UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DOCKET NO. 05-2024

ROBERT GRAY, Petitioner	)	**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**
v.	)	
TRANSPORTATION SECURITY ADMINISTRATION, Respondent	)	

Petitioner, Robert Gray ("Gray"), respectfully requests that this Court reconsider the Order entered on September 28, 2005 granting the motion of Respondent, Transportation Security Administration ("TSA"), to file secret evidence under seal for *ex parte* and *in camera* review ("Order" granting "TSA Motion" concerning "Secret Evidence"), which Order was entered only a few hours after the TSA Motion was filed and before Gray had an opportunity to oppose same. In the alternative, Gray respectfully requests an Order consistent with established precedent compelling TSA to produce as much information as possible concerning the Secret Evidence. In light of the expedited briefing schedule that this Court has established, Gray respectfully requests that this Court adjudicate the instant Motion as quickly as possible.

Gray has asserted significant claims regarding retaliatory conduct in violation of the First Amendment and alleges unconstitutional conduct by TSA in denying Gray permission to participate in flight training without disclosing the basis for its decision or permitting any meaningful challenge thereto. Remarkably, TSA has proposed that this Court adjudicate these constitutional claims without permitting Gray to learn even the gist or substance of the asserted

Secret Evidence upon which it rested its decisions. Such a procedure would impermissibly undercut the fundamental protections of the adversary process and dramatically hinder the Court in reaching a fair and accurate determination of Gray's claims.

I. STATEMENT OF FACTS[1]

Gray is a permanent legal resident of the United States who holds a British passport and has lived in the United States since August 1993. Since 1997, Gray has worked as a pilot for a number of domestic airlines, flying small commercial aircraft in the United States. He has never engaged in or supported any terrorist or other illegal activity. Moreover – and as TSA is aware – Gray has never had any involvement whatsoever with the criminal justice system.[2]

On July 8, 2005, Gray filed a petition with this Court ("Petition") and a related Verified Complaint in the District Court ("Complaint"), Gray v. TSA et al., Docket No. 05-11445DPW. On July 15, 2005, Gray served these pleadings by mail on TSA and the other District Court Defendants. Both the Complaint and the Petition challenge TSA's decision to deny Gray authorization to obtain training to fly larger aircraft – and, correlatively, to accept any position in the field of his choice – based upon (a) unspecified allegations from unidentified sources and (b) secret evidence that TSA has refused to disclose or even describe.

Upon information and belief, Gray has never appeared on any Government watch-list of suspected terrorists prior to the date on which he filed the Petition and the Complaint. It bears emphasis that TSA maintains two such lists. Individuals on the Selectee List are subjected to certain forms of screening before they are permitted to fly. Individuals on the No-Fly List are

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[1] The bulk of the facts set forth herein are derived from the Affidavit of Robert William George Mulryne Gray ("Gray Aff.") on file with the Court. Because the Gray Aff. was filed in connection with related proceedings in the District Court, it bears the caption associated with that matter.

absolutely barred from flying a plane as a pilot, boarding any aircraft as a passenger or entering certain areas of airports. 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.

As set forth more fully in the Affidavit of Robert William George Mulryne Gray ("Gray Aff.") on file with this Court, TSA conducted in the months prior to the date on which Gray filed the Complaint and the Petition at least four investigations concerning the issue of whether Gray is a threat to national security.[3] For example, TSA confirmed to Gray's employer on May 2, 2005 – i.e., just two months before Gray filed the Complaint and the Petition – that (a) the "Robert Gray" whose name was included on the Selectee List on that date was not Gray and (b) that Gray was clear to continue to fly as a pilot. See Gray Aff. Ex. B. At no point during any of these investigations did TSA divulge any information tending to suggest the presence of any reason to suspect that Gray is a threat to national security. At the conclusion of each of these investigations, TSA decided not to put Gray on either the Selectee List or the No-Fly List.

On or about September 6, 2005 – i.e., just seven weeks after Gray served the Complaint and before any Defendant filed a responsive pleading to either the Complaint or the Petition – TSA decided to place Gray on the No-Fly List. Aside from the fact that Gray filed suit against the Government, Gray is unaware of any relevant fact that changed subsequent to TSA's four recent decisions not to place him on either the Selectee List or the No-Fly List. TSA has neither identified such a fact nor otherwise offered a non-retaliatory explanation for its action.

