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Nancy Phelps Patterson

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Comments

AIRPORT FUNDING — APPROACHES FOR SPENDING THE SURPLUS IN THE TRUST FUND

NANCY PHELPS PATTERSON

TO ACCOMMODATE the rapid growth of air travel in the 1960s,¹ Congress enacted the Airport and Airway Development and Revenue Act of 1970 (1970 Act or the Act).² The 1970 Act created a trust fund³ to finance federal participation in the construction, maintenance and operation of eligible airport projects.⁴ The 1970 legislation expired on June 30, 1980,

¹ *Congress Passes Airport and Airway Development Act*, 1970 CONG. Q. ALMANAC 168. President Nixon stated in his June 16, 1969 message to Congress that: "Years of neglect have permitted the problems of air transportation in America to stack up like an aircraft circling a congested airport." He cited statistics of a decade of jet travel, in which air transportation accounted for more intercity passenger miles than any other mode of common carriage. The non-airline aircraft almost doubled in size, while the use of air freight quintupled in the ten year period. In 1968 alone, Nixon stated, the scheduled airlines logged more than 150 million passenger trips, triple that of a decade ago. *Id.*

² Pub. L. No. 91-258, 84 Stat. 219 (codified at 49 U.S.C. §§ 1701-1727 and §§ 1741-1742 (1976), and in scattered sections of the Internal Revenue Code of 1954).

³ 49 U.S.C. § 1742 (1976) states:

(a) There is established in the Treasury of the United States a trust fund to be known as the "Airport and Airway Trust Fund," consisting of such amounts as may be appropriated or credited to the Trust Fund as provided in this section.

Id. § 1716. The 1970 Act defines "eligible airport project" as:

(a) Subject to the provisions of subsection (b) of this section, any public agency, or two or more public agencies acting jointly, may submit to the Secretary a project application, in a form and containing such information, as the Secretary may prescribe, setting forth the airport development proposed to be undertaken. No project application shall propose airport development other than that included in the then current revision of the national airport system plan formulated by the

making new legislation necessary.

The trust created by the 1970 Act was funded by taxes gathered from several sources. These included: (1) passenger ticket fares, at the rate of eight percent of the total fare,⁵ with an additional three dollar passenger tax collected on tickets for international journeys commencing in the United States;⁶ (2) general aviation, through a tax on aviation fuel used in noncommercial aviation⁷ and an annual registration fee based

Secretary under this subchapter, and all proposed development shall be in accordance with standards established by the Secretary, including standards for site location, airport layout, grading drainage, seeding, paving, lighting, and safety of approaches.

Public agencies subject to State law

(b) Nothing in this subchapter shall authorize the submission of a project application by any municipality or other public agency which is subject to the law of any State if the submission of the project application by the municipality or other public agency is prohibited by the law of that State.

Approval

(c) All airport development projects shall be subject to the approval of the Secretary, which approval may be given only if he is satisfied that

(A) the project is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located and will contribute to the accomplishment of the purposes of this subchapter;

(B) sufficient funds are available for that portion of the project costs which are not to be paid by the United States under this subchapter;

(C) the project will be completed without undue delay;

(D) the public agency or public agencies which submitted the project application have legal authority to engage in the airport development as proposed; and

(E) all project sponsorship requirements prescribed by or under the authority of this subchapter have been or will be met.

Id.

⁵ I.R.C. § 4261(a) (1976).

⁶ *Id.* § 4261(c). This type of charge has been commonly called a "head tax." A distinction can be drawn between taxes and charges:

[A]irport charges are imposed by governmental airport sponsors in their proprietary capacity, only on those who use the facilities provided, in amounts proportional to their use, for the purpose of recouping the proprietors' costs. Taxes, on the other hand, generally are levies imposed for the purpose of raising revenue for general governmental expenditure and in amounts not necessarily related to the actual use of services or facilities provided.

Id.

⁷ I.R.C. § 4041(c) (1976). The tax is seven cents per gallon on general aviation fuel.

on the weight of the aircraft;⁸ (3) shippers, through a five percent tax on domestic air transportation of property;⁹ and (4) aircraft in general, by a tax on airplane tires and tubes.¹⁰ The objective of the trust fund was to shift the burden of financing airport development to the users of the system. The trust fund currently has in excess of \$3.25 billion of uncommitted surplus.¹¹

The airport and airway system is presently in a state of confusion because Congress has not enacted new legislation to replace the 1970 Act.¹² Members of the ninety-sixth and the ninety-seventh Congress proposed legislation to continue airport and airway funding.¹³ While the proposed bills were designed to achieve the goal of the 1970 Act, the bills adopted different approaches to this issue. Legislation proposed by the House generally would continue the current program at a higher funding level and extend the current eight percent passenger tax.¹⁴ The Senate proposals, however, would direct the elimination of the seventy-two¹⁵ largest airports from the aid

Id.

⁸ *Id.* § 4491.

⁹ *Id.* § 4271.

¹⁰ *Id.* § 4071(a)(2)-(3).

¹¹ The actual figure of surplus in the trust fund varies from \$3 billion to \$3.5 billion, depending on the source of the information. See, e.g., *Trust Fund Meets House Opposition*, AV. WEEK & SPACE TECH., Apr. 21, 1980, at 31 (\$3.5 billion in surplus); *Would You Believe a \$3.4 Billion Surplus in the Airport and Airway Trust Fund?*, NAT'L J., Jan. 5, 1980, at 16; *Trusting the Trust Fund*, AV. WEEK & SPACE TECH., Oct. 22, 1979, at 9 (\$3.25 billion in surplus); *Bill Would Alter Funding Method*, AV. WEEK & SPACE TECH., Sept. 3, 1979, at 50 (\$3.24 billion in surplus); *Senate Legislation Would Change Airport Funding*, ENG. NEWS REC., Aug. 23, 1979, at 14 (\$3.5 billion in surplus).

¹² *Airport Funding Suspended by Lack of New Law*, 38 CONG. Q. 2908 (1980). See, Pub. L. No. 96-298, 94 Stat. 829 (1980).

¹³ See S. 1648, 96th Cong., 1st Sess., 126 CONG. REC. S944 (daily ed. Feb. 5, 1980); H.R. 6721, 96th Cong., 2d Sess., 126 CONG. REC. E1109-10 (daily ed. March 6, 1980).

¹⁴ *Trust Fund Meets House Opposition*, AV. WEEK & SPACE TECH., Apr. 21, 1980, at 31. The House Budget Committee, in its Fiscal 1981 report, said that the eight percent passenger ticket tax should be continued and that general aviation shall be paying fifty-percent of the costs of operating the airway system attributable to them. *Id.*

¹⁵ S. 1648, 96th Cong., 1st Sess., 126 CONG. REC. S944, 951 (daily ed. Feb. 5, 1980) (seventy-two airports with highest enplanements in 1978). See *Senate Votes to End Aid at 72 Airports and Study Facility Change*, AV. WEEK & SPACE TECH., March 25, 1980, at 31. (An amendment adopted prior to passage of S. 1648 provided that the

program,¹⁶ and cut the passenger tax from eight percent to two percent.¹⁷ The proponents of the Senate versions have taken this approach in an effort to "defederalize"¹⁸ the aviation industry, to remove it from the helping hand of Washington.¹⁹

This comment will discuss the Airport and Airway Development and Revenue Act of 1970, emphasizing the trust fund spending practices that led to the current split in the approaches taken for future multi-year funding methods.²⁰ The legislative proposals from the ninety-sixth and ninety-seventh Congress will be analyzed in detail. The article will conclude with a discussion of the long-term implications of the proposals on airports, air carriers, air passengers and general aviation.

I. HISTORICAL BACKGROUND

The Air Commerce Act of 1926²¹ marked the federal government's first participation in the country's air transport system.²² The 1926 Act encouraged the "establishment of airports, civil airways and other air navigation facilities,"²³ by giving the duty of fostering air commerce to the Secretary of

number of passengers emplaned at an airport during calendar year 1978 would be used as the base for determining whether an airport is eligible for federal assistance.).

¹⁶ S. 1649, 96th Cong., 1st Sess. (1979).

¹⁷ S. REP. NO. 415, 96th Cong., 1st Sess. 1 (1979).

¹⁸ See *infra* text accompanying notes 124-29, 268-70.

¹⁹ *Id.*

²⁰ See *infra* text accompanying notes 52-125.

²¹ Air Commerce Act of 1926, Pub. L. No. 254 (1926). See S. 1648, 96th Cong., 1st Sess., 126 CONG. REC. S944, 926 (daily ed. Feb. 5, 1980). Supreme Court Justice Benjamin Cardozo, in his opinion on the right of Utica, New York, to issue airport bonds wrote the following prophetic words 1928:

The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called by the city of the blind because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness.

126 CONG. REC. S944 (daily ed. Feb. 8, 1980) (quoting *Hesse v. Rath*, 249 N.Y. 435, 164 N.E. 342, 342 (1928)).

²² Air Commerce Act of 1926, Pub. L. No. 254 (1926).

²³ *Id.* § 2(a).

Commerce.²⁴ The Secretary was to implement the 1926 Act through governmental agencies²⁵ and investigations,²⁶ and by making regulations to register aircraft²⁷ and airmen,²⁸ to rate air navigation facilities,²⁹ and to establish air traffic rules.³⁰

The government initially assisted airport development directly pursuant to the Federal Airport Act of 1946.³¹ Under this program, Congress appropriated general revenue funds to provide federal aid for the development of public airports.³² The actual appropriation was \$500 million,³³ to be spent over a period of seven fiscal years³⁴ for the establishment of a nation-wide system of public airports.³⁵ The figure set by Congress, however, was not sufficient to meet the requests of the airports.³⁶

In 1969, the House proposed legislation to expand and improve the nation's airport and airway system. The House's action was in response to the disparity between the funding appropriated and the money needed due to the increased demand for commercial and private air transportation.³⁷ The House determined that the best way to reach this goal was to impose airport and airway user charges.³⁸ The House Commit-

²⁴ *Id.* § 2.

²⁵ *Id.* § 2(c).

²⁶ *Id.* § 2(d).

²⁷ *Id.* § 3(a).

²⁸ *Id.* § 3(c),(b).

²⁹ *Id.* § 3(d),(f).

³⁰ *Id.* § 3(e).

³¹ Federal Airport Act of 1946, Pub. L. No. 79-377, 60 Stat. 251 (1946).

³² *Id.* § 4.

³³ *Id.* § 5(b).

³⁴ *Id.*

³⁵ *Id.* § 4.

³⁶ 1970 U.S. CODE CONG. & AD. NEWS 3047, 3049. Frequently Congress authorizes a minimum figure which is to be spent on a project. This figure is enacted as part of the legislation. The President then makes a request for yearly funding for the project which may be higher or lower than the authorized figure. The Office of Management and Budget (OMB) makes the final appropriation, which is actually the amount the airport receives. See *infra* text accompanying notes 238-41.

³⁷ *Congress Passes Airport and Airway Development Act*, 1970 CONG. Q. ALMANAC 1968. By 1969, several major airports had reached the saturation point. The 747 jumbo jet had been introduced by Pan American Jumbo jets were more economical for the airlines, but they added to the airway safety problems.

³⁸ 1970 U.S. CODE CONG. & AD. NEWS 3047, 3049.

tee on Interstate and Foreign Commerce faced the difficult decision of what specific form the new program should take.³⁹ The House Committee therefore had to confront the following issues:

(1) whether the Federal treasury should contribute toward the development of airport terminal buildings;⁴⁰

(2) the advisability of committing the Federal government to a long-term debt;⁴¹

(3) whether the states, instead of the local communities should assume a greater role in airport development;⁴²

(4) the necessity of certifying the eligibility of airports for funds;⁴³ and

(5) the desirability of regulating the emission of air pollutants from aircraft.⁴⁴

In addressing these issues, the House Committee decided not to include terminal building costs in the Federal funding category. The Committee decided not to obligate the Federal treasury to a long-term debt,⁴⁵ and adopted the trust fund method instead. The Committee determined that the states should have a greater incentive to participate in airport development, and decided to give them a larger role.⁴⁶ In response to the issue of eligibility, the Committee adopted an amendment that required airports to be certified before they could obtain funds for the airport project.⁴⁷ Deciding that it was not desirable to regulate the emission of air pollutants, the Committee dropped the proposal dealing with air pollution.⁴⁸ It was in this form, altered by the incorporation of similar ideas from the 1946 legislation,⁴⁹ that Congress passed the 1970

³⁹ *Id.* at 3048.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* See 49 U.S.C. § 1715 (1976).

⁴⁷ 1970 U.S. CODE CONG. & AD. NEWS 3047, 3048. See 49 U.S.C. § 1716 (1976).

⁴⁸ 1970 U.S. CODE CONG. & AD. NEWS 3047, 3048.

⁴⁹ Plans that are in both Acts include:

(1) National airport system plan;

Act.⁵⁰

The financing vehicle provided by the 1970 legislation to implement the new program was the Airport and Airway Trust Fund⁵¹ (trust fund), which was similar to the Highway Trust Fund⁵² already in existence. Congress designed the trust fund to tax users of the airport and airway system, creating a direct correlation between the use of the system and the amount of money contributed.⁵³ The trust fund was to last for a ten-year period that expired in July of 1980.⁵⁴

The money that Congress appropriated to the trust fund was collected from the taxation of fuel for noncommercial aviation,⁵⁵ air transportation,⁵⁶ shipping by air,⁵⁷ and aircraft in general.⁵⁸ The Secretary of the Treasury is responsible for holding the trust fund's assets, and is required annually to report to Congress on the fund's status.⁵⁹ The Secretary also possesses the authority to make investments from the trust fund,⁶⁰ and to credit the interest from such investments to the

(2) Federal Aid Airport Program (also called Airport and Airway Development Program);

(3) Apportionments;

(4) United States Share of Project Costs (Matching Funds);

(5) Project Sponsorship;

(6) Use of Government-owned lands.

