IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| JOHN GILMORE, | ) | |
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| Plaintiff / Appellant, | ) | |
| | ) | |
| v. | ) | No. 04-15736 |
| | ) | |
| JOHN D. ASHCROFT, et al., | ) | |
| | ) | |
| Defendants / Appellees. | ) | |
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**APPELLANT'S OPPOSITION TO APPELLEES' MOTION TO FILE MATERIALS AND OPPOSING BRIEF UNDER SEAL, FOR *IN CAMERA* AND *EX PARTE* REVIEW**

Pursuant to Fed.R.App.P. 27 and D.C. Cir. Rule 27(g), appellant John Gilmore hereby opposes appellees' motion to file materials and opposing brief under seal, for *in camera* and *ex parte* review. Neither the appellant nor the appellee can add to or enlarge the record on appeal to include material that was *not* before the district court. *Morrison v. Hall*, 261 F.3d 896, 900, fn.4 (9th Cir. 2001). Appellate courts may consider only those matters that were before the trial judge when final judgment was entered. *United States v. $22,474.00 in U.S. Currency*, 246 F.3d 1212, 1218 (9th Cir. 2001). *Ex parte* communications generally are disfavored because they conflict with a fundamental precept of our system of justice: a fair hearing requires "a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938).

## INTRODUCTION

Plaintiff alleged the existence of an administrative directive mandating domestic airlines to require passengers surrender identification as a condition of carriage and that the information gathered is used to operate the Computer Assisted Passenger Prescreening System, the "No Fly" and "Watch" lists. Plaintiff challenged the constitutionality of this directive and practice primarily as an infringement on his rights to travel and assembly. The Government's motion to dismiss required the court to assume the truth of plaintiff's allegations. When asked by the district court to identify the law applied to plaintiff, defendant refused to disclose to the court the language of the directive. Now, defendants claim to recognize that this Court might find access to the law at issue to be necessary for resolution of plaintiff's appeal of the district court's dismissal of his claim with prejudice. Now, defendants ask this Court to permit them file materials and an opposing brief under seal for *in camera* and *ex parte* review.

## FACTUAL AND PROCEDURAL BACKGROUND

1. On July 4, 2002, plaintiff was twice prevented from traveling domestically by common air carrier because he declined to surrender his identification as a condition of carriage or be subjected to a "heightened" level of physical search due to unwillingness to surrender identification. At no time did plaintiff refuse to be physically searched in the ordinary course airport security, in fact on one of his attempts he went through the metal detectors prior to being prevented from boarding a flight at the gate due to his declining to surrender identification. Airline personnel repeatedly indicated that federal law requires airline passengers to provide identification but when asked were unable or unwilling to provide the text of the law applied.

2. On July 18, 2002, plaintiff filed a complaint in the United States District Court for the Northern District of California against federal defendants (which includes the Transportation Safety Administration "TSA") and the two airlines (Southwest and United) that refused to board him. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim for which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Oral argument was held on January 17, 2003. On March 23, 2004, the District Court issued an order granting defendants' motions to dismiss without leave to amend. That order is the subject of this appeal.

## ARGUMENT

### A. In reviewing orders to dismiss, Appellate Courts consider only the record before the trial judge

Defendants' motion is premature, and attempts to re-litigate this case. Defendant chose not to enter the security directive at issue under seal for *ex parte, in camera* review by the district court. The appellate record cannot include factual allegations unsupported by the district court record. *Yniguez v. Arizonans for Official English*, 42 F.3d 1217, 1221, n. 3 (9th Cir. 1994). The creation of the record on appeal occurs solely in the district court. Appellate courts consider only the "record before the trial judge when *his decision was made*" (emphasis in original) *Kirshner v. Uniden Corp. Of America*, 842 F.2d 1074, 1077 (9th Cir. 1988).