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[2] 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. See Gray Aff. Ex. A.

[3] TSA concluded the investigations of which Gray is aware on December 16, 2004 (see Am. Cmplt. Ex. B), January 27, 2005 (see Am. Cmplt. Ex. C), May 2, 2005 (see Gray Aff. Ex. B) and May 11, 2005 (see Am. Cmplt. Ex. J). As stated previously, Gray filed the Complaint and the Petition on July 8, 2005 and served these pleadings by mail on July 15, 2005.

As discussed more fully in the Gray Aff., TSA's placement of Gray's name on the No-Fly List had dramatic consequences in nearly every aspect of Gray's life. In broad strokes, Gray suffered severe reputational harm and he was barred from pursuing his career in his chosen field, substantially limited in pursuing a career in any other field and prevented from both taking his honeymoon in Europe (planned for October) and visiting his ailing mother in Ireland in the likely event of a medical emergency in the near term future.

On September 19, 2005, Gray filed an Amended Verified Complaint and a Motion For A Preliminary Injunction with the District Court.[4] On September 21, 2005, the District Court (Woodlock, J.) denied the motion on the procedural ground that this Court enjoys exclusive jurisdiction over Gray's claims. Shortly before the close of business that same day, Gray filed with this Court and served on TSA an Amended Petition and an Emergency Motion For Interim Relief Pursuant To 49 U.S.C. § 46110 ("Gray Motion").

A few business hours later,[5] counsel for TSA telephoned undersigned counsel and stated that the Government was reconsidering its decision to place Gray's name on the No-Fly List. Three days later, on September 26, 2005, counsel for TSA verbally represented to undersigned counsel that that the Government had reversed its decision and that Gray was free to fly as a passenger. Although counsel for TSA refused to memorialize this representation in writing, a true and accurate copy of a confirmatory letter from undersigned counsel is attached hereto as Exhibit A.

At approximately 9:30 a.m. on September 27, 2005, counsel for TSA informed undersigned counsel that he did not know whether the Government would permit Gray to pilot

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4 A true and accurate copy of the Amended Verified Complaint is on file with this Court.

5 More specifically, on the morning of September 23, 2005.

an airplane and represented that he would ascertain that fact as soon as possible. See Ex. A. As of the date of filing, TSA has not conveyed this fact to Gray.

The following is a condensed summary of the Government's rapidly shifting positions:

- Two months before Gray commenced the instant case, TSA confirmed to Gray's employer that his name was not on the Selectee List;
- Seven weeks after Gray served the initial Complaint, the Government placed him on the No-Fly List (which identifies individuals whom the Government regards as more dangerous to national security than the individuals identified on the Selectee List);
- A few business hours after Petitioner filed the Gray Motion with this Court, TSA announced that the Government was re-considering its decision to place him on the No-Fly List;
- Shortly thereafter, the Government reversed its decision to place Gray on the No-Fly List and confirmed that Gray was free to board planes as a passenger;
- On the morning of September 27, 2005, counsel for TSA stated that he did not know whether the Government would permit Gray to pilot an airplane and represented that he would ascertain that fact as soon as possible;
- As of the date of filing, TSA has not informed Gray of said fact.

TSA served the TSA Motion on undersigned counsel shortly after 4:00 p.m. on September 27, 2005. Shortly before 3:00 p.m. on September 28, 2005 – i.e., less than seven business hours later – undersigned counsel was informed that the Court had entered the Order granting the TSA Motion and denying the Gray Motion "without prejudice to reconsideration by this Court if it deems reconsideration warranted" upon receipt of the Secret Evidence. The Order does not set forth the basis for the rulings.

The Order also establishes deadlines for expedited consideration of this case, pursuant to which Gray is required to file his opening brief prior to the date on which TSA is required to file the Secret Evidence.

II. TSA'S PROPOSED RELIANCE UPON SECRET EVIDENCE VIOLATES FUNDAMENTAL PRINCIPLES OF JUSTICE

In an extraordinary move, TSA sought leave to submit the Secret Evidence *ex parte* in support of its opposition to the then-pending Gray Motion. The submission of secret evidence violates the fundamental principles of our adversary system of justice as well as the clear Federal Rules of Appellate Procedure.

