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Aviation Law

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The Sept. 11, 2001, terrorist attacks and the fatal small plane crash that killed New York Yankee pitcher Cory Lidle in October 2006 show how easily aircraft can penetrate New York City's airspace with deadly consequences. Despite clear warning of the dangers, the Federal Aviation Administration (FAA) has failed to enact rules to protect the city and its residents.

We call upon the FAA to close the city's airspace to civil aviation until proper safety rules are enacted.

The current FAA rules give pilots access to enter New York City's airspace below 1,100 feet, including visual flight routes above the Hudson River. The FAA does not require that such low-level flights have a special clearance or flight plan. Nor is any security screening or inspection imposed. At any one of the dozens of area airports, pilots can simply load their planes, take off and reach Manhattan in a matter of minutes. Numerous such unmonitored aircraft are regularly flying over the Hudson.

There is no defense against an airborne terrorist flying a plane laden with explosives and situated just seconds away from many potential high profile targets in the most densely populated area in the United States. The only way to eliminate the threat is to closely monitor planes in proximity to New York and to close the airspace around the city's center, as has been successfully accomplished in Washington, D.C.

Air Defense System

• **Our Air Defense System Is Not Designed to Intercept and Stop Domestic Flights.** The Sept. 11 attacks demonstrated the vulnerability of our air defense system to an attack initiated from inside our borders. Questions regarding how terrorists were allowed to board and hijack the flights are the subject of wrongful death and property damage litigation pending against airline and security defendants in the U.S. District Court for the Southern District of New York.¹ Not at issue in that litigation, however, is the failure of our air defense system to prevent the flights from reaching the terrorists' targets.

The defense of our nation's airspace is the responsibility of the FAA and the North American Air Defense Command (NORAD). The FAA is responsible for regulating the safety and security of civil aviation in the United States.² NORAD, established in 1958, is a joint U.S.-Canadian command with the mission of defending North America's airspace.³

Terrorists hijacked American Flight 11 between 8:14 a.m. and 8:19 a.m. The FAA's Boston Air Traffic Control Center learned of the hijacking at 8:25 a.m. and notified the Air Force's Northeast Defense Sector Command (NEADS) at 8:38 a.m. Eight minutes later - seconds before Flight 11 crashed into the North Tower of the World Trade Center - NEADS scrambled two F-15 fighter jets from Otis Air Force Base in Falmouth, Mass., 153 miles away from New York City.⁴ The FAA did not know the location of Flight 11 when the fighters were launched.⁵

Terrorists hijacked United Flight 175 between 8:42 a.m.-8:46 a.m. At 8:55 a.m., the FAA's New York Center first suspected that terrorists had hijacked the flight. The terrorists crashed Flight 175 into South Tower of the World Trade Center at 9:03 a.m. At almost the same time, the NORAD air defenders first learned about the hijacking of Flight 175 in a phone call to NEADS from New York Center.⁶

Terrorists hijacked American Flight 77 between 8:51 a.m.-8:54 a.m. At 9:34 a.m. the FAA advised NEADS that Flight 77 was missing. NORAD scrambled two F-16 fighters from Langley Air Force Base in Virginia at 9:24. Three minutes later, Flight 77 crashed into the Pentagon. The fighters were not able to intercept Flight 77.⁷

Terrorists hijacked United Flight 93 about 9:27 a.m. The FAA learned of the hijacking about 9:30 a.m.⁸ The passengers began their valiant attempt to take back control of the flight at 9:57 and Flight 93 crashed in a field near Shanksville, Pa., at 10:03 a.m. Four minutes after the crash, the FAA advised NEADS that Flight 93 had been hijacked.

No doubt the FAA and NORAD are better-equipped today to respond to a similar attack if it occurred. But nothing has been done to counter the risks posed by completely unmonitored flights directly adjacent to Manhattan. These risks are demonstrated by the accident last fall that took the lives of New York Yankee pitcher Cory Lidle and his instructor, Tyler Stanger.

