

1994

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Recommended Citation

Amy K. Bock, *How to Restore the Airline Industry to Its Full Upright Position: An Analysis of the National Commission to Ensure a Strong, Competitive Airline Industry Report*, 59 J. AIR L. & COM. 663 (1994)
<https://scholar.smu.edu/jalc/vol59/iss3/5>

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**HOW TO RESTORE THE AIRLINE INDUSTRY TO
ITS FULL UPRIGHT POSITION: AN ANALYSIS
OF THE NATIONAL COMMISSION TO
ENSURE A STRONG, COMPETITIVE
AIRLINE INDUSTRY REPORT**

AMY K. BOCK

I. INTRODUCTION

CAN A travel brochure save America's failing airline industry? Perhaps so, if that brochure is the slick, full-color report put together by the National Commission to Ensure a Strong, Competitive Airline Industry. Appointed by President Clinton and Congress on May 24, 1993, the Commission had a ninety-day mandate to study the floundering industry and make recommendations to aid its recovery.¹

On August 19, 1993, two days before the deadline, the Commission submitted its recommendations to the President and Congress. Titled "Change, Challenge and Competition," the report is organized along three themes: efficiency and technological superiority, financial strength, and access to global markets.² The colorful, user-friendly format reflects the Commission's desire to target a wide audience that the Commissioners referred to as "the three Ps": press, public and politicians.³

¹ NATIONAL COMMISSION TO ENSURE A STRONG, COMPETITIVE AIRLINE INDUSTRY, CHANGE, CHALLENGE AND COMPETITION 4 (1993) [hereinafter COMMISSION REPORT].

² *Id.*

³ *Baliles Says Airline Commission Targets Broad-Based Audience*, AVIATION DAILY, Aug. 20, 1993 at 283.

This comment will focus on the most controversial and far-reaching of the Commission's recommendations, which ranged from the creation of an independent corporate entity within the Department of Transportation to broad tax relief measures that face opposition in Congress.⁴ Parts II-IV will assess the airline industry's current predicament and some theories as to how it got there. In addition, these Parts will examine the creation of the Commission and its task. Part V will explain and analyze some of the more controversial, far-sighted proposals within each of the three areas targeted in the report. Part VI will point out areas that the Commission may have overlooked. Finally, Part VII will examine the opposition and obstacles the Commission's recommendations face on the path to implementation or obscurity.

II. WHY THE AIRLINE INDUSTRY MATTERS

"Transportation is an infrastructure industry essential for commerce, communications and national defense. It is the veins and arteries through which commerce flows."⁵ Air transportation's effects on the U.S. economy and national security are immeasurable.⁶ From tourism to shipping to business travel, airlines provide services essential to the operation of almost every facet of society. According to the U.S. Travel and Tourism Administration, the number of people annually entering the United States has increased 54% from 1985 to 1990.⁷ Similarly, the amount of money flowing into the U.S. economy within the same time period more than doubled to \$44.5 billion.⁸ In fact, tourism, which largely depends on the airlines, is one of the three most profitable industries in 37 states.⁹

The aviation and aerospace industries are also major

⁴ See generally COMMISSION REPORT, *supra* note 1.

⁵ Paul S. Dempsey, *The Disintegration of the U.S. Airline Industry*, 20 *TRANSP. L.J.* 9, 19 (1991).

⁶ *Id.* at 42.

⁷ COMMISSION REPORT, *supra* note 1, at 5.

⁸ *Id.*

⁹ *Id.*

employers of highly skilled workers. In 1992, airline industries employed 540,000 people, a 64% increase since 1982.¹⁰ These high-wage jobs contribute to economic and technological strength in an increasingly competitive global market.¹¹ U.S. aerospace manufacturers are also leading the way toward a global economy as the country's largest manufacturing exporter and one of the few industries with a positive balance of trade.¹²

Airlines also contribute to the economic health of cities and states. Besides paying their fair share of taxes, airlines provide a catalyst for growth in areas where businesses consider convenient transportation a relocation draw.¹³

III. WHERE THE AIRLINE INDUSTRY IS NOW AND HOW IT GOT THERE

A. U.S. AIRLINES TODAY

Airline executives in this country have seen as many ups and downs as their pilots; occasional financial crises are part of the baggage that goes with the industry.¹⁴ The Commission notes that only once in the past twenty-five years have the typically debt-laden airlines achieved the profit margin average for U.S. industry.¹⁵ But even in civil aviation's turbulent history, the present crisis is unparal-

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* Boeing estimates that U.S. airlines will take delivery of 4,200 passenger jets worth \$285 billion between now and 2010, while foreign airlines will require 7,700 aircraft at \$535 billion. If historical trends continue, 65% of those units will be U.S.-built. *Id.*

¹³ *Id.*

¹⁴ In 1947, for example, a presidential commission was appointed to study the "serious crisis" of domestic airlines' \$22 million loss that year. COMMISSION REPORT, *supra* note 1, at 4. The 1993 Commission cites this as one of the bumps encountered in the industry's meteoric growth since the first flight at Kitty Hawk in 1903. *Id.*

The Commission Report also refers to the production demands of World War II and the 1981 air traffic controllers' strike as periods of stagnation or decline among massive spurts of growth in civil aviation. *Id.*

¹⁵ COMMISSION REPORT, *supra* note 1, at 13.

leled.¹⁶ With two major airlines already dead and buried, at least four other carriers are liquidating furiously or huddling in bankruptcy.¹⁷ Others, such as USAir, have responded by laying off workers, reducing flights, and bowing out of some markets.¹⁸ New entrants, such as People Express and Air Florida, were swallowed up in mergers or fell into bankruptcy alongside some of the old standards.¹⁹

Perhaps the most solid evidence of this unprecedented crisis is the more than thirty-five billion dollars of debt the industry faces.²⁰ Almost eleven billion dollars of that debt has accumulated since 1990.²¹ After three straight years of record losses, not even the profits for the July-September quarter of 1993 could give the airlines the boost they needed.²² In fact, that bit of good news generated fear among industry analysts that the Clinton Administration might feel less pressure to act.²³ The Commission cautioned against such hasty hopes; it found that the airlines would have to post unprecedented profits for years before being comfortably in the black.²⁴

¹⁶ See Dempsey, *supra* note 5, at 9.

¹⁷ *Id.* at 10. Eastern Airlines finally went under in January 1991 after attempts at liquidation and reorganization. *Id.* Pan Am followed suit shortly thereafter. *Aviation Turmoil; Most Commission Recommendations Are Good*, DALLAS MORNING NEWS, Sept. 27, 1993, at 14A. TWA, America West and Midway have slipped into bankruptcy, Dempsey, *supra* note 5, at 10, from which Continental has just emerged for the second time. *Aviation Turmoil, supra*, at 14A. And virtually all of the airlines in, at the brink of and just out of bankruptcy are liquidating assets feverishly to stay above ground. Dempsey, *supra* note 5 at 10.

¹⁸ Dempsey, *supra* note 5, 6, at 11.

¹⁹ *Id.* at 10.

²⁰ COMMISSION REPORT, *supra* note 1, at 2.

²¹ Richard M. Weintraub, *Airlines Fly Into the Blue; 3rd-Quarter Profits Could End 3-Year Nose-dive*, WASH. POST, Sept. 21, 1993, at C1.

²² *Id.*

²³ *Id.* The Air Transport Association's vice president for industry data, David A. Swierenga, said the industry is not out of the woods yet, and is still looking to the Clinton administration to follow through on its commission recommendations. *Id.*

²⁴ COMMISSION REPORT, *supra* note 1, at 12.

B. SOME THEORIES OF THE DESCENT

While little disagreement exists concerning the severity of the airline industry's woes, debates rage concerning the causes behind the crisis. At the heart of some of the most heated controversies are the effects of deregulation.²⁵ Paul S. Dempsey noted in 1991 that

[a]ll the world's airlines are paying the sharply higher fuel prices inspired by the Persian Gulf crisis, and all are suffering from the early pangs of global recession. But only America's are in bankruptcy, only America's have died, and only America's are selling off operating assets—despite the fact that international aviation fuel costs more than domestic fuel.²⁶

The Commission, however, found that the airline industry is more competitive and charges passengers and shippers less in real dollars than it did in 1978 before deregulation.²⁷ The Commission instead blamed more recent developments, finding that “in 1990 a series of events began that carried through 1992 and severely damaged the economic underpinning of the industry.”²⁸ Several of these factors are identified in the Commission report.

1. *The Recession*

Faltering economic conditions at home meant fewer business travellers and vacationers. In fact, in 1991 airlines saw the first decrease in passengers in a decade.²⁹

²⁵ Compare Tom Belden, *New Fuel for Deregulation's Critics, A National Commission Studied Airlines for 90 Days. Its Findings Have Sparked Renewed Protest*, PHILADELPHIA INQUIRER, Sept. 27, 1993, at D5 (organization formed to oppose Commission finding that deregulation not to blame) with Gerald L. Baliles, *The Last Thing the Airlines Need is Re-Regulation*, WASH. POST, Sept. 26, 1993, at C7 (noting that Commission chairman says most experts consulted “did not feel that deregulation had been a real factor in airline and aerospace industry problems”).

²⁶ Dempsey, *supra* note 5, at 12; see also Thomas Eagleton, *Curing the Airline Industry*, ST. LOUIS POST-DISPATCH, Aug. 29, 1993, at 3B (listing reasons for the poor showing of the “Big Three” even after deregulation).

²⁷ COMMISSION REPORT, *supra* note 1, at 1.

²⁸ *Id.* at 4.

²⁹ *Id.*

Even the record 473 million boarded in 1992 could not boost profits because the low fares that enticed travelers often failed to cover airline costs.³⁰

2. *The Gulf War*

The Middle East crisis in 1991 cut off major oil supplies and created a sudden, extreme increase in jet fuel prices.³¹ Although activation of the Civil Reserve Air Fleet (CRAF)³² did not seem to disrupt regularly scheduled flights,³³ low passenger traffic may be blamed in part on fear of terrorism generated by the war itself.³⁴

3. *The Alternative Minimum Tax (AMT)*

Enacted in 1986 to prevent income-generating corporations from escaping federal taxes by excessive deductions,³⁵ the AMT penalizes capital intensive industries such as steel producers, oil drillers and airlines by subjecting them to a minimum tax, even when they are operating at a loss.³⁶ The Commission reports that from 1990 to 1992 the airlines paid \$670 million in AMT, even though they incurred \$10 billion in losses.³⁷ Some airlines had to

³⁰ *Id.*; see also *infra* note 50 and accompanying text.

³¹ *Id.* at 17.

³² Lester Reingold, *CRAF a 'Qualified' Success*, AIR TRANSPORT WORLD, Aug. 1991, at 24. The CRAF was developed during the Korean War to supplement military transport planes. Under the program, which was first activated for Operation Desert Shield, participating civil airlines may be called to carry cargo or troops on as little as 24 hours notice. In return, CRAF carriers receive some preferential consideration in the award of routine military-charter contracts. *Id.*

³³ *Id.* Pan Am canceled fewer than a dozen flights, and rerouted passengers reportedly responded to the changes with support for Operation Desert Storm. *Id.*

³⁴ *Id.* Even some of the airlines were worried. TWA, for instance, painted out the logo on its participating planes. A spokesman explained that the security measure was prompted by terrorist attacks on the carrier in 1985 and 1986. *Id.*

³⁵ *Id.* at 16.

³⁶ *Airline Commission Calls for Changes in Tax Policy*, AVIATION DAILY, Aug. 31, 1993, at 335.

³⁷ COMMISSION REPORT, *supra* note 1, at 16. The following is information the Commission gathered from the General Accounting Office on U.S. effective tax rates:

[Effective tax rates expressed as a percent of income]

borrow money just to pay these taxes.³⁸

4. Restrictive Government Policies and Processes

The regulatory burden on airlines has grown steadily and proved unnecessarily costly to the airline industry.³⁹ The Commission estimated that major regulations have cost the industry more than \$3.5 billion since 1984. Yet as staggering as this figure seems, it does not include the more recent airworthiness directives introduced between 1989 and 1992, and heightened security measures enacted during the Gulf War, which have added another \$1.1 billion to the pot.⁴⁰

Cumbersome federal procurement procedures burden the airlines as well. The process of resolving urgent transportation needs often takes five or six years, and at times, as many as ten years if all does not go smoothly.⁴¹ The FAA, for instance, has identified 250 documents containing 4,500 citations of "required activities" for acquisition officials.⁴² Part of the problem may be lack of communication. Congress and federal agencies, for example, often act in isolation or under the pressure of special interest groups and therefore fail to comprehend the cumulative impact of their actions.⁴³

1986	1987	1988	1989	
Airlines	-43.5	25.7	36.4	110.3
Railroads	-113.2	15.6	11.8	15.1
Trucking	28.4	30.7	18.2	26.1

Id.

