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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action No. 01-455-A
	)	
ZACARIAS MOUSSAOUI,	)	
	)	
Defendant.	)	
	)	

**BRIEF OF INTERVENOR AIR LINE PILOTS ASSOCIATION,  
INTERNATIONAL IN OPPOSITION TO GANNETT SATELLITE  
INFORMATION NETWORK, INC.'S REQUEST FOR ACCESS TO  
COCKPIT VOICE RECORDER TAPES<sup>1</sup>**

Intervenor Air Line Pilots Association, International ("ALPA"), the union that represents 66,000 air line pilots,<sup>2</sup> submits this brief in opposition to the motion of intervenor Gannett Satellite Information Network, Inc. ("Gannett") opposing the Government's Motion For Protective Order Regarding Cockpit Voice Recorders.

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<sup>1</sup> While Gannett's Motion is styled as one in intervention "For the Limited Purpose of Opposing the Government's Motion for Protective Order Regarding Cockpit Voice Recorders," Docket No. 432, Gannett plainly requests that it "be permitted to copy and disseminate" the cockpit recordings. Gannett Brief, at 2.

<sup>2</sup> Four of the airline cockpit crewmembers killed on September 11, 2001, including those aboard United Airlines Flight 93, were members of ALPA.

As we show in Part I below, 49 U.S.C. § 1154 (hereinafter referred to as the “CVR statute”) specifically prohibits release of the CVR tapes to Gannett. As the legislative history makes clear, that statute was passed in response to the release of a CVR tape to the broadcast media in 1989, and was drafted specifically “to prevent a repetition of this unfortunate occurrence” by “prohibit[ing] CVR tapes from being released to the public.” H.R. Rep. No. 661, 101st Cong., 2d Sess. 4 (1990) (Attachment 1 at 4).

In Part II we show that, contrary to the assertions of Gannett, the CVR statute is entirely consistent with the First Amendment. Indeed, both the Supreme Court and the Court of Appeals for the Fourth Circuit have specifically held that the First Amendment does not prevent courts from withholding from the news media tape recordings that have been used as evidence in judicial proceedings. Further, recent District Court decisions have uniformly refused media requests for access to CVR audiotapes, even when the tapes have been utilized as a trial exhibit.

And, as we show in Part III, the fact that the tapes at issue have been played to other persons or may be played during the trial does not and cannot, as Gannett claims, create a waiver of the CVR statute in this case.

In Part IV we show that, even if the Court were to determine that 49 U.S.C. § 1154 does not apply in this case, Gannett has not shown that release of the tapes would be justified under common law principles. Indeed, Gannett has

offered no substantial justification whatsoever for release of the tapes, while in contrast the justifications for withholding them are substantial, including protection of the victims and their families from the trauma associated with reliving these horrible events through repetitive public airing of the CVR tapes on broadcast media.

Finally, in Part V we show that, if the Court nevertheless determines that release of the tapes is proper, it should issue a stay to prevent release until ALPA and others have an opportunity to appeal the Court's ruling.

#### I.

#### **Federal Law Prohibits Public Disclosure Of Cockpit Voice Recorder Tapes.**

In response to almost exactly the same situation presented here -- efforts by the news media to obtain for public broadcast copies of a CVR tape put at issue during a trial -- Congress passed the statute now codified at 49 U.S.C. § 1154. The purpose of that statute, as the House Committee Report bluntly explained, was to "prohibit CVR tapes from being released to the public." H.R. Rep. No. 661 (Attachment 1 at 4). Specifically, Congress sought to prevent a repetition of precisely what Gannett seeks here: a judicial decision to release a CVR tape to the news media. *Id.* To protect the rights of litigants in cases arising out of aircraft crashes, the CVR statute allows use of CVR tapes and transcripts at trial, where necessary, "only if the court places the part of the transcript or the recording under seal to prevent the use of the part of the transcript or the

recording for purposes other than for the proceeding.” 49 U.S.C. § 1154(a)(4)(B).  
See also S. Rep. No. 450, 101st Cong., 2d Sess. 6 (1990), reprinted in 1990  
U.S.C.C.A.N. 6376, 6381 (Attachment 2 at 6) (statute intended to “eliminate the  
use of [CVR materials] except to insure that litigants are able to receive a fair  
trial”). Accordingly, Gannett’s request for access to the CVR tapes should be  
unequivocally denied.

To understand this legislation fully, some background on the use of CVR  
information -- and the limitations on the use of that information -- is important.  
CVRs have been mandatory equipment on most large commercial aircraft since  
1965, and since that time the use of CVR recordings and transcripts has been  
limited by regulation and statute. To airline crewmembers, CVRs represented a  
frightening and unprecedented invasion of privacy and intrusion into the  
workplace, since the existence of a CVR meant that every workplace  
conversation would be recorded, and every statement and action would be  
placed into a record to be reviewed and analyzed in excruciating detail.  
Statement of ALPA President Henry A. Duffy before the Aviation Subcommittee,  
Senate Committee on Commerce, Science and Transportation, United States  
Senate (May 10, 1990). (Attachment 3 at 1-2.) However, pilots also recognized,  
as did the Federal Aviation Administration (“FAA”), that CVRs provided a  
unique opportunity to advance aviation safety by allowing detailed analyses of  
the cause of aviation accidents -- assuming, of course, that one could be sure that

the pilots were not inhibited in their cockpit communications by the presence of the recorder. (Id.) In response to these concerns, the FAA would require CVRs and agreed that CVRs would be used only for accident investigation and prevention:

Information obtained from the [CVR] record is used to assist in determining the cause of accidents or occurrences in connection with investigations under Part 830 [of the NTSB's regulations]. The [FAA] Administrator does not use the record in any civil penalty or certificate action.

14 C.F.R. § 121.359(h).

By itself, however, the FAA proved unable to restrict the use of CVR materials to their intended purposes for several reasons. First, the FAA was not the only entity with access to CVRs; the National Transportation Safety Board ("NTSB"), which had independent jurisdiction to investigate aircraft accidents, also regularly came into possession of CVR tapes. Second, in 1966, the year after CVRs were introduced, Congress passed the Freedom of Information Act, which greatly increased disclosure of information in the hands of the federal government. And third, at about that time news media interest in commercial air disasters began to increase. Consequently, pilots and their families became subjected to CVR transcripts in the news media immediately after aircraft accidents, which in turn led to uninformed speculation about the cause of the accidents, and "unwarranted and unfair accusations being made against the flight crew and others involved." (Attachment 3 at 2.) To curb such abuses, in

1982 Congress supplemented the FAA's existing regulatory limits on CVR use with legislation directed at the NTSB. That legislation provided:

Notwithstanding any other provision of law, the [NTSB] shall withhold from public disclosure cockpit voice recorder recordings and transcriptions, in whole or in part, of oral communications by and between flight crew members and ground stations, that are associated with accidents or incidents investigated by the Board: Provided, That portions of a transcription of such oral communications which the Board deems relevant and pertinent to the accident or incident shall be made available to the public by the Board at the time of the Board's public hearing, and in no event later than 60 days following the accident or incidents[.]

Pub. L. 97-309 § 2(c), 96 Stat. 1453 (October 14, 1982).

Unfortunately, even this legislation proved insufficient to protect pilots' privacy interests, and in the few years following that 1982 statute there were three notorious instances where CVR material found its way into media accounts. (Attachment 3 at 2-3.) The third of these incidents, which served as the final impetus for passage of new legislation, occurred when the actual CVR tape from a Delta Airlines jet involved in a fatal crash in Dallas was played on national news programs. (Id.) Again Congress reacted, this time by enacting in 1990 the provisions of the statute now at issue.

First, Congress mandated procedures for the NTSB to follow regarding protection and disclosure of CVR information when the NTSB was investigating an aircraft accident. In a provision now codified at 49 U.S.C. § 1114(c), Congress reiterated that the NTSB could not release CVR recordings, and could only release CVR transcripts at specified points during its investigation.

Second, with the stated goal of “prevent[ing] a repetition” of the incident in which the CVR from the Delta crash was broadcast on national news, Congress imposed precise limitations on the use of CVR information in judicial proceedings. H.R. Rep. No. 661 (Attachment 1 at 4). These limitations, which are now codified in 49 U.S.C. § 1154, were *independent* of the limitations placed on the NTSB; indeed, since limitations on the NTSB existed under the 1982 statute, the purpose of this portion of the 1990 law was to broaden the protections against release of CVR materials to parties other than the NTSB. As the House Committee Report explains:

Although it was the intent of the existing [1982] law that the recordings themselves would not be made public, the law did not prohibit release of the recordings by persons other than the Board. In 1989, a Texas state court ordered Delta Airlines to release a CVR tape from an accident which had occurred a year earlier. The CVR tape was then broadcast by the media. The reported bill would prevent a repetition of this unfortunate occurrence. It would prohibit CVR tapes from being released to the public.

H.R. Rep. No. 661 (emphasis added) (Attachment 1 at 4). See also S. Rep. No. 450 (Attachment 2 at 6) (The bill would “prohibit[] dissemination of the [CVR] recording or portion to anyone who does not need the information for the [judicial] proceeding. This provision is intended to eliminate the use of such information except to insure

that litigants are able to receive a fair trial.”).<sup>3</sup>

In enacting the 1990 amendments to the CVR statute, Congress recognized that aircraft crashes traditionally spawn litigation, and that litigants should be allowed necessary access to the CVR materials. Accordingly, the statute carefully balanced the privacy privilege afforded pilots and families against the rights of litigants to receive a full and fair trial.

The privilege afforded the CVR is based upon the recognized principle that because voice information on the CVR may prevent or explain crashes, pilots agreed to what would otherwise be overly intrusive, continuous monitoring, knowing that the contents of the tape will likely become of interest to others only

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<sup>3</sup> The NTSB shared the view that the legislation was designed to prevent release of CVR Materials to the media. In a letter to Congressman James L. Oberstar, Chairman on House Public Works and Transportation Committee, NTSB Chairman James L. Kolstad wrote:

The proposed amendment also is aimed at preventing the courts from releasing CVR tapes for public broadcast. We support this goal. In the summer of 1989, a Texas state court ordered Delta Air Lines to release the CVR tape from an accident which occurred on August 31, 1988, at the Dallas-Fort Worth International Airport. The CVR tape was then broadcast by the media. The Safety Board publicly expressed its regret over the court's decision. In actions for damages arising from accidents, CVR tapes have been admitted into evidence and have been played in open court. However, to our knowledge the Texas decision represents the first case in which a court ordered the CVR tape released to the public.

The proposed amendment would prevent a repetition of the Texas broadcast. . . .

(Attachment 4 at 2.)

in the cases when it records their deaths. ALPA is frequently put in the position of intervening in judicial proceedings to enforce the privacy interests protected by the CVR privilege because, as a practical matter, were ALPA not to do so, there is no other party with a consistent and strong enough interest to ensure that the appropriate judicial protections are put and kept in place.

The result of Congress' recognition of the privilege is an intricate method for determining whether and in what circumstances a CVR transcript or the tape itself can be used in a judicial proceeding. In many instances, the portion of the CVR transcript relevant to an accident is made public by the NTSB pursuant to its authority under 49 U.S.C. § 1154(c), and the statute presumes that that portion can be used by the litigants for any proper purposes. Additional parts of the CVR transcript, or the tape itself, may also be made available to litigants, but only if the court determines that one or both is necessary for a fair trial, and only if their use is limited to the proceeding. The statute provides no room, however, for release of CVR materials to the press; in fact, as the authors clearly stated, the statute is specifically designed to prohibit just such release. H.R. Rep. No. 661 (Attachment 1 at 3).

Thus, in enacting the 1990 legislation, Congress addressed two distinct issues: NTSB handling of CVR materials (now codified in 49 U.S.C. § 1114(c)), and judicial handling of CVR materials (now codified in 49 U.S.C. § 1154). As the

legislative history makes clear, Congress enacted this legislation to prevent precisely what is sought here -- release of a CVR tape to the news media.

In 2000, Congress again amended 49 U.S.C. § 1154 by extending the privacy protection afforded under the statute to other modes of transportation and clarified that it was the information contained on these recordings that was protected, no longer just pilot voices.<sup>4</sup> The Senate Report stated that Section 5 of the Act (amending § 1154):

[R]equires the withholding from public disclosure of voice and video recorder information for all modes of transportation comparable to the protections already statutorily provided for cockpit voice recorders (CVRs). . . .

S. Rep. No. 386, 106th Cong., 2d Sess. 8 (2000) (emphasis added) (Attachment 5 at 8-9). Meanwhile, Section 6 “create[d] procedures for [the] NTSB to turn over its investigation to the FBI when it appears that the accident was caused by an intentional criminal act . . . ” (*Id.* at 8). Therefore, Congress clarified that the CVR’s statutory privilege would now cover “voice recorder information” and in the very next section required procedures to include the FBI as well as the NTSB in crash investigations. The Congress plainly anticipated that the CVR tapes would come into the hands of Government investigators and prosecutors, and anticipated that the privilege under 49 U.S.C. § 1154 would extend to criminal “proceedings” involving the FBI.

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<sup>4</sup> National Transportation Safety Board Amendments Act of 2000, Pub. L. No. 106-424, 114 Stat. 1883 (Nov. 1, 2000).

Gannett suggests in its brief, at 6, n.4 that ALPA's privacy concerns might be addressed by making only those portions of the tapes upon which the voices of crewmembers appear subject to a protective order. The CVR statute, however, makes no provision for the Court to select portions of a CVR tape for disclosure. Rather, Congress' plain express intent was "to prohibit CVR tapes from being released to the public." H.R. Rep. No. 661, supra.

