IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN GILMORE Plaintiff-Appellant, v. JOHN D. ASHCROFT, Attorney General, et al. Defendants-Appellees.	No. 04-15736

APPELLEES' MOTION TO FILE MATERIALS AND OPPOSING BRIEF UNDER SEAL, FOR *IN CAMERA* AND *EX PARTE* REVIEW

In accordance with Fed. R. App. P. 27 and Circuit Rule 27-1, defendants/appellees hereby respectfully move to file materials and an opposing brief with this Court under seal, for *in camera* and *ex parte* review. The Government respectfully requests a decision on its motion before September 15, 2004, as its brief is due to be filed by that date.

INTRODUCTION

Plaintiff alleges the existence of a security directive issued by the Federal Government relating to airline security procedures, and he challenges the constitutionality of that directive. Because plaintiff's case was decided in the district court on the Government's motion to dismiss, all parties and the court simply assumed the truth of plaintiff's allegation regarding the existence and content of the security directive described in plaintiff's Complaint. Defendants recognize,

however, that this Court might find the precise content of any alleged security directive to be necessary for resolution of plaintiff's appeal. A federal statute and accompanying regulations, however, prohibit defendants from disclosing any such directive in open court, to plaintiff, or to plaintiff's counsel. Accordingly, defendants respectfully move this Court to permit them to file materials and an opposing brief under seal, for *in camera* and *ex parte* review. (Defendants would also file and serve a redacted, unsealed version of that brief.)

FACTUAL AND PROCEDURAL BACKGROUND

1. On July 4, 2002, plaintiff attempted to board two different commercial airline flights to fly to Washington, D.C. He was not permitted to board because he refused to present identification when asked to do so, and also refused an alternative request to submit to a search of his person and property.

On July 18, 2002, plaintiff filed a complaint in the United States District Court for the Northern District of California against federal defendants and the two airlines (Southwest Airlines and United Air Lines) who refused to board him.[1]

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[1] The federal defendants named in the Complaint 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 ("FBI"); Norm Mineta, in his official capacity as Secretary of Transportation; Jane F. Garvey, in her official capacity as Administration of the Federal Aviation Administration; John W. Magaw, in his official

Plaintiff alleges that defendants "have collectively caused the issuance and enforcement of secret transportation security directives requiring that airlines demand travelers reveal their identity before they are permitted to board an airplane." Complaint at 4-5 ¶ 24. Plaintiff contends that the alleged identification requirement violates his due process rights; his Fourth Amendment rights; his Fifth Amendment right to travel; his First and Fifth Amendment rights to travel and associate anonymously; and his First Amendment right to petition the Government for redress of grievances.

2. Before the district court, the federal defendants declined to acknowledge whether such a security directive existed, and if so, what it requires. Rather, because federal defendants had filed a motion to dismiss plaintiff's claims, the district court was required to accept as true plaintiff's allegation regarding the existence and content of such a security directive, and federal defendants likewise litigated the case on

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capacity as chief of the Transportation Security Administration, and Tom Ridge, in his official capacity as head of the Department of Homeland Security. Pursuant to Federal Rule of Civil Procedure 25(d)(1), defendant Marion C. Blakey substituted for Jane F. Garvey, and Admiral James M. Loy substituted for John W. Magaw.

Private defendant United Airlines has filed a petition for bankruptcy and claims against it are stayed pursuant to the Bankruptcy Code's automatic stay provision. 11 U.S.C. § 362(a). All parties agreed in the district court to sever all claims against United Air Lines.

that assumption.

Moreover, defendants are precluded by federal statute and regulation from disclosing the existence and content of any such security directive. Under 49 U.S.C. § 114(s)(1)(C), "the Under Secretary [of Transportation for Security] shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C).[2] Pursuant to that authority, the Under Secretary has defined a set of information known as "SSI" or "sensitive security information" (see 49 C.F.R. § 1520.3), and has directed that such information shall not be disclosed except in certain limited circumstances not applicable here. 49 C.F.R. § 1520.9(a)(1) ("A covered person must . . . disclose . . . SSI only to covered persons who have a need to know, unless otherwise authorized in writing by TSA.").[3] The Under Secretary has defined SSI to include "[a]ny aircraft operator or airport

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[2] The Under Secretary of Transportation for Security is the head of the Transportation Safety Administration ("TSA"), 49 U.S.C. § 114(d), and is now known as the Administrator of the TSA, 49 C.F.R. § 1500.3, although federal statutes continue to refer to the position as the "Under Secretary."

[3] Sensitive security information may be disclosed if the TSA provides in writing that it is "in the interest of public safety or in furtherance of transportation security" to do so. 49 C.F.R. § 1520.5(b).

operator security program" and "[a]ny Security Directive or order . . . [i]ssued by TSA." 49 C.F.R. § 1520.5(b)(1)(i), (b)(2)(i). By regulation, aircraft operators must also "[r]estrict the distribution, disclosure, and availability of information contained in the security program to persons with a need-to-know." 49 C.F.R. § 1544.103(b)(4). Accordingly, even if plaintiff's allegations about the existence and content of the alleged security directive were correct, defendants were prohibited by statute and regulation from openly disclosing those facts before the district court, plaintiff, or plaintiff's counsel.

3. On March 23, 2004, the district court dismissed plaintiff's Complaint in full. The district court held that it lacked jurisdiction over plaintiff's due process claim, which instead belongs in this Court. In addition, the district court ruled that, even assuming the truth of plaintiff's allegations, plaintiff's remaining claims failed to state a cause of action on which relief could be granted. (A copy of the opinion is attached.)

