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## On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, "Agency Capture," and Airline Security

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# ON THE HIJACKING OF AGENCIES (AND AIRPLANES):

## THE FEDERAL AVIATION ADMINISTRATION, “AGENCY CAPTURE,” AND AIRLINE SECURITY

MARK C. NILES\*

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### INTRODUCTION

On September 11, 2001, millions of Americans watched in awe and horror as over a period of less than two hours, a succession of

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commercial airliners crashed first into the two World Trade Center towers in New York City, and then into the Pentagon in suburban Virginia. As government officials and news organizations scrambled in the first hours after the events to gather information, possible explanations for the crashes were offered. One theory was the obvious assumption that the planes had all been hijacked by "terrorists" using some kind of weapons (guns, bombs) that had presumably been smuggled onto the planes in circumvention of security procedures.

As more concrete information became available in the hours and days that followed, however, the actual circumstances appeared to deviate significantly from these early assumptions. One surprising discovery was that no firearms or explosives appeared to have been used in the attacks, and that the hijackers were able to overpower the flight crew and take over control of the four airplanes with what appeared to have been relatively small knives.<sup>1</sup> This discovery was followed by the even more stunning realization that the weapons used by the hijackers were not prohibited by any applicable regulations, and therefore need not have been smuggled past airline security.<sup>2</sup>

Attention then appropriately shifted from questions about the potential for a conspiracy involving the circumvention of airline and airport security regulations to the regulations themselves and the procedures for their implementation and enforcement. The most critical concerns were whether airport security regulations were sufficient to provide a reasonable level of safety for airline passengers (and the public as a whole) and/or whether sufficient mechanisms were in place to enforce the applicable regulations.

The federal agency authorized by Congress to ensure the safety and security of American commercial air travel is the Federal

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1. See Mark Belko, *Is Air Security Still Too Weak?*, PITTSBURGH POST-GAZETTE, Sept. 23, 2001, at A19 (writing that the terrorists used "concealed, undetectable or even permitted items to take over airplanes and used them as bombs to inflict destruction on the ground without regard to their own lives . . . [they] used small knives, box cutters and razors to take control of the cockpits."); see also Roger Simon, *The Month that Shook the World*, U.S. NEWS & WORLD REP., Oct. 12, 2001 at 2 (noting that we have seen terrorists "bring down twin towers in Manhattan, set the Pentagon ablaze, kill more Americans in a single day than any attack in history, all while armed, it appears, with nothing more than utility knives, box cutters available in any hardware store and, before September 11, legal to bring aboard airplanes.").

2. See Shelley Murphy, *America Attacks/Impact on New England; Logan's Baggage Screeners Defended Workers Unfairly Blamed, Company Supervisor Says*, BOSTON GLOBE, Oct. 10, 2001, at B1 ("I am very confident that nothing got beyond this checkpoint that wasn't allowed," said [Carter] Bibbey, who was one of fifty-one Globe Aviation employees working at the American Airlines terminal on Sept. 11 . . .").

Aviation Administration (“FAA”), a branch of the U.S. Department of Transportation. For decades prior to the events of September 11, legal commentators and other observers of the structure and functions of the administrative state had focused substantial attention on the FAA and its regulation of the airline industry. A trend of comprehensive “deregulation” of the industry over the past few decades in regard to fares, scheduling, and flight plans had produced both praise<sup>3</sup> and criticism<sup>4</sup> from commentators concerned with the impact of lifting such a wide array of requirements from an industry so vital to the life and economy of the nation.

In addition to this debate over deregulation, recent airline disasters — including the Pan Am crash in Lockerbie, Scotland in 1988, the Trans World Airline (“TWA”) crash off the coast of Long Island in 1996, and the ValuJet disaster in the Florida Everglades that same year — have focused attention on the FAA and the possible role its regulatory structure might have played in any particular

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3. See, e.g., Steven A. Morrison & Clifford Winston, *Airline Deregulation and Public Policy*, SCIENCE, Aug. 18, 1989, available at 1989 WL 3077706 (restating that the American Association for the Advancement of Science stated, “It is our contention that a move toward reregulation would be misguided. The airline deregulation ‘experiment’ has been a success.”); *Get Us to the Gate on Time*, WALL ST. J., Mar. 20, 1987, available at 1987 WL-WSJ 325768 (“These problems [of delays and cancelled flights] notwithstanding, Americans have benefited greatly from deregulation of the airline industry. More people are flying to more destinations at lower fares than even the most optimistic deregulators could have imagined in 1978.”); Ed Timms, *Two Sides of Airline Deregulation, Competition Cuts Fares, but Critics Question Safety Incentive*, DALLAS MORN. NEWS, Dec. 8, 1985, at A1; Terrance M. Fox, *Deregulation Shouldn’t Be a Dirty Word*, ST. PETERSBURG TIMES, Jan. 31, 1988, at D1.

4. Alan Eysen, *View from the Cockpit: A Cross-Country Ride in a Jetliner — Picking its Way Through Hazards Ranging From a Complex Airborne Rush Hour to a Treacherous Thunderstorm — Illuminates Challenges Confronting American Commercial Aviation Today*, NEWSDAY, Sept. 25, 1988, at 6 (“In recent years, its industry critics have charged that the FAA is trying to oversee an industry made frenetic by deregulation, with outdated equipment, inadequate funding, and a management subject to political interference.”); Tom Belden, *Fine-Tuning the Friendly Skies: Legislation is Pending to Help Small Airlines Compete with the Nation’s Leading Carriers for Routes*, PHILADELPHIA INQUIRER, Oct. 11, 1998 (page number unavailable).

