first amendment rights: His right to speak without being chilled due to justified fear of arrest (Bykofsky, supra); freedom of association City of Dallas v. Stanglin, supra; Roberts, supra; the right to petition the government for redress (White v. Lee, 227 F.3d 1214 (9th Cir. 2000)); see Section IIB, above.

Being unable to fly to these cities means that it will take him many days to get to these cities by any other method of transport. This is the "indirect injury" referred to in Healy v. James (408 U.S. 168, 183 (1972)) that constitutional protection is not limited to direct interference with

1 fundamental rights, but extends to indirect and unintended interference. Lyng v. International
2 Union, UAW, 485 U.S. 360, 367 (1988) approvingly cites Healy for the proposition that
3 "associational rights 'are protected not only against heavy-handed frontal attack, but also from
4 being stifled by more subtle governmental interference'" – and emphasized that a food stamp cut-
5 off on striking union members' households will not "affect in any significant way the existing
6 members' ability to associate freely". In contrast, the injuries to Plaintiff's relations with his family,
7 his company, and his political advocacy are highly significant. In Waters v. Barry, 711 F. Supp.
8 1125, 1134 (U.S.D.C. 1989), the court struck down a curfew as "tramp(ing) upon associational
9 and liberty interests", holding that "when government undertakes to limit these rights in some
10 manner, it must act gingerly...narrowly focused on the harm at hand, as well as sensitive to needless
11 intrusions upon the constitutional rights of the innocent" (Id. at 1134, citing Roberts, supra, 468
12 U.S. at 623; Aptheker, supra, 378 U.S. at 508; Shelton, supra, 364 U.S. at 488).

13 **IX. IF NECESSARY, THE COURT IS REQUESTED TO REVIEW THE "NEW FACTS"
14 ADDENDUM, AND/OR PROVIDE AN OPPORTUNITY TO AMEND COMPLAINT**

15 Plaintiff has stated valid causes of action based on the contentions of the complaint.
16 Plaintiff has waived argument on his claims pursuant to equal protection and FOIA. If the court
17 feels it necessary, Plaintiff respectfully asks the court to review the "new facts" Addendum and/or
18 provide an opportunity to amend the complaint.

19 **CONCLUSION**

20 Plaintiff is innocent of any wrongdoing. If the individuals on these lists are convicts or have
21 outstanding warrants, these lists are a law enforcement tool and not a security screen.

22 The ID requirement unreasonably prevents people from flying who are not threats to
23 aviation. They violate due process, the right to travel, and the 1st and 4th Amendment.

24 Plaintiff has adequately stated injuries that are traceable to secret law, CAPPS, and the No-
25 Fly and Watch Lists, and has alleged sufficient facts to state the relevant causes of action.

26 Dated: November 27, 2002

27 
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JAMES P. HARRISON
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7 Attorneys for Plaintiff JOHN GILMORE

8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11

12 JOHN GILMORE,
13

Case No. C-02-3444 SI

14 Plaintiff,

15 vs.

PLAINTIFF'S ADDENDUM OF NEW FACTS RE
OPPOSITION TO DEFENDANTS' MOTIONS
TO DISMISS

16 JOHN ASHCROFT, in his
official capacity as
Attorney General of the
United States, ROBERT
17 MUELLER, in his official
capacity as Director of the FEDERAL
18 BUREAU OF INVESTIGATION,
NORM MINETA, in his
19 official capacity as Secretary
of Transportation, JANE F. GARVEY,
20 as Administrator of the Federal
Aviation Administration, JOHN W.
21 MAGAW, in his official capacity as chief
of the Transportation Security
22 Administration, TOM RIDGE, as his official
capacity as chief of the OFFICE OF
23 HOMELAND SECURITY, UAL
CORPORATION aka UNITED AIRLINES,
24 SOUTHWEST AIRLINES,
DOES I-XXX,

Date: January 17, 2003
Time: 9:00 am
Dept: Hon. Susan Illston

25 Defendants.
26

27 Operation of the Computer-Assisted Passenger Prescreening System (CAPPS)
28

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Plaintiff's Addendum of New Facts Re Opposition to
Defendants' Motions to Dismiss

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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02 DEC 20 1

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1. The present system, CAPPS I, was instituted systemwide in January 1998, screening all passengers and examining about 25 items such as name, address, phone number, travel history, criminal records, whether a ticket was paid for in cash, whether it was one-way, and how long before the date of departure it was purchased. (Linda Ackerman, www.seattlepress.com/article-9684.html - also see www.privacyactivism.org/Item/48 - Mary Lou Pickel, Cox News Service 9/9/02; Jim Ritchie, Tribune-Review, 5/1/02) CAPPS I "profiles" people to determine which bags and people are searched more intensively (Complaint, para. 36). It also has access to the FBI's Watch List. (Jim Ritchie, Pittsburgh Tribune-Review, 5/1/02, www.pittsburghlive.com/x/kqradio/s_69011.html)

2. Since Sept. 11, 2001, plans have been made for a much more privacy-invasive system called CAPPS II. Reports state that the new CAPPS II program will go into in a matter of months, after the Homeland Security legislation passes (William Matthews, Federal Computer Week, 9/2/02, www.fcw.com/fcw/articles/2002/0902/news-capps-09-01-02.asp) and technological complexities are solved. (Robert O'Harrow, "Air Security Focusing on Flier Screening", Washington Post, 9/4/02, see <http://washingtonpost.com>) CAPPS II will use the data from one's "required" ID to search government passport and DMV databases to find one's social security number. It will use more than 1000 items of data gleaned from a variety of databases in the public and commercial sector, including police, IRS, family, housing information, credit reporting details, and other personal data to determine if they're "rooted in the community" (O'Harrow, *supra*). It is being coordinated with John Poindexter's "Total Information Awareness" program at DARPA. CAPPS II will demand the key data found on a government-issued ID, and may also demand additional ID such as a social security number, and then electronically absorb the data on every passenger reservation, and correlate these 1000 items of data by integrating and simultaneously analyzing numerous databases from the public and private sectors. (Ackerman, *supra*).

3. Although there is no way to know for certain the accuracy of this secret data, credit reporting information is subject to review and is reportedly 30% inaccurate. (Ackerman, *supra*; also see USPIRG report "Mistakes Do Happen: Credit Report Errors Mean

1 Consumers Lose", 3/98, <http://uspirg.org/uspirg.asp?id2=5970&id3=USPIRG&>. [A report from
2 the U.S. Commission on Civil Rights found that almost one of every seven people, or 14%, on a
3 list of alleged felons provided by a company owned by the information broker ChoicePoint was
4 incorrectly identified and wrongly disqualified from voting in the 2000 Florida election. (Greg
5 Palast, The Best Democracy Money Can Buy (2002)) also see Glenn R. Simpson, Big Brother-in-
6 Law: If the FBI Hopes To Get the Goods on You, It May Ask ChoicePoint, Wall St. J., Apr. 13,
7 2001, at A1., see www.online.wsj.com/public/us

8 4. It is well known that fake identification is a common ruse and is routinely
9 used to obtain government-issued ID that is equally fake. (New York Times, 5/20/02, "Foreigners
10 Obtain Social Security ID with Fake Papers"). The nineteen men who are believed to have
11 hijacked airplanes on September 11, 2001 were all vetted and approved by the same ID checks that
12 are used today. (Para. 30). In fact, several of the nineteen individuals named by the FBI as the 9-
13 11 hijackers turned out to be victims of identity theft. (Telegraph, David Harrison, "Revealed:
14 The Men with Stolen Identities (9/21/01)
15 <http://www.portal.telegraph.co.uk/news/main/jhtml?xml=/news/2001/09/23/widen23/xml> see also
16 http://www.news-bbc.co.uk/1/hi/english/world/middle_east/newsid_1559000/1559151/stm
17 (BBC, 9/23/01)

18 5. After assessing transactions, movements and patterns of behavior
19 (Ackerman, supra), a profile will be created that will produce a specific "score", or "threat risk
20 assessment". (Robert O'Harrow, Jr., 2/1/02, Washington Post, "Intricate Screening of Fliers
21 Database Raises Privacy Concerns") Currently, there is no statute that restricts the use of CAPPS
22 II by other law enforcement agencies. (O'Harrow, Washington Post, 9/4/02, supra).

23 6. This threat risk assessment is then transmitted directly to "front-line
24 security forces" (William Matthews, supra) and determines who will be singled out as 'selectees'
25 for intensive searches of both carry-on and checked luggage, or allowed on the plane at all. This
26 entire process is conducted on the basis of secret regulations, with the passenger given no
27 opportunity to amend or correct the information in these various databases -- and no agency
28 assigned to correct any inaccurate information. (Ackerman, supra)

1 7. Despite all these actions, a recent MIT study shows that the CAPPS
2 analysis can be easily overcome if three dry runs are conducted to determine who is selected.
3 (Brian Loux, "Paper Shows Airline Profiling Ineffective", The (MIT) Tech, Volume 122, issue 48,
4 <http://www-tech.mit.edu/V122/N48/48secure.48n.html>); see also the paper itself, "Carnival Booth:
5 An Algorithm for Defeating the Computer-Assisted Passenger Screening System",
6 <http://swissnet.ai.mit.edu/6805/student-papers/spring02-papers/caps.htm>.

7 8. Since CAPPS I was instituted in 1998, a traveler is in the CAPPS system
8 from the first time one makes a reservation or buys a ticket in one's own name.

9 **B. Background on the No-Fly List and the Watch List**

10 9. Besides CAPPS, another part of today's air security system is the FBI's
11 maintenance of a No-Fly List as well as a Watch List of alleged suspects who require additional
12 scrutiny. (Sara Goo, Washington Post, 7/2/02, Ritchie, supra, William Matthews, Fed. Computer
13 Week, 9/9/02, see <http://www.fcw.com>). TSA manages the lists, relaying names collected to
14 airlines and airports. (Alan Gathright, SF Chronicle, 9/27/02, see also
15 www.mindfully.org/Reform/2002/No-Fly-Blacklist-Activists27sep02.htm), Matthews, 9/9/02,
16 supra)

17 10. These lists are used by many agencies and the airlines, who are
18 responsible for matching these lists with the passenger manifests. (Gathright, supra) Dave
19 Steigman, a TSA spokesman, has said that the criteria for placing someone on the No-Fly list is
20 "special security information not releasable to the public". (Gathright, supra) Steigman states that
21 as of November, 2002 approximately 1,000 people are on the No-Fly list, and that TSA has no way
22 to remove anyone from such a list. Dave Lindorff, In These Times, 11/22/02, see also
23 <http://www.inthesetimes.com./issue/27/02/features3.shtml>.

24 11. If a passenger is found to be on one of the lists, the airlines can question
25 or search the traveler or alert law enforcement officials. (Sara Goo, supra). FBI and airline
26 officials have also been quoted as saying that there is no way to be removed from a list. (Jeff
27 Greenspan, 9/17/02, AP). The FBI's own website admits that "there is no single definition of
28 terrorism". Travelers could be denied boarding or even arrested based on information that may be

1 inaccurate. (Mary Lou Pickel, supra, quoting Mihir Kshirsagar of EPIC).

2 12. The ID cards produced by domestic travelers is used to check them
3 against a No-Fly List prepared by the FBI. A TSA official has stated that these individuals have
4 been deemed "threats to aviation" and may not fly under any circumstances. Another tool used is
5 the FBI's "Watch List", which includes political activists and other individuals who are suspected
6 to have engaged in criminal activity. (Goo, supra; Ritchie, supra)

7 13. The No-Fly List has already been used on domestic flights to harass
8 citizens such as Johnnie Thomas, a woman who has the misfortune of sharing a similar name with
9 John Thomas Christopher, the alias of Christopher Longo, a man who is in jail for allegedly
10 murdering his wife and children. The Thomas case demonstrates that the No-Fly list is used for
11 general law enforcement purposes rather than an aviation security purpose. (New Yorker, 5/13/02)

12 14. The No-Fly list is also being used for political purposes. Twenty
13 protesters attempting to board a domestic flight to a Washington, D.C. demonstration were
14 prevented from attending allegedly because one of their group had a name that *resembled* a name
15 on the No-Fly list and TSA decided to rescreen the entire group. (Gathright, supra) On several
16 occasions, members of the Green Party have been prevented from boarding on domestic flights.
17 (the Maine and North Carolina cases). (Gathright, supra) The founders of the San Francisco
18 antiwar publication War Times were detained and questioned by police at SFO on August 7 --
19 while they were eventually allowed to fly, their boarding passes were marked with a red "S" which
20 subjected them to more scrutiny at SFO and during a layover in Chicago. (Gathright, supra)

21 15. In a similar event, Doug Stuber, a Green Party activist, was unable to
22 board three separate planes out of North Carolina during October, 2002. While being refused
23 boarding at the Raleigh-Durham Airport, he was able to view on an open page the names "Green
24 Party, Greenpeace, Earth First!, Amnesty International". (see Lindorff, supra)

25 16. Plaintiff objects to the *unregulated use* of such lists, because he believes
26 history teaches that granting the government unlimited control over an "enemies list" will
27 inevitably result in abuse -- and he has reason to believe that he is on these lists. He was arrested
28 at SFO in 1996 for violation of California Penal Code Section 148 ("delaying...a peace officer...in

1 the discharge or attempt to discharge any duty of his or her office or employment") during an event
2 where he refused to show his ID shortly after the institution of Security Directive 96-05. (The
3 charges were later dropped.)

4 17. It is reasonable to assume that Southwest employees in Oakland had
5 reported Plaintiff's name and description to officials at SFO, which may have led them to their
6 treatment of Plaintiff. At the United terminal of SFO, Plaintiff found himself surrounded by
7 security officers for a prolonged period of time and did not believe that he was he free to go.

8 **C. The government's stated position on ID policy**

9 18. However, the TSA has publicly stated that ID is not mandatory. "TSA
10 spokesman Greg Warren said "TSA requires air carriers to *request* a valid form of identification
11 from a government issuer. The actual presentation of ID by passengers is not required. Refusal to
12 allow passengers to board or not board the aircraft is at the discretion of the airline." (Paul Boutin,
13 Wired News, "Disputed Air ID Law May Not Exist", 8/15/02, see also
14 <http://www.wired.com/news/privacy/0,1848,54464,00.html>)

15 19. TSA's Warren also mentioned that because states allow people not to
16 have their pictures taken for religious grounds, there is also a requirement that people with no
17 photo ID be put through more stringent security checks. (Lance Gay, Scripps Howard News
18 Service 8/23/02). When asked if people with no ID face a more intensive search, Warren "neither
19 confirmed nor denied that they enforce an ID-or-search requirement on air carriers". (Boutin,
20 supra) The only published legal guidance is in 49 CFR 1544.201, which merely requires that
21 airlines refuse to transport "any individual who does not consent to a search or inspection of his or
22 her person."

