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Procedures before the Federal Aviation Administration

Joseph A. Kovarik

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PROCEDURES BEFORE THE 
FEDERAL AVIATION ADMINISTRATION 

JOSEPH A. KOVARIK*

I. INTRODUCTION

IT ALL began on December 17, 1903, at Kill Devil Hill, near Kitty Hawk, an isolated hamlet on the North Carolina Coast, where the Wright brothers were successful in making four powered flights, the longest of which covered a distance of 852 feet in fifty-nine seconds, against a twenty-one mile per hour headwind, for an average speed of thirty-one miles per hour. Little or no attention was given in the press to the Wright brothers' achievement, and there is no indication that the Wright brothers themselves were aware of the enormity of what they had accomplished.

At the time, the Wright brothers were not only the inventors of the airplane, they were also the only air traffic controllers, the only flight standards inspectors, and the only flight instructors. When you bought an airplane built by the Wright brothers, they taught you to fly and gave you a slip of paper attesting to this fact. Because of the novelty of manned flight, the prevailing thought was that there was no need for the licensing of flight crewmembers or other airmen, and no need for aircraft to be certified as "airworthy." By the same token, there were no government aviation regulators, and there was no Federal Aviation Administration.

All of this changed rapidly during the decade which followed World War I, when, for the first time, there were sufficient numbers of pilots and aircraft to permit standardization of the product. This, in turn, made possible the establishment of civil aviation on a commercial basis. The tremendous growth experienced by civil aviation immediately before and after World War II is widely

* Regional Counsel, Southwest Region, Federal Aviation Administration; B.S., VMI; LL.B., J.D., University of Virginia.
known, and this article will not attempt to detail it here. Of more immediate interest to this presentation are the statistics which show that such growth has continued at a steady rate throughout the past decade, except for temporary deviations (see * and ** below), and the forecast which indicates that it is expected to continue undiminished well into the foreseeable future.

<table>
<thead>
<tr>
<th>Year</th>
<th>Active Pilots</th>
<th>General Aviation Aircraft</th>
<th>Air Carrier Aircraft</th>
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<tr>
<td></td>
<td>Total</td>
<td>% Change</td>
<td>Total</td>
</tr>
<tr>
<td>Jan. 1</td>
<td>Number</td>
<td></td>
<td>Number</td>
</tr>
<tr>
<td>1965</td>
<td>431,041(^1)</td>
<td></td>
<td>88,742(^2)</td>
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<tr>
<td>1970</td>
<td>720,028(^1)</td>
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<td>130,806(^2)</td>
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<td>1975</td>
<td>730,541(^1)</td>
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<td>161,500(^4)</td>
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<tr>
<td>1980***</td>
<td>905,100(^6)</td>
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<td>189,000(^4)</td>
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</table>

* FAA Records purged in 1973 to remove duplication and deceased pilots previously listed as active pilots.
** Temporary deviation caused by introduction of wide body jet aircraft into widespread airline use, and by energy crisis of 1974-1975.
*** Forecasts.

II. ADVENT OF FEDERAL REGULATION

Notwithstanding this country's early lead in the development of aviation, Congress was reluctant to assume jurisdiction over the task of regulating and promoting civil aviation. Congress eventually did come to realize that future aeronautical progress was dependent upon federal help and guidance, and demonstrated its concern by enacting the Air Commerce Act of 1926.\(^1\) This established, for the first time, a federal role in the fostering and regulating of civil aviation. By 1938 commercial aviation had outgrown the ad hoc regulatory provisions written as a series of air mail acts. Congress decided it was time to combine both economic and safety regulation as well as aviation promotional functions into a new, independent agency, and thus created the Civil Aeronautics Author-

\(^1\) 1972 FAA STATISTICAL HANDBOOK OF AVIATION 160 [hereinafter cited as STATISTICAL HANDBOOK].
\(^2\) Id. at 186.
\(^3\) FAA AVIATION FORECASTS, FISCAL YEARS 1975-1986, 48 (September 1975) [hereinafter cited as AVIATION FORECASTS].
\(^4\) Id. at 35.
\(^5\) Id. at 32.
\(^6\) Air Commerce Act of 1926, ch. 344, 44 Stat. 568.
ity (the Authority) by passing the Civil Aeronautics Act of 1938.\(^7\)

The Authority contained three major components: (1) a five-member board responsible for the economic regulation of aviation, safety rulemaking, and various other functions; (2) an Administrator, responsible for the agency's operational functions—some delegated by the five-member board and some specified in the statute—such as certificating airman and aircraft, enforcing safety rules, laying out airways, and providing and maintaining airway navigational aids; and (3) a three-member Air Safety Board responsible for investigating aircraft accidents and recommending safety improvements.

On June 30, 1940, as a result of two presidential reorganization plans taking effect at the same time, the title of the five-member Civil Aeronautics Authority was changed to the Civil Aeronautics Board (CAB), but the agency remained independent. The Air Safety Board was abolished and its functions transferred to the CAB. The Office of the Administrator was transferred to the Department of Commerce and designated as the Civil Aeronautics Administration (CAA). Following these reorganizations, the CAB's functions consisted of the economic regulation of air carriers by adjudication and rulemaking, the prescribing of safety regulations, the revocation and suspension of safety certificates, and the investigation of aircraft accidents. The CAA's functions included the construction, operation, and maintenance of air navigation facilities, the issuance of airman and aircraft certificates, and the enforcement of air safety regulations and standards.

These arrangements remained essentially unchanged until 1958, when Congress passed the Federal Aviation Act.\(^8\) This Act created an independent Federal Aviation Agency (FAA) headed by an Administrator reporting directly to the President. The core of the new agency's functions came from the superseded CAA. In addition, the FAA was given the CAB's safety rulemaking functions.