The consideration of *ex parte* material as the basis for judgment in civil cases is antithetical to our democratic, adversarial system of justice. As Justice Frankfurter has explained, "democracy implies respect for the elementary rights of men.... [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring)"; accord id. at 143 (Black, J., concurring). It is for these reasons that "[o]ur system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation." Ass'n for Reduction of Violence v. Hall, 734 F.2d 63, 67 (1st Cir. 1984) (internal quotation marks omitted).[6]

To ensure fairness in the administration of justice, disputes must be resolved openly through the adversary system. "It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts." Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir.

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[6] Accord Vining v. Runyon, 99 F.3d 1056, 1057 (11th Cir. 1996) ("our adversarial legal system generally does not tolerate *ex parte* determinations on the merits of a civil case") (quoting Application of Eisenberg, 654 F.2d 1107, 1112 (5th Cir. Unit B Sept. 1981)); Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986) ("[A] court may not dispose of the merits of a case on the bases of *ex parte, in camera* submissions"), *aff'd by an equally divided Court,* 484 U.S. 1 (1987).

1986).[7] Our system of justice depends on "open adversarial guidance by the parties." United States v. Zolin, 491 U.S. 554, 571 (1989).

Thus, in criticizing a lower court for relying on *ex parte* evidence "for the purpose of assisting it to make factual determinations or to evaluate other evidence," the Ninth Circuit explained that it "violated principles of due process upon which our judicial system depends to resolve disputes fairly and accurately." Lynn v. Regents of University of California, 656 F.2d 1337, 1346 (9th Cir. 1981). "The system functions properly and leads to fair and accurate resolutions...only when vigorous and informed argument is possible. Such argument is not possible, however, without disclosure to the parties of the evidence submitted to the court." Id.

In addition to violating fundamental rules of our adversarial system, defendants' proposed submission is precluded by the plain language of Rule 25(b) of the Federal Rules of Appellate Procedure, which specifies that, subject to an exception not implicated in this case, "a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review." Fed. R. App. P. 25(b). See Guenther v. Comm'r of Internal Revenue, 889 F.2d 882, 884-85 (9th Cir. 1989) (remanding for evidentiary hearing on question of whether *ex parte* submission by the IRS, which violated Tax Court Rules of Practice and Procedure, also violated due process).

In short, "the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error." American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1069-70 (9th Cir. 1995). This is so because, "[w]ithout any opportunity for confrontation, there is no adversarial check on the quality of the

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[7] See also Allende v. Shultz, 605 F.Supp. 1220, 1226 (D. Mass. 1985) ("the very nature of the adversary system demands that both parties be given full access to any information which may form the basis for a judgment").

information on which [the Government] relies." Id. It bears emphasis that secrecy "'provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.'" Id. at 1069 (quoting U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) [Jackson, J., dissenting]). Moreover, the "risk of error" emphasized by the Ninth Circuit is unusually high in the above-captioned matter. More specifically, the Government 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 data. These admissions have been made by, inter alia, the Audit Division of the Office of the Inspector General within the Department Of Justice[8] and a working group in a report posted on TSA's own website.[9] 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 the only judicial authority cited in the TSA Motion, the incidence of false positives is a "significant problem that affects many Americans." Id.

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[8] Review of the Terrorist Screening Center's Efforts to Support the Secure Flight Program, U.S. Dept. of Justice, Office of the Inspector General, Audit Division (Audit Report 05-34, August 2005) at 24, available at http://www.usdoj.gov/oig/reports/FBI/a0534/final.pdf (Terrorist Screening Center ["TSC"] "officials stated that they believe many errors and omissions in the records [in the Terrorist Screening Database ('TSDB')] are directly attributable to the records received from the source and nominating agencies and that these inaccuracies contribute significantly to the overall reliability of the TSDB."); Review of the Terrorist Screening Center, OIG Audit Report 05-27 (June 2005), U.S. Dept. of Justice, Office of the Inspector General, Audit Division ("June 2005 DOJ Audit") at 42, available at http://www.usdoj.gov/oig/reports/FBI/a0527/final.pdf ("TSC needs to ensure that the information that is being placed into the TDSB accurately represents the data that was submitted by the nominating agency . . . . When comparing TDSB records to the source information, we identified differences for which the TSC could not provide an adequate explanation."); id. at 66 ("Our review of the consolidated watch list identified a variety of issues that contribute to weaknesses in the completeness and accuracy of the data").

