A surge of technological innovation in autonomous vehicles—including aircraft—is afoot. Companies have become increasingly public about their efforts to develop autonomous and semi-autonomous aircraft that could transform transportation. For these future autonomous aircraft to be incorporated into and thrive in a safe operating environment, a comprehensive regulatory framework and physical infrastructure must exist. In some ways, however, the technological challenges of creating and maintaining such an environment for autonomous aircraft may not be as significant as the legal hurdles.

In manned aircraft, the pilot-in-command is responsible for the safe operation of the aircraft. Similarly, in unmanned aircraft under the control of a remote human operator, the remote pilot is responsible for the safe operation of the aircraft. In contrast, fully autonomous aircraft are by definition self-piloting, shifting the operating responsibility from a human pilot—on board

An Alternative Liability System for Autonomous Aircraft

By Lauren Haertlein

Pockets of Privatization: A Way Forward for U.S. Airports

By Stephanie Griffin

Private participation in ownership of public-use airports has been slow to develop in the United States when compared with other countries, despite evidence that privatized airports have significantly higher levels of passenger satisfaction and are more economically productive. This lack of private participation is attributable to several factors, including regulatory hurdles, commercial disincentives, and negative public perception, but potential alternatives to complete privatization exist that are becoming increasingly common at U.S. airports.

This article begins by describing the FAA’s Airport Privatization Pilot Program (APPP) (codified at 49 U.S.C. § 47134), its potential benefits, and examples of airports that have participated in the program. Next the article explains how legal, regulatory, and related financing constraints have severely limited the development of airport privatization in the United States. The article then identifies certain “pockets of privatization” that have emerged and are becoming more prevalent at U.S. airports. These involve airports that

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Happy early summer! Have you joined one of our five Committees: Space Law; Consumer Protection; Drones; General, Business and Charter Aviation; or Aviation and Space Finance—or attended one of our webinars or conferences? Have you “liked” our Facebook page or checked out the great pictures of our events? How about our LinkedIn group? If so, let us know how we are doing or what you think we still need to do. If not, get going! There are a lot of exciting things happening at the Forum, and you want to be in on the action! There are always opportunities to get involved and make a mark, so please let me know if you are interested.

The first week of June was a busy one for the Forum with three events in Washington, D.C.: the Drone Law Conference on June 5 at Baker & McKenzie, a teleconference on “Antitrust Immunity for Airlines” on June 6 at Crowell & Moring, and the Space Law Symposium on June 7 at Jenner & Block. All three were very successful events. Now our attention turns to the Forum’s Annual Conference, which will be held in Chicago on September 27 and 28. For more information, please refer to the Forum’s website: https://www.americanbar.org/groups/air_space.html.

We have another exciting edition of The Air & Space Lawyer, with articles on a range of topics from the DOT and FAA response to the Trump administration’s directive to review and potentially roll back regulations, to the state of airport privatization in the United States, to a case analysis on mental distress damages, to a proposal of a limited liability scheme for autonomous aircraft. The Air & Space Lawyer’s editorial team works hard to publish topical and timely articles that are interesting and vital to our industries. If you have an idea for an article or topic you’d like to write or just read, please let us know.

On the ABA front, the process of analysis of a new membership model continues. The Board of Governors has approved a new fee structure, and it is expected that the House of Delegates will vote on the new model at the ABA’s Annual Meeting in August. The result will be a reduction in dues for many, but also an increase in availability of free CLE content for members in the hopes of attracting more people to join or to stay with the ABA. The ABA is also undergoing a staff reorganization and reduction to become a more streamlined and efficient organization. This should redound to the benefit of all in the long run, although these types of reorganizations can be hard on staff who might need to find another position. The Forum remains involved in the discussion of these changes with the ABA and will continue to work to provide and improve opportunities for our members.

Let me know how we’re doing and what more we can do for you, and have a great summer!

Andrea Brantner
Chair, Forum on Air and Space Law
O ur first cover article examines the state of airport privatization in the United States. The author, Stephanie Griffin, is general counsel of TBI US Operations, Inc./Airports Worldwide, an airport investment company that also provides airport operation and management services in the United States and internationally. Stephanie explains how legal, regulatory, and financing constraints have limited the growth of airport privatization in the United States. The FAA’s Airport Privatization Pilot Program (APPPI) has been in place for more than 20 years, yet only two commercial service airports have completed privatization under the APPP, and one of those airports subsequently reverted to public ownership. Stephanie’s article focuses on “pockets of privatization” that have emerged at publicly owned U.S. airports where a range of activities are delegated to private entities. These can include having a private entity operate and manage an airport or specific areas or activities at an airport under contract. Stephanie also describes how public-private partnerships are undertaking infrastructure projects, including at major U.S. airports such as Chicago O’Hare and New York JFK International Airport.

Our second cover article, by Lauren Haertlein of the General Aviation Manufacturers Association (GAMA), looks forward to the future of autonomous aircraft and offers a novel proposal: to establish an alternative liability scheme for such aircraft. Lauren’s proposal is modeled on the Vaccine Court, which administers a congressionally established no-fault liability system to resolve vaccine-related injury claims. Lauren argues that the Vaccine Court was successful in facilitating the widespread deployment of life-saving and health-enhancing vaccines while addressing the need to compensate the relatively small percentage of vaccine recipients who suffer injury. Lauren highlights the enormous potential social benefits of autonomous aircraft, but warns that if the inevitable liability risks associated with such aircraft are not addressed, it could inhibit the industry’s development.

Next, David Krueger of the Benesch law firm in Cleveland, Ohio, examines the Sixth Circuit’s recent decision in Doe v. Etihad, which could have significant liability implications for airlines. The Etihad court held that passengers may obtain mental distress damages from an air carrier under the Montreal Convention independent of any physical injury suffered. This decision, David explains, runs counter to decades of precedent under the Montreal and Warsaw Conventions. To date, other circuits have refrained from following Etihad’s interpretation of the Montreal Convention, instead limiting damages to those that are the direct result of bodily injury. David warns, however, that Etihad may make courts in the Sixth Circuit a more attractive venue for plaintiffs’ counsel.

Finally, Marina Veljanovska O’Brien and Andrew Orr of The Wicks Group analyze the DOT’s and FAA’s response to the Trump administration’s directives to federal agencies to review and potentially roll back regulations. Shortly after taking office, President Trump issued a series of executive orders directing agencies to implement a regulatory reform agenda focused on improving the “efficiency, effectiveness, and accountability” of the executive branch. These orders included a requirement for agencies to identify at least two prior regulations for elimination for every one new regulation issued. Agencies were also required to establish a regulatory reform task force to drive implementation of regulatory reforms. Marina and Andrew provide a progress report on the DOT’s and FAA’s implementation of the president’s regulatory reform agenda. They note that the so-called “2-for-1” rule has not had a significant impact. They also highlight the tension between directives to eliminate regulations with (in the case of the FAA) widespread support for implementing new safety-focused rules regarding commercial space transportation and drones.

We would like to hear from you about The Air & Space Lawyer: what you like about, and suggestions for improving, our publication. We are always looking for new authors and interesting topics for our articles, so if you may be interested in writing, please contact me at dheffernan@cozen.com.

David Heffernan
Editor-in-Chief

David Heffernan is a member of Cozen O’Connor, based in the firm’s Washington, D.C., office, where he co-chairs the firm’s Aviation Practice.
Mental Distress for Airline Lawyers: The Sixth Circuit’s Decision in **Doe v. Etihad**

By David M. Krueger

In **Doe v. Etihad Airways, P.J.S.C.**, the U.S. Court of Appeals for the Sixth Circuit radically altered the scope of an air carrier’s liability under the Montreal Convention, the international treaty controlling an air carrier’s liability to passengers for damage to persons or property during international flight.

Prior to **Etihad**, courts almost universally held that a passenger who suffers bodily injury as a result of an accident is entitled to physical damages, but is only eligible for emotional damages to the extent any such damages are attributable to the bodily injury sustained. The Sixth Circuit in **Etihad**, however, concluded that passengers may be able to recover for emotional damages that are completely divorced from any bodily injury sustained. In doing so, **Etihad** departs from nearly a century of jurisprudence on this issue, both domestically and internationally (given the Montreal Convention’s interpretation by courts in foreign signatory jurisdictions). As discussed below, **Etihad** significantly increases air carriers’ potential liability for claims in the Sixth Circuit, and sets a dangerous precedent for litigating cases in other circuits that have not directly decided the scope and limits of compensable injuries under the Montreal Convention.

**The Case of Jane Doe**

In **Etihad**, the plaintiff, Jane Doe, was returning from Abu Dhabi to Chicago aboard a flight operated by Etihad Airways (Etihad). After reaching inside the seatback pocket in front of her, she pricked her finger on a hypodermic needle that was hidden in the pocket, drawing blood. Doe was given a Band-Aid for her finger and was tested multiple times for possible exposure to disease, all of which came back negative. Doe sued Etihad, claiming damages both for the physical injury (the needle prick) and “mental distress” owing to her possible exposure to various diseases. Her husband, John Doe, claimed loss of consortium.

