

Journal of Air Law and Commerce

Volume 46 | Issue 1

Article 5

1980

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Recommended Citation

Eric C. Eisenbraun, *The Aviation Safety Reporting System: Is Immunity the Vital Provision*, 46 J. AIR L. & COM. 117 (1980)
<https://scholar.smu.edu/jalc/vol46/iss1/5>

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Comments

THE AVIATION SAFETY REPORTING SYSTEM: IS "IMMUNITY" THE VITAL PROVISION?

ERIC C. EISENBRAUN

THE FEDERAL Aviation Administration (FAA) is the agency charged with policing the national aviation system.¹ In order to effectuate this responsibility the FAA is given authority to promulgate regulations designed to improve or maintain the level of safety in all aviation.² The FAA is also given authority to punish violators of Federal Aviation Regulations (FAR).³ In 1976 the FAA entered into a Memorandum of Agreement with the National Aeronautics & Space Administration (NASA) which established the Aviation Safety Reporting System (ASRS).⁴ For approximately a year prior to this Memorandum the FAA had attempted to operate a similar program without result.⁵ The ASRS was initiated and sponsored in part by the FAA but independently managed by NASA.⁶ Reporters to ASRS were given a promise of immunity from disciplinary action for violations of Federal Aviation Regulations and a promise of complete anonymity.⁷ After three years, on May 16, 1979, FAA Administrator Langhorne Bond, in a speech to the National Aviation Club, made public his plan to modify the ASRS.⁸ The proposed modification was to eliminate

¹ 49 U.S.C. §§ 1341, 1348, 1655(c)(1) (1976).

² *Id.* at § 1348(c).

³ *Id.* at §§ 1471 (Supp. 1980), 1655(c)(1).

⁴ 41 Fed. Reg. 15,915 (1976).

⁵ 40 Fed. Reg. 17,775 (1975).

⁶ Nat'l Aeronautics & Space Ad., Aviation Safety Reporting System Fact Sheet.

⁷ Tripp, *Air Safety's Early Warning System*, THE AOPA PILOT 65 (April 1979).

⁸ Originally established as the Aviation Safety Reporting Program, 40 Fed. Reg. 17,775 (1975), and first modified on April 15, 1976 to become the Aviation Safety Reporting System, 41 Fed. Reg. 15,914 (1976). ASRS is a project set up to identify safety related problems that are in any manner related to aviation. Observers of safety incidents report directly to ASRS which is managed by NASA.

what Bond called the "blanket immunity" provision of ASRS.⁹ This so-called "blanket immunity" provision had been the subject of disagreement between the FAA and the aviation community¹⁰ since April of 1976.¹¹ The FAA believed that because of the immunity provision in ASRS, FAA enforcement responsibilities could not be performed adequately.¹² The reaction to Bond's proposal was instant and unfavorable.¹³ As a result of this reaction, Bond modified his proposed change in an apparent compromise with the aviation community and the Congressional Subcommittee responsible for overseeing the FAA.¹⁴ The purpose of this comment is to plot the life of the Aviation Safety Reporting System, the purposes behind its establishment, and its growth. Finally, the atmosphere surrounding the debate over the immunity provision is examined ending with an analysis of the present system and its future.

I. HISTORY OF THE AVIATION SAFETY REPORTING SYSTEM

A. *The Aviation Safety Reporting Program*

The Aviation Safety Reporting Program (Program), forerunner of the ASRS, was established on April 22, 1975.¹⁵ One of the

under the authority of the FAA. The reports are analyzed and conclusions drawn therefrom are used to make corrections and prevent future safety problems from arising. ASRS applies to that part of the national aviation system involving the safety of aircraft operations, including departure, enroute, approach and landing operations and procedures, Air Traffic Control deficiencies, pilot/controller communications, the aircraft movement area of an airport, and near midair collisions. Dept. of Transp., Fed. Av. Ad., Advisory Circular no. 00-46A (1976). Address by Langhorne Bond, Administrator, Federal Aviation Administration, to the National Aviation Club (March 16, 1979).

⁹ *Id.*

¹⁰ See generally *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 5 (1979-1980)* (statement of John H. Winant) (president, Nat'l Bus. Aircraft Assoc.).

¹¹ 41 Fed. Reg. 15,915 (1976). On April 15, 1976, ASRS was instituted with a provision for what in actuality was only a limited waiver of disciplinary action. *Id.*

¹² Address by Langhorne Bond, Administrator, Federal Aviation Administration, to the National Aviation Club (March 16, 1979).

¹³ *E.g.*, "Removal of immunity is a blow against safety and a return to ignorance." *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 4 (1979-1980)* (statement of John L. Baker) (president, Aircraft Owners and Pilots Assoc.).

¹⁴ 44 Fed. Reg. 18,128 (1979).

¹⁵ 40 Fed. Reg. 17,775 (1975).

catalysts leading to the Program was the crash of Trans World Airlines (TWA) flight 514 in the mountains of northern Virginia on December 1, 1974 in which ninety-two people died.¹⁶ This tragedy emphasized the need for a detailed study of human factors and human performance in the aviation system.¹⁷ Although the TWA crash was one of the catalysts, the idea of some sort of program to study air safety, its causes and results, was not new.

In the early 70's, then Secretary of Transportation Claude Brinegan assigned a task force of senior pilots to study air safety.¹⁸ One of the major recommendations was the establishment of an incident reporting program to evaluate the Air Traffic Control system.¹⁹ Other interested groups were working on the same concerns. Scientists, engineers and medical experts at NASA's Ames Research Center had been studying the role of human factors in aviation safety.²⁰ The task force came to the conclusion that a provision for anonymity, and even possibly immunity, for persons reporting safety incidents (or Federal Aviation Regulation violations) was fundamental to the success of any participative system.²¹

The Program faced opposition and lack of aviation community support from the very beginning.²² Part of the reason for this absence of support was lack of faith in the FAA's intentions.²³ In the 60's and early 70's the FAA conducted a "participative, supposedly cooperative study" of near midair collisions.²⁴ The aviation community who participated in obtaining the information to be used in the study believed that the FAA did not cooperate with them nor share the data obtained with them in the study but in-

¹⁶ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 1 (1979-1980)* (statement of John H. Winant) (president, Nat'l Bus. Aircraft Assoc.).

¹⁷ *Id.*

¹⁸ Tripp, *Air Safety's Early Warning System*, THE AOPA PILOT 65 (April, 1979).

¹⁹ *Id.* The Air Traffic Control System is the system having responsibility for the safe takeoff, flight, and landing of aircraft throughout the United States.

²⁰ *Id.* This group included Dr. Charles Billings who later became project manager for the Aviation Safety Reporting System.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

stead manipulated or omitted the data altogether.²⁵ Because of the similar concerns perceived by the aviation community in the Program, most aviation organizations opposed it.²⁶

Facing the refusal of the aviation community to participate, and recognizing the need for a safety incident reporting program, the FAA negotiated with NASA for the involvement and the application of the system designed by the task force at NASA-Ames.²⁷ NASA's function was as a third party intermediary—to act as an “honest broker” for report processing and analysis of the safety data to be derived from the voluntarily submitted reports.²⁸ The FAA went to the major organizations²⁹ in the aviation community to secure their commitment to participate, offering both immunity and anonymity to reporters, except under specified circumstances.³⁰ The organizations agreed to recommend that their members participate after the FAA made some minor changes.³¹ This support was deemed essential because the purpose of the program was to collect current operating data on hazards in the national aviation system,³² and the organizations are the major source of safety data

²⁵ *Id.*

²⁶ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 2 (1979-1980)* (statement of Dr. James J. Kramer) (Assoc. Admin., Office of Aeronautics & Space Technology. Nat'l Aeronautics & Space Ad.); “[C]itizens were usually reluctant to work with the cops who might punish them in reward for their cooperation.” Tripp, *Air Safety's Early Warning System*, THE AOPA PILOT 65 (April 1979).