Neither the appellant nor the appellee can add to or enlarge the record on appeal to include material that was *not* before the district court. *Morrison v. Hall*, 261 F.3d 896, 900, fn. 4 (9th Cir. 2001). Appellate courts may consider only those

matters that were before the trial judge when final judgment was entered. *United States v. $22,474.00 in U.S. Currency*, 246 F.3d 1212, 1218 (9th Cir. 2001).

The rule prohibiting enlargement of the record is strictly construed. The Ninth Circuit will strike extraneous matters from the record on its own motion, even if the parties have stipulated to their inclusion in the record on appeal. *Panawiew Door v. Window Co. v. Reynolds Metal Co.,* 255 F.2d 920, 922 (9th Cir. 1958). The only exceptions to this rule is when a mistake in the reporter's transcript has occurred (FRAP 10(e); 28 USC Sections 1734, 1735), or where judicial notice is appropriate. *Yagman v. Republic Ins. Co.* 987 F.2d 622, 626, fn. 3 (9th Cir. 1993). Judicial notice may be taken only of "matters of common knowledge" and "readily verifiable facts". FRE 201. (See Section C, *infra*). Defendants' motion impermissibly asks the Court to take judicial notice of an item that is explicitly not a matter of common knowledge nor readily verifiable.

Plaintiff knows of no case that states the capacity of the court of appeals to review *in camera* any documents that are not part of the district court record. Defendants cite *Meridian Intern. Logistics, Inc. v. U.S.*, 939 F.2d 740, 745 (9th Cir. 1991) for their proposition that "this Court has repeatedly endorsed such sealed, *in camera* and *ex parte* submissions, in a variety of contexts." However, *Meridian*, and all of the other cases cited by Defendants, focuses on *in camera* and *ex parte* submissions made first to a district court and then upheld as a practice or reviewed in like manner by the appellate court for the purpose of reviewing the district court's ruling.

In any case, appellate courts should not make factual determinations based on information not available to the district court when it rendered its opinion. Rather, it is preferable to remand the action to the trial court for further

proceedings to allow it to consider the previously unexamined information. See *Inwood Laboratories v. Ives Laboratories,* 456 US 844, 857, fn. 19 (1982).

As no alleged sensitive security information was put into the record by either side at the district court level, it is too late to attempt to enlarge the record now. Defendants should not be permitted to distract the appellate court from properly reviewing the threshold matters relating to plaintiff's constitutional claims addressed in the lower court's order to dismiss.

### B. *Ex Parte, In Camera* review of Defendants' opposition brief is improper

Defendants' admission that *ex parte* and *in camera* review of sealed filings is not the ordinary course of litigation, is an understatement. Defendants cite no legal authority for such a radical request. To justify this request, defendants merely state the appellate court may find necessary what defendants specifically denied the district court. Defendants then requests to put forth new substantive legal arguments *ex parte* and *in camera*. This runs counter to foundational concepts of appellate jurisprudence.

Our judicial system is based on the deeply felt principle that each side must have the opportunity to be fully and fairly heard. L. Tribe, American Constitutional Law 666 (2nd ed. 1988) The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. *United States et al. v. Florida East Coast Railway Co.,* 410 U.S. 224, 242, 243 (1973).

This approach is reinforced by the ban against consideration of *ex parte* communications contained in Canon 3(A)(4) of the Code of Conduct for United States Judges: A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to the law, and,

except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding.

Defendants have not stated why they must presumably directly quote in their opposition brief non-discloseable secret security-related information to make their legal arguments. Defendants' extreme cry for secrecy, preventing even plaintiff's counsel from being privy to their legal arguments because plaintiff's counsel does not meet defendants' self defined "covered persons who have a need to know" criteria, is disturbing and illustrates the dangers of secret law.

## CONCLUSION

For the reasons stated above, this Court should deny the Government's motion to file an opposing brief and materials under seal, *in camera* and *ex parte*.

Respectfully submitted,

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September 7, 2004

## CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2004, I filed and served the foregoing OPPOSITION TO APPELLEES' 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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