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AVIATION SECURITY AND PAN AM FLIGHT 103: WHAT HAVE WE LEARNED?*

NANCY JEAN STRANTZ**

I. INTRODUCTION

THAT CHANGE comes more readily from desperation than inspiration has never been more evident than in the case of the Pan American World Airways Flight 103 (Pan Am Flight 103), which blew up over Lockerbie, Scotland on December 21, 1988. The lives of two hundred forty-three passengers and sixteen crew members were lost.

This article is about the ill-fated Pan Am Flight 103 and of the changes that have followed it. These changes are, by no means, complete. Pan Am Flight 103 has been the catalyst for several bills (House bills for the proposed Airport Technology and Research Act of 1989 and the proposed Aviation Security Act of 1989 and companion House and Senate bills for the proposed Aviation Security Improvement Act of 1990¹) and continues to indirectly af-

* The legislation and information discussed in this article reflects sources as of Oct. 19, 1990.

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¹ Airport Security Technology and Research Act, H.R. 2365, 101st Cong., 1st Sess. 135 CONG. REC. H5881 (daily ed. Sept. 25, 1989) [hereinafter Airport Technology and Research Act]; Aviation Security Act, H.R. 1659, 101st Cong., 1st

fect federal transportation appropriations and budgets.² The Pan Am Flight 103 tragedy has also rekindled the debate over reform of the international Warsaw Convention,³ and is responsible for administrative reorganization within the Federal Aviation Administration (FAA) to increase domestic government accountability. The degree of public involvement in aviation security is also beginning to change as the living victims of Pan Am Flight 103 (the friends and family of those who died) persist in their efforts to make airlines warn passengers of credible bomb threats.

In a broader sense, Pan Am Flight 103 is a lesson in law-making: a case study of how the human element is easily lost in hearings, budget debates, and cost-benefit analyses. The resulting legislative initiatives expose our predisposition to dogmatic reliance on technology, despite glaring deficiencies and exorbitant price tags. Most importantly, Pan Am Flight 103 is, for those who listen, a caution against the very thing that made the tragedy at Lockerbie possible: the abdication of personal responsibility in favor of government "protection."

II. PAN AM FLIGHT 103: THE HORROR

Pan Am Flight 103 originated in Frankfurt, West Germany. It departed Frankfurt at 4:54 p.m. on Wednesday, December 21, 1988. At London's Heathrow Airport, the jet made a routine stop to take on more passengers destined for New York City's Kennedy Airport. At 6:25 p.m., the flight departed London. Only thirty-nine minutes

Sess. (1989) [hereinafter Aviation Security Act]; Aviation Security Improvement Act, H.R. 5200, 101st Cong., 2d Sess., 136 CONG. REC. H8469 (daily ed. Oct. 1, 1990) [hereinafter House Aviation Security Improvement Act]; S. 2822, 101st Cong., 2d Sess., 136 CONG. REC. S9201 (daily ed. June 28, 1990) (companion bill to H.R. 5200) [hereinafter Aviation Security Improvement Senate Companion Bill].

² For a discussion of funding issues, see *infra* notes 169-218 and accompanying text.

³ Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted following* 49 U.S.C. app. § 1502 (1988).

later,⁴ over the small Scottish town of Lockerbie just twenty-four miles from the English border, the jet exploded. During descent and upon impact, the wreckage destroyed a dozen homes, killing eleven of Lockerbie's estimated 2500 residents. Exploding aviation fuel threw a 300 foot fireball skyward, leaving behind a scar on the earth twenty feet deep.⁵ Wreckage and body parts were strewn over a vast area of soggy Scottish countryside.⁶ In a matter of minutes, Pan Am Flight 103 became both the "worst air disaster in British history"⁷ and the highest fatality aviation incident in American history.

As is typical in an aircraft explosion, Pan Am Flight 103's crew sent no distress signal before the crash.⁸ The emanation of a strange orangy-yellow glow in the sky and the wide distribution of debris indicated the plane came apart before ground impact,⁹ leading to immediate speculation that the flight had been sabotaged. It is now virtually certain that a bomb, concealed in a Toshiba radio-cassette recorder and hidden in a suitcase, caused the explosion.¹⁰

⁴ Reports of the exact time vary. D. JOHNSTON, *LOCKERBIE: THE TRAGEDY OF FLIGHT 103*, at 230-31 (1989); Phillips, *A Doomed Flight Home*, *MACLEAN'S*, Jan. 2, 1989, at 46; Platt, *The Warnings That Weren't; New Revelations About the Tragedy of Pan Am 103*, *NEWSWEEK*, Mar. 27, 1989, at 30.

⁵ D. JOHNSTON, *supra* note 4, at 7.

⁶ Wreckage from the airplane was scattered over 845 square miles. *British Government's Report on Pan Am 103 Bombing Suggests Toughening Aircraft Structure and Systems*, *AIR SAFETY WEEK*, Sept. 17, 1990, at 1 [hereinafter *British Report*]. Winds carried some debris as far as the coast of England. *REPORT OF THE PRESIDENT'S COMM'N ON AVIATION SECURITY AND TERRORISM* (May 15, 1990) [hereinafter *PRESIDENT'S COMM'N REPORT*].

⁷ D. JOHNSTON, *supra* note 4, at 63 (noting statements by British Transport Secretary Paul Channon).

⁸ Hughes, *Safety Experts Cite Similarities Between DC-8, 747 Crashes*, 130 *AVI. WEEK & SPACE TECH.*, Feb. 6, 1989, at 58. However, on September 11, 1990, the British Transport Department's Air Accidents Investigation Branch released a report saying the digital flight recorder on Flight 103 made no record of the explosion, but simply stopped at 19:02:50 with "a sudden, loud sound," which could have either been from the explosion, or from the sudden destruction of the plane. The report recommends manufacturing improvements for aircraft digital flight (data) recorders and cockpit voice recorders to ensure data recovery after power or pressure loss. See *BRITISH REPORT*, *supra* note 6, at 1-2.

⁹ Hughes, *supra* note 8, at 58.

¹⁰ On December 28, 1988, the Department of Transport announced traces of

Investigation by Scottish, British, West German, and United States authorities determined that the bomb's detonator and timing device were probably made near Damascus, Syria by or for the Popular Front for the Liberation of Palestine-General Command (PFLP-GC).¹¹ The Semtex plastic explosive most likely originated in Krusevac, Yugoslavia not far from the Bulgarian border. These components were smuggled into Frankfurt and later assembled and fitted into a Toshiba radio-cassette recorder, probably by a known Palestinian bombmaker or by Libyan intelligence agents paid by the PFLP-GC.¹² The bomb was transported to Sliema, Malta and stuffed into a copper-colored suitcase destined for Frankfurt via Air Malta Flight KM180. In Frankfurt, it was transferred to the Boeing 727 that would fly the first leg of Pan Am Flight 103 to London, England. At Heathrow Airport, the bag was transferred either interline or by passenger¹³ to

explosives had been found in the wreckage. *Airports, Airlines Tighten Security as Probers Cite Bomb in Pan Am Crash*, AIR SAFETY L. & TECH., Jan. 10, 1989, at 2; see also Duffy, *On the Trail of Terror*, U.S. NEWS AND WORLD REP., Nov. 13, 1989, at 44. On September 11, 1990, Britain's Civil Aviation Authority reported its findings that an improvised bomb in the jet's left forward cargo hold exploded at 9500 meters, producing a large hole in the fuselage structure and buckling the main cabin floor. The pressure differential propagated large cracks running outward from the hole. With the explosion, the structural identity of the fuselage was destroyed. Consequently, the nose and flight deck area separated from the jet within seconds, and the remaining portions of the aircraft disintegrated on descent. *Build Bomb-Proof Planes, Lockerbie Report Says*, Calgary Herald, Sept. 12, 1990, at A16, col. 1; *British Report*, *supra* note 6, at 2.

¹¹ Duffy, *supra* note 10, at 44-46; *Frontline: The Bombing of Pan Am 103* (WGBH-TV television broadcast, Jan. 23, 1990) (transcript on file at office of *Journal of Air Law & Commerce*; *Frontline: Tracking the Pan Am Bombers* (WGBH-TV television broadcast, Nov. 28, 1989) (transcript on file at office of *Journal of Air Law & Commerce*); D. JOHNSTON, *supra* note 4, at 101-16, 143-63.

¹² *Frontline: Tracking the Pan Am Bombers*, *supra* note 11. Wines, *New Lockerbie Evidence Involves Libya*, Tampa Tribune, Oct. 10, 1990, at B1, col. 1.

¹³ The term "interline" refers to baggage transfer at an airport directly between air carriers. Some uncertainty exists as to whether the suitcase could have been placed on the plane by someone with access to the baggage compartment, but most accounts assume the bomb entered the baggage system via an unsuspecting passenger. See D. JOHNSTON, *supra* note 4, at Postscript; Duffy, *supra* note 10. New evidence suggests a man may have unknowingly had the suitcase he was carrying in connection with a DEA operation exchanged with the suitcase containing the bomb. *Calgary Newshour* (ABC television broadcast, Oct. 31, 1990).

the Boeing 747 jumbo jet that was to proceed to New York City.

III. THE AFTERMATH

A. *Legal Liability*

The investigation of the Pam Am Flight 103 disaster has resulted in a frenzy of finger-pointing and speculation. Complaints range from the lack of airport security in Frankfurt to the lack of compassion shown by United States officials toward both the dead and their families. Adding to the distrust and confusion is evidence that there were certainly two and possibly seven or eight Central Intelligence Agency (CIA) agents aboard the second leg of Pan Am Flight 103.¹⁴ Heroin was discovered among the wreckage, and large amounts of currency were reportedly found blowing around the Scottish countryside after the crash.¹⁵

The estates of the deceased have filed lawsuits against Pan Am claiming millions of dollars in damages. The cases were consolidated for pretrial discovery and liability trial.¹⁶ Once these phases of the litigation are completed, and if liability is established, the remaining issue of damages in individual cases will be determined either through trial or by settlement.¹⁷ The pleadings allege that Pan Am failed to warn passengers of a bomb threat of which the airline had notice, was derelict in the retention, supervision, and training of its personnel and contractors with respect to security and operations, and did not ticket, monitor, board, maintain, and otherwise secure the aircraft so as to prevent its destruction. Pan Am, in turn, has subpoenaed at least six United States Government depart-

¹⁴ D. JOHNSTON, *supra* note 4, at 68-77; telephone interview with Georgia Nucci, Director, "Victims of Pan Am Flight 103," Claverack, N. Y. (Feb. 2, 1990).

¹⁵ D. JOHNSTON, *supra* note 4, at 79; telephone interview, *supra* note 14.

¹⁶ *In re Air Disaster in Lockerbie, Scotland*, No. MDL 799 (E.D.N.Y. Mar. 6, 1990) (1990 WESTLAW 29764).

¹⁷ Telephone interview with Michael Baumeister, Baumeister and Samuels, Member of Plaintiffs' Committee for *In re Air Disaster in Lockerbie, Scotland*, New York, N. Y., (Sept. 21, 1990).

ments, including the CIA, the State Department, and the Drug Enforcement Administration.¹⁸

Some plaintiffs likely considered legal action against the United States Government for its failure to warn passengers of a bomb threat but found they were probably barred by the Federal Torts Claims Act (FTCA).¹⁹ In order to recover in a tort action, this statute requires the plaintiffs prove that the negligence occurred in the United States.²⁰ For example, the FAA would have to be sued for its failure to require the airline to warn passengers or for its own failure to warn passengers of threats to security. The plaintiffs also would have to prove such failure to warn was not part of the FAA's "discretionary function."²¹ It seems unlikely a plaintiff would succeed against the government under the FTCA. The adoption or rejection of policies, rules, or regulations normally falls within the discretion of the FAA, and as such, the "discretionary function" exception to the FTCA would apply to bar recovery.

Speculation that Pan Am Flight 103 was actually a drug run protected by the CIA and DEA in exchange for information on hostages held in Iran at the time implicates the United States Department of State in more serious malfeasance than mere negligence.²² Depending on the pro-

¹⁸ Jacoby, *Looking for Someone to Blame: Grieving Families Gear Up for Legal Battle*, NEWSWEEK, Jan. 9, 1989, at 34; Shapiro, *Pan Am Liability Insurer Sets \$60 Million Reserve*, BUS. INS., Jan. 16, 1989, at 2, 44.

¹⁹ 28 U.S.C. §§ 2671-80 (1988).

²⁰ S. SPEISER & C. KRAUSE, *Aviation Tort Law* § 15:9 (1979). For example, the FAA in Washington would have to be sued for negligence in failing to require the airline to warn passengers or for its own failure to warn passengers of threats to security. See *id.*

²¹ *Id.*

²² D. JOHNSTON, *supra* note 4, at 79-80; Ludtke, *Keeping Lockerbie Alive: Questions Still Burn for Relatives of the Pan Am 103 Victims*, TIME, Nov. 27, 1989, at 33; Telephone interview, *supra* note 14; *Calgary Newshour*, *supra* note 13. A Pittsburgh investigative reporter is said to be taking legal action in an attempt to force United States government agencies to release more information on the events surrounding the Pam Am disaster. Telephone interview with Kevin Bell, reporter, Washington, D.C. (Sept. 19, 1990). This would not be the first time accusations of government conspiracy have been made. The December 1985 Gander, Newfoundland crash is thought to have been related to the Iran-Contra affair. See Bell,

nouncement as to the outcome of the criminal investigation of the Scottish Lord Advocate,²³ a Pandora's box of problems may still await both the State Department and Pan Am. On September 30, 1990, it was reported in London, England, that FBI blunders in the handling of the case may mean a guilty party may never be identified.²⁴ A British judicial inquiry into the handling of the case was scheduled for October 1, 1990.²⁵

Aside from the domestic liability issues, if the guilty party is ever identified, international political repercussions will likely follow. These repercussions could be complex, particularly if the bombing was inspired or given assistance by the governments of Iran, Syria, or Egypt.²⁶ All receive support from the Soviet Union. If criminal indictments are handed down by the Scottish Lord Advocate and the United States commences extradition proceedings, international negotiators will be grappling with additional legal issues relating to the availability of the death penalty in the United States.²⁷

Also on an international level, the crash has prompted discussion and debate at the annual Montreal meeting of

Gander Crash Surrounded by Mystery, Thompson News Service, June 18, 1990 release (unedited version courtesy of Mr. Bell — on file at office of *Journal of Air Law & Commerce*).

²³ The Scottish Lord Advocate is the rough equivalent of the Solicitor General in the United States.

²⁴ *Canadian Broadcasting Corporation: Radio News* (CBC radio broadcast, Sept. 30, 1990).

²⁵ *Id.*

²⁶ See D. JOHNSTON, *supra* note 4, at 21, 158-160. It is possible the bombing of Pan Am Flight 103 was in retaliation for the shooting down of a commercial Iranian airbus over the Strait of Hormuz by the U.S.S. Vincennes on July 3, 1988. Iran is the stated country of choice of Bert Ammerman, Political Committee Chairman of "Victims of Pan Am Flight 103." *Id.*; see also Ludtke, *supra* note 22; *Frontline: Tracking the Pan Am Bombers*, *supra* note 11. For information on the official statements on the Iranian airbus tragedy, see 89 DEP'T ST. BULL. 38 (1989). For an overview of possible suspects, see Watson, *A Trail of Terror: The Search for the Bomber Who Knocked Pan Am Flight 103 Out of the Sky*, *NEWSWEEK*, Jan. 9, 1989, at 28.

²⁷ The United States is one of the few remaining Western countries to continue to uphold capital punishment. Eight European countries retain the death penalty, but five use it only for exceptional crimes like wartime treason. No European country has executed a prisoner in the last decade. *Coleman v. McCormick*, 874 F.2d 1280, 1297 n.13 (9th Cir. 1989) (Reinhardt, J., concurring).

the International Civil Aviation Organization (ICAO) over the adequacy of both international airport security and the relief provided under the Warsaw Convention.²⁸

B. *The "Victims of Pan Am Flight 103"*

Although tragedies of this magnitude create their own impetus for change, another force has kept steady pressure on Pan Am, the United States Government, the FAA, the American public, and the international aviation community to prevent repetition of the events of Lockerbie. On February 19, 1989, families of those who died on Pan Am Flight 103 formed a support group, "Victims of Pan Am Flight 103."

The group originally formed to secure the expeditious return of belongings, obtain answers to questions, and force a full, independent investigation of the crash.²⁹ The group's efforts have blossomed into an investigation of all aspects of air security, both domestic and international. Labeled "strident" by even its own members,³⁰ the group is both persistent and articulate in its criticism of aviation security practices. Members have been a forceful presence at government hearings on aviation security, and are skillful in obtaining media coverage. They have appeared on at least five television broadcasts relating to the Pan Am Flight 103 disaster.

The "Victims of Pan Am Flight 103" has a board of directors heading four committees. A legal committee advises the membership about compensation issues and matters relating to civil and criminal liability. A political committee has pressed for an independent inquiry into the Lockerbie tragedy and currently lobbies for legislative action. The financial committee raises funds and is re-

²⁸ *Foreign Airport Security: Hearing Before the House Comm. on Foreign Affairs*, 101st Cong., 1st Sess. 51-52 (1989) (statement of Mr. Braumfield).

²⁹ D. JOHNSTON, *supra* note 4, at 132-33.

³⁰ *Donohue: Families of the Victims: Pan Am Flight 103, Lockerbie, Scotland* (Multimedia Entertainment Inc. television broadcast Dec. 11, 1989) [hereinafter *Donohue*] (transcript on file at office of *Journal of Air Law & Commerce*).

sponsible for the group's financial records. Ongoing emotional support for the group is provided by a fourth committee. Meetings are held regularly, and the group has its own mailing address and telephone line.

