U.S. Department
of Transportation

**Federal Aviation
Administration**

Study and Report to Congress on Civil Aviation Security Responsibilities and Funding

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Report of the Administrator of the Federal Aviation Administration to the United States Congress pursuant to section 301 of the Federal Aviation Reauthorization Act of 1996

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Executive Summary

This report is provided to Congress by the Federal Aviation Administration (FAA) in response to the requirement for a study of and report regarding allocating civil aviation security responsibilities established by section 301 of the Federal Aviation Reauthorization Act of 1996 (Public Law 104-264).

The study examines the evolution of aviation security responsibilities and finds that a consensus exists to retain the current system of shared responsibilities. The report does not recommend a transfer of air carrier responsibilities to either airport operators or the Federal Government. As a result, the report does not contain methodologies for such a transfer.

The study recognizes the incremental increases in Federal Government involvement that have taken place and predicts that such increases will continue, perhaps in the field of aviation security training.

The study examines discussions of funding for aviation security and considers a number of views. The report contains options for aviation security funding and states the Administration's position that any FAA activities, including security activities, be derived from charges paid by users of the National Airspace System. The report offers no recommendations in the absence of a consensus on the source of funding. The FAA believes that there should be no change to the current system of shared responsibilities or funding at this time and therefore offers no legislative proposals.

I. Background on the Study and Report

The Federal Aviation Reauthorization Act of 1996 (Public Law 104-264) was approved by the President on October 9, 1996. Title III (AVIATION SECURITY) begins with the following provision:

> "SEC. 301. REPORT INCLUDING PROPOSED LEGISLATION ON FUNDING FOR AIRPORT SECURITY.
>
> (a) IN GENERAL.--Not later than 90 days after the date of the enactment of this Act, the Administrator of the Federal Aviation Administration, in cooperation with other appropriate persons, shall conduct a study and submit to Congress a report on whether, and if so how, to transfer certain responsibilities of air carriers under Federal law for security activities conducted onsite at commercial service airports to airport operators or to the Federal Government or to provide for shared responsibilities between air carriers and airport operators or the Federal Government.
>
> (b) CONTENTS OF REPORT.--The report submitted under this section shall--
>
> (1) examine potential sources of Federal and non-Federal revenue that may be used to fund security activities, including providing grants from funds received as fees collected under a fee system established under subtitle C of title II of this Act and the amendments made by that subtitle; and
>
> (2) provide legislative proposals, if necessary, for accomplishing the transfer of responsibilities referred to in subsection (a)."

In January 1997, the FAA notified the House Committee on Transportation and Infrastructure and the Senate Committee on Commerce, Science, and Transportation that this report would be delayed pending receipt of final recommendations from the White House Commission on Aviation Safety and Security (White House Commission). Time would be needed to review and analyze those recommendations and to formulate implementation plans, as appropriate.

The White House Commission recommendations, as well as those of the Aviation Security Advisory Committee (ASAC) Baseline Working Group (BWG), would provide a foundation for the study of responsibilities for security required by the Act. Based on the need to consider the findings of the Commission, the BWG, and the National Civil Aviation Review Commission (NCARC) and the time anticipated to complete analytical work, the FAA notified Congress as indicated above that it would be unable to meet the reporting deadlines specified in the law. However, the FAA pledged to complete the report as expeditiously as possible.

The required elements of the study and report to Congress are as follows:

- Transfer air carrier security responsibilities to airport operators;
- Transfer air carrier security responsibilities to the Federal Government;
- Methodology for the transfer of air carrier security responsibilities to airport operators;
- Methodology for the transfer of air carrier security responsibilities to the Federal Government;
- Methodology for the provision of shared security responsibilities among air carriers and airport operators or the Federal Government;
- Potential sources of Federal and non-Federal revenue to fund security activities; and, if necessary,
- Legislative proposals for the transfer of responsibilities.

The scope of this study is the security of U.S. and foreign air carriers at airports within the United States. International aviation security will be discussed only insofar as it directly relates to the performance of domestic aviation security. A brief review of the responsibilities involved and the system in which they are performed is provided below.

II. The U.S. Aviation Transportation System

The U.S. domestic system is a highly concentrated hub and spoke system that includes 14 of the world's top 20 busiest airports. Ninety-eight percent of all U.S. passengers pass through the 50 busiest hubs. Connection times are down to 25 minutes or less.

Since 1990, annual U.S. air carrier passenger enplanements in the domestic system have increased from 424 million to 523 million in 1996, with 546 million forecast for 1997. The U.S. large commercial aircraft fleet increased from 4,007 in 1990 to 4,916 in January 1997. Including international traffic, systemwide U.S. air carrier enplanements grew from 465 million in 1990 to a forecast of 600 million in 1997. Passengers on U.S. and foreign flag carriers flying to and from the United States increased from 70 million in 1990 to over 100 million anticipated in 1997. Regional and commuter enplanements increased from 37 million in 1990 to a forecast of over 62 million for 1997, while the aircraft fleet increased from 1,819 in 1990 to 2,148 in January 1997.[1]

The basic regulations for aviation security apply to 165 U.S. air carriers, 164 foreign air carriers, and several thousand cargo forwarders at 459 U.S. airports and 244 foreign airports. For example, in fiscal year (FY) 1996, FAA aviation security special agents conducted 6,317 U.S. air carrier inspections both overseas and at home, as well as 643 foreign air carrier inspections at U.S. airports. The FAA performed 870 U.S. airport inspections, 267 facility security inspections, and 123 foreign airport assessments overseas while inspecting indirect air carriers, better known as air freight forwarders, 223 times.

As part of overall civil aviation system security, the FAA is also responsible for protecting nearly 10,000 FAA facilities. Of these, there are about 1,100 FAA facilities, such as control towers at airports and air route traffic control centers, staffed by FAA employees. The protection of these employees, their equipment, and the data and communications they exchange with aircraft in flight is

[1] Federal Aviation Administration, "FAA Aviation Forecasts: Fiscal Years 1997-2008," March 1997, pp. I-1,2,11,13. See also White House Commission on Aviation Safety and Security, "Final Report to President Clinton," Washington, DC, February 12, 1997.

vital to the security and operational integrity of the aviation system as a whole.

III. The Current Aviation Security System

The aviation system within the United States has been on security alert for the past 3 years, and protective measures overseas have been increased and adjusted a number of times over the same period. Increased security measures contained in previously designed contingency plans have been in effect within the United States since the spring of 1995. This is an unprecedented situation.

The events in Asia and the Pacific in 1995, coupled with the destruction of Pan Am Flight 103 in 1988 and the French airline UTA Flight 772 in 1989, remind us that aviation security is an international concern. Even though the threat of terrorism within the United States has increased, the threat still remains greater overseas.

On October 1, 1995, the Secretary of Transportation asked the FAA to direct airports and air carriers within the United States to begin implementation of more stringent measures than those that had been announced by the Secretary just 2 months earlier, on August 9, 1995. Many adjustments to measures have been made in the intervening months.

Stringent security measures have been in place for flights departing the United States for overseas locations for many years. Although the details of the security program cannot be revealed in a published study, it may be stated that all items transported on board commercial passenger aircraft flying overseas have been subjected to security controls. As the President directed in July 1996, air carriers are performing preflight security inspections on all overseas international flights: "every plane, every cabin, every cargo hold, every time."[2]

During 1995 and 1996, the FAA and the Office of the Secretary of Transportation worked through the National Security Council to focus Government attention on the need to revise the domestic aviation security baseline, culminating in the creation by the Aviation Security Advisory Committee (ASAC) of the Baseline Working Group (BWG) on July 17, 1996. The destruction of TWA Flight 800,

[2] White House Office of the Press Secretary, "Statement by the President at Hangar 12, JFK International Airport," July 25, 1996.

which followed by only a few hours the BWG's creation, accelerated a process already underway.

The President established the White House Commission on July 25, 1996. A preliminary report by the BWG was completed and provided to the Commission on August 30, 1996, in support of the President's call for an initial Commission report by September 9, 1996. The BWG was able to provide important data and analyses on aviation security to the Commission from its inception to its final report. The final report of the Baseline Working Group was published on December 12, 1996.[3] The White House Commission published its final report on February 12, 1997.[4]

IV. Responsibilities in the Current Aviation Security System

A. FAA Responsibilities

The mission for the FAA in civil aviation security is to protect the traveling public in air transportation throughout the world and provide for the integrity of the civil aviation system. FAA oversees a complex system composed of trained Government and private sector personnel, properly maintained and calibrated equipment, and appropriate procedures to provide multiple layers of security from the airport perimeter to the aircraft.

The Office of the FAA Associate Administrator for Civil Aviation Security develops and implements regulatory policies, programs, and procedures to prevent criminal, terrorist, and other disruptive acts against civil aviation; protect FAA employees, facilities, and equipment; ensure FAA employees' suitability to serve in positions of trust; ensure the safe transportation of hazardous materials by air; assist in interdicting unlawful drugs and narcotics coming into the United States; and support national security.

The FAA is responsible for establishing and enforcing regulations, policies, and procedures; identifying potential threats and appropriate countermeasures; deploying Federal

[3] BWG, "Domestic Security Baseline Final Report," Washington, DC, December 12, 1996, pp. 78-79. This report contains sensitive information and is not available to the public. It is subject to the provisions of 14 CFR part 191. No part of it may be released without the express written permission of the Associate Administrator for Civil Aviation Security (ACS-1), Federal Aviation Administration, Washington, DC 20591.

[4] White House Commission on Aviation Safety and Security, "Final Report to President Clinton," Washington, DC, February 12, 1997, p. 27.

Air Marshals on selected U.S. air carrier flights; and providing overall guidance to ensure the security of passengers, crew, baggage, cargo, and aircraft. FAA personnel monitor and inspect air carrier and airport security, taking compliance and enforcement measures, such as finding violations and assessing civil penalties when necessary to maintain discipline in the system.

The FAA also has a responsibility to protect its own assets, thereby contributing to the maintenance of the safety and security of the commercial aviation system. FAA facility and National Airspace System security issues support the ability of the FAA to accomplish its mission. These latter security responsibilities are among those addressed by the President's Commission on Critical Infrastructure Protection, which was established in July 1996,[5] and published its final report in October 1997.[6]

In addition, the FAA must ensure that designated personnel at air route traffic control centers, terminal radar approach control facilities, and other staffed facilities are properly trained and equipped in matters related to security and that they meet the standards of integrity necessary for them to perform their security duties in support of the National Airspace System. Security is taken into account during the design and refurbishment of FAA facilities. The FAA strives to provide for effective air traffic control voice and data communications security, and ensure effective navigation system security, including that of the Global Positioning System.

The Office of the Associate Administrator for Civil Aviation Security maintains close ties to its customers: private sector air carriers; State and local governments and airport authorities; facility and air traffic control elements of FAA; and the traveling public. The current organizational structure is the result of exhaustive review and analysis by many entities since 1989. Many functions are codified in law. In addition to policy, intelligence, and operations functions, the organization's work includes aviation security training at the FAA's Mike Monroney Aeronautical Center, Oklahoma City, and the responsibility for guiding the aviation security research and development program conducted at the FAA's William J. Hughes Technical Center, Atlantic City.

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[5] Executive Order 13010 of July 15, 1996, Critical Infrastructure Protection, 61 Fed. Reg. 37347 (1996).

[6] The Report of the President's Commission on Critical Infrastructure Protection, "Critical Foundations: Protecting America's Infrastructures," Washington, DC, October 13, 1997.

The Office of Intelligence and Security in the Office of the Secretary of Transportation coordinates security and intelligence within the Department of Transportation.[7] Consultation and coordination between the Associate Administrator for Civil Aviation Security and the Director of the Office of Intelligence and Security is close and continuous.[8] Cooperation among modal security elements has been encouraged and improved by the formation of a Department of Transportation Security Working Group under the leadership of the Director of the Office of Intelligence and Security.