The Department of Transportation Act of 1966\(^9\) transferred to the Secretary of the Department of Transportation (DOT) all re-

\(^7\)Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.


sponsibilities and functions formerly assigned to the FAA Administrator, but those responsibilities and functions directly concerned with aviation safety were delegated back to the Administrator by the statute itself and the remainder by the Secretary. Thus, the main effect of the Department of Transportation Act on the FAA was to place the FAA's functions in the context of the national transportation policy planning and the coordination of transportation modes for which the DOT was created. Under the overall DOT structure, a five-member National Transportation Safety Board (NTSB) was created, and it assumed all of the investigatory functions in connection with accidents involving civil aircraft, including the determination of probable cause and the issuance of public reports on such accidents. The NTSB also has appellate review of the suspension, amendment, modification, revocation, or denial of any certificate or license issued by the Secretary of DOT, the FAA Administrator or, in fact, any other administrator within the DOT.

III. Structure of FAA

The FAA is the largest of the seven administrations within DOT. FAA national headquarters are in Washington, D.C., where agency policies are formulated. The programs are implemented in the field where ninety percent of the agency's total workforce is located. The FAA presently has twelve geographical regions, nine within the Continental United States, one each in Alaska and Hawaii, and another in Brussels, Belgium, to monitor European activities of the FAA. Each region is headed by a Regional Director, who is in charge of all FAA activities within his region. In addition to the regions, there are two special complexes. One, located near Atlantic City, N.J., is called the National Aviation Facilities Experimental Center (NAFEC), which is responsible for carrying out aviation research and development projects. The other, located in Oklahoma City, Oklahoma, is the agency's Aeronautical Center, and it is the central repository for all airmen and aircraft records. The Aeronautical Center also houses the FAA Academy, one of the world's largest technical training centers, and the Civil Aeromedical Institute.

The day-to-day direction of the FAA's major missions continues
today much as before when it was an independent agency. The central missions of FAA are promotion of aviation safety while ensuring efficient use of the nation's navigable airspace and promotion of air commerce and civil aviation at home and abroad. It also assists in fulfilling national defense requirements. The FAA carries out its responsibilities in aviation safety by: (1) issuing and enforcing safety rules and regulations, (2) certificating airmen, aircraft, aircraft components, air agencies, and airports, and (3) conducting research and development.

Of particular interest to this article are those procedures and practices which have evolved over the years as the result of statutes, regulations, or case law, and which are in general use by the FAA in the handling of enforcement cases involving violations of its safety rules and regulations.

IV. STATUTORY AUTHORITY

The Federal Aviation Act of 1958, as amended, has lodged rather unique enforcement powers in the Administrator of the FAA. It is not a task which he pursues at his discretion. The Act specifically charges the Administrator with the responsibility of regulating both civil and military operations in the airspace in the interest of safety. Additionally, it makes the Administrator responsible for performing his duties under the Act in such a manner as will best reduce or eliminate the possibility or recurrence of accidents in air transportation.

To carry out this responsibility, the Administrator has been given specific authority to enforce the safety and security provisions of the Act and all rules, regulations, or orders issued thereunder. The following sections of the Act are the primary source of this enforcement authority.

Section 609 provides that the Administrator, if he determines that safety in air commerce or air transportation and the public interest requires, may issue an order amending, modifying, suspending, or revoking in whole, or in part, any type certificate, airworthiness certificate, airman certificate, air carrier certificate, air agency certificate, or commissioned air navigation facilities. Prior

11 Id. § 1429.
to issuing such an order, the certificate holder will be advised of the charges and given an opportunity to answer any charges and be heard as to why such certificate should not be modified, suspended, or revoked. An exception to this procedure exists in those cases which require immediate emergency suspension or revocation for public protection. Any person whose certificate is affected by an order issued under Section 609 may appeal to the NTSB.

Section 901\textsuperscript{12} provides for the imposition of civil penalties, not to exceed $1,000 for each violation, and also empowers the Administrator to compromise such penalties imposed as a result of violations of Titles III, V, VI, or XII of the Act. This provision does not apply to members of the armed forces of the United States or to civilian employees of the Department of Defense who are subject to the uniform code of military justice.

Sections 902\textsuperscript{13} and 1203\textsuperscript{14} set forth certain acts which are criminal violations. These include forgery of certificates, false marking of aircraft, interference with air navigation facilities, transportation of illegal cargo including explosives, aircraft piracy, carrying weapons aboard aircraft, interference with aircraft accident investigations, and violations of Title XII of the Act involving security control of air traffic.

Section 1005\textsuperscript{15} provides in part that, if the Administrator is of the opinion that an emergency requiring immediate action exists with respect to air commerce, the Administrator is authorized, either upon complaint or his own initiative, at once if he so orders, without answer or other form of pleading by the interested person or persons and with or without notice, hearing, or the making or filing of a report, to make such and reasonable orders, rules, regulations, as may be essential in the interest of safety in air commerce to meet such emergency.

Section 313(c)\textsuperscript{16} and 1004\textsuperscript{17} empower the Administrator to perform such acts and to conduct such investigations as he determines necessary to carry out the provisions of the Act and to exercise and

\textsuperscript{12} Id. § 1471.
\textsuperscript{13} Id. § 1472.
\textsuperscript{14} Id. § 1523.
\textsuperscript{15} Id. § 1485.
\textsuperscript{16} Id. § 1354(c).
\textsuperscript{17} Id. § 1484.
perform his powers and duties under the Act. In order to conduct such investigations, the Administrator has been given the authority to hold public hearings, take evidence, issue subpoenas, take depositions, and compel testimony.

V. INITIATION OF FAA ENFORCEMENT ACTIONS

Because of the great number and variety of Federal Aviation Regulations (FAR's) which govern the manufacture, operation, and maintenance of aircraft and aviation related activities, information concerning possible violations comes to the FAA from a great many sources. By far the greatest amount of violation information is generated by the Flight Standards Inspector in the performance of his official duties in inspecting air carriers, commercial operators, agricultural aircraft operators, pilot schools, repair station maintenance and technician schools, and general aviation owners and pilots. The sources of information regarding possible violations can be listed in descending order, with the second most fruitful source being the Air Traffic Service which generates a large amount of information because of its handling of aircraft utilizing the FAA Air Traffic Control (ATC) system. With respect to cases involving air carriers, the reports which the carriers themselves are required by regulation to file are the third most productive source, closely followed by public complaints. For cases involving general aviation, public complaints are the third most productive source.