## II.

### **The CVR Statute Is Consistent With The First Amendment.**

Gannett suggests that the CVR statute is contrary to the First (and Sixth)<sup>5</sup> Amendments, and therefore not enforceable. (Brief at 2-3.) That argument is wholly without merit. Both the Supreme Court and the Fourth Circuit have specifically rejected claims that the First Amendment requires disclosure of tapes or other documents that have been admitted into evidence in a judicial proceeding.

In Nixon v. Warner Communications, Inc., 435 U.S. 589, 608-10 (1978), the news media argued that the First Amendment required the district court to disclose the Watergate tapes after they had been admitted into evidence during the trial of Nixon's advisors. The Supreme Court specifically rejected that claim,

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<sup>5</sup> Because it is well established that the right to a fair trial under the Sixth Amendment is personal to the defendant, see Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979), that Amendment need not otherwise be considered except insofar as the Courts have incorporated certain Sixth Amendment tests for media access to evidentiary materials into the First Amendment.

holding that the First Amendment merely preserves the right of the news media and the public to have access to information contained in court records. Id. at 608-10. In that case, there was no issue of a statutory privilege as there is here. The tapes had been played and transcripts made available. Because “there [was] no question of a truncated flow of information to the public,” there was no infringement of First Amendment rights. Id. at 609. Therefore, it is established law that the First Amendment does not require access be granted to the CVR audiotapes themselves.<sup>6</sup> Subsequent cases clarified that even the public and press right of access to criminal trials is not unqualified.

In re Washington Post Co., 807 F.2d 383, 390 (4<sup>th</sup> Cir. 1986), that Court noted that “[t]he mere existence of a First Amendment right of access to a particular kind of hearing or document does not entitle the press and public to access in every case.” The Court denied the press and the public access to sensitive government documents which were protected under the Classified Procedures Act. In doing so, the Fourth Circuit stated: “[a]ccess may be denied ‘if closure is essential to preserve higher values and is narrowly tailored to serve that interest.’” Id., citing Press-Enterprise Co. v. Superior Court of California,

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<sup>6</sup> See also United States v. Beckham, 789 F.2d 401 (1986), where the Sixth Circuit addressed an effort by the news media to obtain copies of tapes played in open court during a criminal trial. In reliance on Nixon, the Court held that there was no abuse of discretion and no violation of the First Amendment to deny the media the right to copy audiotapes. Id. at 408.

464 U.S. 501, 510 (1984) and Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982).

Similarly, Congress has dictated that such a higher value applies to the information contained in post-accident CVR tapes and transcripts -- and has protected those materials with a statutory privilege. The CVR statute serves a compelling public interest in making critical investigatory and safety information available to investigators, and in appropriate cases litigants, while protecting sensitive privacy rights of crash victims and their families. Were the Court to order these sensitive materials disclosed, it is likely that substantial harm will result to the public's interest because air crewmembers will no longer have faith that these communications will be protected and air crash investigations in the future will likely suffer due to the unavailability of these and more advanced recordings. Congress continues to be concerned about this issue, as evidenced by the recent expansion of the CVR's statutory privilege. (See Attachment 5.)

Applying the test of Washington Post, 807 F.2d at 390, here, there are no better alternatives to protect the privacy interests at stake other than closure of media access to the CVR recordings and transcripts. The statute requires it. The First Amendment allows it. Congress carefully weighed the necessity of investigators' and litigants' rights of access to the materials against the privacy rights of air crewmembers in passing the CVR statute. There is a compelling public interest in preserving the integrity of the aviation investigative process.

There is also a substantial probability that the abilities of investigators of aviation disasters in the future will be irreparably harmed if the confidentiality of these materials cannot be guaranteed. Clearly, Gannett has not obtained the CVR tapes from the Government or the airlines; those parties have correctly acted to protect the tapes and the privacy and public interests involved. Gannett should not be permitted to circumvent the CVR's statutory privilege by obtaining through this proceeding the very recordings it has been prevented from obtaining directly. There is no reasonable alternative available to the Court to keeping the CVR tapes and transcripts confidential. The sole remaining question is whether the hearing should be closed to the press and public for the purpose of playing the tapes during trial.

The Courts have made clear that First Amendment rights of the press and public are properly subject to closure of judicial proceedings so long as the closure is narrowly tailored to serve the protected interest. See Waller v. Georgia, 467 U.S. 39, 48 (1984) (closure to cover only those parts of hearing that jeopardize interest advanced; there, the government's interest in protecting confidential criminal wiretap tapes); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 n.18 (1980) (noting that the First Amendment permits reasonable closure of criminal proceedings under some circumstances); Bell v. Jarvis, 236 F.2d 149, 165 (4<sup>th</sup> Cir. 2000) (right of press and public to attend a criminal trial is a qualified right; there, the interest in safeguarding physical and psychological

well-being of minors prevailed and the public and press were properly excluded); Washington Post, 807 F.2d at 393 n.9 (First Amendment closure test also applies to a request to seal documents).

ALPA believes the legislative history of the CVR statute indicates that Congress balanced the interest involved and correctly determined that the CVR recordings be made available only for “purposes of a proceeding.” Congress correctly determined that exposure should be limited to necessary parties to a judicial proceeding, *i.e.*, the judge, and (subject to an applicable protective order) the parties, jury and necessary court personnel. Under Jarvis’ First Amendment test, the actual airing of the CVR tapes in this proceeding before the jury should be closed to the public because the interest to be protected is sensitive enough to warrant closure. Notwithstanding, should the Court determine to open the courtroom to the press and public for the playing of the CVRs, it is plain the statute requires that no recordings be made and that the tapes themselves and any transcripts shall remain under seal.

Finally, despite Gannett’s reference to the “First Amendment right of access . . . to documents submitted in the course of a trial” (Brief at 3), the cases it cites for the proposition that the news media should be allowed access to (*i.e.*, copy) tapes played during trial are not based upon the First Amendment. Instead, those cases rely upon a common law right of access to judicial records; indeed, several of the opinions cited specifically state that there is no First

Amendment right to have access to tapes played at trial. (See Brief at 3-4.)

Common law rights are irrelevant, of course, where Congress has enacted a statute governing the issue. See Nixon, 435 U.S. at 603-8 and n.18.

### III.

#### **There Has Been No Waiver Of Statutory Rights.**

Gannett also argues, at pages 5-6 of its Brief, that because the CVR tapes from Flight 93 was played to certain family members of the passengers and crew, any right to confidentiality is gone, and the “statute’s mandate . . . does not apply.” This is patently in error on a number of grounds.

First, Gannett cites no authority for the proposition that the CVR statute may be disregarded if not followed perfectly in each instance. That is because no such authority exists. Second, there is ample authority for the proposition that limited exposure, even to members of the public, of sensitive materials does not equate to an automatic ruling that public disclosure of the materials themselves is required. E.g., Nixon, 435 U.S. at 608-10. Third, any disclosure by the government to the relatives of passengers and crew killed on Flight 93 was arguably a disclosure to potential trial witnesses, and the playing of the tape to these individuals to assist in the Government’s investigation and/or preparation of its case is arguably a permissible use of the CVR for a “proceeding,” permitted by statute. Moreover, Gannett’s argument directly contradicts the holdings of recent District Court cases in which the Courts correctly withheld from the

media CVR tapes played at trial. US Airways, Inc. v. Parker-Hannifan Corp., C.A. No. 99-CV-917 (W.D. Pa., June 19, 2002) (Order granting Motion for Access to Judicial Record; access to CVR audiotape denied, attached as Exhibit "A" to Government's Motion for Protective Order (Docket No. 399)); United States v. Calloway, No. 94-20112 (W.D. Tenn., August 31, 1995) (Order Denying Access to [CVR] Audiotape Recording)(Attachment 6).<sup>7</sup> Even so, the fact that the CVR tapes may or may not have been handled in precise accordance with the statute does not give anyone license to ignore the CVR statute in the future; indeed, if anything, it makes future compliance with the statute even more critical.

#### IV.

##### **Even Absent Specific Statutory Protections For The CVR Tapes, Release Of The Tapes Would Not Be Warranted.**

Even if the Court were to rule (erroneously, we believe) that 49 U.S.C. § 1154 does not apply in this case, Gannett's motion for access to the tapes should be denied under common law standards.

In Nixon, 435 U.S. at 597-99, the Supreme Court recognized a common law right to inspect records of judicial proceedings. That right, however, is not

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<sup>7</sup> Calloway was decided upon First Amendment grounds. The Court there did not find it necessary to address the applicability of 49 U.S.C. § 1154. However, Calloway was decided prior to the 2000 amendments to the statute, which clarified that the privilege requires withholding from the public voice recorder information . . . even when the NTSB turns over its investigation to the FBI. See Attachment 5 at 8.

absolute, and the decision to allow access is left to the discretion of the District Court, based on the relevant facts and circumstances. Id. at 599.

In this case, nearly every relevant fact weighs against release of the tapes. First, Gannett offers no substantive reason why it should have the tapes, and on that basis alone its request should be denied. Instead, Gannett offers only vague but apparently intentionally tantalizing statements attributed to several relatives of persons who died aboard Flight 93, and a statement of its intention to publish coverage of the trial. Gannett's remaining silence on the issue otherwise is hardly surprising, however, since it almost certainly seeks the tapes for the basest of commercial purposes: to exploit the sounds of Flight 93 for commercial gain.<sup>8</sup> Gannett cannot reasonably now claim that it needs the tapes to allow full reporting of relevant facts, because the relevance of the tapes has not been determined, nor have the tapes been admitted into evidence. Moreover, if the tapes are ultimately admitted into evidence, the Court's protective order may be narrowly drawn to allow the tapes to be used in the proceeding without permitting actual copying for commercial distribution. Cf. Nixon, 435 U.S. at 599 n.11 ("substantial access" one factor to be weighed by the district court).

In contrast, release of the tapes themselves would cause significant, tangible harm to the victims of Flight 93 and their families, and to pilots and the

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<sup>8</sup> See Attachment 3 at 2. It is an unfortunate fact that many CVR tapes from fatal crashes, which were released prior to the amendments to 49 U.S.C. § 1154, or outside its protections, are continuously available on the Internet.

flying public generally. Gannett may argue that the victims and their families could simply turn off the television or radio to avoid this exposure, but that would hardly be a practical solution; indeed, unless the families were to remove themselves from modern society altogether by avoiding all forms of broadcast media, there is no way to insure that they would be protected from such exposure.<sup>9</sup>

Finally, the precedent set by release of the CVR tapes to the news media by this Court will have significant adverse consequences on air safety. As we discussed in Part I above, the installation and proper utilization of CVRs has been dependent upon acceptance of this intrusive device in the workplace. Pilot acceptance, in turn, has rested upon assurances that CVR materials would be used for accident investigation and not for the exploitive purposes of commercial media. Based on the success of the CVR, new generations of safety equipment

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<sup>9</sup> Courts have specifically recognized that families have important privacy interests that are to be protected by withholding audiotapes from the media, even when transcripts of those tapes are available. Thus, in a case arising under the Freedom of Information Act, a district court refused to release the audiotape from the Space Shuttle Challenger:

*What* the astronauts said may not implicate privacy interest; NASA has not argued that it does and has, in fact, provided the public with a transcript of the tape's substantive contents. But *how* the astronauts said what they did, the very sound of the astronauts' words, does constitute a privacy interest. This is the "intimate detail" that the Challenger families seek to protect from disclosure.

New York Times Co. v. NASA, 782 F. Supp. 628, 631 (D.D.C. 1991).

are being designed and installed, such as cockpit and cabin video recorders, that promise to provide even more information for air safety specialists.

While new these devices offer great benefits, pilots will immediately recognize that cockpit and cabin video are even more intrusive than the CVR and offer even greater possibilities for misuse. Accordingly, without solid assurances that cockpit recordings will not be released in the future, it is unlikely that the new devices will gain the support necessary to make them effective. More to the point, the release of these CVR tapes will make it difficult, if not impossible, to give pilots any realistic assurance that the Courts will follow Congress' intent and that cockpit recordings will not be released to the media in the future. Implementation of the new technologies, if it occurs at all, could be significantly delayed. In sum, the circumstances here weigh heavily against release of the tape.

## V.

### **If The Court Orders Disclosure Of The CVR Tapes, That Order Should Be Stayed Pending An Appeal.**

If the Court were to order disclosure of the CVR tapes, ALPA would immediately appeal that decision. Since enforcement of the order would undermine the appeal and cause irreparable injury to the victims, their families, and to other ALPA members operating under what they perceive to be the protections of the CVR statute, ALPA has filed, with this brief, a motion in the

alternative requesting that the Court stay the effectiveness of any such order pending an appeal.

Under Fed. R. Civ. P. 62(c), the Court weighs four factors in considering whether to stay an order pending appeal: (1) the likelihood that the applicant will be irreparably injured absent a stay; (2) the likelihood that the applicant will succeed on appeal; (3) the prospect that other interested parties will be harmed if the stay is granted; and (4) the public interest in granting the stay. Long v. Robinson, 432 F.2d 977, 979 (4<sup>th</sup> Cir. 1970)(Memorandum Opinion and Order), aff'd, 436 F.2d 1116 (1971). Accord Hilton v. Braunskill, 481 U.S. 770, 776-77 (1987). The necessary level and degree of each factor will vary according to the court's assessment of the other factors. Id. at 777. Thus, the greater the irreparable injury, the lesser the likelihood of success that needs to be demonstrated. Id. at 777-78.

First, as we have demonstrated in Part IV above, there can be no question that the victims and their families and the trust pilots place in Congress' ability to prevent disclosure of the CVR tapes will be irreparably harmed if the stay is not granted. Indeed, stays routinely have been granted in other cases where the harm suffered was far less tangible than the harm that would occur here. See e.g., Basicomputer Corp. v. Scott, 973 F.2d 507, 512 (6<sup>th</sup> Cir. 1992) (loss of customer goodwill amounts to irreparable injury because damages flowing from such losses are difficult to compute); Fund for Animals, Inc. v. Espy, 814 F. Supp.

