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Introduction

In aviation accidents or incidents, crew members may be subjected to many venues of enquiry regarding the event. For instance, when an air carrier runs off the end of a runway, and passengers are injured exiting the plane, it is possible the captain may find herself appearing before (but not necessarily in this order) the following tribunals:

- 1) as a defendant in an FAA certificate action (to suspend her license),
- 2) as a defendant in a State criminal court to answer for alleged FUI (flying under the influence),
- 3) as a defendant in a federal criminal court to answer for alleged FUI (flying under the influence)
- 4) as a co-defendant in a State civil court in a personal injury lawsuit brought by the passengers,

- 5) as a grievant in a labor arbitration hearing (the company wants to fire her),
- 6) as a plaintiff in a workers' compensation administrative hearing (she was hurt pushing passengers out of her way to the exit.
- 7) as a witness with the NTSB, which has reporting requirements that may require incriminating statements.

What this means is that as a pilot you may face many different hearing, with different standards of proof (Beyond a reasonable doubt, clear and convincing, or by a preponderance of the evidence), and different burdens of proof (who has to produce evidence). You may also be subject to legal procedural rules regarding (1) issue preclusion, (2) collateral estoppel, (3) res judicata, and double jeopardy, all of which may predetermine the outcome in the next tribunal because of what was decided in the prior tribunal.

CRIMES

State

Aircraft offenses are contained primarily in both the California Public Utilities Code and Penal Code.

Reckless Operation . Pub.Util.C. § 21407 states a general prohibition against operation of an aircraft in the air, on the ground or on water, "in a careless or reckless manner so as to endanger the life or property of another," and makes federal statutes and regulations applicable in determining the issue. The punishment is a fine of not over \$1,000, a county jail sentence of not over 6 months, or both. (Pub.Util.C. § 21019; on suspension of license, see Pub.Util.C. §21408.)

Operating With Unlocked Door . Pub.Util.C. § 21416 requires locking of the door separating the pilot compartment from the passenger compartment on commercial transport planes, except for authorized admission or for emergency exit during takeoff and landing. The pilot is guilty of a misdemeanor if the door is not locked, and it is unlawful for a person in the passenger compartment (except a member of the crew) to have a key or other device for opening the door.

Operating Aircraft or Sport Parachuting While Under the Influence . Pub.Util.C. §21407.1(a) makes it illegal "to operate an aircraft in the air, or on the ground or water, or to engage in parachuting for sport," while under the influence of an alcoholic beverage, a drug, or the combined influence of both. And Pub.Util.C. 21407.1(b) prohibits operation of an aircraft by a person with .04 by weight, of alcohol in his blood. (See also Pub.Util.C. 21415 prohibiting being in or performing any act of maintenance or operation when under influence of intoxicating liquor; this section is inapplicable to passenger, who would be criminally liable under other laws.)

Violation of Pub.Util.C. 21407.1 is a felony_misdemeanor punishable as follows: (a) First conviction, county jail, 30 days to 6 months, fine of \$250 to \$1,000, or both (Pub.Util.C. 21407.6(a)); (b) second or any subsequent conviction, county jail, 5 days to 1 year, fine of \$250 to \$1,000, and no probation or suspended sentence (Pub.Util.C. 21407.6(a)); (c) if, while operating the aircraft, the defendant did a forbidden act or neglected a legal duty, proximately causing bodily injury to another, imprisonment in state prison, or in county jail for 90 days to 1 year, and fine of \$250 to \$10,000 (Pub.Util.C. 21407.6(b)). In any case, the court may order suspension of the defendant's license for not over 1 year. (Pub.Util.C. 21408.)

Operating Without Effective License . Pub.Util.C. 21409 makes it unlawful for any person to engage in aeronautics as an airman without an effective federal license, and Pub.Util.C. 21411 makes it unlawful to operate an unlicensed aircraft.

Unlawful Taking . Unauthorized taking or operating an aircraft, even for temporary purposes and without intent to steal, is a felony, punishable by imprisonment in state prison or a county jail sentence not exceeding 1 year, a fine not exceeding \$10,000, or both. (P.C. 499d.)

Tampering or Injuring . P.C. 625b(a), similar to the automobile statutes (Veh.C. 10852), applies to a person who: (a) "wilfully injures or tampers with any aircraft or the contents or parts thereof"; (b) "removes any part" without the owner's consent; (c) "with intent to commit any malicious mischief, injury or other crime," climbs into it or attempts to manipulate the controls or other mechanism; or (d) "sets in motion any aircraft while it is at rest and unattended." The punishment is a county jail sentence of not over 6 months, a fine not exceeding \$1,000, or both. P.C. 625b(b) creates a felony_misdemeanor and applies to a person who "wilfully and maliciously damages, injures, or destroys any aircraft, or the contents or any part thereof, in such a manner as to render the aircraft unsafe for those flight operations for which it is designed and equipped." The punishment is imprisonment in state prison, or a county jail sentence not exceeding 1 year, or a fine not exceeding \$10,000, or both.

Unlawful Operation on Public Thoroughfare . Pub.Util.C. 21403(b) makes it unlawful to land, take off, or taxi an aircraft on a "public freeway, highway, road, or street," except under the following circumstances: (a) A forced landing; (b) a landing during a "natural disaster or other public emergency," with the prior approval of the public agency having "primary jurisdiction" over traffic on the thoroughfare; (c) a landing, takeoff, or taxiing with prior approval of such public agency. The prosecution has the burden of proving that none of the exceptions apply. (Pub.Util.C. 21403(b).) The punishment is a county jail sentence not exceeding 6 months, a fine not exceeding \$1,000, or both. (Pub.Util.C. 21019.)

Balloon or Kite at Airport . It is a misdemeanor to release or fly a moored balloon, kite, unmanned rocket, or unmanned free balloon within 5 miles of an airport, if it might be ingested by an aircraft engine or obstruct a pilot's view, or could suspend an object capable of endangering aircraft or impairing a pilot's vision. (Pub.Util.C. 21646.)

Unlawful Methods of Hunting . It is unlawful to shoot from an airplane (Fish & Game C. 3002) or pursuing, driving or herding birds or mammals with any air vehicle; (3501) or driving or herding birds or mammals by airplane.

Miscel . In re Bushman (1970) 1 C3d 767, 776, 83 CR 375, involved a probation condition that the defendant, an attorney_pilot convicted of disturbing the peace for dumping two buckets of gravel on the desk of an airport board official to protest runway conditions, seek psychiatric treatment at his own expense. The court held that condition of probation was improper (and the conviction itself was reversed on other grounds). "[W]ithout any showing that mental instability contributed to that offense, psychiatric care cannot reasonably be related to future criminality." (1 C.3d 777.)

