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HANDLING FAA ENFORCEMENT PROCEEDINGS:
A VIEW FROM THE INSIDE

MICHAEL J. PANGIA*

I. INTRODUCTION

WHILE WE MAY reminisce of the founding days of aviation when aeronauts roamed the skies wild and free, we may as well recognize the fact that in our complex society safety regulation is as necessary in aviation as it is in other endeavors which affect the welfare of people. While one may extol the virtues of laissez faire in the air, the fact remains that in those early days, due to the public concern regarding its hazards, aviation in this country was experiencing an alarming decline in comparison to its development in other countries. By the mid-1920s, due to government regulation, aviation in France and Great Britain was considered safer and therefore a better investment than in America.¹

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¹ See THE AIR COMMERCE ACT OF 1926, S. REP. No. 2, 69th Cong., 1st Sess. 1 (1925), wherein it is stated:

Although Americans built the first airplanes capable of sustained flight and were the first to learn how to fly heavier-than-air machines and hold more world's records than do citizens of any other nation, commercial aviation has not advanced as rapidly in the United States as had been hoped and expected. . . . All the leading European countries have been willing to promote commercial aviation. We have done practically nothing.

It is no secret that in England and France commercial aviation is safer than in the United States.

The report further pointed out that American insurance companies did not feel warranted in giving low rates for freight and passengers in America as they did in Europe. By 1920, before the Americans did no more than just consider the possibility of promoting aviation by safety regulation, Great Britain already had an air ministry with 771 persons on its permanent staff to promulgate and enforce regulations in that country. Our neighbor Canada had an Air Board Act which went into effect as early as 1919. This act empowered the board to issue, suspend or revoke licenses to fly, and to regulate and certificate aircraft and aerodromes. Id.
It was the recognition of the obvious fact that the promotion of aviation in this country was going to depend upon the promulgation and enforcement of safety regulations that prompted Congress to enact the Air Commerce Act of 1926.3

Although our society has undeniably considered aviation safety regulation important, there are always those few who would rather see governmental insouciance concerning matters of safety. These few voices are not new; they were heard as far back as the beginning of aviation itself. "I think regulation would put the average commercial aviator out of business," declared a small fixed base operator from Freeport, Illinois, in response to the proposed Air Commerce Act of 1926.4 An aviator from Philadelphia expressed a similar concern: "As sure as the sun rises and sets, strict government regulations will retard commercial aviation ten to fifteen years, if not kill it entirely."5 "It seems somewhat absurd," went the usual criticism, "to have all of this hullabaloo and endeavor to set the massive and ponderous machinery of the law on a measly 120 [commercial] airplanes."6 Nevertheless, the facts were blatant. Unregulated flying in the United States was found to be the cause of more than 300 deaths and over 500 injuries in 1925 alone,7 a startling figure considering the small number of airplanes at that time.

Since then it has become evident that the enactment of laws and regulations mandating aviation safety is largely responsible for aviation's enjoyment in this country of an enviable safety record, technological advancements and a freedom of use unparalleled anywhere in the world. Even in light of this obvious fact, however, one may still hear those few who, for whatever personal reasons, would demean our system. One commentator has denounced the Federal Aviation Administration (FAA) enforcement effort as "a shameful and intolerable situation," calling those charged

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4 AVIATION, Mar. 8, 1926, at 340.

5 AVIATION, Mar. 22, 1926, at 417.

6 AVIATION, Mar. 8, 1926, at 340.

7 See S. REP. No. 2, 69th Cong., 1st Sess. 23 (1926).
with the enforcement of safety regulations "Orwellian pigs." The American regulatory system may have its faults; however, it is undeniably the best in the world, particularly for aviation interests. Most significantly, it is a system which we as a people chose as part of our structure of self-government.8

The Federal Aviation Act of 1958,9 somewhat like its predecessors, grants to the Administrator the authority to issue certificates (licenses) as part of the regulatory authority over aviation activities.10 In order to fulfill this duty the Administrator has been given a statutory mandate to suspend, modify or revoke certificates or to impose civil penalties for the violation of regulations.11 In the enforcement of these regulations the FAA institutes approximately 5000 proceedings a year for infractions by pilots, mechanics, air carriers, air taxis and others who hold various types of certificates issued by the FAA.12 The enforcement proceedings are for the most part similar to those of other regulatory agencies, and

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8 See Scott Hamilton, Administrative Practice Before the FAA and NTSB: Problems, Trends and Developments, speech and accompanying outline presented at the 14th Annual SMU Air Law Symposium sponsored by the Journal of Air Law and Commerce, Dallas, Texas, on March 6-8, 1980. This author was asked to write the present article as a rebuttal to Hamilton's presentation. Although there will be certain footnote references to the Hamilton article, it is submitted that a better purpose would be served by presenting a guide to those choosing to work within the system, pointing out certain due process protections and a few new developments. The Hamilton speech is presented in this issue in article form. See Hamilton, Administrative Practice Before the NTSB: Problems, Trends and Developments, 46 J. AIR L. & COM. 615 (1981) [hereinafter cited as Hamilton].

9 As Alexander Hamilton stated: "Nothing is more certain than the indispensable necessity of government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers" and that "among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their safety seems to be the first." THE FEDERALIST PAPERS, Nos. 2 & 3. (Emphasis supplied in the text.) (There is some controversy as to whether Hamilton or Jay wrote certain Papers. Later texts indicate that Hamilton wrote Paper No. 1 while perhaps Jay may have written Papers Nos. 2 and 3.).

11 Id. §§ 1422-1426.
12 Id. § 1429.

13 The FAA has limited statutory authority to enforce regulations which apply to persons not possessing airmen certificates, e.g., passengers or other persons disrupting the safety of aircraft. See 14 C.F.R. § 91.8 (1980). The sanction, however, is limited to a $1,000 civil penalty and injunctive relief. See 49 U.S.C. § 1471(a) (1976).
provide justice and due process to a degree which equals or exceeds that of the criminal justice system. Nevertheless, some persons who cry out against governmental safety regulation needlessly perceive the practices used in FAA enforcement proceedings as unfair. This article will address some of those unwarranted beliefs and will discuss some of the FAA practices and procedures.

II. THE ROLES OF GOVERNMENT AGENCIES DEALING WITH THE REGULATION OF AVIATION

Because there often is some confusion on the part of members of the public concerning the purpose of the FAA, the National Transportation Safety Board (NTSB or Board), and the Civil Aeronautics Board (CAB), a brief description of each is provided because it is important to understand the differences in their enforcement proceedings.

The basic function of the FAA is to promote aviation by the implementation of plans and policies which insure its safety. Specifically, the Federal Aviation Act, among other things, authorizes and directs the FAA to develop plans and policies for the use of navigable airspace and to prescribe air traffic rules and regulations governing the safe flight of aircraft for the protection of persons and property in the air as well as on the ground. The FAA is required by the Act to prescribe minimum standards governing the design, materials, workmanship, construction and performance of aircraft and their components. Additionally, the FAA must regulate inspections, dictate maximum periods of service of airmen, aircraft and air carriers, and generally provide for safety in air commerce. To fulfill these duties the FAA is empowered by Congress to issue airmen certificates as well as certificates for the design, production and airworthiness of aircraft, and operating certificates. Along with this power, the FAA is given the responsibility to suspend, modify or revoke such certificates if a

13 See Hamilton, supra note 7, at 620, wherein the author addresses what he regards as the self-incrimination dilemma, the lack of counsel dilemma, the logbook dilemma and such. This article will point out that either these problems do not exist or that they can be legally avoided.


15 Id. § 1421.

16 Id. §§ 1421-1428.
reinspection, reexamination or investigation by the FAA reveals that the safety of the public so requires.\textsuperscript{17}

The NTSB was established by the Congress in 1966 as an agency within the Department of Transportation. In 1974 it was made an independent agency through passage of the Independent Safety Board Act\textsuperscript{18} and is now completely separate from the FAA and all other government agencies. The principal duty of the NTSB is to investigate, or cause to be investigated, transportation accidents and to determine the facts, circumstances and probable causes thereof. Autonomy of the NTSB has been insured so that it may freely assess the conduct of and, if necessary, criticize other agencies while recommending modifications and improvements of standards and practices of the transportation industry.\textsuperscript{19} The NTSB is also charged with the responsibility of reviewing on appeal suspensions, amendments, modifications, revocations or denials of any operating certificate or license issued by the FAA to airmen, aircraft and operators.\textsuperscript{20} It is this last function with which we will be dealing in the discussion of enforcement proceedings.

The CAB was established as an economic regulator\textsuperscript{21} and, as such, it has no direct function in the enforcement process. Generally, the CAB issues what are known as certificates of convenience and necessity along with other types of economic approvals which grant specific rights to air carriers to provide services to certain locations and along certain routes. Prior to 1958, in fulfilling this duty the CAB was not required to consider safety matters since that responsibility resided solely with the FAA.\textsuperscript{22}

In 1978, the passage of the Airline Deregulation Act\textsuperscript{23} ushered in sweeping changes in the airline industry, and highlighted a budding need for regulatory enactment and an increase in sur-

\textsuperscript{17} Id. § 1429.

\textsuperscript{18} Id. §§ 1901-1907.

\textsuperscript{19} The intent of Congress has been clearly set forth in the Independent Safety Board Act, 49 U.S.C. § 1901 (1976).