A growing group of critics are asking whether America’s experiment with deregulation isn’t flying off course and poorly serving millions of travelers. Increasingly, business travelers are paying record fares to a handful of big airlines that hold a powerful grip on scores of airports. Though new low-fare airlines spawned by deregulation were expected to provide vigorous competition, more small carriers have been driven out of business than the number still in the air.

*Id.*: Jon Hilkevitch et al., *Common Sense, Leadership Are Lacking as Airlines Delays Mount Nationwide*, CHI. TRIB., Nov. 22, 2000, at 1.

[Scheduling competition] can get so fierce that airlines are willing to fly half-empty planes — adding to congestion — rather than cede a city, or even a share of a city’s business, to a competitor . . . . Airlines are also intensely wary of any intrusion onto their turf, especially the no-frills, cheap-fares kind offered by low-cost carriers.

*Id.*

accident, or on the assurance of air safety in general. Various observers have responded to these incidents by noting the extensive influence that airline industry representatives have on the FAA and its policy initiatives, with some suggesting that the agency has developed into a promoter of the profitability of the airline industry rather than a regulator of its safety and security. Specifically, scholars have pointed to the FAA as a victim of the phenomenon of "agency capture,"<sup>5</sup> and at least one agency veteran was quoted in a national news magazine in 1995 as saying: "To tell the truth, the industry, they really own the FAA."<sup>6</sup>

This Article will analyze the allegation that the FAA has been "captured" by airline industry interests. It begins with a summary of agency capture theory, and a brief reference to some of its more important complexities and nuances. It then reviews the history and regulatory mandate of the agency in order to assess the validity of claims that the FAA is the victim of capture, while at the same time noting the inherent difficulty in making such a determination conclusively. The Article will then detail the FAA's air security regulatory and enforcement structure in an attempt to determine whether there is an identifiable relationship between a possible capture dynamic at the FAA and the tragic events of September 11. Finally, it will briefly comment on the competing congressional proposals for revamping air security which arose after September 11, and will suggest that the ultimate product of the political

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5. David Dana & Susan Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 497 (1999).

In 'captured' agencies, agency regulators do not act as 'arm-length' representatives of some larger 'public interest' in their interaction with regulated industries. Instead, government officials work to advance the agenda of current firms in the industry by formulating regulations that benefit or at least do not substantially burden the industry . . . . Capture of this sort, theorists claim, is particularly likely when an agency is charged with regulating only a single industry (for example, the FAA and the airline industry.).

*Id.* See also JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 83-88 (1989) (suggesting that industry pressure made FAA decisions to ground DC-10s difficult even after several crashes had occurred).

6. See, e.g., Peter Cary et al., *The FAA's About Face*, U.S. NEWS & WORLD REP., July 1, 1996, at 48 (statement of Billie Vincent, a former security official at the FAA); Richard J. Newman & Peter Cary, *What's Wrong with the FAA*, U.S. NEWS & WORLD REP., June 26, 1995, at 28-35 (reporting how the airline industry is compromising the FAA's ability to properly regulate a passenger safety). An ongoing dispute in the mid-90s between Department of Transportation Inspector General Mary Schivo and top officials of the FAA concerning safety inspection activities of the agency led Schivo to comment, during one of her many discussions of the issue with the national press, "I have been a lawyer for 15 years and in law enforcement for 12 years. And quite frankly, I've never seen anything like it. I have never had anybody tell me, 'Don't enforce the law.'" *Id.*

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compromise resulted in a significant improvement over the status quo – the creation of an entity other than the FAA that will have primary responsibility for ensuring the security of commercial air travel.

# I. “AGENCY CAPTURE” AND ITS REGULATORY CONSEQUENCES

## A. *The Administrative State and Agency Capture Theory*

Federal administrative agencies have traditionally been created,<sup>7</sup> and/or authorized to perform certain regulatory functions, for two main reasons. First, once it becomes clear that legal rules are required to regulate some aspect of the activities of the nation (either because of the failure of free market forces to produce the desired state of affairs or for some other reason), and that the governmental entities that would otherwise have the authority to construct and enforce these rules invariably does not have the time or the resources to perform the tasks effectively, such discrete tasks have traditionally been delegated to a new or existing administrative body.<sup>8</sup> Executive branch agencies, for example, proliferated as it became increasingly clear that they were necessary to ensure that the President was able to fulfill his function of “ensuring that the laws are faithfully executed,”<sup>9</sup> particularly as many more complex laws were enacted. Certainly, the President and the White House staff could not handle even a tiny percentage of the enforcement functions carried out by even one of the various modern cabinet-level and sub-cabinet level departments. In much the same way, and for similar reasons, “independent” administrative agencies (independent because they are intentionally structured to function outside the direct control of the Executive Branch) have been created to assist Congress, and even at times the Judiciary, in performing their required functions.

Second, it is generally accepted that an administrative body that is granted regulatory authority over a specific set of issues will naturally develop a certain level of “expertise” in that area, and that this development will result in better and more effective regulation of that area than would have been possible if it had been subject,

7. For extensive discussion of the history of the federal administrative structure, see generally Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

8. See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.3, at 6 (3d ed. 1994) (describing the rise in administrative agencies as the amount of administrative workload increases).

