

Articles

How Airline Security Fees in a Post September 11, 2001 Environment Are Spiraling Out of Control

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I. INTRODUCTION

The four hijackings on September 11, 2001 created immeasurable losses to the families of the 2,749 victims in New York City, New York, the 189 victims in Virginia, and the 40 victims in Pennsylvania, their families, in addition to those people injured from these events.¹ Additionally, those hijackings and the events that happened afterwards dramatically altered the aviation landscape in a number of ways. For the first time ever, the national airspace system (excluding military airspace) was shut down for three days.² Nearly two million people were displaced who were part of air traffic that day, and all 460 commercial airports in the U.S. were closed.³ Within months, federal screeners started taking over the responsibilities of private airline screeners that were previously hired

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1. *New York Settles on Final September 11 Death Toll*, at 1, at http://story.news.yahoo.com/news?tmpl=story&u=/afp/20040123/ts_alt_afp/us_attacks_toll&cid=1506&ncid=1200.

2. Glenn Kessler and Don Phillips, *Air Travel System Grounded for First Time; Travelers and Carriers Face Day of Chaos, Future Questions*, WASHINGTON POST, Sept. 12, 2001, at A11, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A14060-2001Sep11¬Found=true>.

3. *See id.*

by the airlines.⁴

This paper addresses two different fees that grew out of this period of dynamic change: the September 11th Security Fee (September 11 Fee) and the Aviation Security Infrastructure Fee (ASIF), and how these fees impact passengers and airlines. The fees were created by the Aviation and Transportation Security Act (ATSA) after the tragedies of September 11, 2001. These fees disproportionately tax short-haul and connecting flights, and hinder not only an industry just beginning to get its footing again, but also airline customers as well. This article explains how exorbitant airline security fees are not assessed proportionately to passengers, and may eventually threaten the successes and benefits of a deregulated aviation industry.

A. EARLY DEVELOPMENT OF GOVERNMENT INVOLVEMENT IN THE AIRLINE INDUSTRY

After the 1980's, aviation was dramatically different than it had been during its infancy and growth periods.⁵ Rail carriers were the original framework from which the aviation industry was cultivated.⁶ Federal airline regulation can be traced to rail carriers charging high rates on markets they served exclusively.⁷ Small towns that were on the rail lines were often forced to pay these high rates in order to be served by rail.⁸ After creating regulations in the rail industry in the late nineteenth century, Congress moved to regulate motor carriers in 1935 as competitive practices became so excessive that the industry as a whole suffered economic losses, and service was undependable.⁹

Air travel was added to the regulatory scheme in 1938 for many of the same reasons as motor carriers were included, specifically, in hopes of staving off excessive competition and helping to foster a young industry.¹⁰ Deregulation of transportation began in the 1970's under President Carter.¹¹ The Airline Deregulation Act of 1978 provided for the formal deregulation of the airline industry.¹² Restrictions on domestic routes and schedules were eliminated along with government controls over domestic rates. Eventually, the Civil Aeronautics Board (CAB) itself was

4. *Security Screening Personnel*, at 1, at <http://www.aviationnet.com/screeners.html>.

5. Paul Stephen Dempsey, *Transportation Deregulation – On a Collision Course?*, 13 *TRANSP. L.J.* 329, 331-349 (1984).

6. *Id.* at 331.

7. *Id.* at 333.

8. *Id.* at 331.

9. *Id.* at 334.

10. *Id.* at 335.

11. *Id.* at 339.

12. *Id.* at 340.

disbanded as part of the Civil Aeronautics Board Sunset Act of 1984.¹³ Congress mandated that domestic route and rate restrictions be phased out over four years.¹⁴ It provided for complete elimination of restrictions on routes and new services by December 31, 1981, and the end of all rate regulation by January 1, 1983.¹⁵ The CAB began granting new route authority very quickly,¹⁶ and as such, within a year of the law going into effect, air carriers were able to serve essentially any domestic route.¹⁷

