United States Citizenship Requirements of the Federal Aviation Act - A Misty Moor of Legalisms or the Rampart of Protectionism

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UNITED STATES CITIZENSHIP REQUIREMENTS OF THE FEDERAL AVIATION ACT — A MISTY MOOR OF LEGALISMS OR THE RAMPART OF PROTECTIONISM?

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INTRODUCTION

THE WORLD OF aviation has and continues to exist in an ever increasing environment of multinationalism. Carriers, once clearly identified with citizens of their flag, are becoming objects of multinational ownership.1 Aircraft are manufactured by multinational consortiums2 and

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1 The proposed purchase by British Airways and KLM of 20% of the shares in Sabena is one current example. See Intelligence, 296 Aviation Daily 307 (May 15, 1989). In the United States, foreign airlines gained minority interests in a number of United States-owned air carriers: Ansett Airlines of Australia has a 20% interest in America West Airlines; a subsidiary of Japan Air Lines owns 20% of Hawaiian Airlines; Scandinavian Airlines System controls nine percent of Continental Airlines; and Swissair recently acquired five percent of Delta Air Lines. For insight into the difficulties on the horizon in international aviation negotiations because of multinational ownership, see Rules for the Airway, J. Com., June 26, 1989, at 12A, col. 1.

2 For example, Airbus Industrie is composed of partners from France, West Germany, Britain, Spain, the Netherlands, and Belgium. See Boyd, The Commercial Aircraft Market in North America, TRANSLAW, Winter 1988, at 1 (publication of Fed. Bar Ass'n). France tops all other countries in terms of economic interests in the
owned in part, or leased, by persons other than the citizens of the flag which the aircraft bears.\(^3\) Governments may find themselves dealing with each other not in their individual capacity, but in multinational arenas of common economic interest. Europe 1992 is almost upon us. The International Civil Aviation Organization is calling for government consultation, rather than confrontation, in addressing competition disputes.\(^4\) Foreign interests continue to seek to invest in the United States,\(^5\) and

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Airbus A340. French interests comprise a full 30%, while the United States maintains a 27% share. Other significant interests are represented by West Germany at 19%, and the United Kingdom with 14%. The United States share increases if the aircraft's CFM international engines are included. With the Airbus A330, United States interests are about 50%, including the engines. See Intelligence, 297 Aviation Daily 131 (July 24, 1989).

Another example of multinational manufacturing is Dornier's 328 regional aircraft made in Munich, Germany. Honeywell agreed to supply the advanced avionics, Aermacchi of Italy will supply fuselages, and landing gear will be provided by ERAM of France. Still other examples include: the agreement by Transnational Industries of Greenwich, Conn. to supply engine pylon fittings for Bombardiers' Airbus aircraft; British Aerospace's selection of Simmond Precision, a subsidiary of Hercules of Wilmington, Del., and SFENA of France to produce fuel control and monitoring systems for the Airbus A330 and A340; and the agreement by CAE Electronics, Montreal, to design and manufacture flight simulators for Kuwait Airways' Airbus A310, A300 and Boeing's 767-300ER. See Aviation Suppliers, 296 Aviation Daily 214 (May 1, 1989).


Also, Congress is presently considering H.R. 3699, the "Reciprocity of Foreign Investment Act" which would authorize reciprocal response to foreign actions and policies which restrict United States investment in a foreign nation. H.R. 3699, 101st Cong., 1st Sess., 135 CONG. REC. E3927-28 (1989). The Bill hopes to open investment opportunities to the United States in exchange for concessions the United States has made or will make to foreign investors. While foreign control is feared, it is believed that reciprocity in investment policies will mitigate the "price tag" of control which comes with foreign ownership. Id. at E3928.
GATT (the General Agreement on Trade Tariffs) is beginning to look at international aviation in the context of its review of the service sector. In this atmosphere, the citizenship requirement of United States law relating to aviation activities emerges in the eyes of some as an obstacle to the inevitability of true multinationalism, and to others as the bastion of protection of United States interests. To be sure, the citizenship requirement is one of the lynchpins of United States aviation law.

The Federal Aviation Act of 1958 sets forth the requirements that United States air carriers be citizens of the United States and that eligibility for registering aircraft in the United States extend only to United States citizens. The Act specifically defines a “citizen of the United States.” However, when examining the definition of a United States citizen and the various interpretations that have been applied to it by United States government agencies, one is caught up in traversing a misty moor of legal uncertainty. For example, the statutory definition of citizenship refers to partnerships. One government agency interprets this language as permitting only partnerships composed solely of individuals, while another agency interprets the exact same language as authorizing partnerships which include corporations. The corporate
stock ownership requirements contained in the citizenship definition are interpreted one way for aircraft registration purposes, and in another vein for air carrier ownership. The purpose of this Article is to further explore the diversities in the citizenship definition, to examine the origins of the citizenship requirement in United States aviation law, and finally, to suggest with some timidity possible paths through the mist. Any such exploration necessarily brings into play an awareness of competing United States domestic and foreign policy concerns — those which encourage an open investment market and continued United States leadership in aircraft manufacturing and sale, and those which continue to demand economic protection for the United States aviation industry.

I. ORIGINS OF THE CITIZENSHIP REQUIREMENT

In order to understand the United States government's position with respect to citizenship requirements and to suggest certain options for change, it is important to be aware of how United States policy emerged. While United States air transportation existed in embryonic form prior to World War I, the wartime use of aircraft engendered a recognition of the potential for its use commercially. In the context of the United States "citizen-

[We are aware that the FAA ... interprets the term "such an individual" in § 101(16)(b) to require that each partner be a natural person .... We do not read the statute so narrowly, and consider the term "individual," which is not defined in the Act, to be synonymous with "person" which § 101(32) defines as including corporations.] Id.

13 See In re Intera Arctic Servs., Inc., DOT Order No. 87-3-32, at 2 n.1 (Mar. 9, 1987).


Already lines of aerial transportation are being used in England and France in a small way for commercial purposes .... A daily service from London to Paris has been in operation for some time, and promises to be quite serviceable as soon as it can be relieved of its
ship” requirement, commercial aviation development embodied two basic policies. One policy encouraged and protected a fledgling domestic industry in commercial air transportation, while the other sought to assure that sufficient aircraft would be available for United States national security purposes.  For a considerable period of time both considerations travelled the same “citizenship” track. The examination of this track begins with a review of the legislative history attending the passage of the Air Commerce Act of 1926 (the “1926 Act”).

The statutory citizenship requirement first appeared in the 1926 Act, which was Congress’ first national policy en-

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16 Id. at 527 (statement of Maj. Gen. Mason M. Patrick, Chief of the Army Air Service).

acquiescence with respect to aviation. The 1926 Act defined a citizen of the United States as an individual who is a United States citizen, a partnership consisting of individuals who are United States citizens, or a corporation which meets two criteria. For a corporation to be a citizen, the president and at least two-thirds of the board of directors or other managing officers of the corporation must be individuals who are United States citizens, and United States citizens must control at least fifty-one per centum of the voting interest of the corporation. The 1926 Act also contained the first provision governing the eligibility of aircraft for registration in the United States, requiring that civil aircraft be "owned by a citizen of the United States and not registered under the laws of any foreign country" in order to be eligible for registration.

In revisiting the 1926 Act and its origins, it is important to bear in mind that the 1926 Act emerged in the era following World War I and, among other things, was conceived with the view of regulating the use of aircraft and the business of air transportation. For instance, the 1926 Act made it unlawful to navigate any aircraft in interstate or foreign air commerce unless such aircraft was regis-

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18 Id. § 9(a), 44 Stat. at 573.

The term "citizen of the United States" means (1) an individual who is a citizen of the United States or its possessions, or (2) a partnership of which each member is an individual who is a citizen of the United States or its possessions, or (3) a corporation or association created or organized in the United States or under the law of the United States or of any State, Territory, or possession thereof, of which the president and two-thirds or more of the board of directors or other managing officers thereof, as the case may be, are individuals who are citizens of the United States or its possessions and in which at least 51 per centum of the voting interest is controlled by persons who are citizens of the United States or its possessions.

