IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ABOLALA SOUDAVAR,

Plaintiff,

v.

FEDERAL AVIATION ADMINISTRATION,

Defendant.

CASE NO. H-01-0344

DEFENDANT FAA'S REPLY TO PLAINTIFF'S RESPONSE TO THE MOTION FOR RECONSIDERATION

Despite Soudavar's inflammatory language, which attempts to cast the FAA as a villain systemically enacting policies that invidiously discriminate against Iranian citizens, there is no escaping the fact that Soudavar 's Complaint fails, in every way, to state a claim against the FAA for any putatively illegal conduct. Indeed, it could not, for Soudavar's characterization of the FAA's security regulations, regulations which are statutorily directed to protect the greatest number of passengers and property traveling in air transportation from acts of air piracy or criminal violence is, quite simply, unwarranted and without any basis in fact. For example, of those cognizable incidents in his Complaint, Soudavar, in his zeal to blame the FAA, fails to concede that the scenarios involving himself and his baggage at Gatwick Airport in England might very well have been the result of British airport security regulations that were applied to him and his conduct at that airport. Indeed, such British security regulations would be separate and apart, and not at all the same, as anything the FAA mandates in its regulatory scheme. As a

passenger traveling through an English airport, Soudavar would be subject to British airport security laws (or any other foreign country's airport security laws) regardless of whether he flew an American carrier. And unlike the aviation security scheme set forth under 49 U.S.C. § 44901 *et. seq.*, where passenger and luggage screening requirements rests with the air carriers and not with federal officials or personnel, passenger screening in foreign countries (including the United Kingdom), is undertaken either by a quasi-governmental enterprise or by personnel directly employed by the government in question. *See, e.g.*, Proposed Rule, Certification of Screening Companies, 65 Fed. Reg. 560, 568 (2000)(to be codified at 14 C.F.R. §§ 108, 109, 111, 129, 191)(Exhibit 1).[1] Given these facts, it can fairly be said that Soudavar's allegations against the FAA smack of carelessness at best.

Regardless, Soudavar's repeated recitations of the alleged unconstitutionality of the FAA's security regulations as applied to Iranian citizens studiously overlooks one very important facet with regard to the United States Constitution; the classification of citizens and aliens in this country, even resident aliens, is not co-terminous. Actions by the federal government that distinguish on the basis of alienage merit only " a narrow standard of review" under the Fifth Amendment, and do not trigger application of the strict scrutiny test. *Mathews v. Diaz*, 426 U.S. 67, 82 (1976); *United States v. Santos-Rivera*, 183 F.3d 367, 372 (5th Cir. 1999)("we apply the deferential rational basis test to federal statutes that classify based on alienage and will uphold

[1] As the information in Exhibit 1 states, a notice of proposed rulemaking invites interested persons to provide comments. This should put to rest Soudavar's notion that there is no public notice and comment on FAA security rulemakings.

the statute if it is rationally related to a legitimate government interest"). As explained by the Supreme Court in *Mathews*:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. . . . Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution.
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> 426 U.S. at 81 (footnotes omitted). The Court also noted that:
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> a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.

Id. at 78-79 (footnotes omitted).

Thus, "classification by the Federal Government [between citizens and non-citizens] is a routine and normally legitimate part of its business." *Id.* at 85. In *Mathews,* the Court unanimously upheld congressional restrictions on certain non-citizens participating in the Medicare program. The Court observed that it was "obvious that Congress has no constitutional duty to provide all aliens with the welfare benefits provided to citizens," *id.* at 82, and found that the particular restrictions enacted by Congress were not wholly irrational. *Id.* at 83. At bottom, Plaintiffs wanted the Court to substitute its judgment for that of Congress as to where the line should be drawn between those non-citizens eligible and those ineligible for benefits, which was not within the province of the Court to do.

