

FEDERALIZATION OF AIRPORT SECURITY WORKERS: A STUDY OF THE PRACTICAL IMPACT OF THE AVIATION AND TRANSPORTATION SECURITY ACT FROM A LABOR LAW PERSPECTIVE

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I. INTRODUCTION

Two commercial airliners cruised with the accuracy of guided missiles into the Twin Towers of New York's World Trade Center. A third took out a wing of the Pentagon in Washington, D.C. So it was on September 11, 2001 that the nation's attention shifted to obvious questions: How could such a tragedy have occurred? How can we ensure that it never happens again? As American troops boarded planes and ships bound for Afghanistan, Congressional response on the home front came swiftly in the form of the Aviation and Transportation Security Act (the "Act").¹ Passed by both houses on November 19, 2001, the Act amends various sections of Title 49 of the United States Code, and several other titles to provide for enhanced security in America's airports.² The Act sets forth a detailed scheme under which the federal government will exert greater control than

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1. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified in scattered sections of 49 U.S.C.; 5 U.S.C. §§ 5313, 8331; 26 U.S.C. § 9502; 31 U.S.C. § 1105). Because of the many different locations within the United States Code where the Act is codified, for the remainder of the comment, sections referred to will be those in the session laws, unless otherwise specified. In other words, the Act itself will be referenced, not the various titles and chapters of the U.S.C. which the Act amends.

2. Although the majority of the Aviation and Transportation Security Act amends Title 49, dealing with the responsibilities of the Department of Transportation, other titles are also amended by the Act. These include: Title 5, which deals, generally, with government organization and employees; Title 26, the Internal Revenue Code of 1986; and Title 31, regarding presidential budget submissions.

ever before over airport security operations, and creates a new federal workforce to implement that scheme.

The federalization of airport security workers is a unique event for several reasons. While the private sector frequently complains about government regulation of industry, it is not often that the United States, safe haven of capitalism and the free market economy, commandeers a private industry. It is perhaps for this reason that one of the biggest debates concerning passage of the Act centered on whether or not airport security personnel should be made federal employees.

As will be discussed in greater detail below, the only other instance in modern American history which resembles such a mass federalization was also in an airport-related business, that of air traffic control, during President Reagan's standoff with the Professional Air Traffic Controllers Organization (PATCO) in the 1980s.³ Although the air traffic controllers were already federal employees at the time of their infamous strike, they had exercised a good deal of power and autonomy as a unit. This level of autonomy, quite comparable to that of any strong private sector union, was eviscerated by the Reagan administration's clamp-down on union activities, and eventual discharge and replacement of almost 11,000 strikers.⁴

Because of its novelty and its unique effect upon union autonomy, the federalization of a whole sector of private industry as a method of coping with a national emergency bears close scrutiny. It implicates the collective rights of these new federal workers, as well as the future shape of American labor law.

This Comment will lay out the legislative history and basic provisions of the new Act, with special attention to those sections federalizing airport security personnel, and creating guidelines for their hiring and training. With that groundwork established, the Comment will explore from a labor law perspective some of the possible ramifications of the Act's provisions providing for the federalization of an entire workforce. Such discussion will focus on the special status of federal employees with regard to the exercise of their collective action rights.⁵

The remainder of the Comment will address some Title VII concerns that may arise as a result of the new hiring guidelines for airport personnel delineated in the Act, and the current political and social climate with

3. See generally Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731 (1983) (relating the history and legal implications of the PATCO strike of 1981).

4. *Id.* at 746-47 (describing the former willingness of PATCO workers to engage in slow-downs, despite their status as federal employees without the right to strike, and the power of such union activity to affect the air travel industry).

5. By way of prelude, federal workers, while they may join together to form unions, may not, under Title V of the United States Code, go on strike. See 5 U.S.C. § 7311(3)-(4) (2001).

regard to Arab and Muslim Americans. History has shown that in times of war, discriminatory treatment of a feared ethnic group tends to run amok.⁶ The secret military tribunals currently being employed to try individuals associated with the terrorist acts of September 11, for example, raise serious constitutional concerns for individual liberty under the Fourth, Fifth and Sixth Amendments.⁷ Although these concerns reach beyond the scope of an article meant to deal primarily with labor law issues, a limited assessment of the potential for discrimination in the hiring of Arab and Muslim Americans as federal employees seems squarely within the scope of such an article, and will be discussed below.

II. TO FEDERALIZE OR NOT TO FEDERALIZE?: LEGISLATIVE CONFLICT AND THE BIRTH OF THE AVIATION AND TRANSPORTATION SECURITY ACT

The first bill to be introduced in Congress regarding airport security after September 11 was introduced by Senator Edwards just three days after the attacks.⁸ The bill to “provide for the improvement of security at airports and seaports” was rather short, made no mention of federalizing security personnel, and was referred to the Senate Committee on Commerce, Science, and Transportation.⁹ That bill died in Committee and was succeeded by the Senate bill introduced by Senator Johnson on September 26th.¹⁰ Senate Bill 1473 called for immediate federalization of airport security personnel, and did so prominently in the first section of the bill.¹¹ H.R. 3110, the bill favored by House Democrats on October 12, also mandated that federal employees carry out all screening of passengers and luggage.¹² The competing bill sponsored by House Republicans sought federal oversight of the screening process, but not the creation of a new federal workforce. Under that bill, “[a]ll screening of passengers and property at airports . . . [would] be *supervised* by uniformed Federal personnel of the Transportation Security Administration who shall have the power to order the dismissal of any individual performing such screening.”¹³

6. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the United States government’s internment of Japanese Americans during the Second World War).