²⁷ Tripp, *Air Safety's Early Warning System*, THE AOPA PILOT 65, 66 (April 1979).

²⁸ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 2 (1979-1980)* (statement of Dr. James J. Kramer).

²⁹ The following organizations all played a role: Aircraft Owners and Pilots Association; Airline Pilots Association; Aviation Consumer Action Project; Nat'l Business Aircraft Association, Inc.; Professional Air Traffic Controllers' Organization.

³⁰ Tripp, *Air Safety's Early Warning System*, THE AOPA PILOT 65, 66 (April 1979). Those “specified circumstances” were cases involving criminal offenses, accidents, reckless operations, gross negligence, or wilful misconduct. 41 Fed. Reg. 15,903 (1976).

³¹ Tripp, *Air Safety's Early Warning System*, THE AOPA PILOT 65, 66 (April 1979). The changes were: (1) any reference to individual carriers was removed from the data base; and (2) any reference to make and model of aircraft was deleted. *Id.* at 66.

³² *Proposed Modification of the Aviation Safety Reporting System: Hearings*

since their members are working in the aviation business every day. The Program, with the addition of NASA and the support of the aviation community, became known as the Aviation Safety Reporting System.³³

B. *The Aviation Safety Reporting System*

The initial FAA/NASA Memorandum of Agreement (Memorandum) essentially provided for, (1) limited waiver of disciplinary action against reporters by the FAA, (2) confidentiality of information sources, and (3) an advisory subcommittee appointed by NASA and consisting of representatives from all elements involved in the operational aspects of the national aviation system, including the FAA and the Department of Defense.³⁴ The objective of providing for an "honest broker" was to increase the previously light flow of information.³⁵

ASRS is designed to identify system and operating problems through a large number of safety incident reports voluntarily submitted.³⁶ Taken individually, reported experiences could identify particular deficiencies; taken cumulatively and properly organized, the reports, it was hoped, would describe concerns that might be endemic to the system or to operating procedures.³⁷ By acting as a central point for the collection of reports it was hoped that ASRS would be able to detect trends and situations that would serve to

Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 9 (1979-1980) (statement of John L. Baker).

³³ 41 Fed. Reg. 17,775 (1976).

³⁴ 41 Fed. Reg. 15,915 (1976). The agreement between the FAA and NASA was entered into under the authority of Sections 302(K) and 313 of the Federal Aviation Act of 1958, as amended, (49 U.S.C. § 278(a) (1976)) and the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. § 2473 (1976)). The advisory subcommittee is charged with advising on a continuous basis and with insuring the security and confidentiality of the guarantee it makes to reporters. The FAA/NASA Memorandum also gives the subcommittee the responsibility for conducting two intensive evaluations of all aspects of the system's performance, utility and effectiveness. 41 Fed. Reg. 15,915 (1976). Both reports have been made and are referred to in other portions of this comment. See notes 67, 69, 142, 148, 155, 161, 176, 178 *infra*.

³⁵ Dept. of Transp., Fed. Av. Ad., Advisory Circular no. 00-46A (1976).

³⁶ Tripp, *Air Safety's Early Warning System*, THE AOPA PILOT 65, 66 (April 1979).

³⁷ *Id.*

alert the aviation system to developing problems before those problems cause accidents.³⁸

The provision for limited immunity was designed to provide the same set of conditions which exist in a physician's or attorney's office.³⁹ Previous experience under an FAA Near Midair Collision Reporting program indicated that the willingness of persons to submit a report depended significantly on the FAA's ability to preserve the anonymity of those filing the report.⁴⁰ The purpose, then, of the waiver of disciplinary action (immunity) was twofold. First, the waiver was to provide an incentive to encourage the timely, voluntary reporting of safety information.⁴¹ Second, the waiver was to enhance the program's concept of confidentiality.⁴² To support the concept of confidentiality the Memorandum provided for transactional immunity with regard to information contained in ASRS reports.⁴³

Upon receipt of a safety report NASA screens it initially for information relating to any criminal offense or aircraft accident.⁴⁴ If the report contains information relating to a criminal offense or an accident it is immediately forwarded, without further processing, to the Justice Department or the National Transportation Safety Board, respectively, with a copy sent to the FAA.⁴⁵ These are the

³⁸ Nat'l Aeronautics and Space Ad., Aviation Safety Reporting System Fact Sheet.

³⁹ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 3 (1979-1980)* (statement of John H. Winant).

⁴⁰ Dept. of Transp., Fed. Av. Ad., Advisory Circular no. 00-46 (1975).

⁴¹ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 3 (1979-1980)* (statement of Dr. James J. Kramer).

⁴² *Id.*

⁴³ *Id.* Transactional immunity means that if any report is submitted by anyone involved in a safety incident or FAR violation all persons involved in that incident are immune from FAA disciplinary action.

⁴⁴ Nat'l Aeronautics and Space Ad., Aviation Safety Reporting System Fact Sheet, 2. This screening is done by either a qualified attorney with aviation experience or pilot employed by NASA. *Id.*

⁴⁵ An example of a criminal offense would be "a violation of the Federal Statutes, Title 18, U.S. Code. Hijacking, smuggling and sabotage are such violations." *Id.* Aircraft accidents are described in the Code of Federal Regulations as accidents involving midair collisions, flight control system malfunction or failure, fatal or serious injury, substantial damage, etc. 49 C.F.R. § 830 (1980).

only instances when a report leaves NASA's possession with the identity of the reporter revealed.⁴⁶

Concurrently with the information screening process, NASA examines all reports to catch any situation or condition that poses an "immediate, urgent threat to aviation safety."⁴⁷ NASA does not screen safety reports for violations of the Federal Aviation Regulations.⁴⁸ After this initial processing the report is assigned to a report analyst for further processing. If after examining a report the analyst has reason to believe that further details would enhance the value of the report as a safety document, or if clarification is required, the analyst attempts to contact the reporter by telephone.⁴⁹ When the analyst decides that a particular report is as complete as necessary, or when further information is unavailable, he "deidentifies" that report by removing the identification strip⁵⁰ and obliterates any other information in the body of the report that might identify the reporter.⁵¹ The deidentified report is prepared next for computer entry, and once entered into the computer the original is filed and is destroyed in 45 days.⁵² The ASRS computer is searched periodically and automatically to spot trends in the increasing body of processed reports.⁵³

Under ASRS, as set up by the original Memorandum between NASA and the FAA, in order for the waiver of disciplinary action to apply, a written report had to be completed and delivered to NASA within 5 days of the incident, or written notification provided to NASA within 5 days and a complete written report filed

⁴⁶ *Id.*

⁴⁷ *Id.* If such a situation or condition is suspected, the report is given to a report analyst for priority handling. *Id.*

⁴⁸ Nat'l Aeronautics and Space Ad., Aviation Safety Reporting System Fact Sheet, 2.

⁴⁹ Approximately 16% of the reports received require callbacks and approximately 70% of those reporters are actually reached. *Callback*, ASRS Monthly Bulletin, no. 5 (November, 1979).

⁵⁰ The identification strip is a detachable portion of the form used in reporting. The strip is necessary to facilitate callbacks if further information is needed. This strip is returned to the reporter as proof that he submitted a report. Nat'l Aeronautics and Space Ad., Aviation Safety Reporting System Fact Sheet, 3.

