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AN ANALYSIS OF THE PROPOSED PRIVATIZATION OF CHICAGO'S MIDWAY AIRPORT

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ALTHOUGH IT IS now a given that the government will have a substantial influence over many of our daily activities, the ownership and control of an airport do not necessarily have to be almost entirely dominated by government. However, nearly every commercial service airport in the United States is owned and controlled by either the government or a governmental agency.[1] The American method of ownership is not the only viable option, as experiences in many other parts of the world have shown that private ownership or operation of airports can lead to very successful results.[2]

Attempting to get the United States on board with this worldwide phenomenon, Chicago Mayor Richard Daley and his Department of Aviation have applied to the Federal Aviation Administration (FAA), seeking to participate in the Airport Privatization Pilot Program, a trial privatization program.[3] Chicago filed its preliminary application[4] and its application was ac-

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[1] Christopher R. Rowley, *Financing Airport Capital Development: The Aviation Industry's Greatest Challenge*, 63 J. AIR L. & COM. 605, 624 (1998).

[2] *See* U.S. GOV'T ACCOUNTING OFFICE, GAO/RCED 97-3, AIRPORT PRIVATIZATION: ISSUES RELATED TO THE SALE OR LEASE OF U.S. COMMERCIAL AIRPORTS 5 (1996) [hereinafter AIRPORT PRIVATIZATION] ("Specifically, privately owned airports have generated large profits for their shareholders because of steady growth in passenger traffic and concession revenue, despite government caps on airline fees and the owner's investment in infrastructure.").

[3] *See* CITY OF CHICAGO DEP'T OF AVIATION, PRELIMINARY APPLICATION UNDER 49 U.S.C. 47134 FOR PRIVATIZATION OF CHICAGO MIDWAY INTERNATIONAL AIRPORT § 1, 1 (2006) [hereinafter PRELIMINARY APPLICATION].

[4] *Id.*

cepted;[5] thus, Chicago Midway Airport is well on its way to becoming the first major privatized airport in the United States.

The goal of this Comment is to first develop the history behind both the American and global experiences with privatized airports, to give the current progress of the Midway application as well as the current law governing the continued privatization, to outline the theoretical arguments supporting and opposing airport privatization, and finally, to analyze the privatization as it applies to Midway.

I. HISTORY OF THE AMERICAN AND GLOBAL EFFORTS AT AIRPORT PRIVATIZATION

A. Global Experiences

The rest of the world is far ahead of the United States when it comes to the privatization of airports.[6] The airport privatization movement started in 1986 when Margaret Thatcher, then Prime Minister of the United Kingdom, pushed through the Parliament the Airports Act of 1986.[7] The Airports Act dissolved the British Airport Authority, which was the government agency that owned the seven largest British airports.[8] After dissolving the British Airport Authority, the government-owned company BAA PLC was created in order to have a stock flotation; by selling their shares in the new BAA, the British government was able to receive £1.225 billion.[9] A key component of the sale was the fact that the government sold its seven airports as a single package rather than breaking up the airports and selling them separately.[10] Most observers saw this packaging as an enormous problem due to the potential creation of a monopoly over airports in the United Kingdom (UK).[11] The British government sold both the control rights to the airports, as well as the prop-

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[5] Letter from David L. Bennett, Director, FAA Office of Airport Safety and Standards, to Dana Levenson, Chief Financial Officer, City of Chicago (Oct. 3, 2006), *available at* http://dmses.dot.gov/docimages/pdf98/417979_web.pdf.

[6] *See* Airport Privatization, *supra* note 2, at 5.

[7] Airports Act, 1986, c. 31 (Eng.).

[8] BAA, Our History, http://www.baa.com/portal/page/Corporate%5EAbout+BAA%5EOur+history/6f666da45a28201aVgnVCM200000357e120a_/ (last visited Oct. 29, 2007).

[9] *Id.*

[10] José A. Gómez-Ibáñez & John R. Meyer, Going Private: The International Experience with Transport Privatization 215 (1993). The privatized airports were London's Heathrow, Gatwick, and Stansted, and the four major Scottish airports of Prestwick, Glasgow, Edinburgh, and Aberdeen. *Id.* at 212.

[11] *Id.*

erty on which the airports sat, although such a sale is the exception rather than the rule.[12] More airport privatizations have occurred through lease rather than through sale, but the privatization of the seven BAA airports has been by far the most successful example of privatization, as BAA has increased the number of flights and increased profits, all while completing enormous improvements to the airports.[13]

Several other governments have experimented with privatization, mostly in Europe, but also in Australia, South America, India, and China.[14] The Australian privatization was accomplished in a different method than the BAA privatization, as the Australian government privatized several airports, including the major airports of Brisbane, Melbourne, and Perth, in a concession for fifty years with an option for a further forty-nine years.[15] This privatization brought in $2.6 billion for the Australian government, illustrating the degree of interest in private acquisitions of airport infrastructure.[16] Not only was the government a winner in this transaction, but the private parties running the Australian airports were able to provide substantial cost savings across the board, as they cut anywhere from five to twelve percent of cost categories such as labor, utilities, administration, and maintenance, all by increasing the efficiency of the airports.[17] Further, the Australian-type privatization, where the government continues to own the land but leases it to a private company, is seen as a good intermediate solution between a simple management contract and the outright sale of the airport to private interests.[18]

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12 HANS-ARTHUR VOGEL, PRIVATISATION AND FINANCIAL PERFORMANCE OF EUROPEAN AIRPORTS 6 (2005), http://wip.tu-berlin.de/typo3/index.php?id=215 ("Airport privatization usually involves only the transfer of *some* ownership rights.").

13 Charles Sander, Unisys, Airport Privatization: Trends and Opportunities, http://www.unisys.com/transportation/insights/white_papers/papers.htm?insightsID=88345 (last visited Oct. 29, 2007).

14 Zane O. Gresham & Brian Busey, *"Do As I Say and Not As I Do"—United States Behind in Airport Privatization*, 17 AIR & SPACE LAW. 12, 13 (2002).

15 *Id.*

16 *Id.*

17 Sander, *supra* note 13.

18 *See* ROBERT W. POOLE, JR., REASON FOUNDATION, HOW-TO GUIDE NO. 13, GUIDELINES FOR AIRPORT PRIVATIZATION 2 (1994), *available at* http://www.reason.org/htg13.pdf.

B. American Experiences

Ownership and control of commercial airports in the United States, especially for airside functions,[19] has been almost exclusively the domain of the public sector.[20] Interest in the privatization of American airports began after seeing the British results, and the first American experience was the management contract entered into between BAA and the Indianapolis International Airport; this 1995 agreement was one where BAA was paid to run the day-to-day groundside operations of the airport over a ten-year term, but the city of Indianapolis retained long term planning control over the entire airport operation.[21] BAA promised to save the city of Indianapolis at least $32 million—in reality, it saved more than this amount and therefore was able to make a profit.[22] Following its success in Indianapolis, BAA and other international infrastructure management firms entered into additional arrangements at other American airports, such as Pittsburgh, Harrisburg, Atlanta, and Orlando.[23]

However, these management contracts are not the same as the privatization occurring in Europe. There, private companies are either leasing the airport over a long term period or purchasing the airport outright, and therefore have incentives to increase the capacity, productivity, and efficiency of the airport, including airside opportunities.[24] In an effort to promote either the sale or lease of commercial airports in the United States, in 1996 Congress enacted the FAA Pilot program on private ownership of airports ("Airport Privatization Pilot Program" or "the pilot program").[25] This program, which will be further discussed, allows for five airports to either be sold or leased to a private entity; thus, any government owner wishing to sell or lease its airport may apply to the FAA under the statute, and if found to have met certain requirements, may engage on a course toward privatization.[26]

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19 Airside functions are those that relate to runway use, gate decisions on usage, and other similar operations, as opposed to the groundside operations such as airline ticket counters, restaurants, and janitorial services. *See* Gómez-Ibáñez & Meyer, *supra* note 10, at 213.

20 Gresham & Busey, *supra* note 14, at 14.

21 *Id.*

22 *Id.*

23 *Id.*

24 *See* Poole, *supra* note 18, at 2, 7–8.

25 Pub. L. No. 104-264, Title I, § 149(a)(1), 110 Stat. 3224 (codified as amended at 49 U.S.C. § 47134 (2000 & Supp. IV 2004)).

