

Charting a New Course: Government Updates

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AVIATION LAW AND INSURANCE SYMPOSIUM

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What is happening these day to affect the practice of aviation law ?

Some ideas:

- Biden Administration actions
- FAA personnel and office changes
- NTSB personnel and office changes
- New and continuing policies
- Rule changes
- Cases of note
- On the horizon on the Hill

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The Biden Administration

- The President took office January 20, 2021, with country-wide infrastructure as a focus
- Addressing previous administration's actions
- Appointed Pete Buttigieg as DOT Secretary, John Putnam as DOT *Deputy* General Counsel and then nominated to be DOT General Counsel – confirmed May 12, 2022
- Limited movement on political appointments related to aviation since taking office
 - FAA Administrator had been a 5-year appointment, only recently vacated
 - Bradley Mims appointed as Deputy Administrator
 - Marc Nichols appointed as FAA Chief Counsel
 - Shanetta Griffin appointed as Associate Administrator for Airports
- No news of any proposed additional appointments in the pipeline



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NTSB Personnel Movements & Updates

- NTSB Board Members Jennifer Homendy (Chair) – haz mat, pipeline; Bruce Landsberg (Vice Chair) – general aviation, aviation safety; Michael Graham – aircraft manufacture; and Tom Chapman – general and commercial aviation, Hill
 - Robert Sumwalt retired from the Board on June 30, 2021, now with Embry Riddle in Daytona
 - 4 of the 5 member positions currently filled
- NTSB General Counsel Kathleen Silbaugh
 - NTSB Deputy General Counsel Casey Blaine – contact for FAA enforcement case review questions/status
 - 5 Staff Attorney positions filled
- NTSB Judges Office
 - Chief Judge Montano and Judge Woody
 - Two new judges: Judge Darrell L. Fun and Judge Alisa Tapia, both from the Social Security Administration
 - Cases continue to use an email docketing system and hearings are being held in person and virtually
- Most Wanted List 2021-2022 – SMS and CVR/FDR expansion



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FAA Personnel Movements

- FAA Administrator Steve Dickson, sworn in to a 5 year appointment in August 2019
 - Left the agency March 2022
 - AVS-1 Billy Nolen moved into FAA Acting Administrator position (after getting AVS-1 in December)
- FAA Chief Counsel Marc Nichols and Mark Bury as FAA Deputy Chief Counsel
 - New Assistant Chief Counsel for Enforcement Cynthia Dominik with Deputy Adam Runkel
 - 7 Enforcement Teams nationwide reporting to Headquarters (Northeast, Southern, Midwest, Southwest, Western, Alaska, Miramar)
 - Assistant Chief Counsel for Litigation Russell Christensen and DOJ Aviation, Space, and Admiralty Litigation Section Director Barry Benson
- FAA Acting Associate Administrator for Aviation Safety – Chris Rocheleau/David Boulter
 - FAA Federal Air Surgeon Susan Northrup
 - Larry Fields (acting) heads up Flight Standards, Lirio Liu heads up Aircraft Certification, Jay Merkle heads up UAS Integration & Earl Lawrence moved over to Next Gen
- FAA is straight-lined from the field to FAA Headquarters



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A Few FAA Policy Updates

- FAA's Enforcement and Compliance Program – FAA Order 2150.3C
 - FAA's 2015 Compliance Philosophy/Program across all program offices (Just Culture adopted) - #'s steady
 - New policies of note: 1) compromised civil penalties constitute violations histories as part of settlement; and 2) double jeopardy for drone operators receiving emergency orders of revocation AND a civil penalty
- Pilot's Bill of Rights-type protections in jeopardy (Basic Med, Federal Rules, timely notification)
- New way to track medical certificate applications in real-time announced 4/20/2022 – thru MedXpress
- Flight Training constitutes operations carrying persons or property for compensation or hire – D.C. Circuit decision 4/2/2021, FAA FR Notice 7/12/2021, FAA fast track for LODAs and exemptions
- Zero Tolerance for Unruly Passengers – announced 1/13/2021, Change 4 to Order 2150.3C (C&E Bulletin #2021-1), and announced as permanent 4/20/2022
- Advisory Committees, Task Forces, & Draft Advisory Circulars – opportunity to participate in change
- FAA Hot Focus Buttons for legal enforcement cases and criminal prosecution
 - Still illegal charter, drug & alcohol testing violations, intentional falsification, and unruly passengers (TSA enforcement for violation of security directives, too)



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Rulemaking

- Drones/UAS
 - Remote Identification of Unmanned Aircraft, 86 F.R. 4390 (January 15, 2021) – pending review in the D.C. Circuit
 - Operation of Small Unmanned Aircraft Systems Over People [and at Night], 86 F.R. 4314 (January 15, 2021)
 - All part of next and continuing steps to integrate UAS into NAS
- PRIA and PRD (Pilot Records Database)
 - 86 F.R. 31006 (June 10, 2021) in compliance with statutory requirements and a continuing build on PRIA from 1996
 - Electronic data system managed by FAA
 - The sharing of pilot records with input and access by air carriers and operators, including flight departments and fractional companies
 - Became effective August 9, 2021 with phase in extended out to 2024
- DOT Drug and alcohol testing change to allow oral fluid testing, 87 F.R. 11156 (2/28/2022)
- Medical requirements for commercial hot air balloon pilots, 86 F.R. 64419 (11/18/2021)
 - Directed by statute (2018) and recommended by NTSB (2017)



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FAA Enforcement Case Precedent of Note