Upon receipt of information indicating a violation of the regulations, the Flight Standards Division, Airport Division, or Air Transportation Security Division commences its investigation, utilizing Flight Standards Inspectors, Airport Certification Safety Specialists, or Air Transportation Security Agents, depending upon the type of violation being investigated. At this time, statements pertaining to the violation are taken from witnesses and reduced to writing. Photographs, aeronautical charts, and other relevant documents such as National Weather Service reports, communication logs, aircraft logs, and load manifests are also collected and made a part of the violation report. On certain occasions, physical evidence is obtained and utilized. Prior to completion of the investigation, persons under investigation will be informed by letter that
an FAA investigation is in progress, and that they have an opportunity to present their version of the matter. Any information received from the parties being investigated is included with the violation report. Should this information not be received within a reasonable period of time, the investigation will be concluded without its benefit.

By far the greatest number of reported violations arise out of the operation and maintenance of aircraft, rather than matters pertaining to airport certification or air transportation security. In a typical case involving the operation or maintenance of aircraft, the violation report is forwarded from the local District Office to the Flight Standards Division in the appropriate Regional Headquarters for technical analysis and review. If, after such review, it is concluded that the evidence is deficient in some respect, or that there was no violation, the case may be closed without further action. When this occurs, the alleged violator will be informed of the result. On the other hand, should the evidence be considered sufficient to establish violation, the Flight Standards Division will determine whether the case will be handled as an administrative or legal action.

Prior to reaching a decision as to the form of action, the Flight Standards Division will consider the previous violation history of the alleged violator, if any, and also ascertain whether the alleged violation is so minor that the case should be handled as an administrative action. An administrative action will be taken in those cases in which no unsafe condition existed, lack of competency or qualification are not involved, the violation was not deliberate, and the alleged violator has a satisfactory attitude toward complying with the regulations.

There are two types of administrative actions which can be taken: (1) Warning Notice, and (2) Letter of Correction. The Warning Notice is used when no corrective action is required, whereas the Letter of Correction is used when corrective action is required. Administrative actions are not taken as a matter of convenience or merely if there is insufficient evidence to support a violation. Since they are taken summarily without hearing or avenue of appeal, they would not constitute a formal finding or adjudication which would require the utilization of due process
procedures. Records pertaining to administrative actions are retained for two years, after which they are destroyed. Administrative actions were developed to provide a simple means for handling minor violation cases in minimum time with maximum effectiveness.

When a determination is made that the case is too serious to be handled as an administrative action, depending upon the type of violation under consideration, the Flight Standards Division, or Airports Division, or Air Transportation Security Division will forward the case to the Regional Counsel with the recommendation that legal action be initiated by (1) imposition of a civil penalty, or (2) certificate action such as suspension or revocation. On certain rare occasions, circumstances may dictate the use of extraordinary legal remedies in order to achieve a desired result. These remedies could include aircraft seizures, cease and desist orders, and injunctive relief. The determination of the specific type of sanction to be used in legal action cases is arrived at jointly by the regional Flight Standards Division, Airports Division, or Air Transportation Security Division, depending upon the type of violation under consideration, and the Regional Counsel.

Once legal action has been initiated, however, responsibility for handling the case rests with the Regional Counsel, subject to review by the appropriate Regional Division Chief to assure that the action taken will be fair and impartial, will serve to promote safety, and will protect the public interest. In addition, the Regional Counsel is subject to the professional guidance of the FAA's Chief Counsel at any stage throughout the entire handling of the case. Because of the basic importance of the aviation safety enforcement program, Regional Directors are kept personally informed of the progress of all major or sensitive enforcement cases being handled within their respective regions.

What percentage of violation reports are closed by administrative actions? Agency statistics for Calendar Year 1974 indicate that Flight Standards Inspectors filed a total of 6,513 violation reports. Of these, four were closed without any action, and 2,711 were closed by administrative action (including both Warning Notices

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and Letters of Correction), for a total of 41.7 per cent of all violation reports filed. During the same period, a total of 4,626 cases were closed by legal action, of which 1,672 resulted in the imposition or compromise of a civil penalty (36.2%) and 1,841 were by certificate action (39.8%). Interestingly enough, 601 of these so called legal action cases were closed without taking any action at all (13.0%), indicating that upon review the case was considered to be legally deficient in some respect (lack of evidence is the most common deficiency) and, therefore, not worthy of prosecution.

Once a case reaches the Regional Counsel's office for processing as a legal action, and there is agreement with the office referring the case as to what should be done, the sanction usually sought will be either (1) a civil penalty action, or (2) a certificate action. Civil penalty actions are initiated under section 901 of the Federal Aviation Act of 1958, which authorizes the United States to seek a civil penalty of up to $1,000 for each violation of the Act or FAR's issued thereunder. As a general rule, civil penalty actions are used for less serious violations not involving qualifications or when the person charged does not hold any current certificates. Some situations can arise where a new violation occurs each day an aircraft is operated, for example, if a person engages in the carriage of persons or property in air commerce for compensation or hire with a large aircraft, notwithstanding the fact that he lacks an appropriate certificate and operations specifications issued under FAR Part 121. In this example, the maximum civil penalty can reach an astronomical amount in a relatively short period of time.

When a certificate holder, such as an air carrier, is providing a public service which cannot be interrupted without undue hardship and a suspension is not necessary to obtain immediate corrective action, civil penalty actions will be used instead of certificate actions in order to prevent the interruption of service. Civil penalty actions will be used where a certificate action such as suspension would

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19 49 U.S.C. § 1471 (1970); see text at note 12.

21 Defined under 14 C.F.R. § 1.1 (1975) as aircraft of more than 12,500 pounds maximum certificated takeoff weight.
ordinarily be taken except for the fact that it would be manifestly unfair or cause undue hardship.

