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# ADMINISTRATIVE FLEXIBILITY AND THE FAA: THE BACKGROUND AND DEVELOPMENT OF UNITED STATES REGISTRATION OF FOREIGN-OWNED AIRCRAFT\*

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THE PERVASIVE nature of governmental involvement in the private sector has given rise to a conventional wisdom that identifies "overregulation" as the source of most contemporary domestic difficulties. Recent scholarship and commentary have roundly denounced government regulation as, *inter alia*, anticompetitive, inflationary, causative of business failure, and damaging to productivity and incentive.<sup>1</sup> The deleterious impact of govern-

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<sup>1</sup> See, e.g., Eberle, *Reforming the Regulatory Process*, J. INST. SOCIOECON. STUD., Winter, 1979 at 37, 40:

Overregulation of all sectors of society is placing an enormous economic and social burden on the United States economy. . . .

The excessive, often arbitrary, imposition of economic, health and safety, and social regulations on the private sector has seriously eroded the effectiveness of the U.S. economy, fueled an unacceptably high rate of inflation, raised the costs of production, reduced productivity, inhibited technological innovation and retarded economic growth—very often without achieving sufficient benefits to offset these enormous costs to this nation's economic health.

. . . .

Certain types of excessive government involvement in the economy have severely fueled inflation. The overregulation of some areas of this country's economy is progressively eroding the capital base through premature capital equipment changes, costs of mandated production changes, costs of restrictions on operation and drags on innovation and productivity.

ment regulation in general has been examined and re-examined.<sup>2</sup> The demise of Nader-inspired consumer-protective regulation has

Other commentators are equally, if not as colorfully, vocal. See, e.g., Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 HARV. L. REV. 941, 943 (1973) ("[T]he harms regulation has produced so far outweigh the benefits of lower price that gas price regulation at the wellhead should be substantially abandoned."); Green & Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871, 871 (1973) ("[O]ur unguided regulatory system undermines competition and entrenches monopoly at the public's expense . . ."); MacLaury, *Taming Government Regulation*, 50 N.Y.S. BAR J. 385, 415 (1978) ("When the business economists met last fall, some 28 percent nominated government regulation as the worst problem facing the economy . . . [T]he productivity gain from 1974 to 1975 would have been larger . . . had it not been for the costs to industry of . . . health and safety regulations . . ."); L. Loevinger, *The Impact of Government Regulation*, at 59 (unpublished transcript of lecture delivered at New York University College of Business and Public Administration on October 25, 1978, on file with the authors) ("Government regulation almost always increases costs, inhibits innovation, reduces productivity, [and] restrains competition . . .").

Perhaps the most recently celebrated and widely disseminated contention that federal regulation is a primary cause of business failure has stemmed from the financial difficulties of the Chrysler Corporation. See, e.g., *Can Chrysler be Saved?*, NEWSWEEK, August 13, 1979, at 52 ("[T]he government was mostly to blame for the company's troubles because of its overzealous regulation of pollution, safety and energy standards."); *Chrysler's Quest for Federal Welfare*, FORTUNE, August 27, 1979, at 30 ("Chrysler's pitch [was] that its weakening position has not been caused by chronic management failures . . . [but rather by government] regulations, which hit Chrysler harder than G.M. or Ford."); *Is Chrysler the Prototype?*, BUS. WEEK, August 20, 1979, at 102, 104 ("[A] large part of the responsibility for Chrysler's plight must . . . rest with the government's well-meaning but shortsighted efforts to do good through regulation. . . . 'What's happening to Chrysler is just a symptom . . . . The disease is excessive regulation of American industries.'" (quoting Murray L. Weidenbaum, director of the Center for the Study of American Business at Washington University in St. Louis, Missouri)).

Other literature on the subject abounds. See generally Eastman, *We Can Do More than Just Talk About Motor Carrier Regulatory Reform*, 46 I.C.C. PRAC. J. 669 (1979); O'Neill, *Competition Policy and Regulation: The Case of Motor Carrier Protest Standards*, 45 I.C.C. PRAC. J. 569 (1978); Comment, *Regulatory Reform: Will an Injection of Competition Cure the Patient?*, 52 TUL. L. REV. 363 (1978); sources cited in note 2 *infra*.

<sup>2</sup> See generally, e.g., COMMISSION ON LAW AND THE ECONOMY OF THE ABA, *FEDERAL REGULATION: ROADS TO REFORM* (1978); COMPTROLLER GENERAL OF THE UNITED STATES, *GOVERNMENT REGULATORY ACTIVITY: JUSTIFICATIONS, PROCESSES, IMPACTS, AND ALTERNATIVES* (1977); W. MOORE, *REGULATORY REFORM* (1976); R. NOLL, *REFORMING REGULATION* (1971); Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549 (1979); Bruff, *Presidential Power and Administrative Rule-making*, 88 YALE L.J. 451 (1979); Davis, *Surface Transportation Regulation—A Succinct Analysis*, 47 I.C.C. PRAC. J. 55 (1979); Eberle, *supra* note 1; Peltzman, *Toward a More General Theory of Regulation*, 19 J. LAW & ECON. 211 (1976) (highly technical economic analysis); Wriston, *Warning: The Law May*

been calmly noted.<sup>3</sup> Various deregulatory efforts actually have been consummated,<sup>4</sup> to the accompaniment of loud, but possibly premature,<sup>5</sup> acclaim. It cannot be denied that, carrying the banner of the "public health and welfare," government regulation often has created public and private ills.

In contrast to the regulatory excesses that have supplied fuel for the anti-regulation bandwagon, one recent regulatory effort stands out as an example of intelligent and beneficial decision-making, and it therefore is instructive in its message that regulation is not inherently evil and that prudence and caution should temper anti-regulatory fervor. On October 29, 1979,<sup>6</sup> the Federal Aviation Administration (FAA)<sup>7</sup> issued Amendments Numbers 47-20 and 45-11 (Final Regulation)<sup>8</sup> to the then-existing FAA regulations governing aircraft registration and aircraft identification markings, respectively.<sup>9</sup> The Final Regulation was promul-

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*be Hazardous to Society's Health*, 50 N.Y.S. BAR J. 96 (1978); L. Loevinger, *supra* note 1.

<sup>3</sup> See Reich, *Toward a New Consumer Protection*, 128 U. PA. L. REV. 1, 1 (1979) ("Consumer protection is everywhere in retreat").

<sup>4</sup> E.g., Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (to be codified in scattered sections of 49 U.S.C.); Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978) (codified at 15 U.S.C. §§ 3301-3432 (Supp. II 1978)) ("deregulating" the wellhead price of natural gas); Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified in scattered sections of 49 U.S.C.A. §§ 1301-1552 (West Supp. 1980)) (focusing on economic regulation of commercial airlines by the Civil Aeronautics Board).

For a detailed explanation of the analyses that preceded the enactment of the Airline Deregulation Act of 1978, see STAFF OF THE SENATE SUBCOMM. ON ADMIN. PRAC. AND PROC. OF THE COMM. ON THE JUDICIARY, 94th Cong., 1st Sess., REPORT ON CIVIL AERONAUTICS BOARD PRACTICES AND PROCEDURES (Comm. Print 1975).

<sup>5</sup> The beneficial effects of the Natural Gas Policy Act of 1978 and the Airline Deregulation Act of 1978 have been questioned. See, e.g., Erck, *Current Major Developments in Federal Natural Gas Legislation and Regulation*, in 30 INST. ON OIL & GAS L. & TAX. 155, 156 (1979) ("During the constant publicity in 1978, . . . [the Natural Gas Policy Act] was called a 'deregulation' bill. The facts are to the contrary."); *One Year After Deregulation: The Airlines Hit a Downdraft*, BUS. WEEK, Nov. 5, 1979, at 104 (questioning the aftereffects of airline economic deregulation).

<sup>6</sup> This was the date of publication in the Federal Register. The effective date of the regulation was January 1, 1980. See note 117 *infra*.

<sup>7</sup> The FAA promulgates regulations on behalf of the Secretary of Transportation. See note 71 *infra*.

<sup>8</sup> See 44 Fed. Reg. 61,937 (1979) (to be codified in 14 C.F.R. §§ 45.33, 47.1-19 (1980)) [hereinafter cited as Final Regulation].

<sup>9</sup> 14 C.F.R. §§ 45.1-33, 47.1-71 (1979). Although the Final Regulation

gated pursuant to a congressional mandate set forth in the recently-enacted amendments (Amendments)<sup>10</sup> to section 501(b) of the Federal Aviation Act of 1958 (1958 Act),<sup>11</sup> which liberalized the then-existing aircraft registration provisions of the 1958 Act to allow for the registration of aircraft owned by aliens lawfully admitted for permanent residence in the United States (green-card aliens) and aircraft owned by corporations that were not "citizens of the United States" (noncitizen corporations).<sup>12</sup> Because Congress considered the Amendments to be self-explanatory and (with the exception of a single required definition) self-contained,<sup>13</sup> it directed the Secretary of Transportation<sup>14</sup> merely to "define the term 'based and primarily used in the United States' '"<sup>15</sup> as it related to aircraft owned by noncitizen corporations.

This Article will trace, in the context of the development of the Final Regulation, the course of the creation and exercise of regulatory power—from the genesis of the governing statutory provisions, through the shifts and starts of congressional lawmaking, to the promulgation and refinement of regulatory "law"—and will provide evidence that it was the broad powers of the administrative agency in this case, and the intelligent and reasoned exercise thereof, that comprised the means by which Congress' laudable but unfocused intent was fashioned into a body of workable and reasonable governing guidelines.

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affected both parts 45 and 47 of 14 C.F.R., this Article is concerned exclusively with the portion of the Final Regulation that amended the aircraft registration provisions, codified at 14 C.F.R. §§ 47.1-71 (1980).

<sup>10</sup> Pub. L. No. 95-163, § 14, 91 Stat. 1278, 1283 (1977) (the "1977 Amendment"); Pub. L. No. 95-241, 92 Stat. 119 (1978) (the "1978 amendment"). The sole purpose of the 1978 Amendment was to eliminate an undesirable and unintended restriction contained in the 1977 Amendment. See text accompanying notes 62-68 *infra*.

<sup>11</sup> 49 U.S.C. § 1401(b) (1976) (current version at 49 U.S.C.A. § 1401(b) (West Supp. 1980)).

<sup>12</sup> The respective meanings of the terms "person" and "citizen of the United States" are integral to this Article, and are defined and discussed at text accompanying notes 125-33 *infra*.

<sup>13</sup> See note 59 *infra* and accompanying text.

<sup>14</sup> See note 71 *infra*.

<sup>15</sup> Pub. L. No. 95-163, § 14, 91 Stat. 1278, 1283 (1977) (current version at 49 U.S.C.A. § 1401(b) (West. Supp. 1980)). For a full discussion of the legislative history of this section, see text accompanying notes 16-70 *infra*.

## I. BACKGROUND AND HISTORY OF THE STATUTORY PROVISIONS GOVERNING AIRCRAFT REGISTRATION

### A. *The Original Provision*

The statutory provision governing the eligibility of aircraft for registration in the United States was first enacted as section 3(a) of the Air Commerce Act of 1926 (1926 Act),<sup>16</sup> an extensive legislative effort that initiated federal regulation of civil aeronautics. The original section 3(a), which precluded registration of foreign-owned aircraft, provided, *inter alia*, as follows:

No aircraft shall be eligible for registration (1) unless it is a civil aircraft owned by a citizen of the United States and not registered under the laws of any foreign country, or (2) unless it is a public aircraft of the Federal Government, or of a State, Territory, or possession, or of a political subdivision thereof. . . .<sup>17</sup>

The legislative history of this provision<sup>18</sup> indicates that its essence

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<sup>16</sup> Air Commerce Act of 1926, ch. 344, § 3(a), 44 Stat. 568, 569 (1926) (current version at 49 U.S.C.A. § 1401(b) (West Supp. 1980)). Section 3(a) subsequently was recast as § 501(b) of the Civil Aeronautics Act of 1938 (the "1938 Act"), ch. 601, § 501(b), 52 Stat. 973, 1005 (1938) (current version at 49 U.S.C.A. § 1401(b) (West Supp. 1979)), an even more extensive piece of legislation, which created a Civil Aeronautics Authority to perpetuate and expand the regulation of privately-owned aircraft. See note 26 *infra* and text accompanying notes 21-23 *infra*. In turn, § 501(b) of the 1938 Act was re-enacted as § 501(b) of the Federal Aviation Act of 1958 (the "1958 Act"), Pub. L. No. 85-726, § 501(b), 72 Stat. 731, 777 (1958) (current version at 49 U.S.C.A. § 1401(b) (West Supp. 1980)), which created the Federal Aviation Administration and further expanded the scope of federal regulation of civil aircraft. See text accompanying notes 24-26 *infra*. Section 501(b) of the 1958 Act continued in force verbatim until the amendments discussed at text accompanying notes 18-70 *infra*.

<sup>17</sup> Air Commerce Act of 1926, ch. 344, § 3(a), 44 Stat. 568, 569 (1926) (current version at 49 U.S.C.A. § 1401(b) (West. Supp. 1980)).

<sup>18</sup> The forerunner of § 3(a) first appeared, in substantially different form, as § 4(b) of S. 2815, 67th Cong., 2d Sess. 2 (1922), the bill that was Congress' very first legislative attempt to regulate civil aeronautics. Section 4(b) of S. 2815 provided that "the Commissioner of Civil Aviation shall by regulation provide for . . . (b) The registration, identification, inspection, certification, or licensing of all civil aircraft." The citizenship restriction first appeared in the next incarnation of the registration provision, § 6 of S. 3076, 67th Cong., 2d Sess. 5 (1922), which provided as follows:

[N]o civil aircraft shall be used in commerce unless owned by a person who is a citizen of the United States or its dependencies, and in the case of a partnership unless each member is such citizen: *Provided*, That in the case of a corporation or association no such aircraft shall be owned by such corporation or [sic] association unless the president and board of directors or the managing

was derived from analogous provisions of the Shipping Act of 1916,<sup>19</sup> and that its purpose was to ensure that civil aircraft could

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officers thereof, as the case may be, are citizens of the United States and the corporation or association itself is organized under the laws of the United States, or of a State, Territory, District, or possession thereof, and 75 per centum of the interest therein is owned by citizens of the United States.

In the next version of the bill, H.R. 13715, 67th Cong., 4th Sess. (1923), the registration provision was separated from the definition of "citizen of the United States," and was further refined, as follows:

The Secretary [of Commerce] shall by regulation provide for the registration of aircraft as civil aircraft of the United States; but no aircraft shall be so registered unless (1) it is not registered under the laws of any foreign country, and (2) it is a civil aircraft owned by a citizen of the United States. . . .

*Id.* at § 222(a).

The language comprising the registration provision passed through three subsequent unsuccessful draft bills—H.R. 3243, 68th Cong., 1st Sess. (1924); H.R. 10522, 68th Cong., 2d Sess. (1924); and S. 76, 68th Cong., 2d Sess. (1924)—before coming to rest as § 2(a) of S. 41, 69th Cong., 1st Sess. 13 (1925), the bill that eventually was enacted into law as the Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (1926) (current version at 49 U.S.C. §§ 1301-1542 (1976 & Supp. I 1977) and 49 U.S.C.A. §§ 1301-1552 (West. Supp. 1980)).

<sup>19</sup> See H.R. REP. No. 1262, 68th Cong., 2d Sess. 26 (1925). The relevant portions of the Shipping Act of 1916, ch. 451, 39 Stat. 728 (1916) (current version at 46 U.S.C. §§ 1-1508 (1976 & Supp. I 1977)), provided as follows:

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

The provisions of this Act shall apply to receivers and trustees of all persons to whom the Act applies, and to the successors or assignees of such persons.

. . . .

That the [United States Shipping] [B]oard . . . may charter, lease, or sell to any person, a citizen of the United States, any vessel . . . [that it has] purchased, constructed, or transferred.

. . . .

That any vessel purchased, chartered, or leased from the board may be registered or enrolled and licensed . . . as a vessel of the United States and entitled to the benefits and privileges appertaining thereto; *Provided*, That foreign-built vessels admitted to American registry or enrollment and license under this Act. . . . and vessels sold, leased, or chartered to any person a citizen of the United States, as provided in this Act, may engage in the coastwise trade of the United States.

. . . .

When the United States is at war, or during any national emergency the existence of which is declared by proclamation of the

easily be requisitioned for military use in the interest of the national defense:

Registered aircraft of the United States will serve as an auxiliary air force in time of war. It is, therefore, desirable that such aircraft be in fact controlled by citizens of the United States in order that possession of them may be readily obtained by the United States in time of war and that the aircraft be in suitable condition.<sup>20</sup>

The substance and effect of section 3(a) of the 1926 Act were perpetuated when the provision was recast<sup>21</sup> as section 501(b) of

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President, no vessel registered or enrolled and licensed under the laws of the United States shall, without the approval of the board, be sold, leased, or chartered to any person not a citizen of the United States, or transferred to a foreign registry or flag. No vessel registered or enrolled and licensed under the laws of the United States, or owned by any person a citizen of the United States, except one which the board is prohibited from purchasing, shall be sold to any person not a citizen of the United States . . . .

. . . .

That the President, upon giving to the person interested such reasonable notice in writing as in his judgment the circumstances permit, may take possession, absolutely or temporarily, for any naval or military purpose, of any vessel purchased, leased, or chartered from the board; *Provided*, That if, in the judgment of the President, an emergency exists requiring such action he may take possession of any such vessel without notice.

*Id.* at §§ 2, 7, 9, 10.

It is obvious that the 1926 Act relied heavily upon precedent contained in the Shipping Act of 1916. In addition, however, H.R. REP. NO. 1261, *supra* at 26, indicates that the 1926 Act also was modeled after, yet was more restrictive than, the International Air Navigation Convention of 1919, art. 5-8, 3 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS & AGREEMENTS, BETWEEN THE U.S. AND OTHER POWERS, 1910-1923, 3768, 3773-74 (1923), 11 L.N.T.S. (No. 297) 173, 190-91 (1922), the relevant portions of which provided as follows:

No contracting State shall . . . permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State.

Aircraft possess the nationality of the State on the register of which they are entered . . . .

No aircraft shall be entered on the register of one of the contracting States unless it belongs wholly to nationals of such States.

No incorporated company can be registered as the owner of an aircraft unless it possesses the nationality of the State in which the aircraft is registered, unless the president or chairman of the company and at least two-thirds of the directors possess such nationality, and unless the company fulfils all other conditions which may be prescribed by the laws of the said State.

An aircraft cannot be validly registered in more than one State.

<sup>20</sup> H.R. REP. NO. 1262, *supra* note 19, at 26.