B. AIRLINE TAXING BACKGROUND

The federal government has played a very large role in the financing and regulation of the airspace system in the U.S. since 1946, when the Federal Airport Act was created.¹⁸ The Federal Airport Act established an airport grant program aimed at developing civil airports nationwide.¹⁹ In 1970 (during regulation) the Federal Aviation Administration (FAA) created an excise-tax funded trust system to “[p]rovide for the expansion and improvement of the nation’s airport and airway system.”²⁰ There are a plethora of taxes that are used to fund the Airport and Airway Trust Fund: a 7.5% passenger ticket tax; a \$2 passenger flight segment fee; a 6.25% freight waybill tax; a \$12 tax levied on all international arrivals and departures; a 7.5% frequent flyer award tax; and aviation fuel taxes including 4.3 cents per gallon on commercial aviation, 19.3 cents per gallon on general aviation gasoline, and 21.8 cents per gallon on general aviation jet fuel.²¹

Additionally, since 1992, many airports have also been charging airline passengers a \$3 fee known as a passenger facility charge (PFC), which the airlines collect as an add-on to the airfare.²² Beginning in 2001,

13. Commission on Life Sciences, *The Airliner Cabin Environment: Air Quality and Safety*, at 64, available at <http://www.nap.edu/books/0309036909/html/64.html>; see also Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (1984).

14. *Airline Handbook Chapter 2: Deregulation*, at 2, at <http://www.air-transport.org/public/publications/display1.asp?nid=962>.

15. *Id.* at 2.

16. *Id.*

17. For two interesting articles giving a more thorough discussion of airline deregulation, see Paul Stephen Dempsey, *The Rise and Fall of the Civil Aeronautics Board – Opening Wide The Floodgates of Entry*, generally 11 *TRANSP. L.J.* 91 (1979); see also <http://www.heritage.org/Research/Regulation/BG1173.cfm>.

18. Carolyn P. Meade, *Aviation Taxes: Can We Leave FAA Funding on Auto-Pilot?*, 20 *V.A. TAX REV.* 191, 193 (2000).

19. See *id.*

20. AIR TRANSPORT ASSOCIATION, *AIRPORT AND AIRWAY TRUST FUND* (2004), available at <http://www.air-transport.org/econ/d.aspx?nid=1177>.

21. 20 *V.A. TAX REV.* 191, 193-94 (2000).

22. 49 U.S.C. § 40117 (2003). See also 14 C.F.R. pt. 158, available at <http://www1.faa.gov/arp/publications/notices/65fr34536.pdf>.

Congress authorized an increase in the maximum PFC rate that airports can charge passengers: \$4.50 per segment, with a cap of \$18 for a round-trip.²³ These taxes must be pledged to specific capital improvements that will: (1) preserve or enhance safety, capacity or security of the national air transportation system; (2) reduce noise; or (3) enhance competition between or among air carriers.²⁴ According to the Air Transport Association, every PFC is tied to specific capital improvement projects that have been approved by the FAA, and the fee expires when all of the money needed for the approved projects has been raised.²⁵

As of December 31, 2003, 341 airports were collecting PFCs – with 200 collecting the maximum of \$4.50.²⁶ Currently, more than \$1.5 billion in PFCs are collected each year, and the FAA has already authorized the collection of more than \$43.9 billion.²⁷ While the intent of the PFC program has been focused on safety and capacity improvements, only 19% of funds that have been collected have been used for airport safety and capacity improvements.²⁸

Taxes other than the PFC go into the Aviation Trust Fund.²⁹ The Treasury deposits all of these funds into the General Fund.³⁰ The Budget Enforcement Act of 1990 divides non-defense federal government spending into two major categories: direct (mandatory) spending and discretionary spending.³¹ Direct spending only occurs with entitlements, like Social Security, while discretionary spending, as the name suggests, is at the discretion of Congress.³² This means that even if Congress decreases authorizations and appropriations for FAA programs, aviation users continue to pay taxes and build-up the trust fund.³³

The last authorization bill, AIR-21, was considered landmark legislation because it dramatically boosted FAA funding levels, and essentially guaranteed that the revenues channeled into the Airport and Airways Trust Fund would be used for their intended purpose of aviation, and not

23. *Passenger Facility Charges* at <http://www.air-transport.org/econ/d.aspx?nid=1277>.