⁵⁰ Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 (1970) (codified as amended at 49 U.S.C. § 1742 (1976)).

⁵¹ 49 U.S.C. § 1742 (1976).

⁵² 23 U.S.C. § 120 (1976). The Highway Trust Fund is financed by taxes collected on tires of the type used on highway vehicles; other tires and inner tubes; gasoline used in certain circumstances and "lubricating oil." The funds are used to improve the primary and secondary highway systems and the interstate highway system. *Id.*

⁵³ *Would You Believe a \$3.4 Billion Surplus in the Airport and Airway Trust Fund?*, NAT'L J., Jan. 5, 1980, at 16. In 1970 Congress established the trust fund to finance the expansion of the nation's aviation system, which had become overtaxed by a boom in air travel from introduction of wide-bodied jets. The idea was to shift the burden of paying for the system from the general taxpayer to those who benefited the most—the users of the system. *Id.*

⁵⁴ 49 U.S.C. § 1742(b), (f)(3) (1976).

⁵⁵ See *supra* notes 7, 8, 10 and accompanying text.

⁵⁶ See *supra* notes 5, 6 and accompanying text.

⁵⁷ See *supra* note 9 and accompanying text.

⁵⁸ See *supra* note 10 and accompanying text.

⁵⁹ 49 U.S.C. § 1742(e)(1) (1976).

⁶⁰ *Id.* § 1742 (e)(2)(A).

fund.⁶¹

The obligations of the Federal government pursuant to the 1970 Act included planning, research, development, construction, operation and maintenance of: (1) air traffic control;⁶² (2) air navigation;⁶³ (3) air communications;⁶⁴ and (4) airway system support services.⁶⁵ The federal government also handled the administrative expenses incurred by the Transportation Department⁶⁶ in carrying out these duties.⁶⁷ More specifically, the trust fund revenues were contributed to a variety of programs, of which the largest was the Airport Development Air Program (ADAP).⁶⁸ The ADAP was designed to fund safety and capacity development at public air carrier⁶⁹ and general aviation airports.⁷⁰ Other funded programs include: (1) the Facilities and Equipment Program (F & E),⁷¹ which helped to cover the cost of air navigation facilities, airport and enroute traffic control facilities, and flight service station facilities; (2) the Research, Engineering and Development Program (R & E);⁷² and (3) the Operations and Maintenance Program,⁷³ which provided funds for maintaining the facilities developed under the F & E program. Unallocated revenues in

⁶¹ *Id.* § 1742 (e)(2)(C).

⁶² 49 U.S.C. § 1742(f)(1)(B)(i) (1976).

⁶³ *Id.* § 1742(f)(1)(B)(ii).

⁶⁴ *Id.* § 1742(f)(1)(B)(iii).

⁶⁵ *Id.* § 1742(f)(1)(B)(iv).

⁶⁶ *Id.* § 1742(f)(1)(C).

⁶⁷ See generally *Congress Passes Airport and Airway Development Act, 1970* CONG. Q. ALMANAC 168-69; *Pay Now, Fly Later: Head Taxes - A New Phenomenon in Airport Financing*, 58 CORNELL L. REV. 759-61 (1973).

⁶⁸ Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 14, 84 Stat. 219, 224 (1970) (current version at 49 U.S.C. § 1714 (1976)). This section of the Airport and Airway Development Program states:

(a) In order to bring about, in conformity with the national airport system plan, the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics, the Secretary is authorized to make grants for airports in aggregate amounts.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* § 14(c). Terminology for this section is now called F & E; originally it was termed only "facilities."

⁷² *Id.*

⁷³ *Id.*

the trust fund were used for administrative, operating and research expenses.⁷⁴

The Secretary of Transportation was to divide the funds for airline and "reliever" airports⁷⁵ into three parts, and to distribute each part among the states in accordance with one of the three sets of corresponding criteria. Each state was to receive a certain portion of each one-third share, in accordance with its population, the number of passengers enplaned at each airport, and the discretion of the Secretary.⁷⁶ The United States was to bear not more than fifty percent of the cost of an approved airport development project.⁷⁷ When the costs related to navigational aids such as approach lighting, however, the share could be raised to eighty-two percent.⁷⁸ To qualify for the funding, the airport projects had to obtain federal certification to insure that they met the minimum standards.⁷⁹

The surplus in the trust fund grew because the sum of Congressional appropriations was seldom as large as the amount

⁷⁴ *Id.*

⁷⁵ 49 U.S.C. § 1711(16) (1976). A "reliever airport" is a general aviation airport designated by the Secretary as having the primary function of relieving congestion at an air carrier airport by diverting from such airport general aviation traffic. *Id.*

⁷⁶ Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 15, 84 Stat. 219, 225-26 (1970) (current version at 49 U.S.C. § 1715 (1976)).

⁷⁷ *Id.* § 17(a).

⁷⁸ *Id.* § 17(d).

⁷⁹ *Id.* § 18. The standards include:

- (1) airport will be available for public use on fair and reasonable terms without unjust discrimination;
- (2) airport will be operated and maintained with due regard to climatic and flood conditions;
- (3) approaches will be marked and free from hazards;
- (4) zoning action will be taken to restrict activity on land adjacent to or in the vicinity of the airport;
- (5) airport will be available for use by government aircraft;
- (6) airport will contribute to and maintain for the government air traffic control;
- (7) airport will use standardized recordkeeping procedures;
- (8) airport will operate revenue generating structures and facilities in order to keep the airport as self-sustaining as possible;
- (9) airport will submit annual operation and financial reports to the Secretary; and
- (10) airport will keep all records available for inspection.

Id.

of money placed in the airport development portion of the ADAP fund.⁸⁰ An analysis of the Act and its chronological impact on the aviation industry reveals that the current surplus in the trust fund⁸¹ began to build immediately after 1970. The Act established annual minimum expenditure levels of \$280 million for airport improvements and \$250 million for airway equipment. If any portion of the authorized money was left over, the government could use it to cover the airway system's operating costs.⁸² The Nixon Administration requested only \$170 million for airports⁸³ but tried to spend \$200 million for FAA expenses.⁸⁴ In the airway equipment category, virtually the same picture was presented.⁸⁵

Congress reacted to this abuse by the Nixon administration⁸⁶ in the passage of legislation in the 1971 Act,⁸⁷ which further clarified Congress' intent that the trust fund money be used for airport improvements.⁸⁸ The law specified that all user tax funds were to be expended for research and development activities to improve the air traffic control system, and for capital investment in aviation facilities.⁸⁹ The Secretary of Transportation then began to direct the spending from the fund toward new runways and improvements in taxiways and aircraft parking areas.⁹⁰

⁸⁰ *Would You Believe a \$3.4 Billion Surplus In the Airport and Airway Trust Fund?*, NAT'L J., Jan. 5, 1980, at 18.

⁸¹ See *supra* note 10 and accompanying text.

⁸² *Would You Believe a \$3.4 Billion Surplus in the Airport and Airway Trust Fund?*, NAT'L J., Jan. 5, 1980, at 18.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* The authorized minimum was \$250 million. There was a Presidential request of \$226 million and a final appropriation of \$238 million. *Id.* at 19. See generally, *Trusting the Trust Fund*, AV. WEEK & SPACE TECH., Oct. 22, 1979, at 9. (President Nixon made the first raid on the aviation trust fund).

⁸⁶ See *supra* notes 80-85. Nixon also tried to spend more than \$200 million of the trust fund revenues on the Federal Aviation Administration operating expenses. This action appeared to be in violation of the Congressional intent that the trust fund first should be used for capital improvements rather than on FAA expenses.

⁸⁷ 1973 U.S. CODE CONG. & AD. NEWS 1438.

⁸⁸ See *supra* note 62 and accompanying text.

⁸⁹ 1973 U.S. CODE CONG. & AD. NEWS 1438.

⁹⁰ *Id.*

Under the fifty-fifty matching programs,⁹¹ in which the government paid fifty percent of the cost of approved airport development projects, the larger airports were beginning to show a profit. The House Committee, however, decided that the ADAP program would be much more responsive to the needs of the smaller community airport if it changed the government portion of the funding from fifty percent to seventy-five percent.⁹² The House Committee's proposal created a need for new legislation to cover the increase in federal spending. Congress therefore passed the Airport Development Acceleration Act of 1973. The Airport Development Acceleration Act of 1973⁹³ further amended the 1970 Act by increasing the trust fund's annual authorization levels for the fiscal years of 1974-75.⁹⁴ Congress' designation of the trust fund as the source of capital for the government's airport improvement expenditures made new taxation or the expenditure of general funds unnecessary to offset the increase in federal assistance. Even with the 1973 Act's increased authorization levels, trust fund surpluses were predicted for future years.⁹⁵ The Supreme Court decided in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*,⁹⁶ and its companion case, *Northeast Airlines, Inc. v. New Hampshire Aeronautics Commission*,⁹⁷ to uphold passenger head taxes. Both the city of Evansville, Indiana and the state of New Hampshire levied these taxes for "aviation related" purposes.⁹⁸ The city of Evansville imposed a use and service charge of one dollar on each commercial passenger enplaning at Evansville's Dress Memorial Airport.⁹⁹ The state of New Hampshire charged one

⁹¹ 1973 U.S. CODE CONG. & AD. NEWS 1438, 1440. (The Committee concluded that the fifty percent ADAP formula was adequate in assisting with the airport development needs at the nation's twenty-two largest airports.)

⁹² *Id.* at 1440-41.

⁹³ Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, 84 Stat. 220 (1973).

⁹⁴ 1973 U.S. CODE CONG. & AD. NEWS 1438, 1442.

⁹⁵ *Id.* at 1441.

⁹⁶ 405 U.S. 707 (1972).

⁹⁷ *Id.*

⁹⁸ *Id.* at 709.

⁹⁹ *Id.*

dollar for each passenger on a scheduled commercial airliner, with a gross weight of over 12,500 pounds, departing from New Hampshire airports, and fifty cents for each passenger on a scheduled commercial airliner weighing less than 12,500 pounds.¹⁰⁰ The money collected at Evansville was specified for use in maintenance and improvements at the airport,¹⁰¹ while the New Hampshire funds were divided between the state aeronautical fund and the state airport authority.¹⁰² The Court held that the head tax was a valid exercise of the state's power to tax,¹⁰³ and that states and cities could impose a reasonable charge on interstate and intrastate air passengers to help offset airport operation and development costs.¹⁰⁴

In 1973 Congress thought that the head tax caused "confusion, delay, anger and resentment from the passengers paying the tax."¹⁰⁵ Even though the *Evansville* Court ruled that the tax did not infringe on an individual's right to travel,¹⁰⁶ the Senate Committee found that the tax "cut against the grain of the traditional right to travel among the States . . . and ran afoul of the concept of uniformity underlying the Airport and Airway Development Act of 1970."¹⁰⁷ Thus, the Act of 1973 also added a new section to the Federal Aviation Act of 1958, prohibiting any government agency from levying any tax, fee,

¹⁰⁰ *Id.* at 710.

¹⁰¹ *Id.* at 709. The money collected was to be used "for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof." *Id.* See Comment, *Pay Now, Fly Later: Head Taxes — A New Phenomenon in Airport Financing*, 58 CORNELL L. REV. 759, 763 n.29 (1973).

¹⁰² 405 U.S. 707, 710 (1972). See Comment, *Pay Now, Fly Later: Head Taxes — A New Phenomenon in Airport Financing*, 58 CORNELL L. REV. 759, 763 n.29 (1973).

¹⁰³ 405 U.S. at 709, 720-21. The Court cites to the Airport and Airway Development Act of 1970 to substantiate its holding; specifically, it refers to the prerequisite to approval of airport funding that the airport will try to remain self-sustaining. See *supra* note 79.

¹⁰⁴ 405 U.S. at 707.

¹⁰⁵ 1973 U.S. CODE CONG. & AD. NEWS 1438, 1446. The head tax had already gone from a fifty cents charge for an air commuter passenger in New Hampshire to a four dollar charge for a Philadelphia round trip.

¹⁰⁶ *Evansville-Vanderburg Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 714 (1973) (the Court asserted that publicly provided facilities assist rather than obstruct interstate travel). See U.S. CODE CONG. & AD. NEWS 1438, 1446.

¹⁰⁷ 1973 U.S. CODE CONG. & AD. NEWS 1438, 1450.

head charge or other charge, directly or indirectly, on air transportation passengers.¹⁰⁸ The legislation, however, allowed states and state agencies to continue collection of rental charges, landing fees, and other service charges for use of airport facilities.¹⁰⁹

The next major development in airport financing occurred in 1976 when President Ford signed into law legislation authorizing federal spending for airport aid¹¹⁰ over the fiscal period of 1976-80.¹¹¹ Prior to the passage of the legislation, there was much discussion in Congress, particularly in the Senate, over the swelling surplus in the trust fund.¹¹² Senator Howard Cannon of Nevada, Chairman of the Senate Commerce Committee Subcommittee on Aviation, claimed that there was a billion dollar surplus in the fund in 1976,¹¹³ which could be used for this purpose.

