

1998

## Aviation Safety and Security - Legal Developments

Steven A. Mirmina

Follow this and additional works at: <https://scholar.smu.edu/jalc>

---

### Recommended Citation

Steven A. Mirmina, *Aviation Safety and Security - Legal Developments*, 63 J. AIR L. & COM. 547 (1998)  
<https://scholar.smu.edu/jalc/vol63/iss3/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## AVIATION SAFETY AND SECURITY—LEGAL DEVELOPMENTS

STEVEN A. MIRMINA\*

**T**HIS ARTICLE BRIEFLY highlights recent developments in aviation safety and security. The discussion is divided into three topics. The first is protection from terrorist attacks. The United States has been instrumental in developing new techniques for detecting threats against airports, aircraft, and air navigation facilities. The second topic is related to safety of the aircraft in flight. There are both black markets and gray markets for bogus parts and materials sold as “spares” to airlines. A corollary issue to the use of bogus parts is the use of decommissioned military aircraft for civil purposes. With the end of the Cold War, there are many military aircraft (which were never designed for civilian purposes) currently available for sale. After receiving appropriate authorizations, these aircraft may be used for civil purposes. Many commentators are critical of this practice, while others, especially the military, support it. The third aspect of safety and security addressed is the security of passengers in flight. There are proposals for legislation to provide security to passengers by prohibiting alcohol, smoking, and gambling in flight. The major concern is protecting passengers from other passengers.

### I. PROTECTION FROM TERRORISTS

The United States has led the world in developing techniques to protect civil aviation from terrorist attacks. After the Lockerbie disaster in 1988, when Pan Am Flight 103 exploded, killing 270 people, experts later realized that a bomb was placed on the

---

\* The author is an Associate in the aviation law practice group of Crowell & Moring LLP, Washington, D.C. He is the author of several articles and the editor of numerous books on international aviation law. This Article is a revision of a speech presented at Leiden University in The Netherlands. The author wishes to express his thanks to Mr. George Georgallis for his assistance in securing some of the materials necessary for preparation of this Article.

airplane in a suitcase in Frankfurt. The terrorist who checked the suitcase never boarded the plane. As a result, airlines have now instituted very strict programs of "bag-matching." If the passenger does not board the aircraft on which his baggage is loaded, the luggage is removed (and possibly destroyed).

Since 1988, the threat of terrorism against civil aviation has increased. Until the early 1990s, the greatest threats against aviation were overseas, rather than in the United States.<sup>1</sup> However, the bombing of the World Trade Center in New York City and the Federal Building in Oklahoma City have demonstrated that domestic terrorism is greater than ever before.<sup>2</sup> This was further illustrated by the bombing of Philippine Airlines Flight 434 in December 1994. Through accidentally uncovered information, it was learned that this bombing was the first of several planned attacks on future American flights traveling through Asia.<sup>3</sup>

Among the many methods of combatting terrorism, three of the approaches are:

- the development of existing technology to detect explosives in cargo, checked baggage, and carry-on bags;
- a procedure called "Automated Passenger Profiling;" and
- the installation of anti-missile defense systems in civil aircraft.

On July 17, 1996, TWA Flight 800 exploded over Long Island Sound in New York, killing 230 people. The investigators may never know the cause, but some reports suggested that it may have been a bomb placed in the plane or a surface-to-air missile launched from the ground.<sup>4</sup> As a result of this tragedy, President Clinton directed Vice-President Gore to establish a com-

---

<sup>1</sup> See *Aviation Security: Urgent Issues Need to Be Addressed, Testimony Before the Subcommittee on Aviation*, COMM. ON TRANSP. AND INFRASTRUCTURE, H.R., GAO/T-RCED/NSIAD-96-251, at 2 (statement of Keith O. Fultz, Assistant Comptroller General) [hereinafter Fultz].

<sup>2</sup> See *id.*

<sup>3</sup> See *id.* at 3. Ramzi Yousef, who was recently sentenced to 240 years in solitary confinement for his role in the World Trade Center bombing, was also sentenced to life in prison for his role in the Phillipine Airlines attack. See Gary Fields, *Yousef Sentenced to 240 Years in Solitary*, USA TODAY, Jan. 9, 1998, at 4A.

