

2020

## Accountability For Sexual Assault Aboard Airplanes: An Analysis of the Need For Reporting Requirements at 35,000 Feet

Madison L. George  
*Southern Methodist University, Dedman School of Law*

---

### Recommended Citation

Madison L. George, *Accountability For Sexual Assault Aboard Airplanes: An Analysis of the Need For Reporting Requirements at 35,000 Feet*, 85 J. AIR L. & COM. 669 (2020)  
<https://scholar.smu.edu/jalc/vol85/iss4/4>

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

**ACCOUNTABILITY FOR SEXUAL ASSAULT ABOARD  
AIRPLANES: AN ANALYSIS OF THE NEED FOR  
REPORTING REQUIREMENTS AT 35,000 FEET**

MADISON L. GEORGE\*

ABSTRACT

Currently, airlines have no legal duty to report an in-flight sexual assault to law enforcement. This lack of a duty to report hinders investigations, prevents victims from receiving closure, and imposes additional liability on air carriers. This Comment suggests imposing a mandatory and uniform reporting requirement on commercial airlines. This requirement would better assist travelers and help limit airlines' liability for in-flight sexual assault.

By examining the purposes and policies of other mandated reporting laws, it is apparent that the airline industry is an apt place to instill a duty to report. Requiring airlines to report in-flight sexual assault would follow the current trend of making reporting requirements commonplace in the professional and corporate spheres. Pending legislation on this topic has significant shortcomings, but this Comment argues that it is nonetheless important and should be expanded in the near future.

TABLE OF CONTENTS

I. INTRODUCTION.....	670
II. RALLYING THE MEDIA.....	672
A. <i>Dvaladze v. Delta Air Lines, Inc.</i> .....	673
B. <i>Sardinas v. United Airlines</i> .....	673

---

\* Madison George is a J.D. Candidate at SMU Dedman School of Law graduating in May 2021. Madison earned a Bachelor of Arts in Criminal Justice from Sam Houston State University in 2017. She would like to thank Professor Chris Jenks for always being available to listen and assist. She would also like to thank her mom for inspiring her to be a better writer, as well as the rest of her family and friends for their endless love and support.

III.	CURRENT STATE OF THE LAW	674
A.	LIABILITY FOR AIRLINES	674
1.	<i>Liability for International Air Carriers</i>	674
2.	<i>Liability for Airlines as Common Carriers</i>	675
B.	THE GOVERNMENT'S AUTHORITY OVER CRIMES ON AIRCRAFT	677
1.	<i>Constitutional Authority</i>	677
2.	<i>Statutory Authority</i>	678
C.	PENDING LEGISLATION	680
1.	<i>FAA Reauthorization Act</i>	680
2.	<i>House Bill 5139: Stop Sexual Assault and Harassment in Transportation Act</i>	681
IV.	SHORTCOMINGS IN PENDING LEGISLATION	683
A.	THE FAA REAUTHORIZATION ACT	683
B.	HOUSE BILL 5139	685
V.	OTHER MANDATED REPORTERS	686
A.	CRUISE SHIP REPORTING REQUIREMENTS	688
B.	CHILD ABUSE REPORTING REQUIREMENTS	691
C.	HAZARDOUS WASTE REPORTING REQUIREMENTS	694
VI.	THE BENEFITS OF A UNIFORM REPORTING REQUIREMENT	698
VII.	CONCLUSION	700

## I. INTRODUCTION

**I**N JANUARY 2018, DURING A Spirit Airlines overnight flight, a twenty-three-year-old victim awoke to a stranger “molest[ing] her with his hands.”<sup>1</sup> At trial, she testified that she felt frozen and petrified.<sup>2</sup> The assailant was sentenced to nine years in federal prison.<sup>3</sup>

Unfortunately, this is far from an isolated incident. For example, in May 2019, a Massachusetts man was indicted for sexual assault after he allegedly molested a nineteen-year-old United Airlines passenger.<sup>4</sup> In November 2019, an American Airlines flight bound for Salt Lake City, Utah had to be diverted to

<sup>1</sup> Associated Press, *Man in U.S. on Work Visa Gets 9 Years in Prison for Sex Assault on Flight*, NBC NEWS (Dec. 14, 2018), <https://www.nbcnews.com/news/us-news/man-u-s-work-visa-gets-9-years-prison-sex-n9478> [perma.cc/G3TH-JGQD].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> David Oliver, *Passenger Indicted for Alleged Mid-Flight Sexual Assault of 19-Year-Old Woman*, USA TODAY (May 21, 2019), <https://www.usatoday.com/story/travel/flights/2019/05/21/united-airlines-passenger-alleges-sexual-assault/3751023002/> [https://perma.cc/X64B-JWAL].

Tulsa, Oklahoma for the arrest of an assailant after he allegedly grabbed the crotch of a woman sitting next to him who was traveling with her daughter.<sup>5</sup> Additionally, not all assailants are punished. Even more recently, a class action lawsuit was filed against Frontier Airlines alleging the airline mishandled multiple cases of in-flight sexual assault and that they lack proper reporting procedures.<sup>6</sup> All of these cases illustrate the increasingly important issue of sexual assault on airplanes and airlines' responses to these crimes.

According to the Federal Bureau of Investigation (FBI), from 2014 to 2017, the number of reported in-flight sexual assault cases went from thirty-eight to sixty-three.<sup>7</sup> This number may seem small, but numerous sexual assaults occurring on airplanes go unreported each year.<sup>8</sup> One in five flight attendants claims they have experienced a report of passenger-on-passenger sexual assault.<sup>9</sup> These same flight attendants report that law enforcement was notified or met the plane at the gate less than half of the time.<sup>10</sup> In some cases, law enforcement responds to the assaults because airline crewmembers choose to report.<sup>11</sup> Yet, company policy is currently the only guide for reporting on airlines, which results in law enforcement not knowing about—much less investigating—numerous other cases.<sup>12</sup>

Current aviation and criminal laws fail to address the problem of sexual assault aboard aircraft. To better serve travelers, the Federal Aviation Administration (FAA) or the Transportation and Security Administration (TSA) should create a uniform,

---

<sup>5</sup> Mariel Padilla, *Man Charged in Sexual Assault of Woman on a Flight, Officials Say*, N.Y. TIMES (Nov. 8, 2019), <https://www.nytimes.com/2019/11/08/us/american-airlines-passenger-groping.html> [<https://perma.cc/24V4-5MF8>].

<sup>6</sup> Hally Freger, *Class Action Lawsuit Claims Frontier Airlines Mishandled Cases of In-Flight Sexual Assault*, ABC NEWS (Dec. 17, 2019), <https://abcnews.go.com/Business/class-action-lawsuit-claims-frontier-airlines-mishandled-cases/story?id=67787731> [[perma.cc/E8K6-9SDR](https://perma.cc/E8K6-9SDR)].

<sup>7</sup> *Sexual Assault Aboard Aircraft*, FED. BUREAU OF INVESTIGATION (Apr. 26, 2018), <https://www.fbi.gov/news/stories/raising-awareness-about-sexual-assault-aboard-aircraft-042618> [[perma.cc/4WR5-CFVD](https://perma.cc/4WR5-CFVD)].

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

<sup>9</sup> *#MeToo in the Air*, ASS'N OF FLIGHT ATTENDANTS-CWA, <https://www.afacwa.org/metoo> [[perma.cc/96MN-ZT9V](https://perma.cc/96MN-ZT9V)].

<sup>10</sup> *Id.*

<sup>11</sup> *See id.*

<sup>12</sup> *See* Jamie Freed, *In-Flight Sexual Assaults Often Unreported; Airlines Need to Step Up*, REUTERS (Dec. 14, 2017), <https://www.reuters.com/article/us-india-actor-assault-airlines-analysis/in-flight-sexual-assaults-often-unreported-airlines-need-to-step-up-idUSKBN1E80YN> [[perma.cc/9RYY-TW72](https://perma.cc/9RYY-TW72)].

mandatory reporting requirement that requires commercial airline staff to disclose reported instances of in-flight sexual assault to law enforcement. Part II of this Comment will discuss two cases which brought airlines' nonreporting to the media's attention. Part III will address the current state of the relevant U.S. aviation law; this includes the liability airlines currently face for in-flight sexual assault, the government's authority over crimes aboard aircraft, and pending legislation. Part IV will address shortcomings in pending legislation to show why more stringent reporting laws are necessary. Part V will examine other reporting requirements and how their purposes and policies extend to the airline industry. Part VI will address the benefits of a uniform, mandatory reporting requirement. Lastly, Part VII will provide a conclusion by laying out steps Congress should take.

## II. RALLYING THE MEDIA

If a flight attendant or other airline crewmember is notified of an in-flight sexual assault, there is no mandatory reporting requirement or other uniform procedure for handling such an incident.<sup>13</sup> Prior to this decade, the treatment and lack of reporting of in-flight sexual assaults was rarely discussed, but it has garnered media attention in the past few years. This is partially due to two highly publicized cases—both of which illustrate the seriousness of nonreporting.<sup>14</sup>

---

<sup>13</sup> See Andrew Appelbaum, *Recent In-Flight Sexual Abuse Complaints to Feds Released by Airline Passenger Group . . . Nothing Done?*, FLYERS RIGHTS (Nov. 29, 2018), <https://flyersrights.org/press-release/recent-in-flight-sexual-abuse-complaints-to-feds-released-by-airline-passenger-group/> [perma.cc/529A-68GD]; Shannon McMahon, *What to Do if In-Flight Sexual Assault Happens to You*, SMARTERTRAVEL (Mar. 19, 2018), <https://www.smartertravel.com/flight-sexual-assault-what-to-do/> [perma.cc/BQT6-JD87]; see also *Sexual Assault Aboard Aircraft*, *supra* note 7 (noting “in most cases” law enforcement will be available to respond if the flight crew is immediately notified and encouraging victims to reach out to the FBI themselves).

<sup>14</sup> The #MeToo movement has also influenced the attention devoted to in-flight sexual assault as its massive impact continues to result in increased reporting of sexual crimes in all contexts. See, e.g., Frankie Wallace, *How the #MeToo Movement Has Affected the Airline Industry*, AERONAUTICS AVIATION NEWS & MEDIA (Aug. 5, 2019), <https://aeronauticsonline.com/how-the-metoo-movement-has-affected-the-airline-industry/> [perma.cc/J385-Z6ZG]. The breadth of this movement and its influence on the airline industry, however, is outside the scope of this Comment.

A. *DVALADZE V. DELTA AIR LINES, INC.*

The first largely publicized case shows how nonreporting can result in an assailant getting away. In 2018, Allison Dvaladze sued Delta Air Lines, alleging she was assaulted by a stranger mid-flight.<sup>15</sup> Dvaladze stated that she told the crewmembers of the incident immediately but received unsatisfactory responses.<sup>16</sup> One flight attendant told Dvaladze to let it “roll off her back” and that sexual assault occurs frequently on flights.<sup>17</sup> Upon landing, crewmembers did not report the incident to law enforcement, and the alleged assailant was never identified or arrested.<sup>18</sup> Since then, Dvaladze has frequently discussed her case with the media.<sup>19</sup> It was even brought to the FBI’s attention and used in their campaign to raise awareness regarding the dangers of in-flight sexual assault.<sup>20</sup>

B. *SARDINAS V. UNITED AIRLINES*

Another largely discussed case, citing the *Dvaladze* incident in its own complaint, shows how nonreporting hinders law enforcement investigations.<sup>21</sup> A teenager flying unaccompanied on United Airlines (United) woke up mid-flight to a stranger assaulting her.<sup>22</sup> The victim caught a flight attendant’s attention who proceeded to “chastise” the assailant, telling him his actions

---

<sup>15</sup> Complaint for Damages at 3–4, *Dvaladze v. Delta Air Lines, Inc.*, No. 2:18-cv-00297-RSL (W.D. Wash. July 25, 2019), ECF No. 1; *see also* Order of Dismissal, *Dvaladze*, No. 2:18-cv-00297-RSL, ECF No. 22 (noting case was later dismissed pursuant to settlement).

<sup>16</sup> Complaint for Damages at 4–5, *Dvaladze*, No. 2:18-cv-00297-RSL.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.* at 5; *see also* Avi Selk, *She Says She Was Groped on a Delta Flight—Then Told to Sit Down and ‘Let It Roll off Your Back’*, WASH. POST (Feb. 28, 2018), <https://www.washingtonpost.com/news/dr-gridlock/wp/2018/02/28/she-says-she-was-groped-on-a-delta-flight-then-told-to-sit-down-and-let-it-roll-off-your-back/> [<https://perma.cc/MEW6-CSE3>].

<sup>19</sup> *E.g.*, Mary Louise Kelly, *36,000 Feet in the Air, Flight Attendants and Passengers Say ‘Me, Too’*, NAT’L PUB. RADIO (June 21, 2018), <https://www.npr.org/transcripts/622361890> [<https://perma.cc/K253-H3F8>]; Matthew Halverson, *The Unfriendly Skies: Why Sexual Assault Still Plagues Air Travel*, CONDÉ NAST TRAVELER (Mar. 29, 2017), <https://www.cntraveler.com/story/the-unfriendly-skies-why-sexual-assault-still-plagues-air-travel> [[perma.cc/C5QZ-P9PA](https://perma.cc/C5QZ-P9PA)].

<sup>20</sup> *See Sexual Assault Aboard Aircraft*, *supra* note 7.

<sup>21</sup> Complaint at 3, *Sardinas v. United Airlines*, No. 19-2-01663-9 SEA (Wash. Super. Ct.-King Cnty. Feb. 22, 2019), ECF No. 1-1.

<sup>22</sup> *Id.* at 4–5; *see also* Amy Clancy, *Seattle Teen: United Airlines ‘Negligent’ for In-Flight Sexual Assault*, KIRO 7 (Nov. 22, 2019), <https://www.kiro7.com/news/local/tonight-at-5-30-seattle-teen-united-airlines-negligent-for-in-flight-sexual-assault/950947481/> [[perma.cc/R7VF-6JS](https://perma.cc/R7VF-6JS)].

were “not cool.”<sup>23</sup> Yet, the assailant was allowed to walk off the plane undeterred as United never notified law enforcement.<sup>24</sup> Instead, the victim reported the assault to her mother who, in turn, notified law enforcement.<sup>25</sup> Luckily, unlike in *Dvaladze*, the assailant was later identified, arrested, and convicted.<sup>26</sup>

Both of these instances illustrate that the lack of a mandatory reporting requirement for in-flight sexual assault leads to adverse consequences. These cases, along with others, have garnered media attention and forced our legislative and executive branches to examine the current state of the law regarding in-flight assault.<sup>27</sup>

### III. CURRENT STATE OF THE LAW

#### A. LIABILITY FOR AIRLINES

Prior to the late 1990s, sex on airplanes—consensual or otherwise—was rarely discussed.<sup>28</sup> It is unknown if this is due to a lack of reporting, a cover-up mentality, or it just did not occur. Nonetheless, in the past few decades courts have recognized a problem on both domestic and international flights and have come up with avenues of liability to hold airlines accountable.<sup>29</sup> The remainder of this Part will discuss liability for both international and domestic airlines.

##### 1. *Liability for International Air Carriers*

In the 2000 case *Wallace v. Korean Air*, the Second Circuit found that an international air carrier could be liable for injuries arising from passenger-on-passenger sexual assault occur-

---

<sup>23</sup> Clancy, *supra* note 22.

<sup>24</sup> Complaint at 5, *Sardinas*, No. 19-2-01663-9 SEA; Clancy, *supra* note 22.

<sup>25</sup> Complaint at 5–6, *Sardinas*, No. 19-2-01663-9 SEA; Clancy, *supra* note 22.

<sup>26</sup> See Complaint at 5–6, *Sardinas*, No. 19-2-01663-9 SEA; Clancy, *supra* note 22.

<sup>27</sup> See Rene Marsh & Juana Summers, *Women Detail Sexual Assaults and Harassment on Commercial Flights*, CNN (Dec. 28, 2017), <https://www.cnn.com/2017/12/27/politics/women-sexual-assaults-harassment-commercial-flights/index.html> [perma.cc/Q33G-7N68] (containing additional instances of victims complaining of airlines’ responses to in-flight sexual assaults).

<sup>28</sup> See Asra Q. Nomani, *A New Problem for the Airlines: Sexual Misconduct at 37,000 Feet*, WALL ST. J. (June 10, 1998), <https://www.wsj.com/articles/SB897364901819356000> [https://perma.cc/H5FB-DQRQ].

<sup>29</sup> *Id.*; see also Judith R. Karp, *Mile High Assaults: Air Carrier Liability Under the Warsaw Convention*, 66 J. AIR L. & COM. 1551, 1553 (2001) (“[I]n 1997, one-third of the reported cases of ‘unruly behavior’ among airplane passengers involved sexual misconduct.”).

ring mid-flight.<sup>30</sup> Similarly, in *Tsevas v. Delta Air Lines, Inc.*, an Illinois federal district court held that a victim could sue for injuries if the airline failed to act after a passenger-on-passenger sexual assault on a transatlantic flight.<sup>31</sup> In reaching this holding, the court found that the airline contributed to the attack by continuing to serve the alleged assailant alcohol after receiving complaints and refusing to intervene.<sup>32</sup> Courts have subsequently held that liability extends to international air carriers regardless of the victim's gender.<sup>33</sup> Likewise, airlines on domestic flights can be held liable for passenger-on-passenger sexual assault.

## 2. *Liability for Airlines as Common Carriers*

Liability for airlines on domestic flights originates primarily from the classification of airlines as common carriers. U.S. law has long recognized this categorization.<sup>34</sup> Being a common carrier imposes a heightened duty of care for airlines on domestic flights, which makes them liable for foreseeable criminal acts, including sexual misconduct.<sup>35</sup> The test for liability is “whether such an incident was foreseeable under the circumstances of the case or whether the air carrier owed a heightened duty to the passenger due to a special relationship.”<sup>36</sup> For example, in *R.M. v. American Airlines, Inc.*, a minor's parents sued American Airlines after their daughter was sexually assaulted mid-flight.<sup>37</sup> The court held that airlines, as common carriers, are subject to a heightened duty of care; however, this crime was not foreseeable

<sup>30</sup> *Wallace v. Korean Air*, 214 F.3d 293, 296 (2d Cir. 2000); *see also* Karp, *supra* note 29, at 1561.

<sup>31</sup> *Tsevas v. Delta Air Lines, Inc.*, No. 97C0320, 1997 WL 767278, at \*1 (N.D. Ill. Dec. 1, 1997); *see also* Jonathan E. DeMay, Marissa N. Lefland & Constantine J. Petallides, *In-Flight Sexual Misconduct: Congressional Action and Air Carrier Liability*, 2019 ABA FORUM ON AIR & SPACE L. ANN. CONF., Sept. 12–13, 2019, at 1, 9–10.

<sup>32</sup> *Tsevas*, 1997 WL 767278, at \*10; *see also* DeMay et al., *supra* note 31, at 9–10.