The full $1,000 penalty for each violation is not normally sought; instead, the Regional Counsel will advise the person charged by letter specifying the violations in question, and suggesting payment of a compromise offer in some amount up to the $1,000 maximum with the precise amount differing according to the number of violations or the manner in which safety was affected. Obviously, the amounts will differ greatly between those cases which involve air carriers or air carrier personnel and those which involve persons who are general aviation owners or operators. The letter will also advise the person charged that he may proceed in one of three different ways: (1) submit the suggested amount; (2) submit additional information either in writing or at an informal conference which would explain, excuse, or disprove the alleged violation; or (3) request that the issues of fact and law be tried in the United States District Court.

If the person charged pays the suggested compromise offer, this will not be considered to be an admission of a violation, and, consequently, should he again become involved in an FAA enforcement proceeding in the future, the fact that he settled his case by paying a compromise offer will not be construed by the FAA as a prior determination of a violation.

If the person charged decides to request an informal conference, it will be held, usually within thirty days of the date of such request, either at the Regional Office or the General Aviation District Office nearest the person's residence. The purpose of the conference is to provide an opportunity for the person charged to explain why he did not commit the violation, or, if he did, to present mitigating circumstances which might well justify a reduction of the suggested compromise offer. In some cases, the mitigating circumstances are so clear and convincing that the case is closed without payment of any compromise at all. Obviously, when such circumstances exist, the person charged would do well to bring the information to the FAA's attention as early as possible so that it can be properly evaluated.

If the person charged refuses to pay a compromise offer, the case will then be forwarded to the appropriate United States
Attorney, with the request that suit be instituted for the maximum amount of the civil penalty. The U. S. Attorney handling the case will normally attempt to reach a settlement before filing a complaint in the United States District Court. This is done by giving the person charged another chance to pay a compromise; the amount asked, however, would be at least equal to or somewhat above that initially offered by the FAA. The reason for this is to encourage settlement while the case is still being handled by the FAA. If the case is settled by the U. S. Attorney by accepting payment of a compromise, the FAA will not consider this to be an admission of a violation. If it is necessary, however, for the U. S. Attorney to try the case, then any civil judgment obtained would be considered as a determination of a prior violation, although not in the same sense as a criminal conviction.

The other type of legal action is a certificate action for suspension or revocation of the certificate in question. Certificate actions are normally used in cases which involve more serious violations of the FAR’s, or where the violation indicates a lack of qualification on the part of an airman.

Certificate actions are initiated under section 609 of the Federal Aviation Act of 1958. Before ordering suspension or revocation of a certificate, the certificate holder must be given notice of such intention and be provided an opportunity to answer and be heard. Assuming the office referring the case and the Regional Counsel are in agreement regarding the sanction being sought, the first step is the issuance of a Notice of Proposed Certificate Action. The Notice will set forth the facts in sufficient detail so the certificate holder can know and understand the charges being brought against him. Additionally, the Notice will advise the certificate holder that he may elect to proceed in one of four different ways, and that he should make his decision on or prior to the date specified (usually 10 days after his receipt of the Notice). The four options open to the certificate holder are: (1) surrender his certificate, in which event the Order proposed in the Notice will be issued effective the date his certificate is surrendered or placed in the mail; (2) indicate his desire to have an Order issued as proposed in the Notice so that he can perfect his appeal to the National Transpor-

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22 49 U.S.C. § 1429 (1970); see text at note 11 supra.
tation Safety Board (NTSB); (3) answer the charges in writing, and furnish any additional information in writing or other documentary evidence that he may wish to have considered; and (4) request that he or his representative be given an opportunity to have an informal conference with the FAA Attorney who is handling his case at the Regional Office or at the General Aviation District Office nearest his residence.

The informal conference (choice 4) has proven its worth as a "two-way street," leading to a better understanding by certificate holders of the purpose and objectives of the FAA's enforcement program because it provides an opportunity for a full and open discussion of the circumstances which led to the filing of the violation. In many instances the conference has resulted in the certificate holder's acceptance of a sanction without further appeal after being convinced of the strength of the FAA's case. Occasionally, conferences have disclosed facts not otherwise revealed in the violation report which have mitigated the sanction or caused the charges to be dropped. The informal conference is confidential and will not be used by the FAA to gather evidence or admissions for later use against the certificate holder.

When additional evidence or other information is submitted, either in writing (choice 3), or in person (choice 4), it will be considered, and the evidence on which the Notice was originally based will be re-examined. At this point, allegations which have been disproved will be dropped, and, if the sanction proposed is considered to be excessive, it will be reduced. It should be noted that the sanction proposed in the Notice will never be increased as the result of the additional evidence elicited, however, erroneous allegations may be corrected or dropped.

If the certificate holder elects to surrender his certificate (choice 1) or to appeal directly to the NTSB (choice 2), an Order will be issued immediately, with findings and violations alleged identical to those proposed in the Notice. If the matter remains unresolved even after the submission of additional evidence or other matters in writing or in person (choices 3 and 4, respectively), an Order will be issued with any corrections, deletions or reduction in sanction that may be appropriate under the circumstances. This Order will set forth the alleged violations and findings which constitute
the basis for the FAA's action, describe what action has been taken, and state why safety in air commerce or air transportation and the public interest require the certificate action. The Order will also set out the effective date and inform the certificate holder of his right to appeal to the National Transportation Safety Board (NTSB) and the time within which he must appeal.

Emergency orders are another type of legal enforcement action which should be reviewed. These are used for emergency suspensions or revocations of a certificate, and only when deemed necessary as an emergency safety measure to provide immediate protection to the public. As a general rule, emergency orders are issued as soon as possible after the date of the incident or event which created the need for emergency action.

Emergency orders are initiated under section 10053 of the Federal Aviation Act of 1958, which authorizes the Administrator to make immediately such just and reasonable orders, rules, and regulations as may be essential in the interest of safety in air commerce to meet an emergency. Emergency orders will set forth the alleged violations and findings similar to any other order, together with an explanatory statement to the effect that the public interest and safety in air transportation or air commerce require the immediate effectiveness of the order. Since emergency orders are immediately effective, the certificate holder is also advised that an appeal to the NTSB will not stay the effectiveness of the order.