⁵¹ NASA's goal is to have the report deidentified within 72 hours of its receipt. *Id.*

⁵² *Id.*

⁵³ *Id.* at 4.

within 15 days.⁵⁴ If a timely report had been filed, FAA disciplinary action was waived against everyone who might have been involved in the incident.⁵⁵ The procedure for the waiver was as follows: the FAA had a period of 45 days following an incident to ask NASA whether a report had been filed regarding that incident. Except in specified circumstances⁵⁶ the waiver applied if the FAA did not make the request within the 45 days or if the FAA discovered that a report was, in fact, timely filed.⁵⁷

When ASRS was established, the non-punitive, limited immunity provision was judged by the FAA, the aviation community, and ASRS management as "an absolutely critical incentive" for the submission of voluntary reports.⁵⁸ The provision was seen as providing the basis for (1) absolute candor in the descriptive details furnished by the reports; (2) a capability to describe the actions of persons other than the reporter without making those other persons subject to an FAA enforcement action; and (3) encouragement of persons in "borderline" situations to make full reports without fear of involvement in enforcement proceedings.⁵⁹

The tangible product of ASRS took three forms: (1) special studies of the data base; (2) quarterly reports; and (3) alert bulletins.⁶⁰ Alert bulletins were the most responsive products of the system. Strict conditions were followed in making the deci-

⁵⁴ Dept. of Transp., Fed. Av. Ad., Advisory Circular no. 00-46A, 3 (1976).

⁵⁵ *Id.* at 2.

⁵⁶ See note 30 *supra*. Cases involving accidents or criminal offenses were wholly excluded from the program. Reports involving reckless operation, wilful misconduct, or gross negligence were not to be used by the FAA for disciplinary purposes but disciplinary action could be taken in these cases on the basis of information independently obtained by the FAA. Dept. of Transp., Fed. Av. Ad., Advisory Circular no. 00-46A, 3 (1976).

⁵⁷ Dept. of Transp., Fed. Av. Ad., Advisory Circular no. 00-46A, 2 (1976).

⁵⁸ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 9 (1979-1980)* (statement of John H. Winant). Further support for this conclusion can be inferred from the fact that the FAA adopted the conclusion of the NASA task force (see note 21 *supra*) that anonymity and immunity were fundamentals to ASRS success.

⁵⁹ *Id.*

⁶⁰ Tripp, *Air Safety's Early Warning System*, THE AOPA PILOT 65, 67 (April 1979). Nat'l Aeronautics and Space Ad., Aviation Safety Reporting System Fact Sheet, 4-5. These materials are generally available to the public on request by writing to: Office of the NASA Aviation Safety Reporting System, P.O. Box 189, Moffet Field, Cal. 94035.

sion regarding whether an alert bulletin was to be issued. The reports were required to be credible; risk of an accident where negligence wasn't a factor, such as a physical, regulatory, procedural, or operational hazard was required; and a technologically feasible solution (in the judgment of the analysts) had to exist.⁶¹

Outside the FAA, ASRS as set up April 15, 1976 was supported unanimously and was seen as effective at reaching its intended goals.⁶² In connection with the advisory subcommittee final evaluation⁶³ of June, 1979, various elements of the aviation community and the FAA were queried whether they believed that the program resulted in any safety benefits.⁶⁴ While the FAA's responses were largely negative, the aviation community identified significant benefits of a specific or conceptual nature.⁶⁵

[ASRS] was designed and operated from 1976 to 1979 in ways which encouraged and fostered a high degree of utility. ASRS has impressively well met the fundamental utility objective spelled out for it: 'to increase the flow of information' on safety related incidents and occurrences in the national aviation system. . . . In all cases the findings are that ASRS has, through performance judged as being from adequate to outstanding, met desired or contemplated utility criteria.⁶⁶

The waiver/immunity provision was given much of the credit for

⁶¹ *Id.* In 1979, alert bulletins: stimulated the re-surfacing of a runway at a major airport that was reported to ASRS as dangerously slick in wet weather; caused chart revisions of obsolete or incorrect information; was responsible for improved runway and taxiway markings; pointed out some navaid and communication abnormalities; noted ambiguous or confusing aural identifiers and intersection names; and called attention to garbled ATIS broadcasts. *Callback, ASRS Monthly Bulletin no. 1, 2 (July 1979).*

⁶² See *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 11 (1979-1980)* (statement of John H. Winant).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Report on ASRS Utility and Effectiveness, Advisory Subcomm. on Aviation Safety Reporting System, NASA Aeronautical Advisory Comm., 5-6 (June 29, 1979).* In all fairness to Mr. Bond it should be noted that this report was not finished and issued until approximately 3 months after he announced his proposed modification. On the other hand there was some discussion as to the reasons behind Mr. Bond not delaying his decision until after all the facts were in and the final report made.

the success of the program.⁶⁷ The ASRS reports, in actuality, were what was hoped for conceptually in the establishment of the system; they were "plain truth recitations" of what the reporters perceived to be discrepancies and deficiencies in the national aviation system.⁶⁸ The emphasis in the reports was heavily on human factor and human performance occurrences.⁶⁹ The number of reports submitted also support the conclusion that the system was indeed working even better than planned.⁷⁰ The very large total of reports sent in was seen as proof that the system provided a strong incentive for persons to report on discrepancies and deficiencies in the aviation system.⁷¹ The ultimate conclusion drawn by the aviation community was stated by John Leyden, President of the Professional Air Traffic Controllers' Organization. "The program has worked more effectively than any of its predecessors in producing comprehensive and candid reports of hazards in the airspace system."⁷²

C. *The Proposed Modification*

It was against this background⁷³ that Langhorne Bond, FAA

⁶⁷ Letter from John H. Winant to Langhorne Bond (March 15, 1979).

Largely because of the waiver, ASRS received 16,000 reports in less than three years. More important, over 11,000 of these reports have involved human errors in the aviation system. . . . ASRS studies have demonstrated the nature of several system problems which were causing human errors in the air and on the ground. . . . "Immunity" . . . is the most important incentive which has produced this body of available and usable information.

Id.

⁶⁸ *Report on ASRS Utility and Effectiveness*, Advisory Subcomm. on Aviation Safety Reporting System, NASA Aeronautical Advisory Comm., 6 (June 29, 1979).

⁶⁹ 70% of the reports were on these subjects. *Id.* The data reported to ASRS was also tested for relevance to aviation safety and was found to bear an extremely high degree of relevance—97%. *Id.* at 10.

⁷⁰ Tripp, *Air Safty's Early Warning System*, THE AOPA PILOT 65, 67 (April 1979). The data base had been building at a rate of more than 5,000 reports per year as opposed to the 2,000 per year anticipated by the system's designers. *Id.*

⁷¹ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations*, 96th Cong., 1st Sess. 14 (1979-1980) (statement of John H. Winant).

⁷² *Id.* at 5 (statement of John F. Leyden) (president, Prof. Air Traffic Controllers' Org.).

⁷³ While the above statements were all made after Bond's proposal, the sys-

Administrator, made his proposal to drop unilaterally, the "blanket immunity" provision from the Memorandum with NASA.⁷⁴ "Under [the] modifications, airmen will no longer be able to claim immunity for violations—witnessed by others—of safety regulations."⁷⁵ Bond's initial proposed modification was intended to eliminate the waiver of disciplinary action completely while preserving the anonymity provision.⁷⁶ This would allow disciplinary action to be taken when a violation was reported by a source other than ASRS.⁷⁷ In other words, the essence of the proposed modification left NASA's role as it was under the original Memorandum.⁷⁸ Under the proposed modification, whether or not a report had been filed would be irrelevant for purposes of FAA enforcement action.⁷⁹

This proposed modification does not appear as drastic as the response seems to indicate; however, there is more to the effect of the proposal than is apparent at first glance. Playing a large role in the controversy is the view of the FAA held by the aviation community. One concern was that the aviation community would not, because of suspicion of the FAA, understand that the proposed modification left the anonymity provisions of ASRS intact.⁸⁰ Cap-

tem was the same before the proposal, an evaluation was due in 3 months and all the above information was readily available.

