

A CALL TO SCRAP THE TSA'S LARGE AIRCRAFT SECURITY PROGRAM

By: Alan Armstrong*

I.

HISTORICAL BACKGROUND AND CONTEXT

Historically, private, civil aviation ("general aviation") has been an economic engine that has contributed to the productivity of the United States. It has facilitated transportation to remote regions in America not served by the airlines. It has provided air ambulance services to those who are sick or need of medical care. It has performed search and rescue, fire fighting and humanitarian relief functions, among others. In a letter from Congressman Dennis Moore to Congressman Barney Frank of January 12, 2009, Moore wrote:

General aviation contributes more than One Hundred and Fifty Billion Dollars to the U.S. economy annually and employs more than 1,265,000 people.

Americans, in pursuit of business, individual liberty and recreation, have enjoyed the freedom to engage in air transportation without a layer of unnecessary and wasteful government bureaucracy. Now, all of that is about to change.

Eight years after the tragic events of September 11, 2001, an act that was perpetrated *by terrorists from foreign countries*, the Transportation Security Administration ("TSA") has decided some of the most affluent and responsible members of American society now constitute a "security threat." TSA is bent upon curtailing American civil liberties and undermining productivity in this country with no justification for its actions.

In a Notice of Proposed Rule Making (NPRM) of October 30, 2008, with only a 60 day comment period, the TSA published in the Federal Register a 260 page document proposing sweeping changes to general aviation operations in the United States that will substantially erode civil liberties, inflict further harm on an aviation industry all ready in trouble, and put TSA in the business of regulating general aviation air travel. The TSA proposed rule, as written, relates to aircraft weighing 12,500 pounds or more and is called the Large Aircraft Security Program ("LASP").

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If the reader of this paper is in favor of these ill-conceived measures, then do nothing. However, if you oppose rules and regulations that will treat general aviation like the airlines for no justifiable reason, then please continue to read this paper.

II.

ELEMENTS OF THE PROPOSED RULE

A. THE BURDEN ON AIRCRAFT OWNERS AND OPERATORS

For those aircraft owners and operators whose aircraft weigh 12,500 pounds or more, the level of bureaucracy proposed by the TSA is breathtaking. The TSA's LASP proposed rule, if implemented in its present form, will include the following elements:

(1) Pilots and flight attendants will have to undergo a fingerprint-based Criminal History Record Check (CHRC) and a Security Threat Assessment (STA) like those employed by the airlines. According to the TSA, it will cost \$74.00 per person to complete these required checks. Follow up checks will be required every five years.

(2) Passengers for proposed flights will have to be vetted against both a TSA "selectee" list and also a "no-fly" list. If the proposed passenger generates a positive response from the "selectee" list, then additional screening will be required. If the proposed passenger generates a positive response from the "no-fly" list, then the passenger may not board the aircraft.

(3) While currently commercial air carriers conduct the vetting process in house, the TSA proposed rule will create a cottage industry of Watch List Service Providers (WLSP) who will conduct the vetting for the aircraft operator. The WLSP will charge the aircraft operator for the vetting service.

(4) The aircraft operator will have the option of checking passengers on a flight-by-flight basis or creating a Master Passenger List (MPL) which the TSA claims will alleviate the need for a flight-by-flight check. This position by the TSA is inconsistent with reports in the field from an air taxi operator that presently vets its passengers by employing the TSA lists. The MPL notwithstanding, both the passengers *and flight crew* must be vetted with the TSA lists *before every flight*.

(5) Inbound international flights using the Bureau of Customs and Border Protection (CBP) electronic advance passenger information system (eAPIS) would

not need to submit passenger information to TSA, the submission to CBP being sufficient.

(6) The proposed rule will require the designation of key security personnel for the aircraft such as the Aircraft Operator Security Coordinator (AOSC), the In-Flight Security Coordinator (IFSC), and the Ground Security Coordinator (GSC).

(7) Weapons could only be transported in an inaccessible cargo area or in a locked box under the control of the In Flight Security Coordinator.

(8) Various items of sporting equipment and tools could not be carried aboard the aircraft.

