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## Tort Claims Arising From Military Aircraft Crashes Are Not Preempted By The Federal Aviation Act

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**TORT CLAIMS ARISING FROM MILITARY  
AIRCRAFT CRASHES ARE NOT PREEMPTED  
BY THE FEDERAL AVIATION ACT**

TIMOTHY A. LORANGER\* AND CRAWFORD APPLEBY\*\*

**ABSTRACT**

The Second Circuit's landmark ruling in *Jones v. Goodrich Pump & Engine Control Sys., Inc.* establishes crucial precedent by asserting that tort claims stemming from military aircraft crashes are not field or conflict preempted by the Federal Aviation Act (the Act). This decision, the first of its kind at the appellate level, carries far-reaching implications. The court's rationale, grounded in the Act's plain language, emphasizes that "public aircraft," including military ones, are exempt from Federal Aviation Administration regulation. Title 49, section 44701(a)(1), explicitly excludes public aircraft from the Act's purview. While the court's analysis relies on the Act's text, it is fortified by a comprehensive examination of legislative history dating back to the early days of aviation.

This Note contends that the Second Circuit's reasoning, supported by both statutory language and over a century of legislative evolution, should serve as a universally adopted guideline. The separation of civil and military aircraft regulation, initiated in the Paris Convention of 1919 and continued through subsequent legislative acts, underscores the distinct standards governing military aviation. The inherent divergence in purpose and design between civil and military aircraft, coupled with Congress's consistent exclusion of military aircraft from FAA regulation, solidifies the argument against preemption. As the sole appellate authority on this matter, the *Jones* decision provides a

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robust foundation for future courts facing Federal Aviation Act preemption challenges in “public aircraft” tort cases.

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## I. INTRODUCTION

The Second Circuit recently ruled in *Jones v. Goodrich Pump & Engine Control Sys.* that tort claims arising from military aircraft crashes are neither field nor conflict preempted by the Federal Aviation Act of 1958 (the FAAAct).<sup>1</sup> This is the first court of appeal to squarely address this issue, and its reasoning should become universal. Indeed, the court’s analysis, which is largely based on the plain language of the FAAAct, makes sense.

Title 49, section 44701(a)(1) currently provides that “[t]he Administrator of the Federal Aviation Administration shall promote safe flight of *civil* aircraft in air commerce by prescribing—(1) minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work,

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<sup>1</sup> 86 F.4th 1010, 1019, 1021 (2d Cir. 2023); Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

and performance of aircraft, aircraft engines, and propellers . . . .”<sup>2</sup> Because “civil aircraft” is defined as “an aircraft except a public aircraft,” it naturally follows that “public aircraft,” which include military aircraft, are exempt from Federal Aviation Administration (FAA) regulation.<sup>3</sup> Therefore, there is no preemption.

While the *Jones* court’s reasoning was based on the plain language of the Act, its decision is also greatly supported by legislative history dating back to the earliest days of modern flight.<sup>4</sup> This is important information to share given that only the Second Circuit has ruled on this issue. Courts analyzing this issue in the future may need to go beyond the plain language of the statute to be convinced that the FAA does not field or conflict preempt claims arising from military aircraft crashes. This Note aims to provide information for such an occasion.

This Note examines the legal implications of the Second Circuit’s ruling in *Jones*, which holds that tort claims arising from military aircraft crashes are not preempted by the Federal Aviation Act of 1958.<sup>5</sup> Part II outlines the historical distinction between civil and public aircraft, beginning with the Paris Convention of 1919 and leading up to the Air Commerce Act of 1926. Part III explores the evolution of this distinction through subsequent legislative acts, including the Civil Aeronautics Act of 1938, the Federal Aviation Act of 1958, and recent amendments. Part IV analyzes supporting case law, focusing on how the Second Circuit’s reasoning, supported by over a century of legislative evolution, should guide future courts. Finally, Part V synthesizes these findings, asserting that military aircraft have consistently been excluded from FAA regulation, thus supporting the argument against preemption in tort claims arising from military aircraft crashes.

## II. THE BIRTH OF THE CIVIL V. PUBLIC AIRCRAFT DISTINCTION

Although the Wright brothers’ first flight took place in 1903, Congress didn’t pass the first federal laws regulating aviation until the Air Commerce Act of 1926 (ACA).<sup>6</sup> “During the early years

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<sup>2</sup> 49 U.S.C. § 44701(a)(1) (emphasis added).

<sup>3</sup> 49 U.S.C. § 40102(a)(16), (41).

<sup>4</sup> *Jones*, 86 F.4th at 1017–18.

<sup>5</sup> *Id.* at 1021.

<sup>6</sup> FED. AVIATION ADMIN., PILOT’S HANDBOOK OF AERONAUTICAL KNOWLEDGE FAA-H-8083-25(c), 1–3, 1–4, (2023) (ebook), [https://www.faa.gov/regulations\\_policies/handbooks\\_manuals/aviation/phak/](https://www.faa.gov/regulations_policies/handbooks_manuals/aviation/phak/) [<https://perma.cc/NWN5-WSWZ>].

of manned flight, aviation was a free for all because no government body was in place to establish policies or regulate and enforce safety standards. Individuals were free to conduct flights and operate aircraft with no government oversight.”<sup>7</sup> The ACA was not only the first enacted legislation governing commercial aviation, it was also the first time where any such legislation drew a distinction between “civil” and “public” aircraft.<sup>8</sup>

However, the ACA was not the first time where this distinction between these types of aircraft was made, having been influenced by several previous attempts by the federal government at creating a uniform system of regulating civil aircraft both in the United States and internationally. The ACA’s legislative history states that it stemmed from and was greatly influenced by the Paris Convention of 1919 as well as unsuccessful predecessor bills to the ACA, specifically H.R. 10552.<sup>9</sup>

#### A. PARIS CONVENTION OF 1919

The Convention Relating to the Regulation of Aerial Navigation, also known as the “Paris Convention of 1919” or the “International Air Navigation Convention,” took place in Paris, France, and was signed by representatives of the United States on October 13, 1919.<sup>10</sup> However, the United States never ratified it.<sup>11</sup> The Paris Convention of 1919 (the Convention) sought several goals:

The [C]onvention recognized the sovereignty of each nation in the airspace above its territory and provided an international system applicable to all foreign air navigation in respect of such matters as registration, prohibited areas, rating of aircraft and airmen, air traffic rules, maps, meteorological information, log books, entry of merchandise, and the like.<sup>12</sup>

Chapter VII (Articles 30-33) of the Convention drew a line between how private and state aircraft were treated.<sup>13</sup> It defined

<sup>7</sup> *Id.* at 1–3.

<sup>8</sup> Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (codified as amended at 49 U.S.C. § 171, 179(d)-(e) (1940)).

<sup>9</sup> See H.R. REP. NO. 68-1262, at 1, 7 (1925).

<sup>10</sup> Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 LNTS 173 [hereinafter Paris Convention of 1919]; see S. OFFICE OF THE LEGISLATIVE COUNS., 70TH CONG., CIVIL AERONAUTICS 1, 71 (Comm. Print 1928).

<sup>11</sup> *Id.* at 155–56; see *Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume Xiii, Status of the Treaties of the Conference*, OFFICE OF THE HISTORIAN, <https://history.state.gov/historicaldocuments/frus1919Parisv13/ch5> [<https://perma.cc/5PZW-YTDD>] (last visited Feb. 29, 2024).

<sup>12</sup> OFFICE OF THE LEGISLATIVE COUNS., *supra* 10, at 54.

<sup>13</sup> See Paris Convention of 1919, *supra* 10, ch. 7, art. 30–33.