To put these surplus funds to use, Congress adopted the Buckley Amendment to the 1976 legislation, which provided that the trust fund surplus would be used to pay for FAA expenses.¹¹⁴ The amendment conditioned the spending of these funds upon the completion of all other airport capital projects that were authorized by Congress and for which Congress had appropriated trust fund money.¹¹⁵ Senator Cannon, however, characterized Senator Buckley's proposal to use uncommitted fund surpluses for the costs of operating and maintaining air

¹⁰⁸ Airport and Airway Development Acceleration Act of 1973, Pub. L. No. 94-44 § 1113(a), 87 Stat. 88 (1973).

¹⁰⁹ *Id.* § 1113(b).

¹¹⁰ Airport and Airway Development Act Amendments, Pub. L. No. 94-353, 90 Stat. 871 (1976).

¹¹¹ *Id.*

¹¹² *Federal Airport Development Act Reactivated*, 1976 CONG. Q. ALMANAC, 648.

¹¹³ *Id.* The bill proposed a funding level of \$540 million for airport development in 1976. Cannon criticized the Administration's funding proposal of \$350 million, the same level recommended in fiscal 1975, as a step backward because inflation had taken up the slack and airports proportionately would not be getting any more money.

¹¹⁴ Airport and Airway Development Act Amendments, Pub. L. No. 94-353, title II, § 201(d), 90 Stat. 871 (1976). See *Federal Airport Development Act Reactivated*, 1976 CONG. Q. ALMANAC, 648 (by a vote of 46-32 in the Senate). Cannon contended that the action would be a breach of faith with aviation users who were being taxed for investment needs. *Id.*

¹¹⁵ *Id.*

navigation control systems, an FAA expense that previously was paid by the taxpayer through general revenues, as "an attempt to raid the trust fund."¹¹⁶

Furthermore, the 1976 legislation increased the federal share of matching grants for the larger airports from fifty percent to seventy-five percent, and the federal share of matching grants for all other airports from seventy-five percent to ninety percent through fiscal 1978, and to eighty percent in 1979.¹¹⁷ The shift in matching grants was an attempt to channel more aid to the smaller airports, particularly to those airports in cities for which commuter airlines were the only service to the area.¹¹⁸ To assure the sponsors of such airports that they would receive additional funding, the legislation created a new class of airports — commuter service airports.¹¹⁹

II. THE 1979 PROPOSALS

A. *The Senate Proposal*

The Senate Committee on Commerce, Science and Transportation proposed a bill advocating a change in the funding of airport construction and development. Senate Bill 1648

¹¹⁶ *Id.*

¹¹⁷ Airport and Airway Development Act Amendments, Pub. L. No. 94-353 § 9, 90 Stat. 871 (1973).

¹¹⁸ *Id.* § 3(6). ("Commuter service airports" are airports that are not serviced by air carriers and that enplaned at least 2,500 passengers.)

Originally there were two categories for funding purposes: (1) air carrier airports defined as all airports regularly serving federally certified airlines, and (2) general aviation airports, defined as all other airports, including reliever airports. Commuter service airports were included in the general aviation airport category before the 1976 amendments. After the 1976 legislation, commuter airports were included under the air carrier airport category, which allowed them a greater percentage of funds for development than they had received when sharing with general aviation airports.

For air carrier airports, the bill authorized development grants of \$435 million for fiscal 1976 and the budget transition period, July-September 1976; \$440 million for fiscal 1977; \$465 million for fiscal 1978; \$495 million for fiscal 1979; and \$525 million for fiscal 1980.

The bill authorized for general aviation airport development grants of \$65 million for fiscal 1976 and the transition period; \$70 million for fiscal 1977; \$75 million for fiscal 1978; \$80 million for fiscal 1979; and \$85 million for fiscal 1980.

For the first time, trust fund monies authorized the acquisition, improvement and maintenance of air navigation facilities. *Id.*

¹¹⁹ S. 1648, 96th Cong., 1st Sess., 126 CONG. REC. S944-52 (daily ed. Feb. 5, 1980); See *supra* notes 16-19.

(ADAP Bill)¹²⁰ and its companion, Senate Bill 1649¹²¹ are from the Senate Finance Committee.¹²² These bills would extend the trust fund to 1985.¹²³

Senate Bill 1648 merits more discussion than Senate Bill 1649, because it proposes more changes to the 1970 Act. The first concept of the proposed legislation is the disqualification of large and medium hub airports (in 1981 those airports enplaning more than 700,000 passengers annually)¹²⁴ from eligibility for the ADAP funding program. The second deviation by the Senate from the past legislation is a reduction of the airline ticket tax from eight percent of each fare to two percent.¹²⁵ The Senate Committee argues that this tax reduction represents a reduction in passenger air fares throughout the United States of five billion dollars over the next five years.¹²⁶ Consequently, with a reduced ticket fare, the bill's proponents believe that passengers will be able to pay an increased user fee directly to the large and medium hub airports.¹²⁷ Essentially, the bill's sponsors are trying to eliminate the Government as a "middleman."¹²⁸ In addition, both of the legislation's concepts represent the Senate's aim to "defederalize"

¹²⁰ See S. REP. No. 415, 96th Cong., 1st Sess. 6 (1979).

¹²¹ S. REP. No. 415, 96th Cong., 1st Sess. 1 (1979).

¹²² *Id.*

¹²³ *Id.* at 7.

¹²⁴ *Id.* at 2, 12. The large and medium hub airports are professionally staffed, self-sufficient revenue generators where ADAP funding does nothing for the airport but reduce the cost to the users. *Id.* See *Senate Votes to End Aid at 72 Airports and Study Facility Charge*, AV. WEEK & SPACE TECH., March 24, 1980, at 30-31. The Senate defeated by a 31-58 vote an amendment by Sen. Sasser that would have made withdrawal from the federal program voluntary for the seventy-two airports, a measure that would have defeated the purpose of the bill. S. REP. No. 415, 96th Cong., 1st Sess. 1 (1979). See *Grants to Largest Airports Not Necessary, Bond Says*, AV. WEEK & SPACE TECH., Sept. 17, 1979, at 28. Langhorne Bond, past Federal Aviation Administrator, stated to a Senate Committee that he believed the nation's largest airports could survive economically without a federal program. *Id.*

¹²⁵ S. REP. No. 415, 96th Cong., 1st Sess. 1 (1979).

¹²⁶ *Id.* The Senate Committee claims that the "over" ticket tax percentage represents a six percent reduction of airline fares throughout the United States.

¹²⁷ *Id.* See *infra* text accompanying notes 271-99 for a discussion on the Senate's proposals for implementation of user fees.

¹²⁸ S. REP. No. 415, 96th Cong., 1st Sess. 2 (1979). Any airport that accepts government funds is burdened with a mountain of red tape, bureaucratic requirements, and federal government meddling. *Id.*

industries and public agencies related to transportation so that airports can operate without interference from Washington.¹²⁹ The Senate bill authorizes \$1.665 billion for fiscal 1981 for airport development and planning,¹³⁰ the acquisition of facilities and equipment,¹³¹ and select FAA and airway system costs.¹³² The bill provides for a reduced spending level in 1982, an increase in spending in 1983, and a steady increase in spending from 1983 to 1985 to cover the airport development and planning costs.¹³³

To help guarantee funds for smaller airports, S. 1648 has a new feature called the "super discretionary fund."¹³⁴ The bill's proponents argue that in the past, the smaller airports were guaranteed smaller amounts of money, but actually needed more substantial amounts because they were engaging in development or rebuilding projects. To combat this past discrepancy, the bill attempts to combine general aviation airports,¹³⁵ reliever airports,¹³⁶ commuter airports,¹³⁷ and small air carrier airports¹³⁸ into one category, which is eligible for the discretionary fund.¹³⁹ Under the terms of the bill, funds are to be

¹²⁹ *Id.* at 12-13.

¹³⁰ *Id.* at 15.

¹³¹ *Id.*

¹³² *Bill Ending Federal Aid For Some Airport Plans Is Approved by Senate*, CONG. Q., Feb. 9, 1980, at 371.

¹³³ *Id.*

¹³⁴ S. REP. NO. 415, 96th Cong., 1st Sess. 3 (1979).

¹³⁵ *Id.* at 37. "General aviation airport" means a public airport which is not an air carrier airport. *Id.*

¹³⁶ *Id.* at 37. "Reliever airport" means a general aviation airport designated by the Secretary as having the primary function of relieving congestion at an air carrier airport by diverting from such airport general aviation traffic. *Id.*

¹³⁷ *Id.* "Commuter service airport" means an air carrier airport which is not served by an air carrier certificated under section 401 of the Federal Aviation Act of 1958 and which is regularly served by one or more air carriers operating under exemption granted by the Civil Aeronautics Board from 401(a) of the Federal Aviation Act of 1958, at which not less than two thousand five hundred passengers were enplaned in the aggregate by all such air carriers from such airport during the preceding calendar year. *Id.*

¹³⁸ *Id.* at 35-36. "Air carrier airport" means an existing public airport regularly served, or a new public airport which the Secretary determines will be regularly served, by an air carrier certificated by the Civil Aeronautics Board under section 401 of the Federal Aviation Act of 1958. *Id.*

¹³⁹ *Id.* at 9. Under the 1970 Act, the discretionary fund was divided between two categories: air carrier and general aviation.

allocated by the FAA on a priority basis in order to meet the needs of the airports.¹⁴⁰ For the first time, funds are to be provided for privately owned "reliever airports" if they serve a public purpose.¹⁴¹ Five-year minimum funding guarantees would go to reliever, general and small air carrier airports.¹⁴²

Another item in the proposed legislation is a change from the seven cent per gallon fuel tax to a fuel tax of six percent of the price per gallon.¹⁴³ The Committee's intent in offering this alternative to the status quo was to spend the money collected in the trust fund, because it had not been used for the fund's original purpose of financing airport and airway improvements. In five years, under the Senate proposal, the surplus in the fund would be eliminated.¹⁴⁴

Senator Cannon summarized the Senate proposal as follows:

Such a local collection and expenditure of funds will eliminate the cost of the middle man [the federal government], reduce the red tape for airport development and speed up the implementation of needed capital improvements [at the airport]. The negotiation process between airlines and airports would continue as a responsible balance to the proprietors' development desires, and legal assurances would be added that revenues collected at the airport would be utilized for the airport's development, not sent downtown for sewer system improvements. If the federal government is not willing to spend the user taxes it collected on system improvements because of total federal budget implications, then local collection and expenditure will be the more effective means of reaching our capital

¹⁴⁰ *Id.* at 9-10.

¹⁴¹ *Id.* at 22-23, 25. The definition of reliever airport under S. 1648 is broader than that proposed in previous legislation, because it expands the concept of reliever airport to include the rerouting of other than general aviation traffic from a primary airport. See *supra* note 118 and accompanying text.

¹⁴² S. REP. NO. 415, 96th Cong., 1st Sess. 25-27 (1979).

¹⁴³ *Proposed Amendments to the Airport and Airways Development Act of 1970: Hearings on S. 1581 and S. 1648 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transp.*, 96th Cong., 1st Sess. 236-37 (1979) [hereinafter cited as *Senate Hearings on S. 1648*]; *Bill Would Alter Airport Funding Method*; AV. WEEK & SPACE TECH., Sept. 3, 1979 at 40.

¹⁴⁴ See S. 1648, 96th Cong., 1st Sess., 126 CONG. REC. S940-41 (daily ed. Feb. 5, 1980).

improvement goals at lower administrative costs.¹⁴⁵

As of mid-February, 1981, the Airport and Airway Development Act of 1978 still had an uncertain future because no new legislation was enacted before the Act lapsed in October of 1980. The lapse in legislation caused the eight percent ticket tax to decrease to five percent.¹⁴⁶ The tax now goes to the General Treasury rather than the Airport and Airway Trust Fund.¹⁴⁷ The gap in legislation is also expected to delay construction and to create work stoppages on some projects already commenced.¹⁴⁸

Senate Bill 1648 passed the Senate on February 5, 1980.¹⁴⁹ It provided for the elimination of seventy-two large and medium-sized airports from federal funding. Its companion, S. 1649, which would have reduced passenger ticket tax from eight percent to two percent, did not reach the Senate floor.¹⁵⁰

¹⁴⁵ *Bill Would Alter Airport Funding*, AV. WEEK & SPACE TECH., Sept. 3, 1979 at 40.

¹⁴⁶ 26 U.S.C. §§ 4261, 4271 (1976). See *Airway Fund Suspended by Lack of New Law*, CONG. Q., Oct. 4, 1980 at 2908. See also *supra* notes 5, 56.

¹⁴⁷ Telephone interview with David Lawhead, Federal Aviation Administration, Department Director of Office of Airport Planning and Program with the FAA (Jan. 7, 1981). (Most taxes collected for the trust fund are now going into the General Treasury, though the fuel tax is going to the Highway Trust Fund.) Lawhead remarked that the FAA wants this sorted out because they want the money collected to be returned to the Airport and Airway Trust Fund or be placed in the General Treasury instead of the Highway Trust Fund. Lawhead estimated that the Highway Trust Fund is receiving revenues close to \$17 million from the fuel tax. He also stated that several other taxes which previously have fed the Aviation Trust Fund have expired. He mentioned that those taxes included the three dollar international departure tax, the aircraft use tax and the levy on non-gasoline aviation fuels. The seven cents per gallon fuel tax for general aviation fuel was also dropped to four cents and this money has been reverted to the Highway Trust Fund according to Mr. Lawhead. *Id.* See also *Airway Fund Suspended by Lack of New Law*, CONG. Q., Oct. 4, 1980, at 2908. But see *Downward Trend in Highway Trust Fund*, CONG. Q., Feb. 2, 1980, at 276.