19 Id.

20 Id. § 3(a), 44 Stat. at 569.

No aircraft shall be eligible for registration (1) unless it is a civil aircraft owned by a citizen of the United States and not registered under the laws of any foreign country, or (2) unless it is a public aircraft of the Federal Government, or of a State, Territory, or possession, or of a political subdivision thereof.

21 "Air Commerce" was defined as "transportation in whole or in part by aircraft of persons or property for hire, navigation of aircraft in furtherance of a
tered in the United States,\textsuperscript{22} or to navigate any foreign aircraft in the United States except as provided in the 1926 Act.\textsuperscript{23} Thus, the regulation of the economics of air transportation was cast in terms of the registration of aircraft.

The legislative concept of restricting the commercial use of aircraft in the United States to United States citizens first surfaced in a Senate bill introduced in 1922.\textsuperscript{24} The pertinent section of that bill contemplated a "citizenship" requirement for aircraft used in commerce. The 1922 bill's requirements that the president and all members of the board of directors or managing officers of a corporation be United States citizens, and that seventy-five percent of the interest in the corporation be owned by United States citizens were particularly restrictive.\textsuperscript{25} In 1923, a bill was introduced in the House of Representatives as a substitute for the 1922 Senate bill.\textsuperscript{26} The 1923 bill introduced the concept of registration of aircraft. Only civil aircraft owned by a citizen of the United States and not registered under the laws of a foreign country could be registered.\textsuperscript{27}

\textsuperscript{22} \textit{Id.} § 11(2), 44 Stat. at 574.

\textsuperscript{23} \textit{Id.} § 6(b), 44 Stat. at 572.

\textsuperscript{24} S. 3076, 67th Cong., 2d Sess. (1922).

\textsuperscript{25} \textit{Id.} § 6. The bill provided:

That no civil aircraft shall be used in commerce unless owned by a person who is a citizen of the United States or its dependencies, and in the case of a partnership unless each member is such citizen: \textit{Provided}, That in the case of a corporation or association no such aircraft shall be owned by such corporation of [sic] association unless the president and the board of directors or the managing officers thereof, as the case may be, are citizens of the United States and the corporation or association itself is organized under the laws of United States, or of a State, Territory, District, or possession thereof, and 75 per centum of the interest therein is owned by citizens of the United States.

\textit{Id.} (emphasis added).

\textsuperscript{26} H.R. 13715, 67th Cong., 4th Sess. (1923).

\textsuperscript{27} \textit{Id.} § 222(a).

The Secretary [of Commerce] shall by regulation provide for the registration of aircraft as civil aircraft of the United States; but no aircraft shall be so registered unless (1) it is not registered under the
The definition of "citizen of the United States" which appeared in the 1923 bill contained less stringent corporate ownership requirements than the 1922 bill. The 1923 version required the president and "three-fourths or more of the board of directors or managing officers" of the United States corporation to be United States citizens. The bill did, however, retain the seventy-five percent corporate ownership requirement.28

Hearings held in 1924 on a version of the 1923 House bill containing the same definitional framework of United States citizen, philosophically addressed the corporate ownership issue. The hearings produced an interesting colloquy between Congressmen Hoch and Huddleston, and an assistant to the State Department's Solicitor, Mr. Hackworth:

MR. HOCH. Let me see if I understand your position. You are not arguing that we should not make a distinction between domestic corporations, but you are simply arguing that you would rather not have it done in the definition here; that if we are to limit any privileges that may come to corporations we should do it in the various sections dealing with the privileges.

MR. HACKWORTH. Yes; absolutely. The point which I make goes merely to the form. The department has no desire to question the purposes of the committee in making a distinction between a corporation of one category and a corporation of another category. It merely makes the point that ordinarily corporations organized in the United States are to be regarded, for most purposes at least, as citizens, and that to say that a corporation organized in a given way shall be considered a citizen, by implication, means that other corporations are not to be so regarded. It is just a slight innovation upon the generally accepted principle that all corporations created in a State are citizens of the State, which it was thought proper to bring to your attention.

28 Id. § 3.

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laws of any foreign country, and (2) it is a civil aircraft owned by a citizen of the United States.

Id.
MR. HUDDLESTON. Is there any reason why that practice should not be continued in this bill? Is there any more reason why we should apply a different rule to the matter of aircraft than we would to a railroad corporation or a steamship line?

MR. HACKWORTH. As regards citizenship?

MR. HUDDLESTON. Yes.

MR. HACKWORTH. Well, I am not so well versed on the question of aircraft navigation.

MR. HUDDLESTON. In other words, we require here that three-fourths of the stock of the corporation, we will say, must be owned by American citizens. Is there any reason for that requirement that you know of?

MR. HACKWORTH. I understand that the proponents of the bill have a reason, which is, of course, to keep these corporations primarily American; that is, to have the controlling interest in American citizens for reasons of domestic policy. That is my understanding.

MR. HUDDLESTON. That is just what I am trying to get at. What are those reasons, if they are known to you?

MR. HACKWORTH. I am afraid I shall not be able to answer that question.²⁹

As can be recognized from this exchange, Congress intended to condition the right of corporations to engage in aviation activity, namely aircraft ownership and use, by imposing on such corporations the requirement of a specific percentage of stock ownership by United States citizens. Further discussion during this hearing indicated that the bill's aircraft registration requirements were patterned after a provision contained in the United States Shipping Act of 1916.³⁰ Congress in fact relied heavily on United States maritime law precedents in developing the 1926 Act.³¹

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³⁰ Id. (remarks of Mr. Burness).

³¹ See H.R. REP. No. 572, 69th Cong., 1st Sess. 9 (1926). A portion of the report reads as follows:

The provisions . . . are not unique or unprecedented. In practically every case each provision has a precedent in an existing provision of
A 1925 report from the Senate Committee on Interstate and Foreign Commerce accompanied a Senate bill containing the definition of United States citizen and confirmed that the citizenship requirement was based on a similar requirement in the United States Shipping Act of 1916 (the "Shipping Act"). The report further indicated that the citizenship requirement, at least as it applied to aircraft registration, was also derived from provisions of the Convention Relating to the Regulation of Aerial Navigation (the "Paris Convention"). However, the lingering concern with United States security in wartime seemed pervasive. In explaining the rationale be-

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law, and is modeled upon and often paraphrased from it. Usually these existing provisions are those of the marine navigation laws. This is natural for the reason that air space, with its absence of fixed roads and tracks and aircraft with their ease of maneuver, present as to transportation practical and legal problems similar to those presented by transportation by vessels upon the high seas.

Id.


Within the meaning of this chapter no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president and managing directors are citizens of the United States and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof.

Id.; see infra note 88.

34 H.R. REP. No. 1262, 68th Cong., 2d Sess. 7 (1925); see Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, art. 7, 11 L.N.T.S. 173 (the United States was a signatory to the Convention, but never ratified it). Chapter II, article 7 of the Paris Convention provided that:

No aircraft shall be entered on the register of one of the contracting States unless it belongs wholly to nationals of such State. No incorporated company can be registered as the owner of an aircraft unless it possesses the nationality of the State in which the aircraft is registered, unless the president or chairman of the company and at least two-thirds of the directors possess such nationality, and unless the company fulfills all other conditions which may be prescribed by the laws of the said State.

Id.
hind the citizenship requirement, the report stated that since aircraft registered in the United States would be called upon to serve as an auxiliary air force in wartime, at least seventy-five percent of the interest in the corporations owning such aircraft should be held by United States citizens.35

During Senate debate over the bill which was to become the 1926 Act, the bill’s sponsor noticed that for a corporation owning aircraft to qualify as a United States citizen, three-fourths or more of the board of directors of the corporation must be United States citizens. In lieu of this requirement a two-thirds standard was proposed and agreed to. The proponent of the change believed the three-fourths standard was too restrictive.36

The final provision enacted into law continued the two-thirds requirement, yet only required fifty-one percent voting stock ownership by United States citizens in United States corporations.37 The latter was apparently a reflection of the Shipping Act. A decade later, the Civil Aeronautics Act of 1938 contained a more restrictive

Registered aircraft of the United States will serve as an auxiliary air force in time of war. It is, therefore, desirable that such aircraft be in fact controlled by citizens of the United States in order that possession of them may be readily obtained by the United States in time of war and that the aircraft be in suitable condition. The Secretary of Commerce and representatives of the Secretary of War and Secretary of the Navy agreed that it was desirable, in the case of corporate owners, that at least 75 percent of the interest in the corporation should be held by citizens of [the] United States, for the reason that corporations created under our laws, but in fact foreign controlled, should not be able to possess craft that fly the United States flag and should be a part of our air-fleet auxiliary in time of war.