7. See Joseph Margulies, *A Year and Holding: Limbo is No Place to Detain Them*, WASH. POST, Dec. 22, 2002, at B1 (describing the imprisonment of “unlawful belligerents” from Pakistan and Afghanistan in Guantánamo Bay, Cuba).

8. S. 1429, 107th Cong. (2001).

9. *Id.*

10. S. 1473, 107th Cong. (2001).

11. *Id.* at § 1(a).

12. H.R. 3110, 107th Cong., sec. 4, § 44901(b) (2001).

13. H.R. 3150, 107th Cong. sec. 3, § 44901(e) (2001) (emphasis added).

In the next section, just under the provision outlining federal supervision of security screening, the House Republican bill included a segment marked "Limitation on Right to Strike":¹⁴ "An individual that screens passengers or property, or both, at an airport under this section may not participate in a strike, or assert the right to strike, against the person (including a governmental entity) employing such individual to perform such screening."¹⁵ The version of this section that survived in the final Act will be considered and discussed below. For the moment, however, it is important to note the inherent tension between the bill's insistence that private employees perform security screening, and its simultaneous refusal to allow these employees the right to strike.

The rights of private employees to go on strike have been protected by the National Labor Relations Act since its passage in 1935.¹⁶ In conceding to federalization, House Republicans secured the bonus of an anti-striking provision not specifically included in either the original Senate or House Democrat bills; the provision is now codified in Section 111(i) of the Aviation and Transportation Security Act.¹⁷ The inclusion of such a provision is curious in that it is entirely superfluous. Without it, the new federal employees would have been prohibited from striking anyway. Under Title 5, their status as federal employees alone would be sufficient to impose upon them the duty not to go on strike.¹⁸ The United States Code provisions, governing the terms of employment for all federal employees, state under the heading of "Loyalty and striking":

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he . . . (3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or (4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.¹⁹

It seems that a key factor in the decision to federalize airport security

14. *Id.* at § 44901(f).

15. *Id.*

16. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1994)).

17. Aviation and Transportation Security Act, Pub. L. No. 107-71, sec. 111(i), 115 Stat. 597, 619 (2001).

18. 5 U.S.C. § 7311(3)-(4) (2001).

19. *Id.* See also, *Air Trans. Ass'n of Am. v. PATCO*, 516 F. Supp. 1108, 1110 (E.D.N.Y. 1981) (emphasizing that "strikes by federal employees continue to be illegal, . . . and indeed criminal," behavior).

personnel — one that was not emphasized in the media coverage of the debate over federalization — was the knowledge that doing so would prevent such employees from striking, a prohibition that may have obvious safety benefits for the millions of Americans who will depend on the new screeners for secure travel, but may also have less obvious economic ramifications.

When the Professional Air Traffic Controllers went on strike in violation of their no-strike duty as federal employees under Title 5 in 1981, they inflicted, in the words of Professors Bernard Meltzer and Cass Sunstein, “substantial losses on the airlines and the community at large.”²⁰ The threat of crippling financial losses and safety concerns spurred strict enforcement of Title 5 against PATCO in 1981, and though unacknowledged publicly, could have spurred the inclusion of the no-strike clause in the Aviation and Transportation Security Act.²¹ Bearing this political and legislative history in mind, the provisions of the new Act take on added meaning. It is an Act not solely concerned with providing for our safety, but in its efforts to short-circuit any future labor crisis before it starts, it deprives airport workers of the right to strike.²²

III. STATUTORY FRAMEWORK: AN OUTLINE OF THE AVIATION AND TRANSPORTATION SECURITY ACT

The Aviation and Transportation Security Act is divided into two titles: Title I: Aviation Security, and Title II: Liability Limitation.²³ Title II, far shorter than the first title and largely beyond the reach of this Comment, covers the financial liability of various parties affected by the terrorist attacks of September 11.²⁴

Title I, which provides the focus for this Comment, establishes a new federal agency under the Department of Transportation, the Transportation Security Administration,²⁵ to be headed by the Under Secretary of Transportation for Security.²⁶ Appointed by the President “with the advice and consent of the Senate,”²⁷ the Under Secretary’s functions include the research and development of civil aviation security, as well as security responsibilities over other modes of transportation currently under the

20. Meltzer & Sunstein, *supra* note 3, at 747.

21. Act, *supra* note 16.

22. *Id.*

23. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

24. *Id.* sec. 201, 115 Stat. at 645-47.

25. *Id.* sec. 101(a), § 114(a), 115 Stat. at 597.

26. *Id.* sec. 101(a), § 114(b)(1), 115 Stat. at 597.