Article 17(1) of the Montreal Convention provides that an air carrier “is liable for damages 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 district court granted summary judgment in favor of Etihad, holding that Doe’s emotional distress was not caused by the bodily injury sustained—i.e., the physical wound itself. Instead, the district court concluded that the emotional distress damage was caused by the needle and separate from the physical injury, and therefore was not compensable under Article 17(1).

The Sixth Circuit reversed the district court’s order, holding that under Article 17(1) of the Montreal Convention, emotional or mental damages are recoverable “so long as they are traceable to the accident, regardless of whether they are caused directly by the bodily injury.”

The court held that because Doe’s alleged mental distress arose from the accident itself (i.e., pricking her finger on the needle), she could recover for emotional distress damages, even if the mental distress was unrelated to the nominal physical injury she received.

**Why Does This Matter?**

The Sixth Circuit’s decision in **Etihad** represents a radical expansion of air carriers’ potential liability under the Montreal Convention. Under Article 17 of the Warsaw Convention, the predecessor to the Montreal Convention, a carrier is “liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.” Under the Warsaw Convention, an air carrier’s liability for emotional damages was limited to damages resulting from a bodily injury, and a passenger could not recover for emotional damages unconnected with the actual injury.

As a classic example of this liability limitation, assume a crash landing (an accident) occurs. In the process, a passenger pinches his finger in the tray table of his seat, but is otherwise unharmed. The passenger then sues the carrier both for his physical injury (the pinched finger) and emotional distress, claiming the crash landing has led to a fear of flying. Under the Warsaw Convention, and even after adoption of the Montreal Convention, nearly every district, circuit,
and foreign court would reach the same conclusion: the passenger could recover damages (if any) for his pinched finger and any emotional damages resulting from his pinched finger. But the passenger could not recover emotional damages for the new supposed fear of flight, which was the result of the crash landing and unconnected to the bodily injury.

Under *Etihad*, however, the Sixth Circuit held that the air carrier would be liable for emotional damages unconnected with the bodily injury, even using the “pinched finger” example to prove its point.7

Implications for Airline Accident Litigation

The first implication is obvious: there will be more lawsuits against, and increased potential liability for, air carriers. Post-*Etihad*, any passenger may state a claim for any type of emotional distress resulting from an accident, so long as there is some nominal type of bodily injury (even just a pinched finger). Article 17 does not permit recovery of purely psychic injuries, and requires that there be some bodily injury.8 The Sixth Circuit attempted to leave intact Article 17(1)'s requirement that there be some type of bodily injury before unrelated emotional damages are compensable. But even if an accident does not result in any real injury, future litigants are likely to raise spurious claims of pinched fingers, being sore, or other types of nominal injuries as a means to satisfy the “bodily injury” requirement and seek broader emotional damages arising from the accident.

Second, and relatedly, plaintiffs’ attorneys will undoubtedly rely on *Etihad* to try and expand the scope of potential damages, as *Etihad* opens the door for “tag-along” claims of emotional damages completely unrelated to the bodily injury. This not only increases potential exposure for air carriers, but may also undermine carriers’ efforts to contest suspect claims of emotional damages based on alleged conditions that may have existed before the accident giving rise to the claim.

Returning to the “pinched finger” example, *Etihad* apparently endorses the conclusion that emotional damages for fear of flying are compensable even if completely independent of the accident and accompanying bodily injury. It is conservatively estimated that over 20 million Americans have a preexisting fear of flying.9 Absent medical evidence to the contrary, air carriers are put in a difficult position to rebut a plaintiff’s claim that an accident caused his or her nascent fear or anxiety of flying. Indeed, even if a plaintiff admits to having a preexisting fear of flying, aggravation of a preexisting condition may be compensable under Article 17.10 This will create new challenges in determining how, and to what extent, purely psychic injuries may have been aggravated—given that these claimed injuries are completely divorced from the actual bodily injury the passenger incurred.

Under *Etihad*, claimed psychic injuries may not even need to be as specific as fear of flying, and would ostensibly make broad and generic claims of general anxiety compensable under Article 17. Imagine that a passenger has anxiety as a result of turbulence. While unfortunate, such anxiety is not compensable under Article 17. Under *Etihad*, however, if the passenger bumps his or her knee during the turbulence, that anxiety is compensable. This seems contrary to the Montreal Convention’s fundamental proposition that, in exchange for strict liability, air carriers would be provided with uniformity and predictability for resolving claims of damage. Given the generally low bar to establish a claim of “bodily injury” (discussed below), "[s]uch a construction would improperly encourage artful pleading and would therefore 'scarcely advance the predictability that adherence to the treaty has achieved worldwide.'"11

Air carriers defending claims subject to the Montreal Convention must be prepared to address *Etihad*. While the Sixth Circuit claimed to have applied a “plain meaning” interpretation of Article 17(1), and attempted to distinguish nearly 20 years of precedent under the Montreal Convention, there are compelling grounds upon which the reasoning in *Etihad* can be criticized, and why other courts should not adopt its reasoning. Most notably, the court’s decision hinges on its interpretation of the phrase “in case of” as used in Article 17(1), which the court concludes “is conditional, not causal.”12

The court uses the common expression “in case of emergency” as a parallel to its interpretation of Article 17(1), concluding that “[t]o say in case of X, do Y is to say ‘if X happens, then do Y’—none of which means that there is a causal relationship between X and Y.”13 But in using this “plain meaning” example, the court ignores the obvious importance of context. Extending the court’s example, assume two separate buildings, Building A and Building B, have fire alarms that say “pull in case of emergency.” If an emergency occurs in Building B that poses no threat of harm to Building A, should a person in Building A who becomes aware of the emergency pull the fire alarm? The Sixth Circuit would apparently conclude “yes,” because the instruction “pull in case of emergency” is purely conditional; under the court’s reasoning, the mere fact that there is an emergency in Building B satisfies the condition
to pull the alarm in Building A. Most people, however, would reasonably conclude that a person in Building A should not pull a fire alarm unless the emergency is in, or relates to, Building A.

Even if the instruction “pull in case of emergency” may not impart a causal requirement per se, most would construe an implicit requirement of relevance or connection, such as “pull in case of emergency relating to Building A.” In the context of Article 17(1), an air carrier’s liability “for damages sustained in case of death or bodily injury” is therefore reasonably construed—as it has been for decades—as imposing liability for damages relating to the death or bodily injury itself, and not the mere “conditional” event.

Implications for Sexual Assault and Harassment Claims

Another implication of Etihad is its potential impact on claims involving alleged sexual assault of passengers. There has been a sharp increase in the reported incidents of sexual assault of passengers in the past several years, 14 raising the issue of whether an air carrier may be liable under the Montreal Convention if one passenger sexually assaults another. In order to assess the implications of Etihad on sexual assault claims, it is necessary to discuss whether and under what circumstances sexual assault constitutes an “accident” within the meaning of Article 17 of the Montreal Convention.

In order for an air carrier to be held liable for any type of bodily injury under Article 17, there must first be an “accident” which caused the injury, and which “took place on board the aircraft or in the course of any of the operations of embarking or disembarking.” The U.S. Supreme Court has defined “accident” under Article 17 of the Warsaw Convention as “an unexpected or unusual event or happening that is external to the passenger.” 15 This definition has likewise been applied to Article 17 of the Montreal Convention. 16

Before even getting to the issue of sexual assault, whether nonsexual assault is an “accident” has been disputed under both the Warsaw and Montreal Conventions, with the results usually turning on the particular facts of the case. For example, in Ginsberg v. American Airlines, the Southern District of New York held that an altercation between a passenger and a flight attendant was not unexpected or “external” when the passenger “willfully disregarded [the flight attendant’s] instructions and moved the cart with the knowledge that an altercation could occur.” 17 Conversely, when an alleged assault is not the result of any particular conduct of a plaintiff, it is generally hard to dispute that such an altercation is an unexpected or unusual event external to the passenger. 18 In this respect, sexual assault, by its very nature, is an unexpected event that occurs external to the passenger, and thus seemingly would constitute an “accident” within the province of Article 17 of the Montreal Convention.

In discussing the term “accident” in Air France v. Saks, the U.S. Supreme Court noted that Article 17 was designed to encompass liability “for injuries proximately caused by the risks inherent in air travel,” even if the incident is otherwise unexpected and external to the passenger. 19 At first glance, it would seem difficult to conclude that assault, and particularly sexual assault, would be an inherent risk of air travel.

To this end, almost all decisions addressing assault—sexual or otherwise—rely on the Second Circuit’s decision in Wallace v. Korean Air. 20 In Wallace, the Second Circuit held that a passenger’s sexual assault of another passenger constituted an “accident” under Article 17. In making this determination, the Second Circuit did not decide the issue of whether sexual assault was an inherent risk of air travel, as expressly noted by the concurring opinion. 21 Instead, the Second Circuit latched onto the particular facts of the case, essentially concluding that the assault may have been made possible by a lack of supervision by the flight crew.