³⁸ *Id.*

³⁹ *Id.* at 13.

⁴⁰ *Id.* at 10.

⁴¹ *Id.* at 16. In 1986, for example, airport delays created the need for instrument landing systems (ILS) at certain airports. Congress appropriated money for the procurement of this basic equipment as quickly as 1987. Yet because the process would not allow the FAA to acquire the systems immediately from its usual supplier, the first ILS was not delivered until 1990. *Id.*

⁴² *Id.* The documents made a stack 11 feet high. *Id.*

⁴³ *Id.* at 11.

5. *The Bankruptcy Laws*

Some airlines have accused the bankrupt carriers of abusing the protective laws of Chapter 11 to compete unfairly with healthy carriers.⁴⁴ Though the Commission clearly states that bankrupt carriers have contributed to the financial deterioration of the airlines, it comes short of making any accusations of deliberate abuse.⁴⁵ Instead, the report focuses on how airlines mired in bankruptcy affect the entire industry by tying up scarce gates at busy airports and making ineffective use of limited-entry international route authority.⁴⁶

⁴⁴ *Transportation Secretary Federico Pena Interviewed* (CNN television broadcast, Aug. 19, 1993). The "big three" (American, Delta and United) complain that airlines under Chapter 11 protection operate at an advantage by being able to offer drastically slashed fares. *On a Wing and a Dime*, *Economist*, June 12, 1993, at 10. By concentrating on cash flow rather than profits, bankrupt carriers made it more difficult for solvent airlines to compete for the same passengers. Perry A. Trunick, *We Need Competition Among Equals*, *TRANSP. & DISTRIBUTION*, April, 1992, at 9. The short-sightedness of carriers that compete for the sake of cash flow, however, helps create an "arbitrary deflation" that does not reflect true market-driven competition. *Id.*

⁴⁵ COMMISSION REPORT, *supra* note 1, at 15. The Commission said that it "does not believe any airline prefers bankruptcy as a condition of doing business," and cites reduced consumer confidence, significant loss of traffic and decreased revenues as deterrents to this approach. *Id.* Transportation Secretary Pena also tried to soften accusations of abuse of bankruptcy laws by delivering the "good news" that two airlines have recently come out of bankruptcy. Jeanne Meserve, *Transportation Secretary Federico Pena Interviewed*, *supra* note 44. But neither explanation accounts for the airlines' incentive to abuse Chapter 11's protections once they have gone into bankruptcy, or how the airlines are climbing out of bankruptcy under extremely difficult financial conditions.

⁴⁶ COMMISSION REPORT, *supra* note 1, at 15. The megacarriers claim overcapacity—empty seats, stagnant gates and unused routes—stems from the ability of some carriers to operate under Chapter 11 protection. *On a Wing and a Dime*, *supra* note 42, at 10. But Seth Schofield, chairman of USAir, says the big three increased their total capacity by 35% from 1991-1993, despite the recession, while the rest of the industry grew only by about 10%. *Id.* The problem may lie in the long-term leases that allow airlines exclusive control of airport gates and other facilities, *id.*, or in the closely guarded bilateral agreements that control international route allocations. *See infra* note 152 and accompanying text. While an argument for some regulation in these areas exists, market forces eventually dominate: Trans World Airlines (TWA), for instance, helped itself out of bankruptcy by selling off some of its most profitable international routes and giving up control of its gates at Lambert Field to St. Louis for \$70 million. *TWA Survives Red Ink; Airline's Bankruptcy Ends with Celebration, but Struggle Not Over*, *ST. LOUIS POST-DISPATCH*, Nov. 4, 1993, at 1A.

6. *Bad Business Decisions*

The airline industry itself must shoulder some of the blame for its own financial strife, particularly when it is responsible for accumulating \$35 billion in debt.⁴⁷ The airlines, along with many other industries, took on enormous debt in the 1980s with the expectation that business would continue to grow at the same rate into the next decade.⁴⁸ When the economy weakened at the dawn of the 1990s, airlines found it necessary to cancel orders for aircraft⁴⁹ and drop fares to nearly below cost.⁵⁰

These attempts to save the industry simply lowered it further into the abyss. Manufacturers already suffering from military spending cuts and a weak world economy were hit hard by the rash of cancellations. The fare wars of the summer of 1992, during which major and regional airlines tried to boost traffic by offering absurdly discounted fares,⁵¹ resulted in even greater losses despite an increase in traffic.⁵²

⁴⁷ COMMISSION REPORT, *supra* note 1, at 12.

⁴⁸ News Conference with Gerald Baliles, Chairman, National Commission to Ensure a Strong Competitive Airline Industry, Federal News Service (Aug. 19, 1993).

⁴⁹ *Id.*

⁵⁰ COMMISSION REPORT, *supra* note 1, at 4.

⁵¹ *Ease the Squeeze on U.S. Airlines*, AVIATION WK. & SPACE TECH., July 8, 1991, at 7. The editors of *Aviation Week and Space Technology* used the example of America West helping itself into bankruptcy by offering 50% discounts on fares. The discount fares had the effect of increasing traffic, but the airline continued to lose money. *Id.* Air France Chairman Bernard Attali characterized the pricing war as collective suicide, noting with distaste that "[c]annibalism has become a strategic model." *Air France Chairman Attacks Cut-Throat American Aviation Tactics*, AVIATION DAILY, Sept. 9, 1992, at 424.

⁵² *Ease the Squeeze on U.S. Airlines*, *supra* note 51, at 7. At the height of the ticket-slashing frenzy, which began with a half-price war between American and Northwest in late May and early June of 1992, airlines sold nearly 40 million tickets in 10 days. *Fare War is Top Story; 1992's Ten Biggest Newsmakers Also Include Hurricanes*, CRS RULES, TRAVEL WKLY., Jan. 7, 1993, at 1. American introduced a seemingly logical, four-tier pricing structure, cutting first class fares by 20-50% and coach by 38%, and eliminating most special rates and negotiated fares. *Id.* But the airline's plan failed as the industry suffered from overcapacity and traffic decreases. *Id.*

IV. THE COMMISSION'S MEMBERS AND THEIR TASK

Congress created the National Commission to Ensure a Strong, Competitive Airline Industry on April 7, 1993⁵³ and gave it a mandate to study, investigate and make recommendations for the future health and competitiveness of U.S. airlines.⁵⁴ Commission members were drawn from a cross-section of industry leaders and experts representing aviation, economics, finance, labor relations, international trade, marketing, and manufacturing.⁵⁵ Of the 15 voting members, five were appointed by the Senate, five by the House and five by the President. The chairman was a voting member appointed by the President in consultation with the House Speaker and the Senate majority leader.⁵⁶

President Clinton and Transportation Secretary Pena issued a broad challenge to the Commission to review

⁵³ National Commission to Ensure a Strong, Competitive Airline Industry, Pub. L. No. 103-13, 107 Stat. 43 (1993).

⁵⁴ COMMISSION REPORT, *supra* note 1, at ii.

⁵⁵ *Id.*

⁵⁶ *Id.* The 15 voting members follow:

Chairman:

Gerald L. Baliles, Partner in the law firm of Hunton & Williams; Governor of Virginia 1986-90; Attorney General of Virginia, 1982-85.

Members:

Bette B. Anderson, President, Kelly, Anderson and Assoc., Inc., management consultants; Undersecretary of the Treasury for Administration, 1977-81.

Capt. J. Randolph Babbitt, President, Air Line Pilots Assoc.; Captain, Eastern Airlines.

Charles M. Barclay, President, American Assoc. of Airport Executives; staff member, Aviation Subcommittee of the U.S. Senate Committee on Commerce, Science and Transportation, 1977-83.

Robert F. Daniell, Chairman and Chief Executive Officer, United Technologies Corp.

Sylvia A. de Leon, Partner in the law firm of Akin, Gump, Strauss, Hauer and Feld; Coordinator of Transportation Issues, Clinton-Gore Presidential Transition, 1992.

Daniel M. Kasper, Vice President and Director of Transportation Practice, Harbridge House (now a part of Coopers & Lybrand); Director of the Bureau of International Aviation, U.S. Civil Aeronautics Board, 1979-83.

Herbert D. Kelleher, Chairman, President and Chief Executive Officer, Southwest Airlines; Chairman, Partnership for Improved Air Travel, 1989-91.

Russell W. Meyer, Jr., Chairman and Chief Executive Officer, Cessna Aircraft

every aspect of the aviation and aerospace industries and to make recommendations for a stronger, more flexible and more competitive industry both at home and abroad.⁵⁷ Once appointed, the commissioners had ninety days to make their recommendations.⁵⁸

V. RECOMMENDATIONS

The Airline Commission, after reviewing the status of the industry and identifying what it believed to be the sources of industry problems, distinguished three factors essential to the future health and competitiveness of the airlines: 1) efficiency and technological superiority, 2) financial strength and flexibility, and 3) access to global markets.⁵⁹ Within this framework, the Commission heard opinions and suggestions from more than 150 industry leaders⁶⁰ and made sixty-seven findings and fifty-nine rec-

Co.; Chairman of the Board, General Aviation Manufacturers Assoc., 1974 and 1982.

John F. Peterpaul, Vice President for Transportation, International Assoc. of Machinists and Aerospace Workers.

Sandra Pianalto, First Vice President and Chief Operating Officer, Federal Reserve Bank of Cleveland; Economist, Federal Reserve Board of Governors; Staff, House Budget Committee.

John H. Robson, Lester Crown Fellow, Yale School of Organization and Management; Co-chair, Advisory Council on Regulatory Reform, Heritage Foundation; Deputy Secretary of the Treasury, 1989-92; Chairman, U.S. Civil Aeronautics Board, 1975-77.

Felix G. Rohatyn, Senior Partner, Lazard Freres & Co., investment bankers; Chairman, Municipal Assistance Corp. for the City of New York; Member of the Board, Pfizer, Inc., Pechiney S.A. and Howmet Corp.

Abraham D. Sofaer, Partner in the law firm of Hughes Hubbard & Reed; Legal Adviser, U.S. State Dep't, 1985-90; U.S. Dist. Judge for the Southern Dist. of New York, 1979-85.

Gina F. Thomas, Managing Attorney, International Regulatory Office, Federal Express Corp.; Attorney, Office of the General Counsel, U.S. Dep't of Transportation, 1983-92. *Id.* at 28.

In addition, the eleven non-voting members are Senators John Danforth, J. James Exon, Slade Gorton, Ernest Hollings and Patty Murray; Representatives Robert Borski, Maria Cantwell, Richard Gephardt, Newt Gingrich, and Bud Shuster; and Dr. Laura D'Andrea Tyson, Chair, Council of Economic Advisors. *Id.* at ii.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 2.

⁶⁰ *Id.* at 28-32. Industry leaders and experts included airline and manufactur-

ommendations to the president and Congress on Aug. 19, 1993.⁶¹ Following are some of the recommendations made within each of the Commission's target areas.