23 20. Cruise ships that only use U.S. harbors are now demanding ID of
24 travelers. (Dallas News, 9/1/02, also see
25 <http://www.dallasnews.com/travel/cruisenews/stories/090102.dntracruiseident.5af68.html>).

26 21. Since July 4, 2002, Plaintiff has not attempted any domestic travel by
27 air, water, train, or intercity bus, because of the posted ID requirements, the events of 7/4/02, and
28 his previously described experience being arrested at the San Francisco airport for refusing to

1 show ID.

2 **D. Less restrictive means exist**

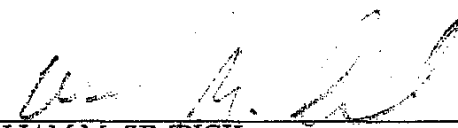
3 22. TSA claims that the ID requirement is optional today - but does not
4 address whether the travelers are properly informed of this option. Each airline has its own set of
5 requirements that they generate for TSA approval, which are also kept secret.

6 23. In Britain, air carriers have discretion on whether to conduct ID checks.
7 The dominant carrier, British Airlines, does not check identification within England despite having
8 been the target of terrorists attacks for decades resulting from England's conflict with Northern
9 Ireland. ("What's Wrong with a Bus Pass as ID?" London Telegraph Travel Newspaper, July 20,
10 2002, page 19).

11 24. A recent MIT study shows that the CAPPS analysis can be easily
12 overcome if three dry runs are conducted to determine who is selected (Loux, supra).

13 25. Armed air marshals are now flying as passengers. Cockpit doors have
14 been strengthened. Physical searches have been intensified. Passengers and crew are now advised
15 to resist any hostile takeover. Pilots are now allowed to possess guns in the cockpit.

16 Dated: November 27, 2002

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18 
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20 JAMES P. HARRISON
21 Attorneys for Plaintiff JOHN GILMORE
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12 Attorneys for Plaintiff JOHN GILMORE

ORIGINAL
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OCT - 8 2003

RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

13 UNITED STATES DISTRICT COURT
14
15 NORTHERN DISTRICT OF CALIFORNIA

16 JOHN GILMORE,

Case No. C-02-3444 SI

17
18 Plaintiff,

19 vs.

20 JOHN ASHCROFT, et al.,

PLAINTIFF'S REQUEST FOR
JUDICIAL NOTICE RE OPPOSITION
TO DEFENDANTS' MOTION TO
DISMISS, AND REQUEST TO SEAL
EXHIBIT 2

21
22
23 Defendants.

Date: Under submission
Dept: Hon. Susan Illston

24
25
26 Pursuant to FRE 201, Plaintiff submits to the court the following items:

27 Exhibit 1. Privacy Act Notice issued by Defendants TSA and DHS, published in the
28 Federal Register at 68 FR 45265-45269 on 1 August 2003. This Notice states, among other
things, that the CAPPS-II system being challenged by Plaintiff (see Plaintiff's Consolidated
Opposition MPA to Motion to Dismiss, 3:15-23) will be used for purposes of "the detection of

1 outstanding state or federal warrants" (p. 5). This violates the doctrine in *United States v. Davis*,
2 482 US 893, 910 (9th Cir. 1973), stating that a reasonable administrative screening search must be
3 as limited in its intrusiveness as is consistent with satisfaction of the administrative need that
4 justifies it, and *Torbet v. United Airlines*, 298 F.3d 1087, 1089 (9th Cir. 2002) (see Opposition
5 MPA, p. 18:15-23), (any searches to prevent airline hijacking or detect the presence of weapons
6 and explosives, such a search must be "confined in good faith to that purpose"). Thus, such a
7 search should not be conducted for general law enforcement purposes.
8

9
10 A further law enforcement purpose is revealed (p. 6) by the intent to link CAPPS-II with
11 the US-VISIT system for checking the validity of visas.
12

13 The Privacy Act Notice also demands that airlines collect more identifying information
14 from every traveler and report it to the government. (p. 4) The requirement is stated circuitously,
15 but creates a new requirement that airlines collect each traveler's full name, home address, home
16 telephone number, and date of birth – information that is not currently collected. It states that "No
17 additional information beyond this data is required to be collected from passengers" (p. 4),
18 implying but not stating that this data *is* now required for the first time.
19

20 The document says nothing about verifying this information against the traveler's ID card,
21 continuing the practice of never documenting the ID requirement in any published regulation.
22 However, it is reasonable to suppose that airlines will be required by a new secret directive to deny
23 boarding to travelers whose ID does not confirm the above information, just as in today's CAPPS-
24 1 system the airlines validate the name and picture from the ID against the traveler's records.
25

26 This document was printed from
27 http://www.dhs.gov/interweb/assetlibrary/CAPPSII_PRIVACY_ACT_NOTICE.pdf on September
28 25, 2003, and is self-authenticating pursuant to FRE 902(5) (official publications).

1 Exhibit 2. The "Airline Passenger Risk Assessment" slides presented by government
2 subcontractor Torch Concepts at the Southeastern Software Engineering Conference on April 2,
3 2003 illustrate prototypes of the system that would use travelers' information plus commercial
4 databases to single out "suspicious" travelers for denial of their constitutional rights. Page 8
5 describes the involvement of defendants DOT and TSA, and Torch's connection with the CAPPS-
6 2 program. Page 23 concludes by recommending that "Passenger Stability Indicators" such as
7 social security number, length of residence, income, and home ownership would be viable
8 candidates for selecting who to search: those who do not provide an SSN, who move frequently,
9 who have low incomes, or who rent their homes.
10

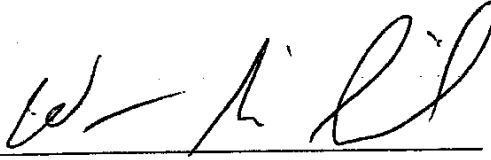
11
12 If asked, Plaintiff will stipulate to the sealing of Exhibit 2. Torch Concepts has issued cease-
13 and-desist letters, based on copyright protection, to several web sites which have republished this
14 document. This document is authenticated with an affidavit by plaintiff John Gilmore pursuant to
15 Federal Rule of Evidence 901(b)(1) (testimony of witness with knowledge).
16
17

18
19 Exhibit 3. The September discovery of this presentation has resulted in extensive news
20 coverage, focused on both the privacy rights of travelers and on the expansion of the air passenger
21 profiling system. The editorial "Betraying One's Passengers" on page A30 of the September 23,
22 2003 New York Times is representative. The Times editorial is authenticated pursuant to FRE
23 902(6) (newspapers and periodicals).
24
25

26 Plaintiff respectfully commends these articles to the court for its consideration and to the
27 Defendants for review and any appropriate response.
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Dated: October 2, 2003



WILLIAM M. SIMPICH

JAMES P. HARRISON

Attorneys for Plaintiff JOHN GILMORE

TSA is establishing this system of records, now entitled "Passenger and Aviation Security Screening Records," to support the function of TSA's CAPPS II system. CAPPS II is intended to conduct risk assessments and authentications for passengers traveling by air to, from or within the United States.

Sources of Information Contained in the CAPPS II System; Process Flow

Under the proposed CAPPS II system, TSA will obtain electronically, either from airlines or from Global Distribution Systems, a passenger's "passenger name record" (PNR) as collected from the passenger by a reservation system. PNR includes the routine information collected at the time a passenger makes a flight reservation. A PNR may include each passenger's full name, home address, home telephone number and date of birth, as well as some information about that passenger's itinerary. No additional information beyond this data is required to be collected from passengers for the operation of CAPPS II.

The CAPPS II system will access PNRs prior to the departure of the passenger's flight. Selected information will be securely transmitted to commercial data providers, for the sole purpose of authenticating passenger identity. This authentication will be accomplished not by a permanent co-mingling of data, but merely by the commercial data providers transmitting back to TSA a numeric score, which is an indication of the percentage of accuracy of the match between the commercial data and the data held by TSA. This will enable TSA to have a reasonable degree of confidence that each passenger is who he or she claims to be. TSA recognizes that inaccuracies in the commercial data may exist and that the CAPPS II system must allow for and compensate for such

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inaccuracies; this test phase is intended to test and further develop such capabilities in the system.

Commercial data providers will receive a limited amount of identifying information from TSA with regard to each passenger, and will provide TSA with an authentication score and code indicating a confidence level in that passenger's identity. The commercial data providers will not provide TSA with any additional information about the individual. They will not acquire ownership of the data, nor will they be permitted to retain the data in any commercially usable form. TSA will not permit the commercial data providers to use this data for any purpose other than in connection with the CAPPS II program. Importantly, the commercial data provider will not retain information about the response they provide to TSA in any record about the individual that they maintain. Further, no persistent link between an individual's records in the private sector and that person's records within the CAPPS II system will be created.

Once CAPPS II has authenticated a passenger's identity, it will conduct its risk assessment. The risk assessment function is conducted internally within the U.S. government and will determine the likelihood that a passenger is a known terrorist, or has identifiable links to known terrorists or terrorist organizations. National security information from within the federal government, as well as information reflecting federal officials with high levels of security clearance, will be part of this analysis function.

After the CAPPS II system becomes operational, it is contemplated that information regarding persons with outstanding state or federal arrest warrants for crimes of violence may also be analyzed and applied in the context of this system. At or after such time as the system becomes operational, where there is an indication of a serious

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violation of criminal law (as described in the Routine Use section, below), such information may be shared between law enforcement agencies and the Department of Homeland Security and appropriate action may be taken. It is further anticipated that CAPPS II will be linked with the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) program at such time as both programs become fully operational, in order that the processes at both border and airport points of entry and exit are consistent. Any such linkages will be performed in full compliance with the Privacy Act of 1974, including any applicable requirement for additional notice.

It is important to note the CAPPS II system is designed to determine the likelihood that a passenger is a known terrorist, or has identifiable links to known terrorists or terrorist organizations, including both foreign and domestic terrorist organizations.

Lastly, it is anticipated that dynamic inputs to the system from intelligence sources will allow the system to respond to current threat conditions and information on a timely basis.

Impact on Traveling Public

Based upon the combination of information derived from commercial sources, national security sources, and dynamic intelligence data, each traveling passenger will be identified with a "risk score," indicating whether that person's information leads to a determination of low, high, or unknown risk to passenger and aviation security.

In the vast majority of cases, passengers will be identified as "low risk," and will simply pass through the ordinary airport security screening process to their flights.

In a small percentage of cases, passengers may be found to present an elevated, uncertain or "unknown risk" of terrorism. In such cases, the passengers in question will

It Took a Long Time to Get Data!

- Dec '01 – Jan '02: Initial Overtures Made to Airlines to Obtain Data (Delta, American, . . .)

March – Contract Funded

- April 11: First Meeting with DOT, Mr. Jim Yeager
- April – May: Congressional Liaison Arranged Meeting with TSA
- June: First DOT-TSA Meeting Addressed Proposed Project.
- July: Given Assurance That We Would Receive the Necessary Data Base Being Used By CAPPS II Contractors in Weeks.
- August: Informed We Would Receive the jetBlue Data Base. We Indicated That This Would Probably Be Very Limited.
- September: Received the jetBlue Data Base. Confirmed Limitations.
- October: Purchased Acxiom Data Base on Passenger Demographics.

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The Passenger Demographics Data Base

- Acquired from Axiom -

For Approximately 40% of the Passengers, the Following Demographic Information Could Be Extracted:

- | <u>Name</u> |
|---|
| 1. Gender |
| 2. Home Specifics – Owner/Renter, . . . |
| 3. Years at Residence |
| 4. Economic Status – Income, . . . |
| 5. Number of Children |
| 6. Social Security Number |
| 7. Number of Adults |
| 8. Occupation |
| 9. Vehicles |

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Risk Assessment Potential

- Several Data Elements Have Been Identified Which Best Distinguish Normal jetBlue Passengers from Past Terrorists.
- These “Passenger Stability Indicators” Include Social Security Number, Length-of-Residence, Income, and Home Ownership. Two Additional Elements If Available Would Likely Be Good Indicators: Namely, Miles Flown Annually and Lifetime.

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The New York Times

Founded in 1851

ADOLPHUS OCHS, Publisher 1896-1898
ARTHUR HAYS SULZBERGER, Publisher 1898-1961
ORVILLE DRYDOOS, Publisher 1961-1963
ARTHUR OCHS SULZBERGER, Publisher 1963-1992

ARTHUR OCHS SULZBERGER JR., Publisher

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LIAM J. CARROLL, VP, Chief Financial Officer

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DENNIS L. STERN, VP, Human Resources

MICHAEL A. WILLIAMS, VP, Chief Information Officer

THOMAS E. CANLEY, President, News Services

Betraying Ones Passengers

IT IS THE AIRLINE'S passengers, more than 3 million of them, who have been manhandling the airlines in the Bush administration's effort to experiment in using commercial databases to assess the risk of a person turning out to be a terrorist. The airline admits it violated its own privacy policy when it disclosed to the Pentagon its request to give passenger records to Torch Concepts, a private technology business that was ostensibly creating a program to enhance security at military bases.

JetBlue's surrender of the information amounts to one of the most serious betrayals of consumers' privacy rights by an American business. The three-year-old airline, praised on this page for sound management and innovative service, recognizes that it made an error of judgment, and has apologized.

It is also quick to note that it did not share the information with a government entity, though it is not clear why passengers should feel reassured and it was a private company using the names, addresses and flight information to extrapolate Social Security and other personal data from other sources.

Plenty of questions remain unanswered about this episode and about the real extent of government involvement. A Congressional inquiry may be appropriate, given the scope of the Bush administration's ambitions regarding surveillance. Torch Concepts maintains, and the airline believed all along, that the data was not used in conjunction with the development of the Pentagon's troubled anti-terror

ism technology project for the Transportation Security Administration's passenger profiling project. That system will match passenger records with commercial databases like credit histories. A presentation made by the company to Homeland Security Department officials in February went far beyond issues of security at military bases.

JetBlue's behavior is a cautionary tale about the promiscuous use of consumer information and the ease with which government can access information ostensibly in private hands. Privacy groups have rightly asked the Federal Trade Commission to open an inquiry into the JetBlue case. Companies' violations of their own privacy policies, which consumers have relied on, must be treated as deceptive business practices. The airline could have volunteered to help develop a new profiling system by sharing passenger records, but only if it had disclosed the plan.