<sup>21</sup> See note 26 *infra*.

the Civil Aeronautics Act of 1938 (1938 Act),<sup>22</sup> which provided as follows:

- (b) An aircraft shall be eligible for registration if, but only if—
- (1) It is owned by a citizen of the United States and is not registered under the laws of any foreign country; or
  - (2) It is an aircraft of the Federal Government, or of a State, Territory, or a possession of the United States, or the District of Columbia, or of a political subdivision thereof.<sup>23</sup>

The language contained in section 501(b) of the 1938 Act was re-enacted as section 501(b) of the 1958 Act,<sup>24</sup> and continued in force unamended until 1977.<sup>25</sup> During the period from 1926 to 1977 (with the exception of the years 1934 to 1938),<sup>26</sup> within which the registration provision remained in effect substantially unaltered from its original state, its incompatibility with other bodies of aviation law, as shown *infra*, permitted aliens and noncitizen corporations to sidestep the thrust of the provision, thereby highlighting the absence of a consistent and equitable federal policy governing the ownership and use of aircraft by foreign individuals and entities.

Section 602 of the 1958 Act provided that "[a]ny person may

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<sup>22</sup> Civil Aeronautics Act of 1938, ch. 601, § 501(b), 52 Stat. 973, 1005 (1938) (current version at 49 U.S.C.A. § 1401(b) (West Supp. 1980)). See note 16 *supra*.

<sup>23</sup> Civil Aeronautics Act of 1938, ch. 601, § 501(b), 52 Stat. 973, 1005 (1938) (current version at 49 U.S.C.A. § 1401(b) (West Supp. 1980)).

<sup>24</sup> Pub. L. No. 85-726, § 501(b), 72 Stat. 731, 777 (1958) (current version at 49 U.S.C.A. § 1401(b) (West. Supp. 1980)). See note 16 *supra*.

<sup>25</sup> The amendments to the 1958 Act are discussed at text accompanying notes 33-70 *infra*.

<sup>26</sup> In 1934, responding to an increasing number of requests by green-card aliens for the passage of private acts that would enable them to register their aircraft, Congress amended § 3(a) of the 1926 Act to vest in the Secretary of Commerce the power selectively to grant such registration requests: "[T]he Secretary may, if he deems it advisable, grant limited registration to aircraft owned by aliens under such conditions as he may by regulation prescribe, but aircraft granted such limited registration shall not be permitted to engage in interstate or foreign air commerce." Ch. 654, § 3, 48 Stat. 1113, 1113-14 (1934).

The legislative history of this amendment reveals the delightfully pragmatic rationale underlying its enactment: "The amendment to subdivision (a) of section 3 permits granting limiting registration of aircraft owned by aliens. We not infrequently have requests for such registration and in most cases there is no good reason for denying them." 17 CONG. REC. 12,203 (1934) (remarks of Mr. Maloney). Despite the persuasive power of this irrefutable logic, the more restrictive version of the registration provision was included in the 1938 Act.

file with . . . [the FAA] an application for an airman certificate";<sup>27</sup> the term "person" as defined in section 101 of the 1958 Act was broad enough to include individuals who were not citizens of the United States.<sup>28</sup> Thus, alien airmen were able to obtain licenses to pilot aircraft registered in the United States, but, under section 501(b) of the 1958 Act, they were not permitted to own the aircraft they were permitted to pilot.

A further legislative anomaly was created by section 1108(b) of the 1958 Act, which permitted, under appropriate circumstances, "[f]oreign aircraft, which are not a part of the armed forces of a foreign nation, . . . [to be] navigated in the United States by airmen holding certificates or licenses issued or rendered valid by the United States."<sup>29</sup> Pursuant to this provision, alien airmen who obtained United States pilot licenses could own and operate in the United States aircraft that were registered under, and subject to, the laws of foreign jurisdictions, but could not, under section 501(b) of the 1958 Act, register those same aircraft in the United States. This inconsistency had the potential to undercut aircraft safety in the United States—an avowed purpose of all major federal civil aircraft legislation since and including the 1926 Act<sup>30</sup>—by removing such foreign-registered but United

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<sup>27</sup> 49 U.S.C. § 1422 (1976). The 1938 Act contained an identical provision. *See* Civil Aeronautics Act of 1938, ch. 601, § 602(b), 52 Stat. 973, 1008 (1938). The 1926 Act did not preclude the licensing of alien airmen. *See* Air Commerce Act of 1926, ch. 344, §§ 3(c), 9(k), 11(a)(4), 44 Stat. 568, 569, 574 (1926).

<sup>28</sup> *See* 49 U.S.C.A. § 1301(32) (West Supp. 1980) ("‘Person’ means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.").

<sup>29</sup> 49 U.S.C. § 1508(b) (1976). The 1926 Act contained similar provisions, *see* Air Commerce Act of 1926, ch. 344, § 6, 44 Stat. 568, 572 (1926), which remained in force until the enactment of § 1108(b) of the 1958 Act. *See also* 14 C.F.R. §§ 375.1-70 (1980) (issued pursuant to § 1108 of the 1958 Act).

<sup>30</sup> The 1926 Act required the Secretary of Commerce to "[p]rovide for the rating of aircraft of the United States as to their airworthiness." Air Commerce Act of 1926, ch. 344, § 3(b), 44 Stat. 568, 569 (1926). An express purpose of the 1938 Act was "to promote the development and safety and to provide for the regulation of civil aeronautics." Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, 973 (1938). The 1958 Act had as one of its several purposes the goal "to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace." Civil Aeronautics Act of 1938, Pub. L. No. 85-726, 72 Stat. 731, 731 (1958).

States-operated aircraft from the ambit of FAA maintenance specifications.<sup>31</sup>

In addition, as a practical matter, the prohibition against registration of foreign-owned aircraft could be circumvented by employing a rental arrangement, whereby alien individuals or non-citizen corporations could, instead of owning the aircraft they operated in United States commerce, merely lease aircraft that were owned and registered by United States citizens.

For the reasons discussed above, it became apparent that section 501(b) of the 1958 Act not only was failing to effectuate its original purposes but was visibly at odds with other federal laws. In addition, section 501(b) unwittingly swept within its proscriptive ambit a class of individuals (namely, green card aliens) that, in the eyes of other federal law,<sup>32</sup> had ceased to be "foreign."

#### B. The 1977 and 1978 Amendments

In response to this state of affairs, remedial legislation was introduced in the House of Representatives in 1975, in the form of H.R. 3647.<sup>33</sup> The original draft of H.R. 3647 contemplated that the eventual legislation would be entitled the "Resident Alien Aircraft Registration Act of 1975,"<sup>34</sup> the avowed purpose of which was "[t]o amend [section 501(b) of] the Federal Aviation Act of 1958 to permit aliens holding permanent residence visas to register aircraft in the United States."<sup>35</sup> The amended version of section 501(b) would have read as follows:

- (b) An aircraft shall be eligible for registration if, but only if—
  - (1) It is owned by a citizen of the United States *or an individual citizen of a foreign country who has been lawfully admitted for permanent residence in the United States* and such aircraft is not registered under the laws of any foreign country; or

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<sup>31</sup> The maintenance specifications contained in 14 C.F.R. §§ 91.161-177 (1980) by definition apply only to "the maintenance, preventative maintenance, and alteration of U.S. registered civil aircraft." *Id.* at § 91.161 (emphasis added).

<sup>32</sup> *E.g.*, the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1557 (1976), contrasts the status of being foreign with that of having been "lawfully admitted for permanent residence." *See id.* at § 1101(a)(15).

<sup>33</sup> H.R. 3647, 94th Cong., 1st Sess. (1975).

<sup>34</sup> *Id.* In subsequent drafts of H.R. 3647, the title was amended to read "An Act To amend the Federal Aviation Act of 1958 relating to eligibility for aircraft registration," which title belies the simplicity of the bill's original purpose.

<sup>35</sup> *Id.*

(2) It is an aircraft of the Federal Government, or of a State, Territory, or possession of the United States, or the District of Columbia, or of a political subdivision thereof.<sup>36</sup>

For reasons not satisfactorily addressed in the legislative history, H.R. 3647 was "limited in applicability to individuals, not companies," as a "wise safeguard."<sup>37</sup> Thus, the thrust of the bill was to "permit aliens who have been admitted to the United States for permanent residence to register their aircraft with the Federal Aviation Administration—much as they now register their automobiles in the States in which they reside."<sup>38</sup> The author of the bill, Mr. Goldwater,<sup>39</sup> explained the restrictive registration provisions of section 501(b) as "an accident of legislation" rather than a provision that had "any real national interest"; a mere "quirk in the law . . . [that] needs to be corrected."<sup>40</sup> The bill easily passed the House of Representatives, but although the operative inconsistencies of section 501(b) were set forth fully in the report that accompanied H.R. 3647,<sup>41</sup> the bill failed to be con-

<sup>36</sup> See H.R. REP. NO. 94-1580, 94th Cong., 2d Sess. 4 (1976) (emphasis in original).

<sup>37</sup> 122 CONG. REC. 31,614 (1976) (remarks of Mr. Jones).

<sup>38</sup> *Id.* at 31,613 (remarks of Mr. Snyder).

<sup>39</sup> It is worth noting that H.R. 3647 was introduced by Congressman Goldwater, Senator Goldwater's son, in the House of Representatives. When a successor bill to H.R. 3647—H.R. 735—cleared the House and moved on for consideration by the Senate, see text accompanying notes 42-52 *infra*, the father-son relationship gave rise to a cameo appearance by Goldwater, senior:

Mr. GOLDWATER. Will the Senator yield?

Mr. ROBERT C. BYRD. Yes.

Mr. GOLDWATER. Mr. President, the only interest I have in this bill, and I shall certainly not object to it, is that it was offered by my son in the House of Representatives. It is not very often that a father in the Senate can be present to vote on a bill offered by his son. I have some reason to be proud of him on this, because it is a long-needed piece of legislation.

I thank the majority leader.

Mr. ROBERT C. BYRD. Mr. President, I congratulate both the father and the son. They are both entitled to congratulations.

123 CONG. REC. S7373 (daily ed. May 11, 1977).

<sup>40</sup> 122 CONG. REC. 31,613-14 (1976) (remarks of Mr. Snyder).

<sup>41</sup> H.R. REP. NO. 94-1580, *supra* note 36, at 2. The report observed as follows:

Under present law persons not citizens of the United States cannot register aircraft in the United States. Section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C. § 1401) makes it unlawful for any person to operate or navigate any aircraft eligible for registration if such aircraft is not registered by its owner, or to operate or navigate within the United States any aircraft not eligible

sidered by the Senate and was not enacted into law during the Ninety-Fourth Congress.

Undaunted, the proponents of H.R. 3647 introduced an identical bill, H.R. 735,<sup>42</sup> in the House in 1977. On the strength of the same rationale and arguments that had been marshalled to obtain passage of H.R. 3647 in the previous year,<sup>43</sup> H.R. 735 breezed through the House and would, if enacted, have amended section 501(b) of the 1958 Act to focus solely on individual green-card aliens, as follows:

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

(1) It is owned by a citizen of the United States *or an individual citizen of a foreign country who has been lawfully admitted for permanent residence in the United States* and such

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for registration. Section 501(b) limits eligibility to (1) those aircraft owned by a citizen of the United States, (2) those aircraft not registered under the laws of any foreign country, and (3) those aircraft of the Federal Government, or of a State, Territory, or possession of the United States, or the District of Columbia or of a palitcal [sic] subdivision thereof.

A foreign national can own and operate an aircraft within the United States provided it is registered in another country and provided that person complies with any permits, orders or regulations issued by the Civil Aeronautics Board pursuant to section 1108(b) of the Federal Aviation Act of 1958 (49 U.S.C. § 1508(b)). This has not been a satisfactory solution for permanent residents of the United States who wish to base their aircraft here. This is because the aircraft must be maintained in accordance with the airworthiness requirements of the country of registry, including periodic maintenance and inspection. It is often difficult, if not impracticable, for a foreign national to contract with qualified mechanics and repair stations in the United States in order to meet the particular requirements of the country of registry.

With respect to airman licensing there is no parallel problem. A foreign national can obtain a U.S. pilot license and a Federal Communications Commission permit to operate the radio transmitters aboard aircraft. The anomaly of the present law is that a foreign national can legally fly a U.S. registered aircraft in the United States, but he or she is prevented from owning an aircraft of U.S. registry.

*Id.*

<sup>42</sup> H.R. 735, 95th Cong., 1st Sess. (1977).

<sup>43</sup> Compare H.R. REP. NO. 95-16, 95th Cong., 1st Sess. 1-2 (1977) and 123 CONG. REC. H1253-54 (daily ed. Feb. 22, 1977) with H.R. REP. NO. 94-1580, *supra* note 36, at 2 and 122 CONG. REC. 31,613-14 (1976).

In a minor deviation from his remarks of the previous year, Rep. Goldwater described H.R. 735 as "not hav[ing] a major impact on the aviation community." 123 CONG. REC. H1254 (daily ed. Feb. 22, 1977). In retrospect, this observation seems to have been premature. See, e.g., text accompanying notes 162-216 *infra*.

aircraft is not registered under the laws of any foreign country;  
or

(2) It is an aircraft of the Federal Government, or of a State, Territory, or possession of the United States, or the District of Columbia or of a political subdivision thereof.<sup>44</sup>

This time around, the Senate considered the bill. Recognizing the problems that existed under section 501(b),<sup>45</sup> and adopting in substantial part the House's analysis and explanation of the bill,<sup>46</sup> the Senate nevertheless expanded the scope of H.R. 735 to include not only green-card aliens, but also noncitizen corporations.<sup>47</sup> The initial Senate version of H.R. 735 would have amended section 501(b) of the 1958 Act to read as follows:

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

(1) It is owned by a citizen of the United States or an individual citizen of a foreign country who has been lawfully admitted for permanent residence in the United States or a corporation lawfully organized and doing business under the laws of the United States or any State thereof and such aircraft is not registered under the laws of any foreign country; or

(2) It is an aircraft of the Federal Government, or of a State, Territory, or possession of the United States, or the District of Columbia or of a political subdivision thereof.<sup>48</sup>

The legislative history of H.R. 735 in the Senate contains no statement of the reasons why the subject matter of the bill—green-card aliens—was broadened to include noncitizen corporations; the report of the Senate Committee on Commerce, Science and Transportation that accompanied H.R. 735 in the Senate appears to take it for granted that the House version of the bill

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<sup>44</sup> See H.R. REP. NO. 95-16, *supra* note 43, at 4 (emphasis in original).

<sup>45</sup> See S. REP. NO. 95-96, 95th Cong., 1st Sess. 1-2 (1977); 123 CONG. REC. S7373-74 (daily ed. May 11, 1977). These sources essentially recite the same factors noted in H.R. REP. NO. 94-1580, *supra* note 36. See also notes 41 and 46 *infra* and accompanying text.

<sup>46</sup> Compare S. REP. NO. 95-96, *supra* note 45, at 1-2 and 123 CONG. REC. S7373-74 (daily ed. May 11, 1977) with H.R. REP. NO. 95-16, *supra* note 43, at 1-2 and 123 CONG. REC. H1253-54 (daily ed. Feb. 22, 1977).

<sup>47</sup> See 123 CONG. REC. S7373 (daily ed. May 11, 1977) (adding noncitizen corporations to the registration provision); S. REP. NO. 95-96, *supra* note 45, at 1-2.

<sup>48</sup> See S. REP. NO. 95-96, *supra* note 45, at 4-5 (emphasis in original).

was intended to cover noncitizen corporations as well as individual green-card aliens.<sup>49</sup>

Subsequent debate on the Senate version of H.R. 735 produced an additional amendment designed to limit noncitizen corporations' registration privileges only to those of their aircraft that were "based or primarily used in the United States."<sup>50</sup> Senator Byrd explained the purpose of this additional provision as follows:

[T]his amendment is designed to clarify the Secretary of Transportation's powers to condition registration of an aircraft on reasonable inspection by FAA personnel in the United States. The FAA might otherwise have to send personnel abroad to inspect an aircraft registered in the United States to assure compliance with U.S. requirements.<sup>51</sup>

In other words, having granted noncitizen corporations the right to register their aircraft in the United States, the Senate was now concerned with problems of administration that would arise if a foreign corporation decided to base and operate its aircraft abroad, beyond the reach of the FAA's day-to-day ability to examine such aircraft to ensure compliance with United States standards of maintenance and safety. With the addition of this amendment, the version of H.R. 735 that eventually passed the Senate would have amended section 501(b) of the 1958 Act to read as follows:

- (b) An aircraft shall be eligible for registration if, but only if—
  - (1) It is owned by a citizen of the United States *or an individual citizen of a foreign country who has been lawfully admitted for permanent residence in the United States or a corporation lawfully organized and doing business under the laws of the United States or any State thereof so long as such aircraft is based or primarily used in the United States* and is not registered under the laws of any foreign country; or
  - (2) It is an aircraft of the Federal Government, or of a State,

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<sup>49</sup> *Id.* The statement of purpose contained in S. REP. NO. 95-96, *supra* note 45, provided that "[t]he purpose of H.R. 735, as reported, is to permit citizens of foreign countries who have been lawfully admitted for permanent residence in the United States and corporations lawfully organized and doing business under the laws of the United States or any State thereof, to register aircraft in the United States." *Id.* at 1.

<sup>50</sup> 123 CONG. REC. S7373 (daily ed. May 11, 1977) (adding this feature to H.R. 735).

<sup>51</sup> *Id.*

Territory, or possession of the United States, or the District of Columbia, or of a political subdivision thereof.<sup>52</sup>

It might appear that the registration provisions were near to becoming reality. However, despite finally having passed both houses of Congress, H.R. 735, in the form set forth above, was not enacted into law.

The green-card alien/noncitizen corporation registration provisions made their next legislative appearance as a small, unrelated section of H.R. 6010,<sup>53</sup> a House bill that originally was intended merely to amend the 1958 Act to provide for aviation war risk insurance.<sup>54</sup> The original version of H.R. 6010 contained no reference to the registration provisions; the Senate inserted into the bill an amended and expanded version of H.R. 735, which had cleared both houses, but had not been enacted, during the previous session of Congress. In justifying the inclusion of such a disparate provision in a bill ostensibly focused upon aviation insurance, Senator Cannon explained that the amendment was needed to stimulate "more favorable possibilities for sale of U.S.-manufactured aircraft both to foreign nationals residing in the United States and foreign corporations doing business in the United States."<sup>55</sup>

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<sup>52</sup> See S. REP. NO. 95-96, *supra* note 45, at 4-5; 123 CONG. REC. S7373 (daily ed. May 11, 1977) (emphasis added).

<sup>53</sup> H.R. 6010, § 14, 95th Cong., 1st Sess. 6 (1977). In its final form, H.R. 6010 represented a compendium of the contents of several precursor bills, among them, the following: H.R. 26, 95th Cong., 1st Sess. (1977) ("To amend the Federal Aviation Act of 1958 to provide improved notice to the public of changes in air carrier fares"); H.R. 27, 95th Cong., 1st Sess. (1977) ("To amend the Federal Aviation Act of 1958 to authorize reduced fare transportation on a space-available basis for elderly persons, and for other purposes"); S. 1325, 95th Cong., 1st Sess. (1977) ("To amend § 406(a) of the Federal Aviation Act of 1958 (49 U.S.C. § 1376) to provide explicit statutory authority for the payment of 'flow-through' subsidies pursuant to an experimental program administered by the Civil Aeronautics Board during the period August 1, 1973 through July 31, 1975"). The original purpose of H.R. 6010 itself was "[t]o amend Title XIII of the Federal Aviation Act of 1958 to expand the types of risks which the Secretary of Transportation may insure or reinsure, and for other purposes." H.R. 6010, *supra*.

