No. 06-211

IN THE
Supreme Court of the United States

JOHN GILMORE,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case presents a profound constitutional question in a singularly important context. Every day in this country, millions of Americans travel by air. Every one of them is subject to a legal requirement to show identification or undergo more extensive screening. The *substance* of the legal rule imposing those requirements is not a secret because the Transportation Security Administration (TSA) has acknowledged it on its web site for all to see. See BIO 18. (Though, as we discuss *infra* at 4-6, the government continues to misstate the law to millions of travelers every day.) But the government inexplicably refuses to publish the text of the legal rule.

This is moreover the single most important context in which the question presented could arise. The number of individuals directly affected by the policy in question is incomparable. The record also establishes the grave dangers of the government's position: when the government aggrandizes the power to announce but not publish the law, it is free to *misstate* the law, for citizens are completely disabled from determining whether the government is shading the truth or making things up outright. That is what happened to petitioner, and what continues to happen on a daily basis to countless passengers in every airport in the country, where TSA maintains signs (falsely) telling travelers that they are required to show identification before they may travel. See BIO 5 (quoting the signs at the airport through which petitioner traveled, which remain in place).[1]

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[1] The government contends that petitioner's claim is fact-bound. BIO 11, 18. But petitioner's request to be provided the relevant section of the directive has been denied. He thus is in the same position as any other American. The government notes that a private airline employee orally advised him of the requirements of the directive. *Id.* at 18. That fact is irrelevant to petitioner's claim, which is that the government cannot

The brief in opposition is one part legal argument, and nine parts obfuscation. The legal argument only serves to emphasize the importance of the question presented: the stated position of the Executive Branch is that due process is satisfied so long as it *tells* you the law; trust it, for it is under no obligation to *show* you the law. BIO 12-13. That is not correct: due process requires publication of the law itself. The disagreement framed by the case over whether the legal rule must be published or may be conveyed less formally is clear; certiorari should be granted here to decide the issue.

The obfuscation by the government is an effort that cannot possibly succeed because the issue is so very simple: petitioner is not asking this Court to order the government to publish the "no fly list," the criteria for deeming a passenger a security threat, or indeed any piece of security information. Contra BIO 14-15. Rather, the question is whether the government can – without any plausible explanation – enforce against the general public a law, the text of which it insists must be kept secret.

Because the legal principle at stake is vitally important but has never been settled by this Court, and because the Executive Branch's position is contrary to basic principles of due process, certiorari should be granted.

* * *

As TSA's web site now acknowledges, the government enforces what it labels for the first time in this case the "identification or search" requirement. TSA (and its predecessor the Federal Aviation Administration) adopted that requirement in a directive to the airlines, and it has

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enforce a rule it refuses to publish. In any event, here too, petitioner is in no different position than millions of travelers who are advised orally by airline employees regarding federally-imposed security procedures.

resolutely kept the directive *itself* a secret while simultaneously disclosing its *contents*. (As the petition explains (at 21 n.8), petitioner challenges TSA's attempt to enforce the directive, the contents of which TSA has made public, without publishing the directive itself; if the directive contains "sensitive" information, TSA bears the burden of indicating what material should be redacted.) Petitioner's contention is that the government's insistence on enforcing a directive it refuses to disclose violates the Constitution.

1. The government is wrong in contending that oral notice of the law is sufficient.[2] Due process requires that the law itself be published, absent some extraordinary circumstance not present here. Oral notice of the law's contents is not a sufficient substitute. Petitioner's argument is firmly rooted in the historical traditions that embody the due process of the laws. See Pet. 10-17. For its entire existence, at all levels of government, the United States has published the laws, regulations, and opinions that govern the conduct of its citizens. Hundreds of years before the Constitution was drafted, England began publishing its laws, establishing the common law tradition that our forefathers embraced.