24. *Airport Financial Assistance, Passenger Facility Charge Program* at <http://www1.faa.gov/arp/financial/pfc/index.cfm>.

25. *Airline Handbook Chapter 7: Airports* at <http://www.airlines.org/public/publications/display1.asp?nid=967>.

26. *Passenger Facility Charges* at <http://www.air-transport.org/econ/d.aspx?nid=1277>.

27. *Id.*

28. *Airline Handbook Chapter 7: Airports* at <http://www.airlines.org/public/publications/display1.asp?nid=967>.

29. *See id.*; 20 VA. TAX REV. 191, 194 (2000).

30. *See id.*; 20 VA. TAX REV. 191, 195 (2000).

31. *Id.*

32. *Id.*

33. *Id.*

taken away by Congress.³⁴ With the enactment of AIR-21, Congress raised the cap to \$4.50, effective April 1, 2001. In addition to the cap per enplanement, the entire roundtrip journey has a statutory ceiling of \$18. The \$43.9 billion approved for collection is allocated as follows:

- Landside improvements (terminal, security)—34%
- Interest (payments on outstanding debt for eligible capital improvements)—31%
- Airside improvements (runways, taxiways, aprons, equipment, planning, or lighting)—18%
- Access (roads, rail, land, planning)—11%
- DEN (payoff of 1990s construction of Denver International Airport)—7%
- Noise abatement (land acquisition, soundproofing, monitoring, planning)—6%³⁵

C. THE IMPACT OF SEPTEMBER 11 ON THE TAX STRUCTURE

On November 19, 2001, Congress created the Aviation and Transportation Security Act (ATSA), establishing a new agency within the Department of Transportation.³⁶ This new agency, the Transportation Security Administration (TSA), bears responsibility for aviation security.³⁷ This Act became law on November 19, 2001 when President Bush signed the bill into law. Section 118 of ATSA, which added section 44940 to Title 49, U.S.C., requires that within 60 days of ATSA's enactment, or as soon as possible thereafter, TSA must impose uniform security service fees on passengers of domestic and foreign air carriers.³⁸ The TSA promulgated a Final Rule, 66 FR 67698, and it was published in the Federal Register on December 31, 2001.³⁹ Under this Rule, the TSA (still under the DOT at this time) can impose a security service fee of \$2.50 per enplanement on passengers of domestic and foreign air carriers in air transportation, foreign air transportation, and intrastate air transportation originating at airports in the U.S. Passengers cannot be charged for more than two enplanements per one-way trip.⁴⁰ Therefore, the cap for this fee is \$10 round trip.⁴¹ This fee is also imposed on passengers using

34. McGraw-Hill, Inc., *House, Senate Gearing Up for FAA Funding Debates*, AVIATION DAILY, Jan. 22, 2003, at 1.

35. *Passenger Facility Charges* at <http://www.airlines.org/econ/d.aspx?nid=1277>.

36. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

37. *Air Travel in the United States* at <http://www.tsa.gov/public/display?theme=175>.

38. *Imposition and Collection of Passenger Civil Aviation Security Service Fees* at <http://www.dot.gov/security/fedreg122801.html>.

39. 66 F.R. 67698 (2001).

40. *Id.* at 1.

41. *Id.*

frequent flyer awards, but not other non-revenue passengers.⁴²

These fees are to cover the costs of providing civil aviation security, namely:

- the salary, benefits, overtime, retirement and other costs of screening personnel, their supervisors and managers, and federal law enforcement personnel deployed at airport security screening locations;
- the costs of training such personnel and the acquisition, operation, and maintenance of equipment used by these personnel;
- the costs of performing background investigations of personnel;
- the costs of the federal air marshals program;
- the costs of performing civil aviation security research and development under Title 49, U.S.C.;
- the costs of federal security managers; and
- the costs of deploying federal law enforcement personnel.⁴³

