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When Airport Security Is Insecure

Poor Roger Vanderklok. All he wanted to do was fly from Philadelphia to Miami in order to run a half-marathon. It was not even a full marathon, but he did not know what a run was in store for him.

In his carry-on luggage, he possessed a heart monitor and watch stored inside a piece of PVC pipe that was capped on both ends. The would-be half-marathoner, Vanderklok, claimed that a Transportation Security Administration officer named Charles Kieser was “disrespectful and aggressive.” When Vanderklok said he was going to file a complaint against Kieser, Kieser, allegedly in retaliation, called the Philadelphia Police and “falsely reported” that Vanderklok had threatened to bring a bomb to the airport. Vanderklok was arrested, but later acquitted of all criminal charges. Kieser’s testimony about Vanderklok’s behavior did not match airport surveillance footage. Vanderklok was off and running, from a legal perspective. He sued Kieser and others for his troubles.

The United States Court of Appeals for the Third Circuit ruled that there can be no First Amendment claim against a TSA employee for retaliatory prosecution in the context of airport security screenings.

The procedural history of the case is complicated. Dismissal of the police officers and the City of Philadelphia as party Defendants were not before the appellate court. The only issue was Vanderklok’s First Amendment retaliatory prosecution claim and his Fourth Amendment malicious prosecution claim.

The now infamous case of *Bivens v. Six Unknown Names Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) permitted actions to be brought directly under the Constitution against federal officials. The purpose of the *Bivens* decision was to give the federal courts authority to enforce the Constitution by virtue of an implied right of action. In recent years, *Bivens* has been restricted at every opportunity. As Circuit Judge Jordan noted, the lawsuit cannot “vindicate every violation of the rights afforded” by the First Amendment. The First Amendment is about speech, and Vanderklok claimed that he was punished for threatening the overly exuberant TSA officer with a complaint.

The Third Circuit, speaking through Judge Jordan, noted that a “rigorous inquiry” must be undertaken before rights may be vindicated under the *Bivens* cause of action. Nothing new can be lodged under the *Bivens* rationale, but rather *Bivens* will be restricted to its narrow facts.

The Court found that there may be a theoretical remedy against the United States in cases where the government employee had the responsibility of an officer. There may be a state law remedy against the individual when the improperly acting TSA employee behaves in a way which is outside the scope of his employment. The trial court had concluded that Kieser was not an investigative or law enforcement officer, and there was no challenge as to whether he acted within the scope of his employment.

In essence, Vanderklok had no means to challenge the behavior to which he was subjected.

What is most disturbing about this opinion is that the Court counseled "hesitation" and determined that such reluctance to enforce the Constitution is "dispositive." The TSA was created as a response to the terrorist attacks of September 11, 2001. National security, therefore, was said to prevent imposition of a *Bivens* remedy when a passenger's rights were blatantly infringed upon.

The Court was not at all warm to a damage remedy, intended to keep the cop on the beat honest. "TSA employees like Kieser are tasked with assisting in a critical aspect of national security – securing our nation's airports and air traffic. The threat of damages liability could indeed increase the possibility that a TSA agent would hesitate in making split-second decisions about suspicious passengers." Rarely have the courts been willing to engage in such speculation. Perhaps TSA agents and government employees in general should be hesitant before they trample on the rights of the traveling public.

The Court ultimately ruled that the role of the TSA "in securing public safety" is so significant that *Bivens* rights should give way to a new kind of immunity for government employees. The mistreatment of Vanderklok, in other words, was trivial compared to the important job that the TSA agent was performing, even if the TSA agent was a liar and a fraud.

I am reminded of a lecture I heard delivered by former U.S. Supreme Court member David Souter. In October 2011, I was invited to hear the Justice speak at a Federal Bar Association convocation in Philadelphia. The Justice arrived late to the Loews Hotel and met with a small group. 911 had just occurred a month earlier. The Justice chose to speak of cases where the government had overreacted during a national emergency. Abraham Lincoln suspended the Writ of Habeas Corpus. Japanese-Americans were interned during World War II, and African-Americans were subject to the "separate but equal" test devised by the United States Supreme Court. What the law is all about, Souter pointed out, "is how we treat other people." He recommended that we read *The Human Comedy* by William Saroyan. The story is about a telegraph messenger, fourteen-year-old Homer, during wartime. Homer encountered the full range of human emotion.

What *Vanderklok v. United States of America* is all about is what the courts will require in terms of how innocent passengers on air flights should be treated. Apparently, the barrier is very low and this case is a red flag waved in front of the bull of arbitrary and capricious government behavior.

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