Federal

Acts that would be a crime if committed in a city or state, are also crimes if committed in an aircraft (no voids in jurisdiction). Violations of regulations can result in civil penalties for lesser offenses, or criminal prosecution for larger misdeeds. Section 902 of the F.A. Act proscribes such acts as air piracy, carrying weapons or explosives on aircraft, interference with flight crews, false or fraudulent applications, forgery, and giving false information (such as joking that you saw a guy with gun get on board). The US takes jurisdiction over any such crimes committed in flight, or attempted in relationship to a flight.

False Statements and DUI's

A few years ago, the NBC Nightly News had as one of its major stories a series of arrests made by federal marshals of pilots at their home who were alleged to have signed false medical applications. The following is an article from AOPA which discusses the ramification of failure

to report drug or alcohol convictions.

What Happens To A Pilot After A DWI (3/95)

By J. Mac McClellan and Tom Benenson

Does your behavior behind the wheel of a car have anything to do with your ability to fly safely? In our recent FLYING/Sporty's Pilot Opinion Survey we learned that 45 percent of all pilots think driving and pilot performance are definitely linked. About 40 percent of pilots believe there is a little correlation between driving and flying performance, and 14 percent think there is no link.

But, as usual, it doesn't matter what we pilots think. The FAA claims to have evidence__based upon its own obscure study__that drivers with one or more DWI convictions are much more likely to have an accident in an aircraft than are pilots with all those red ribbons tied on their cars. That is the FAA's excuse for the DWI pilot purge that has been going on since 1990 when the FAA expanded FAR Part 61, the chapter of the rules that set pilot license qualifications, to include denial of certification, or suspension of certificates, after drunk_driving or drug_related offenses. A DWI__more specifically, how it is reported to the FAA__can be disqualifying for both a medical certificate and a pilot certificate. Two DWI convictions will probably cause suspension of pilot or medical, or both certificates. Three convictions will probably finish your flying career forever. Since pilots must have both medical and pilot certificates to legally fly, the FAA has us surrounded.

Though the FAA's medical police think drinking and driving are linked to flying safety, the highway patrols of the 50 states don't particularly care what the aircops believe. Since the traffic cops of the country don't care if the driver they charge with DWI is a pilot or a ballet dancer, the FAA has put the onus on us, on pilots, to tell the feds if we've been caught. And we'd better tell them instantly, in at least two different forms, with no excuses, or the FAA will conclude that we are not the kind of people who should be sharing the airspace with the FAA medical staff.

To satisfy the FAA's thirst for drunk_driving news, you must report a conviction or action directly to the feds in Oklahoma City within 60 days. That's the FAR Part 61 rule, the rule that governs your pilot certificate. When you visit the AME for your next FAA medical exam, you must report the conviction or action again. And continue to report the conviction or action on every medical application for the rest of your flying career. That report satisfies the FAR Part 67 rule, the rule regulating your medical certificate.

Remember when the scarlet letter stood for adultery and not alcohol? Times have changed and one DWI will live on in your medical records longer than the birthmark you reported when you got your student pilot's license.

Any pilot who has renewed a medical in the last few years should be aware of the need to report any alcohol_ or drug_related action under FAR Part 67, the rules setting medical standards. Question 18v on the current medical certificate application form asks if you have a "history of (1) any conviction(s) involving driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug...."

Everyone seems to understand a "yes" is required in the box if they've had a conviction for driving while intoxicated (DWI) or driving under the influence (DUI), but the paragraph also requires a "yes" if the pilot has a "history of any conviction(s) or administrative action(s) involving an offense(s) which resulted in the denial, suspension, cancellation or revocation of driving privileges or which resulted in attendance at an educational or a rehabilitation program."

If you read the paragraph carefully, you'll see there's nothing that limits the administrative action to alcohol_ or drug_ related offenses. The FAA objects to anything that gets you in trouble with a traffic cop. Nor is the reporting requirement limited to a conviction or the loss of driving privileges. Even attending an educational or rehabilitation program related to your driving is enough to warrant a report. The FAA included the remedial programs because some traffic courts may allow a driver charged with DWI, or the lesser DUI charge, to avoid a conviction by attending the program. The remedial alternatives are typically offered to first_ time offenders, the kind the FAA wants to find and scrutinize. The FAA has tried to make the rule as comprehensive as possible.

Ironically, a pilot does not have to report a speeding conviction but would have to report attendance at a remedial course that expunged the conviction. Dr. Audie Davis, manager of the FAA's aeromedical certification division, said he's aware of some pilots who have opted to take the speeding conviction and accept the fine rather than attend a remedial course that they would then be required to report

Dr. Davis feels it's important for the FAA to know about attendance at rehabilitation programs since sometimes a judge will reduce a DUI to a reckless driving charge if the driver agrees to attend a safety course. "If someone has two DUIs in a three_ year period, or three in a lifetime, then we need to get a complete assessment to determine if there's a [medical] problem," Dr. Davis explained.

Pilots are reminded of the reporting requirement in FAR Part 67 every time they go for a flight physical. While the medical application, like a patrol car parked on the side of the highway, reminds us of the Part 67 reporting rules, there's another FAR that acts more like a motorcycle cop hiding behind a billboard.

"It's a generalization to say that most pilots aren't familiar with the requirements of [FAR Part] 61.15, but it's a generalization I'm comfortable with," explained Jack Harrington, an attorney with Chicago_ based Ross & Harrington and chairman of the EAA's Legal Advisory Council. Harrington, who has represented a number of clients who have been blindsided by their unfamiliarity with the rule, has been actively trying to spread the word about the reporting requirements.

The rule, 61.15, "Offenses involving alcohol or drugs," was added to the regs in 1990 and became effective on November 29, 1990. Simply put, FAR 61.15 requires any pilot who is convicted of an alcohol_ or drug_ related driving offense to report it to the FAA's Security Division within 60 days. If, like the majority of active pilots, you earned your license before 1990, and your instructor has failed to discuss the requirements with you during your biennial reviews, then you, too, are probably ignorant of the law.

But ignorance of the rule is no defense, as a Northwest Airlines captain found out. Stopped for driving while intoxicated, the pilot called the Los Angeles FAA Flight Standards District Office to ask about the ramifications of the DWI conviction. The FAA official he consulted reminded him that he had to report the conviction on his medical application but mentioned no other reporting requirement. Within two weeks of the conviction, the pilot renewed his first_class medical and checked "yes" in the box to indicate the driving infraction on the form. Although he did not elaborate in the remarks section__required for all "yes" responses unless there's been no change since the last medical__the medical examiner questioned him about the DWI conviction and submitted the application. The FAA Aero_medical Division subsequently contacted the pilot for further details about the conviction and it, too, was satisfied. The pilot thought that was the end of it.

