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Aviation and Aerospace Law

WILLIAM G. SCHMIDT

I. Summary of Aviation Law Developments

The year 1996 was eventful for attorneys who practice air and space law. At the end of 1995, the Federal Aviation Administration (FAA) announced that it would modify flight safety standards to impose more stringent requirements on commuter airlines and used 1996 to advance the process which will lead to implementation. In January, the U.S. Supreme Court issued its ruling in *Zicherman v. Korean Airlines*, 116 S. Ct. 629 (1996), holding that plaintiffs in a suit for damages filed under Article 17 of the Warsaw Convention are entitled to recover damages only for "legally cognizable harm," that domestic law must be applied to determine who may recover and to what extent, and, finally, that the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*, is U.S. domestic law which applies to the Korean Airlines Flight 007 disaster and it precludes recovery of nonpecuniary damages such as for loss of society.¹

On May 11, 1996, ValuJet Flight 592 crashed into the Florida Everglades, killing all 110 people on board. As a result of this crash, the FAA subjected ValuJet and other discount airlines to intense scrutiny and the National Transportation Safety Board (NTSB) ultimately decided to begin work on new rules which will require heat sensors, smoke detectors, and fire suppression systems in aircraft cargo holds.² The FAA was criticized for its conduct before and after the ValuJet crash and FAA Administrator David R. Hinson resigned in November 1996.³ On July 17, 230 lives were lost when Trans World Airlines Flight 800 exploded shortly after

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1. Robert Davis, *Small Carriers Decried Cost of Implementation*, USA TODAY, Int'l Ed., Dec. 14, 1995, at 1A.

2. *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996). For an excellent article analyzing the impact of *Zicherman v. Korean Air Lines*, see Andrew J. Harakas, *Loss of Consortium after Zicherman v. Korean Air Lines*, THE AIR AND SPACE LAW., Fall 1996, at 3.

3. N.Y. Times News Service, *Department to Seek Fire-Safety Rules for Air Cargo Holds*, COLORADO SPRINGS GAZETTE-TELEGRAPH, Nov. 16, 1996, at A7; Robert L. Jackson, *Industry to Install Detectors on Jets*, THE DENVER POST, Dec. 13, 1996, at A1.

departing John F. Kennedy International Airport en route to Paris. In spite of extensive efforts, searchers have not located all of the wreckage and the NTSB is still considering several theories to determine the cause of this crash.⁴ While the NTSB worked to discover the reason TWA Flight 800 crashed, the FAA issued orders that required airlines flying the Boeing 737 to conduct more inspections of systems which control the rudder movement and, on January 15, 1997, took more stringent action by mandating changes to the rudder system which Boeing will perform at an estimated cost of \$124 million.⁵ These orders were issued in response to an NTSB report in January which considered pilot reports and the crashes which occurred on March 3, 1991, and September 8, 1994, when a 737 was on final approach to the airports serving Colorado Springs, Colorado, and Pittsburgh, Pennsylvania.⁶ The ValuJet Flight 592 and TWA Flight 800 crashes made 1996 the year in which more passengers lost lives while flying on commercial jets than in any previous year.⁷ With three weeks remaining, Airclaims, a London-based company that tracks loss of life on commercial aircraft, reported that 1,187 passengers had been killed in 1996, surpassing the old record of 1,169.⁸ Flight Safety Foundation, an Alexandria, Virginia, organization, attributed the loss, in part, to the fact that more people are flying and observed that flying remains one of the safest modes of travel. The aviation year ended when U.S. District Court Judge William Moore imposed one of the harshest sentences yet against a passenger who attacked a crew member: 51 months in jail, 200 hours of community services, mandatory drug and alcohol testing, and a \$611.35 fine to compensate for the cost of flying the plane back to its point of departure. The passenger had grabbed a flight attendant, held her against the cockpit door, and pounded on the door near her head after she refused to serve him a drink. The passenger pleaded guilty to one count of interfering with a crew member.⁹

