

## RECENT CASES

CONSTITUTIONAL LAW — FREE SPEECH — SIXTH CIRCUIT HOLDS THAT CIVIL PENALTIES IMPOSED FOR INTERFERING WITH AIRPORT SECURITY SCREENER THROUGH USE OF LOUD AND PROFANE LANGUAGE DO NOT BURDEN FIRST AMENDMENT. — *Rendon v. Transportation Security Administration*, 424 F.3d 475 (6th Cir. 2005).

“It’s not what you say, but how you say it” may provide a keen adage for the Dale Carnegie set, but it seems like a treacherously slippery test for adjudicating First Amendment claims. Nonetheless, constitutional scholars and weary travelers alike should pay heed. Recently, in *Rendon v. Transportation Security Administration*,<sup>1</sup> the Sixth Circuit upheld the constitutionality of civil penalties imposed on an airline passenger who used loud and profane language while protesting airport security procedures and screening delays. The panel reasoned that by prompting a security screener to shut down a checkpoint to retrieve his supervisor, the passenger “interfered” with security procedures in violation of Transportation Security Administration (TSA) regulations. While the panel may have been understandably motivated by concerns of airport security and efficiency, it failed — in its strikingly short opinion — to define clearly the boundary between permissible and impermissible speech with regard to airport regulations. In the panel’s defense, the distinction between protected speech and “interference” is inherently subjective and blurry. But Supreme Court precedent, most notably *City of Houston v. Hill*,<sup>2</sup> suggests that adding scienter and notice requirements could cure this defect and prevent the vagueness and overbreadth challenges stemming from it.

On July 27, 2002, Michael Rendon walked through a Cleveland airport metal detector en route to his flight.<sup>3</sup> When the detector’s alarm sounded, Rendon removed his watch and turned to walk back through the detector. Security screener Richard Pindroh notified Rendon that he was not permitted to do so and needed to wait to be hand-wanded.<sup>4</sup> Rendon, frustrated by the potential delay, exclaimed that this procedure was “fucking bullshit.”<sup>5</sup> While Pindroh resumed screening other passengers, Rendon waited to be hand-wanded and grew exasperated.<sup>6</sup> He cursed loudly to protest the delay, to which Pindroh

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<sup>1</sup> 424 F.3d 475 (6th Cir. 2005).

<sup>2</sup> 482 U.S. 451 (1987).

<sup>3</sup> *Rendon*, 424 F.3d at 477.

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

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

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

responded that Rendon did not need to use profanity.<sup>7</sup> Rendon retorted that, if profanity offended Pindroh, he was “in the wrong line of work and . . . should consider living in a bubble.”<sup>8</sup> Rendon added that he had a “First Amendment right to say what he wanted.”<sup>9</sup> Pindroh then shut down his screening line and retrieved his supervisor.<sup>10</sup> When the supervisor arrived, Pindroh told him that Rendon was being “uncooperative, unruly, and using loud profanities.”<sup>11</sup> Soon after, a police officer removed Rendon from the screening area.<sup>12</sup> The TSA assessed a \$700 fine against him for violating the TSA’s “Prohibition Against Interference with Screening Personnel”<sup>13</sup> by “interfering with” and “intimidating” airport screening personnel.<sup>14</sup>

After a hearing, Judge Brudzinski, an administrative law judge (ALJ), upheld the penalty.<sup>15</sup> Judge Brudzinski found that Rendon “began arguing . . . , using profanity and causing commotion until screening personnel stopped operation of the screening checkpoint.”<sup>16</sup> From these facts, Judge Brudzinski drew two conclusions of law: First, Rendon “disrupted the operation of the security checkpoint.”<sup>17</sup> Second, Rendon “intimidated” Pindroh by “putting him in apprehension of immediate battery.”<sup>18</sup>

On administrative appeal, the Deputy Administrator for the TSA — the delegated agency decisionmaker for appeals — partially upheld the ALJ’s decision.<sup>19</sup> The Deputy Administrator agreed that Rendon’s behavior was disruptive, concluding that a screening agent would not halt a checkpoint “out of whimsy” and that, therefore, Rendon impermissibly interfered with TSA operations.<sup>20</sup> The Deputy Administrator rejected, however, the conclusion of law regarding intimidation, agreeing with Rendon that no evidence supported this charge.<sup>21</sup> The Dep-

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<sup>7</sup> *Id.* at 477–78.

