

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

APPELLEES' MOTION TO RECONSIDER

In accordance with Circuit Rule 27-10, defendants/appellees submit the following Motion to Reconsider the Appellate Commissioner's Denial of the Government's motion to file materials and an opposing brief with this Court under seal, for *in camera* and *ex parte* review. The Government's motion was originally filed on September 2, 2004 and the Appellate Commissioner's order denying the motion was filed on September 10, 2004.¹ Because the Commissioner's order rests entirely on an incorrect legal assumption about the merits of plaintiff's appeal, the September 10 order should be reconsidered and the Government's September 2 motion should be granted.

INTRODUCTION

In this case, 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. In order to protect air travel security, a

¹ This motion for reconsideration is timely because it is filed within 14 days of the Commissioner's order. See Circuit Rule 27-10(a).

federal statute and accompanying regulations prohibit defendants from disclosing any such directive in open court, to plaintiff, or to plaintiff's counsel. See 49 U.S.C. § 114(s)(1)(C); 49 C.F.R. §§ 1520.5(b)(1)(i), (b)(2)(i), 1520.9(a)(1), 1544.103(b)(4). In light of this statute and accompanying regulations, and for reasons set forth in its motion filed on September 2, 2004, the Government moved this Court to permit federal defendants to file materials and an opposing brief under seal, for *in camera* and *ex parte* review (with a redacted version of the brief to be served and filed publicly).

Plaintiff filed an opposition to that motion on September 7, 2004 (hereinafter "Pl.'s Op."). The Appellate Commissioner denied the Government's motion on September 10, 2004, without waiting for the Government's timely reply to plaintiff's opposition, which the Government filed on September 13, 2004.²

DISCUSSION

1. In his opposition to the Government's motion, Plaintiff objected to the Government's motion to file material under seal for *in camera* and *ex parte* review, arguing that the scope of this Court's appellate review is limited to the record developed in the district court. Pl.'s Op. at 3-5.

2. It was that objection that apparently forms the sole basis for the Commissioner's denial of the Government's motion. The September 10 order denying

² A copy of the Government's September 2 motion, plaintiff's September 7 opposition, the Government's September 13 reply, and the Commissioner's September 10 order are attached.

the Government's motion cited only two authorities – Circuit Rule 10-2 and Kirshner v. Uniden Corp., 842 F.2d 1074, 1077-78 (9th Cir. 1988), both of which speak only to plaintiff's argument that the Government cannot expand the district court record.

3. As the Government pointed out in its reply, however, plaintiff's argument incorrectly assumes that this case was properly before the district court in the first place. But whether this case was properly before the district court is one of the principal issues before this Court in plaintiff's appeal. We argued below that the district court lacked jurisdiction over plaintiff's claims under 49 U.S.C. § 46110, which provides for exclusive court of appeals jurisdiction over certain orders issued by the Under Secretary of Transportation for Security. Whether the alleged security directive at issue in plaintiff's case is such an "order" is one of the primary questions now before this Court. Plaintiff contends that the answer to that question turns on the existence of an administrative record. See Pl.'s Opening Brief at 45. Because the materials that the Government proposed in its motion to submit are the administrative record, this Court might find it necessary to review those materials in order to decide the threshold jurisdictional question. Accordingly, this Court should have granted the Government's motion.

Even if the existence of an administrative record is immaterial to the jurisdictional question, this Court should still have granted our motion. Because the manner in which this Court will resolve plaintiff's case is unknown, and because review of the Government's proposed submission would be proper under at least one possible way of resolving the case, this Court should have granted the Government's motion so that the

relevant materials would be available if they are needed by this Court.

In disposing of plaintiff's case, this Court could follow one of three options. First, this Court could hold that the district court lacked jurisdiction over some or all of plaintiff's claims, and could simply affirm the district court's dismissal of those claims on that ground. Second, this Court could hold that the district court properly entertained jurisdiction, but could decide the case on the merits assuming all of plaintiff's alleged facts to be true (including the existence and content of the alleged security directive). Under either scenario, this Court's review could follow the same procedure followed by the district court, namely, disposing of this case without reviewing the sealed materials that are the subject of the Government's motion.

