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PUTTING THE TRANSPORTATION SECURITY ADMINISTRATION IN HISTORICAL CONTEXT

KENT C. KRAUSE*

PRIOR TO THE September 11, 2001 planned suicide hijackings of four airliners, hijackings had been the result of hostage-related terrorist attacks or a demented individual bent on some misguided cause. The shift of terrorist tactics on September 11 spurred the passage of aggressive and comprehensive legislation in aviation security. But even before that now infamous date, aviation security, on paper at least, was a highly regulated area of transportation law.

Federal laws and regulations generally covered airport security, airplane operator security, and indirect air carrier security.

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1 Congress and the President have advanced several new laws under the auspices of homeland security to reduce terrorism threats that are not directly related to aviation. While beyond the scope of this article, some of the other considered legislation includes the Homeland Security Act, the USA Patriot Act, the Terrorism Risk Insurance Act, and the Enhanced Border Security and Visa Entry Reform Act.


3 14 C.F.R. §§ 107, 139.

4 14 C.F.R. § 108.

5 14 C.F.R. § 109.
HISTORICAL OVERVIEW

A. IN GENERAL

Through the Federal Aviation Act in 1958, Congress established the Federal Aviation Administration (FAA), and thus, centralized rulemaking for United States air transportation. The FAA in turn was empowered to promulgate Federal Aviation Regulations (FARs) "to protect passengers and property on an aircraft" from acts "of criminal violence or aircraft piracy," and to establish, "to the maximum extent practicable...a uniform procedure for searching and detaining passengers and property."

The FARs required each airplane operator to adopt a mandatory Air Carrier Standard Security Program (ACSSP) to address a number of security requirements, including procedures for screening passengers and property. The airplane operator had to submit its ACSSP to the FAA for approval. The FARs also required airport operators to adopt security programs, to be approved by the FAA, providing for control of access to operations areas and necessary law enforcement support.

The rash of air carrier hijackings in the 1960's and 1970's created the impetus for a number of security measures. While certainly some security measures existed prior to the hijackings of the late 1960's, the hijackings significantly transformed air transportation security requirements; these standards remained in effect with only minor changes until the events of September 11. The FAA has long regulated passenger screening, bag-
gage screening, limiting airport access, and air freight screening. The FAA found a partner in aviation safety when the Aviation Security Improvement Act of 1990 directed the FAA to work with the Federal Bureau of Investigation to identify and assess current and potential threats to the air transportation system. The 1990 Act required the agencies to identify and continually monitor parties capable of and intending to commit terrorist acts against the air transportation system, and to devise methods to improve aviation security to thwart these threats. The events of September 11 and the subsequent critical analysis of the intelligence and security failings of that day, show a breakdown in the implementation and follow through of communications and measures necessary to fulfil the intent of the 1990 Act, not only between the FBI and the FAA, but even within the FBI itself.

Pre-September 11, the then-existing regulatory scheme placed the responsibility of formulating and implementing security strategy principally upon the airlines and airport operators and relied heavily on the industry to fund, administer, and oversee all aspects of air carrier security. In a fiercely competitive

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16 C.F.R. § 107.13; see also In re Airport Operator, Civil Penalty Decision 1996-1, 5 FAD CP-625 (F.A.A. 1996); Detroit Metropolitan-Wayne County Airport, Civil Penalty Decision 1997-23, 5 FAD (F.A.A. 1997).
17 C.F.R. § 109.3.
20 See also 49 U.S.C. § 44912.
marketplace, the airlines and airport operators were conflicted between the interests of passenger comfort and convenience, their own need for cost cutting, and the desire for truly effective security measures.\textsuperscript{24}

B. \textbf{Air Piracy and Other Airborne Crimes}

Regrettably, air piracy and other airborne crimes have existed almost as long as commercial aviation. The first reported instance of air piracy occurred in Peru in 1931.\textsuperscript{25} Reportedly, more than 1,000 hijackings have occurred worldwide since the late 1940's, when the era of commercial airliner hijackings began in earnest with an attempt to gain control of a Cathay Pacific seaplane near Macao.\textsuperscript{26} The criminality of such actions is not a new concept either.\textsuperscript{27} Congress first addressed air piracy and other airborne crimes in 1961 by amending the Federal Aviation Act of 1958 to establish air piracy as a federal crime.\textsuperscript{28}