<sup>4</sup> See generally *At Outset, Terrorist Act Against TWA Flight 800 Seems Likely*, AIR SAFETY WK., July 22, 1996, at 8; "Evidence" of Missile Shootdown in TWA 800 Generates New Speculation in Cause of the Tragedy, AIR SAFETY WK., Mar. 17, 1997, at 8.

mission and report forty-five days later on how to deploy the latest technology to detect the most sophisticated explosives.<sup>5</sup>

Previously, fundamental security measures consisted of walk-through metal detectors for screening passengers, and the use of X-ray devices to examine baggage. These programs were widely used in the last two decades out of concern for hijacking, more than out of concern for devices that may destroy the aircraft. However, the Federal Aviation Administration (FAA) is now concerned about passengers smuggling bombs aboard, either in their carry-on bags or on their own bodies. As mentioned earlier, the American government uncovered a plan by terrorists to systematically bomb twelve U.S. airliners out of the sky over the Pacific Ocean, and in the last eight years, 700 people have died when bombs destroyed the aircraft on which they were flying.<sup>6</sup>

One of the Gore Commission's proposals was increasing the use of bomb-detection devices.<sup>7</sup> Unfortunately, there is not yet one machine that can detect all possible explosive devices in checked baggage, carry-on bags, and on passengers. Thus, for each type of baggage, there are different machines.

#### A. HIGH TECH METHODS FOR IMPROVING AVIATION SECURITY

##### 1. *Checked Baggage*

For *checked bags*, the latest device is called the CTX-5000. It is a fascinating machine in the sense that it is a computerized tomography device based on advances made in the medical field. Tomography, simply stated, is the process of examining a substance layer by layer to determine its qualities. It is very thorough, but rather slow in processing bags. There are also advanced X-ray devices that process bags more quickly but have lower detection capabilities. Another device uses electromagnetic radiation, searching for particular elements that are often used in manufacturing explosives, but as one can imagine, there will always be new explosives created that can defeat the detection system.<sup>8</sup>

---

<sup>5</sup> See Exec. Order No. 13,015, 3 C.F.R. § 213 (1997), *available in* 1996 WL 480821.

<sup>6</sup> See Initial Report to President Clinton at 1 (White House Comm. on Aviation Safety and Sec., Sept. 9, 1996).

<sup>7</sup> See Final Report to President Clinton at 21 (White House Comm. on Aviation Safety and Sec., Feb. 12, 1997) [hereinafter Final Report].

<sup>8</sup> These three machines are discussed more fully in Fultz's testimony. See Fultz, *supra* note 1, at 7.

## 2. *Carry-On Baggage*

For *carry-on items*, there are different systems altogether. The devices that thoroughly screen carry-on bags and electronics cannot detect bottles or other containers that contain liquid explosives. It is hoped that commercially available technology will be able to detect liquid explosives in a few years. There are several manufacturers who successfully sell machines that can detect the residue or vapor that explosives leave on the exterior of carry-on bags. These machines are sometimes called "trace detectors" or "sniffers." They are very accurate and are not overly expensive.<sup>9</sup>

## 3. *Passengers*

For *passengers*, other trace devices may be used. Some of these trace devices detect vapors or residues that may be left on passengers' hands or clothes, or in the air that surrounds their bodies. Other devices scan a passenger's body for concealed weapons or items under clothing.<sup>10</sup> However, some passengers may find these machines intrusive. In a press conference on September 9, 1996, President Clinton was asked the following question: "Mr. President, the high[ly] sophisticated technology that you mentioned this morning for screening passengers for bomb detection technology can see through clothes. Do you expect there to be a major debate over privacy issues and civil rights in connection with the deployment of this technology?"<sup>11</sup> The President intelligently turned to the Vice President and asked him to comment on the issue.<sup>12</sup>

### B. LOW-TECH METHODS OF IMPROVING AVIATION SECURITY

#### 1. *Bomb-Sniffing Dogs*

In addition to high-technology methods, other methods exist for improving aviation security. One such method is the use of bomb-sniffing dogs. Canines, famous for their keen sense of smell, are being used more and more to detect explosives and drugs. The Gore Commission on Aviation Security suggested

---

<sup>9</sup> See *id.* at 8.

<sup>10</sup> See *id.* at 9.

<sup>11</sup> Remarks by the President During the White House Commission on Aviation Safety Announcement, 32 WEEKLY COMP. PRES. DOC. 1685 (Sept. 9, 1996). The civil rights implications of using these machines are outside the scope of the present analysis.

