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## Airport Security Screeners: In Your Face and Above the Law

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## AIRPORT SECURITY SCREENERS: IN YOUR FACE AND ABOVE THE LAW

LUKE STRIEBER\*

**I**N *VANDERKLOK V. UNITED STATES*, the Third Circuit addressed the issue of whether a First Amendment claim for retaliatory prosecution could be brought against an agent of the Transportation Security Administration (TSA) in the context of airport security screenings—a question of first impression.<sup>1</sup> Any action brought under the Constitution against a federal official is known as a *Bivens* action.<sup>2</sup> In *Vanderklok*, the Third Circuit declined to extend the coverage of a *Bivens* action to include a remedy against TSA screeners who retaliate against a traveler who exercises their First Amendment rights.<sup>3</sup>

### I. BACKGROUND

The case centers around an altercation involving a TSA screener (Kieser) and a traveler (Vanderklok).<sup>4</sup> After passing his luggage through the security checkpoint, Vanderklok’s heart monitor, concealed in a protective piece of PVC pipe, prompted further screening from Kieser.<sup>5</sup> According to Vanderklok, Kieser was “disrespectful and aggressive” during this screening, so Vanderklok informed Kieser of his intent to file a complaint.<sup>6</sup> Kieser, however, maintained that Vanderklok was belligerent, threw his hands in the air, and claimed that he could bring a bomb through airport security at any point.<sup>7</sup> Once the heart

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<sup>1</sup> *Vanderklok v. United States*, 868 F.3d 189, 196 (3d Cir. 2017).

<sup>2</sup> *Id.* at 198.

<sup>3</sup> *Id.* at 209.

<sup>4</sup> *Id.* at 194.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 193.

<sup>7</sup> *Id.* at 194.

monitor was checked and the PVC pipe confiscated, Kieser called the airport police to report that Vanderklok had made a bomb threat.<sup>8</sup> A police officer then approached and arrested Vanderklok just five minutes after he requested the complaint form.<sup>9</sup> Vanderklok was then handcuffed and transported to the police station where he awaited his appearance in court.<sup>10</sup>

At trial, Kieser's testimony was found to be unreliable as the surveillance footage did not corroborate his version of the events, and Vanderklok was acquitted of all charges.<sup>11</sup> Following his acquittal, Vanderklok brought suit asserting a total of nine claims against Kieser, the United States, the TSA, the City of Philadelphia, and various police officers.<sup>12</sup> The nine asserted claims included violations of the First Amendment, Fourth Amendment, Fourteenth Amendment, and the Federal Torts Claims Act (FTCA).<sup>13</sup>

## II. LEGAL HISTORY

The District Court of the Eastern District of Pennsylvania dismissed all claims against the United States, the TSA, the police officers, and the City of Philadelphia, leaving Kieser as the sole defendant.<sup>14</sup> With respect to the First Amendment retaliatory prosecution claim against Kieser, the district court concluded that such a cause of action exists under the stipulations in *Bivens* and that Kieser was not entitled to qualified immunity.<sup>15</sup> The Third Circuit heard the case on interlocutory appeal and ruled on the issue of "whether Kieser ought to be immune from suit for Vanderklok's First Amendment retaliation claim, and, preliminary to that, whether such a claim exists at all in the specific circumstances of this case."<sup>16</sup>

In response to the above issue, the Third Circuit declined to extend a *Bivens* cause of action for First Amendment retaliation in the specific context of airport security screeners.<sup>17</sup> The court determined that, while the Supreme Court had left open the

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 195.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 196.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 198.

<sup>17</sup> *Id.* at 209.

possibility of implying a *Bivens* action under a clause of the First Amendment and the Third Circuit itself had previously assumed that a *Bivens* action extended to First Amendment claims, courts in general should be weary of explicitly extending *Bivens* actions to new contexts with new categories of defendants.<sup>18</sup> The Supreme Court stated in *Wilkie v. Robbins* that in order for a *Bivens* action to extend to a new context and class of defendant: (1) there must be no alternative existing remedy for addressing the grievance; and (2) “special factors counselling hesitation” must not outweigh the benefit of authorizing a new kind of federal litigation.<sup>19</sup> In the case of airport security screeners, the Third Circuit concluded that, although there was no alternative means of redress for Vanderklok, national security concerns demanded that the court not extend *Bivens* actions to this class of defendants.<sup>20</sup>

### III. THIRD CIRCUIT ANALYSIS

Prior to delving into a *Wilkie* analysis, Judge Jordan explained how the expansion of *Bivens* actions into new contexts is strictly limited.<sup>21</sup> Since the original *Bivens* case created a private right of action under the Fourth Amendment, the Supreme Court has further extended *Bivens* to Fifth and Eighth Amendment causes of action in *Davis v. Passman* and *Carlson v. Green*, respectively.<sup>22</sup> However, in the nearly forty years since those cases have been handed down, the Supreme Court has never held that *Bivens* extends to First Amendment claims.<sup>23</sup> This lack of guidance has left the lower courts to form their own opinions on the subject. For example, the Third Circuit has implied a *Bivens* action under the First Amendment for free speech rights and the denial of prisoners’ rights.<sup>24</sup> But, the court merely assumed that a *Bivens* action could exist for a First Amendment right to be free of government retaliation for speech without ruling on the is-

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<sup>18</sup> *Id.* at 199.

