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Aviation Security Measures and Domestic Terrorism Threats

After the January 6, 2021, security breach of the United States Capitol, some Members of Congress have advocated restricting the air travel of individuals who may seek to incite or carry out further violence. The Federal Bureau of Investigation (FBI) is reportedly considering placing individuals who illegally entered the Capitol on the Transportation Security Administration (TSA) No-Fly List. This In Focus discusses the circumstances under which air carriers, TSA, and other federal authorities may restrict domestic airline travel in response to security threats.

The No-Fly List and Airline Passenger Prescreening

The No-Fly List is one of several lists maintained by TSA to identify passengers based on their risk to aviation safety and national security (See 49 U.S.C. §44903). As the name implies, individuals on the No-Fly List are to be denied boarding and referred to law enforcement authorities when they arrive at an airport to check in for a commercial airline flight. In addition to the No-Fly List, TSA maintains lists of individuals who are to receive special scrutiny during pre-flight security screening and whose carry-on bags and checked baggage are to be examined more thoroughly. The primary list of such individuals is referred to as the Selectee List or Automatic Selectee List to indicate that these individuals are to be automatically selected for enhanced screening. Enhanced screening may include measures such as pat-downs and chemical trace detection swabs to test for explosives residue. Passengers not on these lists may be randomly selected for enhanced screening, and passengers or baggage that trigger alarms during initial screening may also undergo these additional measures.

Both the No-Fly and Selectee lists are subsets of the broader consolidated terrorist watchlist, formally known as the Terrorist Screening Database or TSDB. The TSDB is maintained by the FBI's Terrorist Screening Center, which is responsible for consolidating and disseminating terrorism data to federal, state, and local law enforcement, and international partners. TSA's Secure Flight system checks passenger names against these lists multiple times between ticket purchase and the flight's departure, as the lists are routinely updated. TSA may expand these Secure Flight checks to include the larger number of identities in the complete TSDB when warranted by security conditions. This can be done when specific threat intelligence suggests, for example, heightened security concerns regarding a specific flight, flights along a specific route, flights from a certain region, or flights to a specific destination. TSA sometimes refers to this broader use of the complete TSDB as the Expanded Selectee List, suggesting that, under such heightened security conditions, additional individuals may be selected for enhanced security screening. However, the No-Fly list might not be expanded unless specific information warrants inclusion of additional individuals on that list.

In addition to the Selectee list, TSA relies on sets of rules to temporarily assign certain passengers to two other lists it maintains, the Silent Partner and Quiet Skies lists. Individuals may be placed on these lists based on their recent international travel patterns, and are subject to enhanced screening measures, including additional baggage screening, for a period of time.

Historically, the TSA lists and the broader TSDB have focused mainly on international terrorist threats. The FBI most recently released data about its security lists in September 2011. At that time, about 98% of the roughly 420,000 identities contained in the TSDB referred to persons who were not U.S. citizens or legal U.S. residents. The No-Fly list then consisted of about 16,000 identities, of which fewer than 500 referred to U.S. persons. The Selectee list was said to also contain about 16,000 identities, although the FBI did not specify how many of those were U.S. persons. The TSDB apparently has grown considerably since then. According to press reports, about 1.2 million people were on the watchlist in 2017, including about 4,600 American citizens. Official updates regarding the size and scope of the No-Fly and Selectee lists, however, have not been made public.

TSA was required to establish a procedural mechanism enabling people to challenge their inclusion on the No-Fly list or other lists that effectively barred them from traveling by air. The Department of Homeland Security's Traveler Redress Inquiry Program (TRIP) maintains a website through which individuals who claim to have been misidentified may seek redress, but such individuals may be barred from air travel or subject to enhanced screening until their cases are adjudicated.

Airline Blacklists

Airlines' contracts of carriage, to which passengers agree when they purchase tickets, oblige passengers to obey airline rules and policies and comply with crewmembers performing their duties. Airlines may refuse to provide service to individuals who refuse to wear masks or facial coverings for the duration of the flight, as airlines have uniformly required in response to federal recommendations to limit the spread of COVID-19. Airlines may also remove disruptive or uncooperative individuals from an airplane, and may ban them from future flights. Airlines are not obligated to notify the Federal Aviation Administration (FAA), TSA, other federal agencies, or other airlines of individuals who have been banned from future flights. If incidents are brought to their attention, however, FAA or TSA may investigate to determine whether individuals may have violated federal aviation safety or security regulations.

Enforcement of Federal Aviation Regulations

Airlines may notify FAA of passengers who are disruptive, disobey instructions from airline crewmembers, or interfere with airline crew. If FAA determines that an individual violated 14 C.F.R. § 121.580, which prohibits anyone from assaulting, threatening, intimidating, or interfering with a crewmember performing their duties, it may impose civil penalties and, in certain cases may refer cases to the Department of Justice to assess whether federal criminal statutes may have been violated.

