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Allyn E. Hurley

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**FLYING WITH BLINDERS ON—THE DISTRICT OF
COLUMBIA CIRCUIT ALLOWS TSA TO IGNORE
EVIDENCE UNFAVORABLE TO ITS
FINANCIAL INTERESTS**

ALLYN E. HURLEY*

THE CONFLICT between government intrusion and private interest is a timeless issue that shows no signs of disappearing any time soon. The aviation industry is no exception to this struggle. Any time the government is able to dictate the amount of funds owed to it in return for its required services, there is certain to be not only resistance on the part of the affected private entities, but lasting legal and economic implications as well. The Transportation Security Administration (TSA) was created in response to the 2001 attacks on the United States, and it seized control of airport security from commercial airlines, requiring the airlines to pay fees for these security services.¹ Although commercial airlines may be paying too much for these government-imposed services or, at the very least, TSA may be taking advantage of the deferential advantage given to them by the courts to shirk their task of fully vetting all of the available evidence in determining airline fees, the District of Columbia Circuit Court of Appeals (D.C. Circuit) held in *Southwest Airlines Co. v. Transportation Security Administration* (*Southwest II*) that TSA was justified in relying on its consultant's estimate in imposing security fees.² But the dissent correctly noted that TSA chose one of two conflicting sets of data without "articulat[ing] a satisfactory explanation" for that choice, and it failed to explain "a rational connection between the facts found and the choice

* Allyn E. Hurley is a candidate for Juris Doctor at the SMU Dedman School of Law. She is expected to graduate in 2013. She graduated with a Bachelor of Liberal Arts degree in government from the University of Texas at Austin in 2010. Allyn would like to thank her mother for all of her love and support.

¹ *Sw. Airlines Co. v. Transp. Sec. Admin.* (*Southwest II*), 650 F.3d 752, 753–54 (D.C. Cir. 2011).

² *Id.* at 757.

made.”³ Failing to require TSA to make such a connection during the administrative proceedings allows TSA to favor the data that leads to a larger government windfall.

Prior to September 11, 2001, commercial airlines handled the screening of persons and property passing through U.S. airports.⁴ However, in response to the terrorist attacks, the federal government stepped in and created TSA to take over the security function of airports.⁵ Accordingly, TSA has the authority under 49 U.S.C. § 44940(a)(2) to impose air carrier fees, which are intended “to pay for the costs of providing civil aviation security services.”⁶ Section 44940(a)(2)(B)(i) limits these fees to the amounts airlines paid “for screening *passengers and property*” in 2000.⁷ TSA initially determined these fees by relying on data submitted by the airlines; however, suspicions that airlines were taking advantage of the system and “low-balling” their 2000 costs led Congress to order an independent review conducted by the Government Accountability Office (GAO).⁸ The GAO found that screening costs in 2000 were \$448 million, over 40% more than the airlines had initially claimed.⁹ “Numerous airlines” filed petitions for review of TSA’s final orders, alleging that the fee increases contradicted 49 U.S.C. § 44940(a)(2).¹⁰

The D.C. Circuit agreed with the airlines’ determination that the fees had been improperly calculated because the GAO’s estimate was based on incorrect variables and, thus, too high.¹¹ The discrepancy was due to the inclusion of costs associated with screening *non-passengers* in 2000, disregarding the statute’s language.¹² The court remanded the issue to TSA to recalculate the screening costs, excluding those from non-passengers.¹³

³ *Id.* at 759–60 (Brown, J., dissenting).

⁴ *Id.* at 753.

⁵ *Id.*

⁶ 49 U.S.C. § 44940(a)(2) (2006).

⁷ 49 U.S.C. § 44940(a)(2)(B)(i) (emphasis added). “The amounts of fees collected under this paragraph for each fiscal year may not exceed . . . amounts paid in calendar year 2000 by carriers described in subparagraph (A) for screening passengers and property, as determined by the Under Secretary [of Transportation for Security].”

⁸ *Southwest II*, 650 F.3d at 754.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 754. In 2000, people were allowed to drop off and pick up friends and family at the gate, which explains the higher volume of non-passengers. *Id.* at 760 n.3.