\textsuperscript{20} Id. § 1903(a)(9); see also 49 U.S.C. §§ 1422(b), 1429(a) (1976).


\textsuperscript{22} Id. § 1302(a)(1), (a)(2) & (c)(2) (1976); cf. Air Line Pilots Ass'n. Int'l. v. C.A.B., 494 F.2d 1118 (D.C. Cir. 1974), cert. denied, 420 U.S. 972 (1975) (review of a CAB order granting a service exemption to an air taxi based in part upon a favorable safety determination by the FAA).

veillance of certain segments of the air carrier industry. The De-
regulation Act sets forth a plan to abolish the CAB on a phased
basis, returning the airline industry to free economic competition
which will in effect allow air carriers to service freely any city or
route of their choosing. The expected effort of deregulation will be
growth of the air carrier industry. We already have seen a dramatic
increase in new air taxis, airlines and commuters servicing many
more areas of the country. Because of the virtually unbridled air
taxi and commuter industry which would be brought about by the
Deregulation Act, Congress was concerned with the effect on safety.
Therefore, in a change to the policy statement of the Federal Avia-
tion Act, the CAB was charged with the duty to assure that avia-
tion's extraordinary safety record would not be impaired by the
implementation of the Deregulation Act. Concomitantly, the FAA
was directed to revise completely Part 135 of the Federal Aviation
Regulations (FARs) and to set a policy of stepped up enforce-
ment in that area.

III. LEARNING ABOUT VIOLATIONS

Violations of FARs come to the attention of the FAA from a
variety of sources. Fundamentally, the system of law and order
in our country depends upon responsible citizens knowing and
obeying the law and exercising due care for themselves and others.
Similarly, the orderly use of the skies for the greatest common
good depends upon knowledge and compliance by aviators with
the system of regulations governing such use. Society has a right
to expect voluntary compliance as this compliance is vital to
safety and freedom in the air. To help make this expectation a

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25 This policy is sometimes known as the "get tough" policy announced by
the FAA in March, 1979, and directed at the air carrier industry because it was
found that its regulatory compliance attitude and thus its high accident record
was totally unacceptable. In light of the promise of the enormous expansion,
the FAA's responsibility to the public obviously had to increase accordingly.
In NTSB SPECIAL STUDY—COMMUTER AIRLINE SAFETY, NTSB-AAS-80-1 (1980),
the NTSB recommended increased surveillance and enforcement activity in this
area. As announced by the U.S. Department of Transportation, in 1980 a
dramatic improvement in the commuter airlines safety record occurred and
the nation's flag trunk and local service commercial airlines experienced the
reality, the enforcement function of the FAA is implemented by the surveillance duties of its inspectors. These duties are carried out to promote an atmosphere of encouragement to obey the law and, in some instances, to deter disobedience. In the fulfillment of their duty to survey the entire aviation industry, the inspectors attempt to foster an atmosphere of compliance. This endeavor is the primary means of discovering violations.

The FAA is divided geographically into six regions. While the overall responsibility for carrying out enforcement policies resides at FAA headquarters in Washington, D.C., under a decentralized enforcement concept each region is responsible for enforcing FARs within its geographical area. Within the regions reside field offices known as Flight Standards District Offices (FSDOs). These offices always perform at least two surveillance duties: the oversight of aircraft maintenance and aircraft operations. Inspectors assigned to these offices survey certificate holders, investigate infractions in their areas and, when necessary, initiate enforcement proceedings through legal counsel at the regional level.

The second largest governmental source of information concerning violations is the FAA Air Traffic Service which operates the air traffic control (ATC) system. Each ATC service facility is responsible for promptly notifying field offices of any incident or complaint which may involve a violation of regulations. For cases involving air carriers the next most significant source of information is the reports required by regulation to be filled out by the air carriers themselves. Also significant are public complaints. For cases involving general aviation these complaints provide a good source of information of violations such as those involving low flying aircraft or noise.

Formerly the Air Carrier District Offices (ACDO) were responsible for maintenance and operation of air carriers, and the General Aviation District Offices (GADO) were assigned similar responsibilities with respect to general aviation, including air taxis and commuters. This structure is being replaced by a division of maintenance and operational responsibilities applicable to all aviation activities so that air taxis and commuter surveillance falls within the jurisdiction of the same personnel handling large air carriers.

Kovarik, Procedures Before the Federal Aviation Administration, 42 J. Air L. & Com. 11, 17 (1976).
IV. THE INVESTIGATORY STAGE

Informal Investigations

In most instances, after learning of the possibility of a violation the FAA conducts what is known as an informal investigation. At the outset, it should be noted that "informal" as used to describe FAA investigations is not meant to be synonymous with "inconsequential," but to distinguish such investigations from the formal process which is also available and described below. The informal investigation is a means by which inspectors may develop enforcement cases. In the informal process, the FAA field inspector, upon receipt of information indicating a possible violation, initially evaluates the readily available factual data to determine whether there appears to be any basis for conducting an investigation. The purpose of an investigation is to obtain sufficient evidence either to proceed with an enforcement proceeding or preferably to drop the matter. If an investigation is initiated, the field office will notify the alleged violator in writing that such is being conducted.9 The letter is not intended to be a statement of charges; it merely sets forth the facts and circumstances which necessitated the initiation of the investigation. The letter may state that if the facts set forth are found to be correct, a violation of FARs may have been committed. It may also request that specific documents be retained or made available.

The recipient of this letter is in no way obligated to respond. In fact, the letter of investigation contains, as a matter of form, advice that the FAA would "appreciate" receiving the information. The letter explicitly advises as follows: "We wish to offer you an opportunity to discuss the matter personally and submit a written statement. If you desire to do either, this should be accomplished within 10 days following receipt of this letter."28 At this stage it may be advisable for the subject party to obtain legal counsel.

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28 In Hamilton, Appellate Practice in Air Safety Proceedings, 10 Sw. U. L. Rev. 247, 251 (1978) [hereinafter cited as Appellate Practice], the author states: "Indeed, the imposing appearance and vague language of the letter of investigation often give the certificate-holder the impression that he must reply." (Emphasis in original). The letter does not make any such implication.
especially if the alleged violation involved reckless operations or willful disobedience. Although the alleged violator may ignore the letter, doing so may be ill-advised. The FAA attorneys, field offices and inspectors will eventually decide what sanctions, if any, should be imposed. In doing so they must consider a variety of circumstances including the violator's compliance attitude, cooperativeness, and desire to work within the system. It is a matter of common sense that ignoring such an inquiry may convey an indifferent or even contumacious attitude. Therefore, a few thoughts about the manner in which to respond may be helpful.

If the letter of investigation gives the option to discuss the matter personally rather than, or in addition to, making a presentation of a written statement, there can be no hard and fast rule about accepting the proposal because it involves complexities of people's personalities. This is not to say that the system turns on whim; it is simply a recognition that any proceeding or investigatory process can be affected by a person's appearance, approach and attitude. Even if an attorney is hired it may be advisable for the person involved to speak to the investigator alone depending, of course, on the seriousness of the facts and the person's ability and appearance. Therefore, while an attorney's advice at this stage can be very helpful, it does not mean that the attorney should decide to make an appearance in every instance. This is particularly so where the attorney's presence may generate a questioning atmosphere, where the incident under investigation does not appear to involve a serious safety violation, or where the person can explain his actions. As an example, in a recent incident a pilot received a letter of investigation alleging facts brought to the attention of the FAA by persons on the ground who observed what was described as the pilot's dangerous approach to a private airport. The pilot visited the FAA office and explained the circumstances. This resulted in an immediate termination of the investigation. In another instance, a pilot landed in rain and low visibility without a clearance in an aircraft which was not instrument-equipped.  

A complaint was filed by the tower controller. At an informal interview, the FAA personnel were impressed by

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14 C.F.R. §§ 91.33, 91.115 (1980), respectively, require minimum equipment to fly in instrument meteorological weather conditions, a flight plan and clearance for such flights.
the pilot's candor, his recognition of what he had done and his keen interest in safety. On the other hand, his attorney, who was totally obstreperous and discourteous, would not consider a minimum penalty. He insisted upon pursuing the case to a formal hearing before the NTSB, and the pilot's license was suspended for ninety days. The point is that if a recipient of a letter of investigation decides to take the opportunity to participate in a personal interview, whether or not accompanied by counsel, a display of common courtesy and an interest in regulatory compliance can go a long way.

Most often the letter of investigation will request a written response. As in any regulatory proceeding, statements made by the alleged violator can be used in subsequent proceedings. Thus, when drafting a response the best approach is to follow the advice contained in the enforcement notice and to set forth any extenuating or mitigating circumstances which may have a bearing on the incident. If the alleged violator has no history of violations or if safety was not involved an explanation of those facts should be presented in the response because they are factors considered by the FAA in determining the type of any subsequent action to be taken. Therefore, the person involved should treat the letter of investigation not as a trap but as an opportunity to tell his side of the story. When information which the FAA believes to be necessary to an investigation is refused, the FAA may seek that information through the issuance of a subpoena under section 1004 of the Federal Aviation Act, or it may institute a "formal investigation."