Federal Jurisdiction of Crimes Committed Aboard Aircraft

In addition to FAA and TSA, federal law enforcement authorities have jurisdiction over criminal acts that occur on board aircraft. From the time the external doors of an aircraft are closed in preparation for flight until they are reopened, any domestic flight, a U.S.-bound flight, or a U.S.-registered aircraft operating anywhere in the world is said to be within the “special aircraft jurisdiction of the United States” (see 49 U.S.C. Chapter 465). Alleged federal crimes occurring in that jurisdiction are investigated by federal law enforcement and prosecuted by the Department of Justice. These include air piracy, interference with air crew, destruction of aircraft or aircraft facilities, carrying a weapon or explosive device, and a host of serious crimes incorporated by reference including assaults; maiming; murder; manslaughter; attempted murder or manslaughter; theft or attempted theft by force, violence, or deception; and sexual abuse.

Federal statutes require TSA to deploy Federal Air Marshal Service teams on all flights assessed to pose a high security risk based on threat and vulnerability assessments. Air marshal duties are focused on detecting and preventing terrorist attacks against an aircraft in flight, but in some instances they may respond to violent criminal behavior onboard an aircraft. Sworn federal, state, and local law enforcement offers that receive training and TSA approval may also carry firearms on board commercial flights under limited circumstances and could assist in responding to criminal conduct. Additionally, under the Federal Flight Deck Officers program, TSA deputizes airline pilots who volunteer to travel armed to protect the flight deck from terrorist attacks. However, armed pilots would not typically intervene in incidents inside the aircraft cabin, but would instead focus on diverting to an airport where law enforcement resources on the ground could respond.

Charter and General Aviation Flight Security

Actions to restrict the travel of certain individuals aboard scheduled airline flights may result in those individuals instead seeking to travel on charter aircraft. Domestic charter flights are not routinely screened against the TSA lists, and only passengers and their baggage traveling on charters aircraft weighing more than roughly 100,000 pounds (somewhat larger than a typical Boeing 737) are required to undergo physical screening. For smaller jets, passengers are not routinely screened, but flight crew must undergo security background checks. However, all charter and private general aviation flights inbound to Washington Reagan National Airport, regardless of size, are subject to more extensive security measures, including screening of

all passengers and a requirement for TSA-approved armed security personnel on board all flights.

The airspace surrounding Washington, DC is off limits to private aircraft, with certain exceptions. Flights operating in a 30-mile outer ring beyond the Flight Restricted Zone above Washington, DC, a circle with a 15-nautical-mile radius extending from the surface to 18,000 feet, must file a flight plan and maintain constant radio communication with air traffic controllers. Such flights are closely monitored. Defensive measures have been put in place to intercept and interdict unauthorized non-commercial aircraft that stray into the restricted zone.

Potential Limitations and Concerns

While the No-Fly List might prevent some individuals intent on carrying out violence from traveling on a commercial airline flight, it would generally not restrict travel by other modes. Identities contained within the TSDB, however, could be shared with law enforcement on an as-needed basis to restrict access to certain facilities and events.

The various TSA lists may be of limited usefulness outside of the aviation security context. They would not, for example, be capable of stopping individuals from lawfully transporting firearms to sites where armed protests are planned. In general, airline passengers, including individuals that may be on the TSA Selectee or Enhanced Selectee lists, are not prohibited from transporting firearms aboard aircraft so long as the firearms are transported unloaded and locked as checked baggage. On January 17, 2017, a mass shooting in a baggage claim area of the Fort Lauderdale-Hollywood International Airport in Florida was perpetrated by an arriving passenger who had properly declared the handgun and two magazines used in the attack and had transported them in a locked box as required by federal regulations. In mid-January 2021, some airlines temporarily prohibited passengers from checking firearms on flights to the Washington, DC area. Somewhat relatedly, proposals to impose a waiting period on the purchase of firearms by individuals on the No-Fly List or whose identities are included in the broader TSDB have been introduced in recent Congresses, but have not been enacted.

Significantly expanding the No-Fly List could increase the number of misidentifications, potentially resulting in delayed or denied boarding of more passengers. Further complicating matters is that some individuals who might be targeted for inclusion on the No-Fly or Selectee lists based on suspected participation in the January 6, 2021, breach of the U.S. Capitol or other domestic incidents may have been previously cleared to participate in trusted traveler programs, such as TSA’s PreCheck or Customs and Border Protection’s Global Entry. Individuals who participate in these programs are eligible for expedited screening at TSA airport checkpoints. While placement on the No-Fly or Selectee lists would presumably terminate an individual’s participation in these programs, it may raise questions regarding the effectiveness of threat assessments conducted under these programs.

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