26 *Id.*

Given the excitement around the world about the privatization of airports, one may think that the five slots in this pilot program have already been taken; however, to date, only one American airport has participated successfully in the program and achieved privatization, namely Stewart International Airport in Newburgh, New York.[27] Stewart International Airport (Stewart) is currently being leased by National Express Group, an American subsidiary of a UK-based transportation company of the same name.[28] In addition to Stewart's participation in the pilot program, three other airports applied for the program but later withdrew from consideration, and the application of New Orleans' Lakefront Airport is still under review.[29]

Why so few airports have opted to privatize is a puzzling question, and one that will be further explored, but airports are certainly not being scared off by failed results. The privatization of Stewart has been nothing short of a success according to FAA reports, meeting the goals of a successful airport privatization.[30] Congress and the proponents of privatization had three goals in enacting the privatization program: first, they hoped that the infusion of private capital would lead to an increase in capacity; second, they hoped that the private firm could lower operating costs through increasing efficiency; and finally, they hoped that privatization would increase customer satisfaction.[31] According to the FAA, the privatization of Stewart resulted in new sources of capital for the airport, as evidenced by the reduced reliance on both federal and state funding.[32] Second, the FAA found

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[27] Gresham & Busey, *supra* note 14, at 14; *see also* Stewart International Airport, Stewart International Airport: A Journey in Flight, http://www.swfny.com/history.html (last visited Oct. 29, 2007).

[28] Gresham & Busey, *supra* note 14, at 14.

[29] U.S. DEPARTMENT OF TRANSPORTATION & FEDERAL AVIATION ADMINISTRATION, REPORT TO CONGRESS ON THE STATUS OF THE AIRPORT PRIVATIZATION PILOT PROGRAM 1 (2004), *available at* http://dmses.dot.gov/docimages/pdf92/334434_web.pdf [hereinafter 2004 REPORT TO CONGRESS].

[30] *Id.* at 10.

[31] *Id.*

[32] *Id.* ("The private operator's planned capital investments [totaling $48.6 million over five years] include . . . widening of a taxiway ($3.3 million), the construction of administrative and maintenance facilities ($3 million), airfield lighting controls ($2.5 million), perimeter road rehabilitation ($0.5 million), expanded car parking ($1.5 million), and snow removal equipment ($1.1 million)," of which $10.3 million, or over twenty percent of the capital investment budget, will be paid by the private entity. *Id.* This is not just a substitution of expenditure; rather, this is a ten percent increase over what the New York Department of Transportation would have provided. *Id.* at 10–11.).

that the private operators of Stewart decreased operating costs and maintained an operating profit even during the post-September 11th decline in air traffic.[33] Further, in surveys done by the New York State Department of Transportation (NYSDOT), it was reported that "the transfer of the airport to private control has enhanced the performance and efficiency of SWF (Stewart's airport code) by eliminating an entire level of approvals for commercial use of the airport."[34] Finally, it was reported to NYSDOT that the private operator improved the airport's relationship with the business community and aided in the environmental cleanup of the area, showing the increased care for customer service.[35]

C. Background History of Chicago's Airports and Other Infrastructure

Chicago's Midway International Airport ("Midway" or "Midway Airport") was the first great airport in the United States. Built in 1924 as a private airstrip, it was acquired in 1927 by the City of Chicago, and by 1929 was recognized as the busiest airport in the world.[36] However, it soon became clear that Midway was going to be too small to serve the burgeoning needs of a city such as Chicago, and O'Hare International Airport (O'Hare) was built to meet the needs of the local and connecting passengers.[37] O'Hare opened to general traffic in 1955, and in 1962 all scheduled operations moved from Midway to O'Hare.[38] After O'Hare became the dominant airport in Chicago, many airlines left Midway, and the number of passengers flying through Midway drastically diminished throughout the 1960s and 70s.[39] However, with deregulation of the airlines in 1978 and the subsequent creation of smaller airlines, Midway went through a revitalization; in 1979 Midway Airlines started service, but the real boost came in 1985 when Southwest Airlines began flying to and from Midway.[40]

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33 *See id.* at 11.

34 *Id.* at 12.

35 *Id.*

36 Preliminary Application, *supra* note 3, § 6, at 8.

37 Airwise.com, Chicago O'Hare Airport History, http://www.airwise.com/airports/us/ORD/ORD_07.html (last visited Oct. 29, 2007).

38 *Id.*; *see also* Preliminary Application, *supra* note 3, § 6 at 8.

39 *See* Chicago O'Hare Terminal Radar Approach Control (TRACON), A History of Midway Airport, http://www.thetracon.com/MidwayHistory.htm (last visited Oct. 29, 2007).

40 *Id.* *See also* Preliminary Application, *supra* note 3, § 6, at 8.

Currently, Midway is in the process of reinventing itself. During the years of 1994-2004, Midway was the fastest growing airport among the fifty largest airports in the United States, increasing its number of enplaned passengers by 128 percent.[41] Rising from a near death, Midway currently is the twenty-fourth busiest airport in the United States, ranking just behind Washington's Dulles Airport, and ahead of airports such as Salt Lake City, San Diego, and Washington's Reagan Airport.[42]

In addition to evidence of past growth, Midway remains an excellent choice for privatization for a number of other reasons. First, Midway Airport is the closest major airport to the enormous population center that is downtown Chicago, and is conveniently accessible by both car and public transportation, as the airport has a stop on Chicago's "L."[43] Midway also has recently redeveloped its terminals, creating newer facilities for concessions, increased parking, and improved roadways.[44] Additionally, Midway produces a steady revenue stream in excess of $120 million annually, of which over $90 million is operating revenue alone.[45] Finally, and most importantly, Midway has defined itself in the market as an airport catering to the origination and departure (O & D) passenger market, which means that it serves less for connecting traffic and more for people starting and ending their flights in Chicago.[46] Midway has marketed itself as "the premier point-to-point, or O & D airport, in the United States, providing low-cost service to business and leisure travelers throughout the region;"[47] this means that it does not have to compete as directly with O'Hare, as generally the customers will have different preferences regarding price, service, and convenience.

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[41] U.S. DEPARTMENT OF TRANSPORTATION, BUREAU OF TRANSPORTATION STATISTICS, NATIONAL TRANSPORTATION STATISTICS, tbl. 1–41 (2007), *available at* http://www.bts.gov/publications/national_transportation_statistics/html/table_01_41.html [hereinafter PASSENGERS BOARDED].

[42] *Id.*

[43] PRELIMINARY APPLICATION, *supra* note 3, § 6, at 7.

[44] *Id.*

[45] *Id.* § 6, at 12.

> In 2005, Midway generated $92.2 million of operating revenue (excluding PFC and federal grant revenues), plus $22.3 million of net PFC [passenger facility charge, a type of user fee that is charged in order to receive money for specific federally approved capital projects] revenue and $18.1 million of federal grants.

Id.

[46] *Id.* § 6, at 5, 13.

[47] *Id.* § 6, at 5.

One further benefit of privatizing Midway, as opposed to any other large commercial airport, is that the City of Chicago already has experience privatizing its transportation infrastructure. In January 2005, the City of Chicago closed on a ninety-nine year lease with two foreign infrastructure finance firms, in which the two firms paid over $1.8 billion for the lease rights to the Chicago Skyway, a system of toll bridges connecting Chicago and the Indiana Turnpike.[48] Under this agreement, which was the first privatization of an existing toll road in the United States, the private owners are entitled to all of the revenue from the tolls, but they are also responsible for the maintenance and operation costs of the road.[49] Because the City of Chicago has already experienced a major infrastructure asset privatization, the transaction costs of familiarizing the government with the process will be eliminated, and the political support necessary for a smooth transition will already be in place.

II. CURRENT STATUS OF PRIVATIZATION LAW AS APPLIED TO CHICAGO'S MIDWAY AIRPORT

Prior to the 1996 implementation of the Airport Privatization Pilot Program (the pilot program), airports were not allowed to be sold or leased to private parties.[50] During that time, the only American effort at privatization was the management contract entered into between BAA and the Indianapolis Airport, which was a much less comprehensive form of privatization.[51] Currently in the United States, the only legal way to sell or lease a commercial service airport to a private owner is through the pilot program.[52]

A. Background to the Development of the Airport Privatization Program

Before discussing the current state of the law, one must first know what prompted Congress to pass the law and what concerns it was trying to address in creating the pilot program. As mentioned previously, the rest of the world is far ahead of the United States in the privatization of airports, and the goal of the

[48] *See id.* § 6, at 4. *See also* Skyway Concession Co., Chicago Skyway http://www.chicagoskyway.org/ (last visited Oct. 29, 2007).

[49] Skyway Concession Co., Chicago Skyway, http://www.chicagoskyway.org/ (last visited Oct. 29, 2007).

[50] *See* Gresham & Busey, *supra* note 14, at 14.

