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Aviation Professionals and the Threat of Criminal Liability - How Do We Maximize Aviation Safety

AVIATION PROFESSIONALS AND THE THREAT OF CRIMINAL LIABILITY — HOW DO WE MAXIMIZE AVIATION SAFETY?

NTSB BAR ASSOCIATION, SELECT COMMITTEE ON AVIATION PUBLIC POLICY*

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PREFACE

The National Transportation Safety Board (NTSB) Bar Association joins numerous other groups in the aviation community in their concern over a perceived trend of federal, state and local governmental authorities to initiate criminal prosecutions against aviation professionals for acts and omissions that heretofore have been treated solely as civil infractions. Regulatory agencies often employ an "emphasis" or "special safety enhancement" approach to enforcement, as illustrated by the NTSB's/Federal Aviation Administration's (FAA) current runway incursion reduction program.[1]

There is nothing new about criminal prosecution by federal and state authorities of individuals for acts that also violate civil regulations. In fact, several federal statutes and regulations, including the Federal Aviation Regulations (FARs), establish parallel criminal and administrative enforcement mechanisms.[2]

Notwithstanding these salutary common goals, there has been substantial concern that the increased involvement of criminal investigators actually may be detrimental to aviation safety, since

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[1] FAA RUNWAY SAFETY REPORT: RUNWAY INCURSION SEVERITY TRENDS AT TOWERED AIRPORTS IN THE UNITED STATES (June 2001), *available at* http://www.faa.gov/apa/faa_runway_safety_report_v4.pdf.

[2] Examples include airline passengers carrying weapons aboard aircraft and pilots operating common carrier aircraft under the influence of alcohol or a controlled substance. Such cases envision cooperation between civil and criminal investigatorial and prosecutorial authorities to achieve the joint goals of enforcing the law and deterring future misconduct.

aviation professionals fear that routine business decisions could now become the basis for criminal prosecutions. As a result of the increased involvement of criminal investigators, these witnesses could become more guarded when dealing with accident and safety investigators. This, in turn, could lead to less-informed investigations, at the expense of aviation safety.

For these reasons, further inquiry and analysis of this problem is suggested. For example, what effect will a climate of fear have on the ability of NTSB or FAA investigators to interview witnesses? Will the reluctance of witnesses to disclose critical facts thwart the fact-finding process to the point where the NTSB will be unable to determine the cause or probable cause of an accident, or develop accurate safety recommendations? How would such a trend impact current FAA and industry efforts to be "partners" in advancing aviation safety by sharing information voluntarily? Does it encourage selective prosecution in high visibility accidents, as some commentators have suggested? Lastly, what are the practical implications for aviation legal practitioners in advising clients regarding voluntary cooperation with investigating agencies such as the NTSB and the FAA?

With these concerns in mind, the NTSB Bar Association created its Select Committee on Aviation Public Policy and asked that Committee to explore these issues and to report its findings to the Association. The Board of Directors of the NTSB Bar Association has reviewed the Committee's work and recommendations and by majority vote has authorized this paper for publication,[3] adopting it as the official position of the NTSB Bar Association on the subjects addressed herein.

The Committee asked me to thank Ms. Pam Herrington for her assistance and personal commitment in the preparation of the paper. In addition, our organization gratefully acknowledges the contribution of the Journal of Air Law and Commerce at Southern Methodist University for encouraging us to format our work for publication.

Michael L. Dworkin

President

National Transportation Safety Board Bar Association

[3] One Director, Loretta Alkalay, did not concur with the Committee's work and recommendations and dissented from the Board's authorizing this paper for publication.

I. BACKGROUND

Following a French hot air balloon "disaster" in 1852, local governmental authorities obtained criminal sanctions against the pilot who caused the accident.[4] Despite the precedent of this early prosecution, government authorities have not pressed the use of criminal law to influence the conduct of aviation professionals in the performance of their duties. This hands-off approach by prosecutors has been based largely on the sensible assumption that the individuals involved had absolutely no intention of causing the harm attributed to their activities, or otherwise to commit any kind of criminal offense.[5]

In the wake of more recent aircraft mishaps, however, there has been an increasing perception within the aviation community that federal and state prosecutors are becoming more prone to resort to criminal sanctions to judge the conduct of companies and individuals in the aviation community.[6] In the year 2000 alone, five major industry and government forums considered the issues surrounding the criminalization of aviation accidents and incidents.[7] Representatives of all three

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[4] Art A. Van Wijk, *Criminal Liability of Pilots Following an Airline Accident: A History of the Issue Within the International Federation of Air Line Pilots' Associations (IFALPA)*, 9 AIR L. 66 (1984) (referring to *Cour de Cassation*, 14 août 1852. D. 52.5.194). Unfortunately, the referenced document provides no description or details of the nature of the "disaster" or the specific sanctions imposed.

[5] Richard H. Jones, *Criminal Prosecution of Civil Airmen Following Aircraft Accidents: A Dangerous Trend*, 1 AIR & SPACE L. 3, 8 (1984).

[6] *See Oil and Water, Cats and Dogs*, Editorial, AVIATION WK. & SPACE TECH., Feb. 4, 2002, at 70; Michael J. Holland, Criminalization of Negligence: The "Third Rail" in Aviation Accident Litigation, presented at the Joint Seminar on Current Aviation Law Developments, Florida State Bar Association and NTSB Bar Association, Pensacola, Florida (Nov. 2001); Michel F. Baumeister and Dorothea M. Capone, Criminalizing Aviation Misconduct: ValuJet and Beyond—The Trend and Issues Faced by the Aviation Community, presented at SMU Air Law Symposium (Feb. 2001); David Collogan, Turning Accidents into Crimes, Business and Commercial Aviation (Sept. 2000); *"Inadvertent" Safety Violations Key Element In Immunity From Prosecution*, 45 AIR SAFETY WK. 1 (Nov. 9, 1998); James Holahan & Stephane Guibaud, *Euro-Pilots Who Err May Face Criminal Charges*, AIR LINE PILOT, at 24 (Apr. 1994); Jones, *supra* note 5, at 9; Paul McCarthy, *Commentary: Criminal Liability of Pilots*, AIR LINE PILOT, at 8 (June 1993); W. Guldimann, *Some Legal Aspects of Aircraft Accident Investigations*, 15 ANNALS OF AIR & SPACE L. 99, 100 (1990); Phillip J. Kolczynski, *The Criminal Liability of Aviators and Related Issues of Mixed Criminal-Civil Litigation: "A Venture in the Twilight Zone,"* 51 J. AIR L. & COM. 1 (1985); Richard H. Jones, *Criminal Prosecution of Civil Airmen Following Aircraft Accidents: A Dangerous Trend*, 1 AIR & SPACE L. 3, 8 (1984).

[7] *The Trend Toward Criminalization of Aircraft Accidents: Hearing Before the Subcomm. on Aviation of the House Comm. on Transp. and Infrastructure*, 106th Cong. 105 (2000) (statements of Daniel Campbell, Managing Director, NTSB; Marshall S.

branches of the federal government have expressed similar concern in connection with the effects of this perceived trend.

The Eleventh Circuit addressed the issue in connection with its review of the criminal case that resulted from the 1996 crash of ValuJet Flight 592.[8] In vacating the convictions of SabreTech for recklessly causing the transportation of hazardous material in air commerce, the court noted, "The record reflects that these aviation repair station personnel committed mistakes, but they did not commit crimes."[9] In reaching its conclusion, the court also noted that SabreTech's employees "did not intend to kill" the victims of that accident.[10]

In enacting the National Transportation Safety Board Amendments Act of 2000,[11] the U.S. Senate Committee on Commerce, Science and Transportation made the following comments:

> Recently, several NTSB accident investigations have been impeded as other non-transportation related agencies have initiated their own separate investigations. In some investigations, court orders have been issued to prevent the NTSB from testing

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Filler, Counsel, Aeronautical Repair Station Assoc.; Guy A. Lewis, U.S. Attorney, S.D. Fla., Captain Paul McCarthy, Executive Air Safety Chairman, Air Line Pilots Assoc.; Stuart Matthews, President and CEO, Flight Safety Foundation; Robert P. Warren, Senior V.P., Counsel, and Secretary, Air Transport Assoc. of America) [hereinafter *Criminalization of Aircraft Accidents*]; NTSB Bar Association Aviation Law Conference (Oct. 20, 2000) (featuring a panel on *Catching Criminals in Aviation*); American Bar Association Aviation Litigation Committee's 6th Annual Aviation Litigation Seminar, "Challenges in the New Millenium" (June 1, 2000) (featuring a panel discussion on *The Criminalization of Aviation (Mis)Conduct: Trend or Anomaly*); NTSB Symposium, "Transportation Safety and the Law" (Apr. 25-26, 2000) (devoting an entire day to the subject, *Accidental Crimes or Criminal Accidents*; at the symposium, a number of panels on criminal proceedings discussed such questions as: What crimes are accidents, and when do accidents become criminal? What is the relationship between pre-incident regulatory compliance and the likelihood of criminal inquiry? How should companies respond to the possibility of parallel criminal and accident investigations? What rules of process and evidence apply when parallel accident and criminal inquiries go forward? What are the respective roles and proper confines of the independent accident board, the regulator, and the prosecutor?); American Bar Association Forum on Air and Space Law's Annual Update Conference (Jan. 31, 2000) (featuring a panel discussion on *Criminal Prosecution of Violators of the Federal Aviation Regulations*).

[8] United States v. SabreTech, Inc., 271 F.3d 1018 (11th Cir. 2001).

[9] *Id.* at 1019-20 (concluding that the hazardous materials regulations cited by the government had not been authorized by the Federal Aviation Act, as was required "to support the reckless counts").

[10] *Id.* at 1025.

[11] National Transportation Safety Board Amendments Act of 2000, Pub. L. 106-424 (codified in scattered sections of 49 U.S.C.).

> critical components. Safety Board investigators also have been unable to interview transportation operators as criminal and civil litigation has increased. These criminal investigations have impacted NTSB investigations into the ValuJet crash, the FineAir DC-9 cargo crash, and a grade crossing accident at Indiana.

The delays caused by these prosecution inquiries have restrained the Board's capability to make timely determinations of probable cause and issue safety recommendations. To ensure that NTSB will continue to be capable of exercising its responsibilities in a timely and judicious manner, the bill includes language reiterating NTSB's existing jurisdiction, whether the accident is accidental or intentional. The Committee fully expects the NTSB to maintain its longstanding policy of accommodating its investigatory needs to the unique needs of criminal investigations when criminal behavior is suspected or demonstrated.[12]

In opening the July 27, 2000 hearings of the Aviation Subcommittee of the House Transportation and Infrastructure Committee, Chairman John Duncan (R-TN) and Ranking Member William Lipinski (D-IL) expressed bipartisan concern with the trend toward "criminalizing negligent and unintentional conduct that may have contributed to an aviation accident."[13]

As early as the Twenty-First Annual Air Law Symposium at Southern Methodist University, Admiral Donald Engen, then-FAA Administrator, former NTSB Member, and former combat Naval aviator, said "I'm not sure that the next pilot will cooperate, especially if he thinks that information provided to safety investigators might be used by other parties in a criminal prosecution."[14] The FAA continues to be concerned about the decreased flow of information that results from the fear of criminal prosecution. In 1998, the FAA Office of System Safety said: "the fear of criminal prosecution for violations of aviation safety laws and regulations . . . obviously discourages the flow of

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[12] S. REP. NO. 106-386, at 4 (2000) (emphasis added).

[13] *Criminalization of Aircraft Accidents, supra* note 6 (statement of Rep. William Lipinski, D-IL).

[14] George Stein, *Head of FAA Criticizes Hahn's Probe of Pilots*, L.A. TIMES, Mar. 8, 1987, at Metro 2 (remarks made during the 21st Annual Air Law Symposium at Southern Methodist University); *see also* Eric Malnic, *FAA Backs Up Its Vow To Get Tough On Errant Pilots*, L.A. TIMES, Feb. 13, 1987 at 1 (noting concerns over local criminal prosecutions as summarized by one regional counsel for the FAA who said "criminal prosecutions might undermine the 'traditional cooperation' between pilots and regulating agencies").

aviation safety information."[15] In fact, the FAA was concerned enough to ask ICAO to examine whether criminal prosecutions discourage the flow of safety information.[16]

Several criminal investigations and prosecutions have contributed to this increasing perception.[17] The premier example, of

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[15] Aviation Safety Information: Four Potential Problems; Four Proposed Solutions, FAA Office of System Safety (Jan. 1998), *at* http://nasdac.faa.gov/gain/GAIN_information/infoprob.htm.

[16] *Id.* at C.

[17] Examples include:

USAIR 5050 ACCIDENT – In 1989, following an aborted takeoff, USAir Flight 5050 ended up in the East River just off LaGuardia Airport in New York. In the wake of that accident, the Borough of Queens District Attorney convened a grand jury to determine if criminal charges should be filed. *Criminalization of Aircraft Accidents*, *supra* note 6 (statement of Captain Paul McCarthy).

EASTERN AIRLINES MAINTENANCE – In 1991, the Department of Justice (DOJ) obtained a sixty-count indictment against Eastern Airlines, as well as nine of its employees for the falsification of aircraft maintenance log books, work cards, and computer entries. Prosecutors, using the federal mail and wire fraud statutes in the aviation arena, charged that through the false statements, the defendants had conspired to impede, impair, obstruct and defeat the functions of the FAA to promote safety of flight. Eastern Airlines pled guilty to the indictment against it and agreed to pay a $3.5 million fine. The case against Ed Upton, Executive Vice President for Maintenance, was ultimately dismissed for a violation of the speedy trial requirement. *See* Erik Calonius, *The FAA's Loose Grip on Air Safety*, FORTUNE, Oct. 8, 1990 at 85.

TWA 800 ACCIDENT – On July 17, 1996, a TWA Boeing-747 crashed into the Atlantic Ocean shortly after taking off from John F. Kennedy International Airport in New York, killing all 230 persons aboard. The FBI played a major role in the investigation of the accident, amid widespread speculation that criminal misconduct was involved in that accident. *See* Peg Tyre, *FBI Concludes No Criminal Evidence in TWA 800 Crash*, CNN (Nov. 18, 1997), *at* http://www.cnn.com/US/9711/18/twa.presser.update.

ARROW AIR – In April 1998, after a three-year criminal investigation conducted by the DOJ in conjunction with the DOT Office of the Inspector General (OIG) and the FAA, the Miami-based cargo carrier pled guilty to charges that it falsified records to indicate that parts were serviceable, even though the required airworthiness inspections had never been completed. The company agreed to pay a $3 million fine. DOT OIG Semiannual Report to the Congress, Apr. 1 – Sept. 30, 1998, at 21. *See also* Press Release, DOT OIG, Guilty Pleas in Major Unprepared-Parts Settlements (May 1, 1998).

EXECUTIVE FREIGHT FORWARDERS – In May 1998, Angel Dante Fuentes, the president of a freight forwarding company, pled guilty and was sentenced to eight months in prison for shipping 500 pounds of a highly corrosive pesticide on an American Airlines passenger

jet. Press Release, DOT OIG, Illegal Hazmat Shipper Sentences (May 22, 1998).

ALPA INTERNATIONAL, INC. – In July 1999, the Miami-based shipping company and its president pled guilty to violating federal hazardous materials regulations following an incident related to the delivery of printer toning fluid to an air carrier. Press Release, DOT OIG, American Airlines Holding Company Pleads Guilty to Mishandling Hazardous Waste at Miami International Airport (Dec. 16, 1999).

AIR-PRO, INC. – In 1999, the aircraft hose assembly manufacturer and distributor entered a guilty plea for making false representations relating to the date of manufacture of aircraft hoses. Prosecutors, using the federal mail and wire fraud statutes in the aviation arena, charged that through the false statements, the defendants had conspired to impede, impair, obstruct and defeat the functions of the FAA to promote safety of flight. The indictment was ultimately dismissed on other grounds. DOT OIG Semiannual Report to the Congress, *supra. See also* Press Release, DOT OIG, Firm, Vice President Plead Guilty in Substandard Aircraft Parts Case (July 7, 1999).

