No. 06-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Transportation Security Agency (TSA) uses a directive that it claims requires airline passengers, as a prerequisite to boarding a flight, to show identification or undergo further security screening. This directive affects millions of airline passengers each year. The government acknowledges not only the directive's existence, but also its purported contents. TSA nonetheless refuses to actually disclose the directive.

The Question Presented is:

May the government keep secret a directive that is generally applicable to millions of passengers every day notwithstanding that it (i) has acknowledged both the directive's existence and its contents, and moreover (ii) has identified no special circumstance that nonetheless justifies secrecy.

RULE 14.1(B) STATEMENT

Petitioner, who was Plaintiff below, is John Gilmore.

Respondents, who were Defendants below, are Alberto R. Gonzales, in his official capacity as Attorney General of the United States; Robert Mueller, in his official capacity as Director of the Federal Bureau of Investigation; Marion C. Blakely, in her official capacity as Administrator of the Federal Aviation Administration; Kip Hawley, in his official capacity as Director of the Transportation Security Administration; Michael Chertoff, in his official capacity as Secretary of the Office of Homeland Security; and Southwest Airlines. In addition, Maria Cino, in her official capacity as Secretary of Transportation, is Respondent herein, having replaced Norman Mineta, former Secretary of Transportation, who was Defendant below, pursuant to Fed. R. Civ. P. 25(d)(1).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Gilmore respectfully seeks a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in *Gilmore* v. *Gonzales, et al.*, No. 04-15736.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 435 F.3d 1125. Pet. App. 1a-26a. The relevant order of the district court, Pet. App. 27a-41a, is unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its decision on January 26, 2006. Pet. App. 2a. A timely petition for rehearing was denied on April 5, 2006. Pet. App. 42a. Justice Kennedy extended the time for filing a petition for a writ of certiorari until August 4, 2006. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

The relevant statutes and regulatory provisions – 49 U.S.C. 114(s), 40119, 44902 and 49 C.F.R. 1520.5, 1542.303 – are reproduced at Pet. App. 43a-54a.

STATEMENT OF THE CASE

Petitioner, attempting to board a domestic flight, was advised that he was required to show identification. This rule is applied hundreds of millions of times every year. The government has acknowledged that this requirement is imposed by a directive,

and has further acknowledged what it claims are the directive's contents. But it nonetheless insists on keeping the directive secret. Petitioner brought this suit, alleging that it is unlawful to impose a legal requirement on an individual and acknowledge the source and content of the requirement, but simultaneously withhold the basis for that legal duty. The lower courts rejected that claim.

1. Various statutory provisions govern airport security screening. The Under Secretary of Transportation is directed to "provide for the screening of all passengers and property." 49 U.S.C. 44901(a). In addition, the Under Secretary must direct airlines to "refuse to transport * * * a passenger who does not consent to a search * * * establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive or other destructive substance." *Id.* § 44902(a).[1] Neither of these statutes mentions passenger identification.

Other provisions of federal law govern the question of whether legal requirements – such as those governing security screening – must be made public. Congress has generally forbidden the use of secret law. For example, the Federal Register Act – which dates to 1935 – requires the disclosure of all "Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof." 44 U.S.C. 1505(a). Under the statute, "every document or order which prescribes a penalty has general applicability and legal effect." *Ibid.* Section 1507 further provides that "[a] document required by section 1505(a) of this title to be published in the

[1] The Under Secretary was originally the head of the TSA. Congress later transferred the responsibilities of the Under Secretary and the TSA from the Department of Transportation to the Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. 203(2)).

Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of the Federal Register and a copy made available for public inspection as provided by section 1503 of this title." An implementing regulation explains that a rule of general applicability is "any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public * * *." 1 C.F.R. 1.1. The Freedom of Information Act (FOIA) similarly requires publication of "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. 552(a)(1)(D).