<sup>8</sup> *Id.* at 478.

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

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

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

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

<sup>13</sup> 49 C.F.R. § 1540.109 (2005) (“No person may interfere with, assault, threaten, or intimidate screening personnel in the performance of their screening duties under this subchapter.”).

<sup>14</sup> Michael J. Rendon, No. 2002GL750103, 2004 WL 2526015, at \*2 (Dep’t of Transp. Sept. 13, 2004). Ironically, Rendon himself was an agent assigned to a Department of Homeland Security terrorism task force. *See* Rendon v. Dep’t of Homeland Sec., No. CH-0752-04-0346-I-1, 2004 MSPB LEXIS 3735, at \*1–2 (Merit Sys. Prot. Bd. July 6, 2004) (affirming suspension of Rendon from agency employment due to his conduct in instant matter).

<sup>15</sup> *Michael J. Rendon*, 2004 WL 2526015, at \*2.

<sup>16</sup> *Id.* at \*3.

<sup>17</sup> *Id.* at \*4.

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

<sup>19</sup> *Id.* at \*3–4.

<sup>20</sup> *Id.* at \*4.

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

uty Administrator also declined to consider free speech concerns, noting that such constitutional issues were beyond the scope of administrative hearings.<sup>22</sup>

A unanimous Sixth Circuit panel affirmed. Judge Kennedy<sup>23</sup> rejected three First Amendment arguments raised by Rendon in his pro se appeal. First, Judge Kennedy held that the TSA regulation was not, as applied, a content-based restriction, because it was “justified without reference to the content of the regulated speech.”<sup>24</sup> The regulation’s text countenanced “good-faith” questions,<sup>25</sup> and security screening practices generally tolerated comments laden with grumbling and profanities. Consequently, the regulation was narrowly tailored to advance the substantial government interest in efficient and effective airport screening.<sup>26</sup> Rendon was liable, nonetheless, because his “loud and belligerent” conduct, in the face of Pindroh’s request to cease, could not be characterized as being in good faith, and his conduct forced the checkpoint to shut down, thereby interfering with TSA operations.<sup>27</sup> Second, Judge Kennedy denied that the regulation was overbroad, noting that only behavior, including speech, that actually interfered with screeners’ duties was proscribed.<sup>28</sup> Therefore, the regulation did not reach the substantial portion of constitutionally protected speech necessary to trigger overbreadth invalidation.<sup>29</sup> Third, Judge Kennedy found that Rendon’s claim of facial unconstitutional vagueness failed on the same grounds.<sup>30</sup>

Clearly, neither Rendon’s hands nor his mouth were clean in this matter. Such coarse and argumentative behavior could obviously spur security breaches or checkpoint delays.<sup>31</sup> But the Sixth Circuit was too quick to assume that the regulation was narrowly tailored to avoid

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<sup>22</sup> *Id.* at \*1.

<sup>23</sup> Judges Cook and Griffin joined the opinion.

<sup>24</sup> *Rendon*, 424 F.3d at 479 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (internal quotation mark omitted).

<sup>25</sup> *See id.* at 478–79. The regulation’s exception for good-faith questions states: “This rule does not prevent good-faith questions from individuals seeking to understand the screening of their persons or their property. But abusive, distracting behavior, and attempts to prevent screeners from performing required screening, are subject to civil penalties under this rule.” Civil Aviation Security Rules, 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002).

<sup>26</sup> *See Rendon*, 424 F.3d at 479–80 (citing *Ward*, 491 U.S. at 796–99).

<sup>27</sup> *Id.* at 479. Ironically, the panel cited Rendon’s claim that “it was a free country in which he could say what he pleased” as evidence of his impermissible conduct. *Id.*

<sup>28</sup> *Id.* at 480. An interpretation of “interfere” that categorically excludes speech was unavailable to the panel because the TSA explicitly noted “verbal abuse of screeners” in promulgating the regulation. Civil Aviation Security Rules, 67 Fed. Reg. at 8344.

