AVIATION LAW SECTION

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IN THIS ISSUE

- Chairman's Message.....1
- FAA Has No Authority Over Commercial Drones! Or Does It?.....2
- Supreme Court Adopts Mantle of Jury Overturning Defamation Award to Captain Described By Airline Employee as Mentally Unstable and Possibly Armed.....6
- General Aviation and the Fourth Amendment: Do Aviators Waive Privacy Rights by Accepting Airmen Certificates? 12
- Aviation 101: The Montreal Convention.....18

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CHAIRMAN'S MESSAGE: OPENING THE LINES OF COMMUNICATION

by Alan Armstrong, Chair

During our annual meeting in January, one of the major topics of conversation was opening the lines of communication between our members. Arthur Park has stepped forward to serve as editor of our newsletter, and Brian Burgoon, Jennifer Andrews, Jeff Strickland and Donald Andersen have agreed to provide content for upcoming editions of our newsletter. The fact that you are reading this newsletter is a testament to the desires of these volunteers to move communication among our section members forward. It has been said in this age of the Internet that anyone with a cell phone can become a journalist. If that adage is true, then each and every one of us can send a photograph or short story or a comment about our experiences in aviation or aviation law to Arthur Park (apark@mfllaw.com) for inclusion in the newsletter. It is not my intention to overwhelm Arthur with vast quantities of data. It is, however, my intention to stimulate thought amongst each and every one of you about any small contribution you might make to help the *Aviation Law Section Newsletter* become a meaningful medium of communication. My goal is to ensure membership in the Aviation Law Section is relevant and helpful to your practice. Special thanks to Joe Hardy and Jason Kemp for stepping up in this edition.

Now that the newsletter is up and running, we are about to embark on an experiment. The experiment involves establishing a list serve account where members of the Aviation Law Section can post topics or items of discussion online for comment and advice by other members of the section. So, if you are confronted with a unique problem, a case of first impression or other topic you believe your colleagues might be able to help you with, then hopefully the establishment of our new list serve account will help you. Just as the spirit of volunteerism applies to making the newsletter a viable means of communication, the list serve account will need to be used if we are to experience benefits from the capital expended to establish the account. I do hope that each and every member of our Section will employ the list serve account as a means of communicating

continued on page 22

FAA HAS NO AUTHORITY OVER COMMERCIAL DRONES! OR DOES IT?

by Joe Hardy

I've been wrong before.

But I was embarrassed when the *Pirker* decision[1] came out about three months ago. The day before, I told someone that I'd be worried about violating state bar ethics rules if he asked me to bring a legal claim that the FAA did not have authority to regulate commercial drone operations.[2] I was skeptical of the arguments in the blog he forwarded to me.[3] "Fun ideas for the blogosphere," I told him, but no way would they hold up in a true legal forum.

I had been following the migration of drone use from the military into the civilian world over the last few years and Congress' mandate to the FAA to come up with regulations to integrate civilian drone use into the U.S. national airspace system pursuant to the FAA Modernization and Reform Act of 2012.[4] Most of all, I had been keenly aware of the desire of entrepreneurs across the country to dive into the commercial drone market, positioning themselves for when the FAA came out with those regulations, with a few, like Pirker, diving in before those regulations came out.

Along with some of the more curious of those entrepreneurs, I too wondered about the boundaries of this emerging market with its new technologies and what the FAA could and could not regulate. I had even worked with a client to get FAA approval for a commercial drone operation, and, before we did that, I looked into the existing regulations and statutes. I had concluded that, while there may be some possible arguments that the FAA could not regulate commercial drone use, it seemed very unlikely to me, and getting FAA approval would be more efficient and less painful than trying to challenge that authority.

So when the *Pirker* decision first came out, I was worried. I saw headlines like "Judge strikes down small drones ban,"[5] "Commercial Drone Pilots Cheer Judge Finding Against FAA"[6] and "Judge Strikes Down FAA's Ban On Commercial Drones."[7] Had I missed something big? Were the many entrepreneurs and I wasting time and resources trying to comply with existing regulations or wait for new ones, when we could all just launch our commercial drones without worry of any FAA oversight?

More importantly, would Amazon.com, Taco Copter and Lakemaid Brewery now launch their fleets of drones carrying parcels, tacos and twelve-packs unregulated, unmonitored and unseen into the airways, like so many flocks of geese (with the added benefits of carbon/quartz/Kevlar composites and lithium batteries) ready to get sucked into the engines of the next commercial aircraft that my family and I take for vacation to Tallahassee?

I don't think so.

In the *Pirker* decision, NTSB Administrative Law Judge Patrick Geraghty vacated a $10,000 FAA fine against a commercial drone operator assessed for "careless and reckless" operations.[8] The FAA Order of Assessment found that Mr. Pirker

> operated the aircraft directly towards an individual standing on a UVA [University of Virginia] sidewalk causing the individual to take immediate evasive maneuvers so as to avoid being struck by your aircraft…operated the aircraft through a UVA tunnel containing moving vehicles…within approximately 50 feet of numerous individuals…within approximately 20 feet of a UVA active street containing numerous pedestrians and cars… under an elevated pedestrian walkway and above an active street…directly towards a two story UVA building below rooftop level and made an abrupt climb in order to avoid hitting the building…within approximately 100 feet of an active heliport at UVA…[and] in a careless and reckless manner so as to endanger the life or property of another when you operated the above-described aircraft at altitudes between 10 and 1500 feet AGL when you failed to take precautions to prevent collision hazards with other aircraft that may have been flying within the vicinity of your aircraft.[9]

When I sat down to read the *Pirker* decision, I

feared the citation, or the clear argument, that would make me say "How'd I miss that?" Since my prior theory was that any winning argument was too deeply buried to help the regular guy startup drone operator who was unable to fund my weeks of research and skillful drafting, at least I was hoping for a decision with painstaking research and analysis for such a momentous ruling.

I got none of that. No deep secrets revealed. No amazing analysis that made me jealous for not thinking of it myself. Instead, my takeaway was that, according to ALJ Geraghty, the FAA did not have the authority to regulate the type of drone at issue because, although the FAA has regulatory authority over all aircraft, this was not an "aircraft." An aircraft is defined statutorily as "any contrivance invented, used, or designed to navigate, or fly in, the air" and under the FARs as "a device that is used or intended to be used for flight in the air."[10] So, this drone was not a device or contrivance that is used to fly in the air? That was pretty surprising to me.[11]

More surprising to me was that this finding seemed based exclusively on the FAA at times adding the title "model" to some aircraft even though (a) the title was not for purposes of exercising their claimed authority to regulate all aircraft, and (b) such distinctions came in Advisory Circulars and policy statements, which ALJ Geraghty later emphasized repeatedly were non-binding, almost irrelevant, when rebutting the FAA's arguments that it had in the past claimed authority over all aircraft, including model aircraft.[12]

ALJ Geraghty also referred to the 2012 Act.[13] Though the 2012 Act came out after the actions at issue, he considered it instructive as it specifically addresses "the introduction of civil unmanned aircraft systems into the national airspace system."[14]

He noted that the 2012 Act specifically prohibited the FAA from promulgating rules on "model aircraft" as defined and limited in the 2012 Act.[15] He concluded that such a prohibition creates a reasonable inference that Congress shared the view that there were previously no rules regarding model aircraft.[16] I can see that. Could it also be reasonable to infer that Congress shared the view (with the FAA and myself) that existing regulations already addressed model aircraft sufficiently?

Either way, to qualify as a "model aircraft" under the 2012 Act, the operation must be only for "hobby or recreational" use—a limitation stated twice in the 2012 Act.[17] That limitation is consistent with FAA materials restricting the classification of model aircraft to operations involving no compensation.[18] The flight at issue in the *Pirker* case involved compensation, which was not refuted in the decision.[19] As commercial drone operations seem to be the huge potential market that everyone pushing for drone regulation clarity is concerned about, I'm puzzled as to why this aspect of the "model aircraft" definition in the 2012 Act, which remained consistent from the FAA's historic use through the 2012 Act, was not addressed in the *Pirker* decision.

Even more important in my view is Section 336(b) of the 2012 Act, which states that "[n]othing in this section shall be construed to limit the authority of the [FAA] Administrator to pursue enforcement action against persons operating model aircraft who endanger the safety of the national airspace system." That is exactly what the FAA was doing in the *Pirker* case.[20] The fine was based on FAR § 91.13(a), which prohibits the operation of an aircraft "in a careless or reckless manner so as to endanger the life or property of another."[21]

Thus, while it may be a reasonable inference that Congress at the time of passing the 2012 Act saw no specific regulations regarding model aircraft, as the *Pirker* decision concludes, I'd say that it is beyond inference that the 2012 Act confirms that the

FAA has always had, and continues to have, authority to enforce "careless & reckless" violations of any aircraft, including "model" aircraft. Here again, I'm perplexed by ALJ Geraghty's using guidance from a section of the 2012 Act addressing model aircraft to draw a "reasonable inference" while not mentioning another portion of the same section that provides express guidance applicable to his case.

After reading the FAA's Appeal Brief in the *Pirker* case,[22] I was also struck (and jealous for not catching myself) how ALJ Geraghty labeled Pirker's "device" as a "model aircraft" (which is somehow not an "aircraft") without discussion of any factor, not just the hobby/compensation factor.[23] Perhaps I shared an unconscious prejudice with ALJ Geraghty that something with a wingspan of 56 inches, weighing five pounds, would naturally be considered "model" if not for its commercial operation.

But if we're going to exclude an entire category of flying objects from the FAA's regulatory authority based on the label "model," shouldn't we have some guidance on what that means, as Congress provided in the 2012 Act?[24] Pre-2012 Act under *Pirker*, could a de-militarized Predator be used for commercial operations, entirely unregulated, if the manufacturer stuck "Model" in its name? How about if the operator called it a model?