While the legislators initially focused on technological solutions to problems in aviation security, the "Victims of Pan Am Flight 103" maintained that additional measures were needed. The group continues to insist that unless government becomes actively responsible for passenger security, passengers deserve the right to be warned of credible bomb threats so that they may take steps to protect themselves. Until recently, this proposal has met with opposition. The group, however, is determined to get answers and results; some members have gone to great lengths to prove the inadequacy of air security.³¹ As time passes and the sense of urgency for legislative reform subsides, the role of the "Victims of Pan Am Flight 103" will become more important in ensuring change takes place. Fortunately, the "Victims of Pan Am Flight 103" have a sustained, personal commitment to improved aviation security. As the president of the group stated during a television broadcast, "We've all made a commitment to our loved ones. And Secretary Baker and President Bush can't have a higher commitment than I have to my brother, or 259 other people in our organization have to their loved ones. And that's why we will succeed."³²

³¹ A British father, whose daughter was killed on the ground, smuggled a radio-cassette tape player onto a London to New York flight in June 1990 to demonstrate the continuing lack of security and to press for an independent and comprehensive investigation in Britain to discover why the Pan Am Flight 103 bomb was not discovered at Heathrow. The player was filled with three-quarters of a pound of yellow marzipan, resembling Semtex in appearance and odor, which showed through the grill and oozed out the back of the player. Although the player was much heavier than it should have been in normal circumstances, the cassette passed examination by British airport security personnel. He also claimed to have carried a similar bomb replica, undetected, through security at the British House of Commons. *Fake Bomb Fools British Airport Security*, Seattle Post-Intelligencer, July 2, 1990, at A2, col 1.

³² *Donohue*, *supra* note 30, at 2 (statements of Bert Ammerman).

IV. REFORMS PROMPTED BY PAN AM FLIGHT 103

Of the many aspects of aviation security to which Pan Am Flight 103 has directed attention, three have far-reaching legal significance. The first is the recent re-examination of the proposed reforms to the Warsaw Convention and related compensation plans. The second is the introduction in 1989 of both the Aviation Airport Technology and Research Act and the Aviation Security Act.³³ The third is the release of a report by the President's Commission on Aviation Security and Terrorism containing recommendations for reform of the entire aviation security system, and the introduction in 1990 of the Aviation Security Improvement Act.

A. *The Warsaw Convention*

The Warsaw Convention³⁴ is an international treaty governing commercial air travel originally designed to protect a fledgling airline industry. It eliminated unlimited liability of airline carriers, forcing the passenger to share some of the risks of air travel, thus providing an environment more favorable to economic growth of the aviation industry.³⁵ Proposed in 1929, and agreed to by the United States in 1934, it is a widely respected treaty. The Warsaw Convention's primary purpose is uniformity of aviation law among international states.³⁶

The original convention creates a presumption of airline carrier liability, coupled with a ceiling on that liability.³⁷ *Prima facie* liability of the carrier is established on proof of the accident. Thus, plaintiffs suing airline carriers no longer carry the burden of proving the carrier's negligence; however, the amount of recoverable damages

³³ See sources cited *supra* note 1.

³⁴ Warsaw Convention, *supra* note 3.

³⁵ Baumeister, *Expanding Concepts of Liability Under the Warsaw Convention*, at 3-4 (presented at and reprinted in the materials of the 24th Annual SMU Air Law Symposium (*Journal of Air Law and Commerce*), Mar. 2, 1990).

³⁶ *Id.*

³⁷ Warsaw Convention, *supra* note 3, arts. 17, 20.

is limited. To rebut the presumption of liability, Article 21 provides for contributory negligence by the passenger as a partial or absolute defense, dependent on local law. Article 20 exonerates the carrier from liability if the carrier proves it took all necessary measures, or that it was impossible for the carrier to take such measures, to avoid the damage.³⁸

Modifications contemplated in Article 22 of the Warsaw Convention³⁹ were introduced by the Montreal Interim Agreement of 1966 (Montreal Agreement).⁴⁰ The Montreal Agreement increases the limit of liability of international carriers serving the United States to \$75,000 per passenger per incident, unless the airline is found guilty of willful misconduct or the passenger is found contributorily negligent.⁴¹ In other words, the Montreal Agreement eliminates the Article 20 defense, shifting the risk of air travel to the airline carrier, but preserving the original burden of proof. This change appears reasonable, given that, since the mid-1960's, air travel has been an economically viable industry.

As the airline industry has prospered, pressure has been mounting to eliminate the liability limits altogether. In 1975, Montreal Protocols Numbers 3 and 4 (Montreal Protocols)⁴² were signed, increasing the personal liability limits to 100,000 Special Drawing Rights and establishing a liability limit for cargo equivalent to about \$21 per kilogram. Special Drawing Rights are an international monetary unit keyed to the International Monetary Fund,

³⁸ *Id.* arts. 20, 21.

³⁹ *Id.* art. 22. Article 22 of the Warsaw Convention provides for a special contract between the carrier and the United States on behalf of its citizens to increase the liability limits. Baumeister, *supra* note 35, at 5.

⁴⁰ Annotation, *Liability Under Warsaw Convention (49 Stat. 3000 et. seq.) of International Air Carrier for Death or Injury of Passenger Sustained in Airport Terminal During Course of Terrorist Attack*, 36 A.L.R. FED. 490, 495 (1978).

⁴¹ Annotation, *supra* note 40, at 495; Warsaw Convention, *supra* note 3, arts. 20, 21.

⁴² See Annotation, *supra* note 40, at 495; see also Aldred, *Pan Am Crash Imperils OK for New Liability Cap*, Bus. Ins., Mar. 27, 1989, at 1, 28.

equivalent in early 1990 to about \$1.36.⁴³ The purpose of this monetary unit is to eliminate the volatility in the amount of the liability limits under the Warsaw Convention and Montreal Agreement, which are now based on the price of gold.

The United States Department of Transportation (DOT) has been seeking the ratification of the Montreal Protocols since 1975 and, as contemplated therein, has proposed several supplemental compensation plans. In March 1983, the United States Senate voted in favor of ratification of the Montreal Protocols and an earlier supplemental compensation plan, but lacked a sufficient majority to approve them.⁴⁴ Rejection of the proposed plans was based on the belief that they do not adequately compensate plaintiffs.⁴⁵ The latest Draft Supplemental Compensation Plan (Supplemental Plan) provides additional compensation coverage for American citizens on international flights.⁴⁶

In the words of former Secretary of Transportation James Burnley, the Supplemental Plan basically creates "a private insurance program with unlimited recovery per passenger for economic damages, subject only to a per incident, per aircraft limitation of \$500 million."⁴⁷ The plan also establishes a claims procedure, and attempts to encourage the reasonable settlement of claims by the airlines. It permits a court to award costs and attorneys' fees if the airline does not offer to settle the claim both within specified periods of time and for sums equivalent to two-thirds of the ultimate recovery awarded under the plan. The cost of the plan is deferred by a surcharge collected

⁴³ Baumeister, *supra* note 35, at 6 n.34; see also Aldred, *supra* note 42, at 1; Jacobs & Kiker, *Accident Compensation for Airline Passengers: An Economic Analysis of Liability Rules Under the Warsaw Convention*, 51 J. AIR L. & COM. 589 (1986).

⁴⁴ Parish, *Despite Foreign Relations Committee's Endorsement, Senate OK of Montreal Protocols Remains Uncertain*, 4 AIR SAFETY WEEK 1 (Sept. 10, 1990). The Senate rejected the proposals with a 50 to 42 vote, short of the required two-thirds majority. The protocols remain before the Senate for future consideration. *Id.*

⁴⁵ Aldred, *supra* note 42, at 28.

⁴⁶ *Id.*

⁴⁷ *Id.*

by the airline carrier and remitted to a private insurance carrier. The fee has been estimated at about \$5.00 per round-trip international airline ticket purchased in the United States.⁴⁸

At first blush, the proposals look impressive. The Pan Am Flight 103 disaster, however, illustrates a number of problems which may well prolong the ongoing debate as to whether *any* liability limitation should apply. The end result could be that the provisions for Special Drawing Rights will be ratified, while the Supplemental Plan will be terminally stalled by debate. A critical examination of the provisions of the Warsaw Convention in light of modern day realities also gives credence to those advocating the more drastic alternative of abolishing the entire scheme.

1. *Criticisms of the Montreal Protocols and Supplemental Plan*

A primary criticism of the Montreal Protocol and Supplemental Plan is that the Supplemental Plan only includes recovery of "economic damages" — for example, medical bills, rehabilitation expenses, loss of earnings, loss of homemaker services, and burial expenses.⁴⁹ These damages are only significant in the case of an air crash victim who survives and who was employed. In the case of Pan Am Flight 103, the families of the thirty-five Syracuse University students killed in the disaster would receive practically no compensation for "economic damages" as now defined.⁵⁰

A second flaw in the Supplemental Plan is that its limitation on recoverable damages allowing only economic damages could conflict with state tort laws that do not contain such a restriction. The laws of most states now make it possible for a plaintiff to recover for *emotional* damage, regardless of *physical* injury, whereas some courts continue to erroneously hold that under the Warsaw Con-

⁴⁸ *Id.*; see also Annotation, *supra* note 40, at 495.

⁴⁹ Aldred, *supra* note 42, at 38.

⁵⁰ *Id.*

vention, a plaintiff may only recover for bodily injury.⁵¹ To solve these problems, the Supplemental Plan is currently being amended to include whatever damages are permitted under the law of the state of the plaintiff's domicile.⁵²

A third concern is the difficulty of accurately setting an adequate passenger fee to support the Supplemental Plan. Agreement on the basis for the fee and appropriate risk factors to be used will be difficult to reach.⁵³ Although statistics show the number of aviation fatalities from intentional terrorist activity has increased in the last decade,⁵⁴ assessing the risk will still be challenging. It is impossible to predict the number of terrorist bombings that will occur each year, and significant numbers of lives can be lost with each single incident. Arguably, requiring the airline carriers to pay the additional costs may create more incentive for the airlines to provide adequate security.⁵⁵ It is, however, equally likely that any fee paid by the airlines will simply be passed on to the public in the form of increased airfares.

A fourth problem with the proposed law is that a difference still exists between domestic liability for "ground" claims and international liability for "airborne" claims, even where both result from the same incident. For example, under British law, Pan Am may have unlimited liability for the personal injury and property damage claims of the residents of Lockerbie, but its liability to the aircraft

⁵¹ Baumeister, *supra* note 35, at 12-14; *see also* King v. Eastern Airlines, 536 So.2d 1023, 1027, (Fla. Dist. Ct. App. 1988); Floyd v. Eastern Airlines, 872 F.2d 1462 (11th Cir. 1989), *cert. granted*, 110 S. Ct. 2585 (1990); Gilbert v. Pan American World Airways, Inc. 21 Av. Cas. (CCH) 18,177 (S.D.N.Y. 1989).

⁵² Baumeister, *supra* note 35, at 21.

⁵³ Aldred, *supra* note 42, at 28; Mulcahy & Jennings, U.S., *Europe Share Pan Am Crash Cover*, NATIONAL UNDERWRITER PROPERTY AND CASUALTY, Dec. 26, 1988, at 1.

⁵⁴ *Murders and Mistakes*, THE ECONOMIST, Jan. 14, 1989, at 54. Over the past ten years, the number of deaths in planes caused intentionally by other people (shot down, sabotaged, hijacked) has risen, but the statistics are based both on known and suspected cases. *Id.* Sabotage and military action accounted for 11% of the fatalities on United States carriers in 1988. Ramirez, *How Safe Are You in the Air?*, FORTUNE, May 22, 1989, at 80.

⁵⁵ Ramirez, *supra* note 54, at 80.

passengers would be limited to 100,000 Special Drawing Rights and "economic damages" under the proposed amendments.⁵⁶ Thus, even under the new proposals, the uniformity of law that is the basis of the Warsaw Convention remains elusive.

2. *The Specter of Punitive Damages*

The Pan Am disaster also spotlights the most contentious issue relating to the Warsaw Convention: punitive damages. The Warsaw Convention is silent as to whether punitive damages are available to a plaintiff in the absence of its protection. Article 25 simply states that the airline carrier cannot limit its liability if it, or its agents, have engaged in willful misconduct.⁵⁷ This provision leaves unclear the question of a carrier will be open to *punitive* damages in circumstances where it has no limited liability.

In *Chan v. Korean Airlines, Ltd.*,⁵⁸ the Supreme Court interpreted Article 25 literally and held that once a plaintiff proved the existence of willful misconduct, punitive damages may be awarded. In contradistinction to *Chan*, however, the Eleventh Circuit, in *Floyd v. Eastern Airlines, Inc.*,⁵⁹ and the District Court for the Northern District of Illinois in *Harpalani v. Air India, Inc.*,⁶⁰ both reasoned that the Warsaw Convention deals solely with the recovery of compensatory damages and, therefore, Article 25 was merely a waiver of the usual limitations on the recovery of compensatory damages alone.

More recently, the issue of punitive damages was directly addressed in *In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport on September 5, 1986*.⁶¹ In the January 18, 1990 order of Judge Sprizzo,

⁵⁶ Shapiro & McLeod, *Pan Am Liability Claims to Exceed \$250 Million*, Bus. Ins., Dec. 26, 1988, at 38.

⁵⁷ Warsaw Convention, *supra* note 3 art. 25.

⁵⁸ 490 U.S. 122 (1989).

⁵⁹ 872 F.2d 1462 (11th Cir. 1989), *cert. granted*, 110 S. Ct. 2585 (1990).

⁶⁰ 634 F. Supp. 797 (N.D. Ill. 1986).

⁶¹ 729 F. Supp. 17 (S.D.N.Y. 1990), *reprinted in* Baumeister, *supra* note 35, at Appendix; *see also* *In re Air Crash Disaster at Gander, Newfoundland on Dec. 12,*

the District Court for the Southern District of New York found that the words of Article 25 provide for the lifting of all limitations on recovery, whether compensatory or otherwise. Thus, any damages available at common law, including punitive damages, are available to the plaintiff once he meets the predicates of Article 25.⁶² The opposite conclusion was reached by the District Court for the Eastern District of New York on January 3, 1990. In the case arising directly from Pan Am Flight 103, *In re Air Disaster in Lockerbie, Scotland*,⁶³ Chief Judge Platt followed the *Floyd* decision of the Eleventh Circuit, and held that the Warsaw Convention bars punitive damage claims. Counsel for the plaintiffs have now petitioned the decision of Chief Judge Platt to the Second Circuit Court of Appeals, asking for affirmation of the *Karachi* decision.⁶⁴ If the Second Circuit affirms the *Karachi* decision, a dispute will exist between that circuit and the Eleventh Circuit which will ultimately be taken to the United States Supreme Court.

Those who argue that punitive damages are not precluded by Article 25 point to the effectiveness of these damages in deterring and punishing corporate misconduct.⁶⁵ They view the "insurance standard" established by the Warsaw Convention as outmoded and prefer to revert to a true tort system where fault determines compensation. Opponents argue that the limitation of liability provided by the Warsaw Convention would effectively be eliminated if punitive damages were available, and this action would raise possible insurability problems for the air-

1985, 684 F. Supp. 927, 932 (W.D. Ky. 1987). The court held that Articles 3 and 25 are most reasonably interpreted as exceptions to the limitations on compensatory damages, not as authority for the recovery of punitive damages. *Id.*

⁶² *Karachi*, 729 F. Supp. at 19-20.

⁶³ No. MDL 799 (E.D.N.Y. Mar. 6, 1990) (1990 WESTLAW 29764), reprinted in Baumeister, *supra* note 35, at Appendix.

⁶⁴ Baumeister, *supra* note 35 (in presentation only). The case was set for hearing on Oct. 1, 1990. Telephone interview with office of attorney Michael Baumeister, Member of Plaintiffs' Committee for *In re Air Disaster in Lockerbie, Scotland*, Pittsburgh, Pa. (Sept. 20, 1990).

⁶⁵ Baumeister, *supra* note 35, at 15; D. JOHNSTON, *supra* note 4, at 184-85.

line carriers.⁶⁶

3. *Overdue for an Overhaul*

As it stands, the Warsaw Convention serves little purpose in encouraging airline security or safety. It simply provides a uniform system of compensation once the damage is already *fait accompli*. For this reason, some critics argue for the abolition of the Warsaw Convention altogether, in favor of "fault liability" as established by local law.⁶⁷ Arguably, the Warsaw Convention is now an anachronism, given ever-increasing numbers of passengers and solid air carrier profit margins.

Assuming a viable purpose exists, few would dispute that the current provisions of the Warsaw Convention are inadequate, even with the 1966 modifications. Speculation exists that after the December 1985 crash of a DC-8 jetliner in Gander, Newfoundland, also suspected of being a bombing,⁶⁸ the international liability limits were simply ignored.⁶⁹ Even if Pan Am Flight 103 plaintiffs recover outside the Warsaw Convention, the need to amend both the current treaty and the proposed protocols and Supplemental Plan is evident.

On May 15, 1990, the President's Commission on Aviation Security and Terrorism endorsed the ratification of Montreal Protocol 3 "together with a supplemental compensation plan that would provide all United States citizens and permanent residents, for any international flight, full recovery of all economic and non-economic damages" and suggested that "[f]ollowing ratification, the United States should commence a diplomatic initiative to in-

⁶⁶ Aldred, *supra* note 42, at 28; Baumeister, *supra* note 35, at 15.

⁶⁷ Aldred, *supra* note 42, at 28; Baumeister, *supra* note 35, at 18-21.

⁶⁸ Hughes, *supra* note 8, at 58. The cause of the Gander crash has not been conclusively determined, but a public action group similar to "Victims of Pan Am Flight 103," "Families for the Truth About Gander," are convinced a bomb or fire was the cause. Bell, *Americans Want Answers to the Gander Crash*, Daily Courier (copy of article on file at office of *Journal of Air Law & Commerce*). It has been suggested that the Gander, Newfoundland crash on December 12, 1985, was linked to the Iran-Contra affair. See Bell, *supra* note 22.