The Formal Investigation

The Federal Aviation Act, the Administrative Procedure Act and the Hazardous Materials Transportation Act grant authority

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31 In Hamilton, supra note 7, at 621, the author claims that citizens are not aware that their statements may be taken as admissions. This has not been our experience in the FAA. People seem to be well aware of the fact that their statements may be believed by the FAA and may be used against them if they admit to violating FARs. People are also aware that it is a matter of common sense that presenting mitigating circumstances will work in their best interest.

to the FAA to conduct formal fact-finding investigations. The formal investigations are rare; they are generally utilized in the most complex cases when the FAA is unable to obtain statements from key witnesses or essential records for inspection, when fraud or deception is suspected, or when a complaint is filed under section 1002 of the Federal Aviation Act. The manufacture and distribution of bogus parts is an example of a case in which the FAA has conducted a formal investigation. If at any time during the investigation of a case an inspector believes that a formal investigation should be conducted, he may request the FAA regional counsel to initiate formal fact-finding procedures. The formal proceeding empowers the FAA legal counsel to act in furtherance of its statutory authority to issue subpoenas, administer oaths, examine witnesses, and require the production of records and taking of depositions. It also facilitates the coordination of the investigative function of the FAA Flight Standards Office or, if necessary, the Civil Aviation Security personnel.

The formal investigation may be initiated by a formal order issued by the FAA's Chief Counsel, Deputy or Assistant Chief Counsel based in Washington, D.C., but in most instances the order will be issued by the FAA counsel for the region involved. The order will set forth its purpose, for example, to determine whether or not specific regulations were violated, and, if so, whether the violations are continuing and the extent to which safety is or was jeopardized. The order sets forth the enabling statutes, sections 609 and 1004 of the Federal Aviation Act, and the implementing regulations governing the investigation, 14 Code of Federal Regulations Part 13. A presiding officer will be designated in the letter and he will conduct the investigation in accordance with procedures contained in Subpart F of 14 Code of Federal Regulations, Part 13. At any hearing convened by the presiding officer a verbatim record will be kept and documents produced may become part of the record.

It should be noted that any hearing or deposition conducted

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Id. § 13(F).
pursuant to a formal investigation is not intended to be a final adjudication of the alleged violation but merely a fact-gathering process. Therefore, it cannot be regarded as an adversary process. The notice will state that the questioning of witnesses will be conducted by the presiding officer or its designee and that only those documents which he so designates will be entered into the record. As a practical matter, however, the new Subpart F under which the proceedings are conducted specifically allows any party or his counsel to make objections on the record or to question any witness on relevant and material matters as long as it does not unduly impede the progress of the investigation.

After the formal hearing the presiding officer issues a written report based upon the record and a summary of principal conclusions. This report is furnished to all parties and filed in the public docket. If the regional office, acting in concert with the field office, decides that no further action is necessary, the official who ordered the investigation is also required to prepare a summary of principal conclusions which is provided to the parties and filed in a public docket. The decision to proceed after the formal investigation has been completed does not rest with the presiding officer but with the regional counsel. Keeping in mind that the formal investigation is but a means of obtaining facts, the decision to go forth with the enforcement action is made on the basis of the record as well as on any other information gathered by the FAA.

If the FAA decides to initiate a formal investigation, care should be taken by a party or counsel not to assume an adversary posture at this point as such may appear to inhibit the agency's duty to obtain facts on a matter which concerns air safety. This is not to say that an attorney should not represent the best interests of his client, which includes instructing the client to remain silent if he believes that to be necessary. An uncooperative atti-

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40 Id.
41 See id. § 13.117. Under the former regulations any question which one desired to ask had to be written and forwarded to the presiding officer. Although this hearing is a fact-finding rather than adjudicatory process, the right of cross-examination is provided to give the alleged violator as many opportunities as possible to develop his part of the story at an early stage of the case.
42 See id. § 13.127.
43 Id. § 13.129.
tude toward the fact-gathering process, however, clearly can work against the interests of a party suspected of a breach of regulations unless he can clearly establish that no violation occurred. It should also be kept in mind that the record developed in a formal investigation is not necessarily the sole basis of any determination to follow with an enforcement proceeding. Even if the formal investigation reveals insufficient evidence of one violation the FAA still may have evidence sufficient to go ahead with an enforcement proceeding concerning other violations. Therefore, the person involved in the incident under investigation should view this step as another opportunity to demonstrate a cooperative and safety-minded attitude.

Criminal Investigations

A criminal investigation is initiated when more than the breach of FARs is suspected. The FAA has responsibility for the investigation of certain criminal acts under the Federal Aviation Act such as the forgery of certificates, false marking of aircraft, interference with air navigation, failure of an air carrier to make required reports, and failure to obey a subpoena. This responsibility also applies to violations involving the security of air traffic operations, the Hazardous Materials Transportation Act, and certain violations of the Airport and Airway Development Act of 1970. When a field office becomes aware of violations other than those which the FAA is charged with investigating or when it appears that a criminal violation has occurred, the subject FAA regional counsel notifies the Federal Bureau of Investigation, which takes over the investigation. If sufficient facts are disclosed during the FBI’s investigation, the case is referred to the United States Attorney in the jurisdiction where the crime was allegedly committed. If there is enough evidence the Office of the Chief Counsel or the regional counsel may refer the matter to the United States Attorney without having an FBI investigation conducted. Of course, the due process requirements provided by the criminal

45 Id. § 1522.
46 Id. §§ 1801-1812; see also 49 U.S.C. § 1472(h) (1976).
47 Id. §§ 1701-1742.
48 Id. § 1473(a).
law system apply to any criminal investigation or action that may follow.

Protection Against Self-Incrimination

The FAA is not empowered to take any criminal action to enforce FARs since its punitive authority is limited to imposition of civil penalties which do not exceed $1,000 and/or institution of certificate actions, however outrageous or life-endangering the offense may have been. The FAA inspector is not, and should not be, required to give a *Miranda* warning prior to talking to a certificate holder any more than a traffic policeman is required to do so questioning a motorist regarding violation of traffic laws prior to any arrest. Before an attorney decides to advise his client to assert the defense of lack of a *Miranda* warning several factors should be considered.

Fundamentally, the doctrine expounded in *Miranda v. Arizona,* requiring a warning to a criminal suspect that he has the right to an attorney, the right to remain silent, and that anything he says may be held against him, is specifically intended to prevent undue coercion of a criminal suspect to make incriminating statements while being held in custody. The practical application relates solely to laying the foundation for the admission of state-
ments into evidence in a criminal trial. Even a policeman stopping a motorist for a suspected violation of traffic laws does not have to give a *Miranda* warning before asking questions unless an arrest has been made. The warning simply has never been intended to apply to civil investigations or in any other cases where a suspect has neither been taken into custody nor deprived of his freedom of action in any significant way. Nevertheless, a person may refuse to testify in an FAA investigation if he or she fears self-incrimination. In that event the hearing officer, with the approval of the Attorney General, may issue an order requiring testimony. In such instances, however, any information directly or indirectly derived from such testimony may not be used against the person in any criminal case, except for the prosecution of perjury. Therefore, in light of the limitations of *Miranda*, it would be trite to argue that it should be extended to cover infractions of FARs, especially since the alleged violator is sufficiently protected by the existing system.

Additionally, raising a defense which has no legal basis except with respect to arrested criminal suspects may create an undesirable appearance that there is indeed something to hide. Certainly, an argument made by a motorist charged with speeding that his admission to the policeman is inadmissible because he was not given a *Miranda* warning prior to being asked to show his license and registration would not fare well with a court, especially since the sanction imposed may depend upon the judge’s perception of the driver’s attitude. In the same vein, the FAA’s goal and duty is to foster a positive safety attitude. An attorney should, therefore, very carefully consider the possible overall effect before raising defenses which may have no other result than to present an image of his or her client as a locked-up criminal suspect and to require

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56 United States v. LeQuire, 424 F.2d 341 (5th Cir. 1970); United States v. Chase, 414 F.2d 780 (9th Cir.), cert. denied, 396 U.S. 920 (1969). This is so even if a driver is temporarily detained. Allen v. United States, 390 F.2d 476, supplemented, 404 F.2d 1335 (D.C. Cir. 1968).

57 Beckwith v. United States, 425 U.S. 341 (1976); see Mathis v. United States, 391 U.S. 1 (1968); United States v. Michals, 469 F.2d 215 (10th Cir. 1972); Koran v. United States, 469 F.2d 1071 (5th Cir. 1972).

the FAA to exercise its subpoena and other investigative authority to obtain testimony and production of documents.69

It also would be futile to argue that logbooks and records which are required by the FARs to be maintained should not be disclosed except pursuant to subpoena.60 Fundamentally, the requirement to keep logbooks and records is a prerequisite to obtaining and retaining certificates and ratings.61 In fact, it is often the only practical way the FAA can inspect for regulatory compliance.62 As a necessary means of enforcing certain safety regulations the Federal Aviation Act empowers the Administrator to promulgate regulations requiring records to be made, retained and made available for inspection.63 A subpoena to inspect such records has never been held to be necessary by the courts; in fact, the courts have long maintained that subpoenas are unnecessary to compel production of records which any person is required by law or regulation to keep.64 To require a subpoena would obviously frustrate the very purpose of the FAA regulations since the maintenance and availability of records for inspection without the necessity of a subpoena is a condition for holding certain certificates in the first place. Therefore, the demand that FAA inspectors obtain a subpoena before reviewing such records is as frivolous and without legal basis as a requirement that a policeman obtain a subpoena prior to asking for a driver's license.65

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69 Even Hamilton states that:
It is the professional duty of each attorney to refrain from unduly impeding the progress of hearings before the Board by repeatedly raising arguments that obviously will be futile under the law governing the Board’s proceedings (e.g., hearsay objections and attacks on constitutionality or validity of the FAA’s organic statute or regulations).

