No. 03-40783(L);

04-1131 (Con); 04-1796 (Con)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Arshad Chowdhury,

Petitioner,

vs.

Transportation Security Administration, Department of Homeland Security and the United States of America,

Respondents.

On Petitions for Review From the Transportation Security Administration

Petitioner Arshad Chowdhury's Corrected Reply Brief

Christy E. Lopez
Reed Colfax
Jennifer Klar
RELMAN & ASSOCIATES
1350 Connecticut Avenue, NW Suite 304
Washington, DC 20036
Telephone: (202) 728-1888
Facsimile: (202) 728-0848

Alan L. Schlosser
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
1663 Mission Street, Suite 460
San Francisco, CA 94103
Telephone: (415) 621-2493
Facsimile: (415) 255-8437

Douglas E. Dexter
David Lazerwitz
Jessica Nall
Chrysty Esperanza
FARELLA BRAUN & MARTEL LLP
Russ Building
235 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 954-4400
Facsimile: (415) 954-4480

Attorneys for Petitioner
ARSHAD CHOWDHURY

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PRELIMINARY STATEMENT

TSA fails to set forth any law or facts that challenge the basic principle of Chowdhury's petition: Congress did not grant TSA the authority to regulate the disclosure of SSI in civil litigation. To the contrary, TSA's arguments buttress Chowdhury's position that the language and structure of 49 U.S.C. § 114(s) ("114(s)") make it clear that Congress only granted the TSA the authority to regulate the public disclosure of SSI.

Nevertheless, TSA contends that 114(s) permits the agency to absolutely preclude discovery of SSI, without consideration of the parties' right to prosecute their cases, their need for the information, or the court's ability to protect the information. Courts, under this formulation, would play no role: once information is designated SSI the TSA may unilaterally prohibit its discovery under any terms it sees fit—and no court may review this decision.

In the absence of any statutory authority for its position, TSA relies heavily on the McHale Declaration, which purportedly sets forth a blanket prohibition on disclosing SSI to plaintiffs' attorneys in civil litigation. The McHale Declaration however, merely underscores the absence of any legitimate authority for TSA's position and clarifies that TSA's SSI determinations here are unsupported by the evidence, arbitrary, and capricious.

TSA's argument that Chowdhury is not entitled to any due process before being deprived of SSI fares no better. Particularly given the draconian impact of TSA's SSI designations under TSA's interpretation of 114(s), TSA cannot seriously dispute that Chowdhury is entitled to pre-deprivation due process.

It exceeds the bounds of precedent and credulity to suggest that Congress eliminated the judiciary's role in civil litigation via a statute that does not mention civil litigation or provide direction or limits on how this supposed new arbiter of civil discovery—TSA—would exercise its powers. This Court should not accede to TSA's unprecedented and unsupported position that it has complete and unreviewable discretion to limit civil discovery of SSI.

ARGUMENT

I. TSA'S ARGUMENTS CONFIRM THAT TSA'S UNILATERAL PROHIBITION OF SSI DISCOVERY EXCEEDS STATUTORY AUTHORITY

A. Congress Does Not Create by Implication the Authority to Regulate Discovery

TSA argues that Congress granted it, in 114(s), the authority to exercise complete control over information TSA deems SSI. This interpretation of the statute finds no support.

As an initial matter, TSA's interpretation contravenes two well-established principles regarding Congressional limits on discovery. First, courts have long held that statutes purportedly limiting the discovery of competent evidence are to

be strictly construed. St. Regis Paper Co. v. United States, 368 U.S. 208, 218 (1961), superceded on other grounds by statute, Carey v. Klutznick, 653 F.2d 732 (2d Cir. 1981) (holding that the terms of a statute should be strictly construed "to avoid a construction that would suppress otherwise competent evidence.").

Second, when Congress creates limitations on civil discovery it does so expressly. Freeman v. Seligson, 405 F.2d 1326, 1351 (D.C. Cir. 1968) ("[I]n other instances where Congress has thought it necessary to protect against court use of records it has expressly so provided by specific language."); ICG Communications, Inc. v. Allegiance Telecom, 211 F.R.D. 610, 614 (N.D. Cal. 2002) ("Thus, although congress may have the power to impose a ban on discovery for certain matters, there should be a clear expression of congressional intent before relevant information essential to the fair resolution of a lawsuit will be deemed absolutely and categorically exempt from discovery and not subject to the powers of the court under Rule 26"). For example, in Pierce County, Wash. v. Guillen, the Court upheld statutory limits on disclosure where the statute explicitly stated that certain information relating to highway safety "shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages. . . ." 537 U.S. 129, 135-36 (2003). Similarly, in City of N.Y. v. Berretta U.S.A. Corp., the court noted that Congress "used language to clearly distinguish between disclosures to the public and

discovery in a civil action," instructing in 15 U.S.C. § 2055(e)(2) that certain consumer product safety reports "shall be immune from legal process and shall not be subject to subpoena or other discovery in any civil action in a State or Federal court or in any administrative proceeding." 222 F.R.D. 51, 58 (E.D.N.Y. 2004); see also 15 U.S.C. § 7215(b)(5)(A) (indicating that certain information collected or utilized by the Public Company Accounting Oversight Board "shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any Federal or State court or administrative agency"); 46 U.S.C. § 6308 (providing detailed instructions on discoverability of information regarding investigations of marine casualties in civil litigation). See also cases cited, Br. at 28-29.

