



Are We Moving Towards Criminalization in Aviation?

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Aviation Symposium
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Introduction

- U.S. aviation mishap investigation framework
- Criminalization trends and risks
- Key criminalization examples

A large commercial airplane is shown from a low angle, positioned on a runway. The sky is a vibrant orange and red, indicating a sunset or sunrise. The city lights of a large metropolitan area are visible in the background, creating a silhouette effect against the bright sky. The airplane's wings and engines are prominent, and the overall scene conveys a sense of aviation and travel.

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US Aviation Mishap Investigation Framework

NTSB Investigations – Legal Basis

- NTSB Statutory Authority and Related Sections:
 - 49 USC §1101-1155
 - 49 CFR § 831: Accident/Incident Investigation Procedures
 - 49 CFR § 845: NTSB Hearing and Report
- Other laws and applicability (HIPAA, OSHA, immunizations, hazards, etc.)
- Accidents outside the U.S. – International Civil Aviation Organization (ICAO) Annex 13
- Possible implication of treaties
 - Warsaw Convention of 1929
 - The Hague Protocol
 - The Montreal Convention

NTSB Investigations – Initial Response

- NTSB Form 6120.1 – Pilot/Operator Aircraft Accident/Incident Report
- 49 CFR §830: Notification and Reporting of Aircraft Accidents or Incidents and Overdue Aircraft, and Preservation of Aircraft Wreckage, Mail, Cargo and Records
 - General – Applicability and definitions
 - **Initial notification** of aircraft accidents, incidents and overdue aircraft
 - **Preservation** of aircraft wreckage, mail, cargo, and records
 - **Reporting** of aircraft accidents, incidents and overdue aircraft

What Can the NTSB Investigate – 49 U.S.C. § 1131

The National Transportation Safety Board shall investigate or have investigated (in detail the Board prescribes) and establish the facts, circumstances, and cause or probable cause of--

- (A) an aircraft accident ...;
- (B) a highway accident, including a railroad grade crossing accident, the Board selects in cooperation with a State;
- (C) a railroad accident in which there is a fatality or substantial property damage, or that involves a passenger train;
- (D) a pipeline accident in which there is a fatality, substantial property damage, or significant injury to the environment;
- (E) a major marine casualty (except a casualty involving only public vessels) occurring on or under the navigable waters, internal waters, or the territorial sea of the United States ...; and
- (F) any other accident related to the transportation of individuals or property when the Board decides--
 - (i) the accident is catastrophic;
 - (ii) the accident involves problems of a recurring character; or
 - (iii) the investigation of the accident would carry out this chapter.

The Accident Investigation Process

- NTSB is comprised of presidential-appointed board members
 - Five each appointed for a five-year term
 - A member is designated by the President as Chairman and Vice Chairman for two-year terms. Chair requires Senate confirmation
 - Approximately 400 employees located at HDQ in DC, and regional field offices (Ashburn(VA), Denver (CO) Federal Way (WA) and Anchorage (AK)

The Accident Investigation Process

- The NTSB Party Process:
 - 49 CFR Section 831.11 defines the “parties” to an investigation
 - Party status is limited to
 - Federal, state or local government agencies (e.g. PHMSA, FAA), state (i.e., PUC), or local government agencies (e.g., emergency responders)
 - Organizations whose employees, functions, activities, or products were involved in the accident and that can provide suitable qualified technical personnel, to actively assist in the investigation
 - Investigator In Charge (“IIC”) designates party status
 - The role of a party member is to provide technical advice and assistance to the NTSB in the fact gathering phase of the investigation
 - Typically – the “operator” airline, pipeline/gas company, bus company, etc. is a party

The Accident Investigation Process

- The Party Certification - Participants must sign statement agreeing:
 - Not to share info with co-workers, management or anyone outside the investigation (but note safety exception of 49 CFR § 831.13(c)(3))
 - Not to prejudice the investigation or violate NTSB policies or instructions
 - Not to withhold pertinent information
 - He/she does not occupy a legal position
 - He/she does not represent claimants/insurers

See [Certification of Party Representative](#)

The Accident Investigation Process

- Examples of typical Parties to an aviation accident investigation
 - Aircraft manufacturer
 - Engine manufacturer
 - Airline/operator
 - Pilot and flight attendant unions
 - Avionics manufacturer
 - FAA/Air traffic control