142, 151 (D.D.C. 1993) (plaintiffs who enjoyed viewing wild bison would suffer irreparable injury if research study involving capture of wild bison near plaintiffs' property were implemented).

Second, we have demonstrated a significant likelihood of success on appeal. Indeed, even if the Court disagrees with our view of the merits, there can be no doubt that a serious legal question has been presented which should be preserved for appellate review. See Goldstein v. Miller, 488 F. Supp. 156, 172 (D.Md. 1980) (difficult legal question, stay granted), aff'd sub nom., 649 F.2d 864 (4<sup>th</sup> Cir. 1981).

Third, there would be no appreciable harm to Gannett as a consequence of a stay. The information contained in the tapes has already been provided to those family members who wished to hear the recordings. Gannett has had the opportunity to interview those persons and report their impressions. The only thing that would be delayed, of course, would be a public broadcast of the actual screams and cries of the victims, and the sounds of violence and disaster. Plainly the public could wait until the completion of an appeal to hear those sounds.

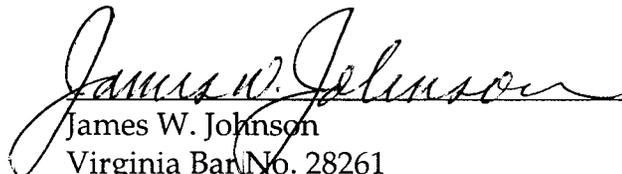
Finally, as we discussed in Part IV above, the public interest in insuring the advancement of air safety lies in granting the stay and allowing considered appellate review.

VI.

Conclusion

For the foregoing reasons, intervenor Air Line Pilots Association urges the Court to grant the motion of the United States for a protective order sealing the CVR tapes and transcripts of the cockpit voice recorder aboard United Airlines Flight 93 and ExecuJet Flight 593 on September 11, 2001 in accordance with 49 U.S.C. § 1154; and grant the Motion of ALPA to close the courtroom to the press and public during any actual playing of the CVR tapes.

Respectfully submitted,



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Virginia Bar No. 28261  
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Dated: October 8, 2002

INDEPENDENT SAFETY BOARD ACT OF 1974  
AMENDMENTS ACT OF 1990

August 8, 1990.—Ordered to be printed

Mr. ANDERSON, from the Committee on Public Works and  
Transportation, submitted the following

REPORT

[To accompany H.R. 5182 which on June 21, 1990 was referred jointly to the  
Committees on Energy and Commerce and Public Works and Transportation]

[Including cost estimate of the Congressional Budget Office]

The Committee on Public Works and Transportation, to whom  
was referred the bill (H.R. 5182) to amend the Independent Safety  
Board Act of 1974 to authorize appropriations for fiscal years 1991,  
1992, and 1993; and for other purposes, having considered the  
same, report favorably thereon with an amendment and recom-  
mend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof  
the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Independent Safety Board Act of 1974 Amendments  
Act of 1990".

SEC. 2. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—Section 809 of the Independent Safety Board Act of 1974 (49  
U.S.C. App. 1907) is amended by striking the section heading, the section designa-  
tion, and subsection (a) and inserting the following:

"SEC. 209. AUTHORIZATION OF APPROPRIATIONS.

"(a) IN GENERAL.—There is authorized to be appropriated for the purposes of this  
Act not to exceed \$28,600,000 for fiscal year 1990, \$31,000,000 for fiscal year 1991,  
\$38,600,000 for fiscal year 1992, and \$38,600,000 for fiscal year 1993. Such sums shall  
remain available until expended."

(b) CONFORMING AMENDMENT.—Section 809(b) of such Act is amended by inserting  
"Emergency Fund.—" after "(b)".

SEC. 3. LABORATORY RECORDS OF TOXICOLOGICAL TESTS.

(a) AUTHORITY OF NTSB TO OBTAIN.—Section 804(b) of the Independent Safety  
Board Act of 1974 (49 U.S.C. App. 1903(b)) is amended by redesignating paragraph

(11), and any reference thereto, as paragraph (12) and inserting after paragraph (10) the following new paragraph:

"(11) ACCESS TO LABORATORY RECORDS OF TOXICOLOGICAL TESTS.—Notwithstanding section 503(e) of the Supplemental Appropriations Act, 1987 (5 U.S.C. 7801 note), the Board is authorized to obtain from the Secretary of Transportation by written request, and shall be furnished, any laboratory record of a toxicological test—

"(A) which is conducted on a person who is reasonably associated with the circumstances of an accident or incident within the investigative jurisdiction of the Board; and

"(B) which is conducted pursuant to post-accident or reasonable suspicion toxicological testing requirements of the Department of Transportation, including its agencies."

(b) CONFIDENTIAL TREATMENT.—Section 304 of such Act is amended by adding at the end the following new subsection:

"(e) CONFIDENTIAL TREATMENT OF LABORATORY RECORDS.—

"(1) IN GENERAL.—Except as provided in paragraph (2), the Board shall maintain in confidence and exempt from public disclosure in accordance with section 552(b)(3) of title 5, United States Code—

"(A) any laboratory record of a toxicological test conducted on a person which reveals medical use of a drug which is permitted under applicable regulations; and

"(B) any medical information provided by such person in connection with such test or in connection with a review of such test.

"(2) USE OF LABORATORY RECORDS IN DEVELOPMENT OF EVIDENTIARY RECORD.—If the fitness of a person is specifically at issue in an investigation of an accident or incident by the Board and if use of a laboratory record of a toxicological test conducted on such person is necessary in developing an evidentiary record in such investigation, the Board may use such laboratory record for development of such evidentiary record."

#### SEC. 4 INSPECTION AUTHORITY.

Section 304(b)(2) of the Independent Safety Board Act of 1974 (49 U.S.C. App. 1903(b)(2)) is amended by inserting after "vehicle," each place it appears "vessel,"

#### SEC. 5 COCKPIT VOICE RECORDER RECORDINGS AND TRANSCRIPTIONS.

Section 306 of the Independent Safety Board Act of 1974 (49 U.S.C. App. 1905) is amended by striking subsection (c) and inserting the following:

"(c) PUBLIC DISCLOSURE OF COCKPIT VOICE RECORDER RECORDINGS AND TRANSCRIPTIONS.—

"(1) GENERAL RULE.—Notwithstanding any other provision of law, the Board shall withhold from public disclosure cockpit voice recorder recordings and transcriptions, in whole or in part, of oral communications by and between flight crew members and ground stations, that are associated with accidents or incidents investigated by the Board.

"(2) EXCEPTION.—Portions of a transcription of oral communications described in paragraph (1) which the Board deems relevant and pertinent to the accident or incident shall be made available to the public by the Board—

"(A) if the Board conducts a public hearing with respect to such accident or incident, at the time of such hearing; and

"(B) if the Board does not conduct such a public hearing, at the time when a majority of other factual reports regarding the accident or incident is placed in the public docket.

"(3) REFERENCES TO COCKPIT VOICE RECORDER INFORMATION IN SAFETY RECOMMENDATIONS.—Nothing in this section shall restrict the Board at any time from referring to cockpit voice recorder information in making safety recommendations.

"(d) USE OF COCKPIT VOICE RECORDER RECORDINGS AND TRANSCRIPTIONS IN JUDICIAL PROCEEDINGS.—

"(1) GENERAL RULE.—Except as provided in this subsection, in a judicial proceeding, there shall not be discovery by a party—

"(A) of portions of cockpit voice recorder transcriptions other than such portions made available to the public by the Board under subsection (c)(2); and

"(B) of cockpit voice recorder recordings.

"(2) EXCEPTION RELATING TO DISCOVERY OF TRANSCRIPTIONS.—

"(A) IN GENERAL.—Subject to subparagraph (B) and paragraph (4), a court may permit discovery of cockpit voice recorder transcriptions by a party if the court, after an in camera review of such transcriptions, finds that—

"(i) the portions of the transcriptions made available to the public under subsection (C) do not provide the party with sufficient information for the party to receive a fair trial; and

"(ii) discovery of additional portions of transcriptions is necessary to provide the party with sufficient information for the party to receive a fair trial.

"(B) NTSB TRANSCRIPTIONS.—No cockpit voice recorder transcriptions prepared by or under the direction of the Board, other than portions made available by the Board under subsection (c), shall be required to be produced for an in camera review or subject to discovery unless the cockpit voice recorder recordings are not discoverable.

"(3) EXCEPTION RELATING TO DISCOVERY OF RECORDINGS.—Subject to paragraph (4), a court may permit discovery of cockpit voice recorder recordings by a party if the court, after an in camera review of such recordings, finds that—

"(A) the portions of transcriptions made available to the public under subsection (c) and to the party through discovery under paragraph (2) do not provide the party with sufficient information for the party to receive a fair trial; and

"(B) discovery of cockpit voice recorder recordings is necessary to provide the party with sufficient information for the party to receive a fair trial.

"(4) PROTECTIVE ORDERS.—If, under paragraph (2) or (3), there is discovery in a judicial proceeding of a cockpit voice recorder recording or any portion of a cockpit voice recorder transcription not made available to the public under subsection (c)(2), the court shall issue a protective order to limit the use of such recording dissemination of such recording or portion to any person who does not need access to such recording or portion for such proceeding.

"(5) LIMITATION ON ADMISSION OF RECORDINGS AND TRANSCRIPTIONS INTO EVIDENCE.—A court may permit admission of a cockpit voice recorder recording or any portion of a cockpit voice recorder transcription not made available to the public under subsection (c)(2) into evidence in a judicial proceeding, only if the court places such recording or portion under seal to preclude the use of such recording or portion for purposes other than for such proceeding."

The reported bill authorizes appropriations for the National Transportation Safety Board (NTSB).

The NTSB was created by the Department of Transportation Act of 1966 and was established as an Independent Federal Agency by the Independent Safety Board Act of 1974. The Board plays a critical role in transportation safety. It is responsible for investigating and determining the probable cause of accidents in five transportation areas: aviation, highways, rail, pipeline, and marine. Following its investigations, the Board makes recommendations to federal, state and local agencies to prevent the recurrence of accidents. The Board also conducts special studies and investigations on transportation safety and reviews and evaluates the performance of other transportation agencies in achieving safety.

The reported bill is designed to reverse the unfortunate reductions in the Board's staff and capabilities which occurred during the 1980's. In 1980, the Board had a staff of 400. By 1982 unnecessary cuts in funding had reduced the Board's staff by 27 percent. Since that time, the Board has been able to regain some of its lost staff but its current staff level of 326 is well below the level of 1980 and below the level which the Committee believes necessary for the Board to carry out its important safety responsibilities. The budget cuts which the Board has sustained have resulted in a substantial increase in the time required for the Board to issue accident reports and a decline in the number of the accidents the Board has

4  
been able to investigate. The budget cuts have also caused the Board to lose staff in key technical areas.

The authorizations in the reported bill will enable the Board to build itself up to the level of effectiveness needed for the Board to continue to be the preeminent accident investigator in the world. The reported bill will permit the Board to increase its staff to 848 in fiscal year 1991 and to 881 in fiscal years 1992 and 1993. For fiscal year 1991, the legislation would permit the Board to add 22 new staff positions. The Board plans to hire 9 accident investigators, 9 technical specialists and 4 legal specialists. The latter will enable the Board to begin reducing the current unacceptable delays in processing appeals by airmen whose licenses are suspended or revoked by the Federal Aviation Administration. For fiscal years 1992 and 1993, the Board plans to add an additional 33 staff positions, including staff with investigative, technical and litigation responsibilities.

In addition, the reported bill now includes several amendments to the Board's basic statutory authority to enhance the Board's ability to carry out its functions.

First, the reported bill ensures that the Board will have access to drug tests conducted under DOT regulations on federal employees who are involved in transportation accidents within the Board's investigative jurisdiction. Under the bill, medical information obtained from the drug testing must be kept confidential by NTSB except in cases where it is needed for the evidentiary record in an NTSB investigation which is specifically considering the fitness of a federal employee involved in an accident.

A second provision in the bill deals with conversations between flight crews or between flight crews and controllers which are recorded on cockpit voice recorders. Existing law strikes a compromise between rights of privacy and the legitimate rights of the public to know. Existing law provides that NTSB must make public a transcription of portions of the recording which are relevant to the accident, but the recordings themselves may not be released. The recordings are sensationalistic and public access to the recordings would not give the public any information beyond that which it would get from a transcription.

Although it was the intent of existing law that the recordings themselves would not be made public, the law did not prohibit release of the recordings by the persons other than the Board. In 1989, a Texas state court ordered Delta Airlines to release a CVR tape from an accident which had occurred a year earlier. The CVR tape was then broadcast by the media. The reported bill would prevent a repetition of this unfortunate occurrence. It would prohibit CVR tapes from being released to the public. However, the reported bill would not prevent tapes from being obtained by litigants and used in a court proceeding if the court found that use of the actual tapes was necessary for a fair trial.

The bill also adjusts the date for the Board to release the transcriptions of relevant portions of a CVR recording. Under current law, the CVR transcription must be released 60 days after an accident. NTSB points out that this requirement ordinarily leads to the CVR tape being released in advance of other factual reports which take longer to prepare. This causes the public and the media to

place too much emphasis on the CVR report because the report cannot be placed in proper perspective by reference to other factual reports.

The reported bill provides that CVR transcriptions will be released at the same time as other factual reports. This change will not limit the ultimate availability of the information to the public but will adjust the timing of the release of the information, so that the information can be meaningfully evaluated.

In sum, the legislation now before us will enable the National Transportation Safety Board to rebuild its staff to a level necessary to continue its excellent work. The bill also makes several adjustments to existing law to enable the Board to function more effectively.

#### SECTION-BY-SECTION SUMMARY

*Section 1. Short Title.*—Provides that the Act may be cited as the "Independent Safety Board Act of 1974 Amendments Act of 1990."