[9] Report of the Secure Flight Working Group at 18, available at http://www.tsa.gov/interweb/assetlibrary/SFWG_Report_September_19_2005_Final (" [T]he watch listing of individuals is an inexact process. It is also clear that watch listing criteria change from time to time, and that the reliability of the information upon which nominations and listings are based is often uncertain.")

It is apparently for these reasons that the Ninth Circuit recently denied a similar motion by the Government to file secret evidence for *ex parte, in camera* review. See Gilmore v. Ashcroft, Docket No. 04-15736 (filed Sept. 10, 2004).[10]

To choose just one illustrative example of the dangers that lie along the path that TSA has proposed, suppose a document filed *ex parte* and reviewed *in camera* suggested that an individual with the fairly common name of "Robert Gray" attended a meeting in New York City at 1:00 p.m. on February 3, 2004 with individuals who had close ties to the terrorists involved in the attacks of September 11, 2001. Further suppose that business records from Petitioner's employer conclusively established that Petitioner was landing a plane in Massachusetts at the time of the meeting. This Court would never learn of these business records unless Petitioner first learned of TSA's allegation.[11] Particularly in light of the Government's string of dramatically inconsistent decisions, there is reason to believe that the Government's Secret Evidence would not stand up to scrutiny. This is, of course, all the more reason to subject it to the adversarial process.

TSA simply ignores the well-settled rule that – as this Court declared two decades ago – "[o]ur system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation." Ass'n for Reduction of Violence, 734 F.2d at 67 (internal quotation marks omitted). Instead, the only case cited in the entire TSA Motion was decided by a lower court in a different Circuit that did not even consider – let alone adjudicate – the issue before this Court.

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[10] For the Court's convenience, a true and accurate copy of this Order is attached hereto as Exhibit B. The Government brief relying on nearly identical arguments to those asserted here is available at http://209.123.170.170/gilmore/_dl/DOJexpartemotion.pdf.

[11] Nor would this Court learn of any motives for fabrication possessed by the source of an allegation, or of an innocent explanation that conclusively refuted the significance of any such allegation. This obstacle to accurate adjudication by this Court is exacerbated by the fact that Gray likewise had no opportunity to respond to any asserted facts in any agency proceeding.

More specifically, the only question in Gordon was whether TSA and the FBI had properly invoked certain exemptions to FOIA. As the District Court made clear, the plaintiffs' sole cognizable interest was the generic interest in "open[ing] agency action to the light of public scrutiny, to inform the citizenry about what their government is up to." Gordon, 2005 WL 1514078 *10 (internal quotation marks omitted). In the instant case, in contrast, Gray has a deeply personal and highly specific stake in vindicating his rights under the Constitution and reclaiming both his reputation and his ability to earn a living.

Although Gordon does not consider the propriety of *ex parte* evidence – and thus does not address the issue before this Court – it does demonstrate TSA's apparent institutional orientation towards concealing information without any legitimate basis for doing so. Before the Gordon plaintiffs filed suit, TSA stonewalled their FOIA requests. 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 reviewing these redactions, the Court rejected TSA's attempts to justify withholding certain additional 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). Gray has reason to believe that TSA's attempt to rely upon secret *ex parte* evidence in the instant case is similarly unfounded.

TSA's claim that its hands are tied by "statutory and regulatory commands of non-disclosure" is without basis. TSA Motion at 4. The only statute that TSA cites is 49 U.S.C. § 114(s)(1)(C), which does no more than authorize the promulgation of regulations prohibiting the

disclosure of information. See TSA Motion at 1 (citing 49 U.S.C. § 114[s][1][C]); 3 (same); 4 (same). Accordingly, TSA has not called to the attention of this Court any statute that prohibits disclosure of the Secret Evidence, and Gray is not aware of any.

Nor is disclosure prohibited by any regulation. In fact, 49 CFR § 1520.9(a)(2) ("Section 1520.9") specifically provides that alleged "sensitive security information" ("SSI") may be disclosed when "authorized in writing by TSA" or others. TSA has not called to the attention of this Court any regulation that either constrains TSA's discretion to authorize disclosure or establishes criteria for the exercise of this discretion, and Gray is not aware of any such regulation. Accordingly, TSA's regulatory argument collapses into the following tautology: (1) Section 1520.9 vests TSA with unbridled discretion to disclose the Secret Evidence, (2) TSA has elected not to exercise that discretion in this case, (3) therefore Section 1520.9 precludes disclosure of the Secret Evidence.

