

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 05-11445DPW

ROBERT GRAY,

Plaintiff,

v.

TRANSPORTATION SECURITY
ADMINISTRATION, JAMES LOY IN HIS CAPACITY
AS SECRETARY OF THE TRANSPORTATION
SECURITY ADMINISTRATION, DEPARTMENT OF
HOMELAND SECURITY, AND MICHAEL
CHERTOFF IN HIS CAPACITY AS SECRETARY OF
THE DEPARTMENT OF HOMELAND SECURITY

Defendant.

VERIFIED AMENDED COMPLAINT

PRELIMINARY STATEMENT

Defendant Transportation Security Administration (“TSA”) denied Plaintiff’s request for flight training. TSA based this denial on (1) unspecified allegations from unidentified sources and (2) secret evidence that it has refused to disclose or even describe. Shortly after Plaintiff exercised his constitutional right to petition the government by challenging this denial in court, TSA retaliated against him by placing him on a watch-list of suspected terrorists. This retaliation has had dramatic consequences in nearly every aspect of Plaintiff’s life.

The reliance by TSA on secret allegations and secret evidence contravenes fundamental principles of due process and fair treatment. Neither fairness nor accuracy

can be achieved by one-sided determinations of facts that trigger consequences as dramatic as those incurred by Mr. Gray. In fact, as the Supreme Court has held in relation to a different sort of system grounded on undisclosed information, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Goss v. Lopez, 419 U.S. 565, 580 (1975) (quoting Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring)). In the latter case, involving governmental designation of "communist" organizations during the McCarthy Era, Justice Frankfurter eloquently emphasized that these fundamental democratic principles "should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe." Id. at 171.

The decision by TSA to punish Plaintiff for coming before this Court to obtain relief from the Government's unlawful actions and its reliance on secret allegations and secret evidence constitutes a dramatic abuse of power by the Executive Branch. Moreover, it threatens to chill the exercise of the right to petition the Government, which "the Supreme Court has consistently recognized . . . as among the most precious of the liberties safeguarded by the Bill of Rights." Powell v. Alexander, 391 F.3d 1, 16 (1st Cir. 2004) (internal citation and quotation marks omitted).

JURISDICTION AND VENUE

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5

U.S.C. § 552a(g)(1). Venue is proper in the District of Massachusetts.

PARTIES

1. Plaintiff Robert Gray (“Gray”) is a permanent legal resident of the United States who holds a British passport and resides in West Yarmouth, Massachusetts.
2. Defendant Homeland Security Department (“HSD”) is a department of the Executive Branch of the United States Government.
3. Defendant Michael Chertoff is the Secretary of HSD.
4. Defendant Transportation Security Administration (“TSA”) is an agency of HSD.
5. Defendant James Loy is the Secretary of TSA.

STATEMENT OF FACTS

Background

6. Gray has lived in the United States since August 1993. He has an unblemished history as a productive member of the American workforce.
7. As TSA is aware, Gray has never had any involvement whatsoever with the criminal justice system. More specifically, TSA received a document from the Federal Bureau of Investigation on or about April 28, 2004 stating that Gray has never been arrested. A true and accurate copy of this document is attached as Ex. A to the Affidavit of Robert William George Mulryne Gray (“Gray Aff.”), filed herewith.
8. Gray has never engaged in or supported any terrorist or other illegal activity.
9. Since 1997, Gray has worked as a pilot for a number of domestic airlines, flying

small commercial aircraft in the United States.

TSA's Denial Of Gray's Request For Authorization For Training To Fly Larger Aircraft

10. In or about October 2004, Gray sought to enter a new field by obtaining a position as a pilot with Executive Fliteways, Inc. ("EFI"), a charter company. This line of work would have been much more lucrative than Gray's prior work as a pilot and would have led to significant new opportunities, including opportunities created by being able to fly significant "pilot in command" jet time.
11. EFI extended to Gray an offer of employment that was conditioned on Gray obtaining authorization from TSA for training to fly larger aircraft.
12. At EFI's request, Gray filed an online application on November 3, 2004 seeking authorization from TSA to obtain training on larger aircraft from CAE SimuFlite, Inc. ("CAE"). A true and accurate copy of this application is attached hereto as Exhibit A.
13. By electronic mail message dated December 16, 2004, TSA declined to either process Gray's application or approve his request for training ("December 2004 Decision"). A true and accurate copy of the December 2004 Decision is attached hereto as Exhibit B.
14. In this message, TSA stated that the ground for the December 2004 Decision was unspecified "derogatory information" in Gray's background that TSA had obtained from unidentified sources.
15. Shortly thereafter, TSA informed EFI that the Government had identified

unspecified “derogatory information” in Gray’s background that TSA had obtained from unidentified sources.

