FLIGHT-WATCH

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TSA AMBITIONS STILL REPRESENT A SUBSTANTIAL THREAT TO THE AVIATION COMMUNITY

I. The Threat Is Not Over

While some members of the aviation community congratulate themselves and each other based on the belief that threats represented by the TSA to the general aviation community are subsiding, the author of *Flightwatch* does not agree with their assessment. If you think the TSA is getting out of the general aviation business, please consider the following:

1. There have been seven initiatives in either the House of Representatives or the Senate to ameliorate abuses inflicted by the TSA on general aviation based upon the Large Aircraft Security Program (LASP), Security Directives 8F and 8G, and the TSA's classified document, "Operation Playbook." Not one Congressional initiative has been passed by both the House and the Senate, and nothing has been submitted to the President to ameliorate abuses of civil liberties previously enjoyed by members of the general aviation community.
2. The Fifth Amendment to the United States Constitution provides: "No person shall be…deprived of life, liberty or property, without due process of law." The regulations that impact us as aircraft owners and operators invariably are first published as Notices of Proposed Rule Making in the Federal Register. This affords American citizens who would be impacted by the proposed regulations an opportunity to comment upon the regulation before it is made a final rule (i.e., a regulation we must follow and observe). However, for the TSA, the rules are different. It can bypass the Administrative Procedure Act (5 U.S.C. § 553) and promulgate security directives that have the force of regulation without ever publishing it in the Federal Register. Consider Security Directives 8F and 8G that were promulgated by the TSA over the course of the past year. The TSA just did it. We were given no chance to comment. The ostensible basis for curbing our civil liberties is the necessity of the TSA to address matters of "national security."
3. When regulations are promulgated by government agencies that lack a rational basis for the proposed rule, a challenge in the court system may result in the regulation being stricken as unconstitutional if the Court is satisfied that the action of the government agency was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." (5 U.S.C. § 706 (2)(a)).
4. When the TSA promulgates a security directive and bypasses the Administrative Procedure Act and due process of law, the ability to challenge the actions of a government agency become more problematic.

5. The actions of TSA in bypassing due process by utilizing security directives resulted in the Mica/Graves/Ehlers/Petri Amendment to H.R. 2200. The amendment would force the TSA after a period of six months to publish the security directive in the Federal Register. This would force the hand of the TSA, make it reveal the basis for the security directive, and pave the way for the TSA initiative being challenged in court if it lacked a rational basis or was otherwise unfounded. While the Mica/ Graves/Ehlers/Petri Amendment to H.R. 2200 narrowly passed in the House of Representatives by a vote of 219 to 211 on June 4, 2009, legislation of that nature has not been passed by the Senate, nor has there been a conference committee between members of the House and members of the Senate to fashion legislation to be considered by the President to stop the TSA from bypassing the Administrative Procedure Act and due process of law protections.
6. The reader will recall that on October 30, 2008, the TSA issued a Notice of Proposed Rule Making that was 265 pages in length proposing to impose a host of restrictions on the operation of aircraft weighing 12,500 pounds or more without any kinetic energy study to justify this "trigger weight." In testimony before the TSA on January 8, 2009, the author took the position that the trigger weight was arbitrary and capricious, since there was no kinetic energy study to justify differentiating aircraft that weighed more than 12,500 pounds from aircraft that weighed less than that amount.
7. Exactly two months after the TSA promulgated the proposed rule concerning the Large Aircraft Security Program, on December 30, 2008, the TSA declared in a classified report that general aviation was not a security threat in America. Nevertheless, the TSA persisted in going forward with implementation of the Large Aircraft Security Program. If there was no security threat, then why was the Large Aircraft Security Program created? The term "empire building" comes to mind.
8. There is a growing body of case law that recognizes the fact that your Fourth Amendment rights to privacy are suspended when you set foot on an airport. Increasingly, the courts are persuaded that local governments have the right to engage in administrative searches without any Fourth Amendment protections in the interest of airport security and air safety. *United States v. Aukai*, 497 F.3d 955 (Ninth Cir.2007); *New York v. Burger*, 482 U.S. 691 (1987).
9. On May 27, 2009, Richard L. Skinner, the Inspector General for the Department of Homeland Security, released a report concerning the actions of the TSA in relation to the Large Aircraft Security Program in which the following telling finding was made: "We determined that general aviation presents only limited and mostly hypothetical threats to security. We also determined that the steps general aviation airport owners and managers have taken to enhance security are positive and effective."
10. In an act reminiscent of the TSA's promulgation of its Large Aircraft Security Program proposed rule (published October 30, 2008), the TSA, on October 30, 2009, published a Notice of Proposed Rule Making requiring a security program for repair stations. The reader is requested to consider the hypothesis that the TSA publishes proposed rules at times when those who would respond are distracted with concerns over a number of holidays such as Thanksgiving, Christmas, Hanukkah and New Years.

11. While on November 11, 2009, Janice Wood of General Aviation News declared "We can fight TSA", it appears that the apologies of Brian Delauter, the new general aviation manager at TSA, are merely designed to assuage the concerns of the general aviation community *long enough to allow the TSA to have its way*. Even if one assumes the TSA were to raise the trigger weight from 12,500 pounds to 30,000 pounds, and even if the TSA exempts piston powered aircraft, once the TSA gets a Large Aircraft Security Program in place, what is to prevent the TSA from lowering the trigger weight to 12,500 pounds or to 10,000 pounds or to 9,000 pounds? If the TSA gets the Large Aircraft Security Program in place, what is to prevent the TSA from terminating the piston powered aircraft exemption?
12. *The simple fact is that the general aviation community has failed to put an end to the abuses of the TSA under the auspices of the Large Aircraft Security Program.* Our failure to terminate the TSA's Large Aircraft Security Program is hardly cause for celebration.

II. Conclusion and Call to Action

When the author brought concerns about the Large Aircraft Security Program before Rep. Lynn Westmoreland of the State of Georgia, he declared that the TSA's Large Aircraft Security Program would only be terminated if the general aviation community brought this issue to the "boiling point." The fact that seven initiatives in Congress have failed to manifest into legislation to be submitted to the President to curtail TSA abuses is evidence of the fact that we never reached the boiling point with respect to the abuses of the TSA. If the TSA succeeds in getting a Large Aircraft Security Program in place, then we have failed. Not only shall we have failed in allowing the TSA to have its Large Aircraft Security Program, but we shall also have failed in allowing the TSA to bypass due process of law and the Administrative Procedure Act under the auspices of "security directives."

An eloquent statement of the problem appears in the letter from Greg Principato, President, Airports Council International – North America to Representatives Mica, Boyd, Ehlers, Graves and Petri of October 5, 2009 which contain the following observation:

> We do not believe that Congress intended to provide TSA such latitude that it could issue SDs absent or months after an identified threat. In addition, ATSA (Aviation and Transportation Security Act) requires all SDs to be reviewed by the Transportation Security Oversight Board, which to our knowledge has never held a meeting.

The reader is requested to visit either or both of the following websites: www.stoplasp.com or www.alanarmstronglaw.com. Extract from those websites the names and addresses of the General Aviation Caucus member list, and write them as well as your elected representatives and tell them three things:

1. To scrap the TSA's Large Aircraft Security Program,
2. To stop the TSA from bypassing the due process provisions of the Administrative Procedure Act by employing security directives, and

3. To scrap "Operation Playbook" which has been used by the TSA to harass pilots and aircraft operators at airports.

Remember, "All that is required for evil to triumph is that good men do nothing." Edmund Burke.

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