⁶⁹ Shapiro & McLeod, *supra* note 56, at 38.

crease the \$130,000 limit on carrier liability."⁷⁰ The Senate bill codifying the recommendations of the Presidential Committee⁷¹ lacks any provision dealing with Protocol 3, however. In contrast, the companion House bill⁷² contains a provision stating that:

"[t]he United States Government should encourage all other nations to promptly adopt the Montreal Protocol No. 3 revisions to the Warsaw Convention and Supplementary Compensation Plans thereunder, to provide full recoveries for passengers killed or injured in terrorist acts against aircraft on international flights, or in other international aviation accidents."⁷³

In early 1990, the Senate Foreign Relations Committee endorsed Protocol 3.⁷⁴ To encourage Senate approval, the Senate Foreign Relations Committee endorsed yet another supplemental compensation plan that increases the proposed compensation fund, accessible by American victims of international aircraft accidents and their survivors, from \$200 million to \$500 million per accident per aircraft. Opponents still resist the package, however, because it continues to eliminate the ability of claimants to recover unlimited damages in cases of willful misconduct, and because they believe airline carriers have sufficient resources to eliminate liability limits altogether.⁷⁵

In any event, parties on both sides agree that resolution of the issue will not occur prior to the 1990 adjournment of the Senate, since bills having higher priority will likely take precedence.⁷⁶ Perhaps this stalemate is fortuitous.

⁷⁰ PRESIDENT'S COMM'N REPORT, *supra* note 6, at 124.

⁷¹ Aviation Security Improvement Senate Companion Bill, *supra* note 1.

⁷² House Aviation Security Improvement Act, *supra* note 1, § 2(b).

⁷³ *Id.* § 2(6).

⁷⁴ The Committee voted for ratification 11 to 2, but critics in the Senate stated they would oppose ratification on the basis that liability limits should be eliminated entirely. Parrish, *supra* note 44, at 1-2.

⁷⁵ *Id.* at 2.

⁷⁶ *Id.* at 2-3. During the week of September 10, 1990, Senator D'Amato called on the Senate to vote in favor of the Warsaw Convention amendments before Congress adjourned. The 101st Congress should be extended past the October 5, 1990 adjournment date due to contentious bills such as those dealing with

Although reform is necessary, the entire compensation scheme created by the Warsaw Convention needs a thorough overhaul, and piecemeal patching of the scheme may not be the best solution in the long run.

B. *Legislative Initiatives*

Although no conclusive statement has been made regarding the method by which the bomb was planted on board Pan Am Flight 103, the bulk of the initial legislative action concerned bomb detection by airport security devices. The focus on improving bomb and weapon detection through advanced technology indicates that the immediate response of government was simply to find the bombs before they found us. The facts surrounding Pan Am Flight 103 raise some interesting questions about the wisdom of this approach to passenger protection.

An emphasis on bomb detection presupposes that adequate technology exists to find all destructive bombs and weapons, that the personnel employed to operate the technological devices are skilled, informed, and responsible, and that those implementing the security programs are incorruptible and apolitical. It also assumes that bombs find their way onto airplanes in baggage, primarily checked baggage, rather than by access to the plane outside the airport terminal. Most importantly, it reflects the belief that the FAA, through regulation of domestic and foreign airports, can better protect passengers than informed passengers can protect themselves.

Despite their obvious shortcomings, the 1989 bills provide a useful framework for the discussion of aviation security issues. The funding difficulties they encountered provide insight into the economic underpinnings of aviation legislation. As historical background, the 1989 bills provide a useful comparison with 1990 legislation. In comparison, the later legislation appears to be supported

budget matters and appropriations. See *D'Amato Seeks Montreal Protocol OK Before Adjournment of Congress*, AIR SAFETY WEEK, Sept. 17, 1990, at 4.

by more solid information and considerably more forethought. A synopsis of the now defunct Airport Security Research and Technology Act of 1989 and Aviation Security Act of 1989 follows.

1. *The Airport Technology and Research Act of 1989*

The Airport Technology and Research Act of 1989 (ATRA) was introduced as a House bill on May 16, 1989.⁷⁷ It was referred to both the House Public Works and Transportation Committee and the House Science, Space and Technology Committee on that day, and was then sent to a House subcommittee. On May 31, 1989, the House Subcommittee on Transportation, Aviation and Materials approved the bill for full committee action. A fourth amended version was reported in the House on September 19, 1989,⁷⁸ and on September 25, it was voted on and passed unanimously by the House of Representatives.⁷⁹ The House requested the concurrence of the Senate on September 26, 1989.⁸⁰ On the same day, the Senate referred the bill to the Senate Commerce, Science and Transportation Committee.⁸¹ The Senate then held the bill in abeyance, pending receipt of the report of the President's Commission on Aviation Security and Terrorism and the outcome of the Aviation Security Act of 1989.⁸² The introduction on June 28, 1990 of companion Senate and House bills for the proposed Aviation Security Improvement Act of 1990⁸³ sounded the death knell for ATRA.

⁷⁷ 135 CONG. REC. H1976 (daily ed. May 16, 1989); *see supra* note 1.

⁷⁸ 135 CONG. REC. H5753 (daily ed. Sept. 19, 1989).

⁷⁹ 135 CONG. REC. H5881 (daily ed. Sept. 25, 1989).

⁸⁰ 135 CONG. REC. S11759 (daily ed. Sept. 25, 1989).

⁸¹ 135 CONG. REC. S11879 (daily ed. Sept. 26, 1989).

⁸² Telephone interview with J. Feathers, Senate Document Room, Washington D.C. (Feb. 27, 1990); Telephone information requests from Senate Commerce Committee and Legislative Information, Washington, D.C. (Feb. 27, 1990); Telephone interview with C. Carmody, Senate Commerce Committee, Washington, D.C. (Feb. 27, 1990) (on status of H.R. 1659 and H.R. 2365).

⁸³ House Aviation Security Improvement Act, *supra* note 1; Aviation Security Improvement Senate Companion Bill, *supra* note 1.

The stated purposes of ATRA were the following: "(1) To support cost-effectiveness and operational feasibility evaluations of alternative explosives detection systems for possible implementation at airports. (2) To promote accelerated research and development of future explosives detection technologies for use in airports."⁸⁴ ATRA was the direct legislative response to the bombing of Pan Am Flight 103 and drew additional support from the bombing of the French UTA Flight 772 over Niger by extremist Shiite Moslems in mid-September of 1989.⁸⁵ The legislation reflected the realization that the technology of terrorists had surpassed the ability of existing conventional airport devices to detect weapons and explosives. For example, metal detectors and x-ray machines would be entirely ineffective in detecting the Semtex plastic explosive used in the Pan Am Flight 103 bomb. Whereas the Airport Security Act of 1990 was primarily directed toward developing a specific security device, ATRA was concerned with providing funds for evaluating the effectiveness and operational feasibility of a variety of new aviation detection systems.

Since 1970, taxes on fuel and cargo, and an eight percent surcharge on every airline passenger's ticket have contributed to an Airport and Airway Trust Fund (Trust Fund) which supports aviation and airport projects and programs. Program expenditures are dependent on annual appropriations.⁸⁶ The funds are distributed in accordance with the provisions of the Airport and Airway Improvement Act of 1982.⁸⁷ Thus, the original purpose of the Trust Fund was to finance *capital improvement* programs. By amending section 506 of the Airport and Airway Improvement Act of 1982, ATRA proposed to

⁸⁴ Airport Technology and Research Act, *supra* note 1, § 2(b).

⁸⁵ 135 CONG. REC. H5761 (daily ed. Sept. 20, 1989) (statements of Rep. Clinger); 135 CONG. REC. H3147 (1989) (statements of Rep. Borski); Salholz, *Terror at 30,000 Feet: Who Did the Bombing*, NEWSWEEK, Oct. 2, 1989, at 30.

⁸⁶ Nutting, *Bush's Airport User Fee Plan Wins Public Approval*, CONG. Q. WEEKLY REP., June 30, 1990, at 2052.

⁸⁷ 49 U.S.C. app. § 2205(a) (1988).

increase the FAA's budget for research, engineering, and development for the 1990 fiscal year by \$8 million. Of the total budget, ATRA earmarked \$16 million exclusively for "research on, and evaluation of aviation and airport security projects and activities."⁸⁸ In effect, ATRA allocated more Trust Funds to more security projects, not all of them capital improvement projects. This proposal proved to be an insurmountable obstacle to Senate approval of the bill, just as in the case of the Aviation Security Act.⁸⁹

2. *The Aviation Security Act of 1989*

The Aviation Security Act of 1989 was introduced as a House bill on April 3, 1989.⁹⁰ The House then forwarded the bill to the House Committee on Public Works and Transportation,⁹¹ which approved an amended version on May 18, 1989.⁹² The bill then went to the House Committee on Foreign Affairs and, after further amendment, was approved on September 7, 1989.⁹³ The House passed a fourth version of the Bill by a 392-31 vote on September 20, 1989.⁹⁴ The House requested Senate concurrence on September 25, 1989.⁹⁵ On the same day, the bill went to the Senate Commerce, Science and Transportation Committee where it was shelved with ATRA, likewise awaiting a report of the seven-member President's Commission on Aviation Security and Terrorism.⁹⁶

a. *TNA: The Technology Solution*

A primary purpose of the Aviation Security Act was to

⁸⁸ 135 CONG. REC. H5882 (daily ed. Sept. 25, 1989).

⁸⁹ For a discussion of funding issues, see *infra* note 169-218 and accompanying text.

⁹⁰ 135 CONG. REC. H1331 (daily ed. April 3, 1989); see *supra* note 1.

⁹¹ 135 CONG. REC. H2046 (daily ed. May 19, 1989).

⁹² H.R. REP. NO. 59, 101st Cong., 1st Sess. (1989).

⁹³ 135 CONG. REC. H5411 (daily ed. Sept. 7, 1989).

⁹⁴ 135 CONG. REC. H5767 (daily ed. Sept. 20, 1989).

⁹⁵ 135 CONG. REC. S11759 (daily ed. Sept. 25, 1989).

⁹⁶ *Id.*

facilitate the use of "thermal neutron analysis" (TNA) devices in strategic airports. The Aviation Security Act would have amended the Federal Aviation Act of 1958⁹⁷ to require all air carriers to maintain and use explosive detection equipment applying technology equal to, or better than, thermal neutron analysis technology.

Section 101 of the Aviation Security Act provided that TNA devices were to be paid for from Trust Fund resources. The bill allocated \$100 million from the Trust Fund for this purpose. As each TNA device costs between \$750,000 and \$1 million dollars,⁹⁸ the Aviation Security Act's rate of funding equated to only 100 devices worldwide. Although legislators contemplated the installation of TNA devices in about forty-five major airports world wide, to date only two machines have been purchased and installed (to the frustration of "Victims of Pan Am Flight 103"),⁹⁹ and only five more installations were scheduled for 1990.¹⁰⁰

TNA devices use low-level radiation to identify explosives. The device bombards the luggage with neutrons, and then analyzes the luggage for traces of organic chemicals used in plastic explosives.¹⁰¹ Initially, FAA testing at Los Angeles and San Francisco showed the devices to be 95 percent successful in finding bombs, with a false alarm rate of only 4 percent.¹⁰² The President's Commission on Aviation Security and Terrorism has since reported the technology cannot reliably detect the small amounts of plastic explosives that have characterized plastic bombs

⁹⁷ 49 U.S.C. app. § 1356 (1988).

⁹⁸ 135 CONG. REC. H5883 (daily ed. Sept. 25, 1989) (statements of Rep. Lewis); Power, *One More Reason for Fear of Flying*, BUS. WEEK, Jan. 16, 1989, at 31; Riley, *The Hard Road to Airport Security*, FORTUNE, May 22, 1989, at 84.

⁹⁹ MacNeil/Lehrer Newshour — *Focus: Early Warning System: Passenger Threats on Airlines* (WNET television broadcast, Jan. 19, 1990) (transcript on file at office of *Journal of Air Law & Commerce*).

¹⁰⁰ Riley, *supra* note 98, at 84.

¹⁰¹ PRESIDENT'S COMM'N REPORT, *supra* note 6, at 63; see also *Section Notes: Aviation Security R & D Wins House Approval*, CONG. Q. WEEKLY REP., Sept. 30, 1990, at 2556; Pytte, *Committees Resolve Turf War Over Airport Trust Fund*, CONG. Q. WEEKLY REP., July 14, 1990, at 2216.

¹⁰² Riley, *supra* note 98, at 84; D. JOHNSTON, *supra* note 4, at 196.

since at least 1982.¹⁰³

Another limitation of TNA technology is that each device weighs approximately ten tons. Thus, each airport that acquires this machine will have to structurally reinforce the building in which it is installed.¹⁰⁴ Additionally, TNA devices are slow. It takes approximately six seconds to screen each bag, and airport operators estimate it will take one hour to screen 600 bags.¹⁰⁵ Although TNA has been touted as the most advanced technology available, in its present form it is unable to detect minute amounts of explosives, and cannot detect liquid-based or non-nitrogen based explosives. Also, because TNA devices use nuclear radiation, they are unsuitable for screening passengers and carry-on luggage.¹⁰⁶

Modern aircraft bombs are compact, come disguised in a variety of forms, and are affordable by the terrorist groups that employ them. For example, a bomb such as that thought to have been used on Pan Am Flight 103 requires only about 300 grams of Semtex plastic explosive. A thin layer of the explosive is sandwiched within a metallic-coated paper to resemble the transformer of a radio-cassette player.¹⁰⁷ Two fuses are linked to the explosive's detonator. A barometric fuse containing mercury is designed to trigger the explosive when the airplane reaches a certain altitude; the mercury expands as the atmospheric pressure drops during the airplane's ascent. This type of bomb can be detected by a decompression chamber which artificially creates the conditions present in the non-pressurized cargo hold of a climbing aircraft. Most major airports have these decompression cham-

¹⁰³ PRESIDENTIAL COMM'N REPORT, *supra* note 6, at 64.

¹⁰⁴ 135 CONG. REC. H5883 (daily ed. Sept. 25, 1989) (statements of Rep. McCurdy); D. JOHNSTON, *supra* note 4, at 210.

¹⁰⁵ 135 CONG. REC. H5770 (daily ed. Sept. 25, 1989) (statements of Rep. Glickman); Riley, *supra* note 98, at 84. For a different time estimate, see Dorsey, *Bush to Form Panel to Probe Flight 103 Bombing*, TRAVEL WEEKLY, Aug. 21, 1989, at 55.

¹⁰⁶ 135 CONG. REC. H5883 (daily ed. Sept. 25, 1990) (statements by Rep. McCurdy); PRESIDENT'S COMM'N REPORT, *supra* note 6, at 63.

¹⁰⁷ D. JOHNSTON, *supra* note 4, at 148. In the case of Pan Am Flight 103, it was a "Toblar" brand candy wrapper. *Id.*

bers.¹⁰⁸ Therefore, a second fuse is used to delay the activation of the mercury fuse; it is an electronic timing device set to allow the baggage enough time to go through the airport's decompression chamber and be placed on the aircraft before the mercury fuse detonates the bomb.¹⁰⁹

Raffie Eitan, Israel's former chief of military staff and a terrorism expert, holds the opinion that the Popular Front for the Liberation of Palestine-General Command might have obtained the bomb (or the necessary technology) from the Arab Organization of 15 May.¹¹⁰ This group, which ironically acquired much of its bombmaking expertise from the Iraqis, is believed to reside safely in Syria.¹¹¹ Given the sophistication of the devices, the possible Arab Organization manufacturers, and the potential of protection and support of Syria, it seems virtually certain that the funding and technological advancement of terrorists could surpass that of the FAA. This possibility must be considered in any analysis of the effectiveness of the 1989 legislative initiatives in the United States.

b. *Screening and Airport Security Programs*

One of the main complaints of "Victims of Pan Am Flight 103" and allegations in the lawsuits against Pan Am, is that ALERT, the security personnel contracted by Pan Am and stationed at Frankfurt, were inadequately trained and negligent in performing their duties. For example, the persons questioning passengers at the Frankfurt airport were not fluent in English and had learned to ask questions phonetically.¹¹² Although private lawsuits will ultimately decide the issue of the competence of Pan Am and its contractors, it is incumbent on the FAA to ensure that, in the future, some correlation exists between

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 149; see also Duffy, *supra* note 10, at 44.

¹¹⁰ D. JOHNSTON, *supra* note 4, at 149.

¹¹¹ *Id.*, at 150.

¹¹² MacNeil/Lehrer *Newshour* — *Focus*, *supra* note 99 (statement by Bert Ammerman, transcript at 11).

its regulated standards of conduct and the legal standard of care imposed on air carriers and airport operators, as well as their respective agents and contractors. If the FAA standard continues to fall behind the legal standard, compliance with FAA regulations will be meaningless. At the same time, airline carriers will cite their compliance with the regulated standard as proof of their lack of negligence. In this way, improvident or inadequate regulation will actually inhibit the development of better security, both by dampening the threat of successful litigation against air carriers and airport operators, and by failing to provide guidelines which will encourage the implementation of appropriate and uniform security measures.

Unfortunately, establishing guidelines for aviation security programs will not be simple. To be effective, a program must provide guidelines appropriate to all airports, whether domestic or foreign, and whether owned by the state, by a government controlled corporation, or by private interests. It must take into account the inability of a United States air carrier to control the operations of a foreign airport, and the undesirability of the United States financing foreign security operations while financing its own. A key problem is the reluctance of United States carriers to substantially increase their expenditures for security. Estimates now place these security costs at about \$1 billion per year.¹¹³ Finally, in addition to being economically feasible, the security program must be workable.