Okay, maybe I was prejudiced, having gone on record that I'd have to see something pretty clear to convince me that the FAA lacked authority to regulate any commercial drones. But the reaction to the *Pirker* decision makes me think that I'm not the only one who sees it this way.

With so many people itching to break into the potentially huge commercial drone market, and some already doing so, I wondered if the *Pirker* decision could be seen as the green light.[25] I also wondered whether there would be a corresponding panic from the FAA, maybe Congress too, to shut the gates before it was too late to reverse the tide—emergency rules, injunctions, public hearings with expedited bills, the works.

But that didn't happen either. The FAA did publicly announce that it was appealing the decision the day after it was issued.[26] They claim that an appeal has the effect of a stay.[27] I'll assume that's true but also presume that it wouldn't matter much to those already skirting what appeared to be the rules before *Pirker*. Beyond that, I haven't heard much more from the FAA, and nothing from Congress.

My purely non-scientific surveys lead me to believe, however, that while there may be a couple of new cases challenging FAA fines for drone operations based on *Pirker*, the commercial drone wannabes have not flooded the airways with unregulated drones, the FAA continues to bring enforcement actions as resources allow and Congress does not seem overly concerned.

Which brings me to my conclusions. *Pirker*, even if upheld, is limited and outdated, and therefore does not signal the wild west of commercial drones that many predicted. Despite its outcome on appeal, it only addresses "model aircraft," however that may be defined pre-2012 Act. More importantly, as noted in the decision, it pre-dates the 2012 Act.[28] The way I read the 2012 Act, as described above, it more clearly reaffirms the FAA's authority to bring "careless and reckless" enforcement actions against all aircraft operators—manned or unmanned, commercial or recreational, model or otherwise. It also reaffirms that, with the exception of a model aircraft, which now is statutorily limited to aircraft involved in operations solely for hobby or recreational purposes, no other drones may be operated in U.S. airspace without specific FAA authority, whether by regulations of general applicability, specific authorization or waiver.

I came to these conclusions before reading the FAA appeal brief.[29] Because most of my clients face FAA regulatory issues, I often disagree with, even argue with, the FAA. And I usually enjoy seeing an NTSB administrative law judge hold the FAA to task rather than rubber-stamping a decision, especially when it comes to "careless and reckless" penalties, which many see as a catch-all accusation if the FAA can't find something more specific to charge. So when I found myself agreeing with the FAA's arguments, I felt a bit like a traitor at first.

But then I realized that when I do argue with the FAA, it is about the application of specific regulations to specific situations, not about the FAA's fundamental mission to keep our airspace safe. Not only do I question the *Pirker* decision, I am also concerned with the safety consequences if it stands—that at least pre-2012 Act, a person can fly a drone, with no defined restrictions on material, size, weight

or thrust, at any altitude, at people, under walkways, in tunnels, up the side of an occupied building, feet from an active helipad, with the FAA helpless to prevent it if the operator convinces an administrative law judge that it is a "model" aircraft, or if the ALJ simply applies that label without discussion as in the *Pirker* decision.

I then read Pirker's reply brief on appeal.[30] Here was the deep analysis and research, with lengthy arguments, I had expected for trying to disprove the FAA's authority. Almost twice as long as the initial *Pirker* decision and the FAA appeal brief combined, detailed arguments addressing 47 cases and 14 statutes, references to studies, reports and some damning materials not brought up by ALJ Geraghty or the FAA (and in some cases, not publicly available from what I could tell.)[31] A very impressive work of research, analysis and drafting.

However, despite seeing several points with which I agreed, and enjoying the comparison to pornography for what could be the test to determine if something is a "model" aircraft and therefore free from all FAA oversight ("I know it when I see it,")[32] I still didn't see how Pirker's drone could not be a "device that is used or intended to be used for flight in the air" and therefore subject to FAA oversight, at least for careless and reckless operations.[33] Moreover, I did not see, nor expect to see, any discussion of the effect of the 2012 Act, which Act I believe at least hurts Pirker's chances on appeal, and at most makes the *Pirker* decision, if upheld, inapplicable and unhelpful to any drone operations conducted after Valentines Day of 2012.[34]

To recap, if I were a betting man, I'd go with the full NTSB reversing *Pirker*. Even if affirmed, however, I believe that *Pirker* will help only drone operators that the FAA fined for operations pre-2012 Act (Feb. 14, 2012) and only for operations involving model aircraft, however that ends up being defined pre-2012 Act. Commercial drone operators today, with the passage of the 2012 Act, regardless of size, probably have to continue to wait for new drone regulations or obtain specific authorization. Likewise, all drone operators post-2012 Act, even "model aircraft" as that is now defined in the 2012 Act, are at least subject to FAA enforcement actions for operating in a careless and reckless manner.

But I've been wrong before.

Joe Hardy is a pilot and aviation transactional and regulatory attorney with Mozley, Finlayson & Loggins LLP. The opinions in this article are solely those of the author and do not necessarily reflect the opinions or positions of Mozley, Finlayson & Loggins LLP or any other individual attorneys with the firm. He can be reached at jhardy@mfllaw.com.

Endnotes

1 *Huerta v. Pirker,* 2014 NTSB Lexis 22 (Mar. 6, 2014), *appeal docketed*, No. CP-217 (N.T.S.B. Mar. 7, 2014).

2 I'm using "drones" here to refer generally to any flying device that is controlled by means other than a pilot on board the device. I include what the FAA and Congress define as unmanned aircraft systems (UASs), and what some call unmanned aircraft vehicles, remotely piloted vehicles or remotely operated aircraft. I am aware of and acknowledge the shortfalls of the term "drones" but choose to use it here for simplicity and common recognition.

3 I have no cite for that blog, as I deleted it, sure of its irrelevance. I had also done my own preliminary research, however, which suggested to me that, while there may exist some argument for FAA non-authority, I had found only hints in my research, and trying to find something solid would take many more hours of research, and I was not hopeful of finding a smoking gun.

4 *See* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, Sec. 332, 126 Stat. 11, 73 (Feb. 14, 2012) (codified as amended in scattered sections of 49 U.S.C.) (hereinafter 2012 Act").

5 Kevin Robillard, POLITICO, Mar. 6, 2014, http://politi.co/1fbY0ZE.

6 Alan Levin, Bloomberg, Mar. 7, 2014, http://www.bloomberg.com/news/2014-03-06/drone-pilot-s-fine-dropped-by-judge-finding-against-faa.html.

7 Kelsey D. Atherton, Popular Science, Mar. 7, 2014, http://www.popsci.com/article/technology/judge-strikes-down-faas-ban-commercial-drones.

8 *Pirker*, 2014 NTSB Lexis 22 at *1, *16, Att. 1.

9 *Id*. at *19-21.

10 *Id*. at *3-4 (citing the definitions of aircraft contained in 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1), *7-8, *14.

11 See what you think: http://www.ritewingrc.com/Zephyr_II_ARF.html.

12 *See Pirker*, 2014 NTSB Lexis 22 at *5-11.

13 *Id*. at *13-14 (citing 2012 Act, *supra* note 5).

14 *Id.* at *13.

15 *Id.*

16 *Id.* at *13-14.

17 2012 Act, *supra* note 5, Sec. 336(a)(1) & 336(c)(3), 126 Stat. 77-78.

18 *See, e.g.,* 72 Fed. Reg. 6689, 6690 (Feb. 13, 2007); FAA Notice of Policy, Docket No. FAA-2006-25714, 5-6 (Feb. 6, 2007).

19 *Pirker*, 2014 NTSB Lexis 22 at *2, *19.

20 *Id.* at *2, *19, *21.

21 14 C.F.R. § 91.13(a).

22 Administrator's Appeal Brief, *Huerta v. Pirker*, No. CP-217 (N.T.S.B. Apr. 7, 2014) (hereinafter "FAA Appeal Brief"), copy available at https://dl.dropboxusercontent.com/u/64117259/Pirker-FAA%20Appeal%20Brief.pdf.

23 *Id.* at 7-9.

24 *See* 2012 Act, *supra* note 5, Sec. 336, 126 Stat 77-78.

25 *See* notes 6-8 *supra* and accompanying text.

26 Press Release - FAA Statement, Mar. 7, 2014, http://www.faa.gov/news/press_releases/news_story.cfm?newsId=15894

27 *Id.*

28 *Pirker*, 2014 NTSB Lexis 22 at *13.

29 *See* note 23 *supra*.

30 Respondent's Reply Brief, *Huerta v. Pirker*, No. CP-217 (N.T.S.B. May 12, 2014) (hereinafter "Pirker Reply Brief"), copy available at https://dl.dropboxusercontent.com/u/64117259/Pirker%20Appeal%20Reply%20Brief.pdf.

31 *Id.*

32 Pirker Reply Brief, *supra* note 30 at 13 (quoting *Jacobellis v. Ohio,* 378 U.S. 184, 196 (1964) (Stewart, J., concurring)).

33 *See supra* notes 11-12 and accompanying text.

34 *See* discussion of Section 336(b) of the 2012 Act accompanying *supra* notes 21-22.

SUPREME COURT ADOPTS MANTLE OF JURY OVERTURNING DEFAMATION AWARD TO CAPTAIN DESCRIBED BY AIRLINE EMPLOYEE AS MENTALLY UNSTABLE AND POSSIBLY ARMED

by Alan Armstrong

On Jan. 27, 2014, the U.S. Supreme Court in *Air Wisconsin Airlines Corporation v. Hoeper*[1] reversed a decision of the Colorado Supreme Court. The Colorado Supreme Court had affirmed a decision by the Colorado Court of Appeals, finding that a jury award in a defamation action was supported by ample evidence to the extent an employee of the airline maliciously, and with reckless disregard for the truth or falsity, falsely reported to TSA officials that the captain was mentally unstable and could be armed.