[51] *See id. See also* Poole, *supra* note 18, at 2–3.

[52] *See* 49 U.S.C. § 47134(a) (2000).

pilot program was to "determine if, once certain economic and legal impediments were removed, airport privatization in the United States could generate alternative sources of capital for airport development and provide benefits such as improvements in customer service."[53]

The "economic and legal impediments" which concerned Congress were varied and truly did present an enormous barrier to the privatization of American airports. The foremost impediment to privatization was the federal law prohibiting an airport operator from diverting revenue to non-airport purposes if they receive or have received federal grants.[54] This prohibition is important for one main reason: if the airport operator, which for all commercial airports is a governmental entity, may not divert revenue to non-airport purposes, then arguably the sale or lease proceeds could be deemed revenue, and the public entity could not use those proceeds for any other purposes.[55] This effectively doomed any attempted sale or lease, because no government was willing to sell such a huge asset if they were not going to be allowed to use the proceeds as they wished.[56]

Another issue facing potential privatization efforts was the fear that after purchasing the airport, the private operator would then be forced to reimburse the federal government for any grants the airport accepted while it was a public entity.[57] Similarly, there was a question as to whether a private operator would be able to continue using any land that the airport acquired as surplus federal property, as the Secretary of Transportation would have to authorize any transfer of such property, and therefore could block the transfer of such lands.[58] With these two issues, the problem was not that a certain law or procedure was blocking the transfer, but rather that there was uncertainty in the legal regime. Therefore a private entity could not know the correct price to pay for an airport and the government owner would not know at what price to sell the airport.[59]

There were also several economic factors that placed constraints on privatization. The first and most important con-

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[53] 2004 REPORT TO CONGRESS, *supra* note 29, at 2.

[54] 49 U.S.C. § 47107(b)(1) (2000). *See also* AIRPORT PRIVATIZATION, *supra* note 2, at 36.

[55] AIRPORT PRIVATIZATION, *supra* note 2, at 37.

[56] *See id.*

[57] *Id.*

[58] *Id.* at 38.

[59] *Id.*

straint was that private airports, which as public entities were eligible to issue tax-exempt bonds, would not have tax-exempt status.[60] It was predicted that this would increase the interest rate on financing by about two percent, which could have a significant impact on whether capital improvement projects are undertaken.[61] Another economic factor was that private airports would lose access to some federal grant money—private airports would no longer be eligible for Airport Improvement Program (AIP) apportionment grants, but still could receive the discretionary grants provided by AIP.[62] The final economic hurdle was that a fully privatized airport could no longer collect Passenger Facility Charges (PFCs),[63] which are fees that airports can collect to offset capital costs for FAA-approved projects.[64] However, this is not much of a problem because a privately leased airport may still be able to collect PFCs with the aid of the government entity from which they are leasing; however, if for some reason they were no longer able to collect PFCs, they could charge passenger usage fees that would replace and potentially exceed any lost revenue from the inability to collect PFCs.[65]

B. The Structure of the Pilot Program

Given these concerns and coupled with a true desire to make privatization of airports in the United States feasible, Congress set out to provide incentives for airports to privatize by enacting the pilot program. The general scheme of the pilot program is that it exempts a few trial airports from some of the federal laws that hindered airport privatization, and changes some economic incentives.[66] Most importantly, the lessor or seller may be ex-

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60 *Id.* at 41.

61 *Id.* It may be possible for the lessee of the airport to issue tax-exempt bonds, as the government entity that has possession of the property will issue the bonds in its name on behalf of the lessee earmarked for debt service. Poole, *supra* note 18, at 15.

62 Airport Privatization, *supra* note 2, at 41. This is not as burdensome a constraint for larger, more successful airports like Midway, as the majority of their funding comes from operating revenues, Passenger Facility Charges, and renting space inside the airport. *See* Preliminary Application, *supra* note 3, at 12.

63 Airport Privatization, *supra* note 2, at 41.

64 Fed. Aviation Admin., Passenger Facility Charge (PFC), http://www.faa.gov/airports_airtraffic/airports/pfc/ (last visited Oct. 29, 2007).

65 Airport Privatization, *supra* note 2, at 41.

66 49 U.S.C. § 47134 (2000 & Supp. IV 2004); 2004 Report to Congress, *supra* note 29, at 2.

empted from "all or part of the requirements to: use airport revenues for airport related purposes; pay back a portion of Federal grants upon the sale of an airport; [and] return airport property deeded by the Federal Government upon transfer of the airport."[67] Further, the purchaser or lessee can be exempted from "the requirement to use all airport revenues for airport purposes to the extent necessary to permit the purchaser or lessee to earn compensation from the operations of the airport."[68]

As the sole method for a commercial airport to engage in either a sale or long-term lease, the details of the pilot program are crucial in establishing incentives for airports to engage in these new methods of capital acquisition. It must first be noted that only five airports are permitted to participate in the pilot program, and only one of the participating airports can be a large hub airport.[69] Thus, if Midway successfully completes its application and becomes privatized, it will be the only large hub airport allowed to participate in the pilot program, thus providing a first mover advantage to the company willing to lease the airport.[70] Another restriction of the pilot program is that a commercial service airport can only be leased, while a general aviation airport can either be either sold or leased.[71] Thus, while the City of Chicago can only lease Midway to a private firm, the restriction has little practical effect, as a ninety-nine-year lease has very little financial impact on the transaction—under a long-term lease, the lessee is still responsible for paying for capital improvements and will receive the benefits as if it were the owner, where the only difference would come towards the end of the lease term.[72]

Following a decision to lease an airport, the government entity must go through a two-step application process involving a

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67 49 U.S.C. § 47134(b)(1)–(3); 2004 REPORT TO CONGRESS, *supra* note 29, at 2.

68 49 U.S.C. § 47134(b)(1)–(3); 2004 REPORT TO CONGRESS, *supra* note 29, at 2.

69 49 U.S.C. § 47134(b), (d)(2) (2000 & Supp. IV 2004). A "large hub airport" is defined as "an airport that had 1 percent or more of the total passenger boardings (as defined by § 47102) in the United States in the preceding calendar year." *Id.* Thus, although not traditionally thought of as a hub in common parlance because it is primarily focused on O & D passengers, for the purpose of the pilot program, grants and funding, and other airport classifications Midway is statutorily defined as a large hub airport. 49 U.S.C. § 47102(10) (Supp. IV 2004).

70 PRELIMINARY APPLICATION, *supra* note 3, § 6, at 5.

71 49 U.S.C. § 47134(a) (2000).

72 POOLE, *supra* note 18, at 3.

preliminary application and a more in-depth final application.[73] The preliminary application includes the objectives of privatization, a timetable for the process, a description of the property, financial statements, and a copy of the request for proposals that the government will use in finding a private entity to lease the airport.[74] The FAA then looks over the preliminary application, and generally either accepts the application within a month of the filing or rejects the proposal and sends it back for additional information.[75] In the case of Midway, the City of Chicago's preliminary application was filed on September 15, 2006, and on October 3, 2006, Chicago received notice that their preliminary application met all of the procedural requirements.[76] The final application is considerably more in-depth, and allows the FAA to decide whether the airport is an acceptable candidate under the pilot program. To make this decision, the FAA requires the final application to include eight parts, including: the terms of the transfer, the qualifications of the private operator, the exemptions requested by both the government and the operator, a certification that sixty-five percent of the air carriers have approved the exemption allowing the use of airport revenue for general purposes, and a description of how the airport will be operated, maintained, and developed after the transfer.[77]

Upon receiving the final application, the FAA will review it to see if the proposal meets all nine of the requirements found in § 47134.[78] These requirements are: the airport will continue to be available for public use; the operation of the airport will not be interrupted by insolvency or bankruptcy; the purchaser or lessee will maintain, improve, and modernize the airport; every fee imposed on an air carrier will not increase faster than inflation unless approved by sixty-five percent of the air carriers; safety and security will be maintained at the highest possible levels; noise and other environmental concerns must be mitigated to the same extent as at a public airport; and any collective bargaining agreement will not be abrogated by the sale or

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73 2004 REPORT TO CONGRESS, *supra* note 29, at 3.

