



U.S. Department of Justice  
Civil Division, Appellate Staff  
950 Pennsylvania Ave., N.W., Rm: 7232  
Washington, D.C. 20530

DNL:JPWaldman  
DJ#145-12-12386

Joshua Waldman  
Staff Attorney

Tel: (202) 514-0236  
Fax: (202) 514-9405

December 14, 2005

Ms. Cathy Catterson  
Clerk, United States Court of Appeals  
for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103-1526

Re: *Gilmore v. Gonzales*, No. 04-15736

**FILING UNDER SEAL, FOR EX PARTE, IN CAMERA REVIEW ONLY**

Dear Ms. Catterson:

On December 8, 2005, this Court ordered the government in the above-captioned appeal to “file under seal the relevant material pertaining to the identification requirement at issue in this case so that this court can conduct *in camera* review.” Enclosed please find one original and four copies of the government’s **under seal, ex parte and in camera** filing. The filing contains only materials relevant to the above-captioned appeal. Please distribute one copy of this letter and one copy of the enclosed filing to each member of the panel in this appeal (Judges Trott, T.G. Nelson, and Paez).

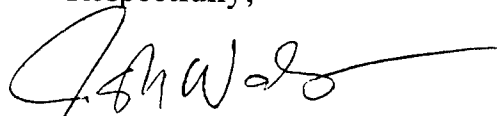
The government in this appeal has previously moved this Court for leave to file these same materials not just under seal for *in camera* review, but also for *ex parte* review. (That motion was denied by an Appellate Commissioner, and the government’s motion for reconsideration remained pending.) The government’s motion was predicated on 49 U.S.C. § 114(s)(2)(c), which states that TSA “shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security” if the agency “decides that disclosing the information would . . . be detrimental to the security of transportation.” Pursuant to that authority, TSA has defined a set of information known as “SSI” or “sensitive security information” (see 49 C.F.R. § 1520.3), and has directed that such information shall be disclosed only to those with a “need to know.” 49 C.F.R. § 1520.9(a)(1). The relevant materials at issue in this case contain SSI, and TSA has determined that neither plaintiff nor plaintiff’s counsel has a “need to know.”

Although this Court's December 8 Order does not expressly state that the court's review will be *ex parte*, the government understands the December 8 Order to grant the government's previously filed motion. In other words, the government understands this Court's December 8 Order to mean that this Court will review the sealed material both *in camera* and *ex parte* (as opposed to construing the December 8 Order as an implicit holding overriding TSA's decision and determining that plaintiff and his counsel have a "need to know" under § 1520.9(a)(1)).

The government's understanding is consistent with this Court's precedents repeatedly endorsing *in camera* and *ex parte* submissions in appropriate circumstances. See, e.g., Meridian Internat'l Logistics, Inc. v. United States, 939 F.2d 740, 745 (9th Cir. 1991) ("We find that the [*ex parte* and *in camera*] procedure used by the court in the instant case was proper; it adequately balanced the rights of the Government and [plaintiff]."); United States v. Sarkissian, 841 F.2d 959, 965-66 (9th Cir. 1988) (upholding submission of material *ex parte* and *in camera* for proceedings under the Classified Information Procedures Act); United States v. Ott, 827 F.2d 473, 476-77 (9th Cir. 1987) (rejecting due process challenge to *ex parte*, *in camera* review of materials under the Foreign Intelligence Surveillance Act); Pollard v. FBI, 705 F.2d 1151, 1153-54 (9th Cir. 1983) ("the practice of *in camera*, *ex parte* review remains appropriate in certain FOIA cases").

Should this Court disagree with the government's understanding of the Court's December 8 Order, the government respectfully requests that it be afforded an opportunity to brief this Court on whether *ex parte* review is appropriate.

Respectfully,



Joshua Waldman  
Attorney, Appellate Staff  
Civil Division

Enclosures

cc (cover letter only): William Simpich  
James P. Harrison  
Jane H. Barrett