A. EFFICIENCY AND TECHNOLOGICAL SUPERIORITY

Technological advances are often thwarted by the slow-moving federal procurement process. New navigational systems and other breakthroughs cannot be accommodated by the snail's pace of federal bureaucracy.⁶² And even if the red tape were somehow extracted from the equation, the volatile, now-you-see-it, now-you-don't federal budget process inhibits the financial stability and predictability necessary for strategic capital investments in new technology.⁶³

1. Restructure the Federal Aviation Administration (FAA)

The FAA employs about 50,000 people, more than 17,700 of whom are air traffic controllers.⁶⁴ Nearly 45% of the FAA budget goes to air traffic control.⁶⁵ Besides running the system that keeps tabs on thousands of private and commercial aircraft on the ground and in the air, the FAA also regulates airworthiness, pilot and crew training, and airport security.⁶⁶ Though government control

ing executives, Wall Street analysts, investment bankers, labor representatives, professors of law and of economics, and environmental organizations. *Id.*

The Commission spent its first three weeks gathering data and information from industry experts on aerospace manufacturing, international negotiations, airport capacity, deregulation, domestic and international competition, air cargo, environmental issues and workforce concerns. *Id.* at 28-30. Work teams on system capacity, domestic aviation, international issues and finance met to hammer out issues and options throughout the fourth week, and weeks five and six were devoted entirely to detailed briefings by experts on the issues identified by the work teams. *Id.* at 30-32.

⁶¹ *Id.* at 32. The Commission proudly notes that its work was completed on the 88th day of its existence, two days before deadline. *Id.*

⁶² *Id.* at 2; see *supra* note 39 and accompanying text.

⁶³ COMMISSION REPORT, *supra* note 1, at 2.

⁶⁴ Richard M. Weintraub, *FAA Chief Favors a Study of Privatizing Air System*, WASH. POST, Sept. 2, 1993, at D12. The number, computed on July 31, 1993, does not include support and administrative personnel. *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

seems appropriate for air travel and safety, the obvious need for technological advances in this area may not best be served by Congressional processes.⁶⁷

The Commission found that "there is a fundamental inconsistency between the processes of government and the operation of a 24-hour-a-day, high-technology, capital-intensive air traffic control system."⁶⁸ The FAA must have control of its own funds in order to invest in state-of-the-art technology, improve efficiency, and attract highly skilled workers.⁶⁹ Therefore, the Commission recommends fundamentally restructuring the FAA and removing it entirely from the federal budget process,⁷⁰ although it emphasizes that the government should maintain policy control and oversee safety.⁷¹

⁶⁷ See *supra* notes 41-43 and accompanying text. Aside from procurement difficulties, Congressional pork barrelling may also require the FAA to provide services to unprofitable or even untenable locations. See, e.g., *President Clinton Endorses ATC Corporation, EAS Subsidy Cutbacks*, AIRPORTS, Sept. 7, 1993, at 352 (noting that nine communities receiving subsidies for essential air services carried five or fewer passengers a day).

Vice President Gore's National Performance Review report, *Creating a Government That Works Better and Costs Less*, calls for a reduction in EAS subsidies, *id.*, contrary to the Commission's recommendation to promote policies which encourage air service to small communities and maintain the EAS program "at sufficient levels to serve its legislative purpose." COMMISSION REPORT, *supra* note 1, at 27. The Commission bases its recommendation on the needs of smaller communities to be connected to the national air transportation system in order to market their goods and services, *id.*, but Gore's report suggests eliminating subsidies only in communities within 70 miles of a hub airport and limiting funding to \$200 per passenger. *President Clinton Endorses ATC Corporation, EAS Subsidy Cutbacks*, *supra*. The Commission's concern for communities that have put a large amount of money into airport development based on government promises or which have been downgraded from jets to prop planes, COMMISSION REPORT, *supra* note 1, at 27, sounds like some pork barrel maintenance of its own.

⁶⁸ COMMISSION REPORT, *supra* note 1, at 6. The Commission illustrates this mismatch with the FAA's attempt to implement the National Airspace System Plan. In 1982, the FAA began implementation of the plan with completion scheduled in 1993 at a cost of \$12.6 billion. Renamed the Aviation System Capital Investment Plan, it now has 155 new projects, and major elements are three to five years late. The cost is now estimated at \$32 billion. The Commission noted that "this system, which was intended to bring 1960s technology into the 1980s, might not even be ready for the next century." *Id.* at 7.

⁶⁹ *Id.*

⁷⁰ *Id.* at 8.

⁷¹ *Id.* at 9.

The recommendation involves creation of an independent air traffic control (ATC) corporation within the Department of Transportation (DOT) to manage and fund traffic control and related functions with the ability to raise and maintain its own source of revenue for operations, maintenance and capital investments.⁷² This includes the ability to issue long-term bonds for capital purchases and the managerial flexibility to attract and maintain high-caliber leadership and staff.⁷³ The Commission left questions of specific structure and implementation to a panel of FAA industry experts to be established in cooperation with the Department of Defense, which will continue to receive air traffic control service in line with national security requirements.⁷⁴

Shortly after release of the Commission's recommendations, widespread approval for what is being called privatization of the FAA echoed from almost every sector of the airline and travel industry.⁷⁵ The National Air Traffic Controllers Association rallied in Washington in September to "draw attention to issues threatening the safety and efficiency" of the government's air traffic control system.⁷⁶ Fearing that "bureaucratic bungling and waste" will destroy the United States' reputation for "the safest and most efficient" skies in the world, the union lobbied members of Congress for FAA reform as a quasi-government corporation.⁷⁷

⁷² COMMISSION REPORT, *supra* note 1, at 9. All present expenditures and revenues in the federal budget would be removed in equal amounts for a fiscally neutral effect. *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *Business Wire* (Atlanta), Aug. 19, 1993 (Delta); *id.* (Chicago), Aug. 19, 1993 (United); *PR Newswire*, Aug. 19, 1993 (American Automobile Assoc.). Commission Chairman Baliles cautions that "the Commission does not call for privatizing anything," *Baliles Seeks Higher-Quality Debate Over ATC Corporation*, AVIATION DAILY, Sept. 15, 1993, at 416, and stresses that safety oversight is to stay with the government. Gerald L. Baliles, *The Last Thing the Airlines Need Is Re-Regulation*, WASH. POST, Sept. 26, 1993, at C7.

⁷⁶ *Air Traffic Controllers 'Rally for Safety' in Washington*, AVIATION DAILY, Sept. 21, 1993, at 449.

⁷⁷ *Id.*

Vice President Gore specifically cited the recommendation in the report from the National Performance Review, his own panel's recommendations for "reinventing" the federal government.⁷⁸ Following the Commission's lead, Gore recommended the ATC be reinvented as "a government-owned corporation, supported by user fees and governed by a board of directors that represents the system's customers."⁷⁹ President Clinton put his stamp of approval on the recommendation, via Vice President Gore's *National Performance Review* report, almost immediately.⁸⁰

Though official approval of the concept of an independent ATC corporation was quick and uneventful, strong opposition emerged from the Aircraft Owners and Pilots Association (AOPA). Responding to the *National Performance Review's* whole-hearted approval of the Commission's recommendation, AOPA President Phil Boyer said "[t]he NPR report seems to conclude that there is 'overwhelming consensus' within the aviation community that the ATC system should be turned over to a government-owned corporation [T]his is not the case."⁸¹ Boyer expressed concern that safety and sound public policy will be sacrificed for economy when there is no proof that the proposal would result in better efficiency.⁸² Recalling the comparison some made between the proposed ATC corporation and the U.S. Postal Service,⁸³ also a corporate entity, Boyer said, "[i]f the Postal Service is the embodi-

⁷⁸ *Gore Backs ATC Reform, Essential Air Service Cutbacks*, AVIATION DAILY, Sept. 8, 1993, at 375 (noting that Vice President Gore's National Performance Review report, *Creating a Government That Works Better & Costs Less*, makes recommendations for streamlining, or "reinventing," the federal government).

⁷⁹ *Id.* Gore said the new structure would increase revenues as customer use rises, providing needed funds to meet increased demands, finance new technology, and improve safety. At the same time, the FAA could be relieved of its operational duties and concentrate on safety regulation. Similar corporations, he notes, are in effect in Great Britain and New Zealand. *Id.*

⁸⁰ *President Clinton Endorses ATC Corporation, EAS Subsidy Cutbacks*, AIRPORTS, Sept. 7, 1993, at 352.

⁸¹ *AOPA Opposes Plan to Create Independent Government Corporation to Run ATC*, WKLY. OF BUS. AVIATION., Sept. 27, 1993, at 134.

⁸² *Id.*

⁸³ *Privatize the FAA*, SEATTLE TIMES, Sept. 17, 1993, at B4.

ment of what we can expect in terms of management efficiencies to be gained from a government-owned corporation, we think our case against the idea is reinforced."⁸⁴

But, Commission Chairman Gerald Baliles said that such concerns are what he hopes to be "the last gasps of a losing argument."⁸⁵ Safety would not be affected, he said, because the corporate entity is to be housed within the DOT with the federal government retaining policy control and safety oversight.⁸⁶ As to the FAA's current safety and efficiency record, cited by the AOPA,⁸⁷ Baliles challenged anyone who reads the Airline Commission report to "tell [him] that the current procurement and funding system makes sense, can be defended or is getting the job done."⁸⁸

In the meantime, newly appointed FAA chief David Hinson has approached the matter cautiously. While he values his unique opportunity to be an instrumental part of such fundamental change, he is maintaining a "show-me" attitude toward the proposed makeover.⁸⁹ Some industry watchers have interpreted this attitude as support for the plan,⁹⁰ but Hinson remains uncommitted, preferring a more in-depth study on the proposed changes before any moves are made.⁹¹ "If it gives us a better air traffic control system, we should do it," he said "[b]ut we

⁸⁴ *AOPA Opposes Plan to Create Independent Government Corporation to Run ATC*, *supra* note 81. Boyer followed the statement with consolations to the "hard-working employees of the Postal Service," but recounted that the inefficiencies inherent in the system's structure are innumerable. *Id.*

⁸⁵ *Baliles Seeks Higher-Quality Debate Over ATC Corporation*, *AVIATION DAILY*, Sept. 15, 1993, at 416. In a speech to the Wings Club in New York, Baliles called for a debate that is on "a higher plane." *Id.*

⁸⁶ *Id.*

⁸⁷ *AOPA Opposes Plan to Create Independent Government Corporation to Run ATC*, *supra* note 81, at 134.

⁸⁸ *Baliles Seeks Higher-Quality Debate Over ATC Corporation*, *supra* note 85, at 416.

⁸⁹ Richard M. Weintraub, *FAA Chief Favors a Study of Privatizing Air System*, *WASH. POST*, Sept. 2, 1993, at D12.

⁹⁰ *See FAA Head Backs Plan for Independent ATC*, *FLIGHT INT'L*, Sept. 8, 1993.

⁹¹ Weintraub, *supra* note 89, at D12.

don't know that."⁹²

2. *Decrease the Regulatory Burden*

Lack of communication among the various bodies whose actions affect the airline industry creates a massive accumulation of regulations and costs.⁹³ The Commission determined that the industry and the FAA must more regularly exchange information, and that Congress and the DOT must be better informed of the costs and effects of their regulations and proposals.⁹⁴ It recommends that the FAA keep an annual regulatory budget to which all but emergency safety regulations are subject, and that an independent mechanism be established to provide outside guidance for cost-benefit analyses.⁹⁵ Though arguments in favor of increased red tape are rare, it is sometimes best to leave well enough alone. FAA Administrator Hinson sees no problem with the FAA's dual role of ensuring safety and promoting the airline industry.⁹⁶ Indeed, he says subjecting regulations to cost-benefit analysis is perfectly appropriate.⁹⁷

⁹² *FAA Administrator, Intelligence*, AVIATION DAILY, Sept. 22, 1993, at 455.

⁹³ The Commission report relates an FAA requirement for the installation of systems to control access to secured areas. FAA's initial cost-benefit analysis estimated implementation costs at \$168 million, but airlines projected that it would initially cost \$658 million, and another \$220 million for maintenance over the next 10 years. Once the major airports had installed the systems, however, the FAA clarified the rule to reduce the area to be controlled, stating that although \$400 million had already been spent, the reduction would save the five airports \$5 million. To date, the cost has climbed to \$500 million and is expected to exceed \$700 million by completion. COMMISSION REPORT, *supra* note 1, at 11.

⁹⁴ *Id.*

⁹⁵ *Id.* To improve communication, the Commission also recommended that Congress and the DOT be better informed of the costs of their own proposals; that Congress, the DOT and the FAA clearly define their proposals to be more effective and efficient; that the FAA receive cost impact data from the industry early in the regulatory process; and that the FAA and DOT, in consultation with the industry, review, reduce and amend existing regulations. *Id.*

⁹⁶ *FAA Administrator Intends Only Minimal Employee Testing for Alcohol*, AVIATION DAILY, Sept. 2, 1993, at 352.