This misstep only feeds legitimate consumer fears that companies and governments are too quick to use private data in unauthorized ways. It is worrisome in this regard that the Homeland Security Department has already backtracked from its original vow to use its passenger profiling program only to fight terrorism. There is now talk of turning it into an all-purpose law enforcement tool. For its part, in addition to ascertaining what actually took place, Congress may also need to consider new legal protections for consumers' privacy.

Question Time for Governor Leavitt

Democrats on the Senate Environment and Public Works Committee have little prospect of blocking committee approval of Michael Leavitt, the Utah governor who is President Bush's choice to succeed Christie Whitman as administrator of the Environmental Protection Agency. Yet they owe it to the country and to the environment to use today's confirmation hearings to cross-examine Mr. Leavitt and to ask how he intends to restore the credibility and independence of an agency that for two years has been little more than an extension of Karl Rove's political operation in the White House.

These senators — including, prominently, Joseph Lieberman, Hillary Clinton and the independent James Jeffords — also owe it to themselves. They have watched with mounting frustration as Mr. Bush has rescinded or weakened one environmental regulation after another without paying a political price. These hearings give them a chance to make a coherent case while people are paying attention.

On the face of it, Mr. Leavitt's record as governor suggests that he will fit right in with the antiregulatory types who occupy every other important environmental post in the administration. He has won praise for reducing air pollution in the Grand Canyon and for trying to control urban sprawl. But his record for enforcing federal laws like the Clean Water Act has been spotty, and this page has taken him to task for two back-room deals with Gale Norton, the Secretary of the Interior,

manipulate science to serve political ends. The most prominent example was some heavy-handed censorship of a chapter on the risks of global warming in what the agency advertised as a comprehensive report on the environment. Several senators have also accused the agency of suppressing evidence that reflect unfavorably on the administration's proposed clean air legislation.

Here are two questions we would ask Mr. Leavitt: He says he is a great believer in state's rights. What, then, does he make of a terrible proposal awaiting his judgment that would greatly narrow the scope of the Clean Water Act by removing federal protections from millions of acres of wetlands, streams and lakes? Nearly 40 states oppose this proposal. The only people who like it are the home builders and their friends in the White House. Is he prepared in this instance to listen to the states and ignore his masters?

He also fancies himself a world-class negotiator. If that is so, would he be prepared to broker a deal adding a global warming provision to Mr. Bush's clean air proposal, thus breaking what appears to be an insurmountable legislative impasse?

Affirmative answers to these two questions do not make him the right man for the job. But they would demonstrate an independent judgment the agency sorely needs.

00060

Correction

A Shocking Award to Berlusconi

To the Editor:

Re "Jewish Group in Honor of Prie Galls 'Flayed'" (news article Sept. 19)

On Tuesday, the Anti-Defamation League plans to hold a dinner for Prime Minister Silvio Berlusconi of Italy to present him with its distinguished Statesman Award. This is shocking to anyone who knows Mr. Berlusconi's controversial history.

Most recently, Mr. Berlusconi was in the news for his comments about Benito Mussolini. "That was a much more benign dictatorship," Mr. Berlusconi was quoted as saying. "Mussolini did not murder anyone. Mussolini sent people on holiday to internal exile."

This is not true; Mussolini was responsible for the deaths of many political opponents, Partisans and Jews. He persecuted Jews with his racial laws and during World War II was responsible for the deportation of thousands of Jews to the death camps.

Thomas L. Friedman (columnist Sept. 21)

As a Marine Corps veteran of the Vietnam War, I am a wounded soldier. When I come to Iraq, I see the same man in a different setting. In Vietnam, the discourse regarding our intervention in both places sounds strikingly similar:

"If we don't fight them over there, we will have to fight them over here." "The light at the end of the tunnel is now." "We are making progress every day."

"We need more money to support our troops" (who simply want to go home).

"Doubt, credibility" is at stake so we must win "what? at all costs." "Winning the war only helps the enemy."

"Vietnamization" has been replaced by "Iraqification."

One's hope that in the future we do not hear "We lost the war, but we won all the battles."

RICHARD C. GENTILCOKE
Fort Lauderdale, Fla., Sept. 21, 2003

To the Editor:

I have to wonder how Thomas L. Friedman (columnist Sept. 21) comes to the conclusion that America "has come to Iraq with the sole intention of liberating its people."

Not more than a year, the Bush administration has provided a variety of explanations for why this war was necessary: Saddam Hussein's weapons of mass destruction and the "Axis of Evil" threat he posed were the most commonly cited reasons. Occasionally, the terrorist connection was included as another prime justification.

It seems to me that the administration has conveniently used the

his support of Israel and of Prime Minister Ariel Sharon. But support for Israel should not be sufficient in itself. It is bad for the Jews, bad for Italy, bad for the United States, even bad for Israel.

FRANCO MODIGLIANI
PAUL A. SAMUELS

ROBERT M. SEL

Cambridge, Mass., Sept. 22
The writers, emeritus professors of M.I.T., are Nobel laureates in economics. The letter was also signed by four other professors at M.I.T. and Harvard.

To the Editor:

Re "Jewish Group to Honor Prie Galls 'Flayed'" (news article Sept. 19)

Prime Minister Silvio Berlusconi of Italy met in Rome on Wednesday with representatives of the Jewish community. He apologized for comments that Benito Mussolini really was a "benign dictator."

Thomas L. Friedman (columnist Sept. 21)

Thomas L. Friedman's silent "justice" in Iraq column Sept. 21 implies the existence of a representative democracy in Iraq. There is no representative democracy in Iraq. Saddam Hussein and his cronies are currently occupying a foreign power that is using military dictatorship to control the country. These are unfortunate facts, but not the case. JOHN G. EAST, Seattle, Wash., Sept. 22, 2003

To the Editor:

Re "Worried Optimism on Iraq" (columnist Sept. 21)

While Thomas L. Friedman argues Iraqis' defense of "our shared values," he may want to consider another important rule of Middle Eastern culture (a sort of corollary to the one he cites). What people you in private is exactly what you want to hear.

Middle Eastern culture and its norms dictate that one never off one's guest. HOUMAN M.
New York, Sept. 21, 2003

Canadian Freedom

To the Editor:

Re "Married Gay Canadian Couple Barred From U.S." (news article Sept. 19)

With the news that United States Customs agents are now in the business of determining what kind of married couples are allowed to enter this country, one has to wonder if official America actually begrudges Canada's freedoms.

Whether on the issue of natic health care, affordable prescription drugs or the equal opportunity, gay and lesbian couples to marry seems that our neighbor to the north is busy setting a governmental example for what is possible in the field of what is said here to be impossible. While the United States is bringing American-style freedom to Iraq, perhaps we should consider bringing Canadian-style freedom to America.

KEITH L.
New York, Sept. 22, 2003

The New York Times Company

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11 Attorneys for Plaintiff JOHN GILMORE

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 JOHN GILMORE,
15 Plaintiff,
16 vs.

Case No. C-02 3334 SI

17 DECLARATION OF JOHN GILMORE IN
18 SUPPORT OF PLAINTIFF'S REQUEST FOR
19 JUDICIAL NOTICE

20 JOHN ASHCROFT, in his
21 official capacity as
22 Attorney General of the
23 United States, ROBERT
24 MUELLER, in his official
25 capacity as Director of the FEDERAL
26 BUREAU OF INVESTIGATION,
27 NORM MINETA, in his
28 official capacity as Secretary
of Transportation, JANE F. GARVEY,
as Administrator of the Federal
Aviation Administration, JOHN W.
MAGAW, in his official capacity as chief
of the Transportation Security
Administration, TOM RIDGE, as his official
capacity as chief of the OFFICE OF
HOMELAND SECURITY, UAL
CORPORATION aka UNITED AIRLINES,
SOUTHWEST AIRLINES,
DOES I-XXX,

Defendants.

I, John Gilmore, declare as follows:

Declaration of John Gilmore

ORIGINAL
FILED

OCT - 8 2003

RICHARD W. WICKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

00061

1. My name is John Gilmore and I am the plaintiff in Gilmore v. Ashcroft, C-02-3444 SI.

2. On September 16, 2003 I downloaded a file from the internet at the URL:

http://www.ndia-tvc.org/SESEC/Presentations/SE2%20Conference%20PDFs/DAY_2/Session%203/S3B3_Roark.pdf

Immediately afterward, I viewed this file on my computer screen. It contained 23 pages of text and diagrams. Based on its contents, its location on the web site, and the surrounding documents such as the conference program, I concluded it to be a slide presentation by Mr. Roark, an employee of Torch Concepts, to the second annual South East Software Engineering Conference ("SESEC"), in session 3 ("Information Technology for Homeland Defense"), presented on April 2, 2003. The conference was held by the National Defense Industrial Association, Tennessee Valley Chapter, at The Von Braun Center in Huntsville, Alabama.

3. On September 17, 2003, the next day, I attempted to download the above document again from the same location. The web site responded that there was no such document. Also, the directory of presentations for the conference at the URL:

http://www.ndia-tvc.org/SESEC/program_presentations.htm

did not show any mention of a presentation from Torch Concepts.

4. On October 1, 2003, I again attempted to download the Torch conference presentation. The web site continued to report that there is no such document. The directory continued to show that there was no presentation by Mr. Roark or by Torch Concepts. However, there were four other documents available under "Session 3", which are named "S3B1_Toliver.pdf", "S3B2_Russell.pdf", "S3B4_Belton.pdf", and "S3B5_Johnson.pdf". There was no file that begins "S3B3". The names "Toliver", "Belton", and "Johnson" were listed in the directory of presentations, as speakers in the same April 2 conference session.

1 5. On September 17, 2003, I also viewed the Torch Concepts web site at www.torchconcepts.com.

2 I downloaded and viewed a May 8, 2002 press release from:

3 <http://www.torchconcepts.com/news/release-9.htm>

4 This document announced that Torch had won a contract to support the Army in pattern
5 recognition for anti-terrorist purposes. The press release identified William Roark as Chief
6 Operating Officer of Torch Concepts. Its final paragraph was the single sentence, "This effort
7 will be performed under a subcontract to SRS Technologies ('SRS')."

8
9
10 6. On September 23, 2003, I again downloaded and viewed the press
11 release from the same location:

12 <http://www.torchconcepts.com/news/release-9.htm>

13 By this time, the paragraph about SRS Technologies had been removed from this purported 2002
14 press release. The rest of the text was unchanged.

15
16 7. This "editing of the past" reminded me of the dystopian novel "1984", in which the main
17 character was employed in constantly rewriting books, newspapers, and other private records so
18 that they would not reveal any historical facts that would embarrass the government.

19
20 8. On October 1, 2003, I again downloaded and viewed the same Torch Concepts press release. It
21 was unchanged from the one I downloaded on September 23; it was still missing the mention of SRS.

22
23 9. I have viewed the 23-page document submitted here to the court for judicial notice, and it is a
24 true and accurate copy of the conference presentation document that I downloaded and viewed on
25 September 16, 2003.

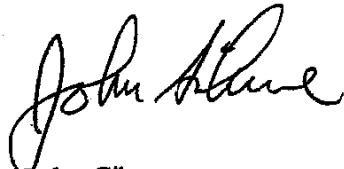
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10. I declare under penalty of perjury that the foregoing is true and correct and of my own personal knowledge.


Date: 2 October 2003 John Gilmore

00064

san francisco, california
friday, january 17, 2003

appearances:

james p. harrison, esq.
980-9th street, 16th floor
sacramento, california 95814

24 mr. lobue: government has no objection.
25 ms. barrett: southwest has no objection.

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1 the court: well, then, united is severed. thank
2 you for coming. and the case against united is stayed and the
3 case against everybody else is not.
4 this is defendant's motion to -- these are
5 defendant's motions to dismiss. i've read the papers, i'll
6 tell you -- what, mr. simpich, what is it exactly that mr.
7 gilmore is complaining about?
8 mr. simpich: your honor, what he's challenging is
9 the identification requirement.
10 the court: the id requirement?
11 mr. simpich: as it stands.
12 the court: so, then to the extent that it's argued
13 you don't have standing to challenge anything but the id
14 requirement, you're content with that, that's all you're
15 challenging?
16 mr. simpich: that's the focus.
17 the court: i want to know what you're challenging.
18 mr. simpich: that's what i'm trying to address.
19 the other side agrees in their papers that the security
20 directive 96-05 and the other security programs related to [the?]
21 identification requirement itself are within the purview of our
22 claim.
23 where the quarrel is, whether the no fly list, the
24 watch list, or the capps prescreening system fall within the
25 challenge of the identification requirement, that's kind of the

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1 terrain we're on here.
2 and it's our contention that in the issue of the
3 identification requirement the -- all three lists are
4 implicated. there's real no way to get around it.
5 as a logical matter, if the identification
6 requirement is spelled out as optional, which we believe it
7 should be, these three programs are going to be affected.
8 there's just no getting around that. so that's the heart of
9 the issue as we see it.
10 the court: i don't understand what you just said.
11 are you challenging the no fly list?
12 mr. simpich: we're challenging the no fly list,
13 watch list and the prescreening list, in that we believe that
14 the reason these -- the identification requirement exists is
15 because these programs are being brought on line in the last
16 few years.
17 and because these programs need to know the true
18 identity, not a phoney identity or second name, that's why
19 96-05 was issued in 1996 after the twa disaster, in that time
20 frame.
21 the court: okay. and the gist of your argument is
22 what?
23 mr. simpich: well, your honor, the gist of our
24 argument is that because of --
25 the court: the gist of your argument, let's start

00067

Page 6

1 off with the standing.
 2 mr. simpich: thank you. on that threshold issue
 3 i'd like mr. harrison to address this directly.
 4 mr. harrison: good morning, your honor. my name is
 5 jim harrison.
 6 mr. simpich and i have somewhat bifurcated the
 7 issues. i'm here to talk about standing and jurisdiction, he's
 8 to talk about the specific injuries that plaintiff suffered as
 9 a result of the identification requirement.
 10 so the issue, as i understand, you want to address,
 11 is the injury -- is the standing issue?
 12 the court: yes.
 13 mr. harrison: with regards to the standing, no fly
 14 and watch list?
 15 the court: right.
 16 mr. harrison: our central issue here, as
 17 mr. simpich said, is the id requirement. if you take the id
 18 requirement and find that it is unconstitutional for any of
 19 the, you know, claims that we bring, and say that it cannot be
 20 used, then the actual functionality of the watch list, or the
 21 no fly list, or the capps program crumbles.
 22 they themselves in their, in the federal reply, on
 23 page eight say that the no fly list would be unfunctional
 24 without the id requirement.
 25 so we're not necessarily suing the -- we're not

Page 7

1 actually bringing the claim against the no fly and capps
 2 program, we're bringing a claim that the id requirement within
 3 all these programs has injured our client in the ways that we
 4 have listed.
 5 the court: the id requirement you say has injured
 6 your client?
 7 mr. harrison: yes.
 8 the court: not the id requirement within the no fly
 9 list, that didn't affect him at all, but the id requirement
 10 itself is what affected him that day when he tried to fly?
 11 mr. harrison: the id requirement we contend was
 12 because of the no fly list. the id requirement that was the
 13 client was asked for id because of the no fly list, he was
 14 asked for id because of the watch list and he was asked for id
 15 because of the capps 2 program. it's not severable in our eyes,
 16 at least.
 17 i mean, you might be able to say in the end
 18 plaintiff wasn't -- his injury didn't result from him not being
 19 able to get on the airplane because of the no fly list, but the
 20 id requirement as is part of the no fly program or the
 21 functionality of the no fly list is what injured him.
 22 the court: right. it seems to me that if you're
 23 challenging the id requirement that's one thing, if you're
 24 challenging the no fly list there's probably ways you can
 25 challenge it separate from the id requirement. you're not

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1 doing that?
 2 mr. harrison: no, i don't think plaintiff would

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3 have standing to do that.

