



# FLIGHT-WATCH



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**UNITED STATE  
COURT OF AP-  
PEALS FOR THE  
DISTRICT OF  
COLUMBIA  
AFFIRMS LIFE-  
TIME REVOCA-  
TION OF  
AIRMAN'S  
CERTIFICATE**

**I.**

**INTRODUCTION**

In Volume 153 of Flightwatch, I discussed a decision rendered by the NTSB affirming a lifetime revocation of an airman's certificate in a situation where it was alleged that the airman carried six tablets in a canister which Japanese authorities claimed were MDMA, methylenedioxymethamphetamine. Thereafter, the airman filed a petition for review with the United States Court of Appeals for the District of Columbia. The appeal was argued on March 17, 2005, and the United States Court of Appeals rendered its decision on June 10, 2005. This article will briefly discuss the decision of the United States Court of Appeals.



**Corkey Fornoff flying his F8F Bearcat**

**II.**

**A FACTUAL OVERVIEW**

The airman was a pilot for Federal Express who traveled to Japan on a Northwest Airlines non-stop commercial site to Nagoya. The ticket was obtained by virtue of the airman's status as a Federal Express pilot. The airman was on a personal trip and was not on duty. He occupied a regular passenger seat aboard the aircraft. After arriving in Nagoya, customs officials searched the airman and found six pills in his pocket that were determined to be MDMA (also known as "Ecstasy"). The airman was held in a Japanese prison for seventy-three days. On August 24, 1999, he was convicted in a Japanese court of

attempting to import six pills containing MDMA. Upon returning to the United States, the airman informed his employer of the conviction and was fired. The airman also reported the incident to the FAA after his pilot union's medical advisor suggested that he submit to a psychiatric evaluation to the FAA to confirm his fitness as a pilot. The medical advisor also reported some of the circumstances surrounding the Japanese conviction to the FAA.

Although the FAA found the pilot qualified for a first-class medical certificate, it sought revocation of his airman's certificate under 49 U.S.C. § 44710(b)(2). The FAA revoked the airman's certificate on February 1, 2001, and amended the order of revocation on June 10, 2001.

**III.**

**THE STATUTORY BACKGROUND**

The FAA is required to revoke an airman's certificate if he is convicted under a law of the United States or a state related to a controlled substance if an aircraft was used to commit or facilitate the commission of the offense and the individual served as an airman or was on the aircraft in connection with committing or facilitating the commission of the offense. 49 U.S.C. § 44710(b)(1)(a)(b). Further, even without a conviction under the laws of the United States, the FAA may still revoke an airman's certificate if it finds that the airman knowingly carried out an activity punishable under the laws of the United States related to a controlled substance (except a law related to simple possession of a controlled substance) by imprisonment for more than one year if an aircraft was used to carry out or facilitate the activity and the person in question served as an airman or was on the aircraft in connection with carry-

ing out or facilitating the carrying out of the activity. 49 U.S.C. § 44710(b)(2)(A),(B),(C). In other words, the FAA has two options. It can revoke, on a lifetime basis, the certificate of an airman if there is a conviction of employing or using an aircraft to facilitate the commission of an offense, or if the FAA can prove an aircraft was used to “facilitate” the activity even without a conviction in the United States.



**Corkey Fornoff landing a P-51D Mustang on one wheel**

The United States Court of Appeals for the District of Columbia reasoned that MDMA, or Ecstasy, was listed on Schedule 1 in the pertinent provision of the Code of Federal Regulations. 21 C.F.R. § 1308.11(d)(10). The Court further noted that if a pilot was engaged in an activity of facilitating transportation of a controlled substance by using an aircraft, then the FAA had the authority to revoke his certificate and not re-issue any airman certificate. 49 U.S.C. § 44703(f).

#### IV.

#### THE AIRMAN’S ARGUMENTS

The airman argued that since the first element of 49 U.S.C. § 44710 required proof of a conviction of a violation of a state or federal statute of the United States, then proof of conviction of a Japanese criminal proceeding was insufficient. (This argument references 49 U.S.C. § 44710(b)(1).) However, the Court of Appeals noted that even without proof of a conviction under the laws of the United States, proof of an “activity” under 49 U.S.C. § 44710(b)(2) would justify a lifetime revocation of the airman’s certificate.

The second argument of the pilot was that the Board’s interpretation of the verb “use” of an aircraft under 49 U.S.C. § 44710(b)(2) was arbitrary and capricious or contrary to law. The pilot argued that the verb “use” would necessarily mean that he flew

the aircraft or somehow served aboard the aircraft. The Court of Appeals rejected this argument, reasoning that an aircraft was used in connection with the activity in question. It was not necessary for the FAA to prove that the airman actually flew the aircraft.

#### V.

#### CONCLUSION

With the recent decision rendered by the United States Court of Appeals for the District of Columbia, we now understand that an airman can have his certificate

revoked on a lifetime basis even if he is not convicted under the laws of the United States. Evidence of his being involved in an “activity” is sufficient to warrant the revocation of his certificate on a lifetime basis if an aircraft was employed in relation to transporting controlled substances. Further, the airman need not physically pilot the aircraft for this provision to apply. Merely sitting as a passenger in an aircraft where the pilot has in his possession a controlled substance is a sufficient nexus with air transportation to justify a lifetime revocation of his airman’s certificate.

*Donnelly v. Federal Aviation Administration and National Transportation Safety Board*, United States Court of Appeals for the District of Columbia, Case Number: 04-1239 (June 10, 2005).

(The airman was represented by Mark T. McDermott, Esq. and Peter J. Wiernicki, Esq. The FAA was represented by James W. Tegtmeier, Esq. and Peter J. Lynch, Esq. An *amicus* brief was filed by James W. Johnson, Esq. and John E. Wells, Esq. on behalf of the Airline Pilots Association, International.

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