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REPRESENTING POTENTIAL LITIGANTS AS PARTIES TO NTSB PUBLIC HEARINGS: SOME PROBLEMS IN SEARCH OF SOLUTIONS

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Cross examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of truth.1

At NATIONAL TRANSPORTATION Safety Board Hearings, this engine has been reduced to a sputter because of the National Transportation Safety Board's (NTSB) 1986 amendment of its public hearing regulation.2 The amendment, which frames questions of constitutional proportion, added the provision that "parties [to NTSB public hearings] shall be represented by suitable qualified technical employees or members who do not oc-

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1 5 J. WIGMORE, EVIDENCE § 1367 (1974).
The regulation thus prohibits attorney representation of the parties at NTSB public hearings in favor of appearances by "technical employees." This article will address some of the questions presented by this agency action.

I. INTRODUCTION

The NTSB is a small agency with a big mission. Congress created it to investigate and determine the probable cause of civil aviation accidents and to find ways to increase air safety. To this end, the NTSB may hold public, trial-like hearings at which designated parties and non-party witnesses present tangible and testimonial evidence regarding the cause of an accident. Factual findings and conclusions of probable cause ultimately are drawn by the Board from this record and published in a formal accident report. The record and accident report, in turn, may play an important role in other forums, including civil actions arising out of the accident.

Congress provided the NTSB with independence from other governmental agencies and with autonomy to pursue the facts and determine the cause of air accidents. In many ways, its powers and procedures are similar to those of the courts. The Board ultimately draws factual findings and conclusions of probable cause from this record for publication in a formal accident report. The formal report can have enormous impact on civil litigation pertaining to an air accident, not to mention related criminal actions, enforcement proceedings, and employer actions.

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3 Id. § 845.13(a).


6 The tensions which give rise to the issues discussed here originate in the common goal shared by the NTSB in an accident investigation and the parties to civil litigation arising from the same accident: both seek to identify the cause of the accident. See 49 C.F.R. §§ 845.1-.51 (1990).

7 See e.g., id. § 821.
The stakes, therefore, are often high for parties to a public hearing. The NTSB's effort to pursue its investigations free from all outside influences conflicts considerably with the parties' need to protect vital interests which may be adversely affected by the fruits of the investigation. The Safety Board has reacted strongly to manifestations of this conflict. At first, the Board limited parties' rights to counsel of their choice. In 1986, its regulatory measure removed party attorneys from public hearings altogether. The Board described its motivation to limit party representation as an effort to insulate itself from involvement in the litigation process. In a formal request for comments on the amendment to section 845.13(a), the Safety Board stated:

Part 845 is intended, among other things, to prevent the injection of liability interests into the Board's hearings as evidenced by the prohibition against a party being represented by a person who also represents claimants or insurers. As noted above, the purpose of the Board's accident inquiries is not to determine the rights or liabilities of any person, and consistent with this objective, the amendment served to distance further the Board's hearings from the litigation that inevitably arises from major transportation accidents by precluding attorneys from acting as spokespersons.

Indeed, the NTSB's general counsel, addressing the Safety Board's view of involvement with litigation, noted that:

The term "entanglement" is, in my view, an extremely apt and descriptive word - it conjures up an image of the Board's investigation becoming intertwined with the tentacles of the litigation. It is therefore the Board's policy,

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9 49 C.F.R. § 845.13(b) (1990). Since the NTSB's inception, 49 C.F.R. § 845.13(b) and its predecessors precluded public hearing representation by "any persons who also represents claimants or insurers." Id.
as expressed in its regulations and practices which I shall discuss below, to maintain the litigation at an arm's length distance so that we can complete our investigation as expeditiously and effectively as possible.\(^\text{12}\)

The 1986 amendment to section 845.13(a) appears to be one expression of the Safety Board's policy of keeping litigation forces at "arm's length." The overt denial of representation by counsel raises a host of issues concerning the efficacy and wisdom of the regulation. To begin with, it is not at all clear whether denying attorney representation at NTSB public hearings insulates the Board from the pressure of outside litigation. Nor is it clear such representation interferes with the Board's responsibility to investigate and determine probable cause.\(^\text{13}\)

Another issue which arises is whether the 1986 amendment to section 845.13(a) represents an over-reaction to the perception that the "tentacles" of civil litigation may strangle the NTSB. This inquiry raises several sub-issues: (1) How serious a threat is the participation of counsel at public hearings? (2) Is the regulation rationally related to its professed goal of insulating the NTSB from undue involvement with civil litigation? (3) Even if an adequate nexus exists, does the regulation infringe upon a right to counsel inherent in basic ideas of fairness and due process?

The following discussion traces the origins of section 845.13(a) and some of these issues raised. The paper also analyzes the regulation against the backdrop of the NTSB's congressional mandate, the forces the NTSB perceives as the "tentacles of litigation," and the considerable impact the NTSB public hearing has on civil litigation.