The extraordinary nature of the remedy dictates that emergency procedure be used sparingly, and only when the certificate holder has demonstrated a lack of necessary qualifications or a determination not to act in accordance with existing regulations, and it is likely that the certificate holder will continue using his certificate.

VI. APPEALS TO THE NTSB

If a certificate holder desires to appeal, he must file it with the NTSB within twenty days from the date he received the Order, along with proof that a copy of the appeal has been sent to the FAA Administrator, which is the same office which issued the Order suspending or revoking his certificate. Each appeal must

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24 49 C.F.R. § 821.30 (1975).
contain a concise but complete statement of the facts relied upon and the relief sought. The timely filing of an appeal with the NTSB will postpone the effective date of the FAA's Order until final disposition of the matter by the NTSB, except in emergency proceedings in which the time for appeal is only ten days from the date of receipt of the Order. The Order of the Administrator from which an appeal has been taken shall serve as the complaint. The FAA's complaint must be filed with the NTSB within five days after an appeal is filed. The certificate holder must then file his answer within twenty days of the date the complaint is served upon him. Failure on his part to deny any allegation in the complaint may be deemed an admission of its truth. In proceedings under both section 609 and section 1005 of the Act, the burden of proof is on the FAA and the proceedings will be handled in accordance with the NTSB Rules of Practice in Air Safety Proceedings.

When an Emergency Order has been appealed, the accelerated appeal provisions under section 609 of the Act require a final disposition within sixty days after the NTSB is advised of the appeal. There are special rules applicable to this type of proceeding which are set forth in Subpart I, NTSB Rules of Practice in Air Safety Proceedings.

Although a proceeding before the NTSB involving both Orders and Emergency Orders is characterized as an appeal, the proceeding is not really an appeal as that term is generally understood. It is, in fact, an administrative due process trial before an NTSB Administrative Law Judge, in which each party (the respondent with respect to the certificate holder, and Administrator with respect to the FAA), may call witnesses, cross-examine the other party's witnesses, and introduce documentary and other types of evidence. The NTSB Administrative Law Judge has authority under section 1004 of the Act to subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to the matter at hand. The proceedings are recorded by a

26 49 U.S.C. § 1429 (1970); see text at note 11 supra.
court reporter, who later prepares a written transcript of the entire proceeding.

At the conclusion of the hearing, the NTSB Administrative Law Judge will issue an Initial Decision. In some instances, this decision will be issued orally; when the matter under consideration is complex, however, the NTSB Administrative Law Judge will call for submission of written briefs by the parties and postpone the issuance of his Initial Decision until after he has had an opportunity to read and consider them.

Either party may appeal from an Initial Decision by filing with the five-man National Transportation Safety Board (Board) a Notice of Appeal within ten days after an Initial Decision has been issued. Each appeal must be perfected within forty days after an oral decision has been rendered, or thirty days after service of a written Initial Decision. The appeal is perfected by filing with the Board, and serving on the opposing party, a written brief setting forth in detail all the objections to the Initial Decision, and stating whether the objections are related to alleged errors in the NTSB Administrative Law Judge's findings of fact and conclusions. It shall also state the reasons for the objections, together with the relief requested. A reply brief must be filed by the opposing party within thirty days after the appeal brief has been filed.

Oral argument before the Board will normally not be granted, but it may be permitted by the Board, either on its own initiative or on the motion of a party. The appeal to the Board is thus a true appeal, with the decision being based upon the transcript of hearing before the NTSB Administrative Law Judge, the Initial Decision, and briefs filed by the respective parties.

VII. JUDICIAL REVIEW

Judicial review of Orders issued by the National Transportation Safety Board (Board) is authorized by section 1006 of the Act. This section provides that any Order issued by the Board or Secretary of Transportation (FAA) under this Act, with certain exceptions, shall be subject to review by the various Courts of Appeals of the United States or the United States Court of Appeals for the Dis-

29 49 C.F.R. § 821.48(g) (1975).
trict of Columbia upon the filing of a petition within sixty days after entry of that Order. Any person disclosing a substantial interest in such Order may seek judicial review. A Petition for Review must state the grounds on which review is sought and must be filed in the court for the circuit wherein the petitioner resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia. Thereafter, both the Board and the FAA shall be respondents, and they must file a respondent's brief. The petitioner will then have an opportunity to file a reply brief. The Act further provides that the findings of fact by the Board or the FAA shall be conclusive, if supported by substantial evidence. The U. S. Court of Appeals will usually permit oral argument on the petition, and will issue a written opinion either sustaining or reversing the Board's Order. Petitions to a U. S. Court of Appeals are costly because of the need for printing and filing the required number of briefs, together with the complete record. It should also be noted that the petitioner's likelihood of success is remote since the U. S. Court of Appeals normally will not overturn the findings of an administrative agency, such as the Board, especially when the findings are based upon the specialized knowledge of the agency in question.

Section 1006 of the Act also provides that the judgment and decree of the court of appeals affirming, modifying, or setting aside any such Order of the Board or FAA shall be subject to review only by the U. S. Supreme Court upon appropriate certification or certiorari; but, as a practical matter, because of the tremendous numbers of petitions for certiorari received each year by the Supreme Court, it is extremely unlikely that the case would have sufficient constitutional importance to warrant its being heard.

In addition to the judicial review of Orders available under section 1006 of the Act, review is also available to either party as the result of an adverse decision in a federal district court when a civil penalty case has been referred by the FAA to the U. S. Attorney. The appeal procedure followed in this type of case is the same as in any similar civil proceeding.

VIII. EXTRADINARY ENFORCEMENT PROCEDURES

Previous portions of this article have shown that the FAA's
aviation safety enforcement program is comprised of administrative actions and legal actions, the latter involving either (1) civil penalty actions or (2) certificate actions leading to suspension or revocation. At this point, it is appropriate to review certain extraordinary enforcement procedures available to the FAA to supplement, if necessary, the normal legal action cases.