Appellate Practice, supra note 29, at 266.

60 In Hamilton, supra note 7, at __, the author complains about what he calls a logbook dilemma because logbooks and records are subject to inspection by the FAA without subpoena.


62 It has long been recognized that logbooks are necessary in the aviation regulatory scheme. The first such requirement dates back to an air bill of the French government in 1913 requiring, among other things, logs to be kept for a period of two years. Legislative History of the Air Commerce Act of 1926, compiled by the Office of the Legislative Counsel, U.S. Senate, at 77 (1928).


64 See Shapiro v. United States, 335 U.S. 1 (1948).

65 C/ United States v. Airways Serv., Inc., 429 F. Supp. 843, 847 n.10
The Certificate Holder's Investigation

FAA personnel involved in investigations in enforcement proceedings are trained to seek out and interview witnesses, take notes and statements, obtain photographs, charts, maps and diagrams, documents and records such as copies of any pertinent weather reports, load manifests, manual pages, air traffic service records and recorded tapes, and gather any physical evidence that may perfect an enforcement case. Upon receipt of a letter of investigation there is no reason why the subject party should not consider doing the same thing to establish innocence or to preserve evidence of mitigating circumstances rather than waiting hopefully for the FAA investigation to disclose that information.

Importantly, the involved person should seek to obtain the factual information contained in the Enforcement Investigative Report (EIR), which is required to be initiated at the field office level and is received and reviewed at the regional level. This report is the FAA's means of assembling, organizing and presenting all the evidence and other pertinent information obtained during an investigation for the purpose of determining what further action, if any, will be taken. If the report is lengthy, it generally will be divided into four sections: (1) general information, including the regulations believed to have been violated; (2) a summary of facts; (3) items of proof; and (4) facts and analysis. Normally an EIR or any part thereof, except the investigator's technical analysis, can be released with the concurrence of the regional counsel, unless a matter of security is involved.

If the alleged violation involves air traffic control instructions or clearances, obtaining a copy of the ATC tape recordings may be helpful. Copies are available upon request. However, the FAA retains all tapes for a period of only fifteen days prior to re-use unless an accident occurs, in which event the tape is saved. Because a letter of investigation may be received more than fifteen days after the suspected violation, when FAA action is expected it may prove wise to instruct immediately the ATC facility in writing to retain the appropriate tape and to ask for a cassette

(N.D. Iowa 1977) (indicating that any such requirement would be undesirable and contrary to the Federal Aviation Act).

recording of the appropriate part. The cost is presently twenty-five dollars per hour of tape or portion thereof recorded, an expense which may be well spent if one believes that it will successfully explain the situation. Likewise, the automated radar terminal system data recording information and tape recordings of communications with certain light service stations may be helpful. In this regard, an attorney knowledgeable in aviation matters can provide excellent counseling in the early stages of some of these cases.

In summary on this point, an early investigation by the alleged violator may be in the best interest of an adequate defense. If an attorney is retained, he can be of invaluable assistance by considering a variety of factors which are discussed below.

V. ENFORCEMENT PROCEEDINGS

In the interest of air safety, the FAA has the option to pursue administrative action, consisting of a warning letter or letter of correction, or to pursue what is known as legal enforcement action, consisting of revocations or suspensions of certificates or the imposition of civil penalties. The chart contained in Appendix A displays the procedural steps for each type of action.

Administrative Enforcement Actions

The purpose of the administrative enforcement action is to provide the field inspectors with an administrative means of disposing of minor violations which do not involve the existence of significant unsafe conditions, lack of competency or qualification, or deliberate violations. In addition, it must appear that the alleged violator has a constructive attitude toward complying with the regulations and has not been involved in previous similar violations. The objectives of the administrative action are to bring the incident to the attention of the person involved and to encourage safe practices.

Administrative action may take the form of a warning letter or notice addressed to the alleged violator which draws attention to the facts and circumstances of the incident involved, advises

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that the subject actions are contrary to regulations, states that the matter has been corrected and/or does not warrant legal enforcement action, and requests future compliance with the regulations. This type of action may also take the form of a letter of correction which serves the same purposes as the warning letter but is intended for use when there is an agreement with the certificate holder that corrective action is being taken or will be taken within a reasonable time. A letter of correction will usually confirm a discussion with the person involved and may also set forth discrepancies or areas needing improvement. The inspector follows the letter with an inspection to determine if the corrections have been made or if more severe enforcement action is warranted.

Importantly, while administrative enforcement actions may be taken by the inspectors when there is convincing evidence of a violation, the action does not itself charge a person with the violation. Records are retained by the FAA for a period of two years, and such actions are not made part of the certificate holder's file. Since a safety-conscious attitude on the part of the person involved must be evidenced before the inspector may terminate the case by taking administrative action, taking the opportunity to have an early interview with the inspector may prove to be an act of good sense. A candid discussion with the inspector may indicate whether administrative action is being considered. As a matter of advice, if there is no written letter of investigation but merely an oral request to come in for a discussion, it may be an indication that administrative action is being considered and the opportunity for an interview should be taken. If the person involved refuses an interview or otherwise displays a non-caring attitude, an important prerequisite for the inspector to consider before termination of the case by administrative action will be nonexistent and the investigator will have no choice but to proceed in a more formal manner.  

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8 In Hamilton, supra note 7, at ____, the author states: "It has been the author's experience that the only practical effect of the suspect's cooperation upon the course of these proceedings is to ease the government's burden of proof (by damaging admissions), frequently perfecting the prosecutor's otherwise unprovable case."

While not disputing the results of that author's personal experience, the FAA enforcement experience points out to the contrary that a significant number of cases were either closed or the proposed sanction reduced after hearings or informal conferences.
Legal Enforcement Actions

Enforcement actions, referred to by the FAA as legal actions, consist of two types: (1) civil penalty actions initiated under section 901 of the Federal Aviation Act which authorizes the United States to seek a civil penalty of up to $1,000 for each violation of the Act or FARs; and (2) certificate actions initiated under section 609 of the Act which provides for the suspension or revocation of a certificate issued under the Act.

The decision to proceed with legal action receives close scrutiny by various levels of the FAA during the entire process. In a typical case, the Enforcement Investigative Report (EIR) is forwarded by the local field office to the Flight Standards Division (or the Airports Division or Air Transport Safety Division, depending upon the type of violation involved) in the appropriate regional headquarters with a recommendation as to the type of action and sanction to be imposed. At the regional level, the report is technically analyzed to determine whether the investigation is adequate, whether the regulations are cited and interpreted correctly, and whether the type of action and sanction recommended by the field office are appropriate. If it is determined that the investigation is inadequate, the file is returned to the field office with specific instructions for further investigation. If the regional office determines that legal action is not warranted, the file is returned along with specific reasons for taking administrative action rather than legal action or for closing the case. On the other hand, the regional office may concur in all respects or concur with the recommendation for legal action but not with the recommended sanctions. In the latter case, the regional office performs an independent technical analysis of the facts and then recommends the type of action and sanctions appropriate for the public welfare and safety.

After agreement is achieved between the field office and the regional flight standards office, the EIR and the regional office’s technical analysis and recommendations are forwarded to the regional counsel’s office. The regional counsel then must make an

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70 Id. § 1429. See also 14 C.F.R. § 13 (1980) (promulgating regulatory guidance in both types of actions).
independent determination as to the appropriate type of legal
enforcement action and sanctions to be imposed and must coordi-
nate the opinions of the flight standards and the field offices
whenever a difference therein exists. Any unresolved differences
of opinion surviving this procedure are referred to the regional di-
rector for final determination. In the legal review process, FAA
counsel may request further investigation and even may return the
file to flight standards with recommendations—essentially the same
process as provided between the flight standards and the field as
described above.

The regional counsel makes the final determination for the initia-
tion of a legal action. Once initiated, counsel has the authority to
change the type of action or sanction, or enter into a settle-
ment agreement with the alleged violator. In doing so, however,
counsel usually will confer with flight standards and/or the field
office. In certain cases regional counsel also may seek direction
and guidance at any stage of the case from the Chief or Assistant
Chief Counsel in Washington.^

As a general rule, civil penalty actions are used for less seri-
ous violations which do not involve the absence of qualifications
or when the person charged does not hold any certificate, for
example, when a passenger allegedly disrupts crew members dur-
ing a flight. The actions to suspend or revoke certificates are
brought when there is a lack of qualifications or a repeated offense,
falsification of records, or operation which endangers the public.

In either type of legal action, a civil penalty letter or notice
of proposed certificate action is sent to the person charged. In
the case of a certificate action, the notice will permit the person
to surrender the certificate (in which case the order proposed in
the notice will be issued effective on the date the certificate is
surrendered or placed in the mail), indicate a desire to have the

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1 All cases which the Administrator or Chief Counsel designates, cases in-
volving violations of certain prohibited areas of flights, violations by foreign
persons, and cases involving the Hazardous Materials Transportation Act are
referred to the Assistant Chief Counsel in Washington for direct handling.

2 14 C.F.R. § 91.8 (1980).