<sup>12</sup> See Fultz, *supra* note 1, at 3.

expanding the number of well-trained dogs and handlers to significantly and rapidly improve security.<sup>13</sup>

Additional methods of ensuring the safety of aviation include controls over who works in secure areas around the aircraft and who boards the aircraft.

## 2. *Screening Airline Personnel*

There are proposals to require investigations of criminal backgrounds and FBI fingerprint checks for all people who screen luggage for bombs and all airport and airline employees who have access to secure areas. Currently, there is no such mandatory background examination for employees who have unrestricted and unescorted access to secure areas of airports.<sup>14</sup> Considering the potential to introduce explosive materials into these areas, the Gore Commission recommended that criminal checks (possibly with the cooperation of Interpol) and fingerprinting systems be implemented.<sup>15</sup>

## 3. *Automated Passenger Profiling*

Passenger profiling is a low-cost idea using data already available in computer databases. These data would be used to examine passengers boarding the aircraft to determine if any might be a higher risk to civil aviation than others. Many agencies, such as the U.S. Customs Service, use similar systems. By using these data, already publicly available through court or criminal records, security officers are better able to focus their attention and resources. The Gore Commission proposed that the Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), and Bureau of Alcohol, Tobacco and Firearms (ATF) pool their data concerning known terrorists, terrorist groups, hijackers, and bombers to develop profiles of "high-risk passengers."<sup>16</sup> However, the proposals are not free from problems. If, for example, a passenger's flying habits were used as a criterion, many business-people or government personnel who travel to places such as Syria, Libya, or Cuba, may be stopped or subject to more thorough questioning.

The passenger profiling system is not without criticism. The American Civil Liberties Union (ACLU) is concerned that these

---

<sup>13</sup> See Final Report, *supra* note 7, at 23.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.* at 20-21.

<sup>16</sup> See *id.* at 4-5.

databases would eventually include personal and unnecessary data, such as fingerprints, DNA samples, and bill-paying records.<sup>17</sup> Other critics suggest that it pits privacy against safety by allowing access to data such as marital status and travel habits. Conversely, supporters of the system have responded that it also profiles passengers who are "low-risk" such as a family traveling to Disneyland for their summer vacation. These passengers would face little more than the normal security checks. The government would not stop passengers merely because of their race or ethnicity; African Americans, muslims or other minorities will not be examined more closely than white passengers, especially considering the existence of various Caucasian terrorist groups such as the IRA (from Ireland) or ETA (from the Basque country in Spain and France). Privacy issues should not be used to thwart the aims of increased aviation security; simultaneously, the aim of aviation security must not be used to violate personal privacy.<sup>18</sup> Some middle ground must be found to resolve the competing viewpoints.

### C. INSTALLING ANTI-MISSILE DEFENSE SYSTEMS IN CIVIL AIRCRAFT AND ANTI-TERRORIST TRAINING

It is now doubted that the explosion of TWA Flight 800 was caused by a surface-to-air missile, but several eyewitnesses stated that they saw a ball of fire shooting from the ground upwards to the plane, before the plane exploded. This may or may not be true.<sup>19</sup> However, the U.S. Department of Defense is evaluating this possibility in conjunction with other government investigators.

The United States is combatting the threat of terrorist acts against U.S. carriers. Vice President Gore stated that "when terrorists attack an American airliner, they are attacking the United States."<sup>20</sup> To this end, the Gore Commission stated that it is also important to provide anti-terrorism assistance in the form of airport security training to countries with airports served by airlines

---

<sup>17</sup> See Graeme Browning, *Big Brother May Get His Big Chance*, NAT'L J., Sept. 21, 1996, at 2037.

<sup>18</sup> See *Justice Department Says Proposed Passenger Profiling System Non-Discriminatory*, AIR SAFETY WK., Oct. 20, 1997, at 6.

<sup>19</sup> See *At Outset*, *supra* note 4, at 8; *TWA 800 Inquiry Seeks More Detail on "Streaks of Light"*, AVIATION WK. & SPACE TECH., Nov. 25, 1996, at 32; *"Evidence" of Missile Shootdown*, *supra* note 4, at 6-8.

<sup>20</sup> Fultz, *supra* note 1, at 1.

flying to the United States.<sup>21</sup> By training foreign countries to detect explosives, protect VIPs, and deal with hostage situations and other emergencies, international civil aviation is safer for all concerned. The proposed 1997 budget for this program was \$2 million, reflecting the U.S. commitment to assist other countries through training security personnel.<sup>22</sup>

## II. AIRCRAFT SAFETY

This section of the Article will address the safety of the aircraft while it is still on the ground in the hangar. It addresses the risks associated with (1) bogus parts and bogus aircraft, and (2) former military aircraft used for civilian purposes.