74 *Id.*

75 *Id.*

76 Letter from David L. Bennett to Dana Levenson, *supra* note 5.

77 Airport Privatization Pilot Program: Application Procedures, 62 Fed. Reg. 48,693, 48,706–08 (Sept. 16, 1997).

78 49 U.S.C. § 47134(c) (2000); *see also* 2004 REPORT TO CONGRESS, *supra* note 29, at 5.

lease.[79] Of these requirements, clearly the two most critical are that the private operator will maintain, improve and modernize the airport, and that each fee imposed on an air carrier will not increase faster than inflation.[80] The former requirement is critical because there are no inexpensive capital projects when it comes to financing an airport improvement project, especially for an airport the size of Midway, and therefore the burden of maintaining and improving the airport could turn out to be extremely heavy. This requirement, combined with the fact that fees cannot rise faster than inflation, could spell a death toll for a private operator, as the rising costs of capital projects will not be offset by increasing fees faster than inflation.

If the application is approved, any agreement between the government and private operator can be finalized, and the privatization can take place. Chicago is currently in the stage of garnering the support of the airlines that have service through the airport, as well as finding an operator that will accept a lease with the city, although sources say that several of the biggest names in infrastructure investment are looking to make bids on Midway.[81] Chicago's current goal is to come to an agreement in principle with one of the private operators, receive final FAA approval, and close the privatization of Midway during the second half of 2007.[82]

The main features of the pilot program are the exemptions mentioned above. These exemptions were added in order to allay concerns of governments, private operators, and the air carriers.[83] The first and most important exemption that can be granted is that the FAA may allow both the government lessor and the private operator to expend revenues for purposes other than capital or operating costs of the airport.[84] This exemption

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79 49 U.S.C. § 47134(c) (2000); 2004 REPORT TO CONGRESS, *supra* note 29, at 5.

80 *See generally* Gresham & Busey, *supra* note 14, at 16.

81 *See* Julie Johnson, *Big Players Circle Midway Eyeing Privatization*, CHICAGO BUS., May 26, 2006, *available at* http://www.chicagobusiness.com/cgi-bin/printstory.pl?news_id=20771. Those firms with interest identified in the story include BAA (now privately owned by a consortium headed by infrastructure giant Grupo Ferrovial) and Australia's Macquarie Infrastructure Group. *Id.*

82 PRELIMINARY APPLICATION, *supra* note 3, § 3, at 3.

83 *See Status of Airport Privatization Efforts: Hearing Before the Subcomm. on Aviation of the Comm. on Transp. & Infrastructure*, 106th Cong. 12 (1999) (statement of Rep. Duncan, Member, H. Comm. on Transp. & Infrastructure) [hereinafter *Status of Privatization Efforts*].

84 49 U.S.C. § 47134(b)(1)(A) & (b)(3) (2000 & Supp. IV 2004); *see also* 49 U.S.C. § 47133 (2000) (legislation prohibiting airports from diverting airport revenues to non-airport purposes).

eliminates the problematic prohibition on diverting revenue.[85] The availability of this exemption was one of the key issues for the State of New York in deciding to privatize Stewart Airport, as there would have been no benefit in selling the airport if the State could not do what it wanted with the money received from the purchase.[86] In fact, in 1995, then-governor of New York George Pataki pushed hard for the pilot program and the ability to privatize airports, but the State's economic development agency felt that the federal restrictions "which prevented an airport operator from taking revenue off the airport and realizing the fruits of running a successful facility . . . [were] particularly onerous."[87] Without the ability to use revenue for purposes other than operating the airport or increasing the capital stock, there would have been no reason for NEG to buy Stewart, or any firm to lease Midway from the city of Chicago, as no money would be made from the venture. In order to receive this exemption, sixty-five percent of both the scheduled air carriers and the total landed weight must approve the exemption before the FAA can grant it.[88] This section, combined with the requirement to maintain and improve the airport, allows airlines to receive some assurances that although airport revenues may now be used for other purposes, capital development levels will remain adequate.

Similarly, the FAA may exempt the government lessor from having to pay back the federal government for any grants or land given from sources such as the Airport and Airway Improvement Fund or other federal money.[89] This was another major issue cited by the State of New York that, once able to be exempted under the pilot program, allowed the State to proceed with the privatization of Stewart.[90] Without this section of the statute creating the pilot program, uncertainty would remain as to whether the federal grants would have to be paid back and whether federal land would revert to the federal government; but with the ability to receive an exemption, such con-

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85 *See* 49 U.S.C. § 47133 (2000).

86 *Status of Privatization Efforts*, *supra* note 83, at 19 (statement of John E. Buttarazzi, Senior Vice President of Empire State Development Corporation).

87 *Id.*

88 49 U.S.C. § 47134(b)(1)(A)(i) (Supp. IV 2004).

89 49 U.S.C. § 47134(b)(2) (2000).

90 *Status of Privatization Efforts*, *supra* note 83, at 17–19 (statement of John E. Buttarazzi, Senior Vice President of Empire State Development Corporation).

cerns can be eliminated and resources can flow to their highest value user.

C. Comparison of American and Foreign Law and Experience

Although foreign countries have a large head start in terms of privatizing airports through either sales or long-term leases, these other countries started from a much different place. The main difference between the American and foreign experience with privatization is that most other countries had a much greater degree of public participation and control in running the airport, as nearly every facet of the operation was controlled by the government,.[91] This is in contrast to the current participation of private employees in the American government-operated airports.[92] Many of these countries are privatizing their airports in the midst of a large-scale move from a state-oriented form of ownership to market-based incentives, and generally have been "driven by a desire to raise capital, reduce the size of the public sector, and to improve economic efficiency.[93] However, airports in other countries are privatizing with fewer government incentives than currently exist under the pilot program. For example, in Britain the state was reimbursed for its past capital expenditures through the stock flotation of BAA, which would not happen in the United States due to the exemption from paying back grants.[94] Further, BAA no longer receives federal funding, while airports under the pilot program would still be eligible for a great deal of federal aid in the form of grants and subsidies.[95]

The current context for American privatization is much different, as there is a greater degree of private participation in airport operation and financing.[96] It is currently estimated that even at airports owned and operated by some level of govern-

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[91] *See* Airport Privatization, *supra* note 2, at 5 ("In most other countries, the national government owns and operates airports."); *see also Status of Privatization Efforts*, *supra* note 83, at 58 (statement of David L. Bennett, Director, Office of Airport Safety and Standards, Federal Aviation Administration) (stating that ownership by the national government is "probably the least efficient form of airport ownership and operation").

[92] Airport Privatization, *supra* note 2, at 26.

[93] *Id.* at 29.

[94] *Status of Privatization Efforts*, *supra* note 83, at 33 (statement of Rep. Peter DeFazio, Member, H. Comm. on Transp. & Infrastructure).

[95] *Id.*

[96] Airport Privatization, *supra* note 2, at 22.

ment, over ninety percent of the employees are employed by private companies,[97] such as Burger King or McDonald's, or private janitorial services. Furthermore, as financial support from the federal government has declined, a greater share of airport financing has been acquired through private financial markets, such that airport investment is already subject to some market discipline.[98] Finally, in order to receive grants, airports must be operated in a way that will make the airport as self-sustaining as possible (for example in their fee and rental structures), thereby increasing the pressure for governments in the United States to operate their airports as a private operator would.[99] Since these factors were not present at airports in foreign countries, foreign countries had much more to gain through privatization in terms of efficiency, increases in capital, and reduced costs, and thus had a much greater incentive to turn the airport control and operation over into private hands.[100]

III. THEORETICAL ARGUMENTS SUPPORTING AND OPPOSING THE PRIVATIZATION OF AIRPORTS

While privatization of airports is almost unheard of in the United States and a relatively recent phenomenon worldwide, there are still some generally accepted arguments supporting and opposing the privatization of airports. These theoretical propositions are largely based on the experience of the privatization of other industries, as well as on the limited foreign experience with airport privatization. Proponents of privatization generally advocate moving towards an enterprise view of airports, in which the airports are no longer a provider of public services, but instead are a vehicle for the acquisition of profits.[101] The opposing view is that these are public uses inclined to result in a monopoly, and are therefore better left to the government.[102]

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97 *Id.* at 26.

98 *Id.* at 22.

99 *Id.*

100 *See generally id.* at 32.

101 *See generally* POOLE, *supra* note 18.

102 *See generally* THE WORLD BANK, POVERTY REDUCTION AND ECONOMIC MANAGEMENT NETWORK, ECONOMIC GROWTH IN THE 1990S: LEARNING FROM A DECADE OF REFORM (2005); Joseph Stiglitz, *An Airport's Debacle Worsened by Greed and Neglect*, FIN. TIMES U.K., Aug. 22, 2006, at 13.