The FAA's Office of Civil Aviation Security Intelligence provides intelligence analysis of the threat to civil aviation as the basis for determining the application of aviation security measures. This is accomplished by synthesizing intelligence and threat information into products such as security directives, information circulars, and threat assessments. These products are needed by the operations and planning offices for ruling on carrier amendments to approved security programs, determinations of foreign airport security effectiveness, and support in changing regulations. The highest level of security is applied in specific situations when there is credible and specific threat information. The FAA, in consultation with the aviation industry, has developed contingency plans that make it possible to implement only those security measures applicable to specific threat situations.

The Office of Civil Aviation Security Intelligence receives and analyzes all information regarding potential or direct threats to civil aviation. The information can be original or from other centers of analysis, classified and open source. It comes from agencies of the U.S. intelligence and law enforcement communities, foreign government authorities, and private sector elements. To keep abreast of rapidly changing threat situations worldwide and to determine their relevance to civil aviation, FAA intelligence analysts stay in contact with their counterparts in other agencies and with FAA special agents in field offices. Decisions to impose additional security measures result from coordinated effort among operations, policy, and intelligence specialists, U.S. and foreign air carriers, and airport operators.

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[7] Section 101 of the Aviation Security Improvement Act of 1990, Public Law 101-604, November 16, 1990.

[8] *Id*., section 103.

Aviation security threat information and additional security requirements are disseminated to U.S. airlines and airports by official FAA communications called "information circulars" and "security directives," respectively, under section 108.18 of the Federal Aviation Regulations (14 CFR §108.18), as well as other written and oral communications. The Department of State, pertinent U.S. Embassies, foreign government security officials, and others may also receive these communications. FAA information is passed to airline crews by their companies. If a specific and credible threat cannot be thwarted and security measures cannot counter it, either the specific flight(s) will be canceled or public notification will be made by both the Department of Transportation (DOT) and the Department of State for international flights, or by DOT for domestic flights.

Finally, to review FAA's responsibilities in customer service terms, the services listed on the next page are those provided by the FAA to industry in the field of aviation security.

TABLE I

The FAA's Responsibilities for Aviation Security
• Establish and enforce aviation security and hazardous materials regulations, policies, and procedures; • Approve security programs and amendments to those programs; • Identify threats and appropriate countermeasures; • Provide guidance and assistance to ensure the safety and security of passengers, crew, baggage, cargo, and aircraft, particularly during times of increased threat; • Chair the Aviation Security Advisory Committee, an advisory body whose membership is drawn from the aviation industry, consumer advocacy and citizen's groups, unions, and U.S. Government agencies; • Determine requirements, conduct aviation security research and development, and provide assistance to equipment manufacturers; • Test, evaluate, and approve security equipment and certify explosives detection systems; • Provide funding and support for the canine explosives detection program; • Provide aviation security technical assistance, advice, education, and training; • Conduct foreign airport security assessments and make recommendations to foreign authorities for improvements; • Deploy Federal air marshals on selected U.S. air carrier flights; and • Represent U.S. aviation security interests abroad, including those of industry, in negotiations and discussions with foreign governments, air carriers, airport authorities, and international organizations.

These services enhance the overall security posture of U.S. air carriers through deterrence and many other ancillary benefits not directly related to terrorism prevention or Federal regulations.

B. Air Carrier and Airport Responsibilities

Air carriers bear the primary responsibility for applying security measures to passengers, service and flight crews, baggage, and cargo. Airports, run by State or local government authorities, are responsible for maintaining a secure ground environment and for providing law enforcement support for implementation of airline and airport security measures.

There are about 100 entities conducting screening at airports in the United States. These include units conducting screening at small airports, air carriers that conduct their own screening, and the large screening companies.[9] Five of the largest screening companies employ approximately 64 percent of the estimated 18,000 screeners nationwide. At least 16 different companies, including 2 air carriers, conduct screening at the 19 Category X[10] airports.

The baseline security required of air carriers and U.S. airport operators represents an effort to match the level of security with FAA's best estimate of the level of threat. The goal is to allocate industry and government resources efficiently to protect the critical entity, commercial air carrier operations. The Aviation Security Contingency Plan allows the FAA and the aviation industry to respond promptly to security emergencies, focusing on those measures that effectively counter threats while taking into account local conditions. Any change in the prevailing threat must be addressed by an adjustment to the baseline.

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[9] An Advance Notice of Proposed Rulemaking (ANPRM) on Certification of Screening Companies was published in the "Federal Register" at 62 Fed. Reg. 12724 (1997) on March 17, 1997; the comment period closed on May 1, 1997. Comments were received and analyzed, a draft NPRM prepared, and concurrence scheduled for February 20, 1998. The critical element in this process is having a reliable and consistent way to measure actual screening performance. It was decided to add more specific screening improvements to the rule based on data gathered by threat image projection (TIP) systems. On March 4, the FAA decided to withdraw the ANPRM, and a notice to that effect was published on May 13, 1998. Special evaluations by field agents are being conducted to validate data gathered by TIP. Results in 1998 were promising; the NPRM should be published in 1999.

[10] Category X airports are generally among the busiest and most complex of all U.S. airports. Category I airports are also among the busiest airports, followed by progressively smaller airports in Categories II, III, and IV. The precise definitions of each category and the identification and location of airports within each category are sensitive information subject to the provisions of 14 CFR §191.1
et seq.

V. Discussion of Responsibilities and Costs in the Current Aviation Security System: An Examination of the Mandate

When hijacking was an all too frequent occurrence in the late 1960's and 1970-71, air carriers voluntarily cooperated with the Federal Government on measures to counter the threat, but not without some concern. One history describes the situation at the time as follows:

> "The airlines as a group had consistently argued that combatting hijacking and airport security were largely Federal responsibilities. They had therefore fought for Federal operation and payment for anti-hijacking programs. The airlines were especially unhappy about the prospect of their employees physically searching passengers or engaging in any other activities normally assigned to law enforcement officials. Most were, therefore, pleased with the infusion of Federal agents under the sky marshal program. When it became clear that security systems would have to be extended to virtually all of their boarding areas, the airlines began an intensive lobbying campaign for an expansion of the existing Federal security force to handle the operation."[11]

For 25 years, the executive branch of the Federal Government has maintained that providing security is a cost of doing business, which should be borne by the air carriers and airports just as they bear the cost of ensuring safe operations. The most authoritative statement of this position was recorded during the hearings in February and March 1973, which led to amendments to the Federal Aviation Act of 1958, now codified in title 49, United States Code. These amendments were contained in two related titles of Public Law 93-366: title I--the Antihijacking Act of 1974, and title II--the Air Transportation Security Act of 1974.

In those hearings, the views of a high-ranking Transportation Department official clearly indicated that the users of civil aviation should bear its costs, and those costs explicitly included those derived from the application of security measures.[12]

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[11] Kent, Richard J., Jr., "Safe, Separated and Soaring: A History of Federal Civil Aviation Policy 1961-1972," U.S. Department of Transportation, Federal Aviation Administration, 1980, pp. 349-50.

[12] "Anti-Hijacking Act of 1973": Hearings on H.R. 3858, H.R. 670, H.R. 3953, and H.R. 4287 (and all identical or similar bills) before the Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, 93rd Cong. 222 (1973) (statement of Hon. Egil Krogh, Jr., Under Secretary, Department of Transportation), February 27, 1973. See also Kent,
supra note 11.

A. Aviation Security, National Security, and Terrorism

In 1986, a new aspect emerged in the executive branch's views on the cost of dealing with terrorism. In the 1986 report of his task force on terrorism, then Vice President George Bush asserted that the United States views terrorism as a threat to the national security.[13] A logical evolution of this view may lead to the conclusion that the Federal Government should be responsible for the costs of combating terrorism, just as it pays for the cost of providing for the common defense of the Nation.

In the late 1980's, a former Administration official extended this view further, including "freedom of the air," meaning the maintenance of civil aviation security, as a vital national interest.[14]

Several years later, Senator Lautenberg, who had been a member of the post-Pan Am Flight 103 President's Commission on Aviation Security and Terrorism, expressed similar views in his opening statement at a hearing of the Senate Commerce, Science, and Transportation Committee on August 1, 1996:

> "Congress, our Nation's airlines, and our airports have been unwilling to make the investments necessary to protect the public. Terrorism is an act of war against an entire nation, with civilians on the tragic front lines, and we have got to confront it with the same commitment and fervor that we must reserve for other threats to our national security."[15]

Ambassador Morris Busby, former U.S. Coordinator for Counterterrorism at the Department of State, agreed during testimony at the same hearing, saying:

> "...the idea that aviation security is a national security issue has received a lot of support around this room today, and I am absolutely

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[13] Bush, George, "Public Report of the Vice President's Task Force on Combatting Terrorism," Washington, DC, February 1986, p. 7.

[14] "The Bombing of Pan Am Flight 103: A Critical Look at American Aviation Security": Hearings before the Subcommittee on Government Activities and Transportation of the House Committee on Government Operations, 101st Cong. 34 (1989) (statement of Mr. Noel Koch, President, International Security Management, Inc.).

[15] "Aviation Security": Hearings before the Senate Committee on Commerce, Science, and Transportation, 104th Cong. 13 (1996) (statement of Senator Lautenberg).

> 100 percent in support of that."[16]

President Clinton and members of his Administration have recently made statements of policy indicating that the security of civil aviation should be treated as a matter of national security. In a speech at George Washington University on August 5, 1996, President Clinton stated:

> "We cannot reduce the threats to our people without reducing threats to the world beyond our borders. That's why the fight against terrorism must be both a national priority and a national security priority. We have pursued a concerted national and international strategy against terrorism on three fronts: First, beyond our borders, by working more closely than ever with our friends and allies; second, here at home, by giving law enforcement the most powerful counterterrorism tools available; and, third, in our airports and airplanes by increasing aviation security."[17]

On September 9, 1996, when receiving the initial report of the White House Commission on Aviation Safety and Security from Vice President Gore, the President reiterated this theme by saying:

> "We know we can't make the world risk-free, but we can reduce the risks we face and we have to take the fight to the terrorists. If we have the will, we can find the means. We have to continue to fight terrorism on every front by pursuing our three-part strategy: First, by rallying a world coalition with zero tolerance for terrorism; second, by giving law enforcement the strong counterterrorism tools they need; and, third, by improving security in our airports and on our airplanes."[18]

The White House Commission, in recommendation 3.1 of its final report, stated:

> "The federal government should consider aviation security as a national security issue, and provide

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[16] Id., p.86 (statement of Morris D. Busby, President, BGI Inc.).

[17] White House Press Release, "Remarks by the President on American Security in a Changing World," at George Washington University, Washington, DC, August 5, 1996.

[18] White House Press Release, "Remarks by the President during White House Commission on Aviation Safety Announcement," the Oval Office at the White House, September 9, 1996.

> substantial funding for capital improvements. The Commission believes that terrorist attacks on civil aviation are directed at the United States, and that there should be an ongoing federal commitment to reducing the threats that they pose."[19]

In section 314 of the Federal Aviation Reauthorization Act of 1996 (Public Law 104-264), the Senate appears to endorse these views, stating the "Sense of the Senate Regarding Acts of International Terrorism." After finding that "...there has been an increase in attempts by criminal terrorists to murder airline passengers through the destruction of civilian airliners and the deliberate fear and death inflicted through bombings of buildings and the kidnapping of tourists and Americans residing abroad," section 314 states:

> "It is the sense of the Senate that if evidence establishes beyond a clear and reasonable doubt that any act of hostility towards any United States citizen was an act of international terrorism sponsored, organized, condoned, or directed by any nation, a state of war should be considered to exist or to have existed between the United States and that nation, beginning as of the moment that the act of aggression occurs."[20]

Again, the President's words are reflected in the White House publication, A National Security Strategy for a New Century:

> "We further seek to uncover, reduce or eliminate foreign terrorist capabilities in our country; eliminate terrorist sanctuaries; counter state-supported terrorism and subversion of moderate regimes through comprehensive program of diplomatic, economic and intelligence activities; improve aviation security worldwide and at U.S. airports; ensure better security for all U.S. transportation systems; and improve protection for our personnel assigned overseas."[21]

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[19] White House Commission, "Final Report to President Clinton," Washington, DC, February 12, 1997, p. 27.