27. *Id.*

regulatory authority of the Department of Transportation.²⁸ This means that along with airports, the Under Secretary is responsible for the safety of passengers on highways, trains, buses, ports and waterways.²⁹

On Monday, December 10, 2001, President George W. Bush nominated veteran law enforcement officer John W. Magaw for the new post of Under Secretary of Transportation for Security.³⁰ Magaw took over as director of the Bureau of Alcohol, Tobacco and Firearms after that bureau received criticism for its handling of the assault on the Branch Davidian compound in Waco, Texas in 1993.³¹ In that capacity, Magaw headed investigations into the Oklahoma City bombing, the 1996 crash of TWA flight 800, and the 1996 bombing at the Atlanta summer Olympics.³² In July of 2002, however, Magaw was forced to resign, due to mounting concerns over his lack of experience in the field of aviation.³³ Retired Adm. James M. Loy, former commandant of the Coast Guard and the number two official at the Transportation Security Administration, was named to replace Magaw.³⁴ Concerns continue to escalate over how the replacement will affect the TSA's ability to fulfill the mandates of the Act on time, when efforts to meet Congress's timetable have already been largely unsuccessful.³⁵

Loy reports directly to the Transportation Security Oversight Board, which is charged with the responsibility of reviewing and ratifying all regulations and security directives issued by Loy.³⁶ The Board, established under section 102 of the Act, is comprised of seven members and will be chaired by the Secretary of Transportation.³⁷ Other members include the United States Attorney General, the Secretary of Defense, the Secretary of the Treasury, and the Director of the Central Intelligence Agency, or alternatively, a designee sent by each of the four above members.³⁸ The Board will also contain one member appointed by the President to represent the National Security Council, and one to represent to Office of Homeland security, currently headed by former Pennsylvania governor Tom Ridge.³⁹

28. *Id.* sec. 101(a), § 114(d)(1)-(2), 115 Stat. at 597.

29. Ellen Nakashima, *Bush Picks Transportation Security Chief*, WASH. POST, Dec. 11, 2001, at A31.

30. *Id.*

31. *Id.*

32. *Id.*

33. Greg Schneider, *Magaw Ousted From Airport Security Post*, WASH. POST, July 19, 2002, at A1.

34. *Id.*

35. *Id.*

36. See Aviation and Transportation Security Act, Pub. L. No. 107-71, sec. 102(a), § 115(c)(1), 115 Stat. 597, 605 (2001).

37. *Id.* sec. 102(a), § 115(a)-(b), 115 Stat. at 604-05.

38. *Id.*

39. *Id.*

As a component of his responsibility for day-to-day passenger screening operations, Loy has a number of duties which make him instrumental in creating the new federal workforce of airport security personnel. The Under Secretary must “develop standards for the hiring and retention of security screening personnel” and must also “train and test” them.⁴⁰ These duties will be discussed below in more depth. Also part of his duties and powers, he shall require background checks for airport security screeners, as well as all other individuals with access to secure areas of airports.⁴¹ It is not yet clear exactly which workers, other than security screeners, will now receive background checks, but baggage handlers, pilots, flight attendants and airport and airline management seem like obvious candidates. While not technically federal employees, these adjunct classes of workers will now be under closer federal supervision. Section 138 of the Act, entitled “Employment Investigations and Restrictions,”⁴² mandates new background checks for these individuals,⁴³ including employees hired long before September 11.⁴⁴ Checks will include “a criminal history record check and a review of available law enforcement data bases and records of other governmental and international agencies” should the Under Secretary see fit.⁴⁵

Security screeners and the Under Secretary are not the only new federal workers created by the Act. To help Loy in his duties, each U.S. airport will now have a Federal Security Manager, appointed by the Under Secretary to oversee screening of passengers and property at his or her airport.⁴⁶

The Act provides the Security Managers and the Under Secretary with several additional tools, aside from testing, training and background checks of workers, to aide in the protection of America’s airports. The Under Secretary can, upon the consent of the Attorney General, deploy federal law enforcement personnel to any airport.⁴⁷ The Act also authorizes the use of “biometric or other technology that positively verifies the identity of each employee and law enforcement officer who enters a secure area of an airport.”⁴⁸ To prevent employees and non-employees alike from hampering the screeners in their work, the Act contains amendments to the United States criminal code making interference with security screening personnel

40. *Id.* sec. 101(a), § 114(e)(1)-(4), 115 Stat. at 597-98.

41. *Id.* sec. 101(a), § 114(f)(12), 115 Stat. at 598.

42. *Id.* sec. 138.

43. *Id.* sec. 138(a)(8), § 44936(a)(1)(C)(i), 115 Stat. at 639.

44. *Id.* sec. 138(a)(10), 115 Stat. at 640.

45. *Id.* sec. 138(a)(8), § 44936(a)(1)(C)(i) 115 Stat. at 639.

46. *Id.* sec. 103, § 44933(a)-(b)(1), 115 Stat. at 605.

47. *Id.* sec. 106(a), § 44903(h)(3), 115 Stat. at 608.

48. *Id.* sec. 106(a), § 44903(h)(4)(E), 115 Stat. at 609.

a crime punishable by fine, imprisonment up to ten years, or both.⁴⁹ If the individual "use[s] a dangerous weapon in committing the assault or interference, [he] may be imprisoned for any term of years or life imprisonment."⁵⁰

As for in-flight concerns, Loy may deploy Federal air marshals "on every passenger flight of air carriers in air transportation or intrastate air transportation."⁵¹ The Act also authorizes improved flight deck integrity measures, such as the strengthening of flight deck doors and the use of video monitors to alert pilots to activity in the cabin.⁵²

All of these measures, the necessity and practicality of which remain to be seen, will likely be expensive. The federal government must now pay for the "[s]alary, benefits, overtime, retirement and other costs of screening personnel, their supervisors and managers, and Federal law enforcement personnel deployed at airport[s],"⁵³ as well as for the costs of training, the costs of background checks, and the costs of research and development of new security technology.⁵⁴ Congress has provided that "the . . . costs of providing civil aviation security services" be paid for via "security service" fees imposed uniformly on all passengers whose flights originate in the United States.⁵⁵ The Under Secretary can also impose fees on air carriers, to make up for any deficiencies in funds from the passenger fees.⁵⁶ Passengers and air carriers with grievances about these new fees will have no recourse to the courts; Loy's ability to impose these fees and to determine the cost of implementation of all programs under his control will not be subject to judicial review.⁵⁷

Eventually, some economic relief to fee bearers may be had in the form of limited subcontracting of security screening. The Act contains provisions allowing for limited subcontracting,⁵⁸ during a two year time period,⁵⁹ by the government to private screening companies, owned by U.S. citizens, whose employees must meet all the same qualifications as the federal employees.⁶⁰ However, the subcontracting can only take place after security has been run by the federal government for at least one year, and then only upon application by an airport that must be approved by the

49. *Id.* sec. 114(a), § 46503, 115 Stat. at 623.