There are narrowly tailored exceptions to the requirement of disclosure. 49 U.S.C. 114(s) provides that notwithstanding FOIA, TSA is authorized, upon making particular findings, to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act * * * or under chapter 449 of this title * * *." 49 U.S.C. 114(s). These findings include a required administrative determination that disclosure is inappropriate for specified reasons, principally because it would "be detrimental to the security of transportation." *Ibid.* See also *id.* § 40119(b)(1) (parallel provision governing Department of Homeland Security, Secretary of Transportation, similarly authorizing nondisclosure upon such a finding of "information obtained or developed in ensuring [transportation] security").

TSA's implementing regulations address "sensitive security information" (SSI) that the agency will refuse to disclose pursuant to the just-cited statutory provisions. The regulations define SSI to include, for example, all "[t]hreat information,"

"[s]ecurity measures," and "[s]ecurity screening information." 49 C.F.R. 1520.5(b)(7)-(9). But the regulations go further to define as SSI "[a]ny Security Directive or order" issued under relevant regulatory provisions, together with "[a]ny comments, instructions, and implementing guidance pertaining thereto." *Id*. § 1520.5(b)(2). A "Security Directive" is the document setting forth "mandatory measures" that airports and TSA personnel must follow in conducting airport screening. *Id.* § 1542.303(a). Every "Security Directive or Information Circular, and information contained in either document," is forbidden to be disclosed "to persons other than those who have an operational need to know." *Id.* § 1542.303(f)(2).

2. This case involves the TSA requirement that all passengers show identification before they are permitted to board a domestic commercial airline flight in the United States. The government categorically refuses to make public the document that imposes this legal obligation on commercial airline passengers.

The "secrecy" surrounding this directive is quite unusual in two respects. First, although the *document* itself is withheld from public disclosure, *its requirements* are disclosed every day to millions of people, who are advised that they must show identification.[2] Thus, the government's "secrecy" does not involve keeping sensitive information non-public. What is at stake is instead the government's refusal to prove that what it claims is the law is, in fact, required.

Second, and relatedly, it appears that the directive or implementing guidance purposefully or inadvertently causes transportation security officials to mislead the public.

[2] This is true with the caveat that (as discussed in the next paragraph) the public is misinformed that it must provide identification, when passengers actually have the alternative option of undergoing additional security screening. But this alternative option is not a secret; the government acknowledged it in the course of this litigation. See *infra* at p. 8.

Passengers are consistently advised that federal law requires them to show identification. That representation is false, however. There is another option. Passengers in reality can generally travel even without showing proper identification so long as they undergo a more extensive security screening. The government's "secrecy" here in refusing to disclose the actual directive thus has the effect of misinforming the public of what the law actually requires.

3. Petitioner John Gilmore was one of the founding employees of Sun Microsystems. On Independence Day 2002 he twice attempted to board flights to the nation's capital, once from San Francisco and once from Oakland, California. Pet. App. 5a-6a. The purpose of the trip was to "petition the government for redress of grievances – specifically, the requirement for airline travelers to provide identification." C.A. E.R. 5 (Complaint).

At both airports, petitioner observed standard security signage, which states the following: "Notice From the Federal Aviation Administration: PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN." C.A. E.R. 6 (Complaint); Pet. App. 6a. Consistent with that requirement, petitioner repeatedly was directed to show identification. In response to his inquiries, he was sometimes advised that he must show official identification to fly, and other times advised that he could still travel if he underwent further screening. His requests to see the document imposing the identification requirement were denied. Gilmore was refused the right to travel on one airline, despite having been physically searched, because he did not show his identification. He would not consent to the more invasive search demanded by the other airline in lieu of showing his identification, and was refused the right to travel there as well. Gilmore has not flown domestically since.

Two weeks after these events, petitioner brought this suit. Petitioner's complaint alleged, *inter alia*, that the government could not lawfully withhold the directive requiring passengers to present identification. The district court held that it lacked jurisdiction over the principal elements of petitioner's suit, which it concluded was a challenge to TSA and FAA regulations that must be filed in the court of appeals. Pet. App. 32a, 33a-34a (citing 49 U.S.C. 46110). Because the government would not disclose the directive even to the district judge, the court recognized that it was "unable to conduct any meaningful inquiry as to the merits" of petitioner's claim that the regulatory scheme is void for vagueness. *Id.* 34a. The district court recognized petitioner's contention that the directive implicates his right to travel and his First Amendment right to association, but held that those rights were not sufficiently impinged to be violated. *Id.* 38a-40a.