Over time, Congress also criminalized interference with flight crewmembers and attendants,\textsuperscript{29} carrying a weapon or explosive on an aircraft,\textsuperscript{30} and providing false information and threats.\textsuperscript{31}

\begin{center}
\textbf{web/assetlibrary/Study_and_Report_to_Congress_on_Civil_AirAviation_Security_Responsibilities_and_Funding_1998.pdf (last visited May 5, 2003)}:
\end{center}

The FAA is responsible for establishing and enforcing regulations, policies and procedures; identifying potential threats and appropriate countermeasures; deploying Federal Air Marshals on selected U.S. air carrier flights; and providing overall guidance to ensure the security of passengers, crew, baggage, cargo, and aircraft.\ldots Air carriers bear the primary responsibility for applying security measures to passengers, service and flight crews, baggage, and cargo. Airports run by State or local government authorities are responsible for maintaining a secure ground environment and for providing law enforcement support for implementation of airline and airport security measures.


\textsuperscript{27} 49 U.S.C. § 46501 (2002).
\textsuperscript{29} 49 U.S.C. § 46504 (2002).
Further, it extended the application of certain other criminal laws to aircraft.\(^3\)\(^2\)

These significant alterations to aviation security were necessary to respond to the rash of hijackings in the late 1960's and early 1970's. From 1968 to 1970 there were nearly 200 hijackings worldwide.\(^3\)\(^3\) The hijackings typically were instigated to capture aircraft or passengers as hostages for the advancement of some notorious cause. The late 1960's ushered in the modern era of international terrorist hijackings when members of the Popular Front for the Liberation of Palestine hijacked an El Al airliner from Rome and forced it to fly to Algeria. The passengers were held for 40 days before being released.

Further examples of this traditional hijacking and hostage pattern extended into the 1970's. In 1970, planes of Pan Am, TWA, and Swiss Air were hijacked and were forced to fly to the Jordanian desert.\(^3\)\(^4\) Four hundred people were on board the planes, but all were eventually released in exchange for the release of Palestinian prisoners. In 1973, Palestinian terrorists hurled hand grenades and fired bullets into a line of passengers waiting in Rome, Italy to board a Pan Am flight bound for New York, killing thirty and injuring fifty-five.\(^3\)\(^5\) An Air France airliner was hijacked in 1976 and forced to land at Entebbe Airport in Uganda. The historic Raid on Entebbe ensued when Israeli commandos freed 105 passengers. Three passengers, one Israeli commando, and all the hijackers were killed in the operation.\(^3\)\(^6\) A Lufthansa airliner was hijacked in 1977 and forced to land in Mogadishu, Somalia. At the end of a five-day stand off, the hijackers had killed the plane's pilot, but released eighty-six other unharmed hostages.