The merits of the decision in Wallace and the uncertainty as to whether an “accident” under Article 17 excludes risks that are not inherent to air travel is beyond the scope of this article. As a practical matter, nearly all courts that have subsequently addressed the issue of assault have essentially treated Wallace as de facto rejecting the inherent risk of travel limitation. 22 Given the U.S. Supreme Court’s instruction that the term accident “should be flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries,” 23 it seems likely that future courts would similarly follow these decisions in concluding that sexual assault constitutes an accident.

Finally, even if an assault constitutes an accident, as discussed above, the passenger must still incur “bodily injury” in order to recover under Article 17. In physical assaults, this requirement is often easily satisfied. In cases of sexual harassment unaccompanied by physical contact, no liability is sustained as even Etihad recognizes that some bodily injury is a necessary precondition under Article 17. But the standard for “bodily injury” is low and generally satisfied by a showing of even a slight physical injury such as bruising. 24 Thus—and without diminishing the gravity of the offense—25—a plaintiff could easily allege that even slight or passing physical touching caused a bodily injury, opening up a panoply of emotional damages claims under Etihad that did not necessarily result from the actual physical injury itself.
Conclusion

After the Sixth Circuit issued its decision, Etihad filed a petition for an en banc rehearing, which was denied. Etihad then filed a petition for a writ of certiorari with the U.S. Supreme Court, which also was denied. Given the conflict Etihad creates with other circuits, the decision warrants review. Yet, the U.S. Supreme Court has not accepted any case relating to Article 17 in nearly 15 years, and has only accepted a few cases during the entire history of both the Montreal and Warsaw Conventions.

Absent review by the U.S. Supreme Court, whether other federal courts of appeal will follow the Sixth Circuit remains to be seen. While the Etihad decision is still relatively recent, no court has followed or otherwise adopted its reasoning to date. Instead, post-Etihad, courts that have addressed Article 17 of the Montreal Convention have continued to follow cases limiting damages to those that are the result of the bodily injury itself, noting that Article 17 of the Montreal Convention was drafted with the intent of being consistent with the jurisprudence developed under the Warsaw Convention.

At a minimum, Etihad makes courts within the Sixth Circuit a much more attractive venue for future lawsuits. This poses a particular risk to foreign air carriers, which may be sued in any judicial district in which they conduct business. Thus, foreign carriers that conduct any flights or business within the Sixth Circuit (Michigan, Ohio, Kentucky, and Tennessee) are more likely to be sued in this jurisdiction, even if the claim arose elsewhere.

Endnotes

1. 870 F.3d 406 (6th Cir. 2017).
3. Etihad, 870 F.3d at 433.
5. See Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 368 (2d Cir. 2004) (holding that under Article 17 of the Warsaw Convention, air carriers are not liable “for mental injuries that accompany, but are not caused by, bodily injuries” (emphasis added)).
7. 870 F.3d at 427.
8. E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991) (“We conclude that 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.”).
10. See Olympic Airways v. Husain, 540 U.S. 644 (2004) (holding that an “accident” occurred within Article 17 of the Warsaw Convention when an unexpected refusal to assist a passenger resulted in the aggravation of the passenger’s pre-existing medical condition).
12. Etihad, 870 F.3d at 413.
13. Id.
16. See, e.g., Etihad, 870 F.3d at 432.
17. No. 09 Civ. 3226, 2010 U.S. Dist. LEXIS 107688, at *11 (S.D.N.Y. Sept. 27, 2010); see also Levy v. Am. Airlines, No. 90 Civ. 7005, 1993 U.S. Dist. LEXIS 7842 (S.D.N.Y. June 9, 1993) (concluding that no “accident” occurred where a passenger was allegedly assaulted by federal agents during the flight because “conduct was in response to [the plaintiff’s] actions and was completely independent of the operation of the flight”).
20. 214 F.3d 293 (2d Cir. 2000).
21. Id. at 300 (Pooler, J., concurring).
22. See, e.g., Lahey v. Singapore Airlines, Ltd., 115 F. Supp. 2d 464, 467 (S.D.N.Y. 2000) (holding that passenger-on-passenger assault constitutes an accident, and “the actions of the crew are not relevant to the determination of whether the assault was an ‘accident’ because it is clear that nothing in the term ‘accident’ suggests a requirement of culpable conduct on the part of the airline crew”); Matveychuk, 2010 U.S. Dist. LEXIS 92450, at *7 n.4 (stating that Wallace stands continued on page 22
DOT and FAA Regulatory Reform under the Trump Administration

Marina Veljanovska O’Brien and Andrew Orr

President Donald J. Trump, acting on his campaign promise, initiated an aggressive “regulatory reform” agenda intended to downsize the imprint and reduce the influence of the federal government. After an immediate “regulatory freeze” and initial review of all pending rulemaking at federal agencies, the administration embarked on a novel reform effort aimed at the federal rulemaking process. Through a series of executive orders (EOs), supported by guidance from the Office of Management and Budget (OMB), and his proposed budget to Congress, the president has directed agencies to scrutinize their regulations and other agency actions.

This article reviews how the U.S. Department of Transportation (DOT) and the Federal Aviation Administration (FAA) have implemented the president’s regulatory reform agenda. First, we provide an overview of the Trump administration’s approach to regulatory reform, as set forth in applicable EOs and guidance material. Second, we briefly describe the ongoing deregulatory activities at the DOT and the FAA, respectively, with a specific emphasis on measuring the impact on FAA rulemaking activities. We then conclude by identifying implications of the president’s policies at the DOT and the FAA.

Executive Orders and Regulatory Reform

On January 30, 2017, the White House issued EO 13,771, “Reducing Regulation and Controlling Regulatory Costs,” requiring that “for every one new regulation issued, at least two prior regulations be identified for elimination,” and that the costs of the new regulation be “prudently managed and controlled through a budgeting process.” Under the so-called “2-for-1 Rule,” the incremental costs of all new regulations for fiscal year (FY) 2017 must be no greater than zero unless the regulation is required by law or consistent with advice provided in writing by the OMB. Agencies are expected to meet this new requirement by offsetting any incremental costs from new regulations with the supposed savings gained from eliminating two existing regulations.

Consistent with EO 13,771, on February 2, 2017, the Office of Information and Regulatory Affairs (OIRA) at the OMB issued the “Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (Interim Guidance), which explained the application of, and exceptions to, EO 13,771. Under the Interim Guidance, EO 13,771 only applies to “significant regulatory actions” as defined in section 3(f) of EO 12,866, “Regulatory Planning and Review,” and only to those agencies that are required to submit their significant regulatory actions to OIRA for review under EO 12,866.

Under EO 12,866, significant regulatory actions are those that: (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the president’s priorities, or the principles set forth in EO 12,866. In the Interim Guidance, OIRA also noted that waivers could be granted for emergency situations, such as those involving critical health, safety, or financial matters.

Subsequently, on February 24, 2017, President Trump issued EO 13,777, “Enforcing the Regulatory Reform Agenda,” establishing a new administrative framework to ensure implementation of his regulatory reform agenda within the federal agencies. Under this EO, each agency must establish a regulatory reform task force (RRTF), headed by a regulatory reform officer (RRO), to improve the implementation of regulatory reform initiatives and policies and to identify regulations for repeal, replacement, or modification. The RRO and RRTF are also expected to target regulations that eliminate or inhibit jobs, are ineffective or outdated, impose costs that exceed benefits, create inconsistencies or otherwise interfere
with regulatory reform initiatives, are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, or are derived from subsequently rescinded EOs or presidential directives. Demonstrating the new authority of the RRTF, agency heads are expected to take instruction from the RRTF by prioritizing the elimination of regulations identified by the RRTF.11

To further enforce his regulatory reform agenda, on March 13, 2017, President Trump issued EO 13,781, “Comprehensive Plan for Reorganizing the Executive Branch.” The purpose of EO 13,781 is to improve the “efficiency, effectiveness, and accountability” of the executive branch by ordering the OMB director to propose a plan to reorganize governmental functions and eliminate unnecessary agencies.12 The OMB director will create the government reorganization plan based on the submission from each agency head of a proposed plan to reorganize their own agencies to improve efficiency and effectiveness.13

This EO was followed by a memorandum from the OMB on April 12, 2017, which provided guidance to agencies regarding EO 13,781 and how to align the order’s initiatives with the president’s budget.14 The memorandum instructed agencies to begin taking immediate action to achieve near-term workforce reductions, to develop a plan to maximize employee performance, and to submit an “agency reform plan” to the OMB that would be included in the president’s FY2019 budget. The memorandum also outlined the steps that the OMB intended to take to create a government-wide reform plan, which would be included in the president’s FY2019 budget.15

On March 28, 2017, the president followed up with another executive order—EO 13,783, “Promoting Energy Independence and Economic Growth.”16 Section 2 of EO 13,783 requires agencies to review all existing regulations, orders, guidance documents, policies, and other similar agency actions that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy sources. Such regulations, policies, and secondary sources should be suspended, revised, or rescinded.17

After its first year in office, the Trump administration claimed “fundamental regulatory reform and a reorientation toward reducing unnecessary regulatory burden on the American people.”18 The OMB provides a summary of the administration’s progress toward “more effective and less burdensome regulations,” boasting the withdrawal or delay of 1,579 agency actions.19 The administration also claimed that during the first eight months of implementation, agencies issued deregulatory actions at a rate of 22–1, issuing 67 deregulatory actions to only three regulatory actions.20 If true, the administration may reach its stated goal for FY2018 requiring agencies to take three deregulatory actions for every new regulatory action (the “3-for-1 Rule”).21 Whether the extent of regulatory reform claimed by the administration is accurate, President Trump’s deregulatory efforts have impacted the DOT and the FAA.

