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## What Is an Airline's Legal Authority To Police Its Passengers?

In Thursday's Aviation Law column, Steven R. Pounian and Justin T. Green of Kreindler & Kreindler discuss the lack a federal statute to define the police authority of airlines over their travelers, and whether the standard set in *Eid v. Alaska Airlines* strikes the proper balance between an airline's need to maintain cabin security and the passengers' interest in preserving their basic personal rights.

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Airline crewmembers are responsible for safety and order in the passenger cabin and necessarily undertake law enforcement responsibilities when planes are in flight. Yet no federal statute clearly defines the police authority of airlines over their passengers. A 1963 treaty, the [Tokyo Convention](#),<sup>1</sup> does establish rules applicable to international flights. It took nearly 50 years, but the first U.S. case interpreting the treaty, [Eid v. Alaska Airlines Inc.](#),<sup>2</sup> was decided last year in a 2-1 decision of the U.S. Court of Appeals for the Ninth Circuit. The Supreme Court recently denied certiorari in *Eid*, despite amicus briefs filed by the United States and various carrier and pilot organizations urging the Court to overturn the decision. *Eid* ruled that under the treaty, airlines are held to a standard of reasonableness rather than a more deferential and higher benchmark that would establish liability only where the airline's conduct was "arbitrary and capricious."

Prior to *Eid*, a series of cases held that an "arbitrary and capricious" standard applied under a federal statute which provides that a carrier "may refuse to transport a passenger...the carrier decides is, or might be, inimical to safety."<sup>3</sup> The U.S. Court of Appeals for the Second Circuit ruled that an airline was within its rights to refuse boarding to a man based on information received from government authorities that he was violent, armed and extremely dangerous.<sup>4</sup> The court rejected arguments that the airline was required to investigate the information, and concluded:

The test of whether or not the airline properly exercised its power...to refuse passage...rests upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision and whether or not the opinion and decision were rational and reasonable and not capricious or arbitrary in the light of those facts and circumstances. They are not to be tested by other facts later disclosed by hindsight.

Subsequent cases extended the higher "arbitrary and capricious" standard not only to an airline's denial of boarding prior to flight but to in-flight incidents involving passengers on domestic flights.<sup>5</sup> The higher standard was justified on the basis that federal regulations establish the airline captain as the final authority responsible for the operation of the aircraft and the safety of its passengers and crew, and that the captain must be in a position to make quick decisions, sometimes based on incomplete information.<sup>6</sup>

### Contested Facts

*Eid* involved a 2003 incident on an Alaska Air flight from Vancouver to Las Vegas. The nine plaintiffs, a group of Egyptian businessmen with several of their wives and a fiancée, were headed to an energy industry convention and seated in first class.

The facts were contested. The airline claimed that several of the plaintiffs congregated near the cockpit door and ignored the demands of a flight attendant to sit down. The plaintiffs contended, however, that though they promptly obeyed the flight attendant's request, she went "ballistic" and started screaming at them. The only non-party witness, a woman passenger also sitting in first class, supported the plaintiffs' version.

Both parties agreed that a flight attendant used the interphone to tell the captain that "I've lost control of the first class cabin." While the captain said that "he heard a bunch of yelling and screaming coming through the interphone," the passengers testified the only person talking at the time was the flight attendant and that the cabin was otherwise quiet. The captain did not ask the flight attendant for details, but

immediately decided to make an emergency landing in Reno. On landing, the nine passengers were removed from the aircraft, and the captain reported to the police that the passengers violated a federal statute that makes it a crime for a passenger to assault or intimidate a crewmember.<sup>7</sup> Federal regulations also establish civil penalties against passengers who "interfere...in the performance of the crewmember's duties aboard an aircraft being operated."<sup>8</sup>

The federal and local authorities in Reno, however, quickly determined that there was no basis for any charges against the plaintiffs. Nevertheless, the airline refused to carry the plaintiffs to Las Vegas and contacted other airlines to advise them to deny boarding. In addition, airline personnel announced to the passengers remaining on the flight that the plaintiffs had interfered with the crew and were responsible for the diversion. The airline's reports to law enforcement also led the plaintiffs to be picked up by the FBI at their Las Vegas hotel in front of their industry colleagues and subjected to mug shots and lengthy interrogation.

The passengers sued for delay and defamation damages, and in response Alaska Air raised a defense that it was immune from liability under the Tokyo Convention.<sup>9</sup>

That treaty authorizes the captain of an international flight to restrain and remove passengers when there are "reasonable grounds to believe" an act affecting the safety, order or discipline aboard the aircraft has occurred or is about to occur.<sup>10</sup> The treaty also authorizes other crewmembers—and even passengers—to act on their own when they have "reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein."<sup>11</sup> The convention further provides for legal immunity for any party who acts in accordance with the treaty's terms.<sup>12</sup>

Alaska Air moved for summary judgment, claiming that the pilot's actions were entitled to substantial deference, and could not be questioned unless he was acting in an arbitrary or capricious manner. While the district court granted the motion, the Ninth Circuit reversed and remanded the case for trial.

