



FLIGHT-WATCH



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I.
PROGRESS IS BEING MADE IN CONGRESS TO CURTAIL ABUSES OF POWER BY THE TRANSPORTATION SECURITY ADMINISTRATION

The TSA has visited two oppressive initiatives directed toward the United States general aviation community that will curtail aircraft operations in the United States, curtail the manufacture of general aviation aircraft in the United States, and put hard-working American citizens out of work. These questionable initiatives of the TSA come at a time when America is struggling to survive amidst the ravages of a deep economic recession.

The first TSA initiative was published in the Federal Register on October 30, 2008, and is called the Large Aircraft Security Program (“LASP”). The Large Aircraft Security Program would visit a host of burdens on anyone who operates an aircraft weighing more than 12,500 pounds. These burdens on the aircraft operator would include: (1) criminal background checks for the flight crew and operator of the aircraft, (2) getting permission from a watch-list service provider for the TSA to fly with passengers aboard your aircraft after they have been vetted against a terrorist watch list and a no-fly list, (3) periodic auditing of the paperwork the aircraft operator is required to have in place in terms of a third party auditor, and (4) the creation and staffing by the aircraft operator of an in-flight security coordinator, a ground security coordina-

tor, and an aircraft security coordinator. Furthermore, the Large Aircraft Security Program would have ominous provisions impacting on airport operators who would have to comply with burdens which are not being funded by the TSA and are referred to as “unfunded mandates.”

The second TSA initiative that is of concern is Security Directive 8F. Security Directive 8F (“SD-8F”) has been promulgated by the TSA under the authority of the Air Transportation Security Act and would require pilots who operate aircraft at airports served by air carriers to obtain a security badge for the pilot’s particular airport. Pilots who fly into such airports without a security badge for that particular airport would have to be escorted to and from their aircraft by a properly-credentialed person, such as an employee of the local fixed base operator providing fuel or maintenance services to transient aircraft. In order to promulgate a security initiative like SD-8F, the TSA must demonstrate that there is the threat of “imminent danger” to the security interests of the United States in order to justify the directive. Currently, the TSA under the auspices of the Air Transportation Security Act can put into place a security directive that will last for years without it being evaluated in the light of public comment and analysis as is required by rules promulgated under the Administrative Procedure Act (“APA”). APA requires that Federal agencies promulgate in the Federal Register a proposed rule and gives the American public an opportunity to comment on the proposed rule **before** it is put into effect. However, the TSA

takes the position that in promulgating security directives its emergency authority allows it to bypass APA requirements and bypass the rights of American citizens to ensure their civil liberties.

This bulletin is written to apprise the aviation community and interested American citizens of the current status of these oppressive and unwarranted TSA initiatives and congressional initiatives designed to curtail and rectify abuses by the Transportation Security Administration.

II. **AN UPDATE ON THE LARGE AIR- CRAFT SECURITY PROGRAM**

There have been a number of meetings between representatives of the TSA and the alphabet groups which represent general aviation in America: (1) the Aircraft Owners and Pilot's Association (AOPA), (2) the Experimental Aircraft Authority ("EAA"), (3) the National Business Aircraft Association ("NBAA"), and (4) the General Aviation Manufacturer's Association ("GAMA"), to name a few.

The fact that there have been discussions by the TSA with "stakeholders" representing the general aviation community is a two-edged sword. On the one hand, it is a positive development, since it suggests an awareness that TSA is perhaps beginning to understand the extraordinary impact LASP will have on general aviation in the United States and the "trickle down effect" on the American economy. However, one can argue the discussions are a bad idea, because many pilots and Americans (including the author) believe there is no requirement at all for the Large Aircraft Security Program in the first place. For "stakeholders" representing the interests of the general

aviation community to enter into a dialogue with the TSA about LASP could be argued to imply that there is some justification the Large Aircraft Security Program, something which has not been demonstrated by any stretch of the imagination. In fact, in a report issued by the TSA in December of 2008, the TSA declared unequivocally that it had no evidence that general aviation in America represented a threat to the national security interests of this country.