- **NTSB review:** General Counsel's office staffed up to draft FAA enforcement case appeals; same triage (emergency, emergency waived, medical certificate denials, and suspensions); since January 2021 – 25 cases have been substantively decided; available on the NTSB website (only decisions on appeal available)
- Pham EA-5889 (1/4/2021) – Alleged refusal in leaving testing site before test completed; Board found collector's instructions confusing & reduced to 180 day suspension; cross appeals in D.C. Circuit; D.C. Circuit denied airman's appeal and granted FAA's appeal, No. 21-1062 (5/10/2022)
- Knight EA-5892 (3/10/2021) – Paruresis is a psychological condition that must have previously been documented, not a physiological condition and therefore ascertainable medical explanation
- Newman EA-5898 (5/27/2021) – Traffic stop in 2011 not disclosed on 2014 and 2016 applications; subsequent second stop 2017 and reported in 2018; credibility but no mention or explanation for passage of time
- Gendron EA-5901 (7/2/2021) – Improper maintenance; credited FAA witnesses and experts over Respondent; issues of failure to respond to discovery and last minute change of counsel



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Add'l NTSB Case Precedent of Note

- Ziv, EA-5897 (2021) – ALJ improperly dismissed petition as untimely
- Kalpin EA-5899 (2021) – FAA does not bear the burden of proving test was random & missing collector information is de minimus procedural violation
- Tushin EA-5902 (2021) (appeal to Court of Appeals pending) – Judge’s pre-trial rulings cause no prejudice; airman’s medical records admissible as statements against interest therefore no need for foundation; FRE are “non-binding guidance”; see Norwitch, EA-5914 (2021) (appeal to Court of Appeals pending) for similar FRE statement in illegal charter case
- Knight EA-5903 (2021) – Accidental ingestion is an affirmative defense to a positive drug test; Board held no deference owed to choice of sanction then applied mitigating and aggravating circumstances to impose suspension
- Lazzari EA-5907 (2021) – review of FAA medical certificate denial; expert testimony must be based on an evaluation of logic, depth, and persuasiveness; FAR medical standards are stricter than DSM because of heightened safety requirements



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Add'l NTSB Case Precedent of Note

- King EA-5908 (2021) – FAA failed to prove comp or hire flight and a misrepresentation of flight as Medevac
- Kolodzieczyk EA-5909 (2021) – NTSB's time limits and good cause standard appropriate instead of FRCP; proper for FAA to use FDR data to prove allegations; Board dissent that Board is statutorily obligated to apply Federal Rules and no reason not to do so here
- Several decisions affirming NTSB's long-standing principle of strict adherence to filing deadlines, only allowing untimely filings upon a showing of good cause, which by Board precedent is a very difficult standard to meet
- Practice tips: 1) on appeal, always ask for oral argument (never granted for summary reason, but remains a rule and should be permitted); 2) if hearings virtual, ask to record and retain for appeal
- TSA Determination affecting certificate privileges: TSA's process in reviewing eligibility to act as a commercial flight crewmember did not deny the airman of due process and 49 U.S.C. §44936 under which TSA acts to prohibit carriers from employing persons who have committed certain felonies was not unconstitutionally vague, Alexander v. TSA, #20-14455 (11th Cir. 2021)



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Some Noteworthy Court Decisions

- Fullerton v. FAA, No. 20-3402 (6th Cir. 1/4/2021) – Credibility determination over identification of aircraft and pilot; Court holds substantial evidence to support Board decision even though another plausible explanation would be supported
- Warbird Adventures, Inc. et al. v. FAA, No. 20-1291 (D.C.Cir. 4/2/2021) (unpub) – paid flight training carries a student for compensation which is not permitted in limited category aircraft
- Bradshaw v. FAA, No. 18-14249 (11th Cir. 2021) – FAA designees do not have a property or liberty interest in their designation; judicial review is limited to internal review process conducted
- Rojas v. FAA, No. 17-55036 (9th Cir. 3/2/2021) – Consultant documents prepared as if an employee protected against FOIA disclosure as intra-agency memoranda
- Kurtz, et. al v. FAA, No. 20-73440 (9th Cir. 3/1/2022) – FAA letter accepting an airport’s corrective action plan subject to certain conditions is not a final, reviewable order
- Regency Air, LLC v. FAA, No. 20-72084 (9th Cir. July 1, 2021) – Employer cannot piggy back on another drug testing program and FAA decision to seek civil penalty enforcement action vs a compliance action is committed to agency discretion



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Legislative Updates

- Infrastructure legislation - \$1.2T, \$25B to aviation, mostly airports then air traffic
 - DOT needs to fill 1,500 positions to implement the law; 8,000 jobs across the federal government (Politico)
- Pilot's Bill of Rights-type legislation introduced – a sampling
 - Promoting the Launch of Aviation's Next Era (the PLANE Act) – S. 2453: Ensures de novo review by district courts, sets out reexamination transparency, and provides liability protection for designees
 - Certainty for General Aviation Pilots Act – S. 2458 & H.R. 4645: preserves historical treatment of flight instruction
 - Hangars Accelerate National Growth and Regional Stability (HANGARS) Act – S. 2459: \$1B in aircraft hangar improvements
 - Aviation Empowerment Act – S. 1118: flight sharing
 - National Center for the Advancement of Aviation Act (NCAA) – H.R. 3482 and S. 1752: to serve as an independent body to facilitate collaboration and cooperation between all aviation and aerospace sectors, and related partners, to coordinate, promote, and support the future of aviation.
- Leaders in Congress
 - Senator Inhofe from Oklahoma retiring at year's end; looking to Senators Duckworth (IL) & Moran (KS)
 - Congressman Sam Graves from Missouri
 - Aviation Caucus remains strong – members from almost every state
- FAA Reauthorization comes up in 118th Congress (January 2023)
 - Mid-term elections could frame the face of the next Congress



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Thank you for the invitation
and your attention!

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