⁹⁷ *Id.*

3. Implementing the Global Positioning System (GPS)

Already in place, this satellite navigational system, according to the Commission, could revolutionize air traffic control by providing users around the world with instant and precise position information, allowing more direct routes and fewer delays.⁹⁸ Nevertheless, the FAA has delayed implementing the super-accurate navigational system despite industry demands for immediate use.⁹⁹ One reason may be a fear of installing GPS only to find international carriers using another form of Global Navigation Satellite System (GNSS).¹⁰⁰ But the airline and aviation industries, eager for the substantial fuel savings from flying more direct routes,¹⁰¹ are unwilling to wait for the International Civil Aviation Organization (ICAO) to decide on a system.¹⁰²

The Commission has ambitiously recommended setting the goal for implementing the GPS system into commercial air traffic control by 1996, and full integration with a modernized ATC system by the end of 1997.¹⁰³ The sys-

⁹⁸ COMMISSION REPORT, *supra* note 1, at 7. The GPS comprises 24 satellites orbiting the earth on six orbital planes (four satellites per orbit about 11,000 miles out). *Id.*

⁹⁹ See Bruce D. Nordwall, *FAA Speeds GPS Approval, 1993 Operations Planned*, AVIATION WKLY. & SPACE TECH., Oct. 19, 1992, at 30 (Radio Technical Commission for Aeronautics (RTCA) study showed broad consensus in aviation and airline industries supporting rapid installation of GPS, and predicted the system would be certified and operating next year (1993) at most airports). *But see Industry Impatient with FAA Progress on GPS, Will Not Wait for ICAO*, AVIATION DAILY, July 29, 1993, at 156 (industry representatives tell House Public Works aviation subcommittee that the FAA is falling behind in developing procedures and air traffic control for GPS).

¹⁰⁰ *Industry Impatient with FAA Progress on GPS, Will Not Wait for ICAO*, *supra* note 99, at 156. The Commission pointed out that the rest of the world has shied away from GPS because it is a U.S. military system. COMMISSION REPORT, *supra* note 1, at 7.

¹⁰¹ See Nordwall, *supra* note 99, at 30. In a 1992 DOT experiment, one airline paid for GPS equipment with one week's fuel savings. *Id.*

¹⁰² *Industry Impatient with FAA Progress on GPS*, *supra* note 99, at 156. House Public Works aviation subcommittee chairman James Oberstar said, "[i]f we wait for the Europeans it is the tail wagging the dog." *Id.*

¹⁰³ COMMISSION REPORT, *supra* note 1, at 8. The Commission suggests expediting implementation and modernization of the system through such means as a public-private consortium. *Id.*

tem can be a component of GNSS or one of its cornerstones, according to the Commission report.¹⁰⁴ The message from the industry and the Commission is clear: the technology is here, and the United States is ready to use it *now*.

FAA Chief Hinson ties the importance of pursuing this program to the broader economic goal of encouraging worldwide use of systems like those used in the U.S. because they are built by U.S. industry.¹⁰⁵ The AOPA shares Hinson's enthusiasm for the GPS system, hoping to see it refined enough to guide landings in poor weather and low visibility.¹⁰⁶ The proposal, which feasibly could save millions of dollars as older and more expensive systems are replaced,¹⁰⁷ may find support from Gore's cost-cutting "reinventing government" panel.¹⁰⁸

Pending legislation, however, may put too much stake in the system's success. The bill, a one-year authorization funding the Airport Improvement Program (AIP), prohibits the FAA from developing or procuring microwave landing systems (MLS) beyond those contracts in place on Jan. 1, 1994.¹⁰⁹ Senate aviation subcommittee Chairman Wendell Ford (D-Ky.), who sponsored the legislation, said he saw "no need to continue to fund this program for no better reason than the Europeans might decide in 1995 to deploy MLS."¹¹⁰ Although Hinson has decided not to wait for the International Civil Aviation Organization to

¹⁰⁴ *Id.*

¹⁰⁵ *FAA Administrator Intends Only Minimal Testing for Alcohol*, *supra* note 96, at 352.

¹⁰⁶ David Field, *Pilot's Eyes in Space; Satellite System Helps Planes Find Route to Runway*, WASH. TIMES, Sept. 23, 1993, at B7.

¹⁰⁷ *Id.* Installing the necessary equipment for GPS use costs about \$15,000 per aircraft and \$100,000 per airport for a simple two-hour installation of the radio transmitter; instrument landing systems, however, may cost \$100,000 per aircraft and up to \$1.5 million at each airport runway. *Id.*

¹⁰⁸ See *supra* notes 78-79, and accompanying text.

¹⁰⁹ *Senate Panel Considers One-Year Authorization to Keep Door Open for FAA Changes*, WKLY. OF BUS. AVIATION, Oct. 4, 1993, at 141. The shorter term legislation was proposed by Senate aviation subcommittee Chairman Wendell Ford (D-Ky.) to allow for the likelihood of FAA restructuring in the near future. *Id.*

¹¹⁰ *Id.*

decide on a technology for global satellite navigation,¹¹¹ he opposes the MLS cutoff provision because the full adaptability of GPS to civil aviation is still unknown, and it might be prudent to continue MLS development as a fallback.¹¹²

B. FINANCIAL STRENGTH

Operating with losses exceeding two billion dollars annually since 1990,¹¹³ airlines are suffering perhaps most obviously in the financial arena. Much of the losses, of course, are attributable to regulatory inefficiency and lack of foresight, as described above. But the airlines themselves are not blameless, and have taken steps toward regaining financial respectability.¹¹⁴

These steps, however, will not be enough to bring the industry back to health, even in the wake of a general economic recovery.¹¹⁵ High fixed costs, coupled with a future looming with large capital expenditures for new equipment, place a heavy burden on the industry.¹¹⁶ The airlines' first response, to cut fares drastically, might have been predictable. Paul S. Dempsey, Director of the Transportation Law program at the University of Denver College of Law, notes that "airlines sell what is, in effect, an instantly perishable commodity. Once a scheduled flight pulls away from the jetway, any empty seats are lost forever."¹¹⁷ Coupled with the short term marginal cost of

¹¹¹ *FAA Administrator Intends Only Minimal Employee Testing for Alcohol*, *supra* note 96, at 352.

¹¹² *Senate Panel Considers One-Year Authorization to Keep Door Open for FAA Changes*, *supra* note 109, at 141.

¹¹³ COMMISSION REPORT, *supra* note 1, at 13. Though major airlines saw profits of \$1 to 2.5 billion from 1984 to 1989, they were, at the same time, taking on long-term debt that grew as profits sagged and losses mounted. *Id.*

¹¹⁴ *Id.* After some review and reassessment, airlines have begun to purge themselves of unprofitable smaller hubs and services; to place a cap on capacity growth; to modify labor agreements and more efficiently use equipment; and to turn over spoke routes to regional partners better equipped for the market size. *Id.*

¹¹⁵ COMMISSION REPORT, *supra* note 1, at 14.

¹¹⁶ *Id.* at 13.

¹¹⁷ Dempsey, *supra* note 5, at 20.

filling a seat, "a bag of peanuts, a cup of Coca-Cola, and a few drops of fuel," according to Dempsey, the result is pricing below the actual cost of production in a competitive market.¹¹⁸ The losses grow and the debts compound.

Though urging the government to enforce the laws against anti-competitive mergers and acquisitions with more zeal, the Commission plainly opposed any attempt at reregulation of routes and fares.¹¹⁹ Those areas, the Commission concluded, should be left to the marketplace and to boardroom discussions.¹²⁰ The slow, cumbersome, disjointed government process is, in great part, responsible for the industry's predicament today, said Commission Chairman Baliles,¹²¹ and more of the same will not solve the dilemma.¹²²

1. *Establish an Independent Financial Advisory Committee to the DOT*

The Commission recommends establishing a presidentially appointed advisory committee to the DOT to review the financial health of the airlines and advise the Secretary of Transportation when an airline's financial condition poses a risk to the public or to the industry.¹²³ The Commission discourages giving the DOT any more regulatory authority because, it says, the DOT already has enough.¹²⁴ In fact, the DOT should continue to review in advance any major ownership changes and be willing to exercise its existing authority.¹²⁵

¹¹⁸ *Id.* Airlines will compete this way in competitive markets and simply hope to survive, swallowing up weaker carriers until one has established market dominance. Those that establish dominance in other markets will cover their losses there in order to continue fighting for survival in competitive markets. Dempsey blames this "death spiral" for unprecedented numbers of mergers, consolidations, and bankruptcies. *Id.*

¹¹⁹ COMMISSION REPORT, *supra* note 1, at 14.

¹²⁰ *Id.*

¹²¹ *News Conference with Gerald Baliles*, Federal News Service, Aug. 19, 1993.

¹²² COMMISSION REPORT, *supra* note 1, at 14.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 15. When asked if the recommendation was made simply because the

In its report, the Commission takes pains to represent the independent financial committee as purely advisory.¹²⁶ But this caveat has done little to allay fears that it will lead to reregulation. Former Civil Aeronautics Board (CAB) Chairman Alfred Kahn called the proposal the Commission's "single most dangerous recommendation,"¹²⁷ and he is joined by a host of others critical of the report.¹²⁸

There is some consensus, however, that part of the problem is a lack of diligence at the DOT. Dempsey condemns the Department for approving all twenty-one mergers submitted, and thus allowing corporate raiders to strip airlines of their assets.¹²⁹ Furthermore, he says, "[t]he Department of Transportation has long held jurisdiction to investigate the 'fitness' of airlines plagued with debt. Here, like with respect to so many of its other statutory responsibilities, DOT has shown no enthusiasm for protecting the public interest."¹³⁰ Others feel the DOT was indifferent to the needs of airlines when fuel prices

DOT was not doing its job, Chairman Baliles answered, "[y]ou've got it right on the button." *News Conference with Gerald Baliles*, *supra* note 121.

¹²⁶ COMMISSION REPORT, *supra* note 1, at 15. "Its influence would come from the quality of its membership, the strength of its analyses and the utility of its advice. . . ." *Id.*

¹²⁷ *Most Popular*, AVIATION DAILY, Sept. 2, 1993, at 351.

¹²⁸ *Experts Blast Commission Report*, TRAVEL WKLY., Sept. 6, 1993, at 37. Early opposition to the Commission report included former DOT secretaries John Barnum, Alan Boyd and Jim Burnley; former CAB Chairman Alfred Kahn; former FAA Administrator Allan McArtor; and former DOT policy chief Jeffrey Shane. The panel was organized by the Federal Bar Association. *Id.* Comments on the recommendation ranged from "the camel's nose under the tent" (leading to reregulation) (Kahn), to "[creating] a shadow government" (McArtor), to "stupendously poor" (Burnley). *Id.* In a supplemental opinion, Commission member John E. Robson joined the view that the advisory committee could be a "trojan horse" for reregulation. COMMISSION REPORT, *supra* note 1, at 35.

¹²⁹ Dempsey, *supra* note 5, at 13-14.

¹³⁰ *Id.* at 24. Dempsey suggested creating an independent agency outside the DOT to handle economic matters in 1991. He went further, however, to suggest that the agency have regulatory authority, rather than simply an advisory capacity. *Id.* at 46. Professor Dempsey, an expert consulted by the Commission concerning deregulation, also recommended in 1991 that the FAA split off as an independent agency from DOT. *Id.* Although the Commission seems to have missed Dempsey's entire point about the harm done by deregulation, his ideas clearly carried some weight.

shot up and traffic dropped. Had the Department been more sensitive to requests for relief, some bankruptcies might have been avoided.¹³¹ But not everyone agrees that an independent advisory committee is the answer. Former FAA Administrator Allan McArtor said that if DOT employees are not doing the job right, "you should give them the tools to do it better," rather than create a "shadow government [to] look over their shoulders."¹³²

2. Restructure the Bankruptcy Laws

Recognizing that bankrupt airlines face difficult financial hurdles themselves,¹³³ as well as affecting the general public and the industry as a whole, the Commission concludes that bankruptcy code reform is long overdue.¹³⁴ Bankrupt carriers tie up scarce airport gates and international routes as they receive extensions for reorganization.¹³⁵ The Commission recommends, therefore, that bankruptcy judges be required to make findings in individual cases to support granting an extension of the 120-day limit on reorganization, and that a one-year absolute limit be imposed on the exclusive right of a bankrupt airline to file its reorganization plan.¹³⁶

¹³¹ See *Ease the Squeeze on U.S. Airlines*, *supra* note 51, at 7. Many airlines joined an Air Transport Association (ATA) petition that called for a list of actions to ease the financial burden, specifically, a break on the eight percent fuel tax and a release of oil from U.S. reserves. *Id.* The ATA, weak and rumored to be near disbandment because of tensions among debt-weary airlines, was revitalized by a cooperative front on the tax issue. *Airlines 'One Voice' Enables ATA to Pursue Tax, Regulatory Relief*, AVIATION DAILY, Aug. 31, 1993, at 335.