But then, although the pilot complied with FAR Part 67, the FAA decided to go after him for not meeting the requirements of Part 61.15 and suspended his license for 20 days. The pilot appealed to the NTSB. William R. Mullins, an administrative law judge (the same judge who initially reinstated Bob Hoover's medical) heard the appeal and dismissed the FAA's case, ruling that the pilot was in "substantial compliance" with 61.15 since he completed the medical form within the 60_day limit.

The kinder_but_gentler FAA appealed Judge Mullins's decision to the full NTSB panel. The five_member Board (the same Board that reversed Judge Mullins's decision in the Bob Hoover case) ruled against the pilot and reinstated the record of conviction. But unlike the FAA, the Board did show some compassion and, although it upheld the conviction, did not reinstate the suspension. The Board pointed out that "although ignorance of the rule does not excuse respondent's violation, the evidence on the record that 1) respondent attempted to comply with all related regulatory requirements and sought FAA assistance in doing so; and 2) the FAA contributed to respondent's failure through its erroneous advice to him, warrants a conclusion that respondent should not be further penalized for the failure."

Attorney Harrington recommends that if you find yourself facing a DWI charge you should consult an attorney who is familiar with the FAA's reporting requirements. "There are 50 different states and all states have different rules. In some states, for example, it may be possible to accept an administrative action__agree to take a driver's training course__and not be convicted of the offense. You have to be careful. A lawyer may be great with DUI cases, but not the FAA reporting requirements. He might tell you, you have no convictions so there's nothing to report__that may be true for your insurance company or if you're applying for a driver's license in another state, but not for the FAA," Harrington warned.

The FAA believes there's a strong correlation between a pilot's driving record and his potential to have an accident. Dr. Davis cited a recent study that he said found that a person who had had at least one DUI conviction had a greater chance of having an accident than someone who had none. According to the FAA in its appeal of the Northwest pilot case, "the rule has two purposes: (1) to remove from navigable airspace pilots who, through a record of alcohol_or drug_related motor vehicle actions, demonstrate an unwillingness or inability to comply with certain safety requirements; and (2) to provide a review, after a motor vehicle action, of a pilot's medical file to determine if there is a basis for reevaluating his eligibility for medical certification." Whatever the scientific basis for the rule, the FAA is taking the reporting requirement very seriously.

Like most FAA regulations, 61.15 includes lawyer_ese that attempts to cover all the bases and possible variations. Nevertheless, it's worth reading [see sidebar]. After stating (in paragraph c) exactly what constitutes a "motor vehicle action," the following paragraphs carefully detail what will happen if you don't report one and exactly what information you have to include in your report. There's no printed form; you have to include the required information in a letter. I'd register the letter to be sure it's received and by whom.

If you read 61.15 carefully you'll notice that although the definition of a motor vehicle action doesn't include "administrative action," the information you are required to report (paragraph e) includes details about either the "conviction or the administrative action." According to Dr. Davis, the reference to administrative action in Part 61.15 applies only to action involving alcohol_ or drug_ related offenses and does not require pilots to report administrative actions resulting from speeding or other traffic violations. Those are, of course, required to be reported under FAR Part 67.

So what does it really mean? It's simple. If you get caught driving drunk you have to report it to the FAA within 60 days of the conviction__ not the arrest and not the hearing, but the actual conviction__ and you have to report the conviction (or any required attendance at a rehabilitation program) at your next__ and each subsequent__ flight physical. If you report two drunk driving convictions within three years, the FAA may take your license away or deny your application__ for up to a year__ for a certificate or rating. Translation: In this circumstance, the word "may" means the FAA will certainly take away your license for at least a year.

If you don't report a conviction and falsely check the "no" box on the medical application, you'll probably lose your license and face criminal prosecution if the FAA finds out. And it will find out. The FAA's most powerful tool is one you hand over when you sign your medical application form. Just above the space for your signature is a paragraph that declares you "hereby authorize the National Driver Register (NDR), through a designated State Department of Motor Vehicles, to furnish to the FAA information pertaining to my driving record."

Dr. Davis said that EVERY Medical application form is matched against the NDR by the Security Division. "We compare the reports of DUI or DWI with our records and if it's not reported [on the medical application] we first make sure we have the correct person and that there were no mistakes in identifying him and then the application comes back to us to deal with the medical aspects. If the pilot failed to report it and falsified his medical application then it also goes to the legal people and the pilot may be suspended or have all his certificates revoked. So it's to a pilot's benefit to check the box and tell us about it."

Each case is handled individually, Dr. Davis said, and the eventual action taken by the FAA depends on the specific circumstances including past history, what and when the pilot reported and how well he cooperated. Although it's been suggested the FAA intentionally waits for the 60_day limit to expire and then pounces on offenders, Dr. Davis pointed out that the NDR reports usually take more than 60 days, and therefore the FAA isn't being intentionally vindictive. It just works out that way.

It would be easy to say that pilots can avoid DWI problems by never driving after having a drink. But that's like saying you can avoid an IRS audit by mailing in all of your money, not just the part the government demands. The problem is that it is legal to drive after drinking, but it's

illegal to fly after drinking. It's easy to abide by the drinking and flying rule because all drinking is banned within eight hours of flying. But driving after drinking is not illegal unless your blood alcohol level exceeds 0.1 percent. Some states set 0.08 percent as the driving under the influence (DUI) threshold. The challenge is to know exactly when you are breaking the drinking and driving law.

If somebody else is available to drive after you've had one or two drinks, let them risk their license while you buckle up tight in the passenger seat. If you must drive after a couple of drinks, buy an accurate alcohol breathalyzer to measure your blood alcohol content (BAC). Remember, you aren't breaking the law in whatever state you happen to be driving in unless your BAC is above that state's legal threshold. Since the FAA seems to care more about what we do in cars than in airplanes, buy a breathalyzer and protect yourself. For those of you still worried about flying or driving safety, don't __you'll need the energy to worry about the FAA and its regulations. __ T.B. and J.M.M.

SPELLING OUT THE RULE

Just so you don't have to dig out your current copy of the FARs (you have one, don't you?), here are the applicable sections of FAR Part 61.15.

