UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DOCKET NO. 05-2024

ROBERT GRAY, Petitioner	)	**EMERGENCY MOTION FOR AN UNCLASSIFIED SUMMARY CONTEMPLATED BY 49 U.S.C. § 46111 AND FOR AN ORDER COMPELLING PRODUCTION OF AS MUCH INFORMATION AS POSSIBLE**
v.	)	
TRANSPORTATION SECURITY ADMINISTRATION, Respondent	)	

On October 26, 2005, the parties to the above-captioned matter filed an Assented-To Motion To Stay ("Assented-To Motion"). In the event that this Court allows that motion, it will be unnecessary to adjudicate the instant Motion at this time. Petitioner nevertheless is filing the instant Motion at this time to account for the possibility that this Court may deny the Assented-To Motion.

Petitioner, Robert Gray ("Gray"), seeks in the instant Motion an Order compelling the production of information concerning the Government's asserted case against him so that he can respond to that case in a manner that will place before this Court sufficient facts to enable it to make a fair and accurate determination. Although this Court previously denied Gray's effort to obtain such information in the abstract, Gray is renewing his request at this time because the Government has just produced to him heavily-redacted versions of three (3) specific documents that it apparently filed with this Court on October 25, 2005 in unredacted form. More specifically Gray seeks access to as much information as possible concerning the items that the

Government has redacted ("Secret Evidence"). Significantly, the same statute upon which the Government relied in urging this Court to review the Secret Evidence *in camera* and *ex parte* also requires the Government to produce to Gray an "unclassified summary" of the Secret Evidence. Gray has filed this motion on an emergency basis because, in the event that this Court denies the Assented-To Motion, his principal brief will be due on November 10, 2005.

Background

In broad strokes, Gray – a pilot with an unblemished record as a law-abiding citizen –asserts in the above-captioned matter that Respondent, Transportation Security Administration ("TSA"), retaliated against him in violation of the First Amendment and violated his Constitutional right to due process. He commenced this action (and a related action in the District Court) to challenge TSA's denial of his request for permission to participate in flight training based upon (a) unspecified allegations from unidentified sources and (b) secret evidence that TSA refused to disclose or even describe. TSA then retaliated against Gray for exercising his First Amendment right to petition this Court by placing his name on a watch-list of suspected terrorists, notwithstanding the fact that it repeatedly had decided not to take this action in the months before Gray filed suit. Gray filed an Amended Petition challenging this retaliation.[1]

After the close of business on October 25, 2005, TSA provided Gray with heavily-redacted versions of the Secret Evidence ("Redacted Filing"). TSA represents in the Redacted

[1] Gray's claims and the pertinent facts are addressed at greater length in Gray's Memorandum In Support Of Emergency Motion For Interim Relief Pursuant To 49 U.S.C. § 46110 and the Affidavit of William George Mulryne Gray ("Gray Aff."), both of which Gray previously filed with this Court. (Because the Gray Aff. was filed in connection with the related proceedings pending in the District Court, it bears the caption associated with that matter).

Filing that the "record in this case" ("Record") consists of only 11 documents, eight (8) of which were either authored by or addressed to undersigned counsel after TSA denied Gray's request for flight training. See Certified Index Of Record ("Index"). Of the remaining three (3) documents in the Record, one[2] was attached to Gray's initial and amended Petitions in the above-captioned matter. TSA redacted the entire entry in the Index concerning one of the remaining two (2) documents in the Record ("Document No. 10"), thus preventing Gray from learning the title, the author or even the date (a critical fact in a retaliation case). In lieu of producing any portion of Document No. 10, TSA produced a page that is completely blank with the exception of the following two words: "Redacted Material." With respect to the final remaining document in the Record – a 23-line document captioned "TECS II – PERSON SUBJECT DISPLAY" ("TECS Printout") – TSA redacted 12 separate items.

The Redacted Filing also includes the Declaration Of Justin P. Oberman ("Oberman Decl."). TSA redacted the following information from this document:

- Two consecutive paragraphs totaling 16 lines of text (pp. 5-6);
- Another paragraph containing five (5) lines of text (p.7);
- The text following the statement that, "[i]n the course of conducting the security threat assessment on Gray, TSA learned that he is" (p. 5);
- The nature and identity of the source of the information upon which TSA allegedly has relied (p. 5);
- The text following the phrase "based upon its independent review of information" (p. 7) and
- Centered text contained in the heading of each page.

