THE ARGUMENT FOR FEDERAL LEGISLATION PROTECTING THE CONFIDENTIALITY OF AVIATION SAFETY ACTION PROGRAM INFORMATION

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I. INTRODUCTION

VOLUNTARY DISCLOSURE programs (VDPs) in aviation are a rich source of safety-related data that are only obtainable from front-line users of the national airspace system. Confidentiality and the absence of retribution are critical

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components of effective VDPs, such as Flight Operations Quality Assurance (FOQA) and the Aviation Safety Action Program (ASAP). Consequently, if regulatory agencies wish to continue to receive this information (and the substantial safety-related gains resulting from this information), these programs must be encouraged, not stifled. The information derived from such programs must be used primarily for safety purposes, and the front-line users (typically employees of a commercial enterprise) reporting such information must have their confidentiality reasonably protected.

However, despite the fact that industry stakeholders, the Federal Aviation Administration (FAA) and the National Transportation Safety Board (NTSB), view the unfettered flow of information from employee reports as integral to producing future improvements in aviation safety, VDPs, in particular the ASAP, are being threatened by attempts to discover the voluntarily disclosed information during civil litigation.[1] Two decisions on this matter, arising out of two fatal crashes, reached diametrically opposed conclusions on whether ASAP information is entitled to a limited qualified privilege.[2] A federal statute protecting this information, similar to the protection given to cockpit voice recorders, is the only way to bring finality to this issue and avoid expensive and incredibly time-consuming, case-by-case, jurisdiction-by-jurisdiction examination and resolution of this issue.

II. HISTORY

The need for a voluntary reporting system was identified as necessary to reduce civil aviation accident rates as early as 1958.[3] Despite this, voluntary reporting of events adverse to flight safety by front-line operators in the National Airspace System (NAS), such as flight crew, dispatchers, mechanics, and air traffic controllers, was virtually non-existent until 1975 when the Aviation

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[1] *See, e.g.*, *In re* Air Crash at Lexington, KY., Aug. 27, 2006, 545 F. Supp. 2d 618, 619–20 (E.D. Ky. 2008); *In re* Air Crash at Lexington, Ky., Aug. 27, 2006, No. 5:06-CV-316-KSF, 2008 WL 170528, at *1 (E.D. Ky. Jan. 17, 2008); Tice v. Am. Airlines, Inc., 192 F.R.D. 270, 271–72 (N.D. Ill. 2000); *In re* Air Crash Near Cali, Colombia on Dec. 20, 1995, 959 F. Supp. 1529, 1530–31 (S.D. Fla. 1997).

[2] *Compare Lexington*, 545 F. Supp. 2d at 624 (holding no privilege applies to ASAP reports), *with Cali*, 959 F. Supp. at 1537 (applying privilege to ASAP reports).

[3] Nat'l Aeronautics & Space Admin., ASRS Program Briefing 7 (2007), http://asrs.arc.nasa.gov/docs/ASRS_ProgramBriefing08.ppt [hereinafter NASA ASRS].

Safety Reporting System (ASRS) was modified with provisions safeguarding the confidentiality of the reporting party and conferring qualified immunity.[4] These provisions were specifically included, as it was believed that compromising confidentiality, or using an ASRS report in punitive action against the reporting party, would detrimentally affect "the free, unrestricted flow of information from the users of the NAS."[5] These safeguards preventing such disclosure have made the ASRS a resounding success (in its modified condition), collecting over 700,000 incident reports in its first 30 years of operation.[6]

Major airlines also recognized the benefit of voluntarily submitted information to improve line safety, leading many airlines, unions, and the FAA to jointly establish ASAP.[7] ASAP is similar to the ASRS program in that it also solicits voluntarily submitted safety information from front-line users of the NAS.[8] The FAA

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[4] *See* FED. AVIATION ADMIN., AVIATION SAFETY REPORTING PROGRAM ADVISORY CIRCULAR NO. 00-46D ¶ 3 (1997), http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/list/AC%2000-46D/$FILE/AC00-46D.pdf [hereinafter ASRP]. The original ASRS, started earlier in 1975, was a standalone project administered entirely by the FAA. *See id.* Users of the NAS were concerned with giving the FAA, the administrative agency responsible for certificate action through administrative enforcement of Federal Aviation Regulation violations, the data that showed such violations happened, but they were assured that the reports and information would only be used for safety purposes. *See* FED. AVIATION ADMIN., AVIATION SAFETY ACTION PROGRAM (ASAP), ADVISORY CIRCULAR NO. 120-66B 2 (2002), http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/list/AC%20120-66B/$FILE/AC120-66B.pdf [hereinafter AC 120-66B]. The FAA concurred that users would only submit meaningful information if another party collected the information. *See* ASRP, ¶ 3. Consequently, NASA was given the responsibilities outlined in AC 00-46D. *Id.*