(c) For the purposes of paragraphs (d) and (e) of this section, a motor vehicle action means __

(1) A conviction after November 29, 1990, for the violation of any federal or state statute relating to the operation of a motor vehicle while intoxicated by alcohol or a drug, while impaired by alcohol or a drug, or while under the influence of alcohol or a drug;

(2) The cancellation, suspension, or revocation of a license to operate a motor vehicle by a state after November 29, 1990, for a cause related to the operation of a motor vehicle while intoxicated by alcohol or a drug, while impaired by alcohol or a drug, or while under the influence of alcohol or a drug; or

(3) The denial after November 29, 1990, of an application for a license to operate a motor vehicle by a state for a cause related to the operation of a motor vehicle while intoxicated by alcohol or a drug, while impaired by alcohol or a drug, or while under the influence of alcohol or a drug.

(d) Except in the case of a motor vehicle action that results from the same incident or arises out of the same factual circumstances, a motor vehicle action occurring within three years of a previous motor vehicle action is grounds for __

(1) Denial of an application for any certificate or rating issued under this Part for a period of up to one year after the date of the last motor vehicle action; or

(2) Suspension or revocation of any certificate or rating issued under this Part.

(e) Each person holding a certificate issued under this Part shall provide a written report of each motor vehicle action to the FAA, Civil Aviation Security Division (ACC_700), P.O. Box 25810, Oklahoma City, Oklahoma 73125, not later than 60 days after the motor vehicle action. The report must include __

(1) The person's name, address, date of birth, and airman certificate number;

(2) The type of violation that resulted in the conviction or the administrative action;

(3) The date of the conviction or administrative action;

(4) The state that holds the record of conviction or administrative action; and

(5) A statement of whether the motor vehicle action resulted from the same incident or arose

out of the same factual circumstances related to a previously reported motor vehicle action.

(f) Failure to comply with paragraph (e) of this section is grounds for:

- (1) Denial of an application for any certificate or rating issued under this Part for a period of up to one year after the date of the motor vehicle action; or
- (2) Suspension or revocation of any certificate or rating issued under this Part.

INTERNATIONAL CRIMES **HIJACKING**

The US asserts jurisdiction over hijacking crimes that involve US aircraft, aircraft within the US, or flights that depart from, or are due to arrive in, the US.

Several international treaties and U.S. penal statutes have been enacted to curb the threat of air piracy. While meeting with limited success as to the casual, domestic, or “for-profit” hijacker, the issue of political, religious and ethical interference with aircrew operation of their plane is a continuing, and yet unsolved problem. We, like a lot of countries, have a history of providing asylum to persecuted people. Hence, who is a hijacker, as opposed to a political refugee?

It is a capital offense to engage in air piracy in the US. To date, no one has been sentenced to that punishment. However, police authorities are vested with power to kill hijacker; this being so because of the extreme threat that the hijacker poses. The last hijacker killed by police while in the attempt to hijack occurred locally at San Jose international Airport.

International Treaties

The Tokyo Convention was enacted in 1969 after 6 years of negotiations. It was only after the international pilot’s union announced an international strike or boycott, that the treaty was signed. Cuba, then the destination of choice for hijackers, did not sign the treaty. This treaty requires that the “host” nation return the aircraft and cargo back to the rightful owners and permit the crew and passengers to leave the host nation and continue their journey as soon as possible. There was no provision for the punishment of the hijacker.

When the hijack problem persisted, the Hague Convention (1970) was enacted. It required that the host nation permit the extradition of the hijacker or subjected to the law and punishment of the host nation. Therein lies the rub.

CONVENTION ON OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT, SIGNED AT TOKYO, ON 14 SEPTEMBER 1963 (**TOKYO CONVENTION**) THE STATES

Parties to this Convention HAVE AGREED as follows:

CHAPTER I SCOPE OF THE CONVENTION

Article 1

1. This Convention shall apply in respect of: (a) offences against penal law; (b) acts which,

whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.

2. Except as provided in Chapter III, this Convention shall apply in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.

3. For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take_off until the moment when the landing run ends.

4. This Convention shall not apply to aircraft used in military, customs or police services.

Article 2

Without prejudice to the provisions of Article 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.

CHAPTER II JURISDICTION

Article 3

1. The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.

2. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 4

A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:

(a) the offence has effect on the territory of such State; (b) the offence has been committed by or against a national or permanent resident of such State; (c) the offence is against the security of such State; (d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State; (e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.

CHAPTER III POWERS OF THE AIRCRAFT COMMANDER

Article 5

1. The provisions of this Chapter shall not apply to offences and acts committed or about to be committed by a person on board an aircraft in flight in the airspace of the State of registration or over the high seas or any other area outside the territory of any State unless the last point of take_off or the next point of intended landing is situated in a State other than that of registration, or the aircraft subsequently flies in the airspace of a State other than that of registration with such person still on board.

2. Notwithstanding the provisions of Article 1, paragraph 3, an aircraft shall for the purposes of this Chapter, be considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the provisions of this Chapter shall continue to apply with respect to offences and acts committed on board until competent authorities of a State take over the responsibility for the aircraft and for the persons and property on board.

Article 6

1. The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1, impose upon such person reasonable measures including restraint which are necessary: (a) to protect the safety of the aircraft, or of persons or property therein; or (b) to maintain good order and discipline on board; or (c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Chapter.
2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.

Article 7

1. Measures of restraint imposed upon a person in accordance with Article 6 shall not be continued beyond any point at which the aircraft lands unless: (a) such point is in the territory of a non Contracting State and its authorities refuse to permit disembarkation of that person or those measures have been imposed in accordance with Article 6, paragraph 1(c) in order to enable his delivery to competent authorities; (b) the aircraft makes a forced landing and the aircraft commander is unable to deliver that person to competent authorities; or (c) that person agrees to onward carriage under restraint.
2. The aircraft commander shall as soon as practicable, and if possible before landing in the territory of a State with a person on board who has been placed under restraint in accordance with the provisions of Article 6, notify the authorities of such State of the fact that a person on board is under restraint and of the reasons for such restraint.

Article 8

1. The aircraft commander may, in so far as it is necessary for the purpose of subparagraph (a) or (b) or paragraph 1 of Article 6, disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in Article 1, paragraph 1(b).
2. The aircraft commander shall report to the authorities of the State in which he disembarks any person pursuant to this Article, the fact of, and the reasons for, such disembarkation.

Article 9

1. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal law of the State of registration of the aircraft.
2. The aircraft commander shall as soon as practicable and if possible before landing in the territory of a Contracting State with a person on board whom the aircraft commander intends to deliver in accordance with the preceding paragraph, notify the authorities of such State of his intention to deliver such person and the reasons therefor.
3. The aircraft commander shall furnish the authorities to whom any suspected offender is delivered in accordance with the provisions of this Article with evidence and information which, under the law of the State of registration of the aircraft, are lawfully in his possession.