II. The NTSB's Air Safety Mandate

The genesis of the federal government's involvement in


\(^{13}\) 49 C.F.R. § 845.2 (1990).
civil air accident investigation and aviation safety is in the Air Commerce Act of 1926.14 This measure empowered the Secretary of Commerce to investigate, record and make public the causes of civil air navigation accidents in the United States.15 The Act established a special investigation division which functioned for more than a decade.16

In 1938, Congress found the Air Commerce Act of 1926 inadequate in its creation of a decentralized federal authority which detracted from the efficiency of the government in regulating the aviation industry.17 As a result, Congress promulgated and passed the Civil Aeronautics Act.18 The Act created the Civil Aeronautics Authority19 which included an entity known as the Air Safety Board.20 The Air Safety Board was specifically authorized to investigate accidents, determine probable cause, make public reports and recommend future safety measures.21 In 1940, the Federal Aviation Act of 1958 subsumed the Civil Aeronautics Authority and the Air Safety Board within the newly created Civil Aeronautics Board.22

The 1958 Federal Aviation Act (the 1958 Act) further refined the federalization of air safety.23 A statement to Congress from President Eisenhower began the legislative process which culminated in this comprehensive Act. The President observed:

Recent midair collisions of aircraft, occasioning tragic losses of human life, have emphasized the need for a sys-

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15 Id. § 2(e).
16 Id. § 2. The next promulgation of air commerce regulations, which included the establishment of a safety investigation division for the aviation industry, occurred in 1938. Civil Aeronautics Act of 1938, Pub. L. No. 706, 52 Stat. 973.
18 Civil Aeronautics Act of 1938, supra note 16.
19 Id. § 201(a).
20 Id. § 701(a).
21 Id. § 702(a)(1)-(5).
22 H.R. REP. No. 2360, supra note 17.
tem of air traffic management which will prevent . . . a recurrence of such accidents. . . . I am recommending to the Congress the establishment of an aviation organization in which would be consolidated . . . all the essential management functions necessary to support the common needs of our civil and military aviation.\(^{24}\)

Due to these concerns, the 1958 Act specifically augmented the powers of the Civil Aeronautics Board (CAB) in several areas including licensing and economic regulation.\(^{25}\) Although accident investigation remained within the CAB's purview, the agency's powers in this area were not extended.

Congress created the NTSB in 1966 by enacting the Department of Transportation Act.\(^{26}\) For the first time, a safety board, rather than the Secretary of the Department of Transportation, was given the independent duty of "[d]etermining the cause or probable cause of transportation accidents and reporting the facts, conditions, and circumstances relating to such accidents."\(^{27}\) To perform this function, Congress gave the NTSB the authority to hold independent hearings regarding accidents.\(^{28}\) According to Congress:

The Board's function in the progress of the accident investigations is to provide an independent tribunal which, unrestricted by departmental or other loyalty or partiality, can examine the extent to which accident investigations fairly state the circumstances of an accident. In other words, the Board, with its independent status, provides a mechanism whereby the record of accident investigation made by the Department will be reviewed to determine the cause or probable cause of an accident.\(^{29}\)

The general thrust of the enabling legislation was to cre-

\(^{24}\) H.R. REP. NO. 2360, supra note 17 at 3742.


\(^{27}\) Id.


\(^{29}\) Id.
create an independent body, insulated from pressure by other agencies and dedicated solely to the discovery of the cause of accidents. Congress considered the creation of such an independent agency the most efficient method of serving the public interest in air safety.\textsuperscript{30}

The NTSB became a truly independent governmental body with the enactment of the Independent Safety Board Act of 1974.\textsuperscript{31} This Act withdrew the NTSB from the control of the Department of Transportation and made it an autonomous agency.\textsuperscript{32} The desire to supply the NTSB with more independence and further insulate it from possible conflicts with other agencies provided the rationale for this change.\textsuperscript{33} Congress again underscored its desire to legislate true independence for the Safety Board: "Because many of its investigations involve other government agencies and because some of its conclusions may involve severe criticism of such agencies . . . this agency would best serve the nation and fulfill its role if it were a totally separate and independent agency."\textsuperscript{34}

Congress could not have made any clearer its intention to insulate the NTSB's fact-finding function from any prospect of compromise by means of influence from other agencies. Nothing in the record suggests, however, that Congress realized, much less intended, that the NTSB deny parties the representation of counsel at public hearings as a result of its perception of encroachment from civil litigation. To the contrary, when Congress passed the 1974 Independent Safety Board Act, NTSB regulations did not proscribe attorney representation at public hearings, and the NTSB allowed such representation until March 1986.\textsuperscript{35} General principles of statutory construction presume that Congress knew of and approved this

\textsuperscript{30} Id. at 3367.


\textsuperscript{32} Id. § 1902(a).

\textsuperscript{33} Id. § 1901(2).


\textsuperscript{35} 14 C.F.R. § 431.20 (1973).
Questions still remain whether precluding representation by counsel at public hearings (i) in any meaningful way furthers the goal of NTSB independence, (ii) deprives the public of fully developed records of public hearings, and (iii) deprives the parties of fundamental rights. At a minimum, the NTSB, the public, and the parties each have a strong interest in the complete cross-examination of witnesses because NTSB regulations model public hearings after the civil trial. The results of this effort—the record and the accident report—may have immeasurable impact on parties in subsequent lawsuits.

III. THE PUBLIC HEARING AND ITS EFFECTS ON CIVIL LITIGATION

An NTSB accident investigation is analogous to a civil action. The Safety Board has broad power to gather and assess facts. Typically, the chief investigator designates other NTSB investigators to chair committees or groups assigned to investigate particular aspects of the accident. The Safety Board may compel examination of persons, documents and things by subpoena. It may conduct such investigation and testing as it deems feasible. Finally, it may determine that a public hearing should be held "in the public interest."