<sup>33</sup> *E.g.*, *Langadinos v. Am. Airlines, Inc.*, 199 F.3d 68, 69 (1st Cir. 2000); Karp, *supra* note 29, at 1563–64.

<sup>34</sup> *See* 45 U.S.C. § 181; 49 U.S.C. § 40102(a)(25), (27); *Am. Airlines, Inc. v. N. Am. Airlines, Inc.*, 351 U.S. 79, 84 (1956); Paul T. David, *Federal Regulation of Airplane Common Carriers*, 6 J. LAND & PUB. UTIL. ECON. 359, 360 (1930).

<sup>35</sup> DeMay et al., *supra* note 31, at 13; *see also* *R.M. v. Am. Airlines, Inc.*, 338 F. Supp. 3d 1203, 1213–14 (D. Or. 2018).

<sup>36</sup> DeMay et al., *supra* note 31, at 13.

<sup>37</sup> *R.M.*, 338 F. Supp. 3d at 1205. Note that the assailant pleaded guilty to “Assault with Intent to Commit Sexual Contact of a Minor and Indecent Sexual Proposal to a Minor.” *Id.* at 1207.

enough for the airline to be liable.<sup>38</sup> The facts indicated that (1) the defendant was not intoxicated; (2) the attack was noticed by a flight attendant; (3) the passengers were separated; (4) law enforcement was notified immediately; and (5) law enforcement met the assailant upon landing.<sup>39</sup>

Conversely, in other cases, such as *Thompson v. Hawaiian Airlines, Inc.*, courts have found some in-flight crimes foreseeable enough to hold airlines responsible in their common carrier role.<sup>40</sup> In *Thompson*, the court denied the defendant airline's motion for summary judgment when it found the foreseeability of an in-flight sexual assault was a question of fact.<sup>41</sup> The plaintiff in *Thompson* alleged that her assailant was visibly intoxicated prior to boarding and that the flight attendants continued to serve him alcohol.<sup>42</sup> She woke up mid-flight to the assailant touching her groin.<sup>43</sup> While a jury later ruled the plaintiff take nothing, the court's recognition that airlines can be liable for their passenger's actions on domestic flights is relevant and followed by most states.<sup>44</sup>

Despite continued recognition of airline liability for in-flight sexual assault, little has been done to encourage specific protocols and reporting when an in-flight assault occurs. This is true even though courts, federal legislators, and the media recognize the problem of in-flight sexual assault.<sup>45</sup> The executive and legislative branches did not begin widely discussing mandated reporting for airlines until 2018.<sup>46</sup> One possible reason for this is the prior lack of media attention on the subject. Another possi-

---

<sup>38</sup> *Id.* at 1215.

<sup>39</sup> *Id.* at 1206–07.

<sup>40</sup> *Thompson v. Hawaiian Airlines, Inc.*, No. CV 09-4515 CAS (PLAx), 2010 WL 1151431, at \*5 (C.D. Cal. July 19, 2010).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at \*2.

<sup>43</sup> *Id.*

<sup>44</sup> See Judgment at 1, *Thompson*, 2010 WL 1151431 (No. CV09-4515 CAS (PLAx)), ECF No. 154; DeMay et al., *supra* note 31, at 13.

<sup>45</sup> See, e.g., *R.M. v. Am. Airlines, Inc.*, 338 F. Supp. 3d 1203, 1215 (D. Or. 2018) (“undeniably a serious issue for airlines today”); Stop Sexual Assault and Harassment in Transportation Act, H.R. 5139, 116th Cong. (1st Sess. 2019) (describing proposed legislation to address sexual harassment in public transportation); Karen Schwartz, *Recent Incidents Put a New Focus on Sexual Assault on Airplanes*, N.Y. TIMES (Oct. 20, 2016), <https://www.nytimes.com/2016/10/20/travel/recent-incident-put-a-new-focus-on-sexual-assault-on-airplanes.html> [perma.cc/G2ZY-SMYV].

<sup>46</sup> See H.R. 5139; FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 339A, 132 Stat. 3186, 3282 (2018).

ble explanation is that Congress does not want to meddle with company policy. While the latter explanation promotes airlines having free reign over their own business, it lacks merit considering the broad authority already bestowed on the federal government to regulate airlines.

## B. THE GOVERNMENT’S AUTHORITY OVER CRIMES ON AIRCRAFT

While airline jurisdictional questions are convoluted and generally outside the scope of this Comment, the U.S. government possesses vast authority over airlines—particularly as it relates to criminal offenses like sexual assault. This authority, stemming from both the Constitution and federal statutes, is more than enough to initiate a mandated reporting requirement. The remainder of this Part will discuss the U.S. government’s constitutional and statutory authority to regulate airlines.

### 1. *Constitutional Authority*

First, the U.S. Constitution’s Commerce Clause states that Congress shall have the power “to regulate commerce with foreign nations, and among the several states.”<sup>47</sup> This power rapidly expanded throughout the twentieth century and has been interpreted to mean that Congress may regulate (1) channels of interstate commerce; (2) instrumentalities of interstate commerce or persons or things in interstate commerce; and (3) activities which substantially affect interstate commerce.<sup>48</sup> A commercial plane arguably fits into all three of these categories.<sup>49</sup> Therefore, “[i]n the context of aviation law, courts generally uphold the federal government’s efforts to regulate even intrastate air travel.”<sup>50</sup>

Additionally, under the Constitution’s Supremacy Clause, the “laws of the United States” are the “supreme law of the land” regardless of the “laws of any State to the contrary.”<sup>51</sup> This means any valid federal laws will take precedence over conflict-

---

<sup>47</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>48</sup> *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

<sup>49</sup> MICHAEL W. PEARSON & DANIEL S. RILEY, *FOUNDATIONS OF AVIATION LAW* 28 (2015).

<sup>50</sup> *Id.*; see also *United States v. Knowles*, 197 F. Supp. 3d 143, 155–56 (D.C. Cir. 2016) (holding “Congress may regulate an instrumentality of both interstate and foreign commerce—an airplane . . . pursuant to its commerce powers.”).

<sup>51</sup> U.S. CONST. art. VI.

ing state laws.<sup>52</sup> States must adhere to these laws; they cannot turn a blind eye to the federal government's decisions—so long as they are constitutional.<sup>53</sup> Congress consequently has the constitutional authority to create a mandatory reporting requirement for commercial airlines under the Commerce Clause. Under the Supremacy Clause, all airlines would have to adhere to this requirement regardless of state laws.

## 2. Statutory Authority

Under the Commerce Clause's authority, the legislature has already enacted numerous statutes regulating airlines and in-flight crimes. Under 49 U.S.C. § 40103, the U.S. government has "exclusive sovereignty of airspace of the United States."<sup>54</sup> Under 49 U.S.C. § 46506, certain in-flight actions considered crimes in the territorial United States are made criminal so long as they are committed within the United States' "special aircraft jurisdiction."<sup>55</sup> This statute includes sexual abuse offenses.<sup>56</sup> Essentially, all U.S. aircraft or any aircraft in the United States is within the special aircraft jurisdiction.<sup>57</sup> In the case of in-flight assaults, the FBI generally has investigative jurisdiction—so long as they are actually reported.<sup>58</sup>

Congress does not possess exclusive interest in aviation laws and regulations. Regarding commercial aviation, Congress has delegated authority to two executive agencies. First, the FAA has authority to regulate any U.S. civil aviation activities.<sup>59</sup> Since its

---

<sup>52</sup> *Id.*; see *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) ("[T]his [Supremacy] Clause creates a rule of decision: Courts 'shall' regard the 'Constitution,' and all laws 'made in Pursuance thereof,' as 'the supreme Law of the Land.' They must not give effect to state laws that conflict with federal laws.").

<sup>53</sup> See *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958) (holding the Constitution is the supreme law of the land, and state legislatures do not have the authority to nullify Supreme Court or other federal court decisions).

<sup>54</sup> 49 U.S.C. § 40103(a)(1).

<sup>55</sup> *Id.* § 46506(1); see also 1412. *Certain Crimes Aboard Aircraft in Flight—49 U.S.C. 46506*, U.S. DEP'T OF JUST., <https://www.justice.gov/jm/criminal-resource-manual-1412-certain-crimes-aboard-aircraft-flight-49-usc-46506> [perma.cc/C55F-ZUBR].

<sup>56</sup> 49 U.S.C. § 46506; 18 U.S.C. §§ 2241–2248; 1412. *Certain Crimes Aboard Aircraft in Flight—49 U.S.C. 46506*, *supra* note 55.

<sup>57</sup> 49 U.S.C. § 46501(2).

<sup>58</sup> *Sexual Assault Aboard Aircraft*, *supra* note 7.

<sup>59</sup> *Federal Aviation Administration*, U.S. DEP'T OF TRANSP., <https://www.transportation.gov/briefing-room/safetyfirst/federal-aviation-administration> [perma.cc/TEX6-N86P]; see also Federal Aviation Act of 1958, Pub. L. No. 85-726, 75 Stat. 737 (repealed and re-codified without substantive change at 49 U.S.C.

creation in 1958, the FAA has grown tremendously and is now in charge of providing the “safest, most efficient aerospace system in the world.”<sup>60</sup> Some of the FAA’s main tasks include developing programs to combat the environmental impact of airplanes; regulating commercial space transportation as well as civil aviation; and setting safety standards for planes and crewmembers.<sup>61</sup> On October 5, 2018, President Trump signed into law the FAA Reauthorization Act of 2018 (FAA Reauthorization Act), which extended the FAA’s authority (and funding) until 2023.<sup>62</sup>

Second, TSA is another executive agency with authority relating to airline transportation. Created in response to the September 11th terrorist attacks,<sup>63</sup> some of TSA’s main tasks include organizing and implementing all security screenings for passengers at U.S. airports; liaising with law enforcement regarding transportation security; and enforcing security-related regulations.<sup>64</sup> TSA also controls the federal air marshals. The air marshals are “federal law enforcement officers deployed on passenger flights worldwide to protect airline passengers and crew against the risk of criminal and terrorist violence.”<sup>65</sup>

Though both agencies regulate aviation safety, the FAA’s mission indirectly helps keep passengers safe by creating safety standards, while TSA is directly responsible for passenger security in all modes of transportation.<sup>66</sup> Considering the authority granted to each agency, either should have the power to create and implement a mandated reporting requirement for commercial airlines. While TSA seems the more logical choice due to its connection to passenger security and its law enforcement powers, the FAA Reauthorization Act directed the Secretary of Transportation to establish a task force addressing the issue of

---

§§ 40101–40105) (stating the FAA has authority over regulations and promotion of civil aviation).

<sup>60</sup> *Safety: The Foundation of Everything We Do*, FED. AVIATION ADMIN., [https://www.faa.gov/about/safety\\_efficiency/](https://www.faa.gov/about/safety_efficiency/) [perma.cc/7JNT-S9MM]; see 49 U.S.C. § 40103(b)(1).

<sup>61</sup> See *Safety, The Foundation of Everything We Do*, *supra* note 60; see 49 U.S.C. §§ 40101–40130 (laying out the general policies and duties of the FAA).

<sup>62</sup> FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat. 3186 (2018).

<sup>63</sup> See *Mission*, U.S. TRANSP. SEC. ADMIN., <https://www.tsa.gov/about/tsa-mission> [perma.cc/TEX6-N86P]; see also 49 U.S.C. § 114(f).

<sup>64</sup> 49 U.S.C. § 114.

<sup>65</sup> *Federal Air Marshal Service and Law Enforcement*, U.S. TRANSP. SEC. ADMIN., <https://www.tsa.gov/about/jobs-at-tsa/federal-air-marshall-service-and-law-enforcement> [perma.cc/U5EQ-JBJP]; 49 U.S.C. § 44917.

<sup>66</sup> 49 U.S.C. § 114(f); *Mission*, *supra* note 63.

in-flight sexual misconduct.<sup>67</sup> This task force, as well as the Stop Sexual Assault and Harassment in Transportation Act (House Bill 5139)—a bill recently passed by the House of Representatives—lay the groundwork for mandated reporting of in-flight sexual assaults.<sup>68</sup>

### C. PENDING LEGISLATION

While Congress has said each airplane should have policies to address in-flight sexual misconduct that include “facilitat[ing] the reporting of sexual misconduct to appropriate law enforcement agencies,”<sup>69</sup> there is no mandatory reporting requirement even if an assault is reported to airline staff.<sup>70</sup> The burden is entirely on the airline itself to create and adhere to a reporting policy.<sup>71</sup> At most, a failure to report may be a factor when determining the airlines’ civil liability for the assault.<sup>72</sup> The rest of Section C will discuss pending legislation that could address the issue of airline nonreporting including the FAA Reauthorization Act and House Bill 5139.

#### 1. *FAA Reauthorization Act*

In 2018, Congress and President Trump addressed in-flight sexual misconduct in the FAA Reauthorization Act,<sup>73</sup> which directed the Secretary of Transportation to create the National In-Flight Sexual Misconduct Task Force (Task Force).<sup>74</sup> The Task Force’s primary function is to review the current practices, protocols, and requirements of airlines when responding to alleged sexual misconduct in-flight—this includes review of an airline’s training, reporting, and data collection.<sup>75</sup> The Task Force’s secondary function is to make recommendations based on their review of the airline’s protocols and firsthand accounts from passengers who have experienced in-flight sexual misconduct.<sup>76</sup>

---

<sup>67</sup> FAA Reauthorization Act § 339A.

<sup>68</sup> See *id.* §§ 339A, 339B; Stop Sexual Assault and Harassment in Transportation Act, H.R. 5139, 116th Cong. (1st Sess. 2019).

<sup>69</sup> FAA Reauthorization Act § 338(1)(B).

<sup>70</sup> See Appelbaum, *supra* note 13 (noting that there are no mandatory reporting requirements so airlines may report according to their own policies).

<sup>71</sup> See FAA Reauthorization Act § 338(1).

<sup>72</sup> See, e.g., Complaint at 2, *Sardinas v. United Airlines*, No. 19-2-01663-9 SEA (Wash. Super. Ct.-King Cnty. Jan. 17, 2019), E.C.F. No. 1-1.

<sup>73</sup> FAA Reauthorization Act §§ 339A, 339B.

<sup>74</sup> *Id.* § 339A(a).

<sup>75</sup> *Id.* § 339A(a)(1).

<sup>76</sup> *Id.* § 339A(a)(2).

The Task Force's purposes are six-fold. First, the Task Force recommends ways to address sexual assault on planes; this could include airline employee and contractor training.<sup>77</sup> Second, the Task Force suggests ways for passengers involved in an in-flight sexual assault to report it.<sup>78</sup> The Attorney General uses these recommendations to "establish a streamlined process" for "individuals involved in incidents of alleged sexual misconduct onboard aircraft to report such allegations" in a way that protects their privacy.<sup>79</sup> Third, the Task Force suggests means of providing data of in-flight sexual misconduct while protecting the victims' privacy and preventing the public from identifying an individual air carrier.<sup>80</sup> Fourth, the Task Force is to "issue recommendations for flight attendants, pilots, and other appropriate airline personnel on law enforcement notification in incidents of alleged sexual misconduct."<sup>81</sup> Fifth, the Task Force reviews and uses firsthand accounts from passengers who have been assaulted in-flight, and, sixth, the Task Force does anything else it deems necessary.<sup>82</sup>

The FAA Reauthorization Act requires that the Task Force consist of representatives from (1) the Department of Transportation (DOT); (2) the Department of Justice; (3) national organizations that specialize in helping sexual assault victims; (4) labor organizations that represent flight attendants and pilots; (5) airports; (6) air carriers; (7) state and local law enforcement agencies; and (8) other federal agencies and stakeholder organizations deemed necessary.<sup>83</sup> These representatives ensure the interests of all groups or individuals affected by in-flight sexual assault are represented. While the FAA Reauthorization Act is a step in the right direction and has prompted discussion of in-flight sexual assault, it leaves a lot to be desired regarding an airline's responsibility to report.

## 2. *House Bill 5139: Stop Sexual Assault and Harassment in Transportation Act*

Representative Peter DeFazio recognized the legislative gap in reporting requirements when he introduced House Bill 5139 to

---

<sup>77</sup> *Id.* § 339A(c)(1).

<sup>78</sup> *Id.* § 339A(c)(2).

<sup>79</sup> *Id.* § 339B(a).

<sup>80</sup> *Id.* § 339A(c)(3).

<sup>81</sup> *Id.* § 339A(c)(4).

<sup>82</sup> *Id.* § 339A(c)(5)–(6).

<sup>83</sup> *Id.* § 339A(b).

the House of Representatives.<sup>84</sup> The main purpose of House Bill 5139, which is still under review, is to “protect transportation personnel and passengers from sexual assault and harassment.”<sup>85</sup> To that end, it has an entire section devoted to the sexual assault and harassment policies of foreign and domestic air carriers.<sup>86</sup> While House Bill 5139 is not yet as detailed as the FAA Reauthorization Act, it better addresses airlines’ responsibility in preventing and reporting sexual assault.<sup>87</sup> As it stands, House Bill 5139 would require all commercial airlines to create a formal in-flight sexual assault policy with five requirements.<sup>88</sup>

First, the policy must state that sexual assault or harassment is always unacceptable.<sup>89</sup> Second, the policy must include procedures to facilitate a victim’s reporting, including appropriate public outreach activities and confidential ways to report.<sup>90</sup> Third, the airlines must limit or prohibit future travel by an assailant.<sup>91</sup> Fourth, the policy must mandate training for airline personnel who may receive reports of in-flight assault and training to recognize and respond to potential human trafficking victims.<sup>92</sup> Fifth, and most importantly, the policy would require specific “procedures that personnel should follow upon the reporting of a transportation sexual assault or harassment incident, including actions to protect affected individuals from continued sexual assault or harassment and *to notify law enforcement when appropriate.*”<sup>93</sup>

To make House Bill 5139 more palatable to air carriers, it also states that compliance with these requirements would not definitively determine whether the airline fell below any requisite standard of care.<sup>94</sup> This essentially prevents noncompliance with House Bill 5139 from becoming a per se determination of liabil-

---

<sup>84</sup> Press Release, Rep. Peter DeFazio, Chair DeFazio Introduces Legislation to Address Sexual Assault and Harassment in Passenger Transportation (Nov. 18, 2019), <https://defazio.house.gov/media-center/press-releases/chair-defazio-introduces-legislation-to-address-sexual-assault-and> [https://perma.cc/XVA3-EB5B].

<sup>85</sup> *Id.*

<sup>86</sup> Stop Sexual Assault and Harassment in Transportation Act, H.R. 5139, 116th Cong. pmb., § 41727 (1st Sess. 2019).

<sup>87</sup> *See id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* § 41727(b)(1).

<sup>90</sup> *Id.* § 41727(b)(2).

<sup>91</sup> *Id.* § 41727(b)(4).

<sup>92</sup> *Id.* § 41727(b)(5).

<sup>93</sup> *Id.* § 41727(b)(3) (emphasis added).