### A. "BOGUS AIRCRAFT" OR "BOGUS PARTS"

A bogus or "counterfeit" aircraft is an aircraft about which the owner or seller thereof intends to cause confusion or to deceive the buyer as to the authenticity of the product.<sup>23</sup> A seller of counterfeit aircraft or parts uses trademarks, falsified papers, or other documentation to give the impression that the product is manufactured by the original equipment manufacturer (OEM). A counterfeit plane may be constructed from surplus military aircraft, parts salvaged from accidents, or other parts that are not authentic to the original craft. This serious problem causes not only death and bodily injury but also property damage and increased insurance costs.

Advertisements in the aviation press offer money for aircraft or parts involved in accidents, fires, or wrecks. There are stories of helicopters destroyed by fire that years later are "remanufactured" and sold again.<sup>24</sup> The concern for safety is obvious. Passengers and purchasers of aircraft rely on brand names (as in any other industry) for guarantees of quality and workmanship.

Aircraft or helicopters that are remanufactured by parties other than the OEM or without the OEM's approval may not conform to the standards of quality and safety used in its production. OMEs are concerned that they will face increased products liability litigation. Moreover, they may face negative publicity and damage to their business reputation, in addition to

---

<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

<sup>23</sup> James L. Burt, III, *Bogus Aircraft Offenses and Defenses*, 61 J. AIR. L. & COM. 859, 859-60 (1996).

<sup>24</sup> *See id.* at 861-62.

competing against their own business products in the reduced market for their goods.

The black market (or gray market) for these goods is constantly growing. These bogus parts are known as "suspected unapproved parts" (SUPs), and the use of these unairworthy parts is not a small problem. An audit of aircraft repair stations in the United States and in foreign countries revealed that as many as ninety-five percent of the parts inventory of parts distributors and brokers were unapproved.<sup>25</sup> Not all of these parts are actually dangerous, but they do not have the "parts manufacturer approval" (PMA).

The FAA is making efforts to combat SUPS by regulating parts distributors and imposing sanctions against distributors of unapproved parts. Quality assurance is being furthered by the use of Notices, Orders and Advisory Circulars. However, the FAA process of certifying parts distributors is not to protect the proprietary rights of manufacturers. Rather, the concern is safety. In doing its investigations, the information the FAA gathers is kept confidential. Thus, if a manufacturer is aware of competitors who are making identical but unapproved parts (likely violating intellectual property laws), the FAA will not reveal the identity of infringers of the intellectual property rights.<sup>26</sup> In Europe, the Joint Aviation Authorities (JAA) have regulations similar to those of the FAA creating an approval process for parts manufacturers.

Manufacturers of bogus aircraft parts face both criminal and civil penalties. The Federal Register states that "the only person authorized to rebuild an aircraft is a person who manufactured it under a type or production certificate."<sup>27</sup> Persons guilty of such actions can suffer up to three years imprisonment and civil

---

<sup>25</sup> See Kenneth P. Quinn, Note, *Bogus Issues and Unapproved Parts: Sorting out the Competing Tensions*, 9 AIR & SPACE LAW. 11 (1995).

<sup>26</sup> See *United Tech. Corp. v. FAA*, Civil Action No. 3:93CV01223 (FTGD June 18, 1993). UTC sued the FAA under the Freedom of Information Act, arguing that the identity of the manufacturers of the unapproved parts was public information that it had a right to know. The FAA responded that it would not release the design drawings of the parts manufacturers because by disclosing this information, future applicants for approval would hesitate to submit information.

<sup>27</sup> 14 C.F.R. § 43.3 (1996). There are also other Federal Aviation Regulations that determine who may repair or rebuild an aircraft and laws forbidding removing or adding data plates that are not authorized by the FAA. See generally 14 C.F.R. § 43 (1996).

penalties up to \$1,000 for every violation, and up to \$10,000 for giving false information to the FAA.<sup>28</sup>

If the accused manufacturer falsely represents that this rebuilt aircraft was made by the original manufacturer, he may be fined or imprisoned for up to five years.<sup>29</sup> In addition, there are other crimes for which he might be found guilty, such as endangering the safety of aircraft in flight, fraud, and conspiracy against the United States.<sup>30</sup>

## B. FORMER MILITARY AIRCRAFT USED FOR CIVILIAN PURPOSES

The problem of using former military aircraft for civilian purposes is related to bogus parts and has more or less developed within the last ten years. At the end of the Cold War, the Berlin Wall came down, and United States and Soviet relations warmed, causing a reduction in the demand for military aircraft previously necessary.