The 1980's witnessed even deadlier hijackings. In 1981, a Pakistan International Airlines jet was hijacked and taken to Kabul, Afghanistan and then Damascus, Syria. The hijackers killed one passenger, but released the others when the Pakistani Government agreed to free more than fifty political prisoners. Hijack-
ers armed with pistols, explosives, and other weapons tortured four American passengers and eventually killed two of them, when in 1984 a Kuwait Airways flight to Pakistan was hijacked and flown to Tehran, Iran. The year 1985 saw three lethal hijackings: (1) a bomb in the forward cargo hold exploded in an Air India Boeing 747 en route to Bombay, India, from Toronto, Canada, killing all 329 people on board;\(^3\) (2) a TWA flight to Athens, Greece, was hijacked and diverted to Beirut, where after seventeen-days one passenger was killed before the remaining passengers and crew were released; and (3) terrorists seized an Egypt Air aircraft and diverted it to Malta, where they began executing American and Israeli passengers.\(^3\) Hijackers also victimized TWA in 1986 when a bomb exploded in one of its Boeing 727s during flight near Athens, Greece, blowing a hole in the fuselage.\(^3\) The resulting cabin decompression sucked out four passengers to their deaths and injured several others. Miraculously, the aircraft landed safely. In 1986, Pan Am Flight 73 was hijacked in Karachi, Pakistan, when hijackers drove a vehicle onto the tarmac, entered the plane and opened fire on the passengers, killing twenty-two people and injuring numerous others. In 1988, terrorists hijacked a Kuwait Airways flight from Thailand and forced it to fly to Algiers, where, over a sixteen-day stand-off, two passengers were killed before the remaining hostages were freed and the hijackers surrendered.\(^4\) Libyan terrorists planted a bomb in Pan Am Flight 103 in 1988 that exploded mid-air near Lockerbie, Scotland, killing all 259 people on board and eleven people on the ground.\(^4\) In 1989, a bomb exploded in a French UTA DC-10 over Niger in the Tenere Desert, killing all 171 people on board.

The 1990's saw a reduction in the number of hijackings and related deaths, but by no means were they eliminated. In 1993, hijackers seized an Ethiopian Airlines plane in eastern Ethiopia, killing one passenger. An Air France A300 was hijacked in Al-

TSA IN HISTORICAL CONTEXT

In December of 1994, the four hijackers killed three passengers and then they in turn were killed when commandos retook the aircraft. In 1996, three hijackers seized an Ethiopian Airlines Boeing 767 in Kenyan airspace demanding to go to Australia, only to run out of fuel, and crash in the Indian Ocean off the Comoros Islands, killing 125 of the 175 on board. Pakistani commandos, in 1998, overpowered and arrested three hijackers of a Pakistan International Airlines airplane, freeing all 29 passengers. Kashmiri militants hijacked an Indian Airlines aircraft and forced it to fly to Kandahar, Afghanistan in 1999. A week long standoff ended when India agreed to release three jailed Kashmiri militants.

During 2000, Afghans seeking to escape the Taliban regime hijacked a domestic flight with 164 people on board and diverted it to Stansted Airport near London where, after a five-day stand off, the hijackers released all hostages and surrendered to authorities. That same year two Saudi hijackers took control of a Saudi Arabian Airlines plane to Baghdad, where they surrendered to Iraqi authorities. Lastly, Chechen separatists hijacked a Vnukovo Airlines flight from Istanbul to Moscow in 2001, diverting it to Saudi Arabia. Once there, security forces initially negotiated the release of 47 passengers, but when further negotiations broke down, Saudi commandos stormed the plane freeing more than 100 passengers and the crew, although one passenger and a flight attendant were killed.

The deadliest terrorist hijacking to date took place in U.S. airspace. On September 11, 2001, nineteen men, now identified as foot soldiers of Osama Bin Laden's Al Qaeda network, hijacked four planes. They intentionally crashed American Airlines Flight 11 scheduled from Boston to Los Angeles into the North Tower of the World Trade Center in New York City, and United Airlines Flight 175 scheduled from Boston to Los Angeles into the South Tower of the World Trade Center. Both towers and some adjacent buildings collapsed within hours.

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tack, American Airlines flight 77 scheduled from Dulles International to Los Angeles was intentionally crashed into the Pentagon. United Airlines Flight 93 scheduled from Newark to San Francisco crashed into a rural area in Stony Creek, Pennsylvania, after several passengers overpowered the hijackers upon learning the fate of the other three planes. Reports estimated that as many as 3,000 people perished in these four attacks. It is now believed that more hijackings were planned, but were averted when all flights in the U.S. were grounded.

Air piracy has been present almost as long as there has been commercial air transportation service. The coordinated plot of multiple, simultaneous hijackings for the purpose of using the aircraft as fuel-laden guided missiles distinguished the events of September 11 from prior hijackings. While the methodology utilized on September 11 was new, the legal framework for addressing these crimes was not, having developed over time in step with the growth of commercial air transportation service.