Id.

36 67 Cong. Rec. S923 (Dec. 16, 1925). Sen. Willis stated:
It has been brought to my notice that there is at least one instance in which there is an organization greatly interested in aircraft production which could not quite comply with that requirement, where it is provided that three-fourths or more of the board of directors shall be individual citizens of the United States, but could comply with it if it were amended so as to provide for two-thirds.

Id.

37 S. Rep. No. 41, 69th Cong., 1st Sess. 26 § 10(a) (1925) (the citizenship requirement was enacted as § 3(a) of the 1926 Act).
percentage of voting stock ownership of seventy-five percent, also based on maritime precedent. It is also interesting to note that the fifty-one percent requirement of the 1926 Act related only to "voting stock controlled by citizens of the United States." A Senate bill provision requiring United States citizen ownership of two-thirds of the corporate stock whether it be voting or nonvoting was rejected. Arguably, administrative interpretations permitting non-United States citizens to hold larger nonvoting stock percentages than required voting stock percentages are consistent with this legislative background.

A 1934 amendment to the 1926 Act relaxed citizenship requirements with respect to aircraft registration. This amendment permitted the Secretary of Commerce to "grant limited registration to aircraft owned by aliens under such conditions as he may by regulation prescribe, but aircraft granted such limited registration shall not be permitted to engage in interstate or foreign air commerce." Secretary of Commerce Roper stated in the Senate report accompanying the change that such registration requests were frequently received and in most cases there was no good reason for denying them. Non-United States citizens were not permitted to engage in air commerce. This commercial activity was preserved for United States citizens only, in keeping with United States protectionist policies.

The Civil Aeronautics Act of 1938 (the "1938 Act") excluded the limited liberalized alien registration provision of the 1934 amendment. The Federal Aviation Act of

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41 Id. at 1113-14 (amending § 3(a) of the 1926 Act).
42 S. REP. No. 1142, 73d Cong., 2nd Sess. 2 (1934).
43 See Civil Aeronautics Act of 1938, ch. 601, Pub. L. No. 76-706, 52 Stat. 977, 1005 (current version at 49 U.S.C. app. § 1401(b) (1982)). Section 501(b) of the 1938 Act provided that:
1958 (the "1958 Act" or "Federal Aviation Act") reenacted the provision regarding registration as well as retaining the citizenship definition contained in the 1938 Act.\textsuperscript{44}

From 1926 to 1977, the aircraft registration provisions of United States aviation law remained in force in essentially the same form. The exception was the limited authority provided to aliens to register aircraft and, of course, the reflection of the changes as to the requirement of stock ownership which occurred in 1938. An amendment to the 1958 Act reinstated the alien registration authority, which had been deleted from the 1938 Act, without the commercial use limitation, but limited it only to foreign citizens who were permanent United States residents.\textsuperscript{45}

While the citizenship requirements for aircraft registration were being relaxed, the same was not true for the requirements of ownership in United States air carriers by non-United States citizens. Thus, a two-track approach to United States citizenship requirements began to emerge, made possible, in part, by the emergence of the concept of "air carrier" as a definitional entity. Senator McCa-

An aircraft shall be eligible for registration if, but only if —

(1) It is owned by a citizen of the United States and is not registered under the laws of any foreign country; or

(2) It is an aircraft of the Federal Government, or of a State, Territory, or a possession of the United States, or the District of Columbia, or of a political subdivision thereof.

\textsuperscript{Id.}

Section 1(13) of the 1938 Act defined "Citizen of the United States" as:

(a) an individual who is a citizen of the United States or of one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States . . . , of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 percent of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.

\textsuperscript{Id. at 978 (current version at 49 U.S.C. app. § 1301(16) (1982)).}


\textsuperscript{45} Civil Aeronautics Act of 1938, ch. 601, Pub. L. No. 75-706, 52 Stat. 977, 1005 (current version at 49 U.S.C. app. § 1401(b) (1982)).
ran, in commenting on the definition proposed in the 1938 Act, stated that "[t]he most important terms defined in this section are 'air carrier' and 'air transportation.' These terms delimit the person to whom the Act applies." The term "air carrier," defined in section 1(2) of the Civil Aeronautics Act of 1938, did not appear in the Air Commerce Act of 1926 as amended. This is important because the "air carrier" definition requires United States citizen ownership.

48 The most revealing comment rationalizing what would emerge as the two-track approach to United States citizenship requirements appeared during a discussion at a 1937 House hearing on bills relating to the enactment of the 1938 Act. Mr. Mulligan of the Commerce Department Solicitor's Office stated:

I would like to invite the attention of the committee to another reference of some historical and practical importance. It concerns section 303(d) in which it is provided that the holders of 51 percent of the voting interest be controlled by persons who are citizens of the United States for air-carrier operations.

While such a percentage is required under the provisions of the Air Commerce Act for purposes of determining the nationality of owners of United States registered aircraft, it is at least open to question whether such a percentage should suffice for air carrier operations receiving economic support from the Government.

It is believed that serious consideration should be given to the water carrier precedent of requiring at least a 75 percent ownership, on the part of our nationals, before engaging in the operation of American registered vessels. The differentiation between stock ownership and stock control has been so clearly pointed out by the Securities and Exchange Commission and leading writers on corporation finance that this matter should be given careful thought.

If you will go back to the 1926 Act, you may remember that the Senate draft of the 1926 statute provided for 66 2/3 percent stock ownership for aircraft registration. The bill was amended in conference, and the Act provides for only 51 percent of voting control.

But voting control is a nebulous thing.


President Roosevelt supported protecting the domestic air transportation industry from foreign competition:

In view of the immense market afforded by the United States, with its correspondingly great contribution to the volume of passengers, mails, and express moving to foreign countries, it is considered essential that a fair share of the air lines serving the United States be controlled by our nationals.

See S. Doc. No. 15, 74th Cong., 1st Sess. 91 (1935) (Federal Aviation Commis-
Efforts by the United States government to deregulate the airline industry in the late 1970s served as the catalyst for two important policy changes in United States law, both of which reflected the United States government's "two-track" approach to the United States citizenship requirements. In 1977, the Federal Aviation Act was amended to permit registration of aircraft by owners who did not meet the stringent requirements of the definition of United States citizen, provided such aircraft were based and primarily used in the United States. The second

49 U.S.C. app. § 1378(a)(4) (1982). The act defined control as:

any person owning beneficially 10 per centum or more of the voting securities or capital, as the case may be, of an air carrier shall be presumed to be in control of such air carrier unless the board finds otherwise. As used herein, beneficial ownership of 10 per centum of the voting securities of a carrier means ownership of such amount of its outstanding voting securities as entitles the holder thereof to cast 10 per centum of the aggregate votes which the holders of all the outstanding voting securities of such carrier are entitled to cast.

Moreover, interlocking corporate relationships, as applied to the United States air carrier industry, were generally banned by the act. See 49 U.S.C. app. § 1379 (1982). However, such prohibitions were eliminated effective January 1989, with changes in the regulatory structure of the Department of Transportation. See id. § 1378.

49 U.S.C. app. § 1378(f) (1982). The task of defining "based and primarily used in the United States" has been charged to the FAA, which holds rulemaking authority delegated by the Secretary of Transportation. The current regulation promulgated by the FAA provides that:

(b) For the purposes of registration, an aircraft is based and primarily used in the United States if the flight hours accumulated within the United States amount to at least 60 percent of the total flight hours of the aircraft during —

(1) For aircraft registered on or before January 1, 1980, the 6-calendar month period beginning on January 1, 1980, and each 6-calendar month period thereafter; and

(2) For aircraft registered after January 1, 1980, the period consist-
change, occurring in 1980, permitted United States carriers to use "dry leased" aircraft (aircraft without crew) in United States domestic operations. This latter change represented a break with the long standing policy that only United States registered aircraft could be used by United States citizens in the air transportation business in the United States.