“[s]tate aircraft” to mean “[m]ilitary aircraft,” “[a]ircraft exclusively employed in State service, such as posts, customs, police,” and “[e]very aircraft commanded by a person in military service detailed for the purpose.”<sup>14</sup> “Every other aircraft shall be deemed to be a private aircraft.”<sup>15</sup> Article 32 required military aircraft to have special authorization from a foreign country in order to fly over it and accord the aircraft with the same privileges as foreign warships.<sup>16</sup>

Article 30 exempted military aircraft from being subject to the other provisions of the Convention: “All State aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention.”<sup>17</sup> For example, military aircraft were not subject to the requirements in Chapter III concerning aircraft registration and certificates of airworthiness.<sup>18</sup>

According to a study on civil v. state aircraft conducted by the International Civil Aviation Organization (ICAO) in 1994, this distinction actually originated from the International Air Navigation Conference (the Conference) that took place in Paris in 1910.<sup>19</sup> “The Conference did not formally adopt a convention, but provisions drafted heavily influenced the Paris Convention of 1919.”<sup>20</sup>

Prior to the Conference, “[i]n August 1909 a questionnaire was sent by the French Government to each State asking for preliminary official views on certain questions to be presented to the conference.”<sup>21</sup> Because one of the main reasons that the Conference was called was due to a series of German balloon landings on French soil, “[t]he United States was not invited as it was deemed to be out of the reach of such incidents, and the [C]onference was therefore limited to Europe.”<sup>22</sup>

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<sup>14</sup> *Id.* art. 30, 31.

<sup>15</sup> *Id.* art. 30.

<sup>16</sup> *Id.* art. 32.

<sup>17</sup> *Id.* art. 30.

<sup>18</sup> *See id.* ch. 3.

<sup>19</sup> *See* Int’l Civil Aviation Org. [ICAO], *Secretariat Study on “Civil/State Aircraft”*, at 6, ¶ 2.1.2, ICAO Doc. LC/29-WP/2-1 (1994), <https://www.icao.int/Meetings/LC37/References/LC.29.WP.2-1.EN-CivilState%20Aircraft.pdf> [<https://perma.cc/RS4K-C84A>].

<sup>20</sup> *Id.* ¶ 2.1.1.

<sup>21</sup> John Cobb Cooper, *The International Air Navigation Conference, Paris 1910*, 19 J. AIR L. & COM. 127, 129 (1952).

<sup>22</sup> *Id.* at 128.

“The majority of European powers which replied to a questionnaire submitted by the French Government in 1909 agreed that public and private aircraft should be distinguished.”<sup>23</sup> A rough translation of the minutes from the Conference discussed this desire:

The Commission, like the Powers moreover in their Memoranda, was unanimous in thinking that there should be private and public aircraft, just as there are private and public ships. Such a distinction is required in the first place by the nature of things: the use of aircraft appears useful both in a general interest and in a particular interest. It results, moreover, from practical necessities, for, as will be seen later, public aircraft must, in many respects, be subject to a regime different from that of private aerostats.<sup>24</sup>

The participants in the Conference (the Commission) defined “public aircraft” as “aircraft assigned to the service of a Contracting State and under the orders of an official, duly commissioned, of that State.”<sup>25</sup> It defined “military aircraft” as “[p]ublic aircraft in military service . . . when they are placed under the orders of a commander wearing the uniform, and have on board a certificate establishing their military character.”<sup>26</sup>

The Commission concluded that the rules decreed for private aircraft must be applied to public aircraft but that exceptions are necessary because of the special character of public aircraft. “Assigned to the service of a State and commanded by a duly commissioned official of that State, these aircraft are, in fact, attached to the sovereign power.”<sup>27</sup> Basically, the Commission felt that because public aircraft were owned and operated by the government itself, the rules designed to control the previously unregulated world of civil aircraft need not apply to public aircraft as the government could be trusted to follow proper measures and protocols.<sup>28</sup>

Thus, for example, “the movement of public aircraft, like that of private aircraft, cannot be made subject to the granting of a navigation permit,” and “pilots and mechanics of public aircraft

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<sup>23</sup> ICAO, *supra* note 19, at ¶ 2.1.1.

<sup>24</sup> Conférence Internationale de Navigation Aérienne, Procès-Verbaux Des Séances et Annexes, 18 mai – 29 juin 1910, [Conference International of Air Navigation, Minutes of the Sessions and Annexes] Imprimerie Nationale [National Printing House], at 69 (Google Translate trans.), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015082631725> [<https://perma.cc/YY5F-VYJU>].

<sup>25</sup> *Id.* at 73.

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

<sup>27</sup> *Id.* at 105.

<sup>28</sup> *See id.*

should not be asked to justify a certificate of competency: simply because the State has commissioned a person to manage an aircraft in its service, we can be sure that this person meets all the required aptitude conditions.”<sup>29</sup> On the other hand, the Commission also recognized that just because a pilot was authorized to fly a public aircraft, it did not automatically make the pilot authorized to fly a private aircraft: “[I]t is not the person of the operator of a public aircraft that we have in mind when we exempt him from a certificate of aptitude, but the administration which commissions it and to which only credit is given.”<sup>30</sup> Therefore, despite the exceptions given to public aircraft, the Commission recognized that they were nontransferable when pilots moved from public to private aircraft. These two worlds needed to remain separate in terms of government regulation.

It was also necessary to differentiate between types of public aircraft (e.g. military v. police aircraft because of “[t]he nature of the services for which they are responsible and the character of the officials.”<sup>31</sup> Therefore, the Commission developed certain exceptions that applied only to military aircraft.<sup>32</sup> Military aircraft would not be registered in a public database for national security reasons because “[m]aking public the table of military aircraft of a State would in reality reveal part of the mobilization plan.”<sup>33</sup> In addition, they would have separate identifying markings that differentiate them from private aircraft and other types of public aircraft and also make it easy to identify their nationality.<sup>34</sup>

If a pilot lands a military aircraft in another country:

[T]he authorities to whom [the pilot] must contact will not be the civil, police or fiscal authorities, but a military authority. This is the solution imposed by the special nature of the aircraft. It is appropriate, in fact, to preserve their dignity, officers should only have to deal with their peers.<sup>35</sup>

In this same vein, military aircraft could only land and depart from a foreign state with that state’s permission but were free to fly over a foreign state at a certain altitude unless generally prohibited from doing so by the state, and military aircraft landing

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

<sup>30</sup> Conférence Internationale de Navigation Aérienne, *supra* note 24, at 106.

<sup>31</sup> *Id.* at 105.

<sup>32</sup> *Id.* at 106–14.

<sup>33</sup> *Id.* at 106–07.

<sup>34</sup> *See id.* at 107–08.

<sup>35</sup> *Id.* at 8.



in a foreign country could, under certain circumstances, be entitled to extraterritoriality.<sup>36</sup>

Concerning the later Paris Convention of 1919 (the Paris Convention), the travaux préparatoires (i.e., legislative history materials) follow in the footsteps of the International Air Navigation Conference.<sup>37</sup> The United States participated in this conference, sending as its representatives Rear-Admiral Harry S. Knapp and Major General Mason M. Patrick.<sup>38</sup> In fact, it was General Patrick who suggested that the following language be added to the end of Article 30 to “give more clarity” to the provision: “All State aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present convention.”<sup>39</sup>

According to a rough translation of the “Report Presented to the Aeronautics Commission by the Legal Sub-Commission (Legal, Commercial, Financial)” dated April 11, 1919, the members of the Paris Convention recognized that they were only “[c]oncerned with ensuring the development of peaceful and commercial air navigation” so that the “[Paris] Convention naturally had to confine itself to the movement of private aircraft.”<sup>40</sup> However, the Paris Convention still needed to differentiate private aircraft from state aircraft, and military aircraft were also entitled to a “special regime.”<sup>41</sup> This resulted in the addition of Articles 30-33 governing state aircraft to the Paris Convention.

## B. HOUSE OF REPRESENTATIVES BILL 10522

Aside from the above aviation conferences in Paris, the legislative intent behind the ACA starts with a series of unsuccessful attempts by Congress to pass aviation regulations, ending with H.R. 10522.<sup>42</sup> Hearings on H.R. 10522 were held in December 1924 during which time its provisions were discussed and debated by members of Congress, military officials, and federal agency

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<sup>36</sup> Conférence Internationale de Navigation Aérienne, *supra* note 24, at 109–114.

