

Absolute Discretion

Protect yourself from an overzealous FAA

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Pilots beware. While our goals and those of air traffic control are the same, we are not considered members of the same team when things go wrong. The FAA is judge, jury and executioner in most disputes between pilot and controller. In a society where the rule of law has levels of appeal to ensure fairness, the FAA's decisions go virtually undisputed.

The FAA's Compliance and Enforcement Program is outlined in FAA Order 2150.3B and states that its discretion when deciding to bring a legal enforcement against a pilot is "absolute and presumed to be immune from review" (Chapter 7, Paragraph 3.b). As for the pilot, the NTSB noted when dealing with the FAA, "inattentiveness or carelessness is presumed" (as we shall see in a case that upheld an FAA violation).

The best way to stay clear of the FAA's sights is to fly perfectly, in accordance with all those regulations, manuals and convention that govern everything from licensing and training to the very manner in which we apply stick and rudder. If that doesn't work, we need to be ready to document our transgressions with what some have come to call a "Get Out of Jail Free" card. Confession is good for the soul and for your chances to prevail in the FAA's omnipotent court of law. And if that fails you, it may be time to get legal help from an aviation attorney who knows how the system works. After all, this is your livelihood we are talking about.

Step One: Fly Perfectly

If you flew the airplane perfectly all the time, none of this would be of any concern to you. But the system

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The San Jose TECKY ONE departure overlaid with the San Francisco Class B altitudes.

includes more than just you. You have to fly perfectly with an ever-changing environment, with other less-than-perfect airplanes sharing your airspace, with an air traffic control system that is less perfect than you, and in a system with rules that vary from place to place across the world, and change from day to day. Perfection is impossible.

No example better serves to prove that than the classic altitude bust. Imagine you have departed the busy Los Angeles area on an IFR flight plan with a clearance to 17,000 ft. You fully expect to get the next clearance before reaching 17,000 ft.

ATC: "Climb and maintain flight level two three zero."

You: "Roger, climb to flight level two three zero."

Passing 18,200 ft. you hear this:

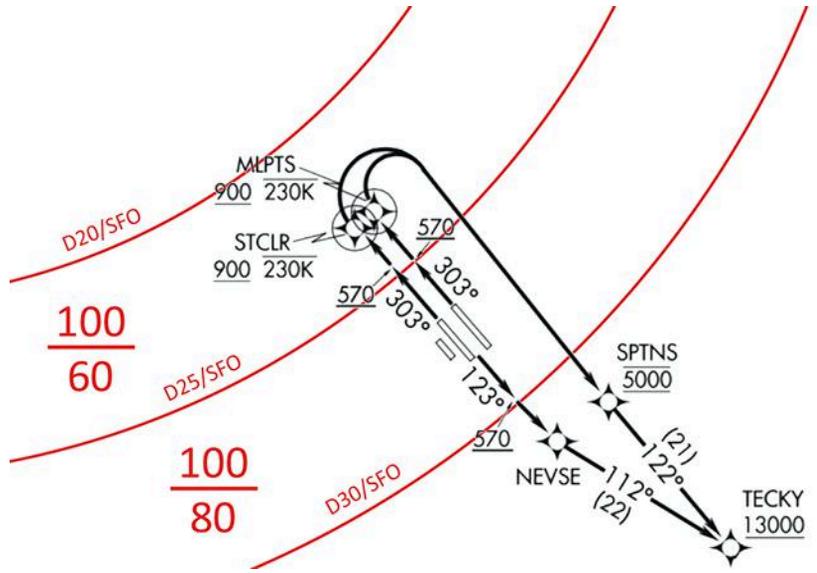
ATC: "Say altitude?"

This was the scenario for Capt. Richard Merrell, the non-flying pilot in command of Northwest Flight 1024 back in 1994. The clearance to FL 230 was intended for American Airlines Flight 94 (note the familiar sounding call sign) and both pilots read back the clearance at precisely the same time. Because Capt. Merrell's read-back was "stepped on," air traffic control never heard it and did not correct his error.