The air carrier is responsible for collecting this tax.⁴⁴ Air carriers and foreign carriers must remit the total amount of fees collected during a calendar month to the TSA by the last calendar day of the following month.⁴⁵ Airlines can do this by paying through a "Do It Yourself" Internet payment site (<http://diy.dot.gov>) or by wire transfer.⁴⁶ The TSA collected \$970 million in fiscal year 2002 through this fee.⁴⁷

Additionally, the Aviation Security Infrastructure Fee (ASIF) was established to reimburse the TSA for the passenger and baggage screening costs that were previously incurred by the airlines themselves prior to the establishment of the TSA.⁴⁸ Because the air carriers no longer have to incur the cost of screening passengers and property, the air carriers are required annually to remit the Aviation Security Infrastructure Fee to the TSA which should be equal to its 2000 calendar year costs for security screening.⁴⁹

To determine these fees, each air carrier was required by regulation to submit security screening cost information for the calendar year 2000.⁵⁰ The air carriers are now paying a monthly fee based on that cost

42. *Id.* at 3.

43. *Id.*

44. 49 U.S.C. § 44940 (2003).

45. *Id.* at 3.

46. *Instructions for Paying the September 11th Security Fee to the Transportation Security Administration* at <http://www.dot.gov/911fees/feinstr.htm>.

47. *Id.*

48. U.S. Department of Transportation, *Statement of Admiral James M. Loy, Under Secretary of Transportation for Security Before the Subcommittee on Aviation; Committee on Commerce, Science, and Transportation for the U.S. Senate*, Feb. 5, 2003, at <http://commerce.senate.gov/pdf/loy020503.pdf>.

49. *Id.* at 4.

50. *Id.*

information.⁵¹ The TSA based projections for this fee at approximately \$750 million annually.⁵² Carriers, however, are certifying their costs in 2000 were only about \$300 million, which is about \$450 million less than previously estimated by both the airline industry and the TSA.⁵³ In fiscal year 2002, airlines paid \$240 million less than what was projected.⁵⁴ As a result of these reduced estimates for income, the TSA requested that Congress set the annual fee at \$750 million and requested changes to allow these fees to be assessed and collected in an equitable fashion among the carriers.⁵⁵

II. THE PROBLEMS WITH THE CURRENT TAX STRUCTURE

A. CONSTANT FLUX IN TAX RATES

Within a year after the September 11, 2001 attacks, Congress began discussing ways to provide more money for the TSA, already overrun at this point with debt.⁵⁶ U.S. airlines won a small battle, however, in defeating a plan to double the passenger security fees from \$10 to \$20.⁵⁷ It was originally part of a \$30 billion supplemental bill and would have added up to \$150 million to the Transportation Security Administration.⁵⁸

Congress in April temporarily lifted the security fee imposition of \$2.50 per segment, beginning on June 1, 2003, as part of a \$2.9 billion relief package to ease the impact of the war and terrorism on the airline industry.⁵⁹ On October 1, 2003, the U.S. government reinstated its \$2.50 security fee for all airline travelers departing from a U.S. airport.⁶⁰

As additional proof of the highly volatile nature of these rates, the September 11, 2001 fees were waived from June 1, 2003 through September 30, 2003, for a number of reasons including an anticipation of a drop in traffic due to concerns with U.S. conflict in Iraq, and a desire to provide relief for the airline industry.⁶¹ While the fees were waived, the ac-

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Appropriators Scrap Doubling Passenger Security Fee*, AVIATION DAILY, May 13, 2002, available at 2002 WL 7638348.

57. *Id.*

58. *Id.*

59. Leslie Miller, *Delta CEO: Let Feds Pay for Security*, June, 20, 2003, Pitt. Post-Gazette, at B19, available at 2003 WL 55948837; see also *Federal Register, Rules and Regulations*, May 21, 2003, available at <http://www.airlines.org/econ/files/FeeSuspensionRule.pdf>.

60. *U.S. Security Fee Reinstated*, AVIATION DAILY, Sept. 29, 2003, available at 2003 WL 8350068.