<sup>37</sup> See La Paix de Versailles-Aéronautique [The Peace of Versailles Aeronautics] [Conférence des Préliminaires de Paix, Commission de L'aéronautique [Preliminaries of Peace Conference Aeronautics Commission] 1934, (Google Translate, trans.), <https://gallica.bnf.fr/ark:/12148/bpt6k1510731m> [https://perma.cc/ZQS4-PR6P].

<sup>38</sup> *Id.* at 7.

<sup>39</sup> See *id.*; Paris Convention of 1919, *supra* note 10, art. 30.

<sup>40</sup> *Id.* at 32, 503.

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

<sup>42</sup> See H.R. REP. NO. 69-572, at 7 (1926).

representatives.<sup>43</sup> Representatives of the Army and Navy spoke at the hearings, but their statements focused on the military's concern about whether the bill would impact the War Department's meteorological and air route charting activities.<sup>44</sup> It is possible that the military representatives did not discuss the distinction between public and civil aircraft due to the bill's clear language drawing a line between the two with respect to regulation.

H.R. 10522 was then reported to the House as an amendment to S. 76, and House Report No. 1262 was prepared, analyzing its provisions and the legislative intent behind them.<sup>45</sup> Ultimately, however, "owing to the lateness of the session no action was had by the House" on S. 76, and it failed to pass.<sup>46</sup> Although H.R. 10522 / S. 76 was never enacted, its language and Congress' intent behind it form the basis for the ACA.<sup>47</sup> House Report No. 572 on S. 41 (which, along with H.R. 4772, was called the Bingham-Parker bill and created the ACA) explains:

The membership of the House is referred to the hearings before the committee, held during the Sixty-eighth Congress, second session on H. R. 10522, December 17, 18, 19, 1924, entitled "Bureau of Civil Air Navigation" in the Department of Commerce, for the greater portion of the record upon which the necessity for the legislation is based. Further reference should be made to House Report No. 1262, Sixty-eighth Congress, second session for a fuller explanation of many of the features of the bill which are here but briefly adverted to.<sup>48</sup>

Much like the Paris conferences, H.R. 10522 drew a distinction between civil and public aircraft and exempted public aircraft from civil aircraft regulation:

**SEC. 22.** (a) The Secretary shall by regulation provide for the registration of aircraft as civil aircraft of the United States; but no aircraft shall be so registered (1) if it is registered under the laws of any foreign country, and (2) unless it is a civil aircraft and is owned by a citizen of the United States. Any aircraft registered shall be issued a certificate of registry . . . .

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

<sup>44</sup> See *Bureau of Civil Air Navigation in the Department of Commerce. Hearing on H.R. 10522 Before the H. Comm. On Interstate and Foreign Comm.*, 68th Cong. 30-34 (1924) [hereinafter *Hearing on H.R. 10522*] (statement of Lieut. J. Parker Van Zandt, U.S. Army & Commander M.A. Mitscher, U.S. Navy).

<sup>45</sup> See H.R. REP. NO. 69-572, at 7, 10 (1926).

<sup>46</sup> *Id.* at 7.

<sup>47</sup> See *id.* at 7-10.

<sup>48</sup> *Id.* at 10.

**SEC. 405.** As used in this act, except Title III<sup>[49]</sup>— . . . (f) The term “public aircraft” means (1) an aircraft navigated by the military or naval forces, including the Coast Guard, or the Air Mail Service of the United States, or by the Advisory Committee for Aeronautics, (2) or aircraft used exclusively in the public service of the government of a foreign country. (g) The term “civil aircraft” means any aircraft other than a public aircraft . . .<sup>50</sup>

The definition of “public aircraft” was expressly designed to “follow[] the definition of public aircraft found in article 30 of the convention,” meaning the Paris Convention of 1919.<sup>51</sup> The intent behind this distinction between civil and public aircraft can be understood by looking at the purpose behind H.R. 10522: the regulation and promotion of *commercial* aviation.<sup>52</sup> As explained by then-Secretary of Commerce Herbert Hoover during the Congressional hearings:

This bill properly covers all the phases of commercial and aerial navigation. The bureau created under it, to be placed in the Department of Commerce, has thus two general functions: One of them is inspection from a life-saving, life protecting point of view, the other is the general promotion of the industry . . .

I might say at once that I have no great feeling about what department these matters are established in. I always have believed that matters which concern civilians primarily, and in which the encouragement of civilian activities is to be brought about, had much better be undertaken in departments dealing with civilian and commercial questions. I do not feel that we get anything like the response from the commercial and economic public at the hands of the military departments that one gets from any one of the three or four departments dealing with entirely civilian issues.<sup>53</sup>

Also during these hearings, Green H. Hackworth, representing the Department of State, recommended that the definition of “public aircraft” be broadened to encompass all aircraft owned and operated by the federal government to ensure it would not be regulated by the Department of Commerce:

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<sup>49</sup> *Hearing on H.R. 10522, supra* note 44, at 13–18. (Title III is called “Application of Existing Law to Air Navigation” and sought to amend certain definitions and provisions of the Tariff Act of 1922.).

<sup>50</sup> *Id.* at 18–19.

<sup>51</sup> H.R. REP. NO. 68-1262, at 7 (1925).

<sup>52</sup> *Hearing on H.R. 10522, supra* note 44, at 22.

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

It is suggested that the definition of ‘public aircraft’ under clause 1 may be unnecessarily narrow. It is conceivable that branches of the Government other than those mentioned under clause 1 may operate aircraft for various governmental purposes. It is therefore suggested that the definition might be made to include all aircraft engaged in the public service, as is done under clause 2 with respect to foreign governments. If it is desirable that aircraft operated by certain branches of the Government should be exempt from regulations applicable to civil aircraft, as defined in the bill, and this is understood to be the purpose of the bill—it is thought that specific exceptions in those cases could be made and the definition of public aircraft under clause 1 at the same time be broadened to correspond with the definition used under clause 2.<sup>54</sup>

The House Report on H.R. 10552 (which was by then referred to as the “House Substitute” to S. 76) mirrors these sentiments.<sup>55</sup> The overall purpose of the bill was summarized as follows:

The necessity for the legislation arises from the fact that the encouragement and protection of civil air navigation is requisite in order to develop our air commerce, provide an auxiliary air fleet and personnel in time of war, develop a new manufacturing industry, and give the United States the increased economic prosperity resulting from speedier methods of transportation.<sup>56</sup>

The first of the enumerated purposes of the bill was to provide “through the proposed Bureau of Civil Air Navigation[,] . . . uniform Federal supervision of safety inspection of aircraft and airdromes, the regulation of the qualifications of aircraft crews, and the establishment and enforcement of air navigation rules.”<sup>57</sup>

However, none of these purposes were meant to directly affect military aircraft. There is no more clear indication of this than the section of the Report titled “MATTERS NOT AFFECTED BY THE HOUSE SUBSTITUTE,” which stated, in pertinent part:

Among other matters the House substitute—

1. Does not affect military, naval, or postal aircraft of the United States, except that postal aircraft are subject to air traffic rules only . . . .
2. Does not affect pending investigations of the relation of the aircraft industry and the Government during the World War.

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<sup>54</sup> *Id.* at 48–49.

<sup>55</sup> *See* H.R. REP. NO. 68-1262, at 4 (1925).

<sup>56</sup> *Id.* at 2.

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

3. Does not provide for the union of civil, military, and naval air functions in a "Department of Aeronautics."
4. Does not provide for the purchase or construction by the Government of military, naval, or postal aircraft.
5. Does not interfere with the technical research activities of the Army, Navy, National Advisory Committee for Aeronautics, or Bureau of Standards.<sup>58</sup>

According to House Report No. 1262, section 26(e) of the House Substitute "exempt[ed] from the regulations of the Secretary of Commerce air navigation of the Army, Navy, Air Mail Service, and National Advisory Committee for Aeronautics."<sup>59</sup> The reason was that: "[t]hese agencies already have in existence inspection systems for their aircraft and training systems for their airmen that are adequate, and duplication by the Secretary of Commerce is unnecessary."<sup>60</sup> "The regulations of the Secretary of Commerce will, however, apply to governmental agencies other than those above mentioned that hereafter enter the field of air navigation for the reason that such agencies will not have inspection and training systems established."<sup>61</sup> "For them to set up systems of their own would be unnecessary duplication of matters for which the Secretary of Commerce would already have available adequate facilities. The above-specified agencies of the Government are also exempted from the traffic rules and other regulations of the Secretary of Commerce."<sup>62</sup> Convention.