The NTSB public hearing bears strong resemblance to a civil trial. A prehearing conference identifies witnesses, issues, evidence and exhibits. At the hearing, parties ex-

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36 New York Council Ass'n of Civilian Technicians v. F.L.R.A., 757 F.2d 502, 509 (2d Cir. 1985), cert. denied, 477 U.S. 846 (1985). But see Washington Hosp. Center v. Bowen, 795 F.2d 139, 143 (D.C. Cir. 1986) (recognizing that only if Congress is silent as to an administrative agency's authority to interpret a statute, a court may assume that "Congress implicitly delegated the interpretative function to the agency").
41 Id. § 845.10.
42 Id.
amine and cross-examine witnesses under oath.  In fact, the NTSB mandates that the parties "shall be given the opportunity" to cross-examine witnesses. The chairman of the hearing, usually a Safety Board member, considers objections to and determines the admissibility of proffered evidence. Following the hearings, the parties may submit proposed findings of fact and probable cause. Thereafter, the Safety Board issues its formal accident report.

Prior to the 1986 amendment, the NTSB allowed party representation by counsel, albeit not necessarily counsel of the parties' choice. Under the 1986 amendment, Section 845.13(a) has precluded party representation by anyone other than "suitable qualified technical employees or members who do not occupy legal positions." Tasks best suited to a trained and experienced trial attorney — issue identification, evidence assessment and objections, adherence to rules of procedure and examination of witnesses — are thrust upon party representatives "who do not occupy legal positions." Surely a chief mechanic cannot expose the half truths in a recalcitrant witness' testimony as well as a trial lawyer. One could equally conclude that the amendment to section 845.13(a) diminishes the very right to cross-examine which the NTSB acknowledges in section 845.25(a).

43 Id. § 845.25(a).
44 Id.
45 Id. § 845.20(c).
46 Id. § 845.27.
47 Id. § 845.40.
48 Id. § 845.13(b). Section 845.13(b) and its predecessor regulations preclude representation at a public hearing by "any person who also represents claimants or insurers." Id. This provision seems unclear. It appears, however, broad enough to permit the NTSB to attempt to disqualify attorneys retained to represent parties by or through insurance companies or attorneys who represent parties in a civil action. One might ask then whether crossclaims between defendants to a tort action for contribution or indemnification are "claims" brought by "claimants".
49 Id. § 845.13(a).
50 Id.
51 49 C.F.R. § 845.25(a) provides that after an initial inquiry by a technical
The record from the NTSB public hearing may have tremendous impact on subsequent civil actions. The potential uses of the NTSB record are myriad. For example, the transcript from an NTSB hearing may be used in a later civil or criminal trial to impeach witnesses or to refresh their recollections. Furthermore, testimony, committee reports, and even accident reports may be admissible, in whole or in part, as substantive evidence. Thus, vital property and liberty interests of the parties, including prospective monetary judgments and damaged reputations, may be at stake depending on the state of the public hearing record and the basis for the NTSB's accident report. It is a great burden to persuade the trial fact-finder to disregard facts previously found by the NTSB. Furthermore, it is naive to suggest that a party subjected to unfavorable NTSB findings suffers no disadvantage because the lawsuit will raise the issues de novo.

These concerns underlie the questions about the efficacy and constitutional soundness of 49 C.F.R. § 845.13(a).

IV. THE ISSUES

Chief among the legal issues raised by the NTSB's 1986 amendment to 49 C.F.R. § 845.13 are: (i) whether denial of attorney representation at public hearings impinges on a right to counsel expressed in the Administrative Proce-
dure Act (APA) or a right implicit in the protections afforded by the due process clause of the fifth amendment to the United States Constitution, and (ii) whether the regulation constitutes an arbitrary and capricious abuse of agency discretion.

A. The Procedural Requirements of the APA

Whenever life, liberty, or property are deprived by the federal government, the procedure by which this deprivation occurs must comply with the due process clause of the fifth amendment to the United States Constitution. Procedural due process, particularly the right to counsel, applies to certain administrative agency proceedings. Congress has acknowledged this precept and incorporated it in the APA.

Where the APA applies to an agency adjudication, the right to counsel attaches. Specifically, the APA entitles a party to an adjudicatory hearing "to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative." This statutory right to counsel extends to allow counsel to accompany, represent and advise the witness without limitation during the hearing.

These procedural aspects of the APA, however, do not apply to all agency proceedings. Rather, they apply only

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57 Id. § 555(b).
58 Id.
59 Backer v. Commissioner, 275 F.2d 141, 143 (5th Cir. 1960).
60 5 U.S.C. § 554(a) (1988). Section 554(a) reads as follows:
   (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved —
   (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
   (2) the selection or tenure of an employee except a administration law judge appointed under section 3105 of this title;
to agency adjudications.\textsuperscript{61} The APA defines "adjudication" as "agency process for the formulation of an order."\textsuperscript{62} The statute defines "order" as "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing."\textsuperscript{63}

While an NTSB public hearing may be all that is required to dispose of a matter before the agency, the procedural safeguards of the APA still may not be implicated. According to the NTSB, the APA does not apply to its public hearings because its "hearings are factfinding proceedings with no formal issues and no adverse parties and are not subject to the [adjudicatory] provisions of the Administrative Procedure Act."\textsuperscript{64} The NTSB's position on this issue may have some support in case law. For example, the United States Supreme Court has recognized that while an administrative hearing may technically result in a final disposition of that hearing, it may not result in the formulation of an "order" as defined by the APA. A final disposition will only be an "order" for purposes of the APA if it has "some determinate consequences for the party to the proceeding."\textsuperscript{65} It is not enough that an agency decision will have a practical consequence in a subsequent proceeding.\textsuperscript{66}

In light of the existing decisional law, it appears that the procedural safeguards of the APA, including the statutory right to counsel, do not apply to an NTSB public hearing.

