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Legal Sidebar

Is a TSA Screener a "Law Enforcement Officer"? Court Allows Lawsuit Against United States to Proceed

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According to a complaint that air traveler Nadine Pellegrino filed in 2009 against the United States in federal court, several Transportation Security Officers (TSOs) working for the Transportation Security Administration (TSA) detained Pellegrino, damaged her property, and fabricated criminal charges against her after she attempted to pass through a security checkpoint at Philadelphia International Airport in 2006. In relevant part, Pellegrino's complaint demanded monetary compensation from the federal government under the Federal Tort Claims Act (FTCA). After a divided panel of judges of the U.S. Court of Appeals for the Third Circuit (Third Circuit) initially ruled that one of the FTCA's provisions barred Pellegrino from pursuing her claims, the Third Circuit voted to rehear the case as a full court. Then, last August, a majority of the participating judges concluded—contrary to the panel's determination—that Pellegrino's suit could proceed.

The *Pellegrino* case is noteworthy for several reasons. For one, the court's competing opinions reflect judicial disagreements over how to interpret statutes governing private lawsuits against the federal government. More specifically, the Third Circuit's holding could also render the government liable not only for tortious acts committed by TSOs, but also for unlawful actions committed by other federal employees who perform similar duties. To inform Congress of the *Pellegrino* decision's potential legal, policy, and financial consequences, this Sidebar (1) describes the law governing when a plaintiff may pursue tort litigation against the United States, (2) explains how the Third Circuit applied those laws in *Pellegrino*, and (3) identifies potential considerations for Congress.

Sovereign Immunity and the Federal Tort Claims Act

The doctrine of sovereign immunity ordinarily bars private parties from suing the United States without the government's consent. To enable persons injured by the federal government to obtain recourse, however, Congress has waived the United States' immunity from certain lawsuits. As relevant here, the FTCA enables plaintiffs to pursue certain state law tort claims against the federal government. For instance, depending on the circumstances, a plaintiff injured by a federal employee's negligence may sue the United States under the FTCA for monetary compensation.

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However, the FTCA's waiver of sovereign immunity is subject to numerous conditions and limitations. For example, subject to a caveat discussed below, 28 U.S.C. § 2680(h)—known as the intentional tort exception—preserves the federal government's immunity from "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" that a federal officer or employee commits while acting within the scope of his employment. As some commentators have observed, the FTCA's legislative history "contains scant commentary" explaining why Congress chose to prohibit these types of lawsuits. At least some Members of Congress appeared to believe, however, that (1) it would be "unjust" to require the government to pay taxpayer funds when its employees commit acts of intentional misconduct like assault or battery; and (2) exposing the government to liability for those categories of lawsuits could threaten the public fisc.

Not only can 28 U.S.C. § 2680(h) prevent plaintiffs from suing the United States; it can potentially prevent plaintiffs from asserting tort claims against anyone at all. A separate provision of the FTCA, 28 U.S.C. § 2679, ordinarily immunizes federal employees from private lawsuits for torts they commit in the scope of their employment. The Supreme Court has interpreted that provision to preclude tort lawsuits against federal employees even when an exception codified in 28 U.S.C. § 2680 bars the plaintiff from suing the United States itself. As a result, if the intentional tort exception prohibits a plaintiff from bringing a particular lawsuit against the federal government, the plaintiff may be entirely unable to pursue tort litigation against any other defendant.

There are limited circumstances, however, in which a plaintiff may assert one of the types of claims enumerated in 28 U.S.C. § 2680(h) against the United States notwithstanding the intentional tort exception. Congress, alarmed by what some Members characterized as inappropriate behavior by federal law enforcement officers conducting investigative raids, amended 28 U.S.C. § 2680(h) in 1974 to specify that the intentional tort exception does not bar claims for "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" committed by "investigative or law enforcement officers of the United States Government." The statute defines "investigative or law enforcement officer" as "any 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." Courts refer to this "exception to the exception" as the "law enforcement proviso."