[20] Section 314 of the Federal Aviation Reauthorization Act of 1996, Public Law 104-264, October 9, 1996.

[21] The White House, "A National Security Strategy for a New Century," May 1997, p.10.

B. Aviation Security and Other Criminal Acts

Given that aviation security measures are designed to prevent acts of terrorism and thereby enhance national security, the Federal Government implicitly accepts increased responsibility for improving aviation security. Nevertheless, it is important to remember when discussing who should be responsible for security, that criminal acts against civil aviation are not committed exclusively by terrorists. Most crimes against civil aviation have been committed by mentally deranged persons, or fugitives and would-be refugees who resorted to hijacking only as a means of transportation with no clear intention of harming the aircraft or its occupants. Others are more deadly.

In 1955, a United Airlines aircraft disintegrated in flight 11 minutes after takeoff near Longmont, Colorado. A dynamite bomb detonated in a baggage compartment, Killing 39 passengers and 5 crew. One J. Graham was arrested, tried, and executed for the crime, for which the motive was insurance fraud.[22] Another incident of sabotage over Bolivia, North Carolina, in early 1960 killed 34 passengers and crew and was also related to insurance fraud. A ceiling on the amount of airline trip insurance passengers can purchase was imposed, and baggage screening was improved. Domestic airline sabotage declined until there were no fatal incidents in the 1970's.[23]

Air carriers also must counter other crimes unrelated to terrorism, such as theft and fraud.[24] Air carriers' security interests are inherently broader than the prevention of terrorism, and their security programs deal with more than is required by Federal Aviation Regulations.

VI. The Transfer of Air Carrier Security Responsibilities to Airport Operators

[22] President's Commission on Aviation Security and Terrorism, "Report to the President," Washington, DC, May 15, 1990, p.160.

[23] Rochester, Stuart I., "Takeoff at Mid-century: Federal Civil Aviation Policy in the Eisenhower Years 1953-1961," U.S. Department of Transportation, Federal Aviation Administration, Washington DC, 1976, pp. 262-3 & 275.

[24] President's Commission on Aviation Security and Terrorism, *supra* note 22, 1990, p. 46.

A. Early Discussions, Debates, and Directions: 1960-1990

From the first implementation of security screening, nearly everyone agreed that the screening of passengers should be a responsibility of the airlines. In 1969, Eastern Air Lines voluntarily agreed to an FAA test of an "operational screening system for boarding airline passengers" with "weapon-detection devices" used in conjunction with "FAA's evolving psychological profile to identify and isolate suspicious individuals for further surveillance or search."[25] Eastern was joined later in that year by TWA, Pan Am, and Continental in "using the screening system."[26] The sharing of the costs of passenger screening was then and has continued to be a topic of debate and divided opinions.

A solution found in 1972 was to require air carriers to provide screening personnel and the airport operators to provide law enforcement support. In the 93rd Congress, 1st Session, Senator Cannon, Chairman of the Aviation Subcommittee of the Senate Committee on Commerce, introduced the "Air Transportation Security Act of 1973" as S.39, "A Bill to amend the Federal Aviation Act of 1958 to provide a more effective program to prevent aircraft piracy and for other purposes."[27] The Air Transportation Security Force proposal in S.39 envisioned Federal law enforcement officers as supporting air carrier screeners, not performing the screening functions themselves. They would only search after a bag or person alarmed a metal detection device and then only after consent was given. Everyone participating in the hearings seemed to believe that many more than 5,000 Federal agents would be needed to perform all functions envisioned. The airlines supported S.39.

Most of the arguments against a Federal force revolved around the philosophy of federalism; that this was a State and local police protection function. In his statement before the Aviation Subcommittee of the Senate Commerce Committee on January 10, 1973, then Secretary of Transportation John Volpe said:

> "To require the creation of a new Federal police force for the sole purpose of satisfying the security needs at airports, regardless of their

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[25] Kent, Richard J., Jr., "Safe, Separated and Soaring: A History of Federal Civil Aviation Policy 1961 - 1972," U.S. Department of Transportation, Federal Aviation Administration, Washington, DC, 1980, p. 338. The recommendations and the test were devised by the FAA Task Force on Deterrence of Air Piracy, created by Acting Administrator Dave Thomas on February 17, 1969.

[26] *Id*., p. 340.

[27] S.39 was introduced on January 4, 1973. Senator Cannon then noted that there were more than 1,700 Federal security officers on duty at U.S. airports.

> size and level of operations is unnecessarily costly and wasteful.... The FBI will exhaustively investigate all air piracy incidents and subsequently bring to justice all violators. On the other hand, we do not feel the Federal Government should get into the day-to-day crime prevention business at our airports. This should properly be managed by local law enforcement officers."[28]

None of the arguments suggested that there was a "national security" aspect to aviation security. While there were 134 domestic hijackings between 1961 and 1972, and 7 explosions aboard commercial aircraft between 1955 and 1976 in the United States, these domestic security incidents did not contain clearly "terrorist" elements until a hijacking at LaGuardia Airport in September 1976. A group called "Fighters for Free Croatia" hijacked a TWA flight bound for Chicago. After stops in Montreal, Quebec; Gander, Newfoundland; and Iceland for refueling, they dropped leaflets over London and Paris, landed in Paris and surrendered.[29] Ironically, the perpetrators believed that security screening was tight at LaGuardia and decided to use simulated explosives made from material smuggled on board rather than traditional weapons, which probably would have been discovered. The group met the profile and triggered more than usual rigorous searching. The ruse was bolstered by a genuine bomb that had been planted in a New York subway locker; the hijackers notified police, and the bomb exploded during examination.[30]

The 1980's saw a change in the nature of criminal acts against aviation. Hijacking, seemingly the preferred form of criminal and terrorist activity, was joined once again by the placement of explosive devices aimed at the total destruction of aircraft, passengers, and crew. The vast majority of criminal and terrorist acts against civil aviation during this decade occurred overseas rather than in the United States. The decline in hijacking may have been due to more effective security at airports.[31] The

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[28] "Emergency Antihijacking Regulations": Hearings before the Aviation Subcommittee of the Senate Committee on Commerce, 93rd Cong. 75 (1973) (statement of Hon. John A. Volpe, Secretary of Transportation).

[29] St. John, Peter, "Air Piracy, Airport Security, and International Terrorism," Quorum Books, New York, Westport, Connecticut, and London, 1991, p. 31.

[30] Preston, Edmund, "Troubled Passage: The Federal Aviation Administration During the Nixon-Ford Term 1973-1977," U.S. Department of Transportation, Federal Aviation Administration, 1987, pp. 215-17. This incident should not be confused with the self-service baggage locker bombing at LaGuardia Airport in New York on December 29, 1975. See also: Moore, Kenneth C., "Airport, Aircraft, and Airline Security," Second Edition, Butterworth-Heinemann, a division of Reed Publishing (USA), Inc., Boston, London, Oxford, Singapore, Sydney, Toronto, and Wellington, 1991, pp. 28, 165, and 389.

[31] Simon, Jeffrey D., "The Terrorist Trap: America's Experience with Terrorism," Indiana University Press, Bloomington and Indianapolis, 1994, pp. 349-50 and 396-99.

events of the 1980's may have stimulated some observers to suggest a large role for airport operators in aviation security. Still others disagreed.

The hearings of the House Subcommittee on Government Activities and Transportation on September 25, 1989, allowed for the presentation of opposing views about the security roles of air carriers and airport operators. Speaking to Isaac Yeffet, former Director of Security of El Al Airlines, then Congresswoman Boxer said:

> "Mr. Koch says in his testimony-and I am quoting-'The carriers should be responsible for safety, and they are. They do it superbly. Security is a separate problem far beyond their competence, and it shows.' He goes on to say that what we need to do-and I am quoting-'The terminal operator ought to have at least as large, if not a larger responsibility for security than the carriers.' Do you agree with that?"

Mr. Yeffet replied:

> "No. I disagree. I believe the airlines must be responsible for the security. They have to get help from the government by asking them what kind of procedures we have to follow; somebody has to teach the airlines how to build a security system if they don't know how. But it is their business as they run their airlines to make sure that the flight will always remain safe and secure, and not to think that somebody else has to run their security."[32]

The continuation of the debate and the diversity of views on the delineation of responsibilities for security between air carriers and airport operators prompted a reexamination of the issues by the FAA in 1991.

B. FAA Study on the Transfer of Security Responsibilities: 1991

An unpublished FAA study evaluated three alternatives for a shift in security responsibilities with respect to passengers, baggage, and cargo from the air carriers

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[32] "The Bombing of Pan Am Flight 103: A Critical Look at American Aviation Security": Hearings before the Subcommittee on Government Activities and Transportation of the House Committee on Government Operations, 101st Cong. 56 (1989).

to airport operators to determine whether or not any alternative was likely to improve performance. The basic framework and content of the study, including conclusions reached at that time, are presented at appendix A without substantive modification. The options examined in 1991 reflect alternatives to the system then in place, and are reiterated in this paper as they were written in 1991. Most elements of these options remain valid today.

The study concluded that the system in 1991 was well understood and accepted by most major participants. Although the system had both pros and cons, it was fundamentally effective and efficient. While the study saw advantages to each of the three alternatives, there were also considerable disadvantages to shifting any of the major security functions from the air carriers to airport operators. The study concluded that there did not appear to be a net benefit in adopting any of the alternatives over the system current at the time. Consequently, it was recommended that the current system be continued. However, in recognition of the need for further analysis to study ways that the security system might be improved, the study recommended that the FAA consider running a trial at a selected domestic airport to test the viability of transferring certain security functions, particularly the screening checkpoints, from air carriers to the airport authority.

C. Airport Operators' Views: 1996

In his testimony before the White House Commission on Aviation Safety and Security on September 5, 1996, Richard Marchi, Senior Vice President for Technical and Environmental Affairs for the Airports Council International-North America (ACI-NA), speaking for his organization and for the American Association of Airport Executives (AAAE), presented the airport operators' opinion when he stated:

> "An important underlying aspect of controlling passenger flow and suspect baggage is continuity. The first point of contact is provided by airline agents at the check in point. Airline agents currently use a battery of relevant information to determine if a passenger or their baggage should be subjected to a more intense screening regime. This information is provided by the intelligence community and FAA directly to the airline security personnel, thus limiting the

> information to those with the quote-need to know-unquote and facilitating the dissemination of information to those employees who will be responsible for implementing the selection process. It is at this point that a suspect passenger and their baggage, either carry on or checked, can be removed from the standard screening process and subjected to more intense scrutiny. By interposing another controlling entity -- an airport or federal employee -- into the midst of the check-in process continuity is lost, and the suspect person and/or their baggage would have the opportunity to evade security control measures such as a positive passenger/baggage match. Currently, if a passenger is determined to be a risk, that individual is escorted to the gate and remains under the control of an agent until he boards the aircraft. That passenger's checked baggage is scrutinized and is placed aboard the aircraft only when the passenger boards. This system works because a single entity -- in this case, the airline -- is responsible for controlling all aspects of that passenger's screening process. If airport or federal government employees were to become responsible for effective screening of suspect passengers and/or baggage, they would multiply the number of points in the system where there must be a hand-off of responsibility and, in turn, multiply the number of opportunities for a miscue."[33]

Finally, moving responsibilities from air carriers to airport authorities could present a number of difficulties. An attempt had been made to exempt aviation safety and security from the Unfunded Mandates Reform Act of 1995 (Public Law 104-4), but the attempt failed.[34]

A certain percentage of Airport Improvement Program (AIP) grant money from the Airport and Airway Trust Fund is allocated by airport authorities for security measures. Under current law, air carriers are ineligible for such grant funding.[35] A legislative approach to this issue could be to permit AIP funds to be used by air carriers

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[33] Statement of Richard F. Marchi before the White House Commission on Aviation Safety and Security, Washington, DC, September 5, 1996.