9. U.S. CONST. art. II, § 1.

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instead, to more generalized governmental oversight.<sup>10</sup> This expertise can arise from a combination of factual familiarity with the kinds of issues that must arise repeatedly while regulating a certain thing or activity, and the expert scientific or other detailed knowledge that only a small percentage of government officials possess.<sup>11</sup>

The development and expansion of the administrative state has taken on somewhat of an inevitable momentum, particularly as the functions of the federal government expanded during and after the Great Depression. But, the creation of administrative bodies and the delegation of extensive authority granted to perform these new governmental functions has created a wide array of concerns and potentially serious legal difficulties and complications. Questions that have formed the basis of just a small percentage of the legal issues raised by the existence and function of administrative agencies over the past 150 years include: the constitutionality of the delegation of legislative authority to agencies;<sup>12</sup> the structures erected to allow Congress to play a post-hoc role in reviewing the exercise of that authority;<sup>13</sup> and the impact on separation of powers on the wide array

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10. See RONALD A. CASS & COLIN S. DIVER, ADMINISTRATIVE LAW: CASES & MATERIALS 9 (1987) (explaining that “[a] specialized agency like the ICC, the argument runs, can better provide ‘continuous expert supervision, capable of ad hoc development to parallel the development of the subject matter involved.’”) (quoting Walter Gellhorn, FEDERAL ADMINISTRATIVE PROCEEDINGS 9 (1941)).

11. See Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 452 (1999).

In addition to knowledge born of experience, agencies are given broad regulatory power because they have professional expertise and the capability to implement technical regulatory requirements. In particular, the delegation of decision making to agencies is premised at least in part on their ability to collect and analyze information and to understand the technical issues relevant to the decisions agencies face.

*Id.*

12. See *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (finding Congress cannot constitutionally delegate its legislative authority to trade or industrial associations or groups, empowering them to enact laws they deem wise and beneficial for their trade or industries, and such delegation cannot be validated by a legislative preface of generalities as to permissible aims); see also *American Trucking Ass’n v. United States*, 344 U.S. 298 (1953) (holding that Interstate Commerce Commission rules governing the use of equipment leased by certified motor carriers from exempt owners, and obtaining of equipment by interchange from other carriers were valid because they bore a reasonable relationship to the regulatory scheme of the Motor Carrier Act, absent express delegation).

13. See *I.N.S. v. Chadha*, 462 U.S. 919, 919 (1983) (holding that section 244(c)(2) of the Immigration and Nationality Act, authorizing one House of Congress to invalidate an Executive Branch decision to allow a deportable alien to remain in the United States, is unconstitutional because the action is essentially legislative, and thus subject to the constitutional requirements of passage by a majority of both Houses and presentation to the President).

of different kinds of authority that agencies are given.<sup>14</sup>

In addition to these purely legal concerns, however, observers have noted potential practical and political consequences of the concentration of significant governmental authority in an agency or set of agencies. While questions have been raised about the potential negative impact of administrative power on the rights of individuals ever since the formation of the first modern administrative agency, the Interstate Commerce Commission ("ICC") in 1887,<sup>15</sup> one thing that was generally not questioned prior to the mid-twentieth century was that the primary concern of federal administrative agencies would be the promotion of what they saw as the "public good." As Professor Richard Stewart noted, it was generally assumed until the mid-fifties that "agency zeal in advancing the unalloyed, nonpolitical, long-run economic interest of the general public would be assured by the professionalism of administrators or by political mechanisms through which the administrative branch would eternally refresh its vigor from the stream of democratic desires."<sup>16</sup> But, over time, faith in the "public interest" focus of the administrative state withered. According to Professor Stewart, "to the extent that belief in an objective 'public interest' remains, the agencies are accused of subverting it in favor of the private interests of regulated and client firms."<sup>17</sup>

The concern was (and remains) that once a relatively small group of government officials is given substantial authority to make and enforce policy decisions, particularly when that group is in some way

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14. See Robert B. Horowitz, *Judicial Review of Regulatory Decisions: The Changing Criteria*, 109 POL. SCI. Q. 1, 136 (Spring 1994).

To traditional supporters of regulatory agencies, the complexity of modern socioeconomic life necessitates state intervention through administrative regulation. Administrative policies are seen as legitimate by virtue of the impartial expertise of regulators. To their detractors, regulatory agencies are faceless bureaucracies that exercise broad authority without being accountable to the electorate. They are, to use a phrase in vogue during the New Deal, a 'headless, fourth branch of government.' Regulatory agencies thus are held to violate the separation of powers laid out by the Constitution.

*Id.*

15. See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1128 (2000); see also Robery L. Rabin, *Federal Regulation in an Historical Perspective*, 38 STAN. L. REV. 1189, 1194-95 (1986) (asserting that Congress established the ICC in response to claims of discriminatory behavior and practices of the railroad industry in 1887). Controversy arose over the scope of regulatory authority, including concern about granting final authority and "traditionally judicial functions in an unfamiliar forum . . . as well as fear of popular tyranny and derogation of property rights." *Id.* at 1210-12.

16. Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1682 (1975).

17. *Id.* at 1682-83.



insulated from the impact of normal political forces, that group is likely to be subjected to extensive pressure from groups that have a particularly strong interest in the consequences of its policy determinations. The focus of this pressure will invariably be an attempt to promote the “private” interest of the regulated group at the expense of some broader interest of the public as a whole, which would otherwise have been the primary concern of the regulatory agency. The consequences of this kind of influence in the hands of the very entities that the agency is relied upon to control could be a wide-ranging, and potentially dangerous distraction of agency policy from the promotion of the public interest to the protection of private agenda, or, in other words, a kind of excessive or hyper-influence imposed by the regulated community.<sup>18</sup>

Thus, while the potential negative public policy impact of this hyper-influence by private interests is relatively easy to articulate, it is a decidedly difficult phenomenon to isolate or remediate, particularly given the dynamics and constraints of our administrative system.<sup>19</sup> To a certain extent, of course, the structure of our

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18. For detailed discussion of this phenomenon, see Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1565-70 (1992).