Regulatory Reform at the DOT and the FAA
Both the DOT and the FAA have taken steps to comply with the president’s deregulatory mandate. They have established their own RRTFs and have requested input from the public to identify current regulations for potential repeal, replacement, or modification. Despite these actions, it appears that the FAA is moving cautiously to issue new rules that would be deemed a significant regulatory action and therefore subject to EO 13,771.

Regulatory Reform at the DOT
The DOT has taken a number of actions to implement the president’s regulatory reform agenda. For instance, in compliance with the president’s directives, on May 26, 2017, the DOT established its RRTF and appointed Deputy Secretary Jeffrey A. Rosen to serve as the DOT’s RRO and chairman of its RRTF.22 In addition, on October 2, 2017, through a notification of regulatory review, the DOT publicized its review of existing DOT regulations and solicited written comments from the public to assist in the DOT’s deregulatory activities.23

The DOT’s RRTF consists of two components: a working group and a leadership council. The working group coordinates with leadership in the Office of the Secretary (OST) and DOT operating administrators (OAs) to conduct reviews and develop recommendations for deregulatory action. The working group presents recommendations to the leadership council, which in turn submits recommendations to the Secretary. Consistent with EO 13,777, on May 25, 2017, the RRTF provided an initial report to Secretary Chao detailing the DOT’s progress to comply with the EO (Initial Report).24 According to the Initial Report, the DOT “has already made significant progress in implementing EO 13777 and advancing the President’s deregulatory priorities”; however, a “significant amount of work remains.”25

As set forth in the Initial Report, the RRTF has submitted its proposed regulatory agenda—current and projected regulatory actions for FY2017 and FY2018—to be included in the Unified Agenda. Furthermore, the RRTF has directed the OAs—like the FAA—to...
identify regulations and policies that impose unnecessary regulatory burdens on stakeholders, which could be repealed, replaced, or modified without compromising the safety of the nation’s transportation system. This has resulted in some deregulatory measures. For example, the DOT withdrew documents pending publication in the Federal Register, extended effective dates on rules that had already been published but were not yet in effect, extended compliance dates for rules that were already in effect, and withdrew rules that were under review with the OMB.26

Furthermore, the Initial Report explained that the DOT planned to solicit public feedback to assist its regulatory reform efforts. Thus, in October 2017, the DOT invited the public to provide written input on existing rules and other agency actions that are good candidates for repeal, replacement, suspension, or modification, without compromising safety.27 The DOT specifically sought public comments on regulations that: (1) eliminate jobs or inhibit job creation; (2) are outdated, unnecessary, or ineffective; (3) impose costs that exceed benefits; (4) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; (5) could be revised to use performance standards; or (6) potentially burden the development or use of domestically produced energy resources.28

The DOT is planning to prioritize rules and regulations that impose “significant cost” on the public—i.e., regulations that may be suitable for elimination or modification under the 2-for-1 Rule.29 “For convenience,” the DOT published a list of “economically significant” rulemakings issued over the past several years. By the end of the extended comment period, the DOT had received 2,840 comments.30 The DOT’s deregulatory activities will no doubt impact agencies like the FAA, which has undertaken its own regulatory reform initiatives.

Regulatory Reform at the FAA

The FAA, like the DOT, has also taken steps to comply with President Trump’s regulatory agenda. These include the formation and tasking of its RRTF, outreach to industry for recommendation on rules that are good candidates for deregulation, and newly proposed regulatory efforts aimed at responding to changes in industry and technology, including in commercial space.

Tasking the Aviation Rulemaking Advisory Committee. The FAA elected to use the Aviation Rulemaking Advisory Committee (ARAC) to support its RRTF initiative. ARAC was tasked with reviewing recommendations on: (1) existing regulations that are good candidates for repeal, replacement, or modification; and (2) regulatory action identified in the FAA’s regulatory agenda.31 To accomplish this task, ARAC was required to provide a detailed explanation for recommending the repeal, replacement, or modification of each regulation, including quantitative data on the costs and benefits of regulatory action.32 The output of ARAC’s work was envisioned to be an initial report and an addendum report containing recommendations on the findings and reports of the tasks explained above. Regulations marked for repeal would, theoretically, fulfill the 2-for-1 directive. As part of the regulatory reform process, the FAA “is directed to seek input/assistance from entities significantly affected by its regulations,” adding that it assigned the review to ARAC because the committee’s “membership represents a broad spectrum of entities significantly affected [by] the FAA’s regulations.”33

In its final report, ARAC recommended that 54 regulations and guidance materials be repealed, replaced, or changed.34 ARAC chose these from over 300 recommendations. The recommendations included in the final report were organized in four sections: (1) “Airspace, Airports and Weather”; (2) “Part[s] 21 & 25”; (3) “Parts 61, 65, 141 and 142”; and (4) “Parts 91, 121, 133 and 135.” Recommendations include, among others, efforts to harmonize U.S. and international regulations (e.g., European Aviation Safety Agency) related to operation in icing conditions,35 removing unnecessary requirements to include the date of last revision on each page of a manual,36 replacing the current requirements for FAA inspections and tests to verify conformity and safety with other approaches that satisfy the same requirements,37 and the repeal of a rule which merely refers to another rule on structural ditching requirements.38

These examples seem to be “low hanging fruit” or noncontroversial items, although ARAC admitted that some recommendations were controversial.39 The report included dissenting opinions from the National Air Disaster Foundation, the Air Line Pilots Association International, the International Association of Machinists and Aerospace Workers, Airlines for America, the Airlines Dispatchers Federation, and the Association of Flight Attendants.40 In addition to evaluating existing rules for repeal or replacement, as part of its regulatory reform efforts the FAA is also considering ways to update its regulations to reflect technology and industry developments.

Regulatory reform prompted by changes in technology and industry. In response to changes in U.S. industry and technology, and partially at the prompting of the National Space Council,41 the FAA’s Office of Commercial Space Transportation has sought to address regulatory reform with its proposed “21st century licensing
Specifically, in December 2017, the FAA submitted to the National Space Counsel a set of regulatory reform recommendations for commercial spaceflight, including streamlining the launch licensing process and developing licenses for newer launch vehicles and “nontraditional” space applications, like satellite servicing technology. Toward that end, on March 28, 2018, the FAA issued a notice and request for public comment regarding the FAA’s collection of information used to determine if applicants satisfy requirements for obtaining a launch license to protect the public from risks associated with reentry operations from a site not operated by or situated on a federal launch range. It remains to be seen how the FAA will implement the envisioned changes to the licensing process. For now, more than a year into President Trump’s term, the FAA has acted cautiously in bringing forth new rulemakings that would be affected by the 2-for-1 Rule.

Implementation of the 2-for-1 Rule. As table 1 shows, during the first year after the 2-for-1 Rule went into effect, the FAA issued approximately 4 percent more rules and proposed rules compared to the same period under the Obama administration, when the 2-for-1 Rule did not exist. However, a closer look at the type of FAA rules that were issued under the Trump administration reveals that almost 95 percent of all FAA rules and proposed rules consisted of airworthiness directives, standard instrument approach procedures, special conditions, amendments, or establishment of airspace. The same is true for the type of rules issued under the corresponding period of the Obama administration. Therefore, even if there was a slight increase in rulemaking, the increase did not result from rules that would be considered game changers in the regulatory sense (e.g., possible privatization of the air traffic control system). In fact, these types of regulatory actions were not considered to be “significant” pursuant to the FAA’s analysis of EO 12,866.

More telling of the impact of the recent regulatory reform agenda are the numbers reflected in table 2. Out of 1,157 total rules and proposed rules issued by the FAA during the period of January 30, 2017, through January 30, 2018, only two were “deemed significant under EO 12,866.” As noted above, the 2-for-1 Rule (EO 13,771) only applies to “significant regulatory action” as defined in section 3(f) of EO 12,866. However, these two rules were “technical amendments” of past rules aimed at removing incorrect cross-references. In both instances, the FAA explained that a “technical amendment is not an EO 13771 regulatory action because [a] technical amendment is not significant under EO 12866.”

Similar results emerged from a search in the Federal Register of all FAA rules and proposed rules for the aforementioned period that include a reference to EO 12,866. Out of 1,157 rules and proposed rules that contain a reference to EO 12,866, only one was “Deemed Significant Under 12866.”

On their face, these results suggest that the 2-for-1 Rule has yet to have a large impact on FAA rulemakings. The majority of the rulemakings consists of airworthiness directives, and less than 1 percent of all rules and proposed rules are analyzed under the 2-for-1 Rule. Agencies appear to have reacted cautiously to EO 13,771 and, as noted above, have relied on public and industry input to inform the deregulatory process.