¹⁴⁸ *Airport Fund Delay Draws Opposition*, AV. WEEK & SPACE TECH., Aug. 18, 1980, at 36. The problem exists at St. Louis International Airport where developers have entered into the third phase of the entire airfield construction and are waiting for about \$13.5 million of ADAP money. Leonard L. Griggs, Director of Airports at St. Louis International said, "The thing I hope for is some sort of legislation or legalistic language [from Congress] that would allow us to start the project and not jeopardize the awarding of the federal grant, and I [would have to] eat the money out of my hide until it's reimbursed by the Feds." *Id.*

¹⁴⁹ [1979-1980] CONG. INDEX (CCH), 20,510.

¹⁵⁰ *The Year in Congress*, CONG. Q., Dec. 6, 1980, at 3507.

When the tax provisions of S. 1649 stalled in committee, the Senate Democratic majority refused to take up another measure extending the eight percent ticket tax, because they were afraid that the Republicans would try to attach general tax cuts for individuals and businessmen to the bill.¹⁵¹ Senate Bill 1648 was passed with the understanding, however, that the tax would be cut to two percent.¹⁵² The drafters of the bills planned to allow airlines to increase their fares, and to allow airports to negotiate with the airlines for increased user fees to pay for development projects funded in the past by the trust fund.¹⁵³

B. *The House Proposal*

Unlike the Senate proposal, the House proposal differs little from the 1970 Act. Focusing on the increased use of the airport systems predicted for the near future, the House proposal concentrates on an increase in ADAP funding levels for fiscal 1981, more specifically, the House proposes to increase the funding to \$875 million for facilities and equipment, \$150 million for noise abatement, \$85 million for research, engineering and development, and \$850 million for operation and maintenance.¹⁵⁴ The program provides for a seven percent annual increase in funding, available through 1985,¹⁵⁵ with the exception of the research and development program, which would be reviewed annually before increasing funding.¹⁵⁶

The House Committee calculated that the bill's total funding authorization for 1981 was at \$2.48 billion compared to \$1.3 billion under the 1970 Act.¹⁵⁷ The recommended 1981

¹⁵¹ *Airway Fund Suspended by Lack of New Law*, CONG. Q., Oct. 4, 1980, at 2908.

¹⁵² *Id.*

¹⁵³ *Id.* See *infra* text accompanying notes 185-204.

¹⁵⁴ *Proposed Amendments to the Airport and Airway Development Act of 1970: Hearings on H.R. 6721 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transp.*, 96th Cong., 2d Sess. 3-63 (1980) [hereinafter cited as *House Hearings on H.R. 6721*].

¹⁵⁵ *Id.* at 14-17.

¹⁵⁶ H.R. 6721, 96th Cong., 2d Sess., 126 CONG. REC. E1109 (daily ed. March 6, 1980).

¹⁵⁷ *Id.* See *supra* notes 5-9, 97-104 and accompanying text for discussion regarding existing user charges under the 1970 Act.

funding levels were within the means of the system and could be funded from the existing levels of user charges.¹⁵⁸ Under the House bill the funding levels and existing taxes would deplete the trust fund to a surplus of \$2.4 billion by the end of fiscal 1985.¹⁵⁹

Although, the House bill is similar to the 1970 Act, it does contain several differences. Under the House proposal, airports receiving scheduled service would be treated identically for funding purposes, regardless of whether the airport is serviced by certified airlines or commuter carriers.¹⁶⁰ Privately-owned reliever and commuter airports would be eligible for funding if the airport agrees to serve as a public-use airport for at least ten years.¹⁶¹ The House proposal also suggests a discretionary fund for all airports to be used in airport planning and development, instead of the current system of separate discretionary funds for air carrier and general aviation airports.¹⁶²

The House proposes that ADAP authorization be subject to three apportionment levels, with the surplus going to the discretionary fund.¹⁶³ The first level of apportionment would not significantly change existing law. The sponsor of an airport eligible for ADAP funds could allocate funds on the basis of local priorities.¹⁶⁴ The second level of apportionment for a primary hub area¹⁶⁵ is based on a new concept. In order to qualify for funding, all commercial and reliever airports in the primary hub area are to agree to plan for airport develop-

¹⁵⁸ 126 CONG. REC. E1109 (daily ed. March 6, 1980).

¹⁵⁹ H.R. REP. NO. 887, Part II, 96th Cong., 2d Sess. 5 (1980).

¹⁶⁰ 126 CONG. REC. E1109 (daily ed. March 6, 1980).

¹⁶¹ *Id.* at E1110.

¹⁶² H.R. 6721, 96th Cong., 2d Sess., § 6(a)(4) (1980); *See supra* note 76 and accompanying text.

¹⁶³ 126 CONG. REC. E1110 (daily ed. March 6, 1980).

¹⁶⁴ *Id.* Under H.R. 6721 airports enplaning more than 0.01 percent of total enplanements—about 315 airports—are entitled to a funding level determined by a per passenger formula with a \$200,000 minimum—raised from the \$150,000 figure in existing law—and a \$12.5 million maximum—raised from the \$10 million figure in existing law. *Id.*

¹⁶⁵ *Id.* Primary hubs are areas that have twenty-five percent of total commercial enplanements. *Id.* *See House Panel Votes Airport Airway Act*, AV. WEEK & SPACE TECH., May 5, 1980, at 34. (In the United States there are sixty-two such airports).

ment.¹⁶⁶ As agreements are reached, an eligible hub is to receive fifty cents per passenger with revenues received totaling between a minimum of approximately \$700,000 and a maximum of \$5 million.¹⁶⁷ The third level of apportionment is to go to states that have general aviation airports and commercial service airports having less than .01 percent of total enplanements.¹⁶⁸

States receive funding based on geographical area and population.¹⁶⁹ The apportionment figure for all states cumulatively would total \$85 million.¹⁷⁰ Finally, the discretionary fund would have a funding level of \$289 million after disbursements had been made to the three aforementioned apportionment categories.¹⁷¹ Discretionary funds would go to reliever airports or public use airports with annual enplanements of 2,500 passengers.¹⁷²

Another provision of the House Bill includes funds that would be spent on reliever heliports during the five year program.¹⁷³ Heliports have always been eligible for ADAP funding, but have never received much money.¹⁷⁴ The House Committee believed that helicopter operators should share in the benefits of the trust fund because they also contribute to the funds by paying the aviation fuel tax.¹⁷⁵

¹⁶⁶ 126 CONG. REC. E1110 (daily ed. March 6, 1980).

¹⁶⁷ *Id.* See *House Panel Votes Airport, Airway Act*, AV. WEEK & SPACE TECH., May 5, 1980, at 34.

¹⁶⁸ 126 CONG. REC. E1110 (daily ed. March 6, 1980). These airports did not get funding under the 1970 Act. *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² AV. WEEK & SPACE TECH., May 5, 1980, at 34.

¹⁷³ H.R. REP. NO. 887, Part II, 96th Cong., 2d Sess. 10 (1980). (The bill provides for at least \$10 million of discretionary and apportioned funds for heliports.).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* See *House Hearings on H.R. 6721*, *supra* note 154, at 504. (statement of Carl D. Perry, Executive Vice President, Hughes Helicopters.)

The helicopter industry has achieved an accelerated rate of growth. It is now delivering about 1,000 new helicopters each year, and we project 2,000 aircraft produced annually by 1990, at an industry gross revenue over \$3 billion. Currently, the commercial helicopter fleet numbers over 7,000 vehicles and is expected to reach over 20,000 by the end of 1990. This, in our opinion, is significant growth.

Helicopter operations in the United States will be over 1.5 million

The last major difference between the House proposal and the existing law is in the eligibility for ADAP funds on ground access projects for off-airport property.¹⁷⁶ An amendment to the House bill, offered by Representative Geraldine Ferraro, would enable the states to use ADAP funds for airport access projects. Representative Ferraro estimated that New York alone needed \$25 million for cloverleaf intersections to facilitate public access to the airport property.¹⁷⁷

The House relied on a 1978 FAA and Department of Transportation study¹⁷⁸ which indicated that ground access difficulties caused excessive delays to travellers at thirteen out of the sixteen airports investigated.¹⁷⁹ Formerly, ADAP money was available only for projects on airport property, with the exception of those projects provided for in the 1976 amendment, including the purchase of land near an airport for noise abatement and off-airport development work to remove flight safety hazards.¹⁸⁰ The House Committee conditioned adoption of the Ferraro amendment on a preference for expenditures on safety developments over ground access projects.¹⁸¹ The House bill 6721 failed to reach the floor before the October, 1979 recess.¹⁸² Even if it had reached the floor, House members doubted that it could have passed, along with the the

flight-hours in 1980. This represents over 6 million landings and take-offs which will result in more than 10-million person-trips.

In its 34-year history, the helicopter industry has made significant contributions to U.S. commerce. Helicopters and the industry are vitally involved in energy and resource developments in the United States and throughout the world. Helicopters are operating daily in urban areas, remote areas, and offshore. As an example of commercial helicopter operational maturity, one operator is logging close to 30,000 flight-hours per month and carrying close to 130,000 passengers each month. This is greater than the busiest commuter airline in the United States.

¹⁷⁶ H.R. REP. NO. 887, Part II, 96th Cong., 2d Sess., 67 (1980).

¹⁷⁷ See *House Panel Votes Airport Airway Act*, AV. WEEK & SPACE TECH., May 5, 1980, at 34.

¹⁷⁸ H.R. REP. NO. 887, Part II, 96th Cong., 2d Sess., 11 (1980).

¹⁷⁹ *Id.*

¹⁸⁰ Airport and Airway Development Act Amendment, Pub. L. No. 353, § 3(a)(1), 90 Stat. 871 (codified at 49 U.S.C. § 1711(3) (1976)).

¹⁸¹ *Id.*

¹⁸² *Airway Fund Suspended by Lack of New Law*, CONG. Q., Oct. 4, 1980, at 2908.

Senate bill, in the short time before the October 1st deadline.¹⁸³

III. IMPLICATION OF SENATE AND HOUSE PROPOSALS OF THE NINETY-SIXTH CONGRESS

Senate Bill 1648 has drawn attention from the larger airports which in the past relied on ADAP funds for airport development. These airports presently contribute far more to the fund than they received through the program.¹⁸⁴ The elimination of funding to the seventy-two primary hub airports may pose financial problems for airlines, because the airports are unlikely to make up for the lost funds by renegotiating airline user fee contracts.¹⁸⁵ Along these lines, Delta Airlines threatened to reduce scheduled flights to Lexington, Kentucky, if the local airport board authorized a contemplated 300 percent increase in landing fees.¹⁸⁶

A similar situation occurred in Tampa, Florida, when the Director of Aviation for Hillsborough County Airport pro-

¹⁸³ *Id.*

¹⁸⁴ S. 1648, 96th Cong., 2d Sess., 126 CONG. REC. S 934 (daily ed. Feb. 5, 1980). In Los Angeles, passengers pay into the trust fund \$80 million per year and get back \$10 million in ADAP and \$39 million in benefit allocation of the other three programs. In Albuquerque, New Mexico, the airport received \$7.35 million in the years 1971 through 1979, but contributed \$61.33 million. In Phoenix, Arizona, the dollar return per six dollars recovered on the average passengers was ninety-seven cents; in Atlanta, fifty-eight cents per six dollars; in Indiana one dollar sixty-six cents per six dollars. A similar picture is painted at the airports in Louisville and Minneapolis. See *Airports and the Trust Fund*, AV. WEEK & SPACE TECH., Nov. 19, 1979, at 11. Two Louisville airports have generated more than \$20.5 million during the first five years of the trust fund program. To date, they have received less than \$8 million back in total ADAP funds for airport improvements, thus Louisville community and aviation users have received less than forty percent of their user tax dollars in return.

¹⁸⁵ *Airport Operators Seeking Cannon's Bill Modifications*, AV. WEEK & SPACE TECH., Dec. 3, 1979, at 36. (The lost funds would be replaced through increased landing and space rental fees to be negotiated directly by the airports and airlines.). But see 126 CONG. REC. S931 (daily ed. Feb. 5, 1980). Senator Boren of Oklahoma testified: "Many of these 72 airports operate under long-term contracts to [sic] air carriers that do not allow renegotiation, or they may contain clauses that require a majority of the air carriers serving that airport to agree on capital needs projects or safety projects for that airport." *Id.*

¹⁸⁶ *Airport Operators Seeking Cannon Bill Modifications*, AV. WEEK & SPACE TECH., Dec. 3, 1979, at 36. (Donald Reilley, Airport Operator's Council International (AOCI) Vice President said that airports are ready and willing to incorporate assurances into the legislation that the money collected will be used appropriately.).

posed rewriting user fee contracts in light of the adoption of the Senate proposal.¹⁸⁷ His reasoning was basically that fewer flights coming to an airport decrease the flow of revenue to the airport. Although the airlines claimed to be cooperative, the director at Tampa determined that the airport would be the captive of the airlines because the airlines would, in essence, control the funds.¹⁸⁸ The director mentioned an added problem, that the Tampa airport would be in competition with all other airports for development funds from the airlines.¹⁸⁹ He feared the possibility of all of the funds being spent at one airport, delaying development at the remaining airports for years.¹⁹⁰

Another area of dispute between the proponents of the Senate bill and those opposing it is whether the larger airports would be self-sufficient once federal funds are gone.¹⁹¹ The Airline Deregulation Act of 1978¹⁹² impacts upon this issue because airlines now formulate their routes on a year-to-year basis, instead of considering the long range interests of the various airports.¹⁹³ Under deregulation, an airline is freer to

¹⁸⁷ *Id.*

¹⁸⁸ See *Senate Hearings on S. 1648*, *supra* note 143, at 172-73 (statement by Paul Ignatius, President, Air Transport Association of America).