3 It is the present policy of the FAA not to bring both types of actions for
the same violation so as to avoid any appearance of double jeopardy, although
if the violations are serious enough there is nothing to prevent the FAA from
doing so.
order issued and then appeal the same to the NTSB, answer the charges in writing and furnish evidence which he or she would like to have considered, or request an informal conference with the FAA attorney handling the case. In the case of a civil penalty letter, the person charged can either submit the suggested amount, submit additional information which would explain or excuse the alleged violation, or request that the issues of fact and law be tried in the United States district court. Although the FAA is not required to provide an opportunity for an informal conference in the case of a civil penalty, it is nevertheless the practice of the FAA to provide for such an opportunity. Although the civil penalty letter may not set forth the opportunity to have an informal conference, the person charged or his attorney should call the FAA regional counsel and request such a conference if desired.

An informal conference, like an informal investigation, should not be considered inconsequential. An informal conference is presided over by an attorney on the regional counsel's staff. The flight standards official who is involved with the file most likely will be present also. At this conference the person charged will be told basically what the charge is but will not necessarily be informed of all of the witnesses or documents the FAA may have in its case file. This factual information should be requested prior to or at the hearing. Importantly, the person charged should be aware that in certificate actions the FAA counsel is required by internal procedures not to use the informal conference as a means of getting additional evidence or admissions to prove the charges. When an informal conference is provided in civil penalty actions, however, FAA counsel is not proceeding under any such written restrictions. In either case an understanding should be made clear at the outset on this point. Nevertheless, it probably would be in the best interest of the person charged to concentrate on presenting those facts which tend to mitigate the conduct, or show a healthy compliance attitude. After this conference the case may be closed or the proposed penalty reduced. If nothing else, the party involved may come away from the meeting with more information about the

75 Id. § 13.15.
76 Compliance and Enforcement Program Order, FAA Order No. 2150.3, at 170 (1980).
FAA’s case. In any event, if the person charged is not satisfied with the case he can always proceed with more formal steps since there are no procedural rights waived by participating in an informal conference, and any due process argument can still be made. The informal conference is simply another step which should be viewed as another opportunity to present the best aspects of the case at the earliest time.

It is highly improbable that “playing hardball” at the informal conference will ever pay off. The informal conference can work adversely to the individual’s interest if he or his attorney display an adversarial or hostile attitude. With this in mind an attorney can better serve his client by helping the person to appear to have a sincere attitude rather than one of defiance. As an example, in a recent case a pilot was charged with doing low level aerobatics in an improper area. Specifically, he performed a loop less than one-half mile from an instrument approach course to a military airfield, completing the top of the loop near an FAA helicopter which was hovering at approximately 1500 feet. At first, our defiant arobat had an alibi in which he claimed that he was a good deal further away from the instrument course than stated by the FAA; however, he soon abandoned that story when he realized that it placed him in the Terminal Control Area of a large metropolitan airport. He then accepted the opportunity for an informal conference where he planned to launch his exculpating strategy, an attack on the FAA helicopter pilot (who came near enough to him to get his aircraft number), charging that pilot with formation flight without prior coordination. Pursuant to advice, he obtained an attorney who was able to point out to him that his planned defense could be analogized to defending a speeding case by blaming the policeman for overtaking him. The attorney’s greatest service in that case was undoubtedly convincing the client that he should be more reserved. By holding his client in check the attorney was able to obtain a reduction of the proposed six-month suspension to a civil penalty. In other cases, depending on the client’s ability and demeanor, it may be advantageous to prepare the client to do most of the talking and presenting of the case himself.”

If an attorney or client were to covertly display an attitude that FAA’s safety pursuits are “vitriolic” or to call FAA inspectors “Orwellian pigs” as done in Hamilton, supra note 7, at —, he might well create the very result
The structure of the informal conference is versatile. The result of this process may be a reduction of a certificate revocation to a suspension, a shortening of the length of a suspension, a settlement of a suspension by the payment of a civil penalty, or even a reduction of a certificate action to an administrative action. There is also available a sanction known as a deferred suspension which allows the certificate holder to keep the certificate if certain suggested corrective actions are agreed to be taken by a certain date, such as obtaining another rating, taking additional training or assuring that the person's employer will take corrective steps. Certainly, the informal conference provides an opportunity to have a personal, one-on-one chat which generally helps the person charged, as many such conferences result in a reduction of the sanction originally proposed.

Prior to the informal conference, in fact as early in the case as practicable, complete preparation for the presentation of mitigating circumstances can be facilitated by the knowledge of what the FAA considers in selecting sanctions. The FAA first considers the degree of hazard to the safety of other aircraft or persons or property created by the alleged violation and whether such is a continuing violation. The FAA then considers the nature of the violation and activity, whether private, public or commercial, and whether it was inadvertent or deliberate. Also considered are the person's history of violations, level of experience, and attitude. The effect of the sanction on the person is considered. This involves examining the effect of a monetary penalty or loss of a certificate. In the former instance, the impact of inflation and the cost of doing business are considered. The FAA also may take into account the indirect impact the action may have on other segments of the industry or public, the need for a special deterrent, and whether any action was taken by the person's employer or some other authority. These considerations are helpful to use as a checklist in the preparation of a defense. Advising a client in

Hamilton seems to be complaining about. Surely, no beneficial purpose will be served by a hostile or recalcitrant attitude or demeanor at any proceeding, whether, civil, criminal or administrative.

Concomitant with charges of violations of certain regulations, the FAA may include an alleged violation of 14 C.F.R. § 91.9, which prohibits careless and reckless operation of aircraft. However, the NTSB has held that a violation of
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certain cases to attend safety seminars or to voluntarily obtain additional training before any FAA action is formally commenced also can be profitable. This can provide an impressive display of a safety-conscious attitude and, thus, such advice may well prove to be most salutary to a client’s welfare.79

If the result of an informal conference in certificate actions is an order pursuant to section 609 of the Federal Aviation Act80 suspending or revoking the relevant certificate, the respondent may appeal the case to the NTSB.81 This must be done by filing a notice with the Board within twenty days from the date the order is received82 along with providing proof that a copy of the notice was sent to the FAA Administrator. The timely filing of an appeal with the NTSB will postpone the effective date of the FAA’s order until final disposition of the matter by the Board, except when a certificate has been revoked on an emergency basis.

Although this first procedure before the NTSB is referred to as an appeal, it is in fact a de novo administrative trial before the NTSB administrative law judge (ALJ) wherein either party may call and cross-examine witnesses and introduce documents and other types of evidence. All proceedings are handled in accordance with the NTSB Rules of Practice in Air Safety Proceedings.83 Importantly, the allegations set forth in the plaintiff’s complaint (which is the FAA’s formal order) must be specifically denied or they are an operational regulation does not automatically constitute a violation of § 91.9. See Administrator v. Eger, 2 N. Trans. S. Dec. 862 (1974). On the other hand, some violations inherently constitute a violation of § 91.9. See Administrator v. Silvernail, 2 N. Trans. S. Dec. 191 (1973).

79 After a suspension period or the payment of a civil penalty by a pilot there is little opportunity to measure the resulting compliance attitude. In the case of a suspension, one can be reasonably certain that a pilot is probably less proficient after the suspension period than before. Therefore, for enforcement cases, I am proposing to the FAA a recurrent training session of about two or three hours which would consist of a film and a short open-book exam to be administered by either general aviation district offices, local accident prevention specialists or pilot examiners. The training would be somewhat similar to that conducted by many states for driving violations and in some cases may be another means of providing deferred suspensions. It would be educational and, if properly designed, would effectively and inexpensively promote a positive attitude toward aviation safety.

81 See Appendix A infra.
82 49 C.F.R. § 821.30 (1979) (NTSB regulations).
83 See generally id. § 821.
deemed admitted." The ALJ has the power to subpoena witnesses and require the production of documents." The FAA has the burden of proof under section 609 of the Act; however, as in any civil or criminal case, this burden may be met by the introduction of circumstantial evidence." At the conclusion of the hearing, the ALJ will issue an Initial Decision. In some instances, this decision is issued orally; however, the ALJ, particularly in complex cases, may request briefs or proposed findings to facilitate the issuance of a written decision. It may be beneficial for the certificate holder to file briefs beforehand explaining the facts and applicable regulations, bearing in mind that the ALJ, like the FAA counsel, may not possess significant aviation experience. Additionally, the presentation of models and diagrams to help explain facts and circumstances, a technique surprisingly seldom used in administrative hearings, may prove to be invaluable."

84 49 C.F.R. § 821.31(c) (1980). The certificate holder may also move for a dismissal of the FAA complaint if the notification of proposed certificate action was given more than six months after the date of the alleged violation, as provided by the "stale complaint rule." 49 C.F.R. § 821.33 (1980).

85 49 U.S.C. § 1484(b) (1976). A certificate holder may request attendance of FAA personnel. In Hamilton, supra note 7, at ___, the author complains that the proscription of 49 U.S.C. § 9 prevents the compulsory attendance of FAA witnesses. This is not so. That section only prohibits employees to act as expert or opinion witnesses against the United States when the United States is involved in the proceeding.

86 49 U.S.C. § 1429 (1976). Note that 5 U.S.C. § 556(d) (1976) provides that the proponent of an order or rule (or a certificate) has the burden of proof of showing he meets the requirements for issuance. See Day v. N.T.S.B., 414 F.2d 950 (5th Cir. 1969). Once a certificate has been issued, the Administrator has the burden of proof in a suspension or revocation proceeding. See Administrator v. Spinks, I N Trans. S. Dec. 1974 (1972) (discussion of the procedural distinctions).