[5] ASRP, *supra* note 4, ¶ 1. *See also* FED. AVIATION ADMIN., DESIGNATION OF AVIATION SAFETY ACTION PROGRAM (ASAP) INFORMATION AS PROTECTED FROM PUBLIC DISCLOSURE UNDER 14 CFR PART 193, ORDER 8000.82 ¶ 3 (2003), http://www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgOrders.nsf/0/3BEDE9F5973E6DFA86256D9B005790CB?OpenDocument [hereinafter ASAP ORDER] (explaining that "safety and security information is protected from disclosure in order to encourage persons to provide the information to the Federal Aviation Administration").

[6] NASA ASRS, *supra* note 3, at 13.

[7] *See* Robert L. Sumwalt, III, Vice Chairman, National Transportation Safety Board, Keynote Address at the 30th Anniversary Celebration of the NASA Aviation Safety Reporting System (Nov. 10, 2006), http://www.ntsb.gov/speeches/sumwalt/rls061110.htm [hereinafter Sumwalt Address] (explaining that the ability of voluntarily submitted safety programs to improve safety issues was proved by USAir's Altitude Awareness Program, which showed a nearly 70% decrease in altitude deviations when awareness of the issue was brought to the attention of line pilots).

[8] AC 120-66B, *supra* note 4, ¶ 3.

has acknowledged that if users are given incentives, such as qualified immunity from administrative action and a guarantee that their employer will not use voluntarily disclosed information for disciplinary purposes, meaningful safety-related information will be disclosed and needed safety improvements made.[9] However, if such information is publicly disclosed and used outside the safety context, it will have a chilling effect on receipt of future data and will be detrimental to the FAA mandate of promoting aviation safety.[10]

VDPs are of increasing importance in today's environment, ironically, exactly because the aviation industry has such an incredible safety history. As reported by the blue ribbon panel appointed May 1, 2008, by then Secretary of Transportation Mary E. Peters to examine the FAA's safety culture and approach to safety management:

> In commercial aviation, the strategy of problem-identification-through-analysis-of-accident-data has just about reached its limits. . . .
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> . . . .
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> Given these significant advances, almost every accident that happens now is unique. Moreover, exhaustive investigation and analysis of each accident leads inexorably to yet more safety enhancements, mandated across the industry, designed to reduce the risk of *that accident* happening again. The forensic approach has been pushed to its limits.
>
> . . . Just like the Nuclear Regulatory Commission (which works to prevent catastrophic failure of nuclear power plants), or intelligence and security agencies seeking to protect us from major terrorist attacks, nearly all of the FAA's work now belongs in the realm of precursors to an accident, and precursors to the precursors. As accidents become more rare, the work of accident prevention moves further and further back in the unfolding chronology of the risk, identifying contributory factors, and *potential* contributors, long before they manifest themselves in a disaster.[11]

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[9] *Id.*

[10] ASAP ORDER, *supra* note 5, ¶ 6(c).

[11] BLUE RIBBON PANEL APPOINTED MAY 1, 2008 BY SECRETARY OF TRANSPORTATION, MARY E. PETERS, REPORT OF THE INDEPENDENT REVIEW TEAM, MANAGING RISKS IN CIVIL AVIATION: A REVIEW OF THE FAA'S APPROACH TO SAFETY 19–20 (2008), http://www.aci-na.org/static/entransit/irt_faa_safety_9-08.pdf [hereinafter IRT REPORT].

III. TYPES OF AVIATION DISCLOSURE PROGRAMS

The FAA is involved in numerous VDPs, the most prominent ones being FOQA, ASAP, and the VDRP programs. These programs were described in the IRT Report as follows:

- *Flight Operations Quality Assurance*: FOQA collects and makes available for analysis digital flight data generated during normal operations. It provides objective data not available through other methods, supporting analysis and enhancement of operational procedures, flight paths, air traffic control procedures, maintenance, engineering, and training. The final FOQA rule, issued in 2001, codifies protections for airlines from the use of FOQA data for enforcement purposes, except where criminal or deliberate acts are involved. Only redacted versions of the data (de-identified and aggregated) are reviewed for operational trends.
- *Aviation Safety Action Program*: This program encourages industry employees to report safety information that may be critical in identifying potential precursors to accidents. Safety issues are normally resolved through corrective action rather than through punishment or discipline. ASAP reports are discussed, and corrective actions formulated, by an *Event Review Committee* (ERC), which typically comprises representatives from the company, the employees' union (when applicable), and the FAA.
- *Voluntary Disclosure Reporting Program* (VDRP): This program encourages regulated entities themselves (e.g., airlines, repair stations, etc.) to voluntarily report instances of regulatory non-compliance. This enables the FAA to participate in root-cause analysis of events leading up to violations, and to propose and monitor corrective actions.[12]

In particular, an ASAP program is formed when an air carrier, the FAA, and the air carrier's affected employees or the labor union representing such employees sign a tripartite memorandum of understanding (MOU) which sets out the framework of the program.[13] The main advantage of ASAP over ASRS is that carrier-specific incidents are reviewed, the parties are educated,

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[12] *Id.* at 30.

[13] *See* AC 120-66B, *supra* note 4, at 13–16, app. 1 at 1–8. *See also* FED. AVIATION ADMIN., AVIATION SAFETY ACTION PROGRAMS (ASAP), ADVISORY CIRCULAR NO. 120-66, ¶ 9, app. 1 ¶¶ 1–15 (1997), http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/list/AC%20120-66/$FILE/AC120-66.pdf.

and corrective action is taken quickly, whereas the ASRS is a "big picture" diagnostic tool and not as proactive at addressing single carrier issues.[14]

Air carriers and the FAA realize that the type of information received in an ASAP report, typically sole-source operational errors and inadvertent violations of Federal Aviation Regulations, can only be obtained with employee cooperation, and without it a valuable source of data would be non-existent.[15] As noted by the IRT Report, with respect to VDPs: "At this stage in the evolution of aviation safety, voluntary disclosures, and the pool of information they generate, are critically important. Without them, safety analysis (which is the only sure basis for future safety enhancements) would have very little reliable data to work on."[16]

However, the ASAP program is different from other similarly established voluntary reporting programs across a number of other major federal agencies in two significant ways: (1) "ASAP reports are prompted by any kind of safety concern," not only those involving a violation of a regulation; and (2) the majority of the other federal programs "focus on disclosure by *companies*, rather than by individuals."[17] Hence, "the disclosure primarily affects the likelihood . . . of enforcement action against the regulated commercial entity itself, rather than its . . . employees."[18]

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[14] *See generally* AC 120-66B, *supra* note 4; NASA ASRS, *supra* note 3.

[15] *See* NASA ASRS, *supra* note 3, at 4–5 (noting that the program collects "voluntarily submitted" information to address the concern of "human performance in the aviation system"); *Hearing Before S. Subcomm. on Aviation Operations, Safety and Security*, 111th Cong. (2009) (statement of John O'Brien, Member of Executive Comm., Flight Safety Foundation) http://www.senate.gov (search for John O'Brien) [hereinafter O'Brien Statement] ("the quality of the data gathered is only as good as the assurances for the operators and the operator's employees that the data will be used to improve safety, not to facilitate prosecution or discipline.").

[16] IRT REPORT, *supra* note 11, at 21.

[17] *Id.* at 31.

[18] *Id.* "The EPA, Occupational Safety and Health Administration (OSHA), Department of State (DOS), Department of Defense (DOD), IRS, Transportation Security Administration (TSA), Department of Health and Human Services (DHHS), Nuclear Regulatory Commission (NRC), and Securities and Exchange Commission (SEC) all operate voluntary disclosure programs." *Id.*

IV. *CALI V. LEXINGTON*

A. Overview

Parties have sought discovery of voluntarily disclosed safety information resulting from ASAP reports in civil actions in two instances resulting from fatal aviation accidents.[19] The first, *In re Air Crash Near Cali, Colombia on December 20, 1995*, was a case in the U.S. District Court for the Southern District of Florida (part of the Eleventh Circuit), in which plaintiffs sought discovery of American Airlines' ASAP data to prove negligence on the part of the air carrier.[20] In this case, the court denied discovery of ASAP data based on a limited common law privilege arising out of Rule 501 of the Federal Rules of Evidence.[21]

In *In re Air Crash at Lexington, Kentucky, August 27, 2006*, the plaintiffs again sought to prove negligence of the air carrier through discovery of Comair's ASAP data.[22] In this case, the U.S. District Court for the Eastern District of Kentucky (part of the Sixth Circuit) refused to uphold the common law privilege relied on in *Cali* and allowed discovery of the information.[23] As a result, the confidentiality afforded voluntarily disclosed safety information, as well as the continued viability of ASAP programs, has been put into question.