AMERICAN AIRLINES, INC. – In late 1999, American Airlines pled guilty to criminal charges in which it admitted violating federal laws governing the storage of hazardous materials. In addition to an $8 million fine, American agreed to enter into a compliance plan, a move that further signals an intention of prosecutors to assume a role traditionally held by the FAA. Upon the announcement of American's plea, prosecutors vowed, "there is more to come." *South Florida: Visible Bellwether of Growing Focus on Criminal Enforcement,* AIR SAFETY WEEK (May 1, 2000).

ALASKA AIRLINES FLIGHT 261 – The investigation of the crash on January 31, 2000 has included interviews of airlines employees with their lawyers before not only NTSB and FAA investigators, but FBI agents as well. Steve Miletich, *Alaska Airlines Worker Wrote 'Panic' Near Log Entry on Search for Parts,* SEATTLE TIMES, Oct. 12, 2000 at A1. The airline's maintenance operation was the subject of a federal grand jury investigation even before the accident. *Alaska Turns Over Records of Crash MD-80 to Grand Jury,* AVIATION DAILY, May 12, 2000.

FINE AIRLINES FLIGHT 101 ACCIDENT – In March 2000, Fine Air and a cargo handling firm, Aeromar Airlines, pled guilty to charges that included making false statements and obstructing the government's investigation by destroying and covering up evidence. Within days of the crash, a former Fine Air pilot appeared on the local television news and charged that Fine Air's management routinely required its employees to fly with improperly loaded cargo. Ultimately, the NTSB determined that the probable cause of the crash was improperly loaded cargo. This plea was in connection with the August 7, 1997 crash of Fine Airlines flight 101 following takeoff from Miami International Airport, killing five people. Pursuant to plea agreements, the companies were fined a total of $5 million dollars and given corporate probation. NTSB Docket No. DCA97MA059.

course, is the federal and state prosecutions of SabreTech, Inc. (SabreTech) and three of its employees following the 1996 crash of ValuJet Flight 592 into the Florida Everglades. SabreTech was ValuJet's maintenance contractor, whose employees improperly packaged and labeled expired chemical oxygen generators before returning them to ValuJet. The NTSB concluded that the oxygen generators ignited shortly after takeoff and were a cause of the ValuJet crash.[18]

This was the first full-scale criminal investigation into the facts and circumstances underlying a major U.S. aviation disaster. The charging decisions were notable because several federal charges were based on maintenance records that had nothing whatsoever to do with the occurrence of the crash.

If this trend toward conducting criminal investigations simultaneously with aircraft accident investigations becomes routine, there is significant risk that the focus of future accident investigations will shift to potential criminal liability of the aviation professional rather than the determination of probable cause of the accident, and the promotion of aviation safety. Since the majority of accidents are caused by human error and not intentional misconduct, aircraft accident investigations should proceed initially on the assumption that the accident did not occur by reason of a criminal act. The investigative procedures and protocols of the aviation professionals on the accident scene are well suited to uncovering the facts of the case, including those pointing to criminal misconduct. Nonetheless, the mere fact

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SUNJET AVIATION, INC. – In April, 2000, FBI agents raided the Florida charter company that owned the jet that crashed in October carrying pro golfer Payne Stewart and others, focusing on aircraft maintenance records, particularly those relating to the emergency oxygen and pressurization systems. *FBI Confiscates Files in Crash that Killed Golfer,* DALLAS MORNING NEWS, Apr. 12, 2001, at 6A.

[18] Because of the discrepancies in SabreTech's paperwork involving the oxygen generators, investigators from the FBI, FAA Security, DOT Inspector General, EPA, Miami-Dade Police and other regulatory agencies swarmed all over the local SabreTech facility looking for any slight deviation from the norm, whether it related to the ValuJet crash or not. After a lengthy criminal investigation, which included the review of hundreds of thousands of pages of documents, the service of grand jury subpoenas, the immunization of witnesses, and the execution of search warrants, Florida prosecutors charged SabreTech with 220 counts of murder and manslaughter. Similarly, federal prosecutors returned a twenty-four count indictment against SabreTech and three of its employees charging them with conspiring to falsify maintenance records, falsifying those records, violating laws regulating the carriage of hazardous materials, and unlawfully placing destructive devices (the oxygen generators) aboard commercial aircraft.

that the FAA and NTSB are more experienced and more capable than the Department of Justice at policing compliance with the FARs does not mean that zealous federal, state or local prosecutors will be content to leave the business of aviation investigation to the accident-investigating professionals. Indeed, even though there is really no evidence that the aviation industry is rife with fraud or various other forms of criminal activity, there are those who would portray the situation in the aviation community as having reached the point of national crisis. Indeed, after the ValuJet case, the U.S. Attorney in Miami announced publicly that criminal prosecutions of aviation professionals after an accident would be a "top priority" of his Administration.

Of course, criminal prosecutions in the aftermath of aviation accidents always should be pursued whenever criminal activity is suspected. In this regard, Congress recently has reaffirmed the general authority of the NTSB to determine whether the cause of an accident was truly accidental. In cases where the evidence suggests that the accident was caused by nothing more than negligence, including mere pilot error, or a mechanic's mistake, the necessary prerequisite to a criminal investigation is simply not present.[19]

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[19] While many of the examples contained in this article address the pilots and mechanics whose errors led to an incident or accident, the themes are equally applicable to the actions of any aviation professional that could lead to an accident. In fact, operations managers, air traffic controllers and maintenance personnel have also been targets of criminal prosecutions. With respect to operations managers, *see, e.g.*, Holahan & Guibaud, *supra* note 6, at 25 (charges brought against three operations managers for failure to include de-icing situation in the operations manual following crash resulting from icing conditions). With respect to air traffic controllers, *see, e.g.*, Jones, *supra* note 5, at 9 (eight Yugoslavian air traffic controllers charged with criminal negligence following midair collision; one was found guilty and eventually served more than two-and-a-half years of his seven year sentence). A five-year prison sentence was recently levied on two Greek air traffic controllers who were found guilty of "negligent manslaughter" with regard to a Ukranian Aerosweet YAK-42 that crashed into a mountain in 1997 while under their "care." AVweb Vol. 6, Issue 51a (Dec. 18, 2000), *at* http://www.avweb.com/newswire/news0051a.html. The duo won their release on appeal and it is unlikely that they will serve any prison time due to the nature of Greek misdemeanor law, which allows guilty parties to pay off their sentences at a rate of $5.20 per day, or about $9,500 for the entire sentence. Finally, with respect to maintenance personnel, *see, e.g.*, Erik Calonius, *The FAA's Loose Grip on Air Safety*, FORTUNE, Oct. 8, 1990 at 85 (DOJ obtained 60-count federal indictment against Eastern Airlines and nine of its employees for maintenance practices at the airline); *Aircraft Mechanic Charged with Manslaughter in Crash*, MIAMI HERALD, Oct. 22, 1988, at 1D (aircraft mechanic charged with manslaughter due to improper installation of an engine part).

II. SUBSTANTIVE AVIATION AND CRIMINAL LAW

The aviation professional is always subject to criminal prosecution for violations of any criminal statute. Criminal prosecutions also have been conducted for violations of regulations prohibiting such things as unlicensed aerial advertising,[20] reckless flying,[21] or endangerment of passengers or those on the ground.

A. FEDERAL LAW

1. Title 49 U.S.C.

The provisions of Title 49 of the United States Code (Transportation) include penalties that may be imposed upon aviation programs for violations of its various statutory sections[22] Along with the more familiar civil penalties,[23] these federal statutes also provide criminal penalties for certain offenses committed by individuals engaged in the aviation industry.[24]

Criminal penalties within Title 49 are delineated for specific violations such as forgery of certificates,[25] refusal to testify before the NTSB or the Secretary of Transportation in response to a subpoena,[26] and for willful violation of security provisions of

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Criminal prosecutions have been pursued in the aviation field for falsification of documents. Paul B. Larsen, *Air Law Education 1967-91*, 56 J. AIR L. & COM. 705, 714 (1991); Marshall S. Filler, *Falsifying Maintenance Records*, AIR LINE PILOT, June 1984, at 30.

[20] *See, e.g.*, Tatum v. City of Hallandale, 71 So.2d 495 (Fla. 1954).

[21] *See, e.g.*, Ward v. State, 374 A.2d 1118 (Md. 1977) (affirming suspended sentence for reckless flying under Md. Code Ann. Art. 1A, § 10-1002); Sanders v. State, 256 P.2d 205 (Okla. Crim. App. 1953) (affirming conviction for reckless flying under Okla. Stat. tit. 3, § 139 (1951)).

[22] 49 U.S.C. §§ 46301-46316 (1996).

[23] With the recent reorganization of the aviation statutes which took effect on July 5, 1994, civil penalties formerly under 49 U.S.C. app. § 1471 (1996) are now addressed under 49 U.S.C.A. §§ 46301-46304 (1996), as well as under 49 U.S.C. § 1153 (judicial review of penalties) and § 1155 (penalties by the NTSB during the conduct of their aircraft accident investigation). For discussion of FAA jurisdiction and its authority to impose civil sanctions, *see infra* note 188 and accompanying text.

[24] Criminal penalties were also reorganized in 1994. Criminal penalties formerly under 49 U.S.C. app. § 1472 are now addressed primarily under chapter 463 of Title 49, 49 U.S.C. §§ 46306, 46308-46316, as well as under 49 U.S.C. § 40113 (hazardous materials transportation violations) and under chapter 465, 49 U.S.C. §§ 46501-46507 (Special Aircraft Jurisdiction of the United States).

[25] 49 U.S.C.A. § 46306 (1996)(formerly 49 U.S.C.A. app. 1472(b)).

[26] *Id.* § 46313 (formerly 49 U.S.C.A. app. 1472(g)).

the Federal Aviation Program.[27] In addition, there is a provision for general criminal penalties for violations of certain federal air commerce and safety statutes and regulations for which no specific penalty is otherwise provided.[28] The statute requires that the violator acted both "knowingly and willfully" in connection with the offense charged.[29]

2. *The False Statement Statute*

The Department of Justice also prosecutes aviation-related matters under certain provisions of Title 18 of the United States Code, including those prohibiting the making of a materially false statement regarding a fact within the jurisdiction of a federal agency.[30] Violation of the False Statement Statute may result in a five-year prison term for *each* count charged, as well as substantial fines and restitution.[31]

The False Statement Statute is one of the most flexible and effective weapons of federal prosecutors, in large part because the courts have interpreted it so expansively. For instance, although the government must demonstrate that the defendant knew the statement was false, some courts have held that the government can meet that burden by showing that the defendant acted with a reckless disregard for the truthfulness of the statement coupled with a conscious effort to avoid learning the truth.[32]

Because the False Statement Statute is worded in language that is industry non-specific, it can be applied broadly to any subject matter, including aviation. Indeed, given the FAA regulatory scheme which measures compliance largely by reference to the existence and accuracy of detailed documentation, it would seem that virtually every aspect of document-keeping in

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[27] *Id.* § 46307 (authority for imposing imprisonment up to one year and a fine of up to $10,000) (formerly 49 U.S.C.A. app. § 1523).

[28] *Id.* § 46316.

[29] *Id.*

[30] 18 U.S.C. § 1001 (1996).

[31] *See Id.* § 3571(b)(3) and (c)(3), which set the fines for federal felony offenses (other than for certain specified offenses not applicable here) at not more than $250,000 for individuals, and $500,000 for organizations, respectively.

[32] *See, e.g.*, United States v. Tamargo, 637 F.2d 346, 351 (5th Cir. 1981); United States v. Lange, 528 F.2d 1280, 1288 (5th Cir. 1976); United States v. Egenberg, 441 F.2d 441, 444 (2d Cir. 1971); *see also* United States v. Hester, 880 F.2d 799, 802 (4th Cir. 1989) (adopting the same formulation for the "knowingly" requirement in the provision criminalizing false statements in connection with acquisition of a firearm).

the ordinary course of conducting an aviation business would fall under the scrutiny of prosecutors who could cite the statute as a basis for claiming a superior right to police the entire federal aviation regulatory scheme.

For example, accurate and complete documentation of the performance of aviation maintenance is a touchstone requirement of the safety-oriented FARs. The failure to perform a maintenance task properly, or to document it fully,[33] may lead not only to a civil enforcement action for violation of an FAR,[34] but also may give rise to a criminal prosecution under the False Statement Statute.

Consequently, three questions may be posed with respect to the use of the False Statement Statue in the context of aviation: (1) whether or not the FAA, in drafting its regulatory scheme, contemplated such broad use of the criminal sanctions of the statute as a means of regulating behavior and promoting air safety; (2) whether penalties authorized under the statute are too harsh or too all-encompassing, when applied to the aviation community; and (3) whether it is a salutary goal in the first place, to engraft onto the body of aviation regulations, a statute that creates general and broad-reaching criminal liability that was never contemplated by Congress.

Prior to the recent crash of Flight 261 off the coast of California, Alaska Airlines was under investigation for allegedly falsifying paperwork. When the accident occurred, law enforcement agencies immediately placed themselves in the investigation and denied some civil accident investigators access to certain key wreckage components, maintenance records, and witnesses.[35] What appeared to be the most disturbing aspect of this intrusion was the *a priori* assumption by the law enforcement agencies that criminal activity must have been a cause of the accident.[36] By denying civil investigators access to valuable data, information, and hardware, these law enforcement agencies hampered the ability of the civil investigators to help determine the probable cause of the accident.

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[33] The act of recording maintenance that was not actually performed is commonly referred to as "pencil whipping" or "pencil maintenance."

[34] *E.g.*, 14 C.F.R. §§ 43.9 through 43.12 (also cite to Parts 91, 121 and 135 sections on the subjects of enforcement actions for intentional false reporting).

[35] *See Criminalization of Aircraft Accidents, supra* note 6 (statement of Captain Paul McCarthy).

[36] *Id.*

The Arrow Air indictment provides another example of the application of the false statement statute to the aviation industry. In that case, Arrow had affixed "Equipment Transfer Records" (ETRs) to parts which had been removed from two Boeing 727s that it had decided to "part out" rather than return to service. The ETRs contained an entry that read "CERTIFIED SERVICEABLE BY_____." The government's theory was that the parts had not been inspected properly upon removal. Therefore, the ETRs "statement" that they were serviceable was knowingly and materially false in violation of 18 U.S.C. § 1001.

The False Statement Statute applies not only to "pencil whipping," but also to statements made in interviews with the FAA, NTSB or any federal agent. Until recently, many courts allowed an individual being interviewed to answer inquiries from a federal agent with a general denial known as an "exculpatory no." Those courts held that such a bare bones denial, without more, was insufficient to constitute a false statement offense. Recently, however, the United States Supreme Court abolished the "exculpatory no" doctrine, holding that falsely answering "no" to an investigator's question is indeed a violation of 18 U.S.C. § 1001.[37]

3. Mail and Wire Fraud

Federal law prohibits participation in schemes to defraud using either the U.S. mail or interstate "wire" communications including facsimiles, telephones, radio, television and computers.[38] Violation of the mail or wire fraud statutes may result in five-year prison terms for each count charged, as well as substantial fines and restitution.

The government used the wire fraud statute to indict several supervisory and management level employees of Eastern Airlines in 1991. The government's theory was that Eastern led its passengers to believe that rigorous maintenance checks had been performed on its planes, when in fact, the defendants knew that such representations were false. In furtherance of the alleged scheme to defraud, Eastern and several of its employees were alleged to have falsified aircraft maintenance log books and work cards and to have created false computer entries to create the appearance that regularly scheduled maintenance had been completed when, in fact, it had not. The indictment

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[37] Brogan v. United States, 522 U.S. 398 (1998).