### C. AIR COMMERCE ACT OF 1926

The Air Commerce Act of 1926 (ACA) (born out of the Bingham-Parker bill, also known as S. 41 and H.R. 4772) established the Aeronautics Branch of the Department of Commerce, which was the first federal agency responsible for regulating commercial aviation in the United States.<sup>63</sup> The ACA defined "air commerce" to mean "transportation in whole or in part by aircraft of persons or property for hire, navigation of aircraft in furtherance of a business, or navigation of aircraft from one place to another for operation in the conduct of a business."<sup>64</sup>

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<sup>58</sup> *Id.* at 3.

<sup>59</sup> *Id.* at 16.

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

<sup>61</sup> See H.R. REP. NO. 68-1262, at 16 (1925).

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

<sup>63</sup> See H.R. REP. NO. 69-572, at 7-8 (1926); FED. AVIATION ADMIN., *supra* note 6, at 1-4.

<sup>64</sup> Pub. L. No. 69-254, 44 Stat. 568 (1926).

Just like H.R. 10522, the ACA differentiated between civil/commercial and public/noncommercial aircraft regulation, except that the ACA used an even broader definition of “public aircraft”: “Sec. 9. Definitions.—As used in this Act— . . . . (d) The term ‘public aircraft’ means an aircraft used exclusively in the governmental service. (e) The term ‘civil aircraft’ means any aircraft other than a public aircraft.”<sup>65</sup> The intent behind this distinction is clear, given the following statement from House Report No. 572, written by the Committee on Interstate and Foreign Commerce, to whom the bill was referred by the House:

It should be clearly borne in mind that the purpose of the Bingham-Parker bill is strictly the promotion of commercial aviation. It does not interfere in any way with the operation of the Army Air Service or the Navy Air Service except that military and naval aircraft are subject to the traffic rules when upon the established airways. Its only other relation to them is that the successful conduct of commercial aviation and the advance and improvements in aircraft which would result therefrom will undoubtedly be of great service not only to the Army and the Navy but to the defense of the whole country as well. Commercial aviation will add a tremendous reserve force of trained airmen in case the Nation may need their services . . . .

The fundamental features of the Bingham-Parker bill may be summarized as follows:

1. The bill relates solely to civil air navigation . . . .

4. For safety purposes the Secretary of Commerce is given broad regulatory powers with respect to the registration of aircraft, the examination and rating of aircraft and airmen, and air traffic rules, including identification and marking. Registration is confined to American-owned craft. Exemptions are provided for public aircraft of the Federal Government.<sup>66</sup>

The last sentence of the above statement referred to section 3 of a prior draft of the bill, which ultimately was excluded from the final version of the ACA. It reads, in pertinent part:

**SEC. 3. EXEMPT AIRCRAFT.**—(a) The Secretary of Commerce shall exempt from the requirements of regulations made under section 2<sup>[67]</sup>, except requirements as to registration or as to air traffic rules upon established airways: (1) Public aircraft of the United

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<sup>65</sup> *Id.*; see also 49 U.S.C. § 179 (1926).

<sup>66</sup> H.R. REP. NO. 69-572, at 8–9 (1926).

<sup>67</sup> Section 2 of this draft listed the regulatory powers of the Secretary of Commerce over aviation. *Id.* at 2.

States and, airmen serving solely in connection therewith, and air navigation facilities owned or operated by the United States or any governmental instrumentality thereof and used exclusively (except for emergency public use as provided in section 5) in the service of the Federal Government; . . .<sup>68</sup>

But the final, enacted version of the ACA did not include the section 3 exemption language. Instead, section 3 of the ACA allowed for the voluntary registration of public aircraft with the Aeronautics Branch:

**SEC. 3 REGULATORY POWERS.**—The Secretary of Commerce shall by regulation—(a) Provide for the granting of registration to aircraft eligible for registration, if the owner requests such registration. No aircraft shall be eligible for registration (1) unless it is a civil aircraft owned by a citizen of the United States and not registered under the laws of any foreign country, or (2) unless it is a public aircraft of the Federal Government, or of State, Territory, or possession, or of a political subdivision thereof. All aircraft registered under this subdivision shall be known as aircraft of the United States.<sup>69</sup>

Importantly, however, the ACA did not mandate that the Aeronautics Branch would prescribe “minimum standards” for aircraft, so the ACA had no equivalent to the current 49 U.S.C. section 44701(a)(1).<sup>70</sup> Such a provision would first be added by the Civil Aeronautics Act of 1938 when it created section 551.<sup>71</sup>

### III. THE EVOLUTION OF THE CIVIL V. PUBLIC AIRCRAFT DISTINCTION

The ACA was not amended until February 28, 1929, but this amendment merely added language to the end of section 3(d), giving the Secretary of Commerce regulatory power over civilian aviation schools.<sup>72</sup> Next, the Act of June 19, 1934, and the Act of June 20, 1934, made a series of amendments to the ACA, but none having to do with the definition of “public aircraft” or “minimum standards” for aircraft design.<sup>73</sup> Then came the next big step in the journey of civil v. public aircraft: the Civil Aeronautics Act of 1938.

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

<sup>69</sup> Pub. L. No. 69-254, 44 Stat. 568 (1926); *see also* 49 U.S.C. § 173 (1926).

<sup>70</sup> Pub. L. No. 69-254, 44 Stat. 568 (1926); 49 U.S.C. § 44701(a)(1).

<sup>71</sup> Pub. L. No. 75-706, 52 Stat. 973 (1938).

<sup>72</sup> Pub. L. No. 70-846, 45 Stat. 1349, 1404 (1929).

<sup>73</sup> *See* Pub. L. No. 73-418, 48 Stat. 1113 (1934); Pub. L. No. 73-420, 48 Stat. 1116 (1934).

## A. CIVIL AERONAUTICS ACT OF 1938

The Civil Aeronautics Act of 1938 (S. 3845) mainly transferred regulatory authority over commercial aviation to the newly created Civil Aeronautics Authority (CAA).<sup>74</sup> Its stated purpose was “[t]o create a Civil Aeronautics Authority, and to promote the development and safety and to provide for the regulation of civil aeronautics.”<sup>75</sup> The Act revised the definition of “public aircraft” and contained the first iteration of what is now 49 U.S.C. section 44701 providing, that the CAA would create “minimum standards” for aircraft design.<sup>76</sup>

The Act changed the definition of “public aircraft” to “an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes.”<sup>77</sup> “Civil aircraft” still meant “any aircraft other than a public aircraft.”<sup>78</sup>

Additionally, the Act added the “minimum standards” provision, which read:

SEC. 601. (a) The Authority is empowered, and it shall be its duty *to promote safety of flight in air commerce* by prescribing and revising from time to time—

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of *aircraft*, aircraft engines, and propellers as may be required in the interest of safety[] . . . .<sup>79</sup>

It defined “air commerce” to mean “interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.”<sup>80</sup> Congress’ intent “in adopting these various safety provisions was to insure the maximum amount of

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<sup>74</sup> FED. AVIATION ADMIN., *supra* note 6, at 1–5.

<sup>75</sup> Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (1938).

<sup>76</sup> See § 1(30), 52 Stat. at 980; § 601(a)(1), 52 Stat. 973, at 1007.

<sup>77</sup> § 1(3), 52 Stat. at 980; *see also* 49 U.S.C. § 179 (1938).

<sup>78</sup> Civil Aeronautics Act of 1938, Pub. L. No. 75-706, § 1(14), 52 Stat. 973, 978 (1938).

<sup>79</sup> § 601(a)(1), 52 Stat. at 1007 (emphasis added).