The infirmity of TSA's statutory and regulatory arguments is starkly revealed by its suggestion that this Court should review the Secret Evidence *ex parte*. TSA has not called to the attention of this Court any statute or regulation that authorizes disclosure of the Secret Evidence to this Court (or, in fact, even addresses judicial proceedings). Instead, TSA proposes that this Court engage in an ad hoc "balanc[ing]" of interests. TSA Motion at 4. Nothing in any statute or regulation of which Gray is aware provides any basis for TSA's argument that the outcome of this "balancing" should disregard the well-settled rule that – as this Court declared two decades ago – "[o]ur system of justice does not encompass *ex parte* determinations on the merits of cases

in civil litigation." Ass'n for Reduction of Violence, 734 F.2d at 67 (internal quotation marks omitted).[12]

In light of TSA's reliance on certain information designated as SSI, it is useful to understand what SSI is – and what it is not. SSI is not "National Security Information," which is governed by Executive Order 12958 and applies in the context of national security and defense, intelligence, or foreign relations. Nor is SSI the equivalent of "state secrets," a judicially-created designation reserved for information that would impair the nation's defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt relations with foreign governments. Black v. United States, 62 F.3d 1115, 1118 (8th Cir. 1995). TSA has not and could not argue that the SSI at issue here constitutes "state secrets" or "national security information."

Rather, SSI is a designation for unclassified and widely disseminated transportation-related information.[13] Although SSI is information "obtained or developed in the conduct of

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[12] For reasons that are not apparent, TSA elected to cite certain other authorities only in its memorandum in opposition to the Gray Motion ("TSA Opp."). These authorities are unavailing.

To begin with, Gray is constrained to observe that TSA has materially mischaracterized 49 U.S.C. § 46111 ("Section 46111"). TSA cites this statute 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 (emphasis added). In fact, Section 46111 does not address – let alone purport to resolve – any issue concerning judicial review. Instead, it is limited to the proposition that classified information concerning revocation of a pilot's certificate "may be submitted . . . to the reviewing administrative law judge . . . and shall be reviewed by the administrative law judge *ex parte* and *in camera*." Section 46111(g)(2)(A) (emphasis added.) Nothing in Section 46111 suggests that judicial review of the ALJ's determination should – let alone must – be conducted on the basis of secret, *ex parte* evidence.

Moreover, TSA has neglected to call to this Court's attention the fact that Gordon and other cases cited by TSA (TSA Opp. at 15) involve statutory frameworks that – unlike the statutory framework in this case – specifically authorize *ex parte, in camera* judicial review. See 5 U.S.C. § 552(a)(4)(B) [part of FOIA statutory framework at issue in Gordon] (authorizing court to examine agency records in camera "to determine whether such records or any part thereof shall be withheld"); Holy Land Foundation v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003) (pertinent statute "expressly authorizes *ex parte* and *in camera* review of classified information in any judicial review" [citing 50 U.S.C. § 702(c), internal quotation marks omitted]); People's Mojahedin Org. Of Iran v. Dept. of State, 327 F.3d 1238, 1242 (D.C. Cir. 2003) (citing express authorization in 8 U.S.C. § 1189(a)(3)(B) for *ex parte* and *in camera* judicial review); see also 8 U.S.C. § 1189(a)(3)(B) ("Classified information shall not be subject to disclosure . . . except that such information may be disclosed to a court *ex parte* and *in camera* for purposes of judicial review."). Because there is no similar statute governing the instant dispute, TSA's claim that "Congressional intent" supports its proposed reliance upon secret, *ex parte* evidence is without basis. TSA Opp. at 11.

security activities," SSI itself need not constitute security information at all. SSI may be a "trade secret," "privileged" information, "confidential" information (including confidential business information), "private" information, or *any other information* that TSA determines is SSI. See §114(s); 49 C.F.R. §1520.5(a); 49 C.F.R. §1520.5(b)(14); 49 C.F.R. §1520(b)(16).

In addition to not necessarily being security-related, SSI need not be secret. TSA routinely discloses SSI to thousands of airline employees. TSA widely distributes information about name lists, boarding procedures, and other SSI to airlines and their staff. See, e.g., Testimony October 1, 2002, Investigation of September 11, before the House Select Committee on Intelligence, 2002 WL31253363 (Statement of Claudio Manno, Assistant Under Secretary for Intelligence, TSA) (SSI is distributed to innumerable "individual airline check-in agents, in either a manual or automated form, depending on the specific airline").