A. Arguments Supporting Airport Privatization

Those in favor of airport privatization are generally people who see government control of airports as a non-core function, which can thus be better managed as a privately held business subject to competition.[103] There are three main advantages cited by the proponents of airport privatization: private control of airports would lead to additional private capital to help fund airport development; private operators would operate the airport more efficiently, thus improving service and lowering costs for all involved parties; and finally, the sale or lease of the airport would augment government budgets, potentially reducing the need for federal grants and taxes.[104]

1. *Airport Privatization Leads to Additional Development Capital*

The first advantage cited by advocates of privatization is that private control of airports will lead to additional capital devoted to airport development. The first thing to note is that the amount of air travel is currently growing[105] and is projected to continue growing.[106] This growth in the amount of air travel can be contrasted with the continuing decline in funding from Airport Improvement Program grants, which leads many observers to believe that this will cause a shortfall in airport development funds.[107] Compounding this problem is the fact that airport development money in the post-9/11 era is being spent on increasing and upgrading security measures, which leaves even less money to spend on increases in capacity and other value-adding airport improvements.[108]

This problem of a lack of federal money is where private financing comes in. Proponents claim that privately operated airports could "potentially tap new sources of private capital—including private equity—that airports will need to meet the growing demand for capacity and facilities."[109] BAA used pri-

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[103] *See* Poole, *supra* note 18, at 2.

[104] Airport Privatization, *supra* note 2, at 32.

[105] Passengers Boarded, *supra* note 41 (total enplaned passengers rose 9.3% from 2003–2004 and 30.5% from 1994–2004).

[106] Airport Privatization, *supra* note 2, at 32.

[107] Gresham & Busey, *supra* note 14, at 16 (describing the "looming funding shortfall in airport development costs"); Airport Privatization, *supra* note 2, at 32 ("Whether existing sources of capital will be adequate to meet future development needs is uncertain.").

[108] Gresham & Busey, *supra* note 14, at 16.

[109] *Id.*

vate equity financing to launch the upgrades to London's Heathrow Airport; BAA had a stock flotation, raised extra capital from private sources that saw the potential for growth, and used that money to add value to consumers and return a profit to the company.[110] Further, with private equity financing, there are stockholders who expect a return; this creates further demand for management who is expected to make risky investments in new capital, such as new terminals or innovative gate leasing practices.[111] Because public entities cannot sell stock and are largely not driven by an incentive to make profits, proponents of airport privatization claim that the ability to use non-debt financing, such as stock offerings, will be critical to the future success of airports, especially when the amount needing to be financed is very large.[112]

2. *Airport Privatization Leads to Greater Efficiency in Airport Operation*

The second advantage to airport privatization is that the private lessor will operate the airport more efficiently, thereby reducing the overall cost to society. There are two parts to this advantage—increasing the customer satisfaction and decreasing the operating costs. Although one could argue that one or the other of these measures of efficiency is more important, the ability of the private sector to decrease operating costs is more quantifiable. For example, the Indianapolis Airport, which is publicly owned but privately managed by BAA, has been able to cut an enormous amount of cost out of the groundside operations of the airport by switching to private management.[113] In fact, if BAA does not save the city of Indianapolis $140 million over the ten year contract, BAA will not earn any profit.[114] Clearly the initial contract period benefited both parties, as BAA continues to manage the Indianapolis Airport and the cooperation between the two entities has consistently been hailed as a success story for airport privatization in the United States.[115] As

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[110] *Id.* at 13.

[111] Robert W. Poole, Jr., *Another Reason for Airport Privatization,* THE FREEMAN: IDEAS ON LIBERTY, June 2000, *available at* http://www.fee.org/publications/the-freeman/article.asp?aid=2256.

[112] AIRPORT PRIVATIZATION, *supra* note 2, at 33.

[113] Asheesh Advani, *Passenger-Friendly Airports: Another Reason for Airport Privatization, in* REASON POLICY STUDY NO. 254, 2-3 (1999), *available at* http://www.heartland.org/PolicyBotTopic.cfm?artTopic=310.

[114] *Id.*

[115] *Id.* at 2; *see also* Sander, *supra* note 13.

further proof that this relationship is seen as a success, other cities were quick to follow suit, engaging BAA and other foreign companies with experience in managing airports to run the commercial operations inside the airport.[116] One area of increased revenue is the ability of privatized airports to think outside the box; privatized airports are more likely to develop malls or other shopping centers in and around the airport property, as well as create new profit areas such as hotels.[117]

While no economic studies have yet been done on the private operation and management of American airports (because it is a relatively new phenomenon), European airports have now been privatized long enough to allow the performance of economic analyses.[118] In a 2005 study comparing European private airports to those owned and operated by a government entity, private airports were found to operate at a significantly lower cost per passenger or unit of cargo.[119] Further, it was found that private airports have a higher revenue to expenditure ratio, and the return on assets was much higher.[120] In order to show the veracity of the results, statistics were run on the privatized airports to see whether they performed better before or after privatization, and eight out of the twelve significant indicators pointed to post-privatization as the better result.[121]

While looking to see if privatization increases the return of airlines and airport operators, it is also important to see how the decision to privatize affects the users of the airport. Things like efficient terminal design, amenities useful to the traveling passenger, and quick check-in all contribute to the convenience or inconvenience to a traveler, which, in the overall scheme, can weigh heavily on the productivity of the economy.[122] If the traveler is forced to wait at long lines for check-in or is forced to walk long distances to gates, this adds to the price that he pays for the ticket in lost opportunities; if airports can become more responsive to passenger needs and wants by providing more desirable services at the airport, the airport system will become

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116 Gresham & Busey, *supra* note 14, at 14.

117 *See* POOLE, *supra* note 18, at 8.

118 *See* VOGEL, *supra* note 12, at 2.

119 *Id.* at 11.

120 *Id.* The study found that the mean value of the return on assets of publicly owned airports was 3.33%, while the privatized airports had a mean value of 5.50%, which is a 65% increase in return. *See id.* These statistics were significant at a 99% level of confidence. *Id.*

121 *Id.* at 14.

122 Advani, *supra* note 113, at 4.

more efficient.[123] One study found that privatized airports were statistically more likely to be responsive to passengers than their government-owned counterparts, meaning that privatized airports generally did more to accommodate their passengers than the government airports with which they were competing.[124] This advantage to privatization should not be overlooked, as the government regulates airports to help the flying public, but if the flying public could be better served by allowing private entities to run airports, it would be a disservice to continue the government ownership.

3. *Airport Privatization Can Benefit Local, State, and Federal Budgets*

As previously mentioned, under the pilot program, revenue earned by the government owner through the sale or lease of an airport may be exempted from the requirement that revenue earned from airport operations cannot be diverted from airport uses.[125] Because such a diversion of revenue is allowed under the pilot program, there is now an incentive for the government operator to sell or lease an interest in the airport.[126] Proceeds received from privatization can potentially be enormous, as seen when Australia's airports were recently leased for over $3 billion.[127] It has been predicted that the Midway privatization would likely fetch a price greater than the $1.8 billion received for selling the Chicago Skyway, and the price, based on recent deals for other airports, could end up in the $2–$3 billion range.[128] Adding such huge amounts to the budget seems like it should be appealing to many local and state governments, which are the main owners of airports in the United States. Such a windfall could be put to use in a variety of ways, such as improving infrastructure in other parts of the state, servicing debt on budget deficits, lowering taxes, or any number of other goals for which the government lacked the funds.

Another advantage of privatization would be that if the privatized airports were no longer eligible to receive federal grants, subsidies, and tax exemptions, the budget position of the gov-

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[123] *See id.*

[124] *Id.* at 11.

[125] *See supra* notes 83–89 and accompanying text.

[126] *See* AIRPORT PRIVATIZATION, *supra* note 2, at 34.

[127] Gresham & Busey, *supra* note 14, at 13.

[128] Paul Merrion, *Clouds Over Midway Deal*, CHICAGO BUS., Jan. 29, 2007, *available at* http://www.chicagobusiness.com/cgi-bin/news.pl?id=23645.

ernments would be augmented by increased revenues combined with decreased expenditures.[129] By privatizing, there is already a reduced dependence on grants and subsidies, and a rule that would eliminate grant and subsidy aid to private airports would aid in the budget position to a greater extent.[130] Further, with airports as public entities, cities, states and the federal government are foregoing money that could be collected in taxes because the government property and revenues are tax-exempt. For example, once an airport is privatized, the lessor will have to pay income tax on the profits made, and would potentially have to pay an additional property tax for the airport property, all of which would make a potentially enormous contribution to budget shortfalls.