4. Petitioner sought review in the Ninth Circuit. In that court, the government sought leave to file the directive under seal for *in camera* review. Counsel for the government suggested their own apparent regret for their inability to provide the court or petitioner with the directive itself. See Mot. to File Materials and Opposing Brief Under Seal, for *In Camera* and *Ex Parte* Review, at 1-2, 7-8. The categorical prohibition on disclosing SSI, they advised the court of appeals, made any other course impossible. See *id.* at 2, 4.

The court of appeals denied that motion but later requested, over the objections of petitioner and the media amici, that the government file under seal relevant material pertaining to the identification requirement. Order, *Gilmore* v. *Gonzales*, No. 04-15736 (Dec. 8, 2005). On the basis of that material, the Ninth Circuit agreed that jurisdiction in the first instance was appropriately before it. It specifically concluded that the directive was an administrative order, which by statute may be challenged only through a petition for review in the court of appeals. Pet. App. 12a-13a & n.8 (citing 49 U.S.C. 46110).

The Ninth Circuit further concluded that it should reach the merits of petitioner's claims because it was appropriate to transfer the case from the district court to the court of appeals. Pet. App. 13a-14a (citing 28 U.S.C. 1631). On the basis of its "determin[ation] that the Security Directive constitutes SSI," the court of appeals also concluded that the directive does "not have to be disclosed to [petitioner]." Pet. App. 13a n.8.

With respect to the contents of the directive, the government acknowledged that, despite its previous claims that complete secrecy was required, it had publicly acknowledged the directive's existence, and some of its substance. Brief of United States, *Gilmore* v. *Ashcroft*, No. 04-15736 (9th Cir. filed Sept. 30, 2004), available at 2004 WL 2448094, at *14-*15 ("U.S. C.A. Br."). A Federal Register entry thus states:

> TSA may publicly release some SSI to help achieve compliance with security requirements. For instance, as part of its security rules, TSA requires airlines to ask passengers for identification at check-in. Although this requirement is part of a security procedure that is SSI, TSA has released this information to the public in order to facilitate the secure and efficient processing of passengers when they arrive at an airport. In this type of situation, TSA must determine whether releasing certain portions of security procedures will improve transportation security to a greater extent than maintaining the confidentiality of the procedure.

Protection of Sensitive Security Information, 69 Fed. Reg. 28066, 28070-71 (May 18, 2004).

The government went further than the Federal Register entry, however, and acknowledged that the directive provides an alternative to providing identification: "Millions of people

board airplanes every year and routinely show identification before boarding. * * * In the alternative, a passenger can submit to a more extensive search rather than show identification." U.S. C.A. Br., 2004 WL 2448094, at *15. See also *id.* at *16 ("the only reason [petitioner] was not permitted to [board] was that he refused to either show identification or submit to a search").[3] The court of appeals, having reviewed the directive, similarly described "the Government's civilian airline passenger identification policy" as "requir[ing] airline passengers to present identification to airline personnel before boarding or be subjected to a search that is more exacting than the routine search that passengers who present identification encounter." Pet. App. 3a. See also *id.* 12a (directive "require[es] airline passengers to present identification or be a 'selectee'").

The court of appeals recognized that "Gilmore's claims * * * implicate the rights of millions of travelers" (Pet. App. 14a), but rejected his contention that the directive violates due process. First, the court of appeals reasoned, the directive is not impermissibly vague because it is not "penal in nature," in that it "does not impose any criminal sanctions, or threats of prosecution, on those who do not comply. Rather, it simply prevents them from boarding commercial flights." Pet. App. 17a. Second, petitioner "had actual notice of the identification policy." *Ibid.* The court of appeals – apparently disclosing the *actual* requirements of the directive – found it decisive that airline personnel "told him that in order to board the aircraft, he must either present identification or be subject to a 'selectee' search." *Ibid.* The court further concluded that "because all passengers must comply with the identification policy" it had