Aircraft piracy is a punishable criminal offense in the United States. Federal regulations grant special jurisdiction to enforce these criminal aircraft piracy laws. The actual moment of seizing the aircraft is not determinative of jurisdiction over the hijackers, so when evidence indicates the unequivocal intention to hijack the aircraft, the hijacking begins in the jurisdiction where the hijackers boarded the aircraft, rather than in the jurisdiction where the hijacking demand was made during flight.

Airborne crimes, aside from aircraft piracy, may occur in various forms. Criminally punishable prohibitions include interference with flight and cabin crew members, carrying a weapon or explosive on an aircraft, providing false information or

51 49 U.S.C. §§ 46505, 46303 (Civil Penalty).
making threats of dangerous behavior,\textsuperscript{52} entering an aircraft in violation of security requirements,\textsuperscript{53} and transporting hazardous material.\textsuperscript{54} Similarly, actions taken by someone against fellow passengers will also give rise to criminal prosecution. Appropriate remedies and jurisdiction will be determined by several factors, including the origin of flight, the location of the offense, and the destination of the flight.\textsuperscript{55}

C. AIRPORT SECURITY

An airport operator is responsible for the security of the air operations area.\textsuperscript{56} An airport operator fulfills this obligation by developing, implementing, and operating an approved security program.\textsuperscript{57} Notwithstanding, the airlines have independent responsibility for the security of their aircraft.\textsuperscript{58}

As a consequence of the hijackings of the late 60's and early 70's, security at airports was substantially altered from the then status quo. In particular, the importance for increased security and the serious nature of the security procedures implemented led one court to find that an unloaded gun constitutes a dangerous weapon.\textsuperscript{59} Another court held that a law prohibiting joking about or falsely reporting a bomb did not violate First, Fifth and Sixth Amendment constitutional rights.\textsuperscript{60} The courts have also ruled that the use of a magnetometer (metal detector) is a constitutionally reasonable search of one's person and does not violate the Fourth Amendment.\textsuperscript{61} Further, the failure to clear through the magnetometer gives justification to a more physically intrusive search.\textsuperscript{62} Because the use of the magnetometer and a subsequent physical search are justified, such search and seizure is not unreasonable and thus constitutionally sound where the search is limited in scope to the circumstances that

\textsuperscript{52} 49 U.S.C. §§ 46507, 46302 (Civil Penalty).
\textsuperscript{53} 49 U.S.C. § 46314.
\textsuperscript{54} 49 U.S.C. § 46312.
\textsuperscript{56} 14 C.F.R. § 107.13.
\textsuperscript{58} In re Continental Airlines, Civil Penalty Decisions 1990-12, 2 FAD CP-51 (F.A.A. 1990).
\textsuperscript{59} United States v. Ware, 315 F. Supp. 1333, 1335 (W.D. Okla. 1971).
\textsuperscript{60} United States v. Feldman, 10 Avi. 18,350 (E.D.N.Y. 1969).
\textsuperscript{61} United States v. Epperson, 454 F.2d 769, 771 (4th Cir. 1972).
justified the interference. Additionally, the courts have addressed the parameters within which a person can be considered to be attempting to board an aircraft with a weapon. The courts have generally found that when a person checks in by surrendering his ticket at a customer service desk and entering a departure lounge in advance of a flight covered by that ticket is an attempt to board. In today's more strict security with expansive 'sterile' areas allowing ticketed passengers only, any attempt to enter a secure area likely would be found by the courts to constitute an attempt to board.

Profiling is an area the courts have considered before and undoubtedly will again in our post-September 11 state of heightened security and caution. In aviation security, developing a profile of potential hijackers has been seriously studied and generally found to be permissible within the right parameters. The courts have found that where appropriate statistical, sociological and psychological data and techniques are utilized to create a profile whose characteristics are easily observed without discrimination on the basis of religion, origin, political views or race, then such profiling does not violate due process or equal protection rights under the Constitution. The TSA expects to implement an updated profiling system using all kinds of data about buying and traveling habits, including information such as where a person has traveled and if he or she has had multiple bank accounts or addresses in recent years.