### Table 1: First Year in Office—Rulemaking at the FAA; Comparing the Obama and Trump Administrations

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<thead>
<tr>
<th></th>
<th>Obama Administration</th>
<th>Trump Administration</th>
<th>Percent Difference</th>
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<tbody>
<tr>
<td>Number of Rules Issued</td>
<td>679</td>
<td>719</td>
<td>+ 6%</td>
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<tr>
<td>Number of Proposed Rules Issued</td>
<td>428</td>
<td>438</td>
<td>+ 2%</td>
</tr>
<tr>
<td>Total</td>
<td>1,107</td>
<td>1,157</td>
<td>+ 4%</td>
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</tbody>
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### Table 2: First Year in Office—Impact of 2-for-1 Rule (EO 13,771) at the FAA

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Total Number of Rules**</td>
<td>719</td>
<td>438</td>
<td>2</td>
</tr>
<tr>
<td>Total Number of Rules Referencing EO 12,866**</td>
<td>596</td>
<td>419</td>
<td>1</td>
</tr>
<tr>
<td>Total Number of Rules Referencing EO 13,771**</td>
<td>6</td>
<td>3</td>
<td>1</td>
</tr>
</tbody>
</table>
Conclusion

Just over one year after the 2-for-1 Rule went into effect, the president’s regulatory reform agenda and the implementing actions of the DOT and the FAA have produced the following results:

First, the president’s EOs have reorganized and refocused the rulemaking and regulatory process at the DOT and the FAA. The formation of the RRTF and the designation of the RRO has provided a focal point within the DOT for the president’s deregulatory initiatives. However, the emphasis on deregulation and numbers (2-for-1) may lead to potential regulatory oversight of an agency whose every rule is meant to increase transportation safety.

Second, both the DOT and the FAA are making a concerted effort to solicit public comment regarding potential deregulatory actions to meet the objectives of the president’s EOs. Through the DOT’s notification of regulatory review and the FAA’s appointment of an industry group to serve as its RRTF, the agencies are undertaking a public engagement campaign.

Third, rulemaking statistics indicate that the impact of the 2-for-1 Rule at the FAA to date is minimal. Only two FAA regulatory actions in the past year were found to be impacted by EO 13,371, and both were considered to be a deregulatory action. The FAA may be avoiding any new rulemaking that would have to be justified under the new regulatory mandate. ARAC’s recommendations relating to current rules that are good candidates for repeal, replacement, or modification also evince a cautious response to the president’s regulatory agenda.

Fourth, it remains unclear how federal agencies can balance the demands of the presidential EOs with potential competing demands for regulatory actions under other legal mandates or industry pressure, such as the case for rulemaking in the commercial space sector.

Finally, it remains to be seen how the FAA and the DOT will treat their guidance documents in light of the Department of Justice decision to stop issuing guidance documents that have the effect of a regulation or law. In the case of the FAA, Order No. 8100.1 (Flight Standards Information Management System), although a guidance document, has been used to interpret FAA regulations and is heavily relied upon by both the agency and industry.

The FAA has acted cautiously in bringing forth new rulemakings that would be affected by the 2-for-1 Rule.

Endnotes


4. Id.

5. “Agencies” do not include “independent regulatory agencies,” as defined in 44 U.S.C. § 3502(5), such as the National Transportation Safety Board (NTSB).


8. See OIRA Interim Guidance, supra note 6.

9. Id.


11. Id.


13. Id.


15. Id.


17. Id.


19. Id.


25. Id.

26. Id.

27. 82 Fed. Reg. 45,750.

28. Id.

29. Id.


32. 82 Fed. Reg. 19,783.

33. Id.

34. AVIATION RULEMAKING ADVISORY COMM., ARAC INPUT TO SUPPORT REGULATORY REFORM OF AVIATION REGULATIONS—ARAC ADDENDUM REPORT (Sept. 12, 2017), https://www.faa.gov/regulations_policies/rulemaking/committees/documents/media/Phase%20%20Report_Final%20Recommendations%02ARAC%0Mt_Sept%20%20%20(1).pdf.

35. 14 C.F.R. § 121.629(b).

36. Id. § 121.135.

37. Id. §§ 21.33, 53; Type Certification, FAA Order No. 8110.4C (Mar. 28, 2007).


40. ARAC ADDENDUM REPORT, supra note 34.

41. The National Space Council approved recommendations for reforms to regulations of commercial space activities. In addition to the recommended changes in the licensing process for launch vehicles, the council recommended: (1) consolidating various offices at NOAA dealing with space issues; (2) developing protections for the radiofrequency spectrum facilitating commercial space activities; and (3) reforming export controls regulations related to commercial spacecraft that lands in another country. Jeff Foust, National Space Council Backs Incremental Space Regulatory Reform, SPACE NEWS (Feb. 21, 2018), http://spacenews.com/national-space-council-backs-incremental-space-regulatory-reform/.

42. The “Percent Difference” is calculated as the percent-age increase in regulatory action at the FAA between the Obama and Trump administrations in the first year of their (first) term, rounded to the nearest whole number.


44. Id.


47. These results are based on the use of the advanced search function on the Federal Register website (https://www.federalregister.gov/documents/search#advanced) by selecting the filter “Significant Regulatory Actions—Deemed Significant Under EO 12866.”

48. These search results are based on the use of the advanced search function on the Federal Register website. The search field was left blank and the results were filtered for a publication date range starting on 01/30/2017 and ending on 01/30/2018 and for publication by the FAA. The front end of the search range begins on the publication date of EO 13,771, 10 days following the first day of the Trump administration.

49. These results are based on the use of the advanced search function on the Federal Register website. The search term was “12866,” and the results were filtered for a publication date range starting on 01/30/2017 and ending on 01/30/2018 and for publication by the FAA.

50. These results are based on the use of the advanced search function on the Federal Register website. The search term was “13771,” and the results were filtered for a publication date range starting on 01/30/2017 and ending on 01/30/2018 and for publication by the FAA.

Pockets of Privatization

continued from page 1

remain under public ownership but enter into commercial service agreements with private companies, thereby retaining certain (primarily funding-related) benefits of public ownership while taking advantage of operational efficiencies that can be realized better by the private sector.

The FAA Airport Privatization Pilot Program

U.S. airports seeking to privatize can look to the APPP to ameliorate certain regulatory burdens involved in the process. The APPP began in September 1997 and is designed to allow publicly owned airports that meet certain criteria to access private capital for development, while preserving the availability of certain federal benefits typically only accessible to public airport operators. The APPP allows qualifying commercial service airports, that is, those publicly owned airports receiving scheduled passenger service of at least 2,500 passengers each year, to be leased to private operators, but not owned outright (general aviation airports can be owned or leased privately).

The most significant benefit of privatizing through the APPP is the ability to obtain exemptions from current federal regulations on revenue use and grant access. Because most public-use airports receive funding through the FAA’s Airport Improvement Program (AIP), they are subject to strict regulations regarding revenue use, grant repayment, and sale of airport property. While public airport operators are typically required to use airport revenue only toward the capital or operating costs of the airport under these regulations, a public operator participating in the APPP can obtain an exemption so that it may use funds derived from privatization toward the general budget. This, for example, could be of substantial benefit to a municipality burdened with underfunded pensions in other areas of its budget. However, under section 47134(b)(1), a primary airport, that is, an airport with 10,000 or more passenger enplanements per year, must obtain approval for this exemption revenue from both 65 percent of air carriers serving the airport as well as from carriers that have at least 65 percent of the landed weight at the airport.

Section 47134(b) also contains two other major benefits for APPP participants: (1) participating airports can obtain an exemption from the obligation to repay funds from prior federal grants or return donations of federal property upon a transfer of an ownership interest; and (2) participating private operators can obtain an exemption from the requirements governing use of airport revenues to the extent necessary to permit the private operator to earn compensation from operation of the airport. APPP private operators of primary airports can also access federal grant funding through the AIP program, albeit at lower dollar amounts than public airport operators, and APPP private operators can collect and use revenue from passenger facility charges (PFCs).

The FAA Modernization and Reform Act of 2012 increased the scope of the APPP to allow participation by 10 airports instead of five. Despite the benefits of the APPP and the expansion of the program, almost all commercial service airports in the United States continue to be owned by governments or other public entities. Only two commercial service airports have completed the privatization process under the APPP: Stewart International Airport (SWF) in Orange County, New York, and Luis Muñoz Marín International Airport (SJU) in San Juan, Puerto Rico. SWF subsequently reverted to public ownership, leaving SJU as the only remaining airport with a private operator under the APPP.

Currently, there are three active applicants in the APPP: Westchester County Airport (HPN) in White Plains, New York, whose preliminary application was accepted by the FAA in December 2017; St. Louis Lambert International Airport (STL) in St. Louis, Missouri, whose preliminary application was accepted in April 2017; and Hendry County Airglades Airport in Clewiston, Florida, whose preliminary application was approved in 2010 and is currently pending final approval. Momentum for the two larger airports, STL and HPN, has largely stalled since submission of their initial applications, and it remains to be seen if they will progress through the APPP. At HPN, the Westchester County Board of Legislators has yet to approve the terms of the agreement between the outgoing county executive and the selected private operator to lease the airport through the APPP. The incoming county executive has expressed opposition to the deal. At STL, local city officials have called for a rejection of the consultants advising on airport privatization, and community leaders are concerned about lack of transparency during these early stages of the project.