<sup>54</sup> See note 53 *supra*.

<sup>55</sup> 123 CONG. REC. S17,533 (daily ed. Oct. 20, 1977). This sweetener was gleaned from the Senate report accompanying H.R. 735, S. REP. NO. 95-96, *supra* note 45, at 2, which observed that leasing of aircraft by noncitizen corporations led to loss of revenue for domestic aircraft manufacturers because leasing was more expensive than purchasing. Of course, this rationale bears little

The new version of the registration provisions embodied several features that differed from the version that comprised H.R. 735. First, the Senate attempted<sup>56</sup> to split into separate clauses the provisions relating to individual green-card aliens and noncitizen corporations, respectively. Second, the term "based *or* primarily used" as it pertained in H.R. 735 to aircraft owned by noncitizen corporations was amended to read "based *and* primarily used."<sup>57</sup> Third, the new provision contained a mandate to the Secretary of Transportation to define the new "based and primarily used" language by administrative regulation, although the Senate downplayed the importance of this portion of the amendment by observing that it was not "require[d] that DOT<sup>58</sup> issue any rules under this provision prior to registering aircraft under the new procedures."<sup>59</sup> None of the reasoning behind any of these alterations is revealed by the legislative history of H.R. 6010.

The conference committee on H.R. 6010 approved the Senate's registration provisions without comment.<sup>60</sup> The bill became law (1977 Amendment) on November 9, 1977, and contained the following amended version of section 501(b) of the 1958 Act:

- (b) An aircraft shall be eligible for registration if, but only if—
  - (1)(A) it is—
    - (i) owned by a citizen of the United States (other than a corporation) or by an individual citizen of a foreign country who has lawfully been admitted for permanent residence in the United States; or
    - (ii) owned by a corporation lawfully organized and doing business under the laws of the United States or any State thereof so long as such aircraft is based and primarily used in the

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resemblance to the original intent behind the registration provision. See note 41 *supra* and text accompanying notes 33-52 *supra*.

<sup>56</sup> See note 63 *infra* and text accompanying notes 62-64 *infra*.

<sup>57</sup> The question arises whether the conjunctive formulation may be read as an attempt to create a more restrictive limitation upon registration; a secondary question is whether it in fact did so. See text accompanying notes 230-34 *infra*.

<sup>58</sup> See note 71 *infra*.

<sup>59</sup> 123 CONG. REC. S17,535 (daily ed. Oct. 20, 1977) (remarks of Senator Cannon). In deemphasizing the need for the prompt promulgation of regulations, and restricting the scope of its mandate to the FAA, Congress was indicating that it viewed the registration legislation as self-explanatory, self-contained, and administrable in the absence of further guidelines.

<sup>60</sup> See H.R. REP. NO. 95-773, 95th Cong., 1st Sess. 13, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 3396, 3398.

United States; and

(B) it is not registered under the laws of any foreign country;

or

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

For purposes of this subsection, the Secretary of Transportation shall, by regulation, define the term "based and primarily used in the United States."<sup>61</sup>

This brand-new law was flawed from the outset. In splitting the green-card alien provision and the noncitizen corporation provision into separate clauses, the 1977 Amendment inadvertently<sup>62</sup> swept into its proscriptive ambit all corporations that were "citizens of the United States" and required, as a precondition to registration, that the aircraft in question be "based and primarily used in the United States."<sup>63</sup> Under the 1977 Amendment, corporations that were citizens of the United States and that owned aircraft for use primarily overseas no longer would be permitted to register those aircraft. This obviously never was the intent behind the registration provisions.<sup>64</sup>

In response to this legislative gaffe, and supported by outcries from domestic industry,<sup>65</sup> remedial legislation was introduced in

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<sup>61</sup> Pub. L. No. 95-163, § 14, 91 Stat. 1278, 1283 (1977).

<sup>62</sup> Congress' mistake was admitted by Rep. Johnson, who attributed it to the Senate. See 124 CONG. REC. H1283 (daily ed. Feb. 21, 1978).

<sup>63</sup> It can be argued that the split formulation of the registration provision contained in the 1977 Amendment did not itself effect the erroneous result, but rather merely crystallized an ambiguity inherent in the version of the registration provision contained in the Senate edition of H.R. 735, see text accompanying note 52 *supra*. In paragraph (1) of the H.R. 735 Senate version, the clause "so long as such aircraft is based or primarily used in the United States and is not registered under the laws of any foreign country," although intended to modify only the phrase "a corporation lawfully organized and doing business under the laws of the United States or any State thereof," may be read also to modify the phrase "citizen of the United States or an individual citizen of a foreign country who has been lawfully admitted for permanent residence in the United States." If the latter interpretation is subscribed to, then the H.R. 735 formulation itself required as a precondition to registration that *all* aircraft, whether owned by citizens or noncitizens, be "based or primarily used in the United States."

<sup>64</sup> See note 65 *infra* and text accompanying notes 38-40 *supra*.

<sup>65</sup> See 124 CONG. REC. H1283 (daily ed. Feb. 21, 1978) (remarks of Mr. Snyder):

Attorneys representing aircraft financing institutions have taken the position that the alien aircraft registration provisions of H.R.

the next session of Congress, in the form of H.R. 10368<sup>66</sup> and its companion bill, S. 2516.<sup>67</sup> Both the House and the Senate reports accompanying these bills succinctly stated that the bills' single purpose was "to amend section 501(b) of the Federal Aviation Act of 1958 . . . to clarify that aircraft registered by 'citizens of the United States' . . . are not required to be based and primarily used in the United States in order to be eligible" for United States registry.<sup>68</sup>

The bills quickly cleared their respective houses and, on March 8, 1978, the House version, H.R. 10368, became law (1978 Amendment).<sup>69</sup> The 1978 Amendment revised section 501(b) of the 1958 Act to read as follows:

#### ELIGIBILITY FOR REGISTRATION

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

(1)(A) it is—

(i) owned by a citizen of the United States or by an individual citizen of a foreign country who has lawfully been admitted for permanent residence in the United States; or

(ii) owned by a corporation (other than a corporation which is a citizen of the United States) lawfully organized and doing business under the laws of the United States or any State thereof so long as such aircraft is based and primarily used in the United States; and

(B) it is not registered under the laws of any foreign country;

or

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

For purposes of this subsection, the Secretary of Transportation, shall by regulation, define the term "based and primarily used in the United States."<sup>70</sup>

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6010 (Public Law 95-163) contain language which cast [sic] doubt on the eligibility of aircraft operated by U.S. international air carriers for U.S. registration—if such aircraft are based abroad. We have been persuaded that those contentions have some merit—although, of course, our intention in H.R. 6010 was never to affect the status of such aircraft one way or the other.

<sup>66</sup> H.R. 10368, 95th Cong., 2d Sess. (1978).

<sup>67</sup> S. 2516, 95th Cong., 2d Sess. (1978).

<sup>68</sup> H.R. REP. NO. 95-868, 95th Cong., 2d Sess. 1 (1978); S. REP. NO. 95-637, 95th Cong., 2d Sess. 2 (1978).

<sup>69</sup> Pub. L. No. 95-241, 92 Stat. 119 (1978).

<sup>70</sup> 49 U.S.C.A. § 1401(b) (West Supp. 1980).

Congress finally had achieved its goals of allowing green-card aliens and noncitizen corporations to register their aircraft in the United States. All that remained for the FAA, on behalf of the Secretary of Transportation, was the apparently simple task of defining the term "based and primarily used in the United States."

## II. BACKGROUND, SCOPE AND INTENT OF THE FINAL REGULATION

The broad authority of the FAA<sup>71</sup> to promulgate rules and regu-

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<sup>71</sup> Pursuant to the Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966), which established the Department of Transportation headed by the Secretary of Transportation (Secretary), the rulemaking authority of the Administrator of the FAA was transferred to the Secretary, as follows:

There are hereby transferred to and vested in the Secretary all functions, powers, and duties of the Federal Aviation Agency, and of the Administrator and other officers and offices thereof, including the development and construction of a civil supersonic aircraft: *Provided, however*, That there are hereby transferred to the Federal Aviation Administrator, and it shall be his duty to exercise the functions, powers, and duties of the Secretary pertaining to aviation safety as set forth in sections 306, 307, 308, 309, 312, 313, 314, 1101, 1105 and 1111, and titles VI, VII, IX, and XII of the Federal Aviation Act of 1958, as amended. In exercising these enumerated functions, powers, and duties, the Administrator shall be guided by the declaration of policy in section 103 of the Federal Aviation Act of 1958, as amended. Decisions of the Federal Aviation Administrator made pursuant to the exercise of the functions, powers, and duties enumerated in this subsection to be exercised by the Administrator shall be administratively final, and appeals as authorized by law of this Act shall be taken directly to the National Transportation Safety Board or to the courts, as appropriate.

*Id.* at § 6(c)(1), 80 Stat. at 938. The Secretary, however, has by regulation outlined the areas of responsibility of the FAA, and formally delegated to the Administrator of the FAA broad rulemaking authority in the area of civil aeronautics, as follows:

*The Federal Aviation Administration . . . [i]s responsible for—*

- (1) Promulgating and enforcing regulations on all safety matters relating to the manufacture, operation, and maintenance of aircraft;
- (2) Registering aircraft and recording rights in aircraft;
- (3) Developing, modifying, testing, and evaluating systems, procedures, facilities, and devices needed for the safe and efficient navigation and traffic control of aircraft;
- (4) Locating, constructing or installing, maintaining, and operating Federal aids to air navigation, wherever necessary;
- (5) Developing air traffic regulation, and administering air traffic control of civil and military air operations within U.S. airspace;
- (6) Providing grants-in-aid for developing public airports; and
- (7) Promoting and encouraging civil aviation abroad through technical aviation assistance to other governments.

*The Federal Aviation Administrator is delegated authority to—*

lations governing civil aeronautics derives in the main from sections 307 and 313 of the 1958 Act,<sup>72</sup> which provide, in pertinent part, as follows:

The . . . [FAA] is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as . . . [it] may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. [The FAA] . . . may modify or revoke such assignment when required in the public interest.<sup>73</sup>

The . . . [FAA] is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, . . . and for the efficient utilization of the navigable airspace . . . .<sup>74</sup>

The . . . [FAA] is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of . . . [the 1958] Act, as . . . [it] shall deem necessary to carry out the provisions of, and to exercise and perform . . . [its] powers and duties under . . . [the 1958] Act.<sup>75</sup>

Against the backdrop of these broad grants of administrative discretion, it is easy to understand how Congress' narrow mandate to the FAA to define, for purposes of the Amendments, the term "based and primarily used in the United States" was expanded into the comprehensive and far-reaching result that is the Final Regulation.<sup>76</sup>

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(a) Carry out the powers and duties transferred to the Secretary of Transportation by sections 6(c)(1) of the Department of Transportation Act (49 U.S.C. § 1655(c)(1)), including those pertaining to aviation safety set forth in sections 306, 307, 308, 309, 312, 313, 314, 1101, 1105, and 1111 and titles VI, VII, IX, and XII of the Federal Aviation Act of 1958, as amended.

49 C.F.R. §§ 1.4(c), 1.47(a) (1978). Thus, although the power to promulgate rules and regulations pertaining to civil aeronautics is statutorily vested in the Secretary, and Congressional mandates are directed accordingly, the actual rule-making function has been delegated to, and is performed by, the Administrator of the FAA.

<sup>72</sup> 49 U.S.C. §§ 1348, 1354 (1976).

<sup>73</sup> *Id.* at § 1348(a).

<sup>74</sup> *Id.* at § 1348(c).

<sup>75</sup> *Id.* at § 1354(a).

<sup>76</sup> Final Regulation, *supra* note 8.

Although Congress had accompanied the enactment of the new registration provisions with the confident declaration that it was not "require[d] that . . . [the FAA] issue any rules under this provision prior to registering aircraft under the new procedures,"<sup>77</sup> the FAA moved quickly to issue an interim rule, Special Federal Aviation Regulation 39 (SFAR 39),<sup>78</sup> which, pending the adoption of a final governing regulation duly promulgated in observance of the time-consuming precepts of the Administrative Procedure Act,<sup>79</sup> would expressly permit registration of aircraft owned by noncitizen corporations under circumstances in which the contacts of such aircraft with the United States were, in the view of the FAA, of the most substantial kind.<sup>80</sup> Citing sections 313 and 501 of the 1958 Act<sup>81</sup> as general authority for the enactment of SFAR 39, the FAA justified this departure from standard rulemaking procedure on the ground that SFAR 39 was in the nature of "an interpretive rule and a statement of general policy . . . [and therefore] notice and public procedure are not required and . . . good cause exists for making it effective in less than 30 days."<sup>82</sup> Although thus placing SFAR 39 above reproach, the FAA nevertheless noted its intention "to review operating experience under the special regulation,"<sup>83</sup> and therefore "invited [interested persons] to submit such written data, views or arguments as they may desire regarding this SFAR."<sup>84</sup> Even though the FAA was out-

<sup>77</sup> 123 CONG. REC. S17,535 (daily ed. Oct 20, 1977) (remarks of Senator Cannon). See note 59 *supra*.

<sup>78</sup> 44 Fed. Reg. 38 (1979) [hereinafter cited as SFAR 39].

<sup>79</sup> Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946), *repealed and superseded* by Pub. L. No. 89-554, § 8, 80 Stat. 378, 632 (1966) (current version at 5 U.S.C. §§ 551-576 (1976 & Supp. II 1978)).

The exercise of the rulemaking power by the FAA is expressly made subject to the provisions of the Administrative Procedure Act. See 49 U.S.C. § 1348(d) (1976). Said provisions require, *inter alia*, that the agency publish a general notice of proposed rule making in the Federal Register, 5 U.S.C. § 553(b) (1976); that interested persons be given the right to participate in the rule-making, *id.* at § 553(c); and that at least 30 days elapse before a rule, once published, becomes effective, *id.* at § 553(d).

<sup>80</sup> See text accompanying notes 217-24 *infra*.

<sup>81</sup> 49 U.S.C. §§ 1354, 1401 (1976) (current version of § 1401 at 49 U.S.C.A. § 1401 (West Supp. 1980)).

<sup>82</sup> SFAR 39, *supra* note 78, at 39.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* Although the FAA went so far as to import into the ambit of the SFAR proceeding the Administrative Procedure Act notion of public participation in

side the ambit of procedural requirements governing public comment on proposed regulations, it nevertheless was ready, willing, and able to respond to reasoned suggestions regarding its temporary limited action.

SFAR 39 itself was, as mentioned above, deliberately focused only upon the most immediately troublesome aspect of the new registration provisions; the meaning of the term "based and primarily used in the United States."<sup>85</sup> Reading into the legislative history of the Amendments Congress' intent thereby to preclude the use of the United States registry as a "flag of convenience,"<sup>86</sup> the FAA fashioned an interim rule, stating that

[c]ontrary provisions of Part 47 of the Federal Aviation Regulations notwithstanding, an aircraft is eligible for registration pursuant to Section 501(b)(1)(A)(ii) and (B) of the . . . 1958 [Act] if it is:

(a) Owned by a foreign corporation which is lawfully organized and doing business under the laws of the United States or any State thereof;

(b) To be exclusively operated in the United States during the period that it is registered in the United States; and

(c) Not registered under the laws of any foreign country during the period that it is registered in the United States.<sup>87</sup>

In formulating this special rule, the FAA evidenced both the

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proposed rulemaking, *see* 5 U.S.C. § 553(c) (1976), no comment on SFAR 39 was received. *See* Final Regulation, *supra* note 8, at 61,938.

<sup>85</sup> *See* SFAR 39, *supra* note 78, at 38.

<sup>86</sup> *Id.* at 38-39. The only possible justification for this interpretation of the intent behind the amendments occurs in the legislative history of the Senate's addition of the "based and primarily used" language to H.R. 735, *supra* note 42. The "based and primarily used" language was needed "to clarify the Secretary of Transportation's powers to condition registration of an aircraft on reasonable inspection by FAA personnel in the United States. The FAA might otherwise have to send personnel abroad to inspect an aircraft registered in the United States to assure compliance with U.S. requirements." 123 CONG. REC. S7373 (daily ed. May 11, 1977) (remarks of Senator Byrd). It seems clear that the "based and primarily used" requirement was added in the interest of administrability of the new, liberal registration provisions, *see* text accompanying note 51 *supra*, and that the FAA's "flag of convenience" rationale thus was a strained interpretation of Congressional intent. It may be argued, however, that the FAA's "flag of convenience" rationale, which justified the promulgation of regulations that precluded access to the American registry by foreign corporations whose aircraft had only tenuous contacts with the United States, is the protective approach that Congress should have taken.

<sup>87</sup> SFAR 39, *supra* note 78, at 39.

willingness to give substance to the intent of Congress, and the ability to move rapidly to deal with what the FAA considered to be an obvious case for expanded registration eligibility.<sup>88</sup> Even in the context of a temporary rule, the FAA, on the basis of its pragmatic insight and its broad administrative authority, identified and developed reasonable guiding principles for dealing with issues that Congress had not explicitly identified.

Simultaneously with the issuance of SFAR 39,<sup>89</sup> the FAA issued a Notice of Proposed Rule Making (Proposed Regulation),<sup>90</sup> which set forth the rules that the FAA felt were logical and necessary corollaries to the Amendments. A description of the areas treated in the Proposed Regulation is necessary in order to appreciate fully the magnitude of the task that devolved upon the FAA in the guise of Congress' deceptively simple instruction to define the term "based and primarily used in the United States."

At the threshold, the FAA's own description of the scope of the Proposed Regulation is instructive:

This notice proposes to amend Part 47 of the Federal Aviation Regulations to provide for: (1) the registration of aircraft by an individual citizen of a foreign country who has been lawfully admitted for permanent residence in the United States; (2) the registration of aircraft by a corporation (other than a citizen of the United States) lawfully organized and doing business under the laws of the United States or any State thereof, if the aircraft is based and primarily used in the United States; and (3) a definition of "based and primarily used in the United States." Additionally, certain technical amendments are now to be made. These involve aspects of registration by partnerships, trustees, and corporations that use voting trusts, the substitution of the term "person" where appropriate, and the provision for immediate termination of a certificate when eligibility has ceased.<sup>91</sup>

Although SFAR 39 had been focused exclusively upon one interim application of the term "based and primarily used in the United States"—the definition of which term was the specific task that Congress felt required administrative attention—the FAA in

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<sup>88</sup> It also evidenced the eclipsing of the "basing" portion of the requirement by the "exclusive use" criterion. See text accompanying notes 223-24 *infra*.