The second potential pitfall of civil republicanism stems from the ability of an ostensibly regulated industry to influence government policy. According to the capture hypothesis, instead of providing meaningful input into deliberation about the public interest, industry representatives co-opt government regulatory power in order to satisfy their private desires. Regulated entities are well organized and generally well funded, and they often have strong interests at stake, which they do not share with the polity as a whole. These entities have much to gain by ensuring that they have control over government decisionmakers and that the decisionmakers whom they do control remain in office.

*Id.*

19. See Thomas Merrill’s discussion of the historical developments in judicial review of agency action in the mid and late 20th century, and his observation that courts displayed a certain reluctance to apply significant deference to agency determinations when:

a key instrumentality of activist government – the administrative agency – came to be regarded as suffering from pathologies not shared by other governmental institutions such as legislatures or courts. The principal pathology emphasized during these years was ‘capture,’ meaning that agencies were regarded as being uniquely susceptible to domination by the industry they were charged with regulating.

Thomas Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997); see also Dana & Koniak, *supra* note 5, at 497-98 (discussing the possible critiques of capture theory).

Capture is, of course, an imprecise and controversial theory. The word itself suggest undue or illegitimate industry influence, but it is possible to speak of illegitimate interest group influence only if one has a coherent normative baseline defining legitimate interest group influence. Moreover, even if one has such a normative theory, it may be difficult to apply the theory in

administrative regime not only allows for contacts and input from interested parties in the course of agency policy-making, but often counts on, or indeed, requires them. Section 553 of the Administrative Procedure Act (“APA”), for example, requires that notices of proposed rulemaking be published in the Federal Register; that interested parties be given the opportunity to comment; and that the agency take those comments into account before it issues a final policy determination.<sup>20</sup> This requirement has generally been lauded as a means of preventing agencies from becoming too insulated and isolated from the interest of the public.<sup>21</sup> Likewise, the “notice and comment” process has been relied upon by courts reviewing agency actions as an indication that the agency has acted in a sufficiently formal and fair manner.<sup>22</sup>

If we assume that there are competing interests involved here – on one hand an acknowledgement of the potential negative consequences of certain kinds of non-governmental influence on agency decision making, and on the other, an express requirement that the concerns and interests of the public be factored into the administrative process – the difficulty comes in drawing the line between needed and required public input in agency decision making and input that rises to an undue level of dominance of the agency function.<sup>23</sup> The latter end of this spectrum has generally been distinguished from the former by some form of *control* as opposed to mere *influence* in the hands of regulated parties, wielded so as to dominate, as opposed to inform, the policy judgment of the regulatory entity.

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practice to the messy realities of political policymaking.

*Id.*

20. See 5 U.S.C. §§ 551, 553 (1994).

21. See *Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981) (Wald, J.).

Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their command must fall . . . Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs.

22. *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 2171 (2001) (holding that notice-and-comment rulemaking is one example of the kind of agency action that appropriately carries the force of law).

23. For a comprehensive discussion of the role of private influence in regulatory decision making, see generally Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

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This undue control and domination of federal administrative agencies,<sup>24</sup> particularly by identifiable private parties that are subject to the regulatory authority of the agency, has been defined as agency or industry “capture,” and has, of course, been all but universally seen as a negative consequence. Indeed, it is referred to as a “pathology” in administrative governance, and consequently, a phenomenon to be either avoided or remedied.<sup>25</sup>

The phenomenon of capture has been variously defined,<sup>26</sup> but proponents of the theory have generally observed that capture occurs when a regulated entity — like a large corporation, or more likely an association of corporate interests — succeed, through lobbying or other influential devices, in replacing what would otherwise be the public-policy agenda of the agency with its own private and self-serving agenda. In other words, when a regulated entity succeeds at winning “the hearts and minds of the regulators,”<sup>27</sup> regulation becomes “a method of subsidizing private interests at the expense of the public good.”<sup>28</sup>

The first articulation of the dynamic has been traced to the work of Marver Bernstein, who, in 1955, observed what he referred to as the natural “life-cycle” of administrative agencies.<sup>29</sup> Bernstein argued

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24. It should be noted that this kind of undue influence by private entities is not the only kind of criticism of administrative structure. There are other inherent “pathologies” in agency structure and governance which complicate the development and judicial review of federal regulations. “For example, agencies were commonly regarded as mindless ‘bureaucracies’ more concerned with expanding their budgets and making life comfortable for tenured civil servants than with attending to the needs of the beneficiaries of regulation.” Merrill, *supra* note 18, at 1050.

25. See Merrill, *supra* note 19, at 1043.

Starting in the 1960’s, many federal judges became convinced that agencies were prone to capture and related defects and – more importantly – that they were in a position to do something about it. In particular, these judges thought that by changing the procedural rules that govern agency decision making and by engaging in more aggressive review of agency decision they could force agencies to open their doors – and their minds – to formerly unrepresentative points of view, with the result that capture would be eliminated or at least reduced.