The legal question in the case was whether the airline employee who gave the allegedly false report to TSA officials was immune from a claim of defamation. This required an interpretation of 49 U.S.C. § 44941 included in the Aviation and Transportation Security Act (ATSA). Section 44941(a) generally provides immunity to a person reporting a security issue to government officials. However, there is an exemption from the immunity provisions if the report was false, inaccurate or misleading or if the report was made with reckless disregard as to the truth or falsity of the report.[2]

The case was tried before a jury in Colorado which found in favor of the pilot, awarding compensatory damages of $849,625, punitive damages of $391,825, and costs of $222,123.09.[3] When the case was tried, Colorado had 30 statutes that conferred qualified immunity in a variety of circumstances, but there was no reported case where a trial court had ever taken from the jury an immunity question involving a disputed issue of material fact. After Air Wisconsin was unsuccessful in its appeal to the Colorado Court of Appeals and in its appeal to the Colorado Supreme Court, it applied for *certiorari* to the U.S. Supreme Court.

The U.S. Supreme Court, in a majority opinion written by Justice Sotomayor, reversed the Colorado Supreme Court and found that the "gist" of the statements were true and, therefore, were not materially false as required to forfeit immunity protections of ATSA.[4] Justices Scalia, Thomas and Kagan dissented, concluding that while the majority was correct in finding that a statement had to be materially false to waive the immunity provisions of ATSA, it was not the province of the Supreme Court to substitute its determination about whether the statements were materially false or not, this being within the exclusive province of the jury.

The Evidence Before the Trial Court

William Hoeper was an Air Wisconsin captain based in Denver. Due to a restructuring of the airline, he was required to upgrade to a different aircraft. He failed on three occasions to successfully accomplish his proficiency check. A waiver was negotiated whereby Hoeper could have a fourth opportunity to complete his checkride.

On Dec. 8, 2004, Hoeper flew from Denver to Virginia for simulator training with Mark Schuerman, an instructor pilot, and the training took place in the simulator of another company. Around 11 a.m., Schuerman called Patrick Doyle, an Air Wisconsin Fleet Manager, and told him that Hoeper had blown up and was very angry. According to Schuerman, Hoeper had failed to cope with a challenging scenario, and the simulator showed the engines "flam[ing] out" due to loss of fuel. As Schuerman began to tell Hoeper he should know better, Hoeper responded angrily. At this point, Hoeper took his headset off and tossed it on the glare shield saying, "This is a bunch of [expletive deleted]. I'm sorry, you are railroading the situation and it's not realistic."[5] Doyle then booked Hoeper a flight on a United Airlines flight back to Denver. Several hours after Schuerman's report to Doyle, Doyle discussed with his concerns with Kevin LaWare, the vice president of operations, and Ken Orozco, the managing director of flight operations, and Robert Frisch, the assistant chief pilot. It was their assessment that Hoeper's employment was going to be terminated as a result of his failure to complete the simulator training.[6] Next, Orozco mentioned that Hoeper was a federal flight deck officer (FFDO). Under 49 U.S.C. § 44921(a), FFDOs are permitted "to carry a firearm while engaged in providing air transportation."[7] Hoeper had become an FFDO in 2004 and had been issued a firearm. By law, Hoeper was not allowed to carry the firearm during his trip to the training facility in Washington, D.C., because he was not "engaged in providing air transportation."[8]

One of the officials engaged in this group discussion opined that Denver Airport's security procedures made it possible for a crew member to bypass screening so that Hoeper could have, theoretically, carried his gun despite the rule. In fact, Frisch testified he was aware of one incident where an Air Wisconsin pilot had come to training with his FFDO weapon.[9] On the basis of this discussion, a concern arose about whether Hoeper *might* be armed, even though he was not supposed to have his weapon with him under the statute.[10]

As the Air Wisconsin personnel speculated about what Hoeper might or might not be doing, there was a discussion about a Federal Express flight engineer who had been under investigation for misconduct and who had entered the cockpit of a FedEx flight and began attacking the crew members with a hammer before being subdued.[11] There was also a discussion about a ticket agent who obtained a gun and brought it aboard a Pacific Southwest Airlines flight, shooting his supervisor and the flight crew leading to a fatal crash.[12]

In light of Hoeper's outburst in the simulator and his impending termination as well as the theoretical possibility that he might be armed, and considering

the history of assaults by disgruntled airline employees, LaWare decided that the airline "need[ed] to make a call to the TSA," to let the authorities know "the status" of the situation.[13] Doyle offered to make the call. Doyle made two statements to the TSA: (1) that Hoeper "was an FFDO who might be armed" and the airline was "concerned about his mental stability and the whereabouts of his firearm," and (2) that an "[u]nstable pilot in [the] FFDO program was terminated today."[14]

Ironically, Doyle who "booked Hoeper on a United Airlines flight back to Denver,"[15] would later testify he never told the TSA anything about Hoeper's mental stability, even though the subject line of the TSA email memorializing his call read "Unstable pilot in FSDO program was terminated today."[16]

As a consequence of Doyle's call to the TSA, the TSA ordered Hoeper's plane to return to the gate. Officers boarded the plane, removed Hoeper, searched him, and questioned him about the location of his gun. When Hoeper stated that the gun was at his home in Denver, a Denver-based federal agent went to Hoeper's home to retrieve the weapon.

The Decision of the Colorado Supreme Court

After being heard by the Court of Appeals,[17] the Colorado Supreme Court granted *certiorari* and also affirmed the jury verdict,[18] finding as follows:

1. the trial court erred in submitting the issue of qualified immunity to the jury, since federal procedural law governed, rather than Colorado law;[19]
2. federal qualified immunity is immunity from suit rather than a mere defense to liability;[20]
3. immunity under ATSA should be determined by the court as a matter of law before trial;[21]
4. where a factual dispute is presented, the court should conduct an evidentiary hearing and make findings of fact;[22]
5. in light of the jury's findings following instructions, any error in submitting the issue of qualified immunity to the jury was harmless;[23]
6. there was no reason to remand the case for further proceedings since the court had before it sufficient evidence to conclude that Air Wisconsin was not entitled to qualified immunity;[24]
7. based on the appellate record, the airline employee's statements about the captain were made with reckless disregard to whether they were true or false;[25]
8. Doyle's actions belied his claims that Hoeper was mentally unstable since he directed an employee to drive Hoeper to the airport, booked a flight for Hoeper and could have instructed Hoeper to go return to his hotel room for the evening until his mental state improved; "at a minimum, Doyle entertained serious doubts as to the truth of the statement's implication that Hoeper was so unstable that he might pose a threat to aircraft or passenger safety";[26]
9. consistent with *New York Times v. Sullivan,* there was clear and convincing evidence in the record of actual malice toward Hoeper;[27]
10. based upon its *de novo* review of immunity under ATSA, "Air Wisconsin made statements to the TSA with reckless disregard as to their truth or falsity," and no First Amendment protections barred Hoeper's recovery of presumed or punitive damages;[28] and
11. Air Wisconsin's characterization of Doyle's statements as opinions was unavailing since "[e]ven a statement of bare opinion is actionable where it implies an assertion of objective fact."[29]

Photo by Pablo Martinez Monsivais, AP

The Colorado Supreme Court affirmed the Court of Appeals opinion (and the jury verdict), conclud-

ing that there was "sufficient evidence" and "substantial evidence" to support the jury's findings. Although the crux of the defamatory statements was that Hoeper was so mentally unstable that he might constitute a threat to aircraft and passenger safety, the record revealed that Hoeper merely lost his temper and "blew up" at one test administrator.[30] However, "Hoeper did not exhibit any other irrational behavior, and no other person who interacted with Hoeper after the confrontation believed Hoeper to be mentally unstable or believed Hoeper to pose a threat to others at the testing center or the airport."[31] The Colorado Supreme Court held that ATSA immunity was a question of law for the trial court to decide before trial, and the trial court may make findings of fact on disputed issues at an evidentiary hearing.[32] Thus, the trial technically erred by submitting the immunity issue to the jury for determination. Importantly, the Colorado Supreme Court found this to be harmless error because Air Wisconsin was not entitled to immunity. "In addition, clear and convincing evidence supports a finding of actual malice, Air Wisconsin's statements were not protected as opinion, and the evidence is sufficient to support the jury's determination that the statements were false."[33]

The dissent asserted that "the majority makes a significant procedural error in deferring to the jury verdict in this case to conclude the statements were false" because the court must decide the immunity issue as a matter of law.[34] Thus, the trial judge "is the finder of fact" in the Colorado Governmental Immunity context.[35] The dissent also noted "the majority's troubling rationale, which I fear may threaten to undermine the federal system for reporting flight risks."[36]

The U.S. Supreme Court Invades the Province of the Jury

Despite the fact that the Colorado Court of Appeals declared its review of the jury's verdict was deferential,[37] and despite the Colorado Supreme Court's assessment that "we have sufficient evidence before us to conclude as a matter of law that Air Wisconsin is not entitled to immunity,"[38] the majority opinion of the U.S. Supreme Court took a different approach. The Court could not affirm the denial of ATSA immunity for several reasons. "First, to the extent that the immunity determination belongs to the court…a court's deferential review of jury findings cannot substitute for its own analysis of the record."[39] Second, the jury did not find that any falsity in Air Wisconsin's statements was "material" due to the language of the trial court's instructions.[40] "Third, applying the material falsity standard to a defamation claim is quite different from applying it to ATSA immunity" based on "the identity of the relevant reader or listener" of the statement made (reputation in the community vs. authorities' perception of a threat.) [41]

Assuming the mantle of a jury, Justice Sotomayor and the majority characterized the misstatements by Doyle to the TSA as immaterial. For example, when Doyle told the TSA that Hoeper may be armed, the Supreme Court majority asserted that Doyle should have said he had no reason to think he was actually carrying his gun.[42] Then, to the extent that Doyle related to the TSA officials that Hoeper was mentally unstable, the majority of the Supreme Court surmised that getting angry in the simulator following the failure of a checkride was the same as being mentally unstable.[43] Finally, the Supreme Court admitted that Hoeper had not been terminated when Doyle made the call to the TSA, but that distinction was immaterial.[44]