[38] *See* 18 U.S.C. §§ 1341 (1996) (mail fraud) and § 1343 (wire fraud).

charged that the defendants falsely and fraudulently conspired to "impede, impair, obstruct and defeat" the lawful government functions of the FAA to promote safety of flight and ensure that aircraft are properly maintained. Eastern Airlines pled guilty to the indictment and paid a $3.5 million fine. The case against the Executive Vice-President of Maintenance was ultimately dismissed due to violations of the Federal Speedy Trial Act requiring criminal prosecutions to be brought in a timely fashion.

4. Hazardous Materials Transportation Act

The Hazardous Materials Transportation Act (HMTA) renders it unlawful for a person to offer or accept a hazardous material for transportation in commerce without first complying with detailed regulations prescribing how the hazardous materials (hazmat) must be packed, labeled, described and transported.[39] Criminal penalties may be imposed where, in violation of a hazardous material regulation, a person willfully delivers hazmat to an air carrier or other operator of a civil aircraft for transportation in air commerce or recklessly causes the transportation of the property in air commerce.[40] While there is some debate regarding the extent of the government's ability to prosecute a person for recklessly causing the transportation of property in air commerce, it is clear that prosecutors will consider prosecuting companies for this reckless conduct.[41] A criminal violation of the Hazardous Materials Regulations (HMRs) may result in fines, imprisonment, or both.[42]

5. Resource Conservation and Recovery Act (RCRA)

RCRA governs the transportation, storage, treatment, and disposal of hazardous waste products, as well as the making of false statements in required documents, manifests and labels.[43] RCRA imposes criminal penalties up to $50,000 per day of viola-

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[39] 49 U.S.C. § 5101 (1996) *et seq.* (formerly codified at 49 U.S.C. app. § 1801 *et seq.*).

[40] *Id.* § 46312.

[41] *See, e.g.*, United States v. SabreTech, Inc., 271 F.3d 1018 (11th Cir. 2001) (involving, among other allegations, an allegation that SabreTech, Inc., recklessly caused the transportation of hazardous materials).

[42] *Id.*; 49 U.S.C. § 5124 (1996) (stating that "[a] person knowingly violating [tampering restrictions] of this title or willfully violating this chapter or a regulation prescribed or order issued under this chapter shall be fined under title 18, imprisoned for not more than 5 years, or both.").

[43] 42 U.S.C. § 6928(d) (2002).

tion and/or five years imprisonment for persons who "knowingly" commit certain violations of the Act's requirements. The statute also defines a crime termed "knowing endangerment," the purpose of which is to provide more substantial felony penalties when the violator "knows at the time that he thereby places another person in imminent danger of death or serious bodily injury."[44] For "knowing endangerment" convictions, the prison term is raised to fifteen years and corporate fines are raised to $1,000,000 for each count. The knowing endangerment provision could have serious implications in the event of a particularly egregious RCRA violation deemed to be causally related to an aircraft accident.

6. Terrorism

Federal law prohibits the willful destruction of an aircraft or aircraft facilities. Title 18 U.S.C. § 32 criminalizes, among other things, willfully damaging an aircraft or aircraft facility, setting fire to an aircraft or aircraft facility, placing a destructive device or substance in an aircraft or aircraft facility or performing an act of violence against an aircraft or aircraft facility. The statute carries with it a penalty of twenty years imprisonment as well as fines and restitution. In the event that a death results from a violation of this statute, the penalty is increased to either life imprisonment or the death penalty.[45]

When terrorism is clearly the precipitating cause of an aircraft accident, such as the attacks on the World Trade Center and the Pentagon on September 11, 2001, criminal law enforcement officials must assume control of the criminal scene immediately. As noted earlier, where clear criminal intent is involved, the goal of promoting safety is best served by criminal investigations. In such cases, the NTSB remains available to provide a significant contribution through its technical expertise; however, its expertise is of secondary importance to the investigation.

In spite of the fact that this statute clearly was enacted to fight international terrorism, the United States used this statute to charge SabreTech with violation of this statute in a case where there was never an honest suspicion of terrorist activity as a cause of the accident. SabreTech's mechanics had signed inaccurate work cards indicating that safety caps had been installed on removed oxygen generators, when, in fact, safety caps had

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[44] *Id.* at § 6928(e).

[45] 18 U.S.C. § 34 (1996).

not been installed. Nonetheless, the mechanics tagged these generators as unserviceable (which prevented them from being reinstalled on an aircraft), took what they believed were equivalent safety measures to render the generators safe, and sent the generators to the ValuJet hold area of the facility for disposition. Unbeknownst to the mechanics, the generators were later returned to the ValuJet ramp area by a shipping and receiving clerk who mistakenly believed that the generators were empty. In charging SabreTech, the government was essentially charging that this fact pattern constituted the willful placement of a destructive device on an airplane. While the jury acquitted the company of this charge, the fact that the government actually charged this as a crime is a strong indication of how dramatically the enforcement landscape has changed.

B. The Assertion of General Police Power under State and Local Law

Perhaps the clearest indication of the changing terrain was the State of Florida's decision to charge SabreTech with felony murder and manslaughter. The State of Florida announced this decision at a joint press conference on the same day the federal government brought charges against SabreTech. While the efficacy of the decision to charge remains to be seen, nothing prevents other states from leveling similar charges in the future if they believe the situation warrants criminal prosecution.

At least thirty-five states have enacted statutes addressing the operation of an aircraft in either a reckless manner or while under the influence of alcohol or drugs.[46] While most state statutes are either a generic "reckless flying" statute or only involve drug or alcohol use, not all statutes are so general in scope.[47]

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[46] Ward v. State, 374 A.2d 1118 (Md. 1977) (summarizing 29 states whose laws dealt with reckless operation of an aircraft or while under the influence of alcohol or drugs and six states whose laws dealt only with operation of an aircraft under the influence of alcohol or drugs). In *Ward*, one such state reckless flying statute was used to prosecute and convict a pilot who had buzzed a hotel. *Id.* at 1126.

[47] For example, the Texas statute specifically prohibits taking off or landing on a road except in an emergency. Jamey Holmes, *Is the Federal Aviation Administration "Kicking the Dog": Pilot Disciplinary Proceedings and the Self-Incrimination Privilege*, 57 J. Air L. & Com. 297, 301 n.29 (citing Tex. Rev. Civ. Stat. Ann. art. 46f-1 (West Supp. 1991)). Criminal prosecution for violation of state statutes has also been sought where the pilot was not in possession of his airman's license and did not present it to local law enforcement officers. State v. Collins, 480 N.E.2d 1132

It is troublesome when state laws are the basis for prosecuting aviation professionals when the laws allegedly violated were not originally passed for governing the conduct of the aviation community. The earliest examples are prosecutions of pilots under local motor vehicle statutes, based upon analogies drawn by local officials between aircraft and motor vehicles.[48] One early case claimed that the state's regulation of this "new form of transportation through its police power is not substantially different from that of regulating the manner of driving automobiles."[49]

Charges more serious than simple infractions of a motor vehicle code have also been directed against pilots under state law. In *State v. Bahl*[50] and *Pritchett v. State*,[51] for instance, courts upheld manslaughter convictions of two pilots.

Bahl involved a flight taken by the defendant and a friend following an afternoon spent in three different drinking establishments.[52] During the flight, the aircraft struck a power line, resulting in the crash of the aircraft and the death of the passenger.[53] The pilot was found guilty of manslaughter by the district

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(Ohio Ct. App. 1984). This case also raised the issue of preemption in the context of the federal licensing regulatory scheme.

[48] Jones, *supra* note 5, at 10; *See, e.g.*, McBoyle v. United States, 283 U.S. 25 (1931) (Holmes, J., construing National Motor Vehicle Theft Act as inapplicable to a case where aircraft was stolen). The analogy between aircraft and motor vehicles has also been used in other nations. *See, e.g.*, N.D. Price, LEGAL IMPLICATIONS, IN PILOT ERROR, 198, 236 (Ronald Hurst ed., 1976) (noting analogy between British Air Navigation Order and the British Road Traffic Act).

[49] People v. Agnew, 113 P.2d 424, 426 (Colo. 1941). These analogies continue to the present day. During the recent arrest of the Northwest pilots for operating an aircraft while under the influence of alcohol, the FAA aviation inspector used an Implied Consent Advisory form provided by the Minneapolis police officer that had been modified by the officer by "substituting 'aircraft' for 'motor vehicle' and 'fly' for 'drive.'" United States v. Prouse, 945 F.2d 1017, 1021 n.2 (8th Cir. 1991). For an extensive example of the Iowa State Supreme Court analogizing between interpretation of motor vehicle statutes and aircraft statutes, *See* State v. Bahl, 242 N.W.2d 298 (Iowa 1976).

Further evidence that the motor vehicle analogy continues today was highlighted in 1989 when the New York district attorney convened a grand jury to look into the crash of USAir 5050. Noting that an aircraft was considered a vehicle under New York state law, the district attorney instructed the grand jury to consider charges of negligent homicide, vehicular manslaughter and leaving the scene of an accident. Donna St. George, *Grand Jury To Mull USAir Case*, PHILADELPHIA INQUIRER, Sept. 26, 1989, at A15.

[50] *Bahl*, 242 N.W.2d at 304.

[51] 414 So. 2d 2 (Fla. Dist. Ct. App.).

[52] *Bahl*, 242 N.W.2d at 299.

[53] *Id.*

court.[54] The appellate court affirmed the conviction, finding that the pilot violated state law by operating his aircraft in a reckless manner, while under the influence of alcohol.[55] The facts of *Pritchett v. State*, another death case, are similar. In *Pritchett*, the appellate court upheld a manslaughter conviction due to eyewitness testimony that the pilot flew approximately forty to fifty feet above the ground over a populated motel and had to pull up to avoid contacting nearby trees.[56]

Local municipalities have also attempted to regulate activity within the aviation field.[57] The ability of a municipality to enact local zoning laws to regulate the placement and operation of airfields has been justified when local laws did not conflict with state regulations.[58] Likewise, the authority to regulate aerial advertising over a municipality has been upheld in a case where an airman was convicted of a violation of a municipal ordinance, even though the aircraft and pilot "complied fully with all requirements" of federal and state regulations.[59]

Finally, numerous attempts by local officials to implement aircraft noise abatement regulations have met with a limited degree of success.[60] Municipalities have been consistently prevented from enforcing laws that attempt to regulate airspace or imposing requirements for airmen to maintain certain minimum altitudes on federal preemption or constitutional grounds.[61]

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[54] *Id.* at 298.

[55] Jones, *supra* note 5, at 9.

[56] *Pritchett*, 414 So.2d at 2.

[57] *See, e.g., infra* note 60 and accompanying text (Denver police wrote a ticket citing B-737 pilots for violation of municipal ordinance prohibiting taxiing aircraft with flaps up).

[58] Garden State Farms, Inc. v. Bay, 370 A.2d 37, 39 (N.J. Super. Ct. App. Div. 1977).

[59] *Tatum*, 71 So.2d at 496.

[60] *E.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 627 (1973); *see also* American Airlines, Inc. v. Town of Hemptstead, 398 F.2d 369 (2d Cir. 1968) (invalidating noise ordinance held where it conflicted with federal regulation). This can be distinguished from local authority when acting as the proprietor of an airport. Lockheed Air Terminal, 411 U.S. at 635 n.14; *See, e.g.*, National Aviation v. Hayward, 418 F. Supp. 417 (N.D. Cal. 1976) (allowing an ordinance to stand that imposes a curfew on air traffic exceeding specified noise level and provides criminal penalties for such action); Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981) (holding an airport noise reduction ordinance as valid).

[61] Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F.2d 812, 814 (2d Cir. 1956).

III. CONCURRENT AGENCY JURISDICTION

The issue of government agency jurisdiction arises with respect to both civil and public aircraft accident investigations. Concurrent investigations are common. One investigating agency focuses on the basic factual inquiry of the accident while another agency searches for evidence of safety violations that would warrant disciplinary action. Yet another agency investigates possible criminal culpability. Which agency has the primary authority over the investigation is always an important issue.

A. FEDERAL JURISDICTION

In the United States, the investigation of an aircraft accident often involves several federal authorities.[62] Congress has designated the task of investigating aircraft accidents[63] and "report[ing] the facts, circumstances and cause or probable cause of" the accident to the NTSB.[64] The FAA also investigates aircraft accidents and incidents because Congress conferred upon the FAA jurisdiction over aviation professionals, other than military pilots.[65] Congress has directed the FAA to implement[66] and enforce[67] a comprehensive regulatory scheme designed to promote aviation safety.[68] Additionally, the FAA either participates in the NTSB's investigation or, by delegation, conducts the fact-

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[62] Although accidents involving military aircraft are not the focus of this paper, it should be noted that appropriate military authorities conduct (or participate in) investigations involving military aircraft. *See* 49 U.S.C. § 1132(a)(1)(B) and (d) (1996).

[63] 49 U.S.C.A. § 1131(a)(2) (1996)(formerly 49 U.S.C.A. app. § 1441(a)).

[64] *Id.* at § 1131(a)(1) (formerly 49 U.S.C.A. app. § 1441(a)(2)).

[65] *Id.* at § 46101(b).

[66] *Id.* at § 44701(a)(2). For a discussion of the original creation of the FAA as directed by the Federal Aviation Act, *see* Greg Daniel Martin, *Enforcement of Federal Aviation Regulations by the Federal Aviation Administration*, 53 J. AIR L. & COM. 543 (1987).

[67] *Id.* at § 46106 (West 1994) (granting authority to bring civil actions to enforce a regulation, order, or term of a certificate or permit).

[68] Enforcement actions by the FAA may be administrative or legal. *See* 14 C.F.R. Pt. 13 (addressing administrative actions in Subpart B and legal enforcement actions in Subpart C). Purely administrative action may involve the issuance of a warning notice or letter of correction, Compliance and Enforcement Program FAA Order 2150.3A, at 126. Legal enforcement action may include civil penalties, 49 U.S.C. § 46301(c)(2), civil actions, 49 U.S.C. § 46106, certificate actions (authorizing Administrator to "issue an order amending, modifying, suspending, or revoking" any certificate), 49 U.S.C. § 44709, and criminal sanctions, 49 U.S.C. § 46316 (providing for general criminal penalties in certain instances).

finding for the Board.[69] Further, federal criminal authorities, including the Federal Bureau of Investigation (FBI), may also investigate an accident.

The concurrent jurisdiction of federal agencies increases the likelihood of parallel investigations of an accident by both criminal and civil authorities. These parallel investigations lead to complications in determining which agency has the primary authority over the accident investigation. Such complications became apparent during the investigation into the TWA 800 accident in 1996.[70]

The FBI played a major role in the TWA 800 investigation and rightfully explored the possibility of a criminal act of terrorism or unintentional missile shoot-down as the cause of the crash. The FBI's involvement, and the "veil of secrecy" introduced by the law enforcement agencies, however, led some experts to be concerned that the NTSB (due to its accountability to the public) had to divert significant time and resources to eliminate these possibilities.[71]

In response to these concerns, Congress clarified the relationship between the NTSB and the FBI in the NTSB Amendments Act of 2000.[72] As codified, the statute authorizes the FBI to assume primary authority over investigations, only in circumstances in which the "Attorney General, in consultation with the Chairman [of the NTSB], determines and notifies the [NTSB] that circumstances reasonably indicate that the accident may have been caused by an *intentional* criminal act."[73] In other

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[69] 49 U.S.C. § 1132(c) (although the FAA is expressly forbidden from participating in the process of establishing probable cause). For the delegation to the FAA to investigate accidents, see 49 C.F.R. App. to Part 800.

[70] The DOJ addresses the coordination of parallel criminal, civil, and administrative proceedings in the U.S. Attorney's Manual (USAM). *USAM 1-12.00.*

[71] *See Criminalization of Aircraft Accidents, supra* note 6 and 35.

[72] NTSB Amendments Act of 2000, Pub. L. 106-424, eff. Nov. 1, 2000.