87 Hamilton also complains of a rule of evidence called the "Lindstam doctrine" which allows for an inference to be drawn that a violation was committed based on circumstantial evidence. This doctrine is not dissimilar to that applied in judicial proceedings. In fact, Rule 401 of the Federal Rules of Evidence provides that "relevant evidence" means that having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Certainly, finders of fact may draw reasonable inferences and, in appropriate cases, apply the doctrine of res ipsa loquitur. In NTSB proceedings, however, the Lindstam doctrine does not apply except where another reasonable inference can be drawn from the same facts which points to an alternative explanation. See Administrator v. Erickson, I N. Trans. S. Dec. 1214 (1971).

88 The use of NTSB decisions in aviation enforcement cases can be helpful. They are contained in volumes entitled NTSB Decisions which may be pur-
Either party may appeal the ALJ’s Initial Decision to the full Board by filing a notice of appeal within ten days after the Initial Decision has been issued. The appeal must be perfected within forty days after an oral decision has been rendered, or within thirty days after service of a written Initial Decision. The timely filing of a notice of appeal will serve as a continuance of the stay of the FAA’s order of suspension or revocation until the full Board has ruled on the case. The appeal is perfected by filing with the Board and serving on the opposing party a brief setting forth in detail all the objections to the Initial Decision and stating whether the objections are related to alleged errors in the ALJ’s findings of fact and conclusions. It shall also state the reasons for the objections and the specific relief requested. A reply brief must then be filed by the opposing party within thirty days. In preparing a brief, keep in mind that the full Board very seldom grants oral argument. On appeal, the full Board will consider only whether the findings are supported by a preponderance of substantial evidence, whether the conclusions are in accordance with precedent and policy, and whether the questions on appeal are substantial and whether any procedural errors have occurred.98

In civil penalty actions, the FAA’s power of enforcement is not effected through the administrative channels but by an action in the United States district court wherein the FAA has the burden of proving its case.99 After a district court decision, the case may be appealed by either party to the circuit court of appeals within sixty days, just as in any federal court action. In the case of a section 609 certificate action, only a final decision of the full NTSB is subject to judicial review by the circuit courts of appeals.91 Only the certificate holder, not the FAA, has standing to seek appellate

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89 49 C.F.R. § 821.49 (1980).
90 See the recent case of Lindy v. FAA, Civil Nos. 79-6212, 6220 (2d Cir., Nov. 26, 1980) (not yet reported), wherein the Court held the FAA to its burden of proof and reversed the lower court decision in favor of the FAA because of insufficient charges to the jury.
review of the Board's decision. A petition for review must be filed in the circuit where the petitioner resides or has a principal place of business, or in the Circuit Court for the District of Columbia, within sixty days after the entry of the Board's order and must state the grounds on which review is sought.

As stated above, except for emergency revocations or suspensions, FAA orders are stayed during the pendency of the NTSB review. If the full Board affirms a revocation or suspension, the FAA's order becomes effective immediately although a petition for judicial review may be filed. Although the court of appeals may grant interlocutory relief, ordinarily such a petition must first be made to the NTSB. In the appeal to the circuit court, the NTSB and the FAA become respondents. A briefing schedule is set forth by the court in accordance with the Federal Rules of Appellate Procedure and any applicable local appellate court rules. The court usually will permit oral argument. Concerning findings of fact, the Federal Aviation Act provides that the findings of the Board are conclusive unless they are unsupported by substantial evidence. Of course, the court may review fundamental questions of due process and procedure. Upon review, it is within the power of the court to affirm, modify or set aside the final order of the Board, in whole or in part, and, if necessary, to order further proceedings by the Board or the FAA. The judgment of the Court of Appeals is then subject to review by the United States Supreme Court upon appropriate certification or by filing a writ of certiorari; however, it is extremely unlikely that the typical enforcement case would have sufficient constitutional importance to warrant review by the Supreme Court.

94 This relief is seldom granted. In the recent case of Torbert v. Bond, No. 80-7324 (9th Cir., July 21, 1980) (not yet reported), the court in a one-page decision found that petitioners failed to demonstrate that the FAA's use of emergency powers was arbitrary and capricious, and the balance of hardships between the financial interests of the petitioners and the risk to public safety in air transportation did not warrant injunctive relief.
96 See Morton v. Dow, 525 F.2d 1302, 1307 (10th Cir. 1975); Aadland v. Butterfield, 502 F.2d 799, 800 (8th Cir. 1974).
VI. EXTRAORDINARY PROCEEDINGS

Emergency Revocation

It can hardly be argued that an agency charged with the responsibility of enforcing regulations for the safety of the public should not have the ability to move quickly in instances where the public could be in danger. Congress specifically provided this ability to the FAA by section 1005 of the Federal Aviation Act\(^9\) which states:

That whenever the [Administrator] is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the [Administrator] is authorized, either upon complaint or his own initiative without complaint, at once, if he so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of safety in air commerce to meet such emergency . . . .

The FAA does not use the emergency suspension or revocation procedure for punitive purposes. It is, however, generally used when there is evidence that two conditions exist: (1) the certificate holder’s actions evidence a question of qualification or demonstrate a determination not to act in accordance with regulations, and (2) because of the certificate holder’s connection with aviation a continued use of the certificate is likely. Examples of instances when emergency action is considered by the FAA are when a person deliberately engages in reckless or dangerous flying, when a repair station has a poor quality control of inspection system,\(^10\) when certain airport operators have no fire fighting capability,\(^11\) and when similar situations arise where continued operation can hurt innocent people. The FAA has been extremely conservative in the use of its emergency powers to suspend or revoke certificates although such action is not violative of a person’s right of due process because of the expedited hearing schedule which the government

\(^9\) Id. § 1485(a).


\(^10\) 14 C.F.R. § 145.45 (1980).

\(^10\) Id. § 139.49.
Due process is provided by the Federal Aviation Act in sections 1005 and 609. Section 1005 states that the Administrator is to give preference to such proceedings over all other matters under the Act insofar as practicable. Section 609 sets forth that the filing of an appeal with the NTSB stays the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency safety matter is involved, in which event the order remains effective and the Board must dispose of the matter within sixty days after being so advised. Therefore, it is incumbent upon the certificate holder to appeal as quickly as possible in this situation.

For years a question existed as to whether the emergency nature of a revocation order makes it a final agency order, and thus immediately appealable to the circuit courts. The problem was that the NTSB would not review the emergency nature of the order but only conduct a hearing on all of the facts, which hearing was to be completed within sixty days. Therefore, if the Board would not look into the emergency nature of the order by itself the question remained whether that part of the order could be considered final and applicable to the circuit court under section 1005 of the Act. One of the problems with an immediate appeal was the lack of an administrative record which the court could review. The ques-

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102 In Hamilton, supra note 7, at —, the author charges that the Administrator's decision to resort to emergency authority may unduly hurt the certificate holder. When questioned for support of this charge during the presentation of the paper in Dallas in March, 1980, the author was only able to cite the Air East case in support. However, in that case, Air East, Inc. v. NTSB, 512 F.2d 1227, 1231 (3rd Cir.), cert. denied, 23 U.S. 863 (1975), the court appropriately stated:

Due process is flexible and must be analyzed in the context of its application. What is reasonable in one situation where there is time to pursue a leisurely and reflective study of the circumstances may be impractical and dangerous to life itself in another situation. Here, the stakes were high indeed—a threat to the lives of passengers who entrusted themselves to an air carrier which they had every right to assume was in compliance with the strict regulations of a specialized government agency. Even though the loss of the privilege of operating aircraft, albeit temporary, is critical to those who are certified, that hardship is outweighed by the disaster that could befall the passengers.


104 Id. § 1429(a).

105 Id. § 1485.
tion has been recently resolved in the case of Nevada Airlines, Inc. v. Bond. 108

The Nevada Airlines case involved an air carrier operating under Parts 121 and 135 of the FARs. 107 Routine surveillance for over one year revealed discrepancies with the FARs in both operation and maintenance. Letters of investigation were answered only with excuses. On one such occasion the air carrier was warned of an improper rudder actuator on one of its aircraft. It replied that it was uncertain about what the FAA was referring to and finally charged that the FAA inspector was incorrect in his observations. It was learned that during this discourse the airline had ordered the correct part and installed it secretly, apparently intending to tell the inspector that it had been present all the time. Because of many suspected practices, a special Surveillance Technical Analysis and Review (STAR) team surveyed the air carrier from March 10 through 28, 1980. The STAR team found ongoing violations of over twenty safety regulations both in the operation and maintenance of aircraft by the company. The violations include flying unairworthy aircraft, maintaining faulty or no maintenance records, allowing insufficient crew rest periods, conducting improper loading practices, using uncertified mechanics and flying aircraft without required fire detection systems. One aircraft had caught fire in flight because of improper maintenance. One had crashed in Tucson, Arizona, on November 16, 1979, seriously injuring ten people. 108 The STAR team sent out two letters of investigation, the last in a series of approximately fifteen letters, but they were not answered. The FAA regional office, with the guidance of Washington, revoked the air carrier's operating certificate on an emergency basis on May 23, 1980.