61. Trebor Banstetter, *U.S. to Resume Airline Security Tax*, Sept. 23, 2003, available at <http://www.dfw.com/mld/dfw/business/6842973.htm>; see also *U.S. Security Fee Reinstated*, AVIATION

tual level of security itself was not reduced.⁶² While the airlines did not have to pay the September 11, 2001 fee for four months, most consumers didn't notice the difference.⁶³ Most large US carriers raised their rates \$10 per roundtrip to coincide with the suspension of the September 11, 2001 Fee.⁶⁴ American Airlines initiated the increase for almost all fares, again effective the same day the fee was waived, and was matched immediately by Continental, Delta, United, US Airways, and Northwest.⁶⁵ In fact, instead of consumers benefiting from a decrease in costs, their actual costs increased as a result of the \$10 re-imposition, as the roundtrip September 11 fee was a "maximum" of \$10 roundtrip with connection(s).⁶⁶ Additionally, because the ASIF is based on 2000 security screeners' costs, there was not an opportunity for additional revenue from an increase in passengers.

Passengers would have to pay up to \$8 per airline segment as opposed to the current \$2.50 per airline segment to cover the TSA's budget annually.⁶⁷ This means that a passenger on a round trip flight with a connection would pay \$32 in security fees alone.⁶⁸ These large potential increases in funding illustrate that airlines would lose any price competitive advantage over other modes of transportation.⁶⁹

B. IMPACT OF TAXES ON AN ALREADY HURTING INDUSTRY

Air Tran CEO Joseph B. Leonard stated that the federal government is taxing the airline passenger at the highest federal tax rates for any service or product including liquor and cigarettes.⁷⁰ This forces fares up to levels that discourage travel for many, particularly bargain hunters and those who otherwise cannot afford to fly.⁷¹ Mr. Leonard argues that these new fees have a disproportionately negative impact on low fare car-

DAILY, Sept. 29, 2003, available at 2003 WL 8350068 (opining an anticipation of drop in traffic due to concerns of U.S. conflict in Iraq).

62. *U.S. to Resume Airline Security Tax*, *supra* note 61.

63. *Id.*

64. *Several U.S. Majors Raise Domestic Base Fares*, AVIATION DAILY, May 13, 2003, available at 2003 WL 8346934.

65. *Id.*

66. *Id.*

67. Stephen Power, *Airline Passenger Fees Don't Cover Cost of Airport Security*, WALL ST. J., Feb. 6, 2003, at D4, available at 2003 WL-WSJ 3958602.

68. *Id.*

69. Adam D. Thierer, *20th Anniversary of Airline Deregulation: Cause for Celebration, Not Re-regulation*, April 22, 1998, available at <http://www.heritage.org/Research/Regulation/BG1173.cfm>

70. *Air Tran Airways: Hearing Before the Subcomm. on Aviation, House Comm. on Transportation and Infrastructure*, at 1, Sept. 24, 2002, (Testimony of Joseph B. Leonard, Chief Executive Officer) available at <http://www.house.gov/transportation/aviation/09-24-02/leonard.html>.

71. *Id.*

riers and passengers seeking lower priced tickets and short haul markets, such as Air Tran.⁷² Mr. Leonard's statements before the U.S. Senate Aviation Subcommittee are relevant because they represent the views of one of the strongest low-fare airlines in the U.S.

The number of people flying commercially between 200 miles and 400 miles dropped 22 percent in the year after the attacks.⁷³ As one newspaper article described it:

the bite is biggest bite on the cheapest flights with the most connections. For someone traveling nonstop, the taxes and fees account for 25.6 percent of a \$100 fare, and 9 percent of a \$900 fare.⁷⁴ For a flight with one stop, the percentages range from 44.2% for a \$100 fare to 11.1 % on a \$900.00 fare.⁷⁵

There are options in the near future for the ASIF, and the TSA is interested in working with the airlines.⁷⁶ Beginning in fiscal year 2005, the TSA is allowed to changed the way it determines the per carrier limit for the ASIF.⁷⁷ It may base the limit on market share or other appropriate measures instead of the screening costs from 2000.⁷⁸ The TSA said it could define a carrier's ASIF share based on passenger enplanements, passenger revenue miles, tickets sold, or revenue.⁷⁹ The TSA is soliciting comments on when the adjustment should be made, and how often ASIF limits should be reviewed.⁸⁰ Some time after the 60 day comment period, the TSA will publish an interim final rule.⁸¹ Many carriers have said that the current system has not taken airline growth into account since 2000, and it provides unfair advantages to new carriers or those that spent less on security in 2000.⁸²