<sup>89</sup> Both SFAR 39 and the Proposed Regulation were issued on December 22, 1978.

<sup>90</sup> 44 Fed. Reg. 63 (1979).

<sup>91</sup> *Id.* at 64.

the Proposed Regulation in effect anticipated the logical consequences of the Amendments, and expanded the scope of its rule-making to contemplate the solutions to the problems those consequences posed.

At the outset, the FAA noted that "[n]either revised Section 501(b) [of the 1958 Act] nor the Federal Aviation Regulations define the term 'individual citizen of a foreign country who has lawfully been admitted for permanent residence in the United States.'"<sup>92</sup> Absent a definition of this key term, it would have been impossible fairly and equitably to administer the new registration provisions in the case of green-card aliens. Accordingly, the FAA undertook an examination of relevant immigration law,<sup>93</sup> and distilled a workable two-pronged test:

[I]t will be sufficient, for the purposes of proof of eligibility for aircraft registration, for a foreign citizen with permanent residency status to identify the applicant's assigned alien registration number on the application for aircraft registration, in addition to a representation of having been lawfully admitted as a permanent resident of the United States.<sup>94</sup>

Inasmuch as the citizenship of an applicant corporation was relevant to a determination of its eligibility to register aircraft, the FAA undertook a "citizenship analysis" in the corporate context, and proposed to require as a precondition to registration that "a noncitizen corporation . . . provide evidence with an application for aircraft registration, that it is lawfully organized and doing business under the laws of the United States, or any State thereof."<sup>95</sup>

Having disposed of the threshold question of nature and proof of citizenship of individuals and corporations in general, the FAA next turned to the central task of the Proposed Regulation: the definition of the term "based and primarily used in the United States." Reiterating the proposition that the legislative history of this term revealed that it was intended to preclude use of the

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<sup>92</sup> *Id.* This term was utilized in the 1977 Amendment in connection with eligibility for registration of aircraft owned by green-card aliens. See Pub. L. No. 95-163, § 14, 91 Stat. 1278, 1283 (1977).

<sup>93</sup> *Id.* See Proposed Regulation, *supra* note 90, at 64 (discussing the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1557 (1976)).

<sup>94</sup> Proposed Regulation, *supra* note 90, at 64. See also *id.* at 66.

<sup>95</sup> *Id.* at 64.

United States registry as a "flag of convenience,"<sup>96</sup> the FAA proposed a "sixty percent test" that focused upon the percentage of use, not basing, in the United States:

The FAA has determined that the percentage of flight hours in the United States is the most effective method of determining where an aircraft is based and primarily used. The FAA believes that the phrase "based and primarily used in the United States" implies that only those aircraft which are operated at least 60 percent of the time in the United States are eligible for registration. The 60 percent figure represents a judgment as to the figure which permits the greatest amount of flexibility to the registrant while being consistent with the [1958] Act.<sup>97</sup>

A flexible standard consistent with the 1958 Act having been proposed, questions of administration of the standard arose. First, in reference to what period of time must an aircraft owned by a noncitizen corporation be utilized at least sixty percent in the United States? This question was resolved by requiring that, "in any 180 consecutive day period, 60 percent of the total flight hours of the aircraft must be spent in the United States."<sup>98</sup>

Second, although the term "United States" was defined in the 1958 Act,<sup>99</sup> the question arose whether to count toward the sixty percent requirement hours accumulated in flights that originated in the United States but terminated abroad, or that originated abroad but terminated in the United States. In response to this,

[t]he FAA interpret[ed] "used in the United States" to include all non-stop (except in emergencies and for purposes of refueling) flights between two points in the United States. Therefore, although an aircraft may be in flight over the high seas or over a neighboring country during a non-stop flight between two points in the United States, all of the flight hours accumulated during such a flight are considered flight hours accumulated in the United States.<sup>100</sup>

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<sup>96</sup> See note 86 *supra* and accompanying text.

<sup>97</sup> Proposed Regulation, *supra* note 90, at 64. See also *id.* at 67.

<sup>98</sup> *Id.* at 64. See also *id.* at 67. The 180-day period subsequently was amended to a six-month period in response to industry comments. See Final Regulation, *supra* note 8, at 61,937-38. See also *id.* at 61,940.

<sup>99</sup> See 49 U.S.C.A. § 1301(41) (West Supp. 1980) ("United States" means the several States, the District of Columbia, and the several Territories and possessions of the United States, including the territorial waters and the overlying airspace thereof.).

<sup>100</sup> Proposed Regulation, *supra* note 90, at 64-65. See also *id.* at 67.

Third, the question arose whether to require that a prospective registrant demonstrate compliance with the sixty percent test as a precondition to registration. Due probably to considerations of verification,

[t]he FAA . . . concluded that the determination of whether an aircraft is based and primarily used in the United States is prospective from the time that it is enrolled in the U. S. registry. In other words, the "based and primarily used" restriction is applicable only during the period that the aircraft is registered in the United States.<sup>101</sup>

Finally, the question arose as to verification of registrants' compliance with the sixty percent test. In order to reduce the administrative burden on the FAA, the Proposed Regulation required

[t]he registered owner or operator of a U.S. aircraft . . . to keep records of the total time in service of the airframe . . . [and] the total flight hours in the United States of the aircraft . . . [, and] require[d] that a report be submitted to the FAA Aircraft Registry at the end of each 180-day period indicating total time in service of the airframe and total number of flight hours in the United States during that period.<sup>102</sup>

The FAA's response to the issues that were implicit in the sixty percent test demonstrates a comprehensive approach to difficult questions, and a concern for economy and administrability. But the FAA's treatment of inchoate difficulties extended beyond the "based and primarily used" formula to resolve ambiguities inherent in the term "citizen of the United States" itself. Section 101(16) of the 1958 Act defines the term "citizen of the United States" to mean

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

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<sup>101</sup> *Id.* at 65. *See also id.* at 67.

<sup>102</sup> *Id.* at 65. *See also id.* at 67.

by persons who are citizens of the United States or of one of its possessions.<sup>103</sup>

The FAA foresaw little difficulty in administering the new registration provisions with respect to individuals and partnerships.<sup>104</sup> But implicit in the definition of a corporate citizen under section 101(16)(c) of the 1958 Act were difficulties in administering the registration provisions with respect to voting trusts and registration in the name of a trustee. A discussion of the substance and effect of the FAA's disposition of these issues is to be found in Section III of this Article.<sup>105</sup> At this point, it will suffice to observe that, from a procedural standpoint, the FAA's approach to the identification and solution of problems raised by the 1977 and 1978 Amendments led to far greater an exercise in administrative rulemaking than Congress had anticipated in its simple directive to define the term "based and primarily used in the United States."<sup>106</sup>

In the discussion preceding the text of the Proposed Regulation, the FAA invited "[i]nterested persons . . . to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire."<sup>107</sup> Several of the points raised in the five comments that were received<sup>108</sup> were utilized by the FAA as a basis for amending certain provisions of the Proposed Regulation. For example, in response to the voting trust provisions of the Proposed Regulation,<sup>109</sup> one commentator contended that "the regulation should not prohibit non-qualifying foreign beneficiaries from participating (in common with other participants) in the ordinary management or direction of the trust so long as the requisite 75 percent control is vested in U.S. citizens

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<sup>103</sup> 49 U.S.C.A. § 1301(16) (West Supp. 1980).

<sup>104</sup> See Proposed Regulation, *supra* note 90, at 64-65. For a discussion of the formulation of the provisions dealing with individuals and partnerships, see text accompanying notes 138-50 *infra*.

<sup>105</sup> See text accompanying notes 118-248 *infra*.

<sup>106</sup> The FAA also considered and proposed rules dealing with the duration of certificates of registration, and made conforming technical amendments to other FAA regulations that would be affected by the proposed Regulation. See Proposed Regulation, *supra* note 90, at 65-66. See also *id.* at 67-68.

<sup>107</sup> See *id.* at 63.

<sup>108</sup> See Final Regulation, *supra* note 8, at 61,937.

<sup>109</sup> See Proposed Regulation, *supra* note 90, at 65, 67.

and other qualified beneficiaries."<sup>110</sup> The FAA responded to this comment by amending the voting trust provisions to

make . . . it clear that persons who are neither U.S. citizens nor resident aliens may exercise up to 25 percent of the aggregate power to direct or remove a trustee. In addition, the rule makes it clear that those persons may have a beneficial interest in the trust that exceeds 25 percent of the aggregate beneficial interests.<sup>111</sup>

Similarly, in response to the provision of the Proposed Regulation that would have required compliance with the sixty percent requirement in each 180-day period,<sup>112</sup> two comments, one quoted below, observed that

[t]his requirement could work a considerable hardship on the operator. Worldwide economic conditions affecting the corporation not a United States citizen could dictate the use of the aircraft. For example, during the first 6-month period, a crisis may develop that requires many trips between the U.S. and the country of the corporation's principle [sic] ownership. The next six months may see an almost exclusive use of the aircraft inside the U.S. So in a year's time, the overall operations may even out. . . .<sup>113</sup>

Although rejecting a one-year rule, the FAA noted the proposal and stated that, "[a]fter further consideration in light of these

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<sup>110</sup> Letter from law firm of Perkins, Coie, Stone, Olsen & Williams to the Federal Aviation Administration (March 1, 1979) [hereinafter cited as Perkins, Coie Letter].

<sup>111</sup> Final Regulation, *supra* note 8, at 61,938. Compare *id.* at 61,939-40 (final version of voting trust provisions) with Proposed Regulation, *supra* note 90, at 67 (proposed voting trust provisions).

<sup>112</sup> See Proposed Regulation, *supra* note 90, at 64, 67.

<sup>113</sup> Letter from Shell Oil Company to the Federal Aviation Administration (February 28, 1979) [hereinafter cited as Shell Letter]. See also Letter from National Business Aircraft Association, Inc. to the Federal Aviation Administration (February 28, 1979) [hereinafter cited as NBAA Letter], which uses almost identical language to make the same point:

The requirement to achieve 60% of the flight time in a 180 day period could work a considerable hardship on an operator. Worldwide economic conditions affecting the foreign-owned corporation could dictate the use of the aircraft. For example, during the first six month period, a crisis may develop that requires many trips between the U.S. and the corporation's home country. The next six months may see an almost exclusive use of the aircraft inside of the U.S. So in a year's time, the overall operations may even out. . . .

The similarity in language is revealing evidence of "cooperation" among commentators.

comments the FAA has decided that the basic period for the rule should be 6 calendar months. This will simplify the rule without making the period so long that the rule may be abused."<sup>114</sup>

The foregoing examples of the FAA's responsiveness to public comment on its proposals is not intended to imply that the FAA conforms its proposals wholesale to the demands of the more vocal elements of the public. In fact, the majority of the points raised in the comments received by the FAA were not utilized in amending the Proposed Regulation.<sup>115</sup> Nevertheless, to the credit of the FAA, all the comments received were acknowledged and discussed, and the reasoning behind the adoption or refutation of the points raised therein was clearly set forth.<sup>116</sup>

The comments received from the public in response to the Proposed Regulation were aggregated with the internal amendments generated by the FAA in the course of its own review process and, on October 29, 1979, the Final Regulation was published in the Federal Register.<sup>117</sup>

### III. THE FINAL REGULATION: PROBLEMS SOLVED AND ISSUES RAISED

#### A. Statutory Mandate and Statutory Limitations

As discussed above,<sup>118</sup> the simple idea of extending the privilege of owning United States-registered aircraft to green-card aliens was born, died, was reborn, and eventually developed into a specific

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<sup>114</sup> Final Regulation, *supra* note 8, at 61,938. Compare *id.* at 61,940 (final version of noncitizen corporation provisions) with Proposed Regulation, *supra* note 90, at 67 (proposed noncitizen corporation provisions).

<sup>115</sup> For example, one comment observed that the Proposed Regulation should be amended to allow noncitizen corporations to "[o]perate demonstrator aircraft on the U.S. Registry . . . [and] [f]erry new aircraft for delivery to U.S. purchasers from . . . [points abroad] to the United States on the U.S. Registry." Letter from British Aerospace, Inc. to Federal Aviation Administration (February 28, 1979). Another comment proposed that "basing" rather than "operation" be the decisive factor in determining eligibility for U.S. registry, so that it would be possible to "lease aircraft from as well as to foreign air carriers." Letter from Flying Tiger Line to Federal Aviation Administration (January 23, 1979) (emphasis in original). For the reasoning behind the FAA's rejection of these and other comments, see Final Regulation, *supra* note 8, at 61,937-38.

<sup>116</sup> See Final Regulation, *supra* note 8, at 61,937-38.

<sup>117</sup> *Id.* at 61,937. The effective date of the Final Regulation was January 1, 1980. See *id.*

<sup>118</sup> See text accompanying notes 33-70 *supra*.

statutory directive to the Secretary of Transportation to define by regulation the term "based and primarily used in the United States" relative to noncitizen corporations. The FAA responded, as outlined above,<sup>119</sup> by issuing regulations of even broader scope.

The discussion will now turn to the specific manner in which the FAA anticipated and dealt with practical problems of administration raised as a result of the statutory broadening of the privilege of aircraft registration, as well as to the substance of the FAA action. However, before examining the details of the Final Regulation, we must first analyze the statutory framework for regulation. As will be seen, although it established the statutory and regulatory machinery for implementing the desired policy, the 1958 Act required certain creative regulatory adjustments and lubrication in order to function properly.

The Amendments<sup>120</sup> spoke to and amended what was in essence the minor premise of the logical statement contained in the registration provisions of the 1958 Act.<sup>121</sup> In order to understand the nature and scope of the FAA action contained in the Final Regulation, we must begin with the major premise: namely, subsection (a) of section 501 of the 1958 Act. This provision states, in pertinent part, as follows:

It shall be unlawful for any person to operate or navigate any aircraft eligible for registration if such aircraft is not registered by its owner as provided in this section, or (except as provided in section 1508 of this title) to operate or navigate within the United States any aircraft not eligible for registration . . . .<sup>122</sup>

Having established, in subsection (a) of section 501, eligibility for registration of aircraft as the critical element in the operative provision, the 1958 Act turns, in subsection (b), to a definition of eligibility for registration:

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

(1) (A) it is—

(i) owned by a citizen of the United States or by an individual

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<sup>119</sup> See text accompanying notes 71-117 *supra*.

<sup>120</sup> Pub. L. No. 95-241, 92 Stat. 119 (1978); Pub. L. No. 95-163, § 14, 91 Stat. 1278, 1283 (1977). For a discussion of the background and legislative history of the amendments, see text accompanying notes 33-70 *supra*.

<sup>121</sup> 49 U.S.C. § 1401 (1976) (current version of § 1401(b) at 49 U.S.C.A. § 1401(b) (West Supp. (1980))).

<sup>122</sup> *Id.* at § 1401(a).

citizen of a foreign country who has lawfully been admitted for permanent residence in the United States; or

(ii) owned by a corporation (other than a corporation which is a citizen of the United States) lawfully organized and doing business under the laws of the United States or any State thereof so long as such aircraft is based and primarily used in the United States; and

(B) it is not registered under the laws of any foreign country; or

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

For purposes of this subsection, the Secretary of Transportation shall, by regulation, define the term "based and primarily used in the United States".<sup>123</sup>

The registration provisions seem clear so far. Upon further scrutiny, however, certain anomalies start to appear. Subsection (a) of section 501 of the 1958 Act speaks to registration of an aircraft "by its owner." However, the 1958 Act contains no definition of the term "own" or "owner," and subsection (f) of section 501 states in unambiguous terms that registration "shall not be evidence of ownership of aircraft in any proceedings in which such ownership by a particular person is, or may be, in issue."<sup>124</sup> The 1958 Act has, accordingly, specifically declined to give federal recognition or effect to any particular contractual structures developed by private parties with respect to the ownership of aircraft.

The potential breadth and vagueness of the ownership concept contained in subsection (a) of section 501 contrast sharply with the more particular rules contained and relationships specified in subsection (b) of section 501. In terms of the nature of the entities (other than individuals) affected by the definition of eligibility for registration, subsection (b) has two focal points. The first is the concept of "citizen of the United States." This term is defined in section 101(16) of the 1958 Act as follows:

"Citizen of the United States" means (a) an individual who is a citizen of the United States or one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a

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<sup>123</sup> 49 U.S.C.A. § 1401(b) (West Supp. 1980).

<sup>124</sup> 49 U.S.C. § 1401(f) (1976).

corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.<sup>125</sup>

The second focal point is the concept of a "corporation (other than a corporation which is a citizen of the United States)."<sup>126</sup>

The definition of the term "citizen of the United States" contains reasonably specific provisions; the definition, however, speaks only to a limited class of legal entities—namely, individuals, partnerships, corporations, and associations. The concept of "owner" in subsection (a) of section 501 of the 1958 Act is not so limited. In fact, subsection (f) of section 501 refers to "ownership by a particular person,"<sup>127</sup> and the definition of "person" contained in section 101(32) of the 1958 Act is of some breadth: "'Person' means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof."<sup>128</sup> Thus, the 1958 Act has not attempted to provide comprehensive guidance as to the qualification of legal entities, other than certain individuals, partnerships, corporations, and associations, to be owners of United States-registered aircraft. Moreover, in establishing the rules governing eligibility for registration of aircraft owned by non-United States citizens, subsection (b) by its terms speaks only to green-card aliens and noncitizen corporations. The result of this language is that, as a technical matter, the 1958 Act does not make explicit provision for ownership of United States-registered aircraft by legal entities not falling within the categories specified in the definition of "citizen of the United States" or non-United States citizens that are neither green-card aliens nor noncitizen corporations.

The Secretary of Transportation<sup>129</sup> does not have explicit statu-

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<sup>125</sup> 49 U.S.C.A. § 1301(16) (West Supp. 1980).

<sup>126</sup> *Id.* at § 1401(b)(1)(A)(ii).

<sup>127</sup> 49 U.S.C. § 1401(f) (1976).

<sup>128</sup> 49 U.S.C.A. § 1301(32) (West Supp. 1980).

<sup>129</sup> For a discussion of the statutory basis for the power of the FAA to

tory authority to expand or contract the concept of "citizen of the United States" or the definition of eligibility for registration. As mentioned above, however, the 1958 Act does not contain a definition of "owner," and the Secretary of Transportation has been given broad authority to develop governing regulations and to establish requirements relative to applications for aircraft registration. Under subsection (g) of section 503 of the 1958 Act, the Secretary of Transportation is authorized to provide by regulation for such "records, proceedings, and details as may be necessary to facilitate the determination of the rights of parties dealing with civil aircraft of the United States, aircraft engines, propellers, appliances, or parts."<sup>130</sup> In addition, subsection (d) of section 501 directs that applications for certificates of aircraft registration "shall be in such form, be filed in such manner, and contain such information as the Secretary of Transportation may require."<sup>131</sup> These specific examples of the authority of the Secretary of Transportation are in addition to the general authority granted him under section 313(a) of the 1958 Act to

perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this chapter, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this chapter.<sup>132</sup>

As a result of the foregoing statutory scheme, and on the basis of the foregoing statutory authority, the FAA has had to develop regulations and procedures for dealing with applications for aircraft registration by many different types of legal entities. Accordingly, although the FAA is not explicitly authorized by statute to define the term "citizen of the United States," the FAA, in order to be responsive to the realities of day-to-day industry requirements and developments, has found itself in a position, in essence, of filling the gaps in, or clarifying, the definition of "citizen of the United States" contained in section 101(16) of the 1958 Act,<sup>133</sup> and

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promulgate regulations on behalf of the Secretary of Transportation, see note 71 *supra*.

