

DEPARTMENT OF HOMELAND SECURITY

Office of Inspector General

**REVIEW OF ALLEGED ACTIONS BY
TRANSPORTATION SECURITY ADMINISTRATION
TO DISCIPLINE FEDERAL AIR MARSHALS FOR
TALKING TO THE PRESS, CONGRESS,
OR THE PUBLIC**



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Preface

The Department of Homeland Security (DHS) Office of Inspector General (OIG) was established by the Homeland Security Act of 2002 (*Public Law 107-296*) by amendment to the Inspector General Act of 1978. This is one of a series of audit, inspection, investigative, and special reports prepared by the OIG as part of its DHS oversight responsibility to identify and prevent fraud, waste, abuse, and mismanagement.

This report assesses the strengths and weaknesses of the program or operation under review. It is based on interviews with employees and officials of relevant agencies and institutions, direct observations, and a review of applicable documents.

The recommendations herein, if any, have been developed to the best knowledge available to the OIG, and have been discussed in draft with those responsible for implementation. It is my hope that this report will result in more effective, efficient, and economical operations. I express my appreciation to all of those who contributed to the preparation of this report.

A handwritten signature in black ink, appearing to read "Clark Kent Ervin".

Clark Kent Ervin
Inspector General

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Abbreviations

ASAC	Assistant Special Agent In Charge
USA PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Public Law 107-56)
DHS	Department of Homeland Security
DOT	Department of Transportation
FAMS	Federal Air Marshal Service
ICE	Immigration and Customs Enforcement
OIG	Office of Inspector General
SAC	Special Agent In Charge
SSI	Sensitive Security Information
TSA	Transportation Security Administration

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Introduction

The Office of Inspector General (OIG), at the request of Congressman Jim Turner, ranking member of the House Select Committee on Homeland Security, reviewed allegations that the Transportation Security Administration (TSA) was conducting a “witch hunt” to ferret out and discipline employees in the federal air marshal program who talked to the media about a TSA decision to remove air marshals from certain long distance flights to save overnight lodging costs. The allegations included a charge that some air marshals had been threatened with having the USA PATRIOT Act¹ used against them.

The objectives of the audit were to determine whether employees in the federal air marshal program, as a result of disclosing sensitive information to the press, the Congress, or the public:

- Have been investigated, and if so, under what authority;
- Have suffered retaliation or were threatened with retaliation; or
- Have had actions taken or threatened against them under authority of the USA PATRIOT Act.

We performed audit fieldwork from November 2003 to March 2004. We interviewed TSA and Federal Air Marshal Service (FAMS) officials at headquarters, System Operation Control Division, and Human Resource Management Branch. We visited 8 of 21 FAMS field offices and interviewed Special Agents in Charge (SAC), Assistant Special Agents in Charge (ASAC), and 157 air marshals at these locations.

¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act; Public Law 107-56

Results in Brief

The FAMS and TSA conducted nine investigations of air marshals for allegedly talking to the press or public. These investigations, and actions taken by FAMS and TSA against air marshals as a result of these investigations, were appropriate under the circumstances. We found no evidence that air marshals were investigated or retaliated against for talking to Congress, or were threatened with or had action taken against them under authority of the USA PATRIOT Act. However, air marshals from two locations said that they were threatened with arrest and prosecution if they were found to have released sensitive security information (SSI), even though release of SSI is not a prosecutable offense. TSA, Immigration and Customs Enforcement (ICE), and FAMS provided technical comments on a draft of this report, which we incorporated where appropriate.

Background

The Aviation and Transportation Security Act empowered TSA to deploy air marshals on all passenger airline flights. It required that TSA deploy air marshals on all high-risk flights and give priority to long distance non-stop flights, such as those used on September 11, 2001, when determining risk.

On July 30, 2003, two articles discussing FAMS issues appeared on the MSNBC website, an online news service. The first article alleged that TSA planned to remove air marshals from some long distance flights because of budget shortfalls, leaving many high-risk flights unprotected. A second article later that day reported that TSA reversed the decision to remove the air marshals.