<sup>94</sup> *See id.* § 41727(d).

ity for the air carrier; however, this safeguard does not prevent a court from reviewing noncompliance with the reporting requirement as a factor in deciding liability. Yet, as promising as the FAA Reauthorization Act and House Bill 5139 are, there are still issues to be addressed.

#### IV. SHORTCOMINGS IN PENDING LEGISLATION

##### A. THE FAA REAUTHORIZATION ACT

As the remainder of this Part will address, both the FAA Reauthorization Act and House Bill 5139 fail to fully solve the issue of nonreporting of in-flight sexual assaults. While the FAA Reauthorization Act is a step in the right direction, it places the burden of reporting on the victim, not the airline.<sup>95</sup> In some ways, it even places the protection of airlines over passenger safety. For instance, the Task Force's third purpose, encouraging data collection, is vital, as instances of in-flight sexual assault are underreported.<sup>96</sup> More accurate information could lead to better prevention tactics. Yet, by failing to pair sexual assault data with specific airlines, the public cannot consider safety as a factor when choosing an airline. It appears this is an attempt to protect air carriers from liability and economic loss, which may not be considerate of the safety of future travelers.

The Task Force's fourth purpose—to issue recommendations for airline crewmembers on how to report to law enforcement—is the most relevant to this Comment.<sup>97</sup> While the FAA Reauthorization Act is worded ambiguously, one can assume the Task Force is meant to address reporting requirements for commercial airline crewmembers. Yet, there is no further mention of requiring airlines to report. Instead, the FAA Reauthorization Act focuses on ways the victim can report.<sup>98</sup> The emphasis on victim's reporting is likely an effort to protect the privacy of victims and to allow them to control whether their assault is reported to law enforcement. While this is commendable, it shifts the burden from airlines, imposing a duty on the traumatized victim who generally lacks reporting capability at 35,000 feet.<sup>99</sup> If

<sup>95</sup> FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 339B(a), 132 Stat. 3186 (2018).

<sup>96</sup> *Id.* § 339A(c)(3).

<sup>97</sup> *Id.* § 339A(c)(4).

<sup>98</sup> *See id.* § 339B.

<sup>99</sup> *See* Celine Hacobian, *Here's How High Planes Actually Fly, According to Experts*, TIME (June 27, 2018), <https://time.com/5309905/how-high-do-planes-fly/>

the victim has already reported the incident to an airline crewmember, the crewmember should have a duty as a common carrier to notify law enforcement.

Further, by placing the reporting burden on the victim instead of the airline, the assailant is more likely to get away. Victims, compared to airline crewmembers, often lack the ability to easily contact law enforcement until after they have landed.<sup>100</sup> This time critically impacts law enforcement's ability to respond effectively.<sup>101</sup> Cell phones remain largely prohibited and inaccessible to passengers in-flight.<sup>102</sup> While some airlines sell in-flight wireless internet,<sup>103</sup> this is often unreliable. Further, while a victim could potentially contact law enforcement using in-flight wireless internet to send an email, it seems unlikely that law enforcement will read the email and take action by the time the plane lands. This impacts the victim's ability to secure protection for themselves, hinders law enforcement's arrest and investigation, and may endanger another victim.<sup>104</sup> Ultimately, the victim is often unable to seek redress or protection via law enforcement until after the plane has landed—potentially after be-

---

[perma.cc/ARA8-TAUP] (noting that planes generally fly at 31,000 to 38,000 feet).

<sup>100</sup> See *Fact Sheet – Portable Electronics on Airplanes*, FED. AVIATION ADMIN. (June 21, 2013), [https://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=14774#:~:text=Since%201991%2C%20the%20FCC%20has,is%20taxiing%20to%20the%20gate](https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14774#:~:text=Since%201991%2C%20the%20FCC%20has,is%20taxiing%20to%20the%20gate) [https://perma.cc/9QFR-4ZWA] (noting banned cell phone use on airplanes and that even in newer model planes, when passengers might be allowed to use their phones after the plane reaches 10,000 feet, cell phones lack the ability to transmit signals until landing); *Portable Electronic Devices*, FED. AVIATION ADMIN. (Sept. 10, 2019), <https://www.faa.gov/about/initiatives/ped/#:~:text=the%20FAA%20is%20not%20considering,airborne%20calls%20using%20cell%20phones> [https://perma.cc/Z426-LLU3] (“The FAA is not considering the use of cell phones . . . during flight because Federal Communications Commission (FCC) regulations currently prohibit any airborne calls using cell phones.”).

<sup>101</sup> WILLIAM SPELMAN & DALE K. BROWN, NAT'L INST. OF JUST., *CALLING THE POLICE: CITIZEN REPORTING OF SERIOUS CRIME*, at xix, 61–80 (1984), <https://www.ncjrs.gov/pdffiles1/Digitization/82276NCJRS.pdf> [https://perma.cc/9H2A-WL5W] (finding time it takes to report crime affects possibility of on-scene arrests).

<sup>102</sup> See *Fact Sheet – Portable Electronics on Airplanes*, *supra* note 100; *Portable Electronic Devices*, *supra* note 100.

<sup>103</sup> See, e.g., *Wi-Fi and Connectivity*, AM. AIRLINES, <https://www.aa.com/i18n/travel-info/experience/entertainment/wi-fi-and-connectivity.jsp?anchorLocation=directURL&title=wifi> [perma.cc/CDH2-HBCM] (showing ability to purchase wi-fi on domestic flights).

<sup>104</sup> See, e.g., *Complaint at 5–6, Sardinias v. United Airlines*, 19-2-01663-9 SEA (Wash. Sup. Ct.-King Cnty. Jan. 17, 2019).

ing subjected to repeated assaults or attempted assaults.<sup>105</sup> While the Task Force is trying to create a streamlined reporting process for the victim of an in-flight assault,<sup>106</sup> this seems to focus on preventing liability for airlines instead of assisting victims and punishing the offender.

Lastly, the FAA Reauthorization Act does not require TSA representatives to be part of the Task Force.<sup>107</sup> If a mandatory reporting requirement is created—as this Comment suggests—the Task Force should include TSA. TSA oversees passenger security and has more direct ties with law enforcement.<sup>108</sup> It would logically follow that TSA is included and has a say in how to handle reporting and investigating in-flight sexual assaults. Additionally, TSA would likely be the agency responsible for ensuring the alleged assailant does not leave the airport prior to being detained.

## B. HOUSE BILL 5139

House Bill 5139 is a great start to addressing the responsibility airlines should have in responding to sexual assault. It supplements the FAA Reauthorization Act and recognizes that the airline, not just the victim, should report transportation assault and harassment to law enforcement because they are in a better posi-

---

<sup>105</sup> While it is possible for flight attendants to move victims to seats away from their assailant, and thus limit their ability to be assaulted again, this is not always the crewmembers' response. *See, e.g.*, Nora Caplan-Bricker, *Flight Risk*, SLATE (Aug. 31, 2016, 5:58 AM), <https://slate.com/human-interest/2016/08/flight-risk.html> [<https://perma.cc/VQM7-4A2E>] (describing incident where female passenger was verbally and physically harassed mid-flight and had to beg to move to different seat); Melanie Cox, *Flight and Fight*, MARIE CLAIRE (Sept. 24, 2020), <https://www.marieclaire.com/politics/a33252517/sexual-misconduct-on-airplanes/> [<https://perma.cc/D66R-Z3F2>] (discussing woman being groped on a Frontier Airlines flight and being forced to return to her seat next to assailant after reporting incident to flight crew). This is likely due to a lack of guidance or training. *See* Nathan Wilson, *WA Senator Makes New Push to Address Airline Sexual Assaults*, KIRO 7 (June 13, 2018, 11:45 AM), <https://www.kiro7.com/news/local/first-on-kiro-7-wa-senator-makes-new-push-to-address-airline-sexual-assaults/769083070/> [<https://perma.cc/KHU2-XZBG>] (reporting 91.5% of flight attendants, out of 2000, received no written guidance or training on how to handle sexual assault from their airline).

<sup>106</sup> FAA Reauthorization Act § 339A(c)(2).

<sup>107</sup> *See id.* § 339A(b).

<sup>108</sup> Bob Burns & Jennifer Lapidow, *10 Things You Might Not Know About TSA*, U.S. TRANSP. SEC. ADMIN. BLOG (Oct. 13, 2017), <https://www.tsa.gov/blog/2017/10/13/10-things-you-might-not-know-about-tsa> [<https://perma.cc/F3GC-44T7>].

tion to do so.<sup>109</sup> As House Bill 5139 stands, however, it allows airlines flexibility to determine their own reporting policies.<sup>110</sup> This needs to be amended to provide more specific direction. One can expect significant pushback from commercial airlines that may not want to spend the money it would take to implement a specific reporting policy. This is especially true if the reporting requirements would mandate updating airplane technology.<sup>111</sup> Nonetheless, while flexibility in company policy is often beneficial from an economic standpoint, passenger safety should be prioritized. More specific requirements would (1) help ensure that an airline cannot find a loophole in the legislation; and (2) help courts uniformly assess airlines' responses to in-flight sexual assaults when determining liability. Further, specific reporting requirements would assist in ensuring that all in-flight assaults reported to crewmembers are addressed and investigated.

Overall, the FAA Reauthorization Act and House Bill 5139 are conduits of conversation for the issue of in-flight sexual assault. Yet, more responsibility should be placed on airlines to combat steadily increasing crime through reporting requirements. By examining the policies and purposes of other reporting requirements, one can see how the pending legislation on this issue fails to capitalize on the benefits more stringent reporting requirements could incur.

## V. OTHER MANDATED REPORTERS

Requiring airlines to report in-flight assaults is consistent with the policies and purposes of reporting requirements in other crimes. Further, a uniform mandated reporting policy would benefit victims and air carriers alike. The remainder of this Comment will address these two propositions.

---

<sup>109</sup> See Stop Sexual Assault and Harassment in Transportation Act, H.R. 5139, 116th Cong. § 41727(b)(3) (1st Sess. 2019).

<sup>110</sup> *Id.* (noting there is no specific method to determine when notifying law enforcement is appropriate or how to do so).

<sup>111</sup> For an example of technology that assists airlines in reporting, see *Making Respect Real: Continued Work to Prevent and Address Sexual Misconduct*, ALASKA AIRLINES: BLOG (Nov. 9, 2018), <https://blog.alaskaair.com/values/people/sexual-harassment-prevention/> [perma.cc/7FCZ-N2D6]. This technology is discussed further in Part VI, *supra*.

“If you see something, say something.”<sup>112</sup> This is the slogan and title of the Department of Homeland Security’s campaign encouraging ordinary, everyday citizens to report suspicious activity to their local law enforcement.<sup>113</sup> While this sort of reporting is encouraged and arguably imposes a moral duty, there is no universal law that requires citizens to report criminal activity.<sup>114</sup> Title 18 of the U.S. Code seems to require the reporting of felonies, but it generally only criminalizes concealment—not nonreporting.<sup>115</sup> Historically, only certain individuals in specific circumstances have been forced (and not just encouraged) to report.<sup>116</sup>

Lately, there has been a trend toward requiring more professionals and corporations to report criminal activity.<sup>117</sup> Requiring airlines to do the same in the case of sexual assault follows this trend; however, creating a reporting requirement for in-flight sexual assault raises the question of whether airlines should be required to report other in-flight crimes. While reliable statistics of in-flight crime are difficult to find, research indicates in-flight theft has been going on for years.<sup>118</sup> Similarly, there have been numerous, highly publicized incidents of in-flight assault.<sup>119</sup> If Congress were to create a reporting requirement for in-flight sexual assault, it would likely have the surplus benefit of the legislature considering mandated reporting for other in-flight crimes. While these benefits are outside of the scope of this Comment, it is useful to recognize the difficulties all in-flight crime imposes on airlines, passengers, and the justice system as a whole.

---

<sup>112</sup> *If You See Something, Say Something*®, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/see-something-say-something> [perma.cc/EZX6-7PJM].

<sup>113</sup> *Id.*

<sup>114</sup> See Candice Delmas, *The Civic Duty to Report Crime and Corruption*, 9 LES ATELIERS DE L’ÉTHIQUE 50, 55–56 (2014).

<sup>115</sup> 18 U.S.C. § 4; Sungyong Kang, *In Defense of the “Duty to Report” Crimes*, 86 UMKC L. REV. 361, 361 (2017).

<sup>116</sup> See generally Sandra Guerra Thompson, *The White-Collar Police Force: “Duty to Report” Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3, 5 (2002) (detailing types of reporting requirements affecting different professionals).

<sup>117</sup> See *id.*

<sup>118</sup> Beth Williams, *On-Board Theft: 10 Tips to Protect Valuables While You Snooze in the Sky*, CORP. TRAVEL SAFETY (Dec. 8, 2018), <https://www.corporatetravel-safety.com/safety-tips/airline-on-board-theft/> [perma.cc/9UYH-XJUJ].

<sup>119</sup> See, e.g., Madeleine Marr, ‘You’re Out of Control.’ *Plane Passenger Hits Husband with Laptop for Ogling Women*, MIA. HERALD (July 24, 2019), [miamiherald.com/news/local/crime/article233056302.html](http://miamiherald.com/news/local/crime/article233056302.html).

The remainder of this Part will examine three mandatory reporting requirements and their underlying policies. It will also state how these policies could apply to an air carrier's duty to report in-flight assaults.

#### A. CRUISE SHIP REPORTING REQUIREMENTS

First, the Cruise Vessel Security and Safety Act of 2010 (CVSSA) requires the owner of a cruise ship to report a crime to the FBI "as soon as possible after the occurrence on board the vessel of an incident involving homicide, suspicious death, a missing United States national, kidnapping, assault with serious bodily injury, [sexual crimes,] firing or tampering with the vessel, or theft of money or property in excess of \$10,000."<sup>120</sup> Prior to the creation of this new reporting requirement, cruise ships did not have to alert law enforcement of crimes occurring on the high seas.<sup>121</sup> The reporting of crimes on cruise ships before 2010 was self-regulating, just as the airline industry is today.<sup>122</sup> "Without a legal duty, cruise companies ha[d] little incentive to voluntarily report or investigate crimes on vessels for fear of victims establishing civil liability against the companies."<sup>123</sup> This lack of reporting—combined with the large amount of time that passes before the FBI can access ships to investigate—posed a substantial problem for addressing onboard sexual assaults and often left victims without justice or closure.<sup>124</sup>

When the CVSSA was introduced, Congress observed that sexual assaults were the primary crime occurring on cruise ships and found issues with a lack of reporting to law enforcement and the public.<sup>125</sup> Congress further recognized the difficulties facing the FBI for securing crime scenes and investigating witnesses such as competing jurisdictions, being on the high seas, and the varying nationalities of the victims.<sup>126</sup> Accordingly, the CVSSA was immensely popular and passed with only four "no"

---

<sup>120</sup> 46 U.S.C. § 3507(g)(3)(A)(i).

<sup>121</sup> Tiffany L. Peyroux, *The Cruise Vessel Security and Safety Act of 2010 Founders on Its Maiden Voyage*, 13 LOY. MAR. L.J. 74, 87 (2014).

<sup>122</sup> *See id.* at 88.

<sup>123</sup> *Id.*

<sup>124</sup> *See id.* at 91–92.

<sup>125</sup> *Id.* at 97–98; *see also* Jim Walker, *Accurate Cruise Crime Statistics Finally Available*, CRUISE L. NEWS (Oct. 8, 2016), <https://www.cruiselawnews.com/2016/10/articles/crime/accurate-cruise-crime-statistics-finally-available/> [perma.cc/BKQ5-TDFP] (noting "sexual assault on cruise ships occurs with a similar regularity as you might find on land").

<sup>126</sup> Peyroux, *supra* note 121, at 98.

votes.<sup>127</sup> Part of the CVSSA's mission was to bring to light crime on cruise ships and prevent the industry from operating under "a veil of secrecy."<sup>128</sup> For this reason, the CVSSA allows for civil and criminal penalties for reporting requirement violations.<sup>129</sup>

The airline industry and the cruise ship industry should have the same heightened reporting requirements as both industries share the same concerns. First, airlines can be held liable for in-flight sexual assaults just as cruise ships can be held liable for onboard sexual assaults.<sup>130</sup> Thus, there is motivation for airlines to cover up in-flight crimes to avoid liability. Competition within both industries provides incentives to avoid lawsuits and losing money.

Further, just as "emergency 911" is nonexistent on some cruise ships,<sup>131</sup> passengers are usually incapable of reporting their assault to law enforcement mid-flight.<sup>132</sup> Difficulty in contacting law enforcement and receiving an immediate investigation beg for a mandatory reporting requirement to ensure that crewmembers who can easily contact law enforcement do so. Law enforcement can then give advice on how to preserve the scene, assist the victim, or deal with the assailant. This is true even if law enforcement cannot investigate until the plane has landed or the ship has docked.

The airline industry is self-regulating, just as the cruise ship industry used to be.<sup>133</sup> By passing the CVSSA, Congress intimated that self-regulation alone was unsatisfactory for the cruise line industry.<sup>134</sup> The similarities of the industries suggest Congress could find the commercial aviation industry likewise should not be self-regulating. Both industries carry over 25 million passengers a year with 25.8 million global cruise passengers

<sup>127</sup> *Id.* at 101.

<sup>128</sup> *See id.*

<sup>129</sup> *See* 46 U.S.C. § 3507(h)(1).

<sup>130</sup> *See* Leticia M. Diaz, Barry H. Dubner & Nicole McKee, *Crimes and Medical Care on Board Cruise Ships: Do the Statistics Fit the Crimes?*, 27 LOY. CONSUMER L. REV. 40, 74 (2014); DeMay et al., *supra* note 31, at 6–20 (discussing liability for sexual assault aboard airplanes).

<sup>131</sup> Diaz et al., *supra* note 130, at 63.

<sup>132</sup> Note that the CVSSA does require that victims of sexual assault onboard cruise ships be given means to contact law enforcement; however, the investigation may still be postponed until the ship is docked. *See* 46 U.S.C. § 3507(d)(5).

<sup>133</sup> *See* Appelbaum, *supra* note 13; McMahon, *supra* note 13 (noting that since there are no mandatory reporting requirements, different airlines are allowed to regulate and report in different ways).

<sup>134</sup> Cruise Vessel Security and Safety Act of 2010, Pub. L. No. 111-207, § 2, 124 Stat. 2243, 2243–44.

in 2017<sup>135</sup> and 1 billion scheduled airline passengers in 2018.<sup>136</sup> Both industries transport travelers in an isolated manner where they lack the ability to easily contact the outside world if passengers could even determine who to contact. Both industries take passengers under similar care and control while traveling. It follows that the policies requiring reporting on cruise ships apply equally to the airline industry. This is particularly true considering how many more people travel on airplanes annually than on cruise ships.<sup>137</sup> More passengers, statistically speaking, means more opportunities for assault and likely more assailants.<sup>138</sup> Although passengers remain on cruise ships for longer than they are on airplanes, many in-flight sexual assaults occur while passengers are sleeping in their seats.<sup>139</sup> On cruise ships, passengers may sleep in bunk rooms with lockable doors. In some cases, lockable doors provide assailants an opportunity to shield themselves and their crime from onlookers;<sup>140</sup> in other cases, lockable doors (especially those with peepholes) should provide some security against assault that is not similarly available to passengers sleeping on airplanes.<sup>141</sup> Accordingly, passengers could be similarly vulnerable on airlines and cruise ships.