A. Fact Finding Investigations.

Fact finding investigations are authorized under sections 313(c) and 1004 of the Federal Aviation Act of 1958, and section 6(b) of the Administrative Procedures Act. This type of investigation involves the use of legal process as an investigative aid to obtain information necessary for deciding what FAA action, if any, should be taken with respect to any matter under FAA jurisdiction. The FAA will not use a fact finding investigation as a substitute for routine investigation. Additionally, it will not be used to investigate violations which constitute felonies under federal law. Although fact finding investigations are not adversary or adjudicatory in nature, the procedures utilized make it possible for the FAA to compile testimony and to obtain documents which, except for the investigation, would not be given or made available voluntarily. Fact finding investigations are used sparingly and with great restraint to avoid the possibility of misuse and abuse.

While it is not possible to itemize all instances in which a fact finding investigation will be conducted by the FAA, circumstances which have justified the use of such investigations in the past include: (1) institution of an enforcement proceeding under section 609 of the Federal Aviation Act or other legal authority; (2) institution of a rulemaking proceeding; and (3) proposing legislation. Fact finding investigations are initiated when the Regional Counsel, Assistant Chief Counsels, or the Chief Counsel issues a Notice of Investigation. The Notice will indicate the subject matter of the investigation, and, when applicable, will designate and identify the presiding officer. The place of hearing is normally determined by the presiding officer. The sessions at which evidence is received are closed to the public.

31 Id. § 1354(c); see text at note 16 supra.
32 49 U.S.C. § 1484 (1970); see text at note 17 supra.
33 Administrative Procedure Act § 6(c), 5 U.S.C. § 555(c) (1970).
Witnesses appearing by compulsion, permission, or at the request of the FAA may be accompanied, advised, and represented by counsel. Except while a person actually under investigation is being examined as a witness, neither he nor his representative may attend any session. The presiding officer is authorized to issue subpoenas directing any person to appear before him at a designated time and place to testify or produce documentary evidence, or both, relating to any matter under investigation by the FAA.

Fact finding investigations are usually terminated at the discretion of the official who issued the Notice of Investigation, and the information obtained is then made available to interested FAA components. If it is decided that FAA action should be taken on the basis of the information obtained from the fact finding investigation, the steps which will be taken are the same as if no information had been obtained from an investigation. In FAA proceedings involving the formal use of evidence, the information obtained from a fact finding investigation is introduced in the same manner as any other evidence and is subject to the same rights of any affected persons.

B. Emergency Cease and Desist Orders.

Emergency Cease and Desist Orders are authorized under section 1005* of the Federal Aviation Act, which confers upon the Administrator of the FAA and his delegates broad emergency powers to deal with immediate hazards to air safety. Because of the extraordinary nature of the emergency authority, Cease and Desist Orders are issued only when more conventional enforcement procedures are considered to be inadequate because of the lack of time or lack of access to the judicial system. It goes without saying that Cease and Desist Orders are issued only when there is an immediate, intolerable hazard threatening the safety of air commerce and the general public.

Again, it is not possible to list all situations in which the FAA would take action and issue a Cease and Desist Order, but the following types of violations by air carriers, air taxis, and commercial operators have resulted in such Orders: (1) operation of aircraft without or beyond operating authority; (2) operation of

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aircraft in unairworthy condition; (3) operation of aircraft without properly certificated or qualified flight crews; and (4) operations that repeatedly violate FAR's with more violations likely in the immediate future. Since Emergency Cease and Desist Orders are normally issued to become effective immediately, without notice, hearing, or pleadings, the person charged is advised by the Order that section 1006 of the Federal Aviation Act provides for judicial review in the various courts of appeals of the United States or the United States Court of Appeals for the District of Columbia within sixty days after entry of the Order being reviewed.

C. Seizure of Aircraft.

Aircraft may be seized under the authority provided by section 903(b) of the Federal Aviation Act and FAR section 13.17 when a civil penalty letter has been issued, or when a civil penalty is contemplated. The aircraft may also be seized when a U.S. district court has assessed a civil penalty and the owner is known to have insufficient assets, other than the aircraft, so that he would be unable to compromise the civil penalty or to satisfy the judgment. Additionally, the FAA will seize an aircraft when it is likely that the alleged violator intends to remove his sole asset, the aircraft, from the jurisdiction of the court which would assess or has assessed the civil penalty. An aircraft may also be seized at the outset of an enforcement action if the following conditions exist: (1) the aircraft has been involved in a serious violation of Titles III, V, VI, or XII of the Act, or any order, rule, or regulation issued thereunder; and (2) the actions of the registered owner indicate the likelihood of future serious violations based upon the owner's unwillingness to comply with the FAR's or to compromise or set aside the civil penalty incurred by reason of the violations arising from his operation of the aircraft.

Seizure under section 903(b) of the Act may be by a state or federal law enforcement officer, or by an FAA Safety Inspector, but the Order must specify who is authorized to effect the seizure. Seizure

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55 Id. § 1486.
56 Id. § 1473(b).
Orders are normally issued by the Administrator or the Regional Director of the region in which the aircraft is located, and directed to the person who will be seizing the aircraft. The Order will also include the finding that the aircraft itself has been involved in one or more violations of the Federal Aviation Regulations and is, therefore, subject to a lien by reason of the violations described. The Order will identify the aircraft by type and number, and identify its registered owner by name and address. Finally, the Order will direct that the aircraft be placed in the nearest available public storage facility within the judicial district in which the seizure is made, and designate the person seizing the aircraft as its custodian.

Concurrently with the issuance of a Notice of Seizure, the Administrator or the Regional Director will send a written Notice of Seizure to the registered owner of the seized aircraft and each person shown by FAA records to have an interest in it. The notice will contain the following information: a statement of the time, date, and place of seizure; the name and address of the custodian; the reason for the seizure, including the violations believed or judicially determined to have been committed; and the amount that may be tendered as a compromise of the civil penalty or payment for his civil penalty assessed by a U. S. District Court. The amount of the compromise or penalty will include the costs of seizure, storage, and maintenance. Upon the issuance of the Order of Seizure, FAA counsel will inform the U. S. Attorney for the district in which the aircraft is being seized of the circumstances, and shall thereafter send him a written report requesting him to institute proceedings to enforce the lien against the seized aircraft.