In an effort to come up with a workable security program, section 216 of the Aviation Security Act required that a feasibility report be obtained regarding implementation by United States carriers of the security measures adopted by El Al Israel Airlines, Ltd. (El Al). El Al has a reputation for having the world's tightest security. It matches its passengers with their luggage before each flight and puts passengers through complete and detailed

¹¹³ Power, *supra* note 98, at 31.

questioning.¹¹⁴ El Al passengers are required to check in significantly earlier for their flights than passengers on other carriers, however, and the airline's security costs are estimated at \$30 million annually.¹¹⁵ Other carriers are quick to note that El Al has only twenty-one aircraft and annual sales of an estimated \$600 million, part of which is government subsidized.¹¹⁶

The Aviation Security Act also required a study of the feasibility and implications of expanding the type of inspection of travel documents performed by the United States at the last point of departure into the United States.¹¹⁷ In addition, the Act proposed establishing a task force on general aviation security with members to be drawn from various sectors of industry and government.¹¹⁸

To improve security at airports in the immediate future, section 102 of the Aviation Security Act would have amended the Federal Aviation Act of 1958 to require screening of passengers and carry-on luggage of all scheduled aircraft carrying more than thirty passengers. Section 102 also provided for amendment of the Airport and Airway Improvement Act of 1982 to appropriate \$170 million from the Trust Fund to assist sponsors of airports to acquire and install computer-controlled access doors. These doors would ensure that only authorized persons would have access to secured areas of airports. Rules promulgated by the FAA now require the installation of such doors.¹¹⁹ One reporter noted that with 270 major airports in the United States, the amount of the funds allocated indicates the FAA must have calculated an average

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Aviation Security Act, *supra* note 1, § 217.

¹¹⁸ *Id.* § 218.

¹¹⁹ PRESIDENT'S COMM'N REPORT, *supra* note 6, at 175. These emergency rules were announced by the FAA on December 31, 1988, as "extraordinary" measures to tighten aviation security programs at airports in Western Europe and the Middle East. *Id.*; see also *Airports, Airlines Tighten Security*, *supra* note 10, at 2-3.

of 128 access points to be secured at each airport.¹²⁰ He then noted that "[o]fficials at Chicago's O'Hare stopped counting at 1,627 and never even made it to the cargo area. No wonder industry experts say the price will be more like \$1.7 billion."¹²¹

Section 104 of the Aviation Security Act provided for FAA approval of security programs of airport operators, including approval of programs incorporating existing security programs of airport tenants that did not have FAA approval. This provision was an attempt to coordinate the efforts of airport operators and their air carrier tenants. It provided for the monitoring and enforcement of the security program by the airport operator. It also exculpated from statutory liability any airport operator that demonstrated it followed the measures set out in its security program to obtain the tenant's compliance and that the tenant, or its employee, permittee, or invitee was responsible for the violation of the security program.¹²² Given the ongoing debate these exculpatory provisions have engendered in similarly worded legislation, such as the Warsaw Convention, it is incomprehensible why the drafters continued to include such provisions in the Aviation Security Act.¹²³ Arguably, because market forces will provide greater sanctions against airline carriers (whose reputation for safety is of commercial value), and because airport operators are already virtual monopolies, this part of section 104 warranted rethinking.

With respect to foreign air carriers, section 105 required quarterly publication of the names of foreign air carriers that were complying with FAA security measures at airports served by American air carriers where approved security programs were operating.¹²⁴ Likewise, section 209 required that the FAA Administrator notify

¹²⁰ Riley, *supra* note 98, at 84.

¹²¹ *Id.*

¹²² Aviation Security Act, *supra* note 1, § 104.

¹²³ See Warsaw Convention, *supra* note 3.

¹²⁴ Aviation Security Act, *supra* note 1, § 105.

the Secretary of State of any continuing noncompliance with a security plan required of a foreign carrier. In case of noncompliance, the Secretary of State was to issue a travel advisory with respect to that carrier or any routes affected by that carrier's noncompliance. Section 209 only required that the travel advisory be published in the Federal Register, however.¹²⁵ *Quaere* how many passengers subscribe to, and read, the Federal Register.

The drafters also believed it useful to inform the public of the names of those nations that are not signatories to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation¹²⁶ and the Convention for the Suppression of Unlawful Seizure of Aircraft.¹²⁷ This information was to be published at least annually in the Federal Register for those prudent passengers subscribing to it. Ironically, although section 205 called on nonsignatory nations to "expeditiously become a party to such international agreements," as of November 1989 the United States itself had not ratified the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. An executive report of the Senate Foreign Relations Committee dated November 19, 1989 recommends that the Senate consent to its ratification.¹²⁸

To eliminate inconsistencies in and upgrade the quality of training and service provided by security contractors in airports around the world, section 206 allocated \$2 million for airport security training and assistance under the Foreign Assistance Act of 1961.¹²⁹ In addition, section 106 set forth a "rulemaking proceeding" to "propose and consider methods of improving the effectiveness of security screening of air carrier passengers and carry-on bag-

¹²⁵ *Id.* § 209.

¹²⁶ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 13, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570.

¹²⁷ Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. 7192, 860 U.N.T.S. 105, 10 I.L.M. 1151.

¹²⁸ S. EXEC. REP. NO. 17, 101st Cong., 1st Sess. 3 (1989).

¹²⁹ 22 U.S.C. § 2151 (1988); *see also* *Warning Appended to Security Bill*, CONG. Q. WEEKLY REP., May 27, 1989, at 1251.

gage, including . . . Federal certification of air carrier security screening personnel and . . . [improvement of the] qualifications, training, management and retention of such personnel."¹³⁰

c. *Dogs, Chemical Markers, and Other Measures*

Section 107 of the Aviation Security Act provided that funding was to be appropriated for an Explosive Detection K-9 Team Training Program for the fifty largest airports in the United States. This program was to involve the training and use of "bomb-sniffing" dogs to detect plastic explosives at airports and aboard aircraft.¹³¹ The security company hired by Pan Am for its Frankfurt operations had bomb-sniffing dogs, but the "Victims of Pan Am Flight 103," allege that the dogs were merely rented from a kennel and were not properly trained.¹³²

Preblast chemical taggants or markers are another way of ensuring detection of chemical explosives, including plastic, malleable and gel-based explosives.¹³³ This alternative is more cost-effective than TNA, and it is supported by both the Airport Operators Council International and the American Association of Airport Executives.¹³⁴ Section 203 of the Aviation Security Act required the Secretary of State to take "appropriate steps (including negotiations for bilateral and multilateral agreements)" to ensure that manufacturers of plastic explosives incorporated taggants or markers in the explosives to facilitate their detection. Underlying this provision was the hope that manufacturing countries could be made to take responsibility for the use of their products by encouraging them, through the unexpressed threat of retaliation, to consider to whom the explosives would be sold. The abil-

¹³⁰ Aviation Security Act, *supra* note 1, § 106.

¹³¹ 135 CONG. REC. H5762 (daily ed. Sept. 20, 1989) (amendment proposed by Rep. Burton).

¹³² *MacNeil/Lehrer Newshour — Focus*, *supra* note 99 (transcript at 11).

¹³³ 135 CONG. REC. H5773 (daily ed. Sept. 20, 1989) (statements of Rep. Burton).

¹³⁴ Dorsey, *supra* note 105, at 55.

ity to effect such a security measure, however, is dependent upon the cooperation of the countries that manufacture explosives. The statute failed to address this practical problem.

The wording of the Aviation Security Act suggested that the development of new chemical explosives might antedate the discovery of appropriate chemical markers. Subsection 203(4) called on countries producing the explosives to require that a taggant or marker "be incorporated in any high explosive manufactured in that country as soon as a taggant or marker suitable for that form of explosive is developed."¹³⁵ This measure seems akin to closing the stable door after the horse is already gone.

Not specifically included under the Aviation Security Act as an option, but contemplated in its provisions for research, were "vapor sniffers." These devices are sensitive to nitrogen and oxygen, which are ingredients in most explosives.¹³⁶ Unlike TNA devices, vapor sniffers are portable and can be used at airport gates, on-board, and even at the aircraft's air-conditioning exhaust vent.¹³⁷

Section 213 came the closest of any provision to allowing the involvement of airline passengers in their own safety. In a "frontier justice" approach to aviation security, Subsection 213(c) provided for the publication of United States Government rewards for information on international terrorist-related activities. The amount of these rewards was to be increased from \$500,000 to a maximum of \$2 million. An amendment proposal suggested that the government be authorized to give rewards for information leading to the apprehension and conviction of terrorists responsible for attacks against the personnel and passengers of United States flag airlines, as well as United States embassies, facilities and citizens. The final House version of the Act omitted wording be-

¹³⁵ Aviation Security Act, *supra* note 1, § 203(4).

¹³⁶ Riley, *supra* note 98, at 84.

¹³⁷ *Id.*

yond "attacks on U.S. citizens and property."¹³⁸

On a more useful note, subsection 213(a) called for the development and publication of guidelines to "thwart efforts by international terrorists to enlist the unwitting assistance of international aviation travelers in terrorist activities."¹³⁹ Using an unsuspecting passenger to carry a package onto a flight is a classic method of getting bombs onto airplanes.¹⁴⁰ Subsection 213(b) required the Secretary of State and Secretary of Transportation to negotiate with other nations for international standards regarding these guidelines.¹⁴¹

d. *Preventative Post-Disaster Provisions*

Disorganization and insensitivity of both government and Pan Am officials exacerbated the trauma experienced by the friends and family of those killed on Pan Am Flight 103.¹⁴² The litany of complaints of misinformation, mismanagement, and mistreatment stemmed in part from the magnitude of the disaster.¹⁴³ A lack of preparation and resources and the apparent inability of the government to accept responsibility for the needs of the bereaved accounted for most of the problems. For example, the State Department relied on Pan Am to contact the families of

¹³⁸ 135 CONG. REC. H5765 (daily ed. Sept. 20, 1990) (statements of Rep. Walsh).

¹³⁹ Aviation Security Act, *supra* note 1, § 213(b).

¹⁴⁰ D. JOHNSTON, *supra* note 4, at 147-48. Originally, investigators believed that a female passenger on Pan Am Flight 103 was duped into carrying the bomb in her luggage under the pretense that it was a Christmas present to be mailed to the donor's friend in the United States. *Id.* More recently it has been speculated that a DEA-related drug courier brought the bomb onto the flight in his luggage, mistaking it for drugs, and that the suitcase carrying the bomb may have been assisted past security checkpoints with the help of West German police. *Calgary Newshour*, *supra* note 13.

¹⁴¹ Aviation Security Act, *supra* note 1, § 213(b).

¹⁴² D. JOHNSTON, *supra* note 4, at 35-42; Fisher, *State Department Says Retaliation is Already an Option: Accepts Criticism Over Treatment of Victim's Families*, AIR SAFETY WEEK, May 21, 1990, at 3; Ludtke, *supra* note 22, at 33; Telephone interview with Georgia Nucci, *supra* note 14. For a general view of the treatment of the bereaved families, see *Donohue*, *supra* note 30.

¹⁴³ Approximately two thousand people flooded into Lockerbie within a day of the crash. D. JOHNSTON, *supra* note 4, at 50.

the deceased. This decision has since been termed "seriously flawed."¹⁴⁴ In some instances, the callous treatment of the bereaved by both government and Pan Am was inexcusable. For example, several relatives were told to pick up their "shipment" from the livestock quarantine area of an airport warehouse. On their arrival at the warehouse, a forklift was used to transport the cardboard box containing the remains of their loved one.¹⁴⁵

Section 212 of the Aviation Security Act sought to eliminate a repeat performance of this incompetence by expanding the State Department's crisis management training program for all diplomatic and consular officers abroad. Improvements included a toll-free telephone service solely for the use of family members of American victims of foreign disasters. The statute also required the Secretary of State to establish a program to handle telephone inquiries by next-of-kin in the event of a major disaster abroad.¹⁴⁶

Section 215 called for the imposition of multilateral sanctions against any country supporting or harboring terrorists. Suggested sanctions included prohibiting aircraft of such countries from engaging in air transportation with the boycotting nations, denying overflight permission, and banning the export and sale of aviation equipment to such countries.¹⁴⁷

e. *Security Bulletins*

United States airlines and airports adjust the level of security based on information they receive from FAA and local government security bulletins. The source of these bulletins is confidential in order to protect those who provide the information.¹⁴⁸ Warnings of potential threats to

¹⁴⁴ 135 CONG. REC. H5772 (daily ed. Sept. 20, 1989) (statements of Rep. Snowe).

¹⁴⁵ *Donohue, supra* note 30 (statements of Ms. O'Connor).

¹⁴⁶ Aviation Security Act, *supra* note 1, § 212.

¹⁴⁷ *Id.* § 215.

¹⁴⁸ D. JOHNSTON, *supra* note 4, at 167.

security are assessed by persons from the FAA, CIA, FBI, and the Defense Intelligence Agency, among others. The FAA revised its security bulletin process in April of 1989.¹⁴⁹ Previously, if a legitimate threat was determined to exist, an FAA Security Bulletin was issued and a Federal Air Marshal or Aviation Security Specialist was sent to coordinate protection with the specific air carrier and the security officials of the airport involved. A long term threat or ongoing danger resulted in a travel advisory. Security bulletins communicated other threats to the embassies, missions, American carrier(s) or the domestic airports affected. The air carrier(s) and airport authorities then presumably acted in accordance with their security program. At the same time, the American embassy security office communicated the threat to the government of the local airport involved, and hopefully that government took some action.

On paper, the Security Bulletin process of the FAA did not appear to be deficient. It is not the process or the law that creates security, however; it is the effort and accountability of the people working within the process that matters. A security bulletin process is only effective if the threats underlying the bulletins are taken seriously, if the bulletins themselves are accurate, if they are given to people who can use them, and if those people act on that information.

In the case of Pan Am Flight 103, warnings of a bomb were received, and FAA security bulletins were issued.

¹⁴⁹ PRESIDENT'S COMM'N REPORT, *supra* note 6, at 176-78. On April 3, 1989, the Transportation Secretary announced several new security initiatives, including some tightening of the security bulletin process:

Information Circulars are now used to notify U.S. airlines of general situations and security information for which the FAA will not require mandatory countermeasures. Security Directives are used to pass on specific, credible threats and mandatory countermeasures, requiring acknowledgement of receipt and a report of implementation. It is a regulatory violation, subject to a civil penalty to fail to comply with a security directive or to release information from security directives without authorization.

Id. The process still did not require public notification of threats.

They were ineffective in preventing the bombing, however, because they were discounted or simply ignored.¹⁵⁰

The handling of the events leading up to the Pan Am Flight 103 bombing was indicative of a fundamental problem more serious than an ineffective security bulletin process or the failure of Pan Am or the government to strictly adhere to such a process. The lack of communication and coordinated effort between the FAA, the State Department and American intelligence gathering agencies were also responsible. The following is a brief account of how the system failed.¹⁵¹

A lengthy surveillance operation by West German intelligence culminated on October 26, 1988 in the arrest of at least seventeen people, some of whom were members of the PFLP-GC. Residences in Frankfurt were raided as part of the operation. Within twenty-four hours, Interpol in Paris was warned of the findings: guns, ammunition, and a bomb thought to be similar to that used on Pan Am Flight 103. The West German police called for a meeting on November 15, 1988. Meeting participants, which included British intelligence experts, were given photographs of the cassette-recorder bomb. By November 22, a telex containing a photograph of the radio-cassette bomb had been sent to the security staff at all United Kingdom airports and airlines with a warning that others might exist.

The FAA bulletins contained no mention of the Octo-

¹⁵⁰ D. JOHNSTON, *supra* note 4, at 105-06, 111-15, 161-82; PRESIDENT'S COMM'N REPORT *supra* note 6, at 6-11, 22, 83, 84; see also *Airport Security: Hearing Before the Subcommittee on Transportation, Aviation and Materials of the House Committee on Science, Space and Technology*, 101st Cong., 1st Sess. (1989); *Foreign Airport Security Hearing Before the House Committee on Foreign Affairs*, 101st Cong. 1st Sess. (1989); *Department of Transportation and Related Agencies Appropriations for 1990: Hearing Before the Subcommittee of the House Committee on Appropriations*, 101st Cong., 1st Sess. (1989); *Aviation Security: Special Hearing Before the Subcommittee of the Senate Appropriations Committee*, 101st Cong., 1st Sess. (1989); *Aviation Security: Hearing before the Subcommittee on Aviation of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1989).

¹⁵¹ The information related in the account of how the system failed in the Lockerbie tragedy was gleaned by the author from various sources, *supra* note 150. Some specific citations have been noted.

ber raids until November 2, 1988. Bulletin 88-17 mentioned the raids, and Bulletin 88-18, issued November 3, mentioned the arrests.¹⁵² Bulletin 88-17 suggested that airline security personnel "disseminate the information to corporate officials able to take precautionary measures in the event that specific threat information is developed that must be passed and reacted to extremely quickly."¹⁵³ Thus, some passengers received notification of the potential bomb threat while others did not. Bulletin 88-18 concentrated on hijacking and did not mention bombing at all. On November 17, 1988, Bulletin 88-19 advised that a bomb was found, described its construction, and noted that it would be "difficult to detect with normal x-ray inspection" and, therefore, it might be intended to pass through airport security controls. The bulletin then gave a summary of the PFLP-GC raid but incorrectly described the terrorist activities of the PFLP-GC.¹⁵⁴

On December 5, 1988, the U.S. Embassy in Helsinki received an anonymous call about a plot to blow up a Pan Am flight traveling from Frankfurt to the United States in two weeks. The chief of the security police in Finland reportedly said that three similar calls were previously made to the Israeli embassy in Helsinki. These calls were assessed and found to be a hoax. Thus, the December 5 "Helsinki warning" was also discounted. The British Transport Secretary, however, told Members of Parliament that the FAA issued a security bulletin received by the British Department of Transport on December 9, 1988. December 5 was also the day Bulletin 88-20 was issued. That bulletin noted that the use of improvised explosive devices continued to be a preferred terrorist technique. Airlines were simply advised to rigorously adhere to their existing security measures.¹⁵⁵

On December 7, the FAA told airlines that persons dis-

¹⁵² D. JOHNSTON, *supra* note 4, at 170-71.

¹⁵³ *Id.* at 171 (quoting Bulletin 88-17).

¹⁵⁴ *Id.* at 69 (quoting Bulletin 88-19).