The centuries-old practice of publishing all laws of general application allows the government to fairly demand that the public comply with those laws. On a more fundamental

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[2] The cases on which the government relies (BIO 12-13) address the notice necessary to ensure that someone has a fair opportunity to be heard before losing a liberty or property interest. They say nothing about the notice that must be given before the government demands that citizens conform their conduct to its laws. In *Goss* v. *Lopez*, 419 U.S. 565, 581 (1975), the question was what notice is required before a school suspension, and in *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 546 (1985), what notice is required before termination of a public employee. Similarly, in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the Court was asked to decide what notice is due before a person is deprived of property.

level, publishing laws gives the public facts needed to engage in democracy. As the petition explains (at 10-15), the drafters of the Constitution viewed open government as a fundamental and necessary part of democracy. The checks, balances, and oversight built into the Constitution were established to permit the public to review the government's actions, debate what it chooses, and make changes where appropriate. The public cannot do this with incomplete and incorrect reporting of the law, which is why the government must *publish* the laws that bind the public.

The government in this case asks the public to trust it. It demands that it be permitted to keep secret the directive that regulates the conduct of hundreds of millions of people each year. It insists, essentially, that it is entitled to give the public inconsistent, even misleading, information about the directive, and demand compliance. But our system of government does not mandate that the public blindly trust the government.[3]

Permitting the government to enforce a secret law invites abuse and confusion in its application. It permits the government to misrepresent the contents of the law to suit its purposes (whatever they may be at the time) and to inappropriately hide provisions that it may not want known. It also deprives the public of the ability to monitor agency compliance regarding enforcement of the law (for example, to ensure that the law is not enforced in a discriminatory manner). The very problems with the secrecy challenged by Gilmore are highlighted by the government's own inconsistent statements about the directive. Airport personnel do not know the standards that they are expected to enforce. Pet. 5.

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[3] One of Gilmore's amici cogently identifies some of the dangers that may arise from secret law. *Amicus* Br. of Electronic Privacy Information Center, at 9-11.

This case perfectly illustrates the dangers to liberty and democracy of the government's position that it can keep the laws secret without justification. TSA continues to provide the traveling public with inaccurate and inconsistent information. As a consequence, members of the public who are concerned about terrorism are unable to evaluate even these public procedures to question whether they are effective. The government emphasizes that petitioner was told by one airline that, if he did not provide identification, he could travel if he went through additional screening. BIO 5. But the government ignores that the only statement of the law from the *government* – the TSA signs stating that identification was required – were inaccurate, and that other airline employees told petitioner, to the contrary, that he could not fly without showing identification.

2. The government responds that the TSA web site has been updated to state that passengers have the option of additional screening. BIO 18-19. This public statement by the TSA of the directive's contents is absolutely fatal to the government's contention that the formal embodiment of the rule must remain a secret. Moreover, the government ignores the extraordinary inconsistency in its own representations to the traveling public. The airport signs stating that identification must be provided remain unchanged, and inaccurate. Travelers confronting these signs that the government now admits are false have no ability to check the text of the law against actual practices at airports. Other statements on the TSA web site are similarly inaccurate. A page titled "The Screening Experience" "Access Requirements" advises air travelers unambiguously: "You must present a Boarding Pass and a Photo ID to get to the checkpoint and to your gate." TSA, *The Screening Experience, Access Requirements*, at http://www.tsa.gov/travelers/airtravel/assistant/editorial_1044.shtm (last visited Nov. 28, 2006), reprinted at Add., *infra*, 4a. As recently as

November 16, 2006 – as it was submitting its brief to this Court – the TSA issued a press release regarding holiday travel, advising prospective passengers: "You must have a boarding pass and valid government photo ID to enter the security checkpoint." *Airports, Airlines and TSA Join Together to Educate Travelers on How to Prepare for Holiday Travel*, at http://www.tsa.gov/press/releases/2006/press_release_11162006.shtm, reprinted at Add., *infra*, 3a.