⁷⁴ Address by Langhorne Bond, Administrator, Fed. Av. Ad., to the National Aviation Club (March 16, 1979). Authority to adopt and modify the program is found in sections 305, 307(c), 313(a), 601(a), 701(a) and 1104 of the Federal Aviation Act of 1958 (49 U.S.C. §§ 1346, 1348(c), 1353(a), 1354(a), 1421(a) and 1504 (1976)) and section 6(c) of the Dept. of Transportation Act (49 U.S.C. § 1655(c) (1976)).

⁷⁵ Address by Langhorne Bond, *supra* note 74.

⁷⁶ 44 Fed. Reg. 18,128 (1979). "It is now accepted that the NASA system has proven that it provides anonymity. Consequently, the waiver of disciplinary actions by FAA against persons involved in incidents reported to NASA is unnecessary so far as reporter protection is concerned." *Id.*

⁷⁷ *Id.*

⁷⁸ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 12 (1979-1980)* (statement of Langhorne Bond).

⁷⁹ *Id.*

⁸⁰ While your proposal would withdraw immunity and still preserve anonymity (so that enforcement actions cannot be initiated because of an ASRS report), and while the FAA may diligently attempt to make this distinction clear to the user community, can you afford to assume that the average user, usually suspicious of possible

tain John J. O'Donnell, president of the 30,000-member Air Line Pilots Association, was one of the first to make a statement which lends support to this concern:⁸¹ "This simply means that no pilot, no controller, . . . nor any other person will provide detailed information about a situation or an incident and then have the FAA build a case against him."⁸² This apparent misunderstanding still prevailed at the congressional hearings held approximately one month after Bond's initial proposal.⁸³ In short, the credibility of the FAA had a significant effect on the perception of Bond's proposal⁸⁴ in the aviation community.

The Administration believed that because of the immunity provision, FAA enforcement responsibilities could not be carried out effectively.⁸⁵

It is an inescapable fact that our enforcement abilities have been seriously compromised by the Program's blanket immunity. . . . [I]f we do not retain for ourselves the flexibility to take enforcement action against any and all who violate the regulations upon

FAA sanctions, will understand this distinction and continue to report with the same frequency?

Letter from Cong. John L. Burton, Chairman, Subcomm. on Gov't Activities and Transp., House Comm. on Gov't Operations, to Langhorne Bond (March 15, 1979).

⁸¹ *News*, Airline Pilots Assoc., no. 79.10 (April 2, 1979).

⁸² *Id.* The misunderstanding is apparent from the fact that any report to ASRS could not be used, indeed would be unknown, by the FAA. Disciplinary action would have to be taken on information obtained independently of ASRS.

⁸³ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. (1979-80).*

Needless to say, controllers will be very reluctant to fully and candidly report on an incident if by doing so they can implicate fellow controllers or pilots. Not only would there be an impairment of the free flow of information vital to ASRS but an atmosphere of mutual distrust and hostility between controllers and pilots could quickly develop.

Id. at 3 (statement of John F. Leyden).

⁸⁴ See text accompanying footnotes 125-30 *infra*.

⁸⁵ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. (1979-80).* Statistics cited by Bond showed that the FAA completed 324 enforcement actions against air carrier pilots in 1976 and 1977 but in the same period of time 116 enforcement actions could not be taken against airline pilots because of the immunity provision. During this time, enforcement actions against air carriers and air carrier personnel decreased by 22% despite increases in traffic levels. *Id.* at 9 (statement of Langhorne Bond).

which air safety is founded, we have lost the deterrent effect that any enforcement program must have to be effective.⁸⁶

The FAA also believed abuse of the immunity provision was serious enough to warrant its discontinuance.⁸⁷ "Freedom from self-incrimination is one thing and freedom from accountability is quite another."⁸⁸ Cited by Bond as an example of this abuse was "[a]t least one air carrier [which] has gone so far as to give blank reporting forms to its pilots, along with the instructions to protect themselves by filing a report whenever they think they've done something that might even be close to a violation."⁸⁹

Bond also based his proposal on the belief that it really did not matter if the modification caused the demise of ASRS since "the majority of problems that are identified through the Program are already known to us through our own information and reporting system."⁹⁰ According to Bond the FAA regional directors had unanimously expressed the opinion that ASRS had not provided any significant, useful data not already known.⁹¹ In addition, much of the data received from ASRS was nearly a year old and unverified whereas the FAA's data was current and verifiable because the sources were known.⁹² In the end, the decision to modify ASRS clearly appears to have been the result of the FAA's own analysis of a system the survival of which depended upon the cooperation of all the aviation community.⁹³

The aviation community, on the other hand, found support for

⁸⁶ *Id.* at 8-9.

⁸⁷ *Id.*

⁸⁸ Address by Langhorne Bond, Administrator, Fed. Av. Ad., to the National Aviation Club (March 16, 1979) at 7. "We are only closing the loophole that makes it possible for a violator to escape punishment even if the offense is committed in full public view." *Id.* at 9.

⁸⁹ *Id.* at 8.

⁹⁰ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 3 (1979-1980)* (statement of Langhorne Bond).

⁹¹ *Id.*

⁹² *Id.* at 3-4.

⁹³ *Id.* "It has become apparent to me that providing blanket immunity to anyone involved in an incident—an incident in which human lives could have been jeopardized—does not promote aviation safety and, in fact, could well serve as a roadblock to the advancement of safety." *Id.* at 5.

reaching an opposite conclusion. They readily admitted that abuse of the immunity provision took place but argued that such facts were taken into consideration in the formation of ASRS and the abuses were insignificant in terms of the advantages offered.⁹⁴ Since none of the conditions under which the program was established had changed, there was no reason to make any major changes in the system's basic structure.⁹⁵ In a letter to Bond, Congressman John Burton stated:

[W]e have been keenly aware that a trade-off between enforcement and information may be inherent in [the decision to modify ASRS]. This is a serious trade-off that should be made only as a last resort, and only to the extent that there is irrefutable evidence that aviation safety is jeopardized by ASRS immunity. . . .⁹⁶

John Winant, Chairman of the ASRS Advisory Subcommittee and president of the National Business Aircraft Association, did not agree with Bond that enforcement effectiveness was suffering to the extent that it had become necessary to withdraw immunity.⁹⁷ In fact, as Congressman Burton explained in the letter to Bond, more than 25% of the claimed damage to enforcement effectiveness was the result of administrative procedure rather than the immunity provision of ASRS.⁹⁸ In another 40% of the cases Congressman Burton found either FAA equipment or procedural de-

⁹⁴ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 18 (1979-1980)* (statement of John H. Winant). "It was fully taken into account in 1975 that some potential for abuse existed under the limited immunity provision. The record shows, . . . that abuses are of insignificant proportions." *Id.*

⁹⁵ *Id.*

⁹⁶ Letter from Cong. John L. Burton to Langhorne Bond (April 9, 1979).

⁹⁷ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 14 (1979-1980)* (statement of John H. Winant). "There is no validity in the FAA's view that the system has deterred the orderly enforcement of Federal Aviation Regulations." *Id.*

⁹⁸ Letter from Cong. John Burton to Langhorne Bond (May 7, 1979).