II. Summary of Space Law Developments

Important events also happened in space during 1996. National Aeronautics and Space Administration (NASA) officials continue to make progress towards the first launch of International Space Station components in 1997. Astronaut Shannon Lucid set an endurance record for a U.S. female astronaut while flying on board the Mir Space Station. Analysis conducted on a meteorite that was found years earlier in Antarctica suggested that Mars once supported life, and NASA renewed the initiative to search for life when it successfully launched the Mars Global Surveyor on November 7 and the Mars Pathfinder on December 4.¹⁰ The Russians were not as successful and lost a space vehicle which was also launched on a mission to Mars

4. *FAA Chief Leaving Legacy*, COLORADO SPRINGS GAZETTE-TELEGRAPH, Nov. 11, 1996, at A5.

5. Matthew L. Wald, *U.S. Agency Says a Defect in 747s Could Ignite Jets*, N.Y. TIMES, Dec. 14, 1996, at A1.

6. *New FAA Rules Exclude Restrictions on 737 Rudders*, COLORADO SPRINGS GAZETTE-TELEGRAPH, Aug. 24, 1996, at A1; and *FAA Orders Changes in Boeing Rudders*, COLORADO SPRINGS GAZETTE-TELEGRAPH, Jan. 16, 1997, at A1. The new rules require Boeing to redesign the power control unit so that the rudder cannot make sudden movements or jam, replace the yaw damper mechanism, reduce hydraulic pressure in the rudder limiter, and redesign and install bolts on the rudder control rod.

7. *New FAA Rules Exclude Restriction on 737 Rudders*, COLORADO SPRINGS GAZETTE-TELEGRAPH, Aug. 24, 1996, at A1.

8. *This Year's Plane Crash Death Set High Mark*, COLORADO SPRINGS GAZETTE-TELEGRAPH, Dec. 10, 1996, at A7.

9. *Id.*

10. *Skies Getting Unfriendlier for Airlines*, COLORADO SPRINGS GAZETTE-TELEGRAPH, Dec. 26, 1996, at A13.

when the rocket that boosted it into space malfunctioned. Finally, scientists announced the discovery of water on the moon and, on January 9, 1997, Motorola launched the first of sixty-six satellites that will be part of its Iridium system for low-earth orbit communications.

As these events were occurring, the House of Representatives passed the Space Commercialization Act of 1996 on September 17;¹¹ the president issued his long-awaited national space policy two days later. Three weeks later he signed Public Law No. 104-265¹² *inter alia*, to make improvements in the FAA and fund its operations, to promote aviation safety, and to improve the system of assistance which is provided to people who lose loved ones in commercial aircraft accidents. This article will look at important provisions of Public Law No. 104-265 and the new space policy and discuss their probable impact on air and space law.

III. Public Law No. 104-264

Public Law No. 104-264, the Federal Aviation Reauthorization Act of 1996, is a compilation of several bills which Congress considered in 1996 to address issues in aviation law. It consists of thirteen titles and more than 120 sections. Title I amends various sections of 49 U.S.C. to permit use of Airport and Airway Trust Fund money to "acquire, establish, and improve air navigation facilities"¹³ as well as to fund FAA operations (\$5,158,000,000 in fiscal year 1997; \$5,344,000,000 in fiscal year 1998).¹⁴ Section 121 changes the formula that is used to determine the amount that will be paid to primary airports that provide commercial passenger services and to cargo only airports under 49 U.S.C. Section 47114 to finance operations.¹⁵ Section 147 amends 49 U.S.C. Section 47128 by increasing the number of states which can qualify under the State block grant pilot program (from seven to eight in fiscal year 1997; from eight to nine in fiscal year 1998).¹⁶ Section 148 authorizes the Secretary of Transportation to "carry out a demonstration program" that encourages innovative approaches to fund airport development,¹⁷ and Section 149 establishes a pilot program on private ownership of airports.¹⁸