---

<sup>135</sup> 2018 Cruise Industry Overview, FLA.-CARIBBEAN CRUISE ASS'N, <https://www.fcca.com/downloads/2018-Cruise-Industry-Overview-and-Statistics.pdf> [perma.cc/SQA3-Z4NR].

<sup>136</sup> 2018 Traffic Data for U.S. Airlines and Foreign Airlines U.S. Flights, BUREAU TRANSP. STATS. (Oct. 2019), <https://www.bts.dot.gov/newsroom/2018-traffic-data-us-airlines-and-foreign-airlines-us-flights> [perma.cc/NU4Q-VCWR].

<sup>137</sup> See 2018 Cruise Industry Overview, *supra* note 135; 2018 Traffic Data for U.S. Airlines and Foreign Airlines U.S. Flights, *supra* note 136.

<sup>138</sup> See Press Release, House Comm. on Transp. & Infrastructure, Chair DeFazio's Bill to Curb Sexual Assault and Harrassment in Passenger Transp. Clears Full House (Oct. 1, 2020), <https://transportation.house.gov/news/press-releases/chair-defazios-bill-to-curb-sexual-assault-and-harrassment-in-passenger-transportation-clears-full-house> [https://perma.cc/N2CU-4SKA] (noting 119 reports of in-flight sexual assaults in 2019 alone compared to 260 reported sexual assaults aboard cruise ships since 2016).

<sup>139</sup> *E.g.*, David Williams & Carma Hassan, *Man Gets 9 Years for Sexually Assaulting an Airline Passenger While She Slept*, CNN (Dec. 14, 2018), <https://www.cnn.com/2018/12/14/us/airplane-sexual-assault-sentence-trnd/index.html> [perma.cc/B3RT-MQE7].

<sup>140</sup> *E.g.*, *Cruise Ship Security Practices and Procedure: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 110th Cong. 12 (2007) (statement of Evelyn Fortier, Vice President, Policy, Rape, Abuse and Incest National Network (RAINN)) (describing crewmember raping passenger in her cabin room).

<sup>141</sup> Emanuella Grinberg, *Cruise Ship Security Bill Clears Congress*, CNN (July 11, 2010), <https://www.cnn.com/2010/TRAVEL/07/01/cruise.ship.bill/index.html> [https://perma.cc/3H5X-QZE6].

Lastly, critics of mandatory reporting requirements often say that requiring a report to law enforcement takes away an individual's autonomy and self-determination—it takes away the victim's decision of whether to report for one's self.<sup>142</sup> This argument fails in the airline and cruise ship context. First, if a victim reports the incident to crewmembers, whether on a plane or a cruise, he or she is already reporting the incident to what is essentially the highest authority available.<sup>143</sup> In such isolated circumstances, the crewmembers are often the only authority figures readily available to take action against an assailant.<sup>144</sup> Second, if a victim is reporting to a crewmember that he or she has been sexually assaulted, the cruise ship or airline is put on notice and has an obligation to act to protect other passengers.<sup>145</sup> Their liability for negligence may be enhanced if they do not tell law enforcement of the incident, particularly if the assailant continues traveling and assaulting others.<sup>146</sup> It is true that the victim may only report the incident to crewmembers so they may switch seats or cabins to avoid their assailant, without intending to report law enforcement. Yet, in passing the CVSSA, Congress indicated that the danger of allowing the assailant to go unreprimed is too great, regardless of a passenger's motivation for reporting.<sup>147</sup> There is no reason this logic should not extend to the airline industry. The assailant may hurt other passengers in the future, and the airline should not open itself up to that sort of liability.

## B. CHILD ABUSE REPORTING REQUIREMENTS

Similarly, the policies underlying child abuse reporting requirements apply to the airline industry. All states require at least some professional actors to report suspected child abuse to

---

<sup>142</sup> See Joseph W. Barber, *The Kids Aren't All Right: The Failure of Child Abuse Statutes as a Model for Elder Abuse Statutes*, 16 ELDER L.J. 107, 122–23 (2008).

<sup>143</sup> *Cruise Industry Oversight: Incidents Show Need for Stronger Focus on Consumer Protection: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 113th Cong. 2 (2013) [hereinafter *Cruise Industry Oversight Senate Hearing*] (opening statement by Sen. John D. Rockefeller IV) (describing responsibility cruise ship's crewmembers have toward protecting passengers from crime while on board).

<sup>144</sup> *Id.*

<sup>145</sup> See *K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041, 1044 (11th Cir. 2019) (overturning a dismissal of a negligence claim against a cruise line when the crewmembers allegedly knew about sexual crimes against cruise ship passengers).

<sup>146</sup> See *id.*

<sup>147</sup> 46 U.S.C. § 3507(g)(3).

law enforcement.<sup>148</sup> This was federally mandated in 1974 when Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA).<sup>149</sup> CAPTA threatened to withhold federal grants to states if they did not have mandatory reporting requirements.<sup>150</sup> Since all states had already passed some form of reporting law by 1967, CAPTA was essentially a reinforcement tactic.<sup>151</sup> Who is required to report varies by state, but even a state with the least comprehensive reporting laws still requires “medical and mental health professionals, school officials, law enforcement officers,” and those in a “safety-sensitive position” to report suspected abuse.<sup>152</sup> Many of these requirements occurred because the media called for it: “[P]ress and broadcasters created an impetus for child abuse reporting laws.”<sup>153</sup>

Regardless of how they came about or the specific requirements of each state, these reporting requirements all share a common purpose. The duty to report child abuse is designed to protect vulnerable children and catch wrongdoers.<sup>154</sup> Reporting notifies law enforcement of an incident and triggers an investigation in hopes of getting the child the help he or she needs, as well as punishing the wrongdoer and preventing future harm.<sup>155</sup> What differentiates child abuse from other crimes, and justifies its mandated reporting, is the vulnerability of the child. “If an adult is assaulted, he or she is more likely to be capable of reporting the incident to the authorities. Society’s view of children, however, is that a child may be too young to protect himself or too frightened to report the abuse to the appropriate authorities.”<sup>156</sup> The individuals generally required to report—such as medical professionals or teachers—are in a position to

---

<sup>148</sup> Leonard G. Brown, III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States’ Current Mandatory Reporting Laws With a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 37, 37 (2013).

<sup>149</sup> See 42 U.S.C. §§ 5101–5119.

<sup>150</sup> Brown & Gallagher, *supra* note 148, at 38.

<sup>151</sup> *Id.* at 37. CAPTA also created a mandatory reporting requirement for certain people who suspected child abuse on federal property. *Id.* at 46.

<sup>152</sup> *Id.* at 61 (describing the South Dakota mandatory reporting requirement).

<sup>153</sup> *Id.* at 40.

<sup>154</sup> Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion.*, 71 MINN. L. REV. 723, 727–28 (1987).

<sup>155</sup> See *id.* at 728.

<sup>156</sup> Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509, 514 (1998).

care for the child with access to special knowledge about the child's physical or mental well-being.

The purposes underlying reporting requirements of suspected child abuse—protecting the vulnerable and initiating criminal investigations—support issuing a reporting requirement for in-flight sexual assault.<sup>157</sup> While the Author does not intend to trivialize the horrors of child abuse or neglect,<sup>158</sup> being an airline passenger makes one vulnerable. If one is assaulted in-flight, they will largely rely on the flight crew for protection and real-time reporting to law enforcement.<sup>159</sup> In some cases, due to a flight crew's poor response, victims have been forced to remain seated next to their assailant.<sup>160</sup>

Further, crewmembers, like medical professionals and other mandatory child abuse reporters, are at least knowledgeable about crimes on airplanes, and they could receive additional training to respond to these types of situations.<sup>161</sup> Moreover, child abuse is a covert crime—even with mandatory reporting.<sup>162</sup> Similarly, the isolated nature of an airplane means in-flight sexual assault is covert.<sup>163</sup> Mandatory reporting in that moment will ensure law enforcement is notified quickly to improve

<sup>157</sup> See Mitchell, *supra* note 154, at 727–28.

<sup>158</sup> Marrus, *supra* note 156, at 514.

<sup>159</sup> See *Experts Explain Why Sexual Assaults Occur On Airplanes & What Airlines Can Do to Stop It*, ASS'N OF FLIGHT ATTENDANTS-CWA, [https://www.afacwa.org/experts\\_explain\\_why\\_sexual\\_assaults\\_occur\\_on\\_airplanes\\_what\\_airlines\\_can\\_do\\_to\\_stop\\_it](https://www.afacwa.org/experts_explain_why_sexual_assaults_occur_on_airplanes_what_airlines_can_do_to_stop_it) [<https://perma.cc/BLY3-R75W>] (“The particular environment of planes can also make the experience of surviving sexual assault even more difficult. . . . [W]hen a victim is violated in a confined space, it can be even more distressing and exacerbate the feeling of helplessness, vulnerability, and powerlessness.”) (internal quotations omitted); see Karen Schwartz, *How to Protect Yourself From Sexual Assault on a Plane*, N.Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/21/travel/how-to-protect-yourself-from-sexual-assault-on-a-plane.html> [<https://perma.cc/XUD2-EJCK>] (stating one of the primary ways to protect against in-flight sexual assault is to report suspicious activity and any harassment to the flight crew and ensure they notify the pilot).

<sup>160</sup> See Elisha Fieldstadt, *Women Claim They Were Sexually Assaulted on Frontier Flights and Airline Did Nothing*, NBC NEWS (Dec. 26, 2019), <https://www.nbcnews.com/news/us-news/women-claim-they-were-sexually-assaulted-frontier-flights-airline-did-n1107231> [[perma.cc/Z3PU-LGKT](https://perma.cc/Z3PU-LGKT)].

<sup>161</sup> Danny R. Veilleux, Annotation, *Validity, Construction, and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse*, 73 A.L.R.4TH 782, § 2(b) (1989) (discussing how training impacts duty to report); 49 U.S.C. § 44918 (discussing some training made available to airline crewmembers).

<sup>162</sup> Marrus, *supra* note 156, at 514.

<sup>163</sup> See *Experts Explain Why Sexual Assaults Occur On Airplanes & What Airlines Can Do to Stop It*, *supra* note 159 (noting in-flight sexual assault “is a crime that is not obvious” and conditions on planes make it more likely to occur).

the chances of preserving evidence and responding to the crimes effectively.<sup>164</sup>

### C. HAZARDOUS WASTE REPORTING REQUIREMENTS

Reporting requirements in environmental law present other parallels to the commercial airline context outside of demonstrating a passenger's vulnerability. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),<sup>165</sup> which was later reinforced by the Emergency Planning and Community Right-to-Know Act (EPCRA),<sup>166</sup> requires that if hazardous waste is released without permission in certain circumstances, it must be immediately reported to the U.S. government, state, local, or tribal officials.<sup>167</sup> One reason this requirement was created is so that the government could appropriately respond to the situation by investigating, organizing a cleanup, and evacuating citizens.<sup>168</sup> Another reason was to record inactive hazardous waste sites.<sup>169</sup> Essentially, this means that the reporting requirement "also contains record keeping requirements that enable the government to track potential threats to the environment."<sup>170</sup>

Under CERCLA and EPCRA, the one required to report the impermissible release of hazardous waste is the "person in charge" of the vessel or facility from which the waste was released.<sup>171</sup> In other words, the one responsible for reporting is the one entrusted with the care of the facility or vessel.<sup>172</sup> The purpose of environmental reporting requirements supports the idea that the general public needs protection from dangerous events beyond their control.<sup>173</sup>

---

<sup>164</sup> See Scott McFarlane, *Surge in Sexual Assaults on Airplanes*, NBC (June 12, 2015), <https://www.nbcwashington.com/news/local/surge-in-sexual-assaults-on-airplanes/1982641/> [<https://perma.cc/WFJ7-4PGS>] ("Investigations [of in-flight sexual assault], though still possible, become more complicated after attackers and witnesses have left the scene.").

<sup>165</sup> Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675.

<sup>166</sup> Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001–11050.

<sup>167</sup> See 42 U.S.C. § 9603(a); Thompson, *supra* note 116, at 31–32.

<sup>168</sup> See Thompson, *supra* note 116, at 34.

<sup>169</sup> *Id.* at 33.

<sup>170</sup> *Id.*

<sup>171</sup> 42 U.S.C. §§ 9603(a), 11004(a).

<sup>172</sup> See Thompson, *supra* note 116, at 33.

<sup>173</sup> See *id.* at 34.

Just as reporting hazardous waste is necessary for the government to appropriately respond to the situation,<sup>174</sup> airline members need to report the instances of in-flight sexual assault so that law enforcement may properly respond to the situation.<sup>175</sup> If the commercial airline does not report the incident to law enforcement when they are notified, the perpetrator may get away.<sup>176</sup> The fact that passengers come from around the world may further complicate this.<sup>177</sup> If assailants are not stopped as soon as the plane lands, they may retreat to a location outside the reach of U.S. law enforcement or far enough away that law enforcement lacks the resources to pursue an effective investigation.<sup>178</sup> Further, if airline crewmembers do not report the incident to law enforcement immediately, important details that were known at the time of the attack may be forgotten or witnesses to the incident may be unavailable.<sup>179</sup> The assailant may even be allowed to fly on the same airline again.<sup>180</sup> All of this

---

<sup>174</sup> *See id.*

<sup>175</sup> *See supra* Parts II, IV.

<sup>176</sup> *E.g.*, Complaint for Damages at 5, *Dvaladze v. Delta Air Lines, Inc.*, No. 2:18-cv-00297-RSL (W.D. Wash. July 25, 2019), ECF No. 1; *see also* Stephen Stock, Mark Villarreal & Kevin Nious, *Chaos on Commercial Flights: Unruly Airline Passengers Rarely Face Criminal Charges*, NBC (Dec. 16, 2015, 2:04 PM), <https://www.nbcbayarea.com/news/local/unruly-passengers-escape-prosecution/143956/> [<https://perma.cc/RXA9-QMHS>] (noting that, similar to the lack of reporting requirements for in-flight sexual assault, airlines are not required to report unruly passengers—even if they must be detained mid-flight—and these passengers are often allowed to go free without facing any repercussions).

<sup>177</sup> *Air Passenger Travel Arrivals in the United States from Selected Foreign Countries*, BUREAU OF TRANSP. STATS., <https://www.bts.gov/content/air-passenger-travel-arrivals-united-states-selected-foreign-countries-thousands-passenger> [<https://perma.cc/SV5G-CF7D>].

<sup>178</sup> Brad Heath, *The Ones That Get Away*, USA TODAY (Oct. 21, 2014), <https://www.usatoday.com/story/news/nation/2014/03/11/fugitives-next-door/6262719/> [<https://perma.cc/VFU6-HEHS>] (describing legal difficulties associated with securing justice once fugitives cross state lines); William Magnuson, *The Domestic Politics of International Extradition*, 52 VA. J. INT'L L. 839, 897 (2012) (describing uncertainty regarding what counts as compliance with international extradition treaties).

<sup>179</sup> *See, e.g.*, McFarlane, *supra* note 164 (describing incident where passenger notified law enforcement of an in-flight assault after landing, but charges could not be brought because “other passengers and potential witnesses had already dispersed”).

<sup>180</sup> *See* Rheana Murray, *The Consequences of Being an Unruly Plane Passenger*, ABC NEWS (Sept. 4, 2014, 1:28 PM), <https://abcnews.go.com/US/consequences-unruly-plane-passenger/story?id=25246721> [<https://perma.cc/G6R8-HHXY>] (reporting on American Airlines spokesperson Josh Freed’s statement that while denying a passenger future travel aboard an airline is possible, it “rarely happens”).

suggests that the airline should be required to report as soon as practicably possible. Just as a hazardous waste facility failing to report an incident may subject others to harm such as pollution or sickness, an airline failing to report sexual assault could create future victims.<sup>181</sup> While this sort of crime does not affect the general public in the same way hazardous waste might,<sup>182</sup> the benefit of requiring reporting—potentially protecting others from being victimized—arguably outweighs the cost of intruding on airline company policy with mandating reporting requirements.

Further, while a commercial airline would not necessarily be responsible for the in-flight assault in the way the one in charge of the vessel or facility leaking hazardous waste might,<sup>183</sup> they are still entrusted with the care of their passengers. Courts have demonstrated this by repeatedly stating that airlines can be held liable for passenger-on-passenger assault.<sup>184</sup> Requiring airline crewmembers to report in-flight crime makes sense, as they have more control over the vessel than their passengers and a responsibility to care for those onboard.<sup>185</sup> Lastly, as the FBI has stated, data on sexual assault aboard planes is likely incorrect.<sup>186</sup> Just as the CERCLA reporting requirement also functions to aid the development of a central database containing violations,<sup>187</sup> requiring airline crewmembers to report in-flight sexual assault could aid law enforcement agencies in collecting and maintaining more accurate data. In the age of technology, data is being used around the world to predict where crime is most likely to

---

<sup>181</sup> See Thompson, *supra* note 116, at 34.

<sup>182</sup> E.g., Isabelle Chapman, *A Landfill in Their Backyard*, CNN (Sept. 11, 2020), <https://www.cnn.com/interactive/2020/09/us/september-11-cancer-rates-fresh-kills/> [<https://perma.cc/5K88-WF9L>] (describing liability to third parties for impacts of hazardous waste).

<sup>183</sup> See Thompson, *supra* note 116, at 33 (discussing how those required to report hazardous waste releases are the ones responsible for it because they oversee the facility or vessel).

<sup>184</sup> See DeMay et al., *supra* note 31, at 6–20.

<sup>185</sup> See Louis Cheslaw, *What Happens When a Law is Broken on a Plane*, CONDÉ NAST TRAVELER (July 8, 2019), <https://www.cntraveler.com/story/what-happens-when-a-law-is-broken-on-a-plane> [<https://perma.cc/W5QL-QXEH>]. When situations occur within the cabin, the flight crew is the group that responds. *Id.* Pilots, who respond to reports from other crewmembers onboard, “are also the ones in charge of reporting any incidents to air traffic control below”—it is this report that leads “to a police presence at the gate once the plane lands.” *Id.*

<sup>186</sup> See *Sexual Assault Aboard Aircraft*, *supra* note 7 (mentioning how in-flight sexual assault is underreported).

