

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOHN GILMORE

Plaintiff-Appellant,

v.

JOHN D. ASHCROFT, Attorney General,  
et al.

Defendants-Appellees.

No. 04-15736

**APPELLEES' REPLY IN SUPPORT OF THEIR  
MOTION TO FILE MATERIALS AND OPPOSING BRIEF  
UNDER SEAL, FOR *IN CAMERA* AND *EX PARTE* REVIEW**

In accordance with Fed. R. App. P. 27 and Circuit Rule 27-1, defendants/appellees submit the following Reply in support of their motion, filed September 2, 2004, to file materials and an opposing brief with this Court under seal, for *in camera* and *ex parte* review.

**INTRODUCTION**

In this case, plaintiff alleges the existence of a security directive issued by the Federal Government relating to airline security procedures, and he challenges the constitutionality of that directive. In order to protect air travel security, a federal statute and accompanying regulations prohibit defendants from disclosing any such directive in open court, to plaintiff, or to plaintiff's counsel. See 49 U.S.C. § 114(s)(1)(C); 49 C.F.R. §§ 1520.5(b)(1)(i), (b)(2)(i), 1520.9(a)(1),

1544.103(b)(4). In light of this statute and accompanying regulations, and for reasons set forth in its motion filed on September 2, 2004, the Government moved this Court to permit federal defendants to file materials and an opposing brief under seal, for *in camera* and *ex parte* review (with a redacted version of the brief to be served and filed publicly).

Plaintiff filed an opposition to that motion on September 7, 2004 (hereinafter "Pl.'s Op."). As discussed below, plaintiff's objections are not well taken.

#### DISCUSSION

1. Plaintiff's first objection to our motion is that the scope of this Court's appellate review is limited to the record developed in the district court. Pl.'s Op. at 3-5. That argument incorrectly assumes that this case was properly before the district court in the first place.

That is one of the principal issues before this Court. We argued below that the district court lacked jurisdiction over plaintiff's claims under 49 U.S.C. § 46110, which provides for exclusive court of appeals jurisdiction over certain orders issued by the Under Secretary of Transportation for Security. Whether the alleged security directive at issue in plaintiff's case is such an "order" is one of the primary questions now before this Court. Plaintiff contends that the answer to that question turns on the existence of an administrative record. See

Pl.'s Opening Brief at 45. Because the materials that the Government proposes to submit are the administrative record, this Court might find it necessary to review those materials in order to decide the threshold jurisdictional question. Accordingly, this Court should grant the Government's motion.

If the existence of an administrative record is immaterial to the jurisdictional question, this Court should still grant our motion. Because the manner in which this Court will resolve plaintiff's case is unknown, and because review of the Government's proposed submission would be proper under at least one possible way of resolving the case, this Court should grant the Government's motion so that the relevant materials are available if they are needed by this Court.

In disposing of plaintiff's case, this Court could follow one of three options. First, this Court could hold that the district court lacked jurisdiction over some or all of plaintiff's claims, and could simply affirm the district court's dismissal of those claims on that ground. Second, this Court could hold that the district court properly entertained jurisdiction, but could decide the case on the merits assuming all of plaintiff's alleged facts to be true (including the existence and content of the alleged security directive). Under either scenario, this Court's review could follow the same procedure followed by the district court, namely, disposing of

this case without reviewing the sealed materials that are the subject of the Government's motion.

Under a third conceivable alternative, this Court could hold that, although the district court did not have jurisdiction over some or all of plaintiff's claims, this Court has jurisdiction to entertain a direct petition for review pursuant to 49 U.S.C. § 46110. And, this Court could conceivably hold that it should treat plaintiff's appeal as if it had been a transfer of the case from the district court under 28 U.S.C. § 1631. See, e.g., City of Alameda v. FAA, 285 F.3d 1143, 1144 (9th Cir. 2002). If the Court were to take that approach as to some or all of plaintiff's claims, treating plaintiff's appeal as a direct petition for review, the Court would be considering the merits of those claims and, in doing so, could consider the materials that the Government proposes in its motion to file. See Camp v. Pitts, 411 U.S. 138, 142-43 (1973) (expressly authorizing the Government to file supplemental declarations in court in order to more fully explain the rationale for its administrative action).