The result and reasoning in *Mathews* control in this case as well. As compared to the provision of welfare benefits, responsibility for regulating the travel of non-citizens at this country's airports certainly goes even more to the heart of congressional and executive authority to specify the relationship between the United States and non-U.S. passport holders. The Constitution imposes no duty on the FAA to treat all non-citizens the same as American citizens in designing airport security measures. "[I]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Nehme v. INS*, 252 F.3d 415, 432 (5th Cir. June 5, 2001)(citations omitted).

The limited and particularized alienage distinctions that may characterize certain aspects of FAA pre-screening procedures are not irrational; they have the legitimate purpose of furthering the FAA's statutory mandate to protect persons and property traveling in air transportation from criminal acts. This limited discrimination on the basis of alienage is constitutional, and although it may be that certain pre-screening measures enacted by the federal government have a disparate impact on certain non-U.S. passport holders, such alleged effect does not imply a discriminatory purpose. There is no constitutional or statutory provision that bars the federal government from implementing a security screening system that has an unintentional discriminatory effect based on race, national origin, religion, gender, or other personal characteristic. Under a disparate impact standard, a policy or practice that has a disparate impact is unlawful unless it is shown to be necessary to the program's operation or there is no less discriminatory alternative. *See, e.g.*, 42 U.S.C. § 2000e-2 (Title VII of the 1964 Civil Rights Act). *See also, Guardians Ass'n v. Civil Serv. Comm's of New York*, 463 U.S. 582, 597 (1983)(holding that in a Title VI action, monetary damages should not be awarded under

Title VI for unintentional disparate impact discrimination). Indeed, the Department of Justice Civil Rights Division (DOJ), who undertook a comprehensive review of those allegedly "racist" FAA security procedures of which Soudavar complains, wrote the following in October 1997:

> Department of Justice Findings
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> (c)To a limited degree, CAPS [the FAA's Computer Assisted Passenger Screening System] distinguishes between American citizens and passengers traveling on the passport of a foreign country. CAPS' narrowly defined reliance on alienage is fully justified and is constitutional.
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> Report by the Department of Justice To the Department of Transportation on the Civil Rights Review of the Proposed Automated Passenger Screening System, p. 7. (Exhibit 2)

In its Conclusion, DOJ wrote:

> The FAA's proposed automated airline passenger screening system, as designed, will not infringe the civil rights or civil liberties of American citizens. The FAA has taken great care in designing CAPS so as to respect Americans' cherished civil rights and civil liberties, and the DOJ has conducted a detailed and comprehensive review of the FAA's proposal. . .
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> Report, p. 10.

The DOJ report referenced above came about as a result of the recommendations of the White House Commission on Aviation Safety and Security of February 12, 1997, which was formed after the tragic crash of TWA 800 on July 17, 1996. (*See*, Final Report to President Clinton, available on-line at www.aviationcommision.dot.gov). In its Recommendations, the Commission stated that it "supports the development and implementation of manual and automated profiling systems," and urged such profiling systems to remain in place "until such Explosive Detection Systems are reliable and fully deployed." (Commission Report, pp. 38-39)(Exhibit 3). In addition, the Commission convened a panel of civil liberties experts to review profiling issues that was made up of, among others, representatives from the Council on

American-Islamic Relations and the American Civil Liberties Union. (*See*, Commission Report, p. 56)(Exhibit 3). The DOJ Civil Rights review of FAA pre-screening procedures, both automated and manual, was one of the results of the panel's proposals. (See, DOJ report, p. 2, Background). In her cover letter to Secretary Slater, Attorney General Reno praised the "highly dedicated public servants" in the Office of the Secretary of Transportation and the FAA, who helped make the report possible. *See*, Letter from Attorney General Reno (Exhibit 2). Since the DOJ Report was issued, both the FAA's computerized screening system, as well as the residual manual system, have been continuously reviewed in response to various concerns that have been brought to the attention of the Department of Transportation (DOT) and the FAA. *See*, DOT Press Release-DOT Investigates Passenger Security Screening's Impact on Minorities, dated 6/4/01 (Exhibit 4), and Remarks by Secretary Slater at 8th Annual Muslim-American Council dated 5/7/99 (Exhibit 5).[2]

Given the above information, it would be exceedingly difficult to recognize Soudavar's crass characterization of the FAA as anything remotely resembling the reality of the situation.

