

A Pilot's Bill of Rights

Help for Pilots and Attorneys

By Charles J. Senger



Imagine good weather urging a pilot to open the airport hangar door for some fresh air while working on a small plane. Through the open door comes not the usual airport aromas, but rather a blast from an airport owner. In short, alleged improper use of the hangar threatens termination of the hangar lease. As what appears to be a misunderstanding escalates, it looks like the pilot needs a lawyer. That could be you, and as you will read below, your tools for helping are now greater and on track to being enhanced even more.

As always, new laws create opportunities and urge attorneys to refresh their professional knowledge and skills. Thus, when a Pilot's Bill of Rights¹ becomes law and a sequel is introduced only a short time later—Pilot's Bill of Rights 2²—attorneys naturally question what they should know and what the implications are for the practice of law.

The bottom line is that as pilots, mechanics, and others obtain enhanced rights, attorneys also receive expanded abilities to use not only their administrative law skills, but also their federal litigation skills. Two stories, with some commentary, provide a good introduction to these changes in aviation law.

Before getting to the hangar case, consider first the pilot who landed on a runway contrary to a claimed Federal Aviation Administration (FAA) Notice to Airmen stating that the runway was closed. The pilot defended himself against FAA sanctions by stating both that the alleged notice had not been found and that a clearance to land on the runway had been appropriately given by a control tower at a nearby airport. Since towers must preserve copies of air traffic control communications for a short time, the case initially appeared simple. First, request a

copy of the Notice to Airmen from the FAA. Then, request a copy of the tape from the control tower, using the federal Freedom of Information Act³ if necessary. The evidence could then quickly resolve the case. The problem? The control tower in question was operated by a private company under contract with the government. Therefore, the company refused to provide the tape, claiming it was not subject to the Freedom of Information Act rules. But that wasn't all. The FAA refused to provide a copy of the Notice to Airmen it claimed had been violated.

The seemingly simple case suddenly became complicated. Unfortunately, the stakes were high. FAA sanctions can include revocation of the pilot's airman's certificate. That would be like losing a driver's license—a life-changing event, especially for someone who drives or flies for a living.

The Pilot's Bill of Rights helps here, and a bit more of the story and background will explain why it applies to many situations. For recreational flights, radar has often given the FAA the what and where details of an airplane flight. To prosecute a violation seen on radar, the FAA needs only the who: the name of the pilot flying the plane. Thus, upon landing, a controller may ask the pilot to taxi over to the tower to help clear up something. Or a letter may come in the mail, purporting to give the pilot an opportunity to give his or her side of the story. A pilot who responds with a name completes the FAA's case. The rest of the pilot's explanation may be seen as irrelevant.

In our story, however, the pilot's name turned out to be one the FAA would not have wanted to see: James Inhofe.⁴ Yes, that's Sen. James Inhofe of Oklahoma. Part of his response was to draft and guide to passage the

Pilot's Bill of Rights. Not surprisingly, it has specific provisions for requests for air traffic control tapes from governmental contractors and ensuring proper distribution of Notices to Airmen like the one alleged to have been given in Sen. Inhofe's situation.

So how else does the Pilot's Bill of Rights drafted by Sen. Inhofe help? Thankfully, it covers more than just the facts of his own situation. First, for actions regarding a pilot's certificate, it requires the FAA to include a warning somewhat like the familiar *Miranda* warning.⁵ Hopefully this will persuade more aviation clients to keep quiet until they speak with their attorneys. That may mean not going directly to the control tower for a chat after landing and not immediately responding to a letter from the FAA. Second, it also specifies that, when practicable, the Federal Rules of Civil Procedure and the Federal Rules of Evidence will be followed. Along with providing earlier access to federal district courts, these changes make the proceedings more formal but also invoke governing rules familiar to federal litigation attorneys. Although the more formal proceedings may entail higher costs for clients, they also make applicable some more protective rules. For example, evidence offered might be based on an allegation that the pilot casually said something to one of the fuel truck drivers, who repeated it to one of the mechanics, who mentioned it to another pilot, who.... Is effective cross-examination possible if the FAA offers testimony from only the last link in this classic telephone-game scenario? Now the answer is that the Pilot's Bill of Rights enables attorneys to apply the Federal Rules of Evidence to ensure multiple levels of hearsay will not informally slip into a case to seal a defendant's fate.

And then there is the airport hangar scenario mentioned earlier. Consider the situation of a person who has rented a hangar to have space necessary to not only store the aircraft, but also to do some maintenance. Planes, after all, benefit from covered storage, routine washing, upholstery cleaning, and the like, even though they typically do not fit into a home garage. Similar arguments are raised by persons who wish to complete the construction of a homebuilt aircraft. Like many airport facilities, however, hangars often involve federal funding. The FAA can therefore claim the power to act,⁶ as can the local governmental entity controlling the airport. In one case, the city of Concord, North Carolina (the airport's sponsor) had asserted a narrow definition of aeronautical activities, and on the basis of a complaint filed by an aircraft owner, the FAA had to determine whether the city was exercising its discretion properly.⁷ The city won.⁸

The concerns of the FAA or local government are easy to understand. Unfortunately, some people clearly abuse the availability of hangars by using them for non-aviation storage or, in some cases, even building houses concealed in hangars.⁹ Another concern is how the rules

Fast Facts

Even attorneys who don't practice aviation law should be aware that the Pilot's Bill of Rights allows greater protections for clients.

Federal funding of airport hangars leads to interesting property issues.

