

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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,

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

v.

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.

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.

1 **BACKGROUND**

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

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

19
20
21
22

²The federal defendants are John Ashcroft, in his official capacity as Attorney General of the
23 United States; Robert Mueller, in his official capacity as Director of the Federal Bureau of
24 Investigation; Norman Mineta, in his official capacity as Secretary of Transportation; Marion C.
25 Blakey, as Administrator of the Federal Aviation Administration, substituted for Jane F. Garvey
26 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

27
28
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.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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
28 in the court of appeals of the United States for the circuit in which the person resides or
has its principal place of business.

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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

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

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

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

Because this claim squarely attacks the orders or regulations issued by the TSA and/or the FAA with respect to airport security, this Court does not have jurisdiction to hear the challenge. As a corollary, without having been provided a copy of this unpublished statute or regulation, if it exists, the 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.