<sup>80</sup> § 1(3), 52 Stat. at 977.



safety in air transportation. Everyone agreed they were desirable and no one dissented from their adoption.”<sup>81</sup>

Importantly, in preparation of this legislation being drafted, the Federal Aviation Commission recommended that “[t]here should be no attempt to require the inclusion of military features in the design or equipment of transport airplanes.”<sup>82</sup> The Commission did “not believe that either military or civil aviation would be helped by requiring any merger of the interests of the two in the equipment of either.”<sup>83</sup> “Any similarity of design between transport and military airplanes is of almost incidental importance. We recommend that nothing be done to encourage any such similarity.”<sup>84</sup>

At one point in its report, the Commission also recognized that the military, not the Department of Commerce, was responsible for the regulation of military aircraft, and the Commission did not think it best to subject civil aircraft to the same requirements as military aircraft: “It seems to us in any case unreasonable to expect that governmental responsibility should extend to the provision of a minute and detailed inspection system in every factory, such as the Army and Navy maintain where their own work is done.”<sup>85</sup>

## B. FEDERAL AVIATION ACT OF 1958

The Federal Aviation Act of 1958<sup>86</sup> was passed:

To continue the Civil Aeronautics Board as an agency of the United States, to create a Federal Aviation Agency, to provide for

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<sup>81</sup> CHARLES S. RHYNE, *CIVIL AERONAUTICS ACT ANNOTATED: WITH THE CONGRESSIONAL HISTORY WHICH PRODUCED IT, AND THE PRECEDENTS UPON WHICH IT IS BASED*, 158 (1939).

<sup>82</sup> S. REP. NO. 74-15, at 11 (1935).

<sup>83</sup> *Id.* at 79.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 211.

<sup>86</sup> After the Civil Aeronautics Act of 1938, Congress did not make any relevant amendments to these rules until the Federal Aviation Act of 1958. *See* Civil Aeronautics Act of 1938, Pub. L. No. 76-721, § 405(1) 54 Stat. 735 (1940) (amending provisions related to certain air-mail services); Civil Aeronautics Act of 1938, Pub. L. No. 77-535, §§ 2, 3, 56 Stat. 265 (1942) (amending provisions related to the maximum number of flying hours, enforcement, and duration); Reorganization Plan No. 3 of 1940, 5 Fed. Reg. 2107 (June 30, 1940), *reprinted in* 54 Stat. 231 (1940); Reorganization Plan No. 4 of 1940, 5 Fed. Reg. 2421 (June 30, 1940), *reprinted in* 54 Stat. 1234 (1940), (transferring authority and functions of the Civil Aeronautics Authority—now called the Civil Aeronautics Board—to the Department of Commerce); *see also* Civil Aeronautics Act of 1938, Pub. L. No. 80-872, §4(c), 62 Stat. 1216, 1217 (1948) (amending a provision related to delegation of authority).

the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft . . . .<sup>87</sup>

It renumbered the relevant sections of the United States Code, moving the definition of “public aircraft” from section 179 to 101 and the provision concerning “minimum standards” from section 551 to 601.<sup>88</sup>

The Federal Aviation Act did not change the definition of “public aircraft.”<sup>89</sup> However, it did change the language of the “minimum standards” provision in a slight yet significant way:

- (a) The Administrator is empowered and it shall be his duty to promote safety of flight of *civil* aircraft in air commerce by prescribing and revising from time to time:
  - (1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety; . . . .<sup>90</sup>

The reason for this change was that, while the makers of the Federal Aviation Act were very concerned about the FAA regulating airspace for both civil and public aircraft to avoid collisions, they did not intend to apply the civil “minimum standards” to military aircraft:

The new Federal Aviation Agency would be headed by a civilian Administrator with plenary authority to—

- (a) Allocate airspace and control its use by *both civil and military aircraft*;
- (b) Make and enforce air traffic rules for *both civil and military aircraft*;
- (c) Develop and operate a common system of air navigation facilities for *both civil and military aircraft*;
- (d) Make and enforce safety regulations governing the design and operation of *civil aircraft* . . . .

Except as noted below, this title is a reenactment of existing law without substantial change . . . .

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<sup>87</sup> Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

<sup>88</sup> *Id.* at 739, 775.

<sup>89</sup> Compare Civil Aeronautics Act of 1938, Pub. L. No. 75-706, §1(30), 52 Stat. 973, 980 (1938), with Federal Aviation Act of 1958, Pub. L. No. 85-726, §101(30), 72 Stat. 731, 739 (1958).

<sup>90</sup> Federal Aviation Act of 1958, Pub. L. No. 85-726, §601(a)(1), 72 Stat. 731, 775 (1958) (emphasis added).

2. The authority of the Administrator under this title with respect to prescribing minimum rules and regulations and standards of safety is *expressly limited to civil aircraft*. For this reason, section 601 (a) (7) of existing law (relating to the authority of the Administrator to prescribe air-traffic rules) has been omitted from this title and such authority is now contained in section 307 (c) of title III of the committee amendment and applies to both civil and military aircraft . . . .<sup>91</sup>

Indeed, during the House hearings on H.R. 12616 (the House bill accompanying S. 3880) and the testimony of Clarence Sayen, President of the Air Line Pilots Association, members of Congress expressed concern over whether these regulations could apply to military aircraft:

Mr. Friedel. Are you saying that this Administrator will not have control of the safety equipment in military planes?

Mr. Sayen. That is my—the Administrator will not have any authority—

Mr. Friedel. Even safety rules and regulations, the military would not come under that?

Mr. Sayen. That is right. They never have. This Administrator will affect the military in only one field, and that is in airspace.

Mr. Friedel. I didn't get that impression from the testimony we have heard all the way through.

Mr. Sayen. There has been no advocacy that he have anything to do with the performance of military aircraft. No, that is not determined by the Civil Aeronautics Board or the Civil Aeronautics Administration, the hours of service of airmen and so on. The only rules that they share in common with us are airspace rules . . . .<sup>92</sup>

A similar viewpoint was held by Piper Aircraft in a letter submitted to the Subcommittee:

The second statement in the message from the President of the United States in which we take exception is his statement that the staffing of the Federal Aviation Agency will be in a manner as to permit the participation of military personnel as well as civilians in positions of authority. This indicates to us that should the rules for design, construction, and type certification of aircraft be vested in

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<sup>91</sup> H.R. REP. NO. 85-2360, at 2, 16 (1958) (emphasis added).

<sup>92</sup> *Federal Aviation Agency Act: Hearing on S. 3880 Before the Subcomm. On Interstate and Foreign Comm. U.S. Sen., 85th Cong. 226 (1958)* (statement of Clarence N. Sayen, President, Air Line Pilots Ass'n, Int.).

the new Federal Aviation Agency, we would have the military issuing regulations on how to design and construct civilian aircraft. If this occurs, the manufacturer of civilian aircraft would eventually be penalized from the standpoint of increased costs based on regulations which primarily would be of a military nature.

We have no objections to the establishment of a Federal Aviation Agency to be responsible for all facilities relating to the efficient and safe use of our air space whether by civilian or military aircraft. However, we do feel it necessary to transfer the rulemaking power of the Civil Aeronautics Board for the design, construction, and type certification of civilian aircraft to this new Federal Aviation Agency, nor do we feel it necessary for the military to become involved in these rules.<sup>93</sup>

Similarly, George Petty, President of the Flight Engineers' International Association, expressed his organization's opposition to H.R. 12616 to the extent that it would shift responsibility for civil aircraft design regulations from the Civil Aeronautics Board to the Federal Aviation Agency because it was concerned about military participation in drafting such regulations as a result of that change:

Furthermore, title VI safety regulations include rules governing construction, design, performance, maintenance, equipment, and instrumentation of civil aircraft. Military aircraft designed for particular missions have in the past found difficulty in complying with civil air regulations on performance. The Boeing Stratocruiser and [sic] the Curtiss-Wright OW-20T are examples of this. Yet these aircraft performed their military missions satisfactorily. If military representatives are to pass on such safety regulations for civil aircraft in the future, it seems inevitable that military experience will influence the performance, construction, design, equipment, and instrumentation of civil aircraft under the plea for uniformity in the interest of national defense . . . .