In contrast, 114(s) provides only that, notwithstanding FOIA, the TSA "shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . ." Section 114(s) cannot be read to include the requisite explicit statement that the information at issue may not be disclosed in civil discovery.

TSA replies that Congress can create limits on discovery without explicitly referencing civil litigation. But TSA does not and cannot cite to any instance where Congress has limited discovery without expressly placing absolute limitations on disclosure that preclude discovery. In Baldrige, for example, the

statute at issue provided that certain census information could be provided only to "sworn officers and employees of the Department or bureau or agency thereof," and that it could not be used "for any purpose other than the statistical purposes for which it is supplied." Baldrige v. Shapiro, 455 U.S. 345, 354-55 (1982). Accordingly, the Baldrige court held that the statute prohibited disclosure of this information beyond the express parameters set by statute, including disclosure in litigation. Similarly, a statute providing that the proceedings of a selection board convened to consider merits of promotions of naval chaplains "may not be disclosed to any person not a member of the board" was held to limit the disclosure of that information in civil litigation. In re England, 375 F.3d 1169, 1170 (D.C. Cir. 2004). Section 114(s) cannot be read similarly to expressly limit disclosure of SSI to a defined group of persons. The statutory language conflicts with TSA's interpretation that 114(s) permits it to unilaterally prohibit disclosure of SSI in civil litigation.

B. Section 114(s) Relates to Public Disclosure of Information, Not Civil Discovery

Far from providing authority to preclude disclosure of SSI in civil discovery even pursuant to an attorneys eyes' only protective order, the law and facts TSA cites all address public disclosure of SSI.[1] TSA relies heavily on Public Citizen,

[1] A statute that limits the disclosure of information to the public may not be presumed to limit discovery. As the D.C. Circuit has recognized, "statutes

Inc. v. F.A.A., 988 F.2d 186, 195 (D.C. Cir. 1993). But Public Citizen actually bolsters Chowdhury's argument that 114(s) speaks only to public disclosure. In Public Citizen, the D.C. Circuit concluded that the predecessor statute to 114(s) was not limited to addressing FOIA, but also applied to other public disclosure statutes ("...we conclude unmistakably that Congress intended to allow the FAA to withhold from public disclosure information falling within § 1357(d), whether or not FOIA is invoked.) 988 F.2d at 195 (emphasis added).

Public Citizen stands, therefore, for the unremarkable proposition that a statute explicitly superseding FOIA's disclosure requirements also applies to other statutes that, like FOIA, establish procedures for public disclosure. Public Citizen confirms that 114(s) allows TSA to create limits on public disclosure of SSI, but does not suggest that the language of 114(s) may apply to other contexts, such as civil litigation.

The history of interpretations of 114(s) and similar statutes further establish that 114(s) does not extend to civil discovery. The regulations interpreting the statute have never referenced discovery or made any attempt to account for the unique circumstances surrounding the production of information in civil litigation. See 49 C.F.R. § 1520, et seq. Nor has the TSA or its predecessor agency made any

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insulating information from publication are aimed at the broadcasting of sensitive information to the general populace; the statutes are not intended to enjoin the limited kind of disclosure encountered in judicial proceedings." Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1344 (D.C. Cir. 1984).

attempt to explain how their purported authority to preclude trade secrets and confidential information from discovery would properly interact with Fed. R. Civ. P. 26(c), which specifically addresses the disclosure of such information pursuant to protective order.[2] TSA cannot credibly assert that TSA, and previously the FAA, interpreted 114(s) and its predecessor statutes as granting the authority to control discovery of SSI, since they have made no attempt to address the complexities of litigation in their regulations.

C. The Unprecedented Authority TSA Claims is Unwarranted

Despite the absence of any evidence that 114(s) is meant to preclude disclosure of SSI in civil litigation, TSA nonetheless argues that Congress not only intended to do so but that, in addition, Congress took the unprecedented step of delegating to an executive agency—by implication—the unbridled and unreviewable authority to limit civil discovery. TSA can cite no instance where Congress has delegated such authority to an executive agency and the nature of SSI does not justify the conclusion that Congress intended to do so here.

SSI is not of such a unique nature that Congress would take the unprecedented step of concluding that only TSA, and not the courts, could safeguard it. TSA does not dispute that SSI is less sensitive than "state secrets"

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[2] Consistent with 114(s), TSA defines SSI to include not only information that would be "detrimental to the security of transportation," but also information that would "[r]eveal trade secrets or privileged or confidential information." 49 C.F.R. § 1520.5.

and other national security information whose discovery Congress has long entrusted in the courts. Yet, TSA demands greater protections for SSI than Congress has mandated for far more sensitive information.

For example, Congress permits courts to order the disclosure of national security information collected under the Foreign Intelligence Surveillance Act where a court deems such disclosure necessary. United States v. Belfield, 692 F.2d 141, 148 (D.C. Cir. 1982). See also United States v. Duggan, 743 F.2d 59, 78 (2d Cir. 1984) (judge has discretion to disclose Foreign Intelligence Surveillance Act classified information "under appropriate protective procedures" if necessary); 18 U.S.C. § 2336(b) (instructing courts to retain discretion over discovery in civil litigation resulting from international terrorism). Similarly, courts conduct a searching inquiry into any proposed application of the state secrets privilege. Doe v. Tenet, 329 F.3d 1135, 1152 (9th Cir. 2003), cert. granted, 124 S. Ct. 2908 (2004) ("The state secrets privilege is an absolute privilege and cannot be overcome by a showing of necessity. Nonetheless, the greater a party's need for the evidence, the more deeply a court must probe to see whether state secrets are in fact at risk."). Yet, TSA asserts that only it may decide whether and how SSI may be disclosed in civil litigation, and that no court may review this decision.

