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## Establishing Commercial Aviation Safety Privilege: Court Precedent versus Statute

Jason Powell  
ERAU, powel55d@my.erau.edu

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The purpose of safety investigations is to identify potential problems quickly and resolve those problems through recommendations. Without complete disclosure by witnesses or participants, investigators may miss a key piece of information that would otherwise be critical to identifying a hazard. Unlike criminal investigators who must inform interviewees of their right to remain silent, a safety investigator has no requirement or ability to protect information provided during an interview and everything an interviewee says can be used against them in the court of law (49 CFR 831, 2022; *Miranda v. Arizona*, 1996). There is no special status awarded to safety investigators; however, they have a vital role and need the tools to keep aviation safe.

Privileged communications allow interviews to stay within the realm of safety and not transgress into the criminal or civil courts. A statute can provide a method to recognize commercial aviation safety privilege as a protected form of communication, just as the Department of Defense (DoD) receives, reduce the effects of judicial bias, and provide a foundation for international information sharing. To understand whether a statute would improve aviation safety, we must first explore the differences between common-law and statute, what kinds of privileges exist in common-law and statute, and what common-law recognizes as safety privilege for the United States DoD.

### **Common-Law and Statute**

Stare decisis is the principle of common-law whereby legal systems place importance on the judicial decisions of previous courts (Ponzetto & Fernandez, 2008; *Stare Decisis*, 2022). Every state within the U.S. uses a common-law judicial system, apart from Louisiana, which uses a civil legal system (*Stare Decisis*, 2022). The primary benefit of a common-law system is the flexibility and ability to adapt to changes over time (Ponzetto & Fernandez, 2008).

The flexibility of the common-law system allows judges to converge on topics and standardize their response within the cultural context of the population as interpreted from the judge's perspective (Ponzetto & Fernandez, 2008). The ruling is limited to the context of the case before the judiciary; however, the judge can address issues within his or her current ruling while incorporating other judicial opinions. Incorporating previous decisions with the current judge's argument helps to establish a midway point for future rulings. The ability of the court to converge makes decisions and case law more efficient (Ponzetto & Fernandez, 2008). However, the system allows the judge to ignore previous decisions allowing for judicial bias that is credited by too many activist judges who are a product of the political system that either appointed or elected the judge to his or her office (Ponzetto & Fernandez, 2008). A serious weakness of the common-law system not found in civil law is that courts do not have to adhere to the ruling of prior courts, nor are they bound by previous decisions in superior courts (*Stare Decisis*, 2022).

Civil legal systems rely on the legislature to declare a statute or ordinance instead of the precedent set by the judiciary (Stare Decisis, 2022). This does not mean precedent does not matter in a civil legal system. The importance of judicial decisions and interpretations is not as critical in a civil system as it is in a common-law system, thereby reducing some of the bias by activist judges (Stare Decisis, 2022). The consequence of the definitive nature of a statute is that it does not evolve with the changes of the prevalent culture (Ponzetto & Fernandez, 2008). This makes a civil law system static, and the people who live with the law are confined to the political wording of the legislature in power at the time of the publication. The secondary benefit of the civil law system is that it is relatively protected from activist judges who disagree with previous rulings and want to set a new precedent (Ponzetto & Fernandez, 2008).

Even with strict adherence to precedent, common-law cannot completely address a set issue, encouraging the legislature to address those fixed issues within statute (Ponzetto & Fernandez, 2008). The common-law system may be more efficient and flexible, but the legislature of every state still passes laws and enforces statutes. The U.S. system of law works best when the legislature sets specific statutes, when necessary, and the judicial system interprets the statute. This works well when considering the concept of aviation safety privilege, which has established case law within the DoD, discussed below, and there are federal statutes in place for other types of safety investigations, such as nuclear safety investigations (10 CFR 1708, 2022).

### **Privilege**

The judiciary's purpose is to seek the truth; however, privileged communication is the antithesis to truth-seeking since it requires information to be left out of evidentiary discovery (Bartholomew, 2017; Elmore, 2014). The concept of privilege started under the English system in the sixteenth century (Elmore, 2014). The State of Connecticut defines privilege as “a legal rule that protects communication within certain relationships from compelled disclosure in court proceedings” (Legal Guide, 2022). Privileged communications are a concept protected under and upheld in precedent through common-law (Federal Rules of Evidence 501, 2022). The Supreme Court held the concept that Federal courts must recognize specific non-constitutional privileges, many of which originate under common-law (Federal Rules of Evidence 501, 2022). Under House Rule 501, all concepts of privileged communication entered under common-law or as dictated by the state law under civil litigation unless a federal law exists contrary to the common-law of the state (28 CFR 1332, 2022; Federal Rules of Evidence 501, 2022; *Sola Electric v. Jefferson Electric Company*, 1942). Every state has at least one privilege recognized in statute. The commonly recognized privileges are between a husband and wife (spousal), clergy, doctor-patient (medical), and legal counsel (Federal Rules of Evidence 501, 2022; Legal Guide, 2022).

