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James W. Callison

# AIRLINE DEREGULATION—A HOAX?

JAMES W. CALLISON*

THE STATED goals of the airline deregulators[1] are ostensibly laudatory: More competition, lower fares and rates, more service, greater management freedom, speedier regulation and, in general, less regulation—goals, indeed, which are not unlike motherhood, apple pie, and patriotism. It is not the purpose of this essay to quarrel with the goals.

Its purpose rather is to show that the proposed means are wholly unnecessary to the coveted ends—that the proposed legislative surgery, indeed, can more logically be related either (1) to the fact that its support is cresting in an election year or (2) to pique by those now urging deregulation over past, considered declination by an independent federal agency (the Civil Aeronautics Board) to follow their wishes in resolving various economic/regulatory issues—or, more likely, both—than it can be to any real need for legislative change. Most of the stated goals of the deregulators are

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* Vice President—Law & Regulatory Affairs, Delta Air Lines, Inc.

[1] The original efforts to revamp the existing air transport regulatory statutes were openly described as "deregulation" efforts. The basic concept was perhaps most candidly described in the following quotation, which has been attributed to the former head of the White House Task Force on revision of regulatory statutes:

> Let anybody set up an airline and fly anyplace they g—d— please and charge what they want. If a few airlines go under in the process, that is not the government's problem.

DUN'S REVIEW, Sept. 1975, at ___.

Needless to say, this revealing description of the goals of the deregulators soon proved to be unpopular. Accordingly, those seeking extensive alteration of the present system have switched their banner to that of "regulatory reform." But the basic goal remains essentially the same, a system governed by pure textbook *laissez faire* economics, with little regard for the fact that common carrier transportation is in many respects imbued with public trust and public utility characteristics. As such, competition and the profit motive, while both important, must be balanced with public service factors affecting each area of the nation, their interrelationship, and their impact on national growth and development, if the overall public interest is to be determined and fulfilled.

*already* provided for in the existing statute and, indeed, have largely *been* accomplished.

As these thoughts are developed, a more fundamental and troublesome question should be borne in mind: If, as even the deregulators admit, this country has the *greatest* air transportation system in the world, with *more* service in *more* markets by *more* carriers with *greater* variety *and at lower fares than exist elslewhere*—and if all of this is provided in constantly increasing volume even as per-seat and per-plane mile fuel consumption, and adverse environmental (noise and emission) impact, both steadily decrease —why the sudden desire to tinker with the regulatory system under which the United States, in these respects, has become the envy of the rest of the planet? The small town chamber of commerce, the traveling businessman, the thoughtful politician now able to divide his time between Washington and home constituency, indeed all present users of air transportation and any careful student of the law or economics will want to ponder this question most carefully lest he stand by while our nation's leadership in air transportation and in aircraft development and manufacturing,[2] is lost to experimentation and other, perhaps less worthy goals.

[2] The United States may very well already be in the process of losing, to the U.S.S.R. and Western European countries, some of the leadership which this country has enjoyed in aero research and commercial aircraft development since World War II. If this be so, one of many important causes was the excessive concern over unproven allegations of possible atmospheric damage and/or undue over-ocean noise from supersonic operation that persuaded Congress to withdraw funding of commercial supersonic aircraft development. The magnitude of this research would have been such that the nation would have benefited from it immensely even if a commercial supersonic aircraft had never flown. But such an aircraft would have flown, of course, because the same research would have overcome or proven groundless the various objections raised. The magnitude of the research was also such that it could only have been funded by the public as a whole—a funding that could soon have been repaid in national technological achievements and, if an opportunity had been afforded to use the fruits of the research, by direct repayments. The price of quitting the field may not only be loss of supremacy in these fields to nations other than the United States. Severe damage may thereby have been done to our balance of payments program (commercial aircraft have been our largest export product for years and clearly remain the largest technological export). In addition, the mutually beneficial exchange of research between military and commercial aircraft development (with the military often taking the lead in technological advances but with commercial aircraft development producing the economic viability and long term dependability desired by both sets of users), may also have been seriously damaged. If the deregulators were now also to succeed in dismantling the nation's air transportation system, as many justifiably feel their proposals would do, the damage to the national interests would be multifold.

Nothing in this article should be construed as suggesting that periodic review of the nation's aviation statutes (or any other law, for that matter) is not desirable. Even good laws—and this article will show that the Federal Aviation Act[3] is an outstanding example of a "good law"—can be improved, as can the implementation and execution of those laws. The current review of the aviation statutes and airline regulation, therefore, has been welcomed by the U.S. air transport industry. But the question remains whether something as drastic as the deregulators propose is either necessary or desirable, or whether their suggestions are excessive to their alleged objectives.

The answer, which this article will undertake to develop, is that the bulk of the deregulators' goals are already provided for in the *existing* statute, and, indeed have largely been accomplished. This will be developed by examining the more prominent of the stated goals of the deregulators from two standpoints: The extent to which present law already provides for their accomplishment and, if it does, whether there is justification for a charge that the goals have not been achieved and will not be achieved in the absence of major legislative change.

## I. Industry Competition; Freedom of Entry and Exit

The deregulators charge that competition is restrained under existing circumstances "by severely restricting the entry of new firms into the industry and tightly controlling which cities existing airlines are allowed to serve."[4] Neither the provisions of the present statute nor the history of the Civil Aeronautics Board's (the CAB) application thereof support this charge.

### A. *The Law*

The existing statute strongly favors competition within the air transport business. Section 102 of the Federal Aviation Act[5] sets

[3] Originally passed as the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 *et seq.* (1938), and, after study, reenacted in virtually the same form with respect to economic regulation as the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301 *et seq.* (1970).

[4] Quoted from page 2 of the so-called "Fact Sheet" which was issued when the Administration's proposed Aviation Act of 1975 was released. [hereinafter cited as Administration's Fact Sheet].

[5] 49 U.S.C. § 1302 (1970).

forth six factors by which the CAB is to be guided "in the exercise and performance of its powers and duties" and which it is to consider "as being in the public interest and in accordance with the public convenience and necessity." One of these factors[6] is "competition to the extent necessary" to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense. This is one of those remarkably flexible provisions which continually looks to the future as times and circumstances change.

This provision permeates many others in the statute which reinforce its competitive goals. For example, the licensing section first invites applications for certificates, including applications for the right to compete against already established lines.[7] This section then states that the CAB "shall" issue the requested certificate, in whole or in part, if it finds that the applicant is fit, willing and able to perform the proposed transportation "and that such transportation is required by the public convenience and necessity." Because of section 102, the latter standard contemplates "competition to the extent necessary" to insure adequate service and, as will be discussed

[6] 49 U.S.C. § 1302 (1970) reads as follows:

> In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
>
> (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by air carriers;
>
> (c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;
>
> (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> (e) The promotion of safety in air commerce; and
>
> (f) The promotion, encouragement, and development of civil aeronautics.

[7] 49 U.S.C. § 1371(b) (1970).

later in this article, the section has been applied so as to create a highly competitive system, with two, three, four and even five carriers certificated to serve a number of domestic markets.

Full ability for the certificated carriers to compete in accordance with their own notions of what will best accomplish the statutory goal of reasonable competition and best serve the public, is guaranteed by section 401(e)(4),[8] 49 U.S.C. 371 (c)(4) which prohibits the CAB from imposing any "term, condition or limitation" on a certificate which would

> restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require.[9]

Similarly, once certificated, service can be temporarily suspended or can permanently be abandoned only after opportunity has been given to affected travelers and shippers to protest, and where the cessation is found to be in accord with the public interest and the public convenience and necessity.[10] In cases where competitive service is involved, this would entail a finding that the competition is no longer necessary to accomplish the broad national interest goals which section 102 states are part of the public convenience and necessity.

The present statute does not provide for unfettered competition. As the United States Court of Appeals for the District of Columbia Circuit recently observed:

> [T]his was one of an emerging group of statutes that did not regulate the so-called "natural monopolies" that identified conventional public utility regulation, but instead called for "regulated competition," achieving the benefits of competition without the evils of unrestrained entry or under-cost rate wars.[11]

But this does not detract from the favor with which the statute views competition in the air transport industry. As the court further observed in *Continental Air Lines, Inc. v. Civil Aeronautics Board*:

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[8] 49 U.S.C. § 1371(e)(4) (1970).

[9] *Id.*

[10] 49 U.S.C. §§ 1371(g), (j) (1970) (suspension and abandonment respectively).

[11] Continental Air Lines, Inc. v. C.A.B., 519 F.2d 944, 953 (D.C. Cir. 1975).

> It is significant that Congress, addressing itself to the air transport industry, deliberately fashioned this 1938 law so as to identify competition in express language as a key element of the public interest. During the Senate debate it was emphasized that both of the 1938 bills—the McCarran bill and the Administration substitute—altered the general declaration of policy contained in earlier bills to take "explicit recognition of the importance of competition to the extent necessary to assure the sound development of air transport."[12]

The Civil Aeronautics Board has clearly taken note of the significance of this legislative drafting change. In an early decision (1940, just two years after its creation), the Board read the inclusion of the express reference to competition in what is now section 102 of the Federal Aviation Act[13] to render inapplicable the doctrine developed under other transportation regulatory schemes, to the effect that competition should not be authorized where an existing carrier is furnishing adequate service and stands ready to meet any additional service needs of the public.[14] Just three years later the Board further interpreted the unique, pro-competition features of its organic statute as creating a clear presumption in favor of competition:

> While no convenient formula of general applicability may be available as a substitute for the Board's discretionary judgment it would seem to be a sound principle that, since competition in itself presents an incentive to improve service and technological development, there would be *a strong, although not conclusive, presumption in favor of competition on any route which offered sufficient traffic to support competing services* without unreasonable increase of total operating costs (emphasis added).[15]

The agency explained during these same early years, as it has many times since, that it is directed to implement competition where the service will not be destructive or uneconomical, because competition generally promotes the other public interest factors set forth in the statute's policy declaration:

> The greatest gain from competition . . . is the stimulus to devise and

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[12] *Id.*

[13] A provision which had no counterpart in other transportation statutes such as the Motor Carrier Act, which provided early precedent for the CAB in many other areas.

[14] American Export Airlines, Inc., 2 C.A.B. 16, 29-31 (1940).

[15] Additional North-South California Services Case, 4 C.A.B. 373, 375 (1943).

> experiment with new operating techniques and new equipment, to develop new means of acquiring and promoting business, including the rendering of better service to the customer and to the Nation. . . . Competition invites comparison as to equipment, costs, personnel, methods of operation, solicitation of traffic, all of which tend to assure the development of an air transportation system as contemplated by the Act.[16]

This basic philosophy, recognizing and applying the pro-competition provisions of the present statute, has been emphasized and expanded during every decade since these initial rulings, as the CAB has steadily made the U.S. air transport system more and more competitive. As early as 1951, in a decade that was to see a great proliferation of competitive routes[17]—often certificated, contrary to the implications of the deregulators, for the *specific* purpose of fostering low fare air transportation, *i.e.*, price competition in general[18]—the Board simultaneously described the fact that it already had a history of strongly favoring competition, and the agency's determination to continue pursuing this course:

> This is not the first instance where we have heard the argument that regulated monopoly is preferable to competition, or the first instance where we have been asked to reexamine our decision finding that a competitive service is in the public interest. We are well aware of the arguments pointing out that theoretically a benevolent monopoly could provide service more economically. Yet the history of this country and the decisions of its courts furnish numerous examples of the evils of monopoly, which indicate that monopolies do not long remain benevolent, but become inefficient, and that their own profits and exercise of prerogatives are placed ahead of the public interest. The Board has from the outset consistently taken the position that the Act implies the desirability of competition in the air transportation industry, where it will be neither destructive nor uneconomic. The Board has repeatedly recognized the benefits of competition, and the inability of economic regula-

[16] Hawaiian Case, 7 C.A.B. 83, 103-04 (1946). *See also, e.g.*, Domestic Passenger Fare Investigation, CAB Order No. 71-4-54, at 27 (April 19, 1971); Seaboard & Western Airlines, Inc., Mail Authorization, 29 C.A.B. 49, 85 (1959); Southern Service to the West Case, Reopened, 18 C.A.B. 790, 799-800 (1954); Trans-Pacific Airlines, Ltd., 12 C.A.B. 900, 901 (1951); IATA Agency Resolutions Proceeding, 12 C.A.B. 493, 509 (1951); Colonial Airlines, Inc., Atlantic Seaboard Operation, 4 C.A.B. 552, 555 (1944).