The limited contemporary importance of the national defense rationale underlying the historical restriction on registration of aircraft and the increased emphasis on the sale of United States manufactured aircraft is evidenced by the comments of one senator during debate over the 1977 amendment of section 501, the aircraft registration provision of the Federal Aviation Act. Senator Cannon stated that expanding registrability of aircraft was necessary to provide "more favorable possibilities for sale of United States-manufactured aircraft both to foreign nationals residing in the United States and foreign corporations doing business in the United States." The creation of the Civil Reserve Act Fleet ("CRAF") program also contributed to a diminishment of national security concerns.

14 C.F.R. § 47.9(b)-(c) (1989). For a general discussion of the development of this provision, see McMeen & Sarchio, Administrative Flexibility and the FAA: The Background and Development of United States Registration of Foreign-Owned Aircraft, 46 J. AIR L. & COM. 1, 15 (1980).


CRAF is composed of those aircraft which have been contractually committed to the Department of Defense to provide civilian support for emergency military airlift operations. The program was created under authority of the Defense
From the foregoing brief outline of the legislative history relating to the requirement for and definition of United States citizenship in United States aviation law, it is clear that the United States government was convinced that the national interest demanded a limitation on foreign ownership and control of the United States aviation industry. This concern has ebbed and flowed with United States national security and economic tides and has been mirrored in the administration of the law by United States government agencies. Secretary of Transportation Skinner provided the most recent pronouncement on the subject, vowing "to enforce the Act's requirements vigorously," and to "maintain a strong, independent system of U.S. air carriers free of foreign control or undue influence." Secretary Skinner did not address aircraft registration requirements.

In a statement before the House Subcommittee on Aviation on October 4, 1989, Secretary Skinner reaffirmed his position on the United States citizenship requirements for air carriers. The Secretary acknowledged the potential benefits of foreign investment, but continued to assert the need to comply with congressional intent and the letter of

Production Act of 1950, Pub. L. No. 81-774, ch. 932, 64 Stat. 798 (codified as amended at 50 U.S.C. app. §§ 2061-2170 (1982)). It should, however, be noted that there is a requirement that aircraft eligible for the program be owned or controlled by U.S. air carriers and registered in the United States. See Memorandum of Understanding Between the Department of Defense and the Department of Transportation Concerning the Civil Reserve Air Fleet Program, May 7, 1981, at 1-2.

Nominations — DOT; Hearing Before the Senate Comm. on Commerce, Science, and Transportation, 101st Cong., 1st Sess. 95 (1989). In response to a specific question in this regard, Secretary Skinner stated during his confirmation proceedings:

"I understand that the Federal Aviation Act already contains safeguards to prevent unwarranted foreign ownership of U.S. carriers. The Act requires that any U.S. air carrier be both 75% owned and entirely controlled by citizens of the U.S. Thus, I am told that even where the numerical requirement regarding stock ownership is met, the Department examines a prospective owner carefully to ensure that no foreign entity will be in a position to exert control over a U.S. air carrier."

the law for the citizenship requirements.56

II. THE FEDERAL AVIATION ACT — ITS INTERPRETATION AND ADMINISTRATION

A. United States Air Carriers

As noted, the Federal Aviation Act defines a United States air carrier as any citizen of the United States who undertakes, whether directly or indirectly, by a lease or other arrangement, to engage in air transportation. Thus, a United States air carrier must be a "citizen" of the United States. In interpreting the term "citizen," the United States Department of Transportation (the "DOT" or "Department") and the predecessor economic regulatory agency, the Civil Aeronautics Board (the "CAB" or "Board"), construed the definitional language relating to corporate structure as requiring not only that the requi-

56 Id. at 7-8. Because the Northwest-Wings merger represented both citizenship and debt concerns due to the leveraged buy-out provisions of the arrangement, the Secretary stated that it and similar arrangements will receive close case-by-case scrutiny. Id.

The restrictions upon airline sales are increasing, and some critics fear the result will be a cutting of corners on safety. Legislation is currently pending before Congress, in the forms of S. 1277 and H.R. 3443, both of which restrict the purchase of airlines by leveraged buy-out deals. H.R. 3443 passed the House on November 1, 1989, and is pending on the Senate Calendar. S. 1277 was placed on the Senate Calendar on October 18, 1989, and is still pending.

Timothy Pettee, of Merrill Lynch, testified to the House Subcommittee on Aviation concerning his belief that cutting back on leveraged buy-outs and restricting foreign equity investment, as was done in the Northwest-Wings situation, is dangerous. Mr. Pettee testified that such measures leave airlines short of sources of capital. Leveraged Buyouts and Foreign Ownership Interest in U.S. Airlines: Hearings Before the Subcomm. on Aviation of the Comm. on Public Works and Transportation, 101st Cong., 1st Sess. 11, 11-12 (1989) (testimony presented by Timothy Pettee, First Vice President, Airline Industry Analyst, Merrill Lynch Capital Markets).

Furthermore, Mr. Pettee states that an increase in leveraged transactions will not have an effect upon the levels of safety in the airline industry because "there is no empirical evidence which correlates the degree of safety of a carrier and its level of debt and debt service." Id. at 8.

However, proponents of the legislation, such as Congressman Bob Carr from Michigan, believe that leveraged takeovers raise considerable concerns as to whether the airline will be able to expend the funds necessary to maintain the aircraft fleet with a sufficient commitment to safety. Carr Warns Against Airline Takeovers: Says Northwest Deal Must Include Other Airlines, News Release by Congressman Bob Carr, 6th Congressional District, Michigan (Oct. 2, 1989).
site percentage of United States voting interest be owned by United States citizens, but further, that there should be no foreign control of such carrier by a non-United States citizen.

As early as 1940, the CAB indicated its intent to ensure that "[t]he shadow of substantial foreign influence" did not exist in a corporation that sought to qualify as a "citizen of the United States" as defined in section 1(13) of the 1938 Act.\(^5\) The Board therefore proposed to look behind the form of an air carrier's management to ensure that its substance was in fact "under the control of citizens of the United States."\(^5\)

In examining the definition of a United States citizen, it is possible for administrative agencies to conclude that the definitional reference in the corporate composition element relating to "voting stock" permits foreign investors to hold nonvoting stock\(^5\) in larger percentages than vot-

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\(^5\) Id. at 337. One of the leading administrative decisions in this area explains the Board's position:

In examining the control aspect for purposes of determining citizenship, we look beyond the bare technical requirements to see if the foreign interest has the power — either directly or indirectly — to influence the directors, officers or stockholders. We have found control to embrace every form of control and to include negative as well as positive influence; we have recognized that a dominating influence may be exercised in ways other than through a vote.

\(^5\) For example, the FAA's Chief Counsel's office has taken the position that Congress used the term "voting interest" rather than "stock" or "interest in a corporation" to describe the requisite seventy-five percent involvement of United States citizens in a corporation deemed to be a United States citizen. A voting interest in a corporation is a particular kind of corporate involvement and is not necessarily identical to economic ownership or economic participation in the corporation. Rather, Congress appears to have preferred the concept of United States citizen control over corporate decision-making to United States citizen economic ownership in or benefit from the corporation, in defining which corporations may be considered citizens of the United States. This is consistent with and complements the United States citizen control that is insured by requiring that the president and two-thirds of the board of directors of a corporate "citizen of the United States" be United States citizens. Consequently, I believe that foreign ownership of more than twenty-five percent of the stock of a corporation does not, in itself, exclude a corporation from the Act's definition of "citizen of the
ing stock. However, as apparent from recent events, if the nonvoting ownership allows the foreign investor to exercise such a degree of control as to nullify the United States controlling interests, or to restrict the United States carrier's operations to suit the needs of the particular foreign investor, the Board could order divestiture of the foreign investment for failure to fulfill the citizenship requirement.  

Several administrative decisions illustrate some of the machinations the United States government has employed in determining whether or not a United States air carrier is, in fact, a citizen of the United States within the meaning of the statute. In *Willey Peter Daetwyler*, the CAB decided that mere compliance with the technical requirements of the 1958 Act's definition of "citizen of the United States" will not qualify a corporation as a United States citizen when the potential for foreign control exists. This case focused on whether Daetwyler, a citizen of Switzerland, could actually be considered fit to control a United States air carrier. Daetwyler was one of three directors of a carrier corporation, and owned twenty-five percent of its stock. As required by the 1958 Act, United States citizens owned the remaining seventy-five percent of the carrier's stock, and United States citizens comprised two-thirds of the corporation's board of directors and other managing officers.