*Id.*

26. See, e.g., Seidenfeld, *supra* note 11, at 459-60 (discussing the distinction between the somewhat mild version of private influence on agencies that he refers to as capture, and the more severe version of special interest “domination,” which he defines as “a broader concept than capture; it occurs whenever an interest group consistently influences an agency to regulate for the benefit of that group rather than to promote stated statutory aims.”).

27. IAN AYERS & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 63 (1992).

28. John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723 (1986).

29. MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 79-

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that “the early stages of the cycle are characterized by vigorous and independent regulation, not unlike the role of agencies imagined by the public interest literature,” but, that in later stages of the cycle, which he called agency “senescence,” “the agency often becomes closely identified with and dependent upon the industry it is charged with regulating.”<sup>30</sup>

As the concept developed over the next few decades, observers focused less on the stages of agency development where capture was most likely to occur, and instead regarded capture “as something more akin to the universal condition of the administrative state.”<sup>31</sup> Professor Richard Stewart characterized this broader concern, when he observed that:

It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the cooperative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.<sup>32</sup>

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97 (1955). See also MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION* 132-52 (1965) (providing the other seminal discussion of the capture dynamic).

30. Merrill, *supra* note 19, at 1060.

31. Merrill, *supra* note 19, at 1060. Merrill provides an intriguing and useful summary of the development of the agency capture jurisprudence, noting, among other things the “curious symmetry” between the attitudes about capture of those associated with right-wing economic theories, such as the Chicago school and others (who used the theory to support arguments for market as opposed to governmental regulation of industry), with those of more observers from the left, such as Gabriel Kolko and ultimately Ralph Nader (who saw the theory as justifying invigoration in government regulation). *Id.* at 1060–62.

These various strands of capture theory roiled together into a general pot of discontent, out of which emerged a new popular muckraking literature. The principal purveyors of this populist strain of capture theory were the so-called ‘Nader Raiders’ who produced a string of monographs and associated publicity in the late 1960s and early 1970s castigating various agencies for cozying up to big business and ignoring the public interest.

*Id.* See also Wiley, *supra* note 28, at 724 (discussing of the “remarkably similar” conception of capture theory expressed by Kolko and conservative economist Milton Friedman).

32. Stewart, *supra* note 16, at 1713. See Horowitz, *supra* note 14, at 142.

Capture, of course, meant that a particular interest group exercised control over the regulatory agency. At the very least, capture theory embodied the claim that regulatory agencies served the interests, if not at the behest, of the regulated industries. By the mid-1960’s, some version of capture theory was the conventional wisdom. And capture theory implicitly become accepted by key members of the judiciary as well . . . .”

*Id.*; Clayton P. Gillette & James E. Krier, *Risk, Courts and Agencies*, 138 U. PA. L. REV. 1027, 1065 (1990).

Administrative power to seize the initiative is especially appealing to anyone who believes that when public agencies act, they act in the public interest . . . . Less clear is the source of this public point of view, or the basis for believing that agency initiative would necessarily serve it . . . . [A]n

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Indeed, agency capture is increasingly viewed less as an exception and more as a common consequence of our federal administrative structure.<sup>33</sup>

One of the inherent complexities of capture theory is its requirement that identifiably “private” interests be distinguished from “public” ones. Capture theory is based on the notion that proper public focus of governmental agencies can be effectively distracted by the private interests of regulated entities. But how can it be determined where the private interests of the regulated end, and the broad public interests begin?<sup>34</sup> Will there not be instances where the private interest of a regulated party, even one as crass as the maximization of profit of specific industry representatives, will also serve the broader public interest in the form of additional employment, more access to goods and services, or even general improvement in economic conditions?<sup>35</sup> The determination that an

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abiding faith that outcomes are in the public interest requires an underlying conviction that information and values filter into and out of agencies in some evenhanded way. If, however, risk producers have a comparative advantage over risk consumers in getting the administrative ear, then agency decision making might be marred by access bias just as judicial decision making is.

*Id.*

33. As Professor Mashaw notes in his summary of public choice critiques of “naïve” images of the administrative regime: “administrative processes can be understood as the means by which political victors maintain the gains for successful interest group struggle at the legislative level. Administrative decision structures are the devices through which legislative principals control the actions of potentially deviant administrative agents.” JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 12-15 (1997); *see also* Stewart, *supra* note 16, at 1687 (noting that “the critique of agency discretion as unduly favorable to organized interests — particularly regulated client firms — has sufficient power and verisimilitude to have achieved widespread contemporary acceptance” citing law review articles and judicial opinions from the late 1960s and early 1970s).

34. As Michael Levine notes in his discussion of the phenomenon of regulatory capture:

[I]t is demonstrably impossible . . . to construct a democratically derived and consistent social welfare function that will allow one to assert objectively that one outcome is socially preferred over another . . . . Unless a democratic, consistent aggregation of the preferences of individuals in group is possible, there is no objective way to tell what is socially preferred (in the ‘public interest’).

Michael Levine, *Regulatory Capture*, in NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 267, 268-69 (3d ed. 1999).

35. Indeed, a determination that the “private” interest of a regulated entity are consonant with a broader public interest should not be immediately suspect, and could fit quite neatly within the proper range of agency determination in support of its determination of where, exactly, the public interest lay. *See generally* Michael E. Levine & Jennifer L. Florence, *Regulatory Capture, Public Interest and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167 (discussing competing theories of how agencies determine what constitutes the “public interest”). *See also* Seidenfeld, *supra* note 11, at 474-79 (describing problems rising from idiosyncratic agency values).

agency is promoting the private interest of its regulated community therefore will not be sufficient in itself to provide conclusive evidence of undue influence amounting to capture.