[34] 141 Cong. Rec. H509-H512 (January 23, 1995). Representatives Mineta and Oberstar strongly supported Representative Collins' amendments Nos. 69 and 70, which were defeated 169 to 256.

[35] Section 308 of the Federal Aviation Reauthorization Act of 1996 (P.L. 104-264) may modify air carrier eligibility.

for security purposes, a solution unlikely to be supported by airport operators.

Again, Mr. Marchi, speaking for airport operators:

> "While airports appreciate the provision found in H.R. 3953 expanding Passenger Facility Charge (PFC) and Airport Improvement Program (AIP) eligibility to help pay for explosive detection equipment and operational costs for activities to enhance aviation security, this departure from current PFC and AIP eligibility, which restricts these funds to capital improvements, should not be undertaken lightly. The use of Trust Fund resources for on-going and growing operating expenses puts these operations at grave risk when the inevitable Federal cost-cutting ax falls on DOT/FAA/Airport appropriations. And, while expanded eligibility may be helpful at the margins, it will only have real benefit if additional AIP funds are made available and the federal cap on PFCs is lifted. We need to remember that airport security investments are among the multitude of airport capital improvement programs that we have estimated will require at least $10 billion a year through the year 2002. (Source: ACI-NA/AAAE 1996 Capital Needs Survey.) AIP funding for airports has suffered major reductions, from $1.9 billion annually to only $1.45 billion, currently. Congress must address the need to invest in our nation's airports to provide greater capacity, safety and security for air travelers -- by giving airports the means to generate needed funding through the time-tested and effective local Passenger Facility Charge program. For smaller airports, we must be willing to consider new options for providing the necessary investment."[36]

VII. The Transfer of Air Carrier Security Responsibilities to the Federal Government

Few have recommended the transfer of screening and other

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[36] Statement of Richard F. Marchi, *supra* note 33.

air carrier responsibilities to the Federal Government.[37] As stated in the next section on shared responsibilities, the BWG clearly opposed the transfer of air carrier responsibilities to the Federal Government for many of the same reasons raised over 20 years ago. Since the failure of their arguments in 1970-71 to transfer responsibility in this manner, the air carriers have repeatedly expressed the desire to retain screening duties and have opposed their transfer to "government" personnel, primarily so that airlines can facilitate passenger movement and better control customer services.

In testimony submitted to the Senate Aviation Subcommittee on January 9, 1973, Paul Ignatius, Executive Vice President of the Air Transport Association (ATA), wrote:

> "The airlines have consistently taken the position that law enforcement is a government responsibility. First, the behavioral profile is an important aspect of the screening process and this must be handled by airline personnel and coordinated with the metal-detecting operations. Secondly, the screening process must be carried out as part of the boarding of passengers. The airlines must be responsible for timely boarding and would lack the necessary control over it if the screening process were operated by government personnel."[38]

Senator Hollings expressed a different view over 20 years later in his prepared statement for the aviation security hearing of the Senate Commerce, Science, and Transportation Committee on August 1, 1996:

> "...the public deserves the best technology operated by the best trained individuals, to reduce the risks of a terrorist attack. Another thing is clear-security is going to be costly. The Federal Aviation Administration (FAA) has estimated that it will cost as much as $2.2 billion to install up to 1,800 machines at 75 airports. The FAA should be authorized to collect a fee to pay for the machines. Today, there are approximately 14,000-18,000 screeners, paid an average of $10,000 to $15,000 per year.

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[37] One such discussion is in Nader, Ralph and Smith, Wesley J., "Collision Course: The Truth about Airline Safety," TAB Books, a division of McGraw-Hill, Inc., Blue Ridge Summit, Pennsylvania, 1994, pp. 230-31.

[38] "Emergency Antihijacking Regulations": Hearings before the Aviation Subcommittee of the Senate Committee on Commerce, 93rd Cong. 167 (1973) (statement of Paul Ignatius, ATA).

> These screeners are one line of defense, but a critical one in the fight against terrorism. They need training, and they need to be paid in accordance with their responsibilities. The present turnover rate among these employees is extremely high. Unless we change the way we provide security, we cannot upgrade it...I am considering whether the FAA should provide the screeners, thereby relieving the air carriers of this responsibility; this also will cost money."[39]

In contrast, and also on August 1, 1996, Senator McCain, speaking about legislation that became the FAA Reauthorization Act (which requires this study) during the Senate hearing, said that the bill would:

> "...require the FAA to study whether airports should be responsible-or who should be responsible-for airport security functions. We are in agreement, and the airlines are in agreement, that it should not be the airlines that are responsible for the security, especially passenger security."[40]

In his prepared statement, Senator McCain broadened the mandate by saying that the legislation would: "require FAA to study whether airports should be responsible for most or all security functions...."[41]

Captain J. Randolph Babbitt, president of the Air Line Pilots Association, before the White House Commission on September 5, 1996, offered yet another alternative when he said:

> "We believe the FAA's role in overseeing aviation security should be reviewed by the Commission, with a view toward making certain of its responsibilities a function of the Department of Justice. The establishment of aviation security policy and procedures by law enforcement professionals within the DOJ, working with their own intelligence officers, would enhance the ability of the U.S. to quickly adapt security measures to new and changing threats."[42]

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[39] "Aviation Security": Hearings before the Senate Committee on Commerce, Science, and Transportation, 104th Cong. 93 (1996) (statement of Senator Hollings).

[40] Id., p. 9. (statement of Senator McCain).

[41] Id., p. 10.

[42] Statement of Captain J. Randolph Babbitt, president, Air Line Pilots Association, before the White House Commission, Washington, DC, September 5, 1996.

Captain John J. O'Donnell, then president of the Air Line Pilots Association, accompanied at the Senate Aviation Subcommittee hearing on January 9, 1973, by two pilots who had been hijacked, supported the then current division of responsibilities, but for a different reason and with a significant caveat:

> "This committee is well aware of the action taken recently by the Secretary of Transportation which makes airport authorities and the airlines responsible for passenger screening, carry-on baggage search and the presence of law enforcement officers. We concurred in that action because little else was being done to develop airport security. However, we are greatly concerned that the fragmentation of responsibility will mean that training will be inconsistent, equipment maintenance will become lax and monitoring of the law enforcement presence will be subject to the whims of local government and airline budgets. The overall responsibility for the air transportation security system should be at a high governmental level in order to give consistency of training and competency to the total system."[43]

A. Screening Overseas

Two significant questions are who would perform screening overseas when foreign entities are incapable or their performance is insufficient, and who would perform such (sometimes redundant) screening in any case? The most logical answer would be the air carriers, as now required by the FAA of U.S. air carriers in such cases. Even if carriers cease doing screening in the United States, they will most likely continue to do redundant screening[44] abroad as required by FAA regulations.

Foreign governments are willing to let private sector entities do redundant screening, but are loathe to allow foreign government employees to perform the same function. A request to foreign governments to allow U.S. Federal Government employees to perform screening overseas would most likely be rejected as an infringement on the national

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[43] "Emergency Antihijacking Regulations": Hearings before the Aviation Subcommittee of the Senate Committee on Commerce, 93rd Cong. 187 (1973) (statement of Captain John J. O'Donnell, president, Air Line Pilots Association).

[44] "Redundant screening" refers to any additional or secondary screening that may be required after a passenger passes through a primary screening checkpoint, but prior to boarding the aircraft.

sovereignty of the host governments. Therefore, even if the Federal Government assumed air carrier responsibilities within the United States, air carriers would still need to develop and maintain expertise to perform screening services overseas.

The only Federal assistance that might be agreeable to foreign governments would perhaps be more civil aviation security liaison officers stationed at or near each airport to assist in the interface with foreign governments. The responsibility for the effective and efficient performance of screening functions would have to remain with either the host government or the air carriers.

B. Economic Considerations

The argument against Federal Government responsibility for security screening overseas is primarily legal or jurisdictional in nature. The argument against the Federal Government assuming air carrier security responsibilities at home contains some of those same concerns but major economic considerations as well.

There are approximately 18,000 screeners working for over 100 entities, including air carriers and screening companies. These individuals would be the minimum number hired as Federal Government employees or as contract employees if the Federal Government chose to "contract out" security services currently provided by air carriers.

Provision for Federal Government screening personnel costs alone could exceed a half billion dollars a year. If costs for training are added to those operational costs, then combined with advanced security equipment procurements under the Facilities and Equipment account and research and development costs, the total could approach a billion dollars a year. Whether financed by the U.S. Treasury's General Fund as a national security expenditure or through the Airport and Airway Trust Fund as a cost of doing business or traveling, that is a substantial amount of money that the Federal Government would have to expend to assume air carrier screening responsibilities.[45]

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[45] Personnel costs are not based on the prevailing salaries paid to screeners under the current system. The assumption is that it will be necessary to increase screeners' salaries and benefits to increase the quality and professionalism of the screener work force, and a key reason for the Federal Government assuming screening responsibilities would be to ensure this change. Therefore, the personnel cost estimate is based on the postulation of 15,000 screeners in Federal Aviation Service Grades (FG) 5/7; 3,000 screening supervisors at FG-9/11; and 429 managers/program, policy, and support staff personnel (a ratio of 1 per 7 screening supervisors) ranging from FG-11 through FG-15, at an average grade of FG-13. Costs estimates are in 1997 dollars and are based on the Washington, DC, locality pay schedule for 1997 General Schedule/FG employees:

$25,897 (FG-7 Step 1) x .35 benefits x 15,000 screeners = $524,414,250

$31,680 (FG-11 Step 1) x .35 benefits x 3,000 supervisors = $128,304,000

On the other hand, a major benefit could be an increase in the professionalism of the security screening work force if sufficient funds were made available to conduct proper training for them at centralized locations; e.g., at the FAA Academy, in Oklahoma City.

Recent FAA personnel reform measures may allow for the creation of a professional FAA security screening force with career paths, appropriate compensation, a variety of assignments, and a sense of service commensurate with their responsibilities. Another perhaps more practical possibility could be the creation of a quasi-governmental work force independent of, although regulated by, the FAA.

In this case, the FAA could still arrange for the training of such a force. The certification of screening companies, as required by section 302 of P.L. 104-264, is a similar approach. The FAA expects to publish a notice of proposed rulemaking on this issue in 1999.

VIII. Shared Security Responsibilities: Air Carriers and Airport Operators or the Federal Government

Possible methodologies to provide for shared security responsibilities among air carriers and airport operators or the Federal Government will be discussed in this section. As has already been noted, the regulatory framework established by the FAA to ensure efficient and effective civil aviation security is currently based upon a system of shared responsibilities.

The FAA is responsible for: establishing and enforcing regulations, policies, and procedures; identifying potential threats and appropriate countermeasures; conducting research; and providing overall guidance to ensure the safety and security of the passengers, crew, baggage, cargo, and aircraft. The air carriers bear the primary responsibility for applying screening and other security measures to passengers, service and flight crews, baggage, and cargo. Airport operators are responsible for maintaining a secure ground environment and for providing local law enforcement support for the implementation of airline and airport security measures. The challenge of properly allocating responsibilities among the three groups

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$54,629 (FG-13 Step 1) x .35 benefits x 429 managers/staff = $31,638,385
$524,414,250 + $128,304,000 + $31,638,385 = $684,356,635

to ensure effective and efficient civil aviation security has been difficult. Some views are presented below.

A. President's Commission on Aviation Security & Terrorism (1990): Comments on Responsibilities

The 1990 President's Commission on Aviation Security and Terrorism did not specifically recommend that the FAA or the Federal Government assume the responsibility for passenger and baggage screening, or other security measures. Some statements seemed to endorse the existing division of responsibilities. However, while not suggesting an actual transfer of responsibility, the Commission did recommend changes to clarify accountability and made strong statements about the Federal role.