B. Arguments in Opposing Airport Privatization

There are three main arguments opposing airport privatization: the risk of monopolistic abuse, loss of government control, and over-sensitivity to economic factors.[131] Further, an emerging problem is that with the newly Democratic Congress, concerns are being raised about the potential for foreign ownership of airports. These factors, set against the benefits of privatization, can often be fixed through an easy solution, but nonetheless merit attention in order to best accomplish the goals of airport privatization.

1. *The Prospect of Monopolistic Abuse*

The main argument in opposition to airport privatization is that while there can realistically be competition in air travel among the airlines, most cities have only one commercial airport, and thus a natural monopoly frequently arises.[132] The main thrust of the argument on monopolistic behavior is that airports will restrict quantity in order to set rates higher than the efficient rate, and thereby reap monopolistic profits. Because of this potential for airport ownership and control to result in monopolistic behavior, many commentators, even those generally

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[129] Airport Privatization, *supra* note 2, at 34.

[130] *See Status of Privatization Efforts*, *supra* note 83, at 14, 29, 33–44 (statements of David Suomi, Vice President of BAA USA, and Representative Peter De Fazio, Member, H. Comm. on Transp. & Infrastructure).

[131] Soon-Kil Hong & Kwang Eui Yoo, *A Study on Airport Privatization in Korea: Policy and Legal Aspects of Corporatization and Localization over Airport Management*, 66 J. Air L. & Comm. 3, 8 (2000).

[132] The World Bank, *supra* note 102, at 183.

in favor of privatization, state that in most situations, such assets "must be regulated or even operated by the public sector."[133]

The question, therefore, is whether privatization of an airport will result in a monopoly-type arrangement, and if so, what can be done to remedy the situation.[134] Most commentators would agree that in isolated cities with a single air carrier airport, the privatization would most likely result in a monopoly; however, most airline passengers are located in an area where they could drive a distance of fifty to seventy-five miles to another airport if the flight prices from the nearest airport were too high.[135] Further, in cities such as Chicago, New York, Los Angeles, and other large metropolitan areas, the people of the city have a choice between two or more airports with commercial service.[136] With two or more airports, it can hardly be argued that a single privatized airport will exercise monopolistic power, as it will be kept in check by the presumably lower prices at the nearby government-owned airport. Further, economic theory would suggest that people with the best skills in managing and marketing, which the airport should be seeking to hire, would seek employment where they can earn the highest wage, which is not usually government employment.[137] Thus, while the private airports in Europe would have access to the best employees, potential employees at American airports would have a greater incentive to use their skills in another, more lucrative, career.[138] This result means skilled workers will not be working at American airports, thereby reducing the benefits to the American citizens engaged in air travel.

Another argument relating to monopolistic behavior comes from Joseph Stiglitz, a Nobel Prize winning economist and Clinton appointee to the Council of Economic Advisors.[139] He argued that, in the wake of the British terrorist plot to blow up an aircraft in August of 2006, privately owned and operated airports such as Heathrow fare worse in the aftermath of such a crisis because there is little incentive to provide extra staff to handle the increased security in the weeks after such an at-

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[133] *Id.*

[134] *See* POOLE, *supra* note 18, at 16.

[135] *Id.*

[136] *Id.*

[137] *See* Hong & Yoo, *supra* note 131, at 4–6.

[138] *See id.*

[139] *See* Stiglitz, *supra* note 102, at 13.

tack.[140] Instead, he argues that the airports tell people to get to the airport earlier, thus increasing the cost to those arriving early by forcing them to wait in long lines and foregoing other opportunities.[141] He argues that because Heathrow operates as a monopoly, there is no incentive for them to change practices.[142] These arguments, however, do not apply to American privatization. First, as mentioned, the FAA and TSA will still be in charge of all security operations at a privatized commercial airport.[143] Further, these types of long lines are present in the United States when there is a terrorist situation, even when the government is handling security. And finally, in the United States, if there was a difference in security measures from Midway to O'Hare, people would simply go to O'Hare, as it would still remain under government control; unlike the London airports which are all owned by BAA, there would presumably be different ownership of the major cities' airports in the United States.

If a monopoly did result, the government could always regulate the airport as it does with many other public utilities. This was the response of the British government when they privatized the London airports, where the British government used their earlier experience in regulating the privatized British Telecom and British Gas to regulate the potential monopoly of the newly created and privately held BAA.[144] In fact, if American airports want to continue to receive federal grants, they must comply with the FAA's definition of fair and reasonable pricing.[145] Other checks on the potential monopolistic practices of airports include antitrust laws, such that if an airport were charging discriminatory prices or engaged in other prohibited behavior, the federal government could step in and prohibit these unwanted practices.[146]

2. *Potential for Loss of Governmental Control*

Another smaller concern is that because the government no longer has direct day-to-day control, or perhaps no ownership stake altogether, the government will no longer have a say in the

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140 *Id.*
141 *Id.*
142 *Id.*
143 PRELIMINARY APPLICATION, *supra* note 3, § 2, at 2.
144 GÓMEZ-IBÁÑEZ & MEYER, *supra* note 10, at 215–16.
145 POOLE, *supra* note 18, at 16.
146 *Id.*

airport's actions.[147] No matter what type of privatization occurs, the government will not lose as much control as advertised because they still have the power to regulate the airport in substantial ways, such as putting a limit on fee charges, imposing safety rules, and maintaining ultimate authority over other important criteria such as noise or pollution.[148] For example, in the Midway privatization, the FAA and TSA standards will continue to apply, and all screening will still be performed by TSA personnel.[149] Further, in a lease of an airport, the government will hold the residual interest in the property, and therefore will have rights commensurate with that position and the rights secured by the contract with the private lessee.

Generally, the over-hyped loss of governmental control is not a good reason to refuse to privatize, as the government still retains a large degree of control, and many of the new incentives created when the government loses control push in the direction the government would have regulated anyway.[150] For example, although the government will no longer have direct control over how much noise is emitted from the airport, it is in the best interest of the private operator to be responsive to the community about the amount of noise emanating from the airspace and runway areas, all of which the government has no real incentive to pay attention to except for a few votes in the area surrounding the airport.[151] As an example of this, Representative Edward A. Pease, a U.S. Congressman whose district abuts but does not contain the Indianapolis Airport, stated that BAA had done a wonderful job dealing with him and his constituents regarding the noise from the Indianapolis Airport, leading him to call that airport a "tremendously well managed facility."[152] Thus, although loss of governmental control may be disappointing for the government because it no longer has the power to control the airport's day-to-day operations, the loss of governmental control should not be considered a legitimate barrier to airport privatization.

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[147] Hong & Yoo, *supra* note 131, at 8.

[148] *See* POOLE, *supra* note 18, at 15–17.

[149] PRELIMINARY APPLICATION, *supra* note 3, § 2, at 2.

[150] *See* POOLE, *supra* note 18, at 15–17.

[151] *Id.* at 17.

[152] *Status of Privatization Efforts*, *supra* note 83, at 39 (statement of Rep. Edward A. Pease, Member, H. Comm. on Transp. & Infrastructure).

3. *Oversensitivity to Economic Factors*

A potential problem arising from privatization is that the private operator may become overly concerned with the share price to the exclusion of other worthy goals.[153] This concern with share price occurs in all corporations, however, so expressing this doubt as a reason not to privatize calls into question much of the American economy. In a related problem, airport management may be seen as owing a duty to the public at large, although the only way for the public to express their displeasure is by voting with their wallets and finding alternative means of travel.[154] While privatization cannot help but encounter these problems, they are not nearly important enough to prevent the benefits of privatization from accruing.

A potential solution to this problem is the continuation of government involvement. When the airports of the UK were privatized, they were still subject to regulations by the Civil Aviation Authority (CAA) for safety and the airspace measures in the same way that an American airport would still be subject to FAA regulations.[155] In addition, the Monopolies and Merger Commission (MMC) were involved to prevent any monopolistic behavior.[156] Further, the CAA and MMC "review the private company's commercial policies as part of the five-year reviews and could require changes."[157] A private operator would also be subject to the reporting requirements of the SEC, IRS, and other financial watchdogs, so concern about the potential abuse of monopolistic ability and the misalignment of corporate profits and public good should fall short of erasing the benefits of privatization.

4. *Issues Relating to Foreign Ownership*

As the privatization of Midway becomes more of a reality and with the new Democratic majority in Congress, foreign control of United States' infrastructure has again become a hot topic.[158] This concern arises because airports are seen as "critical transportation assets in the post-Sept. 11 era,"[159] and Democratic

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153 Hong & Yoo, *supra* note 131, at 8.

154 *Id.*

155 GÓMEZ-IBÁÑEZ & MEYER, *supra* note 10, at 215–16.

156 *Id.* at 216.