The FAA issued an enforcement order against Capt. Merrell. The order alleged that Merrell had violated FAA regulations by operating an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised, in violation of 14 CFR Part 91.123(b).

Merrell appealed the enforcement order. After listening to the tape he conceded that he had simply "misheard" the instruction but argued that ATC controllers are required to correct erroneous read-backs. The NTSB accepted his arguments and dismissed the enforcement order, saying there was "no evidence in the record that [he] was performing his duties in a careless or otherwise unprofessional manner."

The FAA argued that the Safety Board's decision would have a "profound" negative effect on air safety: "Under the decision, airmen can claim, without further proof, that they did not hear or that they misperceived safety



crucial instructions as a means to avoid responsibility for noncompliance or erroneous compliance with ATC clearances and instructions."

NTSB Order No. EA-4814 reversed the Board's earlier dismissal: "Under the administrator's interpretation of the relevant regulations, however, an error of perception does not constitute a reasonable explanation for a deviation from a clearly transmitted clearance or instruction. Rather, inattentiveness or carelessness is presumed from the occurrence of a deviation unless, as we understand it, the misperception or mistake concerning the clearance was attributable to some factor for which the airman was not responsible, such as an equipment failure."

Carelessness is presumed. The FAA is given free reign in these cases unless the pilot can prove there was a factor beyond his or her control. The pilot can be forgiven for thinking he or she is guilty until proven innocent in these cases. So how does the pilot keep this from happening in the first place?

(1) Hear the transmission clearly. Wearing a headset helps; wearing a noise reduction headset helps a lot. Best practices dictate you receive every clearance using a headset and never rely on cockpit speakers.

(2) Read back the clearance or instruction, clearly and in the order the controller expects it. *The Aeronautical Information Manual*, Paragraph 4-4-7, recommends you begin your read-back with your call sign and then the clearance exactly as it was given to you. Few pilots start their transmissions

with their call signs, reasoning that the sooner they spit out the clearance the better the odds they will remember it. But starting the transmission with your call sign prepares the controller to listen. If you read back the clearance in the exact order given, the controller will be more apt to detect any errors.

(3) Never say "to" or "for" in an altitude clearance. Common practice is to read back an altitude clearance while still climbing or descending using the words "to" or "for." For example, "Tiger 66 is passing 6,000 ft. for 3,000 ft." In 1989, Flying Tiger Flight 66 was told to descend "two four zero zero" (2,400 ft.) but the pilot heard "to four zero zero" (400 ft.). The aircraft crashed and all aboard were killed. A better technique is to avoid "to" and "for" in any altitude clearance by using the words "climbing," "descending" and "passing" instead. Our example read-back becomes: "Tiger 66 passing 6,000 ft., descending 3,000 ft."

(4) Avoid jargon. You may understand "angels," "tally ho," "bogey" or even "fish finder." But the controller might not. The FAA gave you and the controller a perfectly good pilot/controller glossary for a reason. You should use it.

Missing an altitude clearance in the heat of battle can be explained in many cases because we operate in a dynamic environment, air-to-air communications can be garbled, and all this is happening in real time. There was a time that the person on the other side of the radio not only understood this but also had the power to make the entire incident disappear. No longer.



TECKY ONE departure on a Gulfstream 450 FMS.

In 1998, a tower controller's error at LaGuardia Airport brought a landing airliner within 20 ft. of another taking off. Neither the controller nor his supervisor reported the incident and only the airline pilot's complaints to the NTSB brought the incident to light. Subsequent investigations uncovered a pattern of these failures to report and prompted the FAA to institute corrective programs called everything from "Air Traffic Quality Assurance" to the "Operational Error Detection Program." Real-time software systems, such as the Traffic Analysis Review Program (TARP), automatically detect, flag and report loss of separation and other occurrences at air traffic terminal facilities without controller input or knowledge. A controller may no longer have the ability to forgive an infraction and may in some cases be at risk when deciding to do so.