As mentioned earlier, the Aviation Trust Fund allows for funding for airports around the country.⁸³ The DOT has stated that the Airline Trust Fund is not as plush as original estimates.⁸⁴ DOT Inspector General

72. *Id.*

73. Leslie Miller, *Air Travelers Hitting the Road/Airport Hassles Drive Many to Cars*, HOUS. CHRON., Oct. 21, 2002, at 3A, available at 2002 WL 23231587.

74. Bruce Mohl, *Air Passenger Fees, Taxes Adding to Costs and to Some Worries*, BOSTON GLOBE, Feb. 16, 2003, at M7, available at 2003 WL 3380709.

75. *Id.*

76. Adrian Schofield, *TSA Considers Changing Airline Security Fee Formula*, AVIATION DAILY, Nov. 4, 2003, available at 2003 WL 8350813.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. See website pertaining to the various aspects of the airline industry available at http://www.gaservingamerica.org/how_work/work_funding.htm

84. Mead Urges a Priority List for Safety Improvements, AVIATION DAILY, March 17, 2003, available at 2003 WL 8345829.

Kenneth Mead testified to the U.S. House Appropriations Committee on March 12, 2003 that aviation trust fund receipts in fiscal year 2004 are likely to be far less than projected.⁸⁵ In April 2001, projected receipts were expected to be about \$12.6 billion, and have now fallen to estimates around \$10.2 billion.⁸⁶ Nonetheless, the FAA still requests the same amount of money.⁸⁷ Airports are concerned that trust money is being taken away from an already dwindling supply to pay for federally mandated security projects.⁸⁸

The reality is that the aviation industry today is a mixed bag. As Representative DeFazio, member of the House Transportation aviation subcommittee leadership stated last year, “[t]his committee would be here regardless of 9/11. The industry was in a dramatic downturn.”⁸⁹ The airline industry was already facing a financial downturn as a result of reduced passenger demand, and high labor costs.⁹⁰ The September 11, 2001 Fee and the ASIF are not “new” in the sense of an unexpected burden on air carriers and passengers: as highlighted, there are already numerous taxes and fees being assessed by local airports as well as the federal government. These new fees are inadequate, and do not meet the needs of either the federal government’s security demands, nor do they satisfy the airline industry, which had profit margins over the last two decades of around 1/2 %, compared to around 6% averaged for all industries.⁹¹ Today, some smaller and upstart airlines are taking advantage of lower cost numbers for security screeners in fiscal year 2000, where their ASIF costs are frozen. Unfortunately, the larger air carriers, which have lost passengers, are still paying the higher costs from fiscal year 2000. On the flip side, large carriers, operating long-haul flights through a hub-and-spoke system, experience a more proportionate burden of the September 11, 2001 fee. This is as opposed to the short-haul point-to-point airlines, which because of the reduced mileage at issue, end up having a disproportionate fee based on the cost of their ticket.

C. PRICE BREAKS FOR CONSUMERS

There is good news. The TSA is soliciting ideas for changing how the

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Mica to Introduce Bill to Ease Airlines’ Financial Burden*, AVIATION DAILY, Sept. 26, 2002, available at 2002 WL 7641052.

90. *Financial Condition of the Airline Industry: Hearing Before the Subcomm. on Aviation*, at 2, Sept. 24, 2002, available at <http://www.house.gov/transportation/aviation/09-24-02/09-24-02memo.html>

91. Air Transport Association Economics Chart, available at <http://www.airlines.org/econ/d.aspx?nid=1034>

ASIF is charged, prompting new calls for fairness and proportionality among the airlines. The September 11, 2001 fee, however, does not seem to be going anywhere – as was evidenced in the spring and summer with proposals to double the fee.⁹² There aren't even guarantees that the flying public would notice a difference in cost for airline tickets, as the air carriers have already illustrated in the summer of 2003 that they are happy to keep the savings themselves.⁹³ Nonetheless, the aviation industry is disproportionately taxed compared to other industries,⁹⁴ and in the spirit of the deregulation that came about over 25 years ago, the airline industry is in dire need of restructuring, allowing airlines to continue to compete not only with themselves, but with the other modes of transportation.