Article 10

For actions taken in accordance with this Convention, neither the aircraft commander, any other member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of

the treatment undergone by the person against whom the actions were taken.

CHAPTER IV UNLAWFUL SEIZURE OF AIRCRAFT

Article 11

1. When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.
2. In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.

CHAPTER V POWERS AND DUTIES OF STATES

Article 12

Any Contracting State shall allow the commander of an aircraft registered in another Contracting State to disembark any person pursuant to Article 8, paragraph 1.

Article 13

1. Any Contracting State shall take delivery of any person whom the aircraft commander delivers pursuant to Article 9, paragraph 1.
2. Upon being satisfied that the circumstances so warrant, any Contracting State shall take custody or other measures to ensure the presence of any person suspected of an act contemplated in Article 11, paragraph 1 and of any person of whom it has taken delivery. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted.
3. Any person in custody pursuant to the previous paragraph shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.
4. Any Contracting State, to which a person is delivered pursuant to Article 9, paragraph 1, or in whose territory an aircraft lands following the commission of an act contemplated in Article 11, paragraph 1, shall immediately make a preliminary enquiry into the facts.
5. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft and the State of nationality of the detained person and, if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 4 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 14

1. When any person has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, or has disembarked after committing an act contemplated in Article 11, paragraph 1, and when such person cannot or does not desire to continue his journey and the State of landing refuses to admit him, that State may, if the person in question is not a national or permanent resident of that State, return him to the territory of the State of which he is a national or permanent resident or to the territory of the State in which he began his journey by air.
2. Neither disembarkation, nor delivery, nor the taking of custody or other measures contemplated in Article 13, paragraph 2, nor return of the person concerned, shall be considered as admission to the territory of the Contracting State concerned for the purpose of its law relating to entry or admission of persons and nothing in this Convention shall affect the law of a

Contracting State relating to the expulsion of persons from its territory.

Article 15

1. Without prejudice to Article 14, any person who has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, or has disembarked after committing an act contemplated in Article 11, paragraph 1, and who desires to continue his journey shall be at liberty as soon as practicable to proceed to any destination of his choice unless his presence is required by the law of the State of landing for the purpose of extradition or criminal proceedings.

2. Without prejudice to its law as to entry and admission to, and extradition and expulsion from its territory, a Contracting State in whose territory a person has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1 or has disembarked and is suspected of having committed an act contemplated in Article 11, paragraph 1, shall accord to such person treatment which is no less favourable for his protection and security than that accorded to nationals of such Contracting State in like circumstances.

CHAPTER VI

OTHER PROVISIONS

Article 16

1. Offences committed on aircraft registered in a Contracting State shall be treated, for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the State of registration of the aircraft.

2. Without prejudice to the provisions of the preceding paragraph, nothing in this Convention shall be deemed to create an obligation to grant extradition.

Article 17

In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offence committed on board an aircraft the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo.

Article 18

If Contracting States establish joint air transport operating organizations or international operating agencies, which operate aircraft not registered in any one State those States shall, according to the circumstances of the case, designate the State among them which, for the purposes of this Convention, shall be considered as the State of registration and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

CHAPTER VII

FINAL CLAUSES

Article 19

Until the date on which this Convention comes into force in accordance with the provisions of Article 21, it shall remain open for signature on behalf of any State which at that date is a Member of the United Nations or of any of the Specialized Agencies.

Article 20

1. This Convention shall be subject to ratification by the signatory States in accordance with their constitutional procedures. 2. The instruments of ratification shall be deposited with the International Civil Aviation Organization.

Article 21

1. As soon as twelve of the signatory States have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the twelfth instrument of ratification. It shall come into force for each State ratifying

thereafter on the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Convention comes into force, it shall be registered with the Secretary-General of the United Nations by the International Civil Aviation Organization.

Article 22

1. This Convention shall, after it has come into force, be open for accession by any State Member of the United Nations or of any of the Specialized Agencies.

2. The accession of a State shall be effected by the deposit of an instrument of accession with the International Civil Aviation Organization and shall take effect on the ninetieth day after the date of such deposit.

Article 23

1. Any Contracting State may denounce this Convention by notification addressed to the International Civil Aviation Organization.

2. Denunciation shall take effect six months after the date of receipt by the International Civil Aviation Organization of the notification of denunciation.

Article 24

1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court. 2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation.

3. Any Contracting State having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the International Civil Aviation Organization.

Article 25

Except as provided in Article 24 no reservation may be made to this Convention.

Article 26

The International Civil Aviation Organization shall give notice to all States Members of the United Nations or of any of the Specialized Agencies:

(a) of any signature of this Convention and the date thereof; (b) of the deposit of any instrument of ratification or accession and the date thereof; (c) of the date on which this Convention comes into force in accordance with Article 21, paragraph 1; (d) of the receipt of any notification of denunciation and the date thereof; and (e) of the receipt of any declaration or notification made under Article 24 and the date thereof.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention. DONE at Tokyo on the fourteenth day of September One Thousand Nine Hundred and Sixty-three in three authentic texts drawn up in the English, French and Spanish languages. This Convention shall be deposited with the International Civil Aviation Organization with which, in accordance with Article 19, it shall remain open for signature and the said Organization shall send certified copies thereof to all States Members of the United Nations or of any Specialized Agency.

CONVENTION FOR THE SUPPRESSION OF

UNLAWFUL SEIZURE OF AIRCRAFT,
SIGNED AT THE HAGUE, ON 16
DECEMBER 1970 (THE HAGUE
CONVENTION 1970)

Preamble

THE STATES PARTIES TO THIS CONVENTION CONSIDERING that unlawful acts of seizure or exercise of control of aircraft in flight jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;

CONSIDERING that the occurrence of such acts is a matter of grave concern;

CONSIDERING that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders;

HAVE AGREED AS FOLLOWS:

Article 1

Any person who on board an aircraft in flight: (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or (b) is an accomplice of a person who performs or attempts to perform any such act commits an offence (hereinafter referred to as "the offence").

Article 2

Each Contracting State undertakes to make the offence punishable by severe penalties.

Article 3

1. For the purposes of this Convention, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.

2. This Convention shall not apply to aircraft used in military, customs or police services.

3. This Convention shall apply only if the place of take-off or the place of actual landing of the aircraft on board which the offence is committed is situated outside the territory of the State of registration of that aircraft; it shall be immaterial whether the aircraft is engaged in an international or domestic flight.

4. In the cases mentioned in Article 5, this Convention shall not apply if the place of take-off and the place of actual landing of the aircraft on board which the offence is committed are situated within the territory of the same State where that State is one of those referred to in that Article.