<sup>187</sup> Thompson, *supra* note 116, at 33.

occur.<sup>188</sup> Law enforcement uses this information and deploys additional resources to deter crime where the patterns indicate it is likely to return.<sup>189</sup> If accurate data were collected regarding in-flight sexual assault, police could potentially review this information and deduce which flights are most likely to have attacks, which airlines need to increase safety procedures, and if other circumstances increase risk for an airline or passenger.<sup>190</sup>

Child abuse and environmental violations are very different types of crimes. Crimes on cruise ships can take a variety of forms. Child abuse generally affects one person and a broad range of individuals may be required to report it.<sup>191</sup> Environmental violations may affect a larger portion of the public and require only a few specified individuals to report them.<sup>192</sup> Crimes on cruise ships generally affect one individual at a time and restrict who is required to report.<sup>193</sup> Yet, the purposes and policies behind all of these varied, large-scale reporting requirements extend to the mandated reporting of in-flight sexual assault. Congress should instill a reporting requirement to better protect and respond to victims, prevent future attacks, decrease incentives for airlines to cover up crimes, assist law enforcement, and collect accurate data. Still, the best solution is not to allow an airline to report however they choose. Instead, a uniform reporting requirement should be enacted, as it is the most beneficial for the victims, the judicial system, and the airlines.

---

<sup>188</sup> Andrej Kovacevic, *Police are Using Big Data to Predict Future Crime Rates*, SMART DATA COLLECTIVE (Nov. 7, 2018), <https://www.smartdatacollective.com/police-are-using-big-data-to-predict-future-crime-rates/> [perma.cc/6AAS-8X98].

<sup>189</sup> JENNIFER BACHNER, PREDICTIVE POLICING: PREVENTING CRIME WITH DATA AND ANALYTICS 8–9 (2013), <http://www.businessofgovernment.org/sites/default/files/Predictive%20Policing.pdf> [https://perma.cc/68UQ-F46K].

<sup>190</sup> For more information on data-driven policing and how law enforcement uses the data it receives, see *id.*; WALTER L. PERRY, BRIAN MCINNIS, CARTER C. PRICE, SUSAN C. SMITH & JOHN S. HOLLYWOOD, PREDICTIVE POLICING (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/243830.pdf> [https://perma.cc/9CE7-4AT6]; Lawrence W. Sherman, Wolfson Prof. of Criminology and Dir. of Police Exec. Programme, Cambridge Univ., *Knowledge-Based Policing: India and the Global Revolution in Crime Prevention* (Apr. 8, 2010), in JINDAL GLOB. L. REV. 1, Sept. 2010, at \*1.

<sup>191</sup> See *supra* Section V.B.

<sup>192</sup> See Thompson, *supra* note 116, at 33–34; see also *supra* Section V.C.

<sup>193</sup> See *supra* Section V.A.

## VI. THE BENEFITS OF A UNIFORM REPORTING REQUIREMENT

While the above Parts of this Comment have addressed some of the general benefits of a reporting requirement, the remainder of this Part will discuss the benefits of a uniform reporting requirement specifically. Unlike child abuse reporting requirements where each state has their own procedures and rules,<sup>194</sup> the federal government could enact a reporting requirement for in-flight sexual assault that would extend to all domestic commercial airlines regardless of jurisdiction.<sup>195</sup> As the federal government likely has the authority to enact such a requirement, it should do so, particularly in light of the benefits that come with a uniform reporting requirement.<sup>196</sup>

Air carriers can be liable for sexual assaults that occur in-flight even if it is a passenger-on-passenger assault.<sup>197</sup> As a common carrier's liability often turns on whether the incident was foreseeable or whether the vessel had a heightened duty of care, airlines are likely to decrease their chances of liability by adhering to a uniform reporting requirement that has been put in place.<sup>198</sup> For example, if a victim reports an in-flight assault, the crime is not reported, and the assailant escapes, the airline could be considered negligent in their treatment of the victim if the court finds they owe the victim a duty of care.<sup>199</sup> This is a likely result under common carrier doctrine.

On the other hand, if the federal government enacts a uniform reporting requirement with specific measures to be taken and procedures to be followed, airlines will have clearer guidelines as to how they should respond. With clarity in guidance, airlines will better understand what they should do, which in turn helps them understand their risks for liability. This clarity would also increase judicial efficiency, as there would be less case-by-case analysis (at least insofar as whether the airline

---

<sup>194</sup> See Brown & Gallagher, *supra* note 148, at 37–38.

<sup>195</sup> See *Federal Aviation Administration*, *supra* note 59; *Mission*, *supra* note 63.

<sup>196</sup> *Supra* Section III.B.

<sup>197</sup> See, e.g., *Wallace v. Korean Air*, 214 F.3d 293, 295 (2d Cir. 2000); *Langadinis v. Am. Airlines, Inc.*, 199 F.3d 68, 74 (1st Cir. 2000); *Tsevas v. Delta Air Lines, Inc.*, No. 97C0320, 1997 WL 767278, at \*16 (N.D. Ill. Dec. 1, 1997).

<sup>198</sup> See DeMay et al., *supra* note 31, at 13 (discussing common carrier liability).

<sup>199</sup> Cf. *R.M. v. Am. Airlines, Inc.*, 338 F. Supp. 3d 1203, 1206–07 (D. Or. 2018) (finding airline not liable when (1) the defendant was not intoxicated; (2) the attack was noticed by a flight attendant; (3) the passengers were separated; (4) law enforcement was notified immediately; and (5) law enforcement met the assailant upon landing).

should have reported), and the court may instead look to see whether they adhered to the uniform requirement. Yet, as House Bill 5139 suggests, adherence or failure to abide by a reporting requirement should not be dispositive in a court proceeding; it should be looked at as a factor to determine the airline's liability.<sup>200</sup> The court should still account for possible extenuating circumstances.

Additionally, as it currently stands, reporting requirements are dictated by the airlines themselves. While some companies, such as Alaska Airlines, have been praised for their recently enacted policies,<sup>201</sup> others have yet to respond to the increase in mid-air assaults.<sup>202</sup> If a mandatory, uniform reporting requirement was enacted, the airlines who have yet to respond to the increasing issue of in-flight sexual assault would be pushed to action. This could help keep passengers safer, shield airlines from liability, and encourage the airlines to enact other policies relating to in-flight sexual assaults. These policies could include additional training for the flight crew, guidance on how to treat a victim of an alleged assault, and regulations concerning when a passenger should be removed or forbidden from future flights with the airline.<sup>203</sup> By making the reporting requirement uniform, airlines will no longer dictate when to report. Uncertainty will be eliminated, and airlines do not have to hope their company reporting policies are sufficient to protect themselves from liability. It will also be more difficult for airlines to find loopholes in the hopes of shielding themselves from legal responsibility. Further, crewmembers will have to be trained on in-flight sexual assault—at least to the extent that they will have to be coached on when to report. A uniform reporting requirement ensures passengers can choose any airline and not have to worry

---

<sup>200</sup> Stop Sexual Assault and Harassment in Transportation Act, H.R. 5139, 116th Cong. § 41727(d) (1st Sess. 2019).

<sup>201</sup> Allison Dvaladze, *Airline Industry Treats Sexual Assaults in the Skies Like an Inconvenience, Not a Crime*, USA TODAY (Apr. 1, 2019), <https://usatoday.com/story/opinion/voices/2019/04/01/sexual-assault-airline-flight-elaine-chao-trump-boeing-column/3312204002/> [perma.cc/8F5F-Z26R] (applauding Alaska Airlines for their policies regarding in-flight assault).

<sup>202</sup> Kirk Johnson, *2 Airline Sexual Assault Cases Draw Charges and a Call for Help*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/us/airplane-assault-seattle.html> [perma.cc/9733-TRE7] (“[M]any other airlines have been silent.”).

<sup>203</sup> See *Making Respect Real: Continued Work to Prevent and Address Sexual Misconduct*, *supra* note 111 (discussing Alaska Airlines' new reporting and training policies).

about an incident of in-flight sexual assault going unreported when it occurs.<sup>204</sup>

A uniform reporting requirement does take away some of the airlines' autonomy and may require a price increase to instill the reporting procedures. For example, Alaska Airlines, currently at the forefront of airlines advocating for increased safety for passengers, has created a "24/7 hotline" and reporting tool.<sup>205</sup> This tool, called Report It!, is a safety app "installed on every company-issued mobile device" which allows crewmembers "to instantly report any allegation of harassment or assault, and flag it for investigation."<sup>206</sup> Despite the likely cost associated with building a new application,<sup>207</sup> Alaska Airlines found that it was a worthwhile price to pay to ensure passenger safety, assist in law enforcement investigations, and shield themselves from liability.<sup>208</sup> Further, existing FAA regulations could be said to impede airline autonomy and cost airlines a substantial amount of money.<sup>209</sup> As these regulations were passed, and many of them relate to passenger safety, it follows that airlines and Congress should be open to a mandated reporting requirement.

## VII. CONCLUSION

"For the women, men and children sexually assaulted while flying who have demanded action, as well as those who suffer in silence, the DOT must do more. . . . Sexual assault can no longer be treated as an inconvenience, it is a crime and must be treated as such."<sup>210</sup> As in-flight sexual assault victim Allison Dvaladze stated, the aviation industry can and needs to do more. The current lack of a reporting requirement for in-flight sexual assault prevents effective investigations by law enforcement and

---

<sup>204</sup> Admittedly, this is something the normal passenger is unlikely to think about when choosing an airline; however, it could play a bigger role in the future as in-flight sexual assaults become more publicized. *See supra* Part II.

<sup>205</sup> *Making Respect Real: Continued Work to Prevent and Address Sexual Misconduct*, *supra* note 111.

<sup>206</sup> *Id.*

<sup>207</sup> While specific numbers for the cost to Alaska Airlines are unavailable, the cost of developing applications, such as the one Alaska Airlines employs, can range from \$40,000 (simple apps) to \$100,000 (complex apps). Kim Smith, *How Much Does It Cost to Create an App?*, GOOD FIRMS, <https://www.goodfirms.co/resources/mobile-app-development-cost> [<https://perma.cc/T6C6-ZDVU>].

<sup>208</sup> *See Making Respect Real: Continued Work to Prevent and Address Sexual Misconduct*, *supra* note 111.

<sup>209</sup> *See* Aeronautics and Space, 14 C.F.R. §§ 1-1399 (2019) (consisting of all current FAA regulations).

<sup>210</sup> Dvaladze, *supra* note 201.

impedes justice for victims while allowing airlines to conceal crimes and escape liability.

The airline industry should follow the lead of the cruise ship industry and impose a uniform, mandatory reporting requirement such as the CVSSA.<sup>211</sup> While the CVSSA is not perfect and a similar reporting requirement alone will not be a solution to the issue of in-flight assault, the first step in finding solutions is knowing there is a problem.<sup>212</sup> A uniform, mandatory reporting law would inform the public and the airlines that Congress takes the safety of its traveling citizens seriously. It alerts airlines to the fact that they will be held accountable for the care of their passengers, promoting safety and better responses to sexual assault.

House Bill 5139 is a necessary first step to establishing mandatory reporting for airlines. House Bill 5139 should, and likely will, be passed into law,<sup>213</sup> but its vague wording and the discretion it leaves to the airline industry poses a potential for airlines to continue to avoid responsibility.<sup>214</sup> Congress should revise House Bill 5139 to make it specific and uniform. Further, Congress should continue to support the Task Force, so that the trend of recognizing and preventing sexual assault in all scenarios can be maintained.<sup>215</sup>

---

<sup>211</sup> See 46 U.S.C. § 3507.

<sup>212</sup> For more information on the CVSSA and some of its initial shortcomings, see Peyroux, *supra* note 121, at 103–17.

<sup>213</sup> See Brown & Gallagher, *supra* note 148, at 39–40 (noting how media attention was part of the basis for enacting CAPTA). If the trend of media attention on abuse continues, House Bill 5139 likely will be passed. See *supra* Part II.

<sup>214</sup> See Stop Sexual Assault and Harassment in Transportation Act, H.R. 5139, 116th Cong. § 41727(b)(3) (1st Sess. 2019); see also Peyroux, *supra* note 121, at 117 (discussing vagueness as one shortcoming of the CVSSA).

<sup>215</sup> DeMay et al., *supra* note 31, at 3–5 (describing composition and purpose of the Task Force); see also Section III.C.1.



**GROUNDING: HOW THE 737 MAX CRASHES HIGHLIGHT  
ISSUES WITH FAA DELEGATION AND A POTENTIAL  
REMEDY IN THE FEDERAL TORT CLAIMS ACT**

DREW H. NUNN\*

**ABSTRACT**

The over-delegation by the Federal Aviation Administration (FAA) of new aircraft design certification authority to the very companies seeking such certification has led to a stunning lack of oversight and bending to private economic interests. Congressional action must be taken to ensure that aircraft certification authority, if delegated to private entities, is not delegated to any entities with ties to the companies seeking certification, and FAA oversight must be tightened.

This Comment analyzes whether the Federal Tort Claims Act could provide a potential avenue for plaintiffs to challenge the FAA as it relates to its oversight and delegation to The Boeing Company (Boeing). In the face of inaction from the FAA, Boeing, and Congress, the judiciary provides the best hope for holding the FAA accountable when it delegates authority to private industry leaders like Boeing. It is likely well within the FAA's discretion to determine that the engineers at Boeing to whom Boeing would assign to this task are qualified in their engineering capabilities. However, if the FAA knew that economic pressures and factors outside of plane safety were guiding Boeing executives' directions to its inspecting engineers, it may have delegated its certification authority to unqualified individuals, which it cannot do.

---

\* J.D. Candidate, SMU Dedman School of Law, May 2021; B.S. Biochemistry, Texas A&M University. I would like to thank my parents for their encouragement and my wife, Miranda, for her constant love and support. Also, a special thanks to my first-year legal writing professor, Heather Stobaugh, for teaching me how to be a competent writer.

## TABLE OF CONTENTS

I.	INTRODUCTION.....	704
II.	HISTORICAL BACKGROUND .....	705
	A. THE 737 MAX AND COMPETITION WITH AIRBUS .	705
	B. THE LION AIR AND ETHIOPIAN AIRLINES CRASHES .....	707
	C. FALLOUT .....	708
III.	CURRENT STATE OF THE LAW.....	709
	A. BRIEF HISTORY OF THE FAA .....	709
	B. THE ORGANIZATION DESIGNATION AUTHORITY: DELEGATION OF CERTIFICATION AUTHORITY TO PRIVATE ENTITIES .....	711
	C. THE FTCA AND THE FAA .....	714
IV.	ANALYSIS.....	716
	A. THE FTCA AS AN AVENUE TO FAA ACCOUNTABILITY.....	717
	1. <i>Delegation of the Certification Process to Boeing</i> .....	718
	2. <i>Improper FAA Oversight and Issuing the Certificate—A Dead End</i> .....	722
	3. <i>Is the Federal Tort Claims Act the Right Tool?</i> .	726
	B. AGENCY CAPTURE AND THE FAA .....	727
V.	CONCLUSION.....	730

## I. INTRODUCTION

THE U.S. GOVERNMENT'S over-delegation of new aircraft design certification authority to the very companies seeking such certification has led to a stunning lack of oversight and bending to private economic interests. Congressional action must be taken to ensure that aircraft certification authority, if delegated to private entities, is not delegated to any entities with ties to the companies seeking certification, and Federal Aviation Administration (FAA) oversight must be tightened.

This Comment begins by describing the background of the Boeing 737 (737) aircraft and the recent 737 MAX accidents. The serious consequences of those crashes are explored, and the scope of the problem is put into perspective. The Comment then explains the relevant historical background of the FAA and the designation program, establishes the framework within which recent issues faced by The Boeing Company (Boeing) reside, and discusses how the delegation program came to be and how the FAA designates private parties as Organization Designa-

tion Authority (ODA) holders (ODA Holders). Next, it analyzes the Federal Tort Claims Act (FTCA) and how the Supreme Court has interpreted the discretionary function exception to the FTCA.

This Comment then assesses whether the FTCA could provide a potential avenue for plaintiffs to challenge the FAA's over-delegation of certification authority to Boeing. While this route was not historically open to plaintiffs, by delegating certain aspects of the safety inspection process to Boeing and failing to maintain oversight, the FAA's actions have moved outside the protection of the discretionary function exception, allowing suits against the FAA by injured plaintiffs. This Comment concludes by discussing why litigation is the best way to spur meaningful reform.

## II. HISTORICAL BACKGROUND

### A. THE 737 MAX AND COMPETITION WITH AIRBUS

The Boeing 737 is one of the most widely recognizable passenger aircraft in the world. Since its first flight in 1967, the 737 has undergone a series of enhancements, culminating most recently with the 737 Next Generation (737NG) and the 737 MAX.<sup>1</sup> These upgrades were designed to provide more fuel-efficient engines, updated avionics and cabins, and lower operating costs, all while having enough in common with previous models that pilots could easily switch back and forth between them.<sup>2</sup> In 2006, Boeing began discussions to significantly upgrade or replace the 737NG with a new, more fuel efficient model.<sup>3</sup> By 2010, Boeing still had not made a decision when one of its chief rivals in the industry, Airbus SE (Airbus), announced the A320neo, "a re-engined, more efficient version of its A320, the main competitor to the 737."<sup>4</sup> These two industry titans have been in competition for almost half a century, and many have wondered whether the tradeoffs being made in the interest of

---

<sup>1</sup> David Slotnick, *The First Boeing 737 Max Crash was 2 Years Ago Today. Here's the Complete History of the Plane That's Been Grounded Since 2 Crashes Killed 346 People 5 Months Apart*, BUS. INSIDER (Oct. 29, 2020, 12:55 PM), <https://businessinsider.com/boeing-737-max-timeline-history-full-details-2019-9> [perma.cc/9N6W-8PKU].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* Neo stands for new engine option.

competition were dangerous.<sup>5</sup> In 2011, Boeing's then-CEO feared that American Airlines, one of Boeing's exclusive customers, would switch to Airbus unless Boeing could convince them otherwise.<sup>6</sup> Boeing decided to upgrade the engines on the 737 and build a new plane, launching Boeing's effort to circumvent important regulatory hurdles.<sup>7</sup> American Airlines wound up purchasing from Airbus, but also ordered 100 next generation 737s from Boeing, and "[j]ust one month later, Boeing announced the 737 MAX family," the newest iteration of the 737.<sup>8</sup> A key selling point of the 737 MAX was its purported similarity with older models, which would make it easier for pilots and staff to adjust to without much additional training.<sup>9</sup> Significantly, and likely most important to Boeing executives, this provided a faster route to certification than what would be necessary for a brand new type of aircraft.<sup>10</sup> One of the key differences in the new plane was that the engines were larger, further forward, and higher up than the previous version.<sup>11</sup> This upgrade could cause the nose of the plane to pitch slightly upward in some situations, leading engineers to implement automated software called Maneuvering Control Augmentation System (MCAS), which would automatically push the nose down so that the plane stays level.<sup>12</sup> Though theoretically the pilots could fly both the old and new planes, "Boeing did not include training on MCAS in the pilots' manual, reasoning that the software would work in the background."<sup>13</sup> "MCAS was designed to take effect when a single sensor showed that the 'angle-of-attack' was high," meaning the system would still respond if one of the two sensors broke.<sup>14</sup> Issues surrounding this system would

---

<sup>5</sup> Peter Cohan, *Did Airbus Rivalry Drive Dangerous Tradeoffs for Boeing's 737 MAX?*, FORBES (Mar. 28, 2019, 9:14 AM), <https://forbes.com/sites/petercohan/2019/03/28/did-airbus-rivalry-drive-dangerous-tradeoffs-for-boeings-737-max/> [perma.cc/BU8H-9JSV].