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[2] Decision dated Dec. 16, 2004.

The unredacted portions of the Redacted Filing do not contain a single fact that allegedly led TSA to make any of the decisions that Gray is challenging. Nor do the unredacted portions of the Redacted Filing contain any indication of the nature, source or reliability of any such facts. Finally, nothing in the Redacted Filing suggests that disclosure of basic information concerning the redactions would threaten a significant governmental interest.

The Dangers That Inhere In Reliance Upon Secret Evidence

As discussed at length in Gray's Motion To Reconsider Allowance Of Motion To File Materials Under Seal For *Ex Parte* And *In Camera* Review And, In The Alternative, For An Order Compelling Production Of As Much Information As Possible ("Gray Motion"), it is well-settled that one of the fundamental principles of the adversary system is that reliance upon secret evidence threatens "both the appearance and the reality of fairness" and accuracy[3] and creates an unacceptable – and unconstitutional – "risk of error."[4] As also discussed at length in the Gray Motion, in addition to the ever-present danger associated with according "a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected,"[5] the risk of error is unusually high in the above-captioned matter because the Government itself has repeatedly admitted that the processes leading to the kinds of decisions at issue in this case lead to a high number of false positives based upon unreliable

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3 Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986); see also Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring); accord id. at 143 (Black, J., concurring); Lynn v. Regents of University of California, 656 F.2d 1337, 1346 (9th Cir. 1981).

4 American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1069-70 (9th Cir. 1995).

5 Id. (internal quotation marks omitted).

6 More specifically, these admissions have been made by, inter alia, the Audit Division of the Office of the

data.[6]

Congress And The Courts Have Compelled Production
Of Information Such As The Secret Evidence At Issue In This Case

In its memorandum in opposition to the Gray Motion ("TSA Opp."), TSA relied upon 49 U.S.C. § 46111 ("Section 46111") for the proposition that "[t]his Court's *ex parte, in camera* review . . . . is consistent with Congressional intent, as evidenced by the recent enactment of [Section 46111], which expressly provides for such review . . . ." TSA Opp. at 11 (citing Section 46111(g)(2)). Although Gray takes issue with this statement – because nothing in Section 46111 addresses judicial (as opposed to administrative) review of secret evidence – if TSA seeks to reap the benefits of the secrecy provision of Section 46111(g)(2) then it must be bound by the requirement in the next numbered subsection of the same subparagraph of the same statute that the Government "shall provide to the individual . . . an unclassified summary of any classified information" upon which the pertinent decision is based. Section 46111(g)(3) (emphasis added). This requirement – which arises in the dramatically less stringent context of administrative review of a pilot's certificate – is both mandatory and unconditional.

Moreover, it is apparent that Congress required an unclassified summary as a counterweight to the extraordinary exception it created to the general rule against secret evidence. Without this modest counterweight, the relative abilities of TSA and Gray to litigate this case are radically imbalanced and the ability of this Court to reach a fair and accurate

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Inspector General within the Department Of Justice and a working group in a report posted on TSA's own website. In addition, the problem of false positives is the subject of at least one Government memorandum that TSA has sought to withhold from disclosure under the Freedom Of Information Act ("FOIA"). Gordon v. FBI, 2005 WL 1514078 * 9 (N.D. Cal.). As discussed in this case – which is the only judicial authority that TSA cited in its motion seeking leave to file the Secret Evidence *ex parte* and *in camera* – the incidence of false positives is a "significant problem that affects many Americans." Id.

determination is dramatically diminished. Moreover, there is no reason in law or logic why TSA either could or should produce an "unclassified summary" in connection with a decision concerning a pilot certificate but could not or should not do so in connection with its decisions to preclude Gray from working as a pilot. As discussed more fully in the Gray Motion, TSA has not called to the attention of this Court any statute or regulation that prohibits the disclosure of the Secret Evidence, and Gray is not aware of any.

