Massachusetts Bay Transportation Authority v. Anderson et al

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# National security and free speech

**By Harvey Silverglate | August 16, 2008**

WHY DID the federal district court gag three MIT undergraduates who apparently discovered a flaw in the MBTA's electronic fare-collection system? The reason one judge imposed the unconstitutional gag order prohibiting the students from presenting their paper Aug. 10 at the DEFCON computer "hackers" conference, and another judge refused on Aug. 14 to vacate that order even after the conference ended, is the current excuse du jour for an epidemic of censorship: national security.

The students, as a project for their class in computer security, discussed how the CharlieCard could be decoded and used to obtain free T rides. When the MBTA learned that they were going to present their paper at DEFCON, it sought a temporary restraining order. Judge Douglas Woodlock, sitting as emergency "duty judge," granted the T's request and prohibited the presentation -- a clearly unconstitutional decision -- citing a violation of the federal Computer Fraud and Abuse Act. Even after a follow-up Aug. 14 hearing before Judge George O'Toole, the order stands.

The Computer Fraud and Abuse Act almost certainly does not apply to mere speech; rather, it covers someone who "knowingly causes the transmission of a program, information, code, or command to a computer or computer system." In other words, the statute outlaws hacking, not a scholarly (or even unscholarly) presentation. And even if the statute could be twisted to cover the DEFCON presentation, the First Amendment's free speech guarantee would render this use unconstitutional. Yet Woodlock issued a patently unconstitutional order. Why?

This bizarre court intervention is rooted, as are many other recent civil liberties violations, in the aftermath of the Sept. 11, 2001, terrorist attacks. The MBTA's court complaint highlights "the role of the MBTA in Homeland Security efforts" and claims that the hacking threat "affects a computer system used by a government entity for national security purposes." A supporting affidavit of MBTA personnel adds that "in 2007 the MBTA received $4 million from the Department of Homeland Security . . . for use in emergency communications initiatives." Thus the T, in reality just another local transit system struggling under crushing debt and long-term mismanagement, transmogrified a temporary threat to its fare collection system into something so urgent as to override the First Amendment.

The MBTA's motion for a gag order was heard by Woodlock. Four years ago, the judge penned an opinion when civil libertarians and political activists challenged Draconian security measures aimed at severely limiting demonstrations at the 2004 Democratic National Convention in Boston. While characterizing the chicken-coop-like "free speech zone" into which protesters were to be herded outside the Fleet Center as akin to "an internment camp," Woodlock said that it was "irretrievably sad" that post-Sept. 11 security threats made such tight restrictions on otherwise protected activity necessary. "One cannot conceive of other elements [that could be] put in place to create a space that's more of an affront to the idea of free expression than the designated demonstration zone," Woodlock moaned as he facilitated the affront.

The convention security issues were, admittedly real, even if the solution was unnecessarily harsh on free speech. But the possibility of real or merely feared -- but in any event temporary -- revenue losses for the T should not qualify as the kind of extraordinary and irreparable threat that can justify a restraining order. The Supreme Court has not had occasion -- yet -- to change that high legal barrier, but some lower federal courts have nonetheless since 9/11 been setting a lower bar for the censors.

Ironically, this constitutional violation is for naught, since the order will not stop other bright minds from making the same discovery. Knowledge and its spread, for both constitutional and practical reasons, are not subject to court injunctions. The MBTA would have been better off hiring, rather than suing, the MIT trio to solve the electronic flaw. The students (and their professor) could doubtless do a better job of patching the security hole than the T's security officials, consultants, and vendors who designed the vulnerable system. But with the


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ghosts of 9/11 and "national security" hovering, the students and the First Amendment didn't stand a chance.

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