The Lidle Accident

Mr. Lidle and Mr. Stanger conducted their sightseeing flight pursuant to Federal Aviation Regulation Part 91 which govern general aviation (noncommercial) flights. The flight departed Teterboro Airport, flew around the Statue of Liberty and then headed north along the East River.

What surprised many New Yorkers was that the uncleared flight in such close proximity to New York City was perfectly legal. The pilots did not file a flight plan and did not seek or receive permission from the FAA to fly their airplane at a low level along the East River.

Mr. Lidle's airplane crashed into the 33rd floor of a condominium building on East 72nd Street. Much of the airplane's wreckage was found inside an apartment, and debris was found on adjacent rooftops and balconies.⁹ It was sheer luck that no one on the ground was killed.

Shortly after the accident, NORAD put fighter aircraft into the air over numerous U.S. cities as a precaution. But the entire event was over well before the fighters launched. And this highlights the problem - since flights have open access to the city's airspace the FAA and NORAD cannot provide any real protection.¹⁰

Following the Lidle crash, the FAA issued temporary flight restrictions to limit civil traffic over the East River. While this measure guarded against another potential mishap in that particularly narrow flight corridor, it did nothing to protect New York City from terrorists. The airspace remains completely open above the Hudson River adjacent to the city's heart.

D.C. Rules Provide a Model

• **The FAA Has Authority to Protect New York City. The Flight Rules for Washington, D.C., Provide a Model.** The United States has complete sovereignty over the nation's airspace.¹¹ The FAA has the responsibility to control airspace and the authority to issue flight restrictions pursuant to the Federal Aviation Act and under Title 14 of the Code of Federal Regulations.

The FAA restricts airspace by establishing Special Use Airspace,¹² where aviation activities are limited for national security reasons, usually military in nature, or Prohibited Areas,¹³ so-called "no-fly" zones restricted to all civil aviation flights. These prohibited areas include the airspace around and above the Washington Mall, which is completely closed to all civil aviation.¹⁴ A variety of other airspace restrictions exist in the United States. The most prominent are those established around Washington, D.C.

In order to protect potential terrorist targets in the District of Columbia, such as the U.S. Capitol and the White House, an air defense identification zone (the "DC ADIZ") was created around the Baltimore-Washington Metropolitan Area following the Sept. 11 attacks.¹⁵ To operate an aircraft within the DC ADIZ a pilot must: (1) file a flight plan, (2) establish and maintain radio communications, and (3) transmit via a transponder the plane's altitude to air traffic control.

Within the DC ADIZ exists a more sensitive zone designated the Washington, D.C., Metropolitan Area Flight Restricted Zone (the "DC FRZ"). This restricted zone encompasses all airspace up to 18,000 feet within 15 nautical miles of Ronald Reagan National Airport.¹⁶ Flights within the DC FRZ are highly restricted. All pilots flying within the airspace must undergo background checks and fingerprinting.

In August 2005, the FAA proposed to codify the Washington, D.C., flight restrictions to make them permanent. It reasoned that the ongoing terrorist threat made the restrictions necessary to "protect national assets in the National Capitol Region."¹⁷

The Aircraft Owners and Pilots Association (AOPA), which has a powerful lobby in Washington, D.C., has opposed the proposed regulations. Among other things, AOPA argues that the regulations are arbitrary and capricious under the Administrative Procedure Act.¹⁸

AOPA's challenges to the proposed regulations will likely fail because they are neither arbitrary nor capricious and are well within the FAA's authority.¹⁹ Congress charged the FAA with the authority to establish the airspace rules in this country and, among other things, to provide for the control of air traffic to meet national defense requirements. It is difficult to believe that a court would deem the proposed regulations unlawful given the terrorist threat and the rational provisions contained in the proposed regulations.

What About New York City?