The Supreme Court, after brushing aside three respects in which the statements made by Doyle to the TSA were false, then opined that "[t]he minor differences are, for the reasons we have explained, immaterial as a matter of law in determining Air Wisconsin's ATSA immunity."[45]

The Dissent by Scalia – the Voice of Reason

Justice Scalia (joined by Justices Thomas and Kagan) dissented from the majority opinion, concluding that after the issue of materiality was addressed—the very reason supporting the grant of *certiorari* of the case—the matter should have been remanded for further proceedings.[46] Justice Scalia observed that the majority had concluded as a matter of law that Air Wisconsin's report to the TSA about Hoeper was not materially false and declared that "the court in my view reaches out to decide a factbound question better left to the lower courts, and then proceeds to give the wrong answer."[47] The dissent noted that materiality is a mixed question of law and fact that has been typically resolved by juries.[48]

The dissent argued that "the jury has a vital role to play in the materiality inquiry, which entails delicate assessments of the inferences a reasonable decision maker would draw from a given set of facts and the significance of those inferences to him and is therefore peculiarly one for the trier of fact."[49] Scalia believed that "such a question cannot be withdrawn from the jury unless the facts and the law will reasonably support only one conclusion on which reasonable persons could not differ."[50] The same rule should apply to a determination of immunity from suit.[51]

The dissent then discussed the theory of the case from Hoeper's perspective and suggested that the jury could have reasonably believed that (a) he was being set up for termination, (b) the checkrides were deliberately manipulated to ensure his termination, and (c) he was angry because he knew management at the company had set him up. Such a theory of the case negates the defense argument that a report to the TSA that Hoeper was mentally unstable was not materially false. To the contrary, if Hoeper's account was believed, then the jury properly concluded the statements were materially false. Accordingly, a jury could have concluded, correctly, that "Hoeper did nothing more than engage in a brief, run-of-the-mill, and arguably justified display of anger that included raising his voice and swearing, but that he did not cause anyone, including the person on the receiving end of the outburst, to view him as either irrational or a potential source of violence."[52]

To the extent the majority sought to minimize the characterization of Hoeper as mentally unstable by stating that mentally unstable did not connate mental illness and was merely one connotation, the dissent noted that the majority's position was disingenuous. The majority "does not even attempt to describe another usage, let alone one that would be a materially accurate description of the facts of the case as jury might find them."[53]

The dissent concluded that "it is simply implausible, that, taking the facts of this case in the light most favorable to Hoeper, a reasonable jury would *have* to find that the report of mental instability would have no effect upon the course of action determined by the TSA. The court's holding to the contrary demonstrates the wisdom of preserving the jury's role in this inquiry, designed to inject a practical sense that judges sometimes lack."[54]

Conclusion

The Supreme Court's decision does not bode well for pilots or anyone asserting defamation claims against airlines arising out of reports to the TSA. Several lessons are clear after reading the opinions of the Colorado Court of Appeals, the Colorado Supreme Court and the U.S. Supreme Court:

1. Any plaintiff asserting a defamation claim against an airline will confront a defense motion for summary judgment which the trial court must decide. If there is a factual dispute, the trial court must render findings of fact and conclusions of law in pronouncing its decision. If the plaintiff cannot persuade the trial court that there are material questions of fact that the statements were materially false, made with reckless disregard to whether they were true or not and/or made with actual malice, the case will be dismissed, summarily. There will be no jury trial.
2. Recognizing *Hoeper* is the first reported case in ATSA's 10-year history where immunity was rejected, very few practitioners will counsel their clients to sue an airline for defamation arising out of a false report by the airline to the TSA.
3. If the trial court finds that there are material questions of fact as to whether the report to the TSA was materially false, made with reckless disregard as to whether it was true or not and/or made with actual malice, then and only then will the case be submitted to the jury, presumably with the airline retaining any pertinent defenses, e.g., that the statement was substantially true, the absence of malice, and departures from an accurate report were immaterial.

With all due respect to the opinion of the majority in *Hoeper*, the U.S. Supreme Court should never have assumed the mantle of the jury and engaged in a series of rationalizations about why Doyle's report to the TSA—that Hoeper was "mentally unstable," could possibly be armed, and had been terminated—did not matter.

The Supreme Court failed to address the fact that Doyle denied he told the TSA *anything* about Hoeper's mental stability[55] even though the TSA email summarizing Doyle's call was captioned: "Unstable pilot in FFDO program was terminated today"[56] Strike One.

The Supreme Court failed to address Doyle's conduct in back-dating his notes to the time of Hoeper's second failed test to say that he [Doyle] was in "fear of [his] own physical harm."[57] Strike Two.

The Supreme Court also failed to address Doyle's conduct in back-dating his notes a second time. The original line provided that "[a]fter heated discussion with [Hoeper], and due to my concerns for my safety," but Doyle later changed it to read as follows: "due to my concerns for my safety and the safety of others at the [testing facility]."[58] Strike Three.

If the Supreme Court wants to assume the mantle of the jury and decide such issues of fact, it should do a better job of addressing the factual issues than it did in reversing the judgment in favor of Hoeper. After all, even a first year law student knows *falsus in uno, falsus in omnibus* [false in one thing, false in everything].

It is disappointing to realize the U.S. Supreme Court granted *certiorari* in a defamation case (resulting in a verdict below stratospheric heights) where the net result was for the Court to, in effect, grant summary judgment to the airline based on *its* assessment that the statements by the airline employee were immaterial. In substituting its assessment of materiality over the jury's, all the Supreme Court did is advance a series of meaningless and unpersuasive rationalizations.

Prayer for Congressional Action

One of the basic tenets of the American government and the law has been, that we, the people, ultimately decide our destiny, and our peers (the jury), subject to instructions from the court, determine the outcome in a case involving disputed questions of fact. The majority decision in *Hoeper* signals that all that has changed. The U.S. Supreme Court is no longer just the Supreme Court. It is the "Supreme Jury." It can divine from reading a cold transcript what *really matters*. Jurors, who sit through endless days of testimony, who observe and evaluate the demeanor of witnesses, who recognize who is lying and who is telling the truth are in a better position to evaluate whether the statements were made with malice, were made with reckless disregard for whether they were true or not and whether they were materially false.

Since Congress passed ATSA, and since the Supreme Court in *Hoeper* purported to be affecting the will and intent of Congress, then Congress can amend ATSA to say that it is not the intent of Congress to artificially abridge a victim's right to a trial by jury by a pre-trial motion to dismiss or motion for summary judgment. Congress could, through appropriate amendments to ATSA, state that only if there is clear and convincing evidence the statements were materially true, were not made with malice and were not made with reckless disregard for their truthfulness should the case be taken away from the jury and dismissed in the context of a pre-trial motion for summary judgment or pre-trial motion to dismiss. Except in the most plain and palpable cases, jurors, not judges, should make the requisite factual determinations in the administration of justice.

With all due respect, the Supreme Court majority in *Hoeper* went too far in protecting and promoting immunity under ATSA. Congress needs to restore the balance.

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Endnotes

1 __ U.S. __, 134 S. Ct. 852 (2014).
2 49 U.S.C. § 44941(b).
3 *Hoeper v. Air Wisconsin Airlines Corp.,* 232 P.3d 230 (Colo. App. 2010).
4 134 S. Ct. 852, 866 (pagination subject to change).
5 Sup. Ct. App. 203-204.
6 *Id.* at 278.
7 49 U.S.C. § 449921(f)
8 *Id.*
9 Sup. Ct. App. 292.
10 *Id.* at 279.
11 *U.S. v. Calloway*, 116 F.3d 1129, 1131 (6th Cir. 1997).
12 Malnic, *Report Confirms that Gunman Caused 1987 Crash of PSA Jet*, L.A. Times, Jan. 6, 1989, p.29.
13 Sup. Ct. App. 282.
14 Sup. Ct. App. 111a. The latter statement appears in the record as the subject line of an internal TSA email, summarizing the call from Doyle . Sup.Ct. App. 414.
15 134 S. Ct. 852, 858.
16 *See* 320 P.3d 830 at 834.

17 *Hoeper v. Air Wisconsin Airlines Corp.,* 232 P.3d 230 (Colo. App. 2010).

18 *Air Wisconsin Airlines Corp. v. Hoeper,* 320 P.3d 830 (Colo. 2012).

19 *Id.* at 835-36. The Court has previously consulted the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. § 11111 (2006), concluding immunity is a question of law for the court to decide. . *Id*. (citing *N. Colo. Med. Ctr., Inc. v. Nicholas*, 27 P.3d 828, 838 (Colo. 2001)).

20 *Id.* at 836.

21 *Id.* at 837.

22 *Id*.

23 *Id.* at 837-38.

24 *Id*. at 838-40.

25 *Id*. at 840 (citing *New York Times v. Sullivan,* 376 U.S. 254, 280 (1964)).

26 *Id.* at 839.

27 *Id.* at 840.

28 *Id.*

29 *Id.* at 841 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990) (First Amendment); *Raytheon Technical Servs. Co. v. Hyland,* 641 S.E.2d 84, 91 (Va. 2007) (Virginia Constitution).

30 *Id.*, at 842.

31 *Id*.

32 *Id*.

33 *Id.*

34 *Id.* at 846-47 (Eid, J., dissenting).

35 *Id*. at 847.

36 *Id.*

37 232 P.3d at 239.

38 320 P.3d at 838.

39 134 S. Ct. 852. 863.

40 *Id.*

41 *Id.*

42 *Id*. at 864-65.

43 *Id.* at 865-66.

44 *Id.* at 865.

45 *Id.* at 867.