B. Essential Arguments

American Airlines, and later Comair, asserted the following in an attempt to keep ASAP reports protected from discovery: (1) the self-critical analysis privilege; and (2) a limited common law privilege based on the Federal Rules of Evidence, which was recognized in *Cali*.[24] Comair further claimed disclosure of ASAP reports was contradictory to congressional intent and prohibited by statute, and asserted that the Plaintiffs' Steering Committee (PSC) was required to show a substantial need for the ASAP re-

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[19] *In re* Air Crash at Lexington, Ky., Aug. 27, 2006, 545 F. Supp. 2d 618, 619 (E.D. Ky. 2008); *In re* Air Crash Near Cali, Colombia on Dec. 20, 1995, 959 F. Supp. 1529, 1530 (S.D. Fla. 1997).

[20] *Cali*, 959 F. Supp. at 1530.

[21] *Id.* at 1533, 1535; Comair's Mem. of Law in Supp. of its Mot. for a Protective Order against Disclosure of Comair's Aviation Safety Action Program Reports and Mot. to Quash Pls.' Rule 30(b)(6) Notice of Dep., *In re* Air Crash at Lexington, Ky., Aug. 27, 2006, No. 5:06-CV-316-KSF 2006 WL 5152923 (E.D. Ky. 2006) [hereinafter Comair Memorandum].

[22] *Lexington*, 545 F. Supp. 2d at 619.

[23] *Id.* at 624.

[24] *Id.* at 619; *Cali*, 959 F. Supp. at 1532–33.

ports.[25] Comair argued that public disclosure of ASAP information would be contrary to the intent of Congress, which recognized that parties would be unlikely to share information if it was to be released publicly '"because it could be easily misinterpreted, misunderstood, or misapplied.'"[26]

In *Cali*, Judge Marcus rejected the self-critical analysis privilege but agreed that a limited common law privilege was applicable and denied discovery of the information.[27] The judge concluded, *inter alia*, that ASAP materials were entitled to a limited common law privilege based on the psychotherapist–patient common law privilege articulated in *Jaffee v. Redmond*.[28] The court used the framework from *Jaffee* to create a balancing test weighing the public need for the privilege versus the cost to the individual plaintiff by considering: (1) the private interests of

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[25] Comair Memorandum, *supra* note 21.

[26] Comair Memorandum, *supra* note 21 (quoting H.R. REP. NO. 104-714(I), at 40 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3658, 3677). Specifically, 49 U.S.C. § 40123(a) states:

> Notwithstanding any other provision of law, neither the Administrator of the Federal Aviation Administration, nor any agency receiving information from the Administrator, shall disclose voluntarily-provided safety or security related information if the Administrator finds that—
>
> (1) the disclosure of the information would inhibit the voluntary provision of that type of information and that the receipt of that type of information aids in fulfilling the Administrator's safety and security responsibilities; and
>
> (2) withholding such information from disclosure would be consistent with the Administrator's safety and security responsibilities.

49 U.S.C. § 40123(a) (2006).

[27] *Cali*, 959 F. Supp. at 1532, 1535.

[28] *See Cali*, 959 F. Supp. at 1533 (discussing Jaffee v. Redmond, 518 U.S. 1 (1996) as providing a useful framework for analyzing American Airlines' claim of an applicable common law privilege based on Federal Rule of Evidence 501). Federal Rule of Evidence 501 states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

"whether dissemination of . . . information will chill the 'frank and complete disclosure of facts' shared;" (2) "the 'public interests' furthered by the proposed privilege;" (3) "the 'likely evidentiary benefit . . . from . . . den[ying] . . . the privilege;'" and (4) "the extent to which the privilege has been recognized by state courts and legislatures."[29]

In reviewing these issues, the *Cali* court observed as follows:

- That discovery of reports would adversely affect private interests by "chill[ing] the 'frank and complete disclosure of facts' shared in an 'atmosphere of confidence and trust.'"[30]
- The PSC had conceded and the court held that there was "a powerful and compelling public interest in improving" aviation safety.[31]
- American Airlines' claim was correct (as were *amici* briefs filed by the Flight Safety Foundation and the Air Line Pilots Association) in that a powerful chilling effect on pilot reporting would result from denial of the privilege.[32]