II. AVIATION AND TRANSPORTATION SECURITY ACT

A. IN GENERAL

The events of September 11, 2001 revealed an undreamed-of use of a fully fueled airliner as a suicidal device of mass destruction by terrorists. New measures of intelligence gathering and analysis, immigration policy changes, and enhanced security of the skies, were clearly required. In this same vein, the pre-September 11th methodology for handling hijackings was one of cooperation in an attempt to secure the safety of the passengers.

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63 Epperson, 454 F.2d at 771.
65 Torbet v. United Airlines, Inc., 298 F.3d 1087 (9th Cir. 2002).
and crew. The advent of the suicide hijacker required a comprehensive change to the historical policy of cooperation and acquiescence.

In response to the clear and present danger of future terrorist attacks in the United States, (in addition to the measures immediately undertaken by the FAA), the Aviation and Transportation Security Act (ATSA) was signed into law on November 16, 2001.

Congress passed the ATSA to bolster what many perceived as past security complacency. Prior to September 11, airlines and passengers were mostly concerned with on-time arrivals and departures. Airlines seldom searched checked baggage, and people passed with alarming frequency through security checkpoints with undetected weapons and false identification. Passengers boarded flights without paying much attention to the people sitting next to them. Most passengers tended to their own interests, tuning out those around them as well as safety instructions from flight attendants. Their concerns upon landing were only of waiting for luggage, ground transportation, and hotel reservations.

After September 11, this complacency disappeared. For many months, armed military personnel roamed airports. Security guards, fellow passengers, and flight crews scrutinized everyone. In one instance, a pilot removed an Arab-American man from a

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68 On October 3, 2001, Senator Fritz Hollings (S.C.) commented that the in-flight security plan in effect on September 11 trained flight crews to cooperate with hijackers:

> Heretofore, until September 11, the rule of the game was for the pilots to say: You want to go to Havana, Cuba? I wanted to go there, too. Let us all fly to Havana. And you ask the other hijacker: You want to go to Rio? As soon as we land in Cuba and get some fuel, we will go to Rio. They will go anywhere they want to accommodate the hijacker and get the plane on the ground at whatever place he wants to go and let law enforcement take over.

147 CONG. REC. S10128 (2001).


plane for allegedly suspicious conduct; the man happened to be a plain-clothes Secret Service agent.\textsuperscript{71}

The ATSA responds to this change in atmosphere and broadly expands the government's control over, and active role in, aviation security. The Act establishes hands-on, full-time federal control over aviation security through the creation of the Transportation Security Administration.\textsuperscript{72} Under the Act, the President appoints an Undersecretary responsible for an administrative agency overseeing security in all modes of transportation, including air travel.\textsuperscript{73}

A principal edict of the ATSA is the implementation of day-to-day screening operations of passenger air transportation and the hiring and training of a national force of security personnel, as well as the development of hiring and training standards for that force.\textsuperscript{74} Additionally, the ATSA enables the creation of regulations governing security measures on aircraft, including the authority to issue orders improving flight deck security.\textsuperscript{75} Specifically, it authorizes the FAA to develop and implement methods to use video monitors or other devices to alert pilots on the flight deck to activity in the cabin, insure continuous operation of an aircraft transponder in the event of an emergency, install devices that enable flight attendants to notify pilots of security breaches in the cabin, restrict access to the flight deck, and restrict possession of a key to the flight deck to certain airline personnel.\textsuperscript{76} While a pilot in command of an aircraft may have unfettered discretion to determine whether to admit certain people to the flight deck,\textsuperscript{77} a question remains as to whether that discretion extends to the cabin aft of the flight deck.\textsuperscript{78}
The ATSA also reestablishes the deployment of federal air marshals and sets forth the requirements for employing and increasing their numbers.\(^{79}\) On September 11, 2002 there were reportedly only 36 active federal air marshals.\(^{80}\) Extensive action regarding screening of checked baggage has also been implemented by the ATSA.\(^{81}\) Also, the ATSA significantly bolsters the position of Federal Security Manager by requiring the Undersecretary to fill and deploy individuals as Federal Security Managers at all commercial airports in the United States regularly served by certificated air carriers.\(^{82}\)