Thus, while plaintiff is right that, if this matter is treated solely as an appeal, the district court record cannot be expanded, there is a possibility that this Court will instead treat some or all of plaintiff's claims as properly before it through the equivalent of a direct petition for review, contemplated by 49 U.S.C. § 46110.

Given that these different options currently exist and there is no way to know at this point which one the panel of judges ultimately assigned to the case will follow, this Court should grant our motion to file sensitive air travel security information under seal for *in camera/ex parte* review. If that panel eventually treats some or all of plaintiff's claims pursuant to a petition for review, then judicial review of the sealed material would plainly be appropriate under the Supreme Court precedent noted above. If the panel instead eventually pursues either of the first two options, it would have no need to examine the sealed material, and no harm will have been done; merely granting our motion now does not mean that the panel must review the sealed sensitive materials if it finds it unnecessary to do so. But, denying our motion now would foreclose the course described above under which this Court considers the merits of plaintiff's claims directly. The more prudent course, therefore, is to grant our motion now so that the Court has available to it whatever option it decides to follow.

2. Plaintiff's second objection is that "[d]efendants cite no legal authority" to support the procedure sought in the Government's motion. Pl.'s Op. at 5. This statement is puzzling because, to the contrary, we cited a slew of cases in which this Court repeatedly endorsed sealed, *in camera* and *ex parte* submissions, in a variety of contexts. See, e.g., Meridian Internat'l Logistics, Inc. v. United States, 939 F.2d 740, 745

(9th Cir. 1991); In re Grand Jury Proceedings, 867 F.2d 539, 540-41 (9th Cir. 1988); United States v. Sarkissian, 841 F.2d 959, 965-66 (9th Cir. 1988); United States v. Ott, 827 F.2d 473, 476-77 (9th Cir. 1987); Pollard v. FBI, 705 F.2d 1151, 1153-54 (9th Cir. 1983). In fact, this Court has already approved of such sealed, *in camera* and *ex parte* submissions for exactly the same kind of sensitive security information at issue here. See Torbet v. United Airlines, 298 F.3d 1087, 1089 (9th Cir. 2002).

Plaintiff also contends that the requested procedure will harm his ability to litigate his case. Pl.'s Op. at 5. In actuality, the opposite is true.

Before the district court, we filed a motion to dismiss, which meant that the parties litigated plaintiff's claims on the assumption that his factual allegations were true. That meant, in turn, that all the parties - as well as the district court - simply assumed that a security directive existed and that it requires what plaintiff claims it does, and the district court's review proceeded entirely on that basis.

Granting our motion now can only enhance plaintiff's position in this litigation because an independent panel of the federal judiciary might review an actual security directive rather than a mere assumption that there is one and what it might provide. Indeed, that is precisely what plaintiff asked for in his complaint. See Complaint at 12 ¶ 52 (alleging the security directive is unconstitutional because it "provides no

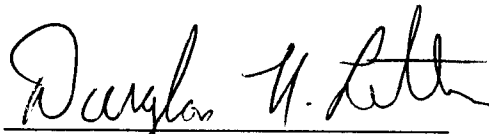
way for ordinary people or reviewing courts to conclusively determine what is legal") (emphasis added); see also Pl.'s Opening Brief at 47 ("It remains impossible to imagine how any Court of Appeal could review any regulation or security directive . . . without . . . knowledge about whether or not a security directive that mandated the airlines to request ID was actually issued or not."). Thus, our motion makes it possible for this Court to conduct more searching judicial review.

We emphasize that, if this Court were to deny our motion, the Government stands ready to litigate this matter as it did before the district court: on the assumption that the security directive alleged by plaintiff to exist does exist, and on the assumption that the alleged security directive requires what plaintiff claims it does, without disclosing to this Court what actually might exist.

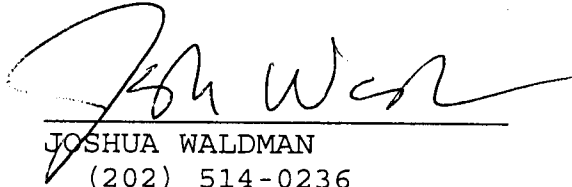
CONCLUSION

For the reasons stated above and in our original motion, this Court should grant the Government's motion to file an opposing brief and Sensitive Security Information under seal, *in camera* and *ex parte*.

Respectfully submitted,



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September 10, 2004