

Statement of James Harrison

before the Subcommittee on the Constitution
Committee on the Judiciary
United States Senate

Hearing on “Secret Law and the Threat to Democratic and Accountable Government”
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Thank you for the opportunity to address the Subcommittee.

My name is James P. Harrison. I am a private attorney and also director of the Identity Project (IDP), <<http://www.PapersPlease.org>>, which provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights. As a private attorney, I represented John Gilmore in *Gilmore v. Gonzales*, a recent federal case that extensively examined the issue of secret administrative law involving identification requirements for domestic air transportation.

Summary

Among the many categories of secret law addressed by the Subcommittee are secret transportation security directives issued by the Transportation Security Administration (TSA). The specific security directive addressed here is that which involves a passenger’s presentation of identification (ID) to travel domestically by commercial air carrier. While the rule that “Passengers Must Show Identification” is printed on TSA posters prominently displayed about

security screening checkpoints in airports, TSA refuses to release the actual written rule that requires passengers to produce identification because it designates the rule itself as part of a control category of information known as “Sensitive Security Information.”

The secrecy surrounding this specific security directive, which has the force and effect of a law, broadly illustrates the dangers inherent in secret law. It is important to make absolutely clear at the outset that the specific security directive at issue here does not involve the training procedures of TSA employees, or the manner in which any aviation security procedure is conducted by the TSA. What is at issue here is the federal requirement imposed directly by federal employees upon domestic air transportation passengers indicating that they must show their ID to fly, which it turns out is actually not the case.

As a result of the secrecy surrounding this law, the public remains misinformed about TSA’s identification requirements. This public confusion has now broadened to include the Department of Homeland Security’s (DHS’) misinformation that the federal penalties imposed upon the citizens of states that decide not to comply with REAL ID results in their inability to travel by air. Further, not being able to actually read the law that requires ID to fly renders it largely unchallengeable in a court of law by those upon whom it is arbitrarily enforced, and legislatively unreviewable by their representatives. It appears that this is a result of deliberate choice and official policy on the part of DHS.

Accepting, or even turning a blind eye to, this secret law invites the public to become accustomed to something antithetical to our systems of justice and liberty. I invite this Subcommittee to recognize and publicly decree this example of secret law for what it is, an abomination.

The Specific Law at Issue

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).

Neither of these statutes mentions passenger identification.

Congress has generally forbidden the use of secret law. However, 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. 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.

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 threat information, security measures, and security 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).

At issue here is 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 as it has determined it to be SSI.

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. 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.

DHS' Admission of Misinformation

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. During the pleadings phase of *Gilmore v. Gonzales* before the Ninth Circuit Court of Appeals, the government defendants asserted that Mr. Gilmore's various rights were not violated by the

identification requirement in part because he had the option for a “heightened” level of physical search instead. After being pressed on this issue during oral argument, defendants were ordered by the Court to file under seal for its *ex parte* and *in camera* examination. In its ruling, the Court referred to its examination of the security directive. “As noted, we have reviewed *in camera* the materials submitted by the Government under seal, and we have determined that the TSA Security Directive is final within the meaning of § 46110(a). The Security Directive “imposes an obligation” by requiring airline passengers to present identification or be a “selectee,” and by requiring airport security personnel to carry out the policy.” 435 F.3d 1125, 1148 (9th Cir. 2006).¹ In part based upon the availability of the “selectee” option, the Court found that Mr. Gilmore’s rights were not unconstitutionally violated by the identification requirement. A writ of certiorari was filed with the Supreme Court focused singularly on the issue of secret law. Despite the filing of multiple amicus briefs, and the importance of the issue, the Supreme Court denied the writ of certiorari.² Despite this admission of misinformation by TSA, the signs at the airports still say identification is required to fly.

One of the major problems with Secret Law is that it is impossible to tell when the law has changed. Since the Appellate Court’s examination of the security directive in the Gilmore case, we have not until recently been able to confirm the law regarding identification to fly had not been altered. In a letter dated March 22, 2008, a DHS official confirmed in writing to a

¹ Gilmore v. Gonzales 435 F.3d 1125 (9th Cir. 2006) is available at http://www.papersplease.org/gilmore/_dl/GilmoreDecision.pdf

² The separate Supreme Court amicus briefs filed by the Electronic Frontier Foundation (EFF); the Electronic Privacy Information Center (EPIC); and Reporters Committee for Freedom of the Press and the American Society of Newspapers Editors are available at <http://papersplease.org/gilmore/legal.html>

private citizen that the law had not changed.³ This letter caught the attention of the media and resulted in a number of newspaper articles including that printed on April 8, 2008, in the Kansas City Star: “Although airport security tells passengers they must show ID to board planes, they really don’t”; on April 14, 2008, in the Seattle Times: “If truth be told, you don't always need ID for domestic flights”; and on April 20, 2008, in the Arizona Star: “You can fly without ID, but a hassle will accompany you.”⁴ Despite these recent admissions by DHS that ID is not actually required to fly domestically, there is no way of knowing whether this secret law has been changed since then, thereby making the federal government’s signs posted at our airports truthful.