¹³ *Id.* at 754.

The difficulties in determining the true screening costs led both the airlines and TSA to commission consultants.¹⁴ As might be expected, the consultants' findings were contradictory and clearly favored their respective clients' financial interests. TSA hired Simat, Helliesen & Eichner, Inc. (SH&E), and found that the screening costs for 2000 were \$420 million; Campbell Aviation Consultants (Campbell), hired by the airlines, concluded that the cost was only \$305 million.¹⁵ The Campbell report primarily relied on a report by the Department of Transportation (DOT), indicating the number of individuals screened in the U.S. in 2000.¹⁶ The SH&E report did not refer to this DOT figure, instead relying on "airport survey data" and "interviews with airport and government officials."¹⁷ TSA—not surprisingly—"found SH&E's report more persuasive,"¹⁸ but beyond stating that SH&E used "more extensive methodology,"¹⁹ failed to explain why.

The airlines challenged TSA's remand decisions, charging that this decision was "arbitrary and capricious because TSA should not have relied on the SH&E report . . . or at least should have more fully explained why it rejected the . . . Campbell report."²⁰ On the appeal following remand, a divided three-judge panel of the D.C. Circuit held that TSA acted reasonably, and not arbitrarily and capriciously, by relying on the SH&E report, and therefore the airlines' petitions for review were denied.²¹

The majority reasoned that, because determining the percentage of passenger and non-passenger screenings was such a difficult and imprecise task, TSA was justified in choosing the SH&E estimates because SH&E conducted a "thorough inquiry" and "deriv[ed] data from several independent sources."²² Furthermore, the court's decision seemed to hinge on the fact that it should pay deference to TSA's decision so long as TSA "adequately consider[ed] contradictory evidence" and met its burden by reasonably explaining that the SH&E report was more

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 755.

¹⁷ *Id.* at 754.

¹⁸ *Id.*

¹⁹ *Id.* at 756.

²⁰ *Id.* at 755.

²¹ *Id.* at 757–58.

²² *Id.* at 755, 757.

detailed and reliable than the Campbell report.²³ The dissent argued that “[a]lthough TSA’s calculation of security fee is entitled to broad deference,” that deference is not absolute.²⁴ The dissent specifically took issue with the fact that TSA gave “no reason for choosing” one consultant’s estimate over another.²⁵ The dissent argued that without sufficient reasoning behind TSA’s decision, it is not entitled to complete deference in its decision making in this case.²⁶

Upon its review of TSA’s determination, the majority discussed the degree of deference a court should give to an agency’s administrative decisions when that agency must consider a contradictory body of evidence.²⁷ The majority followed the standard in *American Wrecking Corp. v. Secretary of Labor*²⁸ and echoed the rationale in the previous *Southwest Airlines Co. v. Transportation Safety Administration (Southwest I)*²⁹ decision to determine the 2000 screening costs, saying that “when an agency ‘adequately considers contradictory evidence . . . our standard of review does not permit a reviewing court to displace the [agency’s] choice between conflicting views.’”³⁰ Specifically, the majority, quoting *Southwest I*, said that it “will not second-guess TSA’s determination of [an] obscure calculation in a ‘data-poor environment’ in which ‘[a]ny decision . . . would have required considerable guesswork.’”³¹ The majority reasoned that TSA’s decision was entitled to strong deference due to the statutory language stating that the fees are “based on the amount TSA ‘determined’ the airlines paid in 2000.”³²

Next the majority examined the airlines’ contention that TSA overlooked a possibly important figure in the DOT report by its complete, yet vague, rejection of the Campbell report.³³ The majority emphasized that TSA adequately addressed the DOT figures by criticizing the Campbell report as a whole due to its

²³ *Id.* at 756 (quoting *Am. Wrecking Corp. v. Sec’y of Labor*, 351 F.3d 1254, 1261 (D.C. Cir. 2003)).

²⁴ *Id.* at 758 (Brown, J., dissenting).

²⁵ *Id.*

²⁶ *Id.* at 760.

²⁷ *Id.* at 756.