The CAB ruled that because Daetwyler was "in a position of control," the carrier did not qualify as a "citizen of

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60 In re Acquisition of Northwest Airlines by Wings Holdings, Inc., DOT Order No. 89-9-51 (Sept. 29, 1989) (Because KLM, a Dutch corporation, owned almost 54% of the equity interest in Wings, DOT required KLM's divestment of all but 25% of the total interest in Wings before Wings could acquire Northwest Airlines).

61 58 CAB, 118 (1971).

62 Id. at 119.
the United States” under the 1958 Act. The Board concluded that the section 101(13) definition of United States citizen did not include “a corporation meeting the bare minimum percent of ownership and directorships held by United States citizens, where control in fact lies in foreign citizens.”

In finding that the carrier corporation did not qualify as a citizen of the United States under the 1958 Act, the CAB rejected the literal interpretation of section 101(13), which provides that seventy-five percent of the voting interest must be “owned or controlled by persons who are citizens of the United States.” The Board decided the definition should be interpreted conjunctively, and required that air carriers be owned and controlled by citizens of the United States. The CAB cited its earlier decision in Uraba and the legislative history of the statutory definition of “citizen of the United States” which, in the Board’s view, indicated that Congress intended that United States citizens have “actual control” over United States air carriers.

Yet, in what appeared to be a move to accommodate foreign interests in air carriers, the Board’s decision in In re Page Avjet Corp. approved foreign ownership of non-
voting stock in a United States air carrier. Page, in response to a CAB order to either cease operations or to develop a reorganization plan which met the citizenship requirements, submitted a plan for the Board’s evaluation.

In reviewing the plan, the CAB focused on the rights of the nonvoting shareholders. While the voting stockholders had the right to elect the company’s officers and directors and to exercise control over the ‘day-to-day operations of the air carrier, the nonvoting stockholders held the right to exercise control only in “extraordinary circumstances.” Even so, the plan required a majority of the nonvoting stockholders to approve a merger, acquisition or consolidation of the corporation, as well as to initiate and approve a corporate dissolution or liquidation.

The CAB applied an “actual control” criterion for qualification as a United States citizen. The Board determined that Page did not qualify as a citizen since the nonvoting stockholders had the power to exert a dominating influence over the corporation. The CAB concluded that “[i]f the nonvoting stockholders disapprove of the way that the officers and directors conduct the company’s affairs, they can vote for dissolution of the company. Given the nonvoting shareholders’ power, it could be expected that the officers, directors and voting stockholders would follow their wishes.”

The Board did, however, allow Page to submit a revised plan designed to create a new corporation with two classes of stockholders. One group of United States citizens would own preferred voting stock, while the other group would own nonvoting common stock. The plan included a buy-out provision, which, upon the occurrence of certain events, required the United States stockholders

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69 Id. DOT described this case as defining the “outer limits of what may be permitted under the [1958] Act.” In re Intera Arctic Servs., Inc., DOT Order No. 87-8-43, at 11 (Aug. 18, 1987).

70 Page Avjet, Citizenship, CAB Order No. 83-7-5, at 4 (July 1, 1983).

71 Id.
CITIZENSHIP REQUIREMENTS

to buy the common stock at its "fair market value." The Page plan defined "fair market value" as one-half of the sum of the net tangible book value per share, plus six times the earnings per share.\textsuperscript{72} The CAB concluded that this plan would meet the citizenship requirement imposed by the 1958 Act.\textsuperscript{73}

More recently, in a variation of the stock ownership standard, the DOT permitted Transpacific Enterprises ("Transpacific") to acquire twenty percent of the voting stock of America West Airlines ("America West"), a United States air carrier, in Transpacific Enterprises, Inc. and America West Airlines, Inc.\textsuperscript{74} Transpacific, a United States corporation, is a subsidiary of Ansett Transportation Industries Limited ("ATI"), an Australian corporation owned by two other Australian corporations.

The Transpacific stock purchase was structured to comply with the United States citizenship requirement. By owning only twenty percent of America West's stock, Transpacific would not violate the citizen ownership requirement. However, to prevent the possibility of a future violation of the citizenship requirement, America West amended its certificate of incorporation to prohibit foreign citizens from owning more than twenty-five percent of America West's voting stock, and to authorize its board of directors to take all necessary steps to maintain America West's status as a United States citizen under the 1958 Act.\textsuperscript{75}

Although the Department approved the transaction, it did so with reservations. The DOT required further examination of other links between America West and affiliates in Transpacific's corporate structure including America West's lease of nine of its seventy aircraft from corporations owned by ATI's parent corporation and

\textsuperscript{72} CAB Order No. 84-8-12, at 2 (Aug. 2, 1984).
\textsuperscript{73} Id.
\textsuperscript{74} DOT Order No. 87-8-31 (Aug. 13, 1987).
\textsuperscript{75} Id. "The amendment ... authorizes the carrier's board of directors to take all steps that may be necessary to ensure that America West remains a U.S. citizen under the terms of the Act." Id.
Transpacific's preexisting ownership of a small quantity of America West's convertible preferred stock.  

The Department ultimately permitted Transpacific and America West to conclude the stock purchase, but neglected to provide a definitive ruling on whether America West would continue to meet the citizenship requirement under the 1958 Act. The DOT subsequently advised the parties that it was satisfied that America West remained a United States citizen for the purposes of the Act.

Finally, the Department's decision in *In re Intera Arctic Services, Inc.* appears to be a retreat from its decision in the *Page Avjet* case. The Department first tentatively ruled that Intera Arctic Services ("IAS") did not qualify as a United States citizen because it failed "to place itself beyond the control of its Canadian affiliates." The grounds for the DOT's tentative ruling were reiterated in the final decision: 1) the broad buy-out provision conferred "virtually unconstrained discretion" on the non-voting stockholders to invoke or threaten to invoke the buy-out provision; 2) the dissolution provisions of IAS' Articles of Incorporation operated to insulate the voting stockholders from the risk of failure, and also from the chance to share in the corporation's success; and 3) the two United States citizens on whom IAS relied to satisfy the numerical requirements of section 101(16) were "key employees" of Intera Technologies, Inc. ("IT"), the Canadian parent corporation of IAS, making them "ready conduits" for IT's exercise of control over IAS.

The Department's ruling is of particular significance since IAS was formed as a domestic corporation by its parent IT, with specific regard for the *Page Avjet* decision.

76 Id. at 5.
77 United States-Australia Service Proceeding, DOT Order No. 89-10-2 (Sept. 25, 1989). "America West, a Delaware corporation, has previously been found to be a citizen of the United States within the meaning of section 101(16) of the Federal Aviation Act." Id.
78 DOT Order No. 87-8-43 (Aug. 18, 1987).
79 DOT Order No. 87-3-32, at 3 (Mar. 9, 1987).
80 Id.
IT held all of the nonvoting common stock, individual United States citizens held three-fourths of the preferred voting stock, and a buy-out provision allowed IT to sell its stock back to IAS upon the occurrence of certain events.

The DOT affirmed its tentative findings in its final order, focusing on the potential for foreign control that the CAB condemned in *Daetwyler*. The Department concluded that the IAS plan mirrored that of *Daetwyler* rather than *Page Avjet*. In light of the strong similarity between the IAS and *Page Avjet* ownership structures, the *Intera Arctic* holding suggests that the DOT may no longer consider the *Page Avjet* decision to be good law.\(^8\)

The DOT recently ordered a limitation of foreign control before allowing the purchase of a domestic airline in *In re Acquisition of Northwest Airlines by Wings Holdings, Inc.*\(^8\) The Department expressed "significant concern" over the degree of foreign participation in Wings Holdings, Inc. ("Wings"). Before permitting Wings to acquire Northwest Airlines, the DOT required KLM, a Dutch airline corporation, to relinquish its equity investment in Wings to the extent it exceeded twenty-five percent of the total interest in Wings.\(^8\) KLM and other foreign investors owned less than twenty-five percent of the voting stock, thereby appearing to fulfill the citizenship requirement of section 101(16).\(^8\) However, the DOT was concerned with the potential for KLM to exercise control over Northwest

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\(^8\) DOT Order No. 87-8-43, at 11.