The *Pellegrino* Case

At bottom, the *Pellegrino* case is a dispute over the law enforcement proviso's breadth. As mentioned above, Pellegrino alleges that TSOs damaged her belongings during a screening at the Philadelphia airport. According to Pellegrino, when she expressed her displeasure to those TSOs, they falsely accused Pellegrino of physically assaulting them. Pellegrino further alleges that Philadelphia police officers then arrested Pellegrino and charged her with various crimes, including committing aggravated assault and making terroristic threats. After a municipal judge found Pellegrino not guilty based on insufficient evidence, Pellegrino sued the federal government for false arrest, false imprisonment, and malicious prosecution. Because 28 U.S.C. § 2680(h) places all three of those claims within the intentional tort exception's ambit, however, Pellegrino's lawsuit could only proceed if the law enforcement proviso exempted her claims from the exception's scope.

To resolve that issue, the Third Circuit needed to consider whether a TSO is 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" as defined by the FTCA. Complicating that question was the fact that TSOs, unlike other TSA employees that the agency explicitly designates as "law enforcement officers," do not carry firearms, make arrests, or seek or execute warrants. Rather, TSOs strictly perform screening of passengers and property at airports. Indeed, TSA called TSOs "screeners" rather than "officers" until 2005, when the government relabeled them as "officers" "as part of an effort to improve morale."

A majority of the full Third Circuit ultimately concluded that TSOs qualify as "investigative or law enforcement officers" within the law enforcement proviso's meaning, and that Pellegrino's lawsuit could therefore proceed. The majority first broke 28 U.S.C. § 2680(h)'s definition of "investigative or law enforcement officer" into its component parts:

1. "any **officer** of the United States;"
2. "who is **empowered by law**;"
3. "to **execute searches, to seize evidence, or to make arrests**;"
4. "for **violations of Federal law**."

Having parsed the proviso's text, the majority **first** concluded that TSOs are "**officers** of the United States" because "they are 'tasked with assisting in a critical aspect of national security—securing our nation's airports and air traffic.'" **Second**, the majority reasoned that TSOs are "**empowered by law**" to execute their duties, as federal law contemplates that TSOs will conduct "screening of all passengers and property" on passenger aircraft. **Third**, the majority determined that TSO screenings constitute "**searches**" under the proviso, as TSOs perform physical searches of luggage and passengers. **Finally**, the majority decided that TSOs execute searches "for **violations of federal law**" to prevent passengers from bringing prohibited items onto planes in contravention of applicable statutes and regulations.

In addition to these textual arguments, the majority also maintained that policy considerations supported its conclusion. The majority first emphasized that Third Circuit precedent foreclosed air travelers from suing TSOs under the "*Bivens*" doctrine, which, subject to various limitations, allows private citizens to assert constitutional claims against federal officers. The majority therefore reasoned that, because judicial precedent barred Pellegrino from asserting *constitutional* claims against the TSOs who allegedly harmed her, interpreting the FTCA to also foreclose Pellegrino's *tort* claims would leave Pellegrino (and other similarly situated airline passengers) with "no remedy when TSOs assault them, wrongfully detain them, or even fabricate criminal charges against them."

In response to objections from the government and the dissenting judges, the majority rejected the view that allowing such lawsuits to proceed would expose the United States to expansive liability. Citing statistics from 2015 suggesting that "fewer than 200 people (out of over 700 million screened) filed complaints with the TSA alleging harm that would fall within the scope of the proviso," the majority maintained that comparatively few litigants would file lawsuits like Pellegrino's in the future. The majority likewise disagreed that its holding would subject the United States to sweeping liability for intentional torts committed by federal employees other than TSOs who perform routine "administrative searches" like health inspections (as contrasted with investigative searches "based on individualized suspicion" of criminal activity conducted by criminal law enforcement officers). Instead, the majority contended that its interpretation of the proviso would only cover officers who perform searches that "are more personal than traditional administrative inspections," such as security screenings that "extend to the general public and involve searches of an individual's physical person and her property."