This issue has competing policy objectives. On the one hand, the U.S. Department of Defense (the Pentagon) has thousands of surplus military aircraft that are no longer necessary, but still have substantial residual value and can be reutilized (and sold), benefitting both the government and the purchaser. On the other hand, the influx of so many aircraft into the market might financially destroy the market. Additionally, manufacturers are concerned that used aircraft, have a limited life and question their safety. The aircraft may have irreparable defects and possibly incomplete maintenance records. Most importantly, some of these aircraft have not been shown to meet the requirements of the ICAO Annexes, particularly Annex 8 to the Chicago Convention.<sup>31</sup>

What happens to the surplus military aircraft?<sup>32</sup> The Pentagon disposes of surplus aircraft in several ways:

<sup>28</sup> Title IX of the FAA Act provides for criminal sanctions for acts inimical to aviation safety.

<sup>29</sup> See Burt, *supra* note 23, at 866 (citing 18 U.S.C. § 1001 (1994)) for further details and discussion.

<sup>30</sup> See *Unapproved Parts and Aviation Safety: Hearing Before the Senate Comm. on Gov't Affairs, Subcomm. on Oversight of Gov't Mgmt.*, 105th Cong. (1995) (statement of A. Mary Schiavo, Inspector General, U.S. Dept. of Transp.) (analyzing the problems associated with bogus parts, SUPs, and the related U.S. regulations).

<sup>31</sup> International Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. 1693, EAS 487, 3 Bevans 916, 84 U.N.T.S. 389.

<sup>32</sup> This discussion focuses on the United States, but there are also many similar programs throughout Europe and N.A.T.O.

- some are retained for extra parts and for training;
- some are given to federal and state drug law enforcement agencies for participation in the National Drug Enforcement Program; for example, the aircraft are used to fight drug traffickers in the Caribbean and Central America;
- some are sold, or given away, as Excess Defense Articles (EDA) through the security assistance Foreign Military Sales (FMS) programs;
- some are given to military history museums or exhibits; and
- some aircraft go to the Defense Reutilization and Marketing Office for disposal, which includes sale, because many aircraft "carcasses" are complete and functional.

When these aircraft enter the civilian market they are certificated in either a *standard* or a *restricted* category.

Standard Category Aircraft are shown to comply with the Federal Aviation Regulations (FARs) and have no unsafe conditions.<sup>33</sup> Surplus Military Restricted Category Aircraft have been manufactured under the specifications of the U.S. armed forces.

There are several reasons for a separate category for military aircraft. The military often designs aircraft for a particular mission, and it is uncertain whether the same standards for civil aviation are maintained by the military. Furthermore, it is probable that the FAA will not know the exact military service history of any aircraft. For example, military helicopters would need to go through extensive modification before they would be certified by the FAA for use by private operators, such as air ambulances or air taxis; however, military aircraft may be more readily used for operations such as firefighting or law enforcement. For this reason, they are in the Restricted Category.

Standard Category Aircraft are reviewed and tested with the quality overseen by the FAA before the aircraft can receive an airworthiness certificate.

Restricted Category Aircraft are reviewed through military records, service records and visual inspection to indicate that the aircraft has no patent unsafe conditions. Such aircraft may not be exported from the United States without the permission of the importing country because the aircraft have not been shown to meet certain minimum standards.

---

<sup>33</sup> See Ken Reilly, Surplus Aircraft Symposium, *Surplus Government Aircraft*, Al Michaels, *Suspected Unapproved Parts Programs and Airworthiness Rotorcraft Specialist*, Fort Myer Officer's Open Mess, Koran Room, Arlington, VA (1994) (discussing the standard and restricted categories).

Not many people object to the special purposes for which these aircraft are used. For example, they are used for fire-fighting purposes or agricultural purposes, such as crop-dusting. However, when they are no longer utilized for their intended purposes and are instead used for carrying cargo or passengers for compensation, air carriers object. These aircraft were not designed for long-life service in civil aviation, but rather for occasional service and possible expendability in times of war. Because of these safety uncertainties, such aircraft are prohibited from carrying persons or property for hire or from operating over densely populated areas or near busy airports.