¹⁵⁵ *Id.* at 171 (discussing Bulletin 88-20).

guised as law enforcement agents had questioned Trans-World Airlines (TWA) in Frankfurt about transporting explosives, a detonator, and pistols. Two weeks later, Pan Am Flight 103 was bombed.

The Aviation Security Act attempted to address some of the obvious flaws in the bulletin process. To ensure future bomb threats would not go unheeded, section 210 required the FAA to establish a follow-up system to determine what action was taken with respect to security bulletins disseminated abroad to American airlines.¹⁵⁶ To avoid a double standard as to who could obtain the benefit of the warnings, and to protect the confidentiality of informants, section 211 provided that FAA security bulletins could only be distributed to certain officers at diplomatic and consular posts. They were not to be released publicly, passed to travel agents or United States businesses, posted in public places, or distributed within the post. They were also not to be used to respond to public or media inquiries.¹⁵⁷ Finally, to remedy a shortage of FAA security personnel, section 207 required the FAA to report on its efforts to increase its staffing levels and to use civil aviation security specialists to help the airline security coordinators act on any legitimate threats received.¹⁵⁸

f. *Bomb Threats and Passenger Warnings*

One of the most controversial issues remaining in the wake of Pan Am Flight 103 is whether bomb warnings received by an airline or the government should be shared with the passengers who are about to purchase tickets for, or embark on, a flight. To airline passengers, their friends, and families, this is likely the most important issue of all: the passenger's right to information relating to security in the air, and the right to be free of forced reliance on the "protection" of government and the airlines.

¹⁵⁶ Aviation Security Act, *supra* note 1, § 210.

¹⁵⁷ *Id.* § 211.

¹⁵⁸ *Id.* § 207.

Section 211 of the proposed Aviation Security Act eliminated any dissemination of security bulletins to the public. The desire of the "Victims of Pan Am Flight 103" was that exactly the opposite would occur.¹⁵⁹ Section 207 of the proposed Aviation Security Act did provide that the in-flight security coordinator be briefed on matters relating to "any conditions that pose a potential threat."¹⁶⁰ The issue of whether passengers themselves should be advised of security concerns remained unaddressed, however. In early 1989, the FAA met with the major airlines' security managers and advised them that the policy of the government was that threats should typically not be publicized.¹⁶¹

The "Victims of Pan Am Flight 103" take the position that until the FAA accepts full accountability for airport and airline security and actively participates in protecting the public, the public should be allowed to protect themselves. The lack of information about the reasons behind the bombing has engendered a distrust of the FAA and the airline industry among members of the group. Speculation exists that Pan Am Flight 103 was a "sacrifice" flight by the U.S. Government, meant to appease the Iranians for the Iranian airbus tragedy earlier in 1988. Anger runs high over the large voluntary reparations that have been paid by the United States government to the families of victims on that flight, while Pan Am's bereaved are left to weave their way through the maze of the American litigation process.¹⁶² Some even believe that the entire Iranian airbus tragedy was a hoax, engineered by the Iranian government to embarrass the United States.¹⁶³

¹⁵⁹ *Donohue*, *supra* note 30 (statements of Mr. Hogan).

¹⁶⁰ Aviation Security Act, *supra* note 1, § 207.

¹⁶¹ Telephone interview with Q. Burgess, FAA Legislative Liaison, Washington D.C. (Jan. 19, 1990); see also PRESIDENT'S COMM'N REPORT, *supra* note 6, at 178-79.

¹⁶² The U.S. Government released \$250,000 in voluntary reparations for the accidental bombing of the Iranian airbus. According to "Victims of Pan Am Flight 103," it also released frozen assets amounting to \$387,000,000 and will possibly release another \$200,000,000 in future. See *Donohue*, *supra* note 30 (statements of Ms. Tsairis); Wines, *supra* note 12, at B1.

¹⁶³ *Id.*

Although from the safety of an armchair these ideas may seem extreme, factual evidence does suggest that Pan Am Flight 103 had more to do with international politics than airport security. If this is true, it seems only logical to question the government's ability to protect passengers while simultaneously endangering them.

Those opposing the disclosure of bomb threats typically give several reasons why it is inadvisable to warn passengers.¹⁶⁴ First, not every bomb threat is specific as to its targeted airport or airline carrier, let alone the date and time of the planned attack. Also, threats are so numerous that airlines receive more than one threat per day.¹⁶⁵ Second, spurious hoax threats might increase if there is a greater opportunity to create mass hysteria. Third, it is questionable whether passengers can make an informed decision on the basis of the limited and hurried information given at the ticket counter. The facts of Pan Am Flight 103 demonstrate that even the experts cannot properly assess threats after two months of investigation. One wonders, however, if passengers could do worse.

Some airlines fear an unnecessary decrease in business will occur if passengers are advised of every security threat. As fuel prices soar and competition stiffens, the threat of a decrease in international air travel is an unsavory thought to the airline industry. The "Victims of Pan Am Flight 103" allege, however, that air travel is not likely to decrease if passengers are notified of a bomb threat. For example, in April of 1989, only seventeen of two hundred ticketed passengers on a Pan Am flight between Paris and the United States refused to board after being informed of a potential bomb threat fifteen minutes before departure.¹⁶⁶ On the other hand, only twenty-two out of one hundred thirty ticketed passengers boarded after being advised by Northwest Airlines of a bomb threat

¹⁶⁴ MacNeil/Lehrer Newshour — *Focus*, *supra* note 99.

¹⁶⁵ *Id.*; telephone interview with Q. Burgess, *supra* note 161.

¹⁶⁶ MacNeil/Lehrer Newshour — *Focus*, *supra* note 99 (statements of Mr. Lehrer and Mr. Ammerman).

on its December 30, 1989, flight from Paris to Detroit flight.¹⁶⁷

Basing a decision of whether public disclosure of bomb threats is desirable solely by an analysis of the effect of warnings on ticket sales ignores the other expenses incurred by the industry for each successful bombing. Legal defense costs, manpower expenditures to deal with the bereaved and the media, costly internal investigations, and the time and money spent in public and governmental hearings all tip the scales heavily in favor of proactive effort. Clearly, the potentially adverse economic impact on ticket sales has not deterred some airlines from attempting to pass some of the risk to the passenger. For example, Delta Air Lines announced a general terrorist threat against its transatlantic flights in January of 1990.¹⁶⁸

The FAA has expressed concern that even warnings restricted to passengers will create mass panic at airports, especially once news of the bomb threat leaks to the media. Admittedly, passenger warnings could lead to practical and administrative problems. These problems are not insurmountable, however. Perhaps the real fear of both industry and government is that the public will find out how unfriendly the skies really are. Public disclosure that neither the fare paid to the airline nor the Trust Fund fee levied on each ticket has effectively improved security would be, at best an embarrassment.

With the existence of groups such as the "Victims of Pan Am Flight 103," it is futile to delay public involvement in aviation security in the hope that the problem will quietly disappear. Irrespective of the merits of such arguments, it is unlikely that the public will accept "administrative convenience" as sufficient reason to preclude the disclosure of bomb warnings. But because "administrative inconvenience" ultimately translates into "administrative

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

cost," it will be interesting to see if government policy will actually change.

3. *Fate of the Proposed Legislation: The Cost of Security*

Although abundant support for new aviation security measures existed, uncertainty plagued the fate of the Aviation Security Act and the Airport Security Research and Technology Act from their inception. Opposition to the funding provisions existed on several fronts — specifically in issue was the issue of the source of the \$100,000 allocated for the purchase of TNA devices.

a. *The Trust Fund Dispute*

The original drafts of the Aviation Security Act required the government to make funds directly available to the airlines to cover their TNA device purchase and installation costs.¹⁶⁹ The FAA opposed the bill arguing that airports should upgrade security with their own funds, and the Ways and Means Committee refused to authorize grants to the airlines for that purpose.¹⁷⁰ The airlines argued that terrorist activities are directed towards government decisions and policies, not air carriers, and that the government must accept responsibility for at least some of the financial burden. A corollary concern of all parties was that additional security costs would further burden the ability of United States carriers to compete internationally. Congressman Oberstar, the sponsor of the Aviation Security Act and of the funding amendment, noted that United States carriers already cover all domestic security costs, including the costs of training and equipment for personnel at 1200 airport security checkpoints, and the costs of air cargo and baggage inspection, airport access systems, and secured area protection at airports. Oberstar noted that, in contrast, all European govern-

¹⁶⁹ Aviation Security Act, *supra* note 1, § 101.

¹⁷⁰ *Transportation - Aviation Security*, CONG. Q. WEEKLY REP. August 12, 1989, at 2110; *see generally Warning Appended to Security Bill*, CONG. Q. WEEKLY REP., May 27, 1989, at 1251 (discussing legislative action on the Aviation Security Act).

ments and the Israeli government provide security for their air carriers, virtually eliminating these costs from the overhead of foreign airline competition.¹⁷¹ Furthermore, the Department of Transportation already required United States airlines to bear the cost of TNA device installation.¹⁷²

Supporters of the funding mechanism in the Aviation Security Act noted that, as of 1989, a surplus of \$5.8 billion had accumulated in the Trust Fund through the contributions of the airline ticket purchasers.¹⁷³ They also pointed to the immediate need for security measures, citing the fact that the aviation security system currently in place was designed to combat the hijacking activities of the 1970s and not the bombings of the late 1980s.¹⁷⁴

Those objecting to the use of the Trust Fund as the source of funds for TNA devices stated that it was unfair for domestic travelers to pay for the security of international travelers through a levy on their domestic tickets.¹⁷⁵ The Secretary of Transportation went so far as to write a letter indicating that, if the Aviation Security Act were enacted, he would strongly recommend that the President veto the bill.¹⁷⁶ He reasoned that the legislation could actually slow the process of getting TNA online by encouraging the airlines to defer purchasing TNA devices until government funds were appropriated. He referred to the funding program as an "expensive precedent for a new Federal subsidy at [sic] the airlines."¹⁷⁷

The real crux of the matter seemed to be the reluctance

¹⁷¹ 135 CONG. REC. H5679 (daily ed. Sept. 20, 1989) (statements of Rep. Oberstar).

¹⁷² *Transportation - Aviation Security*, CONG. Q. WEEKLY REP. Dec. 2, 1989, at 3308.

¹⁷³ 135 CONG. REC. H5768 (daily ed. Sept. 20, 1989) (statements of Rep. Anderson). The Trust Fund was projected to have accumulated a surplus of \$7.6 billion as of July 1990. Pytte, *supra* note 101, at 2216.

¹⁷⁴ 135 CONG. REC. H5767 (daily ed. Sept. 20, 1989) (statements of Rep. Anderson).

¹⁷⁵ *Id.* at H5774 (statements of Rep. Delay).

¹⁷⁶ *Id.* (statements of Rep. Coughlin).

¹⁷⁷ *Id.*

of the FAA and some members of the Appropriations Committee to expend Trust Fund moneys.¹⁷⁸ Those in favor of allocating more of the Trust Fund for security programs noted that Trust Fund moneys are actually figured into the government's budget to offset the federal deficit.¹⁷⁹ Congressman Smith pointedly summarized the position of those in favor of spending the Trust Fund, stating, "First and foremost, we are here to protect people, not the trust fund. The trust fund is not going to get bombed out of the sky."¹⁸⁰

Several other considerations may also have shaped the opinions of those supporting Trust Fund spending. First, the more funds that remained "Trust Funds," the greater the amount of interest accumulating on those funds and the greater the pool of money designated specifically for aviation use. Second, the existence of a large Trust Fund provided political saleability for aviation projects, including aviation security. In other words, elected representatives could point to the existence of this source of funds when seeking support for an aviation program.

Because of continuing controversy, the bill was amended to make funds available from the Trust Fund but subject to the normal appropriation process.¹⁸¹ This amendment dovetailed with the issuance of a final rule by the FAA requiring air carriers to assume the full cost of the equipment.¹⁸² Under the amendment, the carriers would initially pay for the equipment, but the government would be obligated to buy back the devices at their original purchase price, if and when the money became avail-

¹⁷⁸ *Transportation - Aviation Security*, *supra* note 170, at 2110.

¹⁷⁹ Pytte, *supra* note 101, at 2216; *see* Nutting, *supra* note 86, at 2052.

¹⁸⁰ 135 CONG. REC. H5774 (daily ed. Sept. 20, 1989) (statements of Rep. Smith). For comments relating to the use of the Trust Fund to mask the federal deficit, *see id.* at H5780 (statements of Rep. Boehlert); *see also* Pytte, *supra* note 101, at 2216.

¹⁸¹ 135 CONG. REC. H5767 (daily ed., Sept. 20, 1989); *see also* Pytte, *House OKs Bomb Detector Bill With Funding Compromise* CONG. Q. WEEKLY REP., Sept. 23, 1989, at 2454.

¹⁸² 135 CONG. REC. (daily ed. Sept. 20, 1989) at 5767 (statements of Rep. Clinger); *see also* 14 C.F.R. § 108.7 (1990).

able through the action of the Appropriations Committee.¹⁸³ Thereafter, the equipment would be made available to the airports. Supporters endorsed this amendment because it avoided the "dangerous precedent" of authorizing direct grants to individual airlines¹⁸⁴ and eliminated the "long, bureaucratic, Federal procurement process."¹⁸⁵

A potential difficulty remained, however, in that the airlines could pass the cost of the TNA devices on to their passengers, and then subsequently recover the purchase costs from the government, amounting to a double recovery from taxpaying passengers.¹⁸⁶ An additional concern was that money might eventually have to be taken from other aviation programs to permit the future repurchasing of TNA devices.¹⁸⁷ Thus, the FAA still preferred that the airlines purchase their own explosive detection equipment and then ultimately pass on the cost to the flying public in the form of additional surcharges on airfares.

A jurisdictional issue was also hidden within the dispute over whether Trust Funds should be used to purchase TNA devices. Direct allocation under the statute would bypass the Appropriations Committee and usurp its spending jurisdiction.¹⁸⁸ The amendment to the Aviation Security Act allowed for a compromise to be reached on this issue. While the funding for TNA devices would be subject to the 1990 appropriations process, the bill was reworded to reflect Congressional consensus that the TNA program should ultimately be financed out of the Trust Fund.¹⁸⁹

Despite the legislative compromise, opposition to the bill remained. Critics of the legislation continued to ex-

¹⁸³ 135 CONG. REC. H5770 (daily ed. Sept. 20, 1990) (statements of Rep. Clinger).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at H5771 (statements of Rep. Conti).

¹⁸⁶ Pytte, *supra* note 101, at 2216.

¹⁸⁷ *Transportation - Aviation Security*, *supra* note 170, at 2110.

¹⁸⁸ See Pytte, *supra* note 101, at 2216.

¹⁸⁹ *Id.*

press concern over the use of the Trust Fund for the TNA program. They argued the moneys would be taken away from the purposes for which they were intended: capital improvement projects such as airport expansions.¹⁹⁰ In the words of Congressman Hammerschmidt, "For every dollar the federal government spends on security, there is less for airport improvement."¹⁹¹

The same concern over possible underfunding of capital improvement projects has plagued DOT appropriation bills. To avoid the underfunding of capital improvement projects, the bills once contained a "penalty clause." The penalty clause automatically reduced the money available for appropriation from the Trust Fund for FAA operations whenever the appropriations for capital improvement projects fell below required amounts.¹⁹² In such instances, the Trust Funds available for FAA operations were to be reduced by a sum twice the amount capital improvement projects were underfunded. Despite the penalty clause, sums less than those required for capital improvement projects still gained approval, consequently limiting the FAA's operational funding from the Trust Fund account. Therefore, the latest DOT appropriations bill eliminated the penalty clause.¹⁹³ Instead, airport development and planning grants have been increased, and the Trust Fund will now contribute a greater share of the FAA's operational costs.¹⁹⁴

Neither the use of a penalty clause nor the solution used with the 1991 appropriation bill solve the fundamental problem underlying the Trust Fund dispute, which is

¹⁹⁰ *Section Notes: Ways and Means Rejects Aviation Security Plan*, CONG. Q. WEEKLY REP., June 10, 1989, at 1399; *Transportation - Aviation Security*, *supra* note 170, at 2110; *Transportation - Aviation Security*, *supra* note 172, at 3308; Pytte, *supra* note 181, at 2454.

¹⁹¹ Pytte, *supra* note 181, at 2454.

¹⁹² Pytte, *supra* note 101, at 2216.

¹⁹³ H.R. 5229, 101st Cong., 2d Sess. (1990); H.R. REP. NO. 584, 101st Cong., 2d Sess. (1990); S. REP. NO. 398, 101st Cong. 2d Sess. (1990); *see also* Pytte, *supra* note 101, at 2216; Pytte, *Transportation Panel Drafts \$13.1 Billion Spending Bill*, CONG. Q. WEEKLY REP., June 23, 1990, at 1952.

¹⁹⁴ Pytte, *supra* note 101, at 2216.

simply the existence of a limited amount of resources for a potentially unlimited amount of projects. A fact complicating the funding dispute is that while the Trust Fund has been accumulating a "surplus," the federal general revenues have simultaneously been used to finance FAA operations.¹⁹⁵ Since 1982, public works legislation has reportedly appropriated \$5.3 billion from general revenues for FAA operations.¹⁹⁶ Thus, it is arguable that the increase in the Trust Fund has actually been offset by a corresponding decrease in general revenues.

The funding dispute takes on an aura of unreality considering that, ultimately, both the Trust Fund and the general revenues exist only on paper. By way of simple explanation, if the FAA is limited to a defined budget, any Trust Fund money allocated to aviation security programs will mean less Trust Fund money remaining for capital improvement projects. Thus, these projects will require greater allocations from federal general revenues. The "spending down"¹⁹⁷ of the Trust Fund will also mean less of an offset against the federal deficit. In other words, a higher federal deficit will be reflected in the government ledgers. The greater the federal deficit, the smaller the amount of general revenues available to all competing administrative agencies, including the FAA. The smaller the amount of funding to the FAA from the general revenues, the less funds available for capital improvement projects. The converse is also true: limiting expenditures from the Trust Fund to capital improvement projects will leave aviation security programs underfunded.