Of course, an airport can privatize outside of the APPP, but that process is still subject to FAA oversight.
Neither the private operator nor the public entity would be eligible for the exemptions noted above, which would be a commercial disincentive for any public entity (and potential investors) due to the requirement that the revenue derived from the privatization be used at the airport.

**Constraints on Privatization**

The issues faced at HPN and STL show there are significant public perception hurdles that impact the prospects for full privatization of U.S. airports utilizing the APPP. The privatization process can often be viewed in a negative light as lacking public support, especially absent sufficient assurances addressing social concerns. For example, during the privatization of SJU in Puerto Rico through the APPP, protests erupted from residents concerned about the potential for lost jobs and lower wages.9 Concerns about transparency in the privatization process and the potential for unbridled growth to generate revenue by a private operator can draw ire from residents.

Public operators are also insufficiently incentivized by the current landscape to explore privatization. The APPP contemplates complete private operation of the subject airport through long-term leases, without addressing alternative forms of public-private partnerships, such as transferring a partial ownership interest, thereby enabling the public entity to remain involved in the operation of the airport. The long-term lease privatization method results in a loss of control by the public operator, which would essentially forfeit its oversight of the airport. Because public operators have access to tax-exempt municipal bonds to fund airport improvements, whereas private operators typically do not,10 the financing terms of complete privatization can present a bleaker picture to a public airport when compared with its ability to simply issue bonds to fund capital projects. If a public operator wishes to divert revenue from privatization through the APPP, it must obtain approval from air carriers as referenced above, and there is no relief for the public operator if it cannot obtain air carrier approval. Meanwhile, if public operators attempt to obtain more favorable terms by pursuing privatization outside the APPP, they will be subject to restrictions outlined above on the use of the revenue derived from the process.

Even if a public operator wanted to privatize through the APPP, the program itself is inherently flawed from a commercial perspective, and absent a change, participation is likely to remain stagnant. A private operator can only lease a commercial service airport through the APPP, which means that the private operator has a finite window of time to profit from its capital investments in the airport before the lease expires and the facility is ultimately returned to the public operator.

Private operators also do not have access to tax-exempt bond funding, which can make financing more expensive for them. Private operators are required to comply with AIP grant assurances when they participate in the APPP, which include complying with requirements that have associated costs that affect private operators’ bottom line, such as making financial reports to the FAA, maintaining an airport layout plan, and restrictions on charges to air carriers, among others. While private operators do have access to AIP grant funding through the APPP program, the grants are limited to a lower federal share. Private operators must also continue to honor all collective bargaining agreements in place at the airport, which presents an additional financial constriction on the profitability of privatization.

Finally, private operators participating in the APPP must accept restrictions on charges to airlines and passengers. Private operators cannot impose rates on airlines using a commercial service airport that increase faster than inflation without the consent of 65 percent of air carriers that operate at the airport, which is a serious limitation given that air carriers are unlikely to vote to subject themselves to additional fees! Private operators under the APPP are authorized to charge PFCs, but those PFCs are subject to a federal cap (currently $4.50 per enplaned passenger). By contrast, private operators not participating in the APPP can increase rates on air carriers on a reasonable and nondiscriminatory basis, in conformance with AIP grant assurances, without obtaining consent from air carriers. Private operators outside the APPP cannot collect PFCs, but are authorized to impose charges on passengers on a reasonable and nondiscriminatory basis, essentially allowing for subversion of the PFC cap.

The current infrastructure plan promulgated by President Trump in the “Legislative Outline for Rebuilding Infrastructure in America” attempts to address some of these concerns.11 Specifically, the plan encourages Congress to: (1) remove the caps on the number of airports permitted to participate in the APPP; (2) expand the eligibility of private activity bonds to allow privately financed capital investments in airports to benefit from similar financing as public, tax-exempt bonds; and (3) reduce the percentage of air carriers required to consent to privatization from 65 percent to a majority vote. However, this plan leaves many of the above concerns untouched, and air carriers, whose interests may diverge from the airport’s, would still have to approve any privatization effort. Consequently, even if these
provisions were to be enacted into law, a lack of participation in the program is likely to persist. In addition to expanding the use of private activity bonds as described in the Legislative Outline, the APPP’s criteria should be amended to make the APPP a more viable conduit for privatization, particularly by increasing incentives for participation and balancing competing interests among airport stakeholders. To better attract public airport operators, restrictions on the use of revenue by the public operator should be eased for airports participating in the program. Because air carriers have an interest in minimizing airport rates and charges and retaining control over the use of airport revenues, the requirement that 65 percent of air carriers approve both privatization and increases above the Consumer Price Index in airport rates and charges can be anathematic and result in privatization offers that are unattractive to private firms. Rather than require that air carriers expressly approve privatization, the APPP could be amended to incorporate a period of public comment, which is typical in federal administrative practice, during which air carriers could submit their views on the privatization for consideration prior to approval by the FAA. Concomitantly, the FAA should be granted the ability to deny the privatization if it determines that significant issues persist after review of the public commentary in order to adequately address air carriers’ concerns. Finally, amending the AIP grant criteria to allow for airports privatized through the APPP to receive grant funding on the same scale would also create a more level playing field for capital access and encourage more favorable commercial incentives for public and private partnerships in airport operations.

Because of the hurdles and disincentives in the current regulatory scheme for complete privatization, pockets of privatization have emerged at U.S. airports.

**Pockets of Privatization**

Because of the hurdles and disincentives in the current regulatory scheme for complete privatization, pockets of privatization have emerged at U.S. airports, in which certain services, specific management areas, or specific projects are delegated to private entities, but the airport as a whole continues to be publicly owned to preserve the benefits available to both public and private operators. Three such approaches are discussed below: service agreements, operation and management contracts, and design-build-finance-operate-maintain (DBFOM) arrangements. The popularity of these approaches has expanded with their demonstrated success.

**Service Agreements**

Service agreements with private firms have become a common feature of many airports. These arrangements typically are for janitorial, engineering, or other limited-scope, fee-for-service arrangements involving non-core operations. While these types of agreements are widespread, they typically involve a very limited amount of privatization due to their narrow scope.

**Operation and Management Contracts**

Operation and management contracts are becoming increasingly popular and approximate the risks and benefits of privatization more closely than simple service agreements. These agreements allow the public operator to contract out to private firms management or operation of specific responsibilities, such as ramp control or cargo management, or specific facilities, such as operation of an airport terminal or airfield. For example, TBI Airport Management Inc. operates the common-use facilities and equipment at the international terminal at Hartsfield-Jackson Atlanta International Airport (ATL), the facilities at Hollywood Burbank Airport (BUR) in Burbank, California, and the airfield at Ontario International Airport (ONT) in Ontario, California, among others. Management contracts can also be awarded for management of entire airports. AvPORTS, another specialized aviation facilities company, has contracts to manage Albany International Airport (ALB) and Newark Liberty International Airport (EWR), among others.

Benefits under operation and management contracts are numerous for both the private firm and the public operator. They allow the public operator to take advantage of private sector flexibility and innovation in delivery of services, which are subject to the internal controls of the private company instead of a public approval process. These agreements can also enable more effective and efficient cost management through vertical integration of services by the private firm and provide benefits of scale that come from private firms with multiple operating locations. These agreements also allow the public operator and private firm to engage in risk sharing related to innovations and introduction of new methods of service delivery. Shared insurance costs between the parties can provide further mitigation of risk exposure.

While private firms do not have access to AIP grant funding or PFCs under operation and management contracts, the public operator typically retains its eligibility for such funding sources because it has not
transferred ownership of the airport. This allows the parties to take a collaborative approach to capital development, leveraging the financing advantages of the public operator through grants and PFCs with the expertise and access of the private firm.

Additionally, because the public entity retains its role as operator of the airport, it also remains accountable for FAA regulatory compliance as well as compliance with federal and local laws. This is important because there is little regulation governing the direct relationship between private firms engaged in management and operations and FAA regulatory compliance, which can sometimes cause public operators to be reluctant to consider these arrangements. Consequently, it is important that operation and management contracts have clearly defined scope and compliance requirements so that operations are cohesive and do not jeopardize the public operator's obligations. Private firms must comply with federal law and honor the public operator's AIP grant assurances, while also ensuring that any subcontractors hired by the private firm do the same.

The DBFOM Model
Hybrid contracts exist that reflect the DBFOM model of project delivery that are often used in public-private partnerships to structure the delivery of infrastructure projects. Because these arrangements invite a greater degree of investment from private firms, which typically come with a greater degree of control transferred to them as well, these contracts invite a greater degree of privatization than most management and operation contracts while retaining many of the benefits of such agreements. DBFOM contracts also typically provide for risk allocation to the private firm, which is typically better able to bear such risk, and integrate the benefits of expanded operational scale of the private operator.