50. *Id.*

51. *Id.* sec. 105(a), § 44917(a)(1), 115 Stat. at 607.

52. *Id.* sec. 104(a)(1)(B); 104(b)(1), 115 Stat. at 606.

53. *Id.* sec. 118(a), § 44940(a)(1)(A), 115 Stat. at 625.

54. *Id.* sec. 118(a), § 44940(a)(1)(A)-(G), 115 Stat. at 625.

55. *Id.* sec. 118(a), § 44940(a)(1), 115 Stat. at 625.

56. *Id.* sec. 118(a), § 44940(a)(2)(A), 115 Stat. at 625.

57. *Id.* sec. 118(a), § 44940(a)(1)-(a)(2)(A), 115 Stat. at 625.

58. *Id.* sec. 108(a), § 44919(a), 115 Stat. at 611.

59. *Id.* sec. 108(a), § 44919(b), 115 Stat. at 611.

60. *Id.* sec. 108(a), § 44919(f)-(g), 115 Stat. at 611-612.

Under Secretary.⁶¹

To breed cooperation among all employees working in areas related to the new federal agency, Congress included a whistleblower provision under section 125 of the Act, entitled “Encouraging Airline Employees to Report Suspicious Activities.”⁶² The provision states that no private employee of an air carrier, either foreign or national,

who makes a voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism . . . to any employee or agent of the Department of Transportation, the Department of Justice, any Federal, State, or local law enforcement officer, or any airport or airline security officer shall not be civilly liable to any person under any [state or federal laws] for such disclosure.⁶³

IV. TRAINING AND EMPLOYMENT OF SECURITY SCREENING PERSONNEL AS DEFINED BY THE ACT: SOME BROADLY APPLICABLE CIVIL RIGHTS IMPLICATIONS UNDER THE CONSTITUTION, THE ADA, AND TITLE VII

Section 111 of the Act, “Training and Employment of Security Screening Personnel,”⁶⁴ makes clear that the Under Secretary must “establish a program for the hiring and training of security screening personnel.”⁶⁵ As of December 19, 2001, thirty days after the Act became law, the Under Secretary was required to “establish qualification standards for individuals to be hired by the United States as security screening personnel.”⁶⁶ Loy has fairly broad discretion in determining what characteristics will ensure an able workforce, but the Act does give him some mandatory minimum standards. The new workers must score satisfactorily on a Federal security screening personnel selection examination,⁶⁷ which the Under Secretary must draft.⁶⁸ Moreover, the screeners must be U.S. citizens⁶⁹ and must “have the ability to demonstrate daily a fitness for duty without any impairment due to illegal drugs, sleep deprivation, medication, or alcohol.”⁷⁰ All screeners and baggage handlers will be subject to background checks, which will include a criminal history

61. *Id.* sec. 108(a), § 44919(b)-(c), 115 Stat. at 611.

62. *Id.* sec. 125(a), § 44941(a), 115 Stat. at 631.

63. *Id.*

64. *Id.* sec. 111 115 Stat. at 616.

65. *Id.* sec. 111(a)(2), § 44935(e)(1), 115 Stat. at 616.

66. *Id.* sec. 111(a)(2), § 44935(e)(2)(A), 115 Stat. at 616.

67. *Id.* sec. 111(a)(2), § 44935(e)(2)(A)(i), 115 Stat. at 617.

68. *Id.* sec. 111(a)(2), § 44935(e)(3), 115 Stat. at 617.

69. *Id.* sec. 111(a)(2), § 44935(e)(2)(A)(ii), 115 Stat. at 617.

70. *Id.* sec. 111(a)(2), § 44935(e)(2)(A)(v), 115 Stat. at 617.

record, and review of all available law enforcement databases.⁷¹ Applicants for the screening position must also meet a separate host of employment standards in order to obtain and retain their job.

Notwithstanding any other provision of law, presumably including Title VII of the Civil Rights Act of 1964 ("Title VII")⁷² and the Americans with Disabilities Act of 1990 (the "ADA"),⁷³ the screeners must be able to perform a variety of physical and mental tasks.⁷⁴ Congress has mandated that, regardless of whatever other requirements Loy and his agency choose to impose, the federal screeners must possess "basic aptitudes and physical abilities, including color perception, visual and aural acuity, physical coordination, and motor skills"⁷⁵ The Act goes on to state in detail the skills which Congress finds necessary for various components of a screener's daily duties. In effect, Congress has preordained a series of bona fide occupational qualifications for the screeners instead of leaving the skills required more loosely defined, thereby allowing individuals with a disability or for whom English is not their first language to challenge the necessity of a certain characteristic in state or federal court under the ADA or Title VII. For example, people who are visually impaired, even solely color blind, may not qualify for the position, given the language in sections 111(f)(1)(B)(i) and (ii). Those sections require that screeners be able to "distinguish on the screening equipment monitor the appropriate imaging standard specified by the Under Secretary,"⁷⁶ and "be able to distinguish each color displayed on every type of screening equipment and explain what each color signifies."⁷⁷ Hearing impaired applicants will also be disqualified if they are unable to "hear and respond to the spoken voice and to audible alarms generated by screening equipment in an active checkpoint environment."⁷⁸ People with other physical disabilities may be disqualified under section 111(f)(1)(B)(iv), which requires that persons performing physical searches "or other related operations . . . be able to efficiently and thoroughly manipulate and handle such baggage, containers, and other objects subject to security processing."⁷⁹ The subsection immediately following mandates that screeners who perform pat-downs have "sufficient