4 the court: right, that's my point. so, i think,
5 all you have standing to talk about is the id issue, and then
6 the chips ultimately fall wherever they fall. but they only
7 fall in the case brought by somebody who has standing to talk
8 about them.

9 mr. harrison: well, correct. but what's going to
10 happen and what has already happened, was that if we go down
11 the road and we do get standing to bring a claim on the id
12 requirement, and we get to you, your honor gets to a state of
13 doing some sort of balancing test over governmental interests
14 versus the constitutional injury to client, defendants are
15 going to have to bring up the overriding governmental interest
16 of security. and we're going to say how it is necessarily
17 effectuated and we'll go through the rigamarole of scrutiny.
18 and they're going to say it's the no fly list, is how it's
19 implemented or it's the capps program and eventually we're going
20 to get there.

21 and it's my understanding it's unavoidable. they
22 even bring it up, as i said, in their briefs, both their
23 opposition and the reply brief.

24 so it's not that we want to say, hey, you can't, the
25 no fly list prevented me from getting on the airplane because

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1 ike was on the list and, therefore, you know ike has standing
2 to sue. that's not what's going on here. it's the id
3 requirement that's inseparable from the -- these three
4 programs.

5 the court: because you think they'll bring that up
6 by way of justification?

7 mr. harrison: i'm certain they must. in fact, they
8 already have. if you take a look at their pleadings they start
9 with the justification for these violations of my client's
10 constitutional rights.

11 the court: i understand your position. thank you.

12 mr. harrison: i'm willing to talk about

13 jurisdiction as well, should you have a question.

14 the court: the district court versus the court of
15 appeals.

16 mr. harrison: yes.

17 the court: why don't you talk about that.

18 mr. harrison: sure. at first was a battle back and
19 forth over whether or not this is an order for the purposes of
20 statutory review by the appellate courts under section 46110,
21 title 49.

22 they do have statutory power to review orders,
23 however, in our situation this involves a constitutional
24 challenge, and it's -- that is the point that we center on.
25 the appellate courts -- i'm sorry, the

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1 administrative courts within the faa, all the cases that
2 involve review of orders have involved either challenges to
3 certificate actions, someone's mechanics license, or pilot's
4 license, or operating license suspended or revoked, or it
5 involves air space.

00069

6 the air space contentions have all been deemed rules
7 and all been contested on apa standards for notice and comment
8 making sure they comply with those.

9 here we have a situation where we've got rule,
10 admittedly at first we were trying to find a way around it
11 being a rule because of its safety standard, but we concede
12 it's a rule.

13 but what's not at issue here are the merits of
14 plaintiff's case. we're not talking about why he got his

15 license suspended, we're not talking about facts involving
16 airline operations. we're talking about constitutional
17 challenges to practices and policies of the federal government
18 and the airlines.

19 so for that reason it's clearly a constitutional
20 challenge, it's not -- there's no administrative record for the
21 appellate court to review. and i've cited cases.

22 there's an excellent case in the ninth circuit
23 called mace v. skinner. that's kind of a one stop shop for all
24 these issues. you can -- and it says that because the claim
25 was not based on the merits of plaintiff's individual

Page 11

1 situation, but rather based on a challenge to the allegedly
2 unconstitutional practices of the faa, it was a case that the
3 district court had jurisdiction to hear.

4 and they cite the supreme court case mc nary versus
5 haitian refugees which, again, was a situation involving
6 statutory review by the appellate court.

7 however, they found that it did not preclude
8 district courts' jurisdiction over collateral, general
9 collateral challenges to unconstitutional practices and
10 policies. that's the nutshell of my jurisdiction argument.

11 the court: tell me the name of that last case
12 again?

13 mr. harrison: sure. the case that was cited by
14 both plaintiffs and defendants is mace versus skinner 34 f 3d
15 854, ninth circuit decision 1994. and what they're citing is
16 mc nary versus haitian refugee center, supreme court case 498
17 u.s. 479, it's 1991.

18 the court: thank you.

19 mr. harrison: thank you.

20 the court: why don't we hear about those questions
21 first.

22 mr. lobue: jeff lobue from the justice department.
23 first, with respect to the standing issue, we would
24 agree with plaintiffs, that part of the reason identification
25 card is requested is to insure that the individual is not a

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1 person who is known to pose a risk to aviation safety.

2 that's all in the statute. it's in 114 of title 49,
3 that the government is suppose to come up with procedures to
4 provide airlines with that type of information, and the only
5 way they can compare their passengers list with that particular
6 group of people is to find out their identity.

7 that does not mean, however, that plaintiffs can
8 challenge how that list is put together. whether one person on

9 it that shouldn't be on it, whether, you know, the government
 10 has made mistakes, or in milwaukee put the wrong person on, all
 11 that stuff is in the complaint. none of that is relevant to a
 12 claim challenging an identification requirement.
 13 and what we're saying is they can't challenge the
 14 list separate and apart from this identification requirement.
 15 sure, we can argue about one of the purposes for requesting
 16 identification is to do what the statute says, but that's not a
 17 challenge to how the list is compiled.
 18 nor is it appropriate for plaintiffs to get into
 19 other aspects of the so-called passenger prescreening system,
 20 such as whether somebody pays for a ticket in cash or, i think,
 21 there's three or four things they argue about.
 22 plaintiff wasn't injured by any of this stuff,
 23 plaintiff was injured, if he was injured at all, by the request
 24 for identification, which in turn he refused to provide and
 25 then didn't fly. that's his claimed injury.

Page 13

1 he wasn't injured because he purchased a ticket in
 2 cash, he wasn't injured because the name john gilmore appears
 3 on some list somewhere, whether it's a no fly list or a watch
 4 list, he doesn't claim he was.
 5 the question of jurisdiction it seems to me follows
 6 really from the standing issue, because if plaintiff can
 7 challenge all these broad array of different practices of the
 8 agency, which really go beyond an order, if they can challenge
 9 how a no fly list was conducted, that's the type of broad
 10 constitutional challenge which might go beyond a particular
 11 order.
 12 but in this case all they can really challenge is a
 13 particular order, a particular security directive, it's not a
 14 broad constitutional challenge. there maybe half a dozen
 15 different constitutional claims, but they're all focused on the
 16 validity of a particular security directive or a particular
 17 order.
 18 and it's that type of claim which falls directly
 19 within 46110, and 46110(c) says the court of appeals has
 20 exclusive jurisdiction to affirm, modify or enjoin that type of
 21 order.
 22 and what the court of appeals ruled in clark versus
 23 busey is where an order falls within the scope of that statute,
 24 the district court's federal jurisdiction is preempted.
 25 so it's a very different case from mace where you're

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1 challenging the broad group of practices, the challenge is
 2 focused on an order, so we believe the ninth circuit has
 3 jurisdiction.
 4 the court: thank you.
 5 mr. harrison: may i have --
 6 the court: you can have a brief response. then i'd
 7 also like to hear from whoever is going to talk about it, why
 8 you think the id requirement is not okay.
 9 mr. simpich: i'll be addressing that.
 10 mr. harrison: certainly. the federal defendant is
 11 correct, it is their job to defend against known risks. in the

12 known risk under u.s. versus davis is weapons and explosives on
13 airplanes.
14 as you have read in our brief we center a lot on
15 that. it's the violation of the fourth amendment is limited to
16 the search of weapons and explosives and not identification.
17 i want to address the broad constitutional challenge
18 argument that defendant just brought up. he's trying to pull
19 the court's attention off what the issue is.
20 the issue is not whether or not the particular
21 issue, the id requirement, is a broad or narrow thing, whether
22 the challenge to that issue is a broad constitutional
23 challenge.

24 plaintiff has brought seven or six constitutional
25 challenges and a foia request and/or complaint that's obviously

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1 broad. the cases that have found constitutional challenges to
2 be heard by the district courts have involved one single
3 constitutional issue. i call your attention also to mace which
4 addresses that as well.

5 the court: all right. thank you.

6 mr. simpich: thank you, your honor.

7 these broad constitutional challenges to tick them
8 off are, first, the due process issue, best embodies the secret
9 laws, the fourth amendment issue, the right to travel issue and
10 the first amendment issue.

11 starting with the secret law issue, the due process
12 requirement. it's our contention here that not only do we not
13 know what the law is, but it appears they have not told the
14 public, both the federal government and the airlines the actual
15 facts about what the law is.

16 and we say that because their web sites, on the one
17 hand, of the faa and tsa, state that you must provide
18 identification at the airport when, in fact, the practice is
19 quite different. it's not mandatory, it's optional, and this
20 is a central point.

21 the court: it's optional, the alternative to being
22 searched, is that what you mean?

23 mr. simpich: some airlines that is the case. at
24 united, for example, they proffer that option. in this case at
25 this time southwest did not proffer this option. we have

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1 evidence we can show that other airlines go through these
2 options and we believe it will show southwest exercises this
3 option as well.

4 a lot is driven by what the passenger says. in this
5 case mr. gilmore said that i have id, but i don't want to show
6 it. and the colloquy continued between him and the security
7 agent from southwest. he said it would be a different
8 situation if he didn't actually have his id in his possession,
9 they wouldn't spell out what that situation was. they would
10 neither confirm or deny.

11 but it's this kind of engagement both fast and loose
12 with whatever these secret regulations are that we think is
13 improper. we think this is a void for vagueness type
14 situation, one that lends itself to arbitrary and

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15 discriminatory enforcement.
 16 in short, there's been a statement by tsa saying we
 17 mandate the airlines to ask for identification. but we don't
 18 demand that they prevent people from boarding if they don't
 19 have identification. that's the latest statement from tsa
 20 which we include in our addendum of facts.
 21 so this is the first point of inquiry because we
 22 have to determine what the law is. i don't think it
 23 necessarily means having to unveil the law for all to see at
 24 this point, i think it might be able to be done through request
 25 for admission or some tool of that type, but this is the first

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1 inquiry.
 2 the second point of inquiry, your honor, is kind of
 3 different from the first, which is, once the identification
 4 requirement is determined, is that identification requirement
 5 constitutional, and this takes us into the fourth amendment
 6 right to travel and the first amendment analysis.
 7 the court: so when you talk about the right to
 8 travel on the fourth amendment, what are you assuming the rule
 9 to be, that you're complaining about?
 10 mr. simpich: well, we are assuming that the rule is
 11 that either you must show an id or you must submit to a more
 12 intrusive search.
 13 and it's our contention that this alternative is not
 14 reasonable. we focus this on the davis case. the davis case
 15 focuses on the search for weapons and explosives and this is,
 16 we suggest, one center of the inquiry.
 17 because they will, of course, will return and say
 18 the id requirement is an essential aspect for locating weapons
 19 and explosives, and it's our contention in return that that's
 20 not accurate. that, in fact, this type of requirement does not
 21 take you where you want to go.
 22 in fact, it can lead to a sense of false security.
 23 one example that we set forth in our brief is a pattern that
 24 mit students studied and has been published, where there was
 25 several dry runs by these individuals, terrorists, carry no

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1 weapons and simply gaming the system, if you will, your honor,
 2 going on several flights seeing who triggered a search of some
 3 kind.
 4 after several dry runs of this type where there's
 5 been some individuals whose not triggered any search. then on
 6 a subsequent flight that person is basically free to attempt to
 7 smuggle their items on board because they know that they're not
 8 going to be conducted with a search. so for example --
 9 the court: what do you take from that?
 10 mr. simpich: well --
 11 the court: as applies to your argument here.
 12 mr. simpich: what we're saying, your honor, is that
 13 even if you had this very tough system that was based on
 14 scoring, which is what the capps system basically is that the
 15 government wants to implement, which we contend is driving this
 16 identification requirement.
 17 the cap system would take the passengers name, put a

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18 thousand different items from data bases into it and then come
 19 up with a score, and that score would be the determination as
 20 to whether or not this person was forced to endure a more
 21 intrusive search.
 22 and this is the kind of situation that was addressed
 23 in the case called holmes, where a score was produced without
 24 the knowledge of the housing authority applicants, and without
 25 being offered an opportunity to explain or to review or

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1 anything of the kind because it was hermetically sealed.
 2 these housing authority applicants were unable to
 3 get housing because of what they contested as arbitrary and
 4 discriminatory procedure. they had no means of challenging or
 5 making accurate. this is what the, we believe, the id
 6 requirement is going to do, and we also believe it's going to
 7 result in terrible violations of people's rights to travel.
 8 the court: but focusing now on your client and the
 9 id requirement here, tell me again what is it that's so wrong
 10 with that?
 11 mr. simpich: well, our client can't drive, your
 12 honor, he has a medical condition. as things stand he is
 13 unable to fly, or take a train, or take the bus, or travel by
 14 boat because it's our understanding from the government web
 15 sites that identification, government photo id is required for
 16 all those modes of transportation.
 17 the court: i just thought you told me for purposes
 18 of our discussion right now, you're going say it's either id or
 19 search?
 20 mr. simpich: right. we're saying neither should be
 21 permissible. that's --
 22 the court: you just said he can't travel because he
 23 doesn't want to show his id, that's not quite true under your
 24 assumption, which is that he could submit his body to a search,
 25 right?