The Report of the President's Commission stated:

> "To ensure accountability, a clear line of responsibility for security must be established.
>
> Since the federal government is ultimately responsible for the safety and security of the traveling public, it must provide the leadership and take the responsibility for security at the airports."[46]

This passage from the report was in the context of security at both U.S. and overseas airports. The report continued, stating that the "Commission agrees with the premise" expressed by an airline chairman that "Governments of all nations must accept and implement their direct responsibility for security, as distinguished from a passive, regulatory role."[47]

To achieve this greater responsibility and enhance accountability, the President's Commission recommended the creation at each category X airport of a "federal security manager" who:

> "should have the ultimate responsibility for security. These officials would work with the air carriers and airport operators in designing one security plan for each airport, based upon

[46] President's Commission on Aviation Security and Terrorism, *supra* note 22, p. 59.

[47] Id., p.60.

> the known and potential threat. This plan will identify the role and responsibilities of the air carriers, the airport operator, and the local law enforcement participation in terms of what each will do, how they will do it, and what resources will be committed to security, including the qualifications of the security personnel. The federal manager must approve this plan. Furthermore, the federal security manager will oversee air carrier and airport operators in the implementation of this plan. This will include requiring the redirection of air carrier or airport security resources should the federal manager decide....."[48]

The President's Commission report did not recommend the transfer of air carrier screening responsibilities to the Federal Government. It did recommend a more direct, more active role for the Federal Government in directing the deployment of air carrier and airport operator resources as they perform their identified functions. It endorsed the concept of a shift for the Federal Government from "a passive, regulatory role" to "direct responsibility for security" because it was "ultimately responsible for the safety and security of the traveling public" and should therefore "take the responsibility for security at the airports."

The 1990 Commission did not, however, recommend relieving the air carriers or the airport operators of their responsibilities and instead endorsed enhanced Federal oversight of their performance.

B. ASAC Baseline Working Group Recommendation on Responsibilities (1996)

The following is a statement from the BWG report:

> "The BWG considered a transfer of primary responsibility for aviation security, and in particular the screening of passengers and baggage, to the airport operator or the Federal government. However, the current structure is well understood and accepted by the parties involved. The various advantages and disadvantages of a transfer of responsibility do

[48] Id.

> not offer a compelling benefit from a shift of responsibility, particularly when major changes in the domestic security baseline are anticipated. Transferring responsibility for screening passengers and baggage to an airport or Federal agency would also transfer liability, disrupt the continuity of air carrier processing, and could raise Fourth Amendment issues regarding the legality of a security search by a government entity. Government hiring and personnel practices are also less flexible than those used by industry. The fundamental consideration is that aviation security itself must be improved. Merely shifting responsibility will not remedy deficiencies in personnel, procedures, or equipment."[49]

C. White House Commission on Aviation Safety and Security: Comments on Responsibilities (1996-97)

In the conclusions of its final report, the White House Commission made several comments that seem to support the concept of shared responsibilities.

> "The Commission believes that each of its recommendations is achievable. But, the Commission has no authority to implement its recommendations. That responsibility lies with government and industry. Many of the proposals will require additional funding. Some of them will require legislation. Each of them requires sustained attention. We now urge the President to make these recommendations his own. We urge Congress to provide the necessary legislation and funding. We urge the incoming leadership of the DOT and the FAA to make fulfillment of these recommendations a cornerstone of their work. We urge the commercial aviation industry to take up the technical and organizational challenges...."

> "There are few areas in which the public so uniformly believes that government should play a strong role as in aviation safety and security. Aviation is an area over which the average person can exert little control; therefore, it becomes government's responsibility to work with industry to make sure that Americans enjoy the highest

[49] BWG, *supra* note 3, pp. 78-79.

> levels of safety and security when flying. Problems in these areas contribute to an erosion of public faith in aviation, and in government itself. The Commission has laid out an aggressive agenda to help address those concerns, and believes that the implementation of this course of action must be the top priority for all those involved in aviation."[50]

Like its 1990 predecessor, the White House Commission of 1996-97 did not explicitly recommend the transfer of responsibilities from air carriers to the Federal Government or to airport operators. It did, however, like its predecessor, endorse a stronger role for the Federal Government in aviation security:

> "In the area of security, the Commission believes that the threat against civil aviation is changing and growing, and that the federal government must lead the fight against it. The Commission recommends that the federal government commit greater resources to improving aviation security, and work more cooperatively with the private sector and local authorities in carrying out security responsibilities."[51]

One element of that stronger role will be the continuing purchase of security equipment for use by air carriers and airport authorities to assist them in the performance of their aviation security responsibilities.

D. Aviation Industry Comments on Responsibilities

The airline industry seems to agree that there is no need to depart from the shared responsibilities system in place for so many years. In testimony before the White House Commission on September 5, 1996, Carol Hallett, president of the Air Transport Association of America (ATA), stated:

> "It has been suggested by some that we must radically alter our nation's air transportation system in order to make it secure from terrorism. Based upon our understanding of the threat presented, this is not the case - the measured and deliberate steps to enhanced security which

[50] White House Commission, *supra* note 4, p.53.

[51] Id., p.4.

> we have put forward are responsive to the need."[52]

In the "Statement of Aviation Security Principles," attachment 2 to her prepared testimony, Ms. Hallett added:

> "Only with regard to countermeasures, which are deployed by airlines and airports at the direction of the USG in the aviation environment, is there a sharing of this governmental responsibility."[53]

Walter Coleman, president of the Regional Airline Association (RAA), on the same day said:

> "The regional airline industry recognizes that we must participate and contribute to the safety and security of the traveling public in establishing practical security procedures which will achieve the national objectives and also permit the airlines to continue to provide service to the communities they presently serve."[54]

The airport authorities also seem to support the continuation of the current division of responsibilities among airlines, airport operators, and the Federal Government. In his testimony at the same meeting, Mr. Marchi spoke for his organization and also for the American Association of Airport Executives (AAAE) when he stated:

> "The current system can be seen as a natural and logical split of responsibilities based on the evolution of airport and air carrier duties and obligations, which includes the airport acting as property managers and the airlines acting as transporters of people and property. Simply changing the assignment of responsibilities for passenger and baggage security screening will not improve a flawed system; rather the system, itself, and the employees who operate it should be changed.
>
> Incentives to improve performance should also be offered to the pre-board screeners themselves. That is not to say that other parties have no role to play in improving today's operations.

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[52] Statement of Carol B. Hallett before the White House Commission, Washington, DC, September 5, 1996.

[53] Id.

[54] Statement of Walter S. Coleman before the White House Commission, Washington, DC, September 5, 1996.

> Currently, wages are low, positions are often part-time with no benefits, advancement opportunities are limited, and there are no consequences related to making mistakes other than the possible loss of an already-less-than-desirable position. The overall quality of the applicant pool reflects the drawback of the positions offered.
>
> We recommend that all pre-board screeners be subjected to criminal background checks, and employment history verifications. That the FAA develop a standard training curriculum to certify screeners. FAA certified screeners would then be invested with a valuable and transferable skill and would be compensated accordingly. FAA should also develop hiring and training criteria for commercial entities that provide screening personnel. It may also be appropriate to require certification of the companies, themselves, who, in any event, should be responsible for conducting background investigations and should be subject to civil penalties for violation of FAA procedures."[55]

E. Partnership

The White House Commission on Aviation Safety and Security recommended greater use of partnerships between government and the aviation industry in meeting safety and security goals. The Commission stated in its final report:

> "The premise behind these partnerships is that government can set goals, and then work with industry in the most effective way to achieve them. Partnership does not mean that government gives up its authorities or responsibilities. Not all industry members are willing to be partners. In those cases, government must use its full authority to enforce the law. But, through partnerships, government works with industry to find better ways to achieve its goals, seeking to replace confrontation with cooperation. Such partnerships hold tremendous promise for improving aviation safety and security. A shift away from prescriptive regulations will allow companies to take advantage of incentives and reach goals more

[55] "Statement of Richard F. Marchi, *supra* note 33.

quickly."[56]

In 1996, Congress eliminated the FAA's dual mandate of promoting air commerce and ensuring safety, making it clear that safety and security are FAA's highest priority.[57] Since then, FAA and industry have worked together to identify potential improvements in aviation safety and regulation.

In response to the White House Commission's call for partnership in the areas of security and safety, the FAA convened consortia at 41 major U.S. airports during September 1996. By mid-December 1996, 39 of these consortia had completed vulnerability assessments and developed action plans with recommended procedural changes and requirements for advanced security technology. FAA found that airport consortia have the potential to resolve local issues effectively because they involve more local players in a collective effort. The FAA is now attempting to secure voluntary agreements to make the consortia permanent and extend them to smaller airports, with one of their primary functions being the continuing assessment of vulnerabilities and the identification of corrective action.

While the BWG report did not recommend a major change in the responsibilities for aviation security, it did recommend a change in the partnership between the FAA and the aviation industry:

> "Greater demands on the civil aviation system require an enhanced partnership between the agency and the aviation industry. In its initial recommendations the White House Commission on Aviation Safety and Security stressed the need for a fundamental change in the way government and the private sector carry out their responsibilities. The BWG supports this conclusion and recommendation. In its 1990 report, the President's Commission on Aviation Security and Terrorism recommended that Federal Security Managers be put in place at major domestic airports to become the accountable entity for security at that location. Federal Security Managers work with the air carriers and airport operators to design and approve security systems,

[56] White House Commission, *supra* note 4.

[57] Section 223 of the Federal Aviation Reauthorization Act of 1996, Public Law 104-264, October 9, 1996, amending 49 U.S.C. § 106.

> and oversee the carrier's and airport operators' implementation of the security system to ensure compliance. The BWG is recommending that the FSM's program be extended to selected Category I airports."[58]

F. Responsibility for Security Research, Engineering, and Development (R,E&D)

For many years, the Federal Government and the FAA have been fulfilling a major responsibility by fostering and funding security research, engineering and development, which was accelerated by the Aviation Security Improvement Act of 1990. From 1991 to 1996, the FAA spent over $209 million on R,E&D on explosives and weapons detection technology development, airport security technology, security systems integration, aircraft and container hardening, and human factors. This effort will continue.

Following the recommendations of the White House Commission, the Federal Government returned to an area not visited since the height of the hijacking threat in the mid-1970's: the capital purchase of security equipment for use by private sector air carriers to enhance their ability to screen passengers and baggage effectively and efficiently prior to boarding.

On October 30, 1996, the FAA established an integrated product team (IPT) to acquire and deploy advanced security equipment through "non-competitive contracts or cooperative agreements with air carriers and airport authorities, which provide for the FAA to purchase and assist in installation of advanced security equipment for the use of such entities."[59] The equipment acquisition has been funded in the FAA Facilities and Equipment account derived from the Airport and Airway Trust Fund. The team includes working representatives of air carriers and airport authorities.

The following table depicts planned expenditures for various types of equipment selected by the integrated product team for purchase and deployment during FY's 1997-99:

TABLE II

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[58] BWG, *supra* note 3 , p. 77. (14 CFR §191 applies.)

[59] This was authorized and funded by title V of the Omnibus Consolidated Appropriations Act, 1997, Public Law 104-208.

FAA Expenditures in FY 1997-98 for Acquisition of Security Technologies	
Explosives Detection Systems	$ 68,313,400
Other Automated Technologies	$ 15,550,000
Explosives Trace Detectors	$ 45,036,600
Computer-Assisted Passenger Screening (CAPS)	$ 10,000,000
Screener Proficiency Evaluation & Reporting System (SPEARS)	$ 5,300,000
Total	$144,200,000

G. Aviation Security Training

Changes in the current system, which have been debated for years, have occurred only incrementally, often in response to a crisis or loss of an aircraft. One of the common threads weaving throughout all reports, books, hearings, articles, and recommendations over the years has been the need for better and more standardized aviation security training and an increased role for the Federal Government in both.