Since all of the important defects of this bill stem from the amendment to title VI of the Civil Aeronautics Act to give the Administrator the responsibility for all safety regulations, we recommend that this portion of the bill be changed to allow the CAB to retain control of all regulatory functions.

This action will insure civilian control of air commerce and maintain the commission form of regulatory body as has been the practice in governmental regulation of other industries in the public interest for many years.<sup>94</sup>

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<sup>93</sup> *Id.* at 211.

<sup>94</sup> *Id.* at 283.

Cementing the fact that FAA regulations setting the “minimum standards” for aircraft design were and are still limited just to civil aircraft is the fact that this was the last substantive change Congress made to this provision up until the present.<sup>95</sup>

### C. INDEPENDENT SAFETY BOARD ACT AMENDMENTS OF 1994

In 1994, Congress passed a series of laws overhauling Title 49<sup>96</sup>, including the provisions relating to aviation regulation.<sup>97</sup> The first of these acts was designed only to “revise, codify, and enact without substantive change certain general and permanent laws, related to transportation” and moved the definition of “public aircraft” from section 1301 to 40102 and the “minimum standards” provision from section 1421 to 44701.<sup>98</sup> The second, the Federal Aviation Administration Authorization Act, did not make any substantive changes to the definition of “public aircraft” or the “minimum standards” provision.<sup>99</sup> The third also only made a minor, non-substantive change to section 40102.<sup>100</sup>

But the third, the Independent Safety Board Act Amendments, did make important substantive changes.<sup>101</sup> Of particular

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<sup>95</sup> See Pub. L. No. 103-272, §1, 108 Stat. 745 (1994); Pub. L. No. 103-429, §6(55), 108 Stat. 4377, 4385 (1994); Pub. L. No. 106-181, § 714, 114 Stat. 61, (2000); FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 242, 132 Stat. 3258 (2018).

<sup>96</sup> Congress did not make any relevant amendments to the definition of “public aircraft” until 1994. See Pub. L. No. 87-197, 75 Stat. 466 (1961); Pub. L. No. 87-528, 76 Stat. 143 (1962); Pub. L. No. 90-514, 82 Stat. 867 (1968); Pub. L. No. 91-449, 84 Stat. 921, (1970); Pub. L. No. 91-596, § 31, 84 Stat. 1590, 1619 (1970); Pub. L. No. 91-604, 84 Stat. 1676, 1705 (1970); Pub. L. No. 93-366, 88 Stat. 409 (1974); Pub. L. No. 95-163, 91 Stat. 1278 (1977); Pub. L. No. 95-504, §2, 92 Stat. 170 (1978). Except that Congress added the following sentence to the end of the definition of “public aircraft”: “For purposes of this paragraph, ‘used exclusively in the service of means, for other than the Federal Government, an aircraft which is owned and operated by a governmental entity for other than commercial purposes or which is exclusively leased by such governmental entity for not less than 90 continuous days.’” See Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-223, Title II, §207, 101 Stat. 1486, 1523 (1987).

<sup>97</sup> Pub. L. No. 103-272, 108 Stat. 745, 1994 (revising “[c]ertain general and permanent laws related to transportation [Title 49 of U.S. Code]”); Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 (1994); Independent Safety Board Act Amendments of 1994, Pub. L. No. 103-411, 108 Stat. 4236 (1994); Pub. L. No. 103-429, 108 Stat. 4377 (1994).

<sup>98</sup> Pub. L. 103-272, §§ 1101, 40102, 44701, 108 Stat. 745, 1185 (1994).

<sup>99</sup> See Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 (1994).

<sup>100</sup> See Pub. L. No. 103-429, 108 Stat. 4377 (1994) (codifying recent laws related to transportation).

<sup>101</sup> Independent Safety Board Act Amendments of 1994, Pub. L. No. 103-411, 108 Stat. 4236 (1994).

relevance is the Independent Safety Board Act Amendments' incorporation of what was originally S. 1092, the purpose of which was "to make certain regulations, directives, and orders issued under the Federal Aviation Act of 1958 applicable to public aircraft,"<sup>102</sup> including those related to "airworthiness, supplemental type certificates, and technical standard orders" and allowing for the reporting and investigation of accidents involving public aircraft.<sup>103</sup>

However, military aircraft were expressly excluded from these requirements.<sup>104</sup> Senator Larry Pressler, the sponsor of S. 1092, explained that the intent behind the bill was "to ensure that all aircraft—regardless of their designation—be subject to stringent and rigorous safety standards."<sup>105</sup> This was necessary because "[t]hough the FAA alerts public-use aircraft operators of new safety regulations, those aircraft operators are not currently required by law to enforce those safety requirements."<sup>106</sup> Also, "allowing the NTSB to investigate and report on such public-use aircraft accidents could offer FAA experts needed information when trying to establish patterns of safety problems."<sup>107</sup> Despite these concerns, S. 1091 would only apply to "nonmilitary, public-use aircraft."<sup>108</sup> When introducing the bill, Senator Pressler "stress[ed] the extreme importance and necessity of Government oversight of aviation safety. All *nonmilitary* aircraft should be subject to tough FAA safety standards and requirements, regardless of who owns and operates aircraft."<sup>109</sup>

S. 1092's objective was later incorporated into S. 1588 and then ultimately into H.R. 2240, the bill that became the Independent Safety Board Act Amendments.<sup>110</sup> This legislation ultimately met its intended goal by changing the definition of "public aircraft," as explained by the Summary of House Amendments to the NTSB Reauthorization, stating, in relevant part:

- (a) An aircraft is no longer a "public aircraft", and therefore is subject to FAA regulation, if the aircraft is used for transporting

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<sup>102</sup> 139 CONG. REC. S12335, 12392 (daily ed. Jun. 10, 1993) (statement of Sen. Pressler).

<sup>103</sup> S. 1092, 103d Cong. § 1 (1993).

<sup>104</sup> *Id.* § 3.

<sup>105</sup> 139 CONG. REC. S12335, S12392 (daily ed. Jun. 10, 1993) (statement of Sen. Pressler).

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

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (emphasis added).

<sup>110</sup> 140 CONG. REC. S10169 (daily ed. May 12, 1994); *see also* S.1588 103d Cong. (1993).

passengers. However, the aircraft remains a public aircraft if the crew members or other persons transported are performing a governmental function such as firefighting or search and rescue, or if the aircraft is operated for noncommercial purposes by the Armed Forces or an intelligence agency of the United States.

- (b) Authorizes the FAA to grant an exemption from any legal requirements to an aircraft which has lost its status as a public aircraft as a result of this bill, if the Administrator finds that granting the exemption is necessary to prevent an undue burden on the unit of government involved, and if the Administration certifies that the unit of government has an aviation safety program effective and appropriate to ensure safe operations of the type of aircraft operated.<sup>111</sup>

Tellingly, during Congressional hearings concerning H.R. 2240 that occurred on October 6, 1994, Senator Pressler introduced into the record a series of newspaper articles that investigated the problems with the lack of oversight of public aircraft.<sup>112</sup> One article explained why the newspaper's investigation did not include military aircraft: "The Hearst examination did not include military aircraft because the Defense Department has a comprehensive set of aviation safety regulations and accident investigation programs tailored to the difficulty, hazard and special requirements of flying military missions."<sup>113</sup>

In its final form, the Independent Safety Board Act Amendments amended section 40102(a)(37) by striking former subparagraph (B) and replacing it with language that excluded aircraft transporting property or passengers for commercial purposes, with specific exceptions for non-commercial transport related to governmental functions; furthermore, such aircraft may be considered public regardless of commercial limitations if operated to respond to an urgent threat to life or property with no reasonable private operator alternative, as certified to the Administrator of the FAA.<sup>114</sup>

#### D. AVIATION INSURANCE REAUTHORIZATION ACT OF 1997

In 1997, Congress passed the Aviation Insurance Reauthorization Act, which was designed "[t]o amend chapter 443 of title 49, United States Code, to extend the authorization of the aviation

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<sup>111</sup> 140 CONG. REC. H10566 (daily ed. Oct. 3, 1994).