DBFOM contracts invite private sector capital to contribute to large development projects, such as new terminal buildings, parking garages, or rental car facilities. In return, the private investor receives the right to operate and maintain the development for a fixed concession period after its completion. The development is typically returned to the public operator at the end of the concession period, which results in a gain to the public operator and the ability to use its own sources of available funding on other projects. Examples of DBFOM arrangements include the development of Terminal 5 at Chicago O'Hare International Airport (ORD) and Terminal 4 at New York John F. Kennedy International Airport (JFK). The use of innovative DBFOM arrangements will likely continue to grow as older infrastructure at U.S. airports will need to be replaced and growth is required to accommodate expanding traveling populations.

Conclusion
Until the current regulatory scheme for privatization is overhauled to reconcile competing interests within the aviation industry and remove disincentives built into the process for both public operators and private firms, alternative pockets of privatization present a way for U.S. airports to make use of private sector expertise and benefits while remaining under public control.

Endnotes
2. This article focuses on requirements for commercial service airports for clarity of scope, but general aviation airports can also participate in the APPP, subject to a few variations noted in the governing regulations.
4. The scope of what the FAA considers to be airport revenue for purposes of this regulation is defined in FAA Airport Compliance Manual, FAA Order No. 5190.6B, app. E (Sept. 30, 2009).
8. The FAA’s oversight includes requiring private operators’ continued compliance with AIP grant assurances and review for compliance with existing federal laws. See FAA, Airport Sponsor Assurances ¶ C.5.a., f. (Mar. 2014) (No. 5: Preserving Rights and Powers).
or on the ground—to the aircraft itself.

Historically, pilot error has been a primary or contributing cause of most aviation accidents. Increasing autonomy and reducing pilot input could offer tremendous safety benefits. Nonetheless, no technology is perfect, and accidents may occur. In terms of liability, the shift from piloted to autonomous could increase the burden on manufacturers. If liability or even the threat of liability becomes too great, it could have a chilling effect on the introduction and use of autonomous aircraft—technology with enormous potential to revolutionize transportation and make flying even safer than it already is today. To support the continued development and implementation of autonomous aircraft, it may be necessary to proactively mitigate the liability risks to manufacturers.

**Autonomous Vehicles and Liability: Who Is Liable When the Vehicle Is the Driver?**

The emergence of autonomous cars already has prompted a debate about liability for autonomous vehicles: Who should be responsible when something goes wrong? According to the National Highway Traffic Safety Administration (NHTSA) and the Society of Automotive Engineers (SAE), there are six levels of driving automation, ranging from zero (full human control) to five (fully autonomous). Currently, many car manufacturers appear to be undertaking efforts to maintain driver responsibility. For example, Nissan’s ProPILOT assist—which purports to provide lane control, navigate stop-and-go traffic, and maintain speeds and a set distance from the car ahead—requires drivers to keep their hands on the steering wheel. GM’s Cadillac “Super Cruise” driver assist, although hands-free, includes eye tracking technology to detect driver engagement.

Ultimately, however, it is assumed that driving will become increasingly autonomous, which may cause liability to shift predominantly or solely to the car manufacturer. In 2017, the American Association of Justice, a national plaintiffs’ lawyer group, advocated for manufacturers to “take full responsibility” for autonomous car accidents. GM, meanwhile, tried to advance a rule in California to exclude manufacturer liability for autonomous vehicle crashes if the machine had not been maintained in accordance with manufacturer specifications. The proposal evinces a concern that manufacturers could be held responsible regardless of maintenance or user errors.

Even though manufacturers may assume greater liability for autonomous vehicle accidents and incidents, the number of accidents and incidents is expected to be significantly reduced. Self-driving cars are expected to eliminate the majority of automobile accidents, which are caused by human error. Volvo’s senior technical leader for safety and driver-support technologies, Erik Coelingh, asserted that Volvo’s system could bring a car to a safe stop, even in the event of a failure. Volvo previously declared that it will pay for injuries or damages caused by its IntelliSafe Autopilot, which is slated to debut in 2020. Google and Mercedes Benz have made similar claims.

Auto manufacturers may be able to absorb a larger slice of a smaller liability pie for autonomous vehicle accidents. Such a model may not work for autonomous aircraft, however, because of the substantially greater liability exposure associated with aircraft accidents. A study of airline accident deaths found that air accident victims differ from the general U.S. population in a number of ways that make compensation values higher, including employment status, which could apply in the context of air taxi services as well. Aviation accidents often are high-profile and emotional events. In the general aviation context, court judgments and settlements in the millions of dollars—even tens of millions—are common. Insurers may be unwilling to underwrite the liability for autonomous aircraft events, while aviation manufacturers may not be able to absorb the risk and payment of those costs either.

**The Vaccine Court Model**

The Vaccine Court offers a model for an alternative liability system designed to balance the competing factors associated with the public’s interest in beneficial technology that is not completely risk-free. Such a no-fault system and compensation fund has been discussed in the context of autonomous cars. It is even more appropriate for autonomous aircraft, given the level of federal regulation of aircraft design, operation, and safety standards, and the importance of legal uniformity in aviation across states.

In 1986, Congress passed the National Childhood Vaccine Injury Act (Vaccine Act), creating a no-fault...
system to resolve vaccine-related injury claims. Most people who receive vaccinations do not experience any serious adverse effects. In rare cases, however, vaccines can cause serious and even fatal side effects, even if the vaccines are produced and administered properly. In the mid to late 1980s, significant litigation against vaccine manufacturers threatened the vaccine supply. Manufacturers and insurers feared that juries would award substantial damages to sympathetic plaintiffs regardless of fault. Many manufacturers had trouble obtaining liability insurance, and some withdrew from the market. In December 1984, the Centers for Disease Control and Prevention (CDC) predicted that the United States would soon experience vaccine shortages. In response, Congress intervened to protect the vaccine supply and bolster public trust in vaccinations.

With the Vaccine Act, Congress established an Office of Special Masters within the U.S. Court of Federal Claims, unofficially dubbed the “Vaccine Court.” The National Vaccine Injury Compensation Program (Vaccine Program) includes most vaccines routinely given in the United States. Covered vaccines are those recommended for routine administration by the CDC and subject to an excise tax on purchased doses, which creates the pool of funds from which successful plaintiffs are compensated.

Petitioners must file vaccine injury claims with the Vaccine Court before filing in state court. If a petitioner is dissatisfied with the Vaccine Court’s decision, he or she generally may reject the judgment and file in state court. In the Vaccine Court, cases are adjudicated by special masters without juries. The Secretary of Health and Human Services—rather than the vaccine manufacturer or the health-care provider who administered the vaccine—is the respondent.

To receive compensation, petitioners may pursue one of two types of claims: “on-table” or “off-table” injuries. For on-table claims, the Vaccine Program includes a table of adverse events that may occur within a specified period of time after vaccination. If a petitioner proves, by a preponderance of the evidence, that he or she suffered an on-table injury, causation is presumed. For off-table claims, the petitioner must prove by a preponderance of the evidence that the vaccine was the cause-in-fact of the injury. Compensation may cover medical and legal expenses, loss of future earning capacity, and up to $250,000 for pain and suffering or death. The system is intended to provide a more expedient, more flexible, and less adversarial alternative to traditional tort litigation.

**Why an Alternative Liability System Makes Sense for Autonomous Aircraft**

Autonomous aircraft have the potential to offer huge public benefits. For example, autonomous aircraft may improve aviation safety by minimizing or eliminating human error, which may account for 80 percent of aviation accidents. Autonomous aircraft also may operate in ways that greatly improve the national transportation infrastructure. Scheduled airlines serve fewer than 500 airports in the United States. Autonomous aircraft are expected to provide increased flexibility and efficiency, in particular with respect to local and regional travel. For example, as with the auto industry, some players are focused on developing autonomous aircraft for ride-sharing and air taxi services for urban environments. Further, autonomous aircraft are expected to generate environmental benefits. Many developers are exploring hybrid or electric vehicles, which could reduce greenhouse gas emissions directly and indirectly by reducing ground traffic. Hybrid and electric aircraft also could reduce aviation noise and alleviate some community noise concerns.

The potential benefits of autonomous aircraft technology make it worthy of support. The U.S. government’s primary responsibility toward civil aviation is to promote safety, but it also plays a major role in encouraging and developing civil aeronautics, including new technology. As one commenter has observed, “[t]here are countless examples of products that have been removed from the market, that never made it to the market at all, or that experienced substantial price increases as a result of product liability.” The U.S. government has intervened before to protect aviation from product liability concerns stifling the industry. From the mid-1980s to the early 1990s, general aviation product liability costs had caused substantial declines in aircraft manufacturing and sales, significant job loss in the aviation industry, and a lack of research and development in new products and technologies. Congress passed the General Aviation Revitalization Act of 1994 (GARA), which implemented an 18-year statute of repose for lawsuits against manufacturers of general aviation aircraft and parts. GARA is cited not only for reforming tort law, but also for “reviving[ing] the optimism of those involved in the industry.” After GARA, manufacturers reported both manufacturing and job growth.