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1 mr. simpich: that's right.
 2 the court: so --
 3 mr. simpich: he doesn't believe, and we agree, that
 4 it's constitutional to force him to submit to a more intrusive
 5 search simply because he doesn't want to produce id.
 6 the court: but it is okay for the government to be
 7 worried about weapons being taken on airplanes, is that right?
 8 mr. simpich: of course, it is, we don't quarrel
 9 with that for a moment, the question whether there's a logical
 10 connection between the government's worry about weapons and the
 11 efficacy of an identification requirement.
 12 it's our contention the efficacy of an identification
 13 requirement would be -- does not exist, it actually would
 14 result in more harm than good. and davis doesn't permit that
 15 type of analysis. davis says you got to be focused on weapons
 16 and explosives.
 17 now, what good is a scoring system of the type that
 18 we are talking about here, is it efficacious, we contend it is
 19 not. does the identification requirement --
 20 the court: so, you don't, or do you, object to the

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21 patdown search for weapons?
 22 mr. simpich: in terms of the search that all
 23 passengers endure, we don't argue with that, if everybody is
 24 being submitted to a patdown search.
 25 the court: how about if every other person is?

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1 mr. simpich: if it's random, a truly random search
 2 we're not quarreling with. a random search, in fact, we would
 3 argue would be the most logical way to do it.
 4 it would be objective and neutral, more likely to
 5 come up with the bad guys, which is the point of this entire
 6 endeavor.
 7 the court: why doesn't your client allow himself to
 8 be patted down?
 9 mr. simpich: he does allow himself to be patted
 10 down if everybody is being patted down. he doesn't want to be
 11 singled out because there's no basis. it would be
 12 non-objective and non-neutral for him to be patted down.
 13 there's no reason to believe that he as an
 14 individual, there's no indicia that are spelled out, for
 15 example, in one of the cases we cited in our brief that would
 16 put him in the hijacker profile.
 17 if there's an indicia that put him in the -- a
 18 hijacker profile independent of the id requirement, we wouldn't
 19 challenge that. once the id requirement has entered into the
 20 mixture, injected elements of abuse of discretion, your honor,
 21 of standardless discretion.
 22 because there's -- it simply doesn't point to
 23 anything that's illegal. if you've got a warrant out for
 24 somebody, if you got an indictment out for somebody, that's one
 25 thing, you know you can go out there with a photo.

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1 but given that's not the situation with mr. gilmore,
 2 there's no warrant out there for his arrest, there's no basis
 3 for making him endure this type of scrutiny.
 4 the court: okay.
 5 mr. simpich: our argument, your honor, focuses
 6 first on the right to travel. it's a basic compelling state
 7 interest test, and shelton v. tucker it's clear it's got to be
 8 narrowly focused.
 9 this is our contention that in this context he's not
 10 allowed to utilize multiple modes of travel. the alvarado case
 11 and the knoll [sp?] case both state that air travel should be
 12 considered a necessity.
 13 granted the miller case says you're not entitled to
 14 travel, but the case that miller stands on is a case called
 15 barbarian [sp?] which says that you can't limit -- you
 16 can't cutoff people's rights to travel in a common carrier.
 17 and that's what's happened here based on these
 18 regulations to date, your honor, he can't travel in any common
 19 carrier. the only way for him to travel would be if he wanted
 20 to go to washington d.c. or wanted to engage in seeing his
 21 family or business, would be to hire a chauffeur or something
 22 equally wild.
 23 it's a very substantial impact we're talking about,

24 when you can't utilize any of these modes of travel or
25 sacrifice one of your constitutional rights. we brought up the

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1 unconstitutional conditions doctrine for just that reason.
2 your honor, he shouldn't be forced to sacrifice one of his
3 constitutional rights in order to exercise his right to travel.
4 the court: the constitutional right he's
5 sacrificing is?
6 mr. simpich: one, is the right to travel.
7 the court: wait. you just said he's given
8 something up in order, what is it he's giving up?
9 mr. simpich: if he were to submit to producing his
10 identification, that would be violation of his fourth amendment
11 rights under lawson.
12 lawson -- the other side construes these cases
13 saying it only applies to the right to arrest, but what the
14 lawson case states in the ninth circuit is that you are not --
15 forced to endure a request for id is one thing, but a demand
16 for id is another.

17 and once you are, once id is demanded of you and you
18 are forced to cough it up, if you will, then that's considered
19 more serious than a patdown search. the indignity of patdown
20 search lasts just moments, being in a data base and being
21 subject to constant scrutiny as the lawson case instructs lasts
22 forever.
23 that's a more serious injury, and it's for that
24 essential reason that the cases martinelli and casey in the
25 ninth circuit have held that someone who tries to demand id in

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1 that fashion is subject to civil liability.
2 so that's the essential, that's another pivot, your
3 honor, if you will, that mr. gilmore's standing on today. he's
4 saying, he is protected by this line of cases from being forced
5 to show his id and there is a risk of arrest in this context.
6 he was arrested in 1996 shortly after the security
7 directive was passed for refusing to show his id. the other
8 side tries to make some points by saying it was a state officer
9 who did it, but the realistic fear of prosecution is the same.
10 now we've got -- it's federalized at the airport, if
11 it happens again it's going to happen at the hands of a federal
12 agent, and he could very easily be brought in simply for the
13 act of failing to produce his id.
14 once his bags go through the magnetometer he's not
15 free to just leave the airport at this point. that's what the
16 torbet case says and that's what happened in the southwest
17 context.
18 he put his bags with the magnetometer like everybody
19 else, then he got close to the gate and then they said, all
20 right, now we want your id. and he said, well, i don't believe
21 i'm obliged to, pursuant to law, to show you an id, can you
22 show me a law? and they couldn't, but he was not allowed to
23 fly.
24 so we've got a very real injury there. and if i can
25 turn for the moment to the final leg, your honor, the first

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1 amendment.
 2 it's a very broad encompassing injury. it's very
 3 similar to the analogy we want to draw is to the curfew laws
 4 because the curfew laws, like in the case of waters, focused on
 5 all juveniles in, if you will, in the d.c. area.
 6 and the court said, you know, there's just no
 7 getting around it, you're injuring people's rights to
 8 associate, you're injuring people's rights to assemble and
 9 communicate with one another by this broad attack on their
 10 constitutional rights.
 11 the court advised -- when something like this occurs
 12 you got to act gingerly because there's a serious intrusion
 13 going on. and this is simply not a gingerly type act, this is
 14 a broadly encompassed act where it's impacting many people like
 15 mr. gilmore, who are unable to see their families, unable to
 16 attend to their business interests, are unable to see the
 17 political representatives in washington d.c. all because of a
 18 requirement that they feel, and we believe rightly so, is alien
 19 to what this country is about.
 20 it's the equivalent of an internal passport to have
 21 to carry one's papers. and so in that context we think that
 22 the identification requirement should be viewed as analogous,
 23 if you will, to a curfew law, and the standards set forth in
 24 the waters case we think offer a good spotlight.
 25 and we also believe that the court should adhere to

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1 the rule set forth in the healey case we cited, which focuses
 2 on indirect injuries rather than on the line of cases which
 3 focuses on an incidental effect.
 4 we don't think this is an incidental effect, we think
 5 this is a central attack on people's rights to travel
 6 throughout the united states of america without being forced to
 7 show their papers.
 8 not across national borders, we're not raising that
 9 issue, but that's a fundamental right. we think that's what
 10 the right to travel is all about, we think that's what the
 11 fourth amendment is all about.
 12 the court: thank you.
 13 mr. lobue: joe lobue, again, from the department of
 14 justice.
 15 i would like to start, i think, by giving some
 16 background on the identification request and how it fits into
 17 the whole process.
 18 as we've indicated in our briefs, for about forty
 19 years the government has implemented a variety of measures
 20 which are designed to prevent hijacking. finding weapons and
 21 explosives is one means to preventing hijacking.
 22 another means to preventing hijacking set out in the
 23 circuit [sp?] 49 usc section 114 is to prevent hijackers from getting
 24 on airplanes in the first place.
 25 if we know that an individual intends to hijack an

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1 airplane, it is fool hardy to allow him to get to that plane.

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2 whether or not he has any weapons in his possession, if that's
 3 his intent, let's stop him before he gets on the plane.
 4 that's what congress wanted to happen, they wanted
 5 government to provide this information to airlines, so that
 6 they could prevent these people from getting on the plane in
 7 the first place.
 8 the second way it fits in is --
 9 the court: to provide which information to the
 10 airlines?
 11 mr. lobue: under 114 the government is required to
 12 provide to the airlines a list of people.
 13 the court: who are likely to hijack airplanes?
 14 mr. lobue: known to pose a risk to aviation safety.
 15 plaintiff's so-called no fly list provided for in the statute.
 16 known or suspected to pose a risk to aviation safety.
 17 the purpose in that is for those people that are
 18 known to pose a risk because of information the government has
 19 in its possession the airlines can take steps to prevent them
 20 from succeeding.
 21 if they check their passengers' identity and they
 22 find out that this individual is one of the people that the
 23 government has identified, they can prevent him from boarding
 24 the aircraft. it's right in the statute, it's what they're
 25 suppose to do.

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1 secondly, if some other action is called for, if
 2 it's not so clear then these airlines can take further
 3 precautions, maybe do a further search of this individual.
 4 none of this could happen without an identity verification
 5 check.
 6 secondly, when an individual is trying to hide his
 7 identity it may be for innocent reasons, it may not, and the
 8 government, as part of what's called the prescreening process,
 9 which has been in use for about 25 years, is nothing new,
 10 talked about the davis case, it's required by statute to be
 11 used, section 44903(i)(2) requires the use so-called capps, the
 12 computer assisted passenger prescreening system. the purpose
 13 in that system is to identify individuals who are more likely
 14 to pose a risk.
 15 now, this doesn't mean they necessarily pose a risk,
 16 it just means based upon an analysis of what hijackers have
 17 done in the past, the way they've acted, their behavior
 18 patterns, their maybe some indication there's more of a risk of
 19 this individual we need to do a further search.
 20 that's the capps system plaintiff has referred to in
 21 his brief, in his complaint. the criteria used by the
 22 government to identify those individuals is confidential, it's
 23 not made public, prohibited to disclose it. the reasons are
 24 obvious, if we were to disclose it can be circumvented.
 25 the statute authorizes the agency to withhold this,

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1 particularly 49 usc section 40119(b)(1), specifically
 2 authorizes the agency to prohibit disclosure of information
 3 related to security activities.
 4 the agency implemented regulations to prohibit

5 disclosure of this information, and it found if it did disclose
6 it would be detrimental to the safety of passengers. that's
7 ultimately what we're trying to do, protect other passengers,
8 as well as the plaintiff.
9 as the ninth circuit held in the united states
10 versus davis their program really protects the right to travel
11 as much as anything. protects it from private interference.
12 so what they're trying to do is to prevent other
13 individuals who don't want to travel, who don't want to allow
14 plaintiff to travel, their intent is to blow up an airplane, to
15 stop them from doing it. it clearly is rational for both these
16 reasons.
17 one, to check to see if this is amongst the
18 individuals known to pose a risk or suspected to pose a risk.
19 and, secondly, to see if the passenger's engaging in
20 some sort of behavior trying to hide his identity, keep it a
21 secret so authorities don't know who he is.
22 maybe he's trying to evade a detection device, maybe
23 he's doing something else, but ultimately the violation, if
24 there is to be one, is trying -- attempting to hijack an
25 airplane, attempting to carry weapons on an airplane.

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1 everybody knows that's what prohibited, what we
2 don't tell the plaintiffs and what we don't tell anyone else,
3 is what's going to make these security officers suspicious.
4 what is going to make them think, well, gee, maybe that person
5 is going to be the one who's carrying a weapon. just the way
6 he's acting. maybe there's something he's doing that's
7 consistent with what hijackers have done in the past that's
8 going to make the security officer be concerned and do a
9 further search.
10 the due process clause has never been thought to
11 require disclosure of law enforcement techniques like that. if
12 the alarm is going off in a bank and the person is running from
13 the bank, the police officer may well detain him, but nothing
14 requires a publication in advance that's going to happen.
15 all the person needs to know to comply with the law
16 is that bank robbery is prohibited. and that's the distinction
17 you have to keep in mind here and plaintiffs are saying this
18 law is void for vagueness.
19 the court: what is the rule that we all now know
20 that isn't void?
21 mr. lobue: the rule prohibits hijacking, it
22 prohibits attempting hijacking. this all set out in the
23 statute, we set it out in the brief, prohibits carriage of
24 weapons on airplanes, prohibits carriage of weapons in security
25 areas of airports.

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1 there is no rule requiring production of id's for
2 which one can be arrested, there's nothing like that.
3 plaintiff wasn't arrested, he was asked for an identification
4 card, that's it.
5 when he didn't produce it he left. he wasn't
6 detained, he wasn't seized, he was asked for identification.
7 the court: could you just say that once again, the

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8 rule is, don't carry bombs and guns onto airplanes?
 9 mr. lobue: don't attempt to hijack airplanes.
 10 the court: that's the rule?
 11 mr. lobue: that's the rule.
 12 the court: what is the rule, if at all, concerning
 13 identification?
 14 mr. lobue: the identification check, every
 15 passenger is requested to produce identification. as i've
 16 indicated, the statute provides one of the purposes to check
 17 whether that person is amongst those known to pose a risk to
 18 aviation safety.
 19 the other reason it's used for purposes of the
 20 prescreening system, is this a person --
 21 the court: i understand it, you said all of that.
 22 you were saying the rule is not void for vagueness and we can
 23 move on. i just want to know what the rule is that isn't void.
 24 mr. lobue: if you're asking me to disclose what's
 25 in the security directives, i can't do it.

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1 the court: i want to know what we're talking about
 2 in this case. this man was told, "give me your id?"
 3 mr. lobue: according to the complaint the
 4 government mandated airplanes to request identification from
 5 each and every passenger, that's what happened.
 6 the court: i need to know what cite i'm talking
 7 about when i try to make a decision whether this complaint
 8 states a claim. so can i focus on that, that the government
 9 required the airline to --
 10 mr. lobue: i think you have to assume that the
 11 allegations in the complaint are, in fact, true for purposes of
 12 our motion, yes. that the government required the airlines to
 13 request identification from the passengers.
 14 that when they refuse to provide it, that southwest
 15 airlines refused passage, and united airlines indicated that
 16 the plaintiff would be allowed to fly if he submitted to a
 17 further search.
 18 we were prepared to assume all of that is true for
 19 purposes of the complaint, they acted at the initiative of the
 20 government. at the behest of the government.
 21 the court: thank you.
 22 mr. lobue: on the right to travel issue, turning to
 23 that, it's not an absolute right, it's a right not to be -- to
 24 be uninhibited by rules which unreasonably burden or restrict
 25 the right to free movement.