<sup>29</sup> *See Rendon*, 424 F.3d at 480 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

<sup>30</sup> *Id.*

<sup>31</sup> *See* Civil Aviation Security Rules, 67 Fed. Reg. at 8344 (“This rule is necessary to emphasize the importance to safety and security of protecting screeners from undue distractions or attempts to intimidate.”).

such outcomes. The panel's use of semantic nuance to distinguish this case from the Supreme Court's ruling in the similar matter of *City of Houston v. Hill* did little but sweep the First Amendment concerns under the rug. The panel's concern with preserving effective and orderly airport screening did not require it to avoid this issue. Instead, the panel could have demanded procedural protections to compensate for the absence of a clear substantive standard for what constitutes impermissible speech. As the Court wrote in *Hill*, notice and scienter requirements can cure vagueness and overbreadth concerns. Such requirements would allow substantially similar regulation, yet more adequately balance security and First Amendment interests.

Supreme Court precedent outlines the constitutional bounds of permissible speech regulation. Under *United States v. O'Brien*,<sup>32</sup> a regulation on conduct that also affects speech is permissible when "a sufficiently important governmental interest . . . can justify incidental limitations on First Amendment freedoms."<sup>33</sup> Even so, a challenged regulation can be unconstitutionally vague or overbroad. To fail a vagueness challenge, the regulation must be "impermissibly vague in all of its applications"<sup>34</sup> and written so that "ordinary people [cannot] understand what conduct is prohibited," creating the risk of "arbitrary and discriminatory enforcement."<sup>35</sup> To fail an overbreadth challenge, the regulation must infringe on a substantial amount of constitutionally protected conduct.<sup>36</sup> Similarly, a vagueness challenge requires the risk of substantial infringement.<sup>37</sup>

In *Hill*, the Court sustained an overbreadth challenge against an ordinance with language remarkably similar to the regulation at issue in *Rendon*. The ordinance made it "unlawful for any person to . . . in any manner . . . *interrupt* any policeman in the execution of his duty."<sup>38</sup> In sustaining the challenge, the Court was motivated by two concerns: First, the Free Speech Clause allows citizens to level a "significant amount of verbal criticism and challenge directed at police officers," including obscenities.<sup>39</sup> Second, restrictions on such speech would grant police the "unfettered discretion to arrest individuals for words or conduct that annoy or offend them."<sup>40</sup> Consequently, the

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<sup>32</sup> 391 U.S. 367 (1968).

<sup>33</sup> *Id.* at 376.

<sup>34</sup> *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

<sup>35</sup> *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

<sup>36</sup> *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

<sup>37</sup> *See Hoffman Estates*, 455 U.S. at 494.

<sup>38</sup> *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (first omission in original) (emphasis added) (quoting HOUSTON, TEX., CODE OF ORDINANCES § 34-11(a) (1984)) (internal quotation marks omitted).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 465.

Court found the ordinance inadequately tailored to further the legitimate state interest of limiting disorderly conduct and fighting words.<sup>41</sup>

The *Rendon* panel skirted the *Hill* holding with a tenuous semantic distinction. Relying on the reasoning of a federal district court opinion, *Fair v. City of Galveston*,<sup>42</sup> Judge Kennedy argued that “to interfere” has a narrower meaning than “to interrupt” because the former applies only to conduct posing “an actual hindrance.”<sup>43</sup> Yet Judge Kennedy, as well as the district court opinion he cites, failed to provide any support for the proposition that the word “interrupt” does not generally involve “actual hindrance.” Both *Hill* and a dictionary definition suggest that such support is unavailable.<sup>44</sup> More tellingly, the *Hill* ordinance was used to prosecute behavior quite similar to that of *Rendon*.<sup>45</sup>

The larger concern, however, is the *Rendon* panel’s failure to delineate what constitutes “interference,” resulting in a risk of arbitrariness and ambiguity. Despite the panel’s reliance on “actual hindrance” to distinguish *Hill*, the panel left unclear whether “interference” is to be judged from the subjective viewpoint of the particular security screener or by an objective reasonableness standard.<sup>46</sup> Unfortunately,

<sup>41</sup> *Id.*

<sup>42</sup> 915 F. Supp. 873 (S.D. Tex.), *aff’d mem.*, 100 F.3d 953 (5th Cir. 1996).