[3] The government erred in making this assertion. A Southwest employee at the boarding gate turned Gilmore away, and gave his seat to another passenger – without offering Gilmore a search alternative – because Gilmore did not present his identification to that employee, contrary to the TSA's secret directive. C.A. E.R. 5 (Complaint).

publicly described, "the policy does not raise concerns of arbitrary application." *Id.* 18a. Like the district court, the court of appeals acknowledged that the directive affects petitioner's ability to exercise his right to travel and his right to assemble and petition the government, but held that neither was sufficiently implicated to be deemed violated. *Id.* 18a-21a, 24a-26a.

5. After the court of appeals denied rehearing en banc, this petition followed.

REASONS FOR GRANTING THE WRIT

This case presents a profound question of federal law in a context that directly affects millions of individuals every day. The government has promulgated a directive that requires individuals to provide identification or undergo additional security screening before boarding a domestic airline flight. The government moreover acknowledged to the Ninth Circuit the directive's existence and its contents (although it still mischaracterizes the contents of that directive to the public). But it nonetheless refuses to actually release the directive, despite failing to offer *any* justification for its secrecy. The government's position, and the court of appeals' decision sustaining it, is contrary to basic due process principles. Under our system of laws, it is not sufficient for the Executive, charged under the Constitution with administering the laws, simply to *assure* the public as to what the law requires. That inevitably results in arbitrary enforcement of the law. There instead is a basic due process right to actually *see* the law. Stripped of that right, individuals are seriously disadvantaged in their ability to protect their rights in a court of law, debate existing policy and petition the government for change.

This is moreover the ideal case in which to take up the question whether the government may, without special justification, promulgate "secret law." The facts perfectly

illustrate the dangers that such secrecy creates, for the government continues to misrepresent the law to millions of passengers every day. The standard security signage, which petitioner encountered, falsely states that passengers "MUST PRESENT IDENTIFICATION." Pet. App. 6a. As recently as March 2006, TSA's web-site advised would-be travelers:

> If you have a paper ticket for a domestic flight, passengers age 18 and over must present one form of photo identification issued by a local state or federal government agency (e.g.: passport/drivers license/military ID), or two forms of non-photo identification, one of which must have been issued by a state or federal agency (e.g.: U.S. social security card). * * *
>
> For e-tickets, you will need to show your photo identification and e-ticket receipt to receive your boarding pass.

Pet for Rhg. Addendum, at 1. The directive moreover directly implicates airline passengers' constitutional rights to travel and assemble. The need for openness, rather than secrecy, is accordingly at the apex in this case.

Certiorari should be granted, and the judgment reversed.

A. The Government's Insistence on Deeming the Directive a "Secret" – Notwithstanding That It Acknowledges the Directive's Existence and Its Contents – Violates Due Process.

1. "[A] government of laws, and not of men," the great Chief Justice wrote, is the "very essence of civil liberty." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). But we are only a government of laws if the citizenry is genuinely informed about the law's requirements. Liberty cannot thrive if the laws

that can strangle it can freely be hidden from public view, debate, and challenge. Our "democratic decision-making institutions" cannot function if the citizenry is deprived of the information it needs in order to evaluate governmental policies. BREYER, ACTIVE LIBERTY 39 (2005).

That principle is embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments. The predicate to the many decisions of this Court and others prohibiting the enforcement of vague laws is the fundamental principle that the public is entitled to know the terms of the laws being enforced against it. "Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'" *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939)). As this Court has explained, "the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." *City of Chicago* v. *Morales*, 527 U.S. 41, 58 (1999). Indeed, the enforcement of laws which do not adequately convey their terms "would be like sanctioning the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.'" *Screws* v. *United States*, 325 U.S. 91, 96 (1945) (citation omitted).