The court also rejected the PSC's argument that there would be no deterring effect in allowing discovery of the ASAP information and held that: (1) a protective order was not sufficient to protect confidentiality; and (2) discovery of "pilot errors that go beyond the inadvertent or incidental are" recorded by other parties elsewhere so that pilots would not be able to hide behind the ASAP cloak of confidentiality to thwart discovery.[33]

Finally, although no state or federal court or legislature had recognized the limited common law privilege applicable to ASAP reports, Judge Marcus ruled that the value of confidential reporting programs and the need for absolute confidentiality had been supported by other courts, for example, the self-critical analysis privilege.[34]

Over a decade later, the discoverability of ASAP data was reviewed again. The U.S. District Court for the Eastern District of Kentucky adopted the opinion and order of Magistrate Judge Todd (Todd Opinion) which soundly rejected the arguments

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[29] *Cali*, 959 F. Supp. at 1533 (quoting *Jaffee*, 518 U.S. at 10–13).

[30] *Id.* at 1533, 1535 (quoting *Jaffee*, 518 U.S. at 10).

[31] *Id.* at 1534–35, 1537.

[32] *Id.* at 1534.

[33] *Id.* at 1534–35.

[34] *Id.* at 1535.

raised by Comair and the precedent set in *Cali* and allowed discovery of the ASAP information.[35]

In the Todd Opinion, Magistrate Todd ruled as follows:

- Congress did not expressly create a privilege for ASAP programs, and legislative history indicates that Congress only intended to preclude release of ASAP reports to the general public pursuant to Freedom of Information Act (FOIA) requests;[36]
- Disclosure of ASAP information was contemplated by the FAA, as the FAA had agreed to produce the reports pursuant to a court order.[37]
- Congress previously had expressly excluded items such as cockpit voice recorder transcripts from discovery in the past, but had refused to do so for voluntarily disclosed safety information.[38]
- No privilege attached to the information either under the self-critical analysis privilege or a common law privilege as: (1) ASAP reports were sent to third parties and are not held in strict confidence either by the commercial entity doing the reporting or the FAA; and (2) FAA regulations expressly authorize disclosure of ASAP information pursuant to a court order.[39]

Additionally, Magistrate Todd found that discovery of the ASAP data would not create a chilling effect that would discourage such reports, noting: (1) "the 'many incentives' to conduct safety reviews outweigh *any* harm from disclosure;" (2) the gains

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[35] *In re* Air Crash at Lexington, Ky., Aug. 27, 2006, 545 F. Supp. 2d 618, 620 (E.D. Ky. 2008); *In re* Air Crash at Lexington, Ky., Aug. 27, 2006, No. 5:06-CV-316-KSF, 2008 WL 170528, at *8, *10 (E.D. Ky. Jan. 17, 2008).

[36] *Lexington*, 2008 WL 170528, at *5–6.

[37] *Id.* at *2.

[38] *See id.* at *5–6 (referencing Congress's prohibition of discovery of cockpit voice recorder transcripts pursuant to 49 U.S.C. § 1154 (2006); Pls.' Resp. in Opp'n to Comair's Mot. for a Protective Order Against Disclosure of Comair's Aviation Safety Action Program Reports and Mot. to Quash Pls.' Rule 30(b)(6) Notice of Dep., *In re* Air Crash at Lexington, Ky., Aug. 27, 2006, No. 5:06-CV-316-KSF, 2008 WL 170528, at *9 (E.D. Ky. Jan. 17, 2008) ("If Congress had intended that ASAP Reports not be discoverable, Congress knew how to write that privilege in; it did not. Instead, it specifically provided that the FAA could be ordered to disclose ASAP reports by a court of competent jurisdiction.").

[39] *Lexington*, 2008 WL 170528, at *8–9. The court further interpreted 14 C.F.R. §§ 193.7(f) and 193.9 as requiring the FAA to disclose ASAP reports to (1) correct a continually uncorrected safety condition, (2) in a criminal prosecution, and (3) "when ordered to do so by a court of competent jurisdiction", which the FAA did not dispute. *Id.* at *6 (internal quotations omitted).

in safety that result from internal review remain an attractive incentive in itself; and (3) the financial benefit of deterring further lawsuits through review remains important.[40] Finally, and importantly, Magistrate Todd observed that the policy arguments made by Comair and others were in the wrong forum and should be more appropriately addressed to Congress and the FAA.[41]

In the wake of the Todd Opinion decisions, airline general counsel can reasonably conclude that ASAP reports incur legal liability and will advise the airline to consider this when asked to participate in or continue an ASAP program. Hence, it is likely that an air carrier would curtail pure internal review and leave a greater part of the field investigation to the NTSB to offset any increased liabilities. Additionally, airline pilots, mechanics, and flight attendants who participate in an ASAP program must also conclude that confidentiality of these reports can be breached in a negligence action against them personally and question whether a more prudent decision is to report under ASRS and forgo ASAP protection.