To continue the mission of seeking justice, many state courts recognize tests for certain types of privilege, such as spousal and clergy communications, which generally places the requirement on the individual to protect the privileged communication (Bartholomew, 2017; Elmore, 2014). The communication between spouses is considered private, and one spouse must elect to give up the right not to testify (Elmore, 2014). The concept is to prevent the State from violating the privacy of a personal relationship as important as marriage (Elmore, 2014).

There are very few federal-level clergy privilege cases, and the federal government relies heavily on previous state precedence for interpreting Federal Rules of Evidence 501 (Bartholomew, 2017). The Federal Rules of Evidence 501 (2022) recognized clergy as a protected form of communication; however, state precedence demonstrates a reluctance of clergy to withhold information, allowing the clergy to testify in court (Bartholomew, 2017). Bartholomew (2017) explained the need for individuals asserting the privilege to bear the requirement for compelling the court not to allow clergy to testify if they are willing to communicate, even though all fifty states have a set statute recognizing communication with clergy as a protected privilege. Thus, the clergy can decide whether they should utilize their legally protected privilege, unlike the medical community.

Unlike clergy privilege, medical privilege varies from state to state, with only twenty-nine states having statutes that dictate medical privilege (Schuite, 2019). Medical privilege is a familiar concept recognized throughout the world, and each country has different criteria for what doctors must report, even if the patient thinks the communication is private (Schuite, 2019). The Health Insurance Portability and Accountability Act (HIPAA) is a federal statute (45 CFR 164.512, 2022), that has a provision for a duty to warn and a duty to protect beyond the patient. Case precedent demonstrates the culpability of a doctor who does not report medically dangerous behavior or other concerns that may affect public safety even if these admissions were considered a private conversation between a doctor and a patient (Schuite, 2019).

Even though there are multiple types of privileged communications recognized by federal and state statute, there are types, such as military aviation safety privilege, which are only recognized in a limited fashion by court precedent (Carrel, 2018; ICAO, 2002; Federal Rules of Evidence 501, 2022). As this section demonstrated, the judicial system and legislature walk a fine line to protect the public while protecting valuable relationships. The balance between the different protections and safety is apparent, as is the need to keep the balance.

#### **Department of Defense Safety Privilege**

Currently, the DoD is the only U.S. body entitled to safety privileged communications in aviation mishaps (49 CFR 831, 2022; Carrel, 2018). This allows the safety investigator to offer a promise of confidentiality to a witness or

participant to compel testimony (Carrel, 2018; ICAO, 2022). This protection is not a blanket provided to everyone involved in a mishap. Only information provided through the confidential statement and the safety board process is protected through the safety privilege with court precedent requiring all factual data to be released (Machin v. Zuckert, 1963; Karantsalis v. Department of the Navy, 2013; Lofgren v. Polaris, 2021).

The original case that determined the DoD needs safety privilege is Machin v. Zuckert (1963). The judicial decision established the need for the DoD to quickly find the cause of a mishap to prevent further degradation of the DoD mission (Machin v. Zuckert, 1963). Karantsalis v. Department of the Navy (2013), Cooper v. Department of the Navy (1977), and Lofgren v. Polaris Industries (2021) are just a few of the attempts to gain access or utilize privileged safety reports in judicial proceedings since the Machin (1963) case. The plaintiff's general theme is a challenge to the need for the military branch of service to prevent the release of information available in safety reports. For example, in at least the United States v. Weber Aircraft Corporation et al. (1984) case, a lower court went against precedent. This court of appeals judge cited another court case whereby intra- and interagency correspondence could not be protected from admission in court. This judge further ruled that a safety report could be considered correspondence and entered as evidence through the discovery process and is protected against the Machin v Zuckert (1963) privilege (U.S. v Weber Aircraft Corp., 1984). However, a higher court ruled against this decision and prevented the evidence from discovery (U.S. v. Weber Aircraft Corp., 1984). A statute setting the limits of privilege would help alleviate the discrepancy seen between the court precedent and the legal requirement to release information.