The FAMS' plan to limit air marshal missions on cross-country and international flights was the result of reprogramming actions by TSA. According to a Government Accountability Office report, reprogramming actions reduced FY 2003 FAMS program funding from \$545 million to approximately \$450 million, a difference of \$95 million.² While the GAO report concluded that the impact of the budget reduction on FAMS operations was not as significant as FAMS officials estimated, FAMS officials thought the reduction in cross country and international flights was necessary to meet budgetary requirements. The FAMS Director began to reduce scheduled air marshal coverage on cross-country and international flights at the end of July 2003, to be effective August 3, 2003. On

² Government Accountability Office report number GAO-04-577R, *Air Marshal Reprogramming*

July 30, 2003, the scheduled reduction was reported on the MSNBC website. On July 31, 2003, TSA allocated an additional \$9 million to the FAMS and the full schedule of cross-country and international flights was resumed.

There was a temporary decline in the number of flights that air marshals flew beginning on August 1, 2003. Flights decreased by as much as 17% before returning to normal on August 6, 2003. Although the air marshal schedule was reinstated prior to August 2, previously scheduled flights could not be restored due to the complexity of the scheduling process.

The FAMS Director sent memoranda to all FAMS employees on July 30 and August 1, 2003, concerning disclosure of sensitive information. In his first memorandum, the FAMS Director said that each air marshal had a critical role to play to ensure operational integrity and that public discussion of strategic deployment of air marshals was not in the best interest of operational security. In his second memorandum, the Director said that some air marshals had chosen to disclose and disseminate sensitive information, which was a violation of FAMS policy. He also said that this conduct could jeopardize the FAMS mission, FAMS personnel, and the security of our country. According to the memorandum, the policy would be strictly enforced.

SACs were instructed to make sure that all air marshals received, read, and understood the second memorandum relating to FAMS policies on the release of SSI and classified information. At all field offices that we visited, the SAC, ASAC, or a front line supervisor had addressed air marshals about operational security. Some field offices required the air marshals sign a document attesting to the fact that they had read and understood the memorandum's contents.

On August 21, 2003, a third MSNBC article reported that TSA was conducting a "witch hunt" to ferret out and discipline employees in the FAMS who had talked to the media. This article further alleged that air marshals were told that TSA planned to use the USA PATRIOT Act authority to determine who talked to the media.

Congress passed the USA PATRIOT Act following the September 11, 2001, terrorist attacks. The law gave federal officials greater authority to track and intercept communications for law enforcement and foreign intelligence gathering purposes. It provided enhanced surveillance procedures in order to counter terrorism.

In November 2003, FAMS was transferred from TSA to ICE. Department officials said that the move increased DHS' ability to respond to air security threats by creating a larger number of trained federal agents who can respond during times of crisis.

FAMS and TSA Investigations of Air Marshals

FAMS conducted seven investigations and TSA conducted two investigations of air marshals for allegedly disclosing sensitive information to the press or public. There were no investigations of air marshals for allegedly disclosing information to the Congress. FAMS policy prohibits the disclosure of information concerning the FAMS, TSA, or Department of Transportation (DOT) to the press without the permission of the FAMS Director.³ This policy also restricts the disclosure of SSI, which includes information concerning the number of air marshals, air marshal deployments or missions, and the methods involved in FAMS operations. The nine investigations are discussed below.

FAMS Investigations

Two air marshal investigations concerned the release of information to a third party, and were resolved with counseling. Two other investigations concerned air marshals disclosing their identities while on missions. One of these cases was resolved by counseling, and the other resulted in a suspension because it was a second offense. The other three investigations resulted in air marshals being terminated, resigning, or being placed on administrative leave. They are discussed below.

- An air marshal was terminated for divulging SSI in a newspaper article. The air marshal disclosed specific information about operations, including flight seat location, work schedule, workforce size, and a description of training equipment. The article also included the air marshal's picture.
- An air marshal was investigated for providing an article for a professional association newsletter without obtaining prior authorization. The association is comprised of law enforcement personnel, firefighters,

³ According to FAM Administrative Directive Manual 3700, Employee Responsibility and Conduct, "Only the Director FAMS, or his designee, may authorize any public statements concerning the FAMS, TSA, or DOT. Unless designated by the Director FAMS, employees shall not address public gatherings, appear on radio or television, prepare any articles for publication, act as correspondents to a newspaper or periodical, release or divulge investigative information or any other matters pertaining to the FAMS, TSA, or DOT."

military personnel, and other related professionals. The air marshal resigned before the investigation was completed.

- An air marshal was investigated for participating in an unofficial internet website. The air marshal allegedly made disparaging statements about the SAC. The air marshal was placed on administrative leave and was ultimately returned to normal duties.

TSA Investigations

Two TSA Office of Internal Affairs investigations involved air marshals allegedly disclosing SSI. The first case involved a FAMS employee, not an air marshal, who was believed to have disclosed SSI to a reporter for MSNBC. This employee resigned prior to the completion of the investigation and the case was closed.