The flight restrictions imposed in Washington, D.C., are far more substantive than those imposed in New York and other major U.S. cities. The FAA should act immediately to make New York City's airspace at least as secure as Washington, D.C.'s airspace.

The Washington, D.C., flight restrictions work. When a Cessna aircraft strayed into the restricted airspace in May 2005, it was promptly identified. Military fighter jets escorted it to a nearby airport, and law enforcement authorities detained the pilot and co-pilot. Furthermore, potential terrorist targets in Washington, D.C., were evacuated.

Experts consider New York City to be the leading terrorist target in the world. Yet under the FAA's current rules, it remains unnecessarily highly vulnerable to pilot terrorists intent on flying airplanes into the city's "targets." The Lidle crash demonstrates this vulnerability and the immediate need for lasting security upgrades to that airspace.

Restricting flights would impose additional burdens and expenses on the FAA, aviation companies and pilots. However, the serious risk of another aviation terror attack outweighs these costs.

Ours are not the only voices calling for the restrictions. U.S. Senator Charles Schumer, D-N.Y., and other political leaders have publicly urged the FAA and the Department of Homeland Security to act.

The Lidle crash was a wake-up call and our government must take immediate steps to protect New York City from a real and present danger.

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Endnotes:

1. See *In Re September 11 Litigation*, 21 MC 97, 21 MC 101 (AKH) (SDNY).

2. The FAA is responsible for civil aviation safety. Among its many roles is developing air traffic rules and assigning the use of airspace. See 14 CFR Part 71.

3. See Final Report of the National Commission on Terrorist Attacks upon the United States (W.W. Norton & Co.) (the "9/11 Commission Report") at p. 16.

4. See 9/11 Commission Report at p. 20.

5. See 9/11 Commission Report at pp. 18-32

6. See 9/11 Commission Report at pp. 21-24, 32.

7. See Norad News Release, Sept. 18, 2001, www.standdown.net/September82991pressrelease.htm.

8. Flight 93 made its last normal radio transmission to the FAA's Cleveland Center controller at 9:27. Shortly after the communication the Cleveland controller heard "a radio transmission of unintelligible sounds of possible screaming or a struggle from an unknown origin." 9/11 Commission Report at 28 (quoting FAA report, "Summary of Air Traffic Hijack Events September 11, 2001" (Sept. 17, 2001). The controllers heard a second communication with sounds of screaming shortly thereafter and then United 93 descended about 700 feet. Id.

9. Id.

10. See NORAD News Release, Oct. 12, 2006, www.norad.mil/newsroom/news-releases/2006/101206.htm.

11. See Article 1 of the International Civil Aviation (Chicago Convention) signed in Chicago, United States, Dec. 7, 1944. (61 Stat. 1180, TIAS 1591, 51 UNTS 295).

12. See 14 CFR §73.3.

13. See 14 CFR §73.11, et seq.

14. 14 CFR §7367

15. Washington, D.C., Metropolitan Area Special Rules Area 70 Fed. Reg. 45, 252 (Aug. 4, 2005).

16. See FDC NOTAM 06/0223 - Procedures for Washington, D.C., Flight Restricted Zone, 49 CFR §1562.1, et seq. (enhanced security procedures for operations at certain airports in metropolitan D.C. area).

17. Washington, D.C. Metropolitan Area Special Flight Rules Area, 70 Fed. Reg. 45,252 (proposed Aug. 4, 2005) (to be codified at 14 CFR at 93).

18. Comment from Aircraft Owners and Pilots Association to U.S. Dept. of Transp. (Nov. 2, 2005). AOPA also argued that the FAA had not conducted a proper cost-benefit analysis and disagreed with the FAA's regulatory flexibility analysis.

19. See Michele S. Sheets, "From ADIZ to SFRA: The FAA's Compliance with Administrative Procedures to codify Washington, D.C. Flight Restrictions," 71 Journal of Air Law and Commerce No. 3 (Summer 2006).