Finally, it is rarely proper for courts to rely on material not available to the general public to decide the merits of a civil dispute. See generally Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (discussing the historically recognized public interest in monitoring the processes of the judicial system); New York Times Co. v. United States, 403 U.S. 713, 732-33 (1971) (White, J., concurring) (discussing frustration to proper functioning of judicial system if courts do not have access to the basis of other courts' judgments). Although Gray believes that the public has a compelling interest in having access to the Secret Evidence, he recognizes that this Court has the authority in an appropriate case to enter a sealing order restricting access to the Secret Evidence to Gray and his counsel.[14]

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[13] Testimony October 1, 2002, Investigation of September 11, before the House Select Committee on Intelligence, 2002 WL 31253363 (Statement of Claudio Manno, Assistant Under Secretary for Intelligence, TSA), (SSI "consists of a declassified version of originally classified information"); 49 U.S.C. §114(s).

[14] Protective orders are similarly used in the criminal context to prevent the release of information that is properly classified subject to executive order. See generally Classified Information Procedures Act (CIPA), 18

III. IN THE ALTERNATIVE, GRAY IS ENTITLED TO DISCLOSURE OF EXTENSIVE AND SPECIFIC DETAILS CONCERNING THE SECRET EVIDENCE

Even where consideration of an *ex parte* submission is allowed in the fundamentally different context[15] of supporting or refuting a claim of privilege in discovery, courts routinely insist on a detailed justification and public disclosure – prior to *in camera* review – of as much detail as possible about the secret evidence. Courts prohibit reliance on *ex parte* evidence even in ordinary, garden-variety civil lawsuits. For the Government to rely on secret evidence to defend against a claim of unconstitutional retaliation is both unjust and anti-democratic. See Joint Anti-Fascist Refugee Comm., 341 U.S. at 170.

U.S.C. app. III § 1 *et seq.*; see, e.g., United States v. Musa, 833 F.Supp. 752, 758-61 (E.D.Mo. 1993) (implementing protective order to protect from disclosure by a criminal defendant classified information subject to discovery); 18 U.S.C. app. III § 3 ("Upon motion of the United States, the court shall issue an order to protect against the disclosure of classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.").

[15] The courts have recognized that the rule prohibiting consideration of *ex parte* evidence in deciding the merits of any case is fundamentally distinct from the rule governing consideration of such evidence to resolve claims of privilege in discovery disputes. If a party refuses to provide material responsive to a discovery request based on a claim of privilege, either party may then submit material *ex parte* for review by the court *in camera* to support or refute the claim of privilege. See, e.g., Frost v. Perry, 919 F.Supp. 1459, 1467-68 (D. Nev. 1996) (court may review secret affidavit *in camera* to support a claim of military and state secrets privilege); In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982) (court may review *ex parte* evidence to refute claim of attorney-client privilege by grand jury witness). But a defendant cannot wield information presented *ex parte* "as a sword to seek summary judgment and at the same time blind plaintiff so that he cannot counter. Defendant's affidavit must contain on its face, for plaintiff to see, whatever defendant wishes to rely upon to seek summary judgment." Bane v. Spencer, 393 F.2d 108, 110 (1st Cir. 1968).

As one court clarified, "If the court finds that the claimed privilege does not apply, then the other side must be given access to the information; if the court's finding is that the privilege does apply, then the court may not rely upon the information in reaching its judgment." Abourezk, 785 F.2d at 1043; see also Ass'n for Reduction of Violence, 734 F.2d at 67 (reversing and remanding grant of summary judgment based on *ex parte* evidence; holding that "[i]f the defendants renew their motion for summary judgment, the district court will have to rule on the motion without relying on any privileged materials"). Judge Wald of the Southern District of New York explained the fundamental difference between relying on a privilege to withhold information, and relying on secret evidence on the merits:

> [T]he government presents the Court, *in camera*, with material which it asserts must be withheld from plaintiffs as privileged, yet which it requests the Court to consider in ascertaining material facts and drawing legal conclusions concerning dispositive issues in the case. In this Court's view, such a course is wholly unacceptable.... Either the documents are privileged, and the litigation must continue as best it can without them, or they should be disclosed at least to the parties, in which case the Court will rule after full argument on the merits.