46 *Id.* at 867 (Scalia, J., dissenting).

47 *Id.*

48 *Id*. (citing *U.S. v. Gaudin*, 515 U.S. 506, 512 (1995)).

49 *Id*. at 868 (quotations omitted).

50 *Id*. (quotations omitted).

51 *Id.*

52 *Id.* at 869.

53 *Id.*

54 *Id.* at 870.

55 320 P.3d at 834.

56 *Id*.

57 *Id.*

58 *Id.* at 834-35.

GENERAL AVIATION AND THE FOURTH AMENDMENT: DO AVIATORS WAIVE PRIVACY RIGHTS BY ACCEPTING AIRMEN CERTIFICATES?

by Jason Kemp

Aviators avail themselves to voluminous regulations. It is paradoxical that the great freedom of flight is granted only to those willing to submit to pervasive federal regulatory oversight. Nonetheless, aviators agree to governmental intrusion including medical scrutiny and access to aircraft to verify regulatory compliance. Whether this relationship between the regulated and the regulator also gives rise to diminished privacy protections under the constitution is now a matter of concern for aviators.[1] More specifically, the issue is whether the Department of Homeland Security (DHS) and its departmental components may rely on the Federal Aviation Administration's (FAA's) authority to conduct regulatory inspections or "ramp checks" to conduct warrantless and suspicionless searches for evidence of a crime.

Recent Examples Highlight the Issues

Gabriel Silverstein, Cirrus SR-22

Gabriel Silverstein was flying multiple legs across the country and was approached by law enforcement at his plane twice in a four-day span.[2] The first encounter was at a small airport in Oklahoma, but it was the second encounter that shocked Silverstein when he landed at an Iowa airport where law enforcement appeared to be "waiting" for his arrival. The officers, which Silverstein recognized to be from the DHS,[3] surrounded the aircraft and guided a dog around the aircraft. Silverstein objected to the search, but the DHS officer gave him three options: (1) wait inside the airport's fixed base operator, (2) wait quietly outside, or (3) be detained in handcuffs.[4] The dog's behavior convinced the officers to search the entire plane although they did not say what they

"Finally, legislators should continue pressing DHS and CBP officials to justify the practice until it is abandoned, or they should draft legislation barring the practice altogether to guarantee general aviators their Fourth Amendment rights."

were searching for.[5] The search lasted approximately two hours, did not uncover any evidence of wrongdoing, and DHS reportedly left Silverstein with the belongings from his luggage on the tarmac. Silverstein found the two intrusions even more suspect because they were the only times he had ever been approached on the ramp by authorities in more than 15 years of flying. To date, Silverstein has not indicated a desire to file a lawsuit based on this encounter.

Robert Riddlemoser, Beechcraft Bonanza

Robert Riddlemoser landed in Pueblo, Colo., on Oct. 1, 2010.[6] Riddlemoser went inside the FBO to call a mechanic to fix a dangling hose on his aircraft. He was met by several officers of the Drug Enforcement Agency (DEA), Immigration and Customs Enforcement (ICE) and the Pueblo Police Department. Riddlemoser disclosed he was the pilot of the Bonanza, and police stated, "we need to search your plane, and we need to go through your bags." An agent told Riddlemoser that a search warrant would be issued "within the hour" and that the agents would "get what [they] want either way." An agent told Riddlemoser they were looking for "cash and dope." Agents searched the plane and Riddlemoser's belongings to find there was no cash or dope. The basis for the search, according to Riddlemoser, was that the agents believed him to be an associate of "two men serving double-life sentences in connection with the smuggling of tons of marijuana, and money laundering." Riddlemoser proclaims he is not associated with either man, and there is no evidence that officers asked him about the association before informing him of the need to search the plane. It is unclear from the report whether Riddlemoser was given *Miranda* warnings. While conjecture, Riddlemoser believes the agents were looking for another person associated with a similar N number. Nonetheless, the agents left empty-handed, and Riddlemoser was free to go. No lawsuit has been filed.

Larry Gaines, Beechcraft J35 Bonanza

Larry Gaines landed in rural Oklahoma after a Visual Flight Rules (VFR) flight from California.[7] Since Gaines was flying VFR, he did not have to contact air traffic centers so long as he stayed out of controlled airspace. Upon arriving, local law enforcement informed Gaines that DHS wanted to talk to him and waited with Gaines, monitoring his cell phone use, until DHS arrived. Gaines asked why he was to be questioned to which the local officer replied that his flight fit a suspicious profile. The officer further explained that a flight from California to an easterly destination was the profile. The local officer stated he was to check documents, so Gaines furnished only the documents required during a ramp check by the FAA and told the officer he did not have the authority to demand any more. Next, three police cars, three sheriff's cars and two black Suburbans came on the scene with some officers in full riot gear (despite temperatures more than 100 degrees) and wielding shotguns. In all, 20 law enforcement officers were present, placing Gaines in fear that he was being viewed as "some sort of horrible criminal, and that [he] would be treated as such."[8]

Next, two aircraft arrived with the U.S. Customs and Border Protection (CBP) agents; the jet circled above during the ordeal, and the agents on the King Air made contact with Gaines. What happens next is the epitome of why ramp intrusions by law enforcement officers against pilots should not be given great deference. The CBP agent demanded documents as if conducting a ramp check. The agent purported to know what documents the FARs required and demanded a weight and balance sheet. Gaines stated that it was not required for Part 91 flights, which his was, but the agent insisted it was required. The agent went on to say Gaines's flight was suspicious because he was tracked on radar leaving Stockton, a so-called "drug capital." Gaines took issue with the agent's allegation that he was tracked on radar leaving Stockton Metropolitan Airport because he actually had not taken off from there that day. Although the plane was based out of Stockton Metropolitan and the agent claimed to have tracked Gaines, that is not where his flight originated. The CBP agent requested consent to search the plane, and Gaines denied the request.

Gaines, however, did permit the CBP agents to use a dog to sniff the exterior of the plane when asked. The event took approximately two hours and ended with Gaines being told he was free to leave. As with the previous encounters described above, Gaines has not filed suit against the government.

Fourth Amendment Framework

The legal issues that are the focus of this section should be clearer now. The pilots in the encounters above lacked culpability in any offense, regulatory or criminal. That is significant because the motive to challenge government action on Fourth Amendment grounds often comes in the form of a motion to suppress incriminating evidence. The aviators are blameless for the circumstances that led the officers to their planes, no warrants were issued, and each encounter raises major questions as to whether the proper level of suspicion was met to detain the pilots and make demands to search the plane.

It should be understood that the facts above are only from the pilots' perspectives, because the agencies have not volunteered their side of the encounter. However, the Aircraft Owners and Pilots Association (AOPA) filed a Freedom of Information Act (FOIA) request with CBP in February of last year, and CBP replied that it would take approximately six months for a response.[9] In June, AOPA sent the acting commissioner a letter seeking the legal grounds for CBP's alleged actions.[10] CBP responded to the letter in September with a cursory explanation.[11] Acting Commissioner Thomas Winkowski provided AOPA with the following reasoning:

> In the course of conducting pilot certificate inspection, facts may arise meriting further investigation or search to the extent authorized under the Constitution and consistent with the federal law. Each interaction and event must be evaluated independently based on the facts present at the time of the encounter. Depending upon the circumstances presented, and by way of illustration, these interactions may at times include:
>
> 1. A limited search of a person and his immediate vicinity for a weapon on reasonable suspicion that the person is armed and dangerous;
> 2. A protective sweep based on reasonable suspicion that a person is hidden who intents to impede or assault the law enforcement officer; or
> 3. A mobile conveyance search based on probable cause that contraband or evidence is onboard the aircraft.[12]

Before reaching the Fourth Amendment issues, CBP's rationale needs to be scrutinized to see if it is consistent with the scope of the agency's ability to conduct investigations on aircraft. First, CBP assumes that it is permitted to conduct airmen and aircraft certificate inspections . Next, CBP may inspect pilot and aircraft certificates if the aircraft is coming to or leaving the United States. However, the encounters discussed above were all domestic flights that were not suspected to have crossed an international border. Thus, CBP has erred by claiming that it can extend its investigation to aircraft involved in purely domestic flights.

CBP's only remaining rationale is premised on the Fourth Amendment. The text of the Fourth Amendment has not changed since the Bill of Rights was ratified. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause…particularly describing the place to be searched, and the persons or things to be seized."[13]

What has changed over the course of 229 years is how to apply the Fourth Amendment to contemporary situations.[14] The remedy for violations of the Fourth Amendment and the exceptions thereto have also evolved,[15] but the focus of this section is to challenge the constitutionality of the practice of warrantless searches of planes and seizures of pilots where no evidence is produced to be excluded. Analyzing the legal concerns of pilots confronted on the tarmac by law enforcement demands a review of (1) whether a pilot is seized under the Fourth Amendment in the encounters described *supra*; (2) when must an officer get a warrant to search a plane; and (3) conversely, when may an officer search a plane for evidence without consent or a warrant. Eight senators found CBP's practice faulty under the Fourth Amendment and penned a letter to CBP demanding it provide the facts of each investigation dating back to 2009 that dealt with interactions between CBP and general avi-

ation pilots.[16] With the deadline for a response past due, no response has been made public.[17]

Seizure of Pilots

The U.S. Supreme Court has already ruled on a case dealing with CBP and the detention of individuals on what is known as "roving patrols."[18] In *U.S. v. Brignoni*, the Court said, "We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops."[19] Stated plainly, the CBP badge does not permit the agent to infringe upon constitutional rights. The Court went on to note CBP's enhanced investigative powers at the border and said, "[e]xcept *at the border and its functional equivalents*, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.[20] The bottom line is that CBP must meet the same standard of suspicion as any other officer would unless the agent is at the border or functional equivalent.