Plaintiff filed a timely notice of appeal, and on August 16, 2004, filed his opening brief with this Court. Defendant's opposing brief is now scheduled to be filed by September 15, 2004.

DISCUSSION

As discussed above, a federal statute and implementing

regulations prohibit the disclosure of sensitive security information, and that is precisely what is alleged to be at issue here. Because such information may be necessary for this Court's determination in this appeal, however, the Government respectfully moves this Court to grant defendants' motion for leave to file materials and its opposing brief under seal, for *in camera* and *ex parte* review. The Government would also file and serve a redacted, unsealed version of the brief as well. That procedure will adequately safeguard any sensitive security information while permitting this Court's independent review of the merits of plaintiff's claims. Such a procedure has been repeatedly endorsed by this Court in a variety of contexts, particularly when national security or other similar interests are at stake.

1. There is no question that a federal statute and regulations prohibit the disclosure of sensitive security information. 49 U.S.C. § 114(s)(1)(C) grants the Under Secretary authority to prescribe rules prohibiting the disclosure of information if it would harm transportation security, and by regulation the Under Secretary has provided that sensitive security information or "SSI" cannot be disclosed, 49 C.F.R. § 1520.9(a)(1) ("A covered person must . . . disclose . . . SSI only to covered persons who have a need to know, unless otherwise authorized in writing by TSA"). The non-disclosure requirements apply to airline operators as well. 49 C.F.R. § 1544.103(b)(4).

SSI, in turn, has been defined to include "[a]ny security program" or "[a]ny Security Directive or order . . . [i]ssued by TSA," 49 C.F.R. § 1520.5(b)(1)(i), (b)(2)(i).

There is also no question that plaintiff's Complaint directly challenges an alleged security directive. See Complaint at 4-5 ¶ 24 (defendants "have collectively caused the issuance and enforcement of secret transportation security directives requiring that airlines demand travelers reveal their identity before they are permitted to board an airplane") (emphasis added). It follows that plaintiff's case turns on the constitutional validity of an alleged security directive that, under federal statute and regulatory authority, may not be disclosed.

Finally, there is no question that the Government's interest in non-disclosure is compelling. By definition, the restricted information is that which the Under Secretary determines would "be detrimental to the security of transportation" if it were disclosed, 49 U.S.C. § 114(s)(1)(C), and the Government's interest in ensuring airline security is plainly significant and substantial.

2. Access by this Court to SSI, however, may be necessary for resolution of the jurisdictional and/or merits questions presented on appeal. To balance the statutory and regulatory commands of non-disclosure as well as the Government's compelling interest in airline security, with this Court's independent duty

to review the questions presented in this appeal, the Government moves for leave to file SSI material, as well as its opposing brief, under seal, for *in camera* and *ex parte* review, with a redacted and unsealed copy of the brief to be filed openly with this Court and served on opposing counsel.

3. This Court has repeatedly endorsed such sealed, *in camera* and *ex parte* submissions, in a variety of contexts. See, e.g., Meridian Internat'l Logistics, Inc. v. United States, 939 F.2d 740, 745 (9th Cir. 1991) ("We find that the procedure [declarations sealed and subject to *ex parte* and *in camera* review] used by the court in the instant case was proper; it adequately balanced the rights of the Government and [plaintiff]. . . . [A]lthough [plaintiff] did not have the opportunity to conduct discovery and cross-examine the Government's witness, its interests as a litigant are satisfied by the ex parte/in camera decision of an impartial district judge."); In re Grand Jury Proceedings, 867 F.2d 539, 540-41 (9th Cir. 1988) (rejecting due process challenge to *in camera* submission to support enforcement of grand jury subpoena); United States v. Sarkissian, 841 F.2d 959, 965-66 (9th Cir. 1988) (upholding submission of material *ex parte* and *in camera* for proceedings under the Classified Information Procedures Act); United States v. Ott, 827 F.2d 473, 476-77 (9th Cir. 1987) (rejecting due process challenge to *ex parte, in camera* review of materials under the Foreign Intelligence Surveillance Act); Pollard v. FBI, 705 F.2d 1151,

1153-54 (9th Cir. 1983) ("the practice of *in camera, ex parte* review remains appropriate in certain FOIA cases").

To be sure, *ex parte, in camera* review of a sealed filing is not the ordinary course in litigation, nor would it be appropriate in every case. But here, where Congress has authorized the Under Secretary of Transportation for Security to promulgate non-disclosure rules for security-related information, and the Under Secretary has expressly categorized the information at issue in this case as non-discloseable sensitive security information, the Government's interests as well as the plaintiff's are best balanced by such a procedure. The Government's security requirements will be addressed by preventing disclosure beyond the narrow confines of the judges of this Court, and plaintiff's "interests as a litigant are satisfied by the ex parte/in camera decision of . . . impartial judge[s]." Meridian Internat'l Logistics, 939 F.2d at 745.

4. In the district court, the Government filed a motion to dismiss plaintiff's claims, and therefore both the district court and the Government were required to accept plaintiff's allegations as true - including both the existence and content of the security directive as described in plaintiff's Complaint. As a consequence, resolution of plaintiff's claims did not require the district court to review any SSI. While we believe that this appeal likely can be resolved in the same manner - without any review of any SSI - we also acknowledge that this Court may find

review of certain SSI to aid in the resolution of this appeal. Accordingly, we have filed the instant motion for leave to file SSI materials and a our opposing brief under seal, for *in camera* and *ex parte* review.

CONCLUSION

For the reasons stated above, this Court should grant the Government's motion to file an opposing brief and materials under seal, *in camera* and *ex parte*.

Respectfully submitted,

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