There are, however, enough differences between the Page and IAS situations that it will not be necessary for us to consider here whether or not we would have decided that case the same way that our predecessor agency did. Suffice it to say that, in our view and we think, the Board's, the *Page Avjet* precedent constitutes the outer limits of what may be permitted under the Act. Because citizenship decisions under the Act are based on an evaluation of all of the facts and circumstances of each individual case taken together, those who attempt to pattern their conduct on the fringes of what is lawful often overstep the bounds of what is permitted. This is such a case.

*Id.* (footnote omitted).

\(^8\) Id.

\(^8\) DOT Order No. 89-9-51 (Sept. 29, 1989).

\(^8\) *Id.* at 8.

\(^8\) *Id.* at 4.
In assessing what it considered to be "actual control," the DOT distinguished debt investments from equity investments. The DOT views debt agreements with foreign entities as standard covenants which "are clearly aimed at protecting the debtholders' interests," and which do not restrict the regular operations of carriers. Citing Page Avjet and Intera Arctic as precedent, the DOT stated that a foreign entity which owns "a large share in a carrier's equity poses citizenship problems, even where the interest does not take the form of voting stock, particularly if there are other ties to the foreign entity." The DOT felt that since KLM held a 56.74% equity interest in Wings, KLM had more incentive to participate in the business decisions of Wings in order to protect KLM's investment.

Furthermore, as a preferred stockholder, KLM could restrict securities offerings by Wings, and could "block any amendments to the Certificates of Incorporation or Designation that would materially and adversely affect the specified designations, preferences, or special rights of its preferred stock." KLM had the right to appoint a director to the Wings board of directors who would not be restricted in participating in Northwest's decision-making. Also, KLM had the right to name a three-person committee to advise Wings on Northwest's financial affairs.

Before permitting the acquisition of Northwest by Wings, the DOT ordered several compliance measures: 1)
termination of KLM’s right to call the committee to monitor Northwest’s financial affairs; 2) recusal of KLM’s representative on the board of directors in specific circumstances; and 3) Northwest’s agreement to file reports concerning changes of ownership of shareholders and concerning nonstandard agreements made between KLM and Northwest. The Department also ordered KLM to reduce its equity share to twenty-five percent of the total equity in Wings within a six-month period. These measures were calculated to eliminate the possibility of actual control by the foreign nonvoting shareholder.

In November 1989, the DOT issued a final order in In re North American Airlines, issuing a section 401(d)(1) certificate of public convenience and necessity. However, the order also specifically directed North American Airlines (“NAA”) to notify the Department if a non-United States citizen acquired any equity interest in the airline.\textsuperscript{92} Citizenship concerns arose when the DOT learned that although NAA was fully owned and controlled by United States citizens, El Al Israel Airlines held an option to acquire 24.9% of NAA’s outstanding common stock.\textsuperscript{93} The DOT found no justification for an adverse citizenship holding, however, since United States citizens held at least seventy-five percent of the ownership and control of NAA.\textsuperscript{94} Furthermore, the DOT concluded that the existence of a leasing agreement between El Al and NAA had no adverse impact on the citizenship issue.\textsuperscript{95}

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\textsuperscript{92} In re North American Airlines, DOT Order No. 89-11-26 (Nov. 14, 1989).
\textsuperscript{93} In re North American Airlines, DOT Order No. 89-11-8 (Nov. 6, 1989).
\textsuperscript{94} Id. at 7.
\textsuperscript{95} Id. at 7. It is also important to note that an application pending before DOT at the time of publication of this Article addresses the citizenship issue. On July 14, 1989, Discovery Airway, Inc. filed an application for fitness. Six of its seven board members are citizens of the U.S. and more than 85% of its voting stock is owned by U.S. citizens. In re Discovery Airways, No. 46393, at 3 (filed July 14, 1989). On November 20, 1989, Discovery filed a motion to cause the DOT to act immediately upon the July 14th application. An Italian citizen holds approximately 15% of the voting stock in Discovery. Approximately 75% of the stock is held by a United States citizen who has ties to a foreign corporation, Nansay Corporation. Discovery filed a motion for expedited action and agreement to imposition of conditions on November 20, 1989. In that
On December 21, 1989, the DOT issued yet another citizenship order. In *In re Application Discovery Airways*, the DOT raised no objection to an Italian shareholder holding fifteen percent of both the voting common stock and nonvoting participating stock. However, the DOT required that the Italian citizen be removed from all executive functions at Discovery in order to lessen his present executive control, since section 101(16) reserves such control for United States citizens. The Department also ordered that lease agreements with British Aerospace be filed with the DOT to determine British Aerospace's relationship with Discovery. This order was finalized January 29, 1990.

In the *Discovery* decision, the DOT used a strict standard of scrutiny in determining who is to be considered a United States citizen. If a United States citizen has strong ties with a foreign corporation, and if the DOT considers these ties to weaken the individual's ability to exert control over the air carrier, then the DOT will determine that the citizenship requirement has not been met. Consequently, the Department required the removal of three Discovery board members who are American citizens and who have affiliations with a Japanese company.

In *In re Application of Discovery Airways*, DOT Order No. 89-12-41 (Dec. 21, 1989).

*Id.* at 14-15.

*Id.* at 15.


*In re Application of Discovery Airways*, DOT Order No. 89-12-41 (Dec. 21, 1989).
affiliations to a Japanese corporation is a violation of the
citizenship requirement, and if so, whether divestiture is
necessary.\textsuperscript{101}

While the CAB and DOT were and are continuing to
thrust to and fro on the economic battlefield of what con-
stitutes United States citizenship for purposes of qualify-
ing as a United States air carrier under the law, the FAA, a
modal element of the DOT, has been moving towards ac-
commodating foreign interests in United States registered
aircraft.

B. \textit{United States Aircraft Registration Requirements}

The question of citizenship looms decisively not only in
determinations with respect to United States air carriers,
but also in connection with the ability to register aircraft
in the United States. Under the provisions of the 1958
Act, an aircraft which is eligible for registration in the
United States cannot be operated therein unless it is reg-
istered in accordance with the Act.\textsuperscript{102} The definition of
citizenship contained in the 1958 Act, which is applicable
to air carriers, is equally applicable in determining
whether an individual or corporation may register an air-
craft in the United States. The interpretation of that defi-
nition has differed from the interpretation of exactly the
same provisions for purposes of determining what is, or is
not, a United States air carrier.\textsuperscript{103} The FAA has deter-

\textsuperscript{101} Id. at 4.
\textsuperscript{102} 49 U.S.C. § 1401(a) (1982).
\textsuperscript{103} For instance, the FAA has taken the position that:

In administering Title V of the Act, we read 49 U.S.C. § 1301(16)(c)
to apply only to the issue of control in terms of voting interest of
shareholders, not in terms of the board of directors or other manag-
ing officers of a corporation. The only requirement with respect to
these individuals is that two-thirds of them must be citizens of the
United States. Accordingly, the FAA has never required that a cor-
porate applicant for U.S. aircraft registration under 49 U.S.C.
1401(b)(1)(A)(i) demonstrate that the requisite percentage of its
board of directors or managing officers are free from relationships
which might place elements of "control" in a non-citizen entity.
Further, the Federal Aviation Administration (FAA) does not con-
sider CAB decisions controlling with respect to issues involving air-
mined that for purposes of applying the partnership eligibility to the concept of United States citizenship, each member of the partnership must be an individual. The United States government has gone through a number of what some have characterized as legal fictions to establish both the ownership and citizenship requirements for aircraft registration. The government has interpreted leverage, finance leases, and voting trusts in an accommodating manner to satisfy the restrictions imposed with respect to the United States citizenship requirement. The requirements relating to eligibility for registration have been so distorted that the Committee of Aeronautics of the New York State Bar Association suggested that citizenship requirements for aircraft registration may no longer be meaningful. The economic

craft registration, just as FAA decisions in this area do not bind OST, the successor to the CAB's functions. The two agencies have different statutory responsibilities, with different concerns to be addressed in determining an operator's citizenship. For example, in most cases, the FAA requires only that U.S. citizenship be supported by the certification of the applicant. In contrast, OST performs a more detailed analysis in pursuit of its own regulatory goals. With IAS, there is additional conclusive evidence that all voting shareholders, officers and directors are individual U.S. citizens. Consideration of further subtleties as to how such persons might be influenced by their other interests in non-U.S. companies is not relevant to the registration process. Therefore, the fact that U.S. citizens have interests outside the United States should not be disqualifying for purposes of aircraft registration.

