When Airport Security is Insecure, Part II

In *Vanderklok v. United States,* the *Court of Appeals for the Third Circuit* declined to apply the civil rights laws in favor of an air traveler who was mistreated by TSA screeners. However, *Vanderklok* was not the end of the story. The Federal Tort Claims Act grants the United States sovereign immunity for intentional torts committed by federal employees. An exception to that immunity is the so-called "law enforcement proviso." This waives immunity for certain intentional torts committed by employees who are "investigative or law enforcement officers." Thanks to a crimped view of the law, air travelers strike out again.

The Court, in *Pellegrino and Waldman v. United States of America*, held that TSA screeners are not "investigative or law enforcement officers" and therefore the claims must be dismissed.

In 2006, Pellegrino and her husband Harry Waldman arrived at the Philadelphia International Airport. They were to catch a flight to Florida. The traveler asked for a private screening, because she was dissatisfied with how she was being treated. Pellegrino contended that the screener was unnecessarily rough and invasive. The screener and the passenger both acted badly and the situation deteriorated. Repacking of the items became a crass and irritable situation. Pellegrino tossed her shoes through an open door toward the screening lanes and began to carry her largest bag out of the room. Finally, Philadelphia police officers arrived at the scene, arrested Pellegrino and took her to the police station where she was held for approximately 18 hours before being released on bond. Eventually, the Philadelphia district attorney's office filed 10 charges against Pellegrino involving felony aggravated assault, possession of instruments of a crime, reckless endangerment and simple assault and making terroristic threats.

When the matter proceeded in Philadelphia, the screener was no longer employed by the TSA and did not appear. As a result, the judge entered a verdict of not guilty.

Sovereign immunity protects the Federal Government and its agencies from suit. That is also largely true with respect to state governments. While the King is no longer sovereign, most states and the Federal Government still protect themselves from wrongdoing. Citizens are surprised to find that out, given the constitutions that control the Federal Government and the states, not to mention civil rights laws in general.

While the Federal Tort Claims Act waives sovereign immunity for a number of bad behaviors by government officials, there are a number of complex exceptions. The "intentional tort exception" permits the government to maintain sovereign immunity for any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference

with contractual rights. In other words, sovereign immunity exists for the worst things that a federal employee can do to the public.

Sovereign immunity is, however, waived by the Federal Government for certain intentional torts committed by "investigative or law enforcement officers." The bottom line is that while citizens may not bring lawsuits against federal employees for many acts of bad behavior, they can sue for assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution if the alleged acts were committed by an "investigative or law enforcement officer." What is a law enforcement officer? The court defines it, as an officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."

The TSO, found the United States Court of Appeals for the Third Circuit, are not investigative or law enforcement officers.

In *Vanderklok v. United States*, the United States Court of Appeals for the Third Circuit ruled that TSO are not law enforcement officers for purposes of a federal civil rights claim under the United States Constitution.

After many pages of complex legal interpretation, Judge Krause, for the Third Circuit, held that only officers who are engaged in criminal law enforcement may be sued under the language of the Federal Tort Claims Act. It seems odd that federal employees who may be most in need of protection from lawsuits do not get it, while those who are in a position to be most abusive on a daily basis to the American traveling public do receive immunity under the law. There is something very confusing to the public about how we apply our laws in this country and the apparent inconsistencies between policy and actuality.

The Court was aware of the difficulty Mr. or Ms. John Doe American would have with this logic. "We recognize that our holding here, combined with our decision in *Vanderklok*, means that individuals harmed by the intentional torts of TSOs were a very limited legal redress." (Footnote omitted.) The footnote in this case is important. It suggested that the United States could refuse to insulate a TSO from liability by declining to certify under the Westfall Act that the TSO was acting within the scope of her employment. In that scenario, the TSO officer may be able to be sued as a private citizen. Of course, in that situation who would be able to answer in damages for the wrong inflicted? The TSO may not have any personal assets. Therefore, the remedy suggested by the Third Circuit is probably an empty one. Would the federal government indemnify a TSO officer who is designated under the Westfall Act as acting in his or her private capacity? Unlikely.

Judge Ambro wrote a thorough dissent. In this 2 to 1 decision, Judge Ambro noted that the United States Supreme Court has not yet decided the issue. This would be a marvelous opportunity to see whether the Supreme Court of the United States will define itself as pro-citizen and pro-consumer or pro-arbitrary government. Good conservatives should see the government as not only limited but also as responsible for

the misconduct or bad behavior of its employees. It is that sense of responsibility and accountability that makes government work for the people rather than citizens as subject to potentially overreaching misconduct on the part of government employees.

As Judge Ambro noted, "[i]n conclusion, my colleagues' interpretive framework finds little support in analogous decisions from our sister Circuits, and at least two Circuits have disregarded the key factors they consider decisive in their analysis." At Slip Opinion p. 50. Judge Ambro implores other judges to refrain from relying on non-text sources but rather they should, he implores, adhere to the "plain language" of the statute. In effect, Judge Ambro is observant of the salient fact that we sometimes see in court decision: that conservative activism to protect government and large corporate entities is just as bad as liberal activism intended to address the plight of the powerless. Reading statutes as they are written and applying the Constitution as it was intended is a daunting but important job of our judiciary.

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