5. Notwithstanding paragraphs 3 and 4 of this Article, Articles 6, 7, 8, and 10 shall apply whatever the place of take-off or the place of actual landing of the aircraft, if the offender or the alleged offender is found in the territory of a State other than the State of registration of that aircraft.

Article 4

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases: (a) when the offence is committed on board an aircraft registered in that State; (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board; (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 5

The Contracting States which establish joint air transport operating organizations or international operating agencies, which operate aircraft which are subject to joint or international registration shall, by appropriate means, designate for each aircraft the State among them which shall exercise the jurisdiction and have the attributes of the State of registration for the purpose of this Convention and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

Article 6

1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft, the State mentioned in Article 4, paragraph 1(c), the State of nationality of the detained person and, if it considers it advisable, any other interested States of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Article 8

1. The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States. Contracting States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded between them.

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State.

4. The offence shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 4, paragraph 1.

Article 9

1. When any of the acts mentioned in Article 1(a) has occurred or is about to occur, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated by the preceding paragraph, any Contracting State in which the aircraft or its passengers or crew are present shall facilitate the continuation of the journey of the passengers and crew as soon as practicable, and shall without delay return the aircraft and its cargo to the persons lawfully entitled to possession.

Article 10

1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence and other acts mentioned in Article 4. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

Article 11

Each Contracting State shall in accordance with its national law report to the Council of the International Civil Aviation Organization as promptly as possible any relevant information in its possession concerning: (a) the circumstances of the offence; (b) the action taken pursuant to Article 9; (c) the measures taken in relation to the offender or the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.

Article 12

1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation.

3. Any Contracting State having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary Governments.

Article 13

1. This Convention shall be open for signature at The Hague on 16 December 1970, by States participating in the International Conference on Air Law held at The Hague from 1 to 16 December 1970 (hereinafter referred to as The Hague Conference). After 31 December 1970, the Convention shall be open to all States for signature in Moscow, London and Washington. Any State which does not sign this Convention before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time.

2. This Convention shall be subject to ratification by the signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the

United States of America, which are hereby designated the Depositary Governments.

3. This Convention shall enter into force thirty days following the date of the deposit of instruments of ratification by ten States signatory to this Convention which participated in The Hague Conference.

4. For other States, this Convention shall enter into force on the date of entry into force of this Convention in accordance with paragraph 3 of this Article, or thirty days following the date of deposit of their instruments of ratification or accession, whichever is later.

5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession, the date of entry into force of this Convention, and other notices.

6. As soon as this Convention comes into force, it shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations and pursuant to Article 83 of the Convention on International Civil Aviation (Chicago, 1944).

Article 14

1. Any Contracting State may denounce this Convention by written notification to the Depositary Governments.

2. Denunciation shall take effect six months following the date on which notification is received by the Depositary Governments.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their Governments, have signed this Convention.

DONE at The Hague, this sixteenth day of December, one thousand nine hundred and seventy, in three originals, each being drawn up in four authentic texts in the English, French, Russian and Spanish languages.

USA v MCCULLOUGH (1996 CA9)

ORDER

Our earlier decision in this case was filed on September 30, 1994. *United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489 (9th Cir. 1994). Part VI of that opinion held that, unless the forfeiture of the airplane under 21 U.S.C. S 881 could be predicated on conduct other than that for which claimant McCullough had already been prosecuted, the forfeiture violated the double jeopardy clause. *Id.* at 494_95. The government filed a petition for rehearing, and we stayed our mandate to await the decision of the Supreme Court that has now been entered in *United States v. Ursery*, 64 U.S.L.W. 4565 (U.S. June 24, 1996).

Ursery held that forfeitures pursuant to 21 U.S.C. S 881 and 18 U.S.C. S 981 were "neither `punishment' nor criminal for purposes of the Double Jeopardy Clause." *Id.* at 4571_72. *Ursery* therefore renders our previous double jeopardy ruling in this case invalid. We accordingly grant the government's petition for rehearing and withdraw our prior opinion reported at 37 F.3d 489, and substitute the following opinion.

We also deny McCullough's pending motion for costs and attorneys' fees.

OPINION

CANBY, Circuit Judge:

Claimant Perry McCullough appeals the district court's grant of summary judgment to the United States in this civil forfeiture action brought pursuant to 21 U.S.C.S 881(a)(4). He asserts that the district court never gained in rem jurisdiction in this action because the res never was brought

within its district. He also asserts: that the judgment must be reversed because the government lacked probable cause to initiate the action; that the government is promissory estopped from seeking the civil forfeiture; that the government did not provide him constitutionally sufficient notice of the action; and that the forfeiture violates the Double Jeopardy Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment.

We reject McCullough's challenge to the district court's jurisdiction. We also reject all but one of McCullough's other contentions. We conclude, however, that McCullough is entitled to present to the district court his contention that, under the intervening decision of the Supreme Court in *Austin v. United States*, 509 U.S. 602 (1993), the forfeiture of his airplane constitutes an excessive fine within the meaning of the Eighth Amendment. We remand to the district court for consideration of this single issue.

BACKGROUND

McCullough was indicted on June 23, 1989 in the Eastern District of California (Eastern District) for numerous drug-related offenses, including conducting a continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848. The indictment contained a forfeiture provision alleging that several items of McCullough's property, including the aircraft that is the subject of this action, were subject to criminal forfeiture as provided in 21 U.S.C. § 853. On the same day the indictment was received, the government obtained from the Central District of California (Central District) a warrant for seizure of the aircraft pursuant to 21 U.S.C. § 881(b), and it immediately seized the aircraft. In December 1989, the government initiated this civil forfeiture action under 21 U.S.C. § 881(a)(4) in the Eastern District, where the criminal charges were still pending. McCullough filed a verified claim in the civil forfeiture proceedings as provided in Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims (Supplemental Rules to Federal Rules of Civil Procedure, 28 U.S.C., hereinafter "Supplemental Rules").¹ He later filed an answer to the government's complaint as required by the Rule. The district judge who presided over both the criminal and civil actions stayed the civil proceedings pending the outcome of the criminal trial.

The jury in McCullough's criminal case returned a verdict of guilty on all counts. The jury also returned a verdict of forfeiture against the aircraft. Judgment of conviction and forfeiture was entered accordingly.

Following the successful criminal prosecution and forfeiture, the government resumed prosecution of the civil forfeiture action to perfect its title to the aircraft against potential third-party claimants.² The government moved for summary judgment, and the district court granted the motion on the ground that no genuine issues of material fact exist as to the elements necessary to establish the civil forfeiture.