71. *Id.* sec. 138(a)(1), § 44936(a)(1)(A), 115 Stat. at 639.

72. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981-2000h-2 (2001).

73. Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, 29 U.S.C. § 706 (1990).

74. Aviation and Transportation Security Act, sec. 111(a)(2), § 44935(f)(1), 115 Stat. at 617.

75. *Id.* sec. 111(a)(2), § 44935(f)(1)(B), 115 Stat. at 617.

76. *Id.* § 44935(f)(1)(B)(i), 115 Stat. at 617.

77. *Id.* § 44935(f)(1)(B)(ii), 115 Stat. at 617.

78. *Id.* § 44935(f)(1)(B)(iii), 115 Stat. at 617.

79. *Id.* § 44935(f)(1)(B)(iv), 115 Stat. at 618.

dexterity and capability”⁸⁰ to conduct that procedure. Section 111(f)(1)(C) of the Act sets forth a number of reading, writing, and speaking-related tasks, all of which screeners must be able to perform in English.⁸¹

The above training and hiring requirements represent perfectly reasonable, common-sense standards. My purpose in describing them in such detail is not to indicate that Congress was somehow unreasonable or intentionally discriminatory in fixing those standards. After all, being able to operate the screening equipment efficiently and effectively in the hectic atmosphere of an airport where travelers are frequently rushing to make flights seems like the bare minimum we should expect of any screener. Furthermore, emergency situations warranting clear and speedy communication amongst security personnel obviously do not lend themselves to the use of an interpreter, no matter how noble the goal of a diverse work force may be. The English language qualifications set forth by Congress, if subjected to scrutiny in the courts under Title VII’s provisions prohibiting discrimination in employment based upon national origin, would certainly pass as a bona fide occupational qualification.⁸² In fact, Title VII gives special deference in terms of framing employment qualifications to employers whose employees are charged with protecting national security: Title VII, section 2000e-2(g) makes it clear that when the subject of employment is related to national security, it is not an unlawful employment practice for an employer “to fail or refuse to hire and employ any individual for any position, [or] for an employer to discharge any individual from any position”⁸³ if the employee has failed to meet a requirement “imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States”⁸⁴

It is also more than likely that a court would find making accommodations for hearing and visually impaired employees unduly burdensome to the government under the ADA, and would not require such accommodations to be made, given the demands of the job, and its importance to national security.

What Congress has done, however, in specifically stating that the screeners’ job qualifications must hold fast “[n]otwithstanding any provision of law,”⁸⁵ is to prevent individuals from *ever* bringing a challenge under the ADA or Title VII in the first place, despite the fact that such a

80. *Id.* § 44935(f)(1)(B)(v), 115 Stat. at 618.

81. *Id.* § 44935(f)(1)(c)(i)-(iv), 115 Stat. at 618.

82. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

83. *Id.* § 2000e-2(g).

84. *Id.* § 2000e-2(g)(1).

85. Aviation and Transportation Security Act, Pub. L. No. 107-71, sec. 111(a)(2)(f), § 44935(f)(1), 115 Stat. 597, 617 (2001).

challenge probably has a greater likelihood of failing than succeeding. As private employees, baggage screeners would have had the right to challenge, through the appropriate channels, any job requirement that they found discriminatory. As federal employees, they have been stripped of this right. It seems counterintuitive for Congress to pass laws protecting the civil rights of American citizens, and then to fail to extend those rights to persons employed by the United States. While the loss of the chance to bring a lawsuit which may well fail seems, on the surface, not to be much of a loss at all, it constitutes a deprivation of due process. Equal access to the courts is a fundamental right of every U.S. citizen granted in the federal Constitution under both the Fifth and Fourteenth Amendments.⁸⁶

As alluded to in the Introduction to this Comment, personal liberties are frequently subjugated to the interests of national security in times of war.⁸⁷ The appropriate balancing of priorities in such situations is a difficult task, and one which I do not envy the legislators in undertaking. However, when that task has been accomplished, and the balance has been tipped in opposition to individual liberties, it is vital that the move not go unnoticed. Few, if any, of the articles published in the nation's leading newspapers during the five months after September 11 mentioned the deprivation of rights of workers which would necessarily flow from the classification of screeners as federal, rather than private, employees.⁸⁸

The history of labor law in this country has shown that where its own employees are concerned, the federal government has been willing to deprive workers of rights they would be guaranteed under federal law in the private sector. Indeed, strikes by air traffic controllers who happen to work for the government are a criminal offense, while equally disruptive strikes by privately employed airline pilots are protected by law.⁸⁹ It is in this larger historical context that the rights of federal screeners under the Act can best be understood, and it is to this history which I now turn.

86. See U.S. CONST. amend. V and U.S. CONST. amend. XIV, § 1.

87. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the United States government's internment of Japanese Americans during the Second World War).