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1 you're not entitled to be completely free from
 2 government regulation because you're in travel status. the
 3 ninth circuit in miller versus reed make clear that there is no
 4 right to the most convenient form of travel. nobody has a
 5 constitutional right to fly by air. the burden on a single
 6 mode of transportation, the 9th circuit held this, does not
 7 implicate the right to travel, much less violate.
 8 secondly, even if it were implemented here, in
 9 united states versus davis the ninth circuit specifically
 10 upheld the airport screening procedures, which is what

11 plaintiff objects to, as being not an infringement of the right
 12 to travel, specifically ruled on that claim.
 13 so to the extent that plaintiff contends that the
 14 government is taking away his right to travel by requiring him
 15 to submit to a further search, his claim is inconsistent with
 16 the united states versus davis.
 17 to the extent he says that it violates his fourth
 18 amendment rights or we're taking away his fourth amendment
 19 rights by requiring identification because he's required to
 20 submit to a further search, his claim is rejected by torbet
 21 versus united airlines, which is the 9th circuit case that
 22 follows on united states versus davis.
 23 in essence, under the fourth amendment to begin with
 24 a request for information identification is not a seizure, it's
 25 not even subject to the amendment. that's establish by florida

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1 versus royer a supreme court case.
 2 even if it were the standard would not be applicable
 3 to administrative searches. that's set out in davis.
 4 administrative searches being not evidence to find crime serve
 5 some administrative purpose such as preventing hijacking.
 6 in such cases there is no probable cause
 7 requirement, it's sufficient that the search is reasonable, and
 8 torbet the court held that the scanning devices alone are not
 9 sufficient for this purpose. that the government has to be
 10 able to, because those are inconclusive, the government has to
 11 be able to do a hand search in appropriate cases.
 12 so such a hand search is consistent with the fourth
 13 amendment, therefore, plaintiffs aren't giving up their fourth
 14 amendment rights by submitting to such a hand search.
 15 on the first amendment issue the plaintiff cite a
 16 district court opinion in d.c. having to do with a curfew law
 17 which was subsequently effectively overruled by the court of
 18 appeals of the district of columbia.
 19 and the reasoning for that is set out in our reply
 20 brief on page 15. there's two cases cited, one of them a ninth
 21 circuit case nunez versus san diego and the other one arcara
 22 versus cloud books, supreme court case. both of which hold
 23 where the thing being regulated is not expressive activity,
 24 what's regulating here is air travel, we're not regulating the
 25 right to associate, we're not regulating the right to petition

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1 the government, we're regulating air travel which doesn't have
 2 an expressive element, it has an incidental effect on
 3 plaintiffs.
 4 it's not association with others and how he goes
 5 about petitioning the government, but it doesn't regulate
 6 anything with a significant expressive element. air travel
 7 doesn't have significant expressive element, doesn't impose
 8 some kind of disproportionate burden on air travelers try to
 9 associate; they're treated as everybody else, everybody is
 10 asked for id. for those would two reasons the first amendment
 11 isn't even implicated here.
 12 that's all i have, unless you have questions.
 13 the court: that's good. thank you. any final

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14 brief word, mr. simpich?
 15 mr. simpich: thank you, your honor, very briefly.
 16 first point, is that they, in fact, have not addressed the
 17 court's question on what the law is. we still haven't been
 18 told whether this requirement is mandatory or optional.
 19 southwest, for example, never asked mr. gilmore if
 20 he would submit to a search, they simply removed, told him he
 21 had to leave because he wouldn't show his identification.
 22 so when they say that they are adopting the
 23 statements in our complaint, we told them simply what we had
 24 been told, but we still stand here at this day not knowing what
 25 this law is, whether it's mandatory, vis-a-vis the search,

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1 vis-a-vis the id, or whether the search issue is also embedded
 2 within.
 3 it's a secret law and until that particular issue is
 4 resolved, your honor, we don't think that the government can
 5 wiggle out of this case in any way shape or form. the law
 6 needs to be clearly stated in one way or another. it should be
 7 published in one way or another.
 8 we don't have a foia claim, we don't have an equal
 9 protection claim, those claims are gone, but in terms of secret
 10 law, we stand here not knowing what the identification
 11 requirement is.
 12 i also wanted to state, that what makes these
 13 officers suspicious at the gate is the assertion of rights, the
 14 exact assertion which lawson and the ninth circuit case you
 15 can't pick somebody up or force them to be involved in showing
 16 their id. they said it's worse than a seizure, they said it's
 17 worse than a search because it involves injury that will last
 18 forever.
 19 the court: just out of curiosity, what is the
 20 injury that will last forever in showing your id?
 21 mr. simpich: once the id is given, then they are
 22 able to take down your name and all your data. that data can
 23 then go, as lawson instructs, that data can now go into a data
 24 bank and be part of a permanent profile that can be used
 25 against the citizen in the future.

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1 it's precisely for that reason that one's identities
 2 are so jealously guarded in our society. that they can't just
 3 be -- it's one thing to ask, but it's another thing to demand
 4 it. and mr. gilmore was in a situation in 1996 where because
 5 he refused to provide his id he found himself behind bars for a
 6 period of hours. and it's that essential right that we're here
 7 to protect.
 8 the court: that isn't this case, this case is a
 9 different case, right? you didn't bring that case to this
 10 court.
 11 mr. simpich: can't happen here. united, for
 12 example, there was a realistic -- it's an issue of fact whether
 13 he was seized when he was surrounded by the security people.
 14 in this case it's an issue of fact once he submitted to the
 15 magnetometer that he did at southwest he's no longer free to
 16 go.

17 he's got a realistic fear of prosecution. he has
 18 agreed to an implied consent to search under torbet once those
 19 bags go through the magnetometer.
 20 now, again, if they got indicia, which the dorsey
 21 case points out, if he's acting shifty, or clothing is loose,
 22 or needle marks, or this or that that's actual indicia for
 23 which a search is proper.
 24 an identification requirement offers no indicia at
 25 all. it's not constitutional to force individuals who have

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1 done nothing wrong to submit to that and then when they
 2 complain to be forced to a more intrusive search based on that
 3 complaint.
 4 the court: that's what we're here to find out.
 5 that's the question.
 6 mr. lobue: that's where we stand -- lawson. lawson
 7 is our authority.
 8 the court: thank you all very much. i'm sorry i
 9 haven't heard from southwest, what do you want to say?
 10 ms. barrett: not much. your honor, as plaintiff
 11 has pled this case there's only two claims left as to southwest
 12 involving first amendment, because plaintiff's own admission we
 13 did not ask to even search him, so there was no fourth
 14 amendment claim against us, would be only against united who
 15 did ask to search. plaintiff pled we only asked for the id,
 16 when he failed to show it that we would not allow him to board.
 17 so plaintiff's claims against us, i think, are
 18 limited at most to the first amendment claim for freedom of a
 19 association and right to travel. as we pointed out in our
 20 reply brief, we did not interfere by any means, let alone
 21 substantial means, in either of those first amendment rights.
 22 because it's clear from his own pleading he could have traveled
 23 on united airlines to washington d.c. and that all we did was
 24 forbid him from traveling on southwest airlines to baltimore
 25 and that is not a violation of any constitutional right.

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1 it seems to me that southwest airlines, whether or
 2 not it's a government regulation require him to show an
 3 identification, by his own pleadings saying that if he had
 4 submitted to the search, which southwest did not ask for, he
 5 could have traveled.
 6 there is no denial of his right, so of course, as to
 7 the first amendment claims we also adopt the government's
 8 arguments, which i won't burden you with duplicating right now,
 9 but as to my client, your honor, i do not think there's any
 10 claims stated at all.
 11 the other remaining claims in the complaint, which
 12 are one, three, four and i assume now from counsel's statement
 13 six and seven are gone, are all claims against the regulatory
 14 statutory scheme which we would not be involved in obviously
 15 because we're not the government and we did not create or
 16 implement those.
 17 the court: thank you. six and seven are gone?
 18 mr. simpich: six and seven are gone. if i could
 19 have just a moment on one or two points here.

20 the court: a moment.
21 mr. simpich: thank you. in essence, your honor, on
22 her fourth amendment argument, it's our contention that, again,
23 the demand for id by southwest is a fourth amendment violation.
24 whether the court construes it as a search or
25 seizure or doesn't matter much to us, we stand on lawson,

Page 40

1 martinelli, carey, on that line.
2 in regards to the right to travel issue which
3 counsel argues they should not be liable for, again, this goes
4 right back to the secret law issue, as to whether or not they
5 have the right to demand id or not. we do not know what that
6 law is because it's not been published. the government has
7 stated, as we mentioned in our addendum that the airlines are
8 not mandated to demand, merely request it.
9 the court: all right. thank you.
10 (court adjourned:)

(Final page)

certificate of reporter

i, james yeomans, official reporter for the united states
district court, northern district of california, 450 golden
gate avenue, san francisco, california 94102, do hereby certify
that the foregoing transcript, pages numbered 1 through 40,
inclusive, constitutes a true, full and correct transcript of
my shorthand notes taken as such official reporter of the
proceedings hereinbefore entitled, and reduced to typewriting
by computer to the best of my ability.

february 17, 2003

james yeomans, rpt, csr

00084

FILED

MAR 23 2004

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN GILMORE,

No. C 02-3444 SI

Plaintiff,

JUDGMENT

v.

JOHN ASHCROFT, et al.,

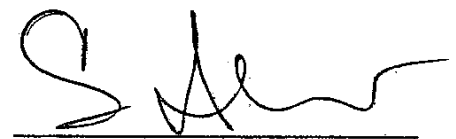
Defendants.

ENTERED IN CIVIL DOCKET 3/24/04

Plaintiff's complaint against federal defendants John Ashcroft, in his official capacity as Attorney General of the United States; Robert Mueller, in his official capacity as Director of the Federal Bureau of Investigation; Norman Mineta, in his official capacity as Secretary of Transportation; Marion C. Blakey, as Administrator of the Federal Aviation Administration, substituted for Jane F. Garvey under Rule 25(d)(1); Admiral James M. Loy, in his official capacity as Acting Undersecretary of Transportation for Security, substituted for John W. Magaw under Rule 25(d)(10); and Tom Ridge, in his official capacity as Chief of the Office of Homeland Security, and against defendant Southwest Airlines is dismissed with prejudice, and plaintiff's complaint against defendant UAL dba United Airlines is dismissed without prejudice. Judgment is entered accordingly.

IT IS SO ORDERED AND ADJUDGED.

Dated: March 19, 2004


SUSAN ILLSTON
United States District Judge

00085

FILED

MAR 23 2004

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN GILMORE,

No. C 02-3444 SI

Plaintiff,

v.

**ORDER GRANTING MOTIONS TO
DISMISS AND DENYING REQUEST
FOR JUDICIAL NOTICE**

JOHN ASHCROFT, in his official capacity as
Attorney General of the United States; ROBERT
MUELLER, in his official capacity as Director of
the Federal Bureau of Investigation; NORMAN
MINETA, in his official capacity as Secretary of
Transportation; MARION C. BLAKEY, as
Administrator of the Federal Aviation
Administration; Admiral JAMES M. LOY, in his
official capacity as Acting Undersecretary of
Transportation for Security; TOM RIDGE, in his
official capacity as Chief of the Office of
Homeland Security; UAL CORPORATION, aka
UNITED AIRLINES; and DOES I-XXX,

Defendants.

ENTERED IN CIVIL DOCKET 2/24/04

Defendants have moved to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. Having carefully considered the arguments of the parties and the papers submitted, the Court GRANTS the motions to dismiss¹ and DENIES plaintiff's request for judicial notice.

¹After the initiation of this action, defendant United Air Lines, Inc. filed for Chapter 11 bankruptcy protection. Thus the claims against it are subject to the automatic stay imposed pursuant to 11 U.S.C. § 362(a). On January 17, 2003, in open court, plaintiff and the remaining defendants agreed to sever the claims against defendant United Air Lines, Inc. from the balance of the complaint. In light of the disposition of the balance of the claims in this case, the severed claims against United will be dismissed without prejudice.

00086

BACKGROUND

Plaintiff John Gilmore is a California resident who is suing the United States² and Southwest Airlines for refusing to allow him to board an airplane on July 4, 2002 without either displaying a government-issued identification consenting to a search. Plaintiff alleges that these security requirements imposed by the United States government and effected by the airline companies violate several of his constitutional rights, including his rights under the First and Fourth Amendments.³

On July 4, 2002 plaintiff went to the Oakland International Airport and attempted to fly to the Baltimore Washington International Airport to "petition the government for redress of grievances and to associate with others for that purpose." Complaint at 2:2-4. Plaintiff approached the Southwest ticket counter with a ticket that he had previously purchased and was asked to provide identification. Complaint at ¶25. Plaintiff refused and inquired whether there was any way for him to board the plane without showing identification. He was told by the ticket clerk that he could be screened instead. Id. Plaintiff also asked the clerk if she knew the origin of this requirement. The clerk expressed uncertainty but speculated that the Federal Aviation Administration ("FAA") might have promulgated the identification rule. Id. Plaintiff was told to show identification again when he went to the gate to board the plane. Complaint at ¶ 26. He refused and was not allowed to board the plane. Id. Plaintiff spoke with a supervisor who explained that airline policy prohibited allowing plaintiff to board. Complaint at ¶ 27.

²The federal defendants are John Ashcroft, in his official capacity as Attorney General of the United States; Robert Mueller, in his official capacity as Director of the Federal Bureau of Investigation; Norman Mineta, in his official capacity as Secretary of Transportation; Marion C. Blakey, as Administrator of the Federal Aviation Administration, substituted for Jane F. Garvey under Rule 25(d)(1); Admiral James M. Loy, in his official capacity as Acting Undersecretary of Transportation for Security, substituted for John W. Magaw under Rule 25(d)(10); and Tom Ridge, in his official capacity as Chief of the Office of Homeland Security

³Plaintiff's complaint also alleged equal protection and Freedom of Information Act (FOIA) claims, but plaintiff's lawyer stated in oral argument that plaintiff withdraws these claims. Accordingly, the equal protection and FOIA claim are no longer before this Court.

LEGAL STANDARD

The Court may dismiss a complaint when it is not based on a cognizable legal theory or pleads insufficient facts to support a cognizable legal claim. Smilecare Dental Group v. Delta Dental Plan, 88 F.3d 780, 783 (9th Cir. 1996).

DISCUSSION

Plaintiff's complaint alleges that as a result of the requirement that passengers traveling on planes show identification and his unwillingness to comply with this requirement, he has been unable to travel by air since September 11, 2001. Plaintiff's complaint asserts causes of action challenging the apparent government policy that requires travelers either to show identification or to consent to a search which involves wand, walking through a magnetometer or a light pat-down. Whether this is actually the government's policy is unclear, as the policy, if it exists, is unpublished. However, this Court for the purpose of evaluating plaintiff's complaint, assumes such a policy does exist, and reviews plaintiff's complaint accordingly.