Moreover, courts regularly safeguard the production of the precise forms of information TSA purports are at issue here. See, e.g., Ospina v. Trans World

Airlines, 975 F.2d 35, 36 (2d Cir. 1992) (noting that the District Court ordered trial of passengers' claims against airline related to bombing of TWA Flight 840 "closed to public at such times as sensitive, anti-terrorist airline security information was to be disclosed, discussed or evaluated."); Gray v. Southwest Airlines, Inc., 33 Fed. Appx. 865 (9th Cir. 2002) (noting that trial court had permitted plaintiff's counsel to review FAA Security Directives designated SSI under a protective order). Courts have also protected SSI and more sensitive forms of information related to anti-terrorist activities in the context of criminal proceedings. In U.S. v. Lindh, the court concluded that "a protective order prohibiting the public dissemination of the detainee interview reports will, in this case, serve to prevent members of international terrorist organizations, including al Qaeda, from learning, from publicly available sources, the status of, the methods used in, and the information obtained from the ongoing investigation of the detainees." 198 F. Supp. 2d 739, 742 (E.D. Va. 2002). Other courts have granted protective orders regarding unclassified, but sensitive material "vital to national security." See, e.g., United States v. Moussaoui, Criminal No. 01-455-A (E.D.Va. Feb. 5, 2002) (Order) (Brinkema, J.); United States v. Bin Laden, 58 F. Supp. 2d 113, 121 (S.D.N.Y. 1999).

D. The McHale Declaration Does Not Authorize TSA's Actions

Given the lack of any independent authority, TSA's claim of unprecedented executive power over civil discovery relies heavily not on any statute, court opinion, regulation, or rule, but on a declaration by a Deputy Administrator of TSA, Stephen J. McHale. The McHale Declaration, however, supports Chowdhury's position rather than the TSA's.[3]

At the outset, it is worth noting that the McHale Declaration itself does not create any basis for court deference. First, TSA uses the declaration to impose, in effect, a regulatory ban on SSI disclosure in civil litigation, but the declaration was not issued under any of the required notice-and-comment procedures. NRDC v. Abraham, 355 F.3d 179, 200 (2d Cir. 2004) (refusing to apply Chevron deference where agency action did not go through notice-and-comment procedures). Second, where an agency has only been granted authority to issue regulations on a particular issue, other administrative actions not constituting a regulation are not entitled to deference. Public Citizen, Inc. v. U.S. Dept. of Health and Human

[3] TSA submitted two McHale Declarations in Chowdhury. The second McHale Declaration, dated September 2, 2003, is identical to the first McHale Declaration, dated October 25, 2002, except that the September, 2003, McHale Declaration adds one additional paragraph that notes: "[s]ince September 11, 2001, no civil litigant who does not otherwise have an operational need to know SSI has been granted access to this sensitive information." Compare A-33-37 to A-26-32. Both declarations are comprised of language derived from McHale's September 2002 declaration submitted in the In Re September 11 litigation. See RA 110-119. Unless otherwise noted, references to the "McHale Declaration" refer to the September 2, 2003, declaration.

Services, 332 F.3d 654, 659-60 (D.C. Cir. 2003). Third, the declaration was issued in the context of litigation, which minimizes its persuasive power. NRDC, 355 F.2d at 201 (holding that an agency position adopted in the course of or in contemplation of litigation is not owed any deference).

The McHale Declaration underscores the lack of support for TSA's interpretation of 114(s). The Declaration is necessary only because, contrary to TSA's assertions, neither 114(s) nor its implementing regulations confer the authority to unilaterally withhold SSI from civil discovery. The Declaration also confirms that TSA did not contemplate 114(s) as addressing civil litigation until after September 11, 2001. The original McHale Declaration, dated September 2002, was expressly drafted to justify the government's refusal to provide evidence sought by families of September 11 victims suing the government in the In re September 11 litigation. See RA 110-20. TSA now attempts to transform its litigation position into a blanket ban on disclosure of SSI in civil litigation by submitting a McHale Declaration, comprised almost entirely of language from the In re September 11 litigation, in Chowdhury. See A-33-37. The McHale Declaration's self-serving conclusions regarding the appropriate role of SSI in civil litigation after September 11, 2001, cannot be read to expand the scope of authority granted by 114(s) or otherwise permit TSA to control discovery of SSI.

In addition, the McHale Declaration itself fails to muster facts to support the proposition that withholding SSI in civil discovery is necessary to further transportation safety. The Declaration purports to explain the potential dangers of allowing SSI to be disclosed in civil litigation, but only cites to the dangers of the information appearing in "open source materials from the media to the internet..." RA 93-94. The Declaration does not consider the fact that, as discussed above, civil discovery is not an open source or that courts can, and regularly do, create effective protections for sensitive information produced in discovery.