¹³² *Experts Blast Commission Report*, *supra* note 128, at 37. Significantly, criticism of the actions (or inactions) of the DOT comes both from proponents of reregulation, see Dempsey, *supra* note 5, at 37, and from supporters of deregulation. *Experts Blast Commission Report*, *supra* note 128, at 37.

¹³³ See *supra* note 46 and accompanying text.

¹³⁴ COMMISSION REPORT, *supra* note 1, at 15.

¹³⁵ *Id.* America West, for instance, recently requested its seventh extension of time for reorganization. *America West asks Court for Seventh Extension of Right to Reorganize*, AIRLINE FIN. NEWS, Sept. 27, 1993.

¹³⁶ COMMISSION REPORT, *supra* note 1, at 15. The Commission also recommends placing limits on the time in which bankrupt carriers may assume or reject their leases for airport gates, to free up idle space for healthy carriers; allowing government bodies whose claims are not tax related, such as airports and the Pension Benefit Guaranty Corporation (PBGC), to sit on creditors' committees and

Possible abuse of the bankruptcy laws to compete with healthy carriers has been one of the most widely cited reasons for the self-destructive, cut-throat competition that emerged from financial distress.¹³⁷ Thus, there is little opposition to the Commission's recommendation to reform the code. In fact, Transportation Secretary Pena suggested considering the changes in other industries as well.¹³⁸

3. *Provide Tax Relief*

Although no single factor is responsible for the airline industry's near collapse, the Commission found that a return to financial prosperity would be significantly impeded by certain tax provisions.¹³⁹ The following three major recommendations are highlighted in the report.

a. Amend the AMT So That Airlines Are not Paying Taxes at the Same Time They Are Operating with Losses

As discussed above, the Alternative Minimum Tax has required the airline industry to pay \$670 million to the government while it simultaneously lost \$10 billion.¹⁴⁰ The reform would affect other capital intensive industries, such as steel producers and oil drillers, who must make

have a voice in reorganization and debt-structure planning; and clarifying code provisions concerning aircraft leases to allay lessors' concerns and to allow other airlines to obtain better lease terms for their planes. *Id.*

Though the recommendations seem to penalize the bankrupt carrier, they may instead help it by providing a basis for creditor support. Lessors asked to affirm their leases on a bankrupt carrier's planes, for example, deserve to know their exposure is limited; and the PBGC should have a say in the financing of unfunded pension liabilities during reorganization.

¹³⁷ *Id.* at 15.

¹³⁸ Meserve, *supra* note 45. In an interview with CNN anchor Jeanne Meserve, Pena was noncommittal about airlines' abuses of bankruptcy laws, but said, "if we're going to reform the bankruptcy laws, should we look at bankruptcies for all companies? . . . Perhaps others are abusing [them]." *Id.*

¹³⁹ COMMISSION REPORT, *supra* note 1, at 16; see also *supra* note 36 and accompanying text.

¹⁴⁰ *Id.*

large capital expenditures despite low profit margins.¹⁴¹ Though the tax has a purpose in preventing the use of excessive deductions to avoid taxation,¹⁴² it clearly operates unfairly when it burdens companies that are already in financial distress.

b. Roll Back Ticket and Cargo Taxes to Pre-1990 Levels

In 1990, passenger ticket and cargo waybill taxes increased twenty-five percent, costing airlines, passengers, and shippers another \$900 million annually.¹⁴³ Though the revenue was earmarked for a trust fund for aviation-related projects, it instead went toward general deficit reduction.¹⁴⁴ This problem has apparently been corrected,¹⁴⁵ but the increased taxation itself is extra baggage for the debt-laden airlines. With apparent indignation at the misappropriation, the Commission calls for a return to eight percent tax on passenger tickets and five percent tax on cargo waybills, down from ten percent and six and a quarter percent, respectively.¹⁴⁶

Though any reduction in taxes is likely to garner support from the beleaguered airlines, Hinson warns that the passenger and cargo tax reductions will remove needed revenue from a fund that would provide capital for future improvements at congested domestic airports.¹⁴⁷ Without directly criticizing the recommended decreases, Hinson suggests a closer look at the balance of give and take,

¹⁴¹ *Airline Commission Calls for Changes in Tax Policy*, *supra* note 34, at 335.

¹⁴² COMMISSION REPORT, *supra* note 1, at 16.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Airline Ticket Rollback Would Take Away Needed Revenues, FAA Chief Says*, BUREAU OF NAT'L AFFAIRS, INC., DAILY REP. FOR EXECUTIVES, Sept. 29, 1993, at G187. Besides reducing ticket and cargo taxes, the Commission also recommends that the FAA's allocation of the airport trust fund be reduced from 75% to 70% as long as the FAA remains part of the federal budget process. COMMISSION REPORT, *supra* note 1, at 16. The proposal recognizes that domestic carriers already pay their fair share of the FAA budget through ticket and cargo user taxes. *Id.*

pointing out that getting relief now means a much longer wait for projects that could immediately reduce congestion and delays.¹⁴⁸

The measure could also meet opposition in Congress from the likes of Senator John Danforth, a member of the Senate Finance Committee, who views the tax rollback as "robbing Peter to pay Paul."¹⁴⁹ Furthermore, Congress is eyeing higher air and sea passenger fees to make up for lower tariff collections under the North American Free Trade Agreement (NAFTA).¹⁵⁰ Given the choice between cutting entitlement spending and increasing revenues, the administration has opted for the latter.¹⁵¹

c. Exempt Airline Fuel from Proposed Transportation Tax

The Commission rather plainly states that "[a]t a time when the United States is looking for ways to strengthen the airline industry, an additional tax seems ill-advised."¹⁵² The Commission estimated that the new tax

¹⁴⁸ *Airline Ticket Rollback Would Take Away Needed Revenues, FAA Chief Says*, *supra* note 147, at G187. Hinson told the Senate Aviation Subcommittee that the administration wants to maintain AIP funding at its current \$1.8 billion level to address congestion problems. *Id.* He more than realized his wish: Subcommittee Chairman Wendell Ford introduced legislation in the fall authorizing \$2.05 billion for the AIP in fiscal 1994. *Sen. Ford's FAA Bill Would Extend AIP for One Year*, AIRPORTS, Sept. 28, 1993, at 384. Sen. Ford's bill also echoed some Airline Commission recommendations by requiring the FAA to review its structural, personnel, and procurement problems, and report on its findings by March 30, 1994, *see supra* part V.A.1.; by prohibiting the FAA from giving international routes to foreign carriers unless the foreign country provides equivalent rights, *see infra* part V.C.1.; and by prohibiting further procurement of microwave landing systems (in anticipation of GPS implementation), *see supra* part V.A.3.

¹⁴⁹ *Airline Ticket Rollback Would Take Away Needed Revenues, FAA Chief Says*, *supra* note 147.

¹⁵⁰ *Panetta: Higher Transport Fees Still 'Leading Candidate' for NAFTA Funding*, Daily Rep. for Executives (BNA), Oct. 21, 1993, at A202.

¹⁵¹ *Id.* Though the administration expressed willingness to look at other alternatives, it is clearly targeting increased passenger fees—collected through customs—to fund the expected five-year loss of \$2.35 billion. *Id.* Allocating such fees away from the airlines and airports, however, is one of the problems targeted by the Commission. COMMISSION REPORT, *supra* note 1, at 16-17.

¹⁵² COMMISSION REPORT, *supra* note 1, at 16.

would cost the industry \$506 million a year.¹⁵³ That figure represents about thirty percent of the profits airlines posted in 1988, when they earned record profits of \$1.7 billion.¹⁵⁴ But the fractious ATA, uniting finally in opposition to the tax,¹⁵⁵ helped pressure Congress late in the summer to grant the airline exemption.¹⁵⁶

Implementation of this recommendation may seem to have been comparatively easy when it comes to pushing for passenger and cargo tax relief. While tax burdens on business and industry grow to meet budget goals under President Clinton's deficit-reduction plan, ATA supporters will have a hard time arguing for actual *reductions* in their industry taxes.¹⁵⁷ When the fuel tax was first created, ATA President James Landry expressed his concern that the administration and Congress "seem indifferent to the cumulative effect of federal policies on the airline industry."¹⁵⁸ Perhaps the test will be whether other Commission proposals¹⁵⁹ are given similar consideration, or if

¹⁵³ *Id.*

¹⁵⁴ John H. Cushman, Jr., *An Uneven Corporate Tax Bite*, N.Y. TIMES, Aug. 18, 1993 at D1. See Robert L. Mandel, *Jet Fuel Taxation: Current State Approach and the Need for Congressional Limitations*, 58 J. AIR L. & COM. 103 (1992) for a discussion of state fuel taxation measures and their effects on airline tax burdens. Mandel argued in 1992 that Congress must "take immediate action towards balancing the tax burden upon the airlines to sustain their economic viability." *Id.* at 140. At the time, Passenger Facility Charges (PFCs) had been added to the list of state impositions on the airlines, and threw out of balance state and federal taxation of airlines. *Id.* Congress's new fuel tax seems an attempt to shift the balance the other way.

¹⁵⁵ *Airlines 'One Voice' Enables ATA to Pursue Tax, Regulatory Relief*, *supra* note 131.

¹⁵⁶ *To Keep U.S. Airlines Flying*, STAR TRIB., Aug. 21, 1993, at 18A. The two-year exemption was included in the new budget bill. *Airline Commission Gives Industry Recommendations*, *Moneyline* (Cable News Network, Aug. 19, 1993).

¹⁵⁷ *See Enactment of Tax Relief for Airlines Called Problematic by Commission Member*, Daily Rep. for Executives (BNA), Sept. 9, 1993, at G173.

¹⁵⁸ *Airlines Still Need Tax, Regulatory Relief, National Commission Concludes*, Daily Rep. for Executives (BNA), Aug. 20, 1993, at G160.

¹⁵⁹ Other recommendations made by the Commission include: full deductibility of flight crew per diem payments (cost of meal and entertainment expenses for crew members on layovers currently only 80% deductible); allocation of funds for incoming passengers and cargo in proportion to that collected in Customs, INS and Agriculture inspection fees; rigorous policing of AIP grants to prevent municipalities from diverting funds from airport improvements to general municipal use; close scrutiny of the use of passenger facility charges (PFCs) to stay in keep-

this was a token consolation from the administration.

C. GLOBAL COMPETITIVENESS

While domestic air traffic growth has been in something of a slump since 1987,¹⁶⁰ U.S. carriers have seen a sharp increase in international traffic, both passenger and cargo, since 1986.¹⁶¹ Turning its focus from the mistakes of the past to the prospects of the future, the Commission is looking to the international arena for growth and profit. According to Commission Chairman Baliles, focusing on profitability rather than market share will be an important first step toward financial recuperation.¹⁶²

1. *Work Toward Multi-National Agreements*

The Commission emphasized the need for liberal global competition and condemned as obsolete the bilateral agreements that grew out of the 1944 Chicago Convention.¹⁶³ These agreements have become increasingly contentious and protectionist, inhibiting U.S. efforts to open up competition and even resulting in foreign access to U.S. markets without equivalent rights running the

ing with FAA requirements; and Presidential consideration of releasing crude oil reserves during fuel shortages and short-term price spikes to alleviate the harsh impact on the airlines and the economy. COMMISSION REPORT, *supra* note 1, at 16-17.