<sup>43</sup> *Rendon*, 424 F.3d at 480 (quoting *Fair*, 915 F. Supp. at 879) (internal quotation mark omitted). The district court’s interpretation may have hinged on the theory that “interrupt” refers to speech, while “interfere” refers to conduct. See *Fair*, 915 F. Supp. at 879 (noting that *Hill* “pertained primarily to verbal acts through the use of the term ‘interrupt’”). In actuality, the *Hill* Court’s conclusion that the “interrupt” language in the ordinance was in effect a speech restriction resulted not from a semantic distinction, but from the presence of a Texas state law that preempted the ordinance’s prohibitions on “assault[s]” and “strike[s].” *Hill*, 482 U.S. at 460 (citing TEX. PENAL CODE ANN. § 1.08 (Vernon 1974)). A similar argument can be applied in *Rendon*. While no formal preemption exists, the presence of a federal statute that bars assaults on airport security personnel similarly narrows the operative focus of the TSA regulation to verbal interference. See 49 U.S.C. § 46503 (Supp. II 2002) (“An individual . . . within a[n] . . . airport . . . who, by assaulting a[n] . . . employee who has security duties . . . , interferes with the performance of the duties . . . or lessens the ability of the employee to perform those duties, shall be fined under title 18, imprisoned for not more than 10 years, or both.”).

<sup>44</sup> The *Hill* Court wrote: “Interrupt commonly means to cause one to cease, such as stopping someone in the middle of something.” 482 U.S. at 456 (quoting district court opinion). “Interrupt” is defined as “to stop by breaking in”; “halt, hinder, or interfere with the continuation of (some activity);” “prevent (one) from proceeding by intrusive or interpolated comment or action.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1182 (1986).

<sup>45</sup> Behavior falling under the ordinance included: “arguing,” “[t]alking,” “[i]nterfering,” “[f]ailing to remain quiet,” “[r]efusing to remain silent,” “[v]erbal abuse,” “[c]ursing,” “[v]erbally yelling,” and “[t]alking loudly, [w]alking through scene.” *Hill*, 482 U.S. at 457 (alterations in original) (quoting *Hill v. City of Houston*, 789 F.2d 1103, 1113–14 (5th Cir. 1986) (en banc)).

<sup>46</sup> On the one hand, the panel reasoned that *Rendon*’s conduct “[could not] be characterized as simply asking a good-faith question.” *Rendon*, 424 F.3d at 479. This language suggests an objective standard. On the other hand, the panel claimed that only conduct “pos[ing] an actual hindrance” is impermissible. *Id.* at 480 (quoting *Fair*, 915 F. Supp. at 879). Whether conduct is an

either standard risks upsetting the balance between First Amendment protections and security concerns. A subjective viewpoint standard — sanctioning speech whenever a screener feels there is an obstruction — may allow unfettered discretion. An objective standard may be difficult to elaborate and administer, especially given differences in airport passenger volumes, screeners' ability to take time to converse with passengers, and screeners' sensitivity to criticism.<sup>47</sup>

Since a satisfactory substantive test for evaluating permissible speech is unavailable, a superior approach would be to provide procedural protections in the form of scienter and notice requirements.<sup>48</sup> The dicta of *Hill*, in both the majority opinion and a concurrence, suggest that incorporating such requirements may cure a vague or overbroad speech regulation.<sup>49</sup> The *Hill* majority noted that obstructive behavior toward police could be adequately checked by disorderly conduct statutes that “make[] it unlawful to fail to disperse in response to a valid police order.”<sup>50</sup> A similar provision could be added to the TSA regulation, requiring the airport screener to notify the passenger that he is disrupting security operations and has thus crossed the threshold of obstructive behavior.<sup>51</sup>

There may be situations in which a notice requirement would fall short of security demands, but a scienter requirement independently sufficient to find liability would alleviate this risk. Some conduct may be so egregious that it should be obvious that the conduct constitutes

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actual hindrance depends on the screener's sensitivity to distraction, so this language suggests a more subjective standard.

<sup>47</sup> If the panel's opinion is construed as offering an objective standard of conduct, it still suffers from two layers of ambiguity. First, the court leaves undecided whether good-faith questions constitute the entire domain, or just a subset, of allowable passenger inquiry and criticism under the regulation. Second, the term “good-faith” itself is vague and subject to misinterpretation.

<sup>48</sup> Scienter is of course a substantive restraint but, because it ensures that a party actually knew or intended that his conduct would violate the law, it can serve the same end as notice. *See* *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (noting “that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed”). A portion of the TSA regulation could be construed as creating liability on the basis of intent to interfere since it advocates liability for “attempts to prevent security screeners from performing required screening.” Civil Aviation Security Rules, 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002) (emphasis added).