<sup>130</sup> 49 U.S.C. § 1403(g) (1976).

<sup>131</sup> *Id.* at § 1401(d).

<sup>132</sup> *Id.* at § 1354(a).

<sup>133</sup> 49 U.S.C.A. § 1301(16) (West Supp. 1980).

identifying those legal entities that are not "citizens of the United States" for the purposes of applications for registration. The Final Regulation is tacit acknowledgment of these problems, as well as a reasonably comprehensive set of solutions and guidelines.

*B. FAA Action to Define Persons Affected by the Final Regulation, and Problems Raised*

An analysis of the substance of the Final Regulation reveals the process and increasing complexity of regulatory decisionmaking in the areas outlined above. The complexity and breadth of issues addressed contrast markedly with the simplicity of the statement of purpose accompanying H.R. 3647<sup>134</sup> and bring into sharp focus the unintended irony of the statement<sup>135</sup> in the legislative history<sup>136</sup> of H.R. 6010<sup>137</sup> to the effect that the statutory amendments were so clear that the FAA need not act quickly to promulgate regulations. The increasing difficulties faced by the FAA are apparent from an examination of the provisions relating to green-card aliens, partnerships, voting trusts, and, finally, trustees.

*1. Green-Card Aliens*

The sole purpose behind H.R. 3647 was to extend the privilege of ownership of United States-registered aircraft to green-card aliens, and thereby to eliminate some logical inconsistencies in the existing law.<sup>138</sup> The problem was clear and limited, and the solution contained in the Final Regulation is reasonably straightforward. The class of individuals to be benefited had to be identified and defined, and the FAA had to contemplate and provide for coordination between governmental agencies of the United States. Although the Immigration and Nationality Act<sup>139</sup> created interesting definitional problems,<sup>140</sup> the identity of the class of persons to be benefited was reasonably easy to establish (namely, as specified by the 1958 Act, "an individual citizen of a foreign

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<sup>134</sup> H.R. 3647, *supra* note 33. See text accompanying notes 33-35 *supra*.

<sup>135</sup> See text accompanying note 59 *supra*.

<sup>136</sup> *Id.*

<sup>137</sup> H.R. 6010, *supra* note 53.

<sup>138</sup> See text accompanying notes 33-35 *supra*.

<sup>139</sup> 8 U.S.C. §§ 1101-1557 (1976).

<sup>140</sup> These problems are discussed by the FAA in the Proposed Regulation, *supra* note 90, at 64 (Part IV.A).

country who has lawfully been admitted for permanent residence in the United States"<sup>141</sup> and, as specified by the Final Regulation, such a foreign citizen who is issued, and must furnish on the application for aircraft registration, an alien registration number from the Immigration and Naturalization Service of the United States Department of Justice).<sup>142</sup>

## 2. Partnerships

When the Final Regulation moves from the treatment of green-card aliens to the rules identifying each partnership that is a "citizen of the United States"<sup>143</sup> (which rules are discussed briefly in the Proposed Regulation<sup>144</sup> but not expressly in the Final Regulation), the scope and substance of the governing statutory provisions are clear, and the problem facing the FAA is not unduly difficult. Clause (b) of the definition of "citizen of the United States" in section 101(16) of the 1958 Act<sup>145</sup> affords citizenship status, for the purposes of registration of aircraft, to "a partnership of which each member is such an individual" (namely, an individual who is himself a "citizen of the United States or one of its possessions").<sup>146</sup> The 1958 Act does not define "partnership" or "member," and the references in the definition of "person" in section 101(32) of the 1958 Act<sup>147</sup> to a "firm" and "copartnership" admittedly do not further the cause of statutory clarity. However, the 1958 Act does not evidence any congressional intention to afford greater or lesser benefit to partners as a function of their limited or unlimited liability for partnership obligations or the quality of the particular or general rights or immunities created by local law or in the governing partnership agreement. Within this statutory framework, the disinclination of the FAA to distinguish between general and limited partners in the context of applications for registration of aircraft is understandable.

Thus, the FAA merely repeats in regulation form what was

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<sup>141</sup> 49 U.S.C.A. § 1401(b)(1)(A)(i) (West Supp. 1980).

<sup>142</sup> Final Regulation, *supra* note 8, at 61,939 (§ 47.7(b)).

<sup>143</sup> *Id.* (§ 47.7(d)).

<sup>144</sup> Proposed Regulation, *supra* note 90, at 63 (Part IV.C.2).

<sup>145</sup> 49 U.S.C.A. § 1301(16) (West Supp. 1980).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at § 1301(32).

reasonably clear in the statute—except for one matter of needed clarification, the treatment of which gives a hint of things to come. Section 101(16) of the 1958 Act<sup>148</sup> speaks to partnerships, but only partnerships of which the partners are *individuals*. Because the definition of “person” in section 101(32) of the 1958 Act<sup>149</sup> contains references to individuals as well as to other legal entities, the 1958 Act could be read to contain an unfortunate conceptual limitation relating to the ownership of aircraft by partnerships. The Final Regulation, however, is not so limited. In permitting a partnership to apply for a certificate of aircraft registration “if each partner, whether a general or limited partner, is a citizen of the United States,”<sup>150</sup> the FAA has established a mechanism for broader partnership ownership of United States-registered aircraft, without relinquishing the power to examine the citizenship of each partner.

### 3. *Voting Trust Arrangements*

When the inquiry moves from partnerships to voting trusts, the subject matter of the Final Regulation shifts from the identification of a particular type of legal entity that falls within the definition of “citizen of the United States” to a more difficult issue. This issue involves, as a given, particular types of legal entities (namely, “a corporation or association”),<sup>151</sup> but requires the understanding and characterization of the legal relationship that will permit or preclude such a legal entity from receiving the benefits afforded to a “citizen of the United States.” The statutory waters are a bit muddy here, but this condition has provided a fertile area for the growth and development of regulatory means to acknowledge and accept the attempt of private parties to comply with the conditions of the 1958 Act.

The relevant statutory provision is clause (c) of section 101(16) of the 1958 Act.<sup>152</sup> In addition to requiring a certain percentage of management of any domestic corporation or association to be individual citizens of the United States or of one of its possessions,

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<sup>148</sup> *Id.* at § 1301(16).

<sup>149</sup> *Id.* at § 1301(32).

<sup>150</sup> Final Regulation, *supra* note 8, at 61,939 (§ 47.7(d)).

<sup>151</sup> 49 U.S.C.A. § 1301(16)(c) (West Supp. 1980).

<sup>152</sup> *Id.*

this provision requires that "at least 75 per centum of the voting interest . . . [be] owned or controlled by persons who are citizens of the United States or of one of its possessions."<sup>153</sup> The general concept is clear: the management and holders of voting power in a corporation or association must be scrutinized for foreign influence. However, the terms "voting interest," "owned," and "controlled" (and, for that matter, "citizen") are not defined in the 1958 Act, and the use of the words "owned or controlled," in the disjunctive, presents a question of construction.<sup>154</sup> The provision does specify a percentage of voting power (seventy-five per cent) that establishes the line of demarcation between United States and non-United States citizens, but it has remained (and remains) for the FAA to produce specific rules governing compliance.

The voting trust rules in the Final Regulation acknowledge the attempt (discussed generally in the Proposed Regulation)<sup>155</sup> of persons to comply with the general formulation in the statute by taking rather drastic steps to separate voting power from the other incidents of stock ownership. The rules are limited to applicants that are "domestic corporation[s]," but otherwise provide com-

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<sup>153</sup> *Id.*

<sup>154</sup> For example, it cannot seriously be contended that, in the absence of control, the ownership by a United States citizen of 75% of the voting interest of a corporation would, of necessity, lead to the conclusion that such corporation is a "citizen of the United States," within the meaning of clause (c) of § 101(16) of the 1958 Act, 49 U.S.C.A. § 1301(16) (West Supp. 1980).

<sup>155</sup> Section C.3 of Part IV of the Proposed Regulation contains the following discussion of the background of the voting trust rules:

In order to provide guidance to corporations that wish to come within the scope of Section 101(16) of the [1958] Act through the use of a voting trust, proposed § 47.7(e) sets forth the position of the FAA with regard to this matter. The issue of validity of a voting trust arises, in the context of aircraft registration, when a corporate applicant meets all of the requirements of Section 101(16), except that 75 percent of the voting interest in the domestic corporation is not owned or controlled by U.S. citizens. To satisfy this requirement, control of foreign-owned stock may be placed in a voting trust, utilizing U.S. citizens and trustees.

The FAA, in determining the validity of a voting trust for the purposes of registration eligibility, must ascertain that a corporation that wishes to register an aircraft . . . is a citizen within the meaning of the [1958] Act. In terms of a voting trust, the problem is whether the voting interest of the stock of the corporate applicant has been so placed in the hands of U.S. citizens as voting trustees that the trustees have a valid, independent, and bona fide control of the voting interest.

Proposed Regulation, *supra* note 90, at 65.

prehensive guidance.<sup>156</sup> Although the voting trust rules do not purport to speak to every conceivable factual situation, or to answer all questions, they address the major issues that must be treated in any analysis of the creation, continuance, and termination of legal relationships. These include the existence, provisions, and binding effect of the instruments creating the relationship (in this case, the voting trust agreement), the citizenship of all parties, the manner in which power is vested and exercised (in this case, the exercise by the voting trustee of a "totally independent

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<sup>156</sup> The voting trust provisions of the Final Regulation are as follows:

§ 47.8 *Voting trusts.*

(a) If a voting trust is used to qualify a domestic corporation as a U.S. citizen, the corporate applicant must submit to the FAA Aircraft Registry—

(1) A true copy of the fully executed voting trust agreement, which must identify each voting interest of the applicant, and which must be binding upon each voting trustee, the applicant corporation, all foreign stockholders, and each other party to the transaction; and

(2) An affidavit executed by each person designated as voting trustee in the voting trust agreement, in which each affiant represents—

(i) That each voting trustee is a citizen of the United States within the meaning of section 101(16) of the Act;

(ii) That each voting trustee is not a past, present, or prospective director, officer, employee, attorney, agent or any other party to the trust agreement;

(iii) That each voting trustee is not a present or prospective beneficiary, creditor, debtor, supplier or contractor of any other party to the trust agreement;

(iv) That each voting trustee is not aware of any reason, situation, or relationship under which any other party to the agreement might influence the exercise of the voting trustee's totally independent judgment under the voting trust agreement.

(b) Each voting trust agreement submitted under paragraph (a)(1) of this section must provide for the succession of a voting trustee in the event of death, disability, resignation, termination of citizenship, or any other event leading to the replacement of any voting trustee. Upon succession, the replacement voting trustee shall immediately submit to the FAA Aircraft Registry the affidavit required by paragraph (a)(2) of this section.

(c) If the voting trust terminates or is modified, and the result is less than 75 percent control of the voting interest in the corporation by citizens of the United States, a loss of citizenship of the holder of the registration certificate occurs, and § 47.41(a)(5) of this part applies.

(d) A voting trust agreement may not empower a trustee to act through a proxy.

judgment under the voting trust agreement<sup>157</sup> and, implicitly, in accordance with customary fiduciary principles), and the actions or conditions, voluntary or involuntary, that will cause a change in the legal relationship created (in this case, the "death, disability, resignation, termination of citizenship, or any other event leading to the replacement of any voting trustee"),<sup>158</sup> and the manner of succession of the replacement voting trustee. At any time when the conditions of compliance with the voting trust rules are not fulfilled, the effectiveness of the certificate of aircraft registration ceases under section 47.41(a)(5) of the FAA regulations,<sup>159</sup> and thereupon it becomes unlawful under section 501(a) of the 1958 Act "for any person to operate or navigate . . . [the affected] aircraft."<sup>160</sup>

The voting trust rules create a workable approach to analyzing a rather specific solution to a particular citizenship problem under clause (c) of section 101(16) of the 1958 Act.<sup>161</sup> Their value lies in the quality of their guidance in outlining the elements comprising this solution. The concepts dealt with in, and the ramifications of, the provisions of the Final Regulation regarding the concept of trustee *ownership* of United States-registered aircraft are of a different order of magnitude entirely.

#### 4. Trustee Ownership of Aircraft

As discussed above, the FAA formulation of the voting trust rules contained in the Final Regulation represents the development of a regulatory interpretation of the meaning of "control" of the "voting interest" of a domestic corporation under circumstances that are present when a voting trust arrangement is in effect. In the case of the provisions of the Final Regulation dealing with trustee ownership of aircraft, the FAA is operating in the absence of governing statutory provisions on the meaning of United States citizenship that would recognize the dual legal positions of an entity appointed and acting as trustee for other persons. In the case of a non-individual trustee, such entity is organized under

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<sup>157</sup> *Id.* at 61,940 (§ 47.8(a)(2)(iv)).

<sup>158</sup> *Id.* (§ 47.8(b)).

<sup>159</sup> 14 C.F.R. § 47.41(a)(5) (1980).

<sup>160</sup> 49 U.S.C. § 1401(a) (1976).

<sup>161</sup> 49 U.S.C.A. § 1301(16)(c) (West Supp. 1980).

and governed by statutory and legal principles pertaining to entities of that type, but, upon accepting a position as trustee under a trust instrument, such entity assumes different obligations and is subject to different governing legal principles. Although section 101(16) of the 1958 Act<sup>162</sup> defines the term "citizen of the United States" with respect to individuals, partnerships, corporations, and associations, that provision does not explicitly acknowledge the fact that an entity, upon accepting a trust, becomes, in essence, a new and different entity. This distinction is, however, recognized in the definition of "person" in section 101(32) of the 1958 Act, which mentions corporations, associations, and "trustees."<sup>163</sup> On the basis of the foregoing, and in the absence of any indication in the 1958 Act that the framers desired that the ownership of aircraft by an entity in its individual corporate capacity should be governed necessarily by the same principles governing the ownership of aircraft by an entity as trustee for other persons, the FAA has again found itself in a position of affecting substantive rights in the context of establishing rules governing applications for aircraft registration.

Before turning our attention to the scope and substance of the trustee provisions of the Proposed Regulation and the Final Regulation, it is necessary, in the interest both of completeness and of illustrating the working of certain statutory provisions, to examine one familiar situation, involving the holding of legal title to aircraft by a trustee, that is disposed of by the 1958 Act and FAA practice without the need to apply the trustee provisions of the Final Regulation. The secured financing of aircraft is often structured in the form of an equipment trust arrangement whereby a bank takes and holds title to the aircraft as trustee and issues non-recourse equipment trust certificates to evidence the loan. The equipment trust certificates are amortized with the rental income of an aircraft lease between the trustee bank, as lessor, and the user, as lessee. The lease vests title to the aircraft in the user for nominal consideration at the end of the lease term, after the equipment trust certificates have been retired.

The aircraft lease in this type of financing is of critical importance. It determines the legal rights and duties of the parties with

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<sup>162</sup> *Id.* at § 1301(16).

<sup>163</sup> *Id.* at § 1301(32).

respect to the title to and the possession of the aircraft, and, as mentioned above, provides for rentals (payable by the user) sufficient to amortize the debt. The 1958 Act has specifically contemplated and made provision for this type of financing. The definition of "conditional sale" contained in section 101(19) of the 1958 Act includes, in clause (b) thereof,

any contract for the . . . leasing of an aircraft . . . by which the . . . lessee contracts to pay as compensation a sum substantially equivalent to the value thereof, and by which it is agreed that the . . . lessee is bound to become, or has the option of becoming, the owner thereof upon full compliance with the terms of the contract.<sup>164</sup>

Furthermore, any such lessee is, under said provision, "deemed to be the person by whom any such contract is made or given."<sup>165</sup> Although this provision, by its terms, dovetails nicely with the provisions of section 503(c) of the 1958 Act,<sup>166</sup> rather than with the ownership provisions of section 501(a) of the 1958 Act,<sup>167</sup> the Final Regulation provides that the term "owner," as used in Part 47 of the FAA regulations,<sup>168</sup> includes "a lessee of an aircraft under a contract of conditional sale."<sup>169</sup>

Title retention agreements of the foregoing nature, or similar in

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<sup>164</sup> *Id.* at § 1301(19).

<sup>165</sup> *Id.*

<sup>166</sup> 49 U.S.C. § 1403(c) (1976). This provision of the 1958 Act indicates the general effect of the filing for recordation of an instrument in the aircraft registry:

No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft . . . against any person, other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation . . .

*Id.*

<sup>167</sup> *Id.* at § 1401(a).

<sup>168</sup> 14 C.F.R. §§ 47.1-71 (1980).

<sup>169</sup> The FAA, in the Proposed Regulation, proposed a change in the definition of "owner" for the purposes of Part 47 of the FAA regulations, 14 C.F.R. §§ 47.1-71 (1979), as a clarification of the then-existing provision, in order to reflect the actual practice of the FAA. Even though no comment letter submitted to the FAA in connection with the Proposed Regulation criticized the change in definition, the FAA did not adopt the proposed definition, for the expressed reason that it was not necessary to revise the existing definition at that time. See Final Regulation, *supra* note 8, at 61,938.

legal consequence to that of the foregoing, have been treated by the FAA as financings by the lessee (or by the "buyer in possession" or "bailee," as the case may be),<sup>170</sup> as owner, in whose name the aircraft will be registered under the FAA regulations. The trustee provisions of the Final Regulation do not purport to change these principles governing contracts of "conditional sale."<sup>171</sup> In the case of equipment trust arrangements involving the taking and retention of equity interests in the aircraft by persons other than the user, and in other types of financings that do not constitute "conditional sales," the trustee provisions have to be consulted and complied with. Tracing the course of the trustee provisions through recent changes in the FAA regulations demonstrates the genesis and growth of a sound concept and the willingness of the FAA to formulate logically supportable rules, at the risk of complicating its own administrative handling of aircraft registrations and recordings of instruments in respect of aircraft.<sup>172</sup>

The FAA regulations that were in effect prior to SFAR 39<sup>173</sup> reflected the fact that registration of aircraft in the names of foreign citizens was then prohibited, and the provision of the regulations pertaining to trustee ownership of aircraft merely recited the documentation to be submitted by a trustee in connection with an application for registration of aircraft.<sup>174</sup> The certificate of aircraft registration was issuable to the applicant as trustee. SFAR 39 did not contain provisions relevant to the determination

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<sup>170</sup> *Id.* at 61,939 (§ 47.5(d)).

