Place Your Rights on the Conveyer Belt: Free Speech at Airports in the TSA Era

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Because airport terminal buildings are considered non-public forums for purposes of the First Amendment, it has been relatively easy for airports to show that restrictions on expressive activity within them pass muster under the First Amendment. However, in the decade since September 11 and the creation of the Transportation Security Administration (TSA), airports have seen a new type of political speech on their premises. The airport's security checkpoint has become a locus of First Amendment activity—and, unlike the traditional test cases on free speech at airport terminal buildings—the message conveyed by protestors is one specifically about the airport itself. As cases involving security protests start to reach the courts, there is a real question to what extent disruption of airport activities will be deemed allowable when First Amendment interests are implicated.

To date, litigation on security protests has involved cases brought by passengers against the TSA itself. Going forward, however, airport operators and local governments should be prepared to deal with protests, leafleting, and other expressive activity adjacent to the TSA checkpoint that will fall within their jurisdiction. This article will discuss the legal standards that will apply and recent case law that may represent developing trends in the area.

The Historical Perspective: Airports as Non-public Forums

Courts have considered at great length the types of restrictions that airports may put on leafleters and protestors inside the airport terminal. At the heart of these cases is the Supreme Court's finding 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, " *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985), 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." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). But, the Supreme Court found, that is not true of airport terminals: it is only relatively recently that they have become forums for public distribution of literature, canvassing, and similar activities. 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." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680-81 (1992) (ISKON).

In deciding *ISKON*, the Supreme Court was influenced by the extent to which expressive activities can impede the business and transportation functions of an airport. It described at length the way 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." *ISKON*, 505 U.S. at 684 (internal quotations omitted). As such, delays can be "particularly costly," as "a flight missed by only a few minutes can result in hours worth of subsequent inconvenience." *ISKON*, 505 U.S. at 684.

Thus, airports are considered non-public forums, and as non-public forums, airport operators have relatively wide discretion to regulate expressive activities on their premises. In a non-public forum, the State may make time, place, and manner regulations (as it may in a public forum); it may also "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Courts have not, however, deemed all restrictions to be reasonable regardless of substance. The Supreme Court has 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." *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 570-71 (1987). Likewise, a court of appeals struck down a total ban on newsracks inside an airline terminal. *Multimedia Pub. Co. of S.C. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154 (4th Cir. 1993). Ultimately, the court concluded that the airport's newsrack 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." *Id.* at 160.

After 9/11: the Rise of Security-Oriented Protest Activity

The First Amendment cases of the '80s and '90s are marked by a particular commonality: they do not involve speech that is about the airport itself, or about activities that are particular to it. Following September 11, 2001, however, and the subsequent creation of the Transportation Security Administration, airports have seen an uptick in expressive activity directed at airport security measures.

Airports and other interested parties may not be able to assume that the "reasonableness" analysis will be resolved in the same way as to an individual protesting airport security as it is when a religious or political group seeks to distribute information unrelated to the airport. There are the seeds of such a finding in much older case law. The Second Circuit, for instance, has found fee and insurance requirements unreasonable when applied to protestors 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." *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1052 (2d Cir. 1983). The court emphasized that the rail bed was "a particularly appropriate site for the message appellants intended to convey," *id.* at 1055, and that the non-profit group in question sought "access for the purpose of communicating a message of public import which is intimately related to the forum sought." *Id.* at 1057. And in doing so, it noted that it did not "suggest that DOT's fee and insurance requirements would not be valid when reasonably applied." *Id.* The Supreme Court has hinted at such considerations as well. In *Cornelius*, the Supreme 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." 473 U.S. at 809.

Of course, some regulations will be permissible, and indeed have already been found so. For instance, a TSA regulation prohibits interfering with, assaulting, threatening, or intimidating screening personnel in the performance of their screening duties. 49 C.F.R. § 1540.109. In a case interpreting that regulation, the Sixth Circuit upheld it as applied to a passenger who engaged in a loud and profane argument with TSA personnel and was fined $700 for it. In upholding the regulation, the court looked at its preamble, which specified that the rule did "not prevent good-faith questions from individuals seeking to understand the screening of their persons or their property." 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002). The Sixth Circuit added to that gloss the note 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." *Rendon v. TSA*, 424 F.3d 475, 478-79 (6th Cir. 2005). Ultimately, it 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." *Id.* at 480.

Perhaps conversely, in January, the Fourth Circuit allowed a claim against the TSA and various agents and officials to proceed on First Amendment grounds past a motion to dismiss. In that case, a 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." *Tobey v. Jones*, 706 F.3d 379, 384 (4th Cir. 2013). 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." *Id.* at 391.

The court did not depart from *IKSON*'s "reasonableness" standard, but found that it was "*unreasonable* to effect an arrest without probable cause for displaying a silent, nondisruptive message of protest," *id.* at 392, and that "peaceful, silent, nondisruptive protest is protected in a nonpublic forum, like an airport." *Id.* at 393. The court concluded its inquiry 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." *Id.* It symbolizes our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

What the court did not find was that Aaron Tobey had disrupted the smooth flow of traffic at the airport or disrupted other passengers as they rushed to make their flights. Interestingly, both the general presence of airport security and the post-September 11 restrictions that allow only ticketed passengers past the security checkpoint may mitigate against the reasonableness of certain expression, even as they serve as the impetus for it. In *ISKON*, the Supreme Court compared airport terminals to bus terminals and train stations. And in the course of that comparison, 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." *ISKON*, 505 U.S. at 681-82.

So far, no court has found that disruptive speech need be allowed at an airport regardless of the context in which that speech occurred. And under *ISKON*, a court might never do so. But there is now precedent that suggests the secured—and security-focused—areas of the airport cannot be insulated from expressive activity. In *Tobey v. Jones*, the Fourth Circuit 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.'" 706 F.3d at 393. And it thus concluded that it "take[s] heed of his warning and [is] therefore unwilling to relinquish our First Amendment protections-even in an airport." *Id.* Such rhetoric, which places the context of the speech at the forefront, might well be the future of First Amendment jurisprudence in airport terminals. Airports and others seeking to enact policies about expressive activities on their premises should consider how they can balance those concerns with the smooth running of the airport. ❖

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