Public Law No. 104-264, Title II addresses FAA reform. Entitled the "Air Traffic Management System Performance Improvement Act of 1996," Title II establishes congressional findings that address the role of the FAA and the requirement for reform. It clarifies the relationship between the Secretary of Transportation and the FAA Administrator,¹⁹ including the power of the Administrator to issue regulations,²⁰ "appoint, transfer, and fix the compensation of . . . officers and employees,"²¹ conclude contracts,²² "use or accept the services, equipment, personnel, and facilities of any other Federal agency,"²³ purchase or lease property,²⁴ and

11. John N. Wilford, *U.S. Launches Second Craft on a Mission to Study Mars*, N.Y. TIMES, Dec. 5, 1996, at A8.

12. H.R. 3936, 104th Cong. (1996). <<http://thomas.loc.gov>>.

13. Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-265 (1996).

14. Department of Transp. and Related Agencies Appropriations Act of 1997, Pub. L. No. 104-205, 110 Stat. 2951, 2954 (1996).

15. *Id.* § 103.

16. *Id.*

17. *Id.* § 147.

18. Federal Aviation Reauthorization Act, *supra* note 13, § 148.

19. *Id.* § 149.

20. *Id.* § 223.

21. *Id.* § 224.

22. *Id.* § 225.

23. *Id.* § 226.

24. *Id.* § 227.

receive "unobligated balances and unexpended balances from other Federal agencies."²⁵ To ensure industry input on these issues, Title II also requires the Administrator to establish a Management Advisory Council with fifteen members representing government and industry which "shall provide advice and counsel to the Administrator on issues which affect or are affected by the operations of the Administrator."²⁶

The process the FAA uses to acquire goods and services attracted congressional interest in 1996 and Section 251 requires the Administrator to "employ outside experts to provide an independent evaluation of the effectiveness of the Administration's acquisition management system."²⁷ Problems with the initiative to modernize the U.S. air traffic control system also prompted Congress to establish standards for terminating acquisition programs that are over budget, do not meet performance goals, or have not been delivered on time.²⁸

Section 253 will be of interest to labor law attorneys as it establishes the rules the Administrator must follow when "developing and making changes to the personnel management system initially implemented . . . on April 1, 1996."²⁹

Title II, Subtitle C was crafted to "provide a financial structure for the Administration so that it will be able to support future growth in the national aviation and airport system, . . . to review existing and alternative funding options, [and] to ensure that any funding will be dedicated solely for the use of the Administration."³⁰ Section 272 authorizes the Administrator to "establish a schedule of new fees" to be collected for performing "air traffic control and related services," subject to the requirement to publish that schedule in the *Federal Register* and consider public comment.³¹ It also requires the Administrator to "contract with an entity independent of the Administration and the Department of Transportation to conduct a complete independent assessment of the financial requirements of the Administration through the year 2002"³² and establishes a National Civil Aviation Review Commission which is composed of twenty-one members representing government and industry to study and report on aviation safety and funding issues.³³

Title IV mandates what is arguably the most important change for the FAA. It eliminates the dual mandate of ensuring aviation safety *while* promoting, encouraging, and developing civil aviation by adding the following statement to 49 U.S.C. Section 40101(d): "assigning, maintaining, and enhancing safety and security [are] the highest priorities in air commerce."³⁴ Because of this change, aviation safety and security should now be the only test by which FAA policies and procedures are measured.

Public Law No. 104-264 addresses other issues that may be of interest to aviation lawyers or pilots. Section 278 addresses the impact of deregulation on service to rural communities by requiring the FAA to use at least \$50,000,000 of funds it receives each fiscal year to ensure the survival of rural air service.³⁵ Title III addresses airport security and requires the

25. *Id.* § 228.

26. *Id.* § 229.

27. *Id.* § 230.

28. *Id.* § 251.