157 *Id.*

158 *See* Merrion, *supra* note 128.

159 *Id.*

leaders say that they think that there will be a similar reaction to the Midway privatization as there was with the failed Dubai Ports issue in 2006.[160] Expressing concerns about the potential sale of Midway to a foreign investment group, Representative Jerry Costello, the new chairman of the House Subcommittee on Aviation, stated that privatizing "an airport is 'much different' from a toll road," and that there "are security concerns unique to airports."[161] This can be seen as a legitimate concern, but as mentioned before, the private operator will not be in charge of security at the airport, as that will still be the province of the TSA.[162] Further, this is not a good reason to block a lease, because there is no assurance that an American company will not win the bid, as there will likely be a great deal of competition between the many potential private operators.[163] In fact, worrying about foreign ownership will only serve to prevent American entry into this lucrative market, as American firms will not be able to outbid without some experience in the process.

IV. IS THE PRIVATIZATION OF MIDWAY A GOOD IDEA?

Of all the large American airports, Chicago's Midway Airport has to be among the best choices for privatization. First, Chicago's objectives for privatization are in line with the standard practices as established by European airports, and thus the expectations of the government of Chicago are not unreasonable for what is likely to occur. Further, Chicago already has experience in privatizing infrastructure, and thus is an excellent choice to be the first large private airport in the United States to privatize. Finally, when looking at the theoretical benefits and problems with airport privatization, most of the prerequisites for privatization exist while many of the largest concerns are nonexistent.

A. MIDWAY'S OBJECTIVES ARE IN LINE WITH THE STANDARD PRACTICES OF THE INDUSTRY

The objectives of the Midway privatization, as laid out in section two of Chicago's Preliminary Application under the pilot

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160 *Id.*

161 *Id.*

162 *See supra* notes 147–52 and accompanying text.

163 *See generally* Merrion, *supra* note 128. For example, Aecom Enterprises, a Los Angeles-based consulting firm, is likely to bid on the Midway privatization. *Id.*

program,[164] are consistent with the observed results of both the European privatization efforts and the few American attempts at privatization. The city divided its objectives into several key areas, including devising a new rate-setting methodology, increasing operating efficiency, maintaining high safety and security requirements, providing for future capital improvements, providing economic benefits to the city, protecting employees, maintaining high noise and environmental standards, and ensuring public use and competition.[165]

As its first objective, Chicago stated that employing a new rate-setting methodology in order to provide certainty and stability for the airlines is a "key element."[166] The current rate is set by the long-used residual cost method,[167] in which "the airport deducts its commercial revenue (for example, lease payments from shopping, car parking, and other concessions) from its total costs and charges the airlines only the residual."[168] This residual pricing system is inherently uncertain, as what the airlines pay in fees is entirely dependent on the cost structure of the airport and how much money it makes in a given period.[169] Chicago is therefore looking to change the rate-setting mechanism in order to provide certainty, which will help airlines operate more efficiently and ensure that fees do not grow too quickly.[170] This is similar to the experience of BAA; the fees charged by BAA have only been able to increase at a rate less than that of inflation.[171] Thus, in the experience of what is considered the best example of privatization, airside charges have decreased in inflation adjusted terms, providing the stability and cost savings favored by today's airlines.[172] This objective was deemed "key" by Chicago because it is necessary to get the support of the airlines to participate in the pilot program, and by showing that the city

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164 PRELIMINARY APPLICATION, *supra* note 3, § 2, at 1–4.

165 *Id.*

166 *Id.* § 2, at 1.

167 *Id.*

168 GÓMEZ-IBÁÑEZ & MEYER, *supra* note 10, at 228.

169 *See* PRELIMINARY APPLICATION, *supra* note 3, § 2, at 1.

170 *Id.* The airlines are now, in their weaker financial state, finally willing to move to a more stable model for space rentals and landing fees. Robert W. Poole, Jr., *Will Midway Lease Re-Start U.S. Airport Privatization?*, PUB. WORKS FINANCING, Jan. 2007, *available at* http://www.reason.org/commentaries/poole_20070100.shtml.

171 POOLE, *supra* note 18, at 11.

172 *Id.*

and private operator are willing to cater to the airlines, it is more likely that a deal can be accomplished.[173]

Other critical objectives of the privatization are increased operating efficiency and increased customer satisfaction.[174] In their stated objective, Midway will be able to operate more efficiently "through the ability to leverage the 'best practices' knowledge and expertise of the Private Operator."[175] These operators are companies such as BAA or Macquarie that have worldwide experience in operating airports at the highest levels; these companies have many different innovative solutions for maximizing the profit of an airport, and thus can squeeze more money out of the same infrastructure.[176] For example, BAA has almost certainly increased the efficiency of the operation of their British airports, as the flotation raised $2.5 billion when sold in 1987, was valued at $4.5 billion in 1995,[177] and was acquired by takeover in 2006 for around $20 billion.[178] BAA must have increased the efficiency and added innovative and creative processes in order to increase the value to shareholders by ten times over twenty years without increasing the real costs of the fees airlines pay to the airport.

The City of Chicago, similar to other cities with privatized airports, expects that the private operator will continue to improve and modernize Midway airport.[179] Although Midway developed new terminal space in 2004, Chicago has the legitimate expectation that a private operator would not only maintain the quality of the space, but make additions to it in terms of design, incorporating new technologies, and generally improving the space to conform to passengers' expectations.[180] This is what BAA has done at several of the airports that it owns or manages; for example, in Pittsburgh, where BAA is the food and retail developer, it was responsible for working with the terminal space and maximizing the potential inside the airport, where they have

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173 PRELIMINARY APPLICATION, *supra* note 3, § 2, at 1.

174 *Id.*

175 *Id.*

176 *See id.*

177 AIRPORT PRIVATIZATION, *supra* note 2, at 30.

178 *BAA Agrees to Ferrovial Takeover*, BBC NEWS, June 6, 2006, *available at* http://news.bbc.co.uk/2/hi/business/5050932.stm (the offer was valued at 10.3 billion pounds).

179 PRELIMINARY APPLICATION, *supra* note 3, § 2, at 2.

180 *See id.*

successfully created a first-class retail facility.[181] Similarly, BAA aggressively developed its groundside business, bringing brand-name retailers into the airport space and turning the terminals of Heathrow and Gatwick into the equivalent of shopping malls, which has drastically improved the performance of their airports.[182] Thus, Chicago's expectation that there will be future capital improvements is on target, as companies such as BAA recognize that improving the airport is a strategy that will benefit both the passengers and the company bottom line.

Finally, Chicago expects that throughout the privatization and continuing into private operation, the private operator and the city will work together to "ensure fair and equitable treatment of all existing airport employees."[183] Chicago wants to ensure that no collective bargaining agreement in effect when privatization occurs will be abrogated.[184] This effort is in response to another interested group, namely the employees, who are afraid that they may lose their jobs or pensions because of the transfer.[185] However, in most of the airport privatizations, the private operator will simply convert the existing public employees to private employees, although the now-private sector workers are subject to the private rights of management including firing based on performance, compensating employees, and determining the work rules and conditions,[186] all of which stand to enhance the efficiency of the airport.

As previously seen, the expectations and objectives of the City of Chicago are consistently in line with the observed results of prior privatizations. Because the City is grounded what they hope to achieve and in the standards to which they expect to hold a private operator, the probability of success is much higher in Chicago than in the case of a government that blindly chases unattainable goals, as a private operator can take the

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181 *Status of Privatization Efforts*, *supra* note 83, at 45 (statement of David Suomi, Vice President of BAA USA).

182 POOLE, *supra* note 18, at 11.

183 PRELIMINARY APPLICATION, *supra* note 3, § 2, at 2.

184 *Id.* § 2, at 2–3.

185 *See* POOLE, *supra* note 18, at 19.

186 *Id.* *See also Status of Privatization Efforts*, *supra* note 83, at 16 (statement of David Suomi, Vice President of BAA USA) ("There is an established track record that demonstrates the positive manner that employees are dealt with . . . . We must let both the staff and the union leadership see that the private sector is not a threat but rather, a way to become empowered, recognized, and properly rewarded.").

objectives at face value and calculate a reasonable price to pay for a contract with the above mentioned characteristics.

B. Chicago Has Prior Infrastructure Privatization Experience

Another major advantage that is working in favor of the Midway privatization is the fact that Chicago already has considerable experience as a lessor of transportation infrastructure. As previously mentioned, in January 2005, Chicago became the first city government to lease an existing toll road to a private entity when it leased the Skyway to a Spanish consortium.[187] This prior experience creates two main benefits: decreased transactions costs due to familiarity with the process and increased political support because the population has seen that privatization works through benefits provided to citizens.