III. FEDERAL FUNDING FOR AVIATION SECURITY SHOULD COME FROM ALL BENEFICIARIES, NOT JUST AVIATION USERS

The Congressional Budget Office (“CBO”) stated that user fees serve two distinct functions: 1) allocating resources and 2) distributing of costs in line with benefits received.⁹⁵ Additionally, the CBO stated that user fees should raise funds in ways that are relatively easy to administer.⁹⁶ The CBO states that user fees should be tied fairly close to a good or service provided by the government to a specific class of users of that good or service.⁹⁷ While this specific study was focusing on taxes collected for the Aviation Trust Fund – the concept of security fees is analogous.⁹⁸ Fees assessed for security reasons should be somewhat easy to administer and be tied fairly closely with the service of providing security to that class.⁹⁹ In this case, one of the central questions to be resolved is who really is the user class, and what is the best way to assess fees for their safety?

In 1996 seven of the major airlines and 69 carriers of the Regional Airline Association developed a user fee plan.¹⁰⁰ Their complaint was simple: under the current ticket tax scheme, all passengers receive equal

92. *Appropriators Scrap Doubling Passenger Security Fee*, *supra* note 56.

93. *See generally Several U.S. Majors Raise Domestic Base Fares*, *supra* note 64, (stating the airline industry chose to raise fares rather than offer customer discounts).

94. *Air Passenger Fees, Taxes Adding to Costs and to Some Worries*, *supra* note 74, (stating that airline taxes on a \$100 ticket can run up to 25.6% of the fare).

95. *Financing the FAA: Comparisons of Existing and Alternative Systems to Provide Funding for Development and Operation of the National Airspace System*, at 2, available at <http://www.library.unt.edu/gpo/ncarc/whitepaper/fin-nas.doc>

96. *Id.*

97. *Id.*

98. *See Id.*

99. *Id.* at 2.

100. *Id.* at 4.

benefit of FAA oversight, but some passengers inherently pay more into the system than others.¹⁰¹ Much of the complaint stems from the concept that the ticket tax, in this instance, is based on the price of a passenger's ticket, rather than the cost of the services provided by the FAA.¹⁰²

The airline's proposal asked for the 10% ticket tax to be replaced with a charge for domestic flights that was more proportional to the services.¹⁰³ Specifically, they advocated for a \$2 fee per airplane seat, a \$4.50 per passenger, and a \$.005 per passenger per nonstop origin and destination mile.¹⁰⁴ The charge per seat (even if it's not occupied) is an attempt to charge the airline for the size of the aircraft.¹⁰⁵ The airline's past proposal attempted to relate the user fee to the costs imposed on the air traffic control system by aircraft size, regardless of the number of seats occupied.¹⁰⁶ The charge per mile is an attempt to reflect the amount of time en route and therefore the amount the aircraft used the air traffic control services.¹⁰⁷

Much of the animosity against this proposal by point-to-point providers, such as Southwest, could be because of the charge per mile. Because this charge would be "as the crow flies," a passenger flying from Washington, D.C. to San Francisco would be charged for the miles between the two cities regardless of whether the passenger has to connect in St. Louis, Minneapolis, or Atlanta.¹⁰⁸ In this situation, it could have been cheaper for a passenger to fly through the solidified hub and spoke system on a larger carrier going through a hub – even if it was more miles in actual flight distance flown.

Airlines and airline passengers have been turned into involuntary tools in an assault on the United States, as was evidenced on September 11, 2001. Sadly, it was not only those passengers in the planes who became victims, but also bystanders in buildings in New York and Virginia. As such, the "users" that are paying up to \$10 per round trip flight are helping fund a security system that not only is designed to protect the flying public, but also the public at large on the ground. This current tax is not an adequate representation of the intended use of security resources.