<sup>171</sup> On the other hand, it must be said that the FAA does not, in the Final Regulation, explicitly limit the trustee provisions to situations involving the holding of "legal title" to aircraft by a trustee that do not fall within the rules pertaining to "conditional sales."

<sup>172</sup> Part 49 of the FAA regulations, 14 C.F.R. §§ 49.1-.55 (1980), entitled "Recording of Aircraft Titles and Security Documents," establishes the rules for the recording of "conveyances" and other instruments in respect of aircraft, under § 503 of the 1958 Act, 49 U.S.C. § 1403 (1976).

<sup>173</sup> 14 C.F.R. §§ 47.1-.71 (1979) (especially §§ 47.3, 47.5, 47.11).

<sup>174</sup> Section 47.11(h) of the FAA regulations stated the following, with respect to registration of aircraft in the name of a trustee:

The appointed trustee of property that includes an aircraft must submit either a certified copy of the order of the court appointing him trustee (if appointed by court order), or a copy of the complete trust instrument (if appointed without court order) certified as true under § 49.21 of this chapter. The Certificate of Aircraft Registration is issued to the applicant as trustee.

14 C.F.R. § 47.11(h) (1979).

of when a domestic corporation acting as trustee for foreign beneficiaries ceased to be a "citizen of the United States." Of course, if a bank acting as trustee was not, in its individual corporate capacity, a "citizen of the United States" (by reason of foreign control of its voting stock, for example), the aircraft in question could, under SFAR 39, have been registered in its name if such aircraft were to be exclusively operated in the United States during the period of United States registration.<sup>175</sup>

In the Proposed Regulation, the FAA formally examined for the first time the question whether a United States citizen holding title to aircraft in trust for other persons could be disqualified from the privilege of aircraft registration by reason of the foreign citizenship of one or more of the beneficiaries of the trust. The Proposed Regulation contained the following discussion of the trustee problem:

Increased activities of foreign investors in aircraft financing necessitate clarification of trustee registration eligibility, where legal title to an aircraft is held by a trustee that is a U.S. citizen or an individual foreign citizen lawfully admitted for permanent residence in the United States, but some or all of the beneficial interest is held by foreign investors. FAA experience has shown that trust beneficiaries may wish to exercise various degrees of control over a trustee under trust agreements submitted with registration applications.

The fundamental issue for registration eligibility is who is the "owner" of the aircraft within the meaning of Section 501(b) and (c) of the [1958] Act. FAA practice, as reflected in proposed § 47.7(c), has been to ignore the scope of economic participation of foreign beneficiaries if the trust is an active trust and if the trustee exercises totally independent judgment with respect to all decisions involving the aircraft. Conversely, the FAA has previously concluded, in cases involving passive trusts, where the trustee is strongly controlled by the foreign investor, that the beneficiaries are the true owners of the aircraft for administrative purposes, and that the aircraft is not eligible for registration under Section 501(b)(1)(A)(i).<sup>176</sup>

It should be noted at this juncture that in the foregoing dis-

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<sup>175</sup> The development of the FAA definition of the term "based and primarily used in the United States," and the role of SFAR 39 in the development of such definition, are discussed at text accompanying notes 217-48 *infra*.

<sup>176</sup> Proposed Regulation, *supra* note 90, at 65.

cussion the FAA was concerned with the situation in which a corporate trustee, although existing as a domestic corporation and fully meeting the requirements of clause (c) of section 101(16) of the 1958 Act,<sup>177</sup> was nevertheless so subject to control, in the exercise of its trust powers, by foreign beneficiaries that its application for aircraft registration had to be denied. The FAA was *not* speaking to the converse question: whether a corporation that was not a "citizen of the United States" might otherwise be permitted to obtain aircraft registration in its name by reason of the fact that it had been appointed and was required to act as trustee for beneficiaries, all or substantially all of whom *were* "citizens of the United States."

With the foreign-beneficiary concern in mind, the FAA, in the Proposed Regulation, required the applicant trustee to determine whether each beneficiary was a United States citizen (or a green-card alien) or was directly or indirectly controlled by a "foreign interest" (as defined in the Proposed Regulation).<sup>178</sup> If the applicant trustee determined that any such beneficiary was not a United States citizen (or green-card alien) or was so controlled by a foreign interest, the applicant trustee was required to submit to the FAA the following documentation:

(i) One or more affidavits establishing that each trustee is not aware of any reason, situation, or relationship with either a beneficiary or any foreign interest which could influence or limit the exercise of totally independent judgment by a trustee;

(ii) A true copy of the trust document with all amendments establishing that—

(A) Any trustee has full authority over all matters of administration of the trust, including matters relating to dispositions of the aircraft, independent of any direction from a beneficiary or any foreign interest, and

(B) No trustee is subject to direction or removal (except for cause) by beneficiaries who are U.S. citizens or individual foreign citizens lawfully admitted for permanent residence in the United States and have among themselves control of at least 75 percent of

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<sup>177</sup> 49 U.S.C.A. § 1301(16)(c) (West Supp. 1980).

<sup>178</sup> The final paragraph of § 47.7(c) stated that, for the purpose of the trustee provisions, "a foreign interest is any person that is not a U.S. citizen or an individual foreign citizen lawfully admitted for permanent residence in the United States." Proposed Regulation, *supra* note 90, at 67.

the beneficiaries' aggregate power to give direction to, or effect removal of, a trustee.<sup>179</sup>

Finally, although the FAA, in the Proposed Regulation, proposed certain amendments to section 47.41 of the FAA regulations<sup>180</sup> (relating to termination of the effectiveness of aircraft registration upon the occurrence of certain events), the amendments did not expressly cover the case of the trustee-registrant.

The issues addressed by, and the analysis contained in, the trustee provisions of the Proposed Regulation were strikingly similar to those relating to the voting trust provisions. The FAA, again, did not shy away from treating the substantive issues related to and arising from the creation, continuance, and termination of the trustee-beneficiary relationship, including the existence and terms of the governing trust instrument, the citizenship of all parties, the creation and exercise of power by the trustee, and the allocation of power between the trustee, on the one hand, and the beneficiaries of the trust, on the other.

Although the Proposed Regulation reflected the grappling by the FAA with the correct legal issues, the FAA came to find that certain concepts were unworkable or unnecessary, and that further clarification and refinement were appropriate. The Final Regulation represents the product of an agency unafraid to confess error, to make changes based on reconsideration of the problems, and to act in accordance with sound comments from interested private parties.

The standard of "totally independent judgment," deemed by the FAA in the Proposed Regulation to be pertinent not only to voting trustees but also to trustees holding title to aircraft in trust for other persons, did not reflect the prevailing views in financing circles regarding the customary role of a trustee for investors,<sup>181</sup> and was abandoned by the FAA. Acknowledging that trustees in aircraft financings were not expected by investors to act in a vacuum, the FAA mandated that limitations be placed on the power of foreign beneficiaries to control the trustee. The concept of "foreign interests," apparently deemed unnecessary by the FAA, was also abandoned. In addition, the FAA declared, as a matter of

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<sup>179</sup> *Id.* at 66-67.

<sup>180</sup> *Id.* at 68.

<sup>181</sup> See, e.g., Perkins, Coie Letter, *supra* note 110.

policy, that the percentage limitation on control of the trustee by foreign beneficiaries did not constitute a limitation on the amount of the beneficiary interest in a trust that could be held by foreign citizens. Finally, drafting refinements were made.

The resulting trustee provisions of the Final Regulation read as follows:

(c) *Trustees.* An applicant for aircraft registration under section 501(b)(1)(A)(i) of the [1958] Act that holds legal title to an aircraft in trust must comply with the following requirements:

(1) Each trustee must be either a U.S. citizen or a resident alien.

(2) The applicant must submit with the application—

(i) A copy of each document legally affecting a relationship under the trust;

(ii) If each beneficiary under the trust, including each person whose security interest in the aircraft is incorporated in the trust, is either a U.S. citizen or a resident alien, an affidavit by the applicant to that effect; and

(iii) If any beneficiary under the trust, including any person whose security interest in the aircraft is incorporated in the trust, is not a U.S. citizen or resident alien, an affidavit from each trustee stating that the trustee is not aware of any reason, situation, or relationship (involving beneficiaries or other persons who are not U.S. citizens or resident aliens) as a result of which those persons together would have more than 25 percent of the aggregate power to influence or limit the exercise of the trustee's authority.

(3) If persons who are neither U.S. citizens nor resident aliens have the power to direct or remove a trustee, either directly or indirectly through the control of another person, the trust instrument must provide that those persons together may not have more than 25 percent of the aggregate power to direct or remove a trustee. Nothing in this paragraph prevents those persons from having more than 25 percent of the beneficial interest in the trust.<sup>182</sup>

In addition, the FAA amended the provisions of section 47.41 of the FAA regulations<sup>183</sup> to provide for the termination of the effectiveness of aircraft registration in the name of a trustee who

(i) Loses United States citizenship;

(ii) Loses status as a resident alien and does not become a citizen of the United States at the same time; or

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<sup>182</sup> Final Regulation, *supra* note 8, at 61,939.

<sup>183</sup> 14 C.F.R. § 47.41 (1979).

(iii) In any manner ceases to act as trustee and is not immediately replaced by another who meets the requirements of § 47.7(c).<sup>184</sup>

As the foregoing discussion demonstrates, even before one reaches an analysis of the regulatory response of the FAA to the statutory direction in section 501(b) of the 1958 Act to define the term "based and primarily used in the United States," the foray of the FAA into the theretofore uncharted area of trust creation and administration is an example of intelligent decision-making. One may disagree with particulars of the formulation of the trustee provisions, but one cannot deny the fact that difficult issues were addressed and compromises reached in the context both of sound legal reasoning and of practical application.

As is often the case with ambitious projects, the attempt to deal with major substantive issues raises important questions for further discussion. In the case of the trustee provisions of the Final Regulation, some of these questions involve, not problems or errors, but the delineation of the changing roles and functions that particular institutions must play and perform after the promulgation of the Final Regulation. The necessity for, and the difficulties involved in, ascertaining the relevant facts must be explored. Other questions involve the extent of the reach of the principles in the Final Regulation to analogous situations. Finally, the manner of specific application of certain rules contained in the trustee provisions of the Final Regulation must be analyzed.

The substance of the trustee provisions, and the scope of the substantive legal questions addressed, contemplate and require the reaching of accurate factual and legal conclusions by institutions not theretofore required to do so. It is in the interest of these institutions, practitioners, commentators, and other interested persons to recognize the effort and time required for faithful adherence to the Final Regulation, and to work together to develop means and procedures for obtaining the relevant facts and for reaching the proper legal conclusions.

The most obvious institution affected is the FAA itself. It must appreciate the quality and quantity of the tasks that it has undertaken in the administration of the Final Regulation. It is incumbent upon the FAA to develop proper and consistent practices in

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<sup>184</sup> Final Regulation, *supra* note 8, at 61,940.

dealing with the many practical questions that will arise from the Final Regulation. The FAA has put itself in the position of reviewing the trust instrument and loan documentation involving trustees. It must analyze the quality of title held by a trustee. Does the documentation provide for "legal title" to be held "in trust," for the purposes of the application of the trustee provisions of the Final Regulation? To some extent, the FAA will find itself dealing with issues of state law, whether under section 506 of the 1958 Act<sup>185</sup> or otherwise. The FAA will have to consider which persons are "beneficiaries," within the meaning of the Final Regulation. The agency will have to review the affidavit required of the trustee in connection with beneficiaries, with respect to form and substance, which review in turn requires a review of the provisions of the trust instrument and loan documentation creating or recognizing the power of the beneficiaries "to influence or limit the exercise of the trustee's authority" and "to direct or remove [the] trustee."<sup>186</sup>

The foregoing discussion does not contemplate that the FAA has, by reason of the promulgation of the Final Regulation, converted itself into an investigative body in connection with aircraft registrations, and the authors do not advocate a major change in emphasis in this direction based on a reading of the trustee provisions of the Final Regulation. The FAA will, in all probability, want to develop the practice of relying, as to the accuracy of certain facts and the propriety of certain legal conclusions, on certain documents and opinions that appear proper on their face; or the FAA, in some cases, may accept showings that conform to the Final Regulation. In any event, the practical steps by which the FAA attempts to administer the Final Regulation should be widely publicized, and the views of practitioners, commentators, and representatives of the aviation community should be solicited.

The other institution that, under the Final Regulation, finds itself

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<sup>185</sup> Section 506 of the 1958 Act states the following choice-of-law principle:

The validity of any instrument the recording of which is provided for by section 503 of this Act shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument.

49 U.S.C. § 1406 (1976).

<sup>186</sup> Final Regulation, *supra* note 8, at 61,939 (§§ 47.7(c)(2)(ii), .7(c)(3)).

in a position of responsibility for facts and legal conclusions is the trustee in an aircraft financing. The trustee has not heretofore been required to investigate and take responsibility for the legal status of its beneficiaries. Now, in some way, it must be involved in ascertaining the citizenship status of its beneficiaries (after discovering who its beneficiaries are, for this purpose).<sup>187</sup> The trustee must obtain sufficient assurances (written or otherwise) from its beneficiaries to permit it to give the relevant affidavit called for by the Final Regulation—namely, under section 47.7(c)(2)(ii) thereof, an affidavit stating that “each beneficiary under the trust, including each person whose security interest in the aircraft is incorporated in the trust, is either a U.S. citizen or a resident alien [as each such term is defined in the Final Regulation]”;<sup>188</sup> or, under section 47.7(c)(2)(iii) thereof, an affidavit stating that

the trustee is not aware of any reason, situation, or relationship (involving beneficiaries or other persons who are not U.S. citizens or resident aliens) as a result of which those persons together would have more than 25 percent of the aggregate power to influence or limit the exercise of the trustee’s authority.<sup>189</sup>

The authors hope and trust that the FAA would accept a statement in the first affidavit that the information contained therein is presented to the best knowledge of the trustee, or on the basis of information provided by the beneficiaries. With respect to section 47.7(c)(2)(iii) of the Final Regulation,<sup>190</sup> the trustee must assure itself that it understands the provisions of the trust instrument regarding the direction or removal of the trustee, and the operation of such provisions in the context of foreign beneficiaries. If there is sufficient difference of opinion as to the meaning of the trustee provisions of the Final Regulation, the trustee may consider the desirability of including language of immunity in the

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<sup>187</sup> Even though the trustee in aircraft financings is generally thought to be appointed and to act for the benefit of investors, and not for the borrower or user of the aircraft, the trustee nevertheless may owe duties to the borrower or user. For example, if the trustee is construed to be a “secured party,” as defined in U.C.C. § 9-105(1)(m) (1972 version), then U.C.C. § 9-207(1) (1972 version) requires the trustee to “use reasonable care in the custody and preservation of collateral in his possession.” *Id.* This duty is owed to the “debtor,” as defined in U.C.C. § 9-105(1)(d) (1972 version).

<sup>188</sup> Final Regulation, *supra* note 8, at 61,939 (§ 47.7(c)(2)(iii)).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

documentation to protect the trustee against any liability stemming from its acting upon directions from beneficiaries. In general, the trustee must understand and appreciate the issues raised by the foreign-beneficiary provisions of the Final Regulation, and the effect of these issues on the ordinary administration of the trusts created by the trust instrument. In particular, the trustee must be sensitive to the question of changes in the citizenship status of beneficiaries (whether by corporate reorganizations, sales of assets or stock, sales of interests in the trust, or otherwise) at the time of any beneficiary action to influence, direct, or remove the trustee.<sup>191</sup>

The scope of the factual and legal determinations to be made in connection with, or in the application of, the Final Regulation is important to note at the outset of the analysis because the authors believe that a few problem areas exist in the Final Regulation. The purpose of the following discussion is not to announce firm conclusions with respect to the questions raised (the full analysis of certain of which would require treatment beyond the scope of this Article), but to open the door to examination and analysis of the Final Regulation by the FAA and private parties interested in the content and application of the Final Regulation.

The first issue involves the applicability of the trustee provisions of the Final Regulation. In particular, to what extent, if any, are the trustee provisions applicable to a mortgage on aircraft held by a trustee for the benefit of debtholders? At first blush, the prefatory language of section 47.7(c) of the Final Regulation would seem to limit application of the trustee provisions to a trustee that "holds legal title to an aircraft in trust."<sup>192</sup> Legal title, accordingly, would be a necessary element, and, since the lien of a mortgage on aircraft would, at least under the Uniform Commercial Code,<sup>193</sup> constitute a security interest in personal property and not

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<sup>191</sup> Text accompanying notes 204-06 *infra* contains a further discussion of the issue of the change of beneficiary citizenship.

<sup>192</sup> Final Regulation, *supra* note 8, at 61,939 (§ 47.7(c)).

<sup>193</sup> The interrelationship of the 1958 Act and the Uniform Commercial Code (Code), in all its manifestations relating to federal preemption of state law, construction and application of federal law, construction and scope of federally-dictated choice-of-law principles, and construction and application of choice-of-law principles established by the various versions of the Code, is in itself a fascinating area for study, and is an appropriate subject for another article. The more limited exercise of discovering the legal relationships arising from a

a present ownership interest, the trustee provisions of the Final Regulation would not seem to be applicable to an aircraft mort-

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mortgage on aircraft, by requiring an analysis of the interplay between the 1958 Act and the Code, illustrates the operation of Code provisions and evidences the magnitude of the achievement of the Code draftsmen.

Section 503 of the 1958 Act, 49 U.S.C. § 1403 (1976), directs the Secretary of Transportation to establish and maintain a central registry for instruments affecting the title to or an interest in aircraft. Based upon the knowledge that federal law mandates a system of central filing, one would suspect that Article 9 of the Code, U.C.C. §§ 9-101 to 507 (1972 version), would contain a provision acknowledging federal preemption of state law in this area. In fact, Article 9 contains two such provisions. U.C.C. § 9-104(a) (1972 version) specifies that Article 9 is inapplicable "to a security interest subject to any statute of the United States," but goes on to indicate that Article 9 is only inapplicable "to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property." *Id.* As if this provision were not clear enough, U.C.C. § 9-302(3) (1972 version) states that the filing of a U.C.C. financing statement is not "necessary or effective" to perfect a security interest in property subject to "a statute or treaty of the United States which provides for a national or international registration . . . or which specifies a place of filing different from that specified in this Article for filing of the security interest." *Id.*

Although the 1958 Act requires a central registry for instruments affecting specified types of property (*e.g.*, aircraft), and, in § 503(c), 49 U.S.C. § 1403(c) (1976), clearly indicates the legal consequences of filing instruments for recordation in such central registry, the 1958 Act does not purport to establish or affect substantive "rights of parties to . . . transactions." In fact, § 506 of the 1958 Act, 49 U.S.C. § 1406 (1976), states that the "validity" of any instrument recordable in the central registry is "governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or place of delivery of the property which is the subject of such instrument." *Id.*

Based upon the foregoing, although the FAA is in effect empowered to determine, in connection with the submission of an instrument for filing for recordation in the central registry, whether, for the purposes of the 1958 Act, such instrument affects the title to or an interest in "aircraft," the 1958 Act does not distinguish among types of property for any other purpose. Accordingly, one looks to the Code for this purpose, and finds that aircraft fall within the definition of "goods" in U.C.C. § 9-105(1)(h) (1972 version) — namely, "all things which are movable at the time the security interest attaches or which are fixtures . . . but . . . [excluding certain other specified types of property]." *Id.* In fact, aircraft constitute "mobile" goods for the purposes of the choice-of-law rules contained in U.C.C. § 9-103(3)(a) (1972 version).