I. JURISDICTION

McCullough contends that the United States District Court for the Eastern District of California never obtained jurisdiction over this civil forfeiture action because the aircraft never was brought within the geographic confines of, or "arrested" in, the Eastern District. He asserts that the location of the res within the geographical boundaries of the district at the initiation of a civil forfeiture action is a prerequisite for the exercise of in rem jurisdiction. We hold that, even if McCullough's contention is correct, recent congressional enactments clearly conferring jurisdiction upon the Eastern District are to be applied to this case, which was pending at the time of the enactments.³

Prior to October 1992, federal courts struggled with the questions whether a district court other than that in which the property was located could exercise jurisdiction over the subject of a forfeiture and could effectuate process against the property. See *United States v. Real Property Known as 953 East Sahara, Las Vegas, Nevada*, 807 F. Supp. 581, 583-85 (D. Ariz. 1992)

(discussing the questions and citing cases). The problems involved reconciling the provisions of several statutes dealing with jurisdiction, venue and service of process. See *id.* (discussing interplay between 28 U.S.C. S 1355, 18 U.S.C. S 981(h), 21 U.S.C. 881(j), Supplemental Rule E(3)(a) and Fed. R. Civ. P. 4(f)).

In October 1992, however, Congress amended 28 U.S.C. S 1355, unifying the treatment of jurisdiction, venue and authority to serve process in civil forfeiture cases. Section 1355 now clearly confers jurisdiction over this action in the Eastern District. The section provides:

(a) The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress . . . (b)(1) A forfeiture action or proceeding may be brought in (A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or (B) any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.

. . .

(d) Any court with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property that is the subject of the forfeiture action.

28 U.S.C. S 1355 (emphasis added). The Eastern District has jurisdiction over this forfeiture pursuant to the underlined provision because venue for the proceeding in the Eastern District is provided for in 21 U.S.C. S 881(j) (venue lies in the judicial district in which the criminal prosecution is brought).

We have no difficulty concluding that the amendment to S 1355 applies to this case, which was on appeal at the time the amendment was enacted. See *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1501 (1994) ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed."); *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 99_100 (Thomas, J., concurring). In *Landgraf*, the Court explained:

Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case." Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties."

Landgraf, 114 S.Ct. at 1502 (citations omitted).

We are aware that the Tenth Circuit has declined to apply S 1355 "retroactively." See *United States v. 51 Pieces of Real Property, Roswell, New Mexico*, 17 F.3d 1306, 1312 (10th Cir. 1994). The Tenth Circuit, however, did not have the benefit of the *Landgraf* opinion and its explicit rule regarding retroactive application of jurisdictional statutes. In addition, the Tenth Circuit had before it the further question whether S 1355(d)'s service of process provision should be applied retroactively. *51 Pieces of Real Property*, 17 F.3d at 1312 ("Moreover, even if the provisions were otherwise retroactive, we doubt they could retroactively validate service of process that was invalid when executed."). In contrast, we need not determine whether the service provision of S 1355(d) is retroactive, or even whether service in this case was "invalid" because, as we determine in the next section, *McCullough* has waived any objections to service. We follow *Landgraf*, then, and apply S 1355(b)(1)(B) to uphold the district court's jurisdiction despite the fact that the aircraft res was never physically brought within the boundaries of the Eastern District.

II. SERVICE OF PROCESS

One remaining aspect of *McCullough's* challenge to the district court's in rem jurisdiction

deserves mention. McCullough relied heavily on the language of Supplemental Rule E(3)(a), which provides that service of process in rem must be made within the district. 4 To the extent that McCullough's jurisdictional argument depends on this Rule, however, it is a defense of insufficiency of process that has been waived.

The Federal Rules of Civil Procedure apply to this action to the extent that they are not inconsistent with the Supplemental Rules. See Supplemental Rule A. Rule 12(h) of the Federal Rules of Civil Procedure provides that an objection to sufficiency of process is waived if not made in a motion pursuant to Rule 12 or in a responsive pleading. McCullough did not object to the method of service in the district court. Accordingly, he has waived any objections based upon the service of process. 5

III. PROBABLE CAUSE

McCullough next contends that, when the government initiated this action, there was no probable cause to believe that the aircraft had been used to facilitate drug transactions, as required by 19 U.S.C. S 1615.6 We conclude that the government has shown that probable cause existed when it began this action.7

The standard for probable cause in forfeiture proceedings resembles that required to support a search warrant. *United States v. \$191,910.00 in U.S. Currency*, 16 F.3d 1051, 1071 (9th Cir. 1994). The determination of probable cause is based upon a "totality of the circumstances" test, and the government's evidence must be more than that which gives rise to a mere suspicion, although it need not rise to the level of prima facie proof. *Id.*

For the aircraft that the government seized to be subject to forfeiture, it must have been used to "transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment" of controlled substances "manufactured, distributed, dispensed, or acquired" in violation of the law. 21 U.S.C. S 881(a)(4). Under the totality of the circumstances, we conclude that the government established probable cause that the aircraft in question was so used.

FBI Agent Jack Warren executed an affidavit in support of the seizure warrant issued by the Central District. In that affidavit, Warren described the following series of events: (1) in June 1989, McCullough flew a rented airplane to a California airport where he was met by a car registered to John Mack into which he loaded two suitcases from the rented airplane; (2) subsequent surveillance revealed that narcotics were being distributed from that vehicle; (3) the vehicle was occupied by Mack, McCullough, and a person named Raphael Gonzalez; (4) they stopped at the residence of Vern Hayes; (5) subsequent searches at the residences of Hayes and Mack resulted in the seizure of several kilograms of cocaine; (6) McCullough, arrested the next day, was in possession of five kilograms of cocaine; (7) six months prior to these events, McCullough had flown his own plane (the subject of this action) to another California airport and had been met by Mack's automobile; (8) on that occasion, the aircraft remained on the ground for only fifteen minutes during which time two suitcases were transferred from the aircraft to the car. Finally, Warren attested that a reliable confidential informant had informed a U.S. Customs agent that he had personally "flown with McCullough in that aircraft on at least twenty occasions in which cocaine has been transported in that aircraft."

The Warren affidavit contains sufficient information to support a finding of probable cause that the aircraft was used to transport or facilitate the possession of illegal controlled substances. It is reasonable to infer that some portion of the cocaine seized during the searches of Mack's and Haye's homes and during McCullough's arrest was transported in the rented airplane in June. The earlier flight, made in McCullough's own aircraft, is sufficiently similar to the later flight to permit an inference that McCullough's aircraft also was used to transport or facilitate the delivery of illegal controlled substances. These inferences are bolstered by the information from the confidential informant, which is corroborated by the events recounted in the affidavit. The

government's showing suffices.

