

News from the Hill

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Could You Be Mistaken for a Terrorist?

Under new regulations, a mere suspicion could be enough to revoke your A & P certificate!

Under a new Federal Aviation Administration rule, the FAA will suspend certificates of persons whom the Transportation Security Administration proposes to designate as suspected terrorists and revoke those certificates when the person is finally designated as a suspected terrorist. There is no need to be a terrorist to be designated in this way! Nor is there a need to do anything – mere suspicion is enough to warrant a permanent revocation of a person's airman certificates. Under the regulations, there is no way to petition to get the certificates back.

The certificates that are subject to this suspension/revocation program are those issued under Parts 61, 63 and 65; this includes pilots, instructors, A&P mechanics and repairmen.

The problem lies in the TSA rules, which permit TSA to add ANY person who is suspected of terrorist activity. This is defined to include people suspected of posing any danger to transportation security, and people suspected of air piracy. This could include someone who was arrested for not having the right badge for airport access. Air piracy criminal laws have been used at least once against a mechanic suspected of doing maintenance that caused a fatal crash (the

NTSB later found that the mechanic was not responsible). The "suspected" standard is a very low standard for cutting off a person's livelihood!

Background on Certificate Actions

Traditionally, the FAA has suspended or revoked the airman certificates of persons who were thought to represent a danger to aviation safety. This includes people who are not qualified to hold a certificate, such as people who have demonstrated the lack of qualification through their actions. For example, a pilot who exceeds speed limitations in a traffic area could be subject to a 30- to 60-day suspension. If the same pilot flies while her certificate is suspended, then she could be subject to an emergency revocation.

Where the FAA feels that there is an immediate need to provide protection to the public, the FAA has the power to issue an emergency suspension or revocation of an airman's certificate (or any other certificate issued by the FAA). Although a suspension or revocation (alone) may be punitive in nature, an emergency action is taken to protect the public from danger. In fact, when the FAA intends to perform an emergency suspension or revocation in order to protect the public, and also plans to perform a standard suspension for punitive purposes, the

FAA shall issue a separate notice for the punitive action that is not handled under the expedited rules for emergency actions.

Because the FAA is permitted to suspend or revoke a person's airman certificate whenever "safety in air commerce or air transportation and the public interest" demands such an action, the FAA has a legal basis to support a suspension or revocation in the event that evidence shows that a person is likely to use that certificate to cause harm. This would be considered a remedial action rather than a punitive one. An FAA finding that an individual posed an imminent danger to aviation safety may be sufficient to justify emergency suspension of the certificate until the danger has passed.

The new rules expands the realm of cases in which FAA will suspend or revoke an airman certificate. In many ways the new rule also severely limits the FAA's powers, because it requires the FAA to take action based on a TSA finding even when the FAA Administrator does not agree that a suspension or revocation is warranted under the circumstances.

The FAA Rule

On its face, the FAA rule appears to be potentially reasonable. It requires the FAA to suspend an airman certificate if TSA proposes placing the individual on a list of suspected terrorists.

If the person is placed on the list, then the FAA converts the suspension to a permanent revocation.

Once TSA places a person on the terrorist list, that person is ineligible to hold or to apply for any FAA airman certificate issued under Parts 61, 63 or 65.

This appears reasonable because it appear to prevent terrorists from obtaining airman certificates. Unfortunately, the way that the TSA rule defines who is a terrorist makes the rule far more expansive than the public might expect.

The TSA Rule

TSA's rule permits TSA to list any person who is suspected of posing a security threat.

An individual poses a security threat when the individual is suspected of posing, or is known to pose:

- (1) A threat to transportation or national security;
- (2) A threat of air piracy or terrorism;
- (3) A threat to airline or passenger security; or
- (4) A threat to civil aviation security.

This definition expressly includes people suspected of posing a threat of air piracy. The air piracy law was originally intended to punish hijackers but the government has used them against maintenance personnel who've made mistakes in maintenance. Does this mean that maintenance mistakes in the future could serve as the basis of a determination that an individual could pose a security threat?

Who is a terrorist? An illustration of the answer to this question might be found in the question "who is a mobster?" The RICO laws were originally intended specifically for mobsters (those engaged in racketeering). Those laws today are used against regular businesses, and even against organizations like groups who oppose or support abortion.