A seized aircraft may be released upon the occurrence of any of the following circumstances: (1) the registered owner pays a civil penalty compromise agreed upon and the costs of seizure, storage, and maintenance of the aircraft; (2) the aircraft is seized under an order of the U. S. district court by a proceeding in rem to enforce the lien of the aircraft; (3) the U. S. Attorney notifies the FAA that he refuses to institute such proceedings; or (4) a bond is deposited in the prescribed amount with a surety prescribed by either the Regional Director or the U. S. district court having

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39 See 14 C.F.R. § 13.17 (1975) for specifics concerning seizure under § 903(b) of the Act.
jurisdiction of the action, the bond being conditioned upon payment of the civil penalty or the compromise amount and the costs of seizure, storage, and maintenance of the aircraft. Copies of any Order of Release will be sent to all those to whom Notice of Seizure was given as well as to the appropriate U. S. Attorney.

D. Injunctions.

FAA requests for injunctions are normally made if airmen knowingly continue to operate aircraft without appropriate airman certificates in violation of the Federal Aviation Regulations. Under these circumstances, FAA enforcement actions have failed to deter further violations, and FAA Counsel (Regional Counsel, Assistant Chief Counsel, or the Chief Counsel) will refer requests for injunctions directly to the U. S. Attorney in the proper judicial district.

The Federal Aviation Act in section 1007 grants jurisdiction to the U.S. district courts to enforce compliance with any provisions of the Act, any rule, regulation, requirement, or order issued thereunder, or any term, condition, or limitation of any certificate or permit issued under the Act, by issuing an injunction or other process, mandatory or otherwise, restraining the violator from further violations. This section also authorizes any U. S. Attorney, upon the request of the Administrator, or the Board, and under the direction of the Attorney General, to institute in the proper court all necessary proceedings for the enforcement of such provisions, terms, conditions, or limitations, and for the punishment of all violations thereof.

E. Criminal Penalties.

If an inspector or other employee of the FAA becomes aware of a possible violation of Sections 902(a) - (h) of the Federal Aviation Act of 1958, the matter is referred, prior to referral to the FAA counsel concerned, to the FAA Investigation and Security Division for investigation. If appropriate, the FAA counsel refers the report to the Department of Justice for criminal prosecution of the offender. In this connection, section 902 and 1203 of the

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41 Id. § 1472; see text at note 13 supra.
42 49 U.S.C. § 1523 (1970); see text at note 14 supra.
Act provide criminal penalties for any person who knowingly and willfully violates specified provisions of the Act, or any regulation or order issued under the provisions. Other criminal matters not within the investigatory jurisdiction of the FAA, such as violations of Section 902(i) through (m) of the Act, are referred directly to the Department of Justice or the appropriate agency for investigation.

IX. Medical Cases

The authority of the Administrator, under section 602a of the Federal Aviation Act of 1958, to issue or deny medical certificates is delegated by FAR section 67.25a to the Federal Air Surgeon to the extent necessary to: (1) examine applicants for and holders of medical certificates for compliance with applicable medical standards; and (2) issue, renew, or deny medical certificates to applicants and holders based upon compliance or noncompliance with applicable medical standards. Subject to certain limitations set forth in FAR Part 67,a the authority delegated in (1) and (2) above is also delegated to Aviation Medical Examiners (AME) and to authorized representatives of the Federal Air Surgeon within the FAA. FAR section 183.21b further details the extent of the AME's delegated authority. In general, the AME's functions include: (1) accepting applications for physical examinations necessary for issuing FAA medical certificates under FAR Part 67; (2) conducting physical examinations under the general supervision of the Federal Air Surgeon or the appropriate Regional Flight Surgeon; (3) issuing or denying medical certificates in accordance with FAR Part 67, subject to reconsideration by the Federal Air Surgeon or his authorized representative within the FAA; (4) issuing student pilot certificates when such certificate is combined with an application for an FAA medical certificate as provided by FAR section 61.85c; and (5) participating in investigations of aircraft accidents upon

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request by the Federal Air Surgeon or his authorized representative within the FAA.

When an AME denies issuance of a medical certificate, the airman may apply in writing, within thirty days after the date of denial, for reconsideration to the Federal Air Surgeon, the Chief, Aeromedical Certification Branch, FAA Civil Aeromedical Institute, or to the Regional Flight Surgeon of the region in which he resides. If the airman does not apply for reconsideration during the thirty day period, he is deemed to have withdrawn his application for a medical certificate. Except when the applicant does not meet the standards of FAR section 67.13(d) (1) (i), 48 relating to mental, neurological, cardiovascular, or general medical condition, any action taken other than by the Federal Air Surgeon will be subject to reconsideration by the Federal Air Surgeon. Requests for reconsideration in all other cases will be forwarded to the Federal Air Surgeon for decision. Thus, denial by the Administrator under section 602 of the Act will be made by one of the above-named officials, from which the airman may petition the NTSB for review.

Under FAR section 67.25, a medical certificate issued by an AME is considered to be affirmed as issued unless one of the above-named FAA officials on his own initiative reverses that issuance within sixty days after the date of issuance. If, within this sixty day period, the official requests the airman to submit additional medical information, the FAA official may on his own initiative reverse the issuance within sixty days after he receives the requested information.