Letter from Irene E. Howie, FAA Asst. Chief Counsel, Internal Affairs and Legal Policy Staff, to Gary B. Garofalo and Carl B. Nelson, Jr., at 2-3 (Mar. 9, 1987) (discussing citizenship requirements and their effect upon the continued eligibility for registration of civil aircraft).

104 See FAA Letter, supra note 11.
106 Id. at 202.
107 See New York City Bar Ass'n Comm. on Aeronautics, Two Problems in U.S. Aircraft Registration, at 7 (Apr. 13, 1982) [hereinafter New York City Bar Ass'n]. The committee recommended that section 501(b) of the FAA Act be amended to:

make United States aircraft registration available without regard to citizenship, but subject to the following conditions:

(1) that non-citizen registrants validly submit to United States jurisdiction in all matters concerning U.S.-registered aircraft and,

(2) that all U.S. maintenance, operation, safety and airworthiness
advantage available to the United States in being able to finance the purchase of new aircraft utilizing foreign sources of investment may have motivated, at least in part, the FAA's interpretive position.

Given the evolving legal interpretations of who or what qualifies as a United States citizen, the time has arrived for a review of the entire issue. At the very least, it is time to examine whether the original reasons for restrictive application of the statutory definition of United States citizen are still valid and in the United States national interest.

III. Possible Solutions Resolving the Conflict of Interpretation and United States Domestic Policy Concerns

Assuming the United States wishes to continue to some degree its present posture of insulating United States carriers from foreign control, and United States registered aircraft from foreign "ownership,"\textsuperscript{108} the following changes in the 1958 Act should be considered. These changes are not designed to abandon the present United States policy, but to provide greater flexibility in meeting possible future aviation industry needs in both the domestic and international arenas. While it is recognized that statutory changes are not easy to come by, the following alternatives are suggested as a means of opening a dialogue on this subject.

\textsuperscript{108} See supra note 55 and accompanying text.

\textsuperscript{108} See supra note 55 and accompanying text.
CURRENT LAW

Section 101(16) of the 1958 Act currently defines citizenship as follows:
"Citizen of the United States" means (a) an individual who is a citizen of the United States or of one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.109

SUGGESTED ALTERNATIVES

Alternative 1

Amend section 101(16) by deleting from subparagraph (b) the phrase "such an individual" and substituting in lieu thereof the phrase "a citizen." [The remainder of the section is unchanged].

Alternative 2

Amend section 101(16) by deleting from subparagraph (b) the phrase "such an individual" and substituting the phrase "a citizen"; by deleting from subparagraph (c) the phrase "75 per centum" and substituting in lieu thereof "51 per centum."

Alternative 3

Amend section 101(16) by deleting from subparagraph (b) the phrase "such an individual" and substitute in lieu thereof the phrase "a citizen"; by striking the period at the end of subparagraph (c) and substituting a semicolon and adding the following: "Provided, however, the Secretary

may waive any of the requirements set forth herein in the public interest of the United States."

The first suggested alternative to the citizenship definition merely deletes from the present definition the phrase which has resulted in the prohibition of aircraft registration by corporate partnerships. This alternative becomes even more necessary in light of a proposed recodification of the FAA Act, which by its terms deletes the phrase, but because it is only a recodification and not a substantive amendment, may result in confusion.110

The second alternative for amending the citizenship definition also deletes the troublesome language associated with partnerships and returns to the fifty-one percent criteria for voting stock ownership. The key question in considering such a change is what advantage or necessity is associated with maintaining the seventy-five percent standard? The percentages of stock ownership were derived from United States maritime law. Yet the analogy with maritime law no longer continues to be relevant, if it ever was relevant.111 There is, however, a domestic policy

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110 REPORT FROM THE HOUSE COMM. ON THE JUDICIARY, 100TH CONG., 2D SESS., REVISION OF TITLE 49, UNITED STATES CODE, "TRANSPORTATION" 256-57 (Comm. Print 1988) (the proposed recodification of § 105(c) substitutes the words "other than a corporation which is a citizen of the United States" for "not a citizen of the United States" but provides no substantive change).

111 Corporations which seek the benefits of ship registration with the U.S. government are still required to meet certain shareholder citizenship requirements. Thus, because of cabotage, corporations operating a vessel domestically are required to fulfill a 75% U.S. shareholder ownership threshold for registration purposes. 46 U.S.C. § 802(a) (1982) (46 U.S.C. § 802(a) (1982) was moved to the Title 46 appendix, 46 U.S.C. app. § 802(a) (Supp. I 1983)). Those corporations seeking U.S. registration for purposes of operating in international waters need only 51% U.S. shareholder ownership. However, a completely foreign owned corporation is eligible for U.S. documentation provided it is established under the laws of the United States or of a State... [and its] president or other chief executive officer and chairman of its board of directors are citizens of the United States and no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum.

issue to be debated — the degree of economic protection which the United States government should provide to United States carriers. Is a seventy-five percent of voting stock ownership requirement necessary if the element of control in United States citizens is maintained at a lesser percentage? Does the United States air carrier industry need an infusion of capital not available in the United States — particularly in this day and age of the leveraged buy-out monopoly game now prevalent in the United States?

Finally, the third alternative, while retaining the present definition, authorizes the Secretary of Transportation to waive any of the citizenship definitional requirements if he finds it in the public interest to do so. This amendment would give the United States government flexibility on a case-by-case basis to deal with a number of troublesome international issues ranging from foreign involvement in the ownership of United States carriers and aircraft to cabotage,112 recognizing that the cabotage issue is compli-

112 See generally, Comment, Air Cabotage: Historical and Modern-Day Perspectives, 45 J. AIR L. & COM. 1059, 1059 (1980). This article defines cabotage as the "carriage of passengers, cargo, and mail between two points within the territory of the same nation for compensation or hire." Id.

Air cabotage was first written into international law by the Paris Convention of 1919. Id. at 1060. The resulting Treaty provided, in pertinent part, that "[e]ach contracting State shall have the right to establish reservations and restrictions in favor of its national aircraft in connection with the carriage of persons and goods for hire between two points on its territory." Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173.

In the United States, the Air Commerce Act of 1926 permitted foreign-registered aircraft to be navigated in the United States where reciprocity in favor of American aircraft was provided. Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568, 572. Yet, section 6(c) of the 1926 Act also states that "no foreign aircraft shall engage in interstate or intrastate air commerce." Id. There has been little substantive change in the federal government's air carrier cabotage policy. The current version provides that "aircraft permitted to navigate in the United States . . . may . . . engage in air commerce within the United States except that they shall not take on at any point within the United States, persons, property, or mail carried for compensation or hire and destined for another point within the United States . . . ." 49 U.S.C. app. § 1508(b) (1982); see also 298 Aviation Daily 419 (Dec. 5, 1989), reporting that bilateral negotiations between the United States and the United Kingdom have reached an impasse because the United States proposal failed to address British concerns including cabotage and foreign ownership of United States carriers.
cated by the applicability of the non-discrimination provisions of the Chicago Convention.113

None of the alternatives directly address the issue of foreign entity "control" of United States air carriers. Although the general governmental interpretative position under the theory of Page Avjet114 was liberalizing, the more recent Intera Arctic115 decision and the administrative activities in the KLM-Northwest case indicate a return to a more restrictive application of the "control" theory. A return to the statutory language addressing the control issue in the recently "sunsetted" 1958 Act116 may not be called for, but a definitive United States government policy statement explaining the boundaries of permissible foreign "control" involvement in United States aviation would be helpful.117 Continuing to address this issue on a case by case basis may only compound the uncertainty and confusion in the aviation and financial communities.

With respect to the citizenship requirement for aircraft registration purposes only, the following alternatives are suggested.

