IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN GILMORE,

Plaintiff,

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.
_____/

No. C 02-3444 SI

ORDER GRANTING MOTIONS TO DISMISS AND DENYING REQUEST FOR JUDICIAL NOTICE

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 dismiss[1] and DENIES plaintiff's request for judicial notice.

[1]After 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.

BACKGROUND

Plaintiff John Gilmore is a California resident who is suing the United States[2] 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.

---

[2]The 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

[3]Plaintiff'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 wanding, 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

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

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

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

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

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

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . under this part may apply for review of the order by filing a petition 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.

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

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.

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

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

A. Request for Identification

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

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

> Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, 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.

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

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

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

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

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

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

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

B. Request to consent to search

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

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

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

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

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

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

Plaintiff's allegation that his right to associate freely was violated fails because the only actions which violate this right are those which are "direct and substantial or significant." Storm v. Town of Woodstock, 944 F.Supp. 139, 144 (N.D. N.Y. 1996). Government action which only indirectly affects 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

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

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

Plaintiff alleges that "[t]he right to petition the government for redress of grievances is a fundamental Constitutional right, subject to strict scrutiny" and that this right is "burdened by requiring Petitioners to identify themselves, and by preventing Petitioners from traveling to where the seat of government is located." Complaint at ¶ 69. The right to petition the government for redress of grievances has been "held to be enforceable against the states by virtue of the Fourteenth Amendment." See Hilton v. City of Wheeling, 209 F.3d 1005, 1006-07 (7th Cir. 2000). But the right to petition the government for redress of grievances is only implicated by governmental action that prevents the exercise of such a right. Id. Although the government's refusal to let Mr. Gilmore board an airplane on Mr. Gilmore's terms may have made it more difficult for him to petition the government for redress, he certainly was not altogether prevented from doing so. Therefore, Mr. Gilmore's argument that his constitutional right to petition the government for redress was violated is rejected.

6. Plaintiff's request for judicial notice

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

///

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

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