88. In researching this comment, I ran daily Lexis and Westlaw searches of national and international newspapers, and magazines specializing in the airline industry. My search turned up articles relevant to the Act in the following publications: *Airline Industry Information*, *Aviation Week & Space Technology*, the *Boston Globe*, *Business Recorder*, the *Dallas Morning News*, the *Denver Post*, the *Detroit Free Press*, the *Houston Chronicle*, the *New Jersey Record*, the *New York Times*, the *Philadelphia Inquirer*, *Traffic World*, the *Washington Post*, the *Washington Times*, the *Weekly of Business Aviation*, and *World Airport Week*. I found no article referring to the airport employees' loss of their right to strike.

89. See Meltzer & Sunstein, *supra* note 3, at 734-35.

V. FEDERAL EMPLOYEES AND THE NOT-SO-SACROSANCT RIGHT TO STRIKE

Numerous labor law scholars have noted that the right to strike, whether enjoyed by public sector or private employees, has been steadily on the decline for at least the past twenty years. In fact, many argue that the decline started long before that.⁹⁰ According to one scholar:

When the [NLRA] was enacted in 1935, Congress enabled employees to bargain collectively by providing an unabridged right to strike. As part of this change in public policy, Congress sought to reduce the role of courts in labor disputes. Until then, employers had relied on judges to issue injunctions against strikers and their leaders, enforceable by fines and imprisonment [W]hen Congress provided a right to strike in the NLRA, it carefully chose language to forewarn courts not to interfere in labor disputes. Sixty-five years later, the right to strike is a shadow of what Congress intended.⁹¹

Several theories have been advanced to explain the weakened status of the strike. One theory is that the declining right to strike results from the tactics of employers who provoke strikes as a means of severing bargaining relationships with unions.⁹² This theory holds that strategic union avoidance is the root of the declining right to strike. Proponents of this theory argue that, beginning in the 1960s, employers started to defy the NLRA in order to prevent employees from participating in union activities.⁹³ Others suggest that the Supreme Court's decision in *Mackay Radio v. NLRB*,⁹⁴ in which the Court held that employers have a right to hire permanent replacements for striking employees,⁹⁵ was the turning point in a losing battle for the strike right. A corollary to the *Mackay* theory, and one which will receive a good bit of attention here because of its focus specifically on the rights of federal employees, is known as the "PATCO thesis." This line of analysis suggests that President Reagan's response to

90. *Id.* at 731-32 (discussing the far reaching effects of the PATCO strike of 1981). See generally John J. Murphy, *Striking in the Federal Sector: An Update of the Law*, 35 AM. U. L. REV. 929 (1986) (reviewing decisions of the United States Courts of Appeals for the Federal Circuit); Michael H. Leroy & John H. Johnson IV, *Death by Lethal Injunction: National Emergency Strikes Under the Taft-Hartley Act and the Moribund Right to Strike*, 43 ARIZ. L. REV. 63 (2001) (exploring the decline of workers' collective action rights over the past sixty-five years).

91. See Leroy & Johnson, *supra* note 90, at 63-65.

92. *Id.* at 67.

93. See Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 261 (1990) (explaining that the roots of today's troublesome labor relations began in the 1960s).

94. *Mackay Radio v. NLRB*, 304 U.S. 333 (1938).

95. See Leroy & Johnson, *supra* note 90, at 66.

the crippling 1981 strike of over 11,000 air traffic controllers by hiring permanent federal replacement workers for all strikers caused lasting ripple effects. The theory suggests that Reagan's actions firmly solidified the legal stance against strikes by federal workers and was pivotal in bringing about a more general decline in workers' ability to strike. The "PATCO thesis" has come under recent criticism,⁹⁶ but has been advanced by noted scholars such as Cass Sunstein.⁹⁷

In an article co-written just two years after the PATCO strike, Sunstein prognosticated that "[u]nquestionably, the PATCO affair ended in victory for the federal antistrike policy."⁹⁸ Prior to the PATCO strike and subsequent Reagan administration crackdown, many factors worked together to make the blanket proscription on strikes by federal employees a relatively toothless statute. Public doubts about the wisdom of forbidding strikes by all federal employees, combined with "fear of political and economic reprisals from unions and other opponents of antistrike laws," had nearly "eviscerate[d] enforcement of the proscription. Enforcement had, in fact, been so lax and erratic⁹⁹ . . . as to approach a de facto recognition of 'illegal' public employee strikes as a regular part of the negotiating process."¹⁰⁰

VI. A BRIEF HISTORY OF THE PATCO STRIKE, AND THE REAGAN ADMINISTRATION'S SOLUTION

During the time period between its formation in 1968 and its infamous strike in 1981, the air traffic controllers' union known as PATCO had consistently showed "a willingness to resort to self-help, in the form of slow-downs and strikes, to remedy its stated grievances."¹⁰¹ The union engaged in these activities regularly despite the existing Title V proscriptions against striking by federal employees. Meltzer and Sunstein note five key historical points which explain and give context to the union's brazen disregard for Title V in 1981:

First, the criminal law was apparently not invoked against offenders. Second, the executive branch did not maintain that federal employees engaging in 'strikes' would be ineligible for continued employment in their regular jobs; indeed the administrative sanctions against PATCO and against individual controllers were relatively mild. Third, such sanctions were

96. *Id.* at 69 (calling the PATCO thesis "facile and unrealistic").