Kinoy v. Mitchell, 67 F.R.D. 1, 15 (S.D.N.Y. 1975).

Moreover, in similar cases where the Government asserts an interest in avoiding disclosure of sensitive information in litigation, this Court and others have required, at a minimum, disclosure of "the gist of the evidence." See, e.g., Abourezk, 785 F.2d at 1061 (court may rely on *ex parte* evidence only when following two conditions are satisfied: [1] "the most extraordinary circumstances" exist and [2] there is "public disclosure by the government, prior to any *in camera* examination, of as much of the material as it could divulge without compromising" its claimed privilege); Allende v. Shultz, 605 F.Supp. 1220, 1226 (D. Mass. 1985) ("defendants have offered neither a summary of the information contained in the classified materials...nor a detailed explanation for their inability to do so") (internal citations omitted); cf. U.S. v. Abuhamra, 389 F.3d 309, 321 (2d Cir. 2004) (in context of opposition to bail release, *ex parte* submissions permitted only when following two conditions are satisfied: [1] "rare circumstances" exist and [2] there is "substitute disclosure of the substance of the information to the defense and scrupulous review by the court of the reliability of the sealed materials"); U.S. v. Acevedo-Ramos, 755 F.2d 203, 209 (1st Cir. 1985) (Breyer, J.) (*in camera* review of evidence on bail determination permissible only where following two conditions are satisfied: [1] "very unusual case" exists and [2] "the defendant is apprised of the gist of the evidence").

In the dramatically less stringent context of administrative review of a revocation of a pilot's certificate, Congress has expressly required that, upon request, the Government "shall provide to the individual . . . an unclassified summary of any classified information" upon which the pertinent decision is based.[16] 49 U.S.C. § 46111(g)(3) (emphasis added).[17] Because this

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[16] To the extent that TSA does not deem Gray to have done so already, he hereby requests such an unclassified summary.

[17] As stated previously, TSA invokes this statute in the TSA Opp.

requirement is both mandatory and unconditional in the administrative context, it follows *a fortiori* that TSA possesses both the ability and the obligation to produce at least "an unclassified summary of any classified information" upon which it seeks to rely in its defense of the claims that Gray has asserted before this Court.

In the event that this Court elects to proceed in this manner, Gray respectfully requests the entry of an order compelling TSA to produce specific categories of information, including without limitation the following:

(1) The date on which any decision was made concerning any request by Gray for flight training;

(2) The date on which any decision was made concerning placing Gray's name on – or clearing or removing it from – the Selectee List and/or the No-Fly List;

(3) The date on which any decision was made concerning which "handling code" to assign to Gray;[18]

(4) The date on which any other decision was made concerning Gray;

(5) The date and topic of every communication concerning any decision referenced in Paragraphs (1) through (4) (collectively, "Decisions");

(6) The identity of every participant in every communication concerning each Decision;

(7) The identity of every person involved in making each Decision (collectively, "Decisionmakers");

(8) The date on which each Decisionmaker learned that Gray filed suit against the Government;

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[18] The "handling code" assigned to an individual on the No-Fly List or the Selectee List "provides insight into the level of threat posed by that individual." June 2005 DOJ Audit at vii-viii. Based upon the recent review by the Audit Division of the Office of the Inspector General within the Department Of Justice, it appears that more than ninety-six percent (96%) of individuals on these watch lists are coded at the two lowest levels. Id. Gray expects that the level(s) at which the Government has coded Gray will illuminate the Government's dramatically shifting positions concerning the level of threat that it contends Gray poses.

(9) The date on which the Government acquired every piece of information underlying each Decision;

(10) The date on which each Decisionmaker acquired every piece of information underlying each Decision;

(11) The nature of every piece of information upon which the Government relied in making each Decision;

(12) Whether other individuals who have filed suit against the Government have been subjected to adverse actions similar to those to which Gray has been subjected;

(13) Sufficient information concerning each allegation underlying each Decision 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., the business records concerning Gray's whereabouts on a particular date and time hypothesized supra).