One possible solution to this conundrum is spending Trust Fund money, yet simultaneously continuing to draw on general revenues. This solution would allow the fund-

¹⁹⁵ Telephone interview with Joan Bauerlein, Director of Aviation, FAA, Washington, D.C. (Sept. 7, 1990); Pytte, *supra* note 101, at 2216.

¹⁹⁶ Pytte, *supra* note 101, at 2216.

¹⁹⁷ "Spending down" is defined as spending at a greater rate than the rate at which incoming revenues accumulate, with the result that the fund is gradually reduced. In layman's terms, it amounts to speeding up the rate at which one falls behind.

ing of both capital improvement projects and aviation security, but likewise would increase the federal deficit from both ends — a politically and economically unpalatable alternative. Perhaps the reality of this “Catch 22” is what spurred Congressman Oberstar, sponsor of the proposed Aviation Security Act and originally a proponent of spending down the Trust Fund, to redirect his support to the Bush administration’s latest alternative: user fees.¹⁹⁸ Stating the obvious, Congressman Oberstar noted that “we all know that there is no free lunch.”¹⁹⁹

b. *User Fees*

On March 19, 1990, the Bush administration proposed a five-year plan for the financing of commercial aviation programs, partially utilizing user fees as a funding method.²⁰⁰ The House bill for this Airport and Airway Trust Fund reauthorization was passed on August 2, 1990.²⁰¹ The companion bill²⁰² remains opposed in the Senate, and markup of that bill is unlikely in 1990.²⁰³

The reauthorization plan provides for aviation funding through a combination of increased taxes on cargo, fuel, and airline tickets, and by the imposition of an airport tax, referred to as a “passenger facility charge” (PFC).²⁰⁴ A PFC of up to \$12 per round trip ticket will permit airports

¹⁹⁸ There are also political realities which may contribute to these shifts in position. For further speculation on this point, see Mills, *House OKs Passenger Fees to Boost Airport Funding*, CONG. Q. WEEKLY REP., Aug. 4, 1990, at 2510, 2511.

¹⁹⁹ Nutting, *supra* note 86, at 2052.

²⁰⁰ H.R. 5170, 101st Cong., 2d Sess. (1990).

²⁰¹ The House Public Works Committee approved the bill 37 to 10 on June 28, 1990 (the same day the Aviation Security Improvement Act of 1990 was introduced). Nutting, *supra* note 86, at 2052. The House vote on August 2, 1990 was 405 to 15. Mills, *supra* note 198, at 2510; H.R. 5170, 101st Cong., 2d Sess. (1990); see also H.R. REP. NO. 581, 101st Cong., 2d Sess. (1990).

²⁰² S. 2268, 101st Cong., 2d Sess. (1990).

²⁰³ *Legislative Summaries*, CONG. Q. WEEKLY REP., Aug. 18, 1990, at 2659.

²⁰⁴ Pytte, *Bush Plan for Airports, FAA Depends on Higher Taxes*, CONG. Q. WEEKLY REP., Mar. 24, 1990, at 912. The plan increases federal airline ticket taxes from eight percent to ten percent; freight fees from five percent to six percent; aviation gasoline taxes from twelve cents per gallon to fifteen cents per gallon; and jet fuel taxes from fourteen cents per gallon to eighteen cents per gallon. *Id.*

to generate funds for their own capital improvement projects.²⁰⁵ The plan calls for a corresponding decrease in federal funding for airports of fifty cents for each dollar collected as a PFC. Assuming that the largest forty-five domestic airports will levy PFCs, an estimated \$1 billion annually in additional funds for airport development is anticipated.²⁰⁶ In accordance with the DOT's proposals to "spend down" the Trust Fund, the administration's plan also proposes to reduce the overall balance in the Trust Fund to \$3 billion by fiscal year 1995.²⁰⁷ With the spending down of the Trust Fund, a smaller percentage of general revenues is to be made available for FAA operations.²⁰⁸

Critics of the plan object to the imposition of user fees prior to the reduction of the Trust Fund "surplus."²⁰⁹ The reductions to the Trust Fund contemplated in the plan have also been criticized as being too slow and "unrealistic in light of other transportation cuts" in other sectors.²¹⁰ There is a fear that funds otherwise directed to FAA operations may be required for other transportation projects that are inadequately financed, increasing the possibility that funds may ultimately be directed away from aviation related capital improvement projects.²¹¹

The bill included a clause that provided for repeal of PFCs if federal airport improvement spending dropped below \$3.7 billion over fiscal 1991-92. This clause addressed the concern that the increased income generated from PFC's would be used to reduce expenditures from the Trust Fund rather than to pay for airport

²⁰⁵ Mills, *supra* note 198, at 2510. A PFC will be \$1, \$2, or \$3 per ticket with a maximum of two fees on any one-way trip. *Id.*

²⁰⁶ Nutting, *supra* note 86, at 2052; Mills, *supra* note 198, at 2510.

²⁰⁷ Pytte, *supra* note 204, at 912. For a further discussion of "spending down," see *supra* note 197.

²⁰⁸ Pytte, *supra* note 204, at 912.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ The Appropriation Subcommittee on Transportation received 497 requests for specific projects in fiscal 1991 from 85 Senators. *Transportation Bill Passed by Senate*, CONG. Q. WEEKLY REP., Aug. 11, 1990, at 2592.

improvements.²¹²

What does all of this mean for aviation security? As the debate over aviation funding expands into the realm of DOT budgets and appropriations, it becomes easy to lose sight of the importance of financially supporting the small component of aviation security. As time passes, improving aviation security may appear less urgent, lulling us into complacently preserving the *status quo*. Frustrations over lineups at airports may begin to seem more important than costly security procedures as the tragedy at Lockerbie fades into an unpleasant memory.

c. *"Pay-As-You-Fly" Security and (Low Cost) Public Awareness*

Despite their dulling effect on the improvement of aviation security, economic realities cannot be ignored. Are there other alternatives to those that the policy-makers and legislators have introduced thus far? One editorial on the subject suggests a more radical alternative to aviation security funding. The editorial suggests allowing market forces to dictate completely the levels of safety and security.²¹³ In other words, travelers should themselves choose how much security they wish to have by paying more for less crowded flights, safer aircraft (beyond a minimum standard), and better security. In order to make this work, the editorial notes that all aviation crashes must be fully investigated, and the results of the investigations must be made public.

This "Russian roulette" approach to aviation security seems rather naive. It implies that airline passengers will have a real choice as to the quality of security they wish to obtain. In reality, however, the question will not be "how much security would you like?", but "how much security can you afford?" In some cases, the government, for reasons of "national security" (or perhaps embarrassment)

²¹² Nutting, *supra* note 86, at 2052.

²¹³ *Enjoy Your Flight: Air Crashes are Memorably Horrific, but (Still) Fantastically Rare*, THE ECONOMIST, Jan. 14, 1989, at 17.

may not want the public to be apprised of the results of aviation crash investigations. Furthermore, there are no guarantees that public disclosure of the results of those investigations will be accurate, complete,²¹⁴ or timely. Furthermore, in an industry where certain routes become "captive markets" for the airlines, there is no way for the consumer to comparatively shop the market. It also is impossible to ensure a correlation between the cost of a ticket and the security provided. On Pan Am Flight 103, passengers paid an additional \$5 per ticket for what Pan Am advertised as the best security in the industry.²¹⁵ The results are poignantly clear.

Perhaps the most valuable part of the "pay-as-you-fly" security idea is its call for increased public awareness. Security and safety do vary among airlines, and it is up to the consumer to demand some level of security and safety, or at least some information, in exchange for the price of an airline ticket. Perhaps this is also part of the solution to the current miring of aviation security legislation in disputes over the Trust Fund.

Is raising public awareness too cumbersome and slow a process to be a realistic alternative? Even if the Aviation Security Act had become law, in practice it may have done no more than formally acknowledge the need for an effective security system. The proposed bill merely required the content of security programs to be studied. Although, during early 1990, the FAA promulgated its own rules relating to security,²¹⁶ the pending bill did not contain firm deadlines within which the FAA would be required to pro-

²¹⁴ Some members of "Victims of Pan Am Flight 103" believe the flight may have been involved in a CIA effort to free hostages in exchange for drugs being couriered to the United States. In fact, a substantial quantity of heroin was found on the flight. D. JOHNSTON, *supra* note 4, at 79. If this is true, it is unlikely that the government would disclose it. See telephone interview with Georgia Nucci, *supra* note 14.

²¹⁵ MacNeil/Lehrer Newshour — *Focus*, *supra* note 99; Donohue, *supra* note 30 (statements of Barbara Zinnenberg).

²¹⁶ Mills, *Federal Officials Report Progress On Commission's Recommendations*, AIR SAFETY WEEK, July 30, 1990, at 3.

duce new security regulations.²¹⁷

We can only speculate as to how effective or ineffective the Aviation Security Act would have been, and whether it has had any effect in shaping FAA policy. For now, it gathers dust with ATRA on the shelves of the Senate Commerce Committee. Fortunately, however, new opportunity to improve aviation security now exists in the form of the proposed Aviation Security Act of 1990.²¹⁸

C. *Post-1989 Initiatives*

1. *The President's Commission on Aviation Security and Terrorism*

On August 4, 1989, the bipartisan President's Commission on Aviation Security and Terrorism (Commission) was established,²¹⁹ largely in response to the lobbying efforts of the "Victims of Pan Am Flight 103." The Commission's purpose was "to review and evaluate policy options in connection with aviation security, with particular reference to the destruction on December 21, 1988, of Pan American World Airways Flight 103."²²⁰ Subsection 2(b) required the seven-member Commission²²¹ to "conduct a comprehensive study and appraisal of practices and policy options with respect to terrorist acts involving aviation," including the evaluation of "the adequacy of existing procedures for aviation security, compliance therewith, and enforcement thereof." The Commission was required to make a submission to the President within six months.²²² By executive order,²²³ the deadline for the

²¹⁷ See Aviation Security Act, *supra* note 1; Airport Technology and Research Act, *supra* note 1.

²¹⁸ House Aviation Security Improvement Act, *supra* note 1; Aviation Security Improvement Senate Companion Bill, *supra* note 1.

²¹⁹ Exec. Order No. 12,686, 54 Fed. Reg. 32,629 (1989).

²²⁰ *Id.*

²²¹ The Commission included Chairwoman McLaughlin and six other members: Senators D'Amato and Lautenberg, Congressmen Oberstar and Hammerschmidt, retired USAF General Richards, and Mr. Hidalgo, an attorney. PRESIDENT'S COMM'N REPORT, *supra* note 6, at 1.

²²² Exec. Order No. 12,686, *supra* note 219, § 2(b).

²²³ Exec. Order No. 12,705, 55 Fed. Reg. 8,113 (1990).

report was extended, and on May 15, 1990, the Commission presented its report to the President.

The 182-page Report is highly critical of every aspect of the existing aviation security system, calling it "seriously flawed."²²⁴ In Senator Lautenberg's words: "As with other team efforts, an aviation security system is only as strong as its weakest link. When we on the Commission looked at the existing system, we found a chain with weaknesses at virtually every link."²²⁵ The Report describes the FAA as a "reactive" agency that failed to enforce its own safety regulations.²²⁶ Disturbingly, some of the inadequate security procedures followed by Pan Am and weaknesses within the security system that contributed to the Pan Am Flight 103 disaster were found to still exist at the date of the Report.²²⁷

The report provides a comprehensive overview of both the Pan Am Flight 103 disaster and the aviation security system in general. It contains sixty-four recommendations which can be grouped into the following seven areas of reform: administrative reorganization within the government, research and development, security procedure reform, coordinated intelligence and improved security bulletin process, public notification of security threats, improved crisis response and compensation, and increased national will against terrorism.

a. *Administrative Reorganization*

One of the key problems with the aviation security system highlighted by the Pan Am Flight 103 disaster is the lack of coordination and communication between the State department, the FAA, and the American intelligence gathering community. Both a duplication of effort and a

²²⁴ *President's Commission Faults Pan Am, Government For Flight 103 Bombing, Makes 60 Recommendations*, AIR SAFETY WEEK, May 21, 1990, at 1.

²²⁵ 136 CONG. REC. S.9202 (daily ed. June 28, 1990) (statements of Sen. Lautenberg).

²²⁶ PRESIDENT'S COMM'N REPORT, *supra* note 6, at 63; see also *President's Commission Faults Pan Am*, *supra* note 224, at 1.

²²⁷ *President's Commission Faults Pan Am*, *supra* note 224, at 1.

lack of accountability existed within the system.²²⁸ The group responsible for civil aviation security did not have any formal organizational link with the Department of Transportation (DOT), and likewise, DOT had no formal means of requiring accountability.

The Commission endorses several organizational changes, the two most notable being the Transportation Secretary's appointment of an Assistant Secretary for Aviation Security and Intelligence within the DOT and the requirement that the executive heading the FAA aviation security operational function report directly to the FAA Administrator.²²⁹ The Commission also suggested moving the FAA's Office of Civil Aviation Security to the DOT and having that office report to the Assistant Secretary for Aviation Security and Intelligence.²³⁰ To strengthen communication between the DOT and the intelligence community, the Report indicates that one or more intelligence agents from the CIA or another appropriate agency should serve in a senior capacity at the Office of the Secretary in the DOT.²³¹

The Commission also recommends that, with respect to security issues, the lead negotiating role at the international level should shift from the airline carriers to the State Department, with the DOT playing a strong supporting role.²³² To this end, the Commission recommends the creation of a Coordinator for International Aviation Security, having an ambassador's rank.²³³

b. *Research and Development*

The Commission appears to deemphasize TNA as the

²²⁸ PRESIDENT'S COMM'N REPORT, *supra* note 6, at 57.

²²⁹ 136 CONG. REC. S.9202 (daily ed. June 28, 1990) (statements of Sen. Lautenberg); *see also* PRESIDENT'S COMM'N REPORT, *supra* note 6, at 59.

²³⁰ PRESIDENT'S COMM'N REPORT, *supra* note 6, at 39.

²³¹ 136 CONG. REC. S.9202 (daily ed. June 28, 1990) (statements of Sen. Lautenberg); *see also* PRESIDENT'S COMM'N REPORT, *supra* note 6, at 39.

²³² PRESIDENT'S COMM'N REPORT, *supra* note 6, at 81, 82.

²³³ *Id.* at 82.

primary means of counteracting terrorism,²³⁴ noting several alternative technologies with promise, such as new electromagnetic technologies, vapor-detection devices, and atmospheric-pressure chambers for air cargo.²³⁵ The Report calls for a "more focused and higher profile" research and development program,²³⁶ recommending the FAA undertake a "vigorous effort to marshal the necessary expertise to develop and test effective explosive-detection systems."²³⁷ The FAA is directed to "think ahead and anticipate how to counter the next generation of terrorist weapons,"²³⁸ and to give higher priority and more federal funds to research and development.²³⁹ The Commission expressed a preference for "multiple approaches" in improving security technology, including researching methods to minimize airframe damage caused by small amounts of explosives.²⁴⁰

c. *Airport Security Procedure Reform*

The Report enumerates a plethora of problems with security procedures, noting that the FAA's security regulations "primarily set performance standards but do not prescribe how these standards should be met."²⁴¹ The Report recommends better training of airport security employees and government security inspectors, and the development of appropriate security plans specific to each airport.²⁴² Because of the division in responsibility between airport operators and airline carriers, the FAA plays crucial role in developing security policies, assessing their effectiveness, and enforcing them consistently. The Report calls for an on-site security manager at each high

²³⁴ *Id.* at 66.

²³⁵ *Id.* at 64.

²³⁶ 136 CONG. REC. S9202 (daily ed. June 28, 1990) (statements of Sen. Lautenberg).

²³⁷ PRESIDENT'S COMM'N REPORT, *supra* note 6 at 66.

²³⁸ *Id.* at 67.

²³⁹ *Id.* at 66.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 56.

²⁴² *Id.* at 56, 58, 60.

risk airport, whose function is to promote communication and coordinated effort between the airport operator and airline carriers, to ensure on-site familiarity with the airport security plan, and to facilitate consistent enforcement of security regulations.²⁴³

Presently, no uniform international security system exists, and countries vary in their technical capabilities, financial resources and priorities, and in their approaches to aviation security.²⁴⁴ Therefore, the Commission recommends that security objectives with foreign governments be reached through bilateral and multilateral agreements, and through the use of the Foreign Airport Security Act and the Foreign Airport Assessment program.²⁴⁵ The Foreign Airport Assessment Program provides for periodic security assessments of foreign airports used by American carriers, measured against ICAO standards.²⁴⁶

In addition to proposing a greater presence in foreign airports to help resolve security-related problems and correct system weaknesses,²⁴⁷ the Report also recommends that sanctions be imposed against a foreign airport when it fails to meet minimum security standards set by ICAO, after a ninety day notice period. The suggested sanctions include mandatory issuance of a travel advisory in passenger tickets, printed notice in the Federal Register together with public advertisement, possible suspension of assistance under the Foreign Assistance Act of 1961²⁴⁸ and the Arms Export Control Act,²⁴⁹ and suspension of American air service to the airport by the Transportation Secretary.²⁵⁰ These sanctions have considerably more impact than mere publication in the Federal Regis-

²⁴³ *Id.* at 57, 60.

²⁴⁴ *Id.* at 27, 28.

²⁴⁵ *Id.* at 28, 39, 40.

²⁴⁶ *Id.* at 28.

²⁴⁷ *Id.* at 56.

²⁴⁸ 22 U.S.C. § 2151 (1988).

²⁴⁹ 22 U.S.C. § 2751 (1988).