29. *Id.* § 252.

30. *Id.* § 253.

31. *Id.* §§ 271-278.

32. *Id.* §§ 272 and 273.

33. *Id.* § 274(a).

34. *Id.* § 274(b).

35. *Id.* § 401.

Administration and other agencies to conduct or commission studies which will show the state of airport security and make recommendations on changes and improvements which should be made.³⁶ This title also requires the FAA "to certify companies providing security screening and to improve the training and testing of security screeners through development of uniform performance standards,"³⁷ to require criminal history records checks of people who work in airport security positions,³⁸ and to carry out joint threat and vulnerability assessments.³⁹ Pilots will probably approve of Section 402 which gives the FAA more authority to protect "voluntarily-provided safety or security related information" from disclosure⁴⁰ but will not like Title V which requires air carriers to conduct more extensive background checks before they hire pilots.⁴¹ People seeking access to information about aircraft accidents should benefit from Section 407 which requires the FAA and NTSB to "develop a system for classifying air carrier accident data maintained by the [NTSB]."⁴² Title VI requires the Administrator to revoke the certificate of any pilot in command of an aircraft who allows a person who does not possess a valid private pilot's certificate and a medical certificate issued by the FAA to fly the aircraft if the pilot in command "knows or should have known that the individual is attempting to set a record or engage in an aeronautical competition or aeronautical feat," but Title IV defers Title VI decision of whether children should be prohibited from flying aircraft by requiring that the FAA Administrator to study and report on this issue within six months.⁴³ This section is a direct reaction to the accident on April 11, 1996, in Cheyenne, Wyoming, in which Jessica Dubroff, Jessica's father, Lloyd, and her flight instructor, Joe Reid, were killed.⁴⁴

Families who lose loved ones in an aircraft accident should benefit from Title VII. Title VII is Congress's reaction to the complaints it received from family members after the crash of TWA Flight 800. Those complaints described a system of notification and support that was fragmented and Title VII is Congress's attempt to address this problem. Under Title VII, the NTSB is given the "primary Federal responsibility for facilitating the recovery and identification of fatally-injured passengers" [and to] "designate an independent nonprofit organization, with experience in disasters and post-trauma communication with families, which shall have primary responsibility for coordinating the emotional care and support of the families of passengers" when an aircraft accident occurs within the United States and involves a domestic or foreign air carrier and there is major loss of life.⁴⁵ Attorneys, air carriers, and insurance companies may not like Title VII because it provides that

[i]n the event of an accident involving an air carrier providing interstate or foreign air transportation, no unsolicited communication concerning a potential action for personal injury or wrongful death may be made by an attorney or any potential party to the litigation to an individual injured in the accident, or to a relative of an individual involved in the accident, before the 30th day following the date of the accident.⁴⁶

36. Rural Air Service Survival Act, *id.* § 278.

37. *Id.* §§ 301 and 303.

38. *Id.* § 302.

39. *Id.* § 304.

40. *Id.* § 310.

41. *Id.* § 402.

42. Pilot Records Improvement Act of 1996, *id.* § 502.

43. *Id.* § 407.

44. Child Pilot Safety Act, *id.* § 602.

45. *Pilots Group Supports Ban of Young Flyers*, COLORADO SPRINGS GAZETTE-TELEGRAPH, April 23, 1996.

46. Federal Aviation Authorization Act of 1996, *supra* note 13, § 702.

Finally, airport managers will appreciate Title VIII because it prohibits the prior practice by some municipalities of diverting revenue derived from airport operations to other programs. Section 804 of Public Law No. 104-264 provides: "Local taxes on aviation fuel (except taxes in effect on December 30, 1987) or the revenues generated by an airport that is the subject of Federal assistance may not be expended for any purpose other than the capital or operating costs of (1) the airport; (2) the local airport system; or (3) any other local facility that is owned or operated by the person or entity that owns or operates the airport that is directly and substantially related to the air transportation of passengers or property."⁴⁷ (Section 804 allows limited exceptions.)

