

U.S.C 552(b)(7)(D), (E). Release of such information also could have a substantial adverse impact on ongoing investigations being conducted by federal law enforcement agencies, possibly giving a terrorist organization or other group a roadmap of the course and progress of an investigation. In certain instances, release of information could alert a terrorist's coconspirators to the extent of the federal investigation and the imminence of their own detection, thus provoking flight. Those without access to information about the progress of federal investigations are not in a meaningful position and therefore cannot make judgments about the risk of release of information about that investigation that TSA has relied upon in making a security threat determination.

This intelligence "mosaic" dilemma has been well recognized by the courts in concluding both that they are ill-suited to second guess the Executive Branch's determination and that seemingly innocuous production should not be made. The business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak-and-dagger affair. Thousands of pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate. The Fourth Circuit Court of Appeals has observed:

The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in this area.

United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972). *Halkin v. Helms*, 598 F. 2d 1 (D.C. Cir 1978). See also e.g., *Kasza v. Browner*, 133 F. 3d 1159, 1166 (9th Cir. 1998) (Quoting Halkin); *J Roderick MacArthur Foundation v. Federal Bureau of Investigation*, 102 F.3d 600, 604 (D.C. Cir 1996) ("As we have said before, "Intelligence gathering is akin to the construction of a mosaic" (citation omitted)).

For the reasons discussed above, TSA will not provide to the individual under these procedures any classified information, and TSA reserves the right not to disclose SSI or other sensitive material not warranting disclosure or protected from disclosure under law.

Good Cause for Immediate Adoption

This action is being taken without providing the opportunity for notice and comment, and it provides for immediate effectiveness upon adoption. The Under Secretary has determined this action is necessary to prevent imminent hazard to aircraft, persons, and property within the United States. TSA, after consultation with the FAA, has determined that this action is necessary to minimize security threats and potential security vulnerabilities to the fullest extent possible. The FAA, TSA, and other federal security organizations have been concerned about the potential use of aircraft to carry out terrorist acts in the United States since September 11. This rule codifies the fundamental and inherently obvious principle that a person who TSA determines poses a security threat should not hold an FAA-issued airman certificate.

The Under Secretary finds that notice and comment are unnecessary, impracticable, and contrary to the public interest, pursuant to section 553 of the Administrative Procedure Act (APA). Section 553(b) of the APA permits an agency to forgo notice and comment rulemaking when "the agency for good cause finds * * * that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest." The use of notice and comment prior to 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. Further, the Under Secretary finds that good cause exists under 5 U.S.C. 553(d) for making this final rule effective immediately upon publication. This action is necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States.

Economic Analyses

Changes to Federal regulations must undergo several economic analyses. First, E.O. 12866 directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to assess the effect of regulatory changes on international trade. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires agencies to prepare a written assessment of the costs, benefits, and

other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation).

This regulatory evaluation applies to both this rule, which applies to U.S. citizens, and to the corresponding rule, which applies to aliens. While, to date, all individuals whom the Under Secretary has assessed as threats have been aliens, TSA is not able to predict which individuals, who may be subject to TSA threat assessments, may be citizens of the United States or aliens in the future. This regulatory evaluation examines the costs and benefits of TSA notifying the FAA of its assessment that an individual holding or applying for an FAA certificate, rating, or authorization poses a security threat. TSA is taking this action in an ongoing effort to improve national security. The procedure of notification and action taken by the FAA and TSA could prevent aircraft, persons, and property in the United States from imminent peril by the denial or revocation of FAA certificates, ratings, or authorizations of those individuals who pose a security threat.

The Assistant Administrator for Intelligence makes a determination regarding an individual posing a security threat who also holds or is applying for an FAA certificate, rating, or authorization. The Assistant Administrator then issues an Initial Notification to the FAA Administrator and the subject individual. At that time, the individual has the opportunity to act in three ways: (1) Reply and request the materials that the determination is based on; (2) reply without requesting materials; or (3) do nothing. The Deputy Administrator reviews the Initial Notification, and the Under Secretary makes the final review. TSA issues the Final Notification or a Withdrawal of Initial Notification to the FAA Administrator and the subject individual. It is the FAA Administrator who will take action and deny or revoke the FAA certificate, rating, or authorization if the Under Secretary determines that the individual poses a security threat. There are over 3.75 million holders of airmen certificates, ratings, or authorizations, who are subject to this final rule.

TSA has determined that this rule is not, in economic impact, a "significant regulatory action" as defined in E.O. 12866, Regulatory Planning and Review, but due to the potential public interest in this rule it is considered to be a "significant regulatory action" under