¹⁸⁹ *Id.* (Paul Ignatius is fearful that the airlines will budget all money for Atlanta one year, delaying projects at Tampa for several years.).

¹⁹⁰ *Id.* See *Bill Ending Federal Aid for Some Airport Plans is Approved by Senate*, CONG. Q., Feb. 9, 1980, at 370. (The most threatening aspect of the legislation according to Senator Jim Sasser of Tennessee is that the airlines would determine where improvements would be made because they would control the purse strings.).

¹⁹¹ *Senate Hearings on S. 1648*, *supra* note 143, at 141. (statement by Langhorne Bond, past Administrator of the Federal Aviation Administration). Bond admitted that the twenty-five largest airports enplaning annually over one percent of total national enplanements really do not require federal aid for airport programs to survive. He conceded that those airports which exceed about one-half of one-percent of total national enplanements would be able to cover their capital requirements from net operating revenue without having to seek alternative sources of funds. Bond is concerned with those airports that fall below the one-half of one-percent total enplanement level numbering approximately thirty-five. Those airports would have to seek community support to meet their capital needs in addition to renegotiating user contracts. *Id.*

¹⁹² Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (amending 49 U.S.C. §§ 1301-1504 (1976)).

¹⁹³ S. 1648, 96th Cong., 2d Sess., 126 CONG. REC. S935 (daily ed. Feb. 5, 1980) (Memorandum submitted by Marvin Cohen, Chairman, Civil Aeronautics Board, that summarizes the results of the Airline Deregulation Act).

move from airport to airport, and therefore, some airports may be short-changed.¹⁹⁴ If eliminated from air carrier routes, an airport could lose revenue, and thus be forced to operate on less revenue, or to charge higher user fees which could drive away the remaining carriers using the facility.¹⁹⁵ Airlines also could use their increased mobility as a negotiating tool to fight an airport's attempt to boost user charges to compensate for the loss of federal funds.

Many airport operators believe that the adoption of the Senate proposal could mean a resurrection of the head tax¹⁹⁶ as a means of generating revenues. Some of the same abuses that arose in the early 1970's¹⁹⁷ could come back to haunt the

¹⁹⁴ *Id.* at S931. (statement of Senator Boren of Oklahoma.) "During these times of increased competition due to 'deregulation' of the airlines it is becoming increasingly difficult to get a majority of air carriers to agree on projects that might not necessarily benefit one air carrier as much as another." *Id.*

¹⁹⁵ *Id.* at S933 (statement by Senator Levin). "Already the nation's largest airline, United, has announced that it is drastically reducing its service to Detroit and Michigan. I (Senator Levin) believe that the reduction could be further stimulated if airports are forced to charge higher user fees. Many airlines will simply threaten to drop out of certain markets if faced with increased costs and their threats can too easily succeed." *Id.*

¹⁹⁶ *Cannon Willing to Discuss Head Tax in Airport Bill*, AV. WEEK & SPACE TECH., Jan. 21, 1980, at 36. Senator Packwood proposed an amendment to S. 1648 that called for a study of the need for a "passenger facility charge" by General Accounting Office (GAO). He stated by the time this study is done most of the airports will have decided that they will not need the head tax and will be able to raise the money anyway. *See supra* text accompanying notes 96-107; *see also infra* text accompanying notes 271, 276-303.

¹⁹⁷ *Cannon Willing to Discuss Head Tax in Airport Bill*, AV. WEEK & SPACE TECH., Jan. 21, 1980, at 36. The head tax is favored by Howard Clark, Director at Harbor International Phoenix, Arizona. In 1965, Phoenix, through City Council action, set user fees without any negotiation with the airlines. Profits came from the airport concessions. *Id.* *See Airports and the Trust Fund*, AV. WEEK & SPACE TECH., Nov. 19, 1979, at 11 (statement by Albert J. Huber, general manager of the Louisville and Jefferson County Airport Board commenting on the head tax).

The ADAP program, because of its chronic inadequate level of funding and continuing threat of being raided for purposes other than that originally intended by Congress, has proved a poor substitute. It really boils down to this. Either Congress assures [sic] the public its contribution in user taxes will flow back to its airports at a reasonable level to assure financing of needed airport projects or it should repeal the legislation, eliminate the tax and allow airports to collect a head tax or impose other user charges directly to make up the loss in financing leverage.

Id.

air travellers at primary hub airports, which may be forced to charge the head tax to make ends meet. It appears however, that smaller airports, too, could also resort to the tax, giving no assurance that the tax would be limited to only those seventy-two airports cut from federal funding.

While some airport directors favor the head tax,¹⁹⁸ others, such as the director at Omaha Airport, recommend the use of other fees to generate the needed funds.¹⁹⁹ In Omaha, airport operators give the airlines a chance to comment on different revenue proposals prior to the presentation of the proposals to the airport board, which ultimately decides what charges will be implemented.²⁰⁰ The Omaha Board uses a combination of several factors to establish the rate base. These factors include: (1) operating and maintenance expenses; (2) depreciation on local investments; (3) allowance for renewal and replacement reserve; and (4) interest on the outstanding indebtedness.²⁰¹

Even though Omaha enjoys management independence by retaining the money earned at the airport, the airport director favors the Senate bill.²⁰² The director stated that if the Senate bill is adopted, Omaha passengers would save \$2.8 million a year on lower fares.²⁰³ The director also noted that the increased user fees could raise the yearly earnings of the airports and these earnings could, in turn, greatly increase the airport's ability to raise capital.²⁰⁴

Other areas that reflect airport operators' concerns over the adoption of the Senate bill are the necessity for stability in airport financing and the requirements for up-front money for development incentives.²⁰⁵ Some operators feel that stability

¹⁹⁸ *Cannon Willing to Discuss Head Tax in Airport Bill*, AV. WEEK & SPACE TECH., Jan. 21, 1980, at 36.

¹⁹⁹ *Id.* (J. Richard Price, American Airlines Director of Properties in Dallas, does not favor the tax as it results in high rates. He feels rates charged at the Phoenix airport have been reasonable because there is lots of activity there.)

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Airports and the Trust Fund*, AV. WEEK & SPACE TECH., Nov. 19, 1979, at 11.

is the key to the success of an airport.²⁰⁶ Yet airport authorities cannot market revenue bonds if the revenue sources are unpredictable.²⁰⁷ The existing program provides initial funding for airport projects, the government's share being seventy-five or ninety percent of the total cost, depending on the size of the airport.²⁰⁸ Only the net cost of the project has to be financed with revenue bonds, which makes the bonds risk-free to the buyer.²⁰⁹ Under the Senate proposal, the larger airports' development projects would have to be financed without government assistance. Local bond financing increases the risk factor to investors and some operators predict that an innovative method might be required to reduce the risk factor and to make revenue bond financing as attractive to the public as it was under the ADAP system.²¹⁰

Airlines express approval of the Senate proposal for several reasons: (1) the reduction of government red tape; (2) the visibility of the six percent tax reduction and increase in traffic due to the reduction; and (3) the ability of the carriers at non-ADAP airports to raise fares to cover increased user charges.²¹¹ The airlines assert that the money will be put to a more productive use by direct investment in airport improvement, rather than investment via the trust fund.²¹² These airlines believe that the trust fund method has yet to meet the pressing needs of the airports with which the airlines are affiliated.²¹³

In contrast to the airlines' position, the Air Line Pilot's As-

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See *supra* notes 117-18.

²⁰⁹ *Airports and the Trust Fund*, AV. WEEK & SPACE TECH., Nov. 19, 1979, at 11.

²¹⁰ *Id.* (statement by Albert J. Huber, General Manager of the Louisville and Jefferson County Air Board). See generally Dallas & Ft. Worth, Tex., Third Supplemental Regional Airport Concurrent Bond Ordinance (Feb. 10, 1971). This ordinance authorized the issuance of Dallas-Fort Worth Regional Airport Joint Revenue Bonds and was passed by the city councils of Dallas and Fort Worth, Texas.

²¹¹ *Senate Hearings on S. 1648*, *supra* note 143, at 160. The airlines' spokesman was Paul R. Ignatius, President and Chief Executive Officer, Air Transport Association.

²¹² *Id.* at 171.

²¹³ *Id.* See *infra* text accompanying notes 220-25.

sociation (ALPA or Union)²¹⁴ contends that the Senate bill sacrifices the safety of the flying public.²¹⁵ It maintains that most air carrier airports have serious deficiencies, particularly in the landing²¹⁶ and lighting systems.²¹⁷ ALPA believes that the surplus in the trust fund is more than adequate to pay for pressing safety needs, as it has identified them. To bolster the

²¹⁴ *Senate Hearings* on S. 1648, *supra* note 143, at 226. (statement of John O'Donnell, President, Airline Pilots Association). The ALPA represents over 30,000 pilots employed by thirty-one airlines. *Id.*

²¹⁵ *Id.* at 226-27. (statement by the President of ALPA).

ALPA is encouraged by the significant increase in funding for the facilities and equipment account in S. 1648, which we believe will improve the level of safety for the millions of Americans who fly each year. At the same time, however, we have reservations about the reductions in ADAP funding included in the bill. We are also concerned about how safety priorities will be established and improvements in safety paid for at the large and medium airports when they are no longer eligible for ADAP funding. . . .

. . . .
[I]t should be stated in any bill you report — as it is in the statement of policy in S. 1648 — that safety will continue to have the highest priority in civil aviation.

Id.

²¹⁶ *Id.* at 227. These include—Instrument Landing System (ILS) a precision approach system consisting of the following electronic components and visual aids: localizer, glide slope, outer marker, middle marker and approach lights and Microwave Landing System (MLS), an instrument landing system operating in the microwave spectrum which provides lateral and vertical guidance to aircraft having compatible avionics equipment. This system makes it possible to provide precision guidance on all runways; whereas ILS is only feasible on certain runways. *Id.*

²¹⁷ *Id.* The necessary lighting systems include:

- (1) Approach Light System (ALS)—An airport lighting facility which provides visual guidance to landing aircraft by radiating light beams in a directional pattern by which the pilot aligns the aircraft with the extended centerline of the runway on his final approach for landing.
- (2) Runway End Identifier Lights (REIL)—Two synchronized flashing lights, one on each side of the runway threshold, which provide rapid and positive identification of the approach end of a particular runway.
- (3) Visual Approach Slope Indicator (VASI)—An airport lighting facility providing visual approach slope guidance to aircraft during approach to landing by radiating a directional pattern of high intensity red and white focused light beams which indicate to the pilot that he is "on path if he sees red/white," above path if white/white, and "below path" if red/red. Some airports serving large aircraft have three-bar VASI's which provide two visual glide paths to the same runway. The ALPA also maintains that many runways are deficient in markings and groovings. Markings are needed to help airmen identify the assigned runway while making an approach to land. Groovings help keep aircraft from skidding and shorten the stopping distance in wet and freezing weather. *Id.*

ALPA's safety argument, it cites figures which indicate that the vast majority of airline accidents occur within five miles of an airport, either during approaches, landings or takeoffs.²¹⁸ The union also questions whether the funding level of \$400 million,²¹⁹ beginning in fiscal year 1982, would be sufficient to meet the safety needs of smaller airports and their airline services.²²⁰ The Union contends that airports in need of safety improvements are precisely the ones that have relied too heavily on ADAP funds to achieve their present safety levels. As a result, the Union advocates increasing spending authorization levels in the facilities and equipment portion²²¹ of the ADAP program for airports that will be eligible for federal funds.

The Union agrees with the policy in S.1648 that opposes the use of trust fund money to pay for FAA operations and maintenance.²²² The ALPA maintains that using the trust fund to pay for maintaining and checking equipment purchased by the FAA with trust fund money, is less objectionable than using trust fund money to pay a major portion of FAA operating expenses.²²³

General aviation spokesmen, however, agree with some of the major changes in the proposed Senate legislation, while opposing other minor changes. The Aircraft Owners and Pilots Association (AOPA),²²⁴ an active advocate for general avi-

²¹⁸ *Id.* at 227. This situation is due, according to the ALPA President, to the inadequacies of the approach systems at most airports. He noted that only one-quarter of the runways used by airlines have instrument landing systems. The ALPA maintains that each runway used by the airline should have a precision guidance system. Airports that do not have ILS facilities force the carrier to utilize non-precision approach facilities which give the planes information about the position of the aircraft relative to the runways, but which provide no altitude information. *Id.*

²¹⁹ *Id.* at 228. The ALPA suggests raising the proposed funding from 400 to 480 million dollars. *Id.* at 232.

²²⁰ *Id.* at 228, 232. See *Grants to Largest Airports Not Necessary, Bond Says*, Av. WEEK & SPACE TECH., Sept. 17, 1979, at 28.

²²¹ See *supra* text accompanying note 71.

²²² *Senate Hearings on S. 1648, supra* note 143, at 229.

²²³ *Trusting the Trust Fund*, Av. WEEK & SPACE TECH., Oct. 22, 1979, at 9. President Carter's proposal for fiscal 1981 was to take a billion dollars from the aviation trust fund to support FAA operations and maintenance.