[17] *See* note 71 *infra*.

[18] *See, e.g.*, Denver Service Case, 22 C.A.B. 1178, 1183 (1955); New York-Chicago Service Case, 22 C.A.B. 973, 978 (1955).

> tion alone to take the place of the stimulus which competition provides in advancement of technique and service in air transportation. *Colonial Air, et al., Atlantic Seaboard Op.*, 4 C.A.B. 552 (1944); *Transcontinetnal & W. A., North-South California*, 4 C.A.B. 254, 373 (1943); *Northeast Air, et al., Boston Service*, 4 C.A.B. 686 (1944); *West Coast Case*, 8 C.A.B. 14, 19 (1947). There is no regulation which would assure courtesy by a carrier's employees, and it would be difficult to dictate many other matters affecting the quality of the service rendered. In each instance where additional service was authorized the existing carriers argued that competitive service was not required. In each instance the existing carrier showed that its service was adequate to carry the volume of traffic, that it could secure additional equipment in such quantities as was needed to operate any number of schedules. There was no claim that the Post Office Department utilized the full capacity of service and needed the additional service to fill the needs of the postal service. In addition to the existing air service, there were also fine rail and highway services available between the cities involved. Yet in each instance this Board found that additional air service was required by the public interest, and in some instances authorized not one, but two additional carriers to operate between the points involved. These instances did not involve route characteristics so unique as to limit consideration of the principles and benefits of competition to these particular cases.[19]

As the quotation indicates, by the 1950's it was firmly established that, in considering the extent to which competition is necessary to the sound development of the air transportation system, the Board "has not been guided by the negative concept of determining first whether the existing services met minimum standards of legal adequacy."[20]

This cardinal principle was expressed even more expansively in the last half of the 1960's, when still another major layer of competition was established in all areas of the nation.[21] By this time, neither the present nor potential adequacy of service by incum-

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[19] Trans-Pacific Airlines, Ltd., 12 C.A.B. 900, 901-02 (1951). The Board also recognized the other public interest factors contained in Section 102 of the Federal Aviation Act by stating that the touchstone is not "competition for competition's sake" but rather the "overall public interest," which can be determined only after consideration of all the facts and circumstances of each individual case, in light of all the Congressionally prescribed standards. *Id.* at 902.

[20] Southwest-Northeast Service Case, 22 C.A.B. 52, 60 (1955).

[21] *See* note 71 *infra*.

bents, the imminent introduction of large new aircraft types such as the Boeing 747, declining carrier earnings, nor even the fact that past service deficiencies could be attributed to delivery delays by aircraft manufacturers, could overcome the strong presumption in favor of competition. This was made clear in the Board's decision in *Southern Tier Competitive Nonstop Investigation* when, among other things, the Board said:

> The Federal Aviation Act and the Board's regulation under that statute look to the establishment of an air transportation system characterized by competition to the extent feasible. The inherent premise is the desirability of competition and the reliance upon the forces of competition to assure high levels of service and efficiency and low prices for the public. It may be necessary to repeat this concept from time to time but it is so engrained in the regulatory scheme that its justification at this late date would be redundant.[22]

And in the current decade we once more see the CAB stressing that, although inadequacy of existing service is a factor to be weighed heavily in assessing the need for a competitive spur, the presence of adequate service by a monopoly carrier does *not* supplant the statutory emphasis on competition.[23] Only recently the CAB has certificated additional competition[24] and has instituted a new round of cases[25] similar to those in the 1940's, the mid-1950's and the

[22] Pages 11-12 of the Initial Decision in Southern Tier Competitive Nonstop Investigation, adopted as the Board's own opinion by CAB Order No. 69-7-135, at 7 (July 24, 1969). It might be noted that this case established head-to-head, nonstop competition in markets where the first single-carrier service had been possible only eight years earlier. Southern Transcontinental Service Case, 33 C.A.B. 701 (1961).

[23] *See, e.g.,* Domestic Passenger Fare Investigation, CAB Order No. 71-4-54, at 27 (April 9, 1971) where the Board states:

> One of our principal policies has been that the traveling public is entitled to the benefits of competition whenever it is justified by existing and projected market traffic. We have stated that major markets require competition regardless of the quality or quantity of service provided by monopoly carriers.

This continues to reflect the early interpretations, for example in the Syracuse-New York City Case, 24 C.A.B. 770, 790 (1947), where the CAB stated:

> [a]s to the principal criteria for authorizing competing service: the size, importance, and potential are the prevailing factors, not adequacy of service.

[24] Reopened Service to Omaha and Des Moines Case, CAB Order No. 75-9-19 (Sept. 8, 1975); CAB Order No. 75-12-34 (Dec. 5, 1975).

[25] *See, e.g.,* in domestic markets, Midwest-Atlanta Competitive Service Case, CAB Docket No. 28115 (filed July 28, 1975); Boston-Atlanta Nonstop Service Investigation, CAB Docket No. 28033 (filed June 30, 1975); Detroit-Boston Non-

last half of the 1960's to consider the authorization of still more new and competitive routes.

As the court in *Continental* summarized the existing statutory mandate for competition, and the CAB's interpretation and application thereof:

> The legislative history and the early CAB decisions indicate that there is no presumption in favor of competition *per se* because competition may prove uneconomical and destructive of the healthy development of the industry if the relevant market is too small to support competing carriers. *But when sufficient traffic exists to support competition, certification of competing carriers is mandated by the Act as providing the best means of effectuating the other public interest goals contained in § 102* (emphasis added).[26]

In *Continental*, the court of appeals further refined the doctrine by stressing that this mandate is to be applied on an individual market-by-market basis, and cannot be avoided by reference to general industry economic conditions:

> The only remaining factor mentioned in the CAB's prior decision in this matter was the financial condition of the industry as a whole. But that consideration had been relied upon solely in terms of justifying a "more than usually careful" approach to evaluating the competition question in the San Diego-Denver market. That approach may have validity, if not carried to extremes, for it still leads up to an ultimate decision focused on the subject market. But we are unable to discern on what basis the Board can glean any support from this factor of general conditions once it has recognized, as it now apparently has, that the particular market will sustain competition and still be profitable. *If an air transport market is substantial and thriving, we do not see how the fact that other markets are over-served, can justify leaving this market under-served, or depriving it of the public-interest benefits of competition* (emphasis added).[27]

Under existing law, U.S. air transportation is provided by privately owned companies, and is guided, on the one hand, by the

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stop Route Proceeding, CAB Docket No. 27758 (filed April 18, 1975); Shreveport-Dallas Nonstop Proceeding, CAB Docket No. 27330 (filed Dec. 27, 1974); Miami-Los Angeles Competitive Nonstop Service Case, CAB Docket No. 24694 (filed Aug. 23, 1972); Oklahoma/Denver-Southeast Points Investigation, CAB Docket No. 20421 (filed Oct. 30, 1968). There are also a number of international cases pending in which creation of competition is contemplated.

[26] 519 F.2d at 960.

[27] *Id.*

profit motive which is at the heart of the competitive enterprise system and, on the other hand (because of its quasi-utility nature), by this system of "regulation with common sense" which so heavily favors competition. Under such a system, with its strong rebuttable presumption in favor of competition and with the enthusiastic response which the public has given the scheduled and charter air transportation of persons and property, it has to be assumed that any opportunity to compete in the business at a profit will be sought by one or more companies. As shown in subsequent portions of this article, this in fact has been the case.

It must further be presumed that if the law and its presumption in favor of competition are not made available or are not applied to the reasonable satisfaction of the applicant, resort will be had to the federal courts. This is as true at the outset of certification procedures as it is at the end thereof. Thus, for example, cases such as *Delta Air Lines v. Civil Aeronautics Board*[28] and *Civil Aeronautics Board v. Delta Air Lines, Inc.*[29] clearly establish the right of applicants to a fair hearing on their applications for new and competitive authority, or before existing authority is withdrawn or modified.[30] The recent *Continental*[31] case lines the courts up squarely behind applicants for competitive authority if, despite a hearing, these applicants think that the right to compete has been improperly withheld or confined. In *Continental*, after rejecting the Board's reasons for believing that the presumption in favor of competition had been overcome with respect to applications for competitive nonstop authority in the San Diego-Denver market, the court ordered the

[28] 228 F.2d 17 (D.C. Cir. 1955). *See also* Delta Air Lines, Inc. v. CAB, 275 F.2d 632 (D.C. Cir. 1959).

[29] 367 U.S. 316 (1961).

[30] The first of these cases, and the second cited in footnote 28, are two of many by the federal courts interpreting the so-called "Ashbacker Doctrine," which requires a comparative hearing and consideration by an agency of two mutually exclusive applications, and thus giving competing applicants for new or competitive authority an equal chance to be selected as the authorized carrier in situations where the economics will not support both carriers. The second case mentioned in the text, involving an award of competitive authority, prevented the CAB from using assumed reconsideration powers not specifically granted in the statute to withdraw an earlier certificate grant which had become effective and had been implemented. The agency was specifically directed to utilize what is now Section 401(g), requiring notice and a hearing and therefore opportunity for the affected carrier and the traveling and shipping public to express views and present evidence concerning the subject before the authority is modified.

[31] 519 F.2d at 960.

Board to proceed with dispatch to a resolution of the case, which had been pending for some years.

In summary, there seems little room to improve either the policy or the letter of the existing statute—it clearly stands strongly in favor of competition in the U.S. air transport industry.

B. *The Facts*

But what about the CAB's record under that law? Has it stifled competition and prevented entry into the business despite the statutory provisions? Assuming *arguendo* this to be the legitimate inquiry[32] it will briefly be explored because, here too, the arguments of the deregulators are contrary to fact.

The arguments are that the CAB has "severely restricted" the entry of new firms and "tightly controlled" which cities existing airlines are allowed to serve.[33] The facts are as follows.

(1) *There Has Been Extensive Entry Into The Air Transport Business.*

During the first full year of the CAB's existence (1939) there were 16 carriers operating under its authority.[34] The *largest* flew 19,170,018 plane miles, and generated 207,360,215 revenue passenger miles. The figures for the *smallest* were 714,978 plane miles and 2,143,245 revenue passenger miles.[35]

What has happened since 1939? Most fundamentally, *eighty-six new companies* have been certificated to enter the U.S. air transport business (some have since ceased to exist, mostly through merger with other carriers after being unable to produce sustained profits on their own),[36] and hundreds more operate under CAB-granted exemption from the certificate requirements.[37] Four whole new

[32] If the law is good and sufficiently flexible to meet changing times, as it is, legislative supervision and judicial review seem a much prefereable course for resolving objections than forcing change by means of unproven legislative change.

[33] ADMINISTRATION'S FACT SHEET, at 2.

[34] DRAFT REPORT OF THE SENATE SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 94th Cong., 1st Sess., AIRLINE REGULATION BY THE CIVIL AERONAUTICS BOARD (1975).

[35] The figures given are for National Airlines. Colonial Airlines flew fewer plane-miles (374,581) but generated more revenue passenger-miles (3,079,143). CAB ANNUAL AIRLINE STATISTICS (1938-1942).

[36] The total of 86 includes U.S. company entrants into domestic, territorial and international operations in both scheduled and supplemental service.

[37] The latter action is another example of the remarkable flexibility of the present Federal Aviation Act and its ability to adapt to changing times and cir-

"industries" have been created—the all-cargo air carriers, the supplemental (predominantly charter) industry, the commuter/air taxi carriers, and the helicopter carriers.

Turning first to the combination, scheduled carriers of the type existing in 1938, nineteen companies have been allowed to enter the business on the U.S. mainland as what are now known as "regional carriers," nine of which continue to operate.[38] The *smallest* of these carriers operated 21,600,000 revenue plane miles in 1974 and carried 758,900,000 revenue passenger miles that year[39]—*making it (on the revenue passenger mile basis) nearly four times larger than the largest of the original carriers in 1939.*[40] The *largest*

cumstances. Section 416(b) provides that the CAB, from time to time and to the extent necessary, may (with certain limited exceptions) exempt any air carrier or class of air carrier from the economic regulatory provisions of the statute or any rule, regulation, term, condition or limitation prescribed by the CAB thereunder, if the agency finds that the enforcement of those provisions is or would be "an undue burden on such air carrier or class of air carriers" by reason of the limited extent of, or unusual circumstances affecting, its operations, and is not in the public interest. While this provision cannot be used to undermine the basic statutory scheme, the provision does give the agency an immense amount of discretion and flexibility to act expeditiously to meet changing circumstances. *See, e.g.*, Hughes Air Corp. v. CAB, 492 F.2d 567 (D.C. Cir. 1973); Island Airlines, Inc. v. CAB, 363 F.2d 120, 125 (9th Cir. 1966); American Airlines, Inc. v. CAB, 235 F.2d 845, 846 (D.C. Cir. 1956).