¹⁶⁰ *Baliles Says Bilaterals are Obsolete, But Instant Open Skies is No Cure*, AIRLINE FIN. NEWS, Sept. 20, 1993. The exceptional number of passengers boarded in 1992 is attributable to drastically reduced fares and is not indicative of a general market upswing. COMMISSION REPORT, *supra* note 1, at 4; see also *supra* note 50 and accompanying text.

¹⁶¹ COMMISSION REPORT, *supra* note 1, at 21.

¹⁶² *Baliles Says Bilaterals are Obsolete, but Instant Open Skies is No Cure*, *supra* note 160.

¹⁶³ COMMISSION REPORT, *supra* note 1, at 20. The Commission used the markets with two of the U.S.'s largest trading partners to illustrate the restrictive, outmoded results of such agreements: A study done for three dozen Canadian and U.S. cities showed that only 30% of the major international carriers were allowed to schedule non-stop service, and only 8% could compete with Canada's own airlines. Air travel with Canada had grown only 16%, compared to 64% growth with all other U.S. trading partners. Furthermore, Japan allows nonstop service from only 15 U.S. cities, a situation made more implausible by the fact that more than 40 U.S. states have trade and investment offices in Tokyo. *Id.* at 21.

other way.¹⁶⁴ The initial recommendation, therefore, is to focus negotiating efforts on creating a non-restrictive, non-discriminatory multi-national operating environment for airlines and to push for liberal, multi-national agreements.¹⁶⁵

The Commission, however, approaches its recommendation with the realization that many other trading blocs, including the European Community (EC), are not of like mind.¹⁶⁶ A tendency of other countries to attribute poor financial performance solely to the presence of U.S. competition has contributed to "a growing nastiness in international aviation relationships between the U.S. and its

¹⁶⁴ COMMISSION REPORT, *supra* note 1, at 21. Small national carriers fear competing with U.S. carriers on a "level playing field," stating that opening the skies would largely benefit U.S. airlines which already have an advantage in overseas markets. Robin Sidel, *Foreign Airlines Reject U.S. "Open Skies" Policy*, REUTER BUS. REP., Nov. 2, 1993. U.S. carriers claim, however, that charges in Europe are driven up by as much as 30% through practices such as the ground-handling monopolies at Frankfurt, Milan, Madrid and Barcelona. Germany's new terminal navigation charging formula, for example, is designed to benefit smaller planes and will cost Delta an extra \$1 million annually in operating costs. *Europe's Airlines Clash Over Solution to Crisis*, AVIATION EUROPE, Sept. 23, 1993 at 1. While the necessity for reforming airline agreements is widely recognized, Lufthansa chairman Juergen Weber cautioned, "the record of the U.S. airline industry gives no convincing proof of why they should take the lead." Sidel, *supra*.

¹⁶⁵ COMMISSION REPORT, *supra* note 1, at 22.

¹⁶⁶ *Id.* As negotiations progress between the U.K. and the U.S., the possibility of multi-national agreements in Europe becomes more distant. *Baliles Acknowledges Roadblocks to Multilaterals, Open Skies*, AVIATION DAILY, Sept. 17, 1993, at 435. U.K. Transport Secretary John MacGregor warned that the group of "wise men" currently studying Europe's struggling airline industry are ill-equipped to negotiate a multi-level agreement on behalf of countries such as Germany, France and the U.K. *EC Multilateral Negotiations Not Likely in Near Future, Says U.K. Official*, AVIATION DAILY, Sept. 16, 1993, at 423. In fact, British Airways (BA) and the Association of European Airlines (AEA) have diverged sharply over issues of regulation, protectionism and state subsidies, with BA on the side of liberal competition and the AEA pushing for relaxation in the European competition rules and further subsidies for flag carriers. *Airline Executives Urge Committee to Reject State Subsidies for Carriers, Anti-trust and Trade Reg. Rep. (BNA)*, Sept. 30, 1993, at 453. Chairmen for British Midland, Virgin Atlantic and SAS joined BA in its public stand against the AEA's push toward further protectionist policies. *Europe's Airlines Clash Over Solution to Crisis*, AVIATION EUROPE, Sept. 23, 1993, at 1.

Instead, MacGregor urges a liberal bilateral agreement between the U.K. and the U.S. that clearly moves away from regulation, protectionism and state subsidy and that will "provide a pathfinder" for other agreements in Europe. *EC Multilateral Negotiations Not Likely in Near Future, Says U.K. Official, supra*.

trading partners," according to former DOT official Jeffrey Shane, who says the biggest problem the United States faces in shifting toward multi-national agreements is "find[ing] anyone to talk to."¹⁶⁷ Indeed, Delta Chairman Ron Allen journeyed before the AEA to ask that the groundwork be laid for open skies talks between the U.S. and the EC, but he received a cold shoulder from Europe's airline bosses.¹⁶⁸ Baliles believes much of the opposition to the change comes from a tendency for airlines to overreach a little when discussing the possibility of open skies.¹⁶⁹ The DOT itself has defined "open skies" with incredibly rosy vision,¹⁷⁰ probably scaring off most foreign airlines who hear the term in any context. The Commission, therefore, defined some short-term issues for the slow transition to a more competitive global regime and made the following recommendations.

a. Raise the Foreign Investment Limit to 49% Voting Equity

The Commission cautiously urges that such foreign investment in U.S. airlines must be accompanied by a liberal bilateral agreement containing equivalent reciprocal opportunities for the United States, and that the foreign investor must not be government-owned.¹⁷¹ This recommendation serves two broad purposes: to provide

¹⁶⁷ *Multilateral Pacts with the U.S. Recommended by Former DOT Policy Official*, AVIATION DAILY, Aug. 25, 1993, at 305.

¹⁶⁸ *Europe's Airlines Clash Over Solution to Crisis*, *supra* note 164, at 1.

¹⁶⁹ *Baliles Acknowledges Roadblocks to Multilaterals, Open Skies*, *supra* note 166, at 435.

¹⁷⁰ *In the matter of defining "Open Skies"*, DOT order 92-8-13, Aug. 5, 1992, at 13. The definition includes such open-ended and liberally competitive provisions as

- (1) Open entry on all routes;
- (2) Unrestricted capacity and frequency on all routes;
- (3) Unrestricted route and traffic rights;
- (8) Open code-sharing opportunities;
- (9) Self-handling provisions; and
- (11) Explicit commitment for non-discriminatory operation of and access for computer reservation systems.

Id. at 14-16.

¹⁷¹ COMMISSION REPORT, *supra* note 1, at 22-23.

new sources of capital to ailing U.S. airlines, and to show a good-faith effort toward reaching competitive, multi-national agreements.¹⁷² British Airways Chairman Colin Marshall, in the midst of renegotiating a bilateral agreement with the United States, expressed his hope that the recommendation would be approved, raising the foreign investment limit from the current 25% to the 49% that the United Kingdom and European Community already allow.¹⁷³ Transportation Secretary Pena indicated that the administration is interested in the proposal, adding that the U.S.-U.K. bilateral agreement may depend on its approval in Congress.¹⁷⁴

Opposition to the recommendation, however, may gain strength as the big three—American, Delta and United—see formerly weak and bankrupt foes gain competitive footing with the infusion of capital from foreign investors.¹⁷⁵ The megacarriers fear that such deals, without truly open skies, will allow foreign subsidization of competing airlines without giving the big U.S. airlines the chance to compete internationally.¹⁷⁶ Although airline

¹⁷² *Id.*

¹⁷³ *British Airways Hopes Positive US-UK Talks*, REUTERS FIN. REPS., Oct. 4, 1993. BA's failed attempt to invest in struggling USAir last year may have been substantially due to its bid for a 44% share in the airline's equity and several representatives on the board of directors. James T. McKenna, *USAir-BA Pact Will Spark New Transatlantic Battle*, AVIATION WK. & SPACE TECH., July 27, 1992, at 26. Early in 1993, however, BA and USAir concluded an agreement for a much smaller stake in the airline—about 20% voting stock and nearly 25% equity and three seats on the board with substantially less control, Robert L. Rose & Brian Coleman, *British Airways Buys Stake in USAir, Drawing Protests from Other Carriers*, WALL ST. J., Jan. 22, 1993, at A3—and received the administration's blessings. Richard M. Weintraub, *Rebuilding USAir; Investment by British Airways Gives Carrier a Big Lift*, WASH. POST, Mar. 22, 1993, at F1.

¹⁷⁴ *House Aide Says Lawmakers May Examine Raising Limits on Foreign Investment*, Int'l Bus. & Fin. Daily (BNA), Sept. 17, 1993.

¹⁷⁵ See Weintraub, *supra* note 173. British Airways' \$300 million injection into USAir reduced the ailing airline's debt, opened access to international markets, and created a partnership that USAir chairman Seth Schofield hopes will lead to better service and more efficient operations. *Id.*

¹⁷⁶ See, e.g., Donna Kelley, *British-USAir Deal Stirs Talk on Airline Policy* (CNN News Broadcast, Nov. 9, 1992, available in LEXIS, Nexis Library, CNN File) (interviewing Mark Dunkerly, vice president of commercial and government affairs for British Airways; Scott Yohe, vice president of government affairs for Delta; and

analyst Julius Maldutis predicts that service, fares, and job security will improve with foreign investment, contrary to arguments from the big three, he says there is a fundamental failure of U.S. aviation policy when "we are asking, in effect, foreign governments to come and rescue our carriers."¹⁷⁷

b. Elevate Status of Air Service Negotiations

U.S. negotiating teams presently consist of foreign service officers who are pulled out of their specific career paths and temporarily assigned to the Office of Economic and Business Affairs at the Department of State.¹⁷⁸ This rotation of negotiators leads to a lack of continuity and expertise on the United States' side of the table. Other countries delegate the duties to higher-level officials, reflecting the higher priority they attach to the agreements.¹⁷⁹

The Commission recommends that the United States strive for more continuity by strengthening the aviation career track at the Department of State and by appointing an ambassador-at-large to provide leadership in air service negotiations.¹⁸⁰ It also urges that the United States strictly enforce its current bilateral rights by imposing sanctions, when necessary, for violations.¹⁸¹ The Commission adds that increased foreign investment opportunities and liberal multi-national agreements must not adversely affect the availability of aircraft for the CRAF program.¹⁸²

Julius Maldutis, airline analyst with Salomon Brothers, about the proposed agreement between BA and USAir).

¹⁷⁷ *Id.*

¹⁷⁸ COMMISSION REPORT, *supra* note 1 at 23.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 24; *see also supra* note 30. *But see* Dempsey, *supra* note 5, at 32-42 (discussing the dangers of foreign ownership in a vital infrastructure industry such as aviation).

2. Bolster the Aerospace Manufacturing Industry

Yet another convergence of factors led manufacturers into the financial mire. Besides the rash of canceled orders from airlines laden with debt, manufacturers were hit with U.S. military budget cuts and growing international competition at the same time the world economy weakened.¹⁸³ Subsidies for manufacturers in other countries and international market and certification differences also put U.S. builders and machinists at a disadvantage.¹⁸⁴

Though manufacturers and commissioners seem to agree that the best measure of help would be to restore the airlines to health,¹⁸⁵ the Commission came up with some suggestions of its own for giving the manufacturing sector a boost.

a. Level the Playing Field

The Commission maintains that only in a fair and free trading environment will U.S. aerospace manufacturers thrive in the global aviation marketplace.¹⁸⁶ It therefore recommends expanding international agreements that set limits on government involvement and subsidizing of aircraft manufacturing projects; enforcing international trade obligations and eliminating unfair trading practices; encouraging international cooperation among aviation components manufacturers to attract more capital and market new products; increasing Export-Import Bank funds in order to give U.S. manufacturers financial parity with their foreign counterparts; trying to harmonize international certification standards; and avoiding unilateral sanctions on exports unless national security is at risk.¹⁸⁷

b. Limit Manufacturer Liability

Open-ended products liability has driven insurance

¹⁸³ *News Conference with Gerald Baliles*, *supra* note 121.

¹⁸⁴ COMMISSION REPORT, *supra* note 1, at 24.

¹⁸⁵ *News Conference with Gerald Baliles*, *supra* note 121.

¹⁸⁶ COMMISSION REPORT, *supra* note 1, at 25.