<sup>6</sup> Slotnick, *supra* note 1.

<sup>7</sup> Cohan, *supra* note 5; David Gelles, Natalie Kitroeff, Jack Nicas & Rebecca R. Ruiz, *Boeing Was 'Go, Go, Go' to Beat Airbus With The 737 Max*, N.Y. TIMES (Mar. 23, 2019), <https://nytimes.com/2019/03/23/business/boeing-737-max-crash.html> [perma.cc/N25Z-EHAJ].

<sup>8</sup> Slotnick, *supra* note 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Cohan, *supra* note 5; Slotnick, *supra* note 1.

<sup>13</sup> Slotnick, *supra* note 1.

<sup>14</sup> *Id.*

later prove catastrophic.<sup>15</sup> In 2015, the first 737 MAX was released, with its first test flight in 2016.<sup>16</sup> It gained certification from the FAA in 2017.<sup>17</sup> “By May 2018 . . . more than 130 [737 MAX] planes were in service with 28 different airlines around the world.”<sup>18</sup>

## B. THE LION AIR AND ETHIOPIAN AIRLINES CRASHES

On October 29, 2018, Lion Air Flight 610 took off from Jakarta, Indonesia in the early hours of the morning.<sup>19</sup> The plane had given incorrect speed and altitude readings during a previous flight but was kept in service.<sup>20</sup> Immediately after take-off, the pilots received stall warnings; their instruments were not giving readings on key data, and it seemed the plane was automatically being forced into a downward pitch.<sup>21</sup> Twelve minutes later, the plane crashed into the sea, killing all 189 on board.<sup>22</sup> Shortly after the investigation began, MCAS and the pilots’ response became a focus, and the FAA and Boeing said they planned to issue an Airworthiness Directive on issues related to the system.<sup>23</sup>

Less than five months later, a disturbingly similar scene played out in Ethiopia, when an Ethiopian Airlines flight crashed, killing everyone on board.<sup>24</sup> Once again, pilots of a 737 MAX were unable to control the pitch of the aircraft, and MCAS forced the nose down and crashed the plane.<sup>25</sup> Shortly after the crash, although it was clear MCAS played a role, investigators were unsure how much fault lay with the pilots.<sup>26</sup> However, a year later, investigators determined that MCAS was entirely at

---

<sup>15</sup> See *infra* Section II.B.

<sup>16</sup> Slotnick, *supra* note 1.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Tucker Reals, *Ethiopian Airlines Flight 302 Crash; Preliminary Report Says Pilots Followed Boeing’s Guidance*, CBS NEWS (Apr. 4, 2019, 12:53 PM), <https://cbsnews.com/live-news/ethiopian-airlines-flight-302-crash-preliminary-report-today-live-updates-04-04-2019/> [perma.cc/E7WY-KD7P].

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

fault, shining an even more negative light on the aircraft itself and on Boeing.<sup>27</sup>

Ethiopian Airlines grounded the rest of its 737 MAX fleet the day of the crash.<sup>28</sup> The rest of the world followed suit, and soon the highly publicized global grounding of the plane was in full force.<sup>29</sup> However, the FAA was the last to do so.<sup>30</sup> Boeing initially thought it could get the software issue fixed and the planes back up and running by the end of March 2019.<sup>31</sup> But due to delays with the software updates, the FAA only cleared the 737 MAX aircraft to fly again in late 2020.<sup>32</sup>

### C. FALLOUT

The fallout from the crashes continues to grow, touching all aspects of government (particularly the FAA), the airline industry, and Boeing. The FAA continued to scrutinize the plane following delays in a potential fix, which led to the entire certification process coming under scrutiny.<sup>33</sup> Boeing has had to cut production of the 737 MAX, suffering significant losses.<sup>34</sup> “[It] is in talks with banks to secure a loan of \$10 billion or more . . . as the company faces rising costs stemming from two fatal crashes of its 737 MAX planes.”<sup>35</sup> Recently, Boeing announced that further delays are expected after the recent disclosure of a software issue.<sup>36</sup> These delays will continue to drive up costs as customers seek compensation for undelivered planes.<sup>37</sup> Airbus has now surpassed Boeing as the world’s largest aircraft manu-

---

<sup>27</sup> Simon Marks & Abdi Latif Dahir, *Ethiopian Report on 737 Max Crash Blames Boeing*, N.Y. TIMES (Mar. 9, 2020), <https://nytimes.com/2020/03/09/world/africa/ethiopia-crash-boeing.html> [perma.cc/Z4GM-PSUR].

<sup>28</sup> Slotnick, *supra* note 1.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Slotnick, *supra* note 1; *American Airlines Plans to Return Boeing 737 Max to Service at Year-End*, REUTERS (Oct. 18, 2020), <https://reuters.com/article/us-boeing-737max-american-airline/american-air-to-run-boeing-737-max-at-year-end-bloomberg-news-idUSKBN27305O> [perma.cc/A2KT-BLYR].

<sup>32</sup> Niraj Chokshi, *Boeing 737 Max Is Cleared by F.A.A. to Fly Again*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/business/boeing-737-max-faa.html> [perma.cc/WZR5-KJSC].

<sup>33</sup> Slotnick, *supra* note 1.

<sup>34</sup> Leslie Josephs, *Boeing Is in Talks to Borrow \$10 Billion or More as 737 Max Crisis Wears On*, CNBC (Jan. 20, 2020, 11:47 PM), <https://cnbc.com/2020/01/20/737-max-crisis-boeing-seeks-to-borrow-10-billion-or-more.html> [perma.cc/99TU-ZWPN].

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

facturer, and Boeing's credit rating has been placed under review.<sup>38</sup>

Congress has gotten involved and launched investigations into Boeing, the FAA, and the relationship between the two. Dennis Muilenburg, former Boeing CEO, testified before Congress in October 2019 and was subject to intense questioning.<sup>39</sup> In December 2019, Boeing fired Muilenburg for his handling of the 737 MAX crises.<sup>40</sup> During the congressional investigation, FAA administrator Steve Dickson gave a shocking piece of testimony: "After the first crash, an internal FAA analysis showed a high likelihood of future crashes, as many as 15 over the 30–40 year life of the jet. However, the FAA let the plane keep flying."<sup>41</sup>

The FAA commissioned the Joint Authorities Technical Review (JATR), consisting of technical experts from the FAA, National Aeronautics & Space Administration, European Union Aviation Safety Agency, Australia, Brazil, Canada, China, Indonesia, Japan, Singapore, and the United Arab Emirates.<sup>42</sup> The review documented observations, findings, and a series of recommendations for actions that could be taken to help prevent similar tragedies from occurring.<sup>43</sup>

### III. CURRENT STATE OF THE LAW

#### A. BRIEF HISTORY OF THE FAA

In 1926, at the urging of aviation industry leaders, and in an effort to help air travel reach its full commercial potential, the Air Commerce Act was passed.<sup>44</sup> Under this initial version of what would later become the Federal Aviation Act, the Secretary of Commerce was charged with "fostering air commerce, issuing and enforcing air traffic rules, licensing pilots, certifying aircraft, establishing airways, and operating and maintaining aids

---

<sup>38</sup> *Id.*

<sup>39</sup> Slotnick, *supra* note 1.

<sup>40</sup> Josephs, *supra* note 34.

<sup>41</sup> Slotnick, *supra* note 1.

<sup>42</sup> *The Joint Authorities Technical Review (JATR) – Boeing 737 MAX Flight Control System*, FLIGHT SAFETY FOUND. (Oct. 22, 2019), [https://skybrary.aero/index.php/The\\_Joint\\_Authorities\\_Technical\\_Review\\_\(JATR\)\\_-\\_Boeing\\_737\\_MAX\\_Flight\\_Control\\_System](https://skybrary.aero/index.php/The_Joint_Authorities_Technical_Review_(JATR)_-_Boeing_737_MAX_Flight_Control_System) [perma.cc/U3YF-9JCB].

<sup>43</sup> *Id.*

<sup>44</sup> *A Brief History of the FAA*, FED. AVIATION ADMIN. (Jan. 4, 2017, 4:42 PM), [https://www.faa.gov/about/history/brief\\_history/](https://www.faa.gov/about/history/brief_history/) [perma.cc/ZN5M-N7BR]; Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926).

to air navigation.”<sup>45</sup> One of the first tasks of the new Bureau of Air Commerce centered on air traffic control.<sup>46</sup> But by the early 1930s, the Department of Commerce’s oversight responsibilities were already being called into question following crashes that killed a prominent football coach and a U.S. Senator.<sup>47</sup> To ensure a focus on safety, President Franklin Roosevelt signed the Civil Aeronautics Act in 1938, establishing the Civil Aeronautics Authority (CAA) to conduct investigations into aviation accidents and provide recommendations to prevent future accidents.<sup>48</sup> Just before the United States’ entry into World War II, the CAA took full control over air traffic control towers, making air traffic control a permanent federal responsibility.<sup>49</sup> However, in 1956, a midair collision killed 128 people and highlighted the need for even greater oversight and safety control of national airspace.<sup>50</sup>

In 1958, the Federal Aviation Act was passed, transferring the CAA function to the new independent Federal Aviation Agency.<sup>51</sup> Feeling a need for a coordinated transportation system among all modes of transportation, Congress authorized the creation of the Department of Transportation in 1966 and 1967.<sup>52</sup> The Federal Aviation Agency became known as the FAA, and oversight of the FAA soon transitioned to the Department of Transportation.<sup>53</sup> However, the new agency was not just tasked with safety, but also with fostering air commerce.<sup>54</sup> As one commenter has noted, “This additional imperative has had a profound impact on the development of the FAA and its administrative functions over the past four decades.”<sup>55</sup> Thus, from the beginning, the FAA has had to balance airline safety against commercial success in the airline industry—two positions that will inevitably conflict from time to time.<sup>56</sup> Concerns over this

---

<sup>45</sup> *A Brief History of the FAA*, *supra* note 44.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; *see also* 49 U.S.C. § 1131.

<sup>49</sup> *A Brief History of the FAA*, *supra* note 44.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; Federal Aviation Act, Pub. L. No. 85-726, 72 Stat. 731 (1958).

<sup>52</sup> *A Brief History of the FAA*, *supra* note 44.

<sup>53</sup> *Id.*

<sup>54</sup> Federal Aviation Act, pmb.

<sup>55</sup> Mark C. Niles, *On the Hijacking of Agencies (And Airplanes): The Federal Aviation Administration, “Agency Capture,” and Airline Security*, 10 AM. U. J. GENDER SOC. POL’Y & L. 381, 407 (2002).

<sup>56</sup> *Id.*

“dual mandate” led to statutory amendments removing the “promoting” language and focusing more on safety.<sup>57</sup> Nonetheless, “[o]ne salient apparent consequence of the FAA’s dual mandate has been its extensive reliance on the private entities it regulates.”<sup>58</sup>

#### B. THE ORGANIZATION DESIGNATION AUTHORITY: DELEGATION OF CERTIFICATION AUTHORITY TO PRIVATE ENTITIES

Part of the legislation directing the Secretary of Transportation to promote safety in the airline industry granted the Secretary the discretion to “prescribe reasonable rules and regulations” governing aircraft inspection, including how the inspections would be accomplished.<sup>59</sup> Congress, however, emphasized that air carriers themselves “retained certain responsibilities to promote the public interest in air safety.”<sup>60</sup> Congress established a certification process to monitor and control how the airline industry complied with the regulations.<sup>61</sup> At each step in this process, FAA employees inspect materials submitted by aircraft manufacturers for compliance, then issue the appropriate certificate to allow the manufacturers to produce and market their products.<sup>62</sup>

Step one in this process is known as type certification.<sup>63</sup> This involves obtaining FAA approval of the plane’s basic design.<sup>64</sup> “By regulation, the FAA has made the applicant itself responsible for conducting all inspections and tests necessary to determine that the aircraft comports with FAA airworthiness requirements.”<sup>65</sup> During this process, a prototype of the new

---

<sup>57</sup> *Id.* at 408.

<sup>58</sup> *Id.* at 413.

<sup>59</sup> *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 804 (1984).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 805.

<sup>63</sup> *Id.*; 14 C.F.R. §§ 21.11–.55 (2020).

<sup>64</sup> *Varig Airlines*, 467 U.S. at 805.

<sup>65</sup> *Id.* (citing 14 C.F.R. §§ 21.33, 21.35).

Each applicant must make all inspections and tests necessary to determine

- (1) Compliance with the applicable airworthiness, aircraft noise, fuel venting, and exhaust emission requirements;
- (2) That materials and products conform to the specifications in the type design;
- (3) That parts of the products conform to the drawings in the type design; and

plane is developed, and ground and flight tests are conducted.<sup>66</sup> The FAA then reviews all the submitted data and, if it finds the proposed design meets the minimum safety standards, it approves the design and issues a type certificate.<sup>67</sup> However, production still cannot begin.<sup>68</sup> Before production, a company must obtain a production certificate allowing it to produce copies of the prototype for commercial use.<sup>69</sup> “To obtain a production certificate, the manufacturer must prove to the FAA that it has established and can maintain a quality control system to assure that each aircraft will meet the design provision of the type certificate.”<sup>70</sup> While this certificate allows the manufacturer to mass produce the new aircraft, it still cannot be put into service.<sup>71</sup> First, the FAA must grant an airworthiness certificate, essentially assuring the particular plane is safe for flying.<sup>72</sup>

When an aircraft manufacturer like Boeing wants to upgrade its planes and introduce a major change in its design, yet another certificate is required: a supplemental type certificate.<sup>73</sup>

If a person holds the [type certificate] for a product and alters that product by introducing a major change in type design that does not require an application for a new [type certificate] under § 21.19, that person must apply to the FAA either for an STC, or to amend the original type certificate under subpart D of this part.<sup>74</sup>

To obtain this supplemental type certificate, the altered aircraft must meet its airworthiness requirements.<sup>75</sup> Similar to the prior steps, the applicant must conduct the required inspections and tests to ensure its product complies with regulations.<sup>76</sup> However, this is no small task. The FAA has a limited number of engineers

---

(4) That the manufacturing processes, construction and assembly conform to those specified in the type design.

14 C.F.R. § 21.33(b).

<sup>66</sup> *Varig Airlines*, 467 U.S. at 805–06.

<sup>67</sup> *Id.* at 806.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*; 14 C.F.R. §§ 21.131–150.

<sup>70</sup> *Varig Airlines*, 467 U.S. at 806.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*; 14 C.F.R. § 21.183.

<sup>73</sup> *Varig Airlines*, 467 U.S. at 806 (citing 14 C.F.R. § 21.113).

<sup>74</sup> *Id.* (citing 14 C.F.R. § 21.113).

<sup>75</sup> *Id.* (citing 14 C.F.R. § 21.115(a)).

<sup>76</sup> *Id.*

and employees.<sup>77</sup> “[R]oughly 700 individuals are responsible for ALL design approvals, production & continued airworthiness of everything that flies and of that, maybe 400 are engineers.”<sup>78</sup> In contrast, private companies like Boeing employ thousands of employees. “According to the Boeing website, it has over 45,000 engineers spread throughout the entire company. [With s]uch a deep roster of talent, [Boeing] has incredibly deep and specific expertise for new designs and to manage the safety and airworthiness of the nearly 14,000 Boeing airplanes flying today.”<sup>79</sup>

In response to the FAA’s limited resources, Congress has authorized the FAA to delegate some of its testing authority.<sup>80</sup> The FAA “may delegate to a qualified private person, or to an employee under the supervision of that person, a matter related to (A) the examination, testing, and inspection necessary to issue a certificate under this chapter; and (B) issuing the certificate.”<sup>81</sup> Based on this provision, the FAA created the ODA program to delegate to private organizations its authority to inspect aircraft designs and issue certificates.<sup>82</sup> “An FAA Designation ‘allows an organization to perform specified functions on behalf of the Administrator related to engineering, manufacturing, operations, airworthiness, or maintenance.’”<sup>83</sup> This ODA system is designed to be a system of direct oversight.

Generally, to be considered as an ODA, an applicant must:

- (1) Have sufficient facilities, resources, and personnel, to perform the functions for which authorization is requested;
- (2) Have sufficient experience with FAA requirements, processes, and procedures to perform the functions for which authorization is requested; and
- (3) Have sufficient, relevant experience to perform the functions for which authorization is requested.<sup>84</sup>

According to federal regulations:

The ODA Holder must—

---

<sup>77</sup> Mike Borfitz, *What FAA Delegation Does—How and Why?*, AVIATION TECH. SOLS.: BLOG (Jan. 2, 2020), <https://jdasolutions.aero/blog/what-faa-delegation-does-how-and-why/> [perma.cc/3QVB-QUGS].

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> 49 U.S.C. § 44702(d)(1).

<sup>82</sup> *Riggs v. Airbus Helicopters, Inc.*, 939 F.3d 981, 984 (9th Cir. 2019).

<sup>83</sup> *Id.* (citing 14 C.F.R. § 183.41(a) (2020)).

<sup>84</sup> 14 C.F.R. § 183.47.

- (a) Comply with the procedures contained in its approved procedures manual;
- (b) Give ODA Unit members sufficient authority to perform the authorized functions;
- (c) Ensure that no conflicting non-ODA Unit duties or other interference affects the performance of authorized functions by ODA Unit members;
- (d) Cooperate with the [FAA] Administrator in his performance of oversight of the ODA Holder and the ODA Unit;
- (e) Notify the [FAA] Administrator of any change that could affect the ODA Holder's ability to continue to meet the requirements of this part within 48 hours of the change occurring.<sup>85</sup>

Though its origins date back to the 1950s, the ODA program itself began in 2005 and was not fully implemented until 2009.<sup>86</sup> This system relies heavily on the integrity and transparency of the ODA holder and strict, careful oversight by the FAA.

### C. THE FTCA AND THE FAA

In 1946, Congress enacted the Federal Tort Claims Act (FTCA) as part of the Legislative Reorganization Act.<sup>87</sup> The FTCA authorizes suits against the United States for damages:

[F]or injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.<sup>88</sup>

However, there are exceptions; the FTCA does not waive federal sovereign immunity in all respects.<sup>89</sup> In particular, under the discretionary function exemption,<sup>90</sup> the FTCA does not apply to

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such state or regulation be valid, or

---

<sup>85</sup> *Id.* § 183.57.

<sup>86</sup> Roncevert Ganan Almond, *After the Max: Rebuilding U.S. Aviation Leadership*, 60 VA. J. INT'L L. ONLINE 1, 14 (2019).

<sup>87</sup> David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 IDAHO L. REV. 291, 293 (1989).

<sup>88</sup> 28 U.S.C. § 1346(b).