In practice, these aircraft are operated to earn revenue in air transportation. Often, the owners of the aircraft dry-lease the aircraft and later provide crews and maintenance through a different corporation. Since the U.S. government loses control and oversight over these aircraft, they are now beginning to compete with normal certificated civil aircraft.

The FAA has measures to prevent former military aircraft from being used in commercial civil aviation. Every aircraft registered in the United States must have an airworthiness certificate displayed during flight. To receive this certificate from the FAA, the aircraft's design must be approved and "type certificated" by the FAA. In other words, if a surplus aircraft is approved only for scrap material, then the aircraft would not pass inspection, would not receive an airworthiness certificate, and thus would not be permitted for commercial use.

When a U.S. registered aircraft is sold, both the owner and the buyer must notify the FAA of the sale. The FAA then issues the new owner what is known as an "N-number," which is linked to the aircraft's serial number. The FAA can trace aircraft sold illegally back to the original owner by using this N-number.

### III. PROTECTION FROM FELLOW PASSENGERS

The third and most entertaining part of this Article examines safety from dangers presented by other passengers in the aircraft. In the 1970s and 1980s, safety from other passengers generally referred to safety from hijacking. International conventions were drafted to address this issue.<sup>34</sup> Now, however,

---

<sup>34</sup> See, e.g., Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1643, 860 U.N.T.S. 105 (entry into force Oct. 14, 1971, with 140 ratifications in 1994; established the crime of hijacking and required the state that held the offender to prosecute or extradite him (generally, *aut dedere*,

safety from other passengers in flight refers to safety from obnoxious passengers, including passengers who obviously had too many glasses of champagne, who unsuccessfully invited the flight attendant to dinner, or who just lost \$1,000 through the in-flight gambling or entertainment system.

There are many federal laws that protect the safety of civil aviation, and those that protect the passengers in flight can be broken down into three categories. There are laws against:

- smoking in aircraft and
- gambling in aircraft.

There is no law against drinking alcohol in aircraft, but Part III. C of this Article contains descriptions of actual cases, which, after reading, the reader may conclude that there should be laws prohibiting excessive drinking in aircraft.

#### A. SMOKING IN AIRCRAFT

There is no U.S. law that bans smoking on international flights to and from the United States. If there was, the law would jeopardize aviation agreements to which the United States is a party. A non-smoking law on domestic flights, however, comports perfectly with international law.<sup>35</sup> However, on an international route, any aircraft that is outside the territorial jurisdiction of a state may only be regulated by the state that owns or operates it.<sup>36</sup>

In 1973, the Civil Aeronautics Board (CAB) adopted a rule requiring U.S. airlines to provide separate sections for smokers and non-smokers on both domestic and international routes.<sup>37</sup> The main reason for this rule was comfort rather than safety or health. In 1984, the rule was amended so that any passenger who arrived by the check-in deadline that wanted, would be pro-

---

*aut punire*)); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 567, 974 U.N.T.S. 177 (entered into force on Jan. 26, 1973, with 150 ratifications; internationally prohibited attacks and interference with air navigation facilities on domestic flights); Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 726 (not yet entered into force; drafted as a result of the destruction of Pan Am flight 103 by a plastic explosive hidden in a radio cassette player).

<sup>35</sup> See Donna Abu-Nasr, *Caution Advised Before Banning Smoking on International Flights*, ASSOCIATED PRESS, July 16, 1996, available in 1996 WL 4431690 (referring to testimony of William Karas, an attorney with the International Airline Coalition on the rule of law).

<sup>36</sup> See *id.*

<sup>37</sup> See 14 C.F.R. § 252.7 (1997).

vided a seat in the non-smoking section.<sup>38</sup> If no non-smoking seats were left, then the airline had to expand the non-smoking section to accommodate the passenger.<sup>39</sup> Additionally, smoking was completely banned on aircraft with fewer than thirty seats,<sup>40</sup> and no cigar or pipe smoking was allowed on any aircraft.<sup>41</sup> In 1988, smoking was banned on all domestic flights of less than two hours, and in 1989, was extended to all flights shorter than six hours.<sup>42</sup>

In 1992, the International Civil Aviation Organization (ICAO) passed a non-binding resolution encouraging Member States to progressively ban smoking on all international passenger flights. As it was non-binding, it has not been effectuated.<sup>43</sup>

In 1994, the House of Representatives passed a bill intended to ban smoking on all domestic flights and all international flights arriving to or departing from the United States.<sup>44</sup> Because the Senate never acted on this bill, it never became a law. If it would have, it would have violated some basic provisions of international air law.<sup>45</sup>

Smoking should be banned for several reasons other than flight safety. First, passengers on international flights "fall asleep with lit cigarettes, burn flight attendants as they walk down the aisles and frequently extinguish cigarettes on the floor."<sup>46</sup> Some flight attendants working on those flights suffer nausea, dizziness, severe headaches, fatigue, and loss of balance.<sup>47</sup> And sometimes fights occur between smoking and non-smoking passengers.