As is its reliance on 114(s) and its implementing regulations, TSA's reliance on the McHale Declaration to justify its attempt to appropriate traditionally judicial authority is misplaced.

II. TSA PROVIDES INSUFFICIENT SUPPORT FOR ITS SSI DECISIONS IN THIS INSTANCE

A. TSA's Disclosure Determinations are Judicially Reviewable

The final orders at issue here were promulgated by the TSA under the authority of 114(s), and thus these orders are expressly subject to judicial review pursuant to 49 U.S.C. § 46110(a). In fact, TSA has heretofore argued strenuously that this Court has the exclusive and expansive authority to review all aspects of the TSA's SSI decisions related to Chowdhury's district court litigation. See Second Statement of Interest of the United States of America in Opposition to Plaintiff's Motion to Compel, Chowdhury v. Northwest Airlines Corp., C 02-2665

CRB (N.D. Cal.), at 6 (A-871) ("If access to the information is his goal, Mr. Chowdhury must bring a direct challenge to TSA's SSI designation and withholding decision in the court of appeals, where he could appropriately argue that TSA's decision is unlawful").[4]

Despite the express provision for judicial review and TSA's prior official position, TSA now contends that its SSI disclosure decisions have been "committed to agency discretion by law" and are therefore unreviewable by this court. This argument is baseless.

This case is not one of those "rare instances" where a lack of a meaningful standard precludes judicial review. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971), abrogated on other grounds by Califano v. Sanders, 430 U.S. 99 (1977). In this case, 49 U.S.C. § 114(s)(1)(C) clearly limits the TSA's discretion in this area, and the statute's standard of "detrimental to the security of transportation" is meaningful and easily applied by this Court. This case is not dissimilar from Jifry v. F.A.A., 370 F.3d 1174 (D.C. Cir. 2004). In Jifry, the D.C. Circuit heard petitions for review from two alien pilots, who contested the FAA's revocation of their airman certificates. Id. at 1177.

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[4] See also Statement of Interest of the United States in Opposition to Plaintiff's Motion to Compel Sensitive Security Information, Chowdhury v. Northwest Airlines Corp., C 02-2665 CRB (N.D. Cal.), at 8 (A-859); Second Report of the Transportation Security Administration Regarding SSI-Related Discovery, In re September 11 Litigation, 21 MC 97 (AKH) (S.D.N.Y.), at 2-3 (RA 85-86) & 15 (RA 98).

Notwithstanding the connection to aviation security in the post-9/11 environment, the Court of Appeals did not simply defer to the FAA's determinations, but undertook a review of the revocations to see if "substantial evidence" existed for the FAA's determination that the men were a "security threat." Id. at 1181. The court had no difficulty using "security threat" as a manageable standard for judicial review. Id.; see also 49 C.F.R. § 1540.117(c) (defining "security threat" as including "[a] threat to transportation or national security"). This Court may use the similar statutory standard in the instant case to decide whether TSA's SSI determinations based on "detrimental to the security of transportation" are supported by substantial evidence and not arbitrary or capricious. See Penobscot Air Servs., Ltd. v. F.A.A., 164 F.3d 713, 717 (1st Cir. 1999) (giving standards of review).[5]

The inapposite cases cited by TSA do no more than demonstrate that this is not one of the "rare instances" in which agencies are given unbridled discretion. The first category of cases cited by the Government involves statutory schemes

[5] Likewise, the fact that the statute empowers the TSA to "decide[]" whether such a standard is met, see Gov. Br. 24 (quoting 49 U.S.C. § 114(s)(1)(C)), does not confer upon TSA unlimited and unreviewable discretion. Neither permissive language nor vesting of a decision in a government official commits a matter exclusively to an agency's discretion. See Dickson v. Secretary of Defense, 68 F.3d 1396, 1402 (D.C. Cir. 1995) (citing Chappell v. Wallace, 462 U.S. 296, 303 (1983)). Again, Jifry is instructive. The enabling statute at issue in Jifry contains similar "decides" language, yet the D.C. Circuit did not hesitate to review the agency's decision. Compare 49 U.S.C. § 44709(b)(1)(A) with 49 U.S.C. § 114(s)(1)(C).

that, unlike 114(s), explicitly evince congressional intent to place the agency's decision beyond judicial review. See Schneider v. Feinberg, 345 F.3d 135, 149 (2d Cir. 2003) (refusing review where statute "place[d] the resolution of claims beyond the reach of judicial review"); Steenholdt v. F.A.A., 314 F.3d 633, 638 (D.C. Cir. 2003) (refusing review where statute empowers agency to take action "at any time for any reason the Administrator deems appropriate").

The second category of cases cited by the Government involves situations where constitutional concerns relating to the Executive Branch's preeminence in national security and foreign affairs weighed heavily in courts' decisions. See Webster v. Doe, 486 U.S. 592, 600 (1988), rev'd in part on other grounds, 981 F.2d 1316 (1993) (deferring to the CIA where governing statute authorized agency to act "in the interests of the United States"); Department of the Navy v. Egan, 484 U.S. 518, 527 (1988) (granting deference in a similar situation and emphasizing that the agency's discretion "flows primarily from this constitutional investment of power in the President [as Commander in Chief] and exists quite apart from any explicit congressional grant"); People's Mojahedin Org. of Iran v. U.S. Dept. of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (finding "nonjusticiable" the political question of whether organizations threatened "the security of United States nationals or the national security of the United States"). TSA here does not and cannot contend that national security or separation of powers concerns dictate

unreviewability. This Court should not accept TSA's arguments, which amount to an unprecedented expansion of unreviewable Executive Branch decision-making ability, beyond these accepted and circumscribed limits.

