Freedom of Speech at the TSA Checkpoint

By Katharine Mapes

Airport terminal buildings are considered nonpublic forums for purposes of the First Amendment. Consequently, it has been relatively easy for airport operators[1] to show that limitations on speech and other expressive activity within their terminal buildings pass muster under the First Amendment. In the almost decade-and-a-half since September 11, 2001, and the subsequent creation of the Transportation Security Administration (TSA), however, airports have seen the emergence of a new type of political speech on their premises. Airport security checkpoints have become a locus of First Amendment activity—and, unlike that at issue in the traditional body of cases on speech at airport terminal buildings, the message conveyed by protesters is one specifically about the airport itself, or the governmental activities conducted therein.

As courts consider these new forms of expressive activities at security checkpoints, they must decide anew what balance to strike between security and liberty. Likewise, they must consider both that protests at TSA checkpoints may be particularly disruptive to other passengers and that there may be nowhere else so appropriate for certain views to be expressed.

A few cases against the TSA and its officers or against local law enforcement are currently working (or have already worked) their way through the court system. Courts have reached split decisions even on the threshold question of whether the government officials involved are entitled to qualified immunity from suit. Going forward, a broader set of defendants, including airport operators and local governments, should be prepared to deal with protests, leafleting, and other expressive activity near or adjacent to TSA checkpoints within their jurisdiction.

While some courts may continue to follow the traditional rule allowing strict limits on expressive activity at airport terminals, others may be swayed by particular characteristics of the speech in question: that it is critical of the government (and thus within the core category of First Amendment concerns) and particularly relevant to the forum.

This article first reviews pre-9/11 case law establishing airports as nonpublic forums and then discusses two recent trends in political speech at airports: security-oriented protest activity and accidental protests. It concludes with an analysis of what it will take for courts to reconcile the existing case law with post-9/11 realities and what airport operators and others involved in airport security can expect in the future.

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The Historical Perspective: Airports as Nonpublic Forums

Courts have considered at great length the types of restrictions that airport operators may impose on leaflet distributors and protesters inside and immediately outside terminal buildings. At the heart of these cases is the U.S. Supreme Court's holding that an airport terminal is not a "public forum" for purposes of the First Amendment. A public forum has as "a principal purpose . . . the free exchange of ideas,"[2] and has "immemorially been held in trust for the use of the public and, time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[3] Conversely, it is only relatively recently that airport terminals have become forums for public distribution of literature and canvassing. Nor have airports "been intentionally opened by their operators to such activity," if only because "the frequent and continuing litigation evidencing the operators' objections belies any such claim."[4]

In deciding *International Society for Krishna Consciousness, Inc. v. Lee* (*ISKON*), the U.S. Supreme Court was influenced by the extent to which expressive activities can impede the business and transportation functions of an airport. The Court described at length how passengers must alter their paths to avoid solicitation and proselytization. This impedes the normal flow of traffic in any venue; however, "[t]his is especially so in an airport, where air travelers, who are often weighted down by cumbersome baggage . . . may be hurrying to catch a plane or to arrange ground transportation."[5] As such, delays can be "particularly costly," as "a flight missed by only a few minutes can result in hours' worth of subsequent inconvenience."[6]

Thus, airport terminals are considered nonpublic forums, and, as such, airport operators have relatively wide discretion to regulate expressive activities on their premises. Airport operators not only may impose time, place, and manner regulations (as may the government in a public forum), but also may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is

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reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view"—i.e., it is "content-neutral."[7]

Courts however, have not deemed all airport operator restrictions to be reasonable. The U.S. Supreme Court ruled that the Board of Airport Commissioners of Los Angeles could not enact a resolution providing that "the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity."[8] Likewise, a federal court of appeals struck down a total ban on news racks inside an airline terminal.[9] In that case, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) concluded that the airport's news rack ban made "newspapers hard to come by for many patrons of the Greenville-Spartanburg Airport and impossible for others, thereby placing a heavy burden on the newspaper companies' protected distribution activity."[10]

For some years, the scope of permissible limitations on First Amendment activities at airports seemed reasonably well settled: (1) they must be content-neutral; (2) they must be "reasonable"; and (3) the airport's operator may prioritize the smooth functioning of airport operations over providing a forum for public expression. However, older case law involving non-airport contexts suggests that there might be a heightened standard for determining the permissibility of a limitation where the message expressed is particularly appropriate to the forum. For instance, the U.S. Court of Appeals for the Second Circuit was asked to consider fee and insurance requirements as applied to protesters seeking to use an abandoned railway bed that was officially closed to the public to "demonstrate the availability of a suitable corridor for a rail line."[11] The court emphasized that the rail bed was "a particularly appropriate site for the message appellants intended to convey"[12] and that the nonprofit group in question sought "access for the purpose of communicating a message of public import which is intimately related to the forum sought."[13]

The U.S. Supreme Court has hinted at such considerations as well. In *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, the Court noted that the reasonableness of a challenged regulation must be assessed "in the light of the purpose of the forum and all the surrounding circumstances."[14]

The recent increase in expressive activity directed at airport security measures (particularly those of the TSA) has given rise to the question of whether the principle set forth in *Cornelius* warrants a change in the analysis applied by courts to airport forums.