What is needed is an indication that the agency's industry-promoting efforts arise not from its own determination of what will promote the long-term public interest, but out of some motivation to promote these interests despite the impact it will have on the vast majority of affected parties, or the society as a whole. If it could be determined, for example, that while the promotion of the private profit motives of a firm or group of firms would provide 5,000 more jobs to a depressed community, the same regulatory choice would result in permanent health effects that could be expected to cause serious injury to 15,000 people across three states (and it could be shown that the agency knew of this risk, and had as part of its regulatory responsibility the protection of the health of citizens); then it could be shown that while either of its available choices would have produced both public benefits and harms, the agency chose the course that benefited the identifiably smaller "public" interest at the expense of the larger one.

Assuming that public and private interests can be effectively defined and differentiated, the explanations for the phenomenon of agency capture can be founded in an acknowledgement of the functional and practical limitations of agencies vis a vis regulated parties. Proponents of the theory note that agencies, when faced with a regulatory battle with powerful industry members, are frequently obliged to capitulate to the superior resources commanded by their regulated entities. In many, and arguably most instances of federal regulation, limited financial and political resources will require an agency to "rely on the regulated industries themselves to furnish the information upon which the regulators based their decisions,"<sup>36</sup> a reliance which invariably creates "an institutional bias favoring potentially responsible parties."<sup>37</sup> As

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36. Dion Casey, *Agency Capture: The USDA's Struggle to Pass Food Safety Regulations*, 7 KAN. J.L. & PUB. POL'Y 142, 142 (1998). See Stewart, *supra* note 16, at 1686.

Limited agency resources imply that agencies must depend on outside sources of information, policy development, and political support. This outside input comes primarily from organized interests, such as regulated firms, that have a substantial stake in the substance of agency policy and the resources to provide such input. By contrast, the personal stake in agency policy of an individual member of an unorganized interest, such as a consumer, is normally too small to justify such representation.

*Id.*

37. Bradford C. Mank, *Superfund Contractors and Agency Capture*, 2 N.Y.U. ENVTL. L.J. 34, 54 (1993). See Stewart, *supra* note 16, at 1686.

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Thomas Merrill characterizes the concern, agency capture is the likely consequence when “compact groups whose members have high per capita stakes in a controversy out-organize and out-influence larger more diffuse groups, resulting in a pervasive ‘majoritarian bias’ on the part of decisionmakers.”<sup>38</sup> In addition to more substantial resources, and more focused motivation, the entities that are the primary targets of the regulation of specific agencies naturally become extremely familiar with the decision-making processes and structures of the agency, making their efforts to influence these procedures inherently more successful than anyone else’s.<sup>39</sup>

Furthermore, the very structures that are instituted to facilitate public participation in the administrative process — most notably the notice and comment procedures for informal agency rulemaking — enhance these advantages by providing a relatively limited time period to provide comments to proposed regulations.<sup>40</sup> A focused, highly motivated, and concerned regulated entity will have a significant advantage and a genuine opportunity to dominate this comment process from start to finish, long before less informed entities can even begin to get their acts together.<sup>41</sup>

Mark Seidenfeld recently articulated the traditional concept of capture:

[F]irms in regulated industries and interest groups with strong central staffs still occupy a favored position in regulatory and

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The resources – in terms of money, personnel, and political influence – of the regulatory agencies are limited in comparison to those of regulated firms. Unremitting maintenance of an adversary posture would quickly dissipate agency resources. Hence, the agency must compromise with the regulated industry if it is to accomplish anything of significance.

*Id.*

38. Merrill, *supra* note 19, at 1053; see Wiley, *supra* note 28, at 724.

In many political situations, each member of a group benefits from successful joint action irrespective of that member’s own participation. Thus, if the group is large, individual members have little incentive to participate because participation is personally costly and contributes little to the group’s chances for successful joint action. Small groups encounter fewer of such problems. If group members behave in this rational self-interested manner, then ‘there is a systematic tendency for exploitation of the great by the small’; less numerous, more intensely concerned special interests can predictably outmatch more numerous, more mildly concerned consumer or ‘public’ interests in legislative or regulatory fora – even though the actions of special interests imposed a net loss on society.

*Id.* at 724-25 (quoting M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 29 (1965)).

39. See SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, *REGULATORY LAW AND POLICY* 113 (1998).

40. See Mashaw, *supra* note 33, at 127-28.

41. For a discussion of the limiting effects of APA notice and comment regulations, see Mashaw, *supra* note 33, at 127-28.

political structures that allows them an advantage in influencing agency decisions. They have the incentive and the means to monitor what the agency does on a day-to-day basis. They often have information without which a regulatory agency cannot do its job. A regulated entity frequently is a large corporation with resources to appeal agency decisions at every level. Finally, regulated entities and special interest groups often contribute significantly to political campaigns. For all of these reasons, administrators have a strong incentive to cooperate with entities directly subject to their regulatory decisions and other interest groups that regularly participate in the agency's proceedings.<sup>42</sup>

Capture theorists, in addition to describing the various political and institutional advantages enjoyed by industry representatives that make capture of an agency possible, have also provided convincing arguments for why regulators will often become willing and enthusiastic participants in their own seduction. As Professors Jerry Mashaw and David Harfst have observed:

Once in operation, the regulatory scheme is maintained in the interest of the regulated industry by bureaucrats who look both to Congress and to the industry for their rewards. These rewards flow from industry in the form of social and business relations and the prospects of further career opportunities in the private sector. Rewards also include the goodwill of oversight and appropriations committees staffed by legislators who can derive the greatest electoral payoff from the regulation in question.<sup>43</sup>

The development of capture theory in the mid-twentieth century had a significant impact on the broader development of administrative law both in the courtroom and the classroom. The theory called into question the second of the justifications mentioned above for the existence of the administrative state, and also for the provision of deference to administrative agencies by courts charged with the task of reviewing their regulatory activities – the concept of agency “expertise.”<sup>44</sup>

The very structure of administrative law since the New Deal and the explosion of federal involvement in the daily life of the nation – from the Administrative Procedure Act to the key Supreme Court cases which helped define the APA's standards like *Universal Camera*,<sup>45</sup>

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42. Seidenfeld, *supra* note 11, at 464.

43. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 16 (1990).

44. Merrill, *supra* note 19, at 1060.

45. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).



*Overton Park*,<sup>46</sup> *Chevron*,<sup>47</sup> and even later cases more skeptical of agency function, such as *State Farm*<sup>48</sup>—is founded on the assumption that agency action is entitled to some measure of “deference” because it is informed by the kind of specific expertise that agencies are presumed to not only enjoy, but to incorporate in their factual determinations, legal interpretations, or policy pronouncements. If one accepts the notion that some, if not many, agencies are the victims of the hyper-influence of the very private entities that they are obliged to regulate, then the assumption that any expertise the agencies might have is actually being relied upon in their decision-making process is dubious, at best, and the relationship between the courts and the agencies would require a dramatic restructuring. Indeed, the development of more exacting and penetrating review of agency decision making, particularly agency policy making, in *State Farm* and other cases,<sup>49</sup> was based in large part on the belief among many influential federal judges that capture was a widespread phenomenon, and that courts should do more to require that agencies actually take a “hard look” at the policy issues before them, and apply expertise, and not industry bias, to their determinations.<sup>50</sup>

It should be noted that the dynamics of capture do not necessarily suggest malevolent motives on the part of the regulators or the regulated. Of course, some individuals involved in complex regulatory relationships could have unduly venal or self-aggrandizing

46. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

47. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

48. While the Court in *State Farm* invalidated the agency action at issue based on its conclusion that it had not examined “the relevant data and articulat[ed] a satisfactory explanation for its action” it nonetheless noted that its standard of review for agency policymaking was “narrow,” and that because of the superior expertise of the agency, a reviewing court should “not substitute its judgment for that of the agency.” *Motor Vehicles Mfg’s Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

49. See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (discussing a court’s role in reviewing an administrative decision). The Circuit Court held that the court should properly intervene,

not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision-making.

*Id.*

50. See Civil Aeronautics Board, *infra* text pp. 415-16; Seidenfeld, *supra* note 11, at 462-63 (discussing the changes in the nature of administrative practice, including judicial review of administrative action, that has resulted from the capture phenomenon). See generally Gillette & Krier, *supra* note 32 (discussing the relationship between agency capture and judicial deference to agency action).

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motivations, but the story of the phenomenon is not primarily (or at least not exclusively) one of villains and blame. Professors Gillette and Krier noted, after listing some of the commonly identified factors that lead to agency capture, that these

examples mix sinister elements with benign ones, but the capture argument hardly depends on the former. There is nothing sinister in the fact that various citizens might cluster into interest groups for the purpose of contributing recourses – data, perspectives, arguments – to administrative deliberation. Nor is it troubling that each such group might hold some sort of proxy for one or another popular attitude or value . . . . Information, points of view, voter attitudes, and dollars as a measure of intensity of voter attitudes are, after all, obviously relevant to making decisions in the public interest (unless the public interest means something utterly unrelated to what the public is interested in).<sup>51</sup>

The problem, therefore, comes less from the evil acts of individuals seeking to hijack the regulatory process, than from breakdowns in the system that allow only some of the self-interested voices to be heard, and therefore, to have inordinate influence over the agency's policy making.<sup>52</sup>

Capture theory has had its share of critics, of course, who have doubted the real impact of the dynamic, or, more often, have questioned its status as an independently identifiable phenomenon distinct from the broader political dynamics identified increasingly over the past two decades by the “public choice” school of administrative law.<sup>53</sup> Recent scholars have questioned the notion that

51. Gillette & Krier, *supra* note 32, at 1066.

52. Gillette & Krier, *supra* note 32, at 1067.

Almost by definition, interest group pluralism can endorse decisions as ‘in the public interest’ only if all the various interest groups are indeed able to voice their wants effectively. If, instead, some groups enjoy a comparative advantage in catering to administrative needs and desires (that is, if the pluralist process is too singular, not sufficiently plural), there arises the danger that agency attention will be captivated by too narrow a range of interests and be diverted from an appropriately public perspective.