<sup>112</sup> 140 CONG. REC. S14418 (daily ed. Oct. 6, 1994).

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

<sup>114</sup> 49 U.S.C. § 40102(a)(37) (1994).

insurance program, and for other purposes.”<sup>115</sup> One of the “other purposes” was to “clarif[y] that aircraft owned by the United States government and leased to the manufacturer are not ‘civil’ aircraft, and do not require FAA certification and registration.”<sup>116</sup> During Congressional proceedings and debates held on November 13, 1997, Congressman Bud Shuster explained why this amendment was necessary:

The new provision on public aircraft is a response to a problem recently experienced by Boeing, McDonnell-Douglas, and other defense contractors. The problem arises because these companies will sometimes lease back from the military aircraft that they had previously sold them. They do this in order to fly them in air shows, flight demonstrations, research, development, test, evaluation, or aircrew qualification. When they do this, FAA now believes that they lose their status as public aircraft and become subject to FAA regulations. However, as military aircraft, they cannot comply with civil regulations.

In order to allow aircraft manufacturers to once again fly their aircraft in air shows and demonstrate them for customers, this bill will make clear that these aircraft retain their status as public aircraft when leased back to the manufacturer for these limited purposes. This provision will certainly not allow anyone to lease a plane from the military and use it to carry passengers or for similar commercial purposes.<sup>117</sup>

#### E. WENDELL H. FORD. AVIATION INVESTMENT AND REFORM ACT FOR THE 21<sup>ST</sup> CENTURY

Congress amended the definition of “public aircraft” again in 2000 when it passed the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“Wendell H. Ford Act”).<sup>118</sup> As part of passing this legislation, the Committee on Transportation and Infrastructure wrote House Report No. 106-167, which nicely summarized the history of the definition of “public aircraft.”<sup>119</sup>

It explained that “[u]nlike general aviation, civil, or commercial aircraft, public aircraft are not subject to FAA safety regulations, thus making such aircraft much less expensive to operate . . . . Public aircraft have been exempted from safety regulations since

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<sup>115</sup> Pub. L. No. 105-137, 111 Stat. 2640 (1997).

<sup>116</sup> S. REP. NO. 105-140 (1997).

<sup>117</sup> 143 CONG. REC. H8057, H8094 (daily ed. Sept. 29, 1997).

<sup>118</sup> Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, § 702, 114 Stat. 61, 155 (2000).

<sup>119</sup> H.R. REP. NO. 106-167, pt. 1, at 88-91 (1999).



Federal regulation of aviation began in 1926.”<sup>120</sup> Thus, problems had arisen when, for example, former military aircraft, which had never been certified, were sold and used for other purposes but could not be certified for these new purposes.<sup>121</sup>

The express purpose of the Wendell H. Ford Act, with respect to amending the definition of “public aircraft”, was to “[r]evise[] the definition of public aircraft to make it more understandable but without intending to make any substantive change in the law.”<sup>122</sup> As further explained in House Report No. 106-167:

The reported bill does not attempt to resolve the dispute between the public and private aircraft operators. Rather, it merely attempts to create a statutory context in which this dispute can be considered and hopefully addressed.

Despite attempts to explain it above, the current definition is needlessly complex. This hinders the ability of the Congress and the affected parties to consider changes.

Therefore, section 702 of the reported bill revises the definition. The purpose and intent of Congress in adding Section 702 to H.R. 1000 is solely to replace old convoluted language (laden with multiple negatives) with positive language that states existing law in terms that are readily understood by both the nation’s aviation community and the general public. Nothing in section 702 should be interpreted as a change in current public policy relating to public aircraft. Before making any changes the Committee will be mindful of the delicate balance between highly technical Federal Aviation Regulations (FARs), public aircraft operators’ need for exemptions from these rules, and the need for small businesses operating commercial aircraft to be protected from government-subsidized competition in the marketplace.<sup>123</sup>

#### F. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008

Over the next eight years, the only relevant change made to section 40102 was moving the definition of “public aircraft” from subsection (a)(37) to (a)(41) to make room for additional defined terms.<sup>124</sup> Then, the National Defense Authorization Act for Fiscal

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<sup>120</sup> *Id.* at 88.

<sup>121</sup> *See id.* at 90.

<sup>122</sup> *Id.* at 121.

<sup>123</sup> *Id.* at 91.

<sup>124</sup> Vision 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176, § 225, 117 Stat. 2490, 2528 (2003).

Year 2008 made substantive edits to the definition of “public aircraft.”<sup>125</sup>

The stated purpose of the National Defense Authorization Act for Fiscal Year 2008 was as follows:

To provide for the enactment of the National Defense Authorization Act for Fiscal Year 2008, as previously enrolled, with certain modifications to address the foreign sovereign immunities provisions of title 28, United States Code, with respect to the attachment of property in certain judgments against Iraq, the lapse of statutory authorities for the payment of bonuses, special pays, and similar benefits for members of the uniformed services, and for other purposes.<sup>126</sup>

One of those “other purposes” was to amend the definition of “public aircraft” in sections 40102 and 40125.<sup>127</sup> According to House Report No. 110-477:

The Senate amendment contained a provision (sec. 1070) that would provide the Secretary of Defense the flexibility to determine whether an operational support mission can be conducted as a civil operation in compliance with the Federal Aviation Regulations. The Secretary of Defense would have the authority to determine whether a chartered aircraft performing operational support missions is performing a civil or public aircraft operation.

The House bill contained no similar provision.

The House recedes with an amendment that would further clarify the definition of “public aircraft,” such that the term ‘other commercial air service’ would be limited to an aircraft operation that:

- (1) is within the United States territorial airspace;
- (2) the Administrator of the Federal Aviation Administration determines is available for compensation or hire to the public; and
- (3) must comply with all applicable civil aircraft rules under title 14, Code of Federal Regulations.<sup>128</sup>

Therefore, sections 40102 and 40125 were amended, in relevant part, to read as follows:

§40102 Definitions (a) General definitions.—In this part— . . . .

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<sup>125</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1078, 122 Stat. 3, 334 (2008).

<sup>126</sup> *Id.* at 3.

<sup>127</sup> *Id.* § 1078, at 334.

<sup>128</sup> H.R. REP. NO. 110-477, at 998 (2007).

(41) “public aircraft” means any of the following:

- (A) Except with respect to an aircraft described in subparagraph (E), an aircraft used only for the United States Government, except as provided in section 40125(b).
- (B) An aircraft owned by the Government and operated by any person for purposes related to crew training, equipment development, or demonstration, except as provided in section 40125(b).
- (C) An aircraft owned and operated by the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments, except as provided in section 40125(b).
- (D) An aircraft exclusively leased for at least 90 continuous days by the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments, except as provided in section 40125(b).
- (E) An aircraft owned or operated by the armed forces or chartered to provide transportation or other commercial air service to the armed forces under the conditions specified by section 40125(c). In the preceding sentence, the term “other commercial air service” means an aircraft operation that (i) is within the United States territorial airspace; (ii) the Administrator of the Federal Aviation Administration determines is available for compensation or hire to the public, and (iii) must comply with all applicable civil aircraft rules under title 14, Code of Federal Regulations . . . .<sup>129</sup>

§40125. Qualifications for public aircraft status

(a) Definitions.—In this section, the following definitions apply:

- (1) Commercial purposes.—The term “commercial purposes” means the transportation of persons or property for compensation or hire, but does not include the operation of an aircraft by the armed forces for reimbursement when that reimbursement is required by any Federal statute, regulation, or directive, in effect on November 1, 1999, or by one government on behalf of another government under a cost reimbursement agreement if the government on whose behalf the operation is conducted certifies to the Administrator of the Federal Aviation Administration that the operation is necessary to respond

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<sup>129</sup> 49 U.S.C. § 40102(a)(41).