\textsuperscript{61} \textit{Id.}
\textsuperscript{62} \textit{Id.} § 551(7).
\textsuperscript{63} \textit{Id.} § 551(6).
\textsuperscript{64} 49 C.F.R. § 845.2 (1990).
\textsuperscript{66} \textit{Id.} at 445.
B. Procedural Due Process

Even if the NTSB position on applicability of the procedural aspects of the APA is valid, NTSB public hearing procedures must satisfy the basic tenets of procedural due process. The starting point of any procedural due process analysis is the idea that "due process, unlike certain legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."67 The requirements of due process are flexible and are determined by considering competing interests.68

The United States Supreme Court set forth three factors to consider when determining what procedure is required by the due process clause before deprivation of a liberty or property interest occurs:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.69

Under this analysis, due process considerations extend the right to counsel in civil trials70 and certain administrative proceedings.71 The following review focuses on decisional law in the administrative setting.

In a manner similar to the APA approach, the courts in administrative agency cases make a threshold determination of whether the proceeding involved is "adjudicatory"

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69 Id. at 335.
or "investigatory." The case law requires only minimal procedural safeguards to comply with due process in investigatory proceedings. If the court, however, determines that the hearing is "adjudicatory," the due process protections associated with a judicial trial apply, including the right to counsel. The seminal case on this issue is Hannah v. Larche. In this case, the Supreme Court considered procedures adopted by the Federal Commission on Civil Rights whereby the Commission prevented disclosure of the complainants' identities and did not permit the subjects of the investigation to cross-examine witnesses.

The Court examined the enabling statute and noted that the Commission's responsibility was to "investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin." The Court further emphasized that

[the Commission's function] is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission ... cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for a legislative or executive action.

The Court distinguished the due process ramifications of investigative hearings and adjudicatory functions. In adjudicatory hearings, an agency makes binding determi-

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72 See Hannah, 363 U.S. at 440-41.
73 See, e.g., id. at 449-51.
75 363 U.S. at 420.
76 Id. at 421-22.
77 Id. at 423.
78 Id. at 441.
nations which directly affect protected interests. In these hearings "it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." Furthermore, the Court observed that adjudicatory hearings are generally governed by the Administrative Procedure Act. On the other hand, the Court explained that when agency action is investigatory, as in general fact-finding hearings, "it is not necessary that the full panoply of judicial procedures be used."

The Court dismissed as conjecture the concerns of parties that those appearing before the Commission might suffer irreparable harm by being subjected to public scorn, loss of employment, and possible subsequent criminal prosecution based on the Commission's findings. The Court explained that "even if such collateral consequences were to flow from the Commission's investigations, they would not be the result of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission's investigative function." The Hannah Court, however, observed that:

[T]he investigative process could be completely disrupted if investigatory hearings were transformed into trial-like proceedings, and if persons who might be indirectly affected by an investigation were given an absolute right to cross-examine every witness called to testify. Fact-finding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. Even a person not called as a witness could demand the right to appear at the hearing, cross-examine any witness whose testimony or sworn affidavit allegedly defamed or incriminated him, and call an unlimited number of witnesses of his own selection. This type of proceeding would make a shambles of the investi-

\[^{70}\] Id. at 442.  
\[^{71}\] Id. at 445.  
\[^{80}\] Id. at 442.  
\[^{81}\] Id. at 442.  
\[^{82}\] Id. at 443.
gation and stifle the agency in its gathering of facts.\textsuperscript{83}

In \textit{Jenkins v. McKeithen},\textsuperscript{84} however, the Supreme Court distinguished \textit{Hannah} and held that the procedures employed by a state commission investigating possible criminal activity did not comply with requirements of due process.\textsuperscript{85} The Court remanded the case, asking the lower court to determine the exact procedures required to satisfy the due process clause.\textsuperscript{86} State law empowered the Commission to investigate individuals and determine whether there was probable cause to believe that they had violated criminal laws.\textsuperscript{87} However, the enabling statute gave the Commission no authority to make binding adjudications of criminal violations. Rather, it was given discretion to make prosecution recommendations to the Governor.\textsuperscript{88} The procedure in question did not allow counsel to cross-examine witnesses. Rather, the statute limited the investigation to the submission of proposed questions to the Commission to be asked at the Commission's discretion.\textsuperscript{89} Furthermore, persons under investigation could not call witnesses to testify.

The Court distinguished \textit{Hannah}, in effect finding that criminal prosecution is not a collateral consequence of the investigation, but rather is the very purpose of this Commission.\textsuperscript{90} The Court observed: "In short, the Commission very clearly exercises an accusatory function; it is empowered to be used . . . to find . . . individuals guilty of violating the criminal laws . . . and to brand them as criminals in public."\textsuperscript{91} The Court concluded that since a person investigated could not confront and cross-examine witnesses against him and was drastically limited in his

\textsuperscript{83} \textit{Id.} at 443-44.
\textsuperscript{84} 395 U.S. 411, 428 (1968).
\textsuperscript{85} \textit{Id.} at 428.
\textsuperscript{86} \textit{Id.} at 430.
\textsuperscript{87} \textit{Id.} at 416.
\textsuperscript{88} \textit{Id.} at 416-17.
\textsuperscript{89} \textit{Id.} at 417-18.
\textsuperscript{90} \textit{Id.} at 427.
\textsuperscript{91} \textit{Id.} at 427-28.
right to present evidence on his own behalf, the procedures violated due process requirements.\textsuperscript{92}