²²⁴ *Senate Hearings on S. 1648, supra* note 143, at 234 (statement by Robert E. Monroe, Vice President, Aircraft Owners & Pilots Association (AOPA)). Mr. Monroe

ation, agrees that certain large airports no longer need federal aid,²²⁵ and that FAA operations and maintenance costs should not be funded by the trust fund.²²⁶ AOPA further endorses the proposed reduction of the passenger ticket tax from eight percent to two percent.²²⁷ The major rift between members of the Senate and those of the AOPA arises from the conversion of the fuel tax on general aviation from seven cents a gallon to six percent of the total purchase price.²²⁸ The proposed increase could essentially double the tax paid by general aviation fuel consumers.²²⁹ AOPA also favors an elimination of the aircraft use tax on general aviation aircraft.²³⁰

The General Aviation Manufacturer's Association (GAMA) is in agreement with the AOPA.²³¹ GAMA maintains that taxes on general aviation should not be increased until the trust fund surplus is exhausted.²³² GAMA also maintains that the trust fund has become a "pawn" of the unified budget,²³³ because the money contributed by the eight percent ticket tax²³⁴ and the seven percent tax on general aviation fuel²³⁵

stated: "AOPA . . . represent[s] the interests of more than 240,000 members who employ private aircraft for business and personal purposes. Our members account for the ownership of about seventy-percent of the aircraft in U.S. civil fleet and eighty-percent of the hours flown in U.S. civil aviation." *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 235.

²²⁷ *Id.* at 236.

²²⁸ S. 1649, the companion bill to S. 1648, did not pass the Senate. *See Federal Airport Development Act Reactivated*, 1976 CONG. Q. ALMANAC 648.

²²⁹ In February 1981, one gallon of 100LL, a commonly used grade of general aviation fuel, was selling at \$1.85 per gallon at Braniff Realty Corp. located at Love Field, Dallas, Texas. S. 1649 proposes that the tax be increased by a formula represented by figuring six to ten percent of the sales price. Instead of seven cents on the \$1.85 sale the tax would be eleven cents to eighteen cents.

²³⁰ *Senate Hearings* on S. 1648, *supra* note 143, at 237. This change, AOPA maintains, would neither raise nor lower general aviation's tax contribution, but instead would eliminate a troublesome separate tax return (on the aircraft use tax or registration fee) that gives our people (general aviation enthusiasts) and the IRS many problems. *Id.*

²³¹ *Id.* at 241 (statement by Edward W. Stimpson, President). GAMA is an association that represents companies who manufacture most of the general aviation aircraft engines, avionics, pilot supplies and component parts which are used on aircraft.

²³² *Id.* at 251.

²³³ *Id.*

²³⁴ *See* 26 U.S.C. § 6426 (1976); *see also supra* text accompanying note 5.

²³⁵ *See* 26 U.S.C. § 4041 (1976); *see also supra* text accompanying notes 7, 224-29.

was originally paid by the users to make their flights safer, by improving airport facilities and navigational aids with expenditures from the trust fund.²³⁶ GAMA argues that the trust fund money has not been used for safety projects as was originally intended.²³⁷

Because the trust fund is treated as an on-budget item,²³⁸ the Office of Management and Budget (OMB) has been accused by legislators and members of the aviation industry of holding down Aviation Trust Fund spending to reduce the federal deficit.²³⁹ OMB vigorously denies charges that all eligible projects have not been funded. OMB argues that the surplus has ballooned because of the timing of construction and hardware programs at eligible airports.²⁴⁰ Several members of the House also agree that the OMB "may be the real culprit" behind the trust fund surplus.²⁴¹

²³⁶ See *supra* note 184.

²³⁷ *Senate Hearings on S. 1648, supra* note 143, at 251. See *Trusting the Trust Fund*, AV. WEEK & SPACE TECH., Oct. 22, 1979, at 9. See also Goldwater, *The Aviation Trust Fund, Free the Hostage*, AVIATION/SPACE, Sept./Oct. 1980, at 13 (Editorial by Congressman Barry Goldwater, Jr. from California). The trust fund revenues, though segregated and theoretically earmarked, are still part of the Unified Budget of the federal government for bookkeeping purposes. Projects funded through the trust fund are treated as expenditures in the overall budget. Any excess of revenues from the passenger ticket tax and other taxes contributed to the fund over the expenses of projects financed by the aviation trust goes to reduce the budget deficit in any given year. Any surplus in the trust fund makes the federal deficit look smaller. Also any expenditures from the trust fund are counted against the Unified Budget total. *Id.*

²³⁸ *Trusting the Trust Fund*, AV. WEEK & SPACE TECH., Oct. 22, 1979, at 9. In general terms, on budget items are expenditures in the overall budget as opposed to expenditures from a department's operating budget.

²³⁹ *Trusting the Trust Fund*, AV. WEEK & SPACE TECH., Oct. 22, 1979, at 9. See *The Aviation Trust Fund, Why Not Sue?*, AVIATION/SPACE, Sept./Oct. 1980, at 13. In an editorial, the author advocates suing the Administration, particularly the Department of Transportation and the Office of Management and Budget, for ignoring the binding contract provisions of the ADAP trust fund, which were handed down by Congress and funded by air travelers and airway users. *Id.* See generally H.R. 7611, 96th Cong., 2d Sess. (1980), proposed legislation by Rep. Goldwater, that prohibits the receipts and disbursements of the Airport and Airway Trust Fund and any amount in such Trust Fund from being included in the totals of the budget of the United States Government and exempts such receipts, disbursements, and amounts from any general limitations imposed on budget outlays of the United States. *Id.*

²⁴⁰ *Trusting the Trust Fund*, AV. WEEK & SPACE TECH., Oct. 22, 1979, at 9. (Nevertheless, the OMB makes no apologies for its distaste for trust funds in general).

²⁴¹ *Airport Operators Seeking Cannon Bill Modifications*, AV. WEEK & SPACE TECH., Dec. 3, 1979, at 30. See *supra* notes 238-40.

House Bill 6721, an extension of the current legislation, does not carry with it the drastic implications of the Senate proposal.²⁴² The House has emphasized the inadequacies of the current system. For example, proponents of the House legislation point to the 1978 mid-air collision over San Diego, between a Pacific Southwest Airlines (PSA) air carrier and a privately owned Cessna, that, killed 144 persons.²⁴³ The House Committee contends that had the FAA spent \$500,000 of the trust fund on upgrading radar at the field, as its operators had requested every year since 1974, the accident might not have occurred.²⁴⁴ The purpose of the House legislation is to continue spending in the areas of need, such as those at Lindberg Field in San Diego.²⁴⁵

Though this effort by the House is an attempt to remedy unsafe conditions existing at airports, the House legislation has come under attack from people in the aviation industry and users of the system because it authorizes exceedingly high expenditures from the trust fund, particularly for operation and maintenance of the FAA.²⁴⁶ The House originally authorized \$400 million for the FAA in fiscal year 1981, with a seven percent increase through 1985.²⁴⁷ In contrast, in 1980 the

²⁴² See *supra* text accompanying notes 154-81.

²⁴³ *Would You Believe a \$3.4 Billion Surplus In The Airport and Airway Trust Fund?*, NAT'L J., Jan. 5, 1980, at 17.

²⁴⁴ *Id.* In an interview with Langhorne Bond, past Administrator of the FAA, he responded to the following question regarding the collision in San Diego:

Q: Why didn't the FAA authorize improving the radar and air traffic control procedures at Lindbergh Field [San Diego] before the collision?

A: Everybody has a request for equipment. Basically, our decision was that we could put the money somewhere else to provide a higher net safety within the system. We didn't give San Diego a high priority because of the relatively high cost of putting in a digitized radar readout, which had to come from Miramar. [Air traffic approach control was located at the Miramar Naval Air Facility, eight miles away.]

Id.

²⁴⁵ *Id.*

²⁴⁶ H.R. REP. NO. 887, Part II, 96th Cong., 2d Sess., 65-67 (1980). See *Transportation Budget Increases Energy Saving Program by 37-Percent*, CONG. Q., Feb. 2, 1980, at 277. Carter proposed boosting the trust fund contribution for FAA operations from \$75 million to \$1.3 billion in fiscal 1981. The FAA's total 1981 budget was slated for \$3.5 billion, an increase of \$229 million over fiscal 1980. *Id.*

²⁴⁷ H.R. REP. NO. 887, Part II, 96th Cong., 2d Sess., 66 (1980).

funding for the FAA was \$325 million.²⁴⁸ The difference between the figure introduced in the House and the "reported figure" for FAA operation and maintenance spending is an increase of \$400 million.²⁴⁹ The bill, as reported, contains an operations and maintenance authorization figure of \$875 million, more than double the amount which was originally proposed by its committee sponsors.²⁵⁰ Opponents of this measure maintain that high expenditures on the FAA take away funds from projects designed to increase safety and capacity at airports, and also work to impair efforts to reduce the tax burden on the users who have contributed the surplus to the trust fund.²⁵¹

The House Bill does not propose a reduced taxation level on passenger fares, as does the Senate proposal.²⁵² This aspect of the legislation has been criticized by the industry because it does not appear to reduce the surplus currently in the fund. If the present program levels and tax structure are maintained, as proposed by the House legislation, the trust fund surplus is expected to grow to \$10 billion within the next five years.²⁵³ In contrast, the Airline Transport Association (ATA)²⁵⁴ predicts that the surplus will grow only to \$6 billion in five years, using the projected trust fund expenditures authorized by H.R. 6721.²⁵⁵ The ATA recommends a reduction of the passenger tax from eight percent to four percent, accompanied by a defederalization of the seventy-two largest airports as outlined in the Senate bill.²⁵⁶ According to the ATA, the Senate bill, with its reduced taxation levels, could deplete the surplus in the five-year span.²⁵⁷

²⁴⁸ *Id.*

²⁴⁹ H.R. 6721, 96th Cong., 2d Sess., 126 CONG. REC. E1109-10 (daily ed. March 6, 1980).

²⁵⁰ *Id.*

²⁵¹ H.R. REP. NO. 887, Part II, 96th Cong., 2d Sess., 66 (1980).

²⁵² *Id.* at 4-6. See *supra* notes 125-27.

²⁵³ *House Hearings on H.R. 6721, supra* note 154, at 760.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 763-64. ATA recommends prohibition of head tax imposed by individual airports. See *Id.* at 868-69 (statement by Henry S. Pflanz, President, Pilot's Lobby).

²⁵⁷ *Id.* at 763.

General aviation, through the organization of the AOPA,²⁵⁸ has voiced displeasure over the programs carried out under the Airport and Airway Act of 1970 which have been completed during the past ten years.²⁵⁹ AOPA members are especially concerned with the needs of general aviation, and support the elimination of funding for large airports, hoping that some of that money will be funnelled to the smaller airports that cater to general aviation.²⁶⁰ To accomplish this goal, the AOPA wants the House legislation to redefine "reliever airports," recognizing the true reliever situation, in order to place practical and realistic geographical limits on the reliever concept.²⁶¹

The House Bill also has been criticized for its proposal to fund airport ground access projects, which would have a significant effect on trust fund expenditures. Funding for ground access could potentially exceed funding for actual airport development in some areas.²⁶² Critics of the House amendment additionally contend that the ground access provision is deficient in its determination of which airports would be eligible to use ADAP funds for their projects, because not all eligible airports would be treated equally.²⁶³ The major criticism of the ground access portion of the legislation, however, is that the trust fund was originally conceived to provide for safety needs in airport expansion and development, through taxes paid by the users of the system.²⁶⁴ The argument states that funding for ground access has several other sources aside from tapping the trust, including: the Federal Aid Highway Pro-

²⁵⁸ See *supra* note 224.

²⁵⁹ *House Hearings* on H.R. 6721, *supra* note 154, at 351. AOPA feels that the trust fund money has been impounded rather than spent on safety and enhancements of the capacity of the national system.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 353. See *supra* notes 136-39.

²⁶² H.R. REP. NO. 887, Part II, 96th Cong., 2d Sess., 68 (1980). See *supra* notes 176-80 and accompanying text.

²⁶³ H.R. REP. NO. 887, Part II, 96th Cong., 2d Sess., 6, 8 (1980). Under the amendment funding formula, small air carrier and commuter airports would be slighted from funds available for ground access projects because they would receive their funds out of the discretionary funds in the form of five-year guaranties.

²⁶⁴ *Id.* See *supra* notes 1-10 and accompanying text.

gram under the Federal Aid Highway Act;²⁶⁵ state highway departments;²⁶⁶ and mass transit funding from the Urban Mass Transportation Act of 1964.²⁶⁷

IV. PROPOSALS OF THE NINETY-SEVENTH CONGRESS

The Senate Committee on Commerce Science and Transportation of the ninety-seventh Congress proposed S. 508.²⁶⁸ S. 508 is very similar to S. 1648, but contains some important differences.²⁶⁹ The differences include: (i) the defederalization of the nation's sixty-nine largest airports instead of the seventy-two largest;²⁷⁰ (ii) the authorization of a limited passenger facility charge (PFC) for those defederalized airports;²⁷¹ (iii) the authorization of qualifying states to issue ADAP

²⁶⁵ 23 U.S.C. §§ 101-156 (1976).

²⁶⁶ *Id.* § 120.

²⁶⁷ Urban Mass Transportation Act of 1964, Pub. L. No. 88365, 78 Stat. 302 (1964) (codified as amended at 49 U.S.C. §§ 1601-1613 (1976)).

²⁶⁸ S. 508, 97th Cong., 1st Sess., 127 CONG. REC. S1404-06 (daily ed. Feb. 20, 1981).