Public Law No. 104-264 is a major step forward in aviation law. Although not everyone will like all the solutions which Congress adopted to address problems which existed in aviation law at the beginning of 1996, no one can dispute the fact that in enacting the Federal Aviation Reauthorization Act of 1996, Congress addressed most of the important issues in aviation law which existed when the year began. The task ahead is to implement the law effectively and efficiently so that the airline industry and the flying public derive full benefit.

IV. Space Policy

On September 19, 1996, the White House Science and Technology Council released the Clinton administration's *Fact Sheet on National Space Policy*.⁴⁸ This policy supersedes the national space policy which was approved by President Bush on November 2, 1989. The Clinton administration promises to "maintain" the leadership role which the United States has held by "supporting a strong, stable and balanced national space program that serves our goals in national security, foreign policy, economic growth, environmental stewardship and scientific and technical excellence" while pursuing "greater levels of partnership and cooperation in national and international space activities and work with other nations to ensure the continued exploration and use of outer space for peaceful purposes."⁴⁹ The Clinton policy retains the "division of authority" approach which was a feature of President Bush's policy,⁵⁰ making the National Science and Technology Council "the principal forum for resolving issues related to national space policy."⁵¹

NASA remains "the lead agency for research and development in civil space activities" and is charged, *inter alia*, with the following responsibilities: (1) developing and operating the International Space Station (ISS); (2) working with private industry on programs that will allow national leaders to make decisions about the "next-generation reusable launch system" by the end of this decade; (3) undertaking "a sustained program to support a robotic presence on the surface of Mars by the year 2000; (4) beginning a long-term program to "identify and characterize planetary bodies in orbit around other stars;" and (5) using space resources to study and improve

47. *Id.*

48. *Id.* § 804.

49. The text of the *Fact Sheet* can be found at 66 Fed. Cont. Rep. 290-94 (Sept. 23, 1996). An analysis of the new policy appears at *id.* at 278-79.

50. *Id.* at 290.

51. President Clinton's *Fact Sheet on Space Policy* provides that "The U.S. Government will maintain and coordinate separate national security and civil space systems where differing needs dictate." *Id.* President Bush's *Fact Sheet on U.S. National Space Policy* read as follows: "United States space activities are conducted by three separate and distinct sectors: two strongly interacting governmental sectors (Civil and National Security) and a separate, nongovernmental Commercial Sector."

human knowledge about the Earth.⁵² President Clinton's policy requires development and use of smaller, more efficient spacecraft purchased, if possible, from the private sector.⁵³ The policy also instructs NASA to "[m]ake use of relevant private sector remote sensing capabilities, data, and information products" and to "[s]eek to privatize or commercialize its space communications operations no later than 2005."⁵⁴ Procurement law and policy are to be reviewed and "innovative" practices adopted.⁵⁵ NASA is not the only government agency that will have a leadership role in civil space activities under the Clinton space policy. The policy gives the Department of Commerce (acting through the National Oceanic and Atmospheric Administration) "lead responsibility for managing Federal space-based civil operational Earth observations," tasks the Department of the Interior (acting through the U.S. Geological Survey) to "maintain a national archive of land remote sensing data and other surface data," and requires the Department of Energy (DOE) to "maintain the necessary capability to support civil space missions" by conducting research on space energy technologies and space radiation.⁵⁶

As mentioned, President Clinton's space policy separates civil space activities and national security space activities. Under the new policy, national security activities "will be overseen by the Secretary of Defense and the Director of Central Intelligence (DCI) consistent with their respective responsibilities as set forth in the National Security Act of 1947, as amended, other applicable law, and Executive Order 12333."⁵⁷ Other agencies are required to assist or are given specific responsibilities. For example, the DOE is required "with DoD, ACDA (the Arms Control and Disarmament Agency), and the DCI [to] carry out research and development of technologies needed to effectively verify international agreements to control special nuclear materials and nuclear weapons."⁵⁸ The Clinton policy also makes a commitment to "pursue a ballistic missile defense program to provide for enhanced theater missile defense capability later this decade [and] a national missile defense deployment readiness program as a hedge against the emergence of a long-range missile threat to the United States."⁵⁹