In terms of the idea of sensitive security information ("SSI") being provided to "watch list service providers" and "third party auditors" for purposes of the aircraft operator receiving permission to fly passengers aboard aircraft and/or be audited by a third party auditor, the Congress has indicated it does not want this kind of information being distributed to third parties. If one accepts the Congressional premise, there will be no (third party) watch list service providers, nor third party auditors. Those components of LASP appear to be in jeopardy if not completely off the table.

The author has received information to the effect that large piston-powered aircraft would be exempt from this program if, in fact, there is to be a Large Aircraft Security Program. This bodes well for the Commemorative Air Force, and the Collings Foundation, to name a few.

Finally, there has been some discussion about increasing the threshold weight or "trigger weight" for aircraft that would be impacted by TSA's envisioned Large Aircraft Security Program. Most recently, the author understands that a trigger weight of 30,000 pounds has been suggested by the TSA.

In the event that some sort of negotiated rulemaking does emerge from discussions between the TSA and the representatives of the aviation interest in America, then the TSA would reissue a proposed rule concerning the Large Aircraft Security program and have it published in the Federal Register. In that event, interested persons could comment on any such revised TSA initiative.

III. **AN UPDATE ON TSA SECURITY** **DIRECTIVE 8F**

As of the writing of this bulletin, there is presently before Congress a Transportation Security Administration Reauthorization Bill. The Reauthorization Bill is expected to be on the House floor during the first week of June. Congressman Mica has offered an amendment to the Bill that is co-sponsored by Congressman Sam Graves. The text of the amendment can be summarized as follows:

Would alter the standard for when TSA can issue an emergency regulation or security directive without adhering to the rule making and public notice and economic provisions of the Administrative Procedures Act (APA).

Would allow the TSA to issue a regulation or security directive when needed "to respond to an imminent threat of finite duration" and would require TSA to comply with the rule making requirements of its APA when a security directive or emergency order has been in place for more than 180 days.

The amendment offered by Congressmen Mica and Graves means that

the TSA will still have the authority to issue a security directive based upon "imminent danger," and that security directive can remain in place for 180 days. However, after the expiration of 180 days, the security directive will have to go through the rulemaking process of the Administrative Procedures Act. The APA procedures will be open to the public and impose on TSA the burden of demonstrating that there was an "imminent threat" to national security in order to justify issuing the security directive in the first instance. The expectation among sponsors of the amendment is that if TSA knows the implementation of a security directive will result in its actions being scrutinized to ensure it was warranted in the first instance, TSA will no longer issue burdensome security directives unless they are based on an actual threat to security as opposed to a bureaucracy with ambitions of arrogating power unto itself. Again, a TSA study released in December of 2008 said that general aviation did not present a threat to the national security interests of the United States.

IV. **CONCLUSION.**

The amendment to the Transportation Security Administration Reauthorization Bill offered by Congressmen Mica and Graves demonstrates that the United States still follows democratic principles, unlike Nazi Germany where the SS and secret police were allowed to take over control of the country by edict from Adolf Hitler. Thankfully, Americans are going to enjoy a due process procedure whereby arguably well-intentioned employees of the TSA are going to have their motives analyzed and publicly debated if they promulgate a security directive such as

SD-8F. This is particularly appropriate if the TSA cannot demonstrate that America is in "imminent danger" as required by the Air Transportation Security Act which empowers TSA to issue security directives like SD-8F. Everyone reading this bulletin is encouraged to contact his or her United States political representative and make him aware of their support for the amendment to the Transportation Security Administration Reauthorization Bill offered by Congressmen Mica and Graves. Please tell your elected official that you strongly endorse this amendment.

With reference to the Large Aircraft Security Program, it is premature at this time to speculate what any new Large Aircraft Security Program proposed rule might mean for the general aviation community. For those of you receiving this Bulletin who believe that there is no need for a Large Aircraft Security Program, this is an opportune time to contact your elected officials and let them know LASP is a mistake, since there exists no basis for the Large Aircraft Security Program in the first place. Each reader of this bulletin can be guided his or her conscience.

The fight is not over. However, progress is being made. Please contact your elected officials and make them aware of your sentiments as relate to TSA Security Directive 8F and the TSA's Large Aircraft Security Program.

*Those who sacrifice liberty
for security deserve neither.*

Benjamin Franklin

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