The ATSA authorizes additional action to improve airport perimeter access security. Heightened security measures include traditional methods of screening all individuals, goods, property, and vehicles before they are permitted in a secured area, as well as newer methods such as biometric and other technologically advanced methods of verifying identity.\(^{83}\)

Many ATSA provisions address the need for change from a policy of cooperation with hijackers and terrorists to one more suited to combat the suicidal acts of September 11, 2001. Under the ATSA, existing programs are expanded for research and development of methods to understand, anticipate, and respond to various threats posed by modern terrorists.\(^{84}\) The ATSA also implements new provisions regarding flight school security,\(^{85}\) in-

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\(^{81}\) 49 U.S.C. § 44901.
\(^{84}\) Pub. L. No. 107-71, § 112.
creases penalties for interference with security personnel,\textsuperscript{86} establishes new requirements for air carrier passenger manifests,\textsuperscript{87} develops airline computer reservation systems,\textsuperscript{88} and implements a security service fee for funding the mandates provided for in the ATSA.\textsuperscript{89} Other miscellaneous provisions include the grant of immunity for encouraging airline employees to report suspicious activities,\textsuperscript{90} consideration of weaponry for flight deck crews,\textsuperscript{91} and the research and development of new security technology and the assessment and deployment of emerging aviation security technology.\textsuperscript{92}

The ATSA also amended the Air Transportation Safety & System Stabilization Act,\textsuperscript{93} broadening the scope of the parties benefiting from the liability limitation provisions of the original act.\textsuperscript{94}

Commercial airlines are not the only ones affected by the increased security measures. Private and charter aircraft may have felt an even greater impact.\textsuperscript{95} Air taxi and charter operations initially benefited by an increase in business travelers wanting to avoid increased terminal security. But the initial allure has faded with new regulations being applied to them, too: soon-to-be-required fingerprint-based criminal background checks, airport and flight restrictions, cockpit security measures, and to some extent, airline-type passenger and baggage security screening procedures.\textsuperscript{96} Private pilots' access to airports and airspace

\begin{itemize}
\item \textsuperscript{86} Pub. L. No. 107-71, § 114; 49 U.S.C. § 46503.
\item \textsuperscript{87} Pub. L. No. 107-71, § 115.
\item \textsuperscript{88} Pub. L. No. 107-71, § 117.
\item \textsuperscript{89} Pub. L. No. 107-71, § 118; 49 U.S.C. § 44940.
\item \textsuperscript{90} Pub. L. No. 107-71, § 125; 49 U.S.C. § 44941.
\item \textsuperscript{91} Pub. L. No. 107-71, §§ 126, 128.
\item \textsuperscript{92} Pub. L. No. 107-71, §§ 136, 137.
\item \textsuperscript{94} Pub. L. No. 107-71, § 201. The Air Transportation and System Stabilization Act originally only limited the liability of the air carriers victimized on September 11. The ATSA broadens those receiving liability relief to include also aircraft manufacturers, airport sponsors and persons with a property interest in the World Trade Center.
\end{itemize}
has been restricted at unprecedented levels.97 In an effort to bridge the gap between the TSA’s efforts at the 492 public use airports served by airlines and the more than 1400 general aviation airports in the U.S., the Aircraft Owners and Pilots Association (AOPA) partnered with the TSA to develop a nationwide general aviation airport security program.98 Called the AOPA Airport Watch, the program enlists pilots to report suspicious activity that might signify criminal or terrorist threats.