[73] 49 U.S.C. § 1131(a)(2)(B) (emphasis added). Annex 13 has a similar standard addressing the sharing of information gathered in an accident investigation with enforcement authorities: "The State conducting the investigation of an accident or incident, wherever it occurred, shall not make [certain records] available for purposes other than the accident or incident investigation, unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations." Annex 13 to the Convention on International Civil Aviation, Std. 5.12. For additional discussion about the interaction between police investigations and civil litigation under Annex 13, *see* Mark Franklin, Air Law Lecture, given at Royal Aeronautical Society, Cyprus Branch, Nicosia, Cyprus, May 27, 1998.

cases, the NTSB retains priority over other departments and agencies of the United States Government in the investigation of civil or public aircraft accidents.

B. STATE AND LOCAL

A number of criminal prosecutions of aviation professionals have been conducted under state laws. Most assertions of criminal jurisdiction by the states have been in non-commercial settings.[74] Such prosecutions have been undertaken typically in cases involving loss of life, resulting in charges of manslaughter.[75]

State or local law enforcement authorities usually assert jurisdiction over aviation matters when the incident was accompanied by aggravating circumstances such as drunkenness.[76] An exception to this generalization occurred in California, when the Los Angeles City Attorney's office utilized the State's "reckless flying statute" to impose penalties for violations of Class B Airspace[77] within the city limits.[78] This aggressive pursuit of aviators for relatively minor infractions was challenged by the FAA on grounds that parallel investigations of private pilots by the City Attorney would hinder the federal investigation by deterring the pilots from cooperating with FAA officials.[79] The City Attorney eventually dropped the Class B incursion investigations in order to resolve this dispute.[80]

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[74] *See, e.g.*, People v. Valenti, 200 Cal. Rptr. 862 (Cal. App. Dep't Super. Ct. 1984) (affirming conviction for reckless flying in and around Oxnard, Calif.); Pritchett v. State, 414 So. 2d 2 (Fla. Dist. Ct. App. 1982) (affirming manslaughter conviction for death of only passenger on recreational flight); Ward v. State, 374 A.2d at 1118 (Md. 1977) (conviction for reckless flying after "buzzing" apartment buildings); State v. Bahl, 242 N.W.2d 298 (Iowa 1976) (convicted of manslaughter for flying aircraft while intoxicated during recreational flight).

[75] *See, e.g., Pritchett*, 414 So. 2d at 2 (affirming manslaughter conviction); *Bahl*, 242 N.W.2d at 298 (convicted of manslaughter for flying aircraft while intoxicated during recreational flight).

[76] *E.g., Ward*, 374 A.2d at 1118 (conviction for reckless flying after "buzzing" apartment buildings while intoxicated).

[77] 14 C.F.R. § 71.41 (formerly known as "Terminal Control Area").

[78] Malnic, *supra* note 14, at 1.

[79] Jack Jones, *Veteran Pilot Accused of Reckless Stunt Flying*, L.A. TIMES, Mar. 26, 1987, at 6.

[80] *Id.* Less than one month later, however, the City Attorney's office pursued criminal misdemeanor charges based on the state reckless flying statutes in a case involving a stunt pilot who allegedly "performed stunts too close to a commuter airliner." *Id.* The City Attorney, Mr. Hahn, distinguished the pursuit of this violation from the earlier TCA incursions, characterizing the new case as typical of cases his office has traditionally pursued. *Id.* The FAA acquiesced to some de-

Until 1989, there had not been a serious attempt to investigate potential *criminal* liability of a commercial aviator in this country. This tradition nearly ended when the New York District Attorney convened a grand jury to determine if criminal charges should be filed following the 1989 crash of USAir Flight 5050 into the East River during an aborted takeoff from LaGuardia Airport.[81] The District Attorney is reported to have taken this unusual action because he was dissatisfied with the federal investigation, because federal investigators, in keeping with the procedures normally used during the early stages of the investigation, had not placed the pilots under oath during their questioning.[82] Even after the grand jury had determined that no criminal charges were appropriate, the District Attorney stated he would continue to pursue the matter (including interviewing the Captain of the flight and listening to the cockpit voice recorder) before abandoning his criminal investigation.[83]

In so doing, the New York District Attorney became the first local official to challenge the traditional primacy[84] of the NTSB investigation. Indeed, one of his first on-scene actions was to

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gree, agreeing to work "in the spirit of cooperation and the principle of comity . . . in the criminal prosecution of aggravated violations such as drunk flying, very low beach buzzing and the like." *Id.*

[81] St. George, *supra* note 49, at A15; Leonard Levitt & Joseph W. Queen, *The LaGuardia Crash Queens DA Wants Own Crash Probe*, NEWSDAY, Sept. 24, 1989, at 5. Because an airplane is considered a vehicle under New York law, the grand was allowed to consider such charges as negligent homicide, vehicular manslaughter or leaving the scene of an accident. The prosecutor's response to the crash of USAir 5050 was a startling departure from the typical response to prior investigations. As a result, the Air Line Pilots Association completely revamped their post-accident representation procedures. McCarthy, *supra* note 6, at 8.

[82] Levitt & Queen, *supra* note 81, at 5.

[83] Wendy Lin and Beth Holland, *DA Says Flight "Clean"*, Newsday, Oct. 6, 1989, at 19.

[84] Many state statutes explicitly provide for the primacy of the federal investigation. *See, e.g.*, Alaska Stat. § 02.15.050(c) (West 1993) (evidence of aviation accident shall be preserved "until the federal agency institutes an investigation"); Ind. Code Ann. § 8-21-1-8(o) (West 1994) (directing local agencies to comply with state rules "until representatives of appropriate federal agencies arrive on the site"); Me. Rev. Stat. Ann. tit. 6, § 17 (West 1993) (1991 amendment requires department to assist NTSB rather than conduct its own investigation). Other states are not as clear regarding the level of cooperation with the NTSB. *See, e.g.*, Conn. Gen. Stat. Ann. § 15-71a (West 1994) (authorizing, but not requiring state commissioner to accept federal report in lieu of conducting his own "detailed investigation"); Mass. Gen. Laws Ann. ch. 90, § 41 (West 1994) (authority for state investigation of aircraft accidents may be exercised jointly with federal agency); Ohio Rev. Code Ann. § 4561.06 (Anderson 1993) (state department "may cooperate" with federal agency).

threaten to "cordon off" the area as a crime scene and refuse to allow the Airline Pilots Association (ALPA) to examine the wreckage.[85] The NTSB considered this move unprecedented. The FAA declared the criminal probe a "radical departure from the usual practice," especially because the NTSB never uncovered any evidence of criminal activity during the entire course of its investigation.[86]

The rarity of such intrusions by local officials into the investigative process caused one NTSB official to comment that he was aware of only three prior occasions in which local law enforcement officials had ever become involved in an accident investigation.[87] In these cases local law enforcement officials never challenged the FAA or NTSB's jurisdiction over the accident scene.[88]

IV. THE IMPACT OF CRIMINAL PROSECUTIONS ON AVIATION SAFETY

The SabreTech prosecution highlights the issues raised when criminal law is used to advance aviation safety. The facts underlying the SabreTech prosecution are critical to understand the impact.

A. THE SABRETECH PROSECUTION

On May 11, 1996, ValuJet Flight 592 departed Miami International Airport, carrying 110 passengers and crew, and crashed into the Florida Everglades, leaving no survivors. Immediately, teams from the NTSB and the FAA descended upon the Everglades to investigate the cause of the accident. Within days, it became apparent that the most likely cause of the disaster was a fire in the cargo hold fueled by oxygen generators that were placed aboard the aircraft as COMAT (Company Owned Materials). The oxygen generators had been removed from three

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[85] Wendy Lin, *Santucci Takes Charge of USAir Jet Crash Probe*, Newsday, Sept. 26, 1989 at 6.

[86] *Id.* at 6. Additionally, the NTSB said, in referring to the local prosecutor's concurrent criminal investigation, "We don't have any indication of criminal activity."

[87] *Id.* All three cases involved the element of intent associated with the action: (i) autopsy of dead commuter pilot indicated cocaine in system, (ii) disgruntled employee shot both pilots, resulting in accident killing everyone on board, and (iii) pilot of Japanese airliner involved in crash in Alaska determined to be drunk.

[88] *Id.*

ValuJet-MD 80s, which had recently been modified at SabreTech's maintenance facility in Miami.

Shortly after the crash, NTSB and FAA investigators interviewed several SabreTech mechanics and employees. These interviews took place before some of the witnesses consulted an attorney. This procedure became particularly troublesome because both federal and state law enforcement authorities were investigating the accident, and ValuJet, SabreTech and many of their employees were the subjects of criminal investigations.

The employee interviews revealed that SabreTech mechanics had removed the oxygen generators from three ValuJet MD-80s months before the crash. Although the work cards indicated to the mechanics the generators became hot when initiated, there were no hazardous materials labels or other warnings on the generators to alert the mechanics to these hidden dangers. The mechanics had no safety caps for the generators, therefore, they tightly wound the generator lanyards through the firing pins to prevent accidental ignition, and taped the ends to the generator bodies. Despite the lack of safety caps on the generators, the mechanics signed the removal and installation workcards indicating that safety caps, in fact, had been installed. The mechanics properly tagged the generators as unserviceable and "out of date," and took them to the ValuJet hold area of the SabreTech facility. The mechanics, who never saw the generators again, believed they were to be discarded, not shipped.

Later, without the knowledge of the mechanics, a SabreTech shipping clerk, believing the generators were empty, boxed them for return to ValuJet. Because he did not know these parts constituted hazardous materials, the clerk did not comply with the hazardous materials labeling, packaging and shipping regulations. A different SabreTech employee returned the boxed generators, along with other parts, to ValuJet, who placed the boxes aboard Flight 592. The NTSB found that these generators were the primary contributing cause of the fire that brought the plane down.

Following discovery of the erroneous paperwork, the FBI executed a search warrant at SabreTech's facility and served wide-ranging grand jury subpoenas on both SabreTech and ValuJet. The government received hundreds of thousands of pages of maintenance and other business records. SabreTech, its executives, and other company employees found themselves under the government microscope. At one point, Metro-Dade police officers posted themselves outside the gates of SabreTech's busi-

ness offices in an attempt to interview employees on their way to and from work. In addition, FBI agents and state law enforcement officials visited employees at their homes at night and on weekends in an attempt to interview them. Representatives of the U.S. Attorney's Office for the Southern District of Florida, the FBI, and the Metro-Dade (Miami) Police were provided their own table at the NTSB hearings into the ValuJet crash.

In July 1999, the United States Attorney's Office for the Southern District of Florida returned a twenty-four count indictment, charging SabreTech and three of its mechanics with conspiring to falsify aircraft records, falsifying aircraft records, violating hazardous materials regulations, and placing a destructive device aboard an airplane. At the same time, the State Attorney for Miami-Dade County Florida, charged SabreTech with 220 counts of felony murder and manslaughter and an environmental offense.

In December 1999, after a three-week federal trial, SabreTech and its mechanics were acquitted of the conspiracy charges, the false statements charges, the willful hazardous materials charges, and the destructive device charge. The company, however, was convicted of eight counts of recklessly violating the hazardous materials regulation and one count of failing properly to train its employees in the recognition of hazardous materials. The judge imposed a $2 million fine on SabreTech, and ordered restitution in excess of $9 million.

On November 7, 2001, the Eleventh Circuit Court of Appeals reversed SabreTech's convictions on the eight counts of reckless violation of HAZMAT regulations, holding that the charges were not properly authorized by law.[89] The appellate court also set aside a lower court order granting restitution and, at resentencing, extinguished approximately $1.5 million of the $2 million fine imposed by the lower court.[90]

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[89] United States v. SabreTech, Inc., 271 F.3d 1018 (11th Cir. 2001).

[90] Upon receiving the maximum $ 500,000 fine at resentencing, Sabre Tech once again filed an appeal based on its poor financial condition. This appeal is pending at the time of publication.

B. The Effect of Criminal Prosecution on Future NTSB Investigations—The Problem of Self-Incrimination

Safety investigations are primarily undertaken to determine the accident's cause to prevent future accidents.[91] This goal requires the free flow of information from all possible sources, including participants and witnesses.[92] When criminal investigations are conducted concurrent with (or even as part of) accident investigations, however, conflicting interests arise, particularly with respect to the use of the evidence. The concurrent investigation may deter potential witnesses from cooperating in the accident investigation because of a legitimate concern that their testimony could be used against them in a criminal prosecution. Indeed, the United States Air Force has adopted a safety program in which Safety Investigation Board ("SIB") investigators may grant to witnesses a promise of confidentiality. This promise helps SIB investigators obtain information pertaining to an aircraft mishap for the purpose of assessing matters of safety, combat readiness, and mission accomplishment.[93] Under this policy, the Air Force promises confidentiality to crew mem-

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[91] This is the purpose behind investigations of the NTSB and Annex 13 investigations in other countries. *See* Convention on International Civil Aviation pmbl., Dec. 7, 1944, 59 Stat. 1693, 15 U.N.T.S. 296 ("that international civil aviation may be developed in a safe and orderly manner"); Michael Milde, *Aircraft Accident Investigation in International Law*, 9 Air Law 61, 63 (1984) (standard 3.1 to Annex 13) ("It is not the purpose of this activity to apportion blame or liability."); *see also* Civil Aviation (Investigation of Air Accidents) Regulations 1989 (Eng.), art. 4 ("The fundamental purpose of investigating accidents under these Regulations shall be to determine the circumstances and causes of the accident with a view to the preservation of life and the avoidance of accidents in the future; it is not the purpose to apportion blame or liability."), *reprinted in* Shawcross and Beaumont: Air Law vol. 2, C 1621 (4th ed. 1994).

[92] This was well expressed in the military context, "[t]he success of the [flight safety] program depends in large part on the ability of the investigators to get full information on the cause of any accident." Machin v. Zuckert, 316 F.2d 336, 339 (D.C. Cir. 1963) (summarizing Inspector General of the Air Force); *see also* Cooper v. Dep't of the Navy of the United States, 558 F.2d 274, 276 (5th Cir. 1977) (noting that the success of an investigation is dependent on "disclosures against interest" obtained through appeal made to "witnesses' concern for the safety of others").

"If the investigators were unable to give such assurances, testimony in many instances would be less than fully factual and the determination of the exact causative factors would be jeopardized." *Machin*, 316 F.2d 336 at 339 (summarizing the Inspector General of the Air Force).

[93] Air Force Instruction ("AFI") 91-204, *Safety Investigations and Reports*, May 22, 2001, paragraphs E.4.4.2.2, DoDI 6055.7; paragraph 1.1.1.1, AFI 91-204.

bers, aircraft mechanics, supervisors, and other witnesses and technical experts who have knowledge of the accident.

In return for the free, unfettered testimony of these witnesses, the Air Force has agreed that the testimony may be used for mishap prevention purposes only, and may not be used in any disciplinary or criminal proceedings, or other administrative actions. Air Force Instruction 91-204, however, does provide an exception in the case of false testimony or investigative misconduct, "or to comply with a valid court order on behalf of a defendant in a criminal trial."[94] Relying on the "military safety privilege," the military services consistently have withheld from the public certain safety information contained in its investigation reports. The military safety privilege continues to be an essential element in the Air Force's safety program.[95]

The promise of confidentiality granted to witnesses by the United States Air Force in its investigation of aviation mishaps serves to encourage frank and open communications to individuals who provide witness statements to an investigating officer, and to government contractors involved in the design, construction, or maintenance of the aircraft or component parts.[96] Various courts have recognized the salutary purpose of the military safety privilege. In the case of *Machin v. Zuckert*,[97] the Washington, D.C. Circuit Court of Appeals considered a claim of governmental privilege asserted by the Secretary of the Air Force in connection with the investigation of a B-25 bomber crash on May 17, 1956. Moments prior to the crash, the pilot of the aircraft reported a propeller over speed. The only surviving crew member aboard the accident aircraft, Mr. Machin, filed a lawsuit against the manufacturer of the propeller and served a subpoena upon the Air Force for a copy of its privileged safety report. The Air Force was successful in quashing the subpoena based upon its claim of executive privilege with respect to witness statements contained in the report given under a promise of confidentiality. The appellate court affirmed the lower court ruling regarding the privileged witness statements, and ordered

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[94] AFI 91-204, figure 2.6.