Trial and appellate court decisions since \textit{Hannah} and \textit{Jenkins} contemplate a broad interpretation of the "investigatory" function of government agencies and broad application of the collateral consequence rationale and, thus, allow minimal due process safeguards. In \textit{Georator Corp. v. EEOC},\textsuperscript{93} for example, the plaintiff challenged the procedures of the Equal Employment Opportunity Commission (EEOC) which allowed, prior to a formal hearing, findings of reasonable cause to believe a charge of discrimination.\textsuperscript{94} The court rejected plaintiff's efforts to invoke APA procedures to compel a prior hearing.\textsuperscript{95} The Fourth Circuit adjudged that the finding of reasonable cause was an investigative function, reasoning that any determination was preliminary and neither created an obligation nor imposed any liability.\textsuperscript{96} The court found that the EEOC's pronouncement of reasonable cause "is lifeless" and merely preparation for further proceedings.\textsuperscript{97} The decision could come to life only at a subsequent civil trial where a party is provided with the usual procedural safeguards.\textsuperscript{98}

In reaching its conclusion, the court boldly stated that "when only investigative powers of an agency are utilized, due process considerations do not attach."\textsuperscript{99} Since preliminary findings are without legal effect, the court found due process concerns satisfied so long as an opportunity to be heard is provided before any final agency order is

\textsuperscript{92} Id. at 428.
\textsuperscript{93} 592 F.2d 765 (4th Cir. 1979).
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 767-68.
\textsuperscript{96} Id. at 768.
\textsuperscript{97} Id. "No . . . finality exists with respect to the EEOC's determination of reasonable cause. Standing alone, it is lifeless, and can fix no obligation nor impose any liability on the plaintiff." Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
The court specifically rejected the argument that potential admissibility of the reasonable cause determination in a subsequent civil lawsuit compelled due process safeguards. The court reasoned that the finding would not be binding in a subsequent trial and "would carry only as much weight as the trial court ascribes to it."101

Similarly, in *Haines v. Askew*, a school teacher raised a due process challenge against the state board of education hearing procedures for finding probable cause that a teacher committed an act justifying punitive action.102 Specifically, the teacher attacked procedures which denied him active counsel and cross-examination of witnesses during the hearing.103 The court determined that the hearings are investigative and upheld the hearing procedure.104 The court reasoned that determinations made by the Professional Council served only as recommendations to the Commissioner of Education and findings of probable cause could not, without a separate hearing, result in punitive action against a teacher.105 Consequently, the basic rights of active counsel and cross-examination, which would be provided at the subsequent hearing, were not required at the probable cause phase.106

In *Goldberg v. Kelly*, one of the relatively few reported decisions holding that due process requires an administrative agency to provide a full panoply of procedural safeguards, the Supreme Court considered New York state's procedure for termination of the property interest in welfare benefits.107 Since it was apparently uncontro-

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100 Id. at 769. (citing Ewing v. Mytinger & Casselberry, 339 U.S. 594, 598 (1950)).
101 Id. at 769.
103 Id. at 369.
104 Id. at 372.
105 Id. at 376-77.
106 Id. at 377.
107 Id. at 377.
109 Id.
verted that the agency action constituted an "adjudication," the Court applied the basic three-point due process test. It determined that (i) the welfare recipients' interest in welfare benefits is great since the benefits are often their only income; (ii) the stakes are simply too high to risk erroneous deprivation of the benefits; and, (iii) the government interest in lessening administrative burdens was slight and was clearly outweighed by the recipients' property interests. Consequently, the Court held that before welfare benefits could be terminated, the recipient was entitled to an evidentiary hearing which provided an opportunity to confront and cross-examine witnesses, the right to counsel, and the right to present evidence.

Under the foregoing authorities, NTSB public hearings may be deemed investigatory proceedings, which are immune from the full range of due process requirements. However, considering the nature and extent of the interests at stake for NTSB public hearing parties, the investigatory-adjudicatory distinction and the related collateral effects rationale of Hannah and its progeny seem attenuated and inappropriate.

Applying the traditional three-point due process analysis to the question at hand, the property and liberty interests of parties appearing in an NTSB hearing are manifest. While NTSB probable cause findings may not be admissible per se in evidence, they surely find their way into the news media. A party's reputation as a prudent air carrier or avionics manufacturer, for example, may suffer immeasurable harm from publication of hearing testimony and accident reports. The prospect of judgments or settlements predicated on NTSB fact findings plainly implicates the parties' property rights.

Second, the risk of erroneous deprivation of these rights absent representation by counsel is clear. "Technical personnel" are not trained or qualified to cross-examine witnesses. It is ludicrous to suggest that a

110 Id. at 264-66.
111 Id. at 269-71.
corporate pilot or a design engineer is best suited to assist the NTSB in confronting an evasive witness with a prior germane statement. Similarly, the burden of negating the impact of erroneous NTSB findings in subsequent litigation is just as wrong to overlook and even more difficult to quantify.

Finally, the government's interests in precluding attorneys from public hearings are difficult to discern, much less to assess. The NTSB's expression of its intent boils down to basic agency "beliefs." First, "technical personnel" are better able to assist the NTSB at public hearings than lawyers. Second, lawyers inevitably bring the lethal "tentacles of litigation" within striking distance of the NTSB. 112 Neither "belief" appears founded in the reality that NTSB public hearings have all the characteristics of civil trials, including the quest for truth derived from direct and cross-examination of witnesses.