Procedure Design: Putting Pilots and Controllers at Risk

You may have heard of 14 CFR Part 91.117(c) and you may even know what it says:

"No person may operate an aircraft in the airspace underlying a Class B airspace area designated for an airport or in a VFR corridor designated through such a Class B airspace area, at an indicated airspeed of more than 200 kt. [230 mph]."

But how often do you consciously plan for it? The controller also knows the rule but may not care until the day the sky

is crowded with smaller aircraft that are having trouble spotting you in time to avoid a collision. Consider the San Jose TECKY ONE departure published on Jan. 8, 2015.

If you simply pull up the departure procedure, read the narrative and mentally

fly the solid black line, you can be forgiven for thinking you can accelerate to 230 kt. right after takeoff. The first waypoints departing Runway 30 Left or Right have two restrictions: You must be at least 900 ft. in altitude and you cannot be faster than 230 kt. Since we are normally keyed to remaining below 250 kt. when below 10,000 ft., we tell ourselves our new target speed is 230 kt. until passing STCLR or MLPTS. And the flight management system on many airplanes will dutifully accelerate to that speed, Class B overhead or not.

Class B area you should print the chart or have it readily accessible in the cockpit. If you can overlay the chart on your avionics you should. You should also add Class B considerations to departure procedure and approach briefings.

Chances are the first person to detect a problem will be the one sitting in the pilot's seat. You know the rules and you might, after all is said and done, realize you might have "brushed up against" a restriction. Or you may get the dreaded "November XXXX, advise ready to copy a phone number" instruction. Your first indication could very well be a registered or certified letter. No matter how you find out, you need to start thinking about the space program.

Step Two: Confession

In 1975, the FAA enlisted the help of NASA to act as an independent third party to receive and process Aviation Safety Reports from pilots, controllers and other users of the National Airspace System. The intent was very good, of course. Allowing the free, unrestricted flow of information gave the FAA the data it would not normally get

DO NOT REPORT AIRCRAFT ACCIDENTS AND CRIMINAL ACTIVITIES ON THIS FORM.
ACCIDENTS AND CRIMINAL ACTIVITIES ARE NOT INCLUDED IN THE ASRS PROGRAM AND SHOULD NOT BE SUBMITTED TO NASA.
ALL IDENTITIES CONTAINED IN THIS REPORT WILL BE REMOVED TO ASSURE COMPLETE REPORTER ANONYMITY.

(SPACE BELOW RESERVED FOR ASRS DATE/TIME STAMP)

IDENTIFICATION STRIP: Please fill in all blanks to ensure return of strip.
NO RECORD WILL BE KEPT OF YOUR IDENTITY. This section will be returned to you.

 2013 May 08 AM 12:00
NASA AMES, MFT, FLA.

TELEPHONE NUMBERS where we may reach you for further details of this occurrence:

HOME Area _____ No. _____ Hours 2000-0600
WORK Area _____ No. _____ Hours 0600-2000

NAME _____
ADDRESS/PO BOX _____
CITY _____ STATE _____ ZIP _____

TYPE OF EVENT/SITUATION
ATC Clearance _____

DATE OF OCCURRENCE 05/07/0300
LOCAL TIME(24 hr. clock) 23:00

PLEASE FILL IN APPROPRIATE SPACES AND CHECK ALL ITEMS WHICH APPLY TO THIS EVENT OR SITUATION.

NORCAL Departure Control would be fully within their rights to point out that you are flying below the San Francisco Class B airspace and your speed cannot exceed 200 kt. under 14 CFR Part 91.117(c). The fact the Class B is not mentioned or depicted on the departure procedure is no excuse. NORCAL has been called several times on the discrepancy and it's been said that more than one pilot deviation has been issued.