V. THE ARGUMENT FOR STATUTORY PROTECTION

Voluntarily reported safety information has led to great gains in aviation safety, but these gains will only continue as long as these programs are credible and front-line operators are assured that their identities are kept confidential and that their information will only be used to improve aviation safety. As a result, it is in the best interests of industry stakeholders (air carriers and unions), participants (employees and air traffic controllers), industry regulators (the FAA), and the flying public to continue to receive ASAP data and its associated gains in safety.[42]

Support for the ASAP programs from airline employees is eroding due to conflicts between management and unions and the lack of protection for the confidentiality of this information

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[40] *Id.* at *9 (quoting Dowling v. Am. Haw. Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992)) (emphasis added).

[41] *See id.* at *7 ("The balancing of conflicting interests of this type is particularly a legislative function.").

[42] The importance of such programs has recently been reinforced by Congress. *See* Airline Safety and Pilot Training Improvement Act of 2009, H.R. 3371, 111th Cong. § 14 (2009) (addressing further implementation of ASAP programs). In the proposed legislation, Congress specifically directs the FAA to develop a plan to facilitate the establishment of ASAP and FOQA programs by all Part 121 air carriers. *Id.*

perceived by both unions and airlines.[43] Therefore, unless Congress takes action to protect this information, aviation safety stands in real jeopardy of losing a safety tool considered to be invaluable by most experts that have reviewed the subject.

Congress knows well how to take protective measures. In 1964, the FAA required airlines to install cockpit voice recorders (CVRs) in large airplanes, and it noted that CVRs "would be a valuable tool in the investigation of accidents by providing firsthand information of the flight crews' observation and analysis."[44] The FAA further observed:

> The Agency agrees that its only purpose in requiring the recorded information is to assist in determining the cause of accidents or occurrences, and that the information should be used only in connection with the investigation of accidents or occurrences . . . and not in any civil penalty or certificate action . . . . The Agency cannot, of course, bind the Courts or the Civil Aeronautics Board with respect to accident information . . . .[45]

However, as one author has noted, "[w]ith the enactment of the FOIA and increased interest on the part of the media, the floodgates were opened."[46] CVR transcription excerpts and tapes found their way into the media and the courtrooms.[47] Given the disclosures, Congress not once, but twice, passed legislation restricting the use and dissemination of CVR information and tapes so that they would be used as originally intended, in accident investigations.[48] Congress passed such protective measures while still ensuring that the public and the judicial system had access to information that was needed.[49]

The current restrictions on use of CVRs are found at Title 49 U.S.C. § 1154(a).[50] Subject only to certain exceptions that allow

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[43] *See, e.g.*, Trebor Banstetter, *American, Pilots Agree to Renew Key Safety Program*, FORT WORTH STAR-TELEGRAM, Mar. 26, 2009 (describing negotiated agreement between American Airlines and its pilots regarding ASAP program).

[44] Installation of Cockpit Voice Recorders in Large Airplanes Used by an Air Carrier or a Commercial Operator, 29 Fed. Reg. 8401 (Fed. Aviation Agency July 3, 1964) [hereinafter Installation of CVRs].

[45] *Id.*

[46] Van Stewart, *"Privileged Communications?" The Bright Line Rule in the Use of Cockpit Voice Recorder Tapes*, 11 COMMLAW CONSPECTUS 389, 395 (2003).

[47] *Id.*

[48] *See* Act to Extend the Aviation Insurance Program for Five Years, Pub. L. No. 97-309, 96 Stat. 1453, 1453 (1982) (codified at 49 U.S.C. § 1114(c) (2006); Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4654, 4654 (codified at 49 U.S.C. § 1154 (2006)).