An airman who has been denied issuance of a medical certificate

48 14 C.F.R. § 67.13(d)(1)(i) (1975), [Mental. No established history or clinical diagnosis of any of the following: (a) personality disorder that is severe enough to have repeatedly manifested itself by overt acts; (b) psychosis; (c) alcoholism; or (d) drug dependence.], id. (d)(2)(i), [Neurologic. No established history or clinical diagnosis of either of the following: (a) epilepsy; or (b) a disturbance of consciousness without satisfactory medical explanation of the cause.], id. (e)(1), [Cardiovascular. No established medical history or clinical diagnosis of (a) myocardial infarction, or (b) angina pectoris or other evidence of coronary heart disease that the Federal Air Surgeon finds may reasonably be expected to lead to myocardial infarction.], id. (f)(1), [General medical condition. No established medical history or clinical diagnosis of diabetes mellitus that requires insulin or any other hypoglycemic drug for control.]. 14 C.F.R. § 67.15(d)(1)(i), (d)(2)(i), (e)(1), or (f)(1), or 14 C.F.R. § 67.17(d)(1)(i), (d)(2)(i), (e), or (f)(1). Note: The standards under these subparts of 14 C.F.R. § 67.15 and 14 C.F.R. § 67.17 are the same as those under 14 C.F.R. § 67.13.
has the statutory right under section 601 (c)\textsuperscript{49} of the Act to petition the Administrator for an exemption from applicable medical standards. Petitions for Exemption of FAR Part 67\textsuperscript{50} are reviewed on behalf of the Administrator by the Federal Air Surgeon and his medical consultants. A group of independent medical experts reviews such cases, and advises the Federal Air Surgeon whether the requested exemptions may be issued without endangering public safety. The decision to grant or deny an exemption is made by the Federal Air Surgeon after considering the recommendations of the medical consultants.

An airman who has been denied a medical certificate by the Administrator has the right under section 602\textsuperscript{51} to petition the NTSB for review of the denial. This type of case is normally handled by the Assistant Chief Counsel, Operation and Evaluation Division, rather than by the Regional Counsel.

In cases involving known incapacity or disqualification of airmen, the Office of Aviation Medicine in the FAA's Washington Headquarters, or the appropriate Regional Flight Surgeon will request the initiation of enforcement proceedings under section 609\textsuperscript{52} of the Act. If it appears that the airman in question will continue to operate aircraft notwithstanding his incapacity or disqualification, an Emergency Order of Suspension or Revocation of his medical certificate will be issued utilizing the emergency authority of the Administrator available under section 1005\textsuperscript{53} of the Act. On the other hand, if conditions permit normal procedures, the enforcement proceeding may be commenced by issuance of a Notice of Proposed Certificate Action similar to other legal action initiated under section 609.

If there is a reasonable basis to question an airman's medical qualifications, the Regional Flight Surgeon normally will write the airman and request a re-examination. If, after this request, the airman declines to be re-examined under section 609, a suspension of the airman's medical certificate would normally follow pending re-examination and a finding that he is qualified. Airmen are fre-

\textsuperscript{49} 49 U.S.C. § 1421(c) (1970).
\textsuperscript{50} 14 C.F.R. pt. 67 (1975).
\textsuperscript{52} Id. § 1429.
\textsuperscript{53} Id. § 1485.
quently requested to submit additional information after certifica-
tion by the Office of Aviation Medicine or the appropriate Regional
Flight Surgeon. FAR section 67.31 provides that any person who
applies for or holds a medical certificate may be requested to furnish
additional medical information or history data, or to authorize
clinics, hospitals, doctors, or other persons to release any available
information or records concerning his medical history. Refusal or
failure to provide the requested information or to authorize its
release would be a basis for denying, suspending, or revoking the
airman's medical certificate.

Under certain circumstances relative to medical matters, it is
appropriate to suspend or revoke an airman certificate in the same
proceeding in which the medical certificate is affected. For example,
if the person in question had committed an act prohibited under
FAR section 67.20(a), such as the making of any fraudulent or
intentionally false statement on any application for a medical
certificate, this act would be a basis for suspending or revoking any
airman, ground instructor, or medical certificate already held by the
person. Although the necessity for taking action against an airman
certificate is determined on a case-by-case basis, the general rule is
that when a medical certificate has been revoked, it is appropriate
to suspend the airman certificate until such time as the airman
may be able to meet the applicable medical standards.

X. CONCLUSION

This presentation has attempted to convey some idea of how
the FAA proceeds in its task of promoting aviation safety while
ensuring efficient use of the nation's navigable airspace. While it
is true that the FAA has traditionally approached this task by
issuing and enforcing safety rules and regulations, by certificating
airmen, aircraft, aircraft components, air agencies, and airports,
and by conducting research and development, the general practi-
tioner comes in contact with the FAA most often when some type
of aviation safety enforcement case has been initiated.

Th FAA has always attempted to promote the highest possible
level of voluntary compliance with its rules and regulations by the

\[54\] 14 C.F.R. § 67.31 (1975).
\[55\] Id. § 67.20(a).
aviation community. Contrary to what may be a popular belief, FAA attorneys do not go out of their way to try cases when the evidence is of questionable weight and credibility. Indeed, most FAA attorneys will generally try to close a weak case without further action, but this calls into play an evaluation process which requires the weighing of many unpredictable factors, and it is not always possible to ascertain beforehand which direction a case will take. Some of these factors are: (1) the nature of the violations; (2) whether the violation was inadvertent or deliberate; (3) the certificate holder's level of experience and responsibility; (4) the attitude of the violator; (5) the hazard to safety of others which should have been foreseen; (6) the action taken by employer or other government authority; (7) the length of time which has elapsed since violation; (8) the certificate holder's use of the certificate; (9) the need for special deterrent action in a particular regulatory area, or segment of industry; (10) the presence of any factors involving national interest, such as the use of aircraft for criminal purposes; (11) the prior violation history; and (12) existing NTSB and court precedent.

Over the years the FAA has issued literally hundreds of rules and regulations that govern the operation of aircraft. It is true that these rules and regulations are continually reviewed and changed by the FAA to accommodate the latest advances in aviation technology, but for the most part the basic rules and regulations remain the same year after year. This being so, the general practitioner who also happens to be an active pilot will probably find it easier to handle an aviation enforcement safety case than would the practitioner who has had little or no exposure to FAA rules and regulations.

It is entirely possible that this presentation has attempted to cover too broad an area, and that the end result has been to overwhelm the reader with a myriad of "nuts-and-bolts" details which have little meaning to anyone outside the field of aviation law. It is the author's hope that the material presented herein will enable the practitioner to become better acquainted with the manner in which the FAA carries out its regulatory responsibility, so that he may more effectively represent his client.