Witness Statements – Possible criminalization

- NTSB has the right to interview "witnesses" which include employees of the operator, the manufacturer, applicable component manufacturers, search and rescue organizations.
- 49 C.F.R. Section 831.7, 845.24 provides that each witness has a right to representation during an interview: the witness "has the right to be accompanied, represented or advised by an attorney or non- attorney representative"
 - "Company counsel" does not have the right to accompany the witness
- Witnesses in the US retain their 5th Amendment rights against self incrimination
- **Criminal Risk:** 18 U.S.C. § 1001 makes it a criminal offense to knowingly give false testimony or provide false records in an NTSB proceeding
 - Witness Statements, including working group reports are not privileged, and in fact are public, and can be used in other proceedings, including criminal prosecution and civil litigation

Family Assistance - A Necessary Component

- Aviation Disaster Family Assistance Act of 1996 (ADFAA)
- October 1996: US Airlines only
- Foreign Air Carrier Family Support Act of 1997: Foreign Airlines operating in the US (FACFSA)
- Expansion thereafter; 1998 Task Force Recommendations, 2000 Amendments (AIR 21), 2003 Amendments (Vision 100), 2008 Federal Family Assistance Plan for Aviation Disasters
- ***Failure to file a plan or commit the resources necessary to carry it out...***
 - Will cause US carriers to lose Certificate of Public Convenience & Necessity
 - Will cause foreign carriers to lose their authority to fly to the United States

Investigations and Privileges

- NTSB Party Participants waive privilege over “information or records received as a result of...participation in the NTSB investigation.”
 - Competing views on scope of waiver – whether merely documents, or investigative role. *See In re Air Crash at Charlotte, N.C.*, 982 F.Supp. (D. S.C. 1995); *Caves v. Beechcraft Corp.*, Case No. 15-CV-125-CVE-PJC, 2016 WL 355491 (N.D. Okla. Jan. 29, 2016).
- Be mindful of attorney’s and client’s role, communications, and work-product in relation to this privilege scope.
- **Criminal risk reminder:** US witnesses retain their 5th Amendment rights against self incrimination



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Criminalization Trends and Risks

Criminalization – History and Trends

- Various countries have advanced criminal investigations and prosecutions arising from aviation mishaps.
 - Air France Flight 4590 (Concorde) – 2010 French court manslaughter conviction (later overturned in 2012)
 - Helios Airways Boeing 737-300 Greece accident: Cypriot 2011 prosecution, later conviction in April 2012 of manslaughter and negligence in an Athens court; 10-year prison sentence
 - Embraer/GOL mid-air collision – two American pilots convicted in Brazilian court in May 2011; sentences later reduced although convictions upheld

Criminalization – History and Trends

- United States Justice Department has invoked, in limited instances, criminal investigations and/or penalties for mishaps. Statutes invoked include:
 - Fraud provisions: 18 U.S.C. § 371
 - Fines: 18 U.S.C. § 3571(d)
 - Restitution: 18 U.S.C. § 3663
 - Corporate plea agreement(s) under Fed. R. Crim. Pro. 11(c)(1)(C); *United States v. Trafigura Beheer B.V.*, No: 1:23-cr-20476 (S.D. Fla. Mar. 28, 2024); *United States v. Gunvor S.A.*, No: 1:24-cr-00085 (E.D.N.Y. Mar. 1, 2024); *United States v. SAP SE*, No: 1:23-cr-202 (E.D.Va. Jan. 10, 2024)

Substantive Bases for U.S. Criminal Liability

- Involuntary Manslaughter: 18 U.S.C. § 1112(a)
- Falsification crimes: 18 U.S.C. § 1001(a)
- Obstruction of Justice: 18 U.S.C. § 1510-1520
- Federal conspiracy statute: 18 U.S.C. § 371
- FAR criminal provisions: 49 U.S.C. § § 46306, 46316, 46317

U.S. Corporate Criminal Liability

- Corporate criminal liability first recognized in the 1909 case of *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909)
- Other courts have held corporations criminally liable by imputing the criminal intent of the corporation's employees to the corporate entity under the tort principle of *respondent superior*
 - See Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 MINN. L. REV. 1095, 1103 (1991).
 - *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972): Held corporation criminally liable for hotel agent's threatening of suppliers with loss of hotel's business if suppliers did not contribute money to a trade association; "such liability may attach without proof that the conduct was within the agent's actual authority, and even though it may have been contrary to express instructions."