*Section 2. Authorization of Appropriations.*—Authorizes appropriations for NTSB of \$31 million for fiscal year 1991, \$38.6 million for fiscal year 1992, and \$38.8 million for fiscal year 1993.

*Section 3. Laboratory Records of Toxicological Tests.*—(a) Authorizes NTSB to obtain from the Department of Transportation laboratory records of toxicological tests conducted on persons reasonably associated with the circumstances of an accident or incident within the investigative jurisdiction of NTSB, when the testing is undertaken pursuant to post-accident or reasonable suspicion toxicological testing requirement of DOT.

(b) NTSB is required to keep these test results confidential to the extent they reveal lawful medical use of a drug, or other medical information, unless use of the information is necessary to develop the evidentiary record in an investigation in which the fitness of the person tested is specifically at issue.

*Section 4. Inspection Authority.*—Clarifies that the Board has authority to conduct examination or testing of vessels when required for purposes of a Board investigation.

The Committee would like to clarify that this technical amendment which adds the word "vessel" to Section 304(b)(2) of the Independent Safety Board Act of 1974 simply clarifies the Board's powers with respect to currently authorized investigations. The amendment does not expand or otherwise modify the authority of the Board with regard to major marine casualties. Specifically, the amendment does not give the Board the authority to investigate occurrences in international waters involving foreign registered vessels or the authority to investigate an extraterritorial marine casualty involving a foreign registered vessel once that vessel or its crew enters U.S. waters. In this regard, the Committee agrees with the explanation of the provision in the following letter from the Board:

NATIONAL TRANSPORTATION SAFETY BOARD,  
Washington, DC, June 27, 1990.

Hon. GLENN M. ANDERSON,  
Chairman, Committee on Public Works and Transportation,  
House of Representatives, Washington, DC.

DEAR CHAIRMAN ANDERSON: This letter is in reference to H.R. 5132, to amend the Independent Safety Board Act of 1974 to authorize appropriations for fiscal years 1991, 1992 and 1993, and for other purposes.

As you know, the Board has offered a technical amendment to section 304(b)(2) of the Independent Safety Board Act of 1974, 49 U.S.C. Sec. 1903(b)(2). It would add the word "vessel" to the list of surface transportation equipment that the Board can examine and test during the course of an authorized accident investigation. Although the Board believes that it has the inherent power to examine and test surface transportation conveyances involved in accidents it investigates, the absence of the word "vessel" from the itemized equipment the Board can test could provide a vessel owner with a basis for trying to frustrate an investigation authorized by the Congress. The technical amendment we seek would merely avoid uncertainty and eliminate potential ambiguity in the scope of the Board's crucial power to test and examine physical evidence.

This technical amendment is independent of the substantive authority the Board is seeking to investigate occurrences in international waters involving foreign registered vessels that embark and disembark United States citizens at U.S. ports. The technical amendment is not intended to and would not confer jurisdiction over accidents the Board currently has no power to investigate. Specifically, it is not intended and would not expand the Board's authority to investigate accidents of foreign flag vessels in international waters. The Board's testing authority is an adjunct to its investigative jurisdiction, and the technical amendment for "vessel" would clarify the Board's testing powers over marine accidents it is currently empowered to investigate.

Your consideration and approval of this amendment will be appreciated.

Sincerely,

JAMES L. KOLSTAD,  
Chairman.

*Section 5. Public Disclosure of Cockpit Voice Recorder Recordings and Transcriptions.*—(a) Modifies existing law on NTSB public disclosure of the transcriptions of relevant portions of the cockpit voice recorder recordings of communications between flight crews and air traffic controllers. Under existing law the transcriptions are made available at the time of NTSB's hearing on the accident, or 60 days after the accident, whichever occurs first. Under the reported bill, the 60 day requirement is eliminated, and the transcriptions are to be made available at the time of the hearing, in an investigation in which there is a hearing. If there is no hearing, the transcriptions must be made available at the time a majority of the other factual reports on the accident are placed in public docket.

(b) Prohibits discovery in judicial proceedings of CVR recordings, or those portions of transcriptions of CVR recordings not made public by NTSB, unless the court finds that discovery of these materials is necessary to give a party a fair trial. If discovery is permitted, the court shall issue a protective order to limit use of the recordings or transcriptions to the judicial proceeding. If the material is placed in evidence, it shall be placed under seal to preclude its use for purposes other than the judicial proceeding.

(c) The reported bill is not intended to restrict the parties to an NTSB accident investigation from receiving access to the CVR transcript prior to public disclosure, for purposes of such investigation.

#### COMMITTEE ACTION AND VOTE

With respect to clause 2(1)(2) (a) and (b) of the Rules of the House of Representatives, the Committee, with a majority present favorably reported H.R. 5182, as amended by a voice vote on June 28, 1990.

#### OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that no separate hearings were held on the subject matter of the legislation by the Subcommittee on Investigations and Oversight.

With respect to clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has not received a report from the Committee on Government Operations pertaining to the subject matter of the legislation.

#### CONGRESSIONAL BUDGET ACT REQUIREMENTS

With respect to clause 2(1)(3)(B) of rule XI of the Rules of the House of Representatives, and in compliance with section 308(a) of the Congressional Budget Act of 1974, the Committee reports that H.R. 5182 does not provide any new budget authority or new or increased tax expenditures.

With respect to clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives the Committee has received the following report from the Congressional Budget Office under Section 403 of the Congressional Budget Act of 1974.

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
Washington, DC, July 17, 1990.

HON. GLENN M. ANDERSON,  
Chairman, Committee on Public Works and Transportation,  
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for H.R. 5182, the Independent Safety Board Act of 1974 Amendments Act of 1990.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER,  
Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 5182.
2. Bill title: Independent Safety Board Act of 1974 Amendments Act of 1990.
3. Bill status: As ordered reported by the House Committee on Public Works and Transportation, June 28, 1990.
4. Bill purpose: H.R. 5182 would authorize appropriations for the activities of the National Transportation Safety Board (NTSB) for fiscal years 1990 through 1998. The bill would authorize \$31.0 million for 1991, \$38.6 million for 1992, and \$38.8 million for 1993. The NTSB received an appropriation of \$27.2 million for fiscal year 1990.

H.R. 5182 also would:

Authorize the NTSB, in certain instances, to obtain from the Department of Transportation laboratory records of toxicological tests of persons associated with accidents or incidents investigated by the Board;

Modify existing law concerning disclosure of the transcripts of cockpit voice recorder recordings; and

Limit discovery in judicial proceedings of these recordings and of portions of transcripts not already made public by the NTSB.

5. Estimated cost to the Federal Government:

(By fiscal year, in millions of dollars)

	1991	1992	1993	1994	1995
Authorization level	31	39	39		
Estimated outlays	28	34	39	4	

The costs of this bill fall within budget function 400.

*Basis of Estimate*

CBO assumed that the full amounts authorized for fiscal years 1991 through 1993 would be appropriated. While H.R. 5182 would authorize \$1.4 million above the amount appropriated for the current fiscal year, we assumed that enactment would be too late for any additional appropriations to be forthcoming for this fiscal year. The outlay estimate is based on historical spending rates for similar programs.

6. Estimated cost to State and local governments: None.
7. Estimate comparison: None.
8. Previous CBO estimate: None.
9. Estimate prepared by: Marjorie Miller.
10. Estimate approved by: C.G. Nuckols for James L. Blum, Assistant Director for Budget Analysis.

### INFLATIONARY IMPACT ANALYSIS

With respect to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the Committee reports that there should be no inflationary impact on prices and costs in the operation of the national economy by enactment of H.R. 5132.

### COST ESTIMATE OF LEGISLATION

With respect to clause 7(A)(1) of rule XIII of the Rules of the House of Representatives, the Committee agrees with the analysis of the Congressional Budget Office on the costs of H.R. 5132.

With respect to clause 7(A)(2) of the rule XIII of the Rules of the House of Representatives, the Committee reports that no cost estimate of H.R. 5132 was submitted to the Committee by a government agency.

### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 8 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

### INDEPENDENT SAFETY BOARD ACT OF 1974

### TITLE III—INDEPENDENT SAFETY BOARD

#### GENERAL PROVISIONS

SEC. 804. (a) . . .

(b) POWERS OF BOARD.—(1) . . .

(2) Any employee of the Board, upon presenting appropriate credentials and a written notice of inspection authority, is authorized to enter any property wherein a transportation accident has occurred or wreckage from any such accident is located and do all things therein necessary for a proper investigation, including examination or testing of any vehicle, vessel, rolling stock, track, or pipeline component or any part of any such item when such examination or testing is determined to be required for purposes of such investigation. Any examination or testing shall be conducted in such manner so as not to interfere with or obstruct unnecessarily the transportation services provided by the owner or operator of such vehicle, vessel, rolling stock, track, or pipeline component, and shall be conducted in such a manner so as to preserve, to the maximum extent feasible, any evidence relating to the transportation accidents, consistent with the needs of the investigation and with the cooperation of such owner or operator. The employee may inspect, at reasonable times, records, files, papers, processes, controls, and facilities relevant to the investigation of such accident. Each inspection, examination, or test shall be commenced and completed

with reasonable promptness and the result of such inspection, examination, or test made available.

**(11) ACCESS TO LABORATORY RECORDS OF TOXICOLOGICAL TESTS.**—Notwithstanding section 503(e) of the Supplemental Appropriations Act, 1987 (5 U.S.C. 7301 note), the Board is authorized to obtain from the Secretary of Transportation by written request, and shall be furnished, any laboratory record of a toxicological test—

(A) which is conducted on a person who is reasonably associated with the circumstances of an accident or incident within the investigative jurisdiction of the Board; and

(B) which is conducted pursuant to post-accident or reasonable suspicion toxicological testing requirements of the Department of Transportation, including its agencies.

[(11)] (12) Establish such rules and regulations as may be necessary to the exercise of its functions.

(c) **USE OF REPORTS AS EVIDENCE.**—No part of any report of the Board, relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

(d) **JUDICIAL REVIEW.**—Any order, affirmative or negative, issued by the Board under this title shall be subject to review by the appropriate court of appeals of the United States or the United States Court of Appeals for the District of Columbia, upon petition filed within 60 days after the entry of such order, by any person disclosing a substantial interest in such order. Such review shall be conducted in accordance with the provisions of chapter 7 of title 5, United States Code.

**(e) CONFIDENTIAL TREATMENT OF LABORATORY RECORDS.**—

(1) **IN GENERAL.**—Except as provided in paragraph (2), the Board shall maintain in confidence and exempt from public disclosure in accordance with section 552(b)(3) of title 5, United States Code—

(A) any laboratory record of a toxicological test conducted on a person which reveals medical use of a drug which is permitted under applicable regulations; and

(B) any medical information provided by such person in connection with such test or in connection with a review of such test.

(2) **USE OF LABORATORY RECORDS IN DEVELOPMENT OF EVIDENTIARY RECORD.**—If the fitness of a person is specifically at issue in an investigation of an accident or incident by the board and if use of a laboratory record of a toxicological test conducted on such person is necessary in developing an evidentiary record in such investigation, the Board may use such laboratory record for development of such evidentiary record.

## PUBLIC ACCESS TO INFORMATION

SEC. 306. (a) . . .

**[(c) COCKPIT VOICE RECORDER.**—Notwithstanding any other provision of law, the Board shall withhold from public disclosure cockpit voice recorder recordings and transcriptions, in whole or in part, of oral communications by and between flight crew members and ground stations, that are associated with accidents or incidents investigated by the Board: *Provided*, That portions of a transcription of such oral communications which the Board deems relevant and pertinent to the accident or incident shall be made available to the public by the Board at the time of the Board's public hearing, and in no event later than 60 days following the accident or incidents; *And provided further*, That nothing in this section shall restrict the Board at any time from referring to cockpit voice recorder information in making safety recommendations.]

**(c) PUBLIC DISCLOSURE OF COCKPIT VOICE RECORDER RECORDINGS AND TRANSCRIPTIONS.—**

**(1) GENERAL RULE.**—Notwithstanding any other provision of law, the Board shall withhold from public disclosure cockpit voice recorder recordings and transcriptions, in whole or in part, of oral communications by and between flight crew members and ground stations, that are associated with accidents or incidents investigated by the Board.

**(2) EXCEPTION.**—Portions of a transcription of oral communications described in paragraph (1) which the Board deems relevant and pertinent to the accident or incident shall be made available to the public by the Board—

**(A)** if the Board conducts a public hearing with respect to such accident or incident, at the time of such hearing; and

**(B)** if the Board does not conduct such a public hearing, at the time when a majority of other factual reports regarding the accident or incident is placed in the public docket.

**(3) REFERENCES TO COCKPIT VOICES RECORDER INFORMATION IN SAFETY RECOMMENDATIONS.**—Nothing in this section shall restrict the Board at any time from referring to cockpit voice recorder information in making safety recommendations.

**(d) USE OF COCKPIT VOICE RECORDER RECORDINGS AND TRANSCRIPTIONS IN JUDICIAL PROCEEDINGS.—**

**(1) GENERAL RULE.**—Except as provided in this subsection, in a judicial proceeding, there shall not be discovery by a party—

**(A)** of portions of cockpit voice recorder transcriptions other than such portions made available to the public by the Board under subsection (c)(2); and

**(B)** of cockpit voice recorder recordings.

**(2) EXCEPTION RELATING TO DISCOVERY OF TRANSCRIPTIONS.—**

**(a) IN GENERAL.**—Subject to subparagraph (B) an paragraph (4), a court may permit discovery of cockpit voice recorder transcriptions by a party if the court, after an in camera review of such transcriptions, finds that—

**(i)** the portions of the transcriptions made available to the public under subsection (c) do not provide the

party with sufficient information for the party to receive a fair trial; and

(ii) discovery of additional portions of transcriptions is necessary to provide the party with sufficient information for the party to receive a fair trial.