This is particularly important now, since many new, more complicated but effective types of equipment are being deployed at U.S. airports. The operators of advanced security equipment need far more detailed training, management attention, and motivation to ensure that devices are properly and effectively operated. Much more in the way of following operational procedures and making decisions needs to be done by the screeners. This places additional burdens on the selection, training, and maintenance of at least this part of the screener work force.

As long ago as the September 1989 hearings of the House Government Activities and Transportation Subcommittee on the bombing of Pan Am Flight 103, Mr. Noel Koch, formerly Principal Deputy Assistant Secretary of Defense for International Security Affairs, in his prepared statement said:

> "..... we have to pay much closer attention to the personnel side of the security equation. At the present time, the economics of security appear to militate in favor of hiring entry-level minimum wage people. They often get little or no training, they have frequently the most limited 'people skills,' and the turnover rates among them are wholly inconsistent with the requirements of an effective security system. Put minimum wage people on a million dollar machine, give them little or no training, manage them like entry level people, and you will get minimum wage performance out of your million dollar machine.... Coupled to a more imaginative hiring philosophy, we will benefit from a systematic approach to training security personnel. This is an area in which the FAA may need additional authority, to standardize training requirements for security personnel, and to assist in bringing training regimes up to those standards."[60]

Mr. Koch's comments are still pertinent today. The "Certification of Screening Companies" rulemaking[61] offers an opportunity for FAA to present to the public for comment both selection criteria and training standards and seek ideas for improving aviation security training.

In his 1993 book Combatting Air Terrorism, Rodney Wallis, former director of security for the International Air Transport Association, also suggested an increased role for the FAA in the area of training:

> "Training is a truly vital part of air transportation's fight against terrorism, yet too many governments, airport administrations, and airline managements fail to ensure their staff are adequately prepared for their roles...A role the FAA might well enlarge is the physical monitoring of U.S. based airlines' training and security implementation at home and abroad."[62]

There is broad, although not universal, agreement that the regime of shared responsibilities should stay the same. However, it could be argued that the Federal Government should increase its involvement by setting training standards, thereby adding to its other responsibilities

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[60] The Bombing of Pan Am Flight 103 (statement of Mr. Noel Koch), *supra* note 14.

[61] See note 9, *supra*.

[62] Wallis, Rodney, "Combatting Air Terrorism," Brassey's (US), Washington, New York, London, 1993, p.117.

for capital equipment purchases, R,E&D, intelligence assessments, testing countermeasures, standard setting, and compliance and enforcement of regulations. Air carriers would still be responsible for screening, but their employees, the screeners and their supervisors, would be trained to standards set by the FAA in accordance with White House Commission recommendations 3.2 and 3.10.

Commissioner Victoria Cummock introduced and supported recommendation 3.2 at the final meeting of the White House Commission on February 12, 1997. Later, she went further in her discussion of training under recommendation 3.10 in her dissent, contained in appendix I of the final report:

> "This recommendation contains a number of admirable objectives but it, like its predecessor recommendation in President Bush's Commission on Aviation Security and Terrorism lacks teeth. Following President Bush's Commission of Aviation Security and Terrorism and the follow-on Aviation Security Improvement Act in 1990, the FAA established standards for the selection and training of aviation security personnel. Those standards were, and still are, totally inadequate. There is nothing to prevent the same inadequate actions by the FAA to this recommendation. The Commission should specifically recommend that the FAA mandate 80 hours of intensive classroom/laboratory and 40 hours of on-the-job training before performance certification for all airline security screening personnel."[63]

An identical recommendation for 80 hours of classroom and 40 hours of on-the-job training had been made by Patricia Friend, international president of the Association of Flight Attendants, AFL-CIO, at the White House Commission meeting on September 5, 1996. These discussions, contained in the final report and its dissent, and in testimony, all support the need for improved, more comprehensive training. Again, the certification of screening companies rulemaking offers an opportunity to improve training and thereby improve screener performance. Investment in training and requirements for improved performance will offer an economic incentive for airlines to retain the most productive, efficient, and effective screeners which will, in turn, lead to higher wages and better benefits.

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[63] White House Commission, *supra* note 4, Appendix I, dated February 19, 1997, unnumbered p.8.

The FAA takes human factors into account (as required by the provisions of Aviation Security Improvement Act of 1990)[64] by providing appropriate training and developing utilization standards, clear guidance, and operational procedures in partnership with the airlines to ensure the effective use of security equipment by trained and properly motivated air carrier and contractor personnel. FAA is already taking steps to improve initial and recurrent training curricula for checkpoint screeners and their supervisors. Such FAA involvement will increase.

All of us must be concerned with how to help people do the difficult job of screening baggage for explosive devices better by improving the human factors engineering of their work environment. Lessons learned from the operational deployment of explosives detection systems (EDS) substantiate the need for screeners who use the machines to be properly trained and highly motivated. Personnel selection criteria and training standards are important considerations receiving particular attention by all concerned.

The FAA developed and is currently deploying the Screener Proficiency Evaluation and Reporting System (SPEARS), which can help train air carrier screeners and maintain their proficiency. One SPEARS component, a computer-based training (CBT) system for screeners, was successfully tested in 1996 in Chicago. CBT modules for training security screening checkpoint x-ray machine operators are now operational at 36 major airports, including Seattle, Miami, Los Angeles, St. Louis, Baltimore, Detroit, Houston, Dallas, New York, Denver, Orlando, San Juan, Atlanta, and San Francisco, with additional airport installations continuing throughout 1998 in about 77 of the busiest U.S. airports. Specialized modules will soon be available for training operators of explosives detection systems and will be installed on all deployed systems.

Another component of SPEARS is the Threat Image Projection (TIP) system, which displays artificial images of improvised explosive devices and dangerous articles in baggage, as though they were part of an actual item being screened by an x-ray device or EDS. The screeners' decisions are tabulated and recorded to provide feedback for effectiveness monitoring and use as a training tool. After final evaluations and adjustments are completed, several hundred TIP modules will be installed in checkpoint x-ray machines

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[64] Sections 105 and 107 of Public Law 101-604, November 16, 1990, adding sections 316 (d) and (g) to the former Federal Aviation Act of 1958, now 49 U.S.C. 44912 (a) and 44935 (b), respectively.

and explosives detection systems at the busiest airports in the United States.

The FAA provides formal training through airport security seminars for law enforcement officers and airport personnel with aviation security responsibilities. Aviation security special agents are also asked by individual airlines to provide 1- or 2-hour blocks of instruction in airline training courses. Similar participation occurs in industry association-sponsored schools and conferences as part of FAA's partnership efforts. Specialized courses of instruction on specific topics have been prepared by the FAA and are presented on request.

The White House Commission called for an additional 114 canine explosives detection teams to be trained and deployed at the Nation's busiest airports, and Congress appropriated $8.9 million for that purpose. During 1997, the FAA trained 54 handlers and 60 dogs. The first "FAA exclusive" class of K-9 handlers graduated from the Military Working Dog School at Lackland Air Force Base, Texas, on March 25, 1997. The FAA will continue to cover canine procurement costs and training, evaluation, and certification for explosives detection team dogs and handlers as the program is expanded.

At the time the White House Commission's initial report was published in September 1996, there were 87 teams deployed at 31 locations. In June 1997, there were 116 canine teams at 33 major airports, then 130 teams at 38 airports across the country by early 1998. As program expansion continues, by the end of 1998, there will be about 154 teams at about 40 airports.

In one of many interagency partnerships, the FAA and the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (BATF) signed an agreement in 1997 outlining the principles governing a joint research pilot project, then began the project, using one FAA trained and certified team working in parallel with a BATF trained and certified team.

It is important to note that the teams will be doing more and operating longer. In addition to clearing terminals and airplanes after bomb threats, they will search suspect bags and cargo, and perform visible patrols and training to increase deterrence. The FAA has worked closely with industry to establish a reimbursement process to cover allowable operational expenses, such as handler salaries, kenneling, dog food, vehicles and associated maintenance, and routine veterinary care. The program remains voluntary on the part of airports. Those not in the current program

are unlikely to join without adequate cost sharing by the Federal Government. Future growth is therefore a function of available funding.

IX. Funding for Aviation Security

One purpose of this study is to "examine potential sources of Federal and non-Federal revenue that may be used to fund security activities," a matter of continuing controversy for the last 30 years. Section 301 of the Federal Aviation Reauthorization Act of 1996 states that one potential source of revenue to be considered is "providing grants from funds received as fees collected under a fee system established under subtitle C of title II of this Act and the amendments made by that subtitle." Both the White House Commission and the Aviation Security Advisory Committee Baseline Working Group discussed funding issues and identified potential sources of revenue.

In introducing the discussion of chapter 3 on aviation security during the final public hearing of the White House Commission on February 12, 1997, Commissioner Brian Jenkins said:

> "Most importantly, we now recommend that the federal government should consider aviation security as a national security issue and provide substantial funding for capital improvements. Specifically, we recommend $100 million annually. We recognize that this is not enough and therefore we also recommend that the National Civil Aviation Review Commission established by Congress consider a variety of options to pay for further implementation and operation of these vital security measures."[65]

The wording of Recommendation 3.1 of the White House Commission's final report is even more direct:

> "The federal government should consider aviation security as a national security issue, and provide substantial funding for capital improvements. The Commission believes that terrorist attacks on civil aviation are directed at the United States, and that there should be an ongoing federal

[65] Transcript of the Final Public Hearing of the White House Commission, Washington, DC, February 12, 1997.

> commitment to reducing the threats that they pose."[66]

The FAA Aviation Security Advisory Committee's Baseline Working Group (BWG) in its final report went further:

> "A majority of the BWG concluded that the full cost of implementing and maintaining an improved domestic security baseline should be funded by a Congressional appropriation from the General Fund. Such costs include, but are not limited to, the acquisition, installation, training, and implementation of equipment, facilities, personnel, and procedures. A dedicated funding stream should be identified to fund the operating costs associated with continuing to maintain the elevated domestic security baseline prescribed by the BWG recommendations. Operating costs associated with the domestic security baseline include, but are not limited to, costs associated with the continuing operation, maintenance, and staffing of programs identified by the BWG recommendations and as may be required by Federal mandate."[67]

The BWG's majority opinion on funding sources discussed the issue in greater depth than indicated in the recommendations above. The Group also said:

> "Federal resources certainly exist to fund any program if the national will is to do so. The money could be made available rapidly as no new collection mechanism would be needed. However, such an outlay may also be subject to shifting agendas and priorities from year to year which could be disruptive to the coherence and continuity of a major plan to increase security. The Federal government could, in principle, fund all aviation security costs out of general revenues. If the threat of terrorism is viewed as a national security issue requiring a concerted national response, then there is no fundamental distinction between expenditures for aviation security and other counter-terrorism programs funded directly through appropriations.

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[66] White House Commission, *supra* note 4.

[67] BWG, *supra* note 3, p.90.

> The mechanism of collecting and disbursing funds for aviation security can assume many forms but the source of those funds must inevitably be the public. The basic difference is whether to assess the necessary expenses selectively to the air traveling public or generally to all taxpayers. The current mechanisms of collection that could be used are: Congressional Appropriation (General Fund); PFC Capital/Operating Fund; AIP Capital/Operating Fund; Security Surcharge; and Ticket Tax.
>
> Whichever collection mechanism is considered, it must be federally mandated to avoid competitive pressures and require stringent accounting procedures to assure that the funds will be disbursed only for aviation security purposes. Such funds must be subject to federal audit procedures. The total, 10-year cost of the new security baseline is estimated at $9.9 billion.
>
> Costs associated with interim security measures are not included in this figure but are detailed in the full BWG report."[68]

In May 1997, the FAA estimated that the total 10-year cost to the Federal Government, airport authorities, and airlines for security programs at Category X airports alone would be close to $3 billion. The total includes capital costs for new equipment as well as added personnel and their training. This averages out to $154 million per Category X airport, or slightly over $15 million annually for the next 10 years.