Under a third conceivable alternative, this Court could hold that, although the district court did not have jurisdiction over some or all of plaintiff's claims, this Court has jurisdiction to entertain a direct petition for review pursuant to 49 U.S.C. § 46110. And, this Court could conceivably hold that it should treat plaintiff's appeal as if it had been a transfer of the case from the district court under 28 U.S.C. § 1631. See, e.g., City of Alameda v. FAA, 285 F.3d 1143, 1144 (9th Cir. 2002). If the Court were to take that approach as to some or all of plaintiff's claims, treating plaintiff's appeal as a direct petition for review, the Court would be considering the merits of those claims and, in doing so, could consider the materials that the Government proposes in its motion to file. See Camp v. Pitts, 411 U.S. 138, 142-43 (1973) (expressly authorizing the Government to file supplemental declarations in court in order to more fully explain the rationale for its administrative action).

Thus, while plaintiff is right that, if this matter is treated solely as an appeal, the district court record cannot be expanded, there is a possibility that this Court will instead treat some or all of plaintiff's claims as properly before it through the equivalent of a direct petition for review, contemplated by 49 U.S.C. § 46110.

Given that these different options currently exist and there is no way to know at this point which one the panel of judges ultimately assigned to the case will follow, this Court should have granted our motion to file sensitive air travel security information under seal for *in camera/ex parte* review. If that panel eventually treats some or all of plaintiff's claims pursuant to a petition for review, then judicial review of the sealed material would plainly be appropriate under the Supreme Court precedent noted above. If the panel instead eventually pursues either of the first two options, it would have no need to examine the sealed material, and no harm will have been done; merely granting our motion now does not mean that the panel must review the sealed sensitive materials if it finds it unnecessary to do so. But, denying our motion now forecloses the course described above under which this Court considers the merits of plaintiff's claims directly. The more prudent course, therefore, would have been to grant our motion now so that the Court has available to it whatever option it decides to follow.

4. The Appellate Commissioner, however, did not have the benefit of the above analysis because he denied the Government's motion on Friday, September 10, 2004, while he did not receive the Government's reply until Monday, September 13, 2004 (it was sent by Federal Express on September 10). Accordingly, the above sets forth points of law overlooked by or unknown to the Commissioner. See Circuit Rule 27-10(a).

Because the Commissioner ruled before receiving the Government's reply, and because the argument in that reply undermines the entire basis for the Commissioner's order, the September 10 order denying the Government's motion should be reconsidered, and the Government's September 2 motion should be granted.

5. The Government's brief is now due on September 29, 2004. This Court, however, might not act on the instant motion to reconsider before that time. Accordingly, the Government will file its brief on that date without filing any portion of its brief or other material under seal for *in camera* and *ex parte* review. In other words, the Government will file a timely brief, but will not be providing the Court with the confidential material that could aid its consideration of this case. The Government respectfully requests, however, that should the Commissioner or this Court grant its motion to reconsider and grant the Government's September 2 motion, the Commissioner or this Court also grant the Government a reasonable period of additional time in which to prepare a new version of its brief, and to submit other materials for filing under appropriate procedures.

CONCLUSION

For the reasons stated above, in our original September 2, 2004 motion, and in our September 13, 2004 reply, this Court should grant the Government's motion to reconsider.

Respectfully submitted,

DOUGLAS N. LETTER
(202) 514-3602

JOSHUA WALDMAN
(202) 514-0236

Attorneys, Appellate Staff
Civil Division, Room 7232
Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

September 20, 2004

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2004, I filed and served the foregoing MOTION TO RECONSIDER by causing the original and four copies to be sent to this Court via Federal Express and by causing one copy to be served upon the following counsel by Federal Express:

WILLIAM SIMPICH
1736 Franklin Street
10th Floor
Oakland, CA 94612

JAMES P. HARRISON
Attorney at Law
980 9th Street
16th Floor
Sacramento, CA 95814

Joshua Waldman
Counsel for Appellees