The Rise of Security-Oriented Protest Activity in the Post-9/11 Airport

A Fourth Circuit judge recently compared TSA agents to "the proverbial Roman tax collector," noting that they are "not natural objects of affection."[15] Particularly since the TSA's decision to begin implementing Advanced Imaging Technology scans—or, in the alternative, a full-body pat down—a growing number of First Amendment cases have arisen from protests carried out during the screening process.

Some of these cases were resolved relatively quickly and in the TSA's favor. For instance, in a case interpreting a TSA regulation that prohibits interfering with, assaulting, threatening, or intimidating screening personnel in the performance of their screening duties,[16] the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) both rejected claims that the rule is overbroad and unconstitutionally vague and upheld it as applied to a passenger who was fined $700 for engaging in a loud, profanity-riddled argument with TSA personnel. In upholding the regulation, the court considered the rule's preamble, which specified that it did "not prevent good-faith questions from individuals seeking to understand the screening of their persons or their property."[17] The Sixth Circuit noted that "the asking of a good-faith question while using profanities would also not by itself be sufficient for a finding that a screener has been interfered with in the performance of his duties."[18] Ultimately, the court concluded that the regulation limited "speech only in the narrow context of when that speech can reasonably be found to have interfered with a screener in the performance of the screener's duties."[19]

Perhaps conversely, in a case that creates more ambiguity about the extent to which law enforcement is allowed to detain protesters at checkpoints, the Fourth Circuit, by a 2–1 margin, denied a motion to dismiss a First Amendment claim against TSA and various of its agents and officials. In that case, passenger Aaron Tobey placed his "sweatpants and t-shirt on the conveyer belt, leaving him in running shorts and socks, revealing the text of the Fourth Amendment written on his chest."[20] Tobey was arrested, questioned, and then released after about an hour. In rejecting the defendants' motion to dismiss, the court found that "it is crystal clear that the First Amendment protects peaceful nondisruptive speech in an airport, and that such speech cannot be suppressed solely because the government disagrees with it."[21]

The court did not depart from *ISKON*'s "reasonableness" standard, but found that it was "*unreasonable* to effect an arrest without probable cause for displaying a silent, nondisruptive message of protest,"[22] and that "peaceful, silent, nondisruptive protest is protected in a nonpublic forum, like an airport."[23] The court concluded by noting that "[w]hile the sensitive nature of airport security weighs heavily on the Court, protest against governmental policies goes directly to the heart of the First Amendment."[24] It symbolizes our "profound national commitment to the principle that debate on public issues should be uninhibited,

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robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[25]

Significantly, the Fourth Circuit did not find that Tobey had interfered with the smooth flow of traffic at the airport or disrupted other passengers as they rushed to make their flights. Ironically, both the general presence of airport security and the post-9/11 restrictions that allow only ticketed passengers past the security checkpoint may mitigate against the reasonableness of certain types of expressive activity, even as they serve as the impetus for it. In *ISKON*, the Supreme Court compared airport terminals to bus terminals and train stations. In doing so, it noted that an airport's "security magnet" entirely "lacks a counterpart" in other transportation centers, and that "access to air terminals is . . . not infrequently restricted—just last year the Federal Aviation Administration required airports for a 4-month period to limit access to areas normally publicly accessible."[26]

A Coast Guard administrative law judge (ALJ) who considered a similar case *did* explicitly find that John Brennan, who disrobed entirely during a pat down at the Portland International Airport in Oregon, blocked traffic through the security checkpoint for a total of three minutes. Both the ALJ and the agency on review upheld a complaint against Brennan for interfering with screening personnel in the performance of their duties. TSA, on review of the ALJ's decision, emphasized what it deemed to be the disruptive nature of Brennan's conduct, writing that "the Constitution protects non-disruptive speech." TSA emphasized that "airports are not public forums and speech is subject to appropriate regulation in such environments."[27] Quoting a New Mexico federal district court, the agency concluded that "the primary purpose of a screening checkpoint is the facilitation of passenger safety on commercial airline flights, and the safety of buildings and the people for whom a plane can become a dangerous weapon."[28]

The Oregon state courts also had an opportunity to consider the case, and there, Brennan was found not guilty of indecent exposure. Multnomah County Circuit Court Judge David Rees ruled from the bench and, according to the Multnomah County criminal court clerk, no written opinion was issued aside from documentation confirming Brennan's acquittal. The Associated Press reported that Judge Rees ruled that Brennan's act was "one of protest and therefore, protected speech."[29] While suggestive of a split, because of the lack of written opinion, it is unclear whether Judge Rees' ruling was based on the First Amendment or a right established under Oregon law.