Without access to 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 for exercising his right under the First Amendment to petition this Court or his claim that the Government unconstitutionally denied his request for flight training based on unspecified charges. Unless Gray can meaningfully litigate these claims, this Court may not have access to potentially dispositive information concerning the historical facts underlying the Government's actions. As the Ninth Circuit has put it, "[w]ithout any opportunity for confrontation, there is no adversarial check on the quality of the information on which [the Government] relies." American-Arab Anti-Discrimination Comm., 70 F.3d at 1069-70 (citing Abourezk). TSA's extraordinary suggestion that this Court should forego the benefit of this crucial check on the quality of the information upon which this Court's adjudication of this case will depend is, in functional terms,

a request that this Court set aside the central premise of the adversary system of achieving fair and accurate judicial determinations. For the reasons stated herein, asking the Court to operate under such a handicap is unacceptable.

IV. THE ADJUDICATION OF THE INSTANT MOTION IS TIME-SENSITIVE

The Court's just-issued Order requires Gray to file his opening brief by October 7, 2005. Gray cannot meaningfully brief the issues raised in this case until he has received and reviewed the Secret Evidence (or as much of the Secret Evidence as this Court elects to compel TSA to produce). Accordingly, Gray respectfully requests that this Court adjudicate the instant Motion as expeditiously as possible.

For the foregoing reasons, the submission of the Secret Evidence on an *ex parte* basis is manifestly improper and barred by long-established precedent. Gray respectfully requests that this Court decline to countenance such a submission.

Respectfully submitted,

ROBERT GRAY,
By his attorneys,

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DATED: September 29, 2005

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Exhibit A

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OF COUNSEL

September 27, 2005

Via Facsimile And Electronic Mail

Mark T. Quinlivan, Esq.
Office Of United States Attorney
U.S. Courthouse, Suite 9200
1 Courthouse Way
Boston, MA 02210

Re: **Robert Gray vs. Transportation Security Administration**
(First Circuit) Docket No. 05-2024

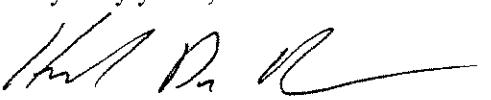
Dear Attorney Quinlivan:

I am writing to memorialize the substance of our teleconference this morning. Thank you for confirming that the Government has reversed its decision to preclude my client, Robert Gray, from boarding an airplane as a passenger. At your first convenience – and in no event later than the close of business on September 28, 2005 – please provide an answer to the open question that you identified concerning whether there are any remaining restrictions that the Government contends currently affect Mr. Gray, including any restrictions on Mr. Gray's ability to work as a pilot. As you know, it is our position that no such restrictions would be justified.

As we discussed, I fear that in light of the risk that information concerning Mr. Gray's status may not have been conveyed to all relevant airport security or airline officials there is a very real chance that resulting delays at the airport might preclude Mr. Gray from boarding an airplane in a timely fashion. Accordingly, I urge the Government to reconsider its refusal to generate a document confirming Mr. Gray's status, including that he is no longer on the No Fly List and that there are no restrictions regarding his ability to fly as a passenger.

I look forward to hearing from you at your first convenience on these matters.

Very truly yours,



Hugh Dun Rappaport

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Exhibit B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 10 2004

CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

JOHN GILMORE,

Plaintiff - Appellant,

v.

JOHN ASHCROFT, Attorney General, in his official capacity as Attorney General of the United States; et al.,

Defendants - Appellees.

No. 04-15736

D.C. No. CV-02-03444-SI
Northern District of California,
San Francisco

ORDER

Before: Peter L. Shaw, Appellate Commissioner

The Government's motion to file the answering brief and excerpts of record under seal and in camera is denied. 9th Cir. R. 10-2; *Kirshner v. Uniden Corp.*, 842 E2d 1074, 1077-78 (9th Cir. 1988). The current briefing schedule remains in place.

Peter L. Shaw
General Order 6.3(e)

promo commissioner 9.8.04/cb

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DOCKET NO. 05-2024

ROBERT GRAY,)
Petitioner)
)
v.)
TRANSPORTATION SECURITY)
ADMINISTRATION,)
Respondent)

CERTIFICATE OF SERVICE

I, Hugh Dun Rappaport, hereby certify that on September 29, 2005, I served a copy of a 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, via email and first class mail, postage prepaid, upon Mark T. Quinlivan, Esq., Office of the United States Attorney, U.S. Courthouse, Suite 9200, 1 Courthouse Way, Boston, MA 02210 and Douglas Letter, Esq., U.S. Department of Justice, Appellate Staff, Civil Division, 950 Pennsylvania Avenue, N.W., Room 7513, Washington, DC 20530.

Hugh Dun Rappaport

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