3. The government's response to petitioner's showing of the historically-rooted due process right to publication of the laws is empty rhetoric. It asserts that "it is plain that disclosures of security procedures only aid those who would seek to circumvent them, thereby posing a risk to airline safety." BIO 17. This rote invocation of the mantra "the terrorists will win" illuminates the merit of petitioner's position that the Executive Branch cannot be permitted freely to judge for itself when to withhold publication of the laws. The "procedures" in question have *already* been disclosed, because they were disclosed *by the TSA* – as the opposition itself points out, they now are available on TSA's web site. BIO 18. What the government is keeping secret is not the security "procedures" but the proof that the government is in fact accurately describing the law and the means for the citizenry to evaluate the law and comment on or effectively challenge it.

More generally, the government has offered no authority permitting a law of general applicability to be withheld from the public, particularly when its contents are not secret. Instead, the government props up and then attacks a strawman by invoking authority for the proposition that law enforcement detection techniques may be kept secret. BIO 14-15. But Gilmore only challenges the government's insistence on enforcing a law it refuses to publish. Gilmore is not asking for disclosure of "how the government intends to detect violations." Contra BIO 15. The government

simply ignores the difference between laws that apply to the general public, and internal agency rules, regulations, and policies. Federal courts – which have easily drawn the distinction between the two – have made clear that the former must be made publicly available, while the latter need not. Pet. 19-20 n.6.[4] See also *Amicus* Br. of Reporter's Committee for Freedom of the Press, at 8-9 (explaining distinction between investigative techniques and laws of general applicability); *Amicus* Br. of Electronic Frontier Found. *et al.*, at 9-12 (same).

4. Of course, the glaring constitutional infirmity in the government's position can be easily avoided. The government is refusing to disclose the relevant portions of the directive in question on the ground that it is so-called "SSI" (Sensitive Security Information). The governing statute permits information to be deemed SSI only if secrecy is necessary to maintain the "security of transportation." 49 U.S.C. 114(s). The petition explained that the government's position is directly contrary to this statutory requirement: keeping the relevant *text* of the directive secret cannot plausibly be required to maintain security, given that the

[4] The government's cases, like the cases cited in the Petition, recognize that if rules governing the behavior of the public are not disclosed, they constitute impermissible "secret law." *Caplan* v. *Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 554 (2d Cir. 1978) ("[a]n administrative manual which sets forth or clarifies an agency's substantive or procedural law should be made available since there is a legitimate public interest in having those affected guide their conduct in conformance with the agency's understanding"); *Hardy* v. *Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 657 (9th Cir. 1980) (recognizing distinction between "law enforcement" materials, which need not be disclosed, and "administrative" materials, involving "the definition of the violation and the procedures required to prosecute the offense," which must be disclosed); *Hawkes* v. *IRS*, 467 F.2d 787, 795 (6th Cir. 1972) ("[i]nformation which merely enables an individual to conform his actions to an agency's understanding of the law applied by that agency does not impede law enforcement").

substance of the document is already public. Pet. 18-20. It is telling that the government does not attempt to answer this straightforward point in any way. TSA should not be permitted to flout Congress's directives so freely on a matter that directly affects millions of Americans and that violates a basic tenet of American law.

Separately, the government offers little opposition to Gilmore's claim that 49 U.S.C. 114(s) does not permit this generally-applicable law to be classified as "sensitive security information" and enforced without being publicly disclosed. Pet. 18-21; BIO 17. It apparently has located one dictionary, published nearly two decades ago, that defines "information" as "[a]n item of training; an instruction," and it implicitly argues that the law at issue here falls within that definition. BIO 17. But as discussed above, this is not simply an instruction to a government employee, such as a training manual. This is a law, which mandates compliance by the public and deprives them of their ability to travel by air if they refuse. It is fundamentally different.[5]

The government claims this Court lacks the power to decide the question of the categorization of the directive in this case because petitioner did not challenge below the statutory categorization of the directive as SSI. BIO 16. This claim is not determinative. The court of appeals expressly held that the directive was SSI after reading its text

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[5] The legislation recently adopted relating to SSI, cited by the government in a final footnote, does nothing to diminish the importance of the issue presented in this case. BIO 19 n.11. SSI that is "incorporated in a current transportation security directive," or is categorized as "security inspection or investigative information," "threat information," "security measures," or "security screening information" – the information Gilmore seeks here – is exempt from disclosure under Section 525(a)(2) of the Act. Thus, the essential question remains whether the government can characterize a generally-applicable law as "sensitive security information."