The second investigation involved a person, believed to be an air marshal, who may have disclosed SSI on an unofficial internet website. Participation in any such unofficial internet websites is against FAMS policy. TSA focused its investigation, however, only on air marshals who posted SSI on the website. There were two incidents where someone, using an internet alias, had disclosed SSI on an internet website. TSA was unable to determine the person's identity and the case was closed.

According to FAMS policy, employees are prohibited from releasing sensitive or classified information unless authorized by the FAMS Classified Documents Custodian. Violators of this policy are subject to disciplinary action. Air marshals are required to sign a statement annually that requires them not to disclose SSI.

Federal regulations⁴ prohibit disclosure of sensitive information obtained or developed in carrying out security activities. According to the regulations, SSI includes security directives and information circulars, information that may reveal a systemic vulnerability of the aviation system, and specific details of aviation security measures. This included the numbers of air marshals, their deployments or missions, and the methods involved in FAMS operations.

The actions taken by FAMS and TSA in the nine cases discussed above were consistent with current guidelines and regulations. Section 17.a. of TSA's

⁴ Title 49 Code of Federal Regulation, Part 1520

directive on Employee Responsibilities and Conduct instructs employees not to "...criticize or ridicule FAMS, TSA, or DOT policy or other employees by speech, writing or other expressions that is defamatory, obscene, unlawful, impairs the operation or efficiency of the FAMS, TSA, or DOT, or is made with reckless disregard for the truth." Section 5.b.5. of the directive warns that "... violation of this directive... may be cause for appropriate corrective or disciplinary action in addition to any action or penalty prescribed by law."

Retaliation or Threats of Retaliation

We interviewed 157 air marshals, 120 of whom did not believe that FAMS management had threatened them, and seven of whom refused to comment on this issue. The remaining 30 air marshals believed they had been threatened about disclosing information to the press or public. Many of those 30 air marshals provided no details on alleged threats, other than saying that FAMS management said they would take action against anyone found to be disclosing information improperly. FAMS policy prohibits the disclosure of SSI and is punishable by disciplinary actions. Disclosure of SSI is also a violation of 49 CFR and is punishable by civil penalty and other enforcement or corrective actions.

Five air marshals, from two field offices, said they were threatened with prosecution for disclosing information to the press or public. They said their supervisors' threats included being led away in handcuffs, being fired and prosecuted, or being subjected to polygraph exams if the leaks continued. Neither FAMS policy nor current regulations mention criminal penalties for leaking SSI. However, according to the FAMS policy, employees who release classified information or records in any form without authority from the Classified Documents Custodian are in violation of United States Code and are subject to arrest and prosecution.⁵ While the alleged threats made to the air marshals may have been excessive, based on current guidelines, it should be noted that some information considered SSI prior to September 11, 2001, is now being classified as secret.

We found no evidence that TSA or FAMS had taken or threatened to take any action against any air marshal under authority of the USA PATRIOT Act.

⁵ We question the legal accuracy of this policy statement, which seems to criminalize all releases of classified information. However, analyzing the FAMS Directives System is outside the scope of this audit.

Purpose, Scope, and Methodology

At the request of Congressman Jim Turner, ranking member of the House of Representatives, Select Committee on Homeland Security, we reviewed allegations that TSA was conducting a “witch hunt” to ferret out and discipline employees in the federal air marshal program who have talked to the media. The allegations include a charge that some air marshals have been threatened with having the USA PATRIOT Act used against them. The objectives of the audit were to determine whether FAMS employees, as a result of disclosing sensitive information to the press, the Congress, or the public:

- Have been investigated, and if so, under what authority;
- Have suffered retaliation or were threatened with retaliation; or
- Have had actions taken or threatened against them under authority of the USA PATRIOT Act.

We interviewed TSA and FAMS officials at headquarters, the System Operation Control Division in Virginia, and the Human Resource Management Branch in New Jersey. We also visited 8 of 21 FAMS field offices where we interviewed SACs, ASACs, and 157 air marshals.

We reviewed FAMS conduct incident reports from March 2002 through December 2003, internal investigation reports, TSA records of congressional correspondence, budget requests, budget planning documents, and actual expenditures for FY 2003.

The audit fieldwork was performed between November 2003 and March 2004. We conducted this review pursuant to the Inspector General Act of 1978, as amended, and according to generally accepted government auditing standards.

Appendix B
Major Contributors to this Report

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