The NTSB acknowledges that there is no greater device than cross-examination for the discovery of truth. Even its own regulations mandate the opportunity for cross-examination. Yet it denies itself, the public, and the parties who have protected interests at stake, the opportunity to employ the professionals best qualified to utilize this device. While the full range of procedural due process protections may not apply, according to the current status of the law, the NTSB's rationale for amending section 845.13(a) calls into question the soundness of its action.

C. Judicial Review Under the APA

Quite apart from the procedural requirements of the APA and the general due process requirements, 115 the APA's judicial review provisions provide that administrative actions, including the promulgation of regulations, will be set aside if found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with

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115 See supra note 55-109 and accompanying text.
the law."\textsuperscript{114} In reviewing a regulation under this standard, a court may not substitute its judgment for that of the agency.\textsuperscript{115} Nevertheless, courts have given a presumption of regularity to administrative regulations and are deferential to the administrative agencies' promulgations of regulations.\textsuperscript{116}

For an administrative regulation to withstand review under the arbitrary and capricious standard, the agency must articulate a satisfactory explanation for the regulation including "a rational connection between the facts found and the choice made."\textsuperscript{117} Thus, judicial deference to administrative regulations will not extend to the validation of regulations merely because a judge may conceive a rational basis for its application.\textsuperscript{118} In fact, the Supreme Court has expressly stated that the "'presumption of regularity afforded an agency in fulfilling its statutory mandate' is not equivalent to 'the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause'."\textsuperscript{119} Therefore, if the agency has not provided a rational basis for a particular agency regulation, a reviewing court should not attempt to create one.\textsuperscript{120}

Under the APA, agency regulations will be set aside as arbitrary and capricious if

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to

\textsuperscript{115} Sierra Pac. Indus. v. Lyng, 866 F.2d 1099, 1105 (9th Cir. 1989).
\textsuperscript{118} Id. at 626.
\textsuperscript{119} Id. at 626-27 (quoting State Farm, 463 U.S. at 43 n.9).
\textsuperscript{120} State Farm, 463 U.S. at 43.
Several courts have applied this analysis to invalidate agency regulations. For example, in *Bowen v. American Hospital Association*, the Supreme Court considered whether certain regulations promulgated by the Secretary of Health and Human Services were reasonably related to the enabling statute. The regulations in question provided the Secretary with broad authority to conduct on-site investigations of hospitals, review hospital records, and participate in medical decision making on certain cases.

The stated basis for the regulation was that various hospitals were unlawfully refusing to provide handicapped individuals with medical care and refusing to report medical neglect of handicapped infants. The agency asserted that the regulations were needed to combat these problems. The Court found no evidence to support the allegation of unlawful discrimination. Specifically, the Court concluded that the hospital’s failure to provide medical treatment to certain handicapped children related to lack of parental consent. Moreover, on a review of the record pertaining to the forty-nine actual investigations summarized in the preamble to the challenged regulation, no evidence indicated that any hospital either failed, or was accused of failing, to make an appropriate report to an agency. In fact, the Court found that many of the hospitals had voluntarily reported instances of suspected medical neglect. Branding the agency’s asserted factual basis for the challenged regulation “manifestly incorrect,” the Court affirmed the judgments below.

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121 *Id.*
123 *Id.* at 647.
124 *Id.; see 45 C.F.R. § 84.55 (1989).*
125 *Bowen*, 476 U.S. at 628-29.
126 *Id.* at 611, 630-31.
127 *Id.* at 638 n.24.
128 *Id.* at 637.
which invalidated the regulations. 129

The Tenth Circuit also employed the rational basis test to invalidate an administrative regulation in *Humana of Aurora, Inc. v. Heckler.* 130 There, a hospital challenged a regulation which substantially departed from prior methods of reimbursing hospitals for treatment of Medicare patients. 131 The agency asserted that the change in the longstanding policy resulted from the agency’s payment of “an excessive portion of malpractice insurance costs.” 132 The agency relied on a consultant’s study which allegedly established that malpractice damage awards were significantly lower for Medicare patients than they were for the general patient population.

The court invalidated the regulation because it could find no rational connection between the facts before the agency and the promulgation of the regulation. According to the court, the “fundamental nexus between evidence and agency action is absent.” 133 The Court emphasized that the consultant’s report relied upon by the Secretary contained various deficiencies and was insufficient to justify the regulation. The report, for example, was not designed for the purpose of upholding such a regulation, and was even criticized by its authors on points essential to the use sought to be made of it. 134 In reaching its decision, the court found the agency had fallen short of the requirement that, in promulgating a change in a long-standing policy, “the agency must clearly articulate the basis for the change.” 135

As the foregoing cases illustrate, determination of the validity of an administrative regulation must begin with a

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129 Id. at 647.
130 753 F.2d 1579 (10th Cir. 1985).
131 Id. at 1580.
132 Id.
133 Id. at 1582.
134 Id.
135 Id. (quoting Dimensional Fin. Corp. v. Board of Governors, 744 F.2d 1402, 1409 (10th Cir. 1984)). In the same vein are the decisions holding rescission of agency regulations to the identical arbitrary and capricious standard of review. See, e.g., State Farm, 463 U.S. at 44.
review of the statute empowering the agency to promulgate the regulation. Here the NTSB's enabling statutes are the Federal Aviation Act of 1958\textsuperscript{136} and the Independent Safety Board Act of 1974.\textsuperscript{137}

The Federal Aviation Act sets forth the general duties of the NTSB.\textsuperscript{138} The Act empowers the NTSB to ascertain facts and find the cause of transportation accidents by several means, including public hearings.\textsuperscript{139} While the Act gives the NTSB latitude to set hearing procedures, nowhere in the statute nor in its legislative history does Congress mention attorney representation at public hearings.