Nevada Airlines went to the District Court for the District of Nevada, ex parte, and obtained a temporary restraining order (TRO) staying the effectiveness of the FAA's emergency revocation order. The district court rationalized that it could not conclude that the violations constituted an imminent danger to the safety of

108 622 F.2d 1017 (9th Cir. 1980).
107 49 C.F.R. § 121 (1979) deals with the operation of large aircraft for hire. 49 C.F.R. § 135 (1979) deals with small aircraft for hire (under 12,500 pounds).
108 See NTSB Aircraft Accident Report No. 80-7 (1979) (involving a Martin 404, N40438).
the airline's passengers. The FAA immediately filed a motion for withdrawal of the TRO, pointing out to the court that it had no jurisdiction to review the agency process. The court withdrew the TRO and Nevada Airlines filed an emergency motion for stay with the Ninth Circuit Court of Appeals on June 4, 1980. Responding to the emergency, the circuit court set up an argument before a three-judge panel by telephone on the evening of June 5 and rendered a decision denying the motion on the morning of June 6, 1980. The written opinion followed.

In its analysis, the circuit court was concerned with the reviewability of the emergency revocation order and distinguished it from the underlying substantive determination that the revocation was warranted. The court noted that it was the first time the question had been presented since previous cases on the subject had dealt with the use of emergency action only in conjunction with review of the revocation question, and only after the administrative appeal had been considered. Cognizant of the fact that an emergency revocation or suspension order can deprive a certificate holder of a substantial property interest, the circuit held that such orders are immediately reviewable on the basis of an arbitrary and capricious standard. The court stated that in making such a review it would not usurp the function of the NTSB in its factual hearing, and that the burden would be on the certificate holder to show that the Administrator acted in an arbitrary and capricious manner. The FAA considers this case to be a victory for both the certificate holder and the public in that it answers a valid due process question by giving the certificate holder an immediate recourse while preserving the FAA's ability to move quickly when public safety so requires.


See Stern v. Butterfield, 529 F.2d 407 (5th Cir. 1976); Morton v. Dow, 525 F.2d 1302 (10th Cir. 1975); Air East, Inc. v. NTSB, 512 F.2d 1227 (3rd Cir.), cert. denied, 23 U.S. 863 (1975); Aadland v. Butterfield, 502 F.2d 799 (8th Cir. 1974).

Interestingly, after the Court rendered its opinion, it continued its concern for the certificate holder by contacting this author to receive an update on the outcome of the NTSB hearing. The Court was appraised of the fact that the
Injunctions

The FAA does not itself have the power to enjoin violations of regulations. Section 1007 of the Federal Aviation Act, however, grants jurisdiction of the district court of the United States to enforce obedience to any provision of the Act or any rule, regulation, requirements or order promulgated thereunder, by the issuance of an injunction, mandatory or otherwise, restraining the violator from any further similar actions. In cases where FAA enforcement actions have failed to deter violations or where life or property is in imminent danger, the FAA regional counsel, or Chief or Assistant Chief Counsel may refer the matter to a United States Attorney for initiation of injunctive proceedings.

The statute does not give private persons a right to seek injunctive relief which in effect would put the court in a rulemaking posture with respect to aviation safety. Following the crash of the American Airlines DC-10 in Chicago, Illinois, on May 25, 1979, an association called the Airline Passengers Association (APA) sought a temporary restraining order from the District Court for the District of Columbia grounding the DC-10s. After the court refused the TRO based on a lack of jurisdiction the APA went back to the same court two days later, but to a different judge, and obtained the grounding order. Three appeals were taken by McDonnell Douglas Corporation and various air carriers, both domestic and foreign, to the Court of Appeals for the District of Columbia Circuit. The circuit ruled that the district court had no jurisdiction to act and ordered the district court to dismiss the action. A person may, however, seek to enjoin another from

NTSB affirmed a revocation after a full hearing.

As a further matter of interest, on May 14, 1981, I telephonically argued in Briles Wing & Helicopter, Inc., v. FAA, No. 81-7244 (9th Cir. 1981) (denying petition for review and motion for stay), in opposition to a motion for a stay of emergency revocations. After hearing about some of the evidence supporting many charges of violations of safety regulations, the court, following Nevada Airlines, Inc. v. Bond, 622 F.2d 1017 (9th Cir. 1980), denied the motion less than one hour after the argument.


115 However, the district court has no jurisdiction to enjoin enforcement of an FAA order since that jurisdiction resides solely within the Courts of Appeals. Id. § 1486. See also cases cited at note 96 supra.


violating any regulation or order which has been duly promulgated by the agency.\footnote{Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc., 466 F.2d 552 (9th Cir. 1972), cert. denied, 410 U.S. 967 (1973).}

**Cease and Desist Orders**

Section 1005 of the Federal Aviation Act\footnote{49 U.S.C. § 1485 (1976).} confers upon the Administrator of the FAA broad emergency powers to deal with immediate hazards threatening the safety of air commerce and the general public. This power is used when more conventional enforcement procedures are considered to be inadequate because of lack of time or lack of access to the judicial system. In such cases the Chief Counsel, Assistant Chief Counsel or any regional counsel may issue a cease and desist order. Except in emergency cases, the FAA is required to provide notice and give the opportunity for formal hearing to the person who is to be restrained prior to the issuance of such an order.\footnote{14 C.F.R. § 13 (1980) (Subpart D).} When cease and desist orders are issued on an emergency basis they normally become effective immediately without any notice, hearing or pleadings. Consequently, a person receiving such an order is advised therein that section 1006 of the Federal Aviation Act\footnote{49 U.S.C. § 1486 (1976).} provides for judicial review in the federal courts of appeals within sixty days after the entry of the order.\footnote{It is not certain how the courts of appeal can review the matter without a record except perhaps on the basis stated in Nevada Airlines v. Bond, 622 F.2d 1017 (9th Cir. 1980). See notes 106-11 supra, and accompanying text. In the case of a cease and desist order, it appears that the FAA would have to proceed on an expedited basis similar to that provided in emergency revocations and suspensions.} In cases not involving an emergency revocation or suspension of a certificate, however, an application to the court for an injunction is perhaps the FAA’s most effective tool since a breach of the injunction can be considered by the court as contempt.

**Seizure of Aircraft**

The FAA may seize an aircraft under the authority provided by sections 901(b) and 903(b) of the Federal Aviation Act.\footnote{49 U.S.C. §§ 1471(b), 1473(b) (1976). See also 14 C.F.R. § 13.17 (1980). The statutes make reference to "aircraft" and not parts and appliances.}
In addition, a civil penalty may be imposed. Seizure may be made by a state or federal law enforcement officer or by an FAA safety inspector but the order of seizure must specify the person so authorized. The order must state the involvement of the aircraft in question in one or more violations of FARs. The order also must recite the identification of the aircraft and the registered owner along with a statement that the aircraft is subject to a lien by reason of the violations described. The person seizing the aircraft shall place it in the nearest adequate public storage facility in the judicial district in which the aircraft was seized. The aircraft may be released from FAA seizure when: (1) the registered owner or violator pays a civil penalty compromise agreed upon, together with costs of seizure, storage and maintenance; (2) the aircraft is seized under an order of the court to enforce a lien; (3) the United States Attorney notifies the FAA of a refusal to undertake proceedings; or (4) a bond has been posted in an amount sufficient to cover the penalty, together with costs of seizure, storage and maintenance of the aircraft.

In the event a civil penalty letter has not been issued, but only contemplated, seizure will take place only when immediate action is essential and a written notice has been given to the registered owner and other persons having an interest in the aircraft as may appear in the aircraft records filed with the FAA. Seizure of the aircraft for contemplated violations is more akin to injunctive relief since procedural safeguards must be afforded by the FAA.

There appears to be no authority in the Federal Aviation Act to seize an aircraft except in conjunction with a civil penalty which has been either imposed or contemplated since sections 901(b) and 903(b) are contained in statutes which deal explicitly with the imposition of and procedure for the collection of civil penalties. The statutory scheme is straightforward. If the FAA determines that there is probable civil penalty liability for a violation involving an aircraft, it may seize the aircraft to enforce the statutory lien for such civil penalty until a bond to secure payment has been posted.

It is presently untested whether the statute may apply to parts and appliances also in actions involving entities such as manufacturers.