Plaintiff asserts the unconstitutionality of this policy on the following grounds: vagueness in violation of the Due Process Clause; violation of the right to be free from unreasonable searches and seizures; violation of the right to freedom of association; and violation of the right to petition the government for redress of grievances.

The federal defendants and airline defendant both brought motions to dismiss. As plaintiffs' claims are common to both sets of defendants, this Court treats them collectively. While there are questions about the private defendant's liability as a state actor and about the federal defendants' liability for the private defendant's actions, as this Court has not found plaintiff's complaint to have alleged a constitutional violation, those issues need not be addressed at this time.

1. Standing

As a preliminary matter, the federal defendants have objected to all of plaintiff's claims other than plaintiff's challenges to the identification requirement. It is unclear from plaintiff's complaint whether he intended to plead any other claims, but he did allude to the "government's plan to create

1 huge, integrated databases by mingling criminal histories with credit records, previous travel history and
2 much more, in order to create dossiers on every traveling citizen," including creation of "no fly"
3 watchlists. Complaint, ¶ 8. He pointed to newspaper and magazine articles and internet websites
4 describing various activities and directives issued by various federal agencies, including the increased
5 use of the Consumer Assisted Passenger Prescreening System ("CAPPS") in the wake of the terrorist
6 attacks on September 11, 2001. Complaint, ¶¶ 35-50.

7 The federal defendants argue that "as a threshold matter, plaintiff has standing in this action
8 solely insofar as he challenges an alleged federally-imposed requirement that airlines request
9 identification as part of the screening process at airports. The complaint is devoid of any allegation that
10 plaintiff personally has suffered any injury that is fairly traceable to any other practice, procedure, or
11 criterion that may be used by any defendant in screening airline passengers for weapons and explosives."
12 Motion to Dismiss at 2:21-25.

13 The only injury alleged by plaintiff was his inability to board a plane as a result of the
14 identification requirement. Article III requires that to have standing a plaintiff must show that (1) he was
15 injured (2) that the injury is directly related to the violation alleged and (3) that the injury would be
16 redressable if plaintiff prevailed in the lawsuit. Simon v. Eastern Kentucky Welfare Rights Org., 426
17 U.S. 26, 38, 41 (1976).

18 Plaintiff objects to defendants' "no fly" list, to other "watchlists" and to the CAPPS program,
19 but fails to allege that his name was on any of these lists or that he personally suffered any injury or
20 inconvenience as a result. The federal defendants are correct that plaintiff has not pled injury sufficient
21 to establish Article III standing concerning these other lists and activities.

22 In the course of his complaint, plaintiff describes certain orders and directives issued by the FAA
23 and the Transportation Security Administration ("TSA"). The Courts of Appeals have exclusive
24 jurisdiction to review orders issued by the FAA and the TSA. Under 49 U.S.C. § 46110(a):

25 [A] person disclosing a substantial interest in an order issued by the Secretary of
26 Transportation . . . under this part may apply for review of the order by filing a petition
27 for review in the United States Courts of Appeals for the District of Columbia Circuit or
in the court of appeals of the United States for the circuit in which the person resides or
has its principal place of business.

28 Jurisdiction to review such orders is vested in the Courts of Appeals, not the district courts.

1
2 Accordingly, to the extent that plaintiff pleads causes of action beyond those stemming from the
3 identification requirement, those causes of action are DISMISSED for lack of standing or jurisdiction.
4

5 **2. Plaintiff's First Cause of Action: violation of the Due Process Clause**

6 Plaintiff alleges that the identification requirement is "unconstitutionally vague in violation of
7 the Due Process Clause of the Fifth Amendment because it is vague, being unpublished, and thus
8 provides no way for ordinary people or reviewing courts to conclusively determine what is legal."
9 Complaint, ¶ 52. This claim directly attacks the policy, regulation, order or directive requiring
10 production of identification at airports.

11 In this case, the federal defendants refuse to concede whether a written order or directive
12 requiring identification exists, or if it does, who issued it or what it says. They contend, however, that
13 to the extent this action challenges an order issued by the TSA or the FAA, 49 U.S.C. § 46110(a) vests
14 exclusive jurisdiction in the Courts of Appeals to decide the challenge.

15 The federal defendants also argue that there is no requirement that they issue orders, regulations
16 or policy directives explaining all aspects of the airport security screening process, so that their failure
17 to do so should not result in a finding that policies and procedures are "void for vagueness." Under 49
18 U.S.C. § 44901(a), the Under Secretary of Transportation for Security is required to "provide for the
19 screening of all passengers and property . . . that will be carried aboard a passenger aircraft," and under
20 49 U.S.C. § 44902(a), the Under Secretary must prescribe regulations requiring an air carrier to "refuse
21 to transport - [] a passenger who does not consent to a search . . . establishing whether the passenger is
22 carrying unlawfully a dangerous weapon, explosive or other destructive substance." Defendants argue
23 that the government's interest in ensuring the effectiveness of the screening process is a sufficient
24 justification for its failure to provide these regulations to the public.

25 Because this claim squarely attacks the orders or regulations issued by the TSA and/or the FAA
26 with respect to airport security, this Court does not have jurisdiction to hear the challenge. As a
27 corollary, without having been provided a copy of this unpublished statute or regulation, if it exists, the
28 Court is unable to conduct any meaningful inquiry as to the merits of plaintiff's vagueness argument.

1 This argument would better be addressed to the Ninth Circuit Court of Appeals or to the Court of
2 Appeals for the District of Columbia Circuit, both of which have jurisdiction to review these matters.

3
4 **3. Plaintiff's Second Cause of Action: violation of the Fourth Amendment right to be free
5 from unreasonable searches and seizures**

6 **A. Request for Identification**

7 Plaintiff alleges that any requirement that he either display government-issued identification or
8 submit to search prior to boarding a plane violates the Fourth Amendment. Complaint at ¶¶ 56-59.

9 The request for identification, where plaintiff is free to refuse, is not a search and so does not
10 implicate the Fourth Amendment. See U.S. v. Cirimele, 845 F.2d 857, 860 (9th Cir. 1988) (D.E.A.
11 agent's request for identification from person in airport was not a seizure within the meaning of the
12 Fourth Amendment). In another context the Supreme Court has held that "[A] request for identification
13 by the police does not, by itself, constitute a Fourth Amendment seizure," explaining:

14 Unless the circumstances of the encounter are so intimidating as to demonstrate that a
15 reasonable person would have believed he was not free to leave if he had not responded,
16 one cannot say that the questioning resulted in a detention under the Fourth Amendment.
But if the person refuses to answer and the police take additional steps . . . to obtain an
answer, then the Fourth Amendment imposes some minimal level of objective
justification to validate the detention or seizure.

17 Immigration and Naturalization Service v. Delgado, 466 U.S. 210, 216 (1984). Similarly, in U.S. v.
18 Black, 675 F.2d 129, 136 (7th Cir. 1982), the court held that the request that a person in an airport
19 produce his driver's license and airline ticket was not a seizure, and that a seizure occurred only after
20 the officers took and kept the airline ticket and driver's license. The court stated, "Under our reasoning
21 it is clear that the mere request for and voluntary production of such documents does not constitute a
22 seizure, but rather falls into the category of a non-coercive police-citizen encounter." Id.

23 Plaintiff has cited several cases supporting the proposition that requiring identification, under
24 threat of arrest or some other significant penalty for failure to produce identification, may violate the
25 Fourth Amendment. Those cases do not suggest that what happened to Mr. Gilmore, the request that
26 he provide identification alone, violates the Fourth Amendment. For example, in Lawson v. Kolender,
27 658 F.2d 1362, 1367-68 (9th Cir. 1981) (aff'd on other grounds, 461 U.S. 352(1983)), the court stated
28 that a statute criminalizing the refusal to provide identification violated the Fourth Amendment.

1 Notably, the Court based its decision in part on the fact that criminalizing the refusal to provide
2 identification provides a basis for arrest. Id. at 1367. Where individuals are or can be arrested for
3 failing to identify themselves, seizure, and hence the Fourth Amendment, are clearly implicated. Thus,
4 in Martinelli v. Beaumont, 820 F.2d 1491 (9th Cir. 1987), the plaintiff was arrested for failure to identify
5 herself, and the court held that arresting a person for failure to identify herself violated the Fourth
6 Amendment. Similarly in Carey v. Nevada Gaming Board, 279 F.3d 873, 880 (9th Cir. 2000), the Court
7 found a Fourth Amendment violation in a statute which made it a misdemeanor for individuals detained
8 on reasonable suspicion of having committed a crime to refuse to identify themselves.

9 In plaintiffs' case, he was not required to provide identification on pain of criminal or other
10 governmental sanction. Identification requests unaccompanied by detention, arrest, or any other penalty,
11 other than the significant inconvenience of being unable to fly, do not amount to a seizure within the
12 meaning of the Fourth Amendment. Plaintiff has not suggested that he felt that he was not free to leave
13 when he was asked to produce identification. None of the facts submitted by plaintiff suggests that the
14 request for identification implicated plaintiff's Fourth Amendment rights. Therefore, plaintiff's claim
15 that the identification requirement is unreasonable does not raise a legal dispute that this Court must
16 decide.

17 Defendants, while contending that the request for identification was neither a search nor a
18 seizure, did nevertheless argue at some length that the request for identification is a reasonable means
19 of effectuating the purpose of airline safety and meeting the requirements of 49 U.S.C. § 114(h)(2)-(3).
20 That statute requires the TSA to establish procedures for informing airlines of the identity of "individuals
21 known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline of passenger
22 safety" (49 U.S.C. § 114(h)(2)), and to establish policies that enable air carriers to identify people "on
23 passenger lists who may be a threat" (49 U.S.C. § 114(h)(3)(A)) and prevent them from boarding an
24 aircraft (49 U.S.C. § 114(h)(3)(B)). Defendants argue that verifying passengers' identity is a reasonable
25 means of effectuating the purpose of the statute.

26 It appears to this Court that the requirement that identification be provided before boarding an
27 airplane is a minimal intrusion on personal privacy and is a reasonable, if modest, step toward ensuring
28 airline safety. It may be, as plaintiff argues, that easy access to false identification documents will

1 reduce the effectiveness of the effort, but the effort itself seems a reasonable one. However, in light of
2 this Court's finding that no search or seizure occurred, no finding concerning the reasonableness of the
3 identification requirement is required.

4
5 **B. Request to consent to search**

6 Under this circuit's jurisprudence, Southwest's request that the plaintiff submit to search may
7 have constituted a seizure subject to Fourth Amendment scrutiny. When the government is significantly
8 involved in a plan to search, state action, and thus the Fourth Amendment, may be implicated. The
9 Ninth Circuit has held that an airport search is a "functional, not merely a physical process . . . [that]
10 begins with the planning of the invasion and continues until effective appropriation of the fruits of the
11 search for subsequent proof of an offense." U.S. v. Davis, 482 F.2d 893, 896 (9th Cir. 1973). Under
12 these stringent guidelines, the request that plaintiff consent to search may have been tantamount to a
13 search for purposes of Fourth Amendment analysis, even though the only part of the search that occurred
14 was the planning.

15 However, if a search did occur, the search was reasonable. An airport screening search is
16 reasonable if: "(1) it is not more extensive or intensive than necessary . . . ; (2) it is confined in good faith
17 to [looking for weapons and explosives]; and (3) passengers may avoid the search by electing not to fly."
18 Torbet v. United Airlines, 298 F.3d 1087, 1089 (9th Cir. 2002); see United States v. Davis, 482 F.2d at
19 895 (9th Cir. 1973) ("We hold further that while 'airport screening searches' per se do not violate a
20 traveler's rights under the Fourth Amendment, or under his constitutionally protected right to travel,
21 such searches must satisfy certain conditions, among which is the necessity of first obtaining the
22 'consent' of the person to be searched."). In Torbet the Court held that the placement of luggage on an
23 x-ray conveyor belt was an implied consent to a luggage search. 298 F.3d at 1089. At all times plaintiff
24 was free to leave the airport rather than submit to search. Further, searches of prospective passengers
25 are reasonable and a necessary as a means for detecting weapons and explosives. Torbet v. United
26 Airlines, Inc., 298 F.3d at 1089-90. Accordingly, the request that plaintiff consent to search was
27 reasonable and not in violation of the Fourth Amendment.

28

00093

1 **3. Plaintiff's Third and Fourth Causes of Action: violation of the right to travel protected by**
2 **the Due Process Clause**

3 Plaintiff alleges that the right to "travel at home without unreasonable government restriction is
4 a fundamental constitutional right of every American citizen and is subject to strict scrutiny." ¶ 61.
5 Defendant Southwest Airlines notes that the right to travel has not been found by the courts to be
6 contained within the constitutional amendments cited by plaintiff. Southwest advocates dismissal on
7 these grounds. Defs' Motion to Dismiss at 2, n.1. The Court declines to dismiss on these grounds as
8 the notice pleading standard requires this Court to liberally construe plaintiff's complaint. The right to
9 travel, while sometimes elusive, is clearly grounded in the Constitution. The Supreme Court has located
10 it at times in the Privileges and Immunities Clause of Article IV, the Commerce Clause, the Privileges
11 and Immunities Clause of the Fourteenth Amendment and the "federal structure of government adopted
12 by our Constitution." Att'y Gen. of New York v. Soto-Lopez, 476 U.S. 898, 902 (1986).

13 However, plaintiff's allegation that his right to travel has been violated is insufficient as a matter
14 of law because the Constitution does not guarantee the right to travel by any particular form of
15 transportation. Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999) ("[B]urdens on a single mode of
16 transportation do not implicate the right to interstate travel."); Monarch Travel Serv. Assoc. Cultural
17 Clubs, Inc., 466 F.2d 55 2(9th Cir. 1972). The right to travel throughout the United States confers a right
18 to be "uninhibited by statutes, rules and regulations which unreasonably burden or restrict this
19 movement." Saenz v. Roe, 526 U.S. 486, 499 (9th Cir. 1973). This Court rejects plaintiff's argument
20 that the request that plaintiff either submit to search, present identification, or presumably use another
21 mode of transport, is a violation of plaintiff's constitutional right to travel.