Recall the Silverstein encounter, where the DHS agents were waiting on him at his destination in Iowa. He was told his flight fit a profile, and a search ensued without a warrant. The search will be discussed in the next section, but the fact that DHS agents, who were awaiting his arrival, boarded his only mode of transportation inspecting it for evidence over the course of two hours could lead a reasonable person to believe he was not free to leave. Otherwise stated, the DHS's show of authority, to which Silverstein submitted effectively restrained his liberty. The likely conclusion is that a seizure has taken place. What is more arguable is whether it was reasonable under the circumstances. In light of CBP general counsel's rationale, DHS would have to argue that there was probable cause to believe drugs or contraband were on the plane or there was reasonable suspicion that a hidden person was onboard. Given that no investigation into the pilot's certificate was initiated, these are the only remaining grounds. For this argument to succeed, DHS would have to reveal the contents of the profile that the aviator matched . Those interested in this response will have to continue to wait for the substantive response to AOPA's FOIA request.

Riddlemoser, wrongfully accused of smuggling "cash and dope," was detained on information that is unascertainable, perhaps because Riddlemoser was confused with someone else. Recall in this case that agents told him if he refused consent to search, they would get what they wanted anyway with a warrant within the hour. These facts are tricky because on one hand, Riddlemoser seemed to understand he could refuse, thus free to leave, but on the other hand the agency's persistence undermined the viability of denying consent if they would pursue the search regardless of his answer. Here, it is a close call which standard of suspicion must be satisfied, but the objectionable tactic used by the agent could lead to a finding that probable cause should be required.

The account given by Gaines seems to be a good argument for a seizure under the Fourth Amendment. He was detained by local police to wait for DHS, who happened to be bringing SUVs and two aircraft. Local police monitored his cell phone call with his mother after first telling him he could not call anyone. Even a strong-willed individual would likely

feel unable to leave under these circumstances. It was feared that he was smuggling drugs. There was no tip. There was no surveillance. Gaines was engaged entirely in legal activity that gave DHS a "hunch." Such a hunch is not recognized as reasonable under the *Terry* standard.[21] It is unlikely that DHS had either reasonable suspicion or probable cause at the time of detaining Gaines, making the seizure unreasonable. Unfortunately for aviators, the analysis cannot end here. Fourth Amendment jurisprudence is riddled with exceptions and policy considerations that make even the most intrusive searches and seizures constitutional.[22] As they apply to aviation law, the extended border exception and the automobile exception are chief concerns among private pilots when dealing with agents that have no warrant in hand. They will be discussed in turn.

Extended Border Exception to the Warrant Requirement

The "functional equivalent of the border" concept arose out of a Supreme Court Case that held roving patrols of vehicles not suspected in border activities was unconstitutional.[23] The Fifth Circuit in *United States v. Brennan* established the rule for considering whether airplanes were subject to the extended border exception to the Fourth Amendment which requires: (1) "a high degree of probability that a border crossing took place" and (2) "an attendant likelihood that nothing about the object of the search has changed since the crossing."[24] The court in *Brennan* held that a plane that was heading in a direction that would lead out of the country but was not tracked out of the country could not be searched under the extended border exception because the evidence is insufficient to prove a border crossing.[25] The Eleventh Circuit reasoned that a plane could only be searched without a warrant under the extended border exception (or the functional equivalent of the border) if the government could prove with *reasonable certainty* that the aircraft crossed an international border.[26] If a nexus to international travel can be established, a suspicionless search of an airplane may follow.[27]

The practical effect of the extended border exception is the government must prove international travel to a reasonable certainty to justify a warrantless and suspicionless search of a pilot's plane. This is particularly concerning in the encounter with Gaines. Gaines was allegedly tracked by DHS leaving the supposed "drug capital" of Stockton, Calif. Gaines denied that he departed from Stockton, and the lack of further interrogation by DHS on that topic implied that Gaines was likely telling the truth. It would not take much for a DHS agent to tell a pilot that he was tracked departing Mexico then into the United States, so a suspicionless search of the plane could follow. If the pilot is unaware that the DHS's blunder cannot form the basis for the search, unless a good faith mistake, then the pilot might not to refuse to cooperate with a federal agent even where he is justified. The remaining encounters made no mention of the suspicion of an international border crossing, calling into question the DHS's or CBP's involvement under this exception.

The scenarios detailed above should not invoke the extended border exception to the Fourth Amendment because they dealt with purely domestic flights. Thus, DHS and CBP must find some other rationale to support their actions.

Automobile Exception to the Warrant Requirement

The U.S. Supreme Court carved out another warrant exception for automobiles due to the "fleeting" opportunity to secure a warrant when the automobile is readily mobile.[28] This rationale is sound when facts giving rise to a desire to search are occurring during the time where the automobile's whereabouts could become a mystery. In *United States v. Nigro*, the Sixth Circuit applied the automobile exception to airplanes.[29] The court reasoned that vehicles and planes are both inherently mobile and it is just as efficient to permit officers to search the plane when reasonable cause is found than impounding the same for a search.[30] There are two important caveats for pilots from the *Nigro* court. First, the court was not persuaded that the inability for a plane to take off removed it from the automobile exception. Second, pilots have a reduced expectation of privacy because they avail themselves to extensive regulation that is more intricate than motor vehicle regulation.[31]

There are problems with permitting officers to utilize the automobile exception with airplanes. Sure, the practice is justified when time is of the essence and there is reason to believe the plane might not be at the airport when officers return with a warrant. But consider the encounters of the detained pilots above. The situations arguably do not demand immediacy.

Similarly, there was scant if any evidence of a crime being committed at the time of the flight. In other words, there were arguably no exigent circumstances such that an independent magistrate need not certify probable cause prior to seizing pilots and searching personal planes. The agents arrived to the aircraft with information they deemed sufficient to detain the pilots. In one case, the pilot was detained to wait for agents to arrive by plane. Some agents even believed the pilot to have connections to multiple inmates with multiple life sentences. The point is the agents had articulable facts to express to a magistrate that there was probable cause, and the time was not of the essence based on the pilots' encounters.

Furthermore, is the analogy between the average automobile and the average plane accurate? Pilots file flight plans, request flight following and planes have transponders signaling its precise location. The air traffic control function is overwhelmingly government controlled. A pilot operating under normal circumstances can be tracked in multiple ways by government agents who do not need warrants to track them, unlike automobiles. Also, the automobile exception has undertones of jurisdiction. If county A believes a driver has contraband, and driver leaves county A in the suspect automobile, county A is out of luck until driver comes back. Where DHS, ICE, and DEA are investigating, there is no such jurisdictional problem unless the plane is leaving the country. The immediacy that gives rise to the automobile exception was not present in these encounters. In short, private pilots should be wary of interactions with law enforcement since it is unclear whether the agents even need a warrant.

Conclusion

With stories like the ones detailed above, it is less likely that the constitutionality of DHS practices will be challenged because the motive of keeping evidence out of court is absent due to the lack of criminal charges. It may be necessary for some of the encounters like the ones mentioned in this article to be litigated to put a stop to the practice of DHS borrowing FAA authority to search for evidence of a crime. This will require a pilot with standing to litigate absent the motive of suppressing evidence and likely an attorney willing to take the case without the promise of a substantial fee. Alternatively, such a constitutional challenge will arise when authorities actually find evidence of a crime, and the criminal defendant argues the positions set forth in this article. This avenue could result in yet another exception to the warrant requirement that will inevitably lead to an increase in this troublesome practice. Finally, legislators should continue pressing DHS and CBP officials to justify the practice until it is abandoned, or they should draft legislation barring the practice altogether to guarantee general aviators their Fourth Amendment rights.

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Endnotes

1 While law enforcement officers may board a vessel to verify compliance with safety laws as a pretext to investigate a criminal matter via the plain view doctrine, DHS may not enforce FARs, and the FAA cannot arrest individuals on a plane for an alleged crime.

2 James Fallows, *Annals of the Security State, Gabriel Silverstein Division*, THE ATLANTIC, (May 19, 2013) http://www.theatlantic.com/national/archive/2013/05/annals-of-the-security-state-gabriel-silverstein-division/276011/.

3 im Moore, *Pilot Detained, Searched for Mysterious Reasons*, AOPA (May 16, 2013) http://www.aopa.org/News-and-Video/All-News/2013/May/16/Pilot-detained-searched-for-mysterious-reasons. AOPA reports it was apparently Customs and Border Protection's Air and Marine Operations Center.

4 Fallows, *supra* note 2, quoting Silverstein in an interview with AOPA *available at* http://www.theatlantic.com/national/archive/2013/05/annals-of-the-security-state-gabriel-silverstein-division/276011/ (last visited Nov. 5, 2013).

5 *Id.*

6 Dan Namowitz, *Agents Question Bonanza Pilot, Search for Dope and Cash*, AOPA (Oct. 21, 2010) http://www.aopa.org/News-and-Video/All-News/2010/October/21/Agents-question-Bonanza-pilot-search-for-dope-and-cash.aspx.

7 James Fallows, *Annals of the Security State: More Airplane Stories*, THE ATLANTIC (May 21, 2013) http://www.theatlantic.com/national/archive/2013/05/annals-of-the-security-state-more-airplane-stories/276018/.

8 *Id.*

9 Jim Moore, *AOPA Demands Answers on Aircraft Searches*, AOPA (June 19, 2013) http://www.aopa.org/News-and-Video/All-News/2013/June/19/AOPA-demands-answers-on-aircraft-searches.aspx.

10 Letter from Ken Mead, General Council, AOPA, to Thomas Winkowski, Acting Commissioner, U.S. Customs and Border Patrol (June 19, 2013).

11 Letter from Thomas Winkowski, Acting Commissioner, U.S. Customs and Border Patrol, to Ken Mead, General Counsel, AOPA (Aug. 12, 2013).