The 1974 Independent Safety Board Act requires the NTSB to investigate and determine the facts, conditions, and circumstances, as well as the causes, or probable causes, of any transportation accidents.\textsuperscript{140} Findings made during the NTSB hearings are to be given to the congressional, federal, state, and local agencies concerned with transportation.\textsuperscript{141} The goal is to avoid the recurrence of such accidents. The Act empowers the NTSB to establish regulations binding on persons subject to its investigatory jurisdiction.\textsuperscript{142}

Nowhere in the Independent Safety Board Act does Congress indicate that the NTSB is empowered to preclude attorneys from public hearings designed to give the parties the right to cross-examine witnesses. Nor does the statute provide that the preclusion of attorneys will assist in NTSB investigations and prevent future transportation accidents. This is important because, at least since 1973 (a year before the Act was passed by Congress), NTSB regulations purported to restrict party representation to counsel other than one "who also represents claimants or

\begin{itemize}
\item \textsuperscript{136} 49 U.S.C. app. § 1441 (1988).
\item \textsuperscript{137} \textit{Id.} §§ 1901-1907.
\item \textsuperscript{138} \textit{Id.} § 1441(a).
\item \textsuperscript{139} \textit{Id.} § 1441(c).
\item \textsuperscript{140} \textit{Id.} § 1903(a)(1)(A)-(F).
\item \textsuperscript{141} \textit{Id.} § 1903(a)(2),(3).
\item \textsuperscript{142} \textit{Id.} § 1903(a)(6).
\end{itemize}
insurers."\textsuperscript{143} Under these circumstances, Congress is presumed to have known and approved of counsel representation for parties to NTSB public hearings.\textsuperscript{144} But did Congress intend to mandate attorney representation of parties to NTSB public hearings? If not, does the Safety Board's rationale for changing long-standing policy measure up to the rational basis requirement of the APA?

The NTSB's formal statement of reasons for the 1986 section 845.13(a) amendment appears in two separate publications in the Federal Register.\textsuperscript{145} Four separate reasons for the amendment may be gleaned from the first formal statement, each of which rest on the NTSB's "belief" and nothing more. As a reason for the amendment, the NTSB in its second formal statement states that:

Since the parties to a field investigation of an accident are virtually always also designated as parties to any hearing held in connection with the accident and since the hearing is an extension of the field investigation, the Board believes that ideally a person who represented a party during an earlier phase of the investigation should serve as spokesperson for the party at the hearing.

This amendment would require spokespersons to be employees or members of the party they represent because such personnel are most likely to possess an intimate knowledge and understanding of the functions, activities, operations or products of the party they represent and therefore would be in the best position to render assistance to the Board.

The Board derives the greatest benefit from the insight and specialized knowledge of qualified technical personnel who represent parties, and the Board believes that the parties invited to participate at a hearing should be represented by a person who theretofore participated in the in-
vestigation or at the very least an official who supervises such persons or an employee who possesses comparable technical qualifications and current work experience. Although the legal representatives of some parties to hearings have had transportation-related technical experience and have contributed to the hearing, the Board believes that persons who occupy technical rather than legal positions will be able to offer more to the Board and be more in keeping with the spirit and purposes of the inquiry.146

These reasons hardly explain a sudden and radical change in long-standing NTSB policy on an issue as important as representation by counsel at the trial-like public hearings. The reasons seem to materialize from nowhere. Certainly, the Safety Board does not mention any problems arising out of attorney representations. The NTSB mentions attorneys only to note that some legal representatives are technically knowledgeable and contribute to the merits at the hearings.147 Nevertheless the Board conclusively states that persons occupying technical positions will offer more to the hearing process.

The NTSB’s stated justification for eliminating attorneys from the public hearings boils down to two points in favor of non-lawyer technical personnel: “continuity” with the field investigation and superior technical knowledge.148 These reasons, however, do not militate against representation by counsel at the public hearing. Even a cursory analysis of the NTSB’s “beliefs” suggests that the agency had more in mind than it published in its first formal statement of reasons for the 1986 amendment.

One year after the amendment took effect, the NTSB published a request for comments on the amendments in the Federal Register.149 There, the NTSB sought “suggested modifications to the amendment which would not

147 Id. at 7278.
148 See id. at 7277-78.
sacrifice its objectives."\textsuperscript{150} In framing this request, the Safety Board stated yet another reason for the amendment:

Part 845 is intended, among other things, to prevent the injection of liability interests into the Board’s hearings as evidenced by the prohibition against a party being represented by a person who also represents claimants or insurers. [49 CFR 845.13(b)] As noted above, the purpose of the Board’s accident inquiries is not to determine the rights or liabilities of any person, and, consistent with this objective the amendment served to distance further the Board’s hearing from the litigation that inevitably arises from major transportation accidents by precluding attorneys from acting as spokespersons.\textsuperscript{151}

In this explanation, the NTSB elevates non-determination of the parties’ liability to an affirmative goal of the accident investigation. While the NTSB may “believe” that this is one of its goals, Congress has not said so. Neither the enabling statute\textsuperscript{152} nor the related legislative history\textsuperscript{153} says or means that avoiding determination of liability issues is an NTSB function, much less “the purpose of the Board’s accident inquiries.”\textsuperscript{154} The issues of causation and liability plainly overlap more often than not.