<sup>19</sup> *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

<sup>20</sup> *Vanderklok*, 868 F.3d at 206.

<sup>21</sup> *Id.* at 198.

<sup>22</sup> *Carlson v. Green*, 446 U.S. 14, 32–33 (1980); *Davis v. Passman*, 442 U.S. 228, 248–49 (1979); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

<sup>23</sup> *Vanderklok*, 868 F.3d at 200.

<sup>24</sup> *Milhouse v. Carlson*, 652 F.2d 371, 374 (3d Cir. 1981) (implied *Bivens* action for the denial of prisoners’ rights); *Paton v. La Prade*, 524 F.2d 862, 870 (3d Cir. 1975) (implied *Bivens* action for a violation of free speech).

sue.<sup>25</sup> Judge Jordan also pointed out that recently “the Court has made clear that expanding the *Bivens* remedy is now a ‘disfavored’ judicial activity.”<sup>26</sup> Acting upon that assumption and understanding that a *Bivens* action for a First Amendment violation had not previously been extended in the context of airport security screeners, the Third Circuit was wary to extend it in this case.

Proceeding to the *Wilkie* analysis, the court’s first step was to determine whether there was any other means of redress for Vanderklok. The three alternative avenues for Vanderklok were (1) the FTCA; (2) state law liability; and (3) the Travel Redress Inquiry Program (TRIP).<sup>27</sup> First, under the FTCA, if a federal employee commits a tort, the United States can be substituted as a defendant.<sup>28</sup> While the United States generally has sovereign immunity, the FTCA provides for a waiver of sovereign immunity when a federal employee commits a tort within the scope of employment.<sup>29</sup> However, if the federal employee commits an intentional tort, he is not acting within the scope of his employment, and the United States’ sovereign immunity is reinstated.<sup>30</sup> Since Kieser is a federal employee who committed an intentional tort, sovereign immunity is reinstated and claims against the United States fail. Under this specific fact scenario, the only way a suit against Kieser could proceed is if Kieser, as an airport security screener, is classified as an “investigative or law enforcement officer.”<sup>31</sup> While some TSA agents are law enforcement personnel, Kieser was not because he was not: “(1) authorized to carry and use firearms; (2) vested with the degree of the police power . . . ; and (3) identifiable by appropriate indicia of authority.”<sup>32</sup> Second, after concluding that the FTCA did not provide a remedy, the court ruled that, because Kieser’s tortious conduct was intentional and was not within the scope of his employment, there was no state law claim against the government or Kieser. Third, because TRIP was intended to provide a means for trav-

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<sup>25</sup> *George v. Rehiel*, 738 F.3d 562, 585 n.24 (3d Cir. 2013).

<sup>26</sup> *Vanderklok*, 868 F.3d at 200 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1848 (2017)).

<sup>27</sup> *Id.* at 201–05.

<sup>28</sup> 28 U.S.C. § 2679(b)(1) (2012).

<sup>29</sup> *Id.* § 2679(d)(1).

<sup>30</sup> *Id.* § 2680(h).

<sup>31</sup> *Id.* § 2680(h).

<sup>32</sup> 49 U.S.C. § 44903(a)(1)–(3) (2012).

elers to contest their placement on the “no fly list,” it did not apply to Vanderklok’s case either as he was not on a no-fly list.<sup>33</sup>

Next, the court analyzed whether there were any special factors counseling hesitation.<sup>34</sup> In this case, a special factor is that imposing liability upon airport security screeners implicates national security concerns.<sup>35</sup> The court recognized that “[t]he Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence.”<sup>36</sup> The judicial branch has been especially reluctant to decide a case involving national security when the remedy is “money damages rather than a claim seeking injunctive or other equitable relief.”<sup>37</sup> Further, the Third Circuit believed that the duty of airport security screeners was “so significant” and “of high consequence” that the judicial branch should decline to impose a remedy in this situation. Instead, the court concluded that Congress should handle the “balancing of priorities” between national security and the protection of constitutional rights of United States citizens.<sup>38</sup> Although other courts have implied a *Bivens* action for First Amendment retaliation claims,<sup>39</sup> the Third Circuit, in this case, held that such a *Bivens* cause of action should not be made available against airport security screeners.