**(B) NTSB TRANSCRIPTIONS.**—No cockpit voice recorder transcriptions prepared by or under the direction of the Board, other than portions made available by the Board under subsection (c), shall be required to be produced for an in camera review or subject to discovery unless the cockpit voice recorder recordings are not discoverable.

**(3) EXCEPTION RELATING TO DISCOVERY OF RECORDINGS.**—Subject to paragraph (4), a court may permit discovery of cockpit voice recorder recordings by a party if the court, after an in camera review of such recordings, finds that—

(A) the portions of transcriptions made available to the public under subsection (c) and to the party through discovery under paragraph (2) do not provide the party with sufficient information for the party to receive a fair trial; and

(B) discovery of cockpit voice recorder recordings is necessary to provide the party with sufficient information for the party to receive a fair trial.

**(4) PROTECTIVE ORDERS.**—If, under paragraph (2) or (3), there is discovery in a judicial proceeding of a cockpit voice recorder recording or any portion of a cockpit voice recorder transcription not made available to the public under subsection (c)(2), the court shall issue a protective order to limit the use of such recording or portion to the judicial proceeding and to prohibit dissemination of such recording or portion to any person who does not need access to such recording or portion for such proceeding.

**(5) LIMITATION ON ADMISSION OF RECORDINGS AND TRANSCRIPTIONS INTO EVIDENCE.**—A court may permit admission of a cockpit voice recorder recording or any portion of a cockpit voice recorder transcription not made available to the public under subsection (c)(2) into evidence in a judicial proceeding, only if the court places such recording or portion under seal to preclude the use of such recording or portion for purposes other than for such proceeding.

\* \* \* \* \*

#### [AUTHORIZATION OF APPROPRIATIONS

[SEC. 309. (a). There are authorized to be appropriated for the purposes of this Act not to exceed \$12,000,000 for the fiscal year ending June 30, 1975; and \$12,000,000 for the fiscal year ending June 30, 1976, such sums to remain available until expended. There are authorized to be appropriated for the purpose of this Act not to exceed \$3,800,000 for the transition quarter ending September 30, 1976, \$15,200,000 for the fiscal year ending September 30, 1977, and \$16,400,000 for the fiscal year ending September 30, 1978, such sums to remain available until expended. There are authorized to be appropriated for the purposes of this Act not to exceed \$16,420,000 for the fiscal year ending September 30, 1979, and

\$17,650,000 for the fiscal year ending September 30, 1980, such sums to remain available until expended. There are authorized to be appropriated for the purposes of this Act not to exceed \$18,540,000 for the fiscal year ending September 30, 1981, \$19,925,000 for the fiscal year ending September 30, 1982, and \$22,100,000 for the fiscal year ending September 30, 1983, such sums to remain available until expended. There are authorized to be appropriated for the purposes of this Act not to exceed \$22,600,000 for the fiscal year ending September 30, 1984, \$24,500,000 for the fiscal year ending September 30, 1985, and \$26,100,000 for the fiscal year ending September 30, 1986, such sums to remain available until expended. There are authorized to be appropriated for the purposes of this Act not to exceed \$25,400,000 for the fiscal year ending September 30, 1988; \$27,000,000 for the fiscal year ending September 30, 1989; and \$28,600,000 for fiscal year ending September 30, 1990. Such sums shall remain available until expended.]

**SEC. 309. AUTHORIZATION OF APPROPRIATIONS.**

(a) *IN GENERAL.*—There is authorized to be appropriated for the purposes of this Act not to exceed \$28,600,000 for fiscal year 1990, \$31,000,000 for fiscal year 1991, \$38,600,000 for fiscal year 1992, and \$38,800,000 for fiscal year 1993. Such sums shall remain available until expended.

(b) *EMERGENCY FUND.*—An emergency fund of \$1,000,000 is authorized for expenditure by the Board to be available for necessary expenses, not otherwise provided for, of the Board for accident investigations. There is authorized to be appropriated such sums as may be necessary to establish the emergency fund under the preceding sentence and to replenish the fund annually. Such sums are authorized to remain available until expended.

## INDEPENDENT SAFETY BOARD ACT AMENDMENTS OF 1990

*P.L. 101-641, see page 104 Stat. 4654*

### DATES OF CONSIDERATION AND PASSAGE

*Senate: October 27, 1990*

*House: October 27, 1990*

Senate Report (Commerce, Science, and Transportation  
Committee) No. 101-450, Aug. 30, 1990  
[To accompany S. 3012]

House Report (Public Works and Transportation Committee)  
No. 101-661(I), Aug. 3, 1990  
[To accompany H.R. 5132]

House Report (Energy and Commerce Committee)  
No. 101-661(II), Oct. 4, 1990  
[To accompany H.R. 5132]

Cong. Record Vol. 136 (1990)

*The Senate bill was passed in lieu of the House bill. The  
Senate Report (this page) is set out below, and the President's  
Signing Statement (page 6381-1) follows.*

### SENATE REPORT NO. 101-450

[page 1]

The Committee on Commerce, Science, and Transportation, having considered an original bill (S. 3012) to amend the Independent Safety Board Act of 1974 to authorize appropriations for fiscal years 1991, 1992, and 1993, and for other purposes, recommends that the bill do pass.

#### PURPOSE OF THE BILL

The legislation, as reported, would amend certain provisions in the Independent Safety Board Act of 1974 (Safety Board Act) and authorize \$32 million, \$38.6 million, and \$38.8 million for the activities of the National Transportation Safety Board (NTSB) for fiscal year (FY) 1991, 1992, and 1993, respectively.

#### BACKGROUND AND NEEDS

Public Law 100-372 authorized the NTSB for FY-1988, 1989, and 1990 in the amounts of \$25,400,000, \$27 million and \$28,600,000, respectively. The authorization expired on September 30, 1990.

The NTSB was created by the Department of Transportation Act of 1966, and made an independent agency by the Safety Board Act. The NTSB is primarily responsible for investigating and determining the causes of aviation, highway, rail, pipeline and marine accidents. In FY 1988, for example, the NTSB investigated 2,694 acci-

## SAFETY BOARD ACT AMENDMENTS

P.L. 101-641

[page 2]

dents, resulting in 365 recommendations to Federal, State and local agencies to improve transportation safety. In FY 1989, the NTSB investigated 2,580 accidents, resulting in 491 recommendations. The NTSB also sent out "go-teams" to investigate 51 major accidents in FY 1990.

The NTSB's mission, as the independent arm of the Federal government to investigate accidents and make recommendations to improve safety, is critical. The NTSB, for example, recently completed its investigation of the Exxon Valdez oil spill, an extremely time-consuming and expensive review of a major environmental disaster. The NTSB also has undertaken an examination of the use of drugs and alcohol by transportation employees and recently released a study which covered a one-year period from October 1, 1987 through September 30, 1988 and was based on data from 8 states. That study on the use of these substances by truck drivers indicated that of 182 truck drivers that died, approximately 33 percent had alcohol or drugs in their systems.

All the NTSB's resources are devoted to improving safety. This bill, as reported, will allow the NTSB to have the workforce and resources necessary to continue its important safety mission.

### LEGISLATIVE HISTORY

On May 10, 1990, the Aviation Subcommittee held a hearing on the reauthorization of the NTSB. Mr. Kolstad, Chairman of the NTSB, explained the agency's three-year reauthorization request as well as the changes sought in the NTSB's statutory authority. Representatives from the Air Line Pilots Association (ALPA) testified on the need for legislation limiting the release of information from cockpit voice recorders (CVRs). On July 31, 1990, the Committee met in open executive session to consider the reauthorization of the NTSB and, without objection, ordered favorably reported an original bill.

### SUMMARY OF MAJOR PROVISIONS

The reauthorization bill covers three fiscal years, and also clarifies the scope of NTSB's authority in certain areas. The major provisions include:

1. an authorization for \$32 million in FY 1991, \$38,600,000 in FY 1992, and \$38,800,000 in FY 1993;
2. a specific limitation on the circumstances under which CVR information can be used in a court of law and a time-frame under which the NTSB would make available such information during its investigation into an accident;
3. a provision clarifying NTSB's authority to conduct investigations; and
4. the addition of the word "vessel" to the list of equipment the NTSB is authorized to examine.

### ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget

LEGISLATIVE HISTORY  
SENATE REPORT NO. 101-450

[page 3]

Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office.

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
Washington, DC August 2, 1990.

HON. ERNEST F. HOLLINGS,  
Chairman, Committee on Commerce, Science, and Transportation,  
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for the Independent Safety Board Act Amendments of 1990.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER,  
Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: Not yet assigned.
2. Bill title: Independent Safety Board Act Amendments of 1990.
3. Bill status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation, July 31, 1990.
4. Bill purpose: This bill would authorized appropriations for the activities of the National Transportation Safety Board (NTSB) for fiscal year 1991 through 1993. The bill would authorize \$32.0 million for 1991, \$38.6 million for 1992, and \$38.8 million for 1993. The NTSB received an appropriation of \$27.2 million for fiscal year 1990.

The bill also would:

Clarify the authority of the NTSB to conduct tests of vehicles, vessels, rolling stock, track or pipeline components as part of an accident investigation;

Modify existing law concerning disclosure of the transcripts of cockpit voice recorder recordings; and

Limit discovery in judicial proceedings of these recordings and of portions of transcripts not already made public by the NTSB.

5. Estimated cost to the Federal Government:

(By fiscal year, in millions of dollars)

	1991	1992	1993	1994	1995
Authorization Level .....	32	39	39		
Estimated Outlays .....	29	38	39	4	

The costs of this bill fall within budget function 400.

*Basis of Estimate:* CBO assumed that the full amounts authorized would be appropriated. The outlay estimate is based on historical spending rates for similar programs.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: CBO previously prepared a cost estimate for H.R. 5132, the Independent Safety Board Act of 1974 Amend-

## SAFETY BOARD ACT AMENDMENTS

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ments Act of 1990, as ordered reported by the House Committee on Public Works and Transportation. That estimate was transmitted on July 17, 1990. These bills are very similar, but the House bill would authorize \$31 million for fiscal year 1991, while the Senate bill would authorize \$32 million. Other than this difference, the estimated costs of the two bills are identical.

8. Previous CBO estimate: None.

9. Estimate prepared by: Marjorie Miller.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

### REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

The bill would not subject any business or individual to additional regulation and, therefore, would not have any impact on such individuals or businesses. The NTSB does not have regulatory authority, but rather authority to investigate the causes of accidents and the corresponding authority to recommend actions to improve safety. Section 2 of the bill authorizes appropriations of \$32 million, \$38,600,000 and \$38,800,000 in FYs 1991, 1992, and 1993, respectively. These sums are modest, and any impact on the economy will be minimal. Safety investigations and any resulting recommendations ultimately save lives and limit damage to property, and thus the funds authorized should have a positive impact on the economy. The bill, as reported, also would not have any adverse impact on the personal privacy of individuals and in fact should protect the privacy interests of airline pilots through a specific limitation on the circumstances under which CVR information would be made available. No additional paperwork is expected to result from the bill.

### SECTION-BY-SECTION ANALYSIS

#### SECTION 1.—SHORT TITLE

This section cites the short title as the "Independent Safety Board Act Amendments of 1990."

#### SECTION 2.—AUTHORIZATION OF APPROPRIATIONS

The reauthorization levels are as follows: FY 1991, \$32 million; FY 1992, \$38,600,000; and FY 1993, \$38,800,000.

The FY 1991 authorization would permit the NTSB to increase full-time equivalencies (FTEs), which would raise the staffing level of the NTSB to 356 FTEs (from 326). The increases in FY 1992 and FY 1993 primarily represent an increase in FTEs (to 381), as well as provide for one-time funding of new laboratory and computer equipment and relocation of regional offices to the suburbs of Los Angeles, CA, New York City, NY, and Fort Worth, TX.

#### SECTION 3.—EXAMINATION AND TESTING

The section clarifies the NTSB's ability to investigate occurrences onboard vessels by amending section 304(b)(2) of the Safety

LEGISLATIVE HISTORY  
SENATE REPORT NO. 101-450

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Board Act. The existing section includes the terms "vehicle, rolling stock, track, or pipeline component," and, while NTSB has defined the term "vehicle" broadly, addition of the word "vessel" to section 304(b)(2) will clarify the NTSB's responsibilities.

The change, however, does not in any way expand the scope of the NTSB's authority to investigate maritime accidents. In a letter dated June 27, 1990, to the Chairman of the House Committee on Public Works and Transportation, the Chairman of the NTSB explained the intent of this change and stated: "[t]he technical amendment is not intended to and would not confer any jurisdiction over accidents the Board currently has no power to investigate. Specifically, it is not intended and would not expand the Board's authority to investigate accidents of foreign flag vessels in international waters."

In addition, this section amends section 304(b) to specify that, in conducting accident investigatory testing, the NTSB retains discretion as to how such tests shall be conducted. The NTSB has had some difficulty with courts intervening in the investigatory process with respect to testing because of pending tort suits.

In the recent past, tort litigants increasingly have initiated law suits against the NTSB to gain access to and/or establish control over ongoing aircraft accident investigations being conducted by the NTSB. Courts typically have recognized and appreciated the important public purpose served by the NTSB's ability to conduct prompt investigations without the burdens and interference that would stem from injecting the civil litigation interests into the NTSB's accident investigation process. *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386 (9th Cir. 1986), cert. denied, 108 S.Ct. 67 (1987); *Miller v. Rich*, 723 F.Supp. 505 (C.D. Cal. 1989). These cases, however, have resulted in needless delays in these investigations and have required the expenditure of considerable resources by the NTSB and Department of Justice. The time devoted by NTSB investigations in defending their decisions diverts the energies that they should be directing to investigating the accidents.