B. TSA's SSI Determinations Find No Support in the Record

1. McHale Declaration Demonstrates TSA's Failure to Make A Safety Determination

TSA cites only one source of support for its "determination" that disclosure of the SSI at issue in this case would be detrimental to transportation safety—the September 2003 McHale Declaration (A-33-37). Opp. at 26-27. The TSA is correct that no other evidence in the record can even purport to support the TSA's decision to unilaterally withhold SSI from Chowdhury's attorneys in this matter. Indeed, none of the three final orders at issue in this case reflect *any* determination that disclosure of SSI would be detrimental to transportation safety, or even mention disclosure. The McHale Declaration, however, cannot make up for this lack of support in the record. Rather, the McHale Declaration supports Chowdhury's position that TSA's determinations in this case are arbitrary, capricious, and unsupported by the evidence.

The McHale Declaration provides no support for the TSA's nondisclosure decisions here for the simple reason that McHale did not consider the TSA's nondisclosure decisions here. Neither of the two McHale Declarations submitted in Chowdhury reference *any* of the materials designated SSI in this case, and both

are dated *prior* to the issuance of TSA's second and third final orders.[6] Moreover the thirteen paragraph McHale Declaration is comprised of language derived from McHale's September 2002 Declaration submitted in the In Re September 11 litigation. See RA 110-119. Indeed, the first twelve paragraphs of both are essentially identical except that the In Re September 11 declaration includes the sentence: "In these cases ("September 11 Tort Litigation") there is already a large number of attorneys representing passengers, ground victims, and businesses. Clearing all of them to receive SSI, along with their experts and litigation support personnel, would greatly increase the risk of unauthorized dissemination of SSI."

Clearly the determinations in the McHale Declaration cannot be deemed by fiat to hold true in the litigation at bar. At the outset, the vastly larger legal teams involved in the September 11 litigation (the electronic case filing docket indicates that over eighty attorneys alone have entered appearances in the case), and the fact that the parties there were not considering an attorneys'-eyes-only protective order, renders any analogy between the two cases useless. In addition, the nature of this case and the SSI at issue here is significantly different. The TSA cannot contend that McHale considered, for example, whether transportation safety would be compromised if a customer service agent's handwritten notes on Chowdhury's

[6] See 9/2/03 Decl. of Stephen J. McHale (A-33); 10/25/02 Decl. of Stephen J. McHale (A-26); 9/27/03 First Final Order (A-41); 1/7/04 Second Final Order (A-251); 2/24/04 Third Final Order (A-401).

reservation were revealed to counsel pursuant to a strict attorneys'-eyes-only protective order. See Br. at 50-51.

The McHale Declaration makes clear that the TSA in fact made *no* determination that disclosure of the SSI *at issue here* pursuant to an attorneys'-eyes-only protective order would be detrimental to transportation safety. The TSA's decisions here are thus contrary to the clear language of 114(s).

2. The Record Shows that TSA's SSI Determinations are Based on Bias

The record in this case demonstrates that the TSA's SSI determinations are based on irrational bias and stereotypes, by definition arbitrary and capricious, rather than on evidence of safety risks. TSA decisions are based, at least in part, on TSA's unsupported assessment that plaintiffs' attorneys are unworthy of trust.

First, while the TSA pretends that its blanket nondisclosure policy applies equally to all civil litigants, the TSA is well aware that, in practice, this policy prevents only plaintiffs from having access to relevant evidence, while permitting defendants to access *and submit as evidence* information deemed SSI.[7]

[7] See 10/25/02 Decl. of Stephen J. McHale at ¶ 13 (A-26) (only those with an "operational need to know SSI" have access to it); 49 C.F.R. §1520.11(a)(5) (SPA-23) (defining those representing a "covered person" in connection with a "judicial proceeding" as having a need to know SSI); Statement of Interest of the United States in Opposition to Motion to Compel Sensitive Security Information at 1-3 (A-852-54) (noting that defendant Northwest may produce unredacted materials to the Court for in camera review of the materials' contents "as it bears on the substantive issues in the litigation").

Second, TSA has never disputed that Carla Martin, Senior Attorney with TSA's Office of the Chief Counsel, has made unsupported statements that plaintiffs' attorneys are too "emotionally or otherwise involved" in the issue to be trusted with SSI. Br. at 21. This statement indicates that the SSI decisions made by Ms. Martin (and perhaps other TSA officials) are based not on an objective analysis of potential risk but on unsupported biases against particular viewpoints. This arbitrary and capricious rationale certainly infects the SSI designations at issue here as Ms. Martin is one of the key agency officials making the SSI designations in this case. See correspondence between Ms. Martin and counsel at (A-110);(A-168);(A-170);(A-221);(A-224);(A-236);(A-241);(A-243);(A-246);(A-249);(A-360);(A-362);(A-399);(A-613);(A-615).