¹⁸⁷ *Id.* at 24-25.

costs up so drastically that light aircraft sales have dwindled because of sharp price increases.¹⁸⁸ General Aviation Manufacturers Association president Edward Stimpson says the industry has been ravaged by lawsuits. Since the late 1970s, annual products liability costs have increased 1,000%.¹⁸⁹ Industry analysts say manufacturers cannot get a high enough price for a new plane to cover the costs of defending an old one.¹⁹⁰

Since at least 30% of the aircraft produced in the U.S. have historically been exported, this market drop has created a loss in the balance of trade.¹⁹¹ The General Aviation Manufacturers Association (GAMA) says small plane sales dropped from 13,000 to 500 annually between 1965 and 1982, and blames that decrease for causing 100,000 lost jobs in the U.S. and encroachment of foreign competitors.¹⁹² The Commission recommends a statute of repose that would limit the liability of small aircraft manufacturers to fifteen years from the date of manufacture.¹⁹³

The International Association of Machinists and Aerospace Workers (IAM), traditionally shy of product liability reform bills, emphatically endorsed the recommendation.¹⁹⁴ IAM representative John Goglia said the statute

¹⁸⁸ *Id.* at 26.

¹⁸⁹ *Small Aircraft Builders Flee Market Due to Lawsuits, Morning Edition*, National Public Radio, Sept. 14, 1993, available in LEXIS, Nexis Library, NPR File.

¹⁹⁰ *Id.* Kevin O'Hara, of Allied Signal's General Aviation Avionics Division, says manufacturers must add \$70,000 to the price of a new plane to cover liability costs. Joe Gose, *Litigation Costs Cut Deliveries, Earnings in General Aviation*, KAN. CITY BUS. J., Sept. 17, 1993, at 1. Beech Aircraft, for instance, defended 203 lawsuits over four years that cost an average \$530,000 each. *Id.*

¹⁹¹ *Id.*

¹⁹² Dina ElBoghdady, *Hansen Sponsors Product Liability Bill to Help Aviation Industry*, States News Service, Sept. 14, 1993 available in LEXIS, NEXIS Library, Wire File. In 1980, there were 29 U.S. and 15 foreign small plane manufacturers; by 1992, 29 foreign manufacturers were in business and only 9 were left in the United States. Gose, *supra* note 190, at 1.

¹⁹³ *Id.*

¹⁹⁴ *IAM Endorses 15-Year Product Liability Statute of Repose*, WKLY. OF BUS. AVIATION, Sept. 20, 1993, at 118. IAM's General Vice President for Transportation, John Peterpaul, was a voting member of the Airline Commission. See *supra* note 55.

of repose “will create thousands of new, high-paying jobs . . . without costing the U.S. Treasury a dime. . . . We can unshackle American technology and know-how and once again lead the world in aircraft and equipment innovation.”¹⁹⁵

In September, Representatives Jim Hansen (R-Utah) and Dan Glickman (D-Kan) sponsored legislation implementing the recommendation.¹⁹⁶ Significantly, the bill has gained support from AOPA—the Aircraft Owners and Pilots Association—which represents a large portion of the people who would file suits against manufacturers.¹⁹⁷ Similar legislation sponsored by Senators Nancy Kassebaum (R-Kansas) and Orrin Hatch (R-Utah) is pending before the Senate.¹⁹⁸

VI. WHAT THE REPORT DOES NOT TELL US

When the initial round of applause from airline executives, travel industries and politicians subsided, some of the Airline Commission’s weaknesses began to show up. Criticism emerged from industry watchers and experts from all imaginable sectors, targeting the report’s glaring omissions concerning marketing operations and competition and its general lack of detail. Some recommendations appear infeasible, while others are simply too general to be meaningful.

¹⁹⁵ *IAM Endorses 15-Year Product Liability Statute of Repose*, *supra* note 194.

¹⁹⁶ ElBoghdady, *supra* note 192. Rep. Glickman has been pursuing similar, but broader, legislation for five years; his attempts have thus far been thwarted by the Association of Trial Lawyers of America. *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* Senate bill 1458, the General Aviation Revitalization Act of 1993, establishes a 15-year statute of repose for manufacturers, thus limiting liability for any plane or part to 15 years from the date the plane or part was purchased. The measure was approved Nov. 10, 1993, without objection. *FAA Bill Approved by Senate Panel but Floor Action Not Likely Soon*, Daily Rep. for Executives (BNA), Nov. 12, 1993, at A217.

A. OMITTED: COMPUTER RESERVATION SYSTEMS,
FREQUENT FLIER PROGRAMS, AND COMMISSION
OVERRIDES

Early in the Commission report, for instance, readers are told that some issues, "such as computer reservations systems (CRS) and frequent flier programs, after careful examination required no action by this Commission."¹⁹⁹ Commission member Herb Kelleher, though himself surprised at the absence of these issues from the agenda, said the Commission decided "after hours of discussion" that such matters were best left in the business arena for the judgment of the individual carriers.²⁰⁰

Anti-competitive pricing programs and costly marketing techniques such as CRS, frequent flier programs, and travel agent commission overrides, however, deserve some attention. Former CAB Chairman Alfred Kahn says these programs make up "a big hunk of overall costs."²⁰¹ And while the Commission looked closely at ways to lift primarily government-made burdens from airlines and help them find new sources of capital, it ignored the possibility of some basic cost-cutting.²⁰²

Market concentration was also largely brushed off in the Commission report. Since deregulation in 1978, dominant airlines have swelled to control more than 60% of

¹⁹⁹ COMMISSION REPORT, *supra* note 1, at 3.

²⁰⁰ Jennifer Lawrence, *Flying Unfriendly Skies, Airline Panel Slips*, ADVERTISING AGE, Aug. 30, 1993, at 4. Commission Chairman Baliles and Transportation Secretary Pena echoed this opinion. See, e.g., Baliles, *supra* note 25; *Transportation Secretary Federico Pena Interviewed*, *supra* note 44.

²⁰¹ Lawrence, *supra* note 200. Kelleher said "[t]he commission wasn't assembled to sit down in a room and decide the issues. . . . The issues came from the outside to us." *Id.* Therefore, the theory runs, since no one brought CRS and frequent flier up, they weren't put on the agenda. Travel marketing consultant James O'Donnell said the numbers show that a reduction in these marketing costs could help eliminate losses, but carriers fear the consequences of being the first to give up a program and risk losing market share; so they just consider it a cost of doing business, grit their teeth and take their losses. *Id.*

²⁰² See *Airline Panel's Recommendations Not Likely to Advance as One Bill*, Daily Rep. for Executives (BNA), Sept. 10, 1993, at A174. Severin Borenstein, a recognized expert on airline deregulation, said getting industry costs down may be of more benefit overall than addressing debt burdens and limiting bankruptcy. *Id.*

the market at about eighteen major airports, compared to the less than 50% dominance of any one airline at any airport during regulation.²⁰³ Some of this trend toward stifling competition can be traced to the use of CRS, frequent flier programs and travel agent commission overrides.²⁰⁴

A CRS, for instance, may improve an airline's chances of selling its product 13-18% and, through its expedient means of exchanging pricing proposals, facilitate implicit price fixing.²⁰⁵ But only the larger carriers, such as American, United and Continental, have their own CRS²⁰⁶ and, therefore, access to that particular manipulation of supply and demand. Many smaller regional carriers affiliated with the megacarriers in order to get "on line" in the CRS.²⁰⁷ Frequent flier programs and commission overrides have similar consequences, with the larger airlines suffering the costs as "doing business" while smaller carriers are hit hard—about 20% of their total costs—trying to match commission payments or price competitively.²⁰⁸

B. FUZZY: SURVIVAL OF NEW ENTRANTS, QUALITY OF OLD WORKFORCE, AND DETAILS OF PROPOSED ENTITIES

Recognizing that the new carriers which entered the market following deregulation were either quickly escorted out of the market, pitched into bankruptcy or swallowed up by larger carriers, the Commission makes some

²⁰³ Dempsey, *supra* note 5, at 15.

²⁰⁴ *Id.* Dempsey lists nine "survival characteristics" of U.S. airlines: multiple hubs, strategically located; frequent flier programs; computer reservation systems; sophisticated yield management; fuel efficient fleet of standardized aircraft; low debt (conservative growth); low wages/flexible work rules; superior service; and international routes. *Id.* at 14. Note that only the international routes factor was treated in any substance by the Commission.

²⁰⁵ *Id.* at 18.

²⁰⁶ *Id.*

²⁰⁷ Robert M. Hardaway & Paul S. Dempsey, *Airlines, Airports and Antitrust: A Proposed Strategy for Enhanced Competition*, 58 J. AIR L. & COM. 455, 480-81 (1992). For example, United Express, Continental Express and American Eagle all fly under a megacARRIER's colors. *Id.*

²⁰⁸ Lawrence, *supra* note 200, at 4.

general comments about ensuring that the DOT is receptive to the latest rush of new entrants into the industry.²⁰⁹ The report's brief discussion, however, stays at the "good intentions" level and is short on specifics. Apparently, no consideration is given to the market forces that destroyed the young carriers²¹⁰ and no recommendations are offered to help the new entrants that "can be an important element in sustaining future competition."²¹¹

In support of building up a better, more reliable, and stronger workforce,²¹² the report's recommendations call for policies, advisements, priorities and amendments. The thoughts are nice, but the Commission could have been more aggressive. The need for a professional career track and training program in the transportation policy areas may become apparent as experienced staff retires or leaves.²¹³ Furthermore, the airline industry is a service industry. Professor Dempsey, describing the "survival characteristic" of a flexible work force, says, "[h]appy employees can give passengers a lovely trip, and lure them back for another, and another. Angry, embittered employees can do the opposite."²¹⁴

Also missing are any details of the proposed financial advisory committee to the DOT. Some of the fears of back-door regulation surrounding this recommendation may be generated by the apparent free rein thrown to the government for the appointment and use of the committee. The dubious caveat that "[n]ew DOT regulatory authority is not recommended"²¹⁵ offers little relief for those who see "the camel's nose under the tent."²¹⁶ For

²⁰⁹ COMMISSION REPORT, *supra* note 1, at 18.

²¹⁰ See *supra* notes 189-92 and accompanying text. Because the Commission deliberately kept its hands off those issues which it believed the market should handle, see Baliles, *supra* note 25, it was unable to make recommendations for the health of new airlines which is directly affected by those issues.

²¹¹ COMMISSION REPORT, *supra* note 1, at 18.

²¹² *Id.* at 19.

²¹³ *Experts Blast Commission Report*, *supra* note 128, at 37.

²¹⁴ Dempsey, *supra* note 5, at 26.

²¹⁵ COMMISSION REPORT, *supra* note 1, at 15.

²¹⁶ See *Expert Blast Commission Report*, *supra* note 128.

those who may not oppose the recommendation, there is still little more to it than the creation of another committee; “hardly . . . decisive action,” says Ed Perkins, editor of the *Consumer Reports Travel Letter*.²¹⁷

Similarly left hanging is the question of how the DOT, which has not been doing its job, and the airline industry, which is mired in debt and inefficiency, are effectively going to run an independent ATC. Gore’s report, which substantially mirrors the Commission,²¹⁸ leaves the same questions unanswered. And while FAA head Hinson has the unique opportunity to spearhead this reform,²¹⁹ his caution suggests that it may be years before the specifics of how to get a “non-government” employee in the control tower are hammered out.²²⁰

VII. THE UNCERTAIN FUTURE

Historically, attempts to revamp the U.S. airline industry have been met by lethargic legislatures and fickle executives.²²¹ With NAFTA, health reform and deficit reduction at the top of the list, the obvious question is whether Congress and the President will just shelve the colorful report which represents three months work for the Commission. Already, the Senate Aviation Subcommittee knows that the recommendations will not be presented in one bill.²²² This means Congress will take its time with the more controversial recommendations, or perhaps attach the fate of some to other bills as riders.

Nevertheless, the recommendations will also be affected by the presence of some unique factors, such as the “three Ps.” The Commission targeted what it calls a “3p” audience — press, public, and politicians — to gain wide sup-

²¹⁷ Ed Perkins, *Indecisive Plan*, CHI. TRIB., Aug. 29, 1993, at C2.