CURRENT LAW

Section 501(b) of the 1958 Act currently provides:
Citizenship for registration purposes only
An aircraft shall be eligible for registration if, but only if—
(1)(A) it is — (i) owned by a citizen of the United States or by an individual citizen of a foreign country who has law-

113 See 296 Aviation Daily 599 (June 26, 1989). For example, legal experts have questioned whether the European community’s plan to create a unified air travel market among member states (i.e., grant domestic traffic rights to member state air carriers) is in conflict with provisions of the Chicago Convention banning the exchange of exclusive cabotage authority. Id.
114 See supra notes 68-69 and accompanying text.
115 See supra note 78 and accompanying text.
117 See, e.g., 14 C.F.R. § 380.25a (1989) (defining “control” with respect to charters operated by direct air carrier affiliates as “any ownership, common management, debtor-creditor, or other relationship between the two entities by which one entity could influence the other’s business decisions other than by arms-length business transactions.”)
fully been admitted for permanent residence in the United
States; or (ii) owned by a corporation (other than a corpo-
ration which is a citizen of the United States) lawfully or-
ganized and doing business under the laws of the United
States or any state thereof so long as such aircraft is based
and primarily used in the United States; and (B) it is not
registered under the laws of any foreign country; or (2) it
is an aircraft of the Federal Government, or of a State, ter-
ritory, or possession of the United States or the District of
Columbia or a political subdivision thereof.

For purposes of this subsection, the Secretary of Trans-
portation shall, by regulation, define the term "based and
primarily used in the United States."118

SUGGESTED ALTERNATIVES

Alternative 1

Leave the definition in section 101(16) unchanged but
amend section 501(b) by deleting the last paragraph and
substituting in lieu thereof the following: "For purposes of
this subsection, the Secretary of Transportation shall, by
regulation, define the term 'based in and primarily used
in the United States' and 'citizen of the United States."

Alternative 2

Leave the definition in section 101(16) unchanged but
amend section 501(b) by deleting it and substituting in
lieu thereof

"section 501(b) United States Registration shall be avail-
able without regard to citizenship subject to the following
conditions: (1) that non-citizen registration validly submit
the registrant to United States jurisdiction in all matters
concerning United States-registered aircraft, and (2) that
all United States maintenance, operation, safety and air-
worthiness standards be fully complied with for all United
States-registered aircraft, without regard to the location of
such aircraft's use."

CITIZENSHIP REQUIREMENTS

In addressing the alternatives relating to the definition of citizenship for registration purposes only, the first alternative permits a regulatory definition of citizen solely for registration purposes, thus providing flexibility. The second alternative adopts a proposal of the New York City Bar Association. Both alternatives suggest a continuation of the trend towards relaxation in aircraft registration requirements. What must be resolved is whether the United States wishes to continue its more restrictive stance against foreign control of United States carriers, while at the same time continuing a more liberal stance in terms of permissibility of aircraft registration. Specifically, the issue is whether the desire to promote the sale of United States manufactured aircraft continues to justify a more liberal "citizenship standard" approach for aircraft registration.

In light of the increasing use of leased aircraft and the pending action to amend the Chicago Convention to permit the delegation of responsibility for certain safety matters from the state of registry to the state of operator, it seems appropriate to suggest this additional amendment to the FAA Act:

Registration of Leased Aircraft

Amend section 501(b)(1)(A) by adding (iii) "leased for a period of not less than five years to a citizen of the United States, an individual citizen of a foreign country who has lawfully been admitted for permanent residence in the United States or a corporation other than a corporation

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STEWART, Lease, Charter and Interchange of Aircraft: A Government Perspective, 14 Akron L. Rev. 187, 199-203 (1980); Howie & Van Dam, Facilitating the Lease and Interchange of Civil Aircraft, ICAO Bull., Feb. 1989, at 9-10. Article 83 bis to the Chicago Convention, unanimously adopted by the ICAO Assembly in 1980, establishes a system whereby countries may enter into bilateral arrangements transferring certain safety responsibilities. Although cast in discretionary terms (i.e., a state of registry may or may not agree to transfer and a state may or may not agree to accept some or all of the obligations under a proposed transfer of regulation), the amendment has received only 50 of the necessary 98 votes for ratification.

NEW YORK CITY BAR ASS'N, supra note 108.
which is a citizen of the United States lawfully organized and doing business under the laws of the United States or any state thereof so long as such aircraft is based and primarily used in the United States.

With the emerging prevalence of aircraft leasing, it is suggested that the 1958 Act be amended to permit the registration of foreign-owned aircraft in circumstances where leases are for five years or more to persons who qualify as citizens of the United States. This proposed amendment contains a provision for lease registration by non-United States citizen corporations where the aircraft is based in and primarily used in the United States, and deletes the troublesome language relating to partnerships. A different formulation of legislative change would be to amend the existing provisions of the law relating to the registration requirements. This amendment would grant the Secretary of Transportation exemption authority to authorize the registration of foreign-owned aircraft leased to a United States citizen when the citizen’s principal place of business is in the United States. This would be in keeping with the proposed “83 bis” amendment to the Chicago Convention. A number of governments already permit such registration.121

While I have suggested amending the statutory language, I believe that this issue may be more effectively dealt with by regulation. This could be accomplished by providing a regulatory definition of the term “owner.” Although not presently defined by statute, the FAA published one interpretative policy addressing the definition of “owner” and authorizing the registration of aircraft under finance leases.122 A similar policy statement or reg-

121 *See generally,* Aircraft Finance: Registration, Security and Enforcement (R. Hames and G. McBain eds. 1988). With the development and growth of financial leasing arrangements, several governments now permit the registration of foreign-owned aircraft by exemption or otherwise. Among this group are Denmark, France, Netherlands, Norway, Sweden, and West Germany.

122 *See Legal Opinion as to Whether the Lessee of an Aircraft Conveyed Under a Finance Lease is the Owner of the Aircraft for Purposes of United States Aircraft Registration,* 46 Fed. Reg. 18,877 (Mar. 26, 1981). Aircraft conveyed under fi-
ulation incorporating the appropriate indicia of ownership requirements in United States citizens could be used to permit the registration of aircraft leased to United States citizens. Regulatory action would permit the United States to gain experience with registering leased aircraft. Also, it may be easier to change or revoke a regulatory requirement found undesirable, than to alter a statutory one.

Conclusions

The requirement of United States citizenship has proven to be a thorny briar patch in advising the financial community, both in the United States and abroad. It is clear from early legislative history of United States aviation law that a concern for insuring United States security motivated the United States citizenship requirements. It is also clear that as the air transportation industry in the United States grew, the citizenship requirement was linked to protecting the United States air carrier industry. With the emergence of deregulation and the need for aircraft to meet the increasing number of air carrier operations, a clear dichotomy developed between the application of the citizenship standards for air carrier purposes and those for aircraft registration purposes. The

lease, may be registered by the lessee as "owner" when such lease is intended as a security transfer. The FAA listed the following criteria as indicia of a lease intended for security:

(1) All the risks and burdens of ownership (e.g. insurance, maintenance, taxes, fees) are transferred to the lessee;
(2) The lessee has an unrestricted right to sublease the aircraft;
(3) A full payout of the lease is required, which is equivalent to the purchase price of the aircraft plus interest;
(4) The term of the lease, with or without options to renew the lease for a nominal sum, is of a duration equal to the useful life of the equipment;
(5) The options to renew are nominal when compared to the lease payments during the base lease term;
(6) The aircraft may be sold at the end of the base lease term, at the option of the lessee and the lessee is entitled to substantially all (i.e. 90%-100%) of the proceeds of the sale.

Id. at 18,877-78.
questions that remain to be resolved are whether or not that dichotomy continues to be valid, particularly in light of the international environment, and what form of legislation, if any, would be useful in addressing the United States citizenship issue. While we can continue to navigate the misty moor and maintain the rampart, the time has arrived to reevaluate the entire issue of the degree to which, in the interest of the United States, foreign ownership in the United States aviation environment is to be permitted. In evaluating this issue, our government policy and decision makers should guard against being blindly chained to a tyranny of bureaucratic precedent that may have validly served the public interest in its time, but which, in today's aviation atmosphere, may not do so.
Comments