It is hoped that the above-referenced facts, in conjunction with the FAA's Motion for Reconsideration, will provide this Court with the information it needs to dismiss Soudavar's claims against the FAA in their entirety. Soudavar's pleadings amount to little more than scurrilous accusations, unsupported by any well-pled facts, and consequently cannot survive a motion to dismiss under 12(b)(1) or 12(b)(6). *See, Khaled Tawfik v. Southwest Airlines*, 1999

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[2] One very important point made in Secretary Slater's remarks to the Muslim-American Council was the difference between "profiling"- the practice of singling out passengers based on personal attributes, such as race, ethnicity, national origin or religion, and "screening"- selecting passengers or baggage for closer examination based on travel-related and other non-discriminatory indicators. The FAA's computerized screening system employs the latter, not the former.

U.S.Dist. LEXIS 5705 (N.D. Cal.)(Exhibit 6)(Plaintiff, an Egyptian, filed suit for intentional discrimination related to alleged discriminatory security search of his carry-on bags; the court dismissed under 12(b)(6), holding that Plaintiff's allegations were conclusory and did not support inference that defendant intentionally discriminated against him).

In sum, the FAA submits that, for the reasons stated above and in its Motion for Reconsideration, this Court is without subject-matter jurisdiction to hear Soudavar's remaining injunctive relief claims. As the DOJ Report and follow-up DOT press releases conclusively demonstrate, the FAA's passenger screening system is under constant review, it is constitutional, its narrowly defined reliance on alienage is constitutional, and the system does not discriminate on the basis of race, color, national or ethnic origin, religion or gender. Accordingly, there is no basis upon which this Court could grant injunctive relief. Moreover, as expressed in the *Zephyr Aviation* case, the caselaw in this Circuit is that a Plaintiff may not make an end-run around the jurisdictional limitations of 49 U.S.C. § 46110(a) by collaterally attacking an FAA order through an action in district court. This is particularly true where, as here, non-monetary relief is at issue, for Congress has provided an exclusive forum in the courts of appeals to hear such claims based upon review of an FAA order. And although it is true that there is a 60-day period of limitations to bring a petition for review of an FAA order in the court of appeals, it is this court's subject-matter jurisdiction that is the relevant issue here, not that of the court of appeals. *See, e.g., Green v. Brantley*, 981 F.2d 514, 520 (11th Cir. 1993), (refusing Plaintiff's request to file a petition for review after the 60 day limitations period had passed, and stating that "where, as in this situation, the court below lacks jurisdiction, we have jurisdiction on appeal, *not of the merits* but merely for the purpose of correcting the error of the lower court in entertaining the suit") (emphasis added)(citations omitted). *See also, Promptair v. Hinson*, 1996 U.S. Dist. LEXIS 17366 * 8

(N.D. Ill.)(attached as Exhibit 3 to FAA's Motion for Reconsideration) (granting motion to dismiss under 12(b)(1) where government argued that even if the court of appeals did not have jurisdiction over the instant case, neither did the district court, as Congress intended that any review of FAA action must be heard in the court of appeals).

In the event that this Court does not agree with the FAA's position, and denies its Motion for Reconsideration to dismiss the remaining injunctive relief claims, the FAA respectfully renews its motion to stay the district court proceedings and certify the issue of this court's subject-matter jurisdiction and § 46110(a) for an immediate appeal to the Court of Appeals for the Fifth Circuit, pursuant to 28 U.S.C. § 1292(b).

Respectfully submitted,

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