²⁶⁹ S. REP. NO. 97, 97th Cong., 1st Sess. 1 (1981). *See Reagan Administration Seen Softening Plan to Increase Airline Ticket, Fuel Taxes*, CONG. Q, Feb. 28, 1981, at 392. *See also* 97 CONG. REC. S1404 (daily ed. Feb. 20, 1981). (President Reagan indicated that the administration would propose legislation to reduce funding available for airport construction grants in 1981 through 1985 by thirty-three percent. S. 508 does not reach that level of reduction.)

²⁷⁰ S. REP. NO. 97, 97th Cong., 1st Sess. 2-4 (1981). *See also* S. 508, 97th Cong., 1st Sess., 127 CONG. REC. S1404-06 (daily ed. Feb. 20, 1981). The difference in sections of the bill means that in 1981, forty of the largest airports will be ineligible to receive funds, and in 1982, twenty-nine airports will be added to that list. This reduction is brought about by a change in the percentages which classify an airport's eligibility.

INELIGIBLE AIRPORT

SEC. 26(a)(1) . . . no obligation for airport development or airport planning may be incurred by the Secretary at any airport that enplaned more than 0.5 percent of the total number of passengers enplaned in calendar year 1979 at all commercial service airports. . .

(2) after September 30, 1982 no obligation for airport development or airport planning may be incurred by the Secretary at any airport than enplaned more than 0.25 percent of the total number of passengers enplaned in the calendar year at all commercial service airports. . . .

S. 508, 97th Cong., 1st Sess. § 26(a)(1), (2) (1981). Section 26 also provides for voluntary withdrawal by an airport from federal assistance for airport development or planning. An airport making such an election may not receive funds for the year in which the election was made or any subsequent fiscal year, and must notify the Secretary of the election at least sixty days prior to the beginning of the year in which the election is to be effective. *See id.* § 26(b)(1), (2).

²⁷¹ S. REP. NO. 97, 97th Cong., 1st Sess. 2, 9-10 (1981).

funds in the form of block grants, in addition to the project grant method;²⁷² and (iv) the institution of higher spending levels in some areas than in previous Senate proposals.²⁷³ The Committee believed that the trust fund surplus had reached \$3.7 billion,²⁷⁴ and its approach to spending the surplus again was based on the defederalization concept.²⁷⁵

The major difference between this piece of legislation and

²⁷² *Id.* at 9, 18. In the past, all grants were made by the Secretary directly to a sponsor for project purposes, except for grants made pursuant to a state's demonstration that it was capable of administering the funds. Under S. 508, the Secretary will transfer a block grant to a state so that the state could distribute the funds for project purposes. The block grants apply to small commercial service airports and general aviation airports within a qualifying state's boundaries.

²⁷³ *Id.* at 2-7. See also S. REP. No. 415, 96th Cong., 1st Sess. 6-7 (1979).

		Fiscal Year				
		1981	1982	1983	1984	1985
ADAP Grants-in-Aid	(S. 508)	450	450	450	450	450
	(S. 1648)	825	600	550	600	650
Facilities and Equipment	(S. 508)	400	450	550	600	750
	(S. 1648)	400	450	550	600	750
Research and Development	(S. 508)	90	95	100	105	110
	(S. 1648)	90	95	100	105	110
Operations and Maintenance	(S. 508)	700	750	800	850	900
	(S. 1648)	350	375	400	425	450
Total	(S. 508)	1640	1745	1900	2005	2210
	(S. 1648)	1665	1520	1600	1730	1960
Overall Total	(S. 508)	9500				
	(S. 1648)	8475				

In the comparison chart, the major difference in the authorization amounts occurs in the operations and maintenance category. The trust fund was originally established to pay for capital development of the airport and airway system, not for the operating and maintenance costs of the FAA. Due to pressures from various administrations, S. 508 proposes that nearly the entire operating budget of the FAA be paid from the trust fund. The Committee supports the increase in user contributions to the FAA because the general public derives benefits from the system. S. REP. No. 97, 97th Cong., 1st Sess. 6-7 (1981).

²⁷⁴ *Airport and Airway System Development Act of 1981: Hearings on S. 508 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transp.*, 97th Cong., 1st Sess. 87 (1981) [hereinafter cited as *Senate Hearings on S. 508*] (statement of Darrell Trent, Deputy Secretary, Department of Transportation). See also *Administration Proposals For Transportation Signal Reduction of Federal Role*, CONG. Q, March 14, 1981, at 483; *Reagan Administration Seen Softening Plan to Increase Airline Ticket, Fuel Taxes*, CONG. Q, Feb. 28, 1981, at 392.

²⁷⁵ S. 508, 97th Cong., 1st Sess., 127 CONG. REC. S1404-06 (daily ed. Feb. 20, 1981). See *supra* text accompanying notes 15-16, 124, 150.

the legislation proposed last session is the PFC, or the passenger facility charge.²⁷⁶ Airports that become ineligible to receive ADAP funds will be permitted to impose a limited passenger facility charge.²⁷⁷ The charge is termed "limited" because the provision limits the charge only by use, not by a specific amount.²⁷⁸ The bill requires that the revenues generated will be used only for capital development at airports.²⁷⁹ This requirement is predicated on the Congressional intent that the funds be a replacement for ADAP funds,²⁸⁰ which also had to be used for airport capital development.²⁸¹

The PFC has both positive and negative considerations. If

²⁷⁶ S. 508, 97th Cong., 1st Sess., 127 CONG. REC. S1404-06 (1981).

²⁷⁷ S. 508, 97th Cong., 1st Sess. § 30(a) 127 CONG. REC. S1405-06 (daily ed. Feb. 20, 1981).

SEC.30(a) AUTHORITY TO IMPOSE. — The operator of a commercial service airport that is ineligible to receive Federal assistance for airport development or airport planning under the provisions of section 26 of this Act [Ineligible Airports] may, at its option, impose a limited passenger facility charge on passengers enplaning at such airport if the operator complies with all of the following requirements:

(1) All revenues generated by such charge shall be obligated or expended only for projects of capital airport development or airport planning (including noise compatibility projects) which (A) would have been, in whole or in part, eligible to receive Federal assistance . . . and (B) are necessary to meet the reasonable needs of revenue passengers using such airport;

(2) All other revenues generated by the airport shall be obligated or expended only for the capital or operating cost of the airport, the local airport system, or other facilities that are owned or operated by the owner or operator of the airport and are directly related to the actual transportation of persons or property; and

(3) Capital airport development projects financed in whole or in part by such charge shall be undertaken only after consultation with the air carriers and foreign air carriers serving such airport.

Id.

²⁷⁸ *Id.* See S. REP. NO. 97, 97th Cong., 1st Sess. 9-10 (1981).

²⁷⁹ *Id.* This requirement means that an airport could not impose a passenger facility charge to replace some other revenue generating source which would then be diverted to non-airport uses. Capital development made pursuant to funds generated through PFC must be reasonably related to the needs of the public using the airport. The Committee intends that airport users have access to the courts in the event that the proceeds are used to finance unwarranted and unnecessary capital development.

Id.

²⁸⁰ *Id.* at 9, 11.

²⁸¹ See *supra* notes 62-74.

properly used by airports that have been eliminated from receiving federal funding, it can provide them with a mechanism to continue increasing and renovating their facilities without renegotiating user contracts,²⁸² increasing facility charges²⁸³ or participating in local bond elections.²⁸⁴ One argument supporting the PFC is that by lowering the ticket tax from eight percent to two percent, as proposed,²⁸⁵ the PFC becomes a viable means to pick up the necessary additional revenue,²⁸⁶ similar to the taxes charged in other "government-subsidized" facilities such as toll bridge crossings,²⁸⁷ toll highways²⁸⁸ and national park usage.²⁸⁹

Many airlines²⁹⁰ that previously favored defederalization

²⁸² See *supra* notes 185-91.

²⁸³ See *supra* notes 199-204.

²⁸⁴ See *supra* notes 205-10. See also *Senate Hearings* on S. 508, *supra* note 274, at 102-05.

²⁸⁵ *Senate Hearings* on S. 508, *supra* note 274, at 92. The eight percent ticket tax has now been reverted to a five percent ticket tax because no legislation was passed when the original Airport and Airway Development Act expired. See *supra* notes 146-47.

²⁸⁶ *Senate Hearings* on S. 508, *supra* note 274, at 97. (statement by John W. Solomon, Director of Aviation, Clark County, Las Vegas, Nevada). Mr. Solomon stated that the traditional ADAP program has not worked for the McCarren International Airport in Las Vegas. The Airport, from June 1970 through September 1980, received \$23 million in enplaned entitlement funds and other moneys through discretionary and planning grants totalling approximately \$24 million. The Director calculated that McCarren produced approximately \$300 million in revenues from the trust fund for a total enplanement of nearly 38 million passengers with an average passenger (ticket) tax of eight dollars, but the airport only got back sixty-four cents per passenger for capital development. *Id.*

²⁸⁷ 33 U.S.C. § 503 (1976).

²⁸⁸ 23 U.S.C. § 129 (1976 & Supp. 1981).

²⁸⁹ 16 U.S.C. § 4601-6a (1976 & Supp. 1981).

²⁹⁰ *Senate Hearings* on S. 508, *supra* note 274, at 144 (statement by Duane H. Ekedahl, Executive Director, Commuter Airline Association of America). The commuter airlines are opposed to head taxes because of the possibility of inequitable tax burdens on short-haul carriers. Of course, commuter airlines are leary of defederalization because those airports cut from funding have expenditure programs subject to a "majority of interest" clause. This clause allows airport proprietors and carriers underwriting long term investments at those airports to decide by majority interest what expenditures on facilities and terminals will be made. Commuter airlines are concerned that this decision-making process will preclude investments in improvements which will help them, such as reliever airports. *Id.* See also *id.* at 175-76 (statement by Paul Ignatius, President, Air Transport Association). The ATA is generally opposed to defederalization, although they supported it under S. 1648. American Airlines and Delta Airlines strongly oppose defederalization as do Northwest Airlines

believe that defederalization, coupled with the PFC, would be harmful to the airline industry²⁹¹ because of (1) the onerous task of collecting the tax, particularly the problem of determining whether the airline or the airport authorities should collect it;²⁹² (2) the burdens on short-haul passenger cost vis à vis the long-haul passenger cost;²⁹³ (3) the tax inequities produced among passengers, depending on where the tax is levied and whether the passenger is arriving or departing;²⁹⁴ (4) the problems involved with the airline's remittance to the airport;²⁹⁵ (5) the collection procedure used by ticket sales per-

and TWA.

²⁹¹ See *User Fee Resistance*, CONG. Q., Oct. 3, 1981, at 1918. While airlines are resisting user charges, President Reagan is in favor of them. His aides, however, do not believe that he will be able to impose charges as high as he would like. In addition to charging user fees in the airline industry, Reagan proposes to levy user fees on Coast Guard services, dredging, construction and maintenance of river channels, locks, dams and ports. *Id.* See also *Members of Congress, Trade Groups Are Wary of Reagan's Full User Fees*, CONG. Q., Nov. 7, 1981, at 2186-87.

²⁹² *Senate Hearings* on S. 508, *supra* note 274, at 167. See *id.* at 156 (statement by Hugh Kelleher, President, American Association of Airport Executives). Mr. Kelleher advocates that airlines should collect the charge at the time of ticket sale and the proceeds passed on to the airport after the airline had deducted a nominal charge for collection. He states that when the same type of tax was imposed in 1972, the airlines made tax collection onerous due to their outright opposition to the tax. His idea seems to alleviate the problems predicted by the ATA which fears that implementation of the head tax would cause "inevitable delays, confusion and passenger resistance. . . ." *Id.* at 167. See also *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 719 (1972).

²⁹³ See *Senate Hearings* on S. 508, *supra* note 274, at 144 (statement by Duane H. Ekedahl, Executive Director, Commuter Airline Association of America). See also *id.* at 260 (statement by Howard W. Willoughby, Director of Aviation, City of Philadelphia). Mr. Willoughby expressed concern over the impact of defederalization on commuter service to small communities because the cost per passenger mile is the greatest on commuter-length routes and there is far less flexibility and less margin for passing increased airport fees through to the passengers. *Id.*

²⁹⁴ *Id.* at 168. The problem is that, without a definition of "enplanement," all boarding passengers will be subject to the charge, whether they are through or connecting passengers. Also, there is controversy over the collection of the tax by foreign carriers. It is not really clear how the Act applies to transportation sold in Canada, Mexico or Europe, and it is possible that passengers purchasing tickets outside the United States might escape the charge. *Id.* See also *id.* at 167. If the tax is levied on originating passengers, arriving passengers get free use of the facility. A connecting passenger, who makes double use of the facility may also escape the tax. If a connecting charge is levied, as opposed to an originating passenger charge, the connecting passenger pays more than a through passenger whose travel has been more direct. *Id.*

²⁹⁵ *Id.* at 167. The ATA contends that airlines are always concerned over arrangements that require them to collect, account for and remit charges to airports on an

sonnel;²⁹⁶ (6) the double taxation if the ticket tax remains effective;²⁹⁷ (7) the potential abuses of PFC revenues spent on non-airport facilities due to the broad language of the bill;²⁹⁸ and (8) the PFC "characterization" as a part of the price of transportation.²⁹⁹

Airlines and airport operators³⁰⁰ alike share another

airport by airport basis. Problems arise involving identification of the source of collection and the proper airport beneficiary. Also, another tangentially related concern is the treatment of refunds when the ticket, including the user charge, was not used and the charge collected has already been remitted to the airport. *Id.* See also *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U. S. 707, 709 (1972).