97. See Meltzer & Sunstein, *supra* note 3, at 794-99.

98. *Id.* at 794.

99. *Id.* at 732.

100. *Id.*

101. *Id.* at 746.

followed by progressively stronger and more overt union pressures. Fourth, PATCO's job actions, though falling far short of a full stoppage, demonstrated its capacity to inflict substantial losses on the airlines and the community at large. Finally, the unlawful conduct of air traffic controllers produced not only prospective injunctions and contempt actions against PATCO, but also judicial admonitions concerning both PATCO's duty to obey the antistrike law and the Attorney General's duty to enforce it.¹⁰²

During the period immediately preceding the 1981 strike, tensions ran high between the management of Chicago's O'Hare Airport and the air traffic controllers. In order to bolster its position, PATCO employed a strategy involving two contradictory prongs. The union simultaneously built support amongst its rank-and-file for a strike and made assurances to Congress that the union would obey Title V's antistrike law.¹⁰³ This strategy gained the union some ground in Congress, where bills were proposed which would have incorporated many of the union's key demands in the PATCO-FAA agreement which was up for renewal on March 15, 1991.¹⁰⁴ Tensions continued, however, and after repeated efforts at negotiation failed to bring about ratification of an agreement acceptable to the union, approximately 13,000 of the 16,400 controllers in the bargaining unit went on strike on August 3, 1981.¹⁰⁵

Presidential response was swift. Reagan gave the controllers forty-eight hours to return to work or face discharge, and approximately 1200 controllers did return to their jobs.¹⁰⁶ Public support for ensuing injunctions sought by the Department of Transportation and the civil and criminal sanctions threatened by the Justice Department was strong because the American public, understandably, wanted to keep planes in the air.¹⁰⁷ Sentiment against the remaining strikers was equally strong. The strike, based on demands for increased salary and improved working conditions, appeared to many "to lack much moral content."¹⁰⁸

Ultimately, Reagan replaced over 11,000 workers who refused to come back to the job. The move sapped PATCO's strength as a union both internally, and in the public eye, as "compassion for the strikers collided directly with concern for both the safety and the sentiments of those controllers who had faithfully discharged their responsibilities to the

102. *Id.* at 746-47 (internal citations omitted).

103. *Id.* at 749.

104. *Id.* at 752.

105. *Id.* at 757-58.

106. *Id.* at 758.

107. *Id.* at 761.

108. *Id.* at 760.

government during . . . the 1981 strike.”¹⁰⁹

The lasting result of the strike and PATCO’s unsuccessful courtroom efforts to challenge the President’s break, argue Meltzer and Sunstein, was to solidify the federal courts’ views on Presidential discretion and the federal right to strike. Namely, post-1981 it was firmly established that the antistrike statute is constitutional in view of concerns for the public’s safety, and that the President in his role as executive has wide discretion to ensure compliance with that law.¹¹⁰

Meltzer and Sunstein’s views have been challenged recently by professors Michael H. Leroy and John H. Johnson IV. Leroy and Johnson assert that long before the PATCO strike, the “Taft-Hartley injunctions seriously harmed several strong unions — most notably, those in the steel, longshoring, and maritime industries.”¹¹¹ Leroy and Johnson doubt that “employers, in response to strikes think: ‘If the President can [forbid strikes] we can, too.’”¹¹² They assert that an examination of the Bureau of Labor Statistics main survey of large work stoppages shows that “the downward trend in strike activity that is so often attributed to Reagan actually began at the end of the period in which Taft-Hartley injunctions were ordered.”¹¹³ In this regard, Leroy and Johnson note the sharp downward trend in strike activity which occurred in the years following President Carter’s petition for a coal-strike injunction between 1977 and 1978.¹¹⁴

While Leroy and Johnson raise valid points, they also concede that “the last Taft-Hartley injunction was issued early in 1978,” and refer to such injunctions as “mothballed labor policy.”¹¹⁵ Given this admission, their criticism of the PATCO thesis warrants some modification. It is my contention that the PATCO affair does indeed have much of the significance that Meltzer and Sunstein predicted it would have in 1983. One need look no further than the Aviation and Transportation Security Act’s antistrike provision to bolster this contention.¹¹⁶ Much like its predecessor in the early House Republican Bill,¹¹⁷ the antistrike provision in the current Act denies any individual “that screens passengers or

109. *Id.* at 771.

110. *See* ATA v. PATCO, 516 F. Supp. 1108 (EDNY, 1981), *aff’d* ATA v. PATCO, 667 F.2d 316 (2d Cir. 1981) (stating that air traffic controller strike injunctions have not been found unconstitutional).

111. *See* Leroy & Johnson, *supra* note 90, at 69.

112. *Id.*

113. *Id.* at 68.

114. *Id.*

115. *Id.*

116. Aviation and Transportation Security Act, Pub. L. No. 107-71, sec. 111(i), § 44935(a)(2)(i), 115 Stat. 597, 619 (2001).