Approximately 28% of the enforcement actions were halted not because an ASRS report had been filed, but because the FAA failed to, or could not, query the NASA data base within 45 days. In other words, more than $\frac{1}{4}$ of the "damage to enforcement" done by ASRS was because of the way it was administered and not because of limited immunity itself. As such, it can be dealt with by a minor administrative change. . . . *Id.*

iciencies.⁹⁹ Another study revealed that of the 5,500 reports sent in per year, only approximately 3% dealt with FAA enforcement matters.¹⁰⁰ In other words, 97% of the reports dealt with matters other than FAA violations. If the immunity provision was dropped the total of reports might drop dramatically because reporters would be concerned about possible enforcement action in any instance where it is not clear whether a FAR violation has occurred.

The aviation community unanimously believed that "the chance of making major breakthroughs in safety right at the frontier of human factors analysis far outweighs an apparently small number of abuses, none of which has involved an accident, injury, or death."¹⁰¹ The consensus was that the concept of limited immunity was vital to the continued success of ASRS.¹⁰² An accurate appraisal of the opinion of the aviation interest groups was stated by Frank Munley:¹⁰³ "Unlike Mr. Bond, I'm firmly convinced that the problem of human error is better tackled by a scientific investigation of the true causes of hazardous situations, as opposed to a punitive approach which ignores the intent of the violator."¹⁰⁴

In addition to the merits of his proposed modification, Bond was criticized for the procedure he followed. There was concern with Bond's disregard of the Advisory Subcommittee. He asked

⁹⁹ *Id.* These instances were either described or cited as such by the FAA inspectors. *Id.*

¹⁰⁰ ASRS management studied a sampling of 1/3 of the FAA queries submitted in 1978. Of the approximately 3,300 queries processed, only 175 were "hits" (an ASRS report concerning the incident was on file). In short, less than 6% of the FAA queries matched up with an ASRS report. A detailed examination of the 175 hits revealed that 21 involved deliberate actions, certificate problems or other alleged violations not covered by the waiver. In these 21 cases it appeared that FAA personnel were ignorant of the ground rules [because enforcement action was not initiated despite the fact that the waiver did not apply.] *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 13-14 (1979-1980)* (statement of John H. Winant). There is also the argument that even 3% is a large margin of error when dealing with human lives, sometimes in large numbers.

¹⁰¹ *Id.* at 17.

¹⁰² *Id.* at 5 (statement of John F. Leyden).

¹⁰³ Safety Consultant for the Aviation Consumer Action Project.

¹⁰⁴ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 2 (1979-1980)* (statement of Frank Munley).

for their input in the process of his decision and then ignored their suggestions.¹⁰⁵ A second important concern was that Bond did not comply with the rulemaking provisions of the Administrative Procedure Act¹⁰⁶ providing for notice and comment on all proposed rules. These criticisms dissipated when Bond, under pressure from all interested groups except his own agency, decided to delay implementation of his proposed modification.

D. *The Compromise*

On April 3, 1979 the House of Representatives Subcommittee on Government Activities and Transportation held hearings at which Bond and the major aviation interest groups were given the opportunity to express their views. In the letter informing Bond of the hearings, Congressman Burton asked him to substantiate his allegation that ASRS deterred FAA enforcement action to a significant degree, to indicate how the FAA would assure that ASRS would not be seriously damaged if immunity was cancelled, and to assess the effect of the cancellation of immunity upon the total data collection system of the FAA.¹⁰⁷ Bond did not answer these questions to the committee's satisfaction¹⁰⁸ and shortly after

¹⁰⁵ To me, at least, it was implicit [in the agreement between the FAA and NASA] that the subcommittee's views would be given careful consideration and due weight through a consultative process.

. . . .

Recent events convince me that of late the FAA has not considered the process of consultation to be pertinent.

. . . .

FAA action to cancel or curtail limited immunity has been on a unilateral, arbitrary basis. We [the Advisory Subcommittee] feel that the element of faith on which the system was founded has been grossly breached.

Id. at 6 (statement of John H. Winant).

¹⁰⁶ 5 U.S.C. § 553 (1976) provides in part:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place and nature of public rule making proceedings; . . .

¹⁰⁷ Letter from Cong. John L. Burton to Langhorne Bond (March 15, 1979).

¹⁰⁸ Letter from Cong. John L. Burton to Langhorne Bond (April 19, 1979). For the later hearings, Bond was given 4 main topics to explain and discuss with the Subcommittee:

1) The definition of current exemptions to immunity, and your efforts to refine and expand those definitions to end perceived

the first round of hearings ended, Congressman Burton, Chairman of the Subcommittee, invited Bond back for a further round of hearings.¹⁰⁹ For this proposed second hearing Bond was asked to prepare to support his position in more detail and with a more thorough analysis.¹¹⁰ The second hearing was never held. On April 30, Bond met with the subcommittee staff director and proposed that the modification be delayed until July 1 so that the FAA could work with the ASRS Advisory Subcommittee both on the actual terms of the modification and on the implementation of it.¹¹¹

The end result of the cooperation between the ASRS Advisory Subcommittee and the FAA was a compromise of Bond's proposal to cancel all immunity.¹¹² The finally accepted proposal did limit immunity somewhat but did not eliminate it as Bond proposed to do. The mainstay of the program, the anonymity offered a reporter making a report to ASRS, was not changed.¹¹³ If anything, this provision was strengthened;¹¹⁴ however, other elements of the compromise modification differ from both the original Memorandum and from Bond's proposed modification. The differences affecting reporters under the system as it now stands are a limitation to

abuses of ASRS, and your efforts to insure a clear understanding of limited ASRS immunity among FAA field personnel.

- 2) The qualitative and quantitative decrease in information, in ASRS and in other FAA programs, which you anticipate as a result of immunity cancellation, and the decrease which you are prepared to accept.
- 3) The statistical evidence substantiating your claim that ASRS immunity, with its current exceptions, has posed a significant deterrent to enforcement.
- 4) The probable violation of the Administrative Procedure Act by your failure to issue a Notice of Proposed Rulemaking, thus allowing for public comment.

Id.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Letter from John L. Burton to Langhorne Bond (April 30, 1979); (confirming the stated arrangement and canceling the proposed hearing).

¹¹² 44 Fed. Reg. 24,980 (1979).

¹¹³ See text accompanying 114, 117 *infra*.

¹¹⁴ The anonymity provision was made a part of the Federal Aviation Regulations. Section 91.57 of the Federal Aviation Regulations prohibits the use of any report submitted to NASA under ASRS (or information derived therefrom) in any disciplinary action by the FAA, except information regarding criminal offenses or accidents. 14 C.F.R. § 91.57 (1980).

one waiver of disciplinary action and a shift in the burden of proof regarding filing of a report.¹¹⁵

[A]lthough a finding of a violation may be made, neither a civil penalty nor certificate suspension will be imposed if:

. . .

(3) The person has not been found in any prior enforcement action to have committed a violation of the ASRP of the Federal Aviation Act or of regulation promulgated under that Act;¹¹⁶

This portion is new and relates back to the establishment of ASRP which was approximately one year prior to ASRS.¹¹⁷ Subsection (4) shifts the burden of proof to the reporter's shoulders whereas prior to this provision all that was required was that a report have been filed regardless of who filed it.¹¹⁸

Also significant is that only the reporter is immune as opposed to anyone involved in a reported incident, the case prior to the modification.¹¹⁹ The modified ASRS, like its predecessor, does not eliminate responsibility for reports, narratives, or forms presently required by other existing non-ASRS directives.¹²⁰ Under the old program the FAA would cease its investigation as soon as it was learned that a report on the incident being investigated had been filed. Under the new system's procedure, even if immunity is granted, the FAA will continue its investigation and may make an official finding that a violation has been committed.¹²¹ In short, the FAA's enforcement responsibilities are closer to what Bond felt they should be, yet there is still some incentive to file a report if one is involved in a safety-related incident.

¹¹⁵ Dept. of Transp., Fed. Av. Ad., Advisory Circular no. 00-46B (1979).

