

Government's motion to file materials and opposing brief under seal, for *in camera* and *ex parte* review. On September 8, 2004, the Government filed another separate motion to suspend the briefing schedule pending this Court's action on their motion to file materials and opposing brief under seal, for *in camera* and *ex parte* review.

DISCUSSION

Until this Court rules on the Government's September 2, 2004, motion the Government should assume that it does not have leave to file materials and an opposition brief under seal, for *in camera* and *ex parte* review and should be required to comply with the long noticed filing deadline of September 15, 2004.

Gilmore's opposition to the Government's September 2, 2004, motion argued that the Government's expansion of the record on appeal is foundationally improper as this Court's review of the district court's order is limited to the record before the district court. Gilmore also argued and that the Government's original filing of documents and pleadings under seal for *in camera* and *ex parte* review by this Court is highly improper as it prevents Gilmore or his attorneys from literally knowing the Government's arguments in opposition to his appeal.

Requests to amend the briefing schedule should be included in the legend as well as the body of the motion for other relief. (See Circuit Advisory Committee note (6) to Circuit Rule 27-1). Had the Government's initial motion properly included a request for the suspension of the briefing schedule, Gilmore's opposition, filed prior to the filing and receipt of the Government's second motion, would have been approached even more strenuously. For instance, significantly more attention would have been paid to contest the Government's position that 49 U.S.C. §114 (s)(1)(C) "prohibits" defendants from disclosing certain information in open court. In fact, 49 U.S.C. §114 (s)(1)(C) provides that the Under Secretary

of the Transportation Security Administration (TSA), a named defendant/appellee to this case, has the authority to prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security if he himself determines that its release would be detrimental to the security of transportation. One can only hope that public access to the content of enforced laws is not considered detrimental to security. Defendant/appellee TSA decided not to disclose the security directive to District Court Judge Susan Illston. Defendant/appellee TSA continues to claim that to make public the law requiring identification to travel domestically by commercial air transport would be detrimental to the security of transportation. Defendant/appellee's "prohibition" to disclose a security directive in open court results from a decision not to do so by Defendant/appellee TSA. To now claim that it is due to compliance with a "federal statute" is a mischaracterization of the process and a self serving use of secrecy.

The Government has indicated that, if their motion of September 2, 2004, is granted, they would file an accompanying redacted, unsealed version of the opposition brief for viewing by appellant's counsel and the general public. The Government has not explained why they are unable to file their unsealed opposition brief by September 15, 2004, in compliance with Fed. R. App. P. 31(a). Should the Court grant them leave to file materials and an opposition brief under seal, for *in camera* and *ex parte* review, to which Gilmore again strongly objects, the Government would then file that material at some future date. The Government has put forth no argument for why they can not meet the September 15, 2004 deadline for filing their unsealed opposition brief.

Should the Court grant the Government's motion to suspend the briefing schedule, Gilmore objects to the Government's announced use of a further 21 day extension in which to file their briefs once the suspension is lifted as it constitutes

excessive delay without cause. There is nothing preventing the Government's preparation of an *ex parte* opposition while the Court rules on their motion for leave to file one.

There is no exigent circumstance requiring a suspension of the briefing schedule. On September 8, 2004, defendant/appellee Southwest Airlines requested Gilmore's consent to a 14 day extension to file their opposition brief. Gilmore's counsel immediately consented to this request and Southwest's opposition to Gilmore's appeal is now due September 29, 2004. When Gilmore's counsel communicated in early August with the Government's counsel (DOJ) asking for a 14 day extension to file appellant's opening brief, the DOJ attorney immediately consented and indicated his intention to likewise use the 14 day extension to file an opposition brief to which Gilmore's counsel immediately consented and expects its use.

CONCLUSION

The Government should not be relieved of its filing deadline to oppose Gilmore's appeal simply because it makes an extraordinary motion and then claims to "not know what procedures to follow in filing its brief." The Government should assume that unless their extraordinary motion is granted, they do not have leave to make such filings. The Government should not benefit from its self imposed delay and should be required to abide by this Court's filing deadlines. For this reason and the reasons stated above, this Court should deny the Government's motion to suspend the briefing schedule.

Respectfully submitted,

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September 10, 2004

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2004, I filed and served the foregoing OPPOSITION TO APPELLEES' MOTION TO SUSPEND THE BRIEFING SCHEDULE PENDING THIS COURT'S ACTION ON THE GOVERNMENT'S MOTION TO FILE MATERIALS AND OPPOSING BRIEF UNDER SEAL, FOR *IN CAMERA* AND *EX PARTE* REVIEW by personally delivering by hand the original and four copies to this Court and by causing one copy to be served upon the following counsel by Federal Express:

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