[95] For a comprehensive review and analysis of the military safety privilege, *see* Paul E. Cormier, *The Military Safety Privilege and Accountability: Are They Compatible?*, presented at the 36th Annual SMU Air Law Symposium Journal of Air Law and Commerce, Dallas, Texas, March 1, 2002.

[96] Paragraph 2.1.2.3, AFI 91-204, *Promise of Confidentiality.*

[97] 316 F.2d 336 (D.C. Cir. 1963).

only the factual information contained within the report must be released. In its opinion, the court stated that:

> [W]e agree with the government that when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important government program and perhaps even, as the Secretary here claims, impair the national security by weakening a branch of the military, the reports should be considered privileged.[98]

Other courts have considered the validity of the "Machin privilege" and have consistently upheld the confidentiality of witness statements provided to safety investigators.[99]

In the context of criminal proceedings, including court-martial, the Department of Defense has recognized the competing interests of the United States' goal to quickly determine the cause of an accident and the public's demand to hold individual's personally accountable for their misdeeds. In recognition of these competing interests, the Defense Department revised its Instruction 6055.7 on October 3, 2000, to allow the release of privileged safety information only under exceptional circumstances.[100]

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[98] *Id.* at 339.

[99] Rabbitt v. Dep't of Air Force, 401 F. Supp. 1206 (S.D.N.Y. 1974) (witness statements provided to a safety investigator are not subject to disclosure under FOIA); United States v. Weber Aircraft Corp., 465 U.S. 792 (1984) (confidential witness statements are intra-agency memoranda within the meaning of the FOIA, and are therefore not discoverable under exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5)); *see also* Badhwar v. Dep't of Air Force, 829 F.2d 182 (D.C. Cir. 1987) (upholding the lower court's order of nondisclosure of statements provided by third-party witnesses to the military Accident Investigation Board).

[100] E4.5.3.3.2, of DoDI 6055.7 states:

> For all investigations where safety investigators are authorized to grant promises of confidentiality, including investigations of flight and flight-related accidents . . . the Secretary of the Military Department . . . shall assert the privilege to oppose any court-ordered release of privileged safety information. If a Secretary of a Military Department determines that exceptional circumstances warrant release of privileged safety information, the Secretary may request the DUSD(ES) to permit the selective release of such information. The request must include certification by the Secretary of the Military Department that the purposes to be served are compelling and solely related to safety and the interests of safety are better served by release. When the DUSD(ES) . . . after consultation with the individual Secretaries of the Military Departments, determines that the interests of safety are better served, the DUSD(ES) may permit the selective use of privileged safety information in exceptional circumstances.

The NTSB has also encountered this problem, when numerous witnesses refused to provide information to NTSB investigators in connection with a pipeline explosion in Bellingham, Washington.[101] Of course, there is no provision of civil or criminal law similar to DoDI 6055.7 available to protect statements given by witnesses with knowledge of facts surrounding civil aircraft accidents.

The reticence of witnesses to disclose information may result in error reporting by those individuals who provide testimony and may ultimately impede an investigation. Approximately seventy-five per cent of aircraft accidents in the United States involve some form of human error.[102] Thus, the potential for losing the cooperation of individuals who feel they may face criminal accusations is very real.

The conflict is even more significant when FAA employees are involved in the investigation. The FARs direct FAA employees to report any suspected violation of a criminal provision of the Federal Aviation Act or HMTA to the FAA's legal department. If appropriate, the FAA's legal department forwards the report to the Department of Justice (DOJ) for criminal prosecution.[103]

1. Evidentiary Sources of Potential Self-Incrimination

In addition to the testimonial evidence of witnesses, an investigation into an accident may yield many types of evidence that are important to criminal prosecutors. The NTSB's final factual report and probable cause summary, as well as cockpit voice recorder and flight data recorder information may be a source of such evidence.[104]

Special statutory guidelines apply to the use of cockpit voice recorder and flight data recorder information. The NTSB has initial control over the cockpit voice recorder and flight data recorder and is precluded from publicly disclosing any part of the cockpit voice recorder if it is relevant to the accident or inci-

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[101] Testimony of Marshall Filler before the House Subcommittee on Aviation, July 27, 2000.

[102] *Inside FAA*—September 15, 2000, p. 11.

[103] 14 C.F.R. § 13.23(b) (2002). Although FAR § 13.23 still refers to the Federal Aviation Act, that Act was recodified in 1994 into Title 49, effective July 5, 1994.

[104] While FAR § 121.359 prohibits the use of information from the CVR in an FAA enforcement action, the grand jury used the CVR in connection with its investigation into SabreTech and its employees.

dent.[105] A transcript of any relevant part may be made public at the time when the majority of the report is made public.[106] Provisions are in place for the discovery of cockpit voice recorder transcripts[107] or recordings[108] and for parts not available to the public if required for a fair trial.[109] If the cockpit voice recorder products are used for discovery, the court is required to take steps to prevent the public release of information.[110] Further, the FAA is precluded from the use of information from the cockpit voice recorder in cases seeking the punitive sanction of pilots in civil or certificate sanctions.[111]

2. *The Impact of the Fifth Amendment*

The use of testimonial evidence acquired after an accident will almost certainly raise constitutional issues of self-incrimination. In the United States, the Fifth Amendment right to refuse to provide evidence which may be self-incriminating does not necessarily apply in every case in which an accident investigation is conducted.[112] The Fifth Amendment specifically affords protection in criminal actions.[113] Nevertheless, established tradition has afforded a liberal interpretation of its provisions,[114] and

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[105] 49 U.S.C. § 1114(c) (2002). The potential use of the cockpit voice recorder and the release of information contained on it is addressed in 49 U.S.C.A. §§ 1114, 1154.

[106] *Id.* § 1114(c)(B).

[107] *Id.* § 1154(a)(2).

[108] *Id.* § 1154(a)(3).

[109] *Id.* §§ 1154(a)(2)(A), (a)(3)(A).

[110] *Id.* § 1154(a)(4)(A).

[111] "The Administrator does not use the record in any civil or certificate action." 14 C.F.R. § 121.359 (1994); 14 C.F.R. § 135.151 (1994).
Despite these restrictions, the intent of which is to increase the free flow of information in the aftermath of an aircraft accident, the information in the cockpit voice recorder has been sought by at least one district attorney in the pursuit of his criminal investigation. *See, e.g., Grand Jury Probing USAir Crash Finds No Evidence of Criminality*, L.A. TIMES, Oct. 7, 1989, at 19 (District Attorney in New York attempts to get cockpit voice recorder from NTSB in aftermath of crash of USAir 5050); Lin Holland, *supra* note 83, at 19. The counsel for SabreTech, Martin Raskin, indicates that the grand jury investigating the ValuJet 592 accident was able to read the transcript of the CVR.

[112] Although individual officers and directors of a corporation have the right to invoke Fifth Amendment protections, George Campbell Painting Corp.v. Reid, 392 U.S. 286, 289 (1968), corporations themselves do not have the right to this same constitutional protection Branswell v. United States, 487 U.S.99 (1988).

[113] U.S. CONST. amend. V ("nor shall be compelled in any criminal case to be a witness against himself").

[114] Boyd v. United States, 116 U.S. 616, 635 (1886). Justice Marshall would afford an even more liberal interpretation than that currently utilized, "The Fifth

Fifth Amendment protection has been extended to include civil cases where "the answer might tend to subject to criminal responsibility him who gives it."[115]

In the aviation context, courts are reluctant to grant Fifth Amendment protections to airmen in civil settings unless there is a "substantial and real" possibility of future criminal prosecution.[116] This ignores, however, the regulatory requirement that the FAA pass to the DOJ any information regarding potential criminal violations,[117] and the DOJ may then use the results of an FAA investigation in subsequent prosecutions of airmen.[118] The reluctance to grant Fifth Amendment protections to individuals testifying in a civil setting ignores the possibility that the testimony itself may provide the foundation for subsequent criminal actions. Thus, airmen may be compelled to give information to government officials who are, in turn, required to report criminal conduct to prosecutors. Such testimony may be required without Fifth Amendment guarantees or even a *Mi-*

Amendment privilege against coerced self-incrimination extends to every means of government information gathering." Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 866 (1984) (Marshall, J., dissenting) (citing Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)).

[115] Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

[116] Roach v. National Transp. Safety Bd., 804 F.2d 1147, 1150-51 (10th Cir. 1986). This right does not preclude the compelling of a witness to testify at administrative hearings when there is not "reasonable cause to apprehend danger from a direct answer." *Id.* at 1151. This is distinguished from the right of a witness to not take the stand at his own criminal trial, which is absolute. *Id.* at 1150. A strong argument can be made that certificate action by itself, even in the absence of criminal proceedings, should raise Fifth Amendment protections. *See* Holmes, *supra* note 47, at 330 (arguing that the constitutional privilege against self-incrimination should be extended to pilots facing decertification). The Fifth Amendment protection was found to extend to a lawyer in a disbarment hearing, noting that when the nature of civil penalties begins to appear very similar to criminal penalties, Fifth Amendment protections may apply. Spevack v. Klein, 385 U.S. 511, 514 (1967) (holding that disbarment could not be a penalty for failure to testify—"[T]he Fifth Amendment . . . should not be watered down by imposing . . . the deprivation of a livelihood as a price for asserting it."). The case notes that the penalties against which the Fifth Amendment protects extend to "any sanction which makes assertion of the Fifth Amendment privilege 'costly.'" *Id.* at 515; *see also* Garrity v. New Jersey, 385 U.S. 493 (1967) (holding that assertion of Fifth Amendment was not grounds for forfeiture of jobs as police officers).

[117] 14 C.F.R. § 13.23(b) (2002). *See, e.g.*, Calonius, *supra* note 17 at 85 (FAA inspector took case to U.S. Attorney).

[118] Martin, *supra* note 66, at 562.

randa warning because the accused is not in custody at the time of testifying.[119]

The duty to provide testimony without first receiving the traditional protections from its possible use in criminal proceedings may engender a healthy skepticism in those who are asked to provide such testimony. Concerns over the effect of criminal prosecution on the cooperation received by safety investigators were at the heart of Admiral Engen's concern that pilots will not cooperate in investigations if they think the information provided to safety investigators could be used "by other parties in a criminal prosecution."[120]

C. IMMUNITY

1. Background on Criminal Immunity

Often in a criminal investigation, only a grant of immunity can persuade a witness to share what he knows with investigators. There are two general types of immunity which may be offered—transactional immunity and use immunity. Transactional immunity protects an individual from prosecution for any conduct addressed in his testimony. Use immunity, or "derivative use immunity" as it is sometimes called, prohibits prosecutors from using both the immunized testimony of a witness, and any leads to additional incriminating evidence against the witness which may be developed through that testimony, in a subsequent prosecution of that witness.

Immunity is a creature of statute. The federal immunity statute does not authorize the grant of transactional immunity in a federal criminal prosecution. Beginning in 1970, transactional immunity was removed from federal statutes and replaced with use immunity provisions.[121] The grant of federal immunity is

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[119] Martin, *supra* note 66, at 564. For detailing of procedural safeguards not available to airmen involved in certificate action, *see id.* at 556-561. For an example where the protection against self-incrimination was not addressed in a criminal forum following testimony given to the FAA, *see* United States v. Myers, 878 F.2d 1142, 1143-44 (9th Cir. 1989) (affirming conviction of pilot for making false statements to FAA after he had made up a story to explain why he had entered prohibited airspace surrounding President Reagan's helicopters).

[120] Stein, *supra* note 14 at 1.

[121] 18 U.S.C. §§ 6001-6005 (2000). Section 6002 provides that a witness who has been granted immunity and ordered to testify may not refuse to testify on self-incrimination grounds. It states as follows:

> *"no testimony or other information compelled under the order* (or any information directly or indirectly derived from such testimony or other information) *may be used against the witness in any criminal case,* ex-

authorized and enforced by a federal judge issuing a compulsion order requiring a witness to testify. It is important to remember that a grant of statutory immunity shields individuals from *criminal* liability only. It does not afford protection against civil liability,[122] tax liability,[123] disciplinary actions[124] or enforcement proceedings.[125] Moreover, a person who receives use immunity still remains subject to criminal prosecution if the government can show that the evidence upon which the prosecution is based was developed through means completely independent of the immunized testimony.

A grant of federal immunity is the prerogative of the Executive Branch of the government. As a general rule, only the Attorney General or a designated officer of DOJ has authority to grant use immunity.[126] Although the statutes provide that an administrative agency also may issue immunity orders in connection with agency proceedings, an agency may only do so "with the approval of the Attorney General."[127]

2. *Department of Justice Guidelines on the Grant of Immunity*

The Department of Justice has published non-binding principles to serve as guidelines for the exercise of discretion in deciding to grant or deny immunity.[128] It is the policy of the DOJ to initiate prosecutions if the government believes that the person's conduct "constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction."[129] Exceptions to this rule are that: (i) no substantial federal interest would be served by prosecution,[130] (ii) the

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cept in a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." (Emphasis added.)

[122] United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir. 1977).

[123] Ryan v. Commissioner, 568 F.2d 531, 541-42 (7th Cir. 1978).

[124] In re Daley, 549 F.2d 469, 474 (7th Cir. 1977).

[125] Childs v. Schlitz, 556 F.2d 1178 (4th Cir. 1977); Thomas v. Bible, 694 F. Supp. 750, 764 (D. Nev. 1988).

[126] Pillsbury v. Conboy, 459 U.S. 248, 261 (1983).

[127] 18 U.S.C. §6004 (a). In re Application of the President's Comm. on Organized Crime, 763 F. 2d 1191 (11th Cir. 1885); *see also infra* note 125 and accompanying text.

[128] *See* USAM Chapter 9-23.000, *et seq.*

[129] *USAM 9-27.220.*

[130] Determining whether prosecution should be declined based on a lack of substantial federal interest, the attorney for the government should weigh all relevant considerations, including: "1) federal law enforcement priorities; 2) the nature and seriousness of the offense; 3) the deterrent effect of prosecution; 4) the person's culpability in connection with the offense; 5) the person's history

person is subject to effective prosecution in another jurisdiction,[131] or (iii) there exists an adequate non-criminal alternative to prosecution.[132] Once a decision to prosecute has been made, "the attorney for the government should charge . . . the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction."[133]

Prior to granting immunity, the prosecutor first must file an application with the Criminal Division of the DOJ demonstrating that: (i) compelling the witness to testify is necessary to the public interest, and (ii) the person has refused or likely will refuse to testify based on his Fifth Amendment privilege against self-incrimination.[134] The non-exclusive criteria used by the DOJ to determine whether the public interest standard has been met are: (a) the seriousness of the offense and the importance of the case in achieving effective enforcement of the criminal law; (b) the value of the witness's testimony to the investigation or prosecution; (c) the likelihood that the witness will comply promptly with the immunity order and provide useful testimony; (d) the witness's culpability relative to other possible defendants; (e) the possibility of successfully prosecuting the witness without immunity; and, (f) the possibility of adverse consequences to the witness if the witness testifies pursuant to a compulsion order.[135]

As a practical matter, federal prosecutors are generally reluctant to grant immunity to serious offenders since they know that the public and potential jurors will look unfavorably upon highly culpable individuals escaping punishment. Prosecutors are similarly hesitant to grant immunity at early stages of an in-

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with respect to criminal activity; 6) the person's willingness to cooperate in the investigation and prosecution of others; and the probable sentence or other consequences if the person is convicted." *USAM 9-27.230.*

[131] This criterion requires the attorney for the government to weigh all relevant considerations, including: "1) the strength of the other jurisdiction's interest in prosecution; 2) the other jurisdiction's ability and willingness to prosecute effectively; and 3) the probable sentence or other consequences if the person is convicted in the other jurisdiction." *USAM 9-27.240.*

[132] In considering the issue of an existing non-criminal alternative to prosecution, the attorney for the government should weigh all relevant considerations, including: "the sanctions available under the alternative means of disposition; 2) the likelihood that an effective sanction will be imposed; and 3) the effect of non-criminal disposition on federal law enforcement interests." *USAM 9-27.250.*

[133] *USAM 9-27.300A.*

[134] *See* 18 U.S.C. § 6003 (b) (2000).