Of even greater concern is a recent development in one case which underscores the need for legislative refinement. In an unpublished order arising from the NTSB's investigation of the United Airlines accident at Sioux City, IA, on July 19, 1989, a court directed that there be no destructive tests on a piece of the rotor fan disk except at an independent laboratory, or in the alternative, that the Board be required to furnish the court with a protocol of any proposed testing along with a factual statement containing the bases for such tests. *Woulfe, et al. v. United States, et al.*, No. 89 C 7822 (N.E. Ill., November 20, 1989).

The Committee recognizes that both the NTSB and litigants have an interest in examining and testing wreckage, but the Committee strongly believes that the ability of the NTSB to conduct investigations independently, thoroughly, and in a timely manner for the benefit of the public, should not be compromised. The basis for vital corrective action may not be discovered in as timely a manner if the immediate needs of an NTSB accident investigation do not take precedence over the needs of ancillary civil litigation. The NTSB must be able to determine where, how, and when testing

## SAFETY BOARD ACT AMENDMENTS

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will be performed and who will be allowed to participate in the investigations.

The amendment to section 304(b) made by this section does not constitute any change in the NTSB's existing authority. For example, while the amendment confirms that the control of investigations is held by the NTSB, it is not meant to change the existing arrangements for marine investigations where consultation and cooperation with the Coast Guard occur. Rather, this provision will simply ensure that there will be no erosion in the NTSB's control over its investigations. It will enable the NTSB to exercise its appropriate discretion and authority.

### SECTION 4.—COCKPIT VOICE RECORDINGS AND TRANSCRIPTIONS

This section limits release of CVR information, specifies when it can be released, and permits discovery of the transcription and recording in certain limited circumstances.

Section 306 of the Safety Board Act provides that CVR recordings and transcripts are not to be released, except that portions of the transcriptions of oral communications by and between the flight crew members and ground stations are to be made available to the public at the time of the public hearing or no later than 60 days following an accident or incident under investigation.

This section amends section 306 to direct that the release of the CVR information occur at the public hearing or, if no public hearing is held, when the majority of the other factual information is placed in the public docket. This provision avoids imposing a date certain on the release of information and also ensures that when the information is released, it is done so in the context of the rest of the accident investigation.

This section also amends section 306 to restrict the ability of litigants to misuse the recording or transcription in a lawsuit by setting standards for discovery and requiring that, if discovery of non-public portions of a recording or transcript is obtained, a protective order is to be issued limiting the use of the information to that proceeding. It also prohibits dissemination of the recording or portion to anyone who does not need the information for the proceeding. This provision is intended to eliminate the use of such information except to ensure that litigants are able to receive a fair trial.

In two incidents outlined in testimony before the Committee (see the testimony of the ALPA at the May 10, 1990, Aviation Subcommittee hearing on the NTSB), the transcription in one case and the recording in another case were released to the public in an inappropriate manner. All parties to an accident investigation recognize both the rights to privacy of the individual crewmembers and the need to conduct a full and fair investigation. This section seeks to maintain a balance between those interests. The section is not intended, however, to restrict the parties to the investigation in any way from access to the CVR information, prior to public disclosure, for purposes of the investigation.

**STATEMENT OF  
CAPTAIN HENRY DUFFY  
PRESIDENT, AIR LINE PILOTS ASSOCIATION  
BEFORE THE  
AVIATION SUBCOMMITTEE  
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION  
UNITED STATES SENATE  
MAY 10, 1990  
COCKPIT VOICE RECORDER PROTECTIVE LEGISLATION**

Mr. Chairman and members of the Subcommittee, I am Henry Duffy, President of the Air Line Pilots Association (ALPA). ALPA represents 42,000 professional pilots who fly for 50 commercial airlines. ALPA appreciates the opportunity to appear before you today to discuss the need to amend current legislation to protect information on Cockpit Voice Recorders from misuse. Accompanying me today is Mr. James Johnson from ALPA's Legal Department and Mr. Harold Marthinsen, Director of ALPA's Accident Investigation Department.

Cockpit voice recorders were first required to be installed in air-carrier aircraft in 1965. The principal reason for the requirement was to glean information regarding the flight crew's communications in the cockpit immediately before a crash. CVRs were particularly important in obtaining first hand information in those cases where the crew did not survive. At the time, it was recognized by all of the interested parties that CVRs were an unprecedented intrusion into the workplace and an invasion of personal privacy. However, these concerns were outweighed by the need for information from the flight crew in order to determine the cause of the accident so future occurrences could be prevented. To guard against unwarranted invasion of privacy, the Federal Aviation Regulation requiring CVRs provided that CVRs be used only to assist in determining the cause of aircraft accidents. Further, the CVR was not permitted to be used in any punitive action against the flight crew.

With those assurances, the Air Line Pilots Association fully supported the CVR requirement. Indeed, since that time, the CVR has proven to be a valuable tool in determining accident causes, and ALPA has continued to support the use of the CVR in accident investigation. Moreover, ALPA has consistently promoted the enhancement of CVR equipment to allow for clear and unambiguous transcript of the recorded sounds and voices to assist accident investigation. To this end, our Board of Directors has endorsed the installation of "hot" microphones, microphones wired directly to each crew member's audio channels of the CVR. This arrangement would improve the quality of recording and help prevent misinterpretation of recorded sounds.

However, with the enactment of the Freedom of Information Act and the increased news media interest in aircraft accidents, the promised protections for CVR

information began to erode. Portions of the CVR transcripts began appearing in the news media, which resulted in premature speculation and misinformation as to the cause of the accident. The media stories often resulted in unwarranted and unfair accusations being made against the flight crew and others involved in the accident. You can imagine the anguish this causes the crewmembers and passengers, if they survive, not to mention their families.

As a result of this misuse of the CVR, Congress in 1982 enacted legislation to preclude premature public disclosure of the CVR information. This legislation prohibits the release of the CVR transcript until 60 days after the accident or at the time of the public hearing, and provides that only those portions of the CVR information relevant to the accident can be released.

The intent of this legislation was to enforce assurances made to pilots that the CVR would be used only for accident investigation. Unfortunately, recent events have revealed that this protective legislation, although well intended, has not fully achieved its goal in at least two respects. First, while premature release of the CVR information is prohibited by the statute, "leaks" have continued. There are two recent examples where someone ignored the statute. In the Northwest MD-82 accident at Detroit in August of 1987, excerpts from the CVR recording were published in the *New York Times*. This occurred prior to the first meeting of the Cockpit Voice Recorder Group, a group of interested parties tasked by the NTSB to formulate the eventual CVR transcript. In our view, this information must have been leaked to the *New York Times* by government employees since they were the only ones with access to the tape prior to the meeting of the CVR group.

Another example of misuse of the CVR transcript is the DAL 1141 accident which resulted in national press publication of personal conversations between the flight crewmembers. In the official NTSB Cockpit Voice Recorder transcript and in the final accident report, the specific text of the flight crew conversations was omitted because the CVR group determined that it was not pertinent to the accident. The penchant for sensationalism by the press resulted in the misleading focus by the news media on the non-pertinent conversation rather than the air safety factors associated with the accident.

The second area of concern is the release of the entire CVR tape, as opposed to a transcript. Recently, a Texas state court released the CVR tape of Delta 1141 to a local newspaper that resulted in the playing of the actual tape on national news programs. We are also aware that a commercial firm produces videos for litigants which incorporates the actual CVR with a simulation of the event. This firm uses such a simulation of the Delta 191 accident with the actual CVR recording as an advertisement for its firm at trade shows. The pilot community is outraged by this misuse of the CVR tapes by the news media for sensational news purposes and others for commercial gain. Pilots view these public disclosures of CVR information as a breach of the government's promise to them

that CVR information would be limited to accident investigation only. We are concerned that the recent misuse of the CVR for purposes other than accident investigation will inhibit crew communications in the cockpit to the detriment of both flight safety and accident investigation.

ALPA recognizes the right of the public to know relevant information concerning air crashes. However, public disclosure of the CVR should be made either at the NTSB's public hearing or when it issues its formal report, whichever occurs first. In the event there is no public hearing, release of the CVR transcript would occur when the majority of the other factual documents regarding the accident is placed in the public docket. This would preclude speculation in the news media regarding the accident based principally upon the CVR. The release of the CVR at the same time as other relevant information regarding the accident would allow the CVR to be considered in the proper perspective.

To stop the unauthorized leaks of the contents of the CVR, we proposed legislation to the House Aviation Subcommittee that would impose a criminal penalty for unauthorized disclosure of CVR information. However, since I testified on March 21, 1990, the Board has advised us that internal procedural changes have been made which it firmly believes will stop the premature disclosure of CVR information. If these procedural changes are effective, then corrective legislative action is not needed.

We are, therefore, withdrawing our proposal for criminal penalties for unauthorized release of CVR information. However, if these new procedures prove ineffective, we will again propose such legislation and would expect the Board to join us if it is unable to protect the CVR information.

We firmly believe that our other concerns can be alleviated by some minor amendments to the current legislation regarding the CVR. We have provided the staff with proposed language that would allow public release of the CVR at the time of the public hearing or when the Board approves the accident report, whichever occurs first. If a hearing is not held, the CVR transcript would be released when the majority of other factual information is made public, and would restrict the disclosure of the CVR tapes to the media by the courts. This language was carefully crafted to balance the competing interests of the flight crewmembers, the public and the litigants. Our proposed amendments would prevent misuse of the CVR information, yet protect the public's right to know relevant information about aircraft accidents as well as insure that private litigants could have access to CVR information that is necessary to pursue their claims in a court of law.

We would urge that the Committee adopt our proposed amendments and wish to thank the Committee for the opportunity to address this important issue.



# National Transportation Safety Board

Washington, D.C. 20594

May 16, 1990

Office of the Chairman

Honorable James L. Oberstar  
Chairman, Subcommittee on Aviation  
Committee on Public Works  
and Transportation  
House of Representatives  
Washington, D. C. 20515

Dear Mr. Chairman:

I am writing in response to your March 21 request, made during the National Transportation Safety Board's reauthorization hearing, for comments on an amendment to our reauthorization legislation relating to the disclosure of cockpit voice recorder (CVR) information. The amendment has been proposed by the Air Line Pilots Association (ALPA). After the hearing the Safety Board staff met with representatives of ALPA, and our discussions have led to some modification of ALPA's original proposal. These comments are based on the amendment as we understand that it is to be modified by ALPA.

I think an explanation of the Safety Board's handling and dissemination of CVR information will facilitate an understanding of the Board's position on this matter. When investigating an accident or incident involving aircraft equipped with CVRs, the Safety Board, upon recovery of the CVR, takes temporary custody of the recorder. It is then flown to our audio laboratory in Washington, D.C. A CVR group, headed by an NTSB expert, and including appropriate representatives of the parties to the investigation (such as the air carrier, ALPA, and Federal Aviation Administration) is usually convened within 1 or 2 days of the accident to decipher the intra cockpit and air to ground communications and to identify other sounds. Frequently the group will prepare a transcript of the entire 30-minute tape. In accordance with 49 U.S.C. 1905(c), which was enacted in 1982, the Board makes public only those portions of the CVR transcript that the Board deems pertinent and relevant to the investigation. Except for the transcript that is made public as an attachment to the CVR Group Factual Report, the Board is prohibited from releasing any other transcriptions or any part of the CVR tape. The original CVR tape is returned to the airline when the Board's work is completed. The tape is then made available by the airline in connection with litigation stemming from the accident or incident.

The timing of the release of the transcript is governed by Section 1905(c), which provides that the pertinent transcriptions must be released at the time of the Board's public hearing and in no event later than 60 days after the accident or incident. Since hearings usually have been held more than two months after the accident, the transcripts have been released 60 days after the accident. At the time the transcript is made public, the Board

Honorable James L. Oberstar  
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strives to release other information and records compiled during the investigation. However, the CVR group report is the only accident investigation record that has a statutory deadline for public issuance. Many of the other factual reports are often not finished within 60 days of the accident. These other factual reports are generally made public at the hearing -- usually about 3-4 months after the accident. If there is no hearing, these factual reports are made public no later than the time the Board holds its technical review of the accident with the parties to the investigation, about 6-8 months after the accident.

The proposed amendment would extend the deadline for public release of the transcript from the current maximum of 60 days after the accident to no later than the time the Board approves its final report, generally about 1 year after the accident. If there is no hearing, the Board would be prohibited from releasing the transcript until the majority of other factual reports become public. We understand and support the intent of the proposed change in the law: to preclude speculation about an accident in the news media based principally upon the CVR transcript, and to allow the transcript to be placed in its proper perspective by associating its release with the public availability of other relevant accident information. The amendment seeks to accomplish its purpose by releasing the CVR transcript with sufficient other factual information to place information on the CVR transcript in proper context.

The proposed amendment also is aimed at preventing the courts from releasing CVR tapes for public broadcast. We support this goal. In the summer of 1989, a Texas state court ordered Delta Air Lines to release the CVR tape from an accident which occurred on August 31, 1988, at the Dallas-Fort Worth International Airport. The CVR tape was then broadcast by the media. The Safety Board publicly expressed its regret over the court's decision. In actions for damages arising from accidents, CVR tapes have been admitted into evidence and have been played in open court. However, to our knowledge the Texas decision represents the first case in which a court ordered the CVR tape released to the public.

The proposed amendment would prevent a repetition of the Texas broadcast. It would prohibit discovery of CVR information in litigation unless the court, after reviewing the tape and the transcript published by the Board, determined that the tape or "a transcription of additional portions of the tape" is needed for a fair trial. The tape could be discovered only if the court decided that "a transcript" is not adequate for a fair trial. Thus, the ALPA amendment creates a need-based limitation on the use of tapes or portions of a transcription beyond what has already been released by the Board in its accident investigation. We support this arrangement. However, the above-quoted provisions of the ALPA amendment could be read to require the Board to divulge transcriptions the Board has prepared but has not publicly released because they were not deemed pertinent and relevant. The Board does not believe that any portion of a transcript that the Board has created, but has not released to the public, should be subject to discovery.