B. TRANSPORTATION SECURITY ADMINISTRATION

By far the most ambitious goal of the ATSA was creating the Transportation Security Administration (TSA).99 Originally created as an administration of the Department of Transportation, the Transportation Security Administration was transferred on March 1, 2003, to the newly created Department of Homeland Security.100 The ATSA contemplates the transfer and consolidation of all transportation-related security activities from various federal departments under the one roof of the newly created Transportation Security Administration.101 The TSA is to oversee not only aviation, but also other modes of transportation,102 although its initial emphasis has been to address the ATSA directives about aviation security. In this regard, the ATSA directs the TSA to establish and undertake the security screening operations on a day-to-day basis at all passenger airports.103 To fulfill this directive, the TSA is to hire, train, test and retain a sufficient number of security screening personnel for placement in airports throughout the United States.104 The ATSA provides very specific requirements for hiring qualifications, training and proficiency.105 Included in the new hiring requirements is a direc-

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97 The FAA has issued numerous Notices to Airman (NOTAMS) advising of air defense identification zones. Particularly affected are three general aviation airports around Washington, D.C., which have been completely shut down from time to time since September 11, 2001. Even when reopened, operations were significantly restricted and security protocols enhanced. See http://www.faa.gov for information on current NOTAMS.


99 Pub. L. No. 107-71, § 101; 49 U.S.C. § 114. The President, with the advice and consent of the Senate, appoints the Undersecretary of Transportation for Security to run the new administrative agency. See supra note 73.

100 Pub. L. No. 107-296.


102 Id.


104 Id.

tive to conduct criminal background checks and an expansion of the right to test for alcohol and controlled substances on existing employees. Early on, some estimated that tens of thousands of persons would need to be employed within less than a year’s time and that this hiring effort would be the biggest federal organizational buildup of its kind since World War II.

The TSA worked furiously over the past year to hire, train and assign the tens of thousands of screeners needed to man 429 airports to meet the November 19, 2002 passenger screening deadline and to meet the December 31, 2002 deadline to screen all checked bags for bombs. Indeed, TSA hired more than 105,000 people since its inception, installed 1100 explosive protection systems and 5600 explosive trace detection machines in 429 airports. Besides the usual concerns over hiring standards and training requirements, there have been and continue to be political battles over funding and perceived unrealistic deadlines. While the most visible deadlines seem to have been met, the funding battles continue.

Less successful has been the TSA’s effort to jump-start the federal air marshals program. With thousands of flights in the United States each day, finding, training and deploying enough qualified marshals and returning them to service has proved a daunting task.

Upon adequately filling their hiring needs, the ATSA mandates that the TSA take over the screening of all passengers and property, including mail, cargo, carry-on, and checked bag-

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109 David Hughes, "TSA Meets Goal With Casts of Thousands," Aviation Week & Space Tech., Jan. 6, 2003, at 35 (of the 105,000, 41,000 were temporary contractors, and 66,000 are new TSA employees).
113 Id.
gage. In connection with the screening of luggage, the TSA had to deploy explosive detection systems or provide for mandatory screening where the explosive detection systems are not yet available. Notwithstanding the obstacles faced, the TSA substantially met the ATSA mandated deadlines. Of course, new issues have arisen. For example, the rapid deployment forced by the congressionally mandated deadlines has been criticized by some for diverting resources from what could have been imaginative new solutions, rather than a massive deployment of existing, and perhaps outdated, technology. Responsibility for the loss of items from checked luggage remains an area yet to be resolved. While the loss of or tampering with checked luggage has historically been the responsibility of the airlines, it is unclear who will take responsibility when items are missing from checked luggage, the airline or the TSA. With the initial efforts of the TSA on airline passenger and baggage screening substantially completed, the focus has shifted to other areas of the mandate. Particular attention is now being paid to air cargo security with new rules currently in development.