12 *Id.*

13 U.S. Const. amend. IV.

14 *See generally Katz v. U.S.*, 389 U.S. 347 (1967) (listening device used by government violates defendant's privacy if defendant had reasonable expectation of privacy and society deemed the expectation reasonable); *Kyllo v. U.S.*, 533 U.S. 27 (2001) (sense enhancing technology that reveals activities in home that could not be revealed without entering home and not in general public use is impermissible search); *See U.S. v. Jones*, 132 S. Ct. 945 (2012) (trespass doctrine still applies in Fourth Amendment cases, and attaching a GPS transmitter/receiver to suspect's car is impermissible search).

15 *See Mapp v. Ohio*, 367 U.S. 643 (1961) (evidence obtained during illegal search must be excluded in subsequent proceedings); *U.S. v. Leon*, 468 U.S. 897 (1984) (the exclusionary rule does not apply when officer relies on invalid warrant in good faith).

16 Letter from Pat Roberts, Sen., U.S. Congress, et al., to Rand Beers, Acting Secretary, Dept. Homeland Security (Oct. 30, 2013).

17 The deadline was Nov. 15, 2013. *Id.*

18 *See U.S. v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975).

19 *Id.*

20 *Id.* at 884.

21 *See Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

22 Alan Wright, et al., *Search Warrant Exceptions—Exigent Circumstances*, 3A Fed. Prac. & Proc. Crim. § 678 (4th ed.). Examples of exigent circumstances include (a) hot pursuit, (b) possibility of evidence being removed or destroyed, and (c) danger to the life of officers or others. *Id.*; *see also U.S. v. Coles*, 437 F.3d 361, 366 (3d Cir. 2006) (citing *U.S. v. Richard*, 994 F.2d 244, 247-48 (5th Cir. 1993)).

23 *See Almeida-Sanchez v. U.S.*, 413 U.S. 266 (1973).

24 538 F.2d 711, 713 (5th Cir. 1976).

25 *Id.*

26 *U.S. v. Garcia*, 672 F.2d 1349, 1361 (11th Cir. 1982) (emphasis added).

27 *Id.* at 1358.

28 *See Chambers v. Maroney*, 399 U.S. 42, 50 (1975).

29 727 F.2d 100, 106 (6th Cir. 1984).

30 *Id.*

31 *Id.* at 105.

AVIATION 101: THE MONTREAL CONVENTION

by Arthur J. Park

In the Aviation 101 series, we will endeavor to provide an overview of a legal issue in the aviation field. Due to the nature of the newsletter, the articles in this series will be somewhat cursory, but feel free to contact the authors with any questions.

The Montreal Convention governs international travel and limits the liability of carriers in the "international carriage of persons, baggage or cargo."[1] The Montreal Convention came into effect in the United States on Nov. 4, 2003, and replaced the uniform system of liability for international air carriers previously established by the Warsaw Convention.[2] Because the Montreal Convention only recently came into force, courts may rely on cases interpreting the Warsaw Convention where the provisions of the Montreal Convention are substantively the same.[3]

When does the Montreal Convention apply?

Article 1 of the Montreal Convention defines "international carriage" as "carriage in which…the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party." A "State Party" is a country that has ratified the Montreal Convention, and there currently are 107 such countries.[4]

In other words, the Montreal Convention applies to the following types of flights: (1) one-way international flights when both countries (departure and destination) have ratified the Convention, and (2) roundtrip international travel that begins and ends in a country that has ratified the Convention. For

roundtrip international travel, the courts have concluded that "the place of destination" is the same as "the place of departure," so only that country's status is reviewed. For example, a roundtrip ticket from the United States to St. Lucia and back was covered under the Montreal Convention, even though St. Lucia was not one of its signatories.[5]

Does the Montreal Convention preempt state law claims?

Yes. Article 29 of the Montreal Convention states: "In the carriage of passengers…any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits as are set out in this Convention." Like the Warsaw Convention, Article 29 of the Montreal Convention preempts state-law claims, whether or not the application of the Montreal Convention results in recovery in a particular case.[6] The U.S. Supreme Court has stated that "the Convention's preemptive effect on local law extends to all causes of action for injuries to persons or baggage suffered in the course of international airline transportation, regardless of whether a claim actually could be maintained under the provisions of the Convention."[7] If an action for damages falls within the Convention's provisions, then the treaty provides the *sole* cause of action under which a claimant may seek redress for his injuries.[8] Accordingly, the Montreal Convention, where applicable, preempts all state-law remedies.[9]

Who has standing?

In general, passengers and those who purchased tickets from the carrier have standing to pursue a claim under the Montreal Convention. Individuals who "were not passengers, nor parties to the agreement" have no standing to pursue an action under the Montreal Convention.[10] In one example, even the individuals who owned the items that went missing from a passenger's baggage did not have standing.[11] As noted above, the Montreal Convention provides the sole remedy, so those without standing are left with no recovery.

What types of claims are available?

Under the Montreal Convention, a passenger may assert the following claims: (1) death and injury of passengers under Article 17, (2) damage to baggage under Article 17 or to cargo under Article 18, and (3) delay under Article 19. There is a two-year statute of limitations for any claim governed by the Montreal Convention.[12]

Proving a bodily injury claim under Article 17

Under Article 17, "[t]he carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking." The Eleventh Circuit has outlined three requirements that must be established to satisfy Article 17: "(1) an accident must have occurred; (2) injury or death must have occurred; and (3) the preceding two conditions must have occurred while 'embarking or disembarking' or during the flight itself."[13] If these three requirements are met, a carrier is held "strictly liable for personal injuries that occur in the course of an international flight."[14] However, there is a cap on the strict liability damages (discussed below).

First, an accident is defined as "an unexpected or unusual event or happening that is external to the passenger."[15] A vast number of cases have dealt with what constitutes an "accident," and some courts have reached differing opinions on similar facts.[16] For example, a "hard landing" can qualify as an "accident" under the Montreal Convention, but the plaintiff must establish that the landing was "unexpected or unusual" and that the landing caused his injuries.[17] In another example, an "accident" occurred where the passenger was arrested at her connecting gate following her altercation with a flight attendant.[18]

If an "accident" did not occur, the Montreal Convention still applies to the flight and to the claim, but the plaintiff simply cannot recover.[19] As the Supreme Court stated, "recovery for a personal injury suffered on board [an] aircraft or in the course of any of the operations of embarking or disembarking . . . if not allowed under the Convention, is not available at all."[20]

Moving to the second requirement, "an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury."[21] Thus, a plaintiff cannot recover for "purely mental distress."[22] "Courts in the United States, and abroad, have consistently read the Convention to preclude recovery for purely psychic injuries."[23]

For the third requirement, because the term "embarking" evokes a "close temporal and spatial relationship with the flight itself," a close connection between the accident and the physical act of boarding the aircraft is required.[24]

As to damages, the carrier may be held strictly liable up to 113,100 special drawing rights (SDR) of the International Monetary Fund (currently $174,700).[25] Even within this cap, the plaintiff still must establish causation and the extent of damages. When damages are sought in excess of the cap, the Convention permits the carrier to prove that the damage was not due to the negligence of the carrier or was solely due to the negligence of another party.[26]

Proving a baggage or cargo claim

For a passenger's baggage, the carrier is liable for the destruction, loss or damage to a passenger's baggage that takes place on board the aircraft or after the checked baggage was placed in the charge of the carrier under Article 17(2). However, the carrier is not liable for damage caused by the inherent defect or quality of the baggage.[27] For unchecked baggage, such as personal items, the passenger must show negligence by the carrier's agent.[28] Baggage is deemed lost if it has not arrived within 21 days.[29]

The Montreal Convention limits the liability of the carrier in the case of destruction, loss, damage or delay of baggage to 1000 SDRs for each passenger (currently $1,539.51) unless the passenger has made a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires.[30] Although the cap on damages to baggage does not apply to intentional or reckless conduct by the carrier, American courts agree that this exception does not apply to acts of theft committed by employees.[31]

For commercial cargo shipments, the carrier is generally liable for the destruction, loss or damage to commercial cargo that takes place during the carriage by air under Article 18(1). However, the carrier does have four defenses available: (a) inherent defect or quality of the cargo, (b) defective packing by a third party, (c) an act of war or (d) an act of public/governmental authority.[32]

Article 22(3) of the Convention limits potential liability to 17 SDRs (currently $26.17) per kilogram of cargo shipped. This limit may be increased in one of two ways: (1) making a special declaration of interest,[33] or (2) "[a] carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever."[34]

Proving a delay claim under Article 19

Article 19 provides that "[t]he carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures."

"Courts have construed nonperformance claims as sounding in delay where plaintiff was initially refused boarding but the defendant ultimately transported plaintiff on a later flight."[35] However, the Montreal Convention does not apply to total nonperformance in which the airline simply refused to fly the plaintiffs without offering any alternate transportation.[36] For example, a plaintiff who was delayed 1.5 hours missed his connecting flight and therefore was unable to attend a funeral service in Cameroon (the entire purpose of his trip); since the airline "did ultimately transport plaintiffs to Cameroon, albeit later than plaintiffs had planned," it was a delay claim subject to Montreal Convention as opposed to a state law claim for nonperformance of contract.[37] Thus, state law concerning breach of contract would apply to total nonperformance (which many plaintiffs prefer), but the Montreal Convention still applies to delay claims. Also, the Supreme Court has stated that delay claims under Article 19 are not limited to "accidents" like Article 17 injury claims.[38]

For damages caused by delay in the carriage of passengers, the plaintiff can recover a maximum of 4,694 SDRs (currently $7,288.06).[39] In addition, "mental injury damages are not recoverable under Article 19."[40] However, at least one court has noted that the Montreal Convention's liability limits do not apply when the defendant acted intentionally.[41]

The Montreal Convention can't preempt a discrimination claim, right?