3. TSA Provides No Evidence that Disclosure Pursuant to Protective Order Will Make Transportation Less Safe

Chowdhury contends that TSA has made no showing that protected disclosure to his attorneys of unclassified, outdated and broadly disseminated information would be detrimental to transportation safety. TSA does not and cannot dispute that the SSI at issue is in fact unclassified, often outdated, and routinely provided to tens or even hundreds of thousands of people who need not receive security clearances before receiving the information.[8] Instead, the TSA's

[8] TSA requires security clearance before disclosing SSI only in some instances. 49 C.F.R. § 1520.11(c) (SPA-23).

arguments rest on misstatements of the record and Chowdhury's arguments, and upon nonsensical assertions.

First, the TSA misstates the nature of the SSI at issue, implying that SSI is far more limited than it is. Contrary to TSA's repeated assertions, the SSI at issue here is not "principally information concerning name lists or 'watch lists'." Opp. at 11. As explained in Chowdhury's opening brief, the SSI at issue here includes a variety of data reflecting the often low-level status of SSI, including not only lengthy watch lists but also business addresses of airline employees, Northwest policies and Northwest's interrogatory responses. Br. at 19, 45. Further, the deposition of Northwest Customer Service Supervisor Keolani Stacey indicated that SSI concerns would also prevent Northwest employees from testifying to issues as critical as Northwest's policy for holding a plane while a passenger undergoes additional security screening and whether the list on which Chowdhury's phonetic match appeared was invalid, as the pilot of the flight indicated in an email. Br. at 52.

Second, the TSA asks the court to believe assertions that simply do not make sense. For example, TSA's contention that it would be unsafe to reveal to Chowdhury years' old watch lists is inexplicable in light of the government's practice of publicly posting *current* terrorist watch lists on the internet, distributing them to recipients of federal funds and *requiring* that such recipients review the

lists to ensure they employ no suspected terrorists.[9] While the government does not deny that specific SSI cited by Chowdhury is publicly available or is common sense, it has failed to provide SSI to the Court so that the Court can assess Chowdhury's assertion for itself. See Br. at 45 (listing SSI that Chowdhury believes to be public or common sense information). Chowdhury urges this Court to require TSA to submit the unredacted documents at issue as this is the only way the Court can determine whether TSA's SSI designations were proper.

Similarly, TSA's justifications for providing SSI to outside defense counsel in this case explain only why such disclosure is expedient, not why it is any less risky than disclosure to attorneys for Chowdhury. TSA's explanation makes clear that disclosure to outside counsel is not necessary; agency officials could perform each of the tasks performed by outside counsel in this case. More importantly, TSA does not dispute that outside defense counsel in this case is as or more likely to reveal SSI, whether inadvertently or otherwise. Chowdhury in no way intends to cast any aspersions on outside counsel to Northwest. It is nonetheless important to note that, despite Chowdhury's contention that outside counsel has never submitted to a background check or received any security clearance, TSA has proffered nothing to indicate that it has required any such measures of outside

[9] See, e.g., http://www.ustreas.gov/offices/enforcement/ofac/sdn/; Jacqueline L. Salmon, Nonprofits Scramble to Meet Terror Rules; Worker Screening Required for CFC Funds, Washington Post, August 14, 2004, at A4. (SA-38)

counsel. In contrast, a number of Chowdhury's attorneys previously submitted to background checks and have received security clearances as attorneys with the Department of Justice and have offered to submit to such clearances again if necessary to review the evidence in this case.[10] Further, TSA still has made no attempt to explain whether it even knows if the copying, filing, and mailing of the considerable amount of SSI documents in this case are actually being handled entirely by defense *attorneys* rather than by support staff. TSA's oft-repeated response that the regulations prohibit disclosure to support staff, Opp. at 27, merely begs the question. TSA's assessment that it is safe to provide SSI to outside counsel in this case but not to Chowdhury's counsel is simply unsupported by the evidence.

Finally, TSA's improper conflation of public disclosure with attorneys'-eyes-only disclosure in civil litigation, infects all of its SSI designation and disclosure determinations. The conclusory boilerplate "explanations" for TSA's SSI determinations contained in the three final orders are rendered even less compelling by the fact that nowhere in the final orders (or anywhere else) does the TSA indicate whether they determined that the information contained therein was determined to be detrimental to transportation safety if released publicly as

[10] U.S. District Court for the Northern District of California, Transcript of Hearing Before the Honorable Charles R. Breyer, September 5, 2003, at 16:24-25, 17:1-7. (SA-16-17).

opposed to being released pursuant to an attorneys'-eyes-only protective order. Indeed, as Chowdhury had not yet requested a protective order when TSA issued its first final order, it would appear that TSA was considering only public disclosure.

4. The District Court's Dicta Is Immaterial

TSA relies on a partial quote of dicta by the district court judge to support its assertion that the SSI at issue will not assist Chowdhury in proving his case. Opp. at 2. TSA's contention is both irrelevant and incorrect.

