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Pilot Counsel

Pilots as security threats

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There is a saying among lawyers that "hard cases make bad law." A perfect illustration is the flurry of legislative and regulatory activity by federal and state governments since the terrorist attacks of September 11, 2001. We pilots have borne the brunt of much of it, some of which has not made much sense. Here is one that defies common sense and could have long-lasting, unfair consequences for pilots.

The Transportation Security Administration (TSA) has teamed up with the Federal Aviation Administration to adopt unprecedented rulemaking that allows the FAA to suspend and revoke a pilot certificate if the TSA determines that the pilot poses, or is suspected of posing, a "security threat." These same grounds also have been made disqualifying for the issuance of any new rating, authorization, or pilot certificate. The due process procedures that pilots have enjoyed to protect their certificates from arbitrary and groundless government action are useless under these new rules.

This is all the result of three separate but related rulemaking actions that were published and became effective on January 24, 2003, two by the TSA (one for citizens and one for aliens) and one by the FAA. The rules give these two agencies the power, in combination, to suspend and revoke an FAA airman certificate on an emergency basis, that is, an immediate grounding, based on a security decision made by the TSA behind closed doors, without an opportunity to be heard by the FAA before such action is taken. It can be done on mere suspicion that a pilot poses a security threat. It can be done without the FAA or TSA ever having to disclose the evidence on which they relied in taking this drastic action. And it can be done without affording the pilot any effective appeal to the National Transportation Safety Board, such as pilots now enjoy in non-security cases.

While we might be inclined to give these agencies the benefit of the doubt about whether they would use these unprecedented new enforcement powers wisely, we need only look at how these rules were adopted by these same agencies. It was a shameful process. The rules were adopted in complete disregard of the Administrative Procedure Act (APA), an act that protects us from such arbitrary regulation. They were adopted as final rules, effective immediately, without the usual prior notice and opportunity for public comment that we have come to expect from years of FAA rulemaking.

The APA requires that a notice of proposed rulemaking first be announced to the public. It requires that there be an opportunity for public participation in the rulemaking process. The agency must honestly consider the written comments it receives from the public on the proposal, and make revisions and modifications to the proposal where warranted. The final rule, when adopted, should not become effective less than 30 days after it is published, in order to give the public an opportunity to prepare for the final version. The TSA and FAA rulemaking actions provided none of these procedures. Rather, they claimed the "good cause" exception to the APA, which is an embarrassingly thin claim.

The APA does allow an exception to these procedures if the agencies "for good cause" find that the notice and public procedure requirements are "impractical, unnecessary, or contrary to the public interest." Both agencies claimed the good cause exception. The TSA tried to justify short-circuiting the APA by saying, "The use of notice and comment prior to the issuance of this rule could delay the ability of TSA and the FAA to take effective action to keep persons found by TSA to pose a security threat from holding an airman

certificate." The TSA added, "This action is necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States." The FAA rulemaking, echoing this theme, said, "The FAA, TSA, and other federal security organizations have been concerned about the potential use of aircraft to carry out terrorist attacks in the United States since September 11."

Assuming the ridiculous, that is, that a terrorist would be deterred if he receives a letter from the FAA suspending or revoking his pilot certificate, the good-cause claim still sounds lame. The agencies failed to explain why it took a year and four months after September 11 to come out with the rules in response to the terrorist attacks. Nor did they explain how long they had been working on the rule (probably close to the full 16 months), a time period that surely could have afforded the three or four months that the public process could take. Most telling is that as of this writing no new cases have been brought after January 24, when the new rules were adopted (at the TSA's request the FAA revoked 11 pilot certificates five months before the adoption date). How could they possibly have been "necessary to prevent a possible imminent hazard?" How could any "delay" caused by affording the pilot community these procedures prevent the TSA and FAA from taking "effective action" against persons found to pose security threats?

I repeat, no new cases have been brought since the rule was adopted. That is why I am concerned that the bureaucrats who abused the regulatory process may be capable of abusing the enforcement process that is also in their hands.

Here is how the new rules work. Through some internal process, the TSA's assistant administrator for intelligence determines that an individual poses a security threat. The rules are a bit devious in that throughout they talk in terms of a "security threat," which implies an established fact, and yet hidden away in the definitions section, the rules say, only once, that an individual poses a security threat if the individual "is suspected" of posing a security threat. Mere suspicion is enough. According to the TSA, "These decisions are based on intelligence and threat information that it receives from a variety of sources." When the assistant administrator makes the threat determination, which could be based on mere suspicion, he issues an "Initial Notification of Threat Assessment" that is given both to the FAA and to the individual.

Based on that initial determination the FAA must immediately suspend the individual's airman certificate (or, in the case of an applicant for a rating, authorization, or certificate, delay the issuance). At this stage the individual can ask for copies of "releasable" materials upon which the Initial Notification was based. Releasable is a key word because the TSA will not include in its response any classified information or other information it does not want to disclose. It seems clear from the rules that the type of information that the TSA will be relying on is the type of information that the TSA will not disclose.

The individual has the traditional right to appeal the FAA certificate action to the NTSB. It is an empty right. The NTSB has already ruled that it does not have jurisdiction to look into the basis for the TSA and FAA determination that the pilot poses a security threat. According to the NTSB, it must summarily affirm the emergency suspension or revocation. There will be no opportunity for a hearing before an impartial NTSB administrative law judge, no discovery, and no opportunity for cross-examination. In order to contest the TSA's determination, a pilot is relegated to the administrative review procedures internal to the TSA.

Under the internal TSA procedures, an individual, without the benefit of knowing the case against him, may serve a written reply to the Initial Notification of Threat Assessment. Then the deputy secretary reviews the case. There is no hearing before the TSA. No discovery. No right to confront one's accusers. No right of cross-examination. The individual likely will never know the information that caused the FAA to suspend or deny the certificate, which, as we noted, could be mere suspicion. Ultimately, the TSA issues a final decision. In the case of a citizen, the under secretary issues the final determination; in the case of an alien, the deputy administrator is the one to do so. If the final determination is favorable, the Initial Notification will be withdrawn and the FAA suspension ended. If unfavorable, the airman certificate, which already is suspended, will be revoked by the FAA (or denied if it is an application for a certificate or rating). The rules for these internal TSA procedures don't contain the usual and minimal "Chinese wall" that other federal agencies erect between the agency personnel that prosecute and the personnel that adjudicate. In the absence of such a procedural wall, these bureaucrats, who have free and private access to one another, constitute the proverbial prosecutor, judge, and jury.

So as I said, under the rules these two agencies, seemingly acting independently, combine to cause the suspension and revocation of an FAA airman certificate on an emergency basis, that is, an immediate grounding. This action is based on a security decision made by TSA behind closed doors, without the opportunity to be heard by the FAA before such drastic action is taken. It can be done on mere suspicion that an airman poses a so-called security threat. It can be done without the FAA or TSA ever having to disclose the evidence on which they relied in taking this drastic action. And, it can be done without affording the airman any effective appeal to the NTSB, such as pilots now enjoy in non-security cases.

It took a great deal for me to write this critical piece. I certainly don't want to be perceived as unpatriotic. I am all for legitimate anti-terrorist activities. In fact, I am amazed that the bureaucrats would take after the pilot community of this country, which is overwhelmingly patriotic, law abiding, and supportive of legitimate anti-terrorist activities. Why attack your natural allies? In making these rules, the bureaucrats went over the edge. That is why AOPA has objected to the rulemaking and is asking Congress for remedial legislation.



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