[38] These carriers were originally created and known as "feeder" airlines. It was then contemplated that, on sort of a "rural free delivery" basis, these airlines would operate between smaller towns as yet incapable of wholly supporting their own air service (hence these carriers were subsidized) and larger hubs, in order to feed traffic to and from the longer distance operations of what then became known as the "trunkline" air carriers. (The latter air carriers have themselves greatly carried in their type of operation over the years. Some have always concentrated heavily on long-haul operations, and have progressively given up smaller cities to other air carriers, whereas carriers such as Delta Air Lines, Inc. have continued to serve small and medium-size towns, as well as operating over longer distances between the major hubs.) The "feeder" air carriers rapidly grew in size and soon became known as "regional" air carriers. Even this title is a misnomer however, because, as will be explained in more detail below in the text, most of these carriers are now far, far larger, and serve a much more vast area, than did the original carriers for many years after their creation. For example, one of the so-called "regional carriers," Allegheny Airlines, serves a system which spreads from Boston and New York in the East to Memphis in the West and from Chicago, Detroit, Cleveland, Buffalo, and Montreal in the North, to Tennessee and Virginia in the South. In the latest year for which statistics are available, Allegheny transported 3,404,639,000 revenue passenger miles over its system. This is more than the largest of the nation's air carriers (then American Airlines) transported as late as 1954.

[39] The foregoing plane mile and revenue passenger mile statistics come from CAB, AIR CARRIER TRAFFIC STATISTICS. This is the same source used for similar statistics in the following text, except where noted otherwise.

[40] Indeed, as early as 1946, following the growth stimulus of World War II

of the so-called regional carriers served 3,404,639,000 revenue passenger miles in 1974—2.6 times more than was carried by the *largest* of the original carriers in 1946. *In fact, the same regional carrier's 1974 revenue passenger mile production was greater than that of the largest of the original carriers as late as 1954.*[41] This is indicative of the extraordinary growth of this *whole new class of entrant.*

The class as a whole served 10,808,141,000 revenue passenger miles during 1974, the latest year for which such data are available—*over twenty-one times the number carried by all air carriers in 1938, when the CAB was created,* and more even than the 10.2 million revenue passenger miles carried by the entire class of original carriers as recently as 1951.

But that is just the beginning. Arguably, merely by creating more of the same (even though there have been thirty-seven new company entrants into the combination, scheduled carrier business,[42] and forty-nine demises, indicating considerable freedom of entry and exit), the CAB would somehow have defaulted in applying the pro-competitive provisions of the statute. But the agency has in no manner so limited itself.

In addition, as mentioned above, the agency has created four whole new industries.[43] First, ten all-cargo "specialists" have been allowed to operate, with eight of these subsequently being certificated, three of which remain in full active service.[44] The largest

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and the sudden availability of aircraft freed from that war, there were 24 U.S. Mainland and territorial carriers. In addition, Pan American and Uraba, Medellin & Central Airways, Inc. operated international routes and in that year "non-scheduled" services were authorized by exemption from the certificate requirements, the beginning of the supplemental carrier industry. Investigation of Non-scheduled Air Service, 6 C.A.B. 1049 (1946). The largest of the combination carriers then operating flew 64,061,899 plane miles and 1,307,908,611 revenue passenger miles, already a big jump over pre-war days. CAB, ANNUAL AIRLINE STATISTICS (1946).

[41] *See* note 38 *supra.*

[42] The total of 37 includes the 19 regional carrier entrants plus the U.S. companies certificated to enter territorial and international service as combination carriers.

[43] If the "regional" (formerly the "local service") carriers are considered a separate industry, as many do consider them, the count is four: regionals; all-cargo carriers; supplemental (charter) carriers; and the helicopter carriers.

[44] These carriers were originally permitted to experiment with cargo service without the necessity for a certificate, under the exemption power discussed in note 38 *supra. See also* former CAB regulation § 292.5, 12 Fed. Reg. 3079

carried 795,778,000 revenue ton miles of property/mail shipments in 1974—*seventy* times more than the 11,314,000 revenue ton miles of such material carried by all of the air carriers existing in 1939; and more than three times the total property/mail carried by all combination (passenger and cargo) scheduled carriers in 1950.

The latter is most significant. Air freight revenues are an important contribution to the economic viability of operations by the scheduled, combination air carriers, often spelling the difference between less than adequate and a more reasonable return on investment. Yet this opportunity to realize satisfactory earnings has been significantly diluted by the very condition which the deregulators pretend has never existed—by the entry of new firms, and new forms of endeavor, into the air transport business.

On an even more penetrating and competitive level, a second new industry has been created—the supplemental air carriers, which specialize in the increasingly popular charter services. Thirty-three such companies have been certificated as *new entrants* into the air transport business.[45] One of these ultimately metamorphosed into a certificated combination carrier.[46] This, however, was its undoing—it subsequently had to merge into a pre-existing scheduled, combination carrier, else its routes would have ceased to exist.[47]

Eleven of these carriers remain, three of which are currently not operating. The other eight constitute a potent and growing force in U.S. air transportation. Together they serviced 10.9 billion revenue passenger miles in 1974, the last calendar year for which such data is available—more than the entire class of original carriers, *plus* the entire group of regional carriers that were given new entry

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(1947). Subsequently, the industry itself sought the stability and the improved access to financing that certification provides (a course also pursued by the supplemental carriers and, today, by some commuter carriers). A number of the original all-cargo carriers have merged into the three survivors, so that their routes continue to exist.

[45] CAB, ANNUAL REPORT TO CONGRESS (1975); CAB, ANNUAL REPORT TO CONGRESS (1960).

[46] Trans Caribbean Airways, Inc., which was certificated in the Service to Puerto Rico Case, 26 C.A.B. 72, 140-44 (1957).

[47] American-Trans Caribbean Merger Case, CAB Order No. 70-12-161 (Dec. 18, 1970).

during and since World War II, carried on a *combined* basis as late as 1950.[48]

As the price of fuel rapidly escalates, and as other costs inflate, significantly increasing the cost of providing air transportation services, charter air transportation is becoming more and more popular. The basic theory of charter air transportation is that it operates on a full-plane (but irregular) basis, thereby holding the per-passenger cost (and fare) as low as possible. At the same time, despite the recent recession, the amount of discretionary income available to citizens of the free world has significantly increased in the last couple of decades, and indications are that it will continue to increase into the foreseeable future.[49]

These two factors, in tandem, are placing considerable emphasis on the desirability of charter air transportation for the mass movement of vacation travelers. This accounts for the phenomenal growth of the supplemental air carrier industry (their volume of revenue passenger miles has increased from 1.5 billion in FY 1964[50] to the 10.9 billion noted above for Calendar Year 1974)[51] and should account for significant growth in the charter services of these carriers as well as the charter services provided by the combination scheduled carriers during the next few decades.

Clearly, then, creation of the supplemental carriers alone has been another major form of entry and exit.

This is also true of the recently authorized one-stop inclusive tour and special event charter concepts. These are extremely liberal charter regulations,[52] which have for the first time allowed major segments of the public to use low cost charter services without having to belong to pre-existing organizations.

The one-stop inclusive tour regulations now permit members of the *general* public to use *single-destination* charter services with

[48] CAB, HANDBOOK OF AIRLINE STATISTICS (1973).

[49] *See, e.g.*, DUN'S REVIEW, Jan. 1976, at 31.

[50] CAB, ANNUAL REPORT TO CONGRESS (1974).

[51] CAB, AIR CARRIER TRAFFIC STATISTICS (Dec. 1974). The data for the supplementals includes their military traffic, which has dwindled in amount in recent years. The fact that this overall volume has not absolutely declined as military traffic decreased shows the great appeal of charter services for discretionary, civilian travel (in 1975 the supplementals experienced some traffic decline, but that was due more to the generally poor economic conditions impacting on all air carriers than the loss of military traffic).

[52] 14 C.F.R. § 378(a) (1975).

very few limitations. For example, an individual passenger, whether he belongs to the Masons, the Knights of Columbus, or is just plain John Q. Public, can secure space on a charter operating simply between Chicago and Ft. Lauderdale, or between New York and Las Vegas, by merely purchasing his ticket and paying for it a short while in advance and agreeing to stay at destination for only four days. This type of operation directly competes with the scheduled carriers' long-existing package vacations which have been instrumental in developing air traffic to and from areas such as Florida, especially during the off-season. These new services will largely blur the distinction between charter and scheduled services, and constitute a significant new competitive condition in the U.S. air transportation industry.

These new types of charter operations, both the one-stop inclusive tour and the special event charter,[53] can be conducted by any air carrier, both the existing scheduled carriers and the various supplemental carriers. What is often overlooked is that a carrier such as United Air Lines, which has a large fleet of grounded aircraft standing by ready to enter into services of this type, can now go to a market in which it is not certificated, such as the New York-Miami market, and operate a large volume of one-stop inclusive tour charter services year round. Nationwide, in all markets, these services and the special events charters can now be operated by any trunkline or local service carrier, whether or not it is certificated in the market involved, and by the supplemental carriers.

This whole new concept, which is just now unfolding, constitutes yet another significant form of entry and exit freedom into and from the U.S. air transportation business. Indeed, during the first three months of the regulation's existence (September 26-December 26, 1975) 495 OTC prospectuses covering 14,000 flight operations and making available approximately 2.5 million seats,[54] were filed with the CAB.[55]

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[53] The special event charter is also available to members of the general public and is not conditioned upon membership in a preexisting organization. This type of charter is very similar to the one-stop inclusive tour charter, except that it is specifically related to special events, such as the Super Bowl game or other traffic-generating circumstances.

[54] Seats computed on basis of average of 180 per flight operation.

[55] These 2.5 million seats compare to the 2.7 million inbound and outbound passengers on scheduled service at Atlanta, the nation's second busiest airport,

These statistics concerning the regional carriers, the all-cargo carriers, and the supplemental carriers alone[56] highlight a gross misrepresentation of the deregulatory proponents. With a semantical sleight of hand, the "Analysis" which accompanied the Administration's unveiling of the proposed Aviation Act of 1975, states:

> No new carrier has ever been permitted to enter trunk line service since the Board [CAB] was created in 1938.[57]

The fact that thirty-seven new entrants have been certificated into the combination, scheduled air carrier business (many now larger than any so-called "trunk-line" in 1938), the entrance and continued existence of the all-cargo carriers, and the certification of the highly competitive supplemental carriers, with the outstanding growth and current market penetration which was detailed above, all go wholly unheeded in this careful choice of the words "trunk-line"—words not even found in the existing statute, and words currently used to describe an industry far different from that existing in 1938 when that statute was first passed.[58]

But the story of airline creation does not end there. By further use of the extraordinary, flexible exemption power, the CAB has allowed another whole class of carrier to flourish and grow and to serve millions of passengers and shippers without even the neces-

during the last quarter of 1974, the latest comparable quarter available. While some of the 2.5 million OTC seats will not be operated on the dates now planned, other prospectuses will be filed during subsequent quarters covering the same and other future periods.

[56] The other sub-industry, the helicopter carriers, remain a relatively small part of the overall air transport industry.

[57] *See* page 3 of the Administration's Analysis which accompanies the proposed Aviation Act of 1975. [hereinafter cited as ADMINISTRATION'S ANALYSIS].