[135] *USAM 9-23.210.*

vestigation since it may be unclear what a particular witnesses' criminal liability may be.

3. *Immunity as a Means of Promoting Aviation Safety*

In the post-*ValuJet* era, the NTSB's investigation is frequently shadowed or even eclipsed by parallel criminal investigations conducted by the FBI, the FAA, the DOT's Office of Inspector General, and/or the EPA's Criminal Enforcement Division. The prudent corporation with close ties to the accident should deploy its own rapid response team of attorneys and others to conduct their own investigation into the facts and circumstances surrounding the accident. Individuals will retain counsel who will advise their clients to think long and hard before giving testimony to the NTSB that ultimately may be used by government prosecutors to build a criminal case against them. Indeed, many criminal lawyers will advise their clients to assert their Fifth Amendment privilege in order to avoid waiving their Fifth Amendment rights.

Often, a grant of immunity from prosecution will persuade such witnesses to furnish the information sought. In the days and weeks immediately following a major transportation accident, when the facts surrounding an accident are still sketchy, it is unlikely that a U.S. Attorney serious about pursuing criminal charges will be willing to grant such immunity. Indeed, few U.S. Attorneys, at this early stage, would be willing to disregard the criteria set by the DOJ for evaluating immunity requests in order to offer grants of immunity to witnesses whom NTSB believes may hold the key to the mysteries of probable cause of the accident. Ironically, this "Catch 22" brings us back to the initial question of whether or not criminal prosecution is an effective, necessary, or desirable means of securing safety in the skies. Surely, if prosecutors are willing to immunize witnesses from prosecution on *any* grounds in order to obtain the truth as to the cause of an accident, then they are basically acknowledging that the pursuit of truth for purposes of promoting aviation safety is really the paramount concern in these investigations. Federal prosecutors have wide discretion in determining when, whom, how and even whether to prosecute for apparent violations of federal criminal statutes.[136]

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[136] *See, e.g.*, Oyler v. Boles, 368 U.S. 448 (1962).

4. The Impact of Prosecutorial Discretion

It is not the prosecutions, in and of themselves, which are the major concern—it is the investigation which precedes the indictments that have the potential to inhibit the search for truth. The DOJ's prosecution criteria, the various bar canons of ethics, and the good faith of most federal prosecutors serve as ample protection against most unwarranted prosecutions.

Domestically, and in most other countries, the majority of aviation incidents trigger the traditional accident investigations by aviation authorities, with no concurrent or parallel investigation into possible criminal liability. If pilots are judged to be at fault, punishment takes the form of administrative action only.

This, however, does not prevent a zealous prosecutor from attempting to bring the investigation of the incursions into his domain, even over FAA objections. The motivational factors behind local criminal prosecutions are not necessarily consistent with the federal government's long-term goal of protecting the flying public. Indeed, a spokesman for the Los Angeles District Attorney's office declared publicly, "The bottom line is [the District Attorney] has been prosecuting pilots in the past for reckless or careless flying and he will continue to do so in the future with or without the cooperation [of FAA officials]."[137]

The decision by a prosecutor to pursue criminal charges also may be fueled by the intense media attention that surrounds an aviation accident.[138] The slow, deliberate pace at which the NTSB conducts major accident investigations may not always satisfy the public's thirst for information and action. This, in turn,

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[137] Stein, *supra* note 14, at Metro 1.

[138] While it is difficult to prove the impact of media attention, criminal prosecutions have occurred in instances of high profile accidents. Domestically, for instance, media attention may have increased the possibility of criminal prosecution following the helicopter crash during the filming of the movie "The Twilight Zone." *See* Kolczynski, *supra* note 6, at 49 (death of actor and involvement of well known director led to "media event").

The effect of media attention is not necessarily limited to a "major" aircraft accident. *See, e.g.*, Sanders v. State, 256 P.2d 205, 205 (Okla. Crim. App. 1953) (noting the abandonment of an initial plea bargain after it attracted the attention of the local media, resulting in a subsequent guilty plea to the charges and a judgment for thirty days in jail and a $100 fine).

Nor is the media attention unique to the United States. One observer of the trial of the Swissair pilots in Athens specifically said he was "scared by the savage manner of the proceedings. The pilots were ill-treated and made scapegoats. They were assailed by the press and photographers . . . ." Report on 40th Annual Conference, Montreal, Canada, 29 April—3 May 1985, 10 ANNALS AIR & SPACE L. 487, 489 (1985) (comment made by Regional Vice-President Europe/South).

may pressure law enforcement agencies to investigate the potential criminal aspects, even where there is none clearly evident.[139] Indeed, prosecutors may believe that the prosecution of sensational cases serves the public interest as a visible demonstration that the government is taking action in the aftermath of an accident.[140] While a public airing of the issues may be essential where serious harm or loss of life has occurred, prosecutors nonetheless should resist the urge to yield to the public clamor. Making a criminal inquiry the vehicle for this public airing may have detrimental effects that offset any safety benefit to be gained from the prosecution.

5. *Immunity of Aviation Professionals From FAA Enforcement Actions*

In the past, the FAA has been willing to grant aviation professionals immunity from administrative sanctions in return for information it believes will improve safety. For instance, in formal fact-finding investigations conducted by the FAA under an Order of Investigation, the FAA has authority to grant criminal immunity (except for perjury) to a witness, with the approval of the Attorney General.[141]

For decades, the Aviation Safety Reporting Program (ASRP) has provided limited immunity from FAA sanctions to pilots, flight attendants, maintenance personnel, and other users of the national airspace system who file an Aviation Safety Report within ten days of an incident or occurrence.[142] The program encourages individuals to provide information that may prevent similar future incidents.[143] It does not apply, however, to criminal activity, aircraft accidents, lack of qualifications or compe-

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[139] Kolczynski, *supra* note 6, at 11.

[140] *Cf.* Mervyn E. Bennun, *Prosecuting Professional Pilots in the United Kingdom after November Oscar: Reflections on the Law and Policy*, 61 J. AIR L. & COM. 331, 347-48 (Dec. 1995/Jan. 1996).

[141] 14 C.F.R. § 13.119(a).

[142] Aviation Safety Reporting Program, Advisory Circular 00-46D (Feb. 26, 1997); *see also* John S. Yodice, *The Aviation Safety Reporting System*, AOPA PILOT, July 1994 at 128. *Id.* The National Aeronautics and Space Administration (NASA) acts as an independent third party to collect the information and ensure confidentiality of the reports. It is only after an independent investigation of an incident by the FAA reveals a violation that the ASRS may be invoked to grant immunity.

[143] Except to the extent that it does not provide protection in cases where there is an accident or a criminal prosecution, the ASRS is analogous to transactional immunity in that it protects aviators from sanctions regardless of whether independent evidence could demonstrate the violation. Thus, it is the desire for

tence, intentional actions, or to prior violations by an individual within the previous five years.

The FAA has recently implemented two other programs that grant some protection to the provider of information used to enhance safety–Flight Operations Quality Assurance (FOQA)[144] and Aviation Safety Action Program (ASAP).[145]

Under FOQA, participating air carriers routinely collect, analyze, and furnish to FAA the data from on-board recorders. The FOQA program is designed to enhance line operational safety, training effectiveness, operational procedures, maintenance and engineering, ATC procedures and airport surface issues. This objective is accomplished by using the accumulated data to detect technical flaws, unsafe practices, or conditions outside of desired operating procedures early enough to allow timely intervention to avert accidents or incidents.[146]

In ASAP, certain employees of participating air carriers and major repair stations voluntarily report safety issues and events. The content of the ASAP report may not generally be used as evidence for any purpose in an FAA enforcement action. The program is essentially a partnership between the FAA, the certificate holder, and any third party, such as an employee's labor

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the cooperation of pilots in the safety program that is the policy behind the program rather than merely to provide protection from self-incrimination.

[144] *See Policy on the Use for Enforcement Purposes of Information Obtained from an Air Carrier Flight Operational Quality Assurance (FOQA) Program*, Dep't. of Transp., 63 FED. REG. 67505 (Dec. 7, 1998); Flight Operational Quality Assurance Program, 65 FED. REG. 41528 (Jul. 5, 2000); *and* HBAT 00-11/HBAW 00-10 FOQA Program Approval Procedures and Continued Program Monitoring (Jul. 26, 2000).

[145] FAA Advisory Circular No. AC 120-66A "Aviation Safety Action Program" (Mar. 17, 2000).

[146] U.S. General Accounting Office, Aviation Safety: Efforts to Implement Flight Operational Quality Assurance Programs, Doc. No. GAO/RCED-98-10 (1997).

The FAA Administrator issued policy statements as early as February of 1995 regarding the use of FOQA information for enforcement purposes in letters to the Presidents of ALPA ATA. Letter from D.R. Hinson, Administrator, FAA to J.R. Babbitt, President, Air Line Pilots Association, (Feb. 9, 1995) (on file with the FAA); Letter from D.R. Hinson, Administrator, FAA to J. E. Landry, President, Air Transport Association (Feb. 9, 1995) (on file with the FAA). The Administrator committed that " . . . it will not use information collected by a carrier in an FOQA program to undertake any certificate or other enforcement action against an air carrier participating in such a program or one of its individual employees. Notwithstanding, the FAA reserves its right to use, for any other purpose, information obtained from sources other than FOQA, including flight recorder parameters specifically required by the Federal Aviation Regulations. The limitation on the use of information applies only to information collected specifically in an FOQA program." *Id.*

organization or their representatives. As with ASRP, the reported event must not appear to involve criminal activity.

Congress sought to put teeth into the immunity these programs provide in order to encourage the voluntary submission of information by mandating that the FAA protect such information.[147] The FAA complied by issuing FAR Part 193, effective July 25, 2001,[148] which generally provides that protected information will not be disclosed. Unfortunately, Part 193 includes significant exceptions to the protections against disclosure that may be capable of engulfing the rule. For instance, while "the FAA expects to propose to designate information it will receive under FOQA and under ASAP as protected under [Part 193],"[149] it has yet to do so. Further, the protection does not apply to conditions that compromise safety or security in cases where those conditions continue uncorrected,[150] or to information provided during a criminal investigation or prosecution.[151] Finally, Part 193 stops short of protecting information from use in enforcement actions, instead promising that the FAA will do so by separate policy or rule.[152] To date, only the FOQA program has been extended enforcement protection.[153] In light of the concern of the aviation community that the threat of criminal prosecutions will prevent witnesses from being totally forth-

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[147] Federal Aviation Reauthorization Act of 1996, PUB. L. 104-264 (Oct. 3, 1996) (adding relevant section at 49 U.S.C. § 40123).

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[148] 66 FED. REG. 33792 (June 25, 2001). Voluntary disclosures are also addressed in FAA AC 00-58, Voluntary Disclosure Reporting Program (May 4, 1998).

[149] 66 FED. REG. at 33802.

[150] 14 C.F.R. § 193.9(a)(2).

[151] *Id.* § 193.9(a)(3).

[152] *Id.* § 193.5(g).

[153] *See new* 14 C.F.R. §13.401.

coming with their knowledge of crucial facts, in 2000, the House of Representative aviation subcommittee began accepting proposals for creating an immunity bill. Subcommittee Chairman, John Duncan (R-TN) solicited the NTSB's advice on the prospect of providing blanket immunity during hearings held in July 2000 on the increasing tendency toward criminalization of the accident-investigation process. So far, however, there is no short-term prospect for the submission of an immunity bill, or the implementation of an official policy with respect to the grant of immunity in aviation-related accident cases.

D. Corporate Liability

1. Vicarious corporate criminal liability

A corporation may be held vicariously liable in a criminal forum for the unlawful conduct of its employees, provided that such conduct is within the scope of the employee's authority and performed for the benefit of the corporation.[154] Such vicarious liability can attach even if the employee's actions are against explicit corporate policy.[155] Furthermore, it can be imposed as a result of tortious activities of the corporation's chief executive officer (and even its Board of Directors) to its lowest employee.

The public policy underlying this rule is that the imposition of liability on a corporation for the acts of its employees will deter criminal activity in the name of the corporation by denying the corporation the benefits of the prohibited conduct.[156] The policy underlying corporate liability for the employees' misconduct

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[154] United States v. Automated Med. Lab., Inc., 770 F.2d 399 (4th Cir. 1985); United States v. Cincotta, 689 F.2d 238, 241-42 (1st Cir. 1982).

[155] United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989); United States v. Basic Construction Co., 711 F.2d 570 (4th Cir. 1983). An example of the principle of strict corporate liability for actions of a rogue employee may be seen in the conviction of Aviation Safeguards of Florida, a firm which provides security personnel at Miami International Airport. The U.S. Attorney's Office in Miami returned an indictment alleging that the company's former general manager allowed at least 22 employees into secure areas of the airport without the required background checks and then lied about it to authorities. Aviation Safeguards was prosecuted despite the fact that there was no evidence that company executives knew of or condoned its former employee's activities. On March 27, 2000, Aviation Safeguards pled guilty to the charges and has agreed to pay a fine of $110,000.

[156] Justice Department policy that charging a corporation does not mean that individual directors, officers, employees or shareholders should not also be charged. According to the United States Attorney's Criminal Resource Manual (USACRM), Title 9, § 162 (I)(B):

is that corporate management will presumably have a greater incentive to ensure full compliance with the law by its employees if it knows that it will be held accountable for their misbehavior. Thus, if an aviation mechanic were shown to have "pencil whipped" a job card, his corporate employer could be prosecuted along with the employee. Similarly, if a shipping clerk willfully or recklessly shipped hazardous materials in violation of the HMR, his corporate employer could share criminal responsibility.

The DOJ has published guidelines in the U.S. Attorney's Manual (USAM) for prosecutors to use in determining whether to charge a corporation with criminal misconduct.[157] These guidelines were discussed in a memorandum recently issued by Eric H. Holder, former Deputy Attorney General (the "Holder Memorandum"), in which he declared that the goal of federal prosecutors is to prosecute "culpable individuals and, *when appropriate*, the corporations on whose behalf they acted."[158] Prosecutors are expected to evaluate their decisions whether or not to prosecute a corporation in light of certain criteria. Holder makes clear these are guidelines only and are not necessarily to be accorded equal weight. First, corporations should receive neither harsher nor more lenient treatment merely because they are corporations. Second, the purpose of prosecuting corporations is the "great benefits it provides for law enforcement and the public, particularly in the area of white collar crime."[159] Indeed, the Deputy Attorney General stressed that the prosecution of corporations allows the government "to be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime."[160]

With respect to the high visibility criminal prosecutions in *ValuJet* and later cases, those accused were not executive employees engaged themselves in illegal corporate activities. Indeed, it

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Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Further, imposition of individual criminal liability on such individuals provides a strong deterrent against future corporate wrongdoing.

157 *USACRM*, Title 9, § 162 (I), et seq.

158 Memorandum from Eric H. Holder, Jr., to Heads of Department Components and All United States Attorneys, June 16, 1999 (emphasis added). Deputy Attorney General Holder's memorandum and the accompanying guidelines are published as parts 161 and 162 to the USACRM, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00000.htm.

159 *Id.*

160 *Id.*

is often the case that the corporate executive lacks the particularized knowledge, skill, training, certification or qualifications the FAA demands of those who are most likely to be the true agents of wrongdoing within the corporation. The prosecution of executives for the failure of their subordinates to meet the standards of care imposed upon them individually by the FARs is not the traditional means of punishing white collar criminals, since these executives lack the requisite *mens rea* to justify the imposition of criminal penalties. Therefore, if stamping out white-collar crime is really the intended goal of prosecutors, it would appear that the imposition of corporate liability in the aviation context should not be the preferred goal of criminal investigations following aircraft accidents.