in camera. Pet. App. 13a n.8 ("*We also determine* that the Security Directive constitutes SSI pursuant to 49 C.F.R. § 1520.5(b)(2)(i), and therefore it did not have to be disclosed to Gilmore." (emphasis added)). The proper characterization of the directive is thus before this Court because it was "passed on" below and is logically antecedent to the constitutional question presented. See Pet. 18 n.5.[6]

Petitioner's inability to challenge the categorization of the directive as SSI in the district court is completely understandable. *The directive was, after all, a secret; petitioner had no way of knowing its contents or even conclusively of its existence*. As the government concedes, in the district court the government "did not publicly confirm the existence or content of the alleged security directives." BIO 10. The order dismissing this case below states: "[T]he federal defendants refuse to concede whether a written order or directive requiring identification exists, or if it does, who issued it or what it says." Pet. App. 33a. It was not until 2004 that the government publicly confirmed that "TSA requires airlines to ask passengers for identification at check-in." BIO 10. In its brief to the Ninth Circuit, the government hinted at the existence of the directive, and it finally conceded at oral argument that "the center of this case is a Security Directive." Pet. App. 10a n.6.

Because the government had withheld confirmation even of the existence of the directive from petitioner up to and including the time he filed his opening brief in the court of appeals, he could not reasonably have been expected to mount a challenge at that time. When he filed his reply brief, however, he did make this challenge, arguing that "Defendants try to collapse an entire system of secret law,

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[6] Nor have Gilmore's other claims been abandoned. BIO 11 n.6. Rather, Gilmore's claims that are dependent on the content of the directive will be addressed on remand.

regulations, and security directives into the phrase 'identification-or-search requirement" and innocuously term it a 'law-enforcement-detection technique.'" Reply Brief ("RB") 2. That brief explicitly challenges the government's characterization of this law as "information," argues that such a characterization "violates both due process and common sense," and claims that "the Under Secretary has plainly exceeded the scope of his authority" by treating a generally-applicable law as SSI. *Id*. at 24-25. Gilmore more than adequately raised this issue below at the earliest available opportunity.[7]

CONCLUSION

For these reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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[7] The government vaguely asserts that, given the arguments petitioner made below, he "may not now contend that the agency's decision to prohibit disclosure was improperly made." BIO 16. That claim goes only to the question of whether this Court may decide the antecedent issue of whether the directive is appropriately categorized as SSI; for the reasons discussed above, the issue is presented here. There is *no* dispute that petitioner's constitutional challenge is properly presented here, and the government does not contend otherwise. Gilmore repeatedly argued below that the government's refusal to publish the law requiring identification to board an aircraft violated due process. *E.g*., Opening Brief ("OB") 34 ("nonpublication of a law that affects a multitude of the protected rights of every citizen clearly violated due process"); *id*. 36 ("[s]ecret law is an abomination" and violates due process); *id*. 38 (secret law increases likelihood of error and abuse); RB 1 (one of the two issues in the case is whether laws requiring identification to travel domestically can be kept secret). Indeed, many of Gilmore's other arguments were predicated on the inappropriate secrecy of the directive. Gilmore's argument that the directive was void for vagueness, for example, was premised on the fact that its contents were hidden. OB 40. Similarly, Gilmore challenged the government's insistence that Gilmore litigate his constitutional claims without access to the directive. *Id*. 35-36.

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ADDENDUM

Airports, Airlines and TSA Join Together to Educate Travelers on How to Prepare for Holiday Travel

Knowing 3-1-1 Ensures Secure Efficient Screening

(available at http://www.tsa.gov/press/releases/2006/press_release_11162006.shtm)

WASHINGTON, Nov. 16 /PRNewswire/ -- The Air Transport Association (ATA), Airports Council International - North America (ACI-NA) and the Transportation Security Administration (TSA) are informing the traveling public how they can prepare for security screening during the busy holiday travel season.