Having established that aircraft fall within the definition of a term used in Article 9, we must determine whether Article 9 applies to a mortgage on aircraft. U.C.C. § 9-102(1) (1972 version) states that, except as otherwise provided in U.C.C. § 9-104, Article 9 applies "to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods." U.C.C. § 9-102(1) (1972 version). As discussed above, since the recording provisions of the 1958 Act do not purport to govern the substantive rights of parties to contractual arrangements, the reference in U.C.C. § 9-102(1) (1972 version) to U.C.C. § 9-104 does not qualify the applicability of Article 9 to a mortgage of aircraft, if the mortgage evidences

gage, and inquiry would not have to be made with respect to the citizenship of the debtholders secured by the mortgage.

Notwithstanding this analysis, the authors feel that the issue is somewhat clouded for two reasons. The first reason involves the interplay among the Proposed Regulation, a comment letter delivered to the FAA in response to the Proposed Regulation, and the response contained in the Final Regulation. The second reason involves the legal relationships created upon and in connection with the foreclosure of a mortgage upon aircraft.

As discussed above,<sup>184</sup> the FAA gave serious consideration to comment letters delivered in response to the Proposed Regulation. Several proposals in one comment letter<sup>185</sup> were cited approvingly by the FAA, and were incorporated in one form or another in the Final Regulation.<sup>186</sup> However, that comment letter also contained the following proposal:

The regulation should make it clear that the reference to beneficiaries of a trust is to owner participants or other persons having a beneficial interest in the *ownership* of the aircraft. It can be argued that loan participants in a leveraged lease transaction, who are beneficiaries of a security interest in the aircraft, might be regarded as beneficiaries under the proposed regulations. Neither the Federal Aviation Act nor the Federal Aviation Regulations limit or prohibit foreign financial institutions and other lenders from obtaining security interests (as distinguished from ownership interests) in U.S. registered aircraft; we believe the regulation should be clarified to avoid imposing such limitations.<sup>187</sup>

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an intent to create a "security interest." The term "security interest" is defined in U.C.C. § 1-201(37) (1972 version) to mean "an interest in personal property or fixtures which secures payment or performance of an obligation," and the term includes the "retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer." *Id.* Accordingly, assuming the absence of provisions in the aircraft mortgage negating the intention of the parties to create a "security interest," the interest of a trustee holding a lien on aircraft under an aircraft mortgage would be a "security interest" under the Code, and Article 9 of the Code would apply to establish the rights and duties of the parties to the mortgage transaction.

<sup>184</sup> See text accompanying notes 107-16 *supra*.

<sup>185</sup> Perkins, Coie Letter, *supra* note 110. See also Final Regulation, *supra* note 8, at 61,937.

<sup>186</sup> See Final Regulation, *supra* note 8, at 61,937, 61,939 (FAA discussion of proposals; § 47.7(c)(3) (final sentence)).

<sup>187</sup> Perkins, Coie Letter, *supra* note 110.

In response to this proposal, the FAA made the following statement in the discussion section of the Final Regulation:

One commenter [sic] believes that the limit on the percentage of foreign beneficiaries who have authority to direct or remove trustees, should not apply to beneficiaries who have only a security interest in the aircraft. However, the rule is intended to apply to these persons since the control which they may exercise over a trustee can be as substantial as that of any other beneficiary. Accordingly, the rule, as adopted, makes it clear that references to beneficiaries under a trust include any person whose security interest in the aircraft is incorporated in the trust.<sup>198</sup>

Immediately after this statement, however, the FAA noted that

[i]t is not the intent of the FAA in any way to change its existing procedure for accepting applications for registration in the name of a trustee wherein the trustee and beneficiaries are all citizens of the United States, regardless of whether the trust is an active or a passive trust.<sup>199</sup>

The operative provisions of the Final Regulation<sup>200</sup> contain, after the appropriate reference to beneficiaries under a trust, the words "including each person whose security interest in the aircraft is incorporated in the trust."

The FAA has clearly rejected the proposed interpretation of the concept of "beneficiary" of a leveraged lease financing involving equity investors and loan participants. However, as the comment letter points out, a contrary rule throws into doubt the clear inapplicability of the trustee provisions of the Final Regulation to a trustee holding a mortgage lien on aircraft for the benefit of debtholders. Presumably, if at the time of registration the trustee and all the debtholders are United States citizens and/or green-card aliens, the issue is moot. The issue of change of beneficiaries, however, discussed later in this Article,<sup>201</sup> then becomes relevant.

The second reason that the trustee relationship created under the ordinary corporate trust indenture and mortgage raises a question under the Final Regulation is that the legal relationship among the parties may change radically after a default. Prior to default,

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<sup>198</sup> Final Regulation, *supra* note 8, at 61,938.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 61,939 (§§ 47.7(c)(2)(ii), .7(c)(2)(iii)).

<sup>201</sup> See text accompanying notes 204-06 *infra*.

as analyzed above, the trustee/mortgagee ordinarily would be construed to have a lien on the aircraft, and the debtor/mortgagor would remain the legal and beneficial owner. However, after a default, and in accordance with the provisions of the mortgage and applicable law, the trustee could take title to the aircraft by foreclosure or other means. Upon such a contingency, what is the extent of the applicability of the Final Regulation to the trustee? One answer is that, if the trustee and all the debtholders are citizens of the United States, there is no problem. The practical answer to this assertion is to ask the question whether the trustee, at the point of title passage, must obtain confirmation that all the debtholders *are* citizens of the United States.<sup>202</sup> Assuming *arguendo* that the passage of title requires an inquiry by the trustee into the citizenship of the debtholders, and assuming that such an inquiry results in a finding that certain debtholders are not citizens of the United States (or green-card aliens), the trustee may find itself in an untenable position. The governing trust instrument, presumably, does not contain provisions that preclude foreign debtholders from influencing, directing, or removing the trustee. If the trust instrument is to be amended to reflect the disenfranchising of foreign debtholders, under the instrument, presumably, the foreign debtholders would have the power to veto such an amendment.

Even if the questions raised in the prior paragraph lead one to the conclusion that it would be a "good idea" for *every* trust indenture covering aircraft to contain appropriate language regarding foreign debtholders, the provisions that must be drafted to deal with the foregoing contingencies may well be construed by the participants in a transaction as needlessly complicating already complicated documents.<sup>203</sup> In addition, the questions are not always susceptible to quick and easy solution. For example, the exact moment at which the foreign-beneficiary restrictions would be triggered is not at all clear. Would it be at the time of registration of the aircraft in the name of the trustee? At the moment of foreclosure under state law? If the aircraft is disposed of pursuant to the exercise of a power of sale contained in the instrument, at what time would the relevant provisions come into play? Also, the

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<sup>202</sup> See 49 U.S.C.A. § 1301(16) (West Supp. 1980).

<sup>203</sup> The authors have been involved in aircraft financings requiring, in each case, a mortgage exceeding 150 printed, single-spaced pages in length.

manner in which the foreign-beneficiary provisions would be administered by the trustee in the context of a mortgage is unclear. For example, in an aircraft fleet mortgage, how would a trustee administer the trust under which it holds a lien on certain aircraft, but has foreclosed title on other aircraft?

At this point, another possible problem surfaces. The citizenship of a beneficiary may change, without advance notice to or knowledge by the trustee. The citizenship could change as a result of a corporate reorganization, a sale of assets, a sale of stock, the transfer of an interest in the trust, or otherwise. Such a change could be either within or outside the control of the beneficiary itself. The trustee provisions of the Final Regulation speak expressly to one point in time—namely, the point at which a trustee makes application for aircraft registration. Moreover, as a technical matter, with respect to a trustee holding title to aircraft, the Final Regulation mandates that the effectiveness of a certificate of aircraft registration, unless suspended or revoked earlier, terminates upon the date when

the trustee in whose name the aircraft is registered—

- (i) Loses United States citizenship;
- (ii) Loses status as a resident alien and does not become a citizen of the United States at the same time; or
- (iii) In any manner ceases to act as trustee and is not immediately replaced by another who meets the requirements of § 47.7(c).<sup>204</sup>

In other words, the FAA has not expressly provided that the effectiveness of a registration of aircraft in the name of a trustee as holder of legal title could be jeopardized by a change in the citizenship status of any beneficiaries.

Although this analysis seems sound on the basis of the text of the Final Regulation, at least two considerations arise. First, although the provision of the Final Regulation quoted in the preceding paragraph mandates the termination of the effectiveness of aircraft registration as the result of changes in the citizenship or status of the trustee (and not of its beneficiaries), the FAA, were it to become concerned about the problem of changes in beneficiary citizenship, could seek to apply the provisions of section

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<sup>204</sup> Final Regulation, *supra* note 8, at 61,940 (§ 47.41(a)(9)).

47.41(a)(4) of the FAA regulations<sup>205</sup> to the situation. This provision specifies the transfer of ownership of aircraft as an event that triggers termination of the effectiveness of aircraft registration. The theory propounded might be that changes in citizenship of beneficiaries, coupled with the absence of language in the trust instrument limiting foreign-beneficiary control of the trustee, in effect work a transfer of ownership of aircraft from a "citizen of the United States" to a non-United States citizen. The authors believe that any such application and theory would reflect a strained reading of this provision, and would recommend either explicit confirmation from the FAA that the effectiveness of aircraft registration cannot be jeopardized by a change in the citizenship status of beneficiaries of the trust, or an admission by the FAA that the matter is not free from doubt and that a policy will be formulated on the basis of views solicited from practitioners, commentators, and industry spokesmen.

The second consideration arising from the foregoing analysis of changes in beneficiary citizenship consists of a simple admonition to the FAA: whatever the analysis of the problem, a trustee appointed and acting under a trust instrument must adhere to its terms. This fact must be remembered by the FAA in the course of developing practices and policy to deal with issues arising in the administration of the Final Regulation (including, perhaps, some of the questions raised in this Article). An appreciation of the trustee's role (and, in some cases, its predicament) should enter not only into the formulation of the principles of application of the Final Regulation but also into the discussion of the question of retroactivity of the Final Regulation, touched upon later in this Article.<sup>206</sup>

The next general problem area of the Final Regulation involves the meaning and application of the percentage limitation to be imposed on the voting power of foreign beneficiaries. Although the FAA, in response to a comment letter,<sup>207</sup> states in the Final Regulation that nothing in the trustee provisions "prevents . . . [beneficiaries who are neither U.S. citizens nor green-card aliens] from

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<sup>205</sup> 14 C.F.R. § 47.41(a)(4) (1980).

<sup>206</sup> See text preceding note 217 *infra*.

<sup>207</sup> Perkins, Coie Letter, *supra* note 110.

having more than 25 percent of the beneficial interest in the trust,<sup>208</sup> two specific provisions require that the voting power of foreign beneficiaries be limited. Sub-clause (iii) of section 47.7(c)(2)<sup>209</sup> of the Final Regulation requires the delivery to the FAA of an affidavit from the trustee to the effect that the trustee is not aware of any "reason, situation, or relationship" as a result of which foreign beneficiaries together would have "more than 25 percent of the aggregate power to influence or limit the exercise of the trustee's authority."<sup>210</sup> In addition, clause (3) of section 47.7(c)<sup>211</sup> of the Final Regulation requires that the trust instrument provide that foreign beneficiaries together may not have "more than 25 percent of the aggregate power to direct or remove a trustee."<sup>212</sup>

The first question that arises is whether the FAA is intending to draw, in the context of provisions of a trust instrument, some kind of subtle distinction between the "power to influence or limit the exercise of the trustee's authority" and the "power to direct or remove a trustee." Presumably, any beneficiary could "influence" the exercise of a trustee's authority by communicating with the trustee and providing arguments why the trustee should follow a particular course of action. The authors believe that the FAA does not intend to impair in any way the communication of ideas between any beneficiary and its trustee. The concept of the power to "limit the exercise of the trustee's authority" in one sense is a corollary of the power to "direct" a trustee. In other words, the power to direct a trustee necessarily involves the power to prevent a trustee from taking certain discretionary action. In another sense, an action could be proscribed as limiting the exercise of the trustee's authority, while not falling within customary notions of directing a trustee. One example might be an amendment of the provisions of the trust instrument relating to the trustee's powers and immunities.

Although one may be tempted to indulge in distinctions between the two foregoing concepts, the authors have concluded that the concept of "directing the trustee" is broad enough to include the

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<sup>208</sup> Final Regulation, *supra* note 8, at 61,939 (§ 47.7(c)(3) (final sentence)).

<sup>209</sup> *Id.* (§ 47.7(c)(2)(iii)).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* (§ 47.7(c)(3)).

<sup>212</sup> *Id.*

concept of "limiting the trustee's exercise of authority," and that the latter language probably derived from the provision of the Proposed Regulation that focused upon "any foreign interest which could influence or limit the exercise of totally independent judgment by a trustee."<sup>213</sup> The concepts of "influence" and "limit[ing] the exercise" of judgment have particular meaning in relation to a standard of "totally independent judgment by a trustee" (a standard that, however, was eliminated by the FAA in drafting the Final Regulation).

Having concluded that the concern of the FAA is with the power to direct or remove a trustee under the trust instrument, we must examine the manner in which the percentage limitation on foreign-beneficiary voting power is to be applied. The first step is to identify the provisions of the trust instrument that could be construed to involve directing or removing a trustee. Included would be provisions (1) authorizing acceleration by the trustee of any indebtedness or obligation, (2) permitting amendments or waivers of provisions, (3) speaking to waivers of default, (4) relating to the resignation, removal, and succession of a trustee, and the appointment, resignation, removal, and succession of co-trustees or separate trustees, and (5) expressly recognizing the power of beneficiaries to direct the trustee to take or refrain from taking certain specified actions. It is not unusual to see trust instruments drafted to provide for differing percentages of beneficiary interests to be required or permitted in connection with amendments of a trust instrument, or the administration of the trusts thereunder. For example, twenty-five percent of beneficiary interest may be required for acceleration of the indebtedness or obligation secured by or created under the trust instrument; fifty-one percent may be required for amendment; sixty-six and two-thirds percent may be required for waivers of default and rescissions of acceleration; and even one hundred percent may be required for amendments changing the terms of the interest of the beneficiaries or adversely affecting the trust estate or security for the interest of the beneficiaries.

There is no discussion in the Proposed Regulation or the Final Regulation of the manner in which the percentage limitation is intended by the FAA to be integrated into the structure of a trust

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<sup>213</sup> Proposed Regulation, *supra* note 90, at 67 (§ 47.7(c)(2)(i)).

instrument. The percentage limitation is specific, and perhaps the FAA believed it to be self-explanatory. Yet, as the following discussion will show, the simplicity may be deceptive.

The first theory for application of the percentage limitation contemplates the simple and direct incorporation of the percentage limitation into the "voting" provisions of a trust instrument. For example, if foreign beneficiaries hold eighty percent of beneficiary interest, and United States citizens hold the remaining twenty percent, and if fifty-one percent of the beneficiary interest is required for removal of the trustee, the foreign beneficiaries, under this theory, would have voting power in the aggregate equal to twenty-five percent of the beneficiary interest. In other words, irrespective of the percentage of beneficiary interest required to authorize any action by the trustee, if foreign beneficiaries hold more than twenty-five percent of beneficiary interest, their voting power is reduced to twenty-five percent. Accordingly, if all the foreign beneficiaries were to vote in favor of removing the trustee, the action taken to remove the trustee would not be effective without the vote of United States citizens amounting in voting power to at least twenty-six percent of the beneficiary interest.

At this point, the inquiry turns to the measurement of the voting power of the United States citizens. If the voting power of the foreign beneficiaries is equivalent to twenty-five percent of the beneficiary interest, and if the foreign beneficiaries vote in favor of removing the trustee, without an "adjustment" in the calculation of the voting power of the United States citizens, the sum of the voting power of the foreign beneficiaries and the twenty percent interest of the United States citizens would not result in enough "votes" to remove the trustee (even though all beneficiaries have voted to remove the trustee)! Assuming that this result is not a proper consequence of the FAA rule, even this rather straightforward theory would seem to require a proportionate *increase* in the voting power of United States citizens in order to offset the reduction in the number of votes permitted to be cast by foreign beneficiaries. In other words, in the foregoing example, at the same time as the eighty percent interest of the foreign beneficiaries translates into a twenty-five percent interest for voting purposes, the twenty percent interest of the United States citizens becomes a seventy-five percent interest. Presumably, the voting interest of

each foreign or United States beneficiary, as the case may be, consists of a proportionate percentage of the voting power, as calculated above.

The foregoing theory represents a direct incorporation of the percentage limitation into the voting structure of a trust instrument, and, as has been demonstrated above, this "direct" application may in itself require some subtle practical refinements. Despite its relative simplicity, however, this theory has shortcomings, based both on the wording of the Final Regulation and on the practical application of such a rule. The Final Regulation, when speaking to the beneficiary interest as a general concept, uses the words "persons . . . having . . . the beneficial interest in the trust,"<sup>214</sup> and, when addressing the issue of voting interest, uses the words "persons . . . [having] the power to direct or remove a trustee."<sup>215</sup> The distinction between beneficiary interest in the trust, and beneficiary voting power, seems to have been clear in the mind of the FAA. If the FAA had intended the percentage limitation to be calculated simply on the basis of the beneficiary interest in the trust, one suspects that the Final Regulation would not have specified the percentage limitation in terms of "25 percent of the aggregate power to direct or remove a trustee," but in words like "the aggregate power to direct or remove a trustee not exceeding 25 percent of the beneficial interest in the trust." By utilizing the concept of voting power, the FAA evidences the recognition that a trust instrument can define beneficiary power in a manner not directly related to the amount of beneficiary interest.

The practical distinction between the quantum of actual voting power and the quantum of beneficiary interest becomes starkly apparent when the theory under discussion is applied to the foregoing example, in the context of an acceleration of indebtedness created under the trust instrument. If the trust instrument provides that the trustee must accelerate the indebtedness created by the trust instrument upon receiving a request, in proper form, from the holders of twenty-five percent of the beneficiary interest, the foreign beneficiaries in our example (eighty percent of beneficiary interest held by foreigners; twenty percent held by United States citizens) have sufficient votes to require the trustee to accelerate the in-

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<sup>214</sup> Final Regulation, *supra* note 8, at 61,939 (§ 47.7(c)(3) (final sentence)).