Actually, yes it can. In *King v. American Airlines, Inc.*,[42] the Second Circuit held that a passenger's claims for racial discrimination during embar-

kation were preempted. "Notably, every court that has addressed the issue of whether discrimination claims are preempted by the Warsaw Convention *post-Tseng* has reached a similar conclusion."[43] The "local" law preempted by the treaties and *Tseng* includes claims under federal statutes as well as state law.[44] "The Convention massively curtails damage awards for victims of horrible acts [of] terrorism; the fact that the Convention also abridges recovery for... discrimination should not surprise anyone."[45] The courts have applied the same reasoning to discrimination claims based on Articles 17, 18, and 19.

The Montreal Convention has a tremendous effect on the rights of carriers and passengers aboard international flights. Its provisions and the cases interpreting them must be carefully reviewed and considered whenever a potential claim is raised involving an international flight.

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Endnotes

1 Montreal Convention, art. 1.

2 *See* Convention for the Unification of Certain Rules for International Carriage by Air, art. 55, May 28, 1999, S. Treaty Doc. No. 106-45, 2242 U.N.T.S. 350 (hereafter cited as the "Montreal Convention"); *see also Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 371 n.4 (2d Cir. 2004) (Montreal Convention "unifies and replaces the system of liability that derives from the Warsaw Convention").

3 *See Ugaz v. Am. Airlines, Inc.*, 576 F. Supp. 2d 1354, 1360 (S.D. Fla. 2008); *Paradis v. Ghana Airways Ltd.*, 348 F. Supp. 2d 106, 111 (S.D. N.Y. 2004).

4 *See* International Civil Aviation Organization's official list of contracting parties to the Montreal Convention, http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf. A list of countries subject to the Warsaw Convention is available at http://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf.

5 *In re Air Crash at Lexington*, 501 F. Supp. 2d 902, 908 (E.D. Ky. 2007). *See also Knowlton v. American Airlines, Inc.*, 2007 U.S. Dist. LEXIS 6882 (D. Md. 2007) (Montreal Convention applied to a round-trip ticket from Maryland to the Dominican Republic, even though the latter was not a party to the Convention).

6 *Tseng*, 525 U.S. at 161; *Best v. BWIA West Indies Airways, Ltd.*, 581 F. Supp. 2d 359 (E.D. N.Y. 2008).

7 *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 174-76 (1999).

8 *See El Al Isr. Airlines, Ltd. v. Tseng*, 525 U.S. 155, 176 (1999) (interpreting the Warsaw Convention); *Paradis*, 348 F. Supp. 2d at 111 (S.D. N.Y. 2004) (finding identical preemptive effect as between Article 24 of the Warsaw Convention and Article 29 of the Montreal Convention).

9 As such, the Montreal Convention can create federal question jurisdiction, especially when it is plead in the complaint. *See* 28 U.S.C. §1331 (federal question jurisdiction includes "treaties of the United States"); *Campbell v. Air Jam. Ltd.*, 891 F. Supp. 2d 1338, 1339 n.2 (S.D. Fla. 2012) ("The Montreal Convention confers exclusive subject matter jurisdiction in federal court"); *Mateo v. JetBlue Airways Corp.*, 847 F. Supp. 2d 383, 386-87 (E.D. N.Y. 2012) (permitting removal under Montreal Convention of an action alleging only state law claims for damages related to international flight); *Ugaz v. Am. Airlines, Inc.*, 576 F. Supp. 2d 1354, 1358 (S.D. Fla. 2008) (Montreal Convention presents a federal question); *Paradis v. Ghana Airways Ltd.*, 348 F. Supp. 2d 106, 111 (S.D. N.Y. 2004) ("the preemptive effect is identical regardless of whether the Montreal Convention or the Warsaw Convention applies").

10 *See Ekufu v. Iberia Airlines*, 2014 U.S. Dist. LEXIS 2817 (N.D. Ill. Jan. 9, 2014).

11 *Id.*

12 Montreal Convention art. 35.

13 *Marotte v. Am. Airlines, Inc.*, 296 F.3d 1255, 1259 (11th Cir. 2002).

14 *Jacob v. Korean Air Lines Co.,* 2014 U.S. Dist. LEXIS 9813 at *20 (S.D. Fla. Jan. 13, 2014) (citing *Marotte v. Am. Airlines, Inc.*, 296 F.3d 1255, 1259 (11th Cir. 2002)).

15 *Air France v. Saks*, 470 U.S. 392, 405 (U.S. 1985).

16 *See, e.g., Siddiq v. Saudi Arabian Airlines Corp.*, 2013 U.S. Dist. LEXIS 72663 (M.D. Fla. Jan. 9, 2013) (question of fact whether carrier's delay in treating passenger's heart attack was an accident).

17 In *Salce v. AER Lingus Air Lines*, 1985 U.S. Dist. LEXIS 20215 (S.D. N.Y. May 1, 1985), the plaintiff claimed a neck injury from a "hard landing" but lost at trial because he slept through the landing, he had a pre-existing condition, and the landing was not reported as unusual by pilot or crew or any other passenger. *See also Mathias v. Pan-Am. World Airways, Inc.*, 53 F.R.D. 447 (W.D. Pa. 1971) (under Warsaw, defendant admitted hard landing but jury had to determine if it "caused" the alleged injuries).

18 *Kruger v. Virgin Atl. Airways, Ltd.*, 2013 U.S. Dist. LEXIS 142110 at *30 (E.D. N.Y. Sept. 30, 2013).

19 *See, e.g.*, *Cush v. BWIA Int'l Airways Ltd.*, 175 F. Supp. 2d 483 (2001) (passenger's refusal to disembark caused immigration official to forcibly lift, throw, punch, handcuff, and push him from the aircraft, so there was no "accident").

20 *Tseng* 161.

21 *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991).

22 *Id.*

23 *Kruger v. Virgin Atl. Airways, Ltd.*, 2013 U.S. Dist. LEXIS 142110 at *30 (E.D. N.Y. Sept. 30, 2013) (citing *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366 (2d Cir. 2004)).

24 *McCarthy v. Northwest Airlines*, 56 F.3d 313, 316-17 (1st Cir. 1995).

25 Increased on December 30, 2009 for inflation. Originally 100,000 SDRs at the time of its enactment

26 *See* Montreal Convention art. 21(1).

27 *Id.*

28 *Id.*

29 *Id.* at art. 17(3).

30 Montreal Convention art. 22(2).

31 *See Shah v. Kuwait Airways Corp.*, 387 Fed. Appx. 13, 15 (2d Cir. 2010).

32 Montreal Convention art. 18(2).

33 *Id.* at art. 22(3).

34 *See* Article 25; *Eli Lilly & Co. v. Air Express Int'l USA, Inc.*, 615 F.3d 1305, 1308-09 (11th Cir. 2010).

35 *Kamanou-Goune v. Swiss Int'l Airlines*, 2009 U.S. Dist. LEXIS 79715 at *4 (S.D. N.Y. Mar. 27, 2009).

36 *See In re Nigeria Flights Contract Litigation*, 520 F. Supp. 2d 447, 454 (E.D. N.Y. 2007); *Weiss v. El Al Israel Airlines, Ltd.*, 433 F. Supp. 2d 361, 366 (S.D. N.Y. 2006). (nonperformance where the plaintiffs "never left the airport"); *Nankin v. Continental Airlines*, No. 09-07851, 2010 U.S. Dist. LEXIS 11879 at *7 (C.D. Cal. Jan. 29, 2010) (nonperformance where airline "refused to perform the contract").

37 *Fangbeng Fuondjing v. American Airlines, Inc.,* 2011 U.S. Dist. LEXIS 40078 (D. Md. Apr. 12, 2011).

38 *Tseng*, 525 U.S. at 179 n.4.

39 Article 22(1). The original amount was 4,150 SDRs.

40 *Mizyed v. Delta Airlines, Inc.*, 2012 U.S. Dist. LEXIS 66848 at *13 (E.D. La. May 14, 2012) (citing *Lee v. American Airlines, Inc.*, 355 F.3d 386, 387 (5th Cir. 2004)).

41 *Fangbeng,* 2011 U.S. Dist. LEXIS 40078.

42 284 F.3d 352 (2d Cir. 2002).

43 *Id.* at 361.

44 *Id.* (citing *Brauner v. British Airways PLC*, 2012 U.S. Dist. LEXIS 51802 (E.D. N.Y. Apr. 12, 2012) (religious discrimination); *Atia v. Delta Airlines, Inc.*, 692 F. Supp. 2d 693, 702 (E.D. Ky. 2010) (national origin discrimination); *Nobre v. American Airlines*, 2009 U.S. Dist. LEXIS 122668 (S.D. Fla. Dec. 21, 2009) (racial discrimination)).

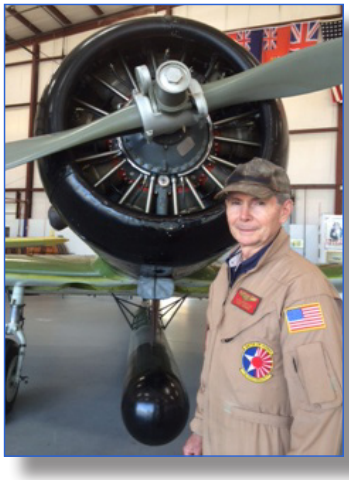
45 *Id.* at 362. The same result was also reached in *Mizyed v. Delta Airlines, Inc.*, 2012 U.S. Dist. LEXIS 66848 (E.D. La. May 14, 2012) (discrimination based on ethnicity) and *Gibbs v. American Airlines*, 191 F. Supp. 2d 144 (D. D.C. 2002) (racial discrimination).

continued from page 1

with other members. Thanks are in order to Todd Westfall, A.J. Merrill and Derrick Stanley for their efforts in relation to the list serve account.

If our section members have other ideas about programs or initiatives to make the Aviation Law Section more vibrant or more relevant to your law practice, then please feel free to share your ideas with me.

Happy landings,



Photos by Moose Peterson at a formation flight in April 2014