According to the USAM and the memorandum and guidelines, the specific factors to be considered in determining whether a corporate prosecution should be initiated include:

- the existence and adequacy of the corporation's compliance program;
- the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
- collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable; and
- the adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.[161]

The DOJ requires prosecutors to be "aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies."[162] Starkly absent from this list of factors is the acknowledgment by the DOJ that the motives and mandates of other agencies investigating an aircraft accident may outweigh "the important public benefits" that criminal prosecutions of corporations are supposed to provide. It is not enough to claim that these benefits may be derived through the likelihood that corporations will take "immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry," when these same prosecutors cannot point to a form of pervasive criminal conduct in the avia-

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[161] *USACRM*, Title 9, § 162 (II) (A).

[162] *Id.* § III.B.

tion industry in the first place. Indeed, if illegal conduct of any particular form were to become pervasive in the aviation industry, it would soon be discovered by FAA inspectors and other professionals charged with the implementation and enforcement of the federal aviation regulations.

Other USAM factors are equally troubling. For example, the provision pertaining to corporate cooperation requires a corporation to act as an investigator for the government and to presume the guilt of its employees before charges are even filed. This same provision also defines the adequacy of a corporation's cooperation in terms of its willingness to waive the attorney-client privilege and work product protections "both with respect to its internal investigation and with respect to communications between specific officers, directors, employees and counsel."[163]

In addition, in weighing whether a corporation's cooperation is deemed significant enough to gain any benefit, prosecutors are instructed to consider "whether the corporation appears to be protecting its culpable employees and agents."[164] In making that assessment federal prosecutors are instructed to determine whether the corporation is advancing attorney's fees to its employees, whether it continues to employ those under suspicion, and whether the corporation shares information with counsel for its employees under a joint defense agreement.[165]

This policy is most disturbing since the above factors significantly intrude upon not only the attorney-client privilege, but also the accused's constitutional right to a presumption of innocence. It also drives a wedge between employers and employees. Frequently, at the point in time that the government would require the corporation to fire its employees and cut off all financial and other support, the government alone is in possession of evidence which might show employee wrongdoing. Grand jury investigations are statutorily cloaked in secrecy,[166] and the government traditionally closely guards the nature and extent of its non-grand jury evidence prior to charges being filed. Thus, a

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[163] *Id.* at § 162 (VI).

[164] *Id.*

[165] A joint defense agreement is an agreement which allows the sharing of information between those with similar interests in litigation without waiving applicable privileges. United States v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir. 1979), Hunydee v. United States, 355 F.2d 183, 184-85 (9th Cir. 1965). Unfortunately, this judicially sanctioned procedure is often deemed by prosecutors to constitute obstructionist behavior.

[166] Fed. R. Crim. P. 6 (e)(2).

corporation desiring to cooperate with the government often finds itself in the unenviable position of having to take drastic, and possibly unwarranted, action against its officers, directors, and employees solely in reliance on the government's say- so.[167] Any requirement which drives a wedge between employer and employee following an aviation incident will adversely impact the NTSB's ability to protect the traveling public.

2. The "Collective Knowledge" Doctrine

The theory underlying the collective knowledge doctrine is that a corporation is deemed to know the totality of the information possessed by all of its employees.[168] Under this doctrine, it is possible to hold a corporation criminally liable even though no single corporate employee is responsible for any wrongdoing. For example, consider a case in which ABC Airline's corporate counsel in Miami is aware of the complicated Resource Conservation and Recovery Act (RCRA) regulations involving the transportation of hazardous waste; meanwhile, an ABC Airline mechanic in New York removes a defective part from an aircraft – which he knows to constitute hazardous waste under RCRA regulations – and forwards it to the Airline's shipping department for proper disposal. Thereafter, an ABC Airline shipping clerk, unaware of either the regulations or the fact that the part is considered to be hazardous waste, decides to mail the part back to the manufacturer for repair without complying with the hazardous waste transportation requirements. Under the above scenario, each and every element of a criminal RCRA violation has been satisfied by ABC's employees, despite the fact that no employee intended to violate – or did violate – the law. Nonetheless, the corporation would be deemed to have knowledge of all of these facts.

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[167] Requiring this type of action against corporate officers, directors, and employees flies in the face of many States' corporate statutes either requiring or allowing indemnification of corporate employees for investigations prior to a formal determination of their guilt or when acting on behalf of the corporation in good faith. *See, e.g.*, Fla. Stat. Ann. § 607.0850 (West 2002). The Justice Department Guidelines attempt to reconcile this conflict only as to those State statutes which make the payment of legal fees of officers under investigation mandatory prior to a formal determination of their guilt. In that event, prosecutors are instructed that "[o]bviously, a corporation's compliance with governing law should not be considered a failure to cooperate." *USACRM, supra* note 151, at § 162 (VI) n.3.

[168] The leading case in this area is United States v. Bank of New England, 821 F.2d 844 (1st Cir. 1987).

It is important to note that the collective knowledge doctrine addresses only a corporation's *knowledge.* It does not address the element of specific intent. Therefore, in specific intent crimes—as opposed to those offenses (like RCRA) requiring only general intent – the element of intent should not be aggregated from several employees to prove corporate intent.[169] Nevertheless, prosecutors in both the federal and state cases against SabreTech attempted to utilize the collective knowledge doctrine to establish the element of specific intent against the corporation. Moreover, the federal authorities went so far as to argue that it was not only the knowledge of SabreTech's employees that could be aggregated to prove corporate intent, but also the information contained in corporate files and manuals, whether or not there was any evidence that employees were aware of those materials.[170]

Criminal sanctions are ineffective to deter behavior that is neither intended nor foreseen. FAA enforcement procedures and remedies are adequate to identify and address these issues. A public policy that prefers to approach problems involving corporate programs and policies in terms of long-term safety instead of short term punishment cannot survive in an atmosphere of punitive redress of technical violations of the law by individuals, acting alone, or in their corporate capacity. Indeed, criminal prosecutions under the collective knowledge doctrine actually serve to undermine and counteract the espoused policies of the USAM with respect to bringing criminal charges against corporations.

E. Degrees of Culpability

Conviction of a criminal offense requires that a certain level of culpability exist in the mind of the accused.[171] Although the labels are often loosely defined, possible degrees of culpability range from no fault up to an intentionally committed act.[172]

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[169] *See* Saba v. Compagnie Nationale Air France, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996); First Equity Corp. of Fla. v. Standard & Poor's Corp., 690 F. Supp. 256, 260 (S.D.N.Y. 1988); United States v. LBS – N.Y., Inc., 757 F. Supp. 496, 501 n.7 (E.D. Pa. 1990).

[170] Taking a similar approach, the Florida state authorities have publicly advanced the position that SabreTech is criminally liable for homicide, despite the fact that no individual SabreTech employees committed a crime.

[171] For a thorough discussion of the varying degrees of culpability, *see generally,* Kolczynski, *supra* note 6, at 12-20.

[172] *Id.*

The greater the degree of negligence, the greater the chance of criminal liability. To be found guilty of committing a crime, an individual generally must act with some degree of criminal intent—*mens rea.*[173]

In connection with aviation-related cases, various standards of criminal intent have supported manslaughter convictions.[174] In *Pritchett v. Florida,* for instance, a manslaughter conviction was upheld where the pilot demonstrated "reckless indifference to the rights of others which is equivalent to an intentional violation of them."[175] In *Iowa v. Bahl,* the court upheld a manslaughter conviction, noting that the use of alcohol provided evidence of the necessary intent to commit a crime.[176]

Typically, simple negligence or carelessness is insufficient to establish the level of intent required for a criminal conviction.[177] For instance, in 1951 case, a military pilot was tried for the deaths of three Maryland residents when his B-25 aircraft crashed into a home after the crew had been forced by a landing gear problem to bail out of the aircraft.[178] The court held

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[173] *Id.* Speaking of the issue of intent as it relates to criminal prosecutions of TCA violations in the Los Angeles area, the regional counsel for the FAA said criminal prosecution was not appropriate because the incidents "are inadvertent and lack criminal intent." Malnic, *supra* note 14, at 1.

[174] Kolczynski, *supra* note 6, at 20-21 (citing C. Torcia, WHARTON'S CRIMINAL LAW § 168 (14th ed. 1979)).

[175] Pritchett v. State, 414 So. 2d 2, 3 (Fla. Dist. Ct. App. 1982). The use of alcohol may also raise the degree of culpability to that of recklessness. State v. Kernes, 262 N.W.2d 602, 606 (Iowa 1978) (reversing manslaughter conviction due to confusing jury instructions combining the terms "recklessly," "heedlessly" and "negligently," where manslaughter conviction may not be based on mere negligence). Although *Kernes* is not in the context of an aircraft accident, it appropriately explains the that prior actions, such as drinking alcoholic beverages, may elevate the resulting incident to a criminal level, by distinguishing them from cases of mere negligence that might result from simple errors in judgment. The use of alcohol has also supported a finding of intentional criminal conduct in lesser cases than manslaughter. In *Ward,* the pilot was found to have "buzzed" a local apartment building, with evidence indicating that he did so under the influence of alcohol. Ward v. State, 374 A.2d 1118 (Md. 1977).

[176] Iowa v. State, 242 N.W.2d 298 (Iowa 1976).

[177] Jones, *supra* note 5, at 10 (stating that there must be gross negligence or "reckless and intentional disregard for the safety of others" to support a criminal conviction); *See, e.g., Bahl,* 242 N.W.2d at 301 (mere negligence is insufficient to support a manslaughter conviction).

[178] State v. Chapman, 101 F. Supp. 335 (D. Md. 1951). The military pilot was placed on trial for the deaths of three Prince George's County, Maryland residents when his unoccupied B-25 bomber crashed into a home. The evidence in the case was to the effect that the decision to abandon the aircraft was made by the pilot only after extensive consultation with military authorities on the

that a conviction for involuntary manslaughter requires a showing of gross negligence in the form of conduct that amounts to wanton or reckless disregard for human life; simple negligence is not enough.[179]

At the heart of the concern over the perceived trend of increased prosecutions is the discomfort with aviation professionals being prosecuted as criminals when they had no intent to commit a crime—that is, when a prosecution is pursued for negligent or reckless conduct. The concern is that their prosecutions may hinder, rather than promote, aviation safety. This concern is particularly troublesome in aviation, where benefits from prosecution under these circumstances are offset by the significant costs associated with the prosecutions. There are several reasons why criminal prosecutions of aviation professionals are not necessary to achieve the goals of aviation safety.

First, aviation accidents are the subject of an established procedure for investigating the circumstances surrounding an accident and a determining its cause. The candor traditionally enjoyed by the NTSB is damaged by the threat of prosecution of aviation professionals for mistakes. It does not matter if this threat does not materialize, since the damage is done by the threat itself. For example, five years after the crash of ValuJet 592, and more than two years after the crash of Alaska Airlines Flight 261, only a single charge of willful failure to train has been upheld in the ValuJet case, and no charges have been brought against Alaska Airlines.[180] It could be argued that the system worked since almost all of those prosecuted and investigated were not actually convicted. But, that argument would ignore the considerable damage that occurs well before convictions are obtained. Even though the individuals and companies were not convicted, aviation safety was damaged by the five years of investigation that preyed on the minds of aviation professionals watching the investigation unfold and asking

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ground, including his fellow pilots and maintenance personnel. The court found that the conduct leading to the decision to bail out did not constitute gross negligence under Maryland law in those circumstances. Indeed, the court noted that "[i]f the resultant deaths were merely accidental or the result of a misadventure or due to simple negligence, or an honest error of judgment in performing a lawful act, the existence of gross negligence should not be found." *Id.* at 341.

[179] *Id.*

[180] AVweb NewsWire, Dec. 24, 2001, *at* http://www.avweb.com/newswire/news0152a.html.

themselves how cooperative they would be if they ever faced an investigation.

Second, ample deterrence against similar future conduct by other similarly situated professionals does not depend on these criminal prosecutions. The threat of legal enforcement action by the FAA has, for decades, provided deterrence to such conduct. This enforcement action may even extend to an individual's ability to perform his job, since the FAA may take enforcement action against the certificates that are a pre-requisite to employment for many aviation professionals. The value added by criminal prosecutions for unintentional conduct does not justify the damage to the ability of NTSB investigators to obtain forthright responses to questions posed in the wake of an aviation accident.

Finally, pilots and mechanics that fly on the aircraft they maintain routinely face the most important deterrent of all to negligent conduct, since they are as likely to be a victim of their negligence as any other individual.

The damage done to aviation safety by prosecutions undertaken where there is no clear intent to commit a crime does not justify the marginal benefit that might result from such prosecutions. This does not mean that there is no role for criminal prosecution in aviation, since such prosecutions continue to be appropriate where there is clear evidence of intent to commit a crime. As noted earlier, there are numerous examples of cases where aviation accidents result from criminal intent. Examples include hijacking and terrorism, drunken flying, and theft of an aircraft. Where this intent does not exist, however, the benefits of prosecution are outweighed by the costs.

The application of criminal laws should be reserved only in cases where there is independent evidence of intentional criminal activity. This standard should be similar to the standards expressed in the NTSB Amendments Act of 2000. In other cases, prosecutors should look to the existing administrative framework to promote aviation safety.

F. The Preemption Issue

Violations of state criminal laws may complicate matters and may further impact aviation safety adversely by permitting state prosecutors to insinuate themselves into federal aircraft accident investigations. In the United States, the existence of federal and state laws which purport to address the same subject

matter raise the issue of federal preemption of state law.[181] In some cases, the federal statute expressly states that preemption does not apply. For example, the regulation requiring drug testing of aviators in the commercial setting states : "The issuance of [these regulations] does not preempt provisions of state criminal law that impose sanctions for reckless conduct of an individual that leads to actual loss of life, injury, or damage to property whether such provisions apply specifically to aviation employees or generally to the public."[182]

In other cases, the intent is not so clear. The Supreme Court outlined its guidance for preemption issues in *Building and Construction Trades Council of Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*[183] A state law is valid in the absence of either an explicit provision in the federal law preempting state law, or evidence, upon review of the "totality of the circumstances that Congress sought to occupy the field to the exclusion of the States."[184]

The issue of preemption in the aviation field was the sole issue raised on appeal in *Ward v. Maryland.*[185] In that case, the Maryland Court of Appeals affirmed the conviction of a pilot for violating a state reckless flying order and ruled that the state law was not preempted by the federal law.[186] The court first looked to the legislative history and concluded there was no express intent of Congress to displace state criminal law through the Fed-

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[181] This constitutional issue is often raised as a result of the power of Congress "To regulate commerce . . . among the several States." U.S. CONST. art. I, § 8. Where a regulation of Congress conflicts with a regulation by the states in the same area, the federal regulation may preempt the state law through the Supremacy Clause. U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."). In areas where Congress does not have an enumerated power to regulate, pursuant to Article I of the Constitution, or in cases where there is no conflict, the state retains its authority to regulate. U.S. CONST. amend X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[182] 14 C.F.R. pt. 121, App. I, XI, (B); *see also* Stuart J. Starry, *Torts at Twenty Thousand Feet: Federal Preemption in Commercial Aviation*, Fall, 1993 Section of Tort & Ins. Practice of the A.B.A. 23 Brief 8 (citing 49 U.S.C. § 1305(a)(1) ([N]o state . . . shall enact or enforce any law . . . relating to rates, routes, or services of any air carrier . . . ")).

[183] Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218 (1993).

[184] *Id.* at 224.

[185] Ward v. State, 374 A.2d 1118, 1121 (Md. 1977).