(9) The TSA proposed rule would require the development of specific security-related procedures for use in the event of a security threat.

(10) The aircraft operator would have to identify procedures for securing the aircraft while at home base and on the road.

(11) The aircraft operators would have to undergo training to ensure that they understand procedures for obtaining law enforcement assistance in the event of a security need.

(12) TSA would require aircraft operators to follow specific regulatory requirements in the event of a threat concerning a bomb or piracy.

(13) Claiming it lacks sufficient general aviation inspectors to oversee the Large Aircraft Security Program, TSA proposes that third-party auditors conduct security inspections and submit reports to TSA *which would determine whether or not the aircraft owner had achieved regulatory compliance.*

B. THE BURDEN ON AIRPORTS

Not only will aircraft operators suffer under the economic and time-consuming burdens imposed by TSA's new safety initiative, but operators of public airports will find their own dose of misery in the Large Aircraft Security Program. An interview of Mike Van Wie, A.A.E., Assistant Director of the DeKalb Peachtree Airport (PDK) on January 14, 2009, confirmed the following:

1. PDK is a General Aviation "Reliever Airport."
2. After 9/11, PDK received Federal funds to raise the fencing around the airport from 4 feet to 8 feet and to add barbed wire.

3. In the current post 9/11 environment, airport operators are not inclined to spend resources on security measures because of concerns that any initiative taken at the local level will not satisfy any new Federal initiative. Moreover, why spend money out of the local budget when Federal funds may become available for new security initiatives?

4. PDK is serviced by 110 police officers from two jurisdictions that employ 75 police cars. Under LASP, all the officers will need to be trained and 75 aircraft radios will have to be purchased and installed in the police cars.

5. The TSA will require that PDK keep a record of the officers' training, but the LASP proposed rule does not define what records have to be kept.

6. PDK will have to be able to receive and disseminate sensitive material and be capable of destroying such material for security reasons.

7. There are twenty locations on the airport from which a large aircraft could operate and therefore twenty areas that could require the posting of LASP notices.

8. The availability of the Airport Security Coordinator is not defined, e.g., on site, available by cell phone but one hour away from the airport, or available by cell phone but out-of-town.

9. Finally, some airports may think it expedient to refuse access to aircraft weighing 12,500 pounds and above. However, as public use airports receiving Federal funds for airport improvements or maintenance, excluding aircraft weighing 12,500 pounds in order to avoid complying with LASP would be a breach of the airport's grant assurances to the FAA that it will make the airport available to all aeronautical activities and users without economic discrimination. Excluding access to aircraft covered under LASP is not the answer to the budgetary and manpower burdens imposed by LASP.

III.

PUBLIC POLICY ARGUMENTS AGAINST THE PROPOSED RULE

Over 15,000 aircraft and 10,000 operators will be impacted by the proposed rule. Operators of aircraft weighing more than 12,500 pounds are typically corporations or other business entities. Unlike airlines engaged in common carriage, private aircraft are flown by pilots who almost without exception know their passengers. Passenger access to corporate aircraft is generally restricted and secure. The mission of corporate aircraft is speed, efficiency, flexibility and *security*

of operation. Historically, private aircraft have been a secure way to engage in air transportation.

The typical pilot flying an aircraft that weighs 12,500 pounds or more holds an airline transport pilot certificate, has received initial or recurrent training at an aircraft training facility recognized by the manufacturer such as Flight Safety or SimCom, who undergoes a flight physical every six or twelve months and who is evaluated both physically and psychologically by an aviation medical examiner (AME), and who is subject to random drug testing. These pilots are carefully scrutinized by their employers before they are hired.

Without any supporting data, TSA has arbitrarily determined that this disciplined and responsible element of society has magically become transformed into a "security threat."

Besides the foregoing, like the rest of the economy, general aviation has been impacted severely by the effects of the crippled American economy. Adding a level of unnecessary bureaucracy that achieves nothing is the last thing general aviation needs in this environment.