22
23 **4. Plaintiff's Fourth Cause of Action: violation of the right to freedom of association**
24 **protected by the First and Fifth Amendments**

25 Plaintiff's allegation that his right to associate freely was violated fails because the only actions
26 which violate this right are those which are "direct and substantial or significant." Storm v. Town of
27 Woodstock, 944 F.Supp. 139, 144 (N.D. N.Y. 1996). Government action which only indirectly affects
28 associational rights is not sufficient to state a claim for violation of the freedom to associate. To the
extent that plaintiff alleged plans to exercise his associational rights in Washington, D.C., the Court finds

1 that plaintiff's rights were not violated as plaintiff had numerous other methods of reaching Washington.

2
3 **5. Plaintiff's Fifth Cause of Action: violation of the right to petition the government for**
4 **redress of grievances protected by the First Amendment**

5 Plaintiff alleges that "[t]he right to petition the government for redress of grievances is a
6 fundamental Constitutional right, subject to strict scrutiny" and that this right is "burdened by requiring
7 Petitioners to identify themselves, and by preventing Petitioners from traveling to where the seat of
8 government is located." Complaint at ¶ 69. The right to petition the government for redress of
9 grievances has been "held to be enforceable against the states by virtue of the Fourteenth Amendment."

10 See Hilton v. City of Wheeling, 209 F.3d 1005, 1006-07 (7th Cir. 2000). But the right to petition the
11 government for redress of grievances is only implicated by governmental action that prevents the
12 exercise of such a right. Id. Although the government's refusal to let Mr. Gilmore board an airplane
13 on Mr. Gilmore's terms may have made it more difficult for him to petition the government for redress,
14 he certainly was not altogether prevented from doing so. Therefore, Mr. Gilmore's argument that his
15 constitutional right to petition the government for redress was violated is rejected.

16
17 **6. Plaintiff's request for judicial notice**

18 Plaintiff filed a request for judicial notice of The Privacy Commissioner of Canada's "Annual
19 Report to Parliament." The Court may take judicial notice of adjudicative facts (Fed.R.Evid.201 (a) and
20 (b)), and under certain circumstances must take judicial notice of those adjudicative facts which are
21 reasonably beyond dispute (Fed. R. Evid. 201(d)). "Adjudicative facts" are "the facts of the particular
22 case." The opinions of the Canadian government regarding privacy issues are not relevant to the
23 adjudication of this dispute. Therefore, the report is not an adjudicative fact, as it is beyond the scope
24 of this case. Further, the Court did not rely on this report in evaluating defendants' motions to dismiss.
25 For the foregoing reasons, the Court declines to take judicial notice of this report.

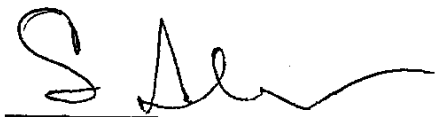
26
27
28 ///

CONCLUSION

For the foregoing reasons, plaintiff's complaint is dismissed. Plaintiff's claims against the federal defendants and Southwest Airlines are dismissed with prejudice; plaintiff's claims against United Airlines are dismissed without prejudice. Plaintiff's request for judicial notice is denied. [Docket ## 6, 8, 10, 22, 28].

IT IS SO ORDERED.

Dated: March 19, 2004


SUSAN ILLSTON
United States District Judge

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FILED

APR 14 2004

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

11 *Attorneys for Plaintiff / Appellant*
12 JOHN GILMORE

13 UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 JOHN GILMORE,

17 Plaintiff / Appellant,

18 v.

Dist. Ct. Case No. C 02-3444 SI

19 JOHN ASHCROFT, in his official
20 capacity as Attorney General of the
21 United States; ROBERT MUELLER, in
22 his official capacity as Director of the
23 Federal Bureau of Investigation;
24 NORMAN MINETA, in his official
25 capacity as Secretary of Transportation;
26 MARION C. BLAKELY, as
27 Administrator of the Federal Aviation
28 Administration; DAVID M. STONE, in
29 his official capacity as Acting
Administrator of the Transportation
Security Administration; TOM RIDGE,
in his capacity as Secretary of the
Department of Homeland Security; UAL
CORPORATION aka UNITED
AIRLINES; SOUTHWEST AIRLINES;
DOES I - XXX

Defendants / Appellees.

NOTICE OF APPEAL TO THE
UNITED STATES COURT OF
APPEALS FOR THE NINTH DISTRICT

Notice of Appeal

Dist. Ct. Civ. Action No. C 02-3444 SI

00097

1
2 John Gilmore, the plaintiff herein, appeals to the United States Court of Appeals
3 for the Ninth Circuit from the final judgment dismissing plaintiff's claims entered in this
4 case on March 24, 2004.

5
6 Dated: April 14, 2004

Respectfully submitted,

7
8 BY: 

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Attorneys for Plaintiff / Appellant
JOHN GILMORE

**U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:02-cv-03444**

Gilmore v. Ashcroft et al
Assigned to: Hon. Susan Illston
Referred to:
Demand: \$
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 05:552 Freedom of Information Act

Date Filed: 07/18/02
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: U.S. Government
Defendant

Plaintiff

John Gilmore

represented by **William M. Simpich**
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ATTORNEY TO BE NOTICED

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V.

Defendant

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capacity as Attorney General of the
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

00099

**Robert Mueller, in his official
capacity as Director of the Federal
Bureau of Investigation**

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as chief of the Office of Homeland
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00100

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Filing Date	#	Docket Text
07/18/2002	1	COMPLAINT <i>no process</i> ; against Jane F. Garvey, John W. Magaw, Norman Mineta, Robert Mueller, Tom Ridge, Southwest Airlines, UAL Corporation (Filing fee \$150 receipt number 4406152). Filed by John Gilmore. (ys,) (Entered: 07/22/2002)
07/18/2002	2	ADR SCHEDULING ORDER: Case Management Statement due by 11/15/2002. Case Management Conference set for 11/22/2002 at 02:00 PM.. Signed by Judge Susan Illston on 7/18/02. (ys,) (Entered: 07/22/2002)
08/02/2002		Summons Issued as to John Ashcroft ; Jane F. Garvey ; John W. Magaw ; Norman Mineta ; Robert Mueller ; Tom Ridge ; Southwest Airlines ; UAL Corporation (ys,) (Entered: 08/05/2002)
09/27/2002	3	WAIVER OF SERVICE OF SUMMONS Returned Executed, by Southwest Airlines. Southwest Airlines waiver sent on 9/12/2002, answer due 11/12/2002 (ys,) (Entered: 09/27/2002)
10/02/2002		Received Document <i>Stipulation and order</i> by Jane F. Garvey, John W. Magaw, Norman Mineta, Robert Mueller, Tom Ridge, Southwest Airlines, UAL Corporation. (ys,) (Entered: 10/03/2002)

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10/03/2002	4	STIPULATION AND ORDER: Federal defendants and Southwest may serve an answer or response to complaint is extended to and including 11/1/02. Federal defendants and Southwest shall file their respective motions to dismiss on or before 11/1/02. Plaintiff shall file opposition to Federal defendants' and Southwest's motions to dismiss on or before 11/29/02. Federal defendants and Southwest shall file reply, if any, on or before 12/20/02. A hearing on Federal defendants' and Southwest's motions to dismiss set for 1/17/03 at 9:00 a.m.. Case management conference is continued until further order of the court. Signed by Judge Susan Illston on 10/3/02. (ys,) (Entered: 10/04/2002)
10/03/2002		Set/Reset Deadlines:, Set/Reset Hearings: Defendants' motions to dismiss due by 11/1/2002. Hearing for defendants' motions to dismiss set for 1/17/2003 09:00 AM. (ys,) (Entered: 10/04/2002)
10/04/2002	5	WAIVER OF SERVICE of Summond Returned Executed, by Southwest Airlines. Southwest Airlines waiver sent on 9/19/2002, answer due 11/18/2002 (ys,) (Entered: 10/07/2002)
11/01/2002	6	MOTION to Dismiss filed by John Ashcroft, Marion C. Blakey, Adm James M. Loy, Norman Mineta, Robert Mueller, Tom Ridge. Motion Hearing set for 1/17/2003 09:00 AM. (ys,) (Entered: 11/01/2002)
11/01/2002	7	Summary of Argument re [6] <i>motion to dismiss</i> filed by John Ashcroft, Marion C. Blakey, Adm James M. Loy, Norman Mineta, Robert Mueller, Tom Ridge. (Related document(s)[6]) (ys,) (Entered: 11/01/2002)
11/01/2002		Proposed Order re [6] by John Ashcroft, Marion C. Blakey, Adm James M. Loy, Norman Mineta, Robert Mueller, Tom Ridge. (ys,) (Entered: 11/01/2002)
11/01/2002	8	MOTION to Dismiss <i>pursuant to FRCP 12(b)(6); Memorandum of Points and Authorities in support thereof</i> filed by Southwest Airlines. Motion Hearing set for 1/17/2003 09:00 AM. (ys,) (Entered: 11/01/2002)
11/01/2002	9	Summary of argument and evidence re [8] <i>motion to dismiss</i> filed by Southwest Airlines. (Related document(s)[8]) (ys,) (Entered: 11/01/2002)
11/01/2002		Proposed Order re [8] by Southwest Airlines. (ys,) (Entered: 11/01/2002)
11/12/2002	10	MOTION to Dismiss filed by UAL Corporation. Motion Hearing set for 1/17/2003 09:00 AM. (ys,) (Entered: 11/13/2002)

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11/12/2002	● 11	MEMORANDUM of Points and Authorities in Support re [10] filed by UAL Corporation. (Related document(s)[10]) (ys,) (Entered: 11/13/2002)
12/02/2002	● 12	Consolidated Opposition re [10], [6], [8] <i>motions to dismiss</i> filed by John Gilmore. (ys,) (Entered: 12/03/2002)
12/02/2002	● 13	Addendum of new facts re [12] opposition filed by John Gilmore. (Related document(s)[12]) (ys,) (Entered: 12/03/2002)
12/04/2002	● 14	NOTICE of Change of Address of counsels by federal defendants. (ys,) (Entered: 12/05/2002)
12/20/2002	● 15	Amended Summary of Opposition re [10], [6], [8] filed by John Gilmore. (ys,) (Entered: 12/23/2002)
12/20/2002	● 16	Addendum of New Facts re opposition to defendants' motions to dismiss filed by John Gilmore. (ys,) (Entered: 12/23/2002)
12/20/2002	● 17	Reply in support of Motion re [6] filed by Federal Defendants. (ys,) (Entered: 12/23/2002)
12/20/2002	● 18	Reply in support of Motion re [8] to dismiss filed by Southwest Airlines. (ys,) (Entered: 12/23/2002)
01/02/2003	● 19	Reply to [12] <i>plaintiff's consolidated oppositoin to defendants' motion to dismiss</i> by UAL Corporation. (ys,) (Entered: 01/03/2003)
01/02/2003	● 20	<i>Suggestion of Bankruptcy</i> by UAL Corporation. (ys,) (Entered: 01/03/2003)
01/21/2003	● 21	Minute Entry: Motion Hearing re [6], [8], [10] held on 1/17/2003 before Susan Illston. Motion submitted. There are no further dates set at this time (see stipulation filed 10/3/02) (Court Reporter J. Yeomans.) (ys,) (Entered: 01/22/2003)
02/10/2003	● 22	Request for Judicial Notice re [12] <i>opposition to defendants' motion to dismiss</i> filed by John Gilmore. Attachment Exh.1. (Related document(s)[12]) (ys,) (Entered: 02/11/2003)
02/24/2003	● 23	NOTICE re [22] <i>JOINDER IN FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE</i> by Southwest Airlines. (Barrett, Jane) (Entered: 02/24/2003)
02/24/2003	● 24	OBJECTIONS to [22] <i>plaintiff's request for judicial notice by Federal defendants.</i> (ys,) (Entered: 02/25/2003)

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02/25/2003	25	Joinder in Federal defendants' opposition to plaintiff's request for judicial notice by Southwest Airlines. (ys,) DUPLICATE ENTRY OF #23 (Entered: 02/26/2003)
03/19/2003	26	Letter dated 3/19/03 to the Court. (ys,) (Entered: 03/20/2003)
10/08/2003	27	NOTICE of association and appearance of co-counsel by John Gilmore. (ys, COURT STAFF) (Entered: 10/09/2003)
10/08/2003	28	Request for Judicial Notice re Opposition to defendants' motion to dismiss and request to seal Exhibit 2 filed by John Gilmore. (ys, COURT STAFF) (Entered: 10/09/2003)
10/08/2003	29	Declaration of John Gilmore in Support of [28] request for judicial notice filed by John Gilmore. (Related document(s)[28]) (ys, COURT STAFF) (Entered: 10/09/2003)
01/15/2004	30	Letter dated 1/13/04 from plaintiff's counsel William M. Simpich to the Court re ruling.(ys, COURT STAFF) (Filed on 1/15/2004) (Entered: 01/15/2004)
03/23/2004	31	ORDER by Judge Susan Illston granting [6] Motion to Dismiss by federal defendants with prejudice, granting [8] Motion to Dismiss by Southwest Airlines with prejudice, granting [10] Motion to Dismiss by United Airlines without prejudice. Denying [22],[28] request for judicial notice. (ys, COURT STAFF) (Filed on 3/23/2004) (Entered: 03/24/2004)
03/23/2004	32	JUDGMENT: Plaintiff's complaint against federal defendants and Southwest Airlines is dismissed with prejudice, and plaintiff's complaint against defendant UAL dba United Airlines is dismissed without prejudice. Judgment is entered accordingly. Signed by Judge Susan Illston on 3/19/04. (ys, COURT STAFF) (Filed on 3/23/2004) (Entered: 03/24/2004)
04/14/2004	33	NOTICE OF APPEAL as to [31] Order on Motion to Dismiss [32] Judgment, by John Gilmore. Filing fee \$ 255, receipt number 3358904. Appeal Record due by 5/14/2004. (vlk, COURT STAFF) (Filed on 4/14/2004) (Entered: 04/15/2004)
04/14/2004		Received Document: Representation Statement by John Gilmore. (vlk, COURT STAFF) (Filed on 4/14/2004) (Entered: 04/15/2004)
04/15/2004		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re [33] Notice of Appeal (vlk, COURT STAFF) (Filed on 4/15/2004) (Entered: 04/15/2004)

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04/15/2004

Docket fee notification form and case information sheet to USCA re
[33] Notice of Appeal (vlk, COURT STAFF) (Filed on 4/15/2004)
(Entered: 04/15/2004)

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CERTIFICATE OF SERVICE

I certify that on August 16, 2004, an original and five (5) copies of Appellant John Gilmore's Excerpt of Record were sent, via hand delivery, to the Clerk of the United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, California 94110-3939, and a copy was sent, via Federal Express, postage prepaid to each of the counsel below:

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