²¹⁸ *Gore Backs ATC Reform, Essential Air Services Cutbacks*, *supra* note 77, at 375.

²¹⁹ Don Phillips, *Change is in the Air*, WASH. POST, Sept. 16, 1993, at A27.

²²⁰ *Id.*

²²¹ *See, e.g.*, Baliles, *supra* note 25 (similar studies became fights for turf in bureaucratic reorganization).

²²² *Airline Panel's Recommendations not Likely to Advance as One Bill*, *supra* note 202, at A174.

port for its recommendations.²²³ The Commission itself shows more interest in its work than the typical government task force. In early November the Commission's fifteen members wrote a stinging letter to Transportation Secretary Pena protesting administration delays.²²⁴ The letter states the members' clear concern that the administration's draft report "calls for more than a dozen studies, most with no deadlines, [which] duplicate earlier efforts, including the Commission's."²²⁵

A number of industry groups also have echoed the Commission's impatience. A lobbying force representing 30 companies and trade groups connected with the airline and travel industry is pushing for action on some of the Commission's major proposals.²²⁶ Perhaps it worked. Early this year President Clinton, Transportation Secretary Pena, FAA Administrator Hinson and Council of Economic Advisors Chairman Laura D'andrea Tyson announced the administration's endorsement of 49 of the Commission's 59 recommendations.²²⁷ The biggest hurdle, however, is still ahead. Convincing Congress to implement these recommendations "will take a concerted effort by the industry and the Clinton Administration"²²⁸

If this is more than just another obscure government report from another unmotivated government task force, and it certainly doesn't look like one, enough pressure from the public and the industry may just keep the airlines' plight on the front lines when it finally reaches Congress. However, if NAFTA and health care reform push

²²³ *News Conference with Gerald Baliles*, *supra* note 121.

²²⁴ *Airline Commission Members Criticize Administration Delays on Recommendations*, WKLY. BUS. AVIATION, Nov. 8, 1993, at 193.

²²⁵ *Id.*

²²⁶ David Field, *1993 Was Painful for Airlines, Workers*, WASH. TIMES, Jan. 1, 1994, at D5.

²²⁷ Don Phillips & Richard M. Weintraub, *Plan Would Reorganize Air Traffic Controllers; Administration Proposes Shift From FAA*, WASH. POST, Jan. 7, 1994, at A17.

²²⁸ *Plan to Aid Airlines is Announced; Clinton Proposals Aim at Reviving Industry*, DALLAS MORNING NEWS, Jan. 7, 1994, at 1A (quoting Jim Landry, president of the Air Transport Ass'n).

the issue too far into the background, or if recent profitable quarters lessen the sense of urgency,²²⁹ waning enthusiasm may ring its death toll.

A. HOW THE RECOMMENDATIONS WILL STACK UP

1. *FAA reform*

Though widely supported and with the benefit of having working predecessors in Germany, New Zealand, South Africa and Switzerland,²³⁰ an independent air traffic control corporation may still face an uphill battle. Congress, currently in control of the FAA's \$4.3 billion budget, will not lightly let go the purse strings²³¹ or the control.²³² Additionally, the Department of Defense will want to raise national security issues concerning military use of the system.²³³ The administration, however, plans to draft a bill by April calling for an ATC corporation that will operate more like a business.²³⁴ Similar to Amtrak, the corporation's stock would be government owned but its revenues would come from a tax on airline tickets.²³⁵ Delta and American Airlines spokesmen applauded the administration's initiative, but Congress is not ready to jump on the wagon.²³⁶ Fears that the proposed overhaul would struggle in Congress were quickly reinforced by members of the House and Senate who cited safety con-

²²⁹ See Weintraub, *supra* note 21, at C1.

²³⁰ *First Step Toward ATC Corporation Already Taken, Study Says*, AVIATION DAILY, Sept. 23, 1993, at 466.

²³¹ Weintraub, *supra* note 64, at D12.

²³² *New FAA Head Open to US Air Traffic Control Reform*, REUTERS FIN. REP., Sept. 1, 1993.

²³³ *Tilting Toward Privatization*, AVIATION WK. & SPACE TECH., Aug. 30, 1993, at 19.

²³⁴ *Plan to Aid Airlines is Announced; Clinton Proposals Aim at Reviving Industry*, *supra* note 228.

²³⁵ See Martin Tolchin, *Let New Corporation Control Air Traffic, U.S. Says*, N.Y. TIMES, Jan. 6, 1994, at A16. The administration's apparent lack of concern over funding the corporation through a ticket tax is indicative of its attitude in general toward the Commission's tax relief proposals. See *infra* note 244.

²³⁶ *Plan to Aid Airlines is Announced; Clinton Proposals Aim at Reviving Industry*, *supra* note 228.

cerns.²³⁷ Rep. James Oberstar, who is strongly opposed to the measure, predicted it would be rejected by Congress.²³⁸

2. DOT Financial Advisory Committee

Opponents of airline regulation will fight this recommendation until it is so weakened that its purpose is defeated.²³⁹ The controversial recommendation, however, does not go far enough for proponents of reregulation, who would give the committee some added regulatory authority,²⁴⁰ thereby leaving the proposal without a motivated lobby. Its strongest backers are the commissioners themselves, though there is dissent even among them.²⁴¹

3. Tax Relief

At a time when Congress and the administration are concentrating on deficit reduction, tax rollbacks and exemptions are hard to justify. Clinton has already trumped airline woes with the deficit card by limiting the industry's fuel tax exemption to two years from the five Congress had drafted.²⁴² It was no one's surprise, therefore, when the administration rejected the Commission's tax relief proposals early this year.²⁴³ The biggest disappointment, however, may have been the administration's reason for excluding the tax measures from its endorsements. Immediate tax relief is unnecessary, according to administration officials, because the economy has improved.²⁴⁴ The

²³⁷ Phillips & Weintraub, *supra* note 227. Sen. Ernest F. Hollings (D-South Carolina) expressed "serious concerns" about safety but promised to work with Transportation Secretary Pena; Rep. James L. Oberstar (D-Minnesota) said the proposal is "fraught with danger" because the airlines would have financial incentive to compromise safety. See Tolchin, *supra* note 235.

²³⁸ Clinton Proposes Body to Monitor Air Traffic in U.S., Hous. Chron. Jan. 6, 1994, at A2.

²³⁹ See *supra* note 128.

²⁴⁰ See, e.g., Dempsey, *supra* note 5, at 44.

²⁴¹ See COMMISSION REPORT, *supra* note 1, at 35.

²⁴² J.A. Donoghue, *U.S. Airline Commission Proposals are Not New*, AIR TRANSPORT WORLD, Sept., 1993, at 5.

²⁴³ See Phillips & Weintraub, *supra* note 227.

²⁴⁴ Plan to Aid Airlines is Announced; Clinton Proposals Aim at Reviving Industry, *supra*

Commission's warning that economic recovery will not be enough has apparently gone unheeded. It was precisely what many Commission members and industry experts feared.²⁴⁵

4. Multi-National Agreements

The Commission spent a lot of time and space promoting a recommendation that, though doubtlessly important, over which it has little control. The commissioners did have the foresight, however, to warn that its hope for "open skies" was tempered by the reluctance of U.S. trading partners to open up to straight competition with U.S. carriers.²⁴⁶ With patience and a little cooperation from Europe, we may be able at least to open the road toward "open skies."

5. Increased Foreign Ownership

Americans for a Sound Aviation Policy (ASAP), a group of fourteen former government and industry executives, academics, consumer activists, and journalists, has formed in opposition to Commission recommendations.²⁴⁷ The organization takes exception to increased foreign ownership and tax relief proposals and questions whether safety issues were adequately addressed.²⁴⁸ The Department of Defense is likely to have something to say on this issue as well, despite Commission assurances that the CRAF program will not be affected.²⁴⁹ Nevertheless, pressure from

note 228. "A strong economy will be the best medicine for what ails the aviation industry," said chief Economic Adviser Tyson. *Id.*

²⁴⁵ See *supra* notes 22-24 and accompanying text. Delta Chairman Ronald W. Allen said he is "concerned that the administration has not gone far enough in addressing the need for tax and regulatory relief." *Plan to Air Airlines is Announced; Clinton Proposals Aim at Reviving Industry*, *supra* note 228.

²⁴⁶ *Commission Report*, *supra* note 1, at 22-23.

²⁴⁷ *National Aviation Commission Opposition Forms*, AVIATION DAILY, Sept. 9, 1993, at 387. Among the members is Prof. Dempsey, who opposes any increase in foreign ownership of U.S. airlines for national security reasons. Dempsey, *supra* note 5, at 28-42.

²⁴⁸ *National Aviation Commission Opposition Forms*, *supra* note 247.

²⁴⁹ COMMISSION REPORT, *supra* note 1, at 24.

the U.K. to raise the U.S. investment limit to equal that of Europe in order to induce liberal air service agreements has helped warm the administration up to the idea. Endorsed by Clinton earlier this year, the proposal to increase to 49% the limit on foreign ownership of voting stock in U.S. airlines should have strong support in Congress as an avenue for new capital for domestic airlines.²⁵⁰ The provision that the foreign carrier must reciprocate may also help liberalize bilateral agreements.

VIII. CONCLUSION

In ninety days, the National Airline Commission tackled a tough job: it reviewed, broke down, analyzed and attempted to find a cure for a very sick, very complex industry. Simply having put something together within its short time allotment is an accomplishment.

The Commission's recommendations can be traced to a single unifying theme: no government regulation. Even where critics fear reregulation may creep back in, as in the case of the financial advisory committee to the DOT, the commissioners were careful to emphasize that no extension of regulatory authority is urged. Even where the report is found lacking in recommendations concerning anti-competitive practices and excessive marketing costs, the omissions are always explained under the theory that those issues are matters of private decision and boardroom discussion. No pure deregulationist would argue that the government's hand belongs in such market-controlled factors. The Commission set out to correct government errors, incompetencies and overreachings, and it strayed little from its scope.

Perhaps the most damning criticism of the Commission's work comes from its lone dissenting member, John Peterpaul.²⁵¹ Condemning the recommendations as "simply follow[ing] the lead of the major trade associations,"

²⁵⁰ *Clinton Proposes Body to Monitor Air Traffic in U.S.*, *supra* note 238.

²⁵¹ Peterpaul's dissent is available through the Int'l Assoc. of Machinists and Aerospace Workers, of which he is vice chairman of transportation.

Peterpaul charges that many Commission members were "more interested in defending the political correctness of the Airline Deregulation Act than getting to the core of the industry's problems."²⁵² It is true, perhaps, that the airline industry's greatest hurdles lie within their self-imposed business structure. Their predatory instincts may not complement an infrastructure industry with a broad public service base. But the Commission stuck to its guns — it would not meddle in the airlines' private business affairs.

If there is a practical, rather than ideological, fault with the Commission's result, it is that it is too cautious. Where recommendations were bound to draw criticism, it would have been better to go far enough to gather support from the other side. Instead, some recommendations may be bound for obscurity at the hands of the opposition without a decent fight. To keep its cause alive, the Commission needs to allay concerns that the financial advisory committee to the DOT is a back route to re-regulation and gather support for its most important, most plausible recommendations from re-regulation's opposition.

As for the fate of the airline industry, it will not be solved by an economic recovery, ninety-day commission study, or a few smart business decisions. It will need a long-term, concentrated, cooperative effort to dig itself out of the trenches, of which this report is the first tiny comprehensive step. Whether we return to broad-based competition or continue on toward three megacarriers and a network of regional carriers will depend both on airlines' internal, self-propelled restructuring and on how the industry follows through with its own recommendations.

²⁵² *U.S. Airline Commission Was Timid*, AVIATION WK. & SPACE TECH., NOV. 1, 1993, at 96. Vocal critic Robert Kuttner could not agree more. The Commission "flamed out," he says, because of the influence of the airlines, "which want[] bailouts but not rules." Robert Kuttner, *Much Wind, Little Lift*, Editorial, WASH. POST, Aug. 20, 1993, at A23. *But see* Baliles, *The Last Thing the Airlines Need is Re-Regulation*, Editorial, WASH. POST, Sept. 26, 1993, at C7 (responding to Kuttner).