²⁵⁰ PRESIDENT'S COMM'N REPORT, *supra* note 6, at 28.

ter, as was provided in the Aviation Security Act of 1989.²⁵¹

d. *Coordinated Intelligence and Security Bulletins*

While the Commission is generally satisfied with the government's coordination of intelligence activities directed at terrorism, it did find areas where "communication and cooperation can be improved."²⁵² Aside from the organizational changes it recommends,²⁵³ the Commission calls for a greater emphasis on long-term strategic thinking and anticipation of future terrorist actions instead of mere operational reaction to such activities.²⁵⁴

An analysis of the process for "receipt, assessment and dissemination of intelligence/threat information" is contained in the Report, and the FAA's new policy initiative to distinguish between "security directives" and "information circulars" is lauded as a "significant improvement." Security directives, issued for more serious or time-sensitive threats, require immediate, mandatory action by affected airlines. Airlines are required to develop written procedures for responding to security directives and must acknowledge receipt of the directives and report actions on them.²⁵⁵ The Commission notes, however, that airlines "still complain that the information they receive from the FAA is too vague and general to be of much value to them," perhaps due to the need to "sanitize" classified information before distribution to the private sector.²⁵⁶ It seems ironic that information gathered for the purpose of protecting the public is then withheld from the public "for its own good."

²⁵¹ Aviation Security Act, *supra* note 1, § 105. For a discussion of screening and airport security programs under proposed 1989 legislation, see *supra* notes 112-130 and accompanying text.

²⁵² PRESIDENT'S COMM'N REPORT, *supra* note 6, at 80.

²⁵³ For a discussion of administrative reorganization, see *supra* notes 228-233 and accompanying text.

²⁵⁴ PRESIDENT'S COMM'N REPORT, *supra* note 6, at 81.

²⁵⁵ *Id.* at 76-79.

²⁵⁶ *Id.* at 79.

Rejecting the airlines' suggestion that senior airline officials be given security clearance, the Commission prefers increasing the federal security role at airports.²⁵⁷ Presumably, this preference is based on a desire to maintain a close connection between the intelligence-gathering community and the FAA. This policy, however, maintains both airline and public dependence on the decision-making capabilities of the government. Because the airlines, their insurers, and the public are those most affected by those decisions, it is crucial to have greater accountability by government to these parties. This greater accountability might be achieved through more liberal policies for public notification of security threats.

e. *Public Notification of Bomb Threats*

While the FAA has consistently taken the position that it is impractical or impossible to warn the public of threats against aviation,²⁵⁸ the Report does not wholly discount this idea. The Commission notes that "the question of when and whether to notify the public of threats of this sort cannot be translated into a mechanical or litmus paper test. The issues are too complex and the variables too case specific."²⁵⁹ Based on its findings that the present system is vulnerable and there are few specific threats, the Commission agrees with public notification when "[t]he threat information is credible, has enough specificity for travelers to act but not enough specificity to tailor special interdiction efforts; and there is a low level of confidence that the threat of plastic explosives can be countered."²⁶⁰

The FAA's policy has been to recommend air carriers cancel threatened flights, rather than provide public notice of the threats. The Commission, however, finds this to be an "unreasonable alternative."²⁶¹ The Commission

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 86-88, 178, 179.

²⁵⁹ *Id.* at 90.

²⁶⁰ *Id.* at 92.

²⁶¹ *Id.* at 87. The Commission notes, "The cost and disruption to the airline passengers of cancellations of flights will presumably be much higher than the

recommends that primary responsibility over notification rest with the government to ensure that a single, consistent standard is applied in decision-making.²⁶² Domestically, the Department of Justice, working with the FBI and coordinating its decisions with the FAA and the DOT, would make the assessment. Notification of threats to flights abroad would be coordinated by the State Department. Airlines would still be free to notify individual passengers, provided the information is unclassified. The Commission does not rule out broad-scale public notification, noting that, in some cases, it may be more appropriate than merely notifying individual passengers at the gate.²⁶³

Although the Commission's recommendations generally endorse passenger notification, practical difficulties remain in determining which threats are credible, and the best means of dealing with them. The effectiveness of public notification will ultimately depend on whether the State Department, the Department of Justice, intelligence-gathering agencies, and the FAA can join forces to develop a workable notification process. Inevitably, and perhaps unavoidably, the public will continue to rely heavily on the decisions of government officials.

f. Crisis Response and Compensation

The Commission is highly critical of the manner in which the State Department and Pan Am handled the aftermath of Pan Am Flight 103. The Report contains a long list of practical methods of improving crisis response. Emergency telephone lines, on-site assistance for the bereaved, "crisis teams" to coordinate response in foreign locations, and training programs to sensitize State Department staff to the needs of the bereaved are in-

costs associated with public notification, a much more reasonable and more realistic solution." *Id.* at 92.

²⁶² *Id.*

²⁶³ *Id.* at 93.

cluded.²⁶⁴ The Commission also recommends that the State Department obtain the airline's passenger manifest in order to identify passengers and notify the families of victims.²⁶⁵ To eliminate overlapping services and to ensure that there is not a lack of response due to confusion over the appropriate party to provide information and assistance, the State Department is given primary responsibility over crisis response management.²⁶⁶

No domestic laws provide for financial compensation of air crash victims or their families, and internationally, the Warsaw Convention provides only limited relief.²⁶⁷ In addition to the ratification of amendments to the Warsaw Convention discussed earlier in this paper,²⁶⁸ the Commission recommends legislation establishing a permanent fund to provide monetary benefits and tax relief for American victims of terrorism.²⁶⁹

g. *National Will Against Terrorism*

The Commission recommends a policy of "zero tolerance" towards terrorism, and it rejects the previous reactive "law enforcement" approach to the problem.²⁷⁰ The Report acknowledges that terrorism has become state-sponsored in recent decades, and that acts of terrorism against citizens are acts of aggression against their na-

²⁶⁴ *Id.* at 124.

²⁶⁵ *Id.* at 123. In the Pan Am Flight 103 case, it took Pan Am two days to produce a complete passenger manifest to the State Department, and Pan Am handled the initial death notifications and provided follow-up information and services. In its Report the Commission noted, "Failure to secure the manifest promptly had a negative ripple effect on the State Department's image in subsequent activities. Thereafter, the Department appeared to lack control or authority over who should notify next of kin, an accurate list of next of kin, and communication with the families." *Id.* at 99, 100, 123; see also telephone interview with Georgia Nucci, *supra* note 14.

²⁶⁶ PRESIDENT'S COMM'N REPORT, *supra* note 6, at 100-102.

²⁶⁷ For a discussion of the limitations on relief provided under the Warsaw Convention, see *supra* notes 34-66 and accompanying text.

²⁶⁸ For a discussion of changes recommended for the Warsaw Convention, see *supra* notes 67-76 and accompanying text.

²⁶⁹ PRESIDENT'S COMM'N REPORT, *supra* note 6, at 105-107.

²⁷⁰ *Id.* at 115.

tions.²⁷¹ Consequently, the Report calls on the American public to support a consistent, aggressive policy against terrorism. It also notes that despite improved technology, training practices and security procedures, security in the air cannot be guaranteed.²⁷²

The recommended responses to terrorist attacks include "planning training and equipping for direct pre-emptive or retaliatory military actions against known terrorist hideouts in countries that sanction them,"²⁷³ and pre-emptive or disruptive covert operations where direct strikes are unwise or inappropriate. It is also recommended that greater international cooperation be utilized to counteract terrorism through improved intelligence-gathering, as well as political, economic, and military isolation of countries guilty of fostering terrorism.²⁷⁴

A contradiction exists in the Commission's proposal that we depart from a "law enforcement" approach, and abandon the "idea of holding ourselves in all cases to a criminal standard of proof before we act."²⁷⁵ The same problem exists with the use of "covert operations." The fact that "terrorists, however, have relied upon the adherence by others to these values [covert operations] to permit them to attack thousands of innocent victims with impunity"²⁷⁶ is no justification for preemptive action. Our adherence to fundamental legal principles, such as the belief that people are innocent until proven guilty and that people should be free from unreasonable search and seizure without probable cause, distinguishes the American system from that of tyrants and terrorists. By rejecting legal process, we move closer in philosophy to the terrorist, thereby failing those countries who still look to the United States as a place where justice prevails over political expedience.

²⁷¹ *Id.*

²⁷² *Id.* at 114.

²⁷³ *Id.* at 115.

²⁷⁴ *Id.* at 115-16.

²⁷⁵ *Id.* at 115.

²⁷⁶ *Id.*

The United States must be prepared to abide by the same standards it imposes on other nations. Only if the United States is certain that its policies and actions are free of state-sponsored vice can the government safely endorse pre-emptive military strikes. Given the speculation surrounding the Pan Am Flight 103 disaster, and the failure of both the State department and the intelligence agencies to accurately assess terrorist threats, one is left with serious reservations about supporting first strikes at "known terrorist hideouts."²⁷⁷ While decisive action is certainly appropriate, the recommendations with the least long-term fallout are those calling for cooperative effort between nations. In this regard, the current events in Kuwait may prove to be instructive.

2. *The Proposed Aviation Security Improvement Act of 1990*

On June 28, 1990, the House and Senate introduced companion bills, each entitled the "Aviation Security Improvement Act."²⁷⁸ The bills codify many of the recommendations of the President's Commission on Aviation Security and Terrorism.²⁷⁹ The Senate bill was referred to the Committee on Commerce, Science and Transportation, and the House bill was referred jointly to the Committee on Public Works and Transportation and the Committee on Foreign Affairs.²⁸⁰

On July 26, 1990, the Committee on Foreign Affairs and the Aviation Subcommittee of the Committee on Public Works and Transportation held a joint hearing.²⁸¹ A large part of the discussions at the joint hearing related to means of implementing the administrative reorganization

²⁷⁷ *Id.*

²⁷⁸ House Aviation Security Improvement Act, *supra* note 1, and Aviation Security Improvement Senate Companion Bill, *supra* note 1.

²⁷⁹ PRESIDENT'S COMM'N REPORT, *supra* note 6.

²⁸⁰ House Aviation Security Act, *supra* note 1, and Aviation Security Improvement Senate Companion Bill, *supra* note 1.

²⁸¹ Transcripts of this hearing were not published as of mid-September, 1990. Telephone interview with T. Greco, Professional Staff for House Committee on Public Works and Transportation, Washington, D.C. (Sept. 6, 1990) [hereinafter Greco interview, Sept. 6].

recommendations of the Commission.²⁸² An amended House bill was then substituted for the bill originally introduced.²⁸³ The substitute bill incorporated three substantive changes.²⁸⁴ First, the bill deleted an earlier provision requiring air carrier screening of mail cargo, giving the FAA an opportunity to further investigate the legal and practical implications.²⁸⁵ Second, the appointment of an assistant Secretary for Aviation Security and Intelligence for a term of five years was amended to provide for an undefined term, at the discretion of the Transportation Secretary.²⁸⁶ Third, because of the complaints by air carriers that the delays and expense of increasing their security practices would place them at a disadvantage in the international market, the House added a section requiring foreign air carriers to offer the same level of protection to passengers as American carriers.²⁸⁷

The first Aviation Subcommittee markup of the House Bill occurred on September 13, 1990. No substantive changes were made at that time.²⁸⁸ Discussions at the Aviation Subcommittee level focused on organizational changes and practical details in implementing the Com-

²⁸² Telephone interview with C. Gable, Professional Staff for House Committee on Public Works and Transportation, Washington, D.C. (Sept. 6, 1990) [hereinafter Gable interview, Sept. 6].

²⁸³ As of Sept. 19, 1990, the substituted House bill was not available from the Document Room. Author's copy obtained courtesy of T. Greco, Professional Staff for House Committee on Public Works and Transportation, Washington, D.C.

²⁸⁴ Telephone interview with C. Gable, Professional Staff for House Committee on Public Works and Transportation, Washington, D.C. (Sept. 18, 1990) [hereinafter Gable interview, Sept. 18]; Gable interview, Sept. 6, *supra* note 282.

²⁸⁵ See Aviation Security Improvement Act, *supra* note 1, § 111; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 13.

²⁸⁶ See House Aviation Security Improvement Act, *supra* note 1, §§ 101, 102. This is "standard" for appointments of this type. Gable interview, Sept. 18, *supra* note 284.

²⁸⁷ See House Aviation Security Improvement Act, *supra* note 1, § 106. As 40% of foreign air carrier passengers are American, it seemed logical that foreign carriers should be required to maintain the same standards for security as that of United States carriers. Gable interview, Sept. 18, *supra* note 284.

²⁸⁸ Telephone interview with T. Greco, Professional Staff for House Committee on Public Works and Transportation, Washington, D.C. (Sept. 18, 1990) [hereinafter Greco interview, Sept. 18]; Gable interview, Sept. 18, *supra* note 288.

mission's recommendations.²⁸⁹ A full committee markup of the substituted bill was held on September 19, 1990, but no major substantive changes resulted.²⁹⁰ Once the markup sessions were completed, the bill proceeded to the House Floor. At the time of writing, the Foreign Affairs Committee was hoping to move quickly on the bill.²⁹¹

As of mid-September 1990, the Senate Committee on Commerce, Science and Transportation was considering a hearing on the Senate bill, in part to obtain input from the "Victims of Pan Am Flight 103" on the proposed legislation.²⁹²

Both the Senate and the House bills reflect many of the recommendations contained in the President's Commission Report, although there are some discrepancies between the two bills. The House bill supports the adoption of Protocol 3 revisions to the Warsaw Convention²⁹³ and contains a general finding that the government "must have the national will to take every feasible action to prevent, counter and respond to terrorist activities."²⁹⁴ The Senate bill, in addition to a general finding supporting national will against terrorism, states that the United States should politically, economically, and militarily isolate all state sponsors of terrorism, and concludes that "active measures are needed to counter more effectively the terrorist threat."²⁹⁵

²⁸⁹ Greco interview, Sept. 18, *supra* note 288; Gable interview, Sept. 18, *supra* note 284.

²⁹⁰ Gable interview, Sept. 18, *supra* note 284. As of Sept. 19, 1990, the amended bill from full committee markup was not available from House Document Room. Author's copy courtesy of C. Gable.

²⁹¹ Greco interview, Sept. 6, *supra* note 281; Greco interview, Sept. 18, *supra* note 288.

²⁹² Telephone interview with C. Carmody, Staff for Senate Commerce Committee, Washington, D.C. (Aug. 29, 1990).

²⁹³ House Aviation Security Improvement Act, *supra* note 1, § 2(6). For a discussion of reforms to the Warsaw Convention, see *supra* notes 49-56 and accompanying text.

²⁹⁴ House Aviation Security Improvement Act, *supra* note 1, § 2(11).

²⁹⁵ Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 2(10), (11).

The following section is a brief review of the most salient features of the two bills.

a. *Administrative Reorganization*

The House bill provides for the appointment of an Assistant Secretary for Transportation Security and Intelligence by the Executive branch and transfers responsibility for strategy and planning of transportation security policy, as well as coordination with intelligence agencies, to this office.²⁹⁶ Subsection 103(a) requires the Transportation Secretary to report annually to Congress on the status of the implementation of the Commission's recommendations.²⁹⁷ Section 104 of the House bill creates the position of Assistant Administrator of Civil Aviation Security, reporting directly to the FAA Administrator, and Section 105 provides for the placement of Federal Security Managers at airports, who report directly to the Assistant Administrator of Civil Aviation Security. Federal Security Managers are to act as a liaison between airport operators and air carriers in the development of comprehensive security plans for their facilities.²⁹⁸ They are also to receive intelligence information relating to their airports and air carriers, and are to oversee the enforcement of the FAA's security requirements and coordinate local law enforcement efforts relating to security at their facilities.

Whereas the House bill creates a new bureaucracy of Foreign Security Liaison Officers at high risk foreign airports,²⁹⁹ the Senate bill leaves Federal Security Managers at foreign airports as the liaison with foreign security authorities with regard to the implementation of FAA requirements at those facilities.³⁰⁰ Under the House bill, Foreign Security Liaison Officers report directly to the As-

²⁹⁶ House Aviation Security Improvement Act, *supra* note 1, §§ 101, 102.

²⁹⁷ *Id.* § 103(a).

²⁹⁸ *Id.* §§ 104, 105.

²⁹⁹ *Id.* § 105.

³⁰⁰ Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 6.

sistant Administrator of Civil Aviation Security.³⁰¹

b. *Research and Development*

Both the House and Senate bills call for accelerated and expanded "research, development and implementation of technologies and procedures to counteract terrorist acts against civil aviation" and set a five-year time frame in which the new equipment and procedures are to be in place.³⁰² The bills also provide for direct appropriations from the Airport and Airway Trust Fund³⁰³ of "such sums as may be necessary."³⁰⁴ Notably the bills further provide:

No deployment or purchase of any explosive detection equipment . . . shall be required . . . unless the Administrator certifies that, based on the results of tests . . . such equipment . . . can reliably detect the minimum amounts, configurations, and types of explosive material which can cause catastrophic damage to commercial aircraft with 60 or more passenger seats.³⁰⁵

Provisions endorsing TNA technology as the primary means of ensuring security in the air are noticeably absent.³⁰⁶

c. *Security Procedures*

Some of the new security procedures the FAA is authorized to introduce include investigations of air carrier and airport personnel with unescorted access to aircraft or secured areas of airports.³⁰⁷ The investigations may include

³⁰¹ House Aviation Security Improvement Act, *supra* note 1, § 105.

³⁰² *Id.* § 108; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 9.

³⁰³ For a discussion of the Trust Fund, see *supra* notes 169-199 and accompanying text.

³⁰⁴ Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 9.

³⁰⁵ House Aviation Security Improvement Act, *supra* note 1, § 109; Aviation Security Improvement Senate Companion Bill, *supra* 1, § 11.

³⁰⁶ House Aviation Security Improvement Act, *supra* note 1, § 101. For a discussion of TNA under the bill, see *supra* notes 97-111 and accompanying text.