To date, courts and agencies—with the possible exception of the Oregon court—have not permitted what they view to be actual disruption of screening activities. What they have done instead is raise questions about the extent to which speech that, in the Fourth Circuit's words, is merely "bizarre" can be the cause for detention and prosecution.[30]

Accidental Protests: When Passengers Inadvertently Engage in Speech at Checkpoints

Another line of cases deals with travelers who inadvertently run afoul of TSA—i.e., travelers who are detained by TSA or arrested at TSA checkpoints based on conduct that, while expressive, was not a premeditated protest. These cases illuminate the extent to which courts consider security interests when ruling on First Amendment rights in this context. While courts have repeatedly recognized the importance of allowing speech that is hostile to government interests at airport checkpoints, they have maintained the government's right to act to preserve the security of those spaces, even where the security threat appears, at most, to be remote.

In what is perhaps the most interesting of those cases, Nicholas George, a college senior double majoring in physics and Middle Eastern studies, arrived at the Philadelphia International Airport with a deck of handwritten Arabic-English flashcards. The flashcards included basic vocabulary such as "nice," "sad," and "cheap"; however, they also included words such as "bomb," "terrorist," "explosion," "kill," and "to target." George alleged that a TSA agent "subjected him to aggressive interrogation and detained him for an additional 15 minutes," informing him that Osama Bin Laden also spoke Arabic and questioning him on, among other things, a book in his possession that was "critical of United States foreign policy."[31] At that point, a Philadelphia police officer arrived and held George for further questioning by two FBI Joint Terrorism Task Force officials, who interrogated him for about 30 minutes about "his personal and religious beliefs, travel, educational background, and political and social associations."[32] Eventually, he was released; the next day he returned to the airport and was allowed to travel to his destination without further incident.[33]

The Third Circuit dismissed George's suit against the TSA officers and others involved, holding that they enjoyed immunity from suit. In reviewing George's First Amendment claim,[34] the court stated that George "clearly had a right to have" the flash cards and that "[a]lthough it is too obvious to require citation," it "nevertheless stress[ed] that the First Amendment will not tolerate singling someone out for enhanced scrutiny because s/he is carrying materials critical of the United States or its foreign policy."[35] The court concluded, however, that "[t]he totality of circumstances here could cause a reasonable person to believe that the items George was carrying raised the possibility that he might pose a threat to airline security."[36]

When confronted with travelers whom TSA agents deem threatening for reasons arguably less political

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than those at issue in *George*, federal district courts have reached mixed results. In one case, passenger Frank Hannibal drew the attention of a TSA screener who noticed a jar of peanut butter in his suitcase—purchased at Whole Foods—where the oil in the peanut butter had separated and risen to the top. Hannibal agreed to check the peanut butter but sarcastically told his wife on the way back to the counter that "[t]hey're looking to confiscate my explosives."[37] Hannibal was subsequently arrested by local authorities. Citing *ISKON*, a federal district court dismissed an action by Hannibal against the officers, holding they enjoyed immunity from suit because "restrictions on speech need only be reasonable and viewpoint neutral."[38]

Elsewhere, however, another federal district court found officers did not retain qualified immunity from suit where a detained traveler reportedly told TSA officers they were "behaving like bitches."[39] The court stated that this comment, while profane, was protected speech; likewise, the court found that the woman's statement that she would "report the [officers] to higher authorities . . . clearly constituted protected speech."[40]

Reconciling the Case Law: What Can We Expect Going Forward?

Courts, in addressing cases involving expressive activity and the TSA, tend to deploy sweeping rhetoric on liberty and security. They universally decry disruption of airport activities while simultaneously reaffirming the right to be critical of government policies in all circumstances. This leaves law enforcement, airport operators, and airport patrons with no useful guide as to what kind of activities are or are not protected at or near airport checkpoints.

Existing case law reflects divergent judgments about what officials can and cannot reasonably consider a security threat. For example, the Third Circuit explicitly noted that the holder of Arabic flashcards with words relating to terrorist attacks might reasonably have raised suspicion. Other courts, meanwhile, appear to believe that a man who disrobes at a TSA checkpoint cannot reasonably be considered a security threat. An analysis regarding who poses a threat need not—and often will not—be congruent with an analysis regarding who is creating a disruption. To the extent that courts focus on possible security threats rather than disruption, the accidental protester may more often be found properly detained than the deliberate one. Protesters and those who distribute leaflets near—but not while going through—the TSA checkpoint may be even more disruptive and less threatening than ticketed passengers actually attempting to clear airport security. Those facts might lead courts to sustain challenges by protesters who are arrested on airport grounds.