*Eid* held that the clear terms of the Tokyo Convention provide immunity only where the pilot has "reasonable grounds" to act and do not establish a higher "arbitrary and capricious" standard. The Ninth Circuit, viewing the evidence on the motion in the light most favorable to the plaintiffs, found there was "no emergency" and that the passengers did nothing to threaten the crew.<sup>13</sup> The court held that "[a] jury could conclude that a reasonable captain should have tried to find out something about what was going on in the cabin before undertaking an emergency landing."<sup>14</sup>

The court relied in part on testimony from plaintiffs' pilot expert that the captain failed to question the flight attendant after her "I've lost control" report to determine what was actually happening or look through the viewing window in the cockpit door. In addition, the court found that the airline improperly branded the passengers as criminals when "they did absolutely nothing that anyone could reasonably believe was criminal."<sup>15</sup>

The dissent argued that the convention did not intend to establish a negligence standard based on reasonableness as defined in American law but rather, when read in the context of the decision-making authority granted the captain, embodied a deferential standard. The dissent concluded that the captain was entitled to rely on the flight attendant's report in making his on-the-spot decision to land the airplane.

### **Interest of Passengers**

A series of cases under the statute permitting airlines to deny boarding have exonerated airlines where a captain reasonably relies on flight attendant statements that are later revealed to be exaggerated or even false.<sup>16</sup> These cases focus solely on the captain's decision, however, and do not address an airline's potential liability for misconduct by its flight attendant. Similarly, in *Eid*, both the majority and minority addressed the airline's liability based solely on the actions of the captain rather than the flight attendant who allegedly triggered the incident.

The Ninth Circuit recognized that airlines must have some latitude in making decisions to preserve safety and order, but that there were countervailing concerns as well, since

passengers also have a legitimate interest in being treated fairly and with dignity; they are, after all, captives of the airline for the duration of the flight, and may be stranded far from home if not allowed to continue on the flight they have paid for. Moreover, air crews have both de facto and de jure law enforcement authority when the plane is in the air.... The Tokyo Convention negotiators...deliberately chose not to give flight crews unfettered discretion to deplane passengers and turn them over to authorities; rather, they insisted that flight crews act reasonably in doing so.

Indeed, although not addressed in *Eid*, the Tokyo Convention's use of the same "reasonable grounds" standard for actions undertaken not only by airline personnel but by the passengers themselves indicates that no special deference was accorded to airlines under the treaty. As a result of the decision in *Eid*, the International Civil Aviation Organization recently commenced discussions regarding a potential amendment to the Tokyo Convention.

Whether the standard set forth in *Eid* strikes the proper balance between an airline's need to maintain cabin security and the passengers' interest in preserving their basic personal rights will undoubtedly be the source of continuing debate for some time.

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## Endnotes:

1. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.
2. 621 F.3d 858 (9th Cir. 2010), cert. denied, 79 U.S.L.W. 3627 (May 2, 2011).
3. 49 U.S.C. §44902(b).
4. [Williams v. Trans World Airlines](#), 509 F.2d 942 (2d Cir. 1975).
5. [Cerqueira v. Am. Airlines Inc.](#), 520 F.3d 1 (1st Cir. 2008); [Cristel v. AMR Corp.](#), 222 F.Supp.2d 335 (EDNY 2002); [Ruta v. Delta Airlines Inc.](#), 322 F.Supp.2d 391 (S.D.N.Y. 2004).
6. 14 CFR §91.3. Moreover, federal regulations designate the captain as the "In-flight Security Coordinator...to perform duties specified in the aircraft operator's security program." 49 CFR §1544.215. That security program "must...[p]rovide for the safety of persons and property traveling on flights provided by the aircraft operator against acts of criminal violence and air piracy...." 49 CFR §1544.103. The actual duties, however, are kept confidential and distributed only on a "need to know" basis.
7. 49 U.S.C. §46504. Federal criminal law and jurisdiction now clearly extend to all flights inside and outside our borders on all U.S. aircraft in flight anywhere in the world and also to foreign aircraft on flights to and from the U.S. Long gone are the days when jurisdiction was uncertain, as demonstrated by the 1950 Brooklyn federal court decision that a drunk passenger who started a fight, punched the plane's captain and nearly caused a crash could not be prosecuted because the acts occurred when the plane was over the high seas. [United States v. Cordova](#), 89 F.Supp. 298 (EDNY 1950).
8. 14 C.F.R. §91.11.
9. The airline also asserted a defense under the then applicable Warsaw Convention. The Ninth Circuit held that the Warsaw Convention barred defamation claims arising from statements made by Alaska Air personnel aboard the flight or in the process of disembarking because the treaty only allows claims involving an actual personal injury. *Eid*, 621 F.3d at 873. The defamation claims involving alleged statements subsequently made by the airline, however, were not barred by the Warsaw Convention.
10. Tokyo Convention, Article 6(1).
11. Tokyo Convention, Article 6(2).
12. Tokyo Convention, Article 10.
13. *Eid*, 621 F.3d at 872.
14. *Id.* at 869-70.
15. *Id.*
16. *Ruta v. Delta Airlines Inc.*, 322 F.Supp.2d at 398; [Al-Qudhai'Een v. Am. W. Airlines Inc.](#), 267 F.Supp.2d 841, 848 (S.D. Ohio 2003); *Cristel v. AMR Corp.*, 222 F.Supp.2d at 340.