The International Civil Aviation Organization (ICAO) (2002) allows for the non-disclosure of interviews to encourage testimony by preventing “inappropriate disciplinary, civil, administrative, and criminal proceedings” by a state because of said testimony. The DoD allows each service to dictate how they operate their safety privileges for the exact reasons the ICAO (2002) discusses. Carrel (2018) dictates how the U.S. Air Force protects and provides safety privileges; however, he clearly states that the DoD only has this ability through stare decisis.

### **Conclusion and Recommendations**

The commercial aviation communities can benefit from aviation safety privileges during NTSB-led investigations. This concept allows the safety investigator to compel testimony by offering protection from prosecution or civil liability, as part of the investigation. Safety privilege does not protect an individual from willful negligence or criminal behavior. This protection is built upon a solid safety culture and increases accident prevention. It further allows for the distribution of safety investigations within the aviation community for accident prevention.

There are federal statutes that manage certain cases of safety privileged communication. ICAO requires doctors to report medical data on patients that are pertinent to safety investigations for reasons of substantial public interest following the Chicago Convention and E.U. Regulation 996/2010 (Schuite, 2019). The FAA does not have a requirement for the sharing of health information; however, the FAA does require disclosure of health information in good faith between the pilot and his or her aeromedical examiner (AME) (Schuite, 2019). According to Schuite (2019), the FAA desires a standard medical privilege and safety investigations policy.

Another excellent example of a statute that helps protect the general public is the need for quick and accurate investigations within the nuclear enterprise. 10 CFR 1708 (2022) establishes the need for safety privileged communications during a nuclear safety investigation. This statute enables investigators to provide protection for the interviewee to promptly ensure the accuracy and completion of the safety investigation. With a statute, the safety investigation does not have to rely on *stare decisis* and has the protection afforded by U.S. law in criminal and civil prosecution.

The ICAO (2002) and DoD (Carrel, 2018) recognize the need to compel testimony to quickly resolve potential safety issues in aviation. Without a federal statute managing aviation safety communications, civil and criminal prosecution for aviation mishaps fall under the common law as established by *stare decisis* or state statute. The challenge with relying on *stare decisis* is the risk for prosecution because the communication lacks the protection of statute (49 CFR 831, 2022; 49 CFR 1114, 2016; ICAO, 2002; *Stare Decis*, 2022). Statute can outline the requirements for aviation safety privilege as 10 CFR 1708 (2022) does for nuclear safety investigations while extending the privilege beyond that of the Department of Defense.

This limitation is a problem for safety investigators, as they do not have the same requirements as criminal investigators or law enforcement officers, even if the result may be a criminal or civil liability (49 CFR 831, 2022; *Miranda v. Arizona*, 1996). The knowledge of possible prosecution or lawsuit may compel an interviewee to remain silent or not provide a full testimony. Aviation safety investigators will have a valuable tool to accomplish their task of quickly finding a hazard and making recommendations to reduce the risk caused by the hazard through the addition of wording from 10 CFR 1708 (2022), Procedures for Safety Investigations, or by adding the following edited wording from 28 CFR 22.28 (2022) to 49 CFR 831, Investigation Procedures, which are currently used by the National Transportation and Safety Board (NTSB) investigator:

(a) [Interviews or statements] identifiable to a private person shall be immune from legal process and shall only be admitted as evidence or used for any

purpose in any action, suit, or other judicial, legislative or administrative proceeding with the written consent of the individual to whom the data pertains.

(b) Where consent is obtained, such consent shall:

(1) Be obtained at the time that information is sought for use in judicial, legislative or administrative proceedings;

(2) Set out specific purposes in connection with which information will be used;

(3) Limit, where appropriate, the scope of the information subject to such consent.

(28 CFR 22, 2022)

Once established in statute, the FAA may apply penalties for violations of aviation safety privileges through 49 USC 46301 Civil Penalties, under the FAA Compliance and Enforcement Program. Furthermore, the FAA may further work with other countries to develop a method of sharing information with international partners. The ICAO (2002) recognizes the need to limit the distribution of safety information due to specific state statutes that provide harsh punishments, which could receive protection under an aviation safety privilege report redacted correctly per 14 CFR 193 (2022). The statute allows the U.S. government to point to a specific law that would allow for information sharing between countries.

Codifying aviation safety privilege into statute would significantly enhance the commercial safety process while opening doors for the FAA to establish a national policy for protecting privileged information. There is enough historical information provided through the stare decisis process under the DoD case law to develop a legislative bill. The loss may be the inability to change with time and a more significant limit on the flexibility of the DoD safety privilege currently in use. The need for a positive safety culture in aviation outweighs some limitations that may be gained through a statute.

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