Apparently, the NTSB’s desire to avoid \textit{undue} influence by outside factors such as civil litigation has exceeded rational bounds. It appears to have led the Safety Board to restate its own purpose in an after-the-fact effort to explain why it regulated attorneys out of the public hearing. Several of the NTSB’s stated “beliefs” are simply wrong and they are not accompanied by any rational explanation.

The NTSB’s second formal statement of purpose behind the 1986 amendment also fails to state any basis for

\textsuperscript{150} Id. at 9678-79.
\textsuperscript{151} Id. at 9679.
\textsuperscript{153} \textit{See}, e.g., H.R. REP. No. 2487, 87th Cong., 2d Sess. 1, \textit{reprinted} \textit{in} 1962 U.S. CODE CONG. & ADMIN. NEWS 3175.
the opinion that the mere appearance of attorneys automatically injects extraneous liability issues into the public hearing and that excluding them "distances" the investigation from the "inevitable" litigation. Certainly, there are less intrusive ways of controlling public hearings than outright banning lawyers. The Board has promulgated regulations governing the conduct of the public hearing. The chairman of the board of inquiry, for example, is empowered to determine issues, to decide the admissibility of evidence and to generally regulate the proceedings. These regulations alone give the chairman enough power to limit both the matters presented at a public hearing and the means of presenting them.

The NTSB misses the mark in its belief that attorney representatives handicap the Safety Board by reasons of technical knowledge limitations. Attorneys are trained to conduct litigation involving many disparate arts, sciences, disciplines, professions, transactions, and events. It is irrational to suggest that attorneys cannot acquire sufficient technical knowledge about the parties' products, functions, activities, and operations to present a matter to the Safety Board. To the extent that a particular technical employee of a particular party may be more knowledgeable than counsel, both may be allowed to participate at the hearing.

To realize the foregoing "beliefs," the NTSB has sacrificed the rights of the parties, the public, and even itself, to a complete investigation record born of effective cross-examination at public hearings. To state the proposition that a technician can cross-examine a witness better than a lawyer is to refute it. To deny attorney representation at public hearings is to negate the NTSB's own acknowledgement that cross-examination is the primary vehicle of the public hearing's trial-like quest for truth. As one commentator noted:

It needs but the simple statement of the nature of cross-

examination to demonstrate its indispensable character in all trials of question of fact. No case reaches the stage of litigation unless there are two sides to it. If the witnesses on one side deny or qualify the statements made by those on the other, which side is telling the truth?... How shall we tell, how to make it apparent to a jury of disinterested men who are to decide between the litigants? Obviously, by the means of cross-examination.  

Non-lawyers simply are not equipped to participate in and contribute to an NTSB public hearing the way lawyers can. The NTSB's regulation limiting cross-examination to non-lawyer representatives is a non-sequitur. It impedes the very purpose and effectiveness of the right to cross-examine witnesses which the NTSB's own regulations confer on every party. The rationale underlying the NTSB's 1986 amendment to 49 C.F.R. § 845.13(a) is questionable at best.  

V. THE PROSPECTS FOR CHANGE

In its March, 1987 request for comments on the amendment to section 845.13(a), the NTSB identified specific issues which it isolated for comment. These issues suggest that the NTSB was considering modification of the amendment to permit attorney representation. The pertinent questions to this discussion include:

Should parties that are involved or are likely to become involved in litigation stemming from the accident be permitted to be represented by a technically knowledgeable attorney if the attorney could be isolated from such litigation? How could the Board administer and enforce such a condition? Would an attorney who is not an employee or member of a party have sufficient knowledge of the operations and activities to effectively assist the Board?  

\[156\] F. WELLMAN, THE ART OF CROSS EXAMINATION 21 (1936).
\[159\] Id. at 9680.
These questions seem to indicate that the NTSB was groping for a resolution of the difficulties it perceived to arise from an attorney’s relative lack of technical knowledge. Lawyers are trained and experienced at immersing themselves in a particular area of technical knowledge to prepare and present a case. Furthermore, to the extent it may be desirable to isolate the parties’ NTSB counsel from the parties’ involvement in civil litigation, an attorney certification to this effect, on pain of contempt, should be effective.

It has been two years since the NTSB expressed any renewed interest towards modifying section 845.13(a). The Safety Board apparently has not acted on its original inclination despite reviewing the nearly universally unfavorable comments it has received from the Aircraft Owners and Pilots Association, the National Business Aircraft Association, the Federal Aviation Administration, the Federal Railroad Administration, the Air Transport Association of America (representing more than two dozen commercial airlines), the Chairman of the Transportation Committee of the American Bar Association and others.160

Any change in section 845.13(a) will apparently have to originate in Congress or the courts. Based on the analysis set forth in section IV, supra, it would appear the best prospects for a successful challenge to the substance of Section 845.13(a), short of an express Congressional mandate, lies in judicial review under the APA.

160 In all, the NTSB docket contains 17 comments from government agencies, private associations, corporations and attorneys who have represented parties at NTSB public hearings. One comment was favorable; 18 were unfavorable. See 52 Fed. Reg. 9678 (1987).