[58] The word "trunkline" seems to have been coined around 1944-46, when the CAB found need to distinguish the original carriers from the new "feeder" carriers then being certificated. *See* Investigation of Local, Feeder, and Pick-Up Air Service, 6 C.A.B. 1, 27 (1944); CAB, ANNUAL REPORT TO CONGRESS, at 3 (1946). As discussed above, those "feeder" carriers are now "regional" carriers and are larger than were the carriers providing "conventional trunk-line service" when that term was used in the 1946 Annual CAB Report to distinguish them from the new entrants. The smaller of the so-called "trunklines" have also been known in times past as "regional" carriers as they passed through the same growth stages that present regional carriers have been experiencing. *See, e.g.*, New York-Chicago Service Case, 22 C.A.B. 973, 978 (1955). But the whole industry and all of its parts have grown since then. Hence, in the sense that the word "trunk-line" was used in the 1940s and 1950s to describe the original carriers, it would aptly describe the present regional carriers. There *has* been entry into the "trunk-line" business and much of it.

sity of certification. Originally known as "air taxis" a number of these carriers have grown into regularly scheduled operations denominated "commuter services,"[59] and one of the original group has since been certificated as a full-fledged regional air carrier.[60] In Fiscal Year 1974, the remaining group of commuters carried 6.3 million passengers[61] (in 1944 the entire air transport industry served only about 4 million passengers).[62] In addition, during 1974 there were 3,424 *additional* air carriers registered with the CAB as air taxis.[63]

The facts thus clearly belie the deregulators' charge that the CAB has "severely restricted" the entry of new firms into the industry. There has been extensive entry and exit, and the process continues.[64]

(2) *Existing Carriers Have Greatly Increased The Number of Cities Served.*

Equally misleading is the charge in the Administration's so-called Fact Sheet that the CAB has "tightly controlled which cities existing airlines are allowed to serve."[65]

Certainly the CAB has applied the provisions of the statute which require it to certificate carriers before they may add new cities to an interstate system. The agency cannot legitimately be criticized for overseeing the development of the nation's air transport systems in this Congressionally prescribed manner, for to have done less would have left the Board open to a charge of dereliction of statutory duty. While the statute is strongly pro-competitive, it does

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[59] 14 C.F.R. § 298 (1975).

[60] Air New England, certificated in the New England Service Investigation, CAB Order No. 74-7-70 (July 17, 1974); CAB Order No. 74-10-101 (Oct. 18, 1974).

[61] CAB, AIR CARRIER TRAFFIC STATISTICS (June 1974).

[61] CAB, ANNUAL AIRLINE STATISTICS (1944).

[63] CAB, ANNUAL REPORT TO CONGRESS, at 11 (1974). The report shows a total of 3,650 registered air taxis, from which the number shown for commuters (226) has been subtracted to product the figure in the text.

[64] A recent U.S. Mainland certificated entrant is Air New England. *See* note 60 *supra*. Since 1970, Northeast Airlines, Mohawk Airlines, Trans Caribbean Airlines, and others have existed (mostly through merger, so most of the routes and the competition remain). The exits were not forced by the CAB, they were dictated by economic reality and the existing Federal Aviation Act was flexible enough to permit same while *preserving* the routes and the competition.

[65] ADMINISTRATION'S FACT SHEET, at ___.

contemplate a certificated system, with security of route authority —a system which has been most instrumental in the development and growth of the U.S. air transport system. This concept of "security of route" was specifically cited by the U.S. Supreme Court in *Civil Aeronautics Board v. Delta Air Lines, Inc.*, when the Court stated:

> It is clear from the statements of the supporters of the predecessor of the Aviation Act—the Civil Aeronautics Act of 1938—that Congress was vitally concerned with what has been called "security of route"—*i.e.*, providing assurance to the carrier that its *investment in operations* would be protected insofar as reasonably possible (emphasis in original).[66]

At the same time, the concept of route security is also important to the investment community. As Robert Hotz, the publisher of *Aviation Week and Space Technology*, editorialized prior to the actual release of the Administration's proposed bill:

> The foundation of this domestic airline system is the government-granted and guaranteed certificate for routes to be operated for the public convenience and necessity. This certificate is what enables the airlines to finance their equipment purchases. The guts of the deregulation proposals would remove this certificate and the routes it guarantees and open all markets to anybody and everybody who had an airplane and offered to transport passengers where the largest profits loomed. This phase of deregulation would pull the financial rug out from under the present airline system and quickly reduce it to the status of a chaotic air taxi service that served neither public convenience nor necessity.
>
> Among other things, the concept of deregulation would destroy air service to about 60% of the cities now served by scheduled airlines because the traffic is only marginally profitable. The free airline market would naturally concentrate only on the high-density routes, leaving the rest of the country to depend on overclogged highways, under-scheduled railroads and the odd river boat. Public convenience and necessity would become the second victim of deregulation.[67]

As long as the CAB gives proper weight to the pro-competitive provisions of this statute, it is only proper that it also recognize

[66] 367 U.S. 316, 323 (1961).

[67] AVIATION WEEK AND SPACE TECHNOLOGY, April 28, 1975, at ___. The proposed Act would technically retain the certificate concept but would nevertheless greatly enhance freedom of entry *and exit*.

and apply this need to secure investment stability. Accordingly, the deregulators must mean that the number of cities and markets served by the carriers now certificated has not sufficiently increased over the years. But in this respect, they strain reality.

Leaving aside the hundreds of daily charter services by the supplemental carriers, the many cities and markets served by all-cargo and commuter carriers, and the vast array of international points added over the years to the routes of U.S. carriers certificated to serve foreign points, the number of domestic cities and markets alone added to the U.S. air transportation system has steadily and phenomenally increased. Thus, in November of 1938, 183 cities and 3,051 markets were served by U.S. air carriers. In 1946 the numbers were already 273 cities and 11,930 city pairs. By 1974, 596 cities were served domestically, and 52,406 city pairs[68]—a *1618% increase in markets since 1938*, and a 339% since 1946. And these are just markets *served*—there are many more city-pair combinations certificated, but between which no traffic currently moves.

If by "existing airlines" the Administration means only the successors of those carriers already existing in 1938, the statistics are still impressively against their position. The following table shows nearly a doubling in the number of cities served by just those carriers:

The foregoing statistics alone show the lack of substance to the charge that the CAB has "tightly controlled" the cities which existing airlines are allowed to serve. But there are more fundamental statistics. For example, while most operations by the industry in 1939, 1946, and even 1955 were "monopoly" in the sense that there were yet few directly competing authorizations of equal dignity,[69] today the situation is vastly different, as demonstrated by the following chart (based on mid-1974 authority as applied to 1973 traffic, the latest available when these computations were made).

[68] CAB, O&D TRAFFIC SURVEYS and predecessors thereto. Cities are actual count, as are city pairs (market) for 1939 and 1946. City pairs for 1974 are estimated on basis of sampling from the now multi-volume survey reports.

[69] There were instances from the outset of a one or two-stop routing competing with a nonstop routing and the like, but before, during and immediately after World War II there were few directly competing routes of equal parity, such as directly paralleling nonstop routes.

NUMBER OF CITIES SERVED[1]
BY ORIGINAL SIXTEEN CARRIERS

| *Carrier* | *1939*[2] | *1960* | *1970* | *1974* |
|---|---|---|---|---|
| American | 59 | 56 | 50 | 53 |
| Braniff | 21 | 51 | 50 | 51 |
| Chicago & Southern | 7 | [3] | [3] | [3] |
| Colonial | 3 | [4] | [4] | [4] |
| Continental | 8 | 41 | 27 | 42 |
| Delta | 13 | 60 | 62 | 75 |
| Eastern | 42 | 106 | 88 | 93 |
| Inland | 12 | [5] | [5] | [5] |
| Mid-Continent | 11 | [6] | [6] | [6] |
| National | 13 | 39 | 36 | 32 |
| Northeast | 16 | 35 | 25 | [3] |
| Northwest | 21 | 40 | 39 | 44 |
| Penn. Central | 19 | [7] | [7] | [7] |
| Trans World | 27 | 70 | 105 | 57 |
| United | 38 | 61 | 90 | 90 |
| Western | 12 | 32 | 36 | 37 |
| Total | 322 | 591 | 608 | 574 |

[1] Cities receiving service through 2 airports, such as Washington National and Dulles, are counted as one city. Multi-community designations, such as New York/Newark, Los Angeles/Ontario are counted as served.
[2] Cities certificated.
[3] Merged with Delta.
[4] Merged with Eastern.
[5] Merged with Western.
[6] Merged with Braniff.
[7] Name changed to Capital Airlines and later merged with United.

Source: 1938—CAB Reports to Congress, Fiscal Year 1971 and November 1939 Official Airline Guide
1960 and 1970: Handbook of Airline Statistics, 1961 and 1971
1974—CAB Form 41 Schedule T-3(a)

COMPETITIVE POSTURE: SCHEDULED, DOMESTIC
AIR TRANSPORT BUSINESS

*Of 1912 Markets With Over 12 Passengers A Day Each Way*

779 have competitive nonstop authority
308 have nonstop and competitive one-stop authority
70 have competitive one-stop authority
1157 61% have competitive authority

599 have monopoly nonstop authority
120 have monopoly one-stop authority
36 have no authority
755

*Of 530 Markets With Over 100 Daily Passengers*

All have nonstop authority
98% have competitive authority
79% have competitive nonstop authority

*Of 71 Markets With Over 500 Daily Passengers*

Only 1 does not have competitive nonstop authority and it has competitive one-stop authority

*Of 863 Markets With Over 50 Daily Passengers*

| *1968* | *Today* |
|---|---|
| 23 with no nonstop authority | 8 with no nonstop authority |
| 165 with no competitive authority | 60 with no competitive authority |
| 11 with competitive authority —no nonstop | 1 with competitive authority —no nonstop |
| 102 without nonstop service | 17 without nonstop service |

Source: CAB O&D Traffic Survey; CAB Granted Air Carrier Certificates for Combination, Scheduled Service. Analysis prepared by Boeing Aircraft Company.

Although the table does not reflect the fact, in many, many markets the competition is multiply authorized. For example, there are *three* carriers certificated in the Northeast-California, Northeast-Florida, Chicago-Atlanta-Florida and other markets; and up to *five* major carriers in such corridors as Atlanta-Miami and New York-Chicago.

In view of all of this, it is not surprising that *over seventy-nine percent of the nation's scheduled air passenger traffic*[70] *is competitively served.*[71] Extensive, additional competition is provided by

[70] Based on domestic scheduled carrier revenue passenger miles in 1972. CAB, O&D TRAFFIC SURVEYS.

[71] ADMINISTRATION'S ANALYSIS, at 3 states that the CAB has been erratic with respect to entry by established firms into new markets, tending at times to permit carriers to expand and at other times denying expansion. The implication is that there is something evil here. But the certification cycles have simply followed the nation's economic cycles. Thus, the initial major round of certification occurred during and immediately after World War II in expectation of greatly expanded demand for air transportation. A period of time ensued during which these certifi-

cations were digested by the carriers and a second major round then followed in the mid-1950s. *See* Great Lakes-Southeast Service Case, 27 C.A.B. 829 (1958) and St. Louis-Southeast Service Case, 27 C.A.B. 342 (1958), creating Midwest-Southeast Florida competition; Service to Puerto Rico Case, 26 C.A.B. 72 (1957); Eastern Route Consolidation Case, 25 C.A.B. 215 (1957), creating new competition between the Midwest and the East Coast, some three-carrier; New York-Florida Case, 24 C.A.B. 94 (1956), establishing *three-carrier* competition in the major East Coast markets; Denver Service Case, 22 C.A.B. 1178 (1955), creating new and additional east-west routes from many cities between and including Chicago and Los Angeles/San Francisco; New York-Chicago Service Case, 22 C.A.B. 973 (1955), establishing competitive and new routes in a broad area bounded by New York, Pittsburgh and Chicago; Southwest-Northeast Service Case, 22 C.A.B. 52 (1955), establishing two and three-carrier competition between the Southeast and Southwest, on the one hand, and the Northeast, on the other hand. The listed cases are only examples of those expanding competition in the 1950s. In addition to such area cases, many particularized awards were made to the so-called "trunklines." The "local service" (now "regional") carriers were being permanently certificated after a trial period and were being rapidly expanded. More and more international competition was being created between U.S. carriers, in addition to the U.S.-foreign flag carrier competition, and the supplemental carriers were given extensive new authority (as to the latter *see* Large Irregular Air Carrier Investigation, 22 C.A.B. 838 (1955)). The latter certifications were mostly made during a period of national economic vitality and were followed by a period of relative economic doldrums in the late 1950s. Again, certifications were relatively few during the period of economic recovery and while the airlines were implementing and adjusting to the route awards of the 1950s, most of which where highly competitive in nature. By the mid-1960s, the airline industry was caught up in the robust, burgeoning economic activity then enjoyed by the entire nation. From 1965 until the early 1970s, the CAB created new route after new route and competitive authorization on top of competitive authorization. *See* Southern Teir Competitive Nonstop Investigation, CAB Order No. 69-7-135 (July 24, 1969), CAB Order No. 72-1-99 (Jan. 28, 1972), creating competition in southern transcontinental markets just eight years after the first single-carrier service was certificated; Dallas/Fort Worth-Phoenix Nonstop Case, 51 C.A.B. 578 (1969); Service to Albuquerque Case, CAB Order No. 69-7-136 (July 24, 1969), CAB Order No. 69-9-110 (Sept. 9, 1969); Memphis/Huntsville/Birmingham-Los Angeles Service Investigation, 51 C.A.B. 648 (1969); Gulf States-Midwest Service Investigation, CAB Order No. 69-5-25 (May 7, 1969), CAB Order No. 69-9-18 (Sept. 3, 1969), creating additional competition between many cities in the Gulf States and Texas, on the one hand, and midwestern points, on the other hand; Transpacific Route Investigation, 51 C.A.B. 161 (1969), establishing, *inter alia*, multiple carrier competition between the U.S. mainland and Hawaii; Pacific Northwest-Southwest Case, 16 C.A.B. 652 (1967), Pacific Northwest-Southwest Case, 51 C.A.B. 698 (1969), establishing new and competitive authorities between the named areas; North Carolina Points Investigation, CAB Order No. 70-4-62 (April 13, 1970), CAB Order No. 70-6-80 (June 12, 1970), establishing Midwest-North Carolina-Florida competition. As with the 1950s, these are only examples of competitive awards in the 1960s. The regional carriers especially were extensively expanded during this time, while many other awards were also made to the so-called "trunklines." Many international routes were awarded. Again, route activity slowed down during the early 1970s, as the national economy slipped into its most serious recession since World War II and the airlines were coping with the extensive route expansion of the late 1960s. For the CAB to have acted otherwise than in concert with these cyclical economic conditions would have constituted an abdication of responsibility and would have seriously weakened the airline industry which, in fact, despite the economic prob-