#### IV. WHY THE COURT GOT IT WRONG

The Third Circuit declined to extend *Bivens* in this case for three reasons: first, the duties of TSA screeners implicate national security concerns;<sup>40</sup> second, Congress is in a better position than the courts to evaluate a “new species of litigation[;]”<sup>41</sup> and third, TSA agents are not given sufficient training to hold them to a standard of probable cause.<sup>42</sup> However, these concerns are overstated and are not critical enough to justify denying a constitutional right to free speech in this context.

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<sup>33</sup> Vanderklok v. United States, 868 F.3d 189, 205 (3rd Cir. 2017).

<sup>34</sup> *Id.* at 205–09.

<sup>35</sup> *Id.* at 206 (quoting *Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012)).

<sup>36</sup> *Doe*, 683 F.3d at 394.

<sup>37</sup> *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017).

<sup>38</sup> *Vanderklok*, 868 F.3d at 209 (quoting *Ziglar*, 137 S. Ct. at 1863).

<sup>39</sup> *Tobey v. Jones*, 706 F.3d 379, 383 (4th Cir. 2013); *Pellegrino v. U.S. Transp. Sec. Admin.*, No. 09-5505, 2014 WL 1489939, at \*10 (E.D. Pa. Apr. 16, 2014), *amended on reconsideration*, 2014 WL 3952936 (E.D. Pa. Aug. 12, 2014).

<sup>40</sup> *Vanderklok*, 868 F.3d at 206.

<sup>41</sup> *Id.* at 208 (quoting *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007)).

<sup>42</sup> *Id.* at 209.

While it is true that courts have often declined to intervene in matters of national security and that this case presents special security concerns, generic security concerns cannot be used as an excuse to deny all constitutional protections at an airport. Other courts, including the Supreme Court, have recognized this and have allowed a constitutional claim to proceed even though the issue at hand related to national security concerns.<sup>43</sup> Because “national security” is not a magic word that can be uttered to avoid deciding a case, any court analyzing a First Amendment claim in this context must look at the specific detriment to national security allegedly threatened.

In this case, the concern is that a *Bivens* remedy might chill the fervent screening practices of TSA screeners. When distilled to a specific form, the claim in this context is no different than the concern whenever a *Bivens* action is implied by a court.<sup>44</sup> Since the *Bivens* action was created in 1971, federal officers have had to weigh personal liability against national security when making split-second decisions.<sup>45</sup> There is no reason to believe that *Bivens* liability would uniquely chill an airport security screener from performing their duties. By declining to imply *Bivens* in this context, the Third Circuit has undercut every past *Bivens* implication given that all implications revolve around the same concerns.<sup>46</sup> This is an unnecessary result since courts in the past have assumed that *Bivens* extends to First Amendment claims.<sup>47</sup> Further, precedent dictating judicial discretion in the realm of national security has revolved around concerns that the judiciary would interfere with the decisions of the executive

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<sup>43</sup> See, e.g., *Tobey*, 706 F.3d at 393 (“We . . . are therefore unwilling to relinquish our First Amendment protections—even in an airport.”); see also *Ziglar*, 137 S. Ct. at 1862 (“[N]ational-security concerns must not become a talisman used to ward off inconvenient claims.”).

<sup>44</sup> *Linlor v. Polson*, No. 1:17CV13, 2017 WL 2955520, at \*5–\*7 (E.D. Va. July 11, 2017).

<sup>45</sup> See, e.g., *Graham v. Connor*, 490 U.S. 386, 397 (1989) (“[P]olice officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”).

<sup>46</sup> *Linlor*, 2017 WL 2955520, at \*6.

<sup>47</sup> *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014).

branch.<sup>48</sup> However, this case only tangentially relates to the executive branch and its decision to set up the TSA.<sup>49</sup>

The Third Circuit next contended that the Supreme Court has laid down a precedent of deference to Congress in cases involving *Bivens* claims and national security. The court relied on *Ziglar v. Abbasi*, where illegal aliens challenged their confinement conditions pursuant to “high-level executive policy” in the wake of 9/11.<sup>50</sup> Following *Ziglar*’s logic, the Court reasoned that Congress is in a better position to put a remedial scheme in place and, because the remedial scheme circumscribed by Congress in the context of airport security screeners does not include a private right of action for First Amendment violations, the courts should not overstep their boundaries and permit new litigation.<sup>51</sup> However, *Ziglar* is inapplicable here because it dealt with “high-level policies” that would draw Congressional attention and make it less likely that Congress’s silence was inadvertent.<sup>52</sup> In the principal case, the TSA-damages framework is not at the same level of executive detention policies, and therefore, the congressional silence does not warrant the same level of deference. Further, the Supreme Court indicated that the availability of an alternate-damages framework was of “central importance” when deciding whether or not the judiciary should intervene.<sup>53</sup> Unlike in *Ziglar*, Vanderklok’s case involves a scenario in which “it is damages or nothing.”<sup>54</sup> It is true that the Supreme Court has cautioned courts when dealing with high-level policy decisions involving a remedial scheme evidencing clear intent of Congress or the executive, but Congressional silence in the context of First Amendment damages for airport security screeners should not stop the judiciary from protecting constitutional rights.<sup>55</sup>