- to a significant and imminent threat to life or property (including natural resources) and that no service by a private operator is reasonably available to meet the threat.
- (2) **Governmental function.**—The term “governmental function” means an activity undertaken by a government, such as national defense, intelligence missions, fire-fighting, search and rescue, law enforcement (including transport of prisoners, detainees, and illegal aliens), aeronautical research, or biological or geological resource management.
- (3) **Qualified non-crewmember.**—The term “qualified non-crewmember” means an individual, other than a member of the crew, aboard an aircraft—(A) operated by the armed forces or an intelligence agency of the United States Government; or (B) whose presence is required to perform, or is associated with the performance of, a governmental function.
- (4) **Armed forces.**—The term “armed forces” has the meaning given such term by section 101 of title 10.
- (b) **Aircraft Owned by Governments.**—An aircraft described in subparagraph (A), (B), (C), or (D) of section 40102(a)(41) does not qualify as a public aircraft under such section when the aircraft is used for commercial purposes or to carry an individual other than a crewmember or a qualified non-crewmember.
- (c) **Aircraft Owned or Operated by the Armed Forces.**—(1) **In general.**—Subject to paragraph (2), an aircraft described in section 40102(a)(41)(E) qualifies as a public aircraft if—(A) the aircraft is operated in accordance with title 10; (B) the aircraft is operated in the performance of a governmental function under title 14, 31, 32, or 50 and the aircraft is not used for commercial purposes; or (C) the aircraft is chartered to provide transportation or other commercial air service to the armed forces and the Secretary of Defense (or the Secretary of the department in which the Coast Guard is operating) designates the operation of the aircraft as being required in the national interest. (2) **Limitation.**—An aircraft that meets the criteria set forth in paragraph (1) and that is owned or operated by the National Guard of a State, the District of Columbia, or any territory or possession of the United States, qualifies as a public aircraft only to the extent that it is operated under the direct control of the Department of Defense.<sup>130</sup>

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<sup>130</sup> 49 U.S.C. § 40125.

#### G. FAA REAUTHORIZATION ACT OF 2018

The latest and current iterations of sections 40102 and 40125 were enacted in 2018 with the passage of the FAA Reauthorization Act, which was designed “[t]o provide protections for certain sports medicine professionals, to reauthorize Federal aviation programs, to improve aircraft safety certification processes, and for other purposes.”<sup>131</sup> It amended these sections to provide that the definition of “public aircraft” included drones owned or operated by an Indian Tribal government.<sup>132</sup>

#### IV. SUPPORTING CASELAW

Prior to the *Jones* decision in 2023, there were two cases from the Ninth Circuit ruling that “public aircraft” did not fall within the regulatory authority of the FAA. First, in *United States v. Aero Spacelines, Inc.*, the Federal Aviation Administrator penalized an aircraft manufacturer for violating civil air regulations for three flights involving a Boeing B-377 Stratocruiser that was redesigned to carry cargo for the National Aeronautics and Space Administration (NASA).<sup>133</sup> The Ninth Circuit ruled that the manufacturer was not subject to the government’s penalties because the aircraft in question was a “public aircraft” and therefore did not require a commercial operator’s certificate from the Federal Aviation Administrator.<sup>134</sup> In other words, the NASA aircraft was “exempt from regulatory control and from rules and regulations relating to ‘civil aircraft.’”<sup>135</sup>

Many years later, in *Est. of Kennedy v. Bell Helicopter Textron, Inc.*, the Ninth Circuit again waded into the “public aircraft” waters.<sup>136</sup> This product liability case arose out of a helicopter crash that occurred during aerial logging in Washington state.<sup>137</sup> Bell, the manufacturer of the helicopter, moved for summary judgment on the ground that the claims against it were barred by the General Aviation Revitalization Act of 1994 (GARA).<sup>138</sup> Of key significance for the purposes of this Note, the subject helicopter began its existence as a “Huey” TH-1L Navy surplus rotor craft and was

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<sup>131</sup> FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat. 3186, (2018).

<sup>132</sup> *Id.* at 3284, 3304–5.

<sup>133</sup> 361 F.2d 916 (9th Cir. 1966).

<sup>134</sup> *See id.* at 922.

<sup>135</sup> *Id.* at 921–22.

<sup>136</sup> 283 F.3d 1107, 1112 (9th Cir. 2002).

<sup>137</sup> *Id.* at 1109.

<sup>138</sup> *Id.*

later sold to a private party for civilian use.<sup>139</sup> While analyzing the applicability of GARA to the subject helicopter, the Ninth Circuit explained that, “[b]ecause the helicopter began its service as a military aircraft, it was not at that time a general aviation aircraft, but rather a ‘public aircraft’ which is defined to include aircraft ‘used only for the United States Government.’”<sup>140</sup> “As such, the helicopter was not required to have either a type certificate or an airworthiness certificate.”<sup>141</sup> Although the court ultimately concluded that GARA barred the claims, its observation about the status of the aircraft and how it fell outside of the purview of FAA regulations supports a finding that tort cases resulting from “public aircraft” crashes are not preempted by the Federal Aviation Act.

Turning to the *Jones* decision, it also arose out of the crash of a military helicopter (a Boeing A/MH-6M attack helicopter commonly referred to as a Mission Enhanced Little Bird) that killed two Army servicemembers.<sup>142</sup> The district court ruled that the plaintiffs’ claims were field preempted by the Federal Aviation Act, but the Second Circuit reversed while further concluding that the claims were also not conflict preempted.<sup>143</sup> With respect to field preemption, the court focused on the plain language of the relevant statutes, explaining that, “by repeatedly distinguishing between *civil* and *public* aircraft as it did, and by only creating a system for regulating the former, it appears that Congress did not intend for the military helicopter at issue here to fall within the preempted field created by the FAA.”<sup>144</sup> Indeed, the court recognized that the Department of Defense, and not the FAA, was responsible for regulating military aircraft.<sup>145</sup> Interestingly, the subject helicopter had been FAA certified at the request of the Army, but this did not affect the preemption question.<sup>146</sup> “[T]he Army’s ad-hoc contract negotiations cannot extend the scope of the field Congress intended to occupy with the FAA.”<sup>147</sup> Finally, the court also rejected a conflict preemption defense because

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<sup>139</sup> *Id.* at 1111.

<sup>140</sup> *Id.* at 1112 (citing 49 U.S.C. § 40102(a)(37)).

<sup>141</sup> *Id.*

<sup>142</sup> *See Jones v. Goodrich Pump & Engine Control Sys.*, 86 F.4th 1010, 1015 (2d Cir. 2023).

<sup>143</sup> *Id.* at 1014–15, 1019.

<sup>144</sup> *Id.* at 1018.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

“there is no indication that Congress meant for the FAA to regulate military aircraft.”<sup>148</sup>

## V. CONCLUSION

Both the plain language of the Federal Aviation Act, as well as over 100 years of legislative history, support the clear interpretation that tort claims arising from military aircraft crashes are not preempted. Beginning with the Paris Convention of 1919 and the Air Commerce Act of 1926, the U.S. government has always separated the regulation of civil aircraft from military aircraft. This is because, unlike the burgeoning, “wild west” field of civil aviation taking place in the early twentieth century, military aircraft were already being held to high standards by the military itself, thus making federal regulation of military aircraft using civil guidelines duplicative. Moreover, military aircraft were designed for specific, special purposes that could not always conform to, nor could they be aligned with, civil aircraft regulations. This reasoning persisted consistently over the passage of many amendments to Title 49, through the latest amendments in 2018, with Congress repeatedly, expressly deciding not to roll military aircraft regulation into the purview of the FAA. Therefore, because military aircraft have always been expressly excluded from federal aviation regulations that apply only to civil aircraft, all courts faced with Federal Aviation Act preemption arguments in “public aircraft” tort cases should follow *Jones* and rule that such claims are not preempted.

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<sup>148</sup> *Jones v. Goodrich Pump & Engine Control Sys., Inc.*, 86 F.4th 1010, 1019 (2d Cir. 2023).