²⁹⁶ *Senate Hearings* on S. 508, *supra* note 274, at 167. This problem is inherent in the ticket sales system. With prices varying depending on ticket source, charging an additional tax would be difficult, and reaching a consistency in prices quoted by brokers would be virtually impossible. *Id.*

²⁹⁷ *Id.* at 167-68. This is one of the most critical arguments against the head tax at airports which potentially will be "defederalized". Passengers will have to pay the federal transportation tax (ticket tax) currently at five percent, in addition to the passenger charge. If the ticket tax is not reduced to two percent, passengers could be paying an amount almost double the amount of the transportation tax. ATA has argued that, regardless of the decrease of the ticket tax to two percent, the passengers are paying an inordinate share of the cost of the ADAP program. *Id.*

²⁹⁸ *Id.* at 168. The PFC could conceivably be used for commuter railroads, docks, yachts and warehouses. The Senate Report accompanying the bill states, however, that the Committee wants users to have recourse to the courts in the event that PFC proceeds are used to finance unwarranted and unnecessary capital development. S. REP. NO. 97, 97th Cong. 1st Sess. 9-10, 36-37 (1981). See also Fact Sheet Fall Budget Program, THE WHITE HOUSE, Office of the Press Secretary, at 9-10 (Sept. 24, 1981).

²⁹⁹ *Senate Hearings* on S. 508, *supra* note 274, at 168. A remedy to this problem is to separate the PFC from the price of transportation. The Senate Committee calls the PFC a "charge" or "fee." Nowhere is it referred to as a "tax," although its function and purpose is that of a tax. S. REP. NO. 97, 97th Cong., 1st Sess. 36 (1981).

³⁰⁰ *Senate Hearings* on S. 508, *supra* note 274, at 207 (statement by A. L. McMillan, Assistant Director for Finance, Dept. of Aviation, City of Houston). The city of Houston opposes the concept of defederalization, but in the event that it is enacted, Houston insists that the PFC will be implemented. To substantiate his claim regarding the PFC, Mr. McMillan stated that the charge must be sufficient to replace fully the federal grant money denied to the larger airports, and must be based on prospective need rather than historical participation. Houston currently needs a new terminal and an additional runway will be necessary in the late 1980s, along with several other related improvements on taxiways, parking aprons and support facilities. The estimated cost of the improvements is \$350 million and of that figure approximately \$100 million would have normally been borne by ADAP funds. Under defederalization, Houston would be required to provide around \$100 million of additional capital from local sources. This requirement necessitates the issuance of airport revenue bonds which will increase the debt service ceiling by about \$10 million annually. Houston maintains that setting the PFC on the basis of past ADAP receipts or some other historical basis will not produce the required flow of funds. See *Id.* at 241.

grievance regarding the PFC, specifically that the bill intends to limit the amount that an airport can charge as a head tax, to the equivalent amount that the airline would have received under ADAP funding.³⁰¹ This rationale appears to undermine the goal of defederalization,³⁰² that is, to compensate those sixty-nine or seventy-two airports that were receiving a return of only a fraction of the funds in ADAP grants that they had put in through facility-generated revenues.³⁰³ Those who endorsed this theory advocate alternative funding programs that do not "replace one inadequate program with another inadequate program."³⁰⁴ Some airport operators, managing airports that are owned under existing contracts that prohibit user fees, express dismay at the Senate proposal.³⁰⁵ The Senate Committee intends the charge to be permitted and to be considered a *new charge* authorized by subsequent Congressional action, so that the charge would fall outside of the original contract terms.³⁰⁶

Other state-owned airports that have used bonds to fund services, have obligations to pay the bond debt with any fees charged.³⁰⁷ Such airports are protected by the bill, which states that all revenues must go to the capital or operating expenses of the airport, the local airport system, or other facilities that are owned or operated by the owner or operator of the airport, and that are directly related to the actual trans-

O'Hare Airport, Chicago, Illinois, through a statement made by Thomas Kapsalis, Commissioner of Aviation, City of Chicago, is in complete agreement with those views of the Houston airport authority. *Id.*

³⁰¹ S. REP. No. 97, 97th Cong., 1st Sess. 36 (1981).

³⁰² *Senate Hearings* on S. 508, *supra* note 274, at 141.

³⁰³ *Id.* at 209-10. Senator Kassebaum addressed with surprise Mayor Berkley, Mayor of Kansas City, concerning the mayor's desire to keep the ADAP program, by stating: "Your community's passengers have been ripped off more than most. That is Senator Cannon's quote." Senator Kassebaum's remark was directed at the calculation that Kansas City received only \$5.4 million from the ADAP fund in its first years, while passenger contribution was \$153 million. The return was only \$3.6 million. Most large to medium hub airports got a seventeen-percent return on money placed into the trust fund on the average. *Id.*

³⁰⁴ *Id.* at 241.

³⁰⁵ S. REP. No. 97, 97th Cong., 1st Sess. 36-37 (1981). The Committee addressed the criticism lodged by the Portland, Oregon airport owners. *Id.* at 36.

³⁰⁶ *Id.* at 36.

³⁰⁷ *Id.* at 37.

portation of persons or property.³⁰⁸ The Committee intends bond debts to be repaid with revenue generated by the charge, because the bonds *bear some direct relationship to the transportation of persons or property.*³⁰⁹

The imposition of the PFC is not without provisions for close governmental supervision.³¹⁰ The bill gives the Civil Aeronautics Board (CAB) the authority to promulgate regulations to impose and collect the PFC.³¹¹ This additional regulatory authority may replace the government red tape that defederalization is trying to cut.³¹²

To date, the House has considered several proposals relating to the improvement of the nation's airport and airway system.³¹³ House Resolution 2643 is the House proposal analogous to last session's H.R. 6721, a bill with multi-year authorizations incorporating the higher spending levels requested.³¹⁴ House Resolution 4182 is a one-year proposal that would provide for \$450 million to be taken from the trust fund for airport development in fiscal 1981 only.³¹⁵ House Resolution 4209 is the Congressional solution³¹⁶ for the imme-

³⁰⁸ *Id.* 36-37. See *supra* note 227 and accompanying text.

³⁰⁹ S. REP. NO. 97, 97th Cong. 1st Sess. 37 (1981).

³¹⁰ S. 508, 97th Cong., 1st Sess. § 30, 127 CONG. REC. S1405-06 (daily ed. Feb. 20, 1981).

³¹¹ S. 508, 97th Cong., 1st Sess. § 30(b) (1981).

³¹² See *Senate Hearings* on S. 508, *supra* note 274, at 99.

³¹³ H.R. 2643, 97th Cong., 1st Sess., 127 CONG. REC. H1035 (daily ed. March 19, 1981); H.R. 4182, 97th Cong., 1st Sess. 127 CONG. REC. H4940-43 (daily ed. July 27, 1981); H.R. 4209, 97th Cong., 1st Sess. (1981).

³¹⁴ H.R. 2643, 97th Cong., 1st Sess., 127 CONG. REC. H1035 (daily ed. March 19, 1981).

³¹⁵ H. R. 4182, 97th Cong., 1st Sess. (1981). The bill authorizes the \$450 million to be spent on airport development, planning and noise compatibility. It also sets a ceiling of \$600 million in trust fund expenditures on airport development in 1982. *Id.*

³¹⁶ H.R. 4209, 97th Cong., 1st Sess., 127 CONG. REC. H9452-69 (daily ed. Dec. 14, 1981). The 1982 transportation appropriations bill passed the House in September, 1981. The Senate passed the House bill in November, 1981. The bill provides a spending limit of \$650 million from the trust fund for airport development. In addition, the House approved \$850 million in trust fund moneys for FAA operations, a cut-back from the Administration's proposals because of the reduction in FAA employment due to the air controller's strike. *Id.* at 9452. See also *House Appropriations Panel Grants Major Concessions to Both Amtrak and Conrail*, CONG. Q., July 25, 1981, at 1338. The Panel recommended \$2.4 billion for FAA operations and maintenance of the national air traffic control system, including \$900 million from the Aviation Trust Fund. The 1981 appropriations act provided \$525 million. H.R. 2643

diating funding authorizations for transportation generally. To this date, the House has not acted on any multi-year authorizations.³¹⁷

V. CONCLUSION

The Airport and Airway Development Act of 1970 was necessary to meet the growing demands of the air transportation system in the United States. The number of airway users is increasing dramatically. General aviation is expected to increase from 193,000 users to 300,000,³¹⁸ and flight operations handled by traffic control are expected to jump from the 1979 figure of 17.2 million to 31 million by 1990.³¹⁹ Although rising costs associated with airline travel and operation might seem to act to slow the growth in air transportation, all indications are otherwise.³²⁰ Legislation that can handle the problems caused by further demands on the system is imperative.

Legislators of the ninety-seventh and ninety-eighth Congresses are faced with several avenues through which to meet the high standard of safety mandated by the 1970 Act, to enable the national transportation system to function efficiently and to make maximum use of the trust fund to meet that goal. The Senate proposal is in line with the Reagan Administration's mandate of "trimming the fat" out of government.³²¹ It might seem politically advantageous for legislators to side with the Senate proposal. Legislators agreeing with the Senate 'defederalization' plan should realize, however, that their constituents could be adversely affected when federal aid is no longer available for airport development. From a political perspective, a much less drastic approach than S. 1648 or S. 508

establishes a formula authorizing \$904 million for fiscal 1982; however, Congress must authorize legislation before money can be spent on wages for members of PATCO (Professional Air Traffic Control Organization). *Id.*

³¹⁷ [1981] 2 CONG. INDEX (CCH) 35,007.

³¹⁸ *Senate Hearings on 1648, supra* note 143, at 241.

³¹⁹ *Id.*

³²⁰ *Id. Contra Senate Hearings on S. 508, supra* note 274, at 89 (statement by Darrell Trent, Deputy Secretary, Dept. of Transp.).

³²¹ 1980 Presidential Debates between Ronald Reagan and Jimmy Carter (October, 1980) (remark by President Reagan in response to question regarding federal spending).

would be the support of House proposals which are essentially extensions of current legislation with increased funding levels.

The ultimate consideration is the determination of which proposal can meet the country's future aviation needs, while fulfilling the mandate of safety. The FAA previously has had an underlying policy of constraint in the growth of aviation.³²³ This notion is antiquated in light of the accomplishments made over the past ten years with trust fund money.³²³ The trust fund has accomplished the goal without direct imposition of a charge on the general taxpayer or the United States Treasury, in accordance with the original intent of the legislators that framed the 1970 Act.³²⁴

This author believes that the trust fund should be a substantial contributor to airport and airway system development. The fund was created to meet the safety needs of airports, and those needs, in certain areas, have been slighted.³²⁵ This goal can be met without undue burden on the general taxpayer by using existing funds which have been manipulated by the various government agencies.³²⁶

The practical solutions to these problems appear to lie in the Senate proposals. Senate Bills 1648 and 508 intend to make full use of the money already contributed to the trust fund before pouring in more tax revenues. Evidence also shows that the largest airports in the country are self-sufficient.³²⁷ Those that have not reached the point of self-sufficiency can renegotiate user fee contracts,³²⁸ increase other administrative charges,³²⁹ and make City Bond packages more attractive, to compensate for lost revenues from the government.³³⁰ Senate Bill 508's proposal for a passenger facility

³²³ H. R. REP. NO. 887, Part II, 96th Cong., 2d Sess., 4 (1980).

³²⁴ 127 CONG. REC. H4943 (daily ed. July 27, 1981).

³²⁵ See *supra* text accompanying notes 37-38, 51, 53.

³²⁶ 127 CONG. REC. H4944 (daily ed. July 27, 1981). For examples of areas in which safety needs have been slighted, see *supra* text accompanying notes 68-74, 87-90, 216-17.

³²⁷ See *supra* text accompanying notes 238-41, 246-51.

³²⁸ See *supra* text accompanying notes 124, 269-70.

³²⁹ See *supra* text accompanying notes 199-201, 204.

³³⁰ *Id.*

³³⁰ See *supra* text accompanying notes 207-10.

charge will provide those defederalized airports with a vehicle by which to collect revenues for continued development and revitalization of their facilities.³³¹ This option, if not abused, makes the Senate proposals operational.³³² Using the PFC concept, the airports that have contributed to the fund will not be without some means through which to replace the lost government assistance. Though air carriers are concerned that the mechanics of implementing the "head tax" will overburden their staffs and create multitudes of other organizational problems, strict regulations promulgated pursuant to the authority of the CAB will address those concerns.³³³ The "head tax" approach compliments the original congressional intent behind the trust fund, specifically to make users of the system pay for it, instead of the General Treasury.³³⁴ In this day of sky-rocketing inflation³³⁵ and a tightening of government spending,³³⁶ defederalization accompanied by a PFC, as outlined in S. 508, appears to be the more workable and equitable solution to the problem of spending the trust fund surplus where it is most needed. To grant trust fund money to airports that can generate their own revenues is wasteful, when many commuter service, reliever and general aviation airports are in dire need of improved navigation facilities and runways.³³⁷ The Senate bills make a concerted effort to redistribute the funds where they are most needed, which should be the primary objective of the enacted legislation.

³³¹ See *supra* notes 268-73, 277-89 and accompanying text.

³³² *Id.*

³³³ See *supra* notes 290-306 and accompanying text.

³³⁴ See *supra* text accompanying notes 96-107.

³³⁵ *Reconciliation Spending Cut Bill Sent to Reagan*, CONG. Q., Aug. 1, 1981, at 1371, 1403-05.

³³⁶ *How Cuts Were Fashioned*, CONG. Q., Aug. 15, 1981, at 1464.

³³⁷ See *supra* text accompanying notes 134-42, 258-61. See also *supra* notes 243-45 and accompanying text.

