No. 04-15736

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN GILMORE,

Plaintiff-Appellant,

v.

JOHN ASHCROFT,
Attorney General, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER

WILLIAM M. SIMPICH
1736 Franklin St, 10th Floor
Oakland, CA 94612
Telephone: (510) 444-0226

I. INTRODUCTION

A. BACKGROUND OF DEFENDANTS' MOTION

Pursuant to Fed.R.App.P. 27 and D.C. Cir. Rule 27(g), appellant John Gilmore opposes appellees' motion for reconsideration 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 are disfavored as a 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).

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.

On September 2, 2004, Defendants claimed 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, and moved this Court to permit them to file materials and an opposing brief under seal for *in camera* and *ex parte* review. On September 7, 2004, Plaintiff opposed that motion on two grounds: 1) That in reviewing orders to dismiss, appellate courts consider only the record before the trial judge, and 2) That ex parte, in camera review of defendants' opposition brief is improper as the right to a hearing embraces a reasonable opportunity to know the claims of the opposing party and to meet them. United States et al. v. Florida East Coast Railway Co., 410 U.S. 224, 242 -243 (1973).

The Appellate Commissioner denied the Government's motion on September 10, 2004, based on Circuit Rule 10-2 and Kirshner v. Uniden Corp., 842 F.2d 1074, 1077-78 (9th Cir. 1988), both of which address plaintiff's argument that the district court record cannot be expanded.

B. BACKGROUND OF DISTRICT COURT PROCEEDINGS

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.

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.

DISCUSSION

I. DEFENDANT HAS COMMITTED PROCEDURAL ERRORS THAT SHOULD HALT ANY RECONSIDERATION OF THEIR INITIAL MOTION FOR PERMISSION TO FILE EX PARTE AND IN CAMERA

A. Defendants Failed to Provisionally File Required Documents under Seal for Consideration

Defendants failed to abide by this circuit's procedural requirements for filing documents under seal. Any motion to file a brief or other material under seal shall be filed simultaneously with the relevant document; that document will then remain sealed on a provisional basis until the court rules on the motion. [Circuit Rule 27-13(b)] Defendant states in its motion for reconsideration that, as a result of this court's denial of their motion to file under seal, it "will not be providing the Court with the confidential material that could aid its consideration of this case." However, this "confidential material" would be paramount in aiding this court in its consideration of this motion. As defendants failed to include the material it desires to file under seal along with the motion itself, the motion must fail.

B. Defendants Failed to File Required Declarations or Affidavits in Support of Its Motions

Defendants also failed to include with its motion to seal the required declaration or affidavit necessary to support the motion. Any discussion of confidential material that is necessary to support the motion the motion to seal must be confined to an affidavit or declaration; the affidavit or declaration may

also be filed under seal. [Circuit Rule 27-13(b)] Neither defendant's motion to file under seal nor their motion for reconsideration contained an affidavit or declaration filed under seal or otherwise. On this basis, the motion must fail.

C. Defendants failed to state with particularity points of law or facts overlooked

Defendants' entire motion for reconsideration addresses issues not raised in its original motion and fails to identify what part of their original argument the court failed to look at or understand. A party seeking a motion for reconsideration must state with particularity the points of law or fact the court has overlooked or misunderstood. [Circuit Rule 27-10] What defendants argue here is merely that plaintiff "incorrectly assumes that this case was properly before the district court in the first place." (Defendant's Motion for Reconsideration, 3: 11 -13) This is one of the major topics on appeal itself.

II. NEITHER PARTY CAN ADD TO OR ENLARGE THE RECORD ON APPEAL TO INCLUDE MATERIAL THAT WAS NOT BEFORE THE DISTRICT COURT

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

Defendants 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 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.

B. Defendants have cited no case illustrating a significant difference between the administrative record on appeal from a district court as distinguished from a petition for review from an agency

This case is not a petition for review; it is an appeal from a district court decision. Even if the court was somehow persuaded to treat this case as equivalent to a petition for review - which it is not, as several constitutional issues are raised that would not be addressed by an administrative agency - Defendants argue that a petition for review is not governed by the same standards as an appeal from the district court. The only case cited, Camp v. Pitts, 411 U.S. 138, 142-143 (1973),

merely permits the court to authorize the government to file supplemental declarations in court in order to more fully explain the rationale for its administrative action. Defendants have cited no case even suggesting such an extraordinary secret remedy - to create an administrative record and then to hide it- because no such cases exist.

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.

III. *Ex Parte and In Camera* review of Defendants' opposition brief is improper and violates the First Amendment

A. Such a request violates both custom and the strong presumption of this Circuit in favor of access to court records

Defendants cite no legal authority for the radical request to file a opposition brief in camera and ex parte. Such a request 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. "In this Circuit, we start with a strong presumption in favor of access to court records." Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003) (sealing in civil cases permitted only for "compelling reasons").

B. DEFENDANTS' REQUEST ALSO VIOLATES THE FIRST AMENDMENT RIGHT OF ACCESS TO CIVIL DOCUMENTS

Other circuits have addressed the First Amendment right of access as to civil court documents. See, e.g. Grove Fresh Distribs. Inc. v. Everfresh Juice Co.,

24 F.3d 893, 897 (7th Cir. 1994) (recognizing First Amendment right to access to

civil proceedings and records); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (finding First Amendment standard applies to documents filed pursuant to summary judgment motion)

The 7th Circuit has denied government requests to file appellate briefs and supporting documents under seal. Matter of Grand Jury Proceedings: Victor Krynicki, 983 F.2d 74, 78 (7th Cir. 1992). Judge Easterbrook observed, inter alia,

that "what happens in the halls of government is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records...Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification." Id. at 75. The same is true here.

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*.

Dated: October 1, 2004

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WILLIAM M. SIMPICH
JAMES P. HARRISON
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2004, I filed and served the foregoing OPPOSITION TO APPELLEES' MOTION FOR RECONSIDERATION 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:

Joshua Waldman
Civil Division, Room 7232
Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530-0001
Attorneys for Federal Defendants / Appellees
Telephone: (202) 514-0236
Facsimile: (202) 616-8470
Angela Dotson

Piper Rudnick
1999 Avenue of the Stars, Fourth Floor
Los Angeles, Ca 90067
Attorneys for Defendant / Appellee Southwest Airlines
Telephone: (310) 595-3000
Facsimile: (310) 595-3300

William M. Simpich
Co-Counsel for Plaintiff / Appellant