the supplemental and commuter carriers (whose traffic is not included in that producing the seventy-nine percent).

In sum, there is little in the law or in fact to support the administration on its charge that freedom of entry and exit, and airline competition, are unduly restricted under the existing law or its implementation and application by the Civil Aeronautics Board.

## II. AIRLINE PRICING COMPETITION; AIRLINE MANAGEMENT PRICING FREEDOM

The Administration's Fact Sheet states that "[b]ecause of economic regulation" there is little price competition in the airline industry.[72] The proposed solution is what is commonly called a "zone of reasonableness," which deregulators want to place, in one rigid form according to a few current economic notions, into the statute itself.

In its basics, a "zone of reasonableness" is a percentage spread above and below some mid-point believed to constitute a "just and

lems faced by some carriers today, has rapidly grown, developed and flourished under the CAB's implementation of the Federal Aviation Act, all to the benefit of the traveling and shipping public, the U.S. Postal Service and the national defense. Indeed, it can be argued that despite paying heed to the economic cycles the CAB has *over*-certificated the industry because, following each round of competitive authorizations, a number of the carriers previously existing have found it necessary to give up the ghost and to merge with other, stronger carriers. Among other carriers which have disappeared in this manner (although their routes persist) are American Overseas, Colonial, Capital, Mohawk, Trans Caribbean and Northeast. Current criticism concerning the CAB's own cyclical response to economic cyclical reality has largely centered upon the supposed belief that the Board and its staff declared an unofficial "moratorium" on new route cases during the early 1970s. Had a complete refusal to consider new applications existed, it would have been contrary to the provisions of the statute. Even this, however, would not establish a defect in the statute, but only improper CAB implementation and administration of that statute.

[72] Although it is beyond the scope of this paper, a good case can be made that the similarity of fares from one carrier to another simply results from the facts (a) that airlines service must essentially be the same from carrier to carrier because of the limited number of vehicles available for providing that service and the limited number of ways in which those vehicles can be configured and (b) that these essentially similar vehicles must be operated over a highly competitive and paralleling route system. While there always has been, and should always be, considerable differences from carrier to carrier in terms of quality of service and experimentation with selective promotional and discounted fares, under these circumstances any fare innovation or basic fare change by one carrier will soon be met by most competitors. This fact, plus the unavoidable "sameness" of the basic ingredient (air transportation of persons and property) despite the competitive climate will always produce a similarity of fares regardless of the statutory and regulatory climate.

reasonable" level for the particular service involved,[73] within which carrier management would be free to adjust its standard fare levels[74] without being subject to complaint from any source, or to the presently existing suspension powers discussed below, with respect to unjustness or unreasonableness.[75]

As with airline competition, however, the present law *already* provides for this type of pricing freedom—but not in the rigid form of casting particular zone parameters into the concrete of legislation. And, as explained below, over the years considerable freedom

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[73] The "justness and reasonableness" of a rate/fare primarily is concerned with its relationship to the cost of providing the service (including a fair return on the investment devoted thereto under honest, economical and efficient management) as best that can be estimated. *See* Domestic Passenger Fare Investigation, Fare Level Phase 7, CAB Order No. 71-4-59 (April 9, 1971), CAB Order No. 71-4-60 (April 9, 1971); Free and Reduced Rate Transportation Case, 14 C.A.B. 481, 493 (1951).

[74] The "zone of reasonableness" concept is normally discussed in terms of its application to the day coach (the predominant) fare. It is here the proponents of the "zone" concept primarily see a need for greater carrier discretion and flexibility than currently exists, which they would achieve by insulating day coach fare changes within a zone or zones from complaint and suspension. Considerable freedom has always existed, and continues to exist, with respect to discounted and promotional fares (*e.g.*, excursion fares). Such fares, as well as first class and night coach fares, are usually stated in terms of a percentage relationship to the day coach fare, with discounted, promotional and night coach fares constituting some percentage reduction from the day coach fare (in return for which the passenger must accept certain conditions on his travel) and with first class fares being set some stated percentage above the day coach fare (in return for which more commodious accommodations and more inflight amenities are provided) These various relationships to the day coach fare would not necessarily be affected by establishment of a day coach "zone of reasonableness," but could remain constant, with such related fares changing up or down as the day coach fare is changed within its zone. At least one carrier (Delta Air Lines) however, has proposed separate "zones" for each standard fare (first class, day coach and night coach). With or without a zone concept in practice, however, carriers are always free to introduce new discount and promotional fares provided that they can be shown to make some net contribution to profit and therefore not simply to constitute predatory pricing. *See* the decisions in Phase 5 of the CAB's Domestic Passenger Fare Investigation, CAB Order No. 72-12-18 (Dec. 5, 1972), CAB Order No. 73-5-2 (May 1, 1973), CAB Order No. 73-8-55 (Aug. 10, 1973).

[75] The "zone of reasonableness" concept is related only to the "just and reasonableness" of fares/rates, *i.e.*, their relationship to the cost of providing the service. Even if a tariff filing is insulated from complaint and/or suspension on the basis of unjustness and unreasonableness," the tariff would always remain subject to those procedures with respect to alleged discrimination and preferential pricing. Furthermore, the normal "zone of reasonableness" concept would leave intact the Board's basic power to investigate any rate or fare, either on its own motion or in response to a petition therefor and to order a change in any rate or fare found in such an investigation to the unlawful (Section 1002(b), (g)) although the proposed Act would severely curtail this power.

has actually been allowed, although full zone of reasonableness freedom has not yet been established and recent CAB decisions have introduced undesirable rigidity into the current passenger fare structure.[76] But the central point of this article remains—a good statute should not be destroyed as a means of reversing what some deem to be wrong decisions under it, any more than the Constitution should be scrapped because of Watergate; the better courses are (a) watchful legislative review and supervision (sometimes herein called "legislative oversight") and (b) judicial review.

Is the present law "good" in this respect? The answer has to be "yes" because the present statute both provides for extensive pricing freedom and flexibility *and* makes provision for establishment of the very kind of true zone of reasonableness ostensibly sought by the deregulators.

As a foundation, the Federal Aviation Act contemplates *carrier* establishment of the fare level and its structure. The Board has aptly summed up the statute in this respect as follows:

> [T]he basic policy of the statute is that rates shall be initiated in the first instance by the carriers, subject to suspension and investigation by the Board if it is believed that such rates are outside the zone of reasonableness. Congress intended to grant carrier management latitude to establish rates within this zone, and empowered the Board to fix rates only if it found the carrier rates unlawful.[77]

The "zone of reasonableness" to which reference is made in this quotation is not the type of zone currently contemplated, within which there would be freedom even from complaint and suspension. The concept discussed by the CAB in the quotation is rather like that of *prima facie* pleading—if a tariff filing appears to be reasonably related to costs (and not to be discriminatory or preferential) it usually will be allowed to take effect, whether or not a complaint has been filed against it. This often is the result in CAB prac-

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[76] This rigidity, discussed in more detail below, resulted from the Board's five-year and recently concluded Domestic Passenger Fare Investigation, CAB Docket No. 21866 (filed April 1, 1970). The air freight rate level and structure remain under investigation in the Domestic Air Freight Rate Investigation, CAB Docket No. 22859 (filed April 15, 1975), which awaits decision by the agency.

[77] Minimum Rates Applicable to Air Freight, 34 C.A.B. 263 (1961). While the quotation is in terms of air freight rates, the same statutory principles govern both rates and passenger fares.

tice even if, in response to a petition or on its own motion, the rate or fare is subjected to investigation.

Despite a belief by the CAB that a carrier-proposed rate or fare is *prima facie* unlawful, the agency can prevent the new tariff from taking effect (can "suspend" it) for only 180 days.[78] If the CAB does not complete an investigation of the rate/fare and find it to be unlawful within that period of time, the carrier is free to place the proposed new tariff in effect, although investigation thereof might continue. Upon subsequent completion of the investigation, the CAB can still order the rate/fare to be changed, but in the meantime the whole initiative lies with the carrier.[79] The Board has no power to prescribe the rates or fares without such an investigation, in which the public as well as the carrier or carriers involved are heard.[80]

Clearly, then, under the present law the basic right and obligation for establishing rates and fares, and their level and structure,[81] lies with the carriers.

Furthermore, the present law specifically provides for the very type of "zone of reasonableness" that the deregulators cite as an alleged benefit of the proposed Aviation Act of 1975. Thus, Section 1002 provides that after notice and hearing, if the Board finds that existing rates and fares are unlawful (and the Board presumably

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[78] The initial suspension can only be for a period of 90 days, but the original 90-day period can be renewed for 90 additional days. 49 U.S.C. § 1482(g) (1970).

[79] A good example of carrier freedom and initiative in this area is Delta Off-Peak Coach Fares, 39 C.A.B. 377 (1963). In that case the Board suspended and set for investigation a proposal by Delta to introduce low fare "off-peak" night coach service between Dallas and San Francisco, in which Delta had then recently been certificated. Such low cost fares had never been provided by the incumbent, which promptly complained against Delta's proposal. The investigation had nowhere near been completed by the expiration of the 180-day period, whereupon Delta put the tariff into effect. The tariff thereafter remained available to, and was extensively used by, the traveling public for a period of nearly two years, until the Board's ultimate decision in the investigation. The decision found the tariff unlawful on grounds of technical discrimination. The particular tariff involved was therefore withdrawn at that time, although night coach service still remains available in the Dallas-San Francisco market.

[80] Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970).

[81] The words "fare structure" normally refer to the relationship among fares for the different classes of standard fare service (first class, day coach and night coach) and the discounted fare services and to the relationship between fares by distance.

could find that the absence of a zone made the existing rate or fare structure unlawful):

> [T]he Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, *or the maximum and minimum thereof*) thereafter to be demanded, charged, collected, or received. . . . (emphasis added).[82]

The "minimum/maximum" provision patently authorizes establishment of a zone or zones insulating tariffs within the zone(s) for complaint or suspension on grounds of justness and reasonableness. A number of carriers (Delta Air Lines, American Airlines and Continental Air Lines), the Department of Transportation, the Department of Justice, and others so argued in the Board's recently completed *Domestic Passenger Fare Investigation*.[83] The Board did not question its own power to adopt such zones,[84] but simply declined to exercise the power in that *Investigation* for a variety of reasons. By not prescribing definite parameters, the present statutory provision allows changes as times and need change.