In the summer of 1996, Senator Fran Lautenberg (D-NJ) proposed a transfer of funds from the Department of Defense as recognition that

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 4-5.

108. *Id.* at 5.

terrorism is a national security threat.¹⁰⁹ His proposal was in the aftermath of the crash of TWA Flight 800, which at the time was thought by many to be an act of terrorism.¹¹⁰ This illustrates that even five years before the deadly attacks of September 11, 2001 where three airplanes were used as terrorist tools to target individuals and buildings on the ground, airline security was recognized as a national threat.

The recognition that airlines and airline passengers are paying a disproportionate amount of funding for security is broad. Specifically, Kevin Mitchell, Chairman of the Business Travel Coalition testified before the U.S. Senate Committee on Commerce, Science, and Transportation in 2003 that, “[t]he airline industry, and its customers, are shouldering a disproportionate burden of what is, in part, a national security budget.”¹¹¹.

Accordingly, the majority of funding for airline security should come from sources other than traditional user fees as are already being assessed. The TSA has announced that it is reconsidering how the ASIF is being assessed – being that the older year 2000 models are inequitable for most airlines. The TSA should also reconsider rescinding the September 11, 2001 Security Fee. As noted from Admiral Loy, the Security Fee already does not pay for all the security services provided by the TSA.¹¹² If the individual passengers must be charged for their portion of airline security, then it should be done in a more equitable fashion. As the fee currently exists, the passengers have to pay the same regardless if they are flying from Washington, D.C. to San Francisco, CA non-stop, or from Washington, D.C. to Richmond, VA. The amount of security being provided for these two hypothetical flights is not necessarily the same; an air marshal is much more likely to be on the transcontinental flight – one that, like in September 11, 2001 could be full of fuel to use as a terrorist weapon – compared to the regional jet that probably does not have an air marshal on board.¹¹³

One possible solution could be to assess a security fee based on the mileage of the flight, such as \$.005 per passenger mile. As noted in the

109. *Government Should Operate Aviation Security, Senators Say*, AVIATION DAILY, Aug. 2, 1996, available at 1996 WL 11113618.

110. *FBI Looks at Sabotage as Possible Cause of TWA Crash*, Nov. 26, 1996 available at <http://www.cnn.com/US/9611/26/briefs/fbi.html>

111. *The Status of the Airline Industry, A Sense of the Customer: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, at 2, Jan. 9, 2003, (Testimony of Kevin Mitchell, Chairman, Business Travel Coalition) available at <http://btweb.biz/commerce.htm>

112. *Hearing Before the Subcomm. on Aviation, Senate Comm. on Commerce, Science, and Transportation*, at 3, Feb. 5, 2003, (Statement of Admiral James M. Loy, Under Secretary of Transportation for Security) available at <http://btweb.biz/commerce.htm>

113. See Kit Miniclier, *Foreign Airlines Jittery About Use of Sky Marshals U.S. Order Could Lead to Gunfire*, DENVER POST, Jan. 4, 2004, at A.07, available at 2004 WL 59316350 (referencing the chances of having an air marshal on a flight are minimal because there are approximately 30,000 domestic flights daily and only about 3,000 of those have air marshals aboard).

UT study, this could be an equitable way to pay for security that is more matched with the services provided.

In conclusion, airlines have grown dramatically since deregulation in 1978. Passengers have significantly cheaper flights than 25 years ago, and many options with air carriers. Competition continues to be strong, with a new wave of low-cost airlines growing rapidly. However, the aviation landscape has changed as a result of the terrorist attacks on September 11, 2001, and aviation security is no longer focused just on the airliners and their passengers, but instead how the planes can be turned into terrorist weapons able to attack anywhere in the United States. As such, we are all users, and just as we all contribute to the Department of Defense, we should all contribute to aviation safety. If all of the funding for aviation security is unable to come from this fund, then aviation security should be charged in a more equitable fashion – one based on miles flown or costs paid. Aviation has become a “darling” of deregulation, and a model for other industries – it benefits everyone to ensure the model thrives by protecting the aviation industry through fair taxation.