There are legitimate safety reasons for banning smoking on flights. In 1983, one passenger on an Air Canada DC-9 sneaked into the lavatory to smoke a cigarette. A fire started and twenty-

---

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *id.* § 252.13.

<sup>41</sup> See *id.* § 252.15.

<sup>42</sup> See 49 U.S.C. § 41706 (1994).

<sup>43</sup> See *Smoking Restrictions on International Passenger Flights*, Res. A29-15 (1992), ICAO Doc. 9600-A29/RES, at 74.

<sup>44</sup> See Airline Cabin Air Quality Act, H.R. 4495, 103d Cong. (1994).

<sup>45</sup> See Abu-Nasr, *supra* note 35, at 2.

<sup>46</sup> *Id.* (quoting Patricia Friend, Int'l President of the Ass'n of Flight Attendants).

<sup>47</sup> See *id.*

three people lost their lives.<sup>48</sup> People smoke in lavatories despite the presence of fire alarms, and some people try to disable the smoke alarms even though it is a federal crime to do so. Others attempt to cover the smoke detectors with a shower cap, while some unsuccessfully try to blow their smoke down the toilet.<sup>49</sup> Anyone caught is subject to a \$2,000 fine.<sup>50</sup>

### B. GAMBLING ON BOARD AIRCRAFT

Gambling on aircraft in the United States is illegal. The Federal Aviation Administration Authorization Act clearly states that “[a]n air carrier or foreign air carrier may not install, transport, or operate, or permit the use of, any gambling device on board an aircraft in foreign air transportation.”<sup>51</sup>

Some U.S. lawmakers are concerned that airlines may become “flying casinos” and that a passenger sitting next to a gambler may not enjoy the flight. Last year, Singapore Airlines reported its plans to install an in-flight gambling system on its aircraft from which it expected to earn between \$600,000 and \$1.5 million *per year, per aircraft*.<sup>52</sup> U.S. carriers that are not permitted to install such systems will lose direct revenues as well as indirect revenues from passengers who elect to fly to the United States on a foreign carrier.

Several European and Asian governments protested the U.S. law that prohibits the installation of gambling systems on foreign airlines.<sup>53</sup> The U.S. Department of Justice responded by issuing an opinion that an in-flight entertainment system with gambling software will not violate U.S. law if it is turned off “during any segment of a flight destined for or leaving the U.S.”<sup>54</sup> The U.S. law’s “extraterritoriality” and the associated public in-

---

<sup>48</sup> See Matthew Wald, *Out of the Haze up in the Skies*, N.Y. TIMES, June 30, 1996, § 5, at 13. In this case, investigators did not actually prove that the fire was the direct result of cigarette smoking. *See id.*

<sup>49</sup> *See id.*

<sup>50</sup> *See id.* The U.S. anti-smoking bias is not shared by all countries. Asians tend to smoke more than westerners. One indication is the presence of smoking sections on most flights to Japan. Japan Airlines has even installed special smoking seats in some of its Boeing 747s. These seats, called *kitsuetsu senyo*, are open to any person who wants to sit and enjoy a cigarette. In contrast, many refurbished planes in the U.S. do not have ashtrays, even though they do have “no-smoking” lights, which are required by the FAA. *See id.* at 13.

<sup>51</sup> 49 U.S.C. § 41311(a) (1994).

<sup>52</sup> *See Singapore Airlines Identified as First Sky Games Customer*, WORLD AIRLINE NEWS, No. 16, Vol. 6, Apr. 22, 1996, at 9-10.