Congress created the Vaccine Court to promote vaccine production, protect immunization programs, and fairly compensate for vaccine injuries according to an established program. To encourage investment and use in autonomous technology, Congress could establish a similar no-fault adjudication system for victims of accidents involving autonomous aircraft. Although the Vaccine Court is a statutory creation, there are other potential avenues for establishing an alternative liability system to resolve vaccine-related injury claims.
system for autonomous aircraft, depending on the system's intended structure, which in turn may depend on how the technology develops. In any event, there is value in being able to discuss the construction of such a system while the technology is developing—to “stay ahead of the airplane,” as pilots say.  

In addition to directly supporting the development of beneficial technology, an alternative, no-fault system for autonomous aircraft could stimulate public trust in autonomous aircraft. The expectations of the anticipated users of autonomous aircraft, in particular air taxi-like services, may not align with those of users of light aircraft today. Today, many of the users of light aircraft are pilots, who have a basic understanding of the aircraft itself as well as the national airspace system. The future users of autonomous aircraft may not be pilots, and may not have experience with smaller aircraft. The creation of an alternative liability system for autonomous aircraft signals trust in the technology; a legal regime that protects technology from unwarranted liability and justly compensates victims will help to promote public acceptance and understanding of product safety.

An alternative liability scheme may also offer direct safety benefits. The aviation industry has demonstrated enormous success through collaborative safety efforts, such as the public-private partnerships of the Commercial Aviation Safety Team and the General Aviation Joint Steering Committee. Because litigation by its nature is adversarial, it can create a barrier to collaboration and transparency and undermine safety objectives. In 2015, former National Transportation Safety Board Chairman Christopher Hart proposed an alternative liability scheme for aviation accidents in a presentation to RTI’s AviCON Conference, citing the undesirable results of civil litigation in aviation accidents. An alternative liability system could reduce litigation costs, as well as improve efficiency in the consideration of claims, reduce delays in compensating victims, and allow for increased focus on safety goals. Although product liability often is touted as pro-safety, autonomous aircraft manufacturers already have a strong incentive to make their products as safe as possible. Even the perception that their products are unsafe could doom their viability.

An alternative liability system also would provide important uniformity. In the context of autonomous cars, states have begun implementing different laws to address liability issues. Despite federal control over the aircraft certification process, the issue of preemption in aviation product liability remains unsettled. The interstate nature of aviation necessitates uniform regulation. Without uniformity, manufacturers could be subject to varying standards across states. State standards might not only jeopardize the development and use of autonomous aircraft, but also compromise safety by undermining the FAA's expertise in aviation safety and oversight.

The Autonomous Aircraft Court: Key Questions

Scope of Covered Autonomous Aircraft Operations
One of the key challenges to establishing an “autonomous aircraft court” would be defining what events it has authority to address. Not all vaccines are included in the Vaccine Court. Covered vaccines are those the CDC recommends for routine administration to children and pregnant women. As such, the standard of care—the expectation of a level of safety—is built into the system. A no-fault system for autonomous aircraft similarly could be limited by vehicle or operation type, or both, that meet certain safety standards. For example, the court could be limited to aircraft that meet certain certification standards. Alternatively or additionally, the court could be limited by type of operation (e.g., commercial or personal).

Another factor for consideration would be the requisite level of autonomy for inclusion in the system. As discussed above, the NHTSA and SAE recognize six levels of driving automation. Autonomous aircraft may or may not feature similar levels in their degrees of autonomy—levels of human input and or intervention—which could include a relatively wide variety of equipment and operations. Different levels of autonomy may offer different safety benefits and liability exposures. Where on the spectrum of fully human-controlled to fully autonomous (i.e., no human input) warrants inclusion in an alternative system?

Eligible Plaintiffs
It also would be necessary to define the types of plaintiffs who would be eligible to bring claims before the autonomous aircraft court. Vaccines only directly injure recipients. Aircraft accidents may directly affect not only passengers but also persons on the ground. Should the program be open only to passengers, or to all individuals who suffer injury? Allowing all injured persons to recover would enlarge the scope of the program, but might help to engender greater public trust in the technology and alleviate “not over my house” type of concerns.

Scope of Covered Accidents and Incidents
The issue of what types of accidents and incidents should be covered is perhaps even more complicated. At the Vaccine Court, causation is presumed for on-table injuries; for off-table claims, causation must be proved. Today, machine learning is used in self-driving cars. Because autonomous aircraft also may involve machine learning, it may not be possible
to predetermine the “adverse events,” presumably malfunctions. In traditional programming, computers follow programmer instructions. With machine learning, computers are given instructions and trained. For example, as part of a system’s detect-and-avoid capabilities, an autonomous vehicle system might be shown thousands of images of birds to be taught how to identify them. Computer code does not simply produce outputs; outputs influence the code. With machine learning, programmers no longer know exactly how computers accomplish tasks they are given. This inability to understand, let alone control, how a system makes its decisions presents a challenge for purposes of explaining malfunctions and establishing causation under traditional liability frameworks. Just as the Vaccine Court compensates unavoidable adverse events, a no-fault autonomous aircraft court may be able to compensate for “unexplainable” failures, once the appropriate scope of accidents and incidents is determined.

**Standard of Proof**

The difficulty of explaining machine learning raises an important question about the appropriate standard of proof for an autonomous aircraft court. The standard of proof is not merely a legal issue, and has been a challenge for the Vaccine Court. The Vaccine Act prohibits the court from finding causation “based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.” Yet, the Vaccine Program does not anticipate full tort litigation, and Congress recognized that it compensates some petitioners whose injuries are not actually vaccine-related. Nonetheless, vaccine cases that have lowered the standard of proof have potentially undermined public confidence in the safety of vaccines.

With respect to autonomous aircraft, the standard of proof must reflect the technology’s true safety record. A standard of proof that compensates claims inappropriately would validate misperceptions and undermine the integrity of the technology’s safety. The public may expect autonomous aircraft to be accident-proof, but that is neither possible nor reasonable. There may be accidents that most or all autonomous aircraft cannot avoid. The standard of proof must facilitate trust in the program itself, avoid the type of “battle of the experts” that is so characteristic of civil litigation, and promote appropriate trust in the technology.

**Conclusion**

Although automation in aviation is not new, the emergence of technology that is leading the industry to manufacture fully autonomous aircraft presents new and complex liability questions. A no-fault liability system could be beneficial to both safety and public acceptance of this new technology. The Vaccine Court presents a model of a system balancing public interest across the risks and benefits associated with important scientific innovation. Even if a full autonomous aircraft court is deemed untenable or undesirable, elements could be adopted, such as a limit on liability or a federal standard of proof, that could benefit the introduction of autonomous aircraft.

**Endnotes**

1. unmanned aircraft do not have human pilots on board the aircraft; they are not necessarily autonomous. As discussed in this article, as the technology continues to develop, unmanned aircraft featuring different levels of autonomy may emerge, potentially ranging from fully human-operated to fully autonomous.


6. Corinne Iozzio, Who’s Responsible When a Self-Driving Car Crashes?, Sci. Am. (May 1, 2016) (quoting Erik Coelingh as saying, “Whatever system fails, the car should still have the ability to bring itself to a safe stop”).


8. See Iozzio, supra note 6 (“In the long run, ‘from the manufacturer’s perspective,’ . . . ‘what they may be looking at is a bigger slice of what we all hope will be a much smaller [liability] pie.’”).


12. Id. § 300aa-11.


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for the proposition that a “passenger’s sexual assault of a fellow passenger was an ‘accident’ under Article 17”). But see O’Grady v. British Airways, 134 F. Supp. 2d 407 (E.D. Pa. 2001) (holding that an assault committed upon a seated plaintiff by a fellow passenger does not automatically qualify as an accident as a matter of law).


25. Article 17 the Montreal Convention only governs liability of the air carrier, not that of the actual tortfeasor.


28. See Olympic Airways v. Husain, 540 U.S. 644 (2004) (holding that an “accident” occurred within Article 17 of the Warsaw Convention when an unexpected refusal to assist a passenger resulted in the aggravation of the passenger’s pre-existing medical condition); El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999) (holding that the plaintiff was barred from pursuing a tort action against the air carrier under the Warsaw Convention); Zicherman v. Korean Air Lines Co., 516 U.S. 217 (1996) (“We conclude that Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum’s choice-of-law rules.”); E. Airlines v. Floyd, 499 U.S. 530 (1991) (“We conclude that 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.”); Saks, 470 U.S. 392 (defining the term “accident” under Article 17).

29. See Ojide v. Air France, No. 17-cv-3224, 2017 U.S. Dist. LEXIS 162419, at *6 (S.D.N.Y. Oct. 2, 2017) (quoting Ehrlich for the proposition that mental injuries that are not caused by bodily injuries are not compensable under Article 17 of the Montreal Convention); Yang v. Air China Ltd., No. 14 C 6482, 2017 U.S. Dist. LEXIS 158507, at *29 n.7 (N.D. Ill. Sept. 27, 2017) (noting that “the drafters of Article 17 of the Montreal Convention ‘expected that this provision will be construed consistently with the precedent developed under the Warsaw Convention and its related instruments’” (citing Montreal Convention, art. 17 cmt. 1)).
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