Although the case arose in an admittedly different context, it bears emphasis that a District Court in California has reviewed submissions that TSA wished to keep secret and determined that the agency had attempted to conceal information without any legitimate basis for doing so. Before the plaintiffs filed suit in Gordon v. FBI, 2005 WL 1514078 (N.D. Cal.) – the only case that TSA cited in its motion seeking leave to file the Secret Evidence *ex parte* and *in camera* – TSA largely rejected their requests under the Freedom Of Information Act. Id. at *1. After the Complaint was filed, TSA released several documents in their entirety "and additional portions of most of the remaining documents." Id. After carefully reviewing these redactions, the Court rejected TSA's attempts to justify withholding certain materials and ordered production of same. Id. at *9 (ordering TSA to disclose names of individuals making policy with respect to watch lists of suspected terrorists); *9 (ordering TSA to disclose who has access to, is managing, and is implementing watch lists of suspected terrorists); see also id. at *4 (ordering FBI to disclose information concerning legal basis for detaining someone whose name appears on watch list of suspected terrorists).

Looking beyond Congressional and judicial decisions specifically involving TSA, and as discussed more fully in the Gray Motion, this Court and others routinely require disclosure of at least "the gist of the evidence" when the

Government asserts an interest in avoiding disclosure of sensitive information in litigation. See, e.g., Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986); Allende v. Shultz, 605 F.Supp. 1220, 1226 (D. Mass. 1985); cf. U.S. v. Abuhamra, 389 F.3d 309, 321 (2d Cir. 2004); U.S. v. Acevedo-Ramos, 755 F.2d 203, 209 (1st Cir. 1985) (Breyer, J.).

Unless this Court permits Gray to review at least some of the Secret Evidence, Gray faces the Kafkaesque prospect of attempting to challenge various decisions without knowing anything about why they were made or even – a critical fact in a retaliation case – when TSA took critical steps leading up to the decisions. In light of this prospect, in light of the mandate of Section 46111 that TSA produce an "unclassified summary," in light of the Gordon Court's rejection of TSA's improper attempt to conceal information, and in light of the decisions by this Court and others compelling the Government to disclose at least the gist of secret evidence, Gray respectfully requests the entry of an order compelling TSA to produce specific categories of information that are missing from the Redacted Filing, including without limitation the following:

(1) The date on which TSA acquired or generated Document No. 10;

(2) The date on which TSA acquired or generated each piece of information contained in the Secret Evidence (including each piece of information contained in Document No. 10);

(3) A summary of the sources and content of the information referenced in the preceding paragraph (or, in the alternative, a description of the nature of said sources and content);

(4) Sufficient information concerning each allegation contained in the Secret Evidence to enable Gray to determine:

(a) Whether he is, in fact, the subject of said allegation and

(b) Whether he possesses evidence that would enhance the ability of

this Court to evaluate said allegation (e.g., as hypothesized in the Gray Motion, business records establishing that Gray was in Massachusetts on the same date and at the same time that TSA alleges he was in New York City).

Without access to at least some of this information, Gray cannot meaningfully litigate either his claim that the Government acted in the manner that it did in order to retaliate against him or his claim that the Government unconstitutionally denied his request for flight training based on unspecified charges. As a result, this Court may not have access to potentially dispositive information concerning the historical facts that this Court needs in order to make a fair and accurate determination. See, e.g., American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1069-70 (9th Cir. 1995) ("Without any opportunity for confrontation, there is no adversarial check on the quality of the information on which [the Government] relies.").

If This Court Denies The Assented-To Motion To Stay,
The Adjudication Of The Instant Motion Is Time-Sensitive

In the event that this Court denies the pending Assented-To Motion, Gray's principal brief will be due on November 10, 2005. If this Court denies the Assented-To Motion and orders TSA to produce some or all of the Secret Evidence, Gray will require some time to marshal his response to same. Accordingly, Gray respectfully requests that, if this Court denies the Assented-To Motion, this Court adjudicate the instant Motion as expeditiously as possible. (As stated previously, TSA filed the Secret Evidence after the close of business on October 25, 2005.)

For the foregoing reasons, Gray respectfully requests that this Court:

(1) Order TSA to produce the "unclassified summary" contemplated by Section 46111 by the close of business of the day after this Court enters an Order allowing the instant Motion;

(2) Produce the specific categories of information identified supra by the close of business of the day after this Court enters an Order allowing the instant Motion and

(3) In the alternative, order TSA to produce as much information as possible concerning the decisions at issue in this case by the close of business of the day after this Court enters an Order allowing the instant Motion.

Respectfully submitted,

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