<sup>89</sup> Fishback & Killefer, *supra* note 87, at 293.

<sup>90</sup> *Id.* at 294.

based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.<sup>91</sup>

The scope of the discretionary function exemption has been an area of dispute since the passage of the FTCA.<sup>92</sup> “On the one hand, some saw the exception as standing for the simple proposition that the FTCA could not be used to review high-level policy decisions. On the other hand, some saw the exception as severely limiting what otherwise would have been a very broad waiver of sovereign immunity.”<sup>93</sup>

The seminal case regarding interpretation of the exception and the scope of the waiver is *Dalehite v. United States*.<sup>94</sup> In that negligence case, explosions destroyed much of Texas City, Texas and killed hundreds of people.<sup>95</sup> The cause of the explosions was fertilizer the government made and shipped to Europe as post-war aid.<sup>96</sup> The easily-ignitable fertilizer was packaged in flammable paper containers with no hazard warning, leading to large explosions during loading onto ships.<sup>97</sup> The plaintiffs alleged negligence by the large body of officials and employees involved in the program.<sup>98</sup> Though the Supreme Court did not determine where the line for discretion ends, it held that the actions of the federal government—the decision to start the program and the actions taken in aid of the program—were not actionable as they involved some measure of discretion.<sup>99</sup> The Court noted that “[w]here there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.”<sup>100</sup> Critics of the decision noted its language was incredibly broad and could potentially encompass almost everything “except the most routine postal truck injury-type cases.”<sup>101</sup>

---

<sup>91</sup> *Id.* (citing 28 U.S.C. § 2680(a)).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (citing *Dalehite v. United States*, 346 U.S. 15 (1953)).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 294–95.

<sup>98</sup> *Id.* at 295.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* (citing *Dalehite v. United States*, 346 U.S. 15, 35–36 (1953)).

<sup>101</sup> *Id.* at 296.

In *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, a 1984 case addressing FAA delegation, the Supreme Court attempted to clarify its position and understanding of the discretionary function exemption.<sup>102</sup> The *Varig* Court held that the discretionary function exemption barred the plaintiff's FTCA suit challenging the FAA's decision to delegate responsibility for compliance with FAA safety regulations to the aircraft manufacturer and its means of monitoring compliance.<sup>103</sup> "The *Varig* Court explained that Congress included the discretionary function exception 'to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of a tort suit.'"<sup>104</sup> The Court stressed that the exception not only protects discretionary acts of the government in its conduct regulating role but also protects its policy judgments.<sup>105</sup> Later Supreme Court decisions defined the outer limits of the discretionary function exemption,<sup>106</sup> stating that the exemption effectively does not apply when a statute, regulation, or policy specifically prescribes a course of action for a government employee to follow.<sup>107</sup> It is within this legal framework that this Comment considers the FTCA as a potential remedy for plaintiffs wronged by negligent government acts related to the Boeing 737 MAX crashes.

#### IV. ANALYSIS

The legal issues facing Boeing and the FAA are extensive and are not fully explored in this Comment.<sup>108</sup> These include lawsuits against Boeing by the families of the victims, claims for compensation from airlines that have unfulfilled orders for the 737 MAX, and lawsuits by Boeing shareholders alleging fiduciary breaches.<sup>109</sup> While these suits address ancillary problems,

---

<sup>102</sup> *Id.* (citing *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984)).

<sup>103</sup> *Id.* at 298.

<sup>104</sup> *Id.* (quoting *Varig Airlines*, 467 U.S. at 813–14).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 301.

<sup>107</sup> *Id.* at 302 (citing *Berkowitz v. United States*, 486 U.S. 531, 536 (1988)).

<sup>108</sup> See Arthur I. Willner, Raymond L. Mariani & Emily K. Doty, *Recent Developments in Aviation Law – 2019*, 85 J. AIR L. & COM. 221, 250–58 (2020).

<sup>109</sup> Sinéad Baker, *Here Are All the Investigations and Lawsuits that Boeing and the FAA are Facing After the 737 Max Crashes Killed Almost 350 People*, BUS. INSIDER (June 24, 2019), <https://www.businessinsider.com/boeing-737-max-crisis-list-lawsuits-investigations-faces-faa-2019-5> [<https://perma.cc/KM4E-VS7E>]; Tom Hals & Tracy

they do not get to the heart of the issue—there are serious flaws in the aircraft certification process that allowed the 737 MAX to fly. These structural failures fall into a few specific categories, each of which can be addressed through legislation or through FTCA claims against the FAA. The JATR report took issue with the FAA’s failures to: (1) designate flight-path-altering changes as “significant” changes, which would have subjected the certification to stricter standards;<sup>110</sup> (2) conduct whole aircraft inspection, determining how MCAS would interplay with other systems;<sup>111</sup> (3) delegate inspection duty to individuals or entities with MCAS expertise;<sup>112</sup> (4) immediately ground the 737 MAX;<sup>113</sup> and (5) take steps to ensure the impartiality of delegated safety inspectors with compromising ties to Boeing.<sup>114</sup> Two primary issues include: (1) the meaning of “qualified private” individuals under the statute authorizing the FAA to delegate its safety inspection authority; and (2) whether the director of the FAA has full discretion to determine who constitutes a qualified private individual.

#### A. THE FTCA AS AN AVENUE TO FAA ACCOUNTABILITY

Federal agencies such as the FAA are largely shielded from lawsuits for negligence and other claims under the discretionary function exemption of the FTCA.<sup>115</sup> Under the exemption, claims cannot be brought against government employees who, while executing a duty prescribed by statute or regulation, perform a “discretionary function or duty on the part of a federal agency or any employee of the government, whether or not the discretion involved be abused.”<sup>116</sup> Since Congress did not define a “discretionary function,” the scope of this exemption has

---

Rucinski, *Lawsuit Against Boeing Seeks to Hold Board Liable for 737 MAX Problems*, REUTERS (Nov. 18, 2019, 3:32 PM), <https://reuters.com/article/us-boeing-737max-lawsuit-board/lawsuit-against-boeing-seeks-to-hold-board-liable-for-737-max-problems-idUSKBN1XS2I3> [perma.cc/M9T3-QB2Q]; *Boeing Settles First Lawsuit With 737 Max Crash Families*, DW (Sept. 25, 2019), <https://dw.com/en/boeing-settles-first-lawsuit-with-737-max-crash-families/a-50587098> [perma.cc/5P4Q-YZNJ].

<sup>110</sup> JOINT AUTHS. TECH. REV., *BOEING 737 MAX FLIGHT CONTROL SYSTEM OBSERVATIONS, FINDINGS, AND RECOMMENDATIONS*, at I (2019).

<sup>111</sup> *Id.* at 6.

<sup>112</sup> *Id.* at 26.

<sup>113</sup> *Id.* at 49.

<sup>114</sup> *Id.* at 30.

<sup>115</sup> 28 U.S.C. § 2680(a).

<sup>116</sup> *Id.*

largely been borne out by judicial decisions. Courts use a generalized two-part test to determine if the exemption applies.<sup>117</sup> First, the Court determines whether the action is discretionary, involving “an element of judgment or choice” in the absence of a law or policy that prescribes a course of action.”<sup>118</sup> Second, if the conduct is discretionary, the judgment must be “the kind that the discretionary function exception was designed to shield”—those actions based on policy analysis.<sup>119</sup>

In the case of the 737 MAX certification process, there are three areas where fault may be found and where the discretionary function exemption may apply: (1) the FAA’s delegation of portions of the certification process to Boeing via the FAA’s ODA program;<sup>120</sup> (2) FAA oversight of the process by the FAA’s Boeing Aviation Safety Oversight Office (BASOO);<sup>121</sup> and (3) the issuance of the amended type certificate for the 737 MAX with MCAS installed.<sup>122</sup>

### 1. *Delegation of the Certification Process to Boeing*

While it is undisputed that the FAA is allowed to delegate certification authority to private parties and that the ODA program as a whole is a discretionary function,<sup>123</sup> it is worth questioning whether delegating the MCAS certification process falls under the FTCA exemption. In 1984, the Supreme Court faced a similar situation in the *Varig Airlines* case. Following an accident that killed 124 people involving a Boeing 707 aircraft, plaintiffs tried to file suit against the FAA alleging negligence in “failing to inspect certain elements of aircraft design” before issuing certification. Plaintiffs took specific issue with the “spot-check” FAA review method and the application of that method to the aircraft involved in the case.<sup>124</sup>

The Supreme Court held the discretionary function exemption shielded the FAA because its decisions about how to conduct its compliance review are discretionary actions “of the most

---

<sup>117</sup> Berkovitz v. United States, 486 U.S. 531, 536–37 (1988).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> JOINT AUTHS. TECH. REV., *supra* note 110, at 26.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 9.

<sup>123</sup> United States v. S.A. Empresa de Viacao Aerea Rio Grandense (*Varig Airlines*), 467 U.S. 797, 807 (1984).

<sup>124</sup> *Id.* at 819.

basic kind.”<sup>125</sup> The FAA was within its statutory rights to consider the resources it has available, decide how to delegate its certification authority, and determine how it would oversee the designee’s inspection process.<sup>126</sup> The statute authorizes the FAA to delegate to a qualified private person a matter related to issuing certificates or examination and testing necessary to issue a certificate.<sup>127</sup> Because the statute does not describe a specific course of action to be taken by the FAA or designee in the certification process, the Court ruled that such a decision was within the discretion of the FAA and the designee.<sup>128</sup> While the Court was correct that the statute’s language is broad and general, Congress set forth a qualification which constrains the delegation: the designee must be a *qualified* private individual.<sup>129</sup> It is not within the discretion of the FAA to designate an unqualified individual to conduct inspections or certify the aircraft. Here, there are serious concerns about the qualifications of those persons inspecting and certifying MCAS.<sup>130</sup>

Among other concerns, FAA engineers and Boeing employees raised red flags about the lack of qualified engineers available to review changes to the aircraft, including MCAS.<sup>131</sup> In 2005, Congress (in response to industry lobbying efforts) allowed Boeing to choose the engineers who would assist with the FAA’s review and certification process.<sup>132</sup> Some FAA engineers have commented that, over time, this change has led to an inability to monitor what was happening at Boeing.<sup>133</sup> During the 737 MAX’s development, two of the BASOO’s most prominent and experienced engineers—who were responsible for flight control systems including MCAS—resigned and were replaced by an engineer with “little experience in flight controls” and a new hire fresh out of school.<sup>134</sup> “People who worked with the two [new] engineers said they seemed ill-equipped to identify any

---

<sup>125</sup> *Id.* at 819–20.

<sup>126</sup> *Id.*; see also 49 U.S.C. § 44702(d).

<sup>127</sup> *Varig Airlines*, 467 U.S. at 807; 49 U.S.C. § 44702(d).

<sup>128</sup> *Varig Airlines*, 467 U.S. at 805.

<sup>129</sup> See *supra* Section III.B.

<sup>130</sup> Natalie Kitroeff, David Gelles & Jack Nicas, *The Roots of Boeing’s 737 Max Crisis: A Regulator Relaxes Its Oversight*, N.Y. TIMES (July 27, 2019), <https://nytimes.com/2019/07/27/business/boeing-737-max-faa.html> [perma.cc/NF9H-RD3F].

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

problems in a complex system like MCAS.”<sup>135</sup> Furthermore, while the FAA originally retained certification authority over MCAS’s addition, it later delegated that authority to Boeing.<sup>136</sup>

With so much authority being delegated to Boeing, it is important to determine whether those involved in the Boeing ODA are qualified private people within the meaning of the statute. Federal regulations outlining the qualifications and duties of ODAs are a good starting point to examine who counts as a qualified private individual.<sup>137</sup> To qualify, an applicant must generally have sufficient facilities, resources, and experience to conduct the duties that have been delegated to them—in this case, certifying the changes made to the aircraft, including MCAS.<sup>138</sup> It is likely well within the FAA’s discretion to determine if the engineers that Boeing would assign to this task are qualified in their engineering capabilities. However, it is the responsibility of the ODA Holder (Boeing) to “[e]nsure that no conflicting non-ODA duties or other interference affects the performance of authorized functions by ODA Unit members.”<sup>139</sup> Accordingly, Boeing has a duty to ensure no undue pressure or influence, such as a race to produce a plane before a competitor, affects the diligence of engineers tasked with certifying the safety of the new systems. It stands to reason that Boeing’s inability to ensure it meets this responsibility could render it unqualified to hold an ODA designation. Therefore, if the FAA knew economic pressures and factors other than plane safety guided Boeing’s directions to its inspecting engineers, then the FAA delegated its certification authority to an unqualified individual, which it cannot do.<sup>140</sup>

There is evidence that, throughout the 737 MAX certification process, Boeing placed profit-motivated pressures on its employees and the FAA. According to the JATR’s findings, “signs were reported of undue pressures on Boeing ODA engineering unit members . . . performing certification activities on the B737 MAX program, which further erodes the level of assurance in this system of delegation.”<sup>141</sup> According to a former Boeing engineer, the company “puts its 737 MAX engineers under immense

---

<sup>135</sup> *Id.*

<sup>136</sup> JOINT AUTHS. TECH. REV., *supra* note 110, at 26.

<sup>137</sup> See 14 C.F.R. §§ 183.47, 183.57 (2020).

<sup>138</sup> *Id.* § 183.47(a).

<sup>139</sup> *Id.* § 183.57(c).

<sup>140</sup> See 49 U.S.C. § 44702(d).

<sup>141</sup> JOINT AUTHS. TECH. REV., *supra* note 110, at VII.

pressure to lower production costs and to downplay new features to avoid scrutiny” by the FAA.<sup>142</sup> The engineer said he saw “a lack of sufficient resources to do the job in its entirety.”<sup>143</sup> Given how intertwined Boeing’s officials are with the FAA, it is possible that the FAA was at least aware of the possibility of undue pressure or influence being asserted on the engineers responsible for the certification.<sup>144</sup> Given the evidence of undue pressure and influence, the perceived inability of the Boeing engineers’ ability to complete their safety certification directives, and the qualification requirements of ODA Holders, there is a colorable argument that the FAA’s designation to Boeing of certification authority over MCAS was to an unqualified private individual, which is forbidden by the statute.<sup>145</sup> This could potentially bar the application of the discretionary function exemption and allow families of those killed in the crashes to bring FTCA suits against the FAA.

If the first prong of the *Berkovitz* test is not met because authority was delegated to private individuals who were not qualified, there is no need to move on to the second prong—the discretionary function exemption does not apply. However, even if the second prong does not need to be satisfied, analysis can still demonstrate the principle that courts strive not to second guess agency policy decisions.<sup>146</sup> A growing body of evidence suggests the delegation in this case was not made on policy grounds, but was instead intended to tilt the scales in Boeing’s race against Airbus.<sup>147</sup> Permitted policy considerations arguably do not include the economic interests of a single airplane manufacturer.

---

<sup>142</sup> Alexandra Ma, *A Former Boeing 737 Max Engineer Said He Was ‘Incredibly Pressurized’ to Keep Costs Down and Downplay New Features to Avoid FAA Scrutiny*, BUS. INSIDER (July 29, 2019, 5:24 AM), <https://businessinsider.com/boeing-737-max-former-engineer-pressure-costs-avoid-faa-scrutiny-2019-7> [perma.cc/8JLN-HF5A].

<sup>143</sup> *Id.*

<sup>144</sup> See Kitroeff et al., *supra* note 130.

<sup>145</sup> See *supra* Section III.B.

<sup>146</sup> Fishback & Killefer, *supra* note 87, at 302 (internal citations and quotations omitted).

<sup>147</sup> Thomas Kaplan, *After Boeing Crashes, Sharp Questions About Industry Regulating Itself*, N.Y. TIMES (Mar. 26, 2019), <https://nytimes.com/2019/03/26/us/politics/boeing-faa.html> [perma.cc/YM2X-7W89].

2. *Improper FAA Oversight and Issuing the Certificate—A Dead End*

The most glaring and well-publicized criticism of the 737 MAX crisis is that there is a significant lack of meaningful FAA oversight over the Boeing ODA program and the 737 MAX certification process.<sup>148</sup> Throughout the 737 MAX certification process, the FAA continually delegated more of its oversight responsibility to Boeing.<sup>149</sup> Members of the BASOO program in charge of oversight complained they were underqualified and unable to understand the significance of MCAS.<sup>150</sup> “For example, during an initial project review, an FAA engineer failed to detect that a manufacturer’s certification plan did not demonstrate compliance with specific aviation regulations governing design and construction of aircraft flight controls.”<sup>151</sup> However, the FAA’s ODA oversight duties are even more generalized and vague, requiring little more than merely overseeing the ODA in unspecified terms.<sup>152</sup> The FAA engineers had no explicit duty to review MCAS themselves.<sup>153</sup> It is likely within the discretionary function exemption for the FAA to determine what oversight is appropriate and who to place on any oversight committee regarding a specific certification, as the *Varig Airlines* case states.<sup>154</sup>

Beyond the *Varig* decision, other circuit courts have reinforced the point that oversight-based allegations of negligence on the part of the FAA are barred by the discretionary function exemption.<sup>155</sup> In *Alinsky v. United States*, victims of an aircraft collision tried to sue the FAA under the FTCA, alleging, among other things, that the agency was negligent in contracting out and overseeing the training and appointing of aircraft controllers.<sup>156</sup> Explaining that the discretionary function exemption shielded the FAA, the Seventh Circuit stated:

Here, Congress authorized the FAA to enter into contracts, as necessary, to carry out the functions of the FAA, and thus the

---

<sup>148</sup> See, e.g., Almond, *supra* note 86, at 15.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 16.

<sup>151</sup> *Id.* at 15.

<sup>152</sup> See 49 U.S.C. § 44736(a)(1).

<sup>153</sup> *Id.*

<sup>154</sup> *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 819–20 (1984).

<sup>155</sup> *Alinsky v. United States*, 415 F.3d 639, 648 (7th Cir. 2005); *Riggs v. Airbus Helicopters, Inc.*, 939 F.3d 981, 992 n.2 (9th Cir. 2019).

<sup>156</sup> *Alinsky*, 415 F.3d at 647.

government did not violate a specific mandatory statute, regulation or policy in hiring Midwest to provide training and oversight at Meigs. The plaintiffs also fail to identify any mandatory statute or regulation dictating how the FAA must oversee private contractors or assure the contractor complies with federal regulations and the contract provisions. Where the plaintiffs' claim is premised on negligent oversight, such a showing is imperative.<sup>157</sup>

Since the FAA made the discretionary decision to contract out the selection, training, and oversight of air traffic controllers in the case, the FAA was not open to attack for oversight failures.<sup>158</sup>

The *Alinksy* decision is distinguishable from the case of the 737 MAX and may provide a means of attacking the FAA for its failed oversight. *Alinksy* focused on the FAA's decision to delegate to a third party authority to select and train air traffic controllers.<sup>159</sup> But here, the FAA retained certain oversight authority, which it vested in the BASOO.<sup>160</sup>

According to the JATR report, "[t]he BASOO is required to perform a certification function, including making findings of compliance of retained (non-delegated) requirements, while also performing the oversight function of the Boeing ODA. The BASOO must have the resources to carry out these two primary functions without compromise."<sup>161</sup> Therefore, the FAA may not have provided enough adequate, qualified individuals to administer its retained oversight over the 737 MAX certification. Some of the engineers involved in the small oversight team were recent graduates and people unfamiliar with MCAS.<sup>162</sup>

The JATR report found that there were twenty-four engineers on the BASOO team, and that the allocated staffing levels may not have been sufficient to "carry out the work associated with retained items and with the conduct of oversight duties."<sup>163</sup> This critical understaffing could have played a part in some key oversights, including the failure to list the appropriate MCAS correction. Initially, Boeing determined and submitted to the FAA that MCAS limited automated corrections in the airplane's flight up to 0.6 degrees.<sup>164</sup> However, the final system design was submit-

---

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 648.