<sup>215</sup> *Id.*

debtedness, and the voting power of the United States citizens is insufficient to block the action by the foreign beneficiaries.

The foregoing example should make it clear that construing the Final Regulation to limit foreign voting power to a specified percentage of beneficiary interest (namely, twenty-five percent) results in a theory that does not take notice of the distinctions that may be drawn by a trust instrument in the importance of various actions, evidenced by the differing percentages of beneficiary interest specified to permit or require different actions. Put in other terms, the foreign beneficiaries in the foregoing example in fact have *one hundred percent* of the voting power required to compel the trustee to accelerate the indebtedness, not merely twenty-five percent. Likewise, if a trust instrument specifies that the removal of the trustee requires fifty-one percent of the beneficiary interest, the foreign beneficiaries could very well be construed as having nearly forty percent of the voting power in that context.

Although the question is not at all free from doubt, the authors believe that limiting the voting power of foreign beneficiaries to twenty-five percent of the aggregate voting power should probably mean limiting the voting power of foreign beneficiaries to twenty-five percent of the minimum percentage of beneficiary interest required for each particular action involved. For example, if fifty-one percent of beneficiary interest is required to remove the trustee, the foreign beneficiaries collectively could represent no more than twelve and three-quarters percent of the aggregate beneficiary interest (and, presumably, the voting power of each foreign beneficiary would be its proportionate percentage of the twelve and three-quarters percent of beneficiary interest specified above).

This theory of the proper application of the percentage rules of the Final Regulation creates some interesting results. For example, even under circumstances in which foreign beneficiaries hold in the aggregate *less* than twenty-five percent of the total beneficiary interest, the foregoing theory would require a reduction in this percentage in order to determine their voting power. If foreign beneficiaries hold in the aggregate twenty percent of the total beneficiary interest, and if fifty-one percent of the total beneficiary interest is required to remove the trustee, the foreign beneficiaries hold more than twenty-five percent of the voting power to remove the trustee (in fact, nearly forty percent), and the twenty percent

interest of the foreign beneficiaries would, in the context of voting power to remove the trustee, be converted into twelve and three-quarters percent of the total beneficiary interest.<sup>216</sup> In addition, the percentage rules create problems for the draftsman of trust instruments in transactions involving aircraft. The draftsman will have to be sensitive both to the citizenship of beneficiaries at the time of execution and delivery of the trust instrument, as well as to the effect of changes of citizenship of beneficiaries on the operative provisions of the trust instrument.

The authors hope and trust that the foregoing, necessarily limited, discussion of the trustee provisions of the Final Regulation will trigger consideration by the FAA and lead to broad discussion among interested persons and between interested persons and the FAA. To the extent that this consideration and discussion lead to the clarification of the FAA's policy and practice in the administration of the Final Regulation, we would hope that the FAA will seriously analyze whether, or the extent to which, any refinements of the trustee provisions of the Final Regulation should operate prospectively and not retroactively. Our concern is that the premises upon which parties have entered, and continue to enter, into transactions, whether as obligors, trustees, or beneficiaries, not be altered by any regulatory action by the FAA in the future. For example, the parties to an aircraft mortgage in the form of a trust indenture involving only United States citizens should not be affected, with respect to that transaction, by any future policies and practices of the FAA with respect to issues such as the effect of the change in citizenship of a beneficiary on the eligibility for continued registration of aircraft owned by the trustee. If retroactivity is required in certain situations, the FAA should consider developing procedures that are well-publicized in order to permit parties under existing

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<sup>216</sup> The percentage limitation on the voting power of foreign beneficiaries does not take any account of the manner in which the voting power is exercised — namely, whether foreign beneficiaries “vote” with or against other beneficiaries who are United States citizens. Accordingly, if, for example, there are two foreign beneficiaries, each having an aggregate interest in the trust greater than twenty-five percent of the aggregate beneficiary interest in the trust, their aggregate voting power is reduced to twenty-five percent, and their individual voting power is reduced to less than twenty-five percent of the aggregate beneficiary interest, notwithstanding that one of the foreign beneficiaries actually votes with those beneficiaries who are United States citizens.

contractual arrangements to conform to the refinements of the Final Regulation within a reasonable time period.

*C. The "Based and Primarily Used" Test in the Final Regulation*

The final sentence of subsection (b) of section 501 of the 1958 Act<sup>217</sup> delegated to the Secretary of Transportation the responsibility for formulating, by regulation, a proper and workable definition of the term that provided the linchpin of the privilege of noncitizen corporations to own United States-registered aircraft. That term, of course, was "based and primarily used in the United States."

The 1958 Act afforded little guidance in the area. Although the 1958 Act was very specific in identifying the type of legal entity that was permitted to qualify (it had to be a corporation; it had to have been organized under the laws of the United States or of a state; and it had to be "doing business" under such laws),<sup>218</sup> the only term in the phrase "based and primarily used in the United States" that was defined in the 1958 Act was the term "United States." This term was defined in section 101(41) of the 1958 Act<sup>219</sup> to mean "the several States, the District of Columbia, and the several Territories and possessions of the United States, including the territorial waters and the overlying airspace thereof."<sup>220</sup> The term "possessions of the United States," used in the definition of "United States," was defined in section 101(34)<sup>221</sup> to mean possessions of the United States and, under certain circumstances, the Canal Zone and the Commonwealth of Puerto Rico.<sup>222</sup> The term "based and primarily used" was not illuminated in the 1958 Act (nor, to the knowledge of the authors, has it been used in any other federal statute).

A reading of SFAR 39 demonstrates that, at a fairly early stage, the FAA was placing more emphasis on the concept of the use of aircraft, and less emphasis on the idea of basing aircraft. Although the FAA clearly stated in SFAR 39 that it would develop the

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<sup>217</sup> 49 U.S.C.A. § 1401(b) (West Supp. 1980).

<sup>218</sup> The authors must confess their doubt that any substantial consideration of distinctions among the concepts of "qualified to do business," "doing business" and "transacting business" entered into the drafting of this provision.

<sup>219</sup> 49 U.S.C.A. § 1301(41) (West Supp. 1980).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at § 1301(34).

<sup>222</sup> *Id.*

"based and primarily used" requirement in a future regulation, it is apparent that the FAA thought the condition to eligibility set forth in SFAR 39, was so clearly within the intent of Congress in amending the 1958 Act that it could be stated as an interpretive rule and a statement of general FAA policy. This rule was that an aircraft, if owned by the proper legal entity, was eligible for registration if it was "to be exclusively operated in the United States during the period that it is registered in the United States."<sup>223</sup> The FAA employed the terms "used" and "operated" interchangeably throughout the discussion in SFAR 39, and the term "operate aircraft" was, in fact, defined in section 101(31) of the 1958 Act to mean "the use of aircraft, for the purpose of air navigation."<sup>224</sup> Although SFAR 39 did not contain extensive discussion of the rule promulgated, the FAA clearly had concluded, as a matter either of logic or of practicality, that the concept of basing of aircraft was subsumed under, or unimportant in light of, exclusive operation of aircraft in the United States.

In developing the Proposed Regulation and the Final Regulation, the FAA continued its emphasis on the fact and amount of flight of aircraft as the determinative factors in deciding under what circumstances a noncitizen corporation would be permitted to register its aircraft under United States law. With this foundation, the rule in the Final Regulation is quite straightforward:

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

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

(2) For aircraft registered after January 1, 1980, the period consisting in [sic] the remainder of the registration month and the succeeding 6 calendar months and each 6-calendar month period thereafter.<sup>225</sup>

Furthermore, the rule makes clear that the term "flight hours accumulated within the United States" means

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<sup>223</sup> SFAR 39, *supra* note 78, at 39.

<sup>224</sup> 49 U.S.C.A. § 1301(31) (West Supp. 1980).

<sup>225</sup> Final Regulation, *supra* note 8, at 61,940 (§ 47.9(b)).

only those flight hours accumulated during non-stop (except for stops in emergencies or for purposes of refueling) flight between two points in the United States, even if the aircraft is outside of the United States during part of the flight . . . .<sup>228</sup>

The definition of "based and primarily used" contained in the Proposed Regulation,<sup>227</sup> and brought forward with certain refinements in the Final Regulation, has been<sup>228</sup> and can be criticized in its particulars. However, it cannot validly be criticized as dogmatic, inflexible, unduly expansive, or unduly restrictive. In fact, in ways to be sketched herein,<sup>229</sup> it is both more expansive (in the sense of limiting the extent of the contacts with the United States required, and thereby broadening the privilege of registration of aircraft by noncitizen corporations) and more restrictive than might have been anticipated after the passage of the 1978 Amendment. We will touch on these points in order.

As this Article has outlined, Congress had at one point passed an amendment to the 1958 Act wherein the eligibility for registration of aircraft owned by noncitizen corporations was dependent upon such aircraft's being "based *or* primarily used" in the United States.<sup>230</sup> The final version of the provision, however, incorporated the concept in the conjunctive—namely, "based *and* primarily used."<sup>231</sup> Accordingly, the FAA would have been within its clear authorization under the 1958 Act to require aircraft owned by noncitizen corporations to have substantial contacts with the United States in connection with both the basing of aircraft and the operation of aircraft. The FAA, however, concluded that compliance with the rule formulated resulted in such substantial contacts with the United States that requiring additional contacts not involving the actual flight of aircraft was unnecessary. The FAA stated, in the Final Regulation, that it considered that

the requirement that 60 percent of the flight hours of the aircraft be within the United States is sufficient to ensure that the aircraft is based within the United States, a requirement that Congress

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<sup>228</sup> *Id.* (§ 47.9(c)).

<sup>227</sup> Proposed Regulation, *supra* note 90, at 67 (§ 47.9).

<sup>228</sup> See text accompanying notes 112-13 *supra*.

<sup>229</sup> See text accompanying notes 230-48 *infra*.

<sup>230</sup> See text accompanying notes 50-52 *supra*.

<sup>231</sup> See text accompanying note 70 *supra*.

imposed to prevent the use of U.S. registration as a "flag of convenience."<sup>232</sup>

This statement was included in the Final Regulation in response to the criticism of two commentators<sup>233</sup> to the effect that the FAA did not acknowledge that basing and using were two separate concepts. Although that may have been a valid conceptual distinction, and, indeed, would have been critical in the context of a "based or primarily used" test, the emphasis upon the distinction under circumstances in which the FAA had the clear power to impose two sets of restrictions seemed to reflect insufficient appreciation of the flexible position that the FAA was taking.<sup>234</sup>

Another example of what might be characterized as an expansive interpretation by the FAA in the Final Regulation involves the concept of "United States." As mentioned above,<sup>235</sup> the definition of "United States" in section 101(41) of the 1958 Act<sup>236</sup> includes territories, possessions, and territorial waters. However, since the FAA (acting for the Secretary of Transportation) was authorized and directed under the 1958 Act to define the term "based and primarily used in the United States," and not merely the term "based and primarily used," the FAA was not required to accept that broad definition for use in the Final Regulation. The FAA, however, explicitly discussed and approved the use of this definition in the Proposed Regulation,<sup>237</sup> and the Final Regulation reflected no limitation of the concept. Moreover, having contemplated the probability of flights between points in the "United States" that involved flight time over the high seas or neighboring countries, the FAA explicitly refused to deduct from the flight time between two points in the "United States" all or any portion of the flight time over the high seas or any such neighboring country.<sup>238</sup> The

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<sup>232</sup> Final Regulation, *supra* note 8, at 61,937.

<sup>233</sup> See Shell Letter and NBAA Letter, *supra* note 113.

<sup>234</sup> Although the commentators made a point of distinguishing the concepts of "based" and "used," they were probably more interested in using their analysis as a springboard to argue for reduction in the "60 percent rule" (to a "51 percent rule") and to criticize the proposed requirement that, for the purpose of calculating flight hours within the United States, only flights with points of origin and destination in the United States would count.

<sup>235</sup> See text accompanying notes 219-22 *supra*.

<sup>236</sup> 49 U.S.C.A. § 1301(41) (West Supp. 1980).

<sup>237</sup> Proposed Regulation, *supra* note 90, at 64 (Part IV.B.).

<sup>238</sup> Final Regulation, *supra* note 8, at 61,940 (§ 47.9(c)).

full flight time counted in the calculation of the necessary flight hours within the "United States," even though the flight time over the high seas or other countries might constitute substantially all the flight time between the two points in the "United States." The FAA did not require allocation.

Although certain persons commenting on the Proposed Regulation<sup>239</sup> argued that the requirement in the Proposed Regulation that at least sixty percent of total flight hours be accumulated within the United States, was unduly burdensome, the adoption by the FAA of a "sixty percent rule" must be considered to fall on the expansive, rather than on the restrictive, side of the scale. The FAA certainly must have been tempted to adhere to a seventy-five percent rule with respect not only to the concept of beneficiary control of a trustee but also to the concept of "primarily used." Commonsense notions of primary use would have supported a higher percentage than sixty percent of flight hours as a test. Finally, taking into account the FAA's view of the relative unimportance of the basing of aircraft, the agency could well have required more substantial contact with the United States as a basis for granting the privilege of United States registration to noncitizen corporations.

As the reader can quickly gather from the foregoing, the authors are not at all sympathetic to any criticism of the Final Regulation that seeks to dismiss it as wholly arbitrary, unreasonable, or restrictive. However, there are restrictive elements in the definition of "based and primarily used in the United States" contained in the Final Regulation, which will be outlined below.<sup>240</sup> The authors do not know at this point how to weigh the "restrictiveness" of these elements. In the Final Regulation, as in any scheme of governmental regulation, the ultimate and immediate goals of the regulation (including, in the case of the Final Regulation, stimulating and maintaining economic and social benefits by requiring regular, continual, and substantial contacts of noncitizen corporations with the United States) must be considered in connection with other values, including the ease and cost of administration by the relevant agency and private parties, the predictability of results, and the difficulty of evasion or subversion of regulatory

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<sup>239</sup> See Shell Letter and NBAA Letter, *supra* note 113.

<sup>240</sup> See text accompanying notes 241-48 *infra*.

purposes. In the case of the Final Regulation, it will be in everyone's interest for the FAA to monitor the administration of the Final Regulation and to be sensitive to hardships and to the frequency and volume of requests for special dispensation.

The first restrictive element involves the converse of a rule denominated as "expansive" in an earlier part of this Article.<sup>241</sup> This element is contained in subsection (c) of section 47.9 of the Final Regulation,<sup>242</sup> which credits toward meeting the sixty-percent requirement only those flight hours accumulated "during non-stop (except for stops in emergencies or for purposes of refueling) flights between two points in the United States."<sup>243</sup> In rejecting the possibility of an allocation of flight hours between time spent in United States airspace and time spent outside United States airspace, the FAA may have been sensitive to the possibility of circumvention of the requirement. For example, an operator, approaching the end of a six-month period for determining compliance, could artificially inflate the number of his flight hours in the United States, by changing schedules, taking circuitous routes in connection with international trips, and otherwise.

Whatever the realistic possibilities or probabilities of abuse of an allocation approach along the foregoing lines, the refusal to allocate does appear to create some practical problems, which do not at first glance appear to create public benefits. For example, noncitizen corporations cannot fully exploit the business of non-stop flights from interior cities of the United States to border areas of Mexico or Canada, without, in each case, an unnecessary stop on the United States side of the border. Again, the authors do not have any particular feeling for the economic effects of the rule in these situations, nor for the extent to which the FAA considered and specifically resolved these and similar problems. The FAA did consider a proposal to allow the counting of flight time between a point in the United States and a point outside the United States, but concluded, without explicit analysis, that such an approach would not "ensure that the aircraft is used primarily in the United States, as intended by Congress."<sup>244</sup> The FAA will have to monitor

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<sup>241</sup> See text accompanying note 238 *supra*.

<sup>242</sup> Final Regulation, *supra* note 8, at 61,940 (§ 47.9(c)).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 61,937.

the operation of this rule in order to determine whether, or the extent to which, the risks of an allocation approach are outweighed by economic and social benefits.

Clauses (1) and (2) of subsection (b) of section 47.9 of the Final Regulation<sup>245</sup> establish fixed six-month periods for the determination of compliance with the rules. The FAA does not dictate when a noncitizen corporation must register aircraft, and, therefore, the noncitizen corporation desiring to reap the benefits of the expanded registration provisions can analyze anticipated business cycles and desired routes and time its application for registration accordingly. If mistake or change of circumstances causes the choice of a particular six-month period to work hardship, the owner can take steps to deregister the aircraft and reregister the aircraft at an appropriate time (complying with the law during any period when the aircraft is not registered under United States law).

Despite the foregoing flexibility, the question arises whether the costs of administration by the FAA and private parties, the lack of predictability, and/or the ease of circumvention would outweigh the benefits of a more liberal approach—namely, permitting the use of “floating,” rather than fixed, six-month periods. The issue involves the extent and nature of the seasonality of demand for aircraft services, and the flexibility of the FAA-established six-month periods to accommodate this seasonality under circumstances in which it should be accommodated. Again, perhaps we must rely on the wisdom of hindsight after the FAA has had the opportunity to monitor this rule.

Certain comment letters<sup>246</sup> on the Proposed Regulation criticized the record-keeping requirements of the Proposed Regulation,<sup>247</sup> which were incorporated (with certain changes) in the Final Regulation.<sup>248</sup> Any additional requirements of reporting to a governmental agency are always anathema to a business. However, such requirements are a small price to pay for the privilege of United States registration. The Final Regulation, however, does not explicitly recognize the difficulty and time involved in assembling and summarizing the data, and preparing and submitting the

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<sup>245</sup> *Id.* at 61,940 (§ 47.9(b)).

<sup>246</sup> See Shell Letter and NBAA Letter, *supra* note 113.

<sup>247</sup> Proposed Regulation, *supra* note 90, at 67 (§ 47.9(e)).

<sup>248</sup> Final Regulation, *supra* note 8, at 61,940 (§§ 47.9(e), .9(f)).

report. The FAA should consider establishing a policy that explicitly permits the registrant a fixed number of days (perhaps thirty) after the end of each six-month period, during which the registrant is permitted to submit the relevant report without fear of violating the Final Regulation.

### CONCLUSION

This Article has examined the history and development of one recent governmental regulation in an attempt to illustrate the nature and magnitude of the tasks that may devolve upon administrative agencies as a result of Congress' inability or unwillingness to provide clear and comprehensive statutory direction. It was the goal of this Article to show that, on the basis of broad authority conferred upon it, its own expertise, and its belief in its own institutional integrity and responsibility to the public, an administrative agency is capable of operating successfully to identify and deal in a reasonable manner with the many issues that must be resolved in the course of fashioning a statement of legislative policy into regulations that work.

The authors do not contend that the regulation that provides the focus of this Article will not engender any public inconvenience or interpretive difficulty, nor do we argue from a single example that all, or even most, regulatory action embodies more virtue than vice. Rather, this Article should be regarded as sounding a note of caution to those who, wielding broad-bladed axe, would endanger the healthy branches of our regulatory system along with those that truly need to be pruned.