Racketeering laws are used against businesses and protesters. Hijacker laws are used against mechanics. This has been true even where an affirmative act had to be proven. In the new TSA rules, a mere suspicion is enough to warrant designation as a potential terrorist (and permanent revocation of the person's airman certificates). Based on past legal history, there is a very real possibility that the TSA anti-terrorist regulations could be used in the future against people who have no terrorist intentions.

If the TSA regulations are used against non-terrorists in the future, is there any protection? In fact, there are significant procedural problems with the TSA rule that make it practically impossible to protect yourself, once suspicion has been raised.

The Procedural Issues

In a criminal context the accused is entitled to confront his accusers; however, that is not the case for TSA's new suspected terrorist designation. The regulations make it clear that TSA is permitted to refuse to provide an accused person with the evidence that support TSA's case, if TSA deems the evidence to be classified (a likelihood in terrorist allegations). This would make it practically impossible for an innocent airman to defend himself against an erroneous charge!

While most court cases permit a lawyer to seek evidence from the other side (discovery) in a reasonable time frame, the new TSA rule limits requests for information to only the first 15 days after service. It is not unusual for people to hire a lawyer on the last day on which a response is due – the lawyer may not have enough time to even ask for the evidence (which saves TSA the trouble of denying the request).

The airman is not even permitted to argue his case in a hearing. The airman's only opportunity to be 'heard'

before the suspension becomes a revocation is in a single written response that is due 15 days after the initial notification is served. This is different from FAA certificate actions, in which the airman is always permitted to request a hearing before an Administrative Law Judge. Many airmen will probably fail to provide a full response because they will assume that "the government can't take my airman's certificate without giving me my day in court."

Even the small number of procedural safeguards proposed by TSA may be ignored – in a recent case, the FAA argued that 'substantial compliance' (rather than strict compliance) with its own rules was sufficient and the D.C. Court of Appeals held that the FAA did not need to adhere to normal hearing procedure in a 'hearing' that was not held in front of an Administrative Law Judge. Similar logic could be used to support a TSA decision to provide an even more abbreviated due-process scheme.

Public Input

While most regulations are subject to public notice and comment before promulgation, these regulations were not. They were promulgated as "direct final" rules. This means that they were published as final rules without any opportunity for public input.

The FAA and TSA invited comments from the public on these final rules. They promised to review the comments and respond accordingly. Historically, though, the FAA has failed to respond to comments submitted in response to direct final rules. For example, when the FAA published the revisions to Part 145 as a final, most of this rule had been subject to the notice and comment mechanism. A small number of elements of this final rule were considered to be "direct final" because they were added to the

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final rule with no prior notice to the public. Despite the fact that organizations submitted comments on these direct final aspects of the rule, the FAA did not publish any response to, or analysis of, these comments.

The FAA and TSA may not have the luxury of ignoring comments filed seeking to improve the airman certificate revocation rules. There has been significant talk in Washington, D.C. about these new rules, and a surprising number of organizations have voiced strong opposition. Intense scrutiny is likely to be focused on these regulations.

Mechanics and other airmen should carefully monitor these new regulations to make sure they are not misused, because they offer the Federal Government a mechanism to circumvent the normal legal procedures and protections normally afforded to someone whose airman certificate is being suspended or revoked.

AEA's Actions

On February 3, AEA's Vice President of Government and Industry Affairs, Ric Peri, took the lead on this issue by sending a letter to Congress asking them to consider the dire ramifications of these regulations and to help to find an appropriate balance between national security, and the respect for due process of law that we all expect from our government.

Peri's letter hit home: since its publication there has been talk in Washington about the other branches of the government applying pressure to the TSA and FAA to amend or revoke these regulations. Whether that talk becomes action may depend significantly on the actions of the industry as a whole.

AEA will be filing complete comments that will explain the legal position of the government and its regula-

tions, and will petition the FAA and TSA to 1) rescind their regulations, 2) revise them to better match the requirements of a free society that respects the law, and then 3) republish the new (improved) regulations through the normal notice-and-comment mechanism that the law requires in order to properly solicit public comments.

AEA plans to reiterate in its formal comments that until the TSA rule can be refinalized, genuine threats to aviation safety and security are still subject to the FAA's power to engage in emergency revocation.

Conclusion

No American wants to contradict or impede the U.S. Government's efforts to protect our country from terrorists. But there is an obvious limit: government protective efforts must remain within the reasonable boundaries established by the Constitution and our existing body of laws.

AEA will continue to strive to work with the government to help produce regulations that make sense, that protect the public, and that represent reasonable exercises of governmental power under the United States Constitution. □

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