Honorable James L. Oberstar  
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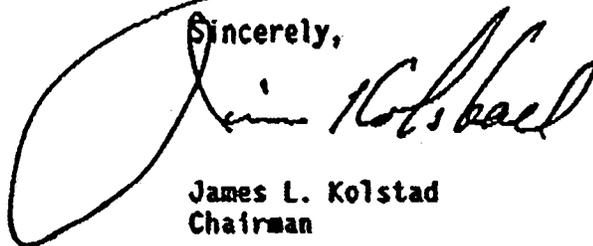
The Board's resources should not be forced to become entangled in civil litigation. If, after comparing the CVR tape with the Board's published transcript, a court determines that additional parts of the tape need to be transcribed, the litigants can hire their own experts to generate additional transcriptions. There is no justification for burdening Board employees with having to produce, authenticate, or to testify to the nonpublic transcriptions they have prepared. Consequently, we would suggest that the amendment be modified to include a provision specifically prohibiting the discovery or use of the unreleased portion of the Board's transcript.

Finally, the proposed amendment would create a mandatory, judicially imposed protective order that limits the use of the CVR tape to the pending litigation. If the tape or a transcript, other than that publicly released by the Board, is admitted into evidence, the tape and/or transcript would be placed under seal to preclude its use for purposes other than the trial. The sole purpose for installing CVRs was for the Board's use as a tool for accident investigation and prevention. Because of the unique nature of the CVR and the potential for misuse of sensitive CVR information, Section 1905(c) was enacted to recognize, by statute, the Board's policy of treating the tape as confidential and only making public a transcription of those portions of the tape deemed relevant by the Board. The need to inform the public of the contents of the CVR is fully satisfied by the transcript that the Board is required to release under Section 1905(c). We believe that Section 1905(c) represents a carefully constructed, reasonable balance between that CVR information which must be disclosed to the public and that CVR information which is withheld from the public. The proposed amendment's imposition of a protective order limiting the use of the tape, and placing the tape or transcript under seal in litigation stemming from the accident, should prevent the circumvention of the prohibitions against public disclosure of the tape and nonpertinent transcriptions embodied in Section 1905(c). We fully support this feature of the proposed amendment.

The Board is deeply concerned about the unauthorized disclosure of CVR information. Although unapproved releases have been few in number, in January 1989, the Board took action to further restrict access to the CVR tape and the transcript before it is made public. Since these new procedures were implemented, there have been no unauthorized disclosures of CVR information.

The above reflects the views of a majority of the Board Members. Thank you for inviting our comments on this proposed amendment.

Sincerely,



James L. Kolstad  
Chairman

Enclosure

cc: Honorable William F. Clinger, Jr.  
Honorable Wendell H. Ford  
Honorable John McCain

**NATIONAL TRANSPORTATION SAFETY BOARD  
AMENDMENTS ACT OF 2000**

*PUBLIC LAW 106-424, see page 114 Stat. 1883*

**DATES OF CONSIDERATION AND PASSAGE**

*House: October 17, 2000*

*Senate: October 3, 2000*

**Cong. Record Vol. 146 (2000)**

**Senate Report (Commerce, Science and Transportation Committee)  
No. 106-386, August 25, 2000  
[To accompany S. 2412]**

*The Senate Report is set out below.*

**SENATE REPORT 106-386**

[page 1]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2412) "A Bill to amend title 49, United States Code, to authorize appropriations for the National Transportation Safety Board for fiscal years 2000, 2001, 2002, and 2003, and for other purposes", having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

**PURPOSE OF THE BILL**

As reported, the bill would authorize appropriations for the Safety Board in the amounts of \$57,000,000 for fiscal year (FY) 2000, \$65,000,000 for FY 2001, \$72,000,000 for FY 2002, and \$79,000,000 for FY 2003. The bill also amends the National Transportation Safety Board Act in several ways. These statutory changes include:

- (1) Technical clarification of NTSB's authority to investigate accidents to the twelve-mile limit beyond the United States coast and its investigative authority over accidents that may have been the subject of intentional acts of destruction.
- (2) Permission to prescribe overtime pay rates for accident investigators.
- (3) Authority to negotiate technical service agreements with foreign safety agencies or foreign governments.
- (4) Authority to collect reasonable fees for the reproduction and distribution of Board products.

**NATIONAL TRANSPORTATION SAFETY BOARD**  
**PUBLIC LAW 106-424**

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(5) Authority to withhold voice and video recorder information from public disclosure.

(6) Creation of a chief financial officer (CFO), with oversight for waste, fraud, and abuse by the Inspector General of the Department of Transportation (DOTIG).

**BACKGROUND AND NEEDS**

The National Transportation Safety Board is an independent agency charged with determining the probable cause of transportation accidents and promoting transportation safety. The Board investigates accidents, conducts safety studies, evaluates the effectiveness of other government agencies' programs for preventing transportation accidents, and reviews appeals of adverse certificate and civil penalty actions by the Administrators of agencies of the Department of Transportation involving airman and seaman licenses. Since its inception in 1967, the NTSB has investigated more than 110,000 aviation accidents, at least 10,000 other accidents in the surface modes and issued more than 11,000 safety recommendations.

The Board has no authority to regulate the transportation industry. Therefore, its effectiveness depends on its reputation for timely and accurate determinations of accident causation and for issuing realistic and feasible safety recommendations:

More than 82 percent of the NTSB's recommendations have been implemented, with an even higher percentage of critical safety recommendations having been adopted. Over the years, these recommendations have included, for example: a ban on the transportation of oxygen generators as cargo on passenger carrying aircraft; the extension of large air carrier safety standards to commuter airline flights in aircraft having 10 or more passenger seats; procedures to permit vehicle owners to install air bag on/off switches until new, more technologically advanced air bags are available; improved school bus construction standards; rail passenger car safety improvements; new recreational boating safety and commercial fishing vessel regulations; and, the development of one-call notification systems in all 50 states to improve protections for buried pipelines.

**LEGISLATIVE HISTORY**

The NTSB's authorization expired at the end of FY 1999 (September 30, 1999) but its funding continues through the annual appropriations process. On April 27, 1999, the NTSB submitted a three-year reauthorization request to the Senate that proposed increased funding, additional staff, and statutory changes.

The Full Committee held a hearing on the NTSB's reauthorization request on July 15, 1999. During that hearing, NTSB Chairman Jim Hall brought the Committee up to date on accident investigations in all transportation modes (civil aviation, highway, railroad, pipeline, marine), its most wanted safety improvements list, and technological changes it has utilized in investigations, such as advances in computer-generated accident simulations. Chairman Hall also highlighted the Safety Board's reauthorization submission.

LEGISLATIVE HISTORY  
SENATE REPORT 106-386

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On April 12, 2000, Chairman McCain introduced S. 2412, a bill authorizing funding for FYs 2000 through 2003. In open executive session on June 15, 2000, the Committee approved without objection S. 2412.

SUMMARY OF MAJOR PROVISIONS

S. 2412 authorizes \$57,000,000 for FY 2000, \$65,000,000 for FY 2001, \$72,000,000 for FY 2002, and \$79,000,000 for FY 2003.

The Committee recognizes the Safety Board is currently experiencing a high level of major accident investigations, many of which are extremely technologically complex. The Committee is committed to providing a sufficient level of funding to ensure the Board has the necessary personnel and resources to complete these challenging investigations and carry out its statutory mission. Therefore, the Committee agreed to support the Safety Board's funding request and to extend the reauthorization through 2003. The Committee expects these additional resources to be targeted for major accident investigation activities and transportation safety improvement activities. To further assist the Board, the legislation also would raise the Board's emergency fund to the level commensurate to that which has been appropriated in recent years.

The Committee is aware that the NTSB has had to expend enormous resources investigating a number of foreign air carrier crashes, but the NTSB has been able to recoup costs for its services.

In addition to setting authorization levels for four years, the bill also adopts a number of statutory changes as requested by the Safety Board:

1. *Voice Recorders.*—The bill includes language requested by the Safety Board to require the withholding from public disclosure of voice and video recorder information for all modes of transportation comparable to the protections already statutorily provided for cockpit voice recorders (CVRs). The bill does not require or endorse that such equipment be updated, but instead provides protections if such updates are forthcoming. This provision would be an important safeguard in ensuring that railroad, maritime, and motor vehicle recorders are protected in a manner similar to CVRs.

2. *Overtime Pay Equity.*—The bill provides the Board with authority to establish reasonable rates of overtime pay for its employees directly involved in accident-related work both on-scene and investigative. This authority was requested in acknowledgment of the extensive time spent by NTSB staff in carrying out their duties and the Board's inability under current law to more fairly compensate these employees. The authority in the bill is similar to that already provided by Congress to the Federal Aviation Administration and the Coast Guard. Bill language is included to place an annual cap on the amount of overtime pay an NTSB employee can receive under the new authority.

3. *Financial Controls.*—The Safety Board's budget has substantially increased over the years. As such, this measure includes a number of provisions to strengthen financial accountability at the Board. Currently, the NTSB is one of the few agencies of the Federal government not required to have a Chief Financial Officer (CFO). While the Board on its own initiative has established a CFO position this bill would ensure such a position of fiscal accountability is permanent. The legislation also statutorily authorizes the

NATIONAL TRANSPORTATION SAFETY BOARD  
PUBLIC LAW 106-424

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Chairman to establish annual travel budgets to govern Board Member non-accident travel. After concerns were raised last year over Board Member travel, the Board Chairman established annual budgets and procedures governing non-accident related travel. These actions were an important step in addressing fiscal accountability at the Board and the Committee believes they should be continued in the future. Further, the bill would give the DOTIG the authority to review the financial management and business operations of the Board to determine compliance with applicable Federal laws, rules, and regulations.

4. *Definition Clarifications.*—The bill clarifies that the NTSB's existing jurisdiction over accidents on the navigable waters or territorial sea of the United States extends to the twelve-mile limit. Jurisdiction to the twelve-mile limit is based on international law, notably the 1982 United Nations Convention on the Law of the Sea. In 1998, twelve-mile jurisdiction authority was affirmed for the Coast Guard in its authorization. Since the NTSB and Guard function under a statutory requirement for joint rules, the use of consistent jurisdiction authority is important.

The bill also clarifies the NTSB's priority over accident scenes. With the exception of major marine investigations, investigations undertaken by the Safety Board are given priority over any investigation by another department, agency, or instrumentality of the United States Government (49 U.S.C. 1131(a)(2)). Recently several NTSB accident investigations have been impeded as other non-transportation related agencies have initiated their own separate investigations. In some investigations, court orders have been issued to prevent the NTSB from testing critical components. Safety Board investigators also have been unable to interview transportation operators as criminal and civil litigation has increased. These criminal investigations have impacted NTSB investigations into the ValuJet crash, the FineAir DC-8 cargo crash, and a grade crossing accident in Indiana.

The delays caused by these prosecution inquiries have restrained the Board's capability to make timely determinations of probable cause and issue safety recommendations. To ensure that NTSB will continue to be capable of exercising its responsibilities in a timely and judicious manner, the bill includes language reiterating NTSB's existing jurisdiction, whether the accident is accidental or intentional. The Committee fully expects the NTSB to maintain its longstanding policy of accommodating its investigatory needs to the unique needs of criminal investigations when criminal behavior is suspected or demonstrated.

The bill also contains language requiring the NTSB to renegotiate the Memorandums of Understanding (MOUs) governing investigation procedures that it currently has with the United States Coast Guard and the Federal Bureau of Investigations. These MOUs should be updated and refined as necessary to provide for a clear understanding of each agency's authority when an accident occurs.

5. *Technical Service Agreements and Collections.*—The bill would clarify the Board's existing authority to enter into agreements with foreign countries for training and technical assistance in safety regulation and aircraft certification. The Board has entered into these agreements for several years but the State Department has re-

LEGISLATIVE HISTORY  
SENATE REPORT 106-386

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cently indicated that the NTSB should no longer negotiate these agreements. The Safety Board participates as the official U.S. representative in foreign aircraft accidents and the subject agreements focus on accident/incident investigation and prevention. The bill language would permit the NTSB to continue to initiate and negotiate these training and technical service agreements, and to recover the costs for the training and technical services. The bill would also permit the Board to recover the costs associated with reproducing and distributing its accident reports and public dockets.

ESTIMATED COSTS

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*S. 2412—National Transportation Safety Board Amendments Act of 2000*

Summary: S. 2412 would authorize the appropriation of \$216 million for the National Transportation Safety Board (NTSB) over the 2001 2003 period and would revise various NTSB policies and procedures. The bill also would authorize the appropriation of amounts necessary to replenish the NTSB emergency fund due to future expenditures. Under the bill, certain fees collected by the NTSB would be classified as offsetting collections credited to appropriations. Finally, S. 2412 would authorize the Inspector General of the Department of Transportation to conduct audits of the NTSB's financial management and business operations and would require the NTSB to reimburse the department for such costs.

Assuming appropriation of the specified amounts, CBO estimates that implementing S. 2412 would result in discretionary spending of \$216 million over the 2001 2005 period. The bill would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply. S. 2412 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

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Estimated cost to the Federal Government: The estimated budgetary impact of S. 2412 is shown in the following table. The costs of this legislation fall within budget function 400 (transportation).

\*\*\*\*\*

Basis of estimate: For this estimate, CBO assumes that the amounts authorized by S. 2412 will be appropriated by the beginning of each fiscal year. Estimated outlays are based on historical spending by the beginning of each fiscal year. Estimated outlays are based on historical spending patterns. CBO estimates that provisions classifying certain proceeds from training services, and the sale of publications as offsetting collections would have no significant effect on discretionary spending.