[186] *Id.* at 1126; Jones, *supra* note 5, at 9.

eral Aviation Act, even when the Act was amended to include criminal penalties in 1961.[187] In fact, the legislative framers said explicitly that the federal law was intended to "be in addition to the State criminal law."[188]

The *Ward* court next looked to whether the state law conflicted with the federal law. They found that the Maryland law "enhances the Congressional purposes . . . by deterring through criminal sanctions" the same offenses prohibited by federal law, which afforded only civil sanctions.[189] Since it did not conflict with federal law, the state reckless flying statute was held to be valid.

The issue of preemption was also raised in *Ohio v. Collins*, addressing the subject of pilot licensing.[190] Ohio law required that the operator of an aircraft possess a valid airman's license and present it upon the demand of a law enforcement officer.[191] Like the *Ward* court, the *Collins* court found that the statutes were valid because they were not expressly preempted by the federal legislation and were not in direct conflict with the legislation.[192] The court went further to note that the Ohio statute strengthened, rather than conflicted with, the federal statute, by providing for criminal sanctions in addition to the federal civil sanctions.[193]

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[187] *Ward*, 374 A.2d at 1124 (referring to 49 U.S.C.A. § 1472(i)-(p)).

[188] *Id.* (quoting 1961 U.S. Code Cong. and Adm. News 2563, 2564).

[189] *Id.* at 1125. The dissenting judges concurred that the imprisonment portion was not preempted, but felt that matters dealing with pilot licensing were subject only to federal regulation. Thus, the state could not prohibit an airman from flying when he holds a federal license since that would provide a conflict with the federal regulation. *Id.* at 1127 (Eldridge, J., dissenting in part). An early New Jersey case held that the state could not simply adopt the federal aviation regulations; the legislature was instead required to delineate the specific rules to be adopted. State v. Larson, 160 A. 556 (N.J. Essex County Ct. 1932). This was distinguished by the court in *Ward* as being a result of the specifics of the New Jersey Constitution that would not allow the legislature to take this approach to adopting the federal standards of aviation. Ward, 374 A.2d at 1125. For a case very similar to the holding of Ward, *see* People v. Valenti, 200 Cal. Rptr. 862, 865 (Cal. App. Dep't Super. Ct. 1984) (holding that federal regulatory system did not preempt the field and preclude state statutes from imposing criminal sanctions).

[190] State v. Collins, 480 N.E.2d 1132 (Ohio Ct. App. 1984).

[191] *Id.* at 1134.

[192] *Id.* at 1135. The court noted that preemption had been found in cases dealing with noise abatement, but did not feel that the subject of pilot licensing was as "pervasive" as the regulation of aircraft noise regulations. *Id.*. The court did not go into any further detail as to why a federal licensing program requiring all aviators to be licensed was not "pervasive."

[193] *Id.*

A conflict over the realm of pilot licensing was also collaterally raised in *Prouse*.[194] As part of the sentence in that case, the district court had precluded the defendants from flying for one year and from carrying passengers for three years.[195] The defendants argued that the power to suspend an airman's license rested exclusively with the FAA and that the court's action represented a suspension by the State of their federally issued license.[196] The appellate court, however, decided that the penalty did not represent an attempt to usurp the domain of the FAA, but rather was "a penalty reasonably related to the nature and circumstance of the offense."[197]

To date, one of the most sweeping preemption decisions was that made by the Third Circuit in *Abdullah v. American Airlines, Inc.*,[198] in which the court held that the Federal Aviation Act completely preempts the field of aviation safety, but allows for state and territorial tort remedies for a violation of the applicable federal standards.[199]

V. CONCLUSIONS AND RECOMMENDATIONS

Federal, state and local criminal laws exist to allow a sovereign state the power to assert authority over unlawful acts committed in the airspace within their respective jurisdictions. Use of this authority, however, must be measured and balanced against the strong policy of maintaining safety in air commerce.

The requirement to maintain safety in the skies justifies the need to ascertain and gather the critical information and facts surrounding every aviation accident or incident. The overall effectiveness of the accident investigation team requires the cooperation of all who have knowledge of the accident, or the circumstances that led to it, even if such cooperation reveals information that possibly could inculpate an individual or corporation criminally. The pressing need for this accident information, combined with its potentially self-incriminating nature, justifies some limited use immunity to ensure full disclosure of all relevant facts to investigators at the earliest possible time in the investigative process. Further, when only uninten-

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194 United States v. Prouse, 945 F.2d 1017, 1026 (8th Cir. 1991).

195 *Id.* at 1026.

196 *Id.*

197 *Id.* (citing 18 U.S.C. § 3583 (1988)).

198 181 F.3d 363 (3d Cir. 1999).

199 *See* 30 SETON HALL L. REV. 403 (1999) for a further discussion of this important case.

tional acts or omissions are involved, criminal punishments generally do not serve a purpose beyond those that can be imposed in administrative civil proceedings.

Criminal laws should be resorted to only in those cases where there is independent evidence of intentional criminal activity, much like the standards now enunciated in the NTSB Amendments Act of 2000. A *prima facie* case of criminal intent should be made, for example, whenever an accident or incident occurs as a result of alcohol or drug use, or as a consequence of the lack of requisite airman certification while piloting an aircraft. The existing administrative framework is sufficient to address the vast majority of acts and omissions, other than those involving criminal *mens rea*, and provides penalties and fines sufficient to deter future behavior and to promote aviation safety.

Given the competing interests of criminal law and civil administrative law, both of which are justifiable means to the common end of punishing wrongdoing and promoting aviation safety, we offer the following recommendations:

1. Aviation safety and security are the paramount considerations following any aviation accident. The determination of probable cause should be the primary focus of every accident investigation, except in those cases where there are clear indications of criminal or terrorist activity as the precipitating cause of the crash.
2. Criminal investigations at the accident scene itself should be initiated only upon a reasonable suspicion that an intentional act was the primary cause of the accident.
3. Criminal investigation of acts of omission should not justify immediate insinuation of criminal investigators into the probable cause of the investigation.
4. Eliminate criminal prosecutions in aviation accidents under 18 U.S.C. § 1001 (which has been interpreted expansively by the courts, in part due to the comprehensive regulatory scheme under which the FAA operates) absent evidence of intentional falsification of a document with the intent to commit or cover up a crime, or to facilitate the commission of a criminal act by an accomplice.
5. Immunity from prosecution should be available to every witness called upon by the NTSB or the FAA to provide factual information deemed necessary to a determination of the causes-in-fact of the accident.
6. We join in the recommendations by Marshall Filler, counsel for the Aeronautical Repair Station Association, made on July 27, 2000, before the Aviation Subcommittee of the House Committee on Transportation and Infrastructure,

chaired by Congressman John Duncan (R-TN) (restated and amplified here):

a. Legislation should be adopted prohibiting the use of any information provided in an NTSB or FAA accident investigation against the provider of that information in a subsequent criminal case, except in a prosecution for perjury or giving a false statement.
b. NTSB, FAA, and the DOJ are urged to jointly develop a policy that provides specific guidance to prosecutors as to when it is appropriate to institute a criminal investigation of a transportation accident. This policy should be based on the premise that criminal prosecution should be selective and undertaken only when it will enhance the safety or security of the flying public and when it will not impede investigations by the NTSB or the FAA into the causes of the accident.

7. Criminal investigation of high visibility accidents, on that basis alone, should be discouraged since the primary goal of accident investigation is safety, not publicity, or the desire to show preferred treatment to a celebrity, or the perceived need to quell public outcries.
8. In general, a State should avoid involvement in an aviation accident investigation, absent the need to vindicate some paramount State interest.
9. The NTSB/FAA must be permitted to gather all evidence first or, at worst, simultaneously with criminal investigators in all cases, including those accidents in which known criminal/terrorist activity is suspected as the precipitating cause of the accident.
10. The aviation community has embraced a system that encourages and facilitates voluntary compliance; this system is more effective than one based on punishment. In furtherance of this principle, the FAA has adopted a new Federal Aviation Regulation (14 C.F.R. § 13.401 (2001)), which codifies enforcement protection for FOQA programs, except for criminal or deliberate acts. This protection should be extended to all voluntary reporting cooperative programs, including ASAP. In addition, FAR 193 protection against the release of voluntarily submitted information, a policy that is strongly supported by the NTSB, should be implemented by the FAA designating information from both the FOQA and the ASAP programs as protected under §193.5.
11. As the ATA recommended at the House subcommittee hearing in July, 2000, Congress should expand the protection of voluntary reporting programs by enacting a "self-critical analysis" privilege. This would codify by statute a mechanism to encourage self-auditing practices by companies to discover

and correct violations *before* they become accidents. The government would not be able to use material generated voluntarily for safety-compliance reasons against company officials. Absent this privilege, a company that voluntarily performs self-audits or creates other self-critical documents could have those documents subpoenaed and used against the company. This, in turn, deters companies from performing these self-critical reviews and limits their ability to improve safety.

12. Limit criminal prosecutions to those cases where *mens rea* based upon criminal intent, transferred intent (i.e., acts of mischief not necessarily directed at the individual/aircraft involved in the accident, but which are designed to cause an accident of some kind), or willful and wanton misconduct is the standard of proof, thereby eliminating mere mistakes, negligence, or gross negligence as a basis for criminal prosecutions.
13. Prosecutors should be more judicious in prosecuting corporations merely for employing individuals suspected of committing acts that contribute to an accident. The *mens rea* standard for such prosecutions should be that possessed by those corporate officers or employees upon whose criminal misdeeds the proposed prosecutions are based. Further, even though corporations can theoretically be criminally responsible even where no individual employee commits a criminal act ("the collective knowledge doctrine"), prosecutors should still adopt a *mens rea* standard for the corporate conduct.
14. Corporate officers, managing employees, and other personnel should be advised of their right to retain counsel where testimony is sought that individuals fear would subject them to self-incrimination. This is consistent with the spirit of the McDade Amendment, as expressed in 28 U.S.C. § 530B. Notification of this right of counsel should be given by the government at the inception of any investigation, rather than waiting until the matter reaches a formal stage later. The attorney should be empowered to negotiate use immunity for the individual prior to giving the incriminating testimony.
15. FAA should continue to petition ICAO to urge its member States to review their laws and regulations to determine whether the possibility of criminal liability is blocking the collection and analysis of information that could prevent accidents.

APPENDIX A

The NTSB Bar Association, Select Committee on Aviation Public Policy members are:

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Mr. Brengle is a 1976 graduate of the University of California, Hastings College of the Law, and a 1968 graduate of the United States Naval Academy. He is a partner in the law firm of Duane Morris LLP, and practices in the areas of admiralty and aviation law, corporate/international law, and civil litigation. Mr. Brengle is admitted to practice in Pennsylvania, New York, and Maryland, and is a member of the Pennsylvania, Philadelphia, Chester County, New York State, New York County, Maryland State, and American Bar associations. He has also been designated a proctor in admiralty by the Maritime Law Association of the United States. Mr. Brengle is a member of the Ports of Philadelphia Maritime Exchange, the Pennsylvania Defense Institute, and the Defense Research Institute. Additionally, he is a member of the Board of Directors of the National Transportation Safety Board Bar Association and the Chairman of its Amicus Curiae Committee, the Airplane Owners and Pilots Association, and the National Business Aviation Association, Inc.

Mr. Brengle is a naval aviator with more than 4,000 hours of total flight time, including 800 instrument hours. He has been rated by the United States Navy in the following aircraft: P-3 Orion (Lockheed 188 Electra); TS2 Tracker (Grumman twin engine), carrier qualified; T28 (North American Texan), carrier qualified; and T34 (Beechcraft Bonanza). Mr. Brengle also has civilian experience in the Piper Aerostar, American Yankee, King Air 200, and Pinto jet aircraft. His civil ratings include Commercial Pilot, Single Engine Land, Multi-engine Land and Instrument ratings. Mr. Brengle is a retired Captain in the United States Navy and a veteran of the Vietnam War. He is the Vice President of the Board of Directors of the Delaware Valley Historical Aircraft Association.

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Mr. Elder is an Associate in the Washington, D.C. office of Hogan & Hartson L.L.P., where he is a member of the Aviation Group. His practice focuses on federal administrative matters, with an emphasis on aviation and general transportation issues. His practice includes advising clients on FAA certification, maintenance and continuing airworthiness, operations, security, hazardous materials transportation regulatory issues, and representation of clients in FAA civil penalty and certificate enforcement actions related to these issues. He represents a broad spectrum of clients that include foreign and domestic air carriers, other aircraft operators, pilots, repair stations, aerospace manufacturers, airports, airport tenants, and various governmental organizations. He also works in conjunction with members of the firm's White Collar Defense Group, representing aviation clients in civil and criminal government investigations involving federal aviation safety laws, hazardous materials transportation laws, and other federal laws.

Mr. Elder graduated with honors from the United States Naval Academy in 1980, and received his law degree, *cum laude*, from the Georgetown University Law Center in 1997. At Georgetown, he served as an Associate Editor of the American Criminal Law Review. He joined Hogan & Hartson in 1997.

Mr. Elder is a member of the Maryland and District of Columbia Bars. He is also a member of the National Transportation Safety Board Bar Association, the Lawyer Pilots Bar Association, and the Federal Bar Association. Mr. Elder was a naval aviator, and is retired from the U.S. Naval Reserve. He holds both an FAA Airline Transport Pilot certificate and an FAA Flight Instructor certificate, and is a former commercial pilot with a major air carrier.

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Darrell Green is a Senior Contract Administrator for the Air Line Pilots Association (ALPA) in Memphis, Tennessee. His duties include administration of the collective bargaining agreement; assisting with negotiations; handling of grievances (contractual, discipline, and discharge proceedings); and representation of individual pilot members in actions involving the Federal Aviation Administration (FAA) (airman's license suspensions/revocations), and the National Transportation Safety Board (NTSB) (safety investigation, including incidents or accidents). Mr. Green is a panel attorney for the Aircraft Owners & Pilots Association and is the Committee Chairman of the NTSB Bar Association's Select Committee on Aviation Public Policy. He has a diploma in Aeronautical Engineering Technology from Southern Alberta Institute of Technology, a Bachelor of Science degree in Professional Aeronautics from Embry-Riddle Aeronautical University, and a Doctor of Jurisprudence from Texas Tech University School of Law. He possesses a Canadian Airline Transport rating and a U.S. Airline Transport Pilot rating with a total of 8000 hours flight time. Immediately prior to joining the FEDEX PILOTS ASSOCIATION in January of 1998 (which merged with ALPA in June 2002) he had a private practice in Houston, Texas, with an emphasis in aviation. Prior to private practice and immediately after graduation from law school, Mr. Green spent two years working for a maritime and aviation insurance defense firm in Houston.

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Mr. Hettinger received his BA and JD degrees from Baylor University and spent the summer of 1992 in an LLM program at Georgetown University Law Center. His thirty-three year career as legal counsel with the Federal Aviation Administration included tours as Regional Counsel for the Northwest and Southwest Regions, and was concluded when he retired from the government in 1994 as Assistant Chief Counsel for Enforcement in Washington. As Assistant Chief Counsel, he provided executive direction over the Appellate, Policy & Evaluation and Special Programs Branches and national oversight over all of the enforcement appeals to the Administrator, the full NTSB and the United States Courts of Appeals. He is a member of the Texas Bar and currently serves as a consultant to the aviation practice group at the Winstead firm.

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Following his graduation from Seton Hall University School of Law in 1974, Mr. Raskin served a federal judicial clerkship in New Jersey. Thereafter, Mr. Raskin held various positions within the United States Department of Justice, including Assistant U.S. Attorney for the District of New Jersey; Special Attorney with the Organized Crime and Racketeering Section assigned to the Miami Strike Force; and Chief of the Criminal Division for the U.S. Attorney's Office for the Southern District of Florida, where he supervised all criminal prosecutions and appeals in that federal district.

Mr. Raskin has been in the private practice of law since 1982, specializing in the area of federal white-collar criminal defense and related civil and administrative proceedings. Over the years, he has represented numerous airlines, aircraft repair stations, and pilots during the course of criminal and grand jury investigations. He currently represents, among other aviation clients, SabreTech, Inc., in the federal and state of Florida criminal cases arising from the crash of ValuJet Flight 592.