²⁸ *Am. Wrecking*, 351 F.3d at 1261.

²⁹ *Sw. Airlines Co. v. Transp. Sec. Admin. (Southwest I)*, 554 F.3d 1065, 1073 (D.C. Cir. 2009).

³⁰ *Southwest II*, 650 F.3d at 756 (quoting *Am. Wrecking*, 351 F.3d at 1261).

³¹ *Id.* (quoting *Southwest I*, 554 F.3d at 1073).

³² *Southwest II*, 650 F.3d at 756; see 49 U.S.C. § 44940(a)(2)(B)(i) (2006).

³³ *Southwest II*, 650 F.3d at 756.

unreliability and limited nature;³⁴ however, in rehashing the TSA decision, the court never elaborated on why or how TSA came to these conclusions. The majority contended that the airlines gave no reason to believe the DOT evidence was reliable, which, according to the majority, was apparently necessary because the figure was based on an industry report and not an independent audit.³⁵ Specifically, the majority speculated that the DOT figure was likely inflated due to pre-9/11 incentives for airlines to “aim high” on their screening estimations, making such numbers “shaky,” influenced, and unreliable.³⁶ Thus, the court found that TSA was justified in ignoring the DOT figure.³⁷

Finally, the majority reasoned that because “there was no authoritative source for the number of airport screenings during the year 2000,” TSA was within its rights to rely solely on the SH&E report; TSA adequately and reasonably explained that the SH&E report was more detailed and reliable than the Campbell report, thus fulfilling the standard in *American Wrecking*.³⁸ The majority then dismissed the airlines’ three other arguments (not discussed here) and concluded that there was not sufficient reason to overturn TSA’s decision.³⁹ However, though *the majority* engaged in this extensive analysis on the merits and weaknesses of the two conflicting reports, it is important to note that TSA did not articulate such analysis in its decision.⁴⁰

Judge Brown’s dissent first took issue with TSA’s failure to make reference to the DOT figure at all, accusing it of impermissibly ignoring contradictory evidence.⁴¹ Brown further argued that though entitled to a degree of deference, TSA is not entitled to unlimited judicial deference in its decisions.⁴² Even if the majority was correct that TSA implicitly rejected the DOT data by rejecting the Campbell report, Brown argued that TSA still articulated no reasoned factual basis in its opinion as to why the Campbell report and, by extension, the DOT data, were not appropriate to include in the fee estimate.⁴³ Brown identified several cases requiring agencies to reasonably explain and show

³⁴ *Id.*

³⁵ *Id.* at 757.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 756–57.

³⁹ *Id.* at 757–58.

⁴⁰ *Id.*; see also *id.* at 760 (Brown, J., dissenting).

⁴¹ *Id.* at 758–59 (Brown, J., dissenting).

⁴² *Id.*

⁴³ *Id.* at 758–60.

“a rational connection between the facts found and the choice made” when a contrary body of evidence exists, and he argued that TSA failed to engage in this process.⁴⁴

The D.C. Circuit’s holding in *Southwest II* sets a potentially dangerous and worrisome precedent in the area of judicial oversight of government agencies. Part of the majority’s argument is based on the deference the court should purportedly give to an agency’s choice between conflicting evidence, specifically invoking 49 U.S.C. § 44940 (a)(2)(B)(i) as authority.⁴⁵ Even if the court finds through reasoned analysis that an agency was correct in its conclusory determination, D.C. Circuit precedent still requires the agency to adequately analyze and consider the contradictory evidence.⁴⁶

The case law on which the majority relied clearly indicates that the court should defer whenever an agency “adequately considers contradictory evidence.”⁴⁷ The issue then is whether TSA “adequately” considered the evidence of both the Campbell report and the SH&E report. Adequate consideration meriting the court’s deference would have been shown had TSA provided a rational line of reasoning for rejecting the DOT’s estimate.⁴⁸ Although the majority and TSA repeatedly stated that the Campbell report was inferior, apparently because it was based on limited data, they never explained or gave evidence as to why the data were limited or how the Campbell data were inferior.⁴⁹ Specifically, the court gave no explanation for TSA’s choice beyond the following:

TSA conducted a thorough review of the Campbell report that included an examination of both the data and methodologies utilized to construct the report findings. TSA concluded that the Campbell report and findings were insufficient for further consideration due to the report’s use of limited data and broad, simplistic methodologies that did not consider the full spectrum of specific cost categories.⁵⁰

⁴⁴ *Id.* at 759 (citing *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 93 (D.C. Cir. 2010); *AT&T Wireless Servs. v. FCC*, 270 F.3d 959, 968 (D.C. Cir. 2001)).