117. H.R. 3150, 107th Cong. sec. 3, § 44901(f) (2001).

property, or both, at an airport under this section” the right to “participate in a strike, or assert the right to strike, against the person (including a governmental entity) employing such individual to perform such screening.”¹¹⁸ Interestingly, the current provision is buried twenty-three pages into the Act, unlike the prominent display it received in the very first section of the early House Republican effort. Buried or not, it is nonetheless effective. As stated earlier in this Comment, Title V of United States Code prohibits all federal employees from striking under any circumstance.¹¹⁹ The duplicative nature of section 111(i) of the Act is quite apparent, and, I believe, not accidental. In insisting that the antistrike clause be included, House Republicans emphasized the currency of Title V, and evidenced their concern for the financial stability of the nation, as well as for the well-being of travelers. The devastating economic effects of the PATCO strike alluded to by professors Sunstein and Meltzer¹²⁰ would be even more disastrous in the wake of a national terrorist threat, and the already wounded economy that has ensued from the September 11 attacks.¹²¹

The PATCO thesis, therefore, must be viewed in the larger historical context of competing and self-contradicting government efforts to protect the rights of workers on the one hand, and protect the national security — most notably, the nation’s financial security — on the other. When viewed in this context, we can readily see the new Aviation and Transportation Security Act as a re-codification of this financial policy of the federal government.

VII. TITLE VII CONCERNS: EXTRAORDINARY TIMES AND DISCRIMINATORY MEASURES FOR ARAB AND MUSLIM AMERICANS?

Much of earlier portion of this Comment focused on the broadly applicable constitutional, Title VII, and ADA concerns posed by the Act’s hiring and training requirements. I would now like to turn the discussion to a more narrowly focused inquiry into special Title VII concerns relating to Arab and Muslim Americans.

Even before the World Trade Center and Pentagon attacks of September 11, Arab and Muslim Americans faced a serious amount of discrimination. A report published by the Council on American-Islamic Relations Research Center in 2001 noted a 15% increase in the number of

118. *Id.*

119. 5 U.S.C. §§ 7311(3)-(4) (2001).

120. Meltzer & Sunstein, *supra* note 3, at 747 (noting PATCOS capacity to inflict substantial losses on the airlines).

121. See Stephen Friedman, *Right Plan at the Right Time*, WASH. POST, Jan. 12, 2003, at B7 (discussing President Bush’s plan to boost the sluggish, post-September 11th economy).

complaints of discrimination from Arab and Muslim Americans over the previous year.¹²² Encounters with bias, the report states, “took place in all institutional settings of life.”¹²³ Complaints detailed discrimination, both subtle and openly violent, based on national origin and religion in public schools, public and private universities, and in the workplace.¹²⁴ A recent article published in the *Fordham Law Review* details government retaliatory measures in the wake of the Oklahoma City bombing, and their continuing adverse effects on Muslim Americans.¹²⁵

Given this background, it would not be surprising if the broad discretion, granted to the Under Secretary in Section 111(a)(2)(e)(C) of the Act to disqualify applicants for the position of federal screeners who by no existing standard pose a security risk, were frequently invoked to deny Arab Americans employment. Under that section, the Under Secretary must establish procedures — procedures which Congress has not at all circumscribed — in addition to criminal background checks “to ensure that no individual who presents a threat to national security is employed as a security screener.”¹²⁶ That section, read in conjunction with the general notice that all training and hiring standards apply notwithstanding any other provisions of law,¹²⁷ may leave innocent Americans of Middle Eastern descent who feel that their Title VII rights have been violated with no legal recourse. This would occur at just a time when discrimination against them is likely to be a more significant obstacle than ever before. It seems to me that little harm would result, and that the ends of justice would be much better served, by allowing Title VII challenges to the hiring practices established by the new Act.

Since the initial drafting of this comment, at least one member of the federal judiciary agrees. On November 15, 2002, Judge Robert M. Takasugi of the Central District of California issued a preliminary injunction barring enforcement of the citizenship requirement in the Aviation and Security Transportation Act. Takasugi held that the government defendants had not established “that the exclusion of all non-citizens is the least restrictive means to further the government interest in improving aviation security.”¹²⁸

122. Mohammed Nimer, *The Status of Muslim Civil Rights in the United States 2001: Accommodating Diversity*, Council on American-Islamic Relations (2001).

123. *Id.* at 2.

124. *Id.* at v, 5-8.

125. See generally Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 *FORDHAM L. REV.* 2825 (2001).

126. Aviation and Transportation Security Act, Pub. L. No. 107-71, sec. 111(e)(2)(C), § 44935(e)(2)(C), 115 Stat. 597, 617 (2001).

127. *Id.* sec. 111(f)(1), § 44935(f)(1), 115 Stat. at 617.

128. *Gebin v. Mineta*, 2002 WL 31947889, at *1 (C.D. Cal. Nov. 15, 2002). See also Sara Kehaulani Goo, *Security Law Called Unconstitutional; Non-U.S. Citizens Win*

VIII. CONCLUSION

Compared to the serpentine manner in which the majority of bills wind their lazy way through the national legislature, the Aviation and Transportation Security Act shot through Congress like a rocket. Surely, this required tremendous effort, and reflects genuine concern for the national well-being on the part of legislators, their staffs, and the President. My criticisms and observations are meant only to remind readers that especially in times of crisis, we should be mindful of the important role civil liberties play in our personal lives, and in the life of our nation. Workers' rights and the rights of minorities will always conflict with majority pressures and capitalist values to some degree. The laws we have, including the NLRA, Title VII, the ADA, and our Constitution, require that we balance these competing interests in light of a fundamental respect for the freedom of assembly, due process, and equal protection rights of individuals. The provisions of the Aviation and Transportation Security Act outlined and discussed above, as any statute passed hastily during a time of national emergency, deserve special attention in this respect.

Screener Ruling, WASH. POST, Nov. 16, 2002, at A12 (discussing the *Mineta* ruling and its importance to the eighty percent of San Francisco screeners and forty percent of Los Angeles screeners under the private-contractor system who are not U.S. citizens).