¹¹⁶ *Id.*

¹¹⁷ ASRP was established in 1975 and ASRS in 1976.

¹¹⁸ Dept. of Transp., Fed. Av. Ad., Advisory Circular no. 00-46B (1979); "(4) the person proves that, within 10 days after the violation, he or she completed and delivered or mailed a written report of the incident or occurrence to NASA under ASRS." *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Yodice, *The Aviation Safety Reporting Program: An Update*, THE AOPA PILOT 116, 117 (November 1979). "The FAA will not fully investigate all cases and stop short only at the point of imposing a remedy." *Id.* at 117.

II. COMPETING INTERESTS IN THE SYSTEM

A. *The FAA's Position*

The FAA believed that in order for it to fulfill effectively its responsibilities to aviation safety the immunity provision of ASRS had to be revoked.¹²² The Administrator viewed ASRS as providing the opportunity for evasion of compliance with Federal Aviation Regulations.¹²³ The atmosphere surrounding the proposed modification was one of cracking down on violations of safety regulations to both improve the public view of the FAA and to punish regular FAR violators who, by filing ASRS reports, escaped punishment.¹²⁴

B. *The Credibility Factor*

One of the main problems Bond was, and is, facing is that the aviation community just does not trust the FAA and its motives.¹²⁵ In an editorial published shortly after the modification took effect this distrust is obvious.

For the suspicious among us, the FAA's timing could not have been worse. Langhorne Bond had just launched his get-tough policy regarding FAA violators, [announced in the same speech as his initial modification proposal] replete with possible fines of up to \$25,000. And the agency was steaming over an ASRS report from NASA that refuted the FAA's projections of the near mid-air collisions within controlled airspace.¹²⁶

Some of the criticism of the FAA in this area was directed towards the FAA's allegedly self-interested use of the aviation community and the information generated from these groups.¹²⁷ The thrust of

¹²² Address by Langhorne Bond, Administrator, Federal Aviation Administration, to the National Aviation Club (March 16, 1979).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See note 82 *supra*. "It is well known that [the] FAA is not now and rarely has been held in high regard by large segments of the aviation community." *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 5 (1979-1980)* (statement of John F. Leyden).

¹²⁶ Olcott, *Business and Commercial Aviation* 11 (July 1979).

¹²⁷ *Questioning the System, Special Report: The Fallacy of Positive Control, THE AOPA PILOT* 49 (April 1979). "It can be said that the FAA manages the system in many ways, one of which is to manage evaluation and to channel any

the criticism was directed at the aviation community, viewed as the FAA's overprotective interest in protecting its own policies. "It's no secret that ASRS may come up with findings which cast doubt on FAA policy. . . . It appears that the FAA wants to seriously weaken ASRS in order to eliminate any future conflicts with FAA policy."¹²⁸ The aviation community saw Bond's action as "a purely defensive, diversionary tactic"¹²⁹ of the FAA which tried to shift the blame for insignificant faults in ASRS to the aviation community by charging "that there are no problems with it [FAA] or with [ASRS], only with those who operate it [the "abusers"]."¹³⁰

The FAA, however, is not the only party in this scenario that can be seen as acting in its own best interests. Counsel for the Aircraft Owners & Pilots Association stated that filing an ASRS report was one way to take the "punitive aspect" out of a FAA "overreaction" to "mistakes."¹³¹ In essence, there is evidence of a sense of distrust and disbelief between the aviation community and the FAA.

C. *The System Today*

ASRS is a program that was instituted by the FAA with NASA playing the "honest broker" role.¹³² The FAA made the initial decision to waive disciplinary action against reporters.¹³³ ASRS was not the first civil aviation reporting system to contain a form of immunity.¹³⁴ From 1968 to 1971 the FAA had conducted a system relating to the reporting of near misses between aircraft.¹³⁵ After about a year of operation the immunity provision of this

potential change in directions most satisfying to itself as an institution. It manages the flow of information and releases what best serves its interests." *Id.* at 49.

¹²⁸ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 2 (1979-1980)* (statement of Frank Munley).

¹²⁹ Tripp, Editorial, *Belling the Cat*, THE AOPA PILOT 2 (April 1979).

¹³⁰ *Id.*

¹³¹ Yodice, *NASA Safety Reporting Program*, THE AOPA PILOT 90 (July 1977).

¹³² See text accompanying note 35 *supra*.

¹³³ Dept. of Trans., Fed. Av. Ad., Advisory Circular no. 00-46 (1975).

¹³⁴ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 14-15 (1979-1980)* (statement of John H. Winant).

¹³⁵ *Id.*

program was revoked, report volume fell dramatically and the system was abandoned because the input became so insignificant that no useful results were forthcoming.¹³⁶ There were other programs which also were not very successful, and it was believed one of the reasons for their ineffectiveness and short life was that the quality and the quantity of reports diminished due to a lack of protection afforded the reporter and those he reported on.¹³⁷ Partially for this reason the designers of ASRS believed a limited immunity provision was critical to the success of the program.¹³⁸ Apparently in confirmation of that belief, report volume jumped approximately tenfold with the inception of the NASA program.¹³⁹ "Dispelled by creation of ASRS were animosities, distrusts, and misunderstandings which had largely prevented the parties from totally unified and open action to enhance aviation safety, particularly in the human factors area."¹⁴⁰

ASRS is a unique system that appears to have commanded respect from those who operate and work with it on a day-to-day basis. In the words of Dr. James Kramer, Associate Administrator, Office of Aeronautics and Space Technology, NASA:

[W]e know of no other such system, voluntary or mandatory, that offers (and delivers) the complete standard of confidentiality and anonymity promised by the ASRS program. An indication of the importance of confidentiality is provided by the fact that 70% of the reports in the ASRS database contain statements revealing human error information; it is not unusual for reporters to reveal their own operational mistakes for the ASRS database when they won't even tell others about the occurrence, let alone why it happened.¹⁴¹

The Advisory Subcommittee, in its 1979 evaluation of the system recognized the importance and utility of this aspect of the system.¹⁴² The highest potential utility of the system is its ability

¹³⁶ *Id.* at 1-2.

¹³⁷ *Id.* (statement of John F. Leyden).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 3 (statement of John H. Winant).

¹⁴¹ *Id.* (statement of Dr. James J. Kramer).

¹⁴² *Report on ASRS Utility and Effectiveness*, Advisory Subcomm. on Aviation Safety Reporting System, NASA Aeronautical Advisory Comm. (June 29, 1979). "Since such kinds of data do not derive from any other aviation report-

to spot misperceptions and misunderstandings by the operators and users of the aviation system.¹⁴³ This ability to identify possible problem areas goes to the heart of explaining the mystery of human error.¹⁴⁴ That this information is available to a much wider group of people and more quickly than any other safety-oriented program, is seen as a major strength of the program.¹⁴⁵ Some believe the fact that the government agency responsible for the program cannot withhold, manipulate, or otherwise control the information received and disseminated is equally, if not more, important.¹⁴⁶ Regarding the confidentiality/immunity provisions, there has not been a breach in the over 17,000 reports received so far.¹⁴⁷ This fact alone is capable of engendering confidence in ASRS in potential reporters. It could also be indicative of the seriousness attached to the possible results of ASRS input.

The Advisory Subcommittee on ASRS admitted in its 1979 evaluation that "ASRS has not yet been the cause of significant changes in the organizational elements of the national aviation system. . . ."¹⁴⁸ In the same breath, the subcommittee acknowledged ASRS as "an important, proven source of tangible and intangible benefits related to safety in the system."¹⁴⁹ Some of those benefits are felt in ways that may not have been foreseen. For instance, several airline companies believe ASRS information has been valuable in the management of their training programs.¹⁵⁰ In addition,

ing system, their collective effectiveness is judged as singularly unique, innovative, and far reaching in impact." *Id.* at 6.