[49] *See id.*

[50] 49 U.S. C. § 1154(a) states:

a court to admit the actual CVR in order to ensure a fair trial, Congress has generally prohibited any use by a party in a judicial proceeding of any part of a transcript of a CVR that the NTSB has not made available to the public, as well as the actual cockpit recorder recording.[51] If a court decides that either the non-public portions of the transcript or the actual CVR recording is required, such items can only be used pursuant to a protective order issued by the court, as specified in the statute.[52]

Protection of voluntarily disclosed safety information by pilots, flight attendants, or mechanics is consistent with the protection offered to CVRs and other safety-related information within the aviation industry, such as NTSB Blue Cover reports.[53] By establishing such a protection, the plaintiffs' bar will not be unduly hindered in its discovery of relevant information in civil cases, any more than it has been unduly hindered given the protection accorded cockpit voice recorders. Although ASAP-type data can only be received from front-line operators, ASAP is not the only source of such information.[54] As an example, operations at a certain airport can be sorted for subject matter and researched through the ASRS.[55] It is a common practice for air carrier captains and first officers to file both an ASAP and ASRS report on the same occurrence.[56] The difference between the reports is that ASRS reports do not list the air carrier and are de-identified by NASA prior to entry into the ASRS database.[57] Additionally, such information can be solicited through the use of

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> (a) Transcripts and Recordings—(1) Except as provided by this subsection, a party in a judicial proceeding may not use discovery to obtain—
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> (A) any part of a cockpit or surface vehicle recorder transcript that the National Transportation Safety Board has not made available to the public under section 1114(c) or 1114(d) of this title; and
>
> (B) a cockpit or surface vehicle recorder recording.

49 U.S.C. § 1154(a) (2006).

[51] *Id.*

[52] *Id.*

[53] *See* 49 U.S.C. § 1154(b) (prohibiting the admission into evidence or the use of any part of a Board report related to accidents or investigations).

[54] *See, e.g.*, NASA ASRS, *supra* note 3, at 4 (describing the source and content of ASRS reports).

[55] *See id.* at 27–32 (detailing "database search requests").

[56] *See* FLIGHT SAFETY INFORMATION JOURNAL, REPORTING METHODS: ASRS/ASAP 5 (Third Quarter 2003), http://www.fsinfo.org/docs/FSI03Q3.pdf (explaining the advisability of filing both ASAP and ASRS reports).

[57] NASA ASRS, *supra* note 3, at 18; NASA, Aviation Safety Reporting System, Confidentiality and Incentives to Report, http://asrs.arc.nasa.gov/overview/confidentiality.html (last visited Feb. 15, 2010).

normal discovery, for example, interrogatories, depositions of current and former employees, and, of course, the production of emails.

Thus, Congress could also use a similar method to protect ASAP information. A new statute requiring such protection should specifically include in the purpose statement and comment section to the final rule in the Federal Register an explanation that the purpose of the legislation is to provide a qualified and reasonable protection of voluntarily submitted aviation safety data from discovery in civil cases.

VI. PROPOSED LEGISLATION

As noted above, the existing legislation[58] and its implementing regulations[59] with respect to VDPs have not been uniformly successful in withstanding the discovery onslaught in civil litigation.[60] Therefore, a legislative solution that mirrors the current restriction on the use of CVRs found at 49 U.S.C. § 1154(a) should be implemented.[61]

Since § 1154 is appropriately located in Chapter 11 of Title 49, which concerns the NTSB, it should not be disturbed. The new language should quite naturally be included in Chapter 401 of Title 49 as VDPs are data submitted to the FAA. Hence, 49 U.S.C. § 40123 becomes the logical candidate to contain the restrictions.[62]

The preamble to the proposed legislation should explain that the purpose of the legislation is to provide a qualified exception from discovery of data obtained by the FAA through ASAP VDPs, similar to the protection accorded the use of CVRs. Such protection is necessary in that safety programs are only as successful as the government can assure the regulated entities that the data submitted will indeed be used to enhance safety, and not to exacerbate their position in damage suits. As with the

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[58] 49 U.S.C. § 40123.

[59] 14 C.F.R. Part 193 (2009).

[60] *See, e.g.*, *In re* Air Crash at Lexington, Ky., Aug. 27, 2006, 545 F. Supp. 2d 618, 624 (E.D. Ky. 2008) (failing to apply common law privilege to ASAP reports).

[61] This is also the position of the Flight Safety Foundation. *See* O'Brien Statement, *supra* note 15 ("The Foundation has called for the creation of a legislative 'qualified exception' form discovery of voluntary self-disclosure reporting programs, similar to that provided in U.S. law against discovery and use of cockpit and surface vehicle recordings and transcripts.").

[62] 49 U.S.C. § 40115, which deals with withholding information from the public, but not the Congress or the judicial system, would remain unchanged. *See* 49 U.S.C. § 40115.