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<sup>48</sup> See, e.g., *Ziglar*, 137 S. Ct. at 1861 (stating that implying a *Bivens* action “would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch”); *Doe v. Rumsfeld*, 683 F.3d 390, 396 (D.C. Cir. 2012) (cautioning that deciding the case “would require a court to delve into the military’s policies regarding the designation of detainees as ‘security internees’ or ‘enemy combatants,’ as well as policies governing interrogation techniques”).

<sup>49</sup> *Vanderklok v. United States*, 868 F.3d 189, 207 (3rd Cir. 2017).

<sup>50</sup> *Ziglar*, 137 S. Ct. at 1860.

<sup>51</sup> *Vanderklok*, 868 F.3d at 208.

<sup>52</sup> See *Ziglar*, 137 S. Ct. at 1862.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)).

<sup>55</sup> *Bush v. Lucas*, 462 U.S. 367, 379–80 (1983).

Finally, the court feared that instituting a *Bivens* action may unfairly subject TSA agents to litigation they are not adequately trained to avoid.<sup>56</sup> If a *Bivens* action were instituted in the context of TSA screeners, and those screeners were sued under the First Amendment, they would be free from liability if their actions, as alleged, were supported by probable cause.<sup>57</sup> The Third Circuit reasoned that because TSA screeners are not trained in the issues of “probable cause, reasonable suspicion, and other constitutional doctrines,” it would be unfair to impose such a standard on them.<sup>58</sup> However, the court also recognized the “inherent uncertainty surrounding the probable cause standard.”<sup>59</sup> In fact, the Supreme Court has often remarked that “probable cause is a flexible, common-sense standard.”<sup>60</sup> Police and other officers of the law frequently have to wager between their lives and their job when making split-second decisions revolving around that same common-sense standard. The gravity of the decisions they are confronted with while on the job warrant the need for training on probable cause. It is apparent that during the formation of the TSA, Congress did not envision TSA agents making decisions of the magnitude that would warrant probable cause training because it did not designate them as special agents or officers nor equip them with firearms.<sup>61</sup>

It would be unfair to impose the probable cause standard of “reasonable caution” on TSA agents not designated as officers without training when interacting with individuals in the course of their employment.<sup>62</sup> There are minimal marginal benefits in training in an inherently uncertain standard such as probable cause.<sup>63</sup> These marginal benefits are worthwhile to protect those who place their lives on the line for the safety of others; however, they are not important enough to justify the limitation of constitutional rights.<sup>64</sup>

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<sup>56</sup> *Vanderklok*, 868 F.3d at 208.

<sup>57</sup> *See Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006).

<sup>58</sup> *Vanderklok*, 868 F.3d at 208–09.

<sup>59</sup> *Id.* at 209.

<sup>60</sup> *Texas v. Brown*, 460 U.S. 730, 742 (1983).

<sup>61</sup> *See Vanderklok*, 868 F.3d at 208.

<sup>62</sup> *See Brown*, 460 U.S. at 742.

<sup>63</sup> *See Vanderklok*, 868 F.3d at 209.

<sup>64</sup> *See id.*

## V. CONCLUSION

It is well understood that “[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.”<sup>65</sup> The Third Circuit decided that national security concerns, deference to Congress, and an unfair result trumped constitutional rights in this case. However, the TSA fails in its duties ninety-five percent of the time.<sup>66</sup> Giving a government agency such as the TSA unbridled leeway to infringe on constitutional rights is akin to taking medicine that blinds you but has a five percent chance of stopping a heart attack. To trade a constitutional right for an ineffective safety measure goes against the fundamental principles of freedom that the nation was built upon. Benjamin Franklin warned that “[t]hose who would give up essential Liberty to purchase a little temporary Safety, deserve neither Liberty nor Safety” with a case such as this in mind.<sup>67</sup>

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<sup>65</sup> *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001).

<sup>66</sup> Andrew Blake, *TSA Failed to Detect 95 Percent of Prohibited Items at Minneapolis Airport: Report*, WASH. TIMES (July 6, 2017), <http://www.washingtontimes.com/news/2017/jul/6/tsa-failed-detect-95-percent-prohibited-items-minn/> [<https://perma.cc/E6EC-E5Y9>].

<sup>67</sup> BENJAMIN FRANKLIN, *THE PAPERS OF BENJAMIN FRANKLIN* 6, at 242 (Leonard W. Labaree ed., 1963).