<sup>49</sup> *See Hill*, 482 U.S. at 474 (Powell, J., concurring in the judgment in part and dissenting in part) (approving a hypothetical ordinance that requires “proof that the person not only intended to speak, but also intended to interfere with the officer's performance of his duties”); *id.* at 481 (suggesting that such a hypothetical ordinance “would limit the present broad discretion of officers and at the same time protect substantially the city's legitimate interests”).

<sup>50</sup> *Id.* at 463 n.11 (majority opinion); *see also id.* at 465 n.14.

<sup>51</sup> Although Pindroh did request that Rendon stop cursing, the request was unaccompanied by any suggestion that Rendon was “interfering” with security operations. For the same reason, signs posted at security checks notifying passengers of the TSA regulation would do little to provide notice. Passengers would still have difficulty discerning whether their conduct might constitute “interference” under the regulation.

“interfering” even without notice. Requiring notice would provide an unwarranted safe harbor for such conduct. A scienter requirement — punishing conduct as “interference” only if the obstruction was knowing or purposeful — could cabin discretion but protect legitimate safety interests. Admittedly, creating a well-functioning scienter requirement would still require the court, or the TSA, to better define the bounds of “interference”; merely requiring that a passenger know that his conduct would “distract” an airport screener would allow expansive and overzealous prosecution under the regulation. Hence, such a solution should require a higher standard than “distraction” for what constitutes “interference.”<sup>52</sup>

Admittedly, the safeguards of notice and scienter still present an imperfect solution. A notice requirement alone is better suited for curing vagueness concerns than overbreadth concerns. Vague regulations leave potential violators ignorant of the bounds of permissible conduct; notice automatically cures this ignorance. But a screener providing notice that conduct violates a regulation does nothing to address the concern that a regulation itself might be overbroad. Nevertheless, if courts — as *Rendon* suggests — are willing to tolerate some infringement on legitimate speech due to their overarching concern with security, then notice provides a palatable compromise, even for overbreadth concerns. Notice elevates a passenger’s knowledge of his conduct to its alleged effects, allowing the passenger to self-regulate his conduct or knowingly risk prosecution. Furthermore, such a procedural requirement still preserves future judicial scrutiny of the TSA regulation’s application. Courts could still strike down overzealous or arbitrary applications of the TSA regulation under the same ad hoc analysis that seems to underlie *Rendon*.<sup>53</sup>

The reasoning behind such a formulation can be linked to the broader scholarly discussion on theories of constitutional underenforcement.<sup>54</sup> The *Rendon* decision, and overbreadth and vagueness doctrines in general, manifest the tension between overenforcing and underenforcing constitutional norms. Faced with a vague regulation and the inescapable likelihood of error in defining permissible conduct,

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<sup>52</sup> The distinction between “distraction” and “interference” might be illustrated as the difference between *Rendon*’s initial engagement with the screener and the consequence of the screener shutting down the line. If *Rendon* intended or knowingly engaged in conduct that would lead to the latter result, then he should be held liable even without notice. If *Rendon* intended only the former action but unwittingly caused the latter consequence, then, on the basis of scienter alone, he should not be held liable.

<sup>53</sup> See *Rendon*, 424 F.3d at 480 (concluding with little discussion that the regulation was not overbroad).

<sup>54</sup> See, e.g., Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

the *Rendon* panel chose to underenforce the constitutional norm, discounting the likelihood of substantial infringement on free speech. In contrast, a blanket prohibition on an “interference” regulation motivated by overbreadth or vagueness doctrine might overenforce free speech norms by protecting impermissible speech as well. Procedural requirements cannot minimize the doctrinal error rate, but at least self-regulation reduces the risk of prosecution.

Michael Rendon was obviously wrong when he claimed that he had a “First Amendment right to say what he wanted.” Yet the Sixth Circuit’s opinion sheds little light on what he could have said. The opacity of the panel’s reasoning is all the more disconcerting in the context of a vagueness and overbreadth challenge: if appellate judges have difficulty issuing a clear decision, how can they assume that the public will be able to discern the boundaries of permissible speech delineated by the regulation? Notice and scienter requirements could clarify that boundary — perhaps not in the most ideal manner, but nonetheless saving Rendon, the screener, and the Sixth Circuit a lot of trouble.