16. As a direct and proximate result of the December 2004 Decision, EFI was prevented from following through on its conditional offer of employment.
17. Also as a direct and proximate result of the December 2004 Decision, Gray was effectively barred from accepting any position in the field of his choice.
18. Also as a direct and proximate result of the December 2004 Decision, Gray’s reputation and standing within the airline industry was substantially diminished.
19. For these reasons, the December 2004 Decision substantially diminished Gray’s ability to earn his livelihood and pursue his chosen career.
20. In an electronic mail message dated January 27, 2005, TSA formally denied Gray’s training request (“January 2005 Denial”). A true and accurate copy of the January 2005 Denial is attached hereto as Exhibit C.
21. The January 2005 Denial is premised on the ground that TSA has “determined that [Gray] pose[s] a threat to aviation or national security.”
22. The January 2005 Denial does not identify a single fact in support of this determination.
23. The January 2005 Denial further states that TSA “does not disclose classified information and reserves the right not to disclose any other information not warranting disclosure”
24. Upon information and belief, TSA provided copies of the January 2005 Denial to EFI, to CAE and to Gray’s current employer.

25. As a direct and proximate result of the January 2005 Denial, Gray was effectively barred from accepting any position in the field of his choice.
26. Also as a direct and proximate result of the January 2005 Denial, Gray's reputation and standing within the airline industry was substantially diminished.
27. For these reasons, the January 2005 Denial substantially diminished Gray's ability to earn his livelihood and pursue his chosen career.
28. Gray timely replied to the January 2005 Denial by letter dated February 22, 2005 ("Reply"). A true and accurate copy of the Reply is attached hereto as Exhibit D.
29. In the Reply, Gray requested all information, documents or data ("Records") upon which the January 2005 Denial was based.
30. By letter dated March 24, 2005, TSA informed Gray that it was providing him with several documents "upon which the [D]enial was based." True and accurate copies of this letter and its enclosures are attached hereto as Exhibit E.
31. In this letter, TSA stated that it had redacted "portions of the documents containing privileged information."
32. The enclosed documents ("March 24 Documents") consisted of a copy of the January 2005 Denial, a copy of a page from Gray's passport and a four-page document titled "Submitted Training Request Information."
33. Nothing in any of the three March 24 Documents suggests the existence of any fact that could plausibly justify the January 2005 Denial.
34. None of the three March 24 Documents reflected any redaction.
35. By letter dated March 31, 2005, TSA produced one additional document, a

computer printout captioned "TECS II - Person Subject Display" ("TECS Printout"). True and accurate copies of this letter and its enclosure are attached hereto as Exhibit F.

36. Upon information and belief, Gray is not the subject of the TECS Printout.
37. The TECS Printout identifies its subject as "Hispanic."
38. Gray is not Hispanic.
39. The TECS Printout identifies its subject as "Robert William Gray."
40. Gray's full name is "Robert William George Mulryne Gray." The TECS Printout does not contain any reference to the middle names "George" or "Mulryne."
41. TSA redacted portions of the TECS Printout. According to TSA's March 31, 2005 letter, it did so to protect "portions of the document containing privileged information."
42. Nothing in the unredacted portions of the TECS Printout suggests the existence of any fact that could plausibly justify the January 2005 Denial.
43. Nothing in the unredacted portions of the TECS Printout suggests the existence of any legally recognized privilege.
44. By letter dated April 1, 2005, Gray formally challenged the sufficiency of TSA's response to the Reply. A true and accurate copy of this letter is attached hereto as Exhibit G.
45. By letter dated April 14, 2005, TSA stated that the March 24 Documents and the TECS Printout constituted "all of the documents upon which the determination in this matter was based that TSA is authorized to release." A true and accurate

copy of this letter is attached hereto as Exhibit H.