The Office of Management and Budget (OMB) representative on the BWG strongly disagreed with the views expressed by the majority of the Group on funding from sources other than prospective users (i.e., passengers). The following dissenting view was received from the OMB:

> "OMB staff strongly disagree with these recommendations. They are inconsistent with the current practice of FAA programs, contradicting long standing government-wide budget policy, and reflect an unrealistic outlook regarding the availability of discretionary funds. First, aviation system users currently pay for on-going aviation security costs. These are considered to be costs incurred by the private aviation industry

[68] *Id.*, pp. 90-91.

> for doing business in modern society. There is no fundamental difference between these programs and those being considered by the BWG.
>
> Second, OMB Circular A-25, which establishes Federal policy regarding user charges, states that such charges should be assessed for Federal activities that convey special benefits to recipients beyond those accruing to the general public. The BWG's recommendation that start-up aviation security costs be funded from the General Fund is inconsistent with this policy.
>
> Third, continuing efforts to balance the budget will significantly limit the amount of General Fund monies available to support this, or other, potentially worthy expenditures. Given the demands on those funds and the number of actors involved in allocating them, it is unrealistic to think that a protected pot of money could be set aside for this purpose. Finally, a dedicated funding stream for operating costs, if not paid by the users, provides little incentive for cost discipline in the provisions of these services and will result in waste and increased cost to the public."[69]

On March 27, 1997, the Acting FAA Administrator responded to the BWG recommendations approved and forwarded by the ASAC in a memo stating: "I have received the recommendations developed by the ASAC for the Domestic Security Baseline. I am pleased that the ASAC continues to provide FAA with balanced and insightful recommendations. However, I do not concur with the following three specific recommendations...Full Federal funding of the baseline recommendations (page 11) was objected to by OMB in a dissenting opinion. The White House Commission has referred further funding issues to the National Civil Aviation Review Commission."

In addition to creating the National Civil Aviation Review Commission (NCARC) and requiring this study, section 274 of the Federal Aviation Reauthorization Act of 1996 directed the FAA to "contract with an entity independent of the Administration and the Department of Transportation to conduct a complete independent assessment of the financial requirements of the Administration through the year 2002."[70]

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[69] *Id*., Appendix A, p.1.

[70] Public Law 104-264, October 9, 1996.

Coopers & Lybrand L.L.P., a professional services firm, was selected to conduct the independent study.

Safety and security programs have the highest priority in FAA budgets. The 1998 budget requested significant increases for safety, including funding for an increase of 500 air traffic controllers, 326 flight standards and certification personnel, and 173 security staff. The 1998 budget also included a request for an advance appropriation of $100 million in 1999 as a follow-on to the $144.2 million appropriated in 1997 to fund White House Commission recommended security equipment deployments.

Coopers & Lybrand also concluded, on the basis of interviews conducted with FAA staff, user groups, and White House Commission members, that the impact on the FAA's budget of Commission and BWG recommendations "could be substantial" though the White House Commission's final report had not been completed.[71] The OMB's FY 1998 passback on the FAA Facilities and Equipment budget, which is also noted in the Coopers & Lybrand report, stated: "The Gore Commission staff are interested in additional 1998 security equipment purchases. Any such purchases are to be user fee financed or financed by airports or airlines in response to FAA regulation." This is, of course, not what the Commission finally recommended.

NCARC and its aviation funding task force were tasked to "submit a report setting forth a comprehensive analysis of the Administration's budgetary requirements through fiscal year 2002, based upon the independent assessment...that analyzes alternative financing and funding means for meeting the needs of the aviation system through the year 2002."[72] Congressional deliberations in response to the NCARC and Administration proposals concerning the structure and content of any system for funding FAA through user fees, now possibly including capital expenditures for security equipment that would be used by air carriers, have not yet been completed. The setting of user fees is one of the options that was examined. A goal of user fee financing would be to balance collections and expenditures so that all needed improvements in safety and security systems could be financed and implemented promptly.

The NCARC's December 1997 report recommended that the air traffic services portion of the FAA be financed

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[71] Coopers & Lybrand L.L.P., "Federal Aviation Administration Financial Assessment," Washington, DC, February 28, 1997, pp. VII-16, 17.

[72] Section 274 of the Federal Aviation Reauthorization Act of 1996.

by user fees but that security and safety oversight be funded by general fund appropriations. The Administration's subsequent budget and reauthorization proposals for the FAA, while consistent with the NCARC recommendations in many ways, differed in that they proposed no general fund appropriations after 1999.

Others have suggested sources and methods of funding. Notably, Senator Lautenberg introduced the Aviation Security Act of 1996 (S.2037) on August 2, 1996, many aspects of which were incorporated into the Reauthorization Act. Speaking about this bill during the hearing held on August 1, the Senator said:

> "ASA [S.2037] proposes that a security assessment fee, or small surcharge of no more than $4, be added to each round trip ticket to pay for needed improvements...An alternative financing mechanism would be to authorize the Department of Defense to transfer such funds as may be necessary to implement provisions of the act. In drawing on defense funds, we would recognize that terrorism is a national security threat."[73]

X. Legislative Proposals

There is no need at this time for the FAA to initiate legislation to transfer responsibilities for aviation security among the major parties. Both Presidential commissions, however, saw a need to clarify authority and responsibility in certain areas. Some clarification may be accomplished through the proposed revision of title 14, Code of Federal Regulations, Part 107, Airport Security, and Part 108, Airplane Operator Security.[74] These are the two basic regulations governing civil aviation security provisions required to be implemented by U.S. airports and air carriers. Individuals are also affected by portions of both regulations.

The rulemakings propose a number of changes, which are intended to update the regulations to reflect the current approach to security better. For example, some proposed changes seek to clarify air carrier and airport security

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[73] "Aviation Security": Hearings before the Senate Committee on Commerce, Science, and Transportation, 104th Cong. 14 (1996) (statement of Senator Lautenberg).

[74] Notices of Proposed Rulemaking on the revision of Federal Aviation Regulations parts 107 and 108 were published in the Federal Register on August 1, 1997, 62 Fed. Reg. 41730, 41760 (1997). Because both rulemakings had been in development for several years, predating 1996-97 legislative initiatives, preambular language notes that the proposals do not reflect changes based upon the most recent legislation, or the recommendations of the White House Commission. Changes resulting from these recent initiatives will be made after the final rules have been published.

personnel training requirements, more clearly define the most critical security areas in an airport, and clarify the role of the airport security coordinator.

XI. Study Conclusions

A. Responsibilities

There appears to be a consensus in the civil aviation community to retain the current system of shared responsibilities for security. In contrast, there appears to be no consensus "to transfer certain responsibilities of air carriers under Federal law for security activities conducted onsite at commercial service airports to airport operators or to the Federal Government."[75] Some argue that airport operators should assume screening responsibilities[76], but most seem content with recommending that airport authorities become more involved in some manner, citing specific examples or areas in which more assistance may be usefully offered. There is little support for the Federal Government's assuming all air carrier responsibilities. There is significant support for more Federal Government involvement and funding.

Incremental increases in Federal Government involvement in aviation security are inevitable given the recognition that the primary justification for security measures is antiterrorist in nature, with aviation security now seen more clearly as a component of national security. Increased involvement means increased investment of personnel and other resources. Most representatives of the airport and airline industry believe that the General Fund should be the financial source for future aviation security Federal expenditures rather than the Airport and Airway Trust Fund. The Administration disagrees with this position and has proposed instead that funding for FAA activities, including security activities, be derived from charges paid by users of the National Airspace System.

The Federal Government intends to continue capital purchases of aviation security equipment to be used by the airlines. Given that commitment and the strong support for better training that was so apparent during the study, it seems

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[75] Section 301 of the Federal Aviation Reauthorization Act of 1996.

[76] For example, on June 20, 1996, the Deputy Commissioner, Department of Aviation, City of Chicago, proposed assuming pre-board passenger screening responsibilities after receiving a report of a study by the Conley Group Inc., on such screening at O'Hare International Airport. The FAA responded that the proposal was "not feasible under applicable law" at that time.

logical for the next incremental Federal involvement to be in developing more comprehensive training standards for the people who use the equipment that has been purchased, rather than in making equipment operations and maintenance subsidy payments to the airlines. Better training is a better investment. Air carriers should not have to bear all the costs of security, but they should bear a substantial portion of the personnel costs to provide security screening and the operational costs of using the advanced security equipment that the Federal Government provides.

Air carriers should be inclined to protect their investments in hiring and training their personnel by providing better compensation and benefits to keep them on the job and lower turnover rates. This applies particularly to screeners. In the absence of consensus to change the existing system, the airlines retain the responsibility for screening, and retain control of passenger movement and the quality of customer service. The U.S. Government continues to control the quality of aviation security and security screening by setting higher, but realistically achievable, standards for screener selection, training, and performance.

B. Funding

There are several options for funding aviation security activities such as those recommended by the BWG and the White House Commission. One possibility is for the Federal Government simply to pay for all expenses out of the general revenue fund. The principal rationale would be that aviation security is a national security issue and that therefore the National Government should be responsible for the costs. This position has been advocated by many in the aviation industry but is likely to be politically impossible, given fiscal constraints. A second option would be to use AIP or PFC funds. This would have the advantage of requiring the users of aviation security to pay for it, resulting in higher ticket prices. Increased prices would impact negatively on the financial health of air carriers and airport operators, and those who do not fly but receive economic and other benefits from a safe, secure, and efficient air transportation system would not be paying their fair share. Further, AIP funding levels have been significantly lower in recent years than they were previously, and there are many other demands placed upon it to fund safety improvements.

A third avenue would be to apply a security user fee or surcharge to the cost of a ticket, similar to a passenger

facility charge but dedicated to funding security. Care would have to be taken to ensure that the collected funds were used only for security purposes. This option would also have the advantage of collecting costs from those who use a service, but it could also reduce passenger volume.

The same arguments also apply to the last option, a dedicated security ticket tax, whose proceeds would be reserved for security costs. Note that a $2-per-enplanement surcharge would have brought in about $1.2 billion in revenues in 1997, which would be sufficient for the additional expenses envisioned in the BWG recommendations.

The NCARC studied recommendations for funding FAA requirements, including security needs. The Administration disagrees with the conclusions of the NCARC report in this regard, specifically "that the security functions of the FAA be paid for through a general fund contribution[77]." The Administration has proposed instead that funding for all FAA activities, including security activities, be derived from charges paid by users of the National Airspace System. The NCARC report included no broad discussion of funding for the entire aviation security system, including private sector air carriers and public sector airport operators.

There is no apparent consensus for changing the overall system of funding for aviation security, particularly funding for that portion provided by private sector air carriers and public sector airport operators. There is also no definitive answer to the longstanding question of "who should pay" for security; the current system as described in the foregoing pages remains in place. Therefore, the FAA will not at this time make additional recommendations regarding funding sources to Congress.

XII. Appendix: FAA Study on Security Responsibilities: 1991

An internal, unpublished FAA study conducted in 1991 evaluated three alternatives for a shift in security responsibilities with respect to passengers, baggage, and cargo from the air carriers to airport operators to determine whether or not any alternative was likely to improve security system performance. The basic framework and content of the study, including the conclusions reached at that time, are presented below without substantive modification. The alternatives examined in 1991 were in addition to the system then in place and are presented here

[77] NCARC, "Avoiding Aviation Gridlock & Reducing the Accident Rate: A Consensus for Change," Washington, DC, December 1997, p. II-31.

as they were then written. The essential elements of these options remain valid today.

Alternative 1. Airports assume the responsibility for the sterile areas[78] and screen all persons and their personal property (sterile area screening); air carriers retain their other security responsibilities.

Alternative 2. Airports conduct sterile area screening, screen checked baggage; air carriers retain their other security responsibilities.