"Secrecy in government is fundamentally anti-democratic * * * ." *New York Times Co.* v. *United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring). Secret law not only transgresses basic norms of fairness, but also is flatly inconsistent with the very form of government established by the Constitution. "The general availability of government information is the fundamental basis upon which popular sovereignty and the consent of the governed rest." Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 7 (1957). Governmental openness is key to the preservation of

democratic government because "[w]ithout publicity, all other checks [on government] are insufficient * * *." 1 Bentham, *Rationale of Judicial Evidence* 524 (1827), quoted in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 596 (1980). Openness and publicity "appear[ed] to [Bentham] the strongest shield against temptations, the strongest incentive for maintaining responsibility." Kraus, *Democratic Community and Publicity*, in II NOMOS, COMMUNITY 248 (Friedrich ed. 1959) (citing Bentham, *Essay on Political Tactics in Political Assemblies*).

Ultimately, secrecy stands in the way of what the Founders considered to be the most important check on governmental power: a knowledgeable citizenry. An "informed public opinion is the most potent of all restraints upon misgovernment." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936). Perhaps "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of democratic government." *New York Times Co.*, 403 U.S. at 728 (Stewart, J., concurring). In a system in which "information is kept secret, public deliberation cannot occur [and] the risks of self-interested representation and factional tyranny increase dramatically." Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 894 (1986). See also Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 398 (1984) ("[p]ublic laws * * * restrain official arbitrariness that otherwise might interfere with individual decisionmaking"). "An unlimited power to withhold information could be used in a way that would destroy government by consent, the separation of powers, checks and balances, and the creative and disciplinary role of free inquiry." Parks, *Open Government Principle*, at 10. See also *Cox* v. *U.S. Dep't of Justice*, 576 F.2d 1302, 1309 (8th Cir. 1978) ("[f]ar

from impeding the goals of law enforcement, in fact, the disclosure of information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law"). Secret law thus is contrary to the very underpinning of our constitutional form of government.

As Jeremy Bentham recognized, secrecy undermines the very purpose of a society's laws: "That a law may be obeyed, it is necessary that it should be known." Bentham, *Of Promulgation of the Laws*, in 1 WORKS OF JEREMY BENTHAM 157 (Bowring ed. 1843). Bentham "considered that every practicable means should be adopted for bringing before the eyes of the citizen the laws he is called on to obey." Burton, *Introduction to the Study of the Works of Jeremy Bentham*, in 1 WORKS OF JEREMY BENTHAM 58. "If your laws of procedure favour the impunity of crimes; if they afford means of eluding justice, of evading taxes, of cheating creditors, it is well that they remain unknown. But what other system of legislation besides this will gain by being unknown?" Bentham, *Of Promulgation of the Laws*, in 1 WORKS OF JEREMY BENTHAM 158. We expect all citizens to conform their behavior to the law's dictates, but "there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him * * *." FULLER, THE MORALITY OF LAW 39 (1964). "The internal morality of the law demands that there be rules [and] that they be made known * * *." *Id.* at 157.[4]

[4] An analogy is also fairly drawn to the First Amendment principle of open court proceedings. "The principle that justice cannot survive behind walls of silence has long been reflected in the Anglo-American distrust for secret trials." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 573 n.9 (1980) (citation omitted). As one early American source observed, "justice may not be done in a corner nor in any covert manner." *1677 Concessions and Agreements of West New Jersey*, in SOURCES OF OUR LIBERTIES 188 (R. Perry ed. 1959).

2. The nation's history compels the same conclusion. "The safeguards of 'due process of law' * * * summarize the history of freedom of English-speaking peoples running back to the *Magna Carta* and reflected in the constitutional development of our people." *Malinski* v. *New York*, 324 U.S. 401, 413-414 (1945) (Frankfurter, J., concurring). Thus, a governmental practice that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," violates due process. *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934). See also *Hurtado* v. *California*, 110 U.S. 516, 535 (1884) (due process identified with "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions").