⁴⁵ *Southwest II*, 650 F.3d at 756.

⁴⁶ *Id.* at 760.

⁴⁷ *Id.* at 756; *Am. Wrecking Corp. v. Sec’y of Labor*, 351 F.3d 1254, 1261 (D.C. Cir. 2003).

⁴⁸ *Southwest II*, 650 F.3d at 761.

⁴⁹ *Id.* at 758.

⁵⁰ *Id.* at 758–59.

Both *International Union, United Mine Workers of America v. Mine Safety & Health Administration* and *AT&T Wireless Services v. FCC* held that relying solely on the agency's knowledge and expertise to dismiss contradictory evidence was arbitrary and capricious, and thus not entitled to a deferential review by the courts.⁵¹ The D.C. Circuit also stated in *AT&T* that an "agency [is required] to 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"⁵² Here, there is nothing to indicate TSA ever engaged in this required articulation of why the SH&E report was preferable to the Campbell report, but instead merely concluded that it was.⁵³

TSA's decision, as well as the majority's assessment of that decision, also did not adequately consider that the two consultants' reports focused on different things, both important in determining the most accurate estimate of the screening costs.⁵⁴ TSA purportedly took issue with the Campbell report's "failure to 'consider the full spectrum of specific cost categories'" that the SH&E report gave in a "sophisticated analysis."⁵⁵ However, once again, in its wholesale adoption of the TSA decision, the court did not give any reasonable basis or even a shred of evidence for this conclusory assessment.⁵⁶ Additionally, even if the Campbell report was not perfect in isolation, it may have contained data, such as the DOT estimates of numbers of persons screened, that, in combination with the SH&E data, would have produced the most accurate and fair estimate of screening costs.⁵⁷ The dissent pointed out that TSA likely did not understand this "fundamental difference" in the reports since it did not devote any attention to discussing or even pointing out this difference—another indication that they never "adequately" considered this contradictory evidence as required by precedent in the D.C. Circuit.⁵⁸ Without TSA's explanation of the rationale behind its decision and the breakdown of how it got from point A to point B,

⁵¹ *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 93 (D.C. Cir. 2010); *AT&T Wireless Servs. v. FCC*, 270 F.3d 959, 968 (D.C. Cir. 2001).

⁵² *AT&T*, 270 F.3d at 968.

⁵³ *Southwest II*, 650 F.3d at 759 (Brown, J., dissenting).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 759–60, 761 n. 2.

there can be no assurance that the agency met its burden of conducting an adequate review.

If the courts continue to allow unlimited deference to the decision-making power of government agencies in these types of matters, the rights and financial well being of the airlines and other private entities stand to be harmed in pursuit of agency self-interest. TSA's absolute adoption of the SH&E report and rejection of the Campbell report, combined with its failure to articulate any line of reasoning for doing so, opens the door to suspicion that TSA never seriously entertained the DOT estimate and thus followed its own self-interest in charging higher fees.⁵⁹ Though the issue of whether TSA complied with the necessary procedure in determining the screening costs may appear to be benign, it could lead to a slippery slope to unchecked government intrusion. If agencies are not required to actually show a reasonable factual basis for how they arrive at the specific amount of money they are charging in fees, then there is no oversight to prevent abuse of the system. An agency has a self-interest in charging the most it can, making meaningful oversight necessary to deter them from unjustly ignoring evidence contrary to that interest. Ultimately courts should take a strong stance against allowing unlimited deference to agency decisions and require a full and complete articulation of the agency's reasoning, especially when they have the power to impose such a large expense on private companies.

⁵⁹ *Id.*