The first major benefit of having already gone through a large infrastructure privatization is that the city government has personnel that have already participated in such a project.[188] The potential pitfalls of negotiating an extremely complex deal or finding an investment bank to handle negotiations have already been experienced, such that going through such a process again will be simpler than starting from scratch.[189] Another benefit is that the state government realizes what steps need to be taken to provide the proper incentives and make it easier to lease the airport. For example, when the Skyway was in the process of being privatized, the Illinois legislature found that in order to entice bidders, they needed to pass a bill that provided property tax exemptions to the land on which the Skyway was situated.[190] Because the legislature already had experience with such privatizations, it was able to pass a similar law applying a property tax exemption to the land under Midway, thus enticing major investors to act even before the bidding officially starts.[191] These little advantages, absent for most other cities, could prove pivotal in establishing interest in the large-scale privatization in the United States, and also a large windfall to the City of Chicago.

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187 *See supra* notes 48–49 and accompanying text.

188 *See* Preliminary Application, *supra* note 3, § 2, at 1–2, § 6, at 4.

189 *See id.*

190 Gregory Meyer, *Midway Privatization Bill Clears IL Senate*, Chicago Bus., Mar. 3, 2006, *available at* http://chicagobusiness.com/cgi-bin/printStory.pl?news_id=19723.

191 Johnson, *supra* note 81.

C. The Benefits of Privatization Are Present, While the Disadvantages Are Not Present

The final reason why the privatization of Midway Airport should take place is because all of the benefits of privatization are present in this situation, while the concerns about privatization do not hold water. Through privatization, Midway is likely to receive more capital development, increase its operating efficiency, and provide a financial boom to the city of Chicago. Further, the privatization of Midway does not raise many of the key concerns, as there is little prospect for monopolistic abuse, the government will retain a large degree of control, and the oversensitivity to economic conditions is not a great concern.

Midway will likely reap the benefits of additional development capital for a number of reasons. First, history would predict this, as nearly all privatized airports have received large capital infusions; prior experiences at airports such as Heathrow (construction of new terminal) and Stewart (widening taxiways, construction of maintenance facilities) illustrate that when private operators take control of the airport, they strive to improve their property.[192] Further, as stated above, any agreement with a private operator will include the stipulation that the "Private Operator will be required to maintain, improve and modernize Midway Airport."[193] Specifically, "the City will obligate the Private Operator to satisfy minimum capital investment requirements."[194] Thus, even if for some reason the private operator does not want to take advantage of increasing its capital stock, it will be mandated to do so by agreement with the City.

History also points to Midway becoming a more efficiently run airport. As previously mentioned, both European and American privatized airports have been able to reduce costs, which is a large part of operating more efficiently.[195] Further, studies have found that privatized airports are more responsive to customer concerns.[196] There is no reason that a major airport in the United States would not exhibit the same increases in productivity, efficiency, and consumer responsiveness as major international airports in cities such as London, Copenhagen, and Melbourne have produced. Midway's main area of increased ef-

192 Poole, *supra* note 18, at 11; 2004 Report to Congress, *supra* note 29, at 10.
193 Preliminary Application, *supra* note 3, § 2, at 2.
194 *Id.*
195 *See supra* notes 113–21 and accompanying text.
196 *See supra* notes 122–24 and accompanying text.

ficiency would likely come from the new rate-setting methodology. Currently, Midway uses the residual method of determining how much to charge airlines, leaving uncertainty and risk for the airlines.[197] However, this can change to a fee based on how much an aircraft uses the facility, relying on such factors as runway time, what time the runway is being used, and how much noise or pollution it produces.[198] Pricing according to the time it takes to land the aircraft and charging a premium for landing times during peak periods leads to the efficient usage of the runways, which are a scarce resource.[199] BAA has adopted these methods, which increases efficiency by guaranteeing that those who place the highest value on the runways get to use them at certain times.[200] Midway, with its new rate-setting methodology, can implement some of these same strategies, while publicly owned airports might not have the flexibility or vision to implement such policies.

If a lease of Midway Airport goes through, it will undoubtedly provide an incredible cash infusion to a city budget sorely in need of a lift. With the potential proceeds from a sale, money would be allocated to continue financing other infrastructure projects, as well as aiding in funding the city's pension system, paying off some debt service, and retiring other debts.[201] While some may claim that the City could have made more money by operating the airport itself for profit, there is little doubt that receiving a lump-sum payment for the stream of profits a private company can make will benefit the budget.

On the potential problem side, the oversensitivity to economic fluctuations will probably occur.[202] However, there are a few reasons why this should not limit the Midway privatization. First, this is a characteristic of the American economic system; all publicly held firms have the same incentives to provide consistent returns to the stockholder, and thus to bring up this issue in the context of privatization raises a critique of the entire American economy. The oversight of entities such as the SEC and IRS should limit the grossest exaggeration of profits or underreporting of losses to the same extent as private utilities. Further, the private operator of Midway will be under heavy

[197] *See supra* notes 166–68 and accompanying text.
[198] *See* GÓMEZ-IBÁÑEZ & MEYER, *supra* note 10, at 220–21.
[199] *Id.* at 221.
[200] *Id.*
[201] *See generally* PRELIMINARY APPLICATION, *supra* note 3, § 2, at 2.
[202] *See supra* notes 139–40 and accompanying text.

government scrutiny, both by the City of Chicago, ensuring that everything is working properly, and by the federal government under the pilot program. Thus, any potential problem of oversensitivity to economic fluctuations is not of great concern for the Midway privatization.

The loss of governmental control also should not be an issue when considering the Midway privatization. Both the federal government under the pilot program and the city government of Chicago will be monitoring the behavior of the private operator, and will be able to step in if anything is amiss. Chicago will be monitoring the capital investment requirements and ensuring that the airport is available for public use,[203] while the federal government, FAA, and TSA will be monitoring such things as noise, pollution, antitrust, and safety and security requirements.[204] Further, the FAA and Department of Transportation will be monitoring the situation under the requirements of the pilot program; under the statute, the Secretary of Transportation is required to report to Congress on the implementation of the pilot program as applied to Midway, and may conduct audits of the financial records of the airport operator.[205] If, after performing such an audit, the Secretary finds that the Midway operator is knowingly violating any of the terms of § 47134(c), he may revoke the exemptions granted to the private operator.[206] Because of all of these safeguards, it should be clear that although the government cedes day-to-day control over airport operations, the government still retains significant control over the important matters on airport property.

Finally, the prospect of monopolistic abuse at Midway airport is slight. First, Midway is neither the only commercial airport nor the largest airport in Chicago. Because O'Hare will remain the principal commercial airport in the region, there is almost zero opportunity for Midway to price above cost, as carriers could switch to operating out of O'Hare for point-to-point flights out of Chicago.[207] Further, although Southwest Airlines is primarily a point-to-point airline, Midway can serve as an informal hub for transcontinental flights; thus if Midway were to increase prices, Southwest could move its quasi-hub activities to another city in the central United States such as St. Louis, Den-

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[203] PRELIMINARY APPLICATION, *supra* note 3, § 2, at 2–3.
[204] *Id.*
[205] 49 U.S.C. § 47134(k) & (l) (2000).
[206] 49 U.S.C. § 47134(i) (2000).
[207] *See* POOLE, *supra* note 18, at 16.

ver, or Minneapolis.[208] Finally, monopolization is not likely to occur at Midway because the federal government will be keeping a close eye on the project in order to ascertain if the pilot program is working for a large airport, and thus the onus of antitrust suits or federal investigations would weigh heavily in preventing the private operator from engaging in monopolistic behavior.

V. CONCLUSION

Chicago's Midway Airport is the perfect test subject for large commercial airport privatization in the United States. Its potential to be profitable will lead to bidders experienced in operating private airports, there is little concern for monopolization, there is room to increase efficiency, and would provide a city in need with a cash infusion. One observer has stated that if Midway becomes privately held, the United States could be poised for an explosion of privatization of airport resources, as occurred in the toll road market after the privatization of the Skyway.[209] The United States has lagged behind the rest of the world in airport privatization, best summarized by the comment that "[t]he United States is a champion of private-sector participation in public services, from electricity to water to airports, except when it comes to airports at home."[210] With the privatization of Midway Airport, the United States' aviation community is departing on a course to catch up with the rest of the world.

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208 *See* GÓMEZ-IBÁÑEZ & MEYER, *supra* note 10, at 226.

209 POOLE, *supra* note 18.

210 Gresham & Busey, *supra* note 14, at 12.