Passengers can greatly affect their experience at the airport by preparing in advance. This includes: Packing liquids, gels and aerosols in checked baggage whenever possible, using 3-1-1 for carry-ons, arriving early and ensuring they are not traveling with prohibited items.

For individuals who must carry liquids, gels and aerosols through the security checkpoint, it's as easy as 3-1-1.

• All liquids, gels and aerosols must be placed in a 3 ounce or smaller container.

• These containers must be placed in a 1 quart, clear, plastic, zip-top bag.

• 1 bag per passenger placed in a plastic bin for screening.

The limitation on liquids reflects changes made after the foiled terror plot involving the possible use of liquid explosives in London on August 10, 2006. In response, TSA immediately banned all liquids at security checkpoints. The

ban was modified on September 25 after extensive testing showed that small amounts of liquids, gels and aerosols did not pose a significant threat.

TSA Administrator Kip Hawley said, "By knowing the rules and remembering 3-1-1, travelers can make a big difference in TSA's ability to efficiently and effectively screen all passengers and their baggage. Each time a physical inspection of a carry-on bag is required, it not only slows the individual traveler down but the entire security line."

The 12-day Thanksgiving holiday period is traditionally the busiest of the year and ATA predicts 25 million passengers will take to the skies Friday, November 17 through Tuesday, November 28.

"Airports will be packed for periods of time over this Thanksgiving season and the best advice is to be prepared," ATA President and CEO James C. May. "The airlines have no greater priority than the safe and convenient travel of our customers and we will work with TSA and ACI-NA to ensure this happens."

Through posters at ticket counters, banners at airports, advertisements on parking shuttles, road signs, extra customer service staff, travel tips on each organization's web site and many other ways, the airlines, airports and TSA are educating travelers before they reach the security checkpoint.

Through the combined efforts of airport and airline staff and the TSA, we're making an unprecedented effort to ensure that passengers have the information they need to get through security checkpoints efficiently this holiday season," said ACI-NA President Greg Principato.

Below are other tips travelers should know before they leave home this holiday season. A full list of tips and prohibited

items is available at http://www.tsa.gov.

Do not wrap gifts. If a security officer needs to inspect a package they may have to unwrap your gift. Please wrap gifts after arriving at your destination.

Pack smart. Bringing prohibited items to the airport will delay the screening process for you and other passengers. If you're not sure which items are allowed, check TSA's Web site for a complete list.

Arrive on time. Arrival time recommendations vary by airline and day of travel, so check with your carrier. You must have a boarding pass and valid government photo ID to enter the security checkpoint. Remember to give yourself adequate time to check your baggage and move through security.

Dress the part. Metal in your clothing may set off the walk-through metal detector. Pack coins, keys, jewelry, belt buckles and other metal items in your carry-on bag. Remember that all shoes must be removed and screened by TSA. Passengers also need to remove blazers, suit coats and bulky sweaters in addition to outer garments.

Film. Undeveloped film should go in your carry-on bag. Hand film that is faster than 800-speed to a security officer for physical inspection to avoid being X-rayed.

Think. Belligerent behavior, inappropriate jokes and threats will not be tolerated. Such incidents will result in delays and possibly missing your flight. Local law enforcement may be called as necessary.

Contact: TSA Public Affairs (571)-227-2829

SOURCE Transportation Security Administration

Transportation Security Administration

The Screening Experience

(available at http://www.tsa.gov/travelers/airtravel/assistant/editorial_1044.shtm)

Access Requirements

You must present a Boarding Pass and a Photo ID to get to the checkpoint and to your gate. There are four ways to obtain a boarding pass:

• Go to your airline's ticket counter at the airport

• Use curbside check-in

• Use your airline's self-service ticket kiosk in the airport lobby

• Print the boarding pass from your airline's Web site

Note: If you need to access the checkpoint for parental, medical business or similar needs you should check with your respective airline for required documentation.

Due to increased security measures, we have some helpful tips for travelers on when to arrive at the airports.