**NATIONAL TRANSPORTATION SAFETY BOARD**  
**PUBLIC LAW 106-424**

Based on historical use of the NTSB emergency fund, CBO estimates that amounts required to replenish the emergency fund would be less than \$500,000 annually, subject to the availability of appropriated funds.

CBO estimates that the Inspector General of the Department of Transportation would spend less than \$500,000 a year to conduct financial audits of the NTSB and that such costs would be funded from the amounts authorized in the bill for the board.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: S. 2412 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Previous CBO estimate: On September 24, 1999, CBO transmitted a cost estimate for H.R. 2910, the National Transportation Safety Board Amendments Act of 1999, as ordered reported by the House Committee on Transportation and Infrastructure on September 23, 1999. H.R. 2910 and S. 2412 are similar, but the Senate bill would authorize funding levels for 2001 through 2003 while the House bill extends only through 2002.

Estimate prepared by: Federal Costs: James O'Keeffe. Impact on the State, Local, and Tribal Governments: Victoria Heid Hall. Impact on the Private Sector: Jean Wooster.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

**REGULATORY IMPACT STATEMENT**

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

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**NUMBER OF PERSONS COVERED**

The number of persons covered should be consistent with current levels.

**ECONOMIC IMPACT**

No negative impact on the taxpayer is expected from this bill. The bill authorizes appropriations similar to currently appropriated levels. The Safety Board is also authorized to collect reimbursements for certain costs associated with training courses it conducts. These reimbursements would be credited to the NTSB as off-setting collections.

**PRIVACY**

The bill as reported would have no adverse impact on the personal privacy of individuals.

**PAPERWORK**

**LEGISLATIVE HISTORY**  
**SENATE REPORT 106-386**

There should be no change in paperwork requirements.

**SECTION-BY-SECTION ANALYSIS**

*Section 1. Short title*

This section states the short title of the bill, the National Transportation Safety Board Amendments of 2000.

*Section 2. Definitions*

This section clarifies that the NTSB's existing authority to investigate accidents on the navigable waters or territorial seas of the United States extends to the twelve-mile limit. Jurisdiction to the twelve-mile limit is based on international law, notably the 1982 United Nations Convention on the Law of the Sea. In 1988, President Reagan extended the territorial sea of the United States to twelve miles from the coast. NTSB investigatory authority is expressed in terms of accidents on the navigable waters or territorial sea of the United States. The NTSB enabling law does not define territorial sea, and this change would codify the 12-mile limit. In 1998, nearly identical twelve-mile jurisdiction authority was affirmed for the Coast Guard in its authorization. This section also provides a technical change to the NTSB's authority, making it consistent with the Coast Guard's jurisdiction. The provision, however, does not affect the respective authorities of each of the two agencies to carry out investigations.

The section also clarifies the NTSB's priority over accident scenes. With the exception of major marine investigations, investigations undertaken by the Safety Board are given priority over any investigation by another department, agency, or instrumentality of the United States Government (49 U.S.C. 1131(a)(2)).

*Section 3. Authority to enter into agreements*

This section clarifies the Board's existing authority to enter into agreements with foreign countries for training and technical assistance in safety regulation and aircraft certification. The section authorizes the Board to charge reasonable fees for the provision of these services and for the expenses it incurs in the provision of the

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training and technical assistance. The section requires the Board to maintain an annual record of the collections received. The fees collected would be credited to the appropriation of the Board as offsetting collections under the provision.

*Section 4. Overtime pay*

The section gives the Board the authority to establish reasonable rates of overtime pay for its employees directly involved in accident-related work both on-scene and investigative. The section caps a Board employee's overtime at 15 percent of the employee's annual rate of base pay.

*Section 5. Recorders*

**NATIONAL TRANSPORTATION SAFETY BOARD**  
**PUBLIC LAW 106-424**

The section requires the withholding from public disclosure of voice and video recorder information for all modes of transportation comparable to the protections already statutorily provided for cockpit voice recorders (CVRs). While language in the section prohibits the public disclosure of the actual voice and video recorder information, it does allow the NTSB to refer to the information when making safety recommendations.

*Section 6. Priority of investigations*

The section creates procedures for NTSB to turn over its investigation to the FBI when it appears that the accident was caused by an intentional criminal act. The section also requires the NTSB and the FBI to revise their 1977 agreement on the investigation of accidents to take into account the amendments made by the bill.

*Section 7. Public aircraft investigation clarification*

The section grants the NTSB the same authority in public aircraft accident investigations that it currently has with respect to civil aviation accident investigations to enter property where a transportation accident has occurred or wreckage from the accident is located and to test components.

*Section 8. Memorandum of understanding with the Coast Guard*

The section requires the NTSB and the United States Coast Guard to revise their investigation Memorandum of Understanding governing major marine accidents, to redefine or clarify the standards used to determine when the NTSB will lead a marine accident investigation, and to develop new standards to determine when a major marine casualty accident involves safety issues related to the Coast Guard's safety functions.

*Section 9. Travel budgets*

The section authorizes the Chairman to establish annual travel budgets to govern Board Member non-accident travel. Last year, the NTSB Chairman announced the establishment of such budgets and this section ensures that travel budgets will continue to be annually prepared. Language in the section also requires the Chairman of the Board to submit to the Senate Committee on Commerce, Science, and Transportation and to the House of Representatives Committee on Transportation and Infrastructure an annual report accounting for foreign and domestic travel, including personnel or other expenses, associated with that travel.

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*Section 10. Chief Financial Officer*

The section statutorily establishes a position of CFO at the Board. The Board currently has a CFO, but the Board is one of the few Federal agencies that is not statutorily required to maintain this position. The section also requires the CFO to report directly to the Chairman of the Board on financial management matters and to provide guidance on the implementation of asset management systems including property and inventory control.

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

W.D. TENN. CLERK  
MAY 17 1995  
52 PM '95

UNITED STATES OF AMERICA,

Plaintiff, **CERTIFIED TRUE COPY**  
**ROBERT R. DI TROLIO**

VS.

**U.S. DISTRICT COURT**  
**WESTERN DISTRICT OF TENNESSEE**

No. 94-20112

AUBURN CALLOWAY,

Defendant. BY F. J. [Signature]  
DEPUTY CLERK

ORDER DENYING ACCESS TO AUDIOTAPE RECORDING

Before the court is the motion of WREG-TV (Channel 3), and Elcom of Memphis, Inc., d/b/a WMC Stations, for the right to inspect and copy an audiotape recording played in open court during the criminal trial in this matter. For the following reasons, the court denies the motion.

Auburn Calloway was tried in this court on charges of attempted air piracy and assaulting flight crew members. During his trial, several audiotapes were admitted into evidence and played in open court. These tapes included a cockpit recording of defendant's attack on three crew members with hammers and a speargun, and the crewmembers' attempts to subdue defendant.

While the trial was proceeding, members of the media applied to the court to copy the audiotapes. On March 23, 1995, the court granted the media access to all audiotapes, with the exception of the cockpit recording. The court released only a written transcript of this evidence, and indicated it would entertain a later motion for access to the cockpit tape itself after completion of the trial. On March 30, 1995, the jury

This document entered on docket sheet in compliance with Rule 55 and/or 32 (b) FRCP on 8/1/95

(17)

returned a guilty verdict against the defendant. On April 4, 1995, the media renewed its request for access to the cockpit recording. The government opposed this request. Defendant, who had earlier opposed the request, filed no brief in response to the renewed motion, but communicated to the court by phone message from his counsel that his position remained the same. After receiving additional briefs opposing release of the tape from the victim crewmembers and the Air Line Pilots Association (ALPA) and from Federal Express Corporation, the court deferred a further ruling on the release issue until after Mr. Calloway's sentencing.

The media assert that the common law right to inspect and copy judicial records mandates access to the cockpit recording in this case. The government, the victims and ALPA oppose the media's request, arguing that because the tape depicts the pain and suffering of the victims as they engaged in a violent struggle with the defendant, the privacy rights of the victims and the potential for media misuse outweigh the benefits to be gained by releasing the tape. In addition, the victims and ALPA argue that release of the tape is prohibited by statute, and Federal Express contends that the tape should not be released because it is private property.

The statute cited by the victims and ALPA is 49 U.S.C. § 1154. It provides in pertinent part:

**(a) Transcripts and Recordings**

(1) Except as provided by this subsection, a party in a judicial proceeding may not use discovery to obtain --

(A) any part of a cockpit voice recorder transcript that the National Transportation Safety Board has not made available to the public under

section 1114(c) of this title; and  
(B) a cockpit voice recorder recording.

(3) Except as provided in paragraph (4) (A) of this subsection, a court may allow discovery by a party of a cockpit voice recorder recording if, after an in camera review of the recording, the court decides that --

(A) the parts of the transcript made available to the public . . . and to the party through discovery . . . do not provide the party with sufficient information for the party to receive a fair trial; and

(B) discovery of the cockpit voice recorder recording is necessary to provide the party with sufficient information for the party to receive a fair trial.

(4) (A) When a court allows discovery in a judicial proceeding of a part of a cockpit voice recorder transcript not made available to the public under section 1114(c) of this title or a cockpit voice recorder recording, the court shall issue a protective order--

(i) to limit the use of the part of the transcript or the recording to the judicial proceeding; and  
(ii) to prohibit dissemination of the part of the transcript or the recording to any person that does not need access to the part of the transcript or the recording for the proceeding.

(B) A court may allow a part of a cockpit voice recorder transcript not made available to the public under section 1114(c) of this title or a cockpit voice recorder recording to be admitted into evidence in a judicial proceeding, only if the court places the part of the transcript or the recording under seal to prevent the use of the part of the transcript or the recording for purposes other than for the proceeding.

The victims and ALPA contend that this statute specifically prohibits release of the cockpit tape to the media. In support of their position, they rely primarily upon the statute's legislative history, which states that the statute would "prohibit [cockpit voice recording] tapes from being released to the public." H.R. Rep. No. 661, 101st Cong., 2d Sess., 4 (1990). In response, the media assert that § 1154 does not apply in the present case because the statute was designed to regulate discovery of cockpit recordings and transcripts of such

recordings only in the context of civil litigation.

There is support for both positions. The statute's legislative history indicates that Congress was troubled by media broadcasts of cockpit recordings. The House Report specifically refers to a Texas state court order directing Delta Airlines to release a cockpit recording of an accident, which was then broadcast by the media. The Report states that the legislation would "prevent a repetition of this unfortunate occurrence." H.R. Rep. No. 661 at 4. See also S. Rep. No. 450, 101st Cong., 2d Sess. 6 (1990) (noting that the legislation "prohibits dissemination of the recording or portion to anyone who does not need the information for the proceeding. This is intended to eliminate the use of such information except to ensure that litigants are to receive a fair trial."). The media correctly note, however, that the statute does not refer to release of a cockpit recording which had been played as evidence in a criminal proceeding. In addition, no request was made during trial to place the tape under seal, as the statute requires.

The court need not decide this issue, however, because even assuming that § 1154 does not prevent release of the tape, the court finds the media do not have a constitutional or common law right of access to the tape.<sup>1</sup>

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<sup>1</sup>An additional argument opposing release of the tape was made by Federal Express Corporation. Federal Express contends that the court should deny the media's request because the tape is the property of Federal Express. The court finds this argument to be without merit. Items introduced as evidence in judicial proceedings are commonly previously privately owned; this does not preclude the court from permitting public access to the items.

It is clear that where the media enjoy unrestricted access to all information in the public domain, including tape transcripts, the First Amendment does not guarantee access to the tapes themselves. This is because the media do not have "a right to information about a trial superior to that of the general public." Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978). Under the common law, however, there is a presumption in favor of public inspection and copying of any item entered into evidence in open court. United States v. Beckham, 789 F.2d 401, 409 (6th Cir. 1986). The district court retains discretion to deny access to evidence where the court finds that, based upon the relevant facts and circumstances, justice so requires. United States v. Rosenthal, 763 F.2d 1291, 1294 (11th Cir. 1985); In re Application of National Broadcasting Co., 653 F.2d 609, 613 (D.C. Cir. 1981).

After carefully considering the relevant factors in this case, the court concludes that release of the cockpit tape is not warranted. The tape has been played in open court, in the presence of members of the public and the media. The written transcript of the tape has been released and printed in newspapers. Release of the tape itself will therefore add little to the public's knowledge of what transpired during the flight or to the media's ability to report on the event. See Nixon, 435 U.S. at 599 n.11 (noting that degree of press' and public's access to tapes is one factor to be weighed in considering request to copy); United States v. Webbe, 791 F.2d 103, 106 (8th Cir. 1986) (denying application to copy tapes where media had

access to trial where tapes were played and received transcripts of tapes); Beckham, 789 F.2d at 415 ("[W]hen the right to make copies of tapes played in open court is essentially a request for a duplicate of information already made available to the public and the media, then the district court has far more discretion in balancing the factors.").

In addition, the court finds that the nature of the tape weighs against its release. Recorded on the tape are the actual sounds of the struggle between Mr. Calloway and his victims, including his victims' cries of fear and pain. Release of the tape itself will therefore infringe upon the privacy of the victims to a much greater degree than has the release of the written transcript of the tape. This factor, considered in light of the very slight incremental gain in public knowledge which would result from release of the tape, leads the court to conclude that release of the tape is not justified. See In re National Broadcasting, 653 F.2d at 619-20 (noting that "possible injury to innocent third persons" is proper factor for court to consider in deciding whether to permit access); United States v. Thomas, 745 F. Supp. 499, 502 (M.D. Tenn. 1990) (denying application to copy videotape in part because it would result in loss of privacy for individual depicted). The media's request to inspect and copy the cockpit recording is therefore denied.

IT IS SO ORDERED this 31<sup>st</sup> day of August, 1995.

*Julia Smith Gibbons*  
JULIA SMITH GIBBONS  
UNITED STATES DISTRICT JUDGE