46. By letter dated April 14, 2005, Gray timely provided formal notice to TSA of Gray's appeal of the January 2005 Denial. A true and accurate copy of this letter is attached hereto as Exhibit I.
47. By letter dated May 11, 2005, TSA affirmed the January 2005 Denial on the ground that Gray "poses a security threat." A true and accurate copy of this letter ("May 2005 Decision") is attached hereto as Exhibit J.
48. This letter does not identify a single fact in support of this determination. More fully, the letter does not identify (a) any allegation upon which TSA relied, (b) the source of any such allegation or (c) any evidence that supports any such allegation.
49. As an attorney for TSA orally confirmed on May 25, 2005, Gray has exhausted his administrative remedies in connection with both the December 2004 Decision and the January 2005 Denial.
50. TSA's reliance on secret allegations, secret sources and secret evidence constitutes an unconstitutional deprivation of due process of law. Moreover, it creates a constitutionally unacceptable risk that an application will be denied based upon, for example, a clerical error concerning individuals with similar names, a good faith mistake by a TSA bureaucrat that an applicant could easily have corrected, and false "evidence" supplied anonymously by someone who is hostile to an applicant.
51. TSA has violated fundamental principles of due process by depriving Gray of an

opportunity to learn such basic facts concerning the December 2004 Decision and the January 2005 Denial as (a) the nature of any allegations upon which TSA relied, (b) the source of each such allegation and (c) the evidence that supports each such allegation.

Watch-Lists Of Suspected Terrorists Maintained By TSA

52. TSA maintains two watch-lists of suspected terrorists.
53. Individuals on the “Selectee List” are subjected to certain forms of screening before they are permitted to fly.
54. Individuals on the “No-Fly List” are absolutely barred from flying a plane as a pilot, boarding any aircraft as a passenger or entering certain areas of airports.
55. In short, the No-Fly List identifies individuals whom TSA regards as more dangerous to national security than the individuals identified on the Selectee List.

TSA’s Decision In May 2005 Not To Put Gray On The Selectee List

56. On May 2, 2005, Gray’s employer learned that TSA had placed the name “Robert Gray” on the Selectee List.
57. Upon learning of this designation, Gray’s employer contacted TSA and provided information concerning Gray’s identity, including his social security number.
58. Shortly thereafter, TSA confirmed to Gray’s employer (a) that the “Robert Gray” on the Selectee List was not Gray and (b) that Gray was clear to continue to fly as a pilot. A true and accurate copy of a business record from Gray’s employer

memorializing this confirmation from TSA (“May 2005 Confirmation”) is attached to the Gray Aff. as Exhibit B.

TSA’s Decision To Place Gray On The No-Fly List

59. On July 8, 2005, Gray filed the initial Verified Complaint in the above-captioned matter (“Complaint”) and a related petition in the First Circuit, Gray v. TSA, Docket No. 05-2024 (“Petition”).
60. Upon information and belief, Gray’s name never appeared on any watch-list of suspected terrorists prior to July 8, 2005.
61. Upon information and belief, TSA affirmatively decided not to place Gray on either the Selectee List or the No-Fly List in the wake of at least four investigations concerning the issue of whether Gray is a threat to national security. More specifically, Gray is aware of TSA investigations underlying the following:
 - (a) The December 2004 Decision,
 - (b) The January 2005 Denial,
 - (c) The May 2005 Confirmation and
 - (d) The May 2005 Decision.
62. Upon information and belief, TSA placed Gray’s name on the No-Fly List on or about September 6, 2005.
63. During the duration of his inclusion on the No-Fly List, Gray is unable to fly a plane, board any aircraft as a passenger or access certain areas of airports.
64. TSA’s decision to place Gray on the No-Fly List has had devastating

consequences in nearly every aspect of Gray's life, including as follows:

- (a) Gray's employer took his badge and suspended him.
- (b) Because the government will not permit Gray to fly a plane, he cannot earn a living as a pilot. Gray does not have any other professional or vocational training. Moreover, potential employers will be reluctant to hire a person whom the government has placed on a watch-list of suspected terrorists. For these reasons, Gray will have difficulty earning a living and paying for his regular and ordinary expenses (including his rent, his consumer debt and the monthly amount due on the student loan that he took out in connection with his training as a pilot).
- (c) Gray's mother, who lives in Ireland, has been in continuous ill health for approximately five years. More than once in the past few years she has been hospitalized in an intensive care unit and has been on the brink of death. On those occasions, Gray has been required to fly to Ireland on extremely short notice. Unless Gray's name is removed from the No-Fly List, there is a very real possibility that he will be unable to visit his mother on her deathbed.
- (d) If Gray is unable to board a plane on October 25, 2005, he will be forced to cancel his honeymoon, which he and his fiancée were planning to spend in Europe.
- (e) Gray's reputation and standing within the airline industry have been substantially diminished.
- (f) Gray's reputation and standing within his community have been substantially diminished.

COUNTS

COUNT I – RETALATION United States Constitution, Amendment I

- 65. Gray repeats and realleges each of the preceding paragraphs as if fully set forth herein.
- 66. The filing of the instant Complaint and the Petition are protected by the United States Constitution, Amendment I.
- 67. The filing of the instant Complaint and the Petition was a substantial or motivating factor for Defendants' decision to place Gray on the No-Fly List.

COUNT II – DUE PROCESS
United States Constitution, Amendment V

68. Gray repeats and realleges each of the preceding paragraphs as if fully set forth herein.
69. Gray has liberty and property interests in his reputation, in his standing within the airline industry, in earning a livelihood and in pursuing his chosen career.
70. As set forth more fully above, TSA deprived Gray of said interests without due process of law.

COUNT III – ADMINISTRATIVE PROCEDURE ACT
5 U.S.C. § 702 et seq.

71. Gray repeats and realleges each of the preceding paragraphs as if fully set forth herein.
72. Gray has suffered a legal wrong, has been adversely affected and/or is aggrieved by both the December 2004 Decision and the January 2005 Denial.
73. Gray has exhausted his administrative remedies in connection with both the December 2004 Decision and the January 2005 Denial.
74. The December 2004 Decision and the January 2005 Denial were arbitrary, capricious, abuses of discretion, not in accordance with law, contrary to constitutional right, in excess of statutory authority, without observance of procedure required by law, unsupported by substantial evidence and unwarranted by the facts.

COUNT IV – PRIVACY ACT
5 U.S.C. § 552a

75. Gray repeats and realleges each of the preceding paragraphs as if fully set forth

herein.

76. Gray requested to gain access to the Records and to information pertaining to him that is contained in TSA's system of records.
77. TSA refused to comply with said request.

WHEREFORE, Gray respectfully requests that this Court grant the following relief:

1. Following a hearing, enter a preliminary injunction enjoining Defendants and all of their employees, agents and representatives from maintaining Gray's name on either the No-Fly List or the Selectee List without leave of Court;
2. Following trial, enter judgment enjoining Defendants and all of their employees, agents and representatives from maintaining Gray's name on either the No-Fly List or the Selectee List without leave of Court;
3. Order TSA to remove Gray from the No-Fly List;
4. Order TSA to rescind the December 2004 Decision;
5. Order TSA to retract its unfounded statement that it had identified unspecified "derogatory information" in Gray's background;
6. Vacate the January 2005 Denial and order TSA to approve Gray's request for training;
7. Order TSA to retract its unfounded statements that Gray "pose[s] a threat to aviation or national security" and "poses a security threat";
8. Enjoin TSA from withholding the Records and order the production of same to Gray;
9. Enter judgment in favor of Gray and against Defendants in an amount to be determined by the Court;
10. Order Defendants to pay Gray's reasonable attorneys' fees and costs and
11. Enter such other and further relief as is just.

Respectfully submitted,

ROBERT GRAY,
By his attorneys,

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DATED: September 16, 2005

Verification

I, Robert Gray, hereby certify that I have read the foregoing Verified Complaint, that I have personal knowledge of the facts alleged therein, and that they are true upon my knowledge, except where stated upon information and belief, which facts I believe to be true.

Signed under the pains and penalties of perjury this 16th day of September 2005.

ROBERT GRAY

I hereby certify that a true copy of the above document was served upon James Loy, the Transportation Security Administration, Michael Chertoff, the U.S. Department of Homeland Security, the Attorney General of the United States and the Office of the United States Attorney by next day mail on September 16, 2005.

Hugh Dun Rappaport