<sup>159</sup> *Id.*

<sup>160</sup> JOINT AUTHS. TECH. REV., *supra* note 110, at VII.

<sup>161</sup> *Id.*

<sup>162</sup> See Kitroeff et al., *supra* note 130.

<sup>163</sup> JOINT AUTHS. TECH. REV., *supra* note 110, at VII.

<sup>164</sup> Dominic Gates, *Flawed Analysis, Failed Oversight: How Boeing, FAA Certified the Suspect 737 MAX Flight Control System*, SEATTLE TIMES (Mar. 17, 2019), <https://>

ted and reviewed with a 2.5-degree limitation instead of 0.6.<sup>165</sup> Boeing decided such a change was insignificant, and so it was never reviewed by FAA oversight engineers, who were unaware of the change until after the crashes.<sup>166</sup> Among other factors, this was one of the key causes of the system failure.

Even if Boeing had disclosed this change to the FAA, it is unlikely the change would have been noticed or further examined due to inadequate staffing at the FAA.<sup>167</sup> Moreover, while the FAA has discretion to decide how to conduct oversight over its retained functions, that discretion is still bound by statutory limits.<sup>168</sup> Thus, if the FAA had a legal duty to provide adequate and qualified supervision of certain aspects of the certification, and the team dedicated to doing so did not have the staff to accomplish it, it could be argued the FAA acted outside of its discretion in allocating its employees. At the same time, however, the FAA's decisions of how to allocate limited resources are exactly the sort of circumstance that typically invites judicial deference.<sup>169</sup>

Other circuit court decisions relating to the policy prong of the FTCA's discretionary function exemption indicate that, absent clear, specific statutory mandates, the FAA is likely within its rights to consider a wide variety of policy decisions.<sup>170</sup> For example, the Second Circuit has held that the government's use of a chemical agent was discretionary, as were its contracting decisions in performing field tests with that agent.<sup>171</sup> Similarly, the First and Ninth Circuits have held that, once a private contractor is delegated authority to perform some function, the government is not liable for the contractor's failure to protect its employees from dangers typically within the government's purview.<sup>172</sup> But that discretion is not without limits. A footnote in the *Berkovitz* decision suggests a limitation to the exemption's

---

seattletimes.com/business/boeing-aerospace/failed-certification-faa-missed-safety-issues-in-the-737-max-system-implicated-in-the-lion-air-crash/ [perma.cc/4LE2-GNMX].

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See *Alinsky v. United States*, 415 F.3d 639, 645 (7th Cir. 2005).

<sup>169</sup> See, e.g., *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820 (1984).

<sup>170</sup> Fishback & Killefer, *supra* note 87, at 298.

<sup>171</sup> *Id.* at 308 (citing *In re Agent Orange Product Liability Litigation*, 818 F.2d 210, 215 (2d Cir. 1987)).

<sup>172</sup> *Id.*

scope.<sup>173</sup> The Court noted that: “While the initial decision to undertake and maintain lighthouse service was a discretionary judgment . . . failure to maintain the lighthouse in good condition subjected the Government to suit under the FTCA [because] the latter course of conduct did not involve any permissible exercise of policy judgment.”<sup>174</sup>

Here, it was within the FAA’s discretion to delegate some certification responsibility to Boeing and to retain some for itself.<sup>175</sup> But once it has decided to retain certain oversight duties, it can only exercise policy judgments that are *permissible*.<sup>176</sup> Economic considerations, FAA resources, and public safety are all valid, permissible policy considerations that should not be subject to judicial scrutiny.<sup>177</sup> However, it is questionable whether the FAA’s consideration of Boeing’s desire to meet deadlines and compete with Airbus is a permissible consideration, and there is evidence that those interests were considered when the FAA was deciding who would conduct the oversight.<sup>178</sup> “A former FAA safety engineer who was directly involved in certifying the MAX [8] said that halfway through the certification process, ‘we were asked by management to re-evaluate what would be delegated. Management thought we had retained too much at the FAA.’”<sup>179</sup> In a troubling episode, a senior Boeing engineer, whose job was to act on behalf of the FAA in issuing certifications, pushed back against Boeing management’s demands for less stringent testing of a feature by the new engineers.<sup>180</sup> After initially rejecting the engineer’s call for stricter safety testing so that he could comply with FAA regulations, Boeing management eventually caved to his requests.<sup>181</sup> But “[l]ess than a month after his peers had backed him, Boeing abruptly removed him from the program even before conducting the testing he’d advocated.”<sup>182</sup> This incident highlights a consistent

---

<sup>173</sup> *Id.* at 303.

<sup>174</sup> *Id.* (citing *Berkovitz v. United States*, 486 U.S. 531, 538 n.3 (1988)).

<sup>175</sup> Borfittz, *supra* note 77.

<sup>176</sup> *See Berkovitz*, 486 U.S. at 538 n.3.

<sup>177</sup> *See Fishback & Killefer*, *supra* note 87, at 297.

<sup>178</sup> Gates, *supra* note 164.

<sup>179</sup> *Id.*

<sup>180</sup> Dominic Gates & Mike Baker, *Boeing Pressured FAA-Authorized Engineers on Safety Issues*, HERALDNET (May 6, 2019), <https://heraldnet.com/nation-world/boeing-pressured-faa-authorized-engineers-on-safety-testing/> [perma.cc/ET9P-PRFQ].

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

problem with the Boeing ODA program: “Many engineers, employed by Boeing while officially designated to be the FAA’s eyes and ears, faced heavy pressure from Boeing managers to limit safety analysis and testing so the company could meet its schedule and keep down costs.”<sup>183</sup> Boeing’s costs and schedules are not likely the type of policy considerations envisioned by the *Berkovitz* Court.<sup>184</sup> However, in the absence of strict, expressly delineated statutory processes that the FAA is bound to follow in designating oversight authority, this mode of attack is probably weaker than one based on the qualified private person grounds.<sup>185</sup>

### 3. *Is the Federal Tort Claims Act the Right Tool?*

Even if it is possible to sue the FAA under the FTCA, a question remains regarding the likelihood that private FTCA suits against the FAA would be effective in ensuring the FAA is not beholden to private companies, like Boeing, and that the FAA performs its duty of ensuring the safety of aircraft without undue private influence.<sup>186</sup> It has been noted that the FTCA makes it hard to sue the FAA for negligence and that it would be more prudent to sue Boeing directly.<sup>187</sup> As one aviation lawyer remarked, “At the start, middle and end, regardless of the role the FAA played, Boeing, Boeing, and Boeing is responsible for the safety of the airplane.”<sup>188</sup> Some feel that the role of investigating the nature of the relationship between the FAA and Boeing is a task better left to the legislature.<sup>189</sup> After all, victims who want to be made whole can always sue Boeing, which has agreed to settlements of over \$1 million for some crash victims.<sup>190</sup> However, if the FAA is susceptible to “capture,” or is already captured, lawsuits against one of the biggest companies in the industry may help, but would not address the root of the problem. Thus, two

---

<sup>183</sup> *Id.*

<sup>184</sup> *See* *Berkovitz v. United States*, 486 U.S. 531, 538 n.3 (1988).

<sup>185</sup> *See id.* at 547.

<sup>186</sup> *See* *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 804 (1984) (“In the Federal Aviation Act of 1958, 49 U.S.C. § 1421(a)(1), Congress directed the Secretary of Transportation to promote the *safety* of flight of civil aircraft in air commerce.”) (emphasis added).

<sup>187</sup> Christine Negroni, *Why It’s Unlikely the FAA Will Be Sued for the 737 MAX*, POINTS GUY (Apr. 1, 2019), <https://thepointsguy.com/news/why-its-unlikely-the-faa-will-be-sued-for-the-737-max/> [perma.cc/NU4S-9MXR].

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *See Boeing Settles First Lawsuit With 737 Max Crash Families*, *supra* note 109.

questions must be addressed; is the FAA “captured”, and if it is, could lawsuits pursuant to the FTCA help?

### B. AGENCY CAPTURE AND THE FAA

Regulatory agencies, such as the FAA, face the Herculean task of overseeing a technological domain that seems to constantly increase in complexity. With limited resources and personnel, agency cooperation with industry leaders, who often have vastly superior resources and technical expertise, is an inescapable reality.<sup>191</sup> But occasionally, the interests of the private parties subject to regulation become so intertwined with the agency that they lead to undue control and domination of the agency’s regulatory authority. This phenomenon is referred to as agency “capture” and has “been all but universally seen as a negative consequence.”<sup>192</sup> Agency capture occurs when a private company, through lobbying or otherwise, usurps the agency’s public policy considerations in favor of the private company’s own selfish interests.<sup>193</sup> “It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the cooperative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.”<sup>194</sup>

The FAA is an agency that is widely considered “captured” by the airline industry.<sup>195</sup> This conclusion is supported by findings of various investigations into the 737 MAX certification program. A *New York Times* report found that many top agency officials “shuffle[ ] between the government and the industry.”<sup>196</sup> Boeing was treated more as a client than as a private party regulated by the FAA.<sup>197</sup> Managers within the FAA’s oversight program over the Boeing ODA were reportedly pressured to make sure Boeing met deadlines to deliver the 737 MAX to its customers.<sup>198</sup> Problems encountered by Boeing engineers tasked with

---

<sup>191</sup> See Niles, *supra* note 55, at 393.

<sup>192</sup> *Id.* at 390.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> See *id.* at 405.

<sup>196</sup> Kitroeff et al., *supra* note 130.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

certification were not reported to disinterested FAA officials, but to Boeing executives.<sup>199</sup>

Concerns about the impartiality of the FAA and fears of its capture by the industry are not new or unique to the aviation industry. The rise of the administrative state has naturally led to an increased number of agencies, and thus increased concern over agency capture.<sup>200</sup> For the FAA in particular, a primary source of concern stems from what has been referred to as the FAA's dual mandate—beyond just regulating airline safety, the FAA is also tasked with fostering air commerce.<sup>201</sup> “[Thus f]rom its inception, the FAA was given the difficult task of balancing two interests which might be frequently, if not inherently, in conflict: the protection of airline safety on one hand, and the ‘fostering’ of successful air commerce, and consequently, the promotion of airline profitability, on the other.”<sup>202</sup>

While that language was removed in subsequent amendments to the statute, the influence of the dual mandate remains.<sup>203</sup> While other industries do rely on “audited self-regulation” by private companies, the FAA is particularly susceptible to “hyper-influence” by regulated parties since it “relies almost exclusively on self-regulation.”<sup>204</sup> Given that concerns about the influence of the aviation industry on the FAA stretch back over forty years and that the prevalence of companies like Boeing in the FAA certification process has only increased in that time,<sup>205</sup> it seems that the legislature and the agency itself may not be capable of crafting solutions to the problem. A critical examination of some of the proposed changes and findings by the JATR reveals why FTCA suits are a necessary aspect of FAA reform.

In its report on the FAA's delegation of certification authority to Boeing, the JATR panel concluded that “in the [737] MAX program, the FAA had inadequate awareness of MCAS function which, coupled with limited involvement, resulted in the inability of the FAA to provide an independent assessment of the adequacy of the Boeing proposed certification activities associated with MCAS.”<sup>206</sup> This statement alone is rather shocking. The fact

---

<sup>199</sup> JOINT AUTHS. TECH. REV., *supra* note 110, at 29.

<sup>200</sup> Niles, *supra* note 55, at 386–88.

<sup>201</sup> *Id.* at 407.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 408.

<sup>204</sup> *Id.* at 413.

<sup>205</sup> *Id.* at 409.

<sup>206</sup> JOINT AUTHS. TECH. REV., *supra* note 110, at VII.

that the FAA was willing to certify the 737 MAX even though it could not determine the adequacy of Boeing's certification activities indicates a disturbing level of incompetence or industry influence—or both—within the FAA. To remedy this, the panel issued Recommendation R5, “that the FAA conduct a workforce review of the BASOO engineer staffing level to ensure there is a sufficient number of experienced specialists to adequately perform certification and oversight duties, commensurate with the extent of work being performed by Boeing.”<sup>207</sup> However, given the Court's broad understanding of the discretionary function exemption, the FAA could likely meet this duty by simply stating that current staffing levels are adequate—it would be acting within its discretion in making that determination. Even if the statute were amended to require “adequate” staffing, it would still be up to the FAA (and by extension, Boeing) to determine what that means.

The JATR also recommended that “[t]he FAA should review the Boeing ODA work environment and ODA manual to ensure the Boeing ODA engineering unit members are working without any undue pressure when they are making decisions on behalf of the FAA.”<sup>208</sup> This would amount to having FAA officials connected with Boeing determine whether Boeing is exerting undue pressure on the engineers, and given the broad scope of the discretionary function exemption, Boeing officials delegated authority would have the discretion to conclude the engineers operate free of undue pressure. Other JATR recommendations involve requiring “holistic, integrated aircraft-level approach[es]” to certification<sup>209</sup>—that ODA engineers consider how adding critical technological systems like MCAS might effect other processes of the aircraft.<sup>210</sup> These recommendations seem so obvious that it is hard to believe they have not been considered by the FAA, fortifying contentions that the agency is subject to industry control, which will only be loosened by bringing FTCA claims against it.

For a captured agency like the FAA, there is very little standing in the way of allowing the industry to apply undue pressure absent judicial intervention. The lobbying groups behind the airline industry are considered some of the most powerful and

---

<sup>207</sup> *Id.* at VIII.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at VIII–IX.

effective in the United States. The FAA is largely run by people with significant connections to the major airlines, and who seem to side increasingly with the industry on issues.<sup>211</sup> Unfortunately, the only catalyst for any semblance of change in the FAA tends to be the public outcry following devastating accidents that cost hundreds of lives.<sup>212</sup> But these incidents are few and far between and changes are typically not implemented once the outrage subsides. For example, in response to a catastrophic crash of an airplane off the coast of Long Island in the late 1990s, the “FAA implemented several heightened safety measures and organized a White House Commission on Aviation Safety and Security.”<sup>213</sup> This commission, among other things, proposed thirty-one recommendations for tightening airport security, especially in the face of terrorism.<sup>214</sup> But those procedures were not seriously implemented by the FAA until after the September 11, 2001 terrorist attack.<sup>215</sup> Most observers agreed that “had those recommendations been implemented within the spirit and intent of the commission, the plans to attack on September 11 might have been detected well before they occurred.”<sup>216</sup> Allowing FTCA suits to proceed against the FAA for acts outside the scope of the discretionary function exemption would place the FAA on notice that it should conduct its duties in accordance with one of its primary purposes—to promote safety.

## V. CONCLUSION

In the absence of congressional action amending legislation to implement oversight requirements and limits on delegation, the FAA might not curb its own excesses. A slew of small, but specific amendments could go some way to creating meaningful change.

First, the statute should require that an impartial FAA engineer have a non-delegable duty to conduct a cursory examination of a proposed change and make the initial determination of whether it is considered significant or minor. In the case of the 737 MAX, the JATR concluded that it was Boeing engineers, likely under pressure from Boeing management, who made the determination that a change in MCAS that increased the ability

---

<sup>211</sup> Niles, *supra* note 55, at 415.

<sup>212</sup> *Id.* at 409.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 410.

<sup>215</sup> *Id.* at 410–11.

<sup>216</sup> *Id.*

of the system to change the pitch of the aircraft was not significant and did not need further FAA review.<sup>217</sup> Had the FAA oversight engineers seen the change, they could have caught the mistakes that caused the accidents.<sup>218</sup>

Along those lines, the statute should mandate that any automated system that can alter the flight path of an aircraft without input from the pilot is, by definition, a significant change that needs to be reviewed independently by FAA engineers. Given the stakes involved, it makes no sense that a change which can alter the flight of the aircraft without input could be seen as anything other than significant. Finally, amending the statute to require the FAA to retain authority to appoint specific Boeing engineers who will participate in the ODA program, rather than delegating that duty to Boeing, is another solution to part of the problem.

But in the face of Congress' inaction, the judicial system provides hope of holding the FAA accountable when delegating authority to private industry leaders like Boeing.

---

<sup>217</sup> JOINT AUTHS. TECH. REV., *supra* note 110, at 13–14.

<sup>218</sup> *Id.* at 14.



## SMU LAW REVIEW

The subscription price for four issues is \$42.00 per year; foreign subscriptions are \$49.00 per year. Regular single issues are available at \$16.50 per copy. Add 8.25% tax on single issue orders within the State of Texas. Tax-exempt institutions must include copy of exemption certificate with order. An additional charge will be made for single issues for postage and handling.

Mail to:

SMU LAW REVIEW  
Dedman School of Law  
Southern Methodist University  
P.O. Box 750116  
Dallas, Texas 75275-0116

## JOURNAL OF AIR LAW AND COMMERCE

A Publication of the SMU Law Review Association

Published since 1930, the *Journal* is the world's foremost scholarly publication dealing exclusively with the legal and economic aspects of aviation and space. The quarterly *Journal* is edited and managed by a student Board of Editors. Each volume features comprehensive leading articles; a review of items of current international interest; a sizable section of student comments, case notes, and recent decisions; book reviews; and a bibliography of current aviation and space literature.

The *Journal* also conducts the annual SMU Air Law Symposium. The 56th Annual Symposium will be held March 24-25, 2021, in Dallas, Texas.

*Single Issue Rate:*

\$16.00

*Annual Subscription Rates:*

Domestic \$43.00; Foreign \$50.00

*Address inquiries to:*

JOURNAL OF AIR LAW AND COMMERCE  
Dedman School of Law  
Southern Methodist University  
P.O. Box 750116  
Dallas, Texas 75275-0116

**CHANGE OF ADDRESS**

Please notify us of any change of name or address:

New Address: \_\_\_\_\_  
(Name of Firm or Individual)  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(City) (State) (Zip Code)

Old Address: \* \_\_\_\_\_  
(Name of Firm or Individual)  
\_\_\_\_\_  
\_\_\_\_\_  
(City) (State) (Zip Code)

\* Give your old name and address as it appears on the most recent mailing label.

Complete and mail this form to:

*Journal of Air Law and Commerce*  
Dedman School of Law  
Southern Methodist University  
P.O. Box 750116  
Dallas, Texas 75275-0116







