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A legal setback for Charlie

By HARVEY SILVERGLATE | August 20, 2008

Free speech has won in the struggle between the MBTA and three MIT undergrads who claim to have uncovered flaws in the T's electronic fare-collection system. At a follow-up hearing on Tuesday, Federal District Judge George O'Toole, who earlier had continued an emergency 10-day temporary restraining order prohibiting the students from disclosing their findings, reversed course and denied the MBTA's request for a preliminary injunction.
Tuesday's hearing was Round Three in the T's legal struggle to silence the students.

A quick recap: on August 9, Judge Douglas Woodlock issued a temporary restraining order, one day before Zack Anderson, R.J. Ryan, and Alessandro Chiesa were scheduled to deliver their insights on re-programming Charlie Cards (thus implying free rides — at least for select geeks) to the DEFCON hackers' convention in Las Vegas. O'Toole continued the order at an interim hearing, held August 14, but promised to resolve the question on August 19, after further study. At that most recent hearing, O'Toole recognized the MBTA's flawed arguments and refused the injunction.

How, until Tuesday, it was deemed lawful to prohibit speech when the only thing at stake was the MBTA's possible loss of revenue, has left First Amendment advocates scratching their heads. The Supreme Court ruled in 1931 that speech could be enjoined in advance of its being spoken or published only in the "exceptional cases" where, if the speech were allowed, there would be irreparable, dire consequences. The example given was the so-called troop-ship scenario, where "a government might prevent actual obstruction of its recruiting service or the publication of the sailing dates of transports or the number and location of troops" in time of war.

Over the years, other high-court decisions echoed this high standard for "prior restraint of speech." In 1969, the court ruled that a speech advocating violence could not be prohibited in advance unless it involved "advocacy [that] is directed to inciting or producing imminent

lawless action and is likely to incite or produce such action." (That case involved a KKK rally where speakers suggested violence against blacks and Jews.) And in 1971, there was the mother of all subsequent-prior-restraint decisions: the Supreme Court allowed the *New York Times* and the *Washington Post* to publish the Pentagon Papers, a leaked classified report detailing US involvement in the Vietnam War, despite government claims that national security would be irrevocably compromised. Publication even of those controversial documents was not deemed to fit the "troop-ship exception" (though post-publication criminal prosecution was left open).

Despite these precedents, Anderson, Ryan, and Chiesa were initially gagged. In refusing to renew that court order, O'Toole concluded that the students' conduct didn't fit within the anti-hacker Computer Fraud and Abuse Act. Since he determined that statute did not even apply here, O'Toole never approached the question of whether the First Amendment would trump the statute (which it clearly would).

The lawlessness of the earlier judicial actions is perhaps explained by occasional judicial obsession with national security. Since the September 11 terrorist attacks, some assertive lower federal courts have shown a marked decrease in respect for a variety of constitutional rights protected by Supreme Court rulings. Lawyers for the Electronic Frontier Foundation and the ACLU of Massachusetts, representing the students, were prepared to appeal as high as necessary. For now, however, it will be up to the MBTA to decide whether to squander scarce resources on an appeal or use the money to fix the air conditioning on the Green Line.

Kyle Smeallie assisted in the preparation of this piece.