Open and published laws are a basic building block of our constitutional form of government, "rooted in the traditions and conscience of our people." *Snyder*, 291 U.S. at 105. Thus, it is no surprise that the Founders viewed openness as an absolute requirement of the system of government they sought to establish. As James Madison recognized, echoing Bentham, "the right of freely examining public characters and measures, and of free communication thereon, is *the only effective guardian of every other right*." 6 WRITINGS OF JAMES MADISON 398 (1906) (emphasis added). Accord FULLER, MORALITY OF LAW, at 149 ("from the first," our Founders "assumed as a matter of course that laws ought to be published"); Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 139-140 (2006) ("open government is among the basic principles on which this nation was founded"); Relyea, *The Coming of Secret Law*, 5 GOV'T INFO Q. 97, 97 (1988) ("[p]ublication of the law * * * constitutes a foundation stone of the self-government edifice").

To ensure that the laws were published and available to citizens, the first Congress ordered the Secretary of State to "'cause every [enacted] law, order, resolution, and vote to be

published in at least three of the public newspapers printed within the United States.'" Relyea, *The Coming of Secret Law*, at 98 (quoting 1 Stat. 68). Ten years later, Congress modified that mandate and requested that the Secretary of State publish its enactments in "at least * * * one of the public newspapers printed within each state" or more, if necessary to insure that the public was informed. *Id.* at 99. Similarly, in 1795, Congress authorized the Secretary to State to arrange for the publication of 5,000 sets of the statutes passed since 1789, and the same number for each successive sitting of Congress. *Ibid.* "All except 500 of these sets were to be distributed to the states and territories 'to be deposited in such fixed and convenient place in each county'" that would be the "'most conducive to the general information of the people.'" *Ibid.* (quoting 1 Stat. 443). From the very beginning, then, Congress established official, routine publication and distribution of the laws.

The Founders' perspective was rooted in the settled principle that secret law was inimical to a free society. Blackstone emphasized that laws must be "*prescribed*" because "a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be *properly a law*." Blackstone, *Of the Nature of Laws in General*, in COMMENTARIES ON THE LAWS OF ENGLAND (1765-1769) (second emphasis added). Rather, "[i]t is requisite that this resolution be notified to the people who are to obey it * * * in the most public and perspicuous manner." *Ibid.* Blackstone, too, warned against Caligula's attempts to enforce laws that nobody could see. *Ibid.* To Blackstone, a secret law was no law at all.

The development of English law, and England's consistent early practice of committing laws to writing, available to the public, establish that this tradition has deep, well-established roots in the common law. Indeed, the first significant work known, the "English Laws," comprised a small series of books apparently prepared nearly nine hundred years ago, in 1115;

the "Laws of Henry I" followed in approximately 1118. JENKS, A SHORT HISTORY OF ENGLISH LAW 18 (1922). Jenks traces the ancient development of law in England, and the many works published to catalogue those laws. *Id.* at 18-25. Included among these ancient laws are the Assises – formal regulations – "made by the King for the direction of his officials." *Id.* at 23. Jenks explains that although "in theory, they did not profess to affect the conduct of the ordinary citizen," in practice they had a "substantial effect in that direction; because the royal officials, in their dealings with private persons, acted upon them, and took good care that they should control the course of business." *Ibid.* Of these Assises, dating between 1166 and 1184, Jenks declares that "it is hardly possible to exaggerate the importance for this period." *Id.* at 23-24.

Jenks describes as "[t]he second great triumph" of the early English development of law "the establishment of a new set of royal tribunals, with a definite legal procedure" – the writ. *Id.* at 39. Through the Assises, England had begun to catalogue substantive law, applicable to the public. *Id.* at 40-41. But this was not enough. Until the establishment of the writ procedure, "the definition of offences had been left to the 'doomsmen' of the court, in whose memory was supposed to lie a store of immemorial wisdom. There were no written records; nothing to which the aggrieved party could turn, to see whether the court would give him a remedy." *Id.* at 44-45. Jenks explains that with a writ, however, "[n]ow, he knew that if he could get his complaint described in a royal message, he could hardly be met by the defence that such complaint 'disclosed no cause of action.'" *Id.* at 45. Jenks declared that "it was a great step gained to have it declared, or at least implied, that, if the facts were as alleged, the plaintiff had a good ground of complaint; and this result was achieved when it was clear that any one could have, as of course, a writ of Debt, or Trespass, or the

like." *Ibid.* This procedure was well entrenched "before the end of the twelfth century." *Ibid.*