Additional duties and powers of the TSA are to receive, assess, and distribute intelligence information related to transportation security; assess threats to transportation; develop policies and strategies for dealing with threats to the transportation security; plan and coordinate counter-measures to security risks with other U.S. agencies; act as liaison with law enforcement and intelligence agencies; undertake day-to-day management of field security; research and development of enhanced transportation and security; implement and ensure adequacy of security measures at airports and other transportation facilities; and develop extensive background checks for airport security screening personnel. Along these lines, the TSA recently announced its efforts to develop the next generation of Computer Assisted

115 Id.
116 David Hughes, TSA Meets Goal With Cast of Thousands, AVIATION WEEK & SPACE TECH., Jan. 6, 2003, at 35.
117 David Hughes, Your Luggage Isn't Lost, Just Your Gold Necklace, AVIATION WEEK & SPACE TECH., Nov. 11, 2002, at 37; see also, Shannon Buggs, Case of the Missing Belt Reveals Baggage Fault Lines, HOUSTON CHRONICLE, Mar. 16, 2003.
Passenger Pre-screening System. Known by the acronym CAPPS II, this system seeks to enhance the ability of airline personnel and TSA screeners to identify a passenger's potential terrorism related threat to aviation.

The ATSA grants the Undersecretary of the TSA the same authority as the administrator of the FAA. Included in these powers is law enforcement power for airports and transportation facilities. The initial principal mission of the TSA is to assume all civil aviation security functions in the United States. With this broad grant of power, the TSA continues to issue directives it deems necessary to ensure security. On January 24, 2003 controversial rules were issued affecting the rights of pilots. These rules direct the FAA to immediately suspend, revoke or refuse to issue an airman certificate to anyone the TSA determines poses a threat to air transportation security.

To date, there are no reported interpretations by the courts of the authority granted to this new administration. However, it would appear that Congress's intent was to create an agency with the means and authority to expand the limited law enforcement duties previously assigned to the FAA and to coordinate and consolidate those duties with the security and law enforcement duties of other government agencies. Accordingly, prior cases and administrative rulings on transportation security and law enforcement should be instructive as issues arise regarding the implementation of the broad goals of the ATSA.

III. CONCLUSION

Now, more than a year and a half since the horrific attacks of September 11, 2001, enormous strides have been taken to shore

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124 Threat Assessments Regarding Citizens of the United States who Hold or Apply for FAA Certificates, 68 Fed. Reg. 16, at 3756 (Jan. 24, 2003). Of particular concern regarding the implementation of these new rules is the apparent lack of due process protection resulting from the methodology employed by the rules. The TSA is charged with determining whether a certificate holder may be a risk or threat to security. The FAA's only role is to carry out the TSA's determination by immediately revoking the certificate. Any appeal must occur within 15 days and it is to the TSA. However, the TSA doesn't have to disclose the evidence against the certificate holder if the TSA designates the determinative evidence as classified because its revelation would be contrary to the interest of national security.
up a very lax aviation security system. Congress has taken strong, serious, and unprecedented measures to create a pervasive air transportation security system. The measures implemented by the TSA in passenger screening, baggage screening, improvement of airport perimeter security, aviation industry employee background screening and upgrades to cockpit security, have immeasurably increased the difficulty for terrorists to target airplanes for use as weapons of mass destruction.

But these measures create inconvenience and cost. The airlines continue to reel from the September 11 grounding and the continued lack of confidence by many in the flying public over the ability of the industry or government to prevent another terrorist strike. Further, the inconvenience caused by heightened security has resulted in many travelers exploring alternative means of transportation. Air travel remains down despite the efforts of the federal government and the airlines to restore confidence.

Will Congress continue to fund this costly new system to provide not only the current level of security procedures, but to develop new methods and technologies for anticipating and combating future, as of yet unimagined, terrorism? What level of security will pacify the public, and at what sacrifice to convenience?

With the implementation of searches on all checked luggage as of December 31, 2002, the TSA is in full swing. Many passengers have said they are willing to endure inconvenience in exchange for some peace of mind. But how long will that willingness last? In a country rightfully proud of our relative freedom and ease of travel, do we have the social memory to stay the course of heightened security? Only time will tell.

125 See e.g., James Ott, Tight Security Compels Airport Design Shake-up, Aviation Week & Space Tech., Feb. 18, 2002, at 48 (estimating at least $3-4 billion alone to refit U.S. airports to make room for explosive detection systems in addition to a like sum for the equipment).