¹⁴³ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 11 (1979-1980)* (statement of John H. Winant).

¹⁴⁴ *Id.*

¹⁴⁵ Tripp, *Air Safety's Early Warning System*, THE AOPA PILOT 65 (April 1979).

¹⁴⁶ *Id.* at 67.

¹⁴⁷ Dept. of Transp., Fed. Av. Ad., Advisory Circular no. 00-46B (1979).

¹⁴⁸ *Report on ASRS Utility and Effectiveness*, Advisory Subcomm. on Aviation Safety Reporting System, NASA Aeronautical Advisory Comm. (June 29, 1979).

¹⁴⁹ *Id.*

¹⁵⁰ Letter from Cong. John L. Burton to Langhorne Bond (April 9, 1979). ASRS has proven valuable beyond just helping airline training programs. Examples of the value of the system are many, but the two following are indicative. One dark, moonless night a pilot operating his craft under VFR (visual flight

Congressman Burton, Chairman of the congressional committee charged with the oversight of ASRS, took the position that the system was too valuable to risk destroying its efficiency and effectiveness by making changes that could only adversely effect the input.¹⁵¹

There are flaws and problems in the system. However, aside from the inevitable, occasional abuse of the immunity provision, these problems are minor and mainly administrative. Initially, there is a problem in communicating the information received to members of the aviation community who could benefit from receiving it.¹⁵² This problem perhaps reflects the small operating budget of NASA or that NASA is research, rather than communi-

rules) learned a frightening lesson which he shared with NASA in an ASRS report. He had called into the Las Vegas approach control over Boulder City at 5,000 feet seeking clearance into the Traffic Control Area. He was given clearance direct to the Las Vegas airport and told to descend to 3,500 feet at his own discretion. After he passed over the mountains, he descended to 3,500 feet and was given a radar vector to 340 degrees. He then became concerned about terrain clearance and requested the minimum safe altitude at least 3 times before he was advised that it was 4,800 feet. This was obviously quite dismaying to the pilot. After he successfully negotiated the unfavorable terrain and landed, he was informed that terrain clearance was his responsibility when flying VFR even if operating under radar vectors in a Traffic Control Area. As it turned out, his was the second report where vectors and an assigned altitude of 3,500 feet had taken pilots into areas where terrain clearance was not assured. NASA advised the FAA which changed procedures at Las Vegas to prevent the danger from arising again. Yodice, *Aviation Safety Reporting Program Modified*, THE AOPA PILOT 133 (June 1979).

A somewhat similar incident also led to corrective action at the Tucson, Arizona, airport. A pilot departing under State III service was cleared to turn right after takeoff to a heading of 150 degrees, maintaining at or below 3,500 feet. After takeoff, departure control assigned him a right turn to a heading of 270 degrees, maintaining at 3,500 feet. Fortunately the pilot was familiar with the area and requested terrain separation to avoid the 3,699 foot mountain south of the San Xavier Mission, and turned left to 240 degrees to effect his own separation. The controller, noticing the turn, called the pilot and directed him to turn back 300 degrees, heading him straight into the mountain. The pilot wisely cancelled Stage III service at that point. This also unfolded as part of a pattern that caused NASA to alert the FAA followed by remedial action from the FAA. *Id.*

¹⁵¹ "This subcommittee [House Subcomm. on Government Activities and Transportation, House Comm. on Government Operations] considers the ASRS . . . to be an irreplaceable system. It is the only truly independent source of information about problems in the air traffic control system." Letter from Cong. John L. Burton to Langhorne Bond (March 15, 1979).

¹⁵² Tripp, *Air Safety's Early Warning System*, THE AOPA PILOT 65, 67 (April 1979).

cation, oriented.¹⁵³ A second problem area is that participation by potential reporters could be broader.¹⁵⁴ This lack of participation may be due to a pervasive fear of self-incrimination despite immunity and confidentiality provisions. More likely, however, it is a concern that identification of problems will only result in more regulation.

One of the answers to the above problems is to increase knowledge about ASRS. An increase in awareness about the system, its methods, and possible results could encourage more reporting of incidents freely described which is invaluable to a useful end product. The Advisory Subcommittee's 1979 evaluation found "there is a less than satisfactory awareness of the system among other than professional pilots and air traffic controllers."¹⁵⁵ The flaws existing in the system could be made less damaging by recognition and administrative remedy.

D. *The Future*

The future of ASRS is now more promising than it would be had Bond's initial proposal to withdraw all immunity been put into effect. Still, the future is not clear. The Aviation Safety Reporting System was designed to operate over an extended period of time. It was so designed in order to identify trends that become evident only after enough data has been reported to show a tendency is present.¹⁵⁶ Notwithstanding the fact that both tangible and intangible benefits have been realized in its nearly four years of existence, the advisory subcommittee saw an even brighter future in the last

¹⁵³ 42 U.S.C. § 2451(c) (1976).

¹⁵⁴ Tripp, *Air Safety's Early Warning System*, THE AOPA PILOT 65 (April 1979). Of more than 14,000 reports received at the time the analysis was made, 47.5% came from pilots, 44.5% from controllers and the balance from unidentified observers. The types of aviation represented were 43.9% air carrier, 41.2% general aviation and 11.5% military. This data looks good, but the problem is most of the general aviation reports come from "sophisticated, professionally flown aircraft operating IFR." *Id.* If a broader range of general aviation operators, particularly VFR pilots and operators reported, ASRS would be able to develop more data on weather problems, weather dissemination and flight service stations service. *Id.*

¹⁵⁵ *Report on ASRS Utility and Effectiveness*, Advisory Subcomm. on Aviation Safety Reporting System, NASA Aeronautical Advisory Comm. at 14 (June 29, 1979).

¹⁵⁶ Tripp, *Air Safety's Early Warning System*, THE AOPA PILOT 65, 66 (April 1979).

evaluation in that the data base was just beginning to reach a stage where trend identification was becoming possible.¹⁵⁷

Despite this optimism, some of the concerns about the possible effects of Bond's initial proposal are useful in attempting to determine the effects the compromise modification will have on ASRS. Should the report input decrease or change character, the effect on the system could be long-term.¹⁵⁸ Only a high volume, high quality system is "capable of identifying broad trends on safety related occurrences."¹⁵⁹ The trend spotting capability of ASRS is seen as one of its greatest potential strengths.¹⁶⁰ A reduction in volume or change in character of reports could also distort the data base if the reduction or change is the result of discouraging the submittal of reports from certain portions of the aviation community. "This is entirely possible on the basis that immunity is of greater concern in some areas of the system than others."¹⁶¹ Many believed it was largely because of the waiver of disciplinary action that ASRS received such an enormous response in its first three years of operation.¹⁶² The reports were "frank discussions of mistakes, whether by the reporter or others"¹⁶³ because the waiver applied to all persons involved in an occurrence rather than only the reporter himself.¹⁶⁴ On the other hand, Bond argued that "6 out of 10 incidents . . . involving human error were reported by an observer or third party" in supporting his belief that a com-

¹⁵⁷ *Report on ASRS Utility and Effectiveness*, Advisory Subcomm. on Aviation Safety Reporting System, NASA Aeronautical Advisory Comm. (June 29, 1979). "[I]t is judged that very important benefits lie in the near term future" . . . the Subcommittee stated in advising continuance of the program beyond June, 1980, when the existing Memorandum of Agreement between the FAA and NASA terminates. 44 Fed. Reg. 24,980, 24,982 (1979).

¹⁵⁸ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations*, 96th Cong., 1st Sess. 8 (1979-1980) (statement of Dr. James J. Kramer) (addressing the first proposed modification).