CVR, there needs to be an absolute statutory exception to ensure that safety investigative tools and analyses are used solely to prevent accidents and not to influence courts or juries in private litigation. To do otherwise only diminishes or destroys the incentives for submitting such data, which is not in the public interest.[63]

As an example, § 40123 could be amended to read as follows:

(a) IN GENERAL—

(1) Except as provided by this subsection, a party in a judicial proceeding may not use discovery to obtain any part of safety or security information or data, submitted, collected, or contained in any form, electronic or otherwise, from any Voluntary Disclosure Reporting Program designated by the Federal Aviation Administration that has not been made available to the public under section 40115 of this title.

(2)(A) Except as provided in paragraphs (3)(A) or (3)(B) of this subsection, a court may allow discovery by a party of data from a Voluntary Disclosure Reporting Program if, after an *in camera* review, the court decides that—(i) the part of the data made available to the public under section 40115 of this title does not provide the party with sufficient information for the party to receive a fair trial; and (ii) discovery of additional parts of the data is necessary to provide the party with sufficient information for the party to receive a fair trial. (B) A court may allow discovery, or require production for an *in camera* review, of data that the Administrator has not made available under section 40115 of this title only if the original Voluntary Disclosure Report is not available.

(3)(A) When a court allows discovery in a judicial proceeding of a part of data from a Voluntary Disclosure Reporting Program not made available to the public under section 40115 of this title, the court shall issue a protective order—(i) to limit the use of the part of the data to the judicial proceeding; and (ii) to prohibit dissemination of the part of the data to any

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[63] As the FAA Administrator recently emphasized, "history has shown that we implement safety improvements far more quickly and effectively when we work together to find solutions to the challenges we face in today's aviation environment." Letter from J. Randolph Babbitt, Administrator, FAA, to Airline Unions (June 24, 2009), http://www.faa.gov/news/updates/media/Letter_to_Unions_062309.pdf. *See also One Year After the Crash of Flight 3407: Hearing Before S. Subcomm. on Aviation Operations, Safety and Security on Aviation Safety*, 111th Cong. (2010) (statement of Peggy Gillian, Associate Administrator for Aviation Safety, Federal Aviation Administration), *available at* http://www.faa.gov/news/testimony/news_story.cfm?newsId=11191.

person that does not need access to the part of the data for the proceeding.

(B) A court may allow a part of the data not made available to the public under section 40115 of this title to be admitted into evidence in a judicial proceeding only if the court places such data under seal to prevent the use of such data for purposes other than for the proceeding.

(4) This subsection does not prevent the Administrator from referring at any time to any data from a Voluntary Disclosure Reporting Program in promulgating any safety regulations.

(b) REGULATIONS—The Administrator shall issue regulations to carry out this section.

Thereafter, Federal Aviation Regulation 193 should be amended to designate which VDPs are to be protected by the new legislation and to make such additional changes as are necessary to conform the regulations to the new legislation.[64]

VII. CONCLUSION

Voluntarily disclosed safety information is a rich source of data that is being used to enhance aviation safety, benefiting the flying public as a whole. VDPs, in turn, complement Safety Management Systems (SMS) that provide a systematic way for carriers and other operators to control risk, and to provide assurance that those risk controls are effective. SMS programs are voluntary and are designed to be compatible with other voluntary programs such as ASAP and FOQA. The FAA has said it believes that a closer more collaborative relationship with more sharing of information will lead to a more effective, efficient management of both the FAA and operator safety responsibilities."[65] Put more emphatically, with a limited number of FAA inspectors and without the assistance of the industry, the FAA cannot possibly obtain the safety data it needs to accomplish its statutory mandate for "assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce."[66] It is imperative, therefore, to protect voluntarily disclosed data from improper use in civil litigation, and it is equally important to

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[64] *See* 14 C.F.R. Part 193 (2009) (addressing FAA protection of safety and security information).

[65] Elwyn Jordan, Fed. Aviation Admin., Introduction to Safety Management Systems (SMS), Apr. 19–19, 2007, http://www.faa.gov/search/?q=Introduction+to+Safety+Management+Systems+April+18 (select "Intro to Safety Mgmt Systems (SMS)" Powerpoint presentation).

[66] 49 U.S.C. § 40101(d)(1) (2006).

protect the confidentiality of the source of such data. Without these two protections, air carriers will view ASAP as a liability to their operations, employees will lose faith in the program, and the flying public will be put at risk. In order to combat these unnecessary results, and in the light of the *Lexington* decision, it is necessary to seek a federal statute protecting voluntarily disclosed safety information.


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