So how do you protect yourself from the unknown Class B area that may be lurking over your head? If your departure or destination lies underneath a

ASRS Reporter Identification Strip

to expose problems and then take the necessary corrective actions.

In return, it was said, licensed pilots, air traffic controllers, dispatchers, mechanics and others would get a form of immunity, a "Get Out of Jail Free" card of sorts. But it doesn't really work that way. The Aviation Safety Reporting Program, now known as the Aviation Safety Reporting System, was designed in 1975 and is outlined in Advisory Circular 00-46E, which has been modified three times. What

you know about the program may have changed.

Title 14 of the Code of Federal Regulations (14 CFR) Part 91.25 prohibits the use of any reports submitted to NASA under the ASRS in any disciplinary action, except information concerning criminal offenses or accidents that are covered under Paragraphs 7a(1) and 7a(2). Notice that it does not prohibit enforcement action, just the use of the information in the ASRS report.

The FAA considers the filing of a report with NASA concerning an incident or occurrence involving a violation of 14 CFR to be indicative of a constructive attitude. Although a finding of violation may be made, neither a civil penalty nor certificate suspension will be imposed if: (1) the violation was inadvertent and not deliberate; (2) it did not involve a criminal offense, accident or discloses a lack of qualification or competency; (3) the person has not been found in any prior FAA

enforcement action in the previous five years, and (4) the ASRS report had been filed in a timely fashion.

AC 00-46E defines timely as “within 10 days after the violation, or date when the person became aware or should have been aware of the violation, he or she completed and delivered or mailed a written report of the incident or occurrence to NASA.” The sooner the better, even though you might not become aware until weeks or months later when the registered or certified mail arrives with a notice from the FAA.

In other words, filing an ASRS report may not get you out of a violation, but it will get you out of a civil penalty or suspension under certain circumstances. It could get you out of the violation if the investigator is so inclined, so you should file the report.

The forms are available online (<http://asrs.arc.nasa.gov>) and can be either mailed or filed electronically.

If the report reveals criminal activity, it is sent to the Justice Department and the FAA with identifying information. If the report details an accident, it is sent to the NTSB and the FAA with identifying information. All other reports are de-identified and sent to interested parties. NASA will time stamp a Reporter Identification (ID) Strip and send that to the sender as proof of submission.

Your Testimony, Made Official

Once you have submitted the report and received the time-stamped ID strip, you should lock that away for safekeeping should the FAA decide to investigate the incident. But you should get your side of the story in writing as soon as possible. If your incident does come under investigation, an official of the FAA with an official title will start

THERE'S EVEN MORE ROOM. (AND NOT JUST FOR YOUR LEGS.)



Welcome to the beautiful and spacious Colorado Rocky Mountains where we've recently completed construction of a new 28,000 square foot solar-powered hangar. This brings our total hangar space to 184,000 square feet. The Vail Valley Jet Center offers lodge-style comfort while being the largest FBO in the region with over 20 acres of ramp space. Ranked as a top FBO for the last 12 years, we are committed to providing unsurpassed quality service to our customers, making your trip to the Vail Valley as seamless as possible.



Don't forget to visit us in the Avfuel section at the 2015 NBAA!
For more information, and to see how we can accommodate you,
visit us online at www.VVJC.com or call (970) 524-7700
871 Cooley Mesa Road Gypsum, CO



making phone calls and will start taking notes. Even if his note-taking skills are not up to par and even if the people he speaks to do not have the best memories, the moment the inspector types them onto a letter with the FAA logo and signs with his FAA title, that document becomes a dated, official piece of evidence. How are you going to challenge that?

You need your own official document. You should make a written record of the incident, taking care that everything is accurate and paints the situation in a favorable light for you. Leave out any embellishments or unnecessary facts. Have knowledgeable friends and coworkers comb over the document with a critical eye and make edits as if your license depended on it. When you are satisfied, take it to a licensed notary public and make it all official with your signature and the notary's seal. The act of getting it in writing will cement the facts in your mind and having it notarized will give any future investigator pause about pursuing the case. The investigator's notes, after all, are quite often recollections of disinterested parties who may not have been paying as close attention to your aircraft as you.