¹⁵⁹ *Id.* at 15 (statement of John H. Winant).

¹⁶⁰ *Id.*

¹⁶¹ *Report on ASRS Utility and Effectiveness*, Advisory Subcomm. on Aviation Safety Reporting System, NASA Aeronautical Advisory Comm., 11 (June 29, 1979).

¹⁶² Letter from John H. Winant to Langhorne Bond (March 15, 1979).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

plete withdrawal of immunity would not harm the system.¹⁶⁵ Evidencing the stature of the FAA in the eyes of the aviation community, concern was expressed that the modification would not only engender further mistrust of the FAA,¹⁶⁶ but so undermine the credibility of future FAA administrators as to preclude user support of any safety effort by the FAA in the future.¹⁶⁷

The most likely effect of the modification on the ASRS of the future is a change in the character of reports because transactional immunity no longer exists. Before an aviation operator will be granted immunity from disciplinary action he must prove that he has submitted an ASRS report. That a colleague submitted the report does not now grant the individual immunity. It is reasonable to assume, then, there will be more reports involving a particular incident. The effect of this may be to keep the number of reports submitted up to the past levels while subtly changing the character of those reports. This would appear to allow NASA to reduce the number of callbacks necessary to get a better statement of the facts. This has not yet been the case, however, and callbacks remain at approximately 15-17% of all reports.¹⁶⁸ The effect of this change in the character of ASRS reports could be to distort the data base and make it necessary again to wait for a year or two before the data is sufficient for trend identification to begin anew.

Another effect, perhaps more serious in the long run, is that reports may not be filed at all since the incentive of avoiding sanctions may be removed. This would apply particularly to those potential reporters who had violated a Federal Aviation Regulation since the inception of the program, thereby losing their immunity for any subsequent violation. This is precisely the type of case at which Bond aimed his modification¹⁶⁹ and it is indeed arguable whether someone who violated the FAR's once should be allowed

¹⁶⁵ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 6 (1979-1980)* (statement of Langhorne Bond).

¹⁶⁶ *Id.* at 2 (statement of John L. Baker).

¹⁶⁷ *Id.*

¹⁶⁸ Conversation with William Reynard, NASA-Ames.

¹⁶⁹ See note 90 *supra*.

to continue to do so with immunity assured.¹⁷⁰ ASRS, therefore, may not receive reports on some incidents that under the old program would have been forthcoming.¹⁷¹

Another result of the modification may be increased morale and efficiency among FAA inspectors. Under the prior system, the investigation ended as soon as the FAA was informed a report had been filed on the particular incident.¹⁷² If an inspector was working on a case only to find out his work would have no effect in the end, he would naturally become frustrated. Under the modified system a full investigation is made and the results turned over to FAA counsel, who then determines whether to prosecute based on an individual's failure to file a report, and whether he had previously violated an FAR.¹⁷³ The inspector knows his efforts have not been fruitless because the least that will happen if a violation occurs is the reporter will not be able to claim immunity for future violations.¹⁷⁴

III. CONCLUSION

As John Winant stated to the House Subcommittee, "[t]he decision (whether or not to revoke immunity) is not a new one. It involves ratification of what was previously determined to be both correct and right versus the effective termination of a unique program which promises a high payoff in aviation safety advancements."¹⁷⁵ Because ASRS is a voluntary, confidential and non-punitive reporting system, and because the program has been able to strike up a dialogue with the community it serves, it has earned a reputation for credibility and effectiveness. This effectiveness of

¹⁷⁰ Waiver, however, has never applied and does not now apply to incidents involving gross negligence, willful recklessness, criminal offenses, purposeful Federal Aviation Regulation violations, or accidents.

¹⁷¹ This effect may be insignificant because usually more than one person will be involved in an incident and a report will be filed by someone not relying on the chance that another will report the incident.

¹⁷² See note 102 *supra*.

¹⁷³ See note 171 *supra*; See Nat'l Aeronautics and Space Ad., Aviation Safety Reporting System Fact Sheet.

¹⁷⁴ Dept. of Transp., Fed. Av. Ad., Advisory Circular no. 00-46B (1979).

¹⁷⁵ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations, 96th Cong., 1st Sess. 18 (1979-1980)* (statement of John H. Winant).

the System, and therein its value, is due to its nature. The FAA acts as a police force, when enforcing its regulations, seeking in part to punish in order to encourage correct and safe operations. This approach is punitive rather than persuasive or tutorial. Also, it takes action only after the facts. Likewise, the National Transportation Safety Board acts after the fact. It investigates and analyzes accidents and then issues recommendations which, theoretically, help avoid similar accidents through information and operational, design, or regulatory changes. Because such procedures are tutorial rather than punitive they may be more valuable but can't compare with a system that acts before the fact to prevent accidents. The first-hand type of information generated by ASRS is invaluable to understanding how hazardous situations develop. In addition to the quarterly reports and alert bulletins, there is another very valuable product of ASRS. A pilot, controller, or other aviation system user acquires an education as he attempts to explain what happened to the ASRS report analyst. Thinking about a problem in order to explain it is invaluable to a better understanding of the role of human error in safety incidents.

The 1979 evaluation concluded that the security measures guarding the confidentiality of the reports have been virtually inviolate and that no weakness exists in the procedures or in the security system elements.¹⁷⁶ This affirms that the interest in safety holds a high place in the order of priorities for an effective national aviation system. The fact ASRS is recognized internationally for its credibility and effectiveness is also a strong testament to its value. If imitation is the sincerest form of flattery then ASRS has been complimented generously by nations such as Canada and Great Britain which have sought the advice of ASRS staff in establishing or reforming their own national aviation safety reporting systems.¹⁷⁷

Not only will ASRS provide information for the aviation com-

¹⁷⁶ *Report on ASRS Utility and Effectiveness*, Advisory Subcomm. on Aviation Safety Reporting System, NASA Aeronautical Advisory Comm. (June 29, 1979).

¹⁷⁷ *Proposed Modification of the Aviation Safety Reporting System: Hearings Before the Subcomm. on Government Activities and Transportation, House Comm. on Government Operations*, 96th Cong., 1st Sess. 6 (1979-1980) (statement of Dr. James J. Kramer) (addressing the first proposed modification).

munity's use but it could quite possibly be a valuable source of information to attorneys involved in aviation related work. ASRS could become a source of information regarding safety incident statistics which could be useful in air crash litigation.¹⁷⁸ The possibility that labor attorneys advising clients how to respond to safety incidents and the consequences of their response could be another element of the usefulness of ASRS products. Likewise, ASRS output may serve as a valuable tool for FAA staff attorney's in advising the aviation community on how to give constructive safety input without fear of punishment for their efforts. In short, increased awareness of ASRS and its possibilities could enhance both its usefulness and the possibility of a long, productive life.

The future of ASRS will be bright if the recommendation of the Advisory Subcommittee is followed. "The Aviation Safety Reporting System should continue its mission beyond 1980 without substantial change in its charter and purposes. Nothing should be permitted to inhibit the flow of information necessary for the continued growth of the ASRS data base during future years."¹⁷⁹ In the end analysis the following statement by the Advisory Subcommittee may very well ring true: "The long and at times heated contention over the waiver may come to be viewed as one of the most classic human factor events associated with ASRS."¹⁸⁰ The future safety advancements, and life and property-saving results of the ASRS will, I believe, overshadow all the debate as to its methods.

¹⁷⁸ See note 60 *supra*.

¹⁷⁹ *Report on ASRS Utility and Effectiveness*, Advisory Subcomm. on Aviation Safety Reporting System, NASA Aeronautical Advisory Comm. (June 29, 1979).

¹⁸⁰ *Id.*