³⁰⁷ House Aviation Security Improvement Act, *supra* note 1, § 106; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 7.

fingerprinting and a criminal history record check. The results of the criminal history record check may be made available to "persons designated by the Administrator."³⁰⁸ Persons found to have committed certain felonies within ten years of the investigation are ineligible for employment in those positions.³⁰⁹ The FAA is also required to prescribe employment standards, including minimum education, language skills, training, and staffing requirements.³¹⁰

Ongoing analysis and monitoring of current and potential threats to both individual airports and the security of the entire domestic air transportation system are to be performed cooperatively by the FBI and FAA, with results reported to Congress within one year.³¹¹ Specific channels for reporting threats are also established.³¹² The bills endorse improving foreign security through bilateral agreements with foreign governments and the use of the foreign airport assessment program under the Foreign Airport Security Act.³¹³ Provisions requiring the FAA to develop "model standards for airport design and construction to allow for maximum security enhancement" are also included in the bills.³¹⁴

d. *Public Notification of Security Threats*

Unlike the 1989 bills, the 1990 bills require the FAA to

³⁰⁸ House Aviation Security Improvement Act, *supra* note 1, § 106; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 7.

³⁰⁹ House Aviation Security Improvement Act, *supra* note 1, § 106; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 7. This type of regulation by the FAA will certainly raise legal issues over privacy rights. The success of those challenges is another issue.

³¹⁰ House Aviation Security Improvement Act, *supra* note 1, § 106; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 7.

³¹¹ House Aviation Security Improvement Act, *supra* note 1, § 107; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 8.

³¹² House Aviation Security Improvement Act, *supra* note 1, § 110; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 12.

³¹³ House Aviation Security Improvement Act, *supra* note 1, § 201; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 29.

³¹⁴ House Aviation Security Improvement Act, *supra* note 1, § 112; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 14.

establish guidelines for determining if public notification of a threat is prudent, ensuring that public notification is timely and effective, and cancelling the departure of a flight.³¹⁵ The bills prohibit selective notification, unless the threat applies only to specific travelers, but requires the FAA, Secretary of State, Attorney General, intelligence agencies, and law enforcement officials to "develop procedures to minimize the number of individuals having access to threat information."³¹⁶ The bill sets out the criteria to be used in determining appropriate action. These criteria include the specificity and severity of the threat, the reliability of the information, the ability of those informed to reduce the risk to their safety, and "other factors as the Administrator considers appropriate."³¹⁷ Selective use of the criteria could, in almost any case, ef-

³¹⁵ House Aviation Security Improvement Act, *supra* note 1, § 110; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 12. The bills specifically provide for the following:

- (1) determining, on a case-by-case basis, if public notification of a threat is in the best interest of the United States and the travelling public;
- (2) ensuring that public notification, when considered appropriate, is made in a timely and effective manner, including the use of a toll-free telephone number; and
- (3) cancelling the departure of a flight or series of flights [if it is determined the threat could be a danger to the safety of the passengers and crew].

House Aviation Security Improvement Act, *supra* note 1, § 12.

³¹⁶ House Aviation Security Improvement Act, *supra* note 1, § 110; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 12.

³¹⁷ House Aviation Security Improvement Act, *supra* note 1, § 109 (House substituted bill unavailable as of Sept. 19, 1990 from the House Document Room. Author's copy courtesy of T. Greco and C. Gable, Professional Staff for House Committee on Public Works and Transportation, Washington, D.C.). Section 109 provides:

The guidelines developed . . . shall provide for the consideration of

- (1) the specificity of the threat;
- (2) the severity of the threat;
- (3) the reliability of intelligence information related to the threat;
- (4) the ability to effectively counter the threat;
- (5) the protection of intelligence information sources and methods;
- (6) cancellation, by an air carrier or the Administrator, of a flight or series of flights instead of public notification;
- (7) the ability of passengers and crew to take steps to reduce the risk to their safety as a result of any notification; and
- (8) such other factors as the Administrator considers appropriate.

Id.

fectively eliminate public notification, and the blanket discretion given to the FAA Administrator pursuant to subsection 109(8)³¹⁸ removes the possibility of any recourse by the public for the failure of the Administrator, Secretary of State, or Attorney General to require public notification. Thus, although the provision is intended to *require* public notification in appropriate cases, it could actually be equally effective in *prohibiting* notification of the public. Given this possibility, one wonders if the entire provision would best be left out of the statute after all.

Following the list of criteria for determining appropriate action, the bill vaguely provides, "[a]ny restrictions adopted shall not diminish the ability of the Federal Government to effectively discharge its responsibilities relating to aviation security."³¹⁹ It would be a gross understatement to suggest that the FAA will have difficulty in drafting guidelines both meeting the criteria set out in the legislation and fulfilling this latter proviso.

Both the Senate and House bills provide for the establishment of an electronic bulletin board accessible to the general public and updated daily, containing security information of the Bureau of Diplomatic Security.³²⁰

e. *Crisis Response and Compensation*

Numerous sections in the bills contain measures to improve crisis response. The legislation compels airlines to produce passenger manifests for the State Department within one hour of any request.³²¹ Other provisions assign a State Department liaison to the family of each aviation disaster victim, establish a toll-free telephone line for inquiries, and provide for the training of consular officers in disaster management, and deployment most of crisis

³¹⁸ *Id.*

³¹⁹ House Aviation Security Improvement Act, *supra* note 1, § 110; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 12.

³²⁰ House Aviation Security Improvement Act, *supra* note 1, § 213; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 27.

³²¹ House Aviation Security Improvement Act, *supra* note 1, § 203; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 19.

teams to the disaster site.³²² The State Department is made responsible for notifying the families of victims of aviation disasters abroad, and for assisting them both in the recovery of personal effects and in the disposition of remains.³²³ The Secretary of State is also required to prepare an assessment of the handling of the Pan Am Flight 103 disaster, and to devise and distribute guidelines for future responses to comparable disasters to all foreign embassy and consular posts.³²⁴

Finally, the bills require that a legislative proposal be submitted to Congress within one year, authorizing monetary and tax relief to compensate American citizens who are victims of terrorism.³²⁵

3. Response to "Post-1989" Initiatives

Only a week after the crash of Pan Am Flight 103, the FAA promulgated an emergency rule strengthening security measures in the Middle East and Western Europe through more careful scrutiny of passengers and baggage, and requiring positive matching of passengers with their luggage.³²⁶ Computer controlled access systems at the entrance of "secure" areas were made mandatory as of January 8, 1989.³²⁷ By April 3, 1989, following an internal review of the security system, the DOT announced further security measures.³²⁸ Those further measures included a revised security bulletin process with two levels of notice (Information Circulars and Security Direc-

³²² House Aviation Security Improvement Act, *supra* note 1, §§ 205-207; Aviation Security Improvement Senate Companion Bill, *supra* note 1, §§ 21-23.

³²³ House Aviation Security Improvement Act, *supra* note 1, §§ 204, 208; Aviation Security Improvement Senate Companion Bill, *supra* note 1, §§ 20, 24.

³²⁴ House Aviation Security Improvement Act, *supra* note 1, § 209; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 25.

³²⁵ House Aviation Security Improvement Act, *supra* note 1, § 212; Aviation Security Improvement Senate Companion Bill, *supra* note 1, § 18.

³²⁶ PRESIDENT'S COMM'N REPORT, *supra* note 6, at 175.

³²⁷ *Id.*

³²⁸ *Id.* at 176.

tives),³²⁹ increased standards for x-ray and metal detection equipment, actual installation of two TNA devices, approval for additional security specialists overseas, discussions with foreign security officials, establishment of an Aviation Security Advisory Committee, increased liaison with intelligence-gathering agencies, and review of airline compliance with the earlier emergency rule.³³⁰ The FAA had also compared 65 of 136 security programs against ICAO standards pursuant to an FAA regulation issued in March of 1989.³³¹

Within two months of the May 15, 1990 release of the Report of the President's Commission on Aviation Security and Terrorism, the FAA and the State Department had implemented two-thirds of the Report's sixty-four recommendations.³³² In testimony before Congress, FAA Administrator James B. Busey remarked, "To my knowledge, this swift and supportive response by the executive branch to a report by a presidential commission is unprecedented So that there can be no doubt, we intend to breathe life into [the] vast majority of the commission's recommendations."³³³

The reaction of legislators to the Report has also been swift and positive. Introducing the Senate bill that would codify the Commission's recommendations on June 28, 1990, Senator Lautenberg expressed hope that the Senate would "move ahead with a strong legislative package before the end of this Congress."³³⁴ In July 1990, the sponsor of the House bill and Aviation Subcommittee Chairman, Congressman Oberstar, optimistically noted, "This bill is on a fast track. We expect it to be enacted this year."³³⁵

³²⁹ *Id.* at 178. For a discussion of security bulletins, see *supra* notes 148-158 and accompanying text.

³³⁰ PRESIDENT'S COMM'N REPORT, *supra* note 6, at 178-182.

³³¹ *Id.* at 180, 181.

³³² Mills, *supra* note 216, at 3.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

The FAA, however, is opposed to a legislative solution, reasoning that this type of solution will curtail its flexibility in dealing with security threats.³³⁶ The FAA's position in this regard is not limited to aviation security; it generally opposes any legislation regulating its operations, preferring instead to set its own internal operational standards in response to broad policy mandates of the DOT.³³⁷ While allowing the FAA a free hand in setting its own standards is like asking a fox to guard the chicken coop, the FAA's aversion to "legislative interference" has some limited practical merit. As an executive agency, it has technical and operational expertise that the legislative branch may lack. Aviation security, by nature, is an area that cannot be neatly packaged into well-defined policies. Its parameters extend into a wide variety of government functions, both domestic and foreign, with each security incident having its own unique character and problems. Limiting the FAA's operational flexibility and ability to deal with emergencies on a case-by-case basis arguably may eliminate its efficiency and effectiveness and waste valuable time.

The inherent difficulty in rejecting legislative action, however, is that no direct accountability then exists. How important is formal accountability? The Commission seems to think the lack of formal reporting lines between the security function in the FAA and the DOT was a serious flaw in the system.³³⁸ Certainly the "Victims of Pan Am Flight 103" agree. The group was pleased with the Commission's report, calling it a "vital first step on the road to justice,"³³⁹ but clearly sees the Report as a forerunner to legislation. Upon release of the Report, a spokesperson for the group stated, "[w]e commit ourselves to redoubling our efforts to ensure that our govern-

³³⁶ *Id.*

³³⁷ Telephone interview with Joan Bauerlein, *supra* note 195.

³³⁸ PRESIDENT'S COMM'N REPORT, *supra* note 6, at 48, 59.

³³⁹ *President's Commission Faults Pan Am*, *supra* note 224, at 3.

ment walks the entire distance."³⁴⁰

Although demanding legislative reform is the typical response of an outraged public, the underlying need is not really "regulation" but "reform." Legislation no more guarantees timely and appropriate action than does complete freedom from accountability. It is not the black letter of the law that will thwart terrorism or improve security; terrorism already contravenes the laws of every civilized nation, and security procedures already existed on the date Pan Am Flight 103 was bombed.

The FAA may say its reform efforts are indicative of its ability to act without legislative prompting. The legislators may argue that the initiatives have all occurred under the threat of impending legislation. What really matters is that change occurs — that all of us, from ambassadors to baggage-handlers, *and including airline passengers*, take responsibility for our link in the security system chain. If aviation security is to improve, cooperative action is needed. What needs to be avoided are those policies and people who refuse to allow others in the security system to participate.

V. CONCLUSION

Law is a creature of society; it reflects the belief system of its citizens. As much a chameleon as those it serves, it evolves with human consciousness. The aviation law of the past reflected society's desire to shield a new airline industry while indemnifying passengers for losses associated with the hazards of modern technology. The industry has since matured and the risks have expanded beyond the realm of mechanical and operational defects. Having shrunk the world for the traveling public, international aviation has likewise created a new vehicle for political expression. Pan Am Flight 103 is a sad example of this development. Students, young children, businessmen, and families all shared in their ability to access the world and

³⁴⁰ *Id.*

in so doing, shared their fate at the hands of a terrorist bomber.

Pan Am Flight 103 is clear in its commentary on world politics, but what does it tell us about our existing beliefs? What does the way we order our responsibilities among the public, government, and industry say about our values? Have we learned anything?

It is clear that we have outgrown the aviation laws of yesteryear. The rationale behind the old Warsaw Convention limitations on recovery no longer exist. It is time that workable reforms to this treaty not just be seriously considered, but adopted. It is equally clear that existing aviation security practices are inadequate to protect the American public from the threat of terrorists. Legislation requiring tighter security controls at airports and more coordinated effort within the government are certainly part of the solution. The other part lies with us as individuals. Not only do our American passports confer a benefit, they carry a liability as well. When we venture outside United States borders, it is no longer appropriate to expect our country to take care of us. On foreign soil, and struggling under the economic constraints of the 1990s, the American government is limited.

Certainly, government legislation has yet to provide a comprehensive solution to our lack of security in the air. Aside from the politics which hampered the initial legislative initiatives to improve security, the legislation itself lacked any sense of immediacy. It required the FAA to undertake certain studies, but specific proactive measures were disappointingly absent. The importance of assessing a need and of carefully setting a direction cannot be underrated. However, as a variation of the old saying goes: The flight path to Hell is vectored with good intentions.

It is interesting that the primary thrust of the earliest legislation was geared to improving technology (TNA in particular), and perfecting administrative processes (airport security programs and FAA security bulletins). Aside from provisions requiring predeparture briefings of in-

flight security personnel and publication in obscure places of rather useless information, the proposed legislation contained only one provision which helped passengers to protect themselves. Neither the government nor the airlines were required to inform passengers of bomb threats, credible or otherwise. The legislation assumed that passengers were to rely on the FAA bulletin process, airport security officials, and airline contractors and personnel for their safety and security. As Pan Am flight 103 has already proven, this reliance on third party protection is both outdated and dangerous.

The proposed Aviation Security Act of 1990 is a great improvement over the earlier legislative initiatives. The bills are encouraging in that they focus less on improving technology and more on improving the communication and coordination among the public, government, and industry players. At this time (October, 1990), the bills are just beginning the markup phase and are still very vulnerable to the politics of the day.

Although the introduction of legislation and the internal efforts of the FAA to improve aviation security procedures are important first steps, tangible improvements in aviation security have been undercut by administrative scuffles over what should be the appropriate funding source. The government is limited in its financial resources, with the whole spectrum of government programs vying for the same funds. Thus, irrespective of the efforts of benefic bureaucrats or black letter law, certain programs will fail to garner political support and will never be properly funded. Hopefully, the improved security system supported by the proposed Aviation Security Improvement Act will not be one of them.

United States deficit financing will probably delay Senate approval of the funding source for new security programs for some time to come. If and when a source of funds can be agreed upon, additional time will be required to get those funds formally allocated and available for use. Further negotiation and number-shuffling will

then be needed to get the funds transformed into actual dollars for security programs. From a technological perspective, aviation security is not likely to improve significantly in 1991. Changes in security procedures and the introduction of new programs will therefore depend upon the initiatives of the FAA, the Department of Transportation, and the American intelligence-gathering community, whom we can only hope will have the vision and foresight to act cooperatively and proactively.

Even if an aviation security statute is enacted, it will not guarantee better safety in the air. Future legislation will be only as effective as the individuals who put its provisions into practice. In the final analysis, while government plays a role in the public welfare, it is no longer prudent for the citizen to sit idly by, waiting to be taken care of by Uncle Sam. For one thing, government may not always have our best individual interests in mind when it takes a position in international affairs. Terrorist bombings are a product of political tensions in which our government is an active participant. To rely solely on government efforts, whatever they may be, is to abdicate our responsibility for the risks we take to the party who may be directly increasing the level of risk.

Surprisingly, none of the airlines, the President's Commission on Aviation Security and Terrorism, the legislators, the FAA, nor the "Victims of Pan Am Flight 103" have mentioned the development of a public awareness program to help airline passengers become more responsible for their own security. Public education — to increase the level of passengers' *vigilance* for the care of their luggage, *promptness* in getting to the airport well in advance of their flights, *patience* with airport delays while luggage is being screened, *cooperation* with and *courtesy* towards airport personnel who work to ensure passenger safety, and *skepticism* about the desirability of transporting "gifts" for strangers — seems like a relatively expeditious and inexpensive means of strengthening public support for and confidence in the aviation security system. In

making the public more responsible and aware, the airlines, the FAA, and legislators could also become more visible as promoters of public welfare instead of ineffective, uninterested technocrats. That such a simple improvement could be overlooked seems to reflect our penchant for "administrative caretaking" of the public. Rather than creatively involving the public in the solution, efforts continue to be directed to organizational flowcharts, technology, and paternalistic regulation. Because airlines and their insurers feel the financial loss and passenger dissatisfaction most directly when the security system fails, perhaps they should consider leading the way in developing and implementing a public awareness program.

As passengers, it must be remembered that our personal safety is of greatest importance to *us*, not to an FAA official or an airline security consultant. One need only read the sections of this article dealing with the Trust Fund allocation dispute, the December 1988, security bulletin process, or the examples of the treatment of the bereaved of Pan Am Flight 103, to question the wisdom in blindly relying on the goodwill of industry or government. If this seems too harsh a judgment, consider the lives of those aboard Pan Am Flight 103. And if the events of December 21, 1988, seem too remote and the topic of aviation security seems too esoteric, then consider a hypothetical:

International affairs in the Middle East have heated up. Czechoslovakia, being preoccupied with Eastern European political and economical tensions, puts a low priority on developing and mandating chemical markers for explosives it manufactures. International flights swell with CIA operatives and sundry sordid terrorist types. The time and energy of embassy personnel worldwide is thoroughly taxed, and it becomes increasingly difficult to assess the multiplying number of threats and warnings. The attention diverted to the political chaos in the Middle East and the economic strife in Eastern European countries

provides a perfect foil for a little known, but well-financed radical political faction. At the ticketing booths, airline agents impatiently converse with their computer terminals, simultaneously ignoring the litany of superfluous messages flashing upon their screens and addressing their passengers, who complain loudly of the heat, crowding, and departure delays. Tired, underpaid baggage inspection personnel halfheartedly screen random passengers. A bomb with a new chemical make-up finds its way into the cargo hold of a transoceanic flight. Another plane-load of hapless souls never make it home.