The proposed Aviation Act of 1975 would withdraw the flexibility inherent in this existing provision.[85] It would prescribe one particular formula and legislatively require its application to all situations and at all times: Plus 10% (over rates/fares existing "one year earlier"), minus 40% (from the rate/fare in effect on date of enactment of the statute), with the latter percentage to be replaced three years after enactment with a floor that would cover only so-called "direct costs" at any particular time. The term "direct costs" is defined to *exclude* all general and administrative expenses, depreciation, interest, amortization, capital expenses, route development costs, "and other fixed costs or costs which do not vary im-

[82] 49 U.S.C. § 1382(d) (1970). The power to set the minimum and maximum, and thus to prescribe a zone of reasonableness, is an alternative to the Board's power to prescribe specific rates, fares or charges in domestic tranpsortation. A proviso to Section 1003 states that with respect to overseas air transportation (transportation between a point in the 50 states or the Disrict of Columbia, on the one hand, and U.S. territories and possessions, on the other hand, or between points in U.S. territories and possessions) the Board can only prescribe a just and reasonable maximum or minimum, or maximum and minimum rate, fare or charge.

[83] CAB Order No. 74-3-82 (March 18, 1974).

[84] *Id.* at 108-122.

[85] The present provision can be exercised only after notice and hearing and a finding of unlawfulness of existing rate/fares, and this particular aspect of the provision perhaps could be liberalized.

mediately and directly as a result of the service at issue."[86] A proposal by any air carrier, large or small, strong or weak—and the advantage would be with the strong carriers—could therefore cut fares and/or rates drastically below full costs or providing the service, and the CAB would be powerless to prevent the resulting destructive price war by use of its suspension power *or even to declare the tariff unlawful after investigation.* Once its competition had been eliminated, under the 10%-a-year rule[87] the surviving carrier could steadily increase rates/fares without the checks formerly provided by the eliminated competitors.[88]

The Administration's proposal has many defects: It would obviously encourage predatory pricing;[89] it would give stronger carriers virtually an unchecked tool to drive out competitors; it wauld aid and abet the concentration of scheduled service between only the larger cities;[90] and as noted, it would introduce undesirable rigidity by withdrawing much of the agency's present flexibility to fashion zones to meet differing times and differing needs. But this

[86] Section 14 of the proposed Act.

[87] Under the proposed legislation, an increase of 10% or less could not be suspended by the CAB. While the increase perhaps could still be investigated and later found to be unlawful, the increase would be in effect for some time prior thereto (the Act does not provide for reparations) and the effect, if any, on later increase under the same 10% rule is not clear.

[88] The deregulators contend that if even greater freedom of entry/exit is also established, new companies would enter the airline business to replace those which the larger carriers had driven from business. This contention is most naive. The capital requirements and the large number of skills necessary to operate an airline on any significant scale or in any major market could not readily be amassed by would-be new entrants, even if the present licensing requirements were eliminated.

[89] Predatory pricing is usually considered to be below-cost pricing in order to gain an unfair competitive advantage. As noted in preceding text, under the proposed Aviation Act of 1975 the CAB would be prohibited from suspending or, even after investigation, from finding unlawful, any fare (or air freight rate) which covered "direct costs," a term so narrowly defined that it would cover little other than salaries, fuel and in-flight amenities. Whatever the standard might be in other industries, it would be a strange airline executive who did not consider an operation which covered only salaries, fuel and in-flight amenities to be "below cost." Any manager who attempted to operate an airline on such a basis would soon be removed by his directors and stockholders. Yet this "loss leader" pricing is *encouraged* by the proposed Aviation Act, and would be particularly appealing to the larger, financially stronger carriers, who could use such a device to quickly rid themselves of weaker competitors.

[90] The proposed freedom of entry and exit would inevitably result in service by the larger carriers (*not* new entrants) being centered in the larger, more lucrative markets. The zone in the proposed Act would provide the means for thinning the ranks of carriers, thereby leaving fewer of the *existing* carriers concentrated in only the major markets.

flexibility is part of the remarkable, overall responsiveness and adaptabililty of the Federal Aviation Act. The present law in these respects is far preferable to the proposed Aviation Act of 1975.

But what has been the CAB's track record under the existing law? Originally the record was quite good; more recently, as mentioned earlier, the record has deteriorated because the agency has introduced more rigidity into the passenger fare structure than intended by Congress.

For the first thirty years or so of its existence, until about 1970, the CAB did not attempt to control passenger fares on any extensive basis. Carriers were largely left free to introduce fares into, or to change fares in, individual markets as their sales and business judgment dictated, subject to the right of the public or other carriers to complain and request investigation. Major fare innovations were studied,[91] and a few general guiding principles were developed,[92] but they did little to hamper carriers' pricing freedom.

Perhaps this was because, prior to the late 1960's, aviation technological advances resulted in a declining trend of unit costs in the air transport business. Accordingly, there were relatively few fare increases.[93] Most of the passenger fare activity concerned promotional and discounted pricing (read "price competition"), in which considerable latitude was allowed to the carriers, although individual proposals were found to be unjust and unreasonable and a number of discounted/promotional programs were found to be discriminatory and therefore unlawful.[94]

[91] For example, when first introduced (in 1948), coach service was subject to a series of Board pronouncements in policy statements and press releases in which the Board encouraged the development of this form of price competition. *See* American Airlines Off-Peak Coach Service, 25 C.A.B. 25, 34-36 (1958). Similarly, significant expansions of the coach concept were investigated, including off-peak (night coach) operations. *See, e.g.*, Delta Off-Peak Coach Fares, 39 C.A.B. 377 (1963); American Airlines Off-Peak Coach Service, 28 C.A.B. 25 (1958). Other innovations were similarly studied in cases such as Airbus Tariffs Investigation, 39 C.A.B. (1963) and Trans World Airlines, Siesta Sleeper-Seat Service, 27 C.A.B. 788 (1958).

[92] *See, e.g.*, General Passenger Fare Investigation, 32 C.A.B. 291 (1960); Suspended Passenger-Fare Increase Case, 25 C.A.B. 511 (1957). Prior to the 1970s, most general principles used in judging the lawfulness of rates and fares were developed on a case-by-case basis.

[93] There were a few increases in the immediate post-war period; an increase in 1952 of $1 per ticket; approximately a 5% increase in 1960 and another 3% in 1962. These increases fell far short of the inflation rate over the same period of time, so that in relative dollar terms, fares decreased.

[94] *See, e.g.*, Capital Group Student Fares, 26 C.A.B. 451 (1958); Capital

In the field of air freight rates, during the pre-1970 period the Board did use the language from Section 1002(d) to establish *minimum* rate levels. This was necessary because the post-World War II entry of new carriers into the air freight field under the exemption noted in previous sections of this article had precipitated a rate war between those carriers and the certificated, combination carriers. In this situation, the Board not only found that the competitive pressures then existing could drive rates to levels which would undermine the financial strength of the new all-cargo industry but also found that:

> On the other hand, experimentation under the pressure of competition with types of aircraft, character of service, route patterns, rate structures, development of traffic potentials, and other phases of operation is of greatest importance to the fullest development of the air freight industry. *The problem to be met is one of determining a balance in the regulatory action to be taken so as to provide effective restraints to destructive rate competition, while leaving the maximum freedom for the development of the operational and service aspects of the industry.* It shall be our purpose in this proceeding therefore to set forth certain of the more basic principles in a program of sound rate making and to take such corrective actions, in respect to the existing and proposed tariffs which gave rise to this investigation, as appear necessary on the basis of the record (emphasis added).[95]

In order to meet this problem, the Board established minimum rates but did so only by limiting the possibilities for destructive competition. In the areas of the greatest concentration of traffic (smaller shipments over short and medium hauls), the minimum was related to actual costs. But for larger shipments the minimum was *below* existing cost levels, recognizing the cost savings inherent in increasing weight and distance of shipment and leaving maximum freedom to construct rate structures with as much variety as the carriers desired.[96] Various modifications to the minimum rate order were made during the period 1948-1958 and, in 1961, the order was revoked in its entirety, leaving the carriers complete free-

Family-Plan Case, 26 C.A.B. 8 (1957). The leading court case concerning promotional and discounted fares came later, Transcontinental Bus System, Inc. v. CAB, 383 F.2d 466, 482 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1967).

[95] Air Freight Rate Investigation, 9 C.A.B. 340 (1948).

[96] *Id.* at 352-54.

dom to price their air freight services, subject only to the normal complaint, suspension, and investigation provisions of the statute.[97]

While considerable freedom thus existed with respect to both fares and rates prior to 1970, the post-1970 period has been quite different, especially with respect to passenger fares. In many respects this change reflected the end of the rapid technological development from which the air transport industry had benefited since its inception. As a consequence, the general cost inflationary spiral, which had been affecting other segments of the economy for some time, rapidly began impacting on the air transport industry. This situation was exacerbated by the rapid escalation of fuel prices commencing in 1974,[98] which was allowed to affect the air transport industry more than most of the economy. These conditions demanded fare increases starting in late 1969 which, of necessity, were approved in significant part by the Civil Aeronautics Board until recently. These approvals, together with other actions by the CAB discussed below, brought the agency into disfavor with some, particularly the deregulators, even though an extensive thinning of the ranks and weakening of service might have resulted had the fare increases not been permitted. More recently, the political uproar has restrained the CAB's freedom even to apply the existing Congressional standards and its own criteria which it had developed after notice and hearing.[99]

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[97] Minimum Rates Applicable to Airfreight, 34 C.A.B. 263 (1961).

[98] From the outset of the "fuel crisis" in the fall of 1973 the federal authorities who allocate fuel held the airlines to a consumption level no higher than that the industry realized in 1972. To the best of the author's knowledge no other industry was so tightly restricted. At first the airlines could not even get this limited quantity. Then, when supplies finally started to increase, suppliers were allowed to increase their prices to the airlines enormously. The average price per gallon paid by Delta Air Lines, for example, has increased over 170% from 1973 to 1976. Although Delta's consumption of fuel has been *decreased* by 8.5% since 1973, Delta's fuel costs in 1976 will be 150% *greater* than they were in 1973. Other airlines have had similar experiences. In 1974 alone the industry's fuel bill increased by $1 billion, and the industry fuel cost is currently increasing at a rate of $1.4 million per day. AIRLINEWS, Oct. 1975, at ___.

[99] *See* CAB Order No. 75-6-72 (June 13, 1975); CAB Order No. 75-8-99 (Aug. ___, 1975); CAB Order No. 75-9-115 (Sept. 30, 1975) where, in acquiescence to the political critics who were second-guessing the agency to which Congress had delegated the power to apply the Congressional standards, the CAB, *without* notice or hearing, revised criteria which it had recently developed only after careful review and study in the five year Domestic Passenger Fare Investigation, *supra* note 76, and, still *without* notice or hearing, arbitrarily adopted

The necessary fare increases which were permitted before 1975 might not have caused the furor they did if the agency had not also rejected the pleas by the Department of Transportation, Department of Justice, others now urging deregulation, and a number of carriers as noted earlier, for establishment of a true "zone of reasonableness." This rejection came in the early part of 1974, in the Board's final decision in its comprehensive, ten-part *Domestic Passenger Fare Investigation*—its decision on fare structure.[100] The rejection seemed to reflect the slowdown in technological improvements of the airplane; at least a subconscious belief that with the consequent end of the airlines' unit cost decline, the agency was obligated to fasten a tight grip on the fare level and structure in order to control the necessary fare increases. The asserted ground for the rejection, and for related decisions to prescribe a precise cost curve by mileage block to which fares must be tightly related, was "that the zone proposals essentially constitute thinly-veiled efforts to eliminate meaningful regulation of passenger fares" and that they would nullify our laborious efforts to achieve a rational, equitable and cost-oriented fare structure[101]

The cost curve initially prescribed (what this article will call the "deviated curve") was skewed somewhat at long and short hauls from the supposedly "true" curve,[102] in order to avoid the sudden

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new criteria, all for the obvious purpose of foreclosing a fare increase which would have been allowed under the Domestic Passenger Fare Investigation criteria and the statutory standards. This matter is under review in American Airlines v. CAB, No. 75-2020 (D.C. Cir. ___ ___, ___).

[100]CAB Order No. 74-3-82 (March 18, 1974).

[101] *Id.* at 121. The latter contention necessarily proceeds on the fallacy that the cost of providing each type of air transportation, for every varying length of haul, can be precisely determined in the first place. But as the CAB has admitted:

> Any attempt to allocate billions of dollars of costs to millions of passengers moving in multitudinous lengths of haul is necessarily imperfect and subject to a number of assumptions and judgments. CAB Order No. 74-3-74, at 17 (March 18, 1974).