President Clinton's policy also addresses commercial space activities. It retains the Bush policy of "purchas[ing] commercially available space goods and services to the fullest extent feasible" while avoiding "activities with commercial applications that preclude or deter commercial space activities except for reasons of national security or public safety."⁶⁰ It also establishes a broad standard of pursuing U.S. commercial space objectives "without the use of direct Federal subsidies."⁶¹ Commercial use of space will be encouraged by facilitating "stable and predictable U.S. commercial sector access to appropriate U.S. Government space-related hardware, facilities and data."⁶² Under President Clinton's policy, "[f]ree and fair trade in commercial space launch services is a goal of the United States" and existing space launch agreements will be replaced with agreements based on open competition.⁶³ The policy encourages elimination

52. 66 Fed. Cont. Rep. 290 (Sept. 23, 1996).

53. *Id.*

54. *Id.*

55. *Id.* at 291.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 291-92.

61. *Id.* at 292.

62. *Id.*

63. *Id.*

or amendment of U.S. law which discourages commercial space activities as well as technology transfer to the private sector.

Finally, the Clinton policy addresses a number of important space-operations issues which are grouped under the heading of "Intersector Guidelines": (1) international cooperation; (2) space transportation; (3) space-based Earth observation; (4) nonproliferation, export controls, and technology transfer; (5) arms control; (6) space nuclear power; (7) space debris; and (8) government pricing.⁶⁴

While President Clinton's *Fact Sheet on National Space Policy* was being readied for release, the House of Representatives was adopting its position on commercial space activities by passing the Space Commercial Promotion Act of 1996.⁶⁵ Science Committee Chair Robert S. Walker (R-PA) introduced this bill on August 1, 1996, and successfully managed its progress through committee hearings until it was approved by the full House on September 17. On September 18, it was sent to the Senate. If passed by the Senate without change and signed by the president, the act would (1) require NASA to study possibilities for commercial use of the International Space Station; (2) "amend federal law to include reentry vehicles and launch and reentry operations within the scope of commercial space launch activities;" (3) waive many existing restrictions on post-government employment so that NASA employees could more easily join the United Space Alliance (the joint venture between Rockwell and Lockheed Martin which is the prime contractor for space shuttle operations); (4) direct NASA to purchase more remote sensing data from private sources; (5) encourage the president to promote wider, international use of the U.S. Global Positioning System; (6) "[r]equire the U.S. government to procure launch services from U.S. commercial providers to the maximum practicable extent, and require competitive bidding for space transportation services; and (7) establish new guidelines for government use of excess intercontinental ballistic missiles."⁶⁶ The Clinton administration has expressed concern about the provision which would make it easier for NASA employees to move from NASA to the Space Alliance.⁶⁷

The Clinton space policy and the Space Commercialization Promotion Act have moved the debate about space policy forward. The former helps eliminate any uncertainty which may have deterred government officials and corporate leaders from moving more quickly to advance policy or programs. The latter gives private industry the sense that Congress is interested in promoting commercial activities in space. These policy pronouncements lay a foundation which should encourage commercial use if important programs such as ISS show that the rewards justify the cost and the risk.

64. *Id.*

65. *Id.* at 293-94.

66. H.R. 3936, 104th Cong. (1996). For a brief discussion of the bill, see 66 Fed. Cont. Rep. 121-22 and 279 (Sept. 23, 1996). A summary of the bill can be found at *Thomas Legislative Information on the Internet* (last modified Feb. 13, 1997) <<http://thomas.loc.gov>>.

67. *Id.*