Step Three: 'Lawyer Up'

If an FAA inspector meets you at the airplane or office, or even calls you on the phone, you may not be well served by saying the first thing that comes to your mind. "I want to talk to my lawyer," however, can be taken as a sure sign of weakness. You need to think about this before it happens.

If, for example, the inspector asks you if you happened to graze the nearby Class B airspace, the right answer could be the wrong answer. Let's say you are positive you were clear of the airspace and said so. If the inspector can produce a radar tape that says otherwise, you have lied to an official of the FAA. A better answer to almost every case would be, "I'm pretty sure I've flown in accordance with all rules and regulations, but I could use some time to do a normal postflight and mental debrief of the trip. May I call you tomorrow at a time of your choosing, please?"

If the inspector thinks you are a consummate professional with an innate desire to do things by the book and a priority on safety, your future

endeavors should go well. The inspector does not want an ugly confrontation. If, on the other hand, you start things on an adversarial tone, they will only escalate from there.

Under FAA Order 2150.3B, a Letter of Investigation (LOI) will not be issued unless evidence shows that a violation may exist. The LOI is sent by regular mail and either certified mail, return-receipt requested, or by registered mail. It normally specifies a 10-day time for reply.

Your next stop should be with a lawyer who specializes in defending

"Consider grounding yourself or remedial training after an incident until you speak with an aviation lawyer. This demonstrates your constructive attitude..."

against FAA enforcement actions. Find a lawyer who has an established reputation with the FAA and can give you an honest assessment of your chances and the best way to pursue your case. At the time of this writing, if you are a member of the AOPA, you can receive a lawyer at no cost for up to 10 hr. (<http://pilot-protection-services.aopa.org>).

Give the lawyer all the facts and be honest. A skilled aviation attorney can paint a picture for the FAA that includes your background and

experience as a professional aviator. A cut and dried case against you can be turned into a tale of a good pilot trapped by difficult circumstances that will never happen again. Or a shaky case built on circumstantial evidence could end your flying career for good. The difference could very well be determined by your legal representation.

Aviation Lawyer Edward J. Page of Carlton, Fields, Jordan, Burt, P.A. and a CFII, offers advice based on years of experience working on behalf of pilots and as a former federal prosecutor:

► "Be courteous to ATC, ramp folk, the FAA and others. [They could end up as witnesses.] If you decide to talk at anytime, make sure it's accurate, truthful and candid."

► "Make a NASA report every time you are involved in an incident."

► "Consider grounding yourself or remedial training after an incident until you speak with an aviation lawyer. This demonstrates your constructive attitude to an investigator."

In the end, the FAA may decide you are innocent or that there is insufficient evidence to issue a violation. If the FAA decides a violation did occur, you could end up with oral or written counseling, remedial training, instructions to voluntarily surrender your certificate, a suspension of your certificate, revocation of your certificate, civil penalties and various combinations of each. While appeals to the NTSB are possible, the Safety Board is required to defer to the FAA in most cases.

The Best Defense ...

The best defense is to never violate a provision of 14 CFR in the first place. Of course, that can be easier said than done, especially when some of the procedures in the real world seem to be engineered to trap you. If you do find yourself in the fed's crosshairs, you should submit a NASA ASRS report and save the Reporter ID strip. Consider writing your side of the story with an eye toward having it read in a legal proceeding, have that notarized, and save that too. But if the day comes when you do receive a Letter of Investigation, find a good aviation lawyer. Unlike the game of Monopoly, the NASA ASRS is not a "Get Out of Jail Free" card. But the investigator holding your license at risk does have a monopoly in the court of law: judge, jury and executioner. **B&CA**