Ultimately, the writs "'original,' *i.e.* writs destined to commence legal proceedings," "were collected into a Register, of which more or less correct copies were in circulation," which "really became a dictionary of the Common Law." *Ibid.* In that same time period – approximately 1215 – the *Magna Carta*, the historic compilation of English law, was published. See *Treasures in Full – Magna Carta*, available at http://www.bl.uk/treasures/magnacarta/translation.html (last visited Aug. 1, 2006). Thus, by 1250, with the adoption of the *Magna Carta* and the making and circulation of the writs, publication of the English common law had begun. See JENKS, SHORT HISTORY OF ENGLISH LAW, at 45. Over the next hundred years, these laws were codified in statutes designed to structure life in the middle ages. *Id.* at 131 (statute enacted in 1330 to govern estate law); 146 (clause in the statute of 1315 governs defamation law); 150 ("the great Statute of Treasons" was codified in 1352). In short, during the hundred years before the United States was founded, written law flourished in England, with statutes, judicial decisions and executive orders being published and updated regularly. *Id.* at 187-190.

3. The foregoing authorities establish that the government cannot, consistent with Due Process, maintain "secret law" without some special justification, such as a legitimate need for secrecy to protect national security. The facts of this case plainly involve no special justification; indeed, the court of appeals required the government to provide no basis whatsoever for the continued secrecy of the directive. Nor could a persuasive justification be offered, for in the court of appeals the government acknowledged what it claims is the substance of the directive's requirements. In these circumstances, the government cannot justify its continued secrecy. Rather, the public is entitled to demand more than the Executive's assurances regarding what the law requires.

Forbidden from seeing the directive, the public is seriously disadvantaged in understanding, assessing, and debating its requirements (including any changes in its requirements), all of which lie at the heart of the democratic process. More fundamentally, the government may not *enforce* any law against the general public if it denies the public the right to see that law, absent special justification.

B. Alternatively, This Court Should Reject the Court of Appeals' Determination That the Directive Is SSI and Hence Immune from Disclosure.

The grave constitutional question raised by the government's illogical position in this case is easily avoided. This Court could simply reverse the Ninth Circuit's determination (Pet. App. 13a n.8) that the directive is properly withheld from public disclosure as SSI. Settled principles of constitutional avoidance counsel in favor of adopting that course. See, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[5]

As discussed *supra* at pp. 2-3, Congress has broadly provided that generally applicable laws and regulations must be publicly disclosed. The statutes governing transportation security contain limited exceptions to those requirements, for certain regulations. As is relevant here, TSA may "prescribe

[5] Because this issue was "passed upon" by the court of appeals, it is within this Court's jurisdiction. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992). The issue is also logically antecedent to the constitutional question decided by the court of appeals and therefore appropriately before this Court for decision. See *United States Nat'l Bank of Ore.* v. *Indep. Ins. Agents of Am., Inc*., 508 U.S. 439, 440 (1993) ("a court may consider an issue antecedent to and ultimately dispositive of the dispute before it, even if the parties fail to identify and brief the issue"); *Town of Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1990) (considering issue logically antecedent to those decided by court of appeals).

regulations prohibiting the disclosure of *information* obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act or under chapter 449 of this title." 49 U.S.C. 114(s) (emphasis added). Secrecy is permitted only if TSA makes a further finding justifying nondisclosure – in this context, a finding that disclosure would "be detrimental to the security of transportation." *Ibid.*

The directive fails *both* of the requirements imposed by Congress for deeming materials relating to transportation security to be secret. The directive is not reasonably understood as "information," which is commonly defined as "the communication or reception of knowledge or intelligence"; "knowledge obtained from investigation, study, or instruction"; "intelligence, news"; and, "facts, data." Merriam-Webster Online Dictionary, available at http://m-w.com/dictionary/information (last visited Aug. 1, 2006). Nor does anything in the legislative history for Section 114(s) suggest that Congress intended "information" to be interpreted broadly enough to encompass laws that govern the conduct of the general public. Instead, the directive is a "substantive rule[] of general applicability" that must be disclosed. 5 U.S.C. 552(a)(1)(D).[6]