IV. PROMISSORY ESTOPPEL

McCullough next asserts that the government is precluded from maintaining this action because it indicated in a status conference report that "[i]f the plaintiff United States is successful at the criminal trial and the airplane is forfeited criminally, plaintiff would move to dismiss this action, and would instead perfect its title to the airplane by following the procedures outlined in Title 21 U.S.C. Section 853(n)." We need not decide this issue because McCullough's criminal forfeiture has been reversed. *United States v. McCullough*, Nos. 9010577, 91_10581, and 92_10597 (9th Cir. June 13, 1994) (unpublished memorandum disposition). The government's representation in the status report therefore could no longer preclude it from maintaining this action, even if that representation were binding on the government.

V. NOTICE

McCullough argues that the judgment of forfeiture must be reversed because the government failed to provide him notice directly while he was in the government's custody. He contends that this failure violated his right to due process. McCullough has waived this point, however, because he did not raise it in the district court. *United States v. Flores_Payon*, 942 F.2d 556, 558 (9th Cir. 1991). Although we have discretion to review issues not raised below, we do so only in exceptional circumstances to prevent manifest injustice. *International Union of Bricklayers & Allied Craftsmen Local Union No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985). There is no manifest injustice here. McCullough had actual notice; indeed, he filed a claim and answer in the action.⁸ Accordingly, we decline to consider this issue.

VI. DOUBLE JEOPARDY

McCullough contends that because the government already sought to obtain a criminal forfeiture of the aircraft, and because the judgment of forfeiture in that case has been reversed, the Double Jeopardy Clause bars the government from now seeking a civil forfeiture. McCullough's argument is foreclosed by the recent decision of the Supreme Court in *United States v. Ursery*, 64 U.S.L.W. 4565 (U.S. June 24, 1996). In *Ursery* the Supreme Court held that forfeitures pursuant to 21 U.S.C. S 881 and 18 U.S.C. S 981 were "neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause." *Id.* at 4571_72. We therefore reject McCullough's double jeopardy argument.

VII. EXCESSIVE FINES CLAUSE

After the district court entered its decision forfeiting McCullough's airplane, the Supreme Court decided *Austin v. United States*, 509 U.S. 602 (1993), in which it concluded that forfeitures under S 881(a)(4) and (a)(7) are subject to scrutiny under the excessive fines clause of the Eighth Amendment. *Id.* at 621_22. In reliance upon that decision, McCullough contends that the forfeiture of his aircraft constitutes an excessive fine. McCullough did not raise this issue in the district court, but we conclude that he may be forgiven for not doing so because *Austin*, which first applied the Excessive Fines Clause to forfeitures, had not yet been decided. In the circumstances, it would constitute manifest injustice if McCullough, a pro se litigant, were subjected to an excessive fine in violation of the Eighth Amendment only because he neglected to foresee the Supreme Court's decision in *Austin*. Because the issue of excessiveness may depend upon various factors and conduct with which the district court is more familiar than this court, we remand the matter to the district court for consideration of that issue in the first instance. Cf. *Austin*, 509 U.S. at 622_23 (remanding question whether forfeiture was excessive fine).

CONCLUSION

In summary, we conclude that the district court has jurisdiction over this civil forfeiture action despite the fact that McCullough's aircraft never was brought within the geographical boundaries

of the district. We also reject all of the other arguments raised by McCullough, except for his contention that the forfeiture of his airplane violated the Excessive Fines Clause of the Eighth Amendment. On the merits of that question we express no opinion, because we conclude that the district court should address it in the first instance. To that end, we vacate the district court's judgment of forfeiture and remand this matter to the district court for such proceedings as it deems appropriate for determination of the excessive fine question.

The judgment of the district court is VACATED, and the case is REMANDED for further proceedings consistent with this opinion. Each party will bear its own costs.

Footnotes

[Footnote 1] McCullough's parents also filed verified claims but took no further action in the proceedings. The district court eventually entered a default against McCullough's parents.

[Footnote 2] The government candidly admits its reasons for returning to the civil proceedings instead of perfecting its title pursuant to the criminal forfeiture statute's procedure for handling third-party claims, 21 U.S.C. S 853(n). The government did so to preclude a possible claim of interest in the aircraft by McCullough's parents who had already defaulted their claim in the civil proceeding.

Since this appeal was filed, McCullough has successfully appealed his CCE conviction and the associated criminal forfeiture. See *United States v. McCullough*, Nos. 90_10577, 91_10581, and 92_10597 (9th Cir. June 13, 1994) (unpublished memorandum disposition). Consequently, this civil action now is necessary for the government to establish title to the aircraft in the first instance, not merely as a means of perfecting its title against third parties.

[Footnote 3] Our disposition of this issue makes it unnecessary for us to consider the government's arguments that this issue is subject to waiver and that McCullough waived it by not raising it in the district court.

[Footnote 4] The Supplemental Rules govern the seizure of the aircraft in this civil in rem forfeiture proceedings. See 21 U.S.C. S 881(b).

[Footnote 5] Because any challenge to service of process has been waived, we need not consider whether the amendments to 28 U.S.C.S 1355 retroactively validate service in this case. We also need not decide whether service was sufficient under the pre_1994 versions of Federal Rules of Civil Procedure 4(e) and (f) or was implicitly authorized by the venue provision of 21 U.S.C. S 881(j).

[Footnote 6] Section 1615 of Title 19 is applicable to this civil forfeiture under 21 U.S.C. S 881(d). See *United States v. 1 Parcel of Real Property, Lot 4, Block 5 of Eaton Acres*, 904 F.2d 487, 490 & n.2 (9th Cir. 1990).

[Footnote 7] The government in its brief urged us to consider instead whether it had established probable cause by the time that the summary judgment was entered. Since the filing of the briefs in this appeal, however, we have held that the requirement found in S 1615 that probable cause must be shown "for the institution" of forfeiture actions precludes consideration of postfiling evidence in making the probable cause determination. *United States v. \$191,910.00 in U.S. Currency*, 16 F.3d 1051, 1071 (9th Cir. 1994). Accordingly, in our de novo review of the determination of probable cause, we consider only evidence that the record discloses was developed prior to the institution of this action.

[Footnote 8] This fact distinguishes *Robinson v. Hanrahan*, 409 U.S. 38 (1972), relied upon by McCullough. In that case, "[it was] undisputed that appellant, who remained in custody throughout the forfeiture proceedings, did not receive such notice until his release." *Id.* at 38_39.