<sup>53</sup> *See id.*

<sup>54</sup> *Id.*

ternational law issues are beyond the scope of this Article, but it does raise many questions. For how many hours could a passenger on Singapore airlines gamble with his in-flight entertainment system before it must be turned off: in other words, could he play for one hour, until entering U.S. air space, or not at all? Because the Department of Justice Opinion refers to a segment of a "flight segment destined for or leaving" the United States, it would seem that there would be no gambling permitted on any flight between the United States and any other country.<sup>55</sup>

### C. ALCOHOL ABOARD AIRCRAFT

Currently, there is no law, and no sincere proposal to prohibit drinking alcohol on-board aircraft. The problem with passengers that consume too much alcohol is that they become unruly and behave badly.<sup>56</sup> In many countries and on international routes, the pilot does have the right to lock those passengers in the lavatory until the plane lands.<sup>57</sup> However, unscheduled landings to oust an unruly passenger can cost a carrier thousands of dollars. The airlines can try to recover this cost afterwards from the passenger, but such actions can themselves be expensive and time-consuming.

There are numerous accounts of intoxicated and unruly passengers. On a United Airlines flight from Frankfurt, Germany, to Dulles International Airport in Washington, D.C., a passenger shouted at a flight attendant, contending that the attendant had bumped him several times with the service cart.<sup>58</sup> The flight attendant doubted bumping the passenger but apologized anyway. Still dissatisfied, the passenger followed the flight attendant to the galley, threw him against an emergency exit, and beat him in the head and face.<sup>59</sup> There are other accounts

---

<sup>55</sup> See *id.* Laws on this subject may not be needed at all. For example, both British Airways and Virgin Atlantic permit gambling during flight, but British Airways' gambling limit is \$200 and Virgin's limit is \$75. These amounts indicate that the in-flight entertainment is in fact only for "entertainment." The fear of flying casinos may not be a legitimate concern after all.

<sup>56</sup> See *Unruly Passenger Behavior Poses Increasing Risk to Safety*, AIR SAFETY WK., May 5, 1997, at 8.

<sup>57</sup> See Convention on Offences and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, art. 6, 20 U.S.T. 1641, 704 U.N.T.S. 220, 226. On domestic flights, the pilot does not have this right.

<sup>58</sup> See Peter Finn, *Unfriendly Skies? Attendants Say Assaults, Harassment Up; Coalition Wants Air Turbulence Curtailed*, WASH. POST, Mar. 18, 1996, at B1, available in 1996 WL 3069609.

<sup>59</sup> See *id.*

as well, such as the British and Irish tourists that had a food fight on the plane, or the Saudi Arabian princess who attacked a flight attendant for not being served her drink quickly enough.<sup>60</sup>

These incidents, however, seem mild compared to an incident on a United Airlines flight between Buenos Aires and New York.<sup>61</sup> A passenger wanted more wine, but the flight attendants refused to serve him, because they had stopped the beverage service at that point, and because he had already poured drinks on himself and on other passengers. Prosecutors later alleged that he started drinking before boarding, had continued during the flight, and then helped himself to the alcohol instead of waiting to be served. When the flight attendants stopped the beverage service to begin food service, the passenger threatened one flight attendant and then pushed another into a seat. The passenger, an investment banker from Connecticut, climbed on top of a food cart, lowered his pants, and defecated on top of the food cart. He then used the linen napkins as toilet paper. The captain suspended all food and beverage service, due to the possibility of an infectious condition.

In the subsequent court case, the passenger was fined \$48,000 to reimburse the other passengers' ticket costs, and a \$5,000 fine.<sup>62</sup> He was also ordered to perform 300 hours of community service and pay United Airlines \$1,000 to clean the airplane.<sup>63</sup> Finally, he was also ordered to undergo counseling.<sup>64</sup>

Today, Congress has not yet addressed the general subject of excessive in-flight alcohol consumption. However, it is likely that, as with smoking and gambling, this issue may also be subject to regulation.

#### IV. CONCLUSION

This Article has summarized recent developments in U.S. aviation policy regarding safety and security of flight, ranging from terrorism to bogus and surplus military aircraft, to smoking,

---

<sup>60</sup> See *id.*

<sup>61</sup> See Gail Appelson, *Executive Charged in Airline Attack, Defecation*, REUTERS N. AM. WIRE, Oct. 24, 1995, available in LEXIS, News Library, Reuna File.

<sup>62</sup> See Richard Pyle, AP ONLINE, May 14, 1996, available in LEXIS, News Library, Taponl File.

<sup>63</sup> See *id.*

<sup>64</sup> See *High-Time Justice*, NEWSDAY, May 15, 1996, at A26, available in LEXIS, NY Library, Newsdy File.

gambling, and drinking aboard aircraft. All are important issues that affect the safety and security of flight.