TSA's assertion is misleading in part because it quotes the district court out of context. The district court itself cautioned that its assertion was "based on [the court's] admittedly limited knowledge of the facts in this case." (A-1172-73) In addition, the district court has expressly held that withholding SSI could "materially affect the outcome of this litigation," as SSI objections have resulted in Northwest "with[holding] much of the information [Chowdhury] seeks in discovery making it more difficult for plaintiff to prove his case." (A-1175). Further, as discussed in Chowdhury's opening brief, the district court had only reviewed a fraction of the SSI that will ultimately be at issue in this case. Br. at 14-15. The district court judge has not yet, for example, reviewed the ample SSI at

issue in Keolani Stacey's deposition, and this is only the first of potentially dozens of depositions in this case.[11]

More importantly, whether the district court believes this information will be ultimately useful to Chowdhury is immaterial. TSA's position here is that 114(s) trumps the application of the Federal Rules of Civil Procedure, stripping the district court of its traditional authority to undertake a protective order analysis. While the importance of the disputed discovery to Chowdhury bears on the propriety of a protective order, it has no bearing on the matter at hand. TSA contends that Chowdhury cannot have this information regardless of its relevance or the limitations placed on its dissemination. Even if the SSI contained a direct admission by Northwest of illegal discrimination, and even if Chowdhury's attorneys signed a restrictive non-disclosure agreement, TSA would still bar

[11] Contrary to TSA's assertion, Opp. at 36, the deposition of Keolani Stacey is of central relevance to the issues before this Court. While it is true that SSI withheld during her deposition is not listed in any of TSA's final orders to date, the amount and type of SSI withheld during her deposition belies TSA's assertion that withholding SSI will not compromise Chowdhury's litigation of his discrimination claim. TSA's proposal that the parties submit written deposition questions and answers that TSA could review for SSI is unworkable. The normally productive dynamics of deposition would be destroyed by this approach. Further, there is every indication that TSA's broad SSI designations would continue in the deposition setting, depriving Chowdhury of information pertaining to Northwest policies central to this case and Northwest's actions the day of the alleged discrimination, just as he was deprived of this information in the Keolani Stacey deposition. Br. at 52.

disclosure, and would still insist that no court could question TSA's decision, even if it meant allowing a defendant to escape liability for its discrimination. Indeed, no party disputes that the SSI at issue here is relevant information to which Chowdhury would otherwise be entitled under the Federal Rules. Thus, while information designated SSI may be critical to proving his claims, as explained more fully in Chowdhury's opening brief, at this juncture Chowdhury need only demonstrate that SSI is relevant to his claims, which he has clearly done.

III. TSA'S SSI DETERMINATIONS VIOLATE CHOWDHURY'S DUE PROCESS RIGHTS

TSA essentially concedes that Chowdhury has a cognizable property interest, and offers facts demonstrating that additional process can help protect that interest. In addition, TSA does not dispute that, under its interpretation of 114(s), its SSI designations have the draconian impact of creating an absolute privilege that is unreviewable by any court. TSA nevertheless asserts that it need not afford even the pre-deprivation process that would be required pursuant to the assertion of a qualified, reviewable privilege in civil discovery. TSA's arguments do not square with the facts of this case or the law.

A. Chowdhury Has Property Interests that are Severely Harmed by TSA's SSI Decisions

As TSA concedes, Chowdhury "has an interest in obtaining information to litigate his discrimination claims." Opp. at 37. The Supreme Court and this Court

have long recognized that this constitutes a cognizable property interest, triggering the due process clause of the Fifth Amendment. See Br. at 44-51 (citing cases). TSA does not refute this proposition, nor does it offer a single case contrary to this well-established line of precedent. This property interest, and Chowdhury's intertwined interest in having access to information relevant to his claims, Br. at 46-47, are rendered meaningless if TSA is permitted to eviscerate the discovery process by unilaterally withholding SSI.

TSA's suggestion that Chowdhury has no cognizable interest because the information he seeks is not helpful to his claim against Northwest is not grounded in fact. As set forth in Chowdhury's opening brief (and undisputed by TSA), SSI designations have stymied discovery at every step of this litigation, and SSI includes information that may be critical to his claims. See Br. at 48-51. Indeed, the district court in the underlying litigation certified that TSA's SSI designations are harming Chowdhury's ability to litigate his case. (A-1175).

TSA's argument that civil litigants like Chowdhury do not have any interest in purported SSI because SSI is privileged from civil discovery is not grounded in logic. TSA's unilateral assertion of privilege merely begs the question. The issue here is not whether this discovery material is privileged; the issue here is whether Chowdhury has an interest in disputing its designation as privileged. See Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (holding that individuals challenging the

termination of welfare benefits have a property interest and cannot be denied benefits without due process, even if the individuals would eventually be deemed ineligible for benefits). TSA cannot be permitted to circumvent due process with its circular argument that a civil litigant has no interest in the process by which TSA determines whether information is privileged because, without such process, TSA has determined the information privileged.

B. TSA Did Not Provide Adequate Due Process Before Making the SSI Decisions at Issue Here

Chowdhury's opening brief clearly lays out how the balance of the Mathews v. Eldridge, 424 U.S. 319 (1976), factors requires TSA to provide additional process in order to satisfy the Fifth Amendment. See Br. at 51-61. TSA bolsters Chowdhury's argument that he did not receive the process he was due by clearly explaining that its decision to deprive Chowdhury of relevant discovery was based on the McHale Declaration. Opp. at 8-9. As discussed above, TSA's use of the McHale Declaration as a regulatory ban on disclosing SSI, circumventing the notice-and-comment procedures of the APA—indeed, circumventing any process whatsoever—is itself invalid. In admitting its reliance on the McHale Declaration to justify its withholding decisions here, TSA in effect concedes that it deprived Chowdhury of relevant discovery without any individualized consideration of the propriety of limited disclosure of the specific SSI at issue. This kind of arbitrary,

standardless and unreviewable government action is a quintessential violation of due process.