Alternative 3. Airports conduct sterile area screening, screen checked baggage, and screen cargo and mail; air carriers retain their other security responsibilities.

The following criteria were used to evaluate the alternatives:

- Effectiveness in improving security;
- General acceptance of an alternative by airport operators, air carriers, and system users as well as the level of political support;
- Economic efficiency;
- Need for statutory and/or regulatory changes;
- Impact on overall quality of air transportation service; and
- Ease of enforcement and oversight.

The following factors are important for understanding the implications of the alternatives as discussed in 1991:

Threat management. Coordinating overlapping responsibilities for the implementation of certain security measures, in particular the response to anonymous telephoned "bomb threats" to aircraft, was complicated by conflicting views and actions of air carriers, airports, and local law enforcement officials. These conflicts should be lessened by a restatement of responsibilities in the

[78] The sterile area is an area to which access is controlled by the inspection of persons and property in accordance with an approved security program or a security program used in accordance with FAR § 129.25 (49 CFR § 129.25). Normally, this is the area one enters after passing through the security screening checkpoint and its metal detectors, x-ray devices, and hopefully, advanced security equipment such as trace explosives detection devices.

rewrite of FAR parts 107 and 108, both published in the Federal Register as a notice of proposed rulemaking on August 1, 1997.[79] The 1991 report did not analyze transferring or adding threat management responsibilities to the airport operator that were not explicitly defined in the then-current regulations.

Passenger/baggage positive identification and reconciliation. In 1991, positive passenger/baggage match was required for all international flights, but not for domestic flights. A positive passenger/baggage match would be greatly affected by a transfer of this responsibility to airport operators. The air carriers would still need to provide the information to perform the match and hold or pull bags from aircraft. With the added delay of processing by the airport operators, on-time departures would be more difficult, and hubs could be disrupted by the delays.

Air carrier security responsibilities. No conceivable alternative can vest total security responsibility with the airport because air carriers will still be responsible for securing aircraft, challenging persons without appropriate identification who approach an aircraft, providing security training for crewmembers, and dealing with in-flight security issues. Shifting these functions was not considered an alternative. Because some FAA requirements go beyond those administered by the International Civil Aviation Organization (ICAO), and are typically not performed by foreign airport/government authorities, shifting certain security functions within the United States would not relieve air carriers of their duty to perform those same functions overseas.

Airport profiling of passengers. In 1991, air carrier ticket agents profiled passengers when they checked in and checked their baggage. Based on specific profiling criteria, actions were taken with respect to selected passengers including a more careful screening of their checked baggage. Use of the ticket agent as the focal point was the most efficient and effective way to profile passengers. Having airport operators profile passengers would still require information that can only be obtained from air carriers. This information would then have to be communicated to airport personnel. Establishing airport proficiency in this area would likely add personnel costs without improving effectiveness.

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[79] Note 72, *supra*.

Carriers continue to screen passengers and carry-on baggage. Establishment of a separate program by airport operators to perform this function was considered problematic because of a need to collocate screening gates, resulting in added expenses and additional oversight requirements. Such a program would have all the disadvantages of Alternative 1 without most of its advantages. Thus, this proposition as an alternative was rejected from further analysis.

The baseline case to which all the alternatives were compared is the system as it existed in 1991. The pros and cons of this option follow, and are followed in turn by the pros and cons of the three alternatives.

Keeping the 1991 Security System

Pro:

- The 1991 system was proven to be effective in maintaining a secure air transportation system (as the study authors believed at the time).

- The system of allocating responsibilities was well understood, was accepted by all major participants, and had supporters.

- The system was a natural and logical division of responsibilities based on the evolution of airport and air carrier duties and obligations, which included airports acting as property owners and air carriers acting as transporters of persons and property.

- The system had developed as an integration of responsibilities that have been logically assigned.

- Maintaining the 1991 system would not have required statutory changes or a major restructuring of regulations and security programs. Updating Parts 107 and 108 will make the system more efficient.

- Maintaining the status quo would have the advantage of avoiding a series of potentially confusing reorganizations with the possibility of temporary security lapses.

- Most of the aviation threats in 6 of the last 7 years (through the late 1980's) were received by air carriers and directed at aircraft. Thus, it would be inefficient to shift the responsibility of evaluating the response to

those threats away from the air carriers and to the airports.

- There would be no disruptive financial changes to the air carriers or the airport authorities and no adverse changes in the overall quality of transportation service.

Con:

- In the 1991 system, there was no single focal point for all sterile area screening at each airport. Making the airport operator accountable for all such screening functions would integrate this responsibility and might improve managerial oversight and accountability.

- It is more difficult to organize and then implement coordinated contingency plans to meet threat conditions when major security responsibilities are fragmented among several entities.

- Originally, passenger and carry-on baggage screening were performed only at the air carrier gate. Over time, these tasks have evolved so that in many airports the sterile area encompasses much or all of the entire terminal. If much or all of the terminal is to remain a sterile area, it might be better for the airport operator to manage sterile area screening.

- Requirements for specialized equipment (explosives detection systems and other devices) might impose future expenses on air carriers.

1991 Evaluation of Options

Alternative 1. Airports assume the responsibility for the sterile areas and screen all persons and their personal property (sterile area screening); air carriers retain their other security responsibilities.

Pro:

- Security efficiency may improve at some airports with multiple sterile area screening checkpoints. There may be a consolidation of security screening personnel and their training.

- Flight schedules suggested in 1991 that airport operators sometimes may have been able to move security personnel

under their control from one section of the airport to another section and screen passengers for less cost than the air carriers. At some airports, air carriers were structuring screening to obtain these efficiencies.

- At many airports in 1991, there were many air carriers responsible for maintaining one screening checkpoint. In such cases, the air carriers rotated, on a periodic basis, the responsibility for screening. This led to a lack of air carrier involvement in managing these checkpoints. Having the airport operators in charge of these checkpoints could potentially improve the effectiveness of oversight.

- Some airports believed they could improve the effectiveness of the passenger and carry-on baggage screening process by hiring, training, and adequately compensating professional screeners. Nearly all air carriers contracted out this function, while a few used their own staff.

- The public often incorrectly assumed that airport operators were responsible for screening efforts, which were sometimes perceived as less effective than they should have been. Airports could therefore improve their public image in some cases by assuming screening responsibilities and then improving screening effectiveness and procedures.

Con:

- Based on conversations with airport personnel in 1991, their previous experiences had shown that increasing salaries alone would not increase screener effectiveness. Further, any air carrier had then and has today a direct interest in protecting its expensive aircraft and company image as a safe carrier.

- Sterile area screening costs were judged likely to increase: airports may want remuneration for screening over their fixed and variable costs. While screening is purely an overhead cost to the air carriers, who struggle to keep airfares low and competitive, it may be viewed as a profit-making "service" not subject to the cost discipline of economic competition, if conducted by the airports. At the very least, each airport may be expected to differ on the cost of screening.

- Air carriers would still have a vested interest in the efficiency of the screening conducted by the airports.

Given their large investments in aircraft and public relations, air carriers were seen as likely to insist on maintaining a screening oversight function to ensure safety and minimize inconvenience to passengers; this would duplicate the oversight program established by the airports.

- Increases in screening costs might result in higher ticket prices. This would be viewed negatively by the air carriers and passengers unless there were a corresponding and noticeable improvement in screening effectiveness.

- Airports are government entities that may have less financial flexibility to pay fines for noncompliance; the assessing of violations and fines by the FAA would also have political ramifications.

- This alternative would require statutory changes to 49 U.S.C. 44901, formerly section 315(a) of the Federal Aviation Act of 1958, unless an airport operator were designated as an agent for the air carriers. At present, air carriers have the legal responsibility for ensuring the security of passengers and carry-on baggage and, when necessary, to perform various levels of searches.

- This alternative would require major restructuring of Federal Aviation Regulations parts 107 and 108 as well as the Air Carrier Standard Security Program (ACSSP) and the Airport Security Program (ASP).

- Airport operators generally do not wish to take on the security responsibilities of the air carriers and the associated liability.

- FAA security staff have indicated that it would be easier to monitor the actual security operational responsibilities of a relatively small number of air carriers, each with a standardized security program, than to review many airports, each with a unique security management system.

- Air carriers will likely resist any shift of control over the sterile area screening process because of residual security responsibility and liability.

Alternative 2. Airports conduct sterile area screening, screen checked baggage; air carriers retain their other security responsibilities.

Pro:

- If an airport responsibility, security-related equipment could be purchased with Airport Improvement Program (AIP)/Passenger Facility Charge (PFC) funds. Air carriers, however, are not eligible for these funds.

- There may be some potential cost savings due to economies of scale at some large airports, where the physical layout would support a centralized checked baggage screening system. For example, if the FAA were to require the use of explosives detection systems (EDS), fewer machines would be needed to serve air carriers, especially those with few flights. (Note: this could be arranged among air carriers as well.)

- There could be some improvement in efficiency (reduction in cost) at an airport if the airport took over responsibility for both sterile area screening and checked baggage screening, because some air carrier security management responsibilities could be consolidated with the airport security responsibilities.

- Consolidation could streamline the channels of communication between airport personnel conducting checked baggage screening and airport police, thus resulting in a potentially shorter response time to security threats.

Con:

- Airports would assume increased liability for losses resulting from security-related events. Joint responsibility could lead to confusion. The net result is that airport operator liability would expand as airports take on more security responsibilities while air carrier liability may not decrease.

- Under this alternative, airports would share partial liability for lost, stolen, or mishandled baggage since both the airport and air carriers would handle baggage.

- Airports may decide to consolidate checked baggage handling at one or more centralized areas to reduce

airport costs. This could cause several problems. One is that it would be more likely for checked baggage to be lost or sent to the wrong air carrier. Another is that such a centralized system would slow down the checked baggage sorting and screening process. Baggage may be conveyed to this centralized area by baggage carts, which would increase the opportunity for security problems. Any improvements in efficiency and effectiveness would be site specific and would not occur on a larger nationwide scale.

- Airports would want remuneration for handling checked baggage, thus raising overall carrier operating costs.

- Passengers are profiled when they check in at the ticket counter and check their baggage. The most efficient party to profile passengers would be the air carrier ticket agent, rather than an airport employee.

- This alternative would encounter strong resistance from air carriers and most airports.

Alternative 3. Airports conduct sterile area screening, screen checked baggage, and screen cargo and mail; air carriers retain their other security responsibilities.

Pro:

- Airports could use AIP/PFC funds to purchase specialized equipment, such as x-ray machines, to assist in screening cargo and mail.

Con:

- Involving the airport in screening cargo is redundant and extremely inefficient. In 1991, freight forwarders and indirect air carriers took cargo directly to the air carrier that handled the cargo. Either the airport would have to have representatives at multiple cargo facilities at each airport or all air cargo would have to be funneled through a centrally established cargo entry point. For the airports to handle and screen the cargo and then provide it to the air carriers would introduce an inefficient additional layer of bureaucracy.

- A major cargo security measure is the documentation that cargo shippers provide. Air carriers have information about known shippers; new or unknown shippers get

scrutinized more carefully. If airports took over screening cargo, each airport would have to establish and maintain a record of each of the air shippers; currently, an air carrier can share this information with its security personnel at each airport it services.

- The United States Postal Service and the air carriers have an established relationship. If air mail security procedures were to change, adding airports to this process would likely make the situation more complex.

Conclusions as Presented in the 1991 Study

The 1991 system was well understood and accepted by most major participants. Although the system had both pros and cons, it was fundamentally an effective and efficient security system. While there were advantages to each of the three alternatives, there also were some major disadvantages to shifting any of the major security functions from the air carriers to airport operators. On balance, there did not appear to be a net benefit in adopting any of the alternatives over the 1991 system. Consequently, it was recommended that that system be continued. However, in recognition of the need for further analysis to study ways that security might be improved, the FAA should consider running a trial at a selected domestic airport to test the viability of transferring certain security functions, particularly screening at checkpoints, from air carriers to the airport authority.

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