Four dissenting judges disagreed with these conclusions. The dissenters first interpreted the phrase "empowered by law to execute searches . . . for violations of federal law" to refer only to *investigatory* searches conducted pursuant to the government's traditional police powers, not to purely *administrative* searches like TSA screenings. The dissenters similarly concluded that the statutory term "officer" did not include mere federal employees, but instead only covered government personnel "charged with police duties." Thus, maintained the dissenters, the proviso only applies to officers like FBI agents and U.S. Marshals who conduct investigatory searches pursuant to their police duties. In the dissenters' view, the proviso does not cover employees like TSOs who merely conduct routine administrative screenings and lack the authority to carry firearms, make arrests, and seek and execute warrants.

Turning to the potential practical consequences of the majority's holding, the dissenters asserted that the court's interpretation of the proviso would "sweep[] in not just TSA screeners, but also countless other civil servants" who "perform inspections, issue administrative subpoenas, conduct audits, perform drug testing, or conduct any of the countless other routine, suspicionless searches authorized by federal law." The dissenters therefore argued that a broader conception of the law enforcement proviso would "subject the United States Treasury to vast tort liability." The dissenters further maintained that the majority's ruling created a circuit split, as a different court of appeals had previously reached the opposite conclusion that the law enforcement proviso does not cover TSOs.

The United States has until late November 2019 to decide whether to ask the U.S. Supreme Court to review the Third Circuit's decision.

Considerations for Congress

Pellegrino thus raises questions about the proper scope of the government's immunity. Decisions regarding whether—and under what circumstances—private plaintiffs may sue the federal government are largely entrusted to Congress. Preserving a broader measure of the federal government's sovereign immunity could reduce the government's susceptibility to litigation and liability, but could also foreclose a greater number of Americans injured by federal officers from obtaining recourse through the judicial system. Expanding the universe of circumstances in which private plaintiffs may sue the United States, by contrast, could potentially place a greater strain on the public fisc and interfere with governmental operations.

In addition to these broader questions regarding when private plaintiffs should be able to sue the federal government generally, *Pellegrino* also raises narrower questions about the law enforcement proviso's breadth. As the foregoing discussion reflects, judges in different courts—and even in the same court—do not always agree whether the proviso applies to any given scenario. In particular, the exchange between the majority and dissenting judges in *Pellegrino* suggests that it is unclear how *Pellegrino*'s holding might apply to government employees who perform administrative searches for federal agencies beyond just the TSA. If, as the *Pellegrino* dissent maintains, the majority's interpretation of the law enforcement proviso covers a potentially broad array of federal employees, then the government's exposure to liability and litigation could increase. Moreover, decisions regarding the law enforcement proviso's scope could affect the way TSOs and other federal employees conduct searches, as some courts have suggested that an employee who believes his actions may subject his employer to liability might perform his duties less zealously than one whose actions are insulated by an exception to the FTCA. On the other hand, some jurists maintain that interpreting the law enforcement proviso more narrowly could leave some Americans harmed by overzealous federal employees with no legal remedy.

Depending on how Congress weighs these competing policy considerations, it could amend 28 U.S.C. § 2680(h) to further specify which officers qualify as "investigative or law enforcement officers" under the proviso. For instance, Congress could resolve the disagreement at the heart of the competing opinions in *Pellegrino* by explicitly specifying that the proviso does (or does not) cover TSOs. Alternatively, to address the broader policy implications of the Third Circuit's decision, Congress could clarify whether the law enforcement proviso covers federal employees who conduct "searches of an individual's physical person and her property"—or whether it merely covers governmental workers who perform other types of "administrative inspections." As an alternative to modifying the rules governing litigation against the federal government, Congress could also consider compensating persons injured by federal employees outside the tort system, such as through an administrative claims process.

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