Heightened Foreign Criminal Liability Risk

- Willfulness and intent elements, hallmarks of US criminal prosecutions, may be absent overseas
- 2012 Athens court conviction related to Helios Airways Boeing 737 accident – manslaughter and criminal negligence for reckless, dangerous, and careless actions of their agents failing to reset the plane's pressurization valve system

Heightened Foreign Criminal Liability Risk

- The goal of ICAO Annex 13 investigations (like NTSB investigations) is to improve safety and avoid future accidents. ICAO Annex 13 explicitly states that the “purpose of an investigation is not to apportion blame or liability.”
- An ICAO Annex 13 investigation relies on the openness and cooperation of those involved in the accident.
- If both civil and criminal investigations are pursued:
 - Which one has precedence?
 - Is there a dual track investigation?
 - Will the criminal and civil investigations share information?
 - Will witnesses be able to refuse to testify?
 - Who will have custody of unique evidence such as wreckage?
 - Who will conduct testing?
 - Will the findings from the civil investigation be usable in the criminal prosecution?
 - Will investigators wind up as witnesses in the criminal prosecution?

Responding to a Criminal Investigation

- Justice Department's U.S. Attorney's Manual guides whether federal authorities pursue criminal case.
- Most important factors under U.S. Attorney's Manual § 9-28.300:
 - Nature and seriousness of offense;
 - Pervasiveness of wrongdoing within the corporation;
 - Corporation's history of similar misconduct;
 - Existence and effectiveness of a compliance program; and
 - Corporation's remedial actions.
- Collect and preserve all available evidence and witness statements.
- Analyze the facts against potentially applicable criminal statutes and Justice Department guidelines.



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Key Criminalization Examples

Criminalization Examples

- 2024 Indictment of former Certified Flight Instructor in USDC for the Eastern District of Pennsylvania. *United States of America v. Philip Everton McPherson II*, Case No. 5:24-cr-00277-JMG, Doc. 1 (E.D.Pa)
 - Arises from a 2022 accident during instructional flight in which the instructor was injured and the student pilot passed away. Final NTSB report lists probable cause as “partial loss of engine power” during takeoff.
 - Indictment contains one count of involuntary manslaughter and 40 counts of serving as an airman without a certificate based upon 40 flights conducted with passengers between October 12, 2021 and September 20, 2022.
 - Involuntary manslaughter Count – alleges violation of 18 U.S.C. § 1112. References litany of alleged FAR violations as basis for involuntary manslaughter, e.g. 14 C.F.R. §§ 1.1, 61.2, 61.3, 61.13, 61.19, 61.27, 61.43, 61.83, 61.89, 61.183, 61.195.
 - Airman without a certificate Counts – punishable by fines and up to three years of imprisonment. Alleged violation of 49 U.S.C. § 46306(b)(7) – “knowingly and willfully serves or attempts to serve in any capacity as an airman without an airman’s certificate authorizing the individual to serve in that capacity...” 49 U.S.C. § 46306 contains general criminal penalties related to registration violations involving aircraft not providing air transportation.
 - Former CFI was allegedly involved in two previous aircraft accidents, both while serving as CFI.

See also AOPA, *Former CFI Charged with Manslaughter*, Jim Moore, August 7, 2024. Available at:
<https://www.aopa.org/news-and-media/all-news/2024/august/07/former-cfi-charged-with-manslaughter#:~:text=A%20Pennsylvania%20man%20who%20allegedly,death%20of%20a%20student%20pilot.>

Criminalization Examples

- Valujet Flight 592
 - In flight fire and crash killing 110 people. Cause of the fire was oxygen generators in the cargo hold
 - The contractor handling the oxygen generators and three of its employees criminally indicted for mishandling hazardous materials, failing to train its employees in proper handling of hazardous materials, conspiracy, and making false statements
 - SabreTech convicted, but most of the counts were overturned on appeal. Two of the three employees were tried and found not guilty. The third failed to appear in court and is still a fugitive, and the FBI is still offering a \$10,000 reward
 - State of Florida agreed to drop 220 counts of murder and manslaughter against SabreTech as part of a plea deal where SabreTech agreed to pay \$500,000 toward aviation safety
 - SabreTech conviction overturned on appeal

Criminalization Examples

- Gol Transportes Aéreos Flight 1907 – Boeing 737
 - Midair collision with Embraer 600. The Embraer landed safely, the 737 crashed killing 154 people
 - The accident triggered a public relations crisis for the Brazilian government as ATC negligence was the cause of the collision
 - Flight crew detained by Brazilian authorities and formally charged with "endangering an aircraft", which carries a penalty up to 12 years in prison
 - Crew allowed to leave after agreeing to return for any trial
 - Brazilian investigators concluded the accident was primarily the fault of the pilots, while the NTSB found it was primarily due to failures by ATC
 - Pilots convicted *in absentia* and sentenced to 37 months in prison, with orders to return to Brazil to serve their sentences

Thank You

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