Ultimately, the majority and the dissent in *Tobey* ably summed up the stakes on each side. Judge Wilkinson, in a dissenting opinion that inverted the traditional judicial concern of preventing chilling effects on speech, argued that limiting the power of TSA agents to detain protesters would chill their willingness to stop all suspects. "Tobey's antics," he wrote, "diverted defendants from their passenger-screening duties for a period, a diversion that nefarious actors could have exploited to dangerous effect."[41] The consequence, he argued, is that he "would expect other TSA agents to refrain from responding to some unknown quantum of future security threats. And who could blame them?"[42]

The majority, by contrast, cautioned that "while it is tempting to hold that First Amendment rights should acquiesce to national security in this instance, our Forefather Benjamin Franklin warned against such a temptation by opining that those 'who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.'"[43] The majority concluded that it "take[s] heed of [Franklin's] warning and [is] therefore unwilling to relinquish our First Amendment protections—even in an airport."[44] Such rhetoric, which places the context of the speech at the forefront, might well be the future of First Amendment jurisprudence in airport terminals. Airport operators seeking to adopt policies regulating leafleting, political protest, and other expressive activities near airport security checkpoints should consider how they can balance those concerns with the smooth running of the airport terminal—and should recognize that, while security itself will remain central, disruption to travelers may cease to be the primary concern of reviewing courts.

Endnotes

1. In the United States, with very few exceptions, commercial airport operators are states or political subdivisions of states, which are subject to First Amendment restraints when regulating expressive activity.
2. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).
3. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).
4. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680–81 (1992) (ISKON).
5. Id. at 684 (internal quotations omitted).
6. Id.
7. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).
8. Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 570–71 (1987).
9. Multimedia Publ'g Co. of S.C. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154 (4th Cir. 1993).
10. Id. at 160.
11. E. Conn. Citizens Action Grp. v. Powers, 723 F.2d 1050, 1052 (2d Cir. 1983).
12. Id. at 1055.
13. Id. at 1057.
14. 473 U.S. 788, 809 (1985).
15. Tobey v. Jones, 706 F.3d 379, 395 (4th Cir. 2013)

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(dissenting op.).

16. 49 C.F.R. § 1540.109.

17. Rendon v. TSA, 424 F.3d 475, 478 (6th Cir. 2005) (citing Civil Aviation Security Rules, 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002)).

18. Id. at 478–79.

19. Id. at 480.

20. Tobey, 706 F.3d at 384.

21. Id. at 391.

22. Id. at 392.

23. Id. at 393.

24. Id.

25. Id. (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

26. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 681–82 (1992).

27. In re John Brennan, Docket No. 12-TSA-0092, Final Decision and Order (Sept. 18, 2014).

28. Id. (quoting Mocek v. City of Albuquerque, 2013 WL 312881, at *53 (D.N.M. Jan. 14, 2013)). In that case, Mocek was arrested after refusing to stop filming at a TSA checkpoint (something he alleged TSA told him was legal). Relying heavily on ISKON, the court found the TSA's prohibition on recording was a reasonable limitation on his right to gather news at the screening checkpoint; it emphasized that the restriction was content neutral and did not constitute viewpoint discrimination.

29. Nigel Duara, *John Brennan, Man Who Stripped in Front of TSA, Found Not Guilty*, Huffington Post (Sept. 17, 2012, 5:12 AM), http://www.huffingtonpost.com/2012/07/18/john-brennan-man-who-stri_n_1684381.html.

30. Tobey, 706 F.3d at 388.

31. George v. Rehiel, 738 F.3d 562, 567–68 (3d Cir. 2013).

32. Id. at 568.

33. Id.

34. The court also found that George had not alleged a violation of clearly established rights under the Fourth Amendment's prohibitions against search and seizure.

35. Id. at 586 & n.26.

36. Id. at 586.

37. Hannibal v. Sanchez, 2014 WL 3845172, at *1 (E.D.N.Y. Aug. 5, 2014) (internal quotations omitted).

38. Id. at *6 (quoting Make the Rd. by Walking, Inc. v. Turner, 378 F.3d 133, 143 (2d Cir. 2004)).

39. Pellegrino v. TSA, 2014 U.S. Dist. LEXIS 52468, at *5 (E.D. Pa. Apr. 16, 2014).

40. Id. at 48.

41. Tobey v. Jones, 706 F.3d 379, 394 (4th Cir. 2013) (dissenting op.).

42. Id.

43. Id. at 393 (majority op.).

44. Id.

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