TSA contends that additional process would not be "meaningful." See Opp. at 38. Yet, the government does not refute the litany of indicators that TSA's decisionmaking was flawed and required additional process. See Br. at 54-59. More fundamentally, TSA concedes that additional process would be "meaningful" when it admits that TSA changed certain of its SSI designations in response to a letter from Chowdhury's attorneys. See Opp. at 38. Indeed, if the Court agrees with Chowdhury that TSA's SSI designations are properly considered reviewable assertions of a qualified privilege, such "process" might be adequate. In that case, the SSI designation would prohibit only public disclosure and courts could review SSI to assess the propriety of the designation as well as whether SSI may be disclosed in civil litigation pursuant to protective order, alleviating the need for pre-deprivation process. The correspondence between TSA and Chowdhury's counsel would be akin to the "meet and confer" process meant to permit parties to resolve discovery concerns without resorting to judicial intervention.[12]

[12] It is important to note, however, that Chowdhury and TSA only corresponded regarding the propriety of SSI designations in TSA's first final order. Chowdhury would thus have to be afforded the opportunity to confer with TSA regarding the propriety of TSA's second and third final orders as well.

In contrast, if the Court agrees with TSA that its SSI designations are equivalent to unreviewable, unqualified privileges, Chowdhury's property interests in his legal claims and access to relevant interest are eviscerated, and he has only extremely limited post-deprivation remedy. In that case, for the reasons discussed here and in Chowdhury's opening brief, Chowdhury is entitled to all the pre-deprivation due process necessary to ensure he is not unfairly deprived of relevant discovery that may be necessary to prove his case. While TSA's decision to remove SSI designations after conferring with Chowdhury's counsel demonstrates that such process is at least marginally "meaningful," it would not by itself, be adequate. See, e.g., Air Line Pilots Ass'n Int'l v. Dept. of Transp., 446 F.2d 236, 244 (5th Cir. 1971) (finding a due process violation because "post-hoc consideration . . . cannot possibly be a fair substitute for that initial look a decision-maker gives to a matter when he has all the material before him for the first time.").

C. TSA Cannot Circumvent the Requirements of Due Process with an Unsupported Assertion of National Security

TSA broadly invokes national security concerns to argue for limiting public disclosure of purported SSI, but does not explain why providing due process to persons affected by its orders implicates those national security concerns. Moreover, although TSA's interest in protecting Americans from future terrorist attacks is irrefutable, TSA does not offer a scintilla of evidence that providing

Chowdhury due process would endanger national security. The government may not broadly invoke the horrible attacks of September 11 to mask the absence of any actual national security interests in the case at hand. National security can be protected consistent with the Constitution.

CONCLUSION

For the foregoing reasons, the petitions for review should be granted.

Respectfully Submitted,

Christy E. Lopez
Counsel of Record
Reed Colfax
Jennifer Klar
RELMAN & ASSOCIATES
1225 19th Street, NW
Washington, DC 20036
(202) 728-1888

Alan L. Schlosser
Jonathan Lange
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
1663 Mission Street, Ste. 460
San Francisco, CA 94103
(415) 621-2493

Douglas E. Dexter
Jessica Nall
Chrysty Esperanza
FARELLA BRAUN & MARTEL LLP
Russ Building
235 Montgomery Street
San Francisco, CA 94104
(415) 954-4400

Attorneys for Petitioner
ARSHAD CHOWDHURY

Dated: October 20, 2004

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B) because the brief contains ٥,٩٩٩ words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in a 14-point font.

Christy E. Lopez
Attorney for Arshad Chowdhury

Dated October 20, 2004.

Certificate of Service

This is to certify that on October 20, 2004, a true and correct copy of the foregoing **PETITIONER ARSHAD CHOWDHURY'S CORRRECTED REPLY BRIEF,** was served by United States Mail, first class, on counsel of record for all parties to the action below in this matter, as follows:

Via Messenger

Jude Cisneros, Esq.
Kenny & Markowitz, LLP
255 California Street, Suite 1300
San Francisco, CA 94111
Attorneys for Northwest Airlines, Inc. and Northwest Airlines Corp.

Via U.S. Mail

Carolyn A. McKee Trial Attorney U.S. Department of Justice Civil Division, Federal Programs Br. 20 Massachusetts Ave., NW, Ste. 7324 Washington, DC 20530	Sarah S. Normand Beth E. Goldman U. S. Attorney's Office, SDNY 33 Whitehall St., 8th Floor New York, NY 10004
Carla J. Martin Senior Attorney, Office of Chief Counsel Transportation Security Administration Department of Homeland Security 701 South 12th St. West Bldg. Eighth Floor Arlington, VA 22202	Douglas N. Letter Terrorism Litigation Counsel U.S. Department of Justice Patrick Henry Building 601 D St., Washington, DC 20530

Attorneys for Interested Parties Transportation Security Administration, Department of Homeland Security, and United States of America

I declare under penalty of perjury that the foregoing is true and correct. I further declare that I am in the office of a member of the bar of this court at whose

direction this service was made. Executed on October 20, 2004, at San Francisco, California.

Pam Woodfin