Not only does the proposed rule make absolutely no sense from a public policy standpoint, it may be unlawful. Since a light sport aircraft is equally capable of delivering a nuclear device as opposed to an aircraft weighing 12,500 pounds or more, the trigger weight in the proposed rule appears to be arbitrary and capricious. The consequence is that the proposed rule, if adopted, may be stricken as unconstitutional by a court of appropriate jurisdiction as a violation of substantive due process in violation of the Fifth Amendment. Courts will, in a proper case, strike down a rule or policy that is arbitrary and capricious. *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Furthermore, there must be a "rational connection between the facts found and the choice made" as required by the United States Supreme Court in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

The simple fact is that the basic premise of the TSA proposed rule, that is, that aircraft weight is an indicator of its capacity to pose a security threat, is false. The weight of the aircraft, whether 12,500 pounds or 3,000 pounds, has nothing to do with its capacity to carry a biological or chemical weapon. Accordingly, there is scarce justification for the TSA rule as presently written.

IV.

HOW TO CONTACT YOUR CONGRESSMAN

The online directory for the 111th Congress is on the Internet. Please visit the following website:

<http://www.visi.com/ljuan/congress/>

V.

WHAT TO TELL OR WRITE YOUR CONGRESSMAN

It is strongly recommended that you either telephone your congressman or senator or send him or her a written letter. Email is easy to delete. If you have the time, a telephone call is suggested. The text below may be employed in your written communication to your congressman or senator or in your conversations with him or her:

Dear Congressman/Senator:

The Transportation Security Administration (TSA) has embarked on an assault against the general aviation community. In a Notice of Proposed Rule Making (NPRM) no less than 260 pages long, the TSA has proposed a host of sweeping rules and regulations that will cripple the general aviation community. Besides flight crew background checks, security training, the requirement to obtain permission from TSA to carry passengers aboard the aircraft through a watch list supervisor, the designation of an aircraft security coordinator, an in flight security coordinator and a ground security coordinator, the TSA rule will require operators of aircraft that weigh 12,500 pounds or more to undergo auditing at their own expense. The auditors will then send reports to the TSA, and the TSA will determine whether or not the aircraft operator is or is not in regulatory compliance. The carriage of tools and equipment aboard the aircraft will be prohibited along with weapons unless they are placed in an inaccessible cargo hold under the control of the in flight security coordinator.

The elements outlined above in the TSA proposed rule demonstrates that the TSA has no understanding of general aviation. Apparently, it thinks that private aviation or general aviation is just like the operation of an airline which is engaged in common carriage. There is a remarkable distinction. General aviation pilots almost invariably know their passengers. There is no need for them to have their passengers cleared through the TSA. Pilots undergo recurrent training, routine flight physicals and often are subject to random drug testing. The owners and operators of aircraft are almost without exception very successful and accomplished

people. With the stroke of a pen, the TSA has deemed these people "security threats."

America is in the midst of a recession. Like other segments of the economy, the aviation community is struggling. Allowing this TSA rule to become final may signal the death bell for many segments of the general aviation community.

I implore you to put a stop to this misadventure by the TSA and make sure that its Large Aircraft Security Program is terminated permanently.

Respectfully,

(Your signature)

V.

FILING COMMENTS TO THE PUBLIC DOCKET

Besides contacting your congressman or senator, it is suggested that you file comments to the public docket. In filing comments, you should reference TSA Docket No. TSA2008-0021. You may submit your comments by mail or fax to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building - Ground Floor, Room W12-140, Washington, DC 20590-0001, Fax: 202-493-2251.

You may submit your comments electronically through the Federal Rulemaking eRulemaking portal at <http://www.regulations.gov>.

VI.

CONCLUSION

Getting the TSA involved in general aviation is a terrible mistake. While the triggering weight of the TSA for deeming an aircraft to be a potential security threat is currently 12,500 pounds, the weight could be lowered tomorrow to 10,000 pounds, 5,000 pounds, or even lower. *Allowing TSA to become involved in general aviation is something we cannot and must not allow.* Please contact your congressman or senator today and tell him or her to stop the TSA's Large Aircraft Security Program.

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