The cost of storing and maintaining the aircraft may be borne by the FAA of the United States Marshal, however, it must be reimbursed by the person seeking release.
posted. Courts, however, will very carefully scrutinize the governmental interest advanced to justify this procedure. Put simply, the legitimate objectives of a statutory scheme as extensive as the Act will not necessarily sanctify all FAA summary proceedings. Courts will consider whether the regulations involved further the governmental interest to a degree sufficient to warrant substituting the usual hearing procedures and proceeding with summary procedures.\footnote{Aircrane, Inc. v. Butterfield, 369 F. Supp. 598 (E.D. Pa. 1974).}

In an extraordinary situation it is not violative of due process to postpone the notice and hearing until after seizure. Such extraordinary situations exist when a sufficient public interest is involved, such as preventing continued illicit use of property, and when pre-seizure notice and hearing might frustrate the interest served by the applicable statutes, as when there is an indication that the property would be removed or destroyed.\footnote{Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).} The courts are protective, however, of the interest of property owners. In the absence of some showing of special need for prompt action to protect the government’s interest in collecting a civil penalty for alleged violations, seizure of an aircraft initiated by the FAA without filing any papers with the court, without seeking court approval, without filing any bond, and without providing for a prompt post-seizure hearing, has been held to be violative of due process requirements.\footnote{United States v. Vertol H21C, 545 F.2d 648 (9th Cir. 1976).} In so determining, courts apparently will give great weight to four factors: (1) the existence of an application to the court; (2) the governmental interest to be protected; (3) the ability of the property owner to post a bond; and (4) the availability of an opportunity for an early hearing.\footnote{See Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).}

As mentioned, the FAA usually will send a notice following a civil penalty letter as a matter of procedure, except when a court has already assessed a penalty. The FAA must then immediately seek enforcement in the district court. If the United States Attorney refuses to request judicial enforcement, the aircraft is released. In any event summary seizure of aircraft by the FAA is extremely rare. When it does occur the aircraft owner's interest and rights are very carefully guarded by the courts.
Immunity Under the Aviation Safety Reporting Program

The FAA established the Aviation Safety Reporting Program (ASRP) to encourage the reporting of any information which a person believes discloses an unsafe condition or deficiency in the national aviation system.\textsuperscript{127} Under this program, reports are made to the National Aeronautics and Space Administration (NASA), not to the FAA. Pursuant to the Code of Federal Regulations,\textsuperscript{128} the Administrator is prohibited from using the reports or information contained in the reports submitted to NASA in any enforcement action, unless such information concerns criminal offenses or accidents. When a violation of the FARs comes to the attention of the FAA from a source other than the report filed with NASA, the FAA will investigate and, if necessary, commence enforcement proceedings. During the enforcement process, however, the inspector will neither query NASA nor the alleged violator as to whether a report was filed under the ASRP. If the investigating field office determines that an administrative enforcement action is appropriate, a warning notice or letter of correction will follow. On the other hand, if the Enforcement Investigative Report is referred to legal counsel for legal enforcement action, appropriate measures will be taken. In the event legal enforcement action has been initiated, the alleged violator, in response to a civil penalty letter or notice of proposed certificate action, may request waiver of the sanction under the ASRP if such person has evidence to establish that he or she completed and delivered or mailed to NASA a written report of the incident within ten days after it occurred.

The filing of a report with NASA concerning a violation of the Federal Aviation Act or the FARs is considered by the FAA to be indicative of a constructive attitude which makes future violations less likely. Accordingly, although a finding of a violation may be made, neither a civil penalty nor a certificate suspension will be imposed if certain conditions are met. The violation must not have been deliberate, and must not have involved a criminal offense, an accident or lack of qualification or competency. Additionally,

\textsuperscript{127} The program is described in Advisory Circular 00-46B, dated June 15, 1979. The expiration date of the program is presently set for October, 1981; however, there is some talk within the FAA to extend that date.

\textsuperscript{128} 14 C.F.R. § 91.57 (1980).
the person must not have been found to have committed a violation since the initiation of an ASRP in any prior FAA enforcement action. The person must also show that a written report was delivered or mailed to NASA within ten days after the subject incident.\textsuperscript{129}

VII. Medical Cases

The authority to issue or deny medical certificates is granted to the FAA Administrator under section 602 of the Federal Aviation Act.\textsuperscript{130} An applicant for a certificate must be found to possess the requisite physical fitness necessary to insure safety in air commerce.\textsuperscript{131} The FARs delegate this authority to the Federal Air Surgeon and regional flight surgeons.\textsuperscript{132} The authority to examine medical certificate applicants is delegated, with certain exceptions set forth in the FARs, to Aviation Medical Examiners (Examiners),\textsuperscript{133} doctors not employed by the FAA. In general, the Examiners' duties include accepting applications for physical examinations, conducting examinations, issuing or denying medical certificates, and issuing student pilot certificates when such certificates are combined with applications for FAA medical certificates as provided by FAR section 61.85.\textsuperscript{134}

The medical certificate issued by an Examiner is considered to be affirmed as issued unless the Federal Air Surgeon, regional flight surgeon, or chief of the Aeromedical Certification Branch of the FAA reserves that issuance within sixty days. When an Examiner denies issuance of a medical certificate the airman may apply in writing to the above officials for reconsideration within thirty days after the date of denial. If the airman does not apply for reconsideration during the thirty-day period the application for the medical certificate is deemed to have been withdrawn. If the denial of

\textsuperscript{129} The report should be made on a NASA ARC Form 277 which may be obtained from FAA offices, including Flight Service Stations, or by writing to the FAA, Aeronautical Center, Distribution Section, AAC-45C, P.O. Box 25082, Oklahoma City, Oklahoma 73125.

\textsuperscript{130} 49 U.S.C. § 1422 (1976).

\textsuperscript{131} The standards are set forth in 14 C.F.R. § 67 (1980).

\textsuperscript{132} Id. § 67.25.

\textsuperscript{133} See generally 14 C.F.R. § 183.21 (1980) (Part 67).

\textsuperscript{134} 14 C.F.R. § 61.85 (1980).
the medical certificate is affirmed after reconsideration the airman may petition the NTSB for review. Throughout this procedure the airman has the burden of proof to show that he meets the standards set forth in the FARs.

The FARs provide that any person who applies for or holds a medical certificate may be requested to furnish additional medical information or history, or to authorize the release of such information by clinics, hospitals, doctors or other persons. Refusal or failure to provide or to authorize release of requested information can be a basis for denying, suspending or revoking the airman's medical certificate. Generally, if there is a reasonable basis for questioning an airman's medical qualifications the regional flight surgeon may request a reexamination as authorized by section 609 of the Federal Aviation Act. In cases involving known incapacity or disqualification of the airman, the Office of Aviation Medicine in the FAA's Washington headquarters or the appropriate regional flight surgeon may initiate enforcement proceedings under section 609 of the Act. If it appears that the airman in question may continue activities notwithstanding his incapacity or disqualification, an emergency order of suspension or revocation of the medical certificate may be issued by using the emergency authority of the Administrator available under section 1005 of the Act. The procedures are similar to other certificate actions as hereinbefore described.

An airman who has been denied a medical certificate has a right under section 601 (c) of the Federal Aviation Act to petition the Administrator for an exemption from applicable medical standards. Petitions for exemption are processed by the Office of the Chief Counsel pursuant to Part 11 of the FARs. Decisions to grant or deny exemptions are made by the Federal Air Surgeon after considering recommendations of medical consultants.

The Act requires that these exemptions be granted upon a finding that such action would be in the public interest. In the recent

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125 Id. § 67.31.
127 Id. § 1485. See also note 82 supra.
128 Id. § 1421(c).
case of *Delta Air Lines v. United States*, a federal district court temporarily halted the entire FAA medical exemption process, taking exception to the Federal Air Surgeon's method of granting exemptions. Among other things, the court reasoned that in his consideration of the public interest the Federal Air Surgeon was giving far too much weight to the interest of the applicant-airman and insufficient weight to the interest of the flying and non-flying public. The court therefore enjoined the FAA from granting exemptions from any of the medical requirements set out in the FARs without a proper finding that the public interest would be served. Therefore, from May 16, 1980, the date of the decision, until September 17, 1980, no exemptions were issued. During that time a careful review was conducted by the FAA to determine if pending applications for exemption could be acted upon favorably while conforming with the requirements of the injunction. From September 17, 1980, to December 1, 1980, over fifty exemptions were granted containing more detailed findings regarding the public interest. In further response to *Delta*, the FAA issued a Notice of Proposed Rulemaking setting forth new procedures for the issuance of exemptions, and requiring applicants to supply more precise information which would support the public interest determination.

An airman who has been denied a medical certificate has the statutory right to petition the NTSB for review of the denial action as mentioned above, along with the right to petition the Administrator for an exemption. These applications may be made simultaneously. In such cases, the policy of the FAA is to afford airmen every opportunity to have petitions for exemptions promptly considered. When a petition for review is also pending before the NTSB, however, concurrent proceedings may cause unnecessary expense to the airman and the FAA, and may create a problem of unavailability of the airman's medical records. If such happens, the airman may wish that the FAA consider the petition for exemption prior to disposition of the petition for review and may therefore request that the NTSB hold the latter in abeyance. As stated, any adverse NTSB decision eventually can be appealed to the courts, particularly on the question of due process if the usual procedural rights have not been afforded.

CONCLUSION

On November 12, 1980, the President of the United States issued the annual proclamation inviting the people of the United States to observe December 17 as Wright Brothers Day.\(^1\) By this act the President reminded us that in the three generations since the historic flight in 1903 our aviation industry has grown to be the greatest in the world. As an example, the President noted in his proclamation that approximately eighty-five percent of the aircraft used throughout the world are of United States manufacture and that the free world’s seven largest airlines are United States flag carriers. Indeed, even private flying is an activity and industry which continues to grow in size and at a rate which contrasts sharply to that of other countries. It has been clearly demonstrated that all this has been made possible by a system which successfully provides necessary compromises between personal freedoms and public safety considerations. In regard to FAA enforcement activities the system has been designed to provide persons every opportunity to obtain due process and fairness which compares favorably to that achieved in enforcement proceedings of other agencies and to criminal proceedings in courts. Continued success, however, depends upon our willingness and ability to work within the system, together with the knowledge and specialization which is necessary to facilitate success in any practice. I hope that this article will provide some assistance in that regard. By working within the system one will find that personal rights, along with the safety of the public, will be adequately protected and substantial justice obtained, while aviation will continue to grow.

\(^1\) Proclamation 4802 of November 12, 1980.