For actions regarding a pilot's certificate, the Pilot's Bill of Rights requires the FAA to include a warning somewhat like the familiar *Miranda* warning.

are used. For example, one potential problem is that an airport may discriminate in the application of the rules to force out small planes in the hope of attracting only business jets with profitable appetites for airport-supplied fuel. In any case, the problem is the familiar one of a general rule that is needed to check abuses, but is subject itself to misuse.

Hangar situations like the one above led the FAA to issue a proposed rule to clarify existing law.¹⁰ Comments to the proposed rule suggest broad support for additional changes.¹¹ Other changes likely will come from the Pilot's Bill of Rights²¹² now before Congress. Sen. Inhofe sought input from the aviation community before drafting additional legislation to address a number of concerns, including:

- expanding the types of aviation certificates protected under the new rules,
- making even clearer the application of the Freedom of Information Act to contractual control towers and other contractors who maintain flight records,
- giving aviation medical and pilot examiners a limitation on civil action liability,
- providing liability protection for volunteer pilot nonprofit organizations that fly for the public benefit (e.g., transporting a financially needy patient to a distant hospital), and
- extending the types of situations in which an individual may act as the pilot in command of the aircraft without a medical certificate as long as other criteria are met.

In addition, the National Transportation Safety Board has long been accused of deferring too much to FAA determinations. The new bill therefore underscores that administrative remedies do not have to be exhausted before certificate denials, suspensions, or revocations can be appealed to a federal district court; appellate review will be *de novo*; and the burden of proof will be on the government.

So, two agency cases, a new law, and more legislation in the hopper. What does all of this mean for an attorney who does not concentrate in aviation law? Simple. Recent developments, like the increased use of drones, are bringing more and more people under federal aviation law. Likewise, new legislation allows attorneys to protect clients using advanced litigation tools. Being aware of these changes empowers attorneys to better assist clients in obtaining the help they need. That is good news, not only for clients, but also for attorneys and our profession. ■



Charles J. Senger, JD, PhD, a pilot for 45 years, clerked for two appellate judges, practiced corporate law, became a certified flight instructor, and taught at two law schools. His career focus has been on helping students by researching teaching, testing, and learning in both law school and aviation. Retired after more than 36 years of teaching, he is now a distinguished professor emeritus of Western Michigan University Cooley Law School.

ENDNOTES

1. 49 USC 44703.
2. 2015 HR 1062.
3. 5 USC 552 *et seq.*
4. FAA letter of January 4, 2011, for File No. 2011SW170014, stated that remedial training had been completed, that no legal enforcement action would be pursued, that the letter was neither an admission nor an adjudication of a violation, and that the record would be expunged after two years. According to its website, The Smoking Gun successfully filed a Freedom of Information Act request for a copy of the FAA letter. The Smoking Gun, *Inhofe "Scared the Crap Out Of" Airport Workers* <<http://www.thesmokinggun.com/documents/bizarre/inhofe-scared-crap-out-airport-workers-192645>>. The requested letter itself is posted on its site <<http://www.thesmokinggun.com/file/senator-inhofe-report?page=1>>. All websites cited in this article were accessed November 10, 2015.
5. See generally *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694(1966).
6. See John H. Anderson Jr., director, Transportation Issues, Resources, Community, and Economic Development Division, Statement before the House of Representatives Subcommittee on Aviation, Committee on Transportation and Infrastructure (June 9, 1999) <<http://gao.gov/assets/110/107956.pdf>>. The director's statement stems from a prior U.S. General Accounting Office (GAO) report. See U.S. GAO, *Report to Congressional Requesters: General Aviation Airports: Unauthorized Land Use Highlights Need for Improved Oversight and Enforcement* (May 7, 1999) <<http://www.gao.gov/assets/230/227215.pdf>>.
7. *Ashton v City of Concord*, FAA Decision & Order, issued July 3, 2000 (Docket No. 16-99-09) (director's determination affirmed by final agency decision) <<http://www.flybouldercity.com/sites/default/files/Ashton%20vs%20concord.pdf>>.
8. *Id.* The aircraft owner's follow-up complaint also failed. *Ashton v City of Concord*, FAA Decision & Order, issued October 16, 2000 (Docket No. 16-00-01). Petitions for review of both agency decisions (16-99-09 and 16-00-01) were denied by an unpublished per curiam decision. *Ashton v FAA*, unpublished opinion per curiam of the U.S. Court of Appeals for the Fourth Circuit, issued September 20, 2011 (Docket Nos. 00-2134 and 01-1562) <<http://www.ca4.uscourts.gov/Opinions/Unpublished/002134.U.pdf>>.
9. For an idea of what sometimes is found in hangars, see, e.g., *Valley Aviation Servs, LLP v City of Glendale*, FAA Director's Determination, issued May 24, 2011 (Docket No. 16-09-06) <<http://static1.squarespace.com/static/54234bb5e4b02306d8349141/t/549b37fee4b09ca9ce5e3a69/1419458558016/FAA+Docket+No.+16-09-06+%28Glendale%2C+AZ+Case%29+pg+1-31.pdf>>.
10. 79 Fed Reg 42483 (proposed July 22, 2014).
11. See, e.g., Letter from Sean Elliott, vice president, Experimental Aircraft Association Advocacy and Safety, to U.S. Department of Transportation, Docket Operations M-30 (October 2, 2014) <https://www.eaa.org/~media/Files/News/2014-10-02_EAA-Non-Aeronautical-Hangar-Use-Policy-Comments.pdf>.
12. 2015 HR 1062.