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[6] See *Sterling Drug Inc.* v. *F.T.C.*, 450 F.2d 698, 708 (D.C. Cir. 1971) ("[t]hese are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public"). As this Court explained in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975), FOIA "represents a strong congressional aversion to 'secret [agency] law' * * * and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law.'" (citations omitted; insertion in original.) Indeed, "[FOIA's] indexing and reading-room rules indicate that the primary objective is the elimination of 'secret law.' Under the FOIA an agency must disclose its rules governing relationships with private parties and its demands on private conduct." *U.S. Dep't of Justice* v. *Reporters' Comm. for Freedom of the Press*, 489 U.S. 749, 772 n.20 (1989) (citation omitted); accord *Tax Analysts* v. *I.R.S.*, 117 F.3d 607, 617 (D.C. Cir. 1997) ("[a] strong theme of our [deliberative

More importantly, it is not plausible for TSA to argue that the directive must be kept secret in order to maintain the "security of transportation." 49 U.S.C. 114(s). The government has never explained how the withholding of the directive document – as opposed to the substance of its requirements – in any way enhances security. By the time of its filings in the court of appeals, the government was willing to freely acknowledge what it claims the directive requires. But it inexplicably refuses to release the actual document that contains those requirements.[7]

The unacceptable result of the government's insistence on secrecy for the directive itself is that the directive has been arbitrarily enforced, with some airline personnel enforcing the directive as reflected on signs in every airport in the nation (requiring identification to fly commercially) and others

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process] opinions has been that an agency will not be permitted to develop a body of 'secret law'") (citations, quotation marks omitted); *Nat'l Treasury Employees' Union* v. *U.S. Customs Serv.*, 802 F.2d 525, 531 (D.C. Cir. 1986) (FOIA "[e]xemption (b)(2) emphatically does not authorize the promulgation of 'secret law' governing members of the public, and such documents would be unprotected whether or not disclosure threatened to make them operationally obsolete").

Thus, courts generally have agreed that all generally applicable laws – regardless of how they are characterized – must be published. See, *e.g.*, *United States* v. *Aarons*, 310 F.2d 341, 345-346 (2d Cir. 1962) (order closing portion of harbor while submarine launched "prescribed 'a course of conduct' for 'the general public' or 'the persons of a locality'" and therefore "publication was required"); *Cox*, 576 F.2d at 1309 (portions of agency manual "clarifying substantive or procedural law must be disclosed" under FOIA); *Stokes* v. *Brennan*, 476 F.2d 699, 703 (5th Cir. 1973) (training manual describing agency's implementation of statute must be disclosed under FOIA).

[7] In the briefing before the court of appeals, counsel to the government declined to release the directive based only on the flat statutory prohibition on releasing any material that TSA had deemed to be SSI, not out of any expressed concern that disclosure would in fact endanger transportation security. See *supra* at p. 6.

apparently enforcing the directive as purportedly written (permitting commercial air travel without identification if the traveler submits to a more extensive search). No good reason exists for the government claim that it is entitled to withhold the directive from the public, particularly in the face of consistent caselaw from this Court and other federal courts mandating that all generally applicable laws be published.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] Nor is there any basis to object to disclosure on the ground that the directive contains *other* information that must be kept secret. The statutorily required finding that secrecy is necessary for security applies to the "information" in question, not the directive as a whole. 49 U.S.C. 114(s). Laws that otherwise must be disclosed may not be shielded by burying them among secrets. Other information within the directive that is properly withheld can simply be redacted. Cf. *Cuneo* v. *Schlesinger*, 484 F.2d 1086, 1090-1091 (D.C. Cir. 1973) (ordering disclosure of portions of manual that "either create or determine the extent of the substantive rights and liabilities of a person affected by those portions").