This Misinformation Spreads into the National REAL ID Debate

Despite the above statements that ID is not required to fly domestically in the United States, the TSA, in its recent issuance of Final Rules pertaining to the Real ID Act, leads the public, and the state governments that may refuse to comply with the Act, to the opposite conclusion. Beginning on page six of the final rules, it reads:

I. BACKGROUND

A. Statutory Authority and Regulatory History

This final rule establishes minimum standards for State-issued drivers' licenses and identification cards that Federal agencies can accept for official purposes on or after May 11, 2008, as required under the REAL ID Act of 2005. *See*, Public Law 109- 13, 119 Stat. 231, 302 (May 11,2005) (codified at 49 U.S.C. 30301 note) (the Act).

³ See <http://papersplease.org/wp/wp-content/uploads/2008/03/tsa-080226-070-mocek.pdf>

⁴ See <http://www.kansascity.com/105/story/567590.html>

http://seattletimes.nwsourc.com/html/travel/2004347810_webflyingnoid14.html

<http://www.azstarnet.com/news/235184>

During the terrorist attacks on the United States on September 11, 2001, all but one of the terrorist hijackers acquired some form of identification document, some by fraud, and used these forms of identification to assist them in boarding commercial flights, renting cars, and other necessary activities leading up to the attacks. See THE 911 COMMISSION REPORT, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS ON THE UNITED STATES (July 2004) (911 Commission Report), p. 390. The 911 Commission recommended implementing more secure sources of identification for use in, among other activities, boarding aircraft and accessing vulnerable facilities. In its report, the Commission stated

Secure Identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification, such as drivers' licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists.

Id. at 390.

Congress enacted the Act in May 2005, in response to the 911 Commission's recommendations.

Under the Act, Federal agencies are prohibited, effective May 11, 2008, from accepting a driver's license or a State-issued personal identification card for an official purpose unless the issuing State is meeting the requirements of the Act. "Official purpose" is defined under §201 of the Act to include access to Federal facilities, boarding Federally-regulated commercial aircraft, entry into nuclear power plants, and such other purposes as established by the Secretary of Homeland Security. Undoubtedly, the most significant impact on the public of this statutory mandate is that, effective May 11, 2008, citizens of States that have not been determined by DHS to be in compliance with the mandatory minimum requirements set forth in the REAL ID Act may not use their State-issued drivers' licenses or identification cards to pass through security at airports. Citizens in this category will likely encounter significant travel delays.

This inconsistency did not go unnoticed. In South Carolina's Governor Mark Sanford's scathing letter of March 31, 2008 to Secretary Chertoff, in which he asked that the citizens of South Carolina not be punished by DHS for their state's deciding not to comply with Real ID, he

specifically raised the point that ID is not actually required to fly.⁵ On the final page of his letter he alludes to the Ninth Circuit's Gilmore decision and the current ability to fly without ID. In this instance, the serious aspect that a secret law prevents an informed legislative examination of the law presents itself. Without Gilmore bringing suit and forcing disclosure of the law, albeit through an *in camera* review and the resulting secondary description of it by a Federal Appellate Court, Governor Sanford may not have been aware of the content of this secret law.

While Real ID now seems to have been passed to next administration to resolve, this important example of secret law remains and will continue to cause confusion and stymie an informed national debate on the Act.

Conclusion

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 here are highlighted by the government's own inconsistent statements about the directive. Airport personnel themselves do not seem to know the standards that they are expected to enforce.

The rule of law protects us from unbridled governmental authority and defends liberty. It continues to be said that our best form of homeland security is liberty. DHS' willingness to stray from the rule of law here, in an attempt to attain some perceived greater security, is something deserving this Subcommittee's continued attention.

⁵ See <http://blog.wired.com/27bstroke6/files/letterf033108realidletterdhs1.pdf>