The latter being the case, the best that cost allocations and judgments can be expected to produce is an approximation for any particular type of service at any particular length of haul and, on this basis alone, the carriers should be allowed some managerial discretion to vary particular fares within reasonable parameters around "the" prescribed fare.

[102] The impreciseness of costing techniques militates against precision for either the "true" or the deviated cost curve. For this reason, and because the area for managerial discretion would be too narrow in any event, the difference between the two curves cannot reasonably be claimed as a "zone of reasonableness."

large increases in short-haul fares which would have been required by the so-called "true" curve.[103]

Carriers were required to refile all of their day coach fares (which, in turn, affected all first class, night coach and discounted fares that bore percentage relationships to the day coach fares) in order to adhere *precisely* to the deviated cost curve at all distances. Since then carriers have been allowed to file changes in the level and/or taper of day coach fares, but any changes in taper must move the coach-fare curve *closer* to the supposedly true cost curve at all distances. Even such permissible taper changes (clearly within any conceivable zone of reasonableness), as well as overall level changes, were left subject to the normal complaint and suspension procedures.[104] The Board prescribed that any change in coach fares in individual markets, or which strayed further from the "true" cost curve than permitted by the deviated cost curve at any distance or distances, would be *rejected*.[105]

The CAB's motives in tying the industry hand and foot in this manner were not entirely self-serving. The decision did strengthen the agency's control of the industry and, to that extent, insured (if

[103] The contention was that long-haul fares had been overpriced in relation to "true cost" while short-haul fares had been underpriced. (Many members of the industry strongly disputed this contention.) The cost curve adopted was supposed to "correct" this alleged situation as much as marketing conditions would permit at that time wtihout serious loss of short-haul traffic, with the remainder of the "correction" to come sometime in the future. CAB Order No. 74-3-74, at 72-82,173-76 (March 18, 1974).

[104] As discussed above, true zone of reasonableness would insulate fare changes within the zone from the complaint and suspension procedures.

[105] These findings and conclusions are set forth at CAB Order No. 74-3-82, at 175 (March 18, 1974). Pages 161-80 of that order discuss the Board's reasoning in arrogating to itself a power to reject tariffs not merely for errors of form, as contemplated by Section 403(a) of the Federal Aviation Act, but because a proposed fare does not comply as to level and structure with an order in a previous CAB investigation. Expansion of the rejection power in this manner in effect repeals the entire statutory scheme whereby carriers are to initiate fare changes which, if they meet the technical, formal requirements of the statute, can at the most be suspended for a temporary period while charges of illegality, if any, are properly investigated. *See* Section 1002 of the Federal Aviation Act. This course of action by the agency has clearly contributed to the rigidity of its fare structure decision and is highly controversial. The CAB's views of its rejection power have been upheld in a limited factual situation where a carrier proposed to change a fare immediately after the Board's decision in a comprehensive investigation, in a cryptic and unhelpful decision, United Air Lines, Inc. v. CAB, 518 F2d 256 (7th Cir 1975). The rejection power remains under review by the U.S. Court of Appeals for the District of Columbia Circuit in another context in, Delta Air Lines, Inc. v. CAB, No. 74-1984 (D.C. Cir. ___ ___, ___).

it did not expand) the CAB's jurisdiction. But the agency's goal was perhaps laudatory: to relate the fare structure as closely as possible to reasonable and allowable costs of providing the service in the new era of unit cost increases, so that no passenger would "subsidize" any other passenger unduly, and so that fares for a particular length of haul in one area of the country would not differ markedly from fares for a similar length of journey in another section of the nation.[106]

These goals could have been accomplished as well, and probably better, without the severe rigidity which the decision introduced into the fare structure.[107] It is strongly felt by some, including the author, that this CAB decision was a major cause of the present deregulation efforts.[108] But pique over rejection of one possible course of action in favor of another, both allowed by the law, is flimsy ground for destroying the benefits of, including the flexibility embodied in, the present statute. The ability of the present law to meet changing circumstances should be preserved, while attempts alter the nature of its implementation and CAB policies should be accomplished by legislative review and supervision[109] or, at the most,

[106] This reasoning overlooks many pertinent considerations, including (a) the fact that the nature of airline operations and the conditions which those operations meet differ widely from area of the country and affect the costs of service from market to market; and (b) the fact that payment by a long-haul passenger, for example, of more than the theoretically allocated costs of providing long-haul service does not necessarily "subsidize" the short-haul passenger who would not fly at all if his fares had to cover the full costs of short-haul service, because the long-haul passenger is also paying for the costs and value of a nationwide, integrated air transportation *system* serving small as well as large markets, costs which the short-haul passenger also pays whenever he journeys beyond a local short-haul market.

[107] Similar rigidities have not yet been introduced into the air freight rate structure but, as noted above, that structure, and its level, remain under consideration in the CAB's comprehensive Domestic Air Freight Rate Investigation, CAB Docket No. 22859 (filed April 15, 1975).

[108] There were other causes for the deregulation effort as well, particularly temporary approval by the CAB of so-called capacity control agreements, which limited competition between certain carriers in a limited number of markets, a decision since reversed (discussed *infra*), and an alleged, but unannounced "moratorium" on new route cases during the early 1970s which has now also been ended (a large number of new route proceedings are currently being instituted, or are in process).

[109] The value of such legislative "oversight" has recently been proven. The end of the alleged route moratorium; the issuance of far more liberalized charter regulations than had earlier been proposed; and, as noted above in the text, a number of recent fare decisions, including those which have rejected costs actually incurred by the industry in a somewhat contrived effort to prevent the carriers

by some experimental direction to the CAB to use its existing "zone of reasonableness" power more fully.[110]

## III. ANTI-COMPETITIVE AGREEMENTS

The Administration's Fact Sheet accompanying the release of the Aviation Act of 1975 explains that another of the Act's major goals is elimination of the CAB's power to approve, and thereby to grant immunity from the anti-trust laws for, intercarrier agreements which dampen competition by setting capacity levels ("capacity control agreements"), pooling revenues, and the like.[111]

This goal, of course, is highly laudatory.[112] But the proposed legislative change is unnecessary.

The present law provides that all agreements among air carriers must be filed with the CAB, and that the Board must approve or disapprove such agreements:

> The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter. . . .[113]

The reference in this section to the public interest invokes the six

from passing fuel and other cost increases through to the traveling and shipping public, can all be ascribed in varying measure to recent Congressional Hearings.

[110] As noted in note 85 *supra*, the existing power can be exercised only after notice and hearing. It might be desirable to ease this requirement with respect to establishment and modification of reasonable pricing freedom zones.

[111] The only agreement of this nature ever approved for U.S. carriers, at least in domestic transportation, is the capacity control type of agreement, for which approval subsequently has been withdrawn. The author is aware of no agreements for pooling revenues or service of the type used in many intra-European markets, that has been approved by the U.S. Civil Aeronautics Board. (The so-called "Mutual Aid Pack," whereby one carrier pays to another carrier member of the agreement a portion of added profits which the former has realized because of a strike against the latter, is not the normal type of service/revenue pooling agreement. Conceivably, however, it could be caught up in the proposed Aviation Act of 1975.)

[112] Many carriers, including particularly Delta Air Lines, Inc., Braniff Airway, Inc., and Northwest Orient Airlines, Inc., have consistently and strongly opposed capacity control agreements and have never entered into such agreements themselves. See the CAB's decision in its Capacity Reduction Agreements Case, CAB Order No. 74-7-98 (July 21, 1975) and the Initial Decision of Judge Seaver incorporated therein.

[113] 49 U.S.C. § 1382(b) (1970).

standards laid down in Section 102 and previously discussed in this article, including the mandate that the Board shall foster "competition to the extent necessary" to insure a national air transportation system which will meet national needs and goals.

Section 414 of the Act provides:

> Any person affected by any order made under section . . . [412] of this title shall be, and is hereby, relieved from the operations of the "antitrust laws," as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.[114]

The Administration would change these provisions in three ways. First, the proposed Act would require the CAB to notify both the Secretary of Transportation and the Attorney General of all agreements filed with the Board and, if requested by either, to hold a hearing.[115] But such a cumbersome procedure is wholly unnecessary. The Department of Transportation and the Department of Justice have the same access to the CAB's public records that any other interested person has, and they have full freedom to comment on filed agreements, to seek particular action by the CAB, and to request hearings in individual cases when they deem same to be necessary. Both Departments have regularly participated in CAB rate, fare, agreement, and other cases for years, and are fully conversant with CAB procedures.

Furthermore, this aspect of the Aviation Act, together with the proposal to apply classical antitrust principles[116] can most logically be explained as an attempt by the Departments of Justice and Transportation (both of which have had a large hand in fashioning the proposed Aviation Act of 1975) to build up their powers at the expense of an independent agency—another example of the jurisdiction war between the Executive and the Congress which is continually waged.[117] Furthermore, the proposed procedure would re-

[114] 49 U.S.C. § 1384 (1970).

[115] ADMINISTRATION'S ANALYSIS, at 15.

[116] *See* text accompanying notes 119 and 122 *infra.*

[117] This explanation is corroborated by another proposal which the Administration has made to modify existing legislation, the so-called Competitive Improvements Act of 1975 (S. 2028, 94th Cong., 1st Sess. (1975)). This legislation would also give the Department of Justice (and the FTC) broad powers to re-

sult in a situation in which, whenever the Administration disliked a particular agency decision concerning intercarrier agreements, or took a dislike to a previously approved agreement, it could force hearings, and then rehearing after rehearing, until the executive will was forced upon an agency which was created as an arm of Congress.

Secondly, the proposed Act would subject intercarrier agreements, even *necessary* intercarrier arrangements,[118] to a two-fold test:

> First, the agreement must meet a serious transportation need. Second, other reasonable, less anti-competitive alternatives must not be available.[119]

The first part of this test has been applied for years, and the second part would be unduly restrictive and inimical to the public interest in a sound air transportation system.

As long ago as 1952, in its *Local Cartage Agreement Case*[120] the

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quire the CAB to hold hearings concerning any matter deemed to be inconsistent with the antitrust laws and would make the Department of Justice and Federal Trade Commission mandatory advisors to the CAB (and a raft of other agencies over which the Executive seeks new power, including the CAB, FCC, FPC, ICC, SEC, Maritime Commission and Agriculture) on procedures, legislative proposals and other matters. In addition the proposed Act would repeal the last proviso of Section 7 of the Clayton Act (15 U.S.C. § 18 (1970)). That provision, among other things, permits regulated companies, with approval by specified agencies (see foregoing list), to acquire the whole or part of the stock or other capital share, or the assets of another corporation engaged in a line of commerce, the effect of such acquisition being to lessen substantially competition and create a monopoly. Repeal of Section 7 at best would create confusion with the existing Federal Aviation Act. If the latter were also amended as proposed, an enormous shift of power from the CAB to the DOJ and FTC would result. In the process, the nation's air transportation system would be fashioned not by "public interest" standards but by classical antitrust economic principles.

[118] No one, including the Administration, has suggested a *prohibition* on those many agreements which are necessary to operation of an integrated common carrier air transportation system conducted by separate free enterprise companies, such as uniform baggage and ticketing agreements, interline agreements covering the handling of air freight and its pickup and delivery, agreements establishing uniform communications systems for airline operation, the Airline Clearing House for the handling of intercarrier financial transactions resulting from sales by one line of tickets for transportation over another, and the like. But the Administration's proposed legislative changes would even subject these necessary agreements to the two-fold tests discussed in the text.

[119] ADMINISTRATION'S ANALYSIS, at 16.

[120] 15 C.A.B. 850 (1952).

CAB ruled that the appropriate standard under Section 412 is that:

> Where an agreement has among its significant aspects elements which are plainly repugnant to established antitrust principles, approval should not be granted unless there is a clear showing that the agreement is required by a serious transportation need, or in order to secure important public benefits.[121]

The Administration, through its own Department of Justice, has recently attempted to persuade the United States Court of Appeals for the District of Columbia Circuit that the second part of the test which it now proposes should also be required. In rejecting the proposal, the court explained:

> There is no dispute that the Board in considering whether an agreement is in the public interest must consider the agreement's effects on competition. The Federal Aviation Act sets out competition as one of six factors to be considered by the Board in making a public interest determination. This court has explicitly stated on prior occasions that the Board must consider the anticompetitive implications of agreements submitted for approval under section 412. In addition, the Supreme Court has recognized in analogous circumstances, even absent a specific statutory statement, that an evaluation of the "public interest" includes a consideration of anticompetitive effects.
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> . . . [In recent cases involving international air fare agreements approved under Section 412 this court indicated] its view that competition was but one factor to be considered in reaching the public interest balance. For example, in *National Air Carrier Assoc. v. CAB* (NACA I) the court said:
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> > In short, the essential question, from an antitrust standpoint, is whether the existence of a market structure conducive to maximum feasible competition will be imperiled by approval of the agreement."Furtherance of the economic policy implications of the agency's particular statutory charter may indeed compel overriding of antitrust principles," [Cities of Statesville v. AEC, No. 21,706 (D.C. Cir. Dec. 5, 1969) (en banc) slip op. at 45; Judge Leventhal, concurring], but first the proper antitrust questions must be asked and answered. Thus it is not really responsive to an antitrust claim, except perhaps as a counterbalance to the projected anticompetitive effects, so say that an agreement will provide the public with lower fares, if there is a risk that these lower fares are merely a step toward an ultimate

[121] *Id.* at 853.

> increase in concentration. Price cutting, after all, is a time-honored tool of the aspiring monopolist.
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> * * *
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> Turning to the Federal Aviation Act itself, it should be noted that competition is merely one of six or more factors to be considered by the Board in determining the public interest. Conceivably, in any given case, a less anticompetitive means of achieving the same result would be possible, but it might be uneconomical, less safe, or discourage development of an air transportation system properly adapted to America's future needs (to name three other considerations set out in section 102). In that event, the statute would appear to contemplate that the factor of competition could be outweighed by one or more of the other factors. Even if the value of competition is given a preferred status relative to other aspects of the public interest, such a preferred status does not lead one inexorably to the Government's "impossibility" standard. In fact, the *Local Cartage* standard itself appears to give competition a preferred status in the public interest balance.[122]

These agency and court decisions, of course, were construing and applying the present Federal Aviation Act. But the balancing of all public interest factors, and not merely a narrow, economic view of antitrust law as applicable to industries less directly affecting the public interest than does the common carrier air transport industry, would clearly seem to remain the soundest approach for the future, and the one most capable of resolving all conflicting national interests during periods of differing factual situations.

Thirdly, the proposed Act would statutorily prescribe specified types of intercarrier agreements. Such a flat, inflexible prohibition is also undesirable, and unnecessary in view of the *Local Cartage* test. While many, including a large segment of the airline industry, have consistently and vigorously opposed the capacity control type of agreement endorsed by a few carriers, this has been done in the context of the existing *Local Cartage* test and its balancing of competitive with other public interest factors. And application of the *Local Cartage* test *alone* has resulted in a firm CAB decision that, under existing conditions, capacity control agreements are *contrary to* the public interest.[123]

[122] United States v. CAB, 511 F.2d 1315 (D.C. Cir. 1975).

[123] Capacity Reduction Agreements Case, CAB Order No. 75-7-98 (July 21, 1975). The overall history of the capacity reduction agreement concept is a good example not only of the flexibility of the existing Federal Aviation Act, but of the fact that under the existing law such matters can be attacked and defended

Rather than attempt to foresee the future and proscribe particular types of agreements, the flexible and broad *Local Cartage* test should be left unmolested. There is no practical, legal, or theoretical need for a change in this aspect of the present law.

*Procedural Reform*

Although not strictly a matter of deregulation, the Aviation Act of 1975 also addresses procedural form in limited respects, particularly expedition of the licensing process.[124]

*correctly*, with opportunity for all to be heard before the agency and in the federal courts. While many members of the air transport industry, as well as other interested persons, opposed the capacity reduction agreement concept, a number of carriers and some other interests, initially at least, were in favor of such agreements. The first agreement filed by the proponents was disapproved by the CAB, as having been developed from unauthorized discussions between the carriers concerning anti-competitive subject matter. *See* CAB Order No. 70-11-35 (Nov. ___, 1970). Thereafter, some of the early agreements were approved and subsequently extended without hearing (the present Federal Aviation Act does not require a hearing concerning inter-carrier agreements, although one can be held if the Board deems it necessary to development of all pertinent facts). *See, e.g.*, CAB Order No. 71-8-91 (Aug. 19, 1971); CAB Order No. 72-6-70 (June 16, 1972), as were a few fuel-related capacity reduction agreements which were executed shortly after the onset of the fuel shortage in late 1973 and early 1974. *See, e.g.*, CAB Order No. 73-10-110 (Oct. 31, 1973); CAB Order No. 74-2-5 (Feb. 1, 1974). Prior to the onset of fuel-related capacity reduction agreements, due in large measure to continuing objection by protesting carriers (Delta, Braniff, and Northwest in particular), the Board set the entire subject of capacity agreements down for thorough, litigated exploration of all policy, legal and factual matters in the *Capacity Reduction Agreements Case*. During the pendency of the administrative case, the Department of Justice, which had participated actively before the CAB throughout the history of the capacity reduction agreement concept, appealed one of the CAB's orders extending approval of one of the agreements, in order to test the standards applied by the Board in continuing its approval of the agreements without hearing. United States v. CAB, *supra* note 122. Before argument on the merits before the court the Administrative Law Judge who heard the CAB's *Capacity Reduction Agreements Case* issued his Initial Decision, *disapproving* the entire concept of capacity reduction agreements. As noted in earlier text, the court's subsequent decision, citing the agency's Administrative Law Judge's Initial Decision, upheld CAB interpretation of the pertinent statutory sections as requiring only the *Local Cartage* test and not the more severe test proposed by the Department of Justice. But the court held that the agency had not made a "principled choice of alternatives based upon evidence," when it continued to extend capacity control agreements without hearing. Shortly thereafter the CAB issued its decision in the *Capacity Reduction Agreements Case*, declaring the agreements contrary to public policy under the evidentiary facts presented. The procedures which were followed were in full accord with existing statutory law and with cardinal principles of due process and checks and balances developed over the entire history of this nation. Anything more precipitous, or a legislative change which would allow less flexibility or compromise the *Local Cartage* test, would be contrary to the public interest.

[124] Essentially, this proposed change is directed at the alleged "moratorium" which the CAB was supposed to have enforced by not hearing new route cases

Procedural reform is a most worthy goal, provided that it looks at all aspects of the subject.[125] But this matter is being addressed much more comprehensively on a number of other fronts.

For example, the CAB has appointed an Advisory Committee, which, acting under the Federal Advisory Committee Act,[126] has recently completed a six month examination of all aspects of CAB procedures. A comprehensive report has been made available to the public.[127] It proposes a large number of procedural reforms designed to expedite and otherwise improve the CAB's procedures.

Similarly, in response to twelve resolutions adopted in August 1970 by the House of Delegates of the American Bar Association, a Special Committee on Revision of the Administrative Procedure Act of the Administrative Law Section of the Association has drafted legislation covering five broad subjects related to administrative procedures: changes in the type of hearing required; development of uniform rules and powers among agencies; *ex parte* communication prohibitions and internal agency separation of functions; delegation of decision making to Administrative Law Judges; and extra-agency matters. These proposed changes have been embodied in draft legislation, which has been introduced in the Senate by Senators Kennedy and Mathias, the Chairman and a minority member of the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee.

In addition, the American Bar Association has recently devoted considerable attention to the "Government in the Sunshine"

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during the early part of the 1970s, following the economic downturn during the early part of the decade. *See* ADMINISTRATION'S ANALYSIS, at 5. Had there been a complete moratorium, it clearly would have been wrong. But even if that had been so, far-reaching legislative change should not be based upon an attempt to overturn individual agency action or inaction; other means, especially Congressional supervision, are available for that purpose.

[125] It has been popular for years to blame the hearing process for administrative delay, but an objective analysis of available data indicates that, at least at the CAB, the delay more often occurs at the level of agency review following the hearing and issurance of the Initial Decision, than it does at the earlier stages. See the Statement of Certain Members which forms a part of the recent report of the CAB's Advisory Committee on Procedural Reform, single copies of which may be obtained by writing Publications Services Section, Civil Aeronautics Board, Washington, D.C. 20428. Another aspect often not given sufficient consideration is the need for more "sunshine" in the administrative process.

[126] 5 U.S.C. §§ 1-15 (Supp. 1975).

[127] *See* note 125 *supra* for address.

legislative concept.[128] More "sunshine" on the inner workings of the Civil Aeronautics Board (and all federal administrative agencies which must, to a large extent, rely on their "faceless staffs") would undoubtedly work wonders with respect not only to substance and openness, but also expedition.

It is submitted that these more comprehensive approaches are preferable to the piece-meal approach of the Aviation Act of 1975, which was conceived in reaction to one specific, unliked example of agency reluctance to move during periods of economic adversity.

## IV. CONCLUSION

The deregulators in general, and the proposed Aviation Act of 1975 in particular, claim goals other than those mentioned in this essay which, because of space limitations, cannot be discussed. Similarly, the proposed Act does not cover subjects which, in the author's view, need more attention than those which are addressed.[129] But it seems abundantly clear that, based on the foregoing considerations, there is simply no need for the drastic legislative surgery proposed in order to achieve the major goals of the deregulators—more competition, more pricing flexibility (and a general restraint on fare/rate increases), tight control of anti-competitive inter-carrier agreements, and procedural reform.

If the legislation is not needed to accomplish these goals, the

[128] Extensive work in this area has been done by the ABA's Special Committee on Open Meetings, chaired by Frank M. Wozencraft, Esq. Its work has resulted in the adoption of a comprehensive resolution by the ABA evaluating and reacting to various proposals for "Government in the Sunshine" legislation. The special committee has now been dissolved at its own request, and it is likely that continued efforts concerning this matter will be directed by the ABA's Administration Law Section. The resolution is set forth at 29 ABA AD. L. SEC., AD. L. REV. iv-vi (1975).

[129] For example, the American Bar Association has recommended legislation which would limit the power of the President in international route and rate matters, essentially confining his role to problems involving the national defense and foreign relations, while removing economic and domestic political considerations from the President's decision making process and assuring availability of judicial review (resolution adopted by the ABA at its 1974 Honolulu meeting, upon recommendation of its Administrative Law Section). Congressional action on this ABA proposal would remove politics from international airline regulation and leave all economic questions in the hands of the CAB. This, it is submitted, would be entirely proper. In particular, the Executive should not play a role in carrier selection for a route which has been found to be required by the public convenience and necessity. *Also see* the recent report of the CAB Advisory Committee, *supra* note 125 concerning this general subject.

question as to why it is being pushed so urgently at this particular juncture rather clearly answers itself—the concept was conceived in displeasure over a few, recent, particularized agency decisions or inactions (mostly since reversed), and is being nurtured in the caldron of election year politics.[130]

These, it is once again submitted, are insufficient bases for mutilating a law which has served the nation so well and for so long. Whether one agrees with the original reasons for enactment of the Federal Aviation Act and its predecessor, or the continued vitality of those reasons, and whether one agrees with all aspects of its execution, it would be well to keep constantly in mind some recent words by a respected colleague, "The more one attempts to preclude, circumvent or solve a problem, the more one sows the seeds of future problems."[131] The present Federal Aviation Act and its administration can hardly be classified as a "problem," when they have produced the world's foremost, lowest priced air transportation system. It is relatively easy, however, to see how tinkering with this well-conceived machinery may sow the seeds of many future problems, most notably the destruction of that system.[132]

[130] There is little doubt but what the drive to force changes in CAB policy and procedure also reflects the general post-Watergate inquisition which, however productive in other areas, is of little value in judging the continued substantive soundness of the Federal Aviation Act.

[131] Quoted from a studied suggestion by Marion Edwyn Harrison, Esq., Last Retiring Chairman of the Administrative Law Section of the American Bar Association, that perhaps better Congressional articulation of objectives and agency responsibilities is needed as much or more than deregulation. *Chairman's Message*, 27 ABA AD. L. SEC., AD. L. REV. ___ (1975).

[132] Mr. Harrison also points out that if a deregulatory proposal should not work out, the proponents, like T. S. Eliot's nimble cat, Macavity, will "not be there" when reckoning time comes. Mr. Harrison correctly notes that "[S]ome of us individually and the aggregate of society are Macavity." But few individuals, and (except in the historian's eye) certainly not society, will take the blame for dismantling the present air transportation system.