*Id.*

53. For summary of public choice theory, see Jody Freeman, *supra* note 23, at 561.

Public choice theory understands administrative decision as the product of interest group pressure brought to bear on bureaucrats seeking rewards such as job security, enhanced authority, or the favor of powerful legislators upon whom the agency depends. Public choice theory shares with interest representation a political model of interest group pressure on agencies, but it goes still further, treating agency outcomes as products of interest group appeals to individual bureaucrats' preferences. It extends the pathology of capture, moreover, to legislatures. Like legislators motivated by desire for re-election, bureaucrats rationally pursue their own interests when exercising administrative discretion. The theory treats administrative procedures, moreover, as a set of controls imposed on agencies by legislators seeking to

the administrative agency is in some sense uniquely susceptible to the kinds of concentrated interest group pressure that results in the loss of independent governmental authority as compared to other governmental entities.<sup>54</sup> Specifically, observers have noted that certain pseudo-regulatory bodies within legislatures, most notably powerful oversight committees of the U.S. Congress, suffer from similar dynamics of capture, as a result of structures and modalities that are similar to those of the agencies. These similarities include authority that has a disproportionate effect on a small and identifiable portion of the population, long-term staff membership, and a dramatic “revolving door” of exchange of personnel from the regulated entity, to the committee staff, and perhaps even back again.<sup>55</sup> According to many of these scholars, capture theory is merely an articulation of a specific instance of a much broader phenomenon – “the disproportionate influence of one type of group [business] on one governmental institution [the administrative agency]” – within the broader framework of the influence of powerful private interests on majoritarian governmental structures in general.<sup>56</sup>

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facilitate interest group monitoring of agencies.

*Id.*; For discussion of “public choice” administrative theories in general, see generally David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000); David B. Spence, *Administrative Law & Agency Policy-making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407 (1997); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW & PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355 (1999); William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Cynthia R. Farina, Symposium, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam’s Razor*, 28 FLA. ST. U. L. REV. 109 (2000).

54. See Merrill, *supra* note 19, at 1051-52.

Implicit in capture theory is the understanding that the central problem of the administrative state is a relatively limited one. Only administrative agencies are subject to the unique pathologies of bureaucracy such as interest group capture. Rival institutions, like the legislature and the courts, were implicitly regarded as being immune from these pathologies or at least as suffering from them to a significantly diminished degree. Moreover, in terms of interest group influence, the problematic actor was seen to be the business lobby. Other groups, such as labor unions or advocates for civil rights or the environment, were tacitly assumed to be champions of the public interest.

*Id.*

55. See Mashaw, *supra* note 33, at 267-70 (regarding their description of the impact of capture on congressional committees); see also Merrill, *supra* note 19, at 1053 (referencing the generalization of capture theory as “pessimism about the performance of administrative agencies . . . to include all political institutions”).

56. Merrill, *supra* note 19, at 1069.

[M]ature public choice theory, as it emerged in economics and political science departments in the 1980’s, works with a far more general model of governmental action that disregards these implicit limitations. Modern

Notwithstanding the recent tendency to see agency capture theory as a kind of quaint and naïve holdover from a less sophisticated time, however, there is still a great deal to be gained from focusing attention on the threats from private hyper-influence that are idiosyncratic to federal administrative agencies. One aspect of agencies that creates an increased likelihood of capture, even as compared to other government entities that are subject to extensive and organized public pressure, is the fact that agencies will often focus on only one industry and will consequently develop regulatory relationships with only a small set of truly interested parties. So, while legislatures and committee staffs might be equally prone to the pressures imposed by lobbyists and other special interest groups, the diversity of their regulatory agenda will help limit the influence of any one industry over their decision-making process. But the “one-issue” agencies have no such insulation born of diversity, and can therefore be expected to be far more likely candidates for effective, long-term capture.<sup>57</sup>

Another aspect of the capture theory that has fostered criticism has been its tacit assumption that the exclusive perpetrators of agency capture are business or industrial lobbying forces.<sup>58</sup> Some argue that the dynamics which give rise to agency capture can be just as effectively manipulated by other kinds of interest groups that enjoy the same, or at least similar, advantages of resources compared to relevant regulatory entities.<sup>59</sup> However, while non-private entities

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public choice theory regards all organized groups demanding services from political institutions – including not just business and producer groups, but also environmental groups, labor unions, civil rights groups, and rent control activists – as being subject to a unitary logic of collective action. And modern public choice theory regards not just administrative agencies but also legislatures, the President, and to an increasing degree even the courts, as institutions that should be modeled on the assumption that they seek to maximize their own self-interested ends in the way they respond to these multifarious groups.

*Id.*

57. See John C. Coates IV, *Private vs. Political Choice of Securities Regulation: A Political Cost/Benefit Analysis*, 41 VA. J. INT'L L. 531, 582 n.150 (2001) (arguing that the removal of regulatory authority over securities from the Federal Trade Commission and the placement of that authority with the SEC facilitated capture by the industry by narrowing the scope of the agency's interest and making its “regulatory clientele more homogenous.”) (quoting Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formulation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 925 (1994)).

58. See Merrill, *supra* note 19, at 1051-52.

59. Seidenfeld, *supra* note 11, at 463.

[T]echnological advances and an awareness of interest group politics have fostered access to agency proceedings by representatives of groups with diffuse interests – the so-called public interest groups. Public interest group representatives, together with an active and diverse press, bring pro-industry

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have similar incentives to seek to control federal regulation, and may have similar, and perhaps in some instances equal, resources, the proper function of government regulation seems to be less threatened by influence from such public groups.

As a general matter, the interests of these groups will be broad public interests (for example, health, safety, or environmental protection) and their influence will therefore be less likely to lead the agency to favor private interests at the expense of the public. This is not to say that these public interest organizations will always be advocating the proper government action (that their version of what is in the “public interest” will be the only or the right version), or that there are not other concerns created by undue influence on their part. But, the consequences of agency capture by such an entity are likely to pose significantly different threats to the administrative state than industrial or other “private” party capture. An industry representative could be expected to have profit as its primary (if not exclusive) motivation for seeking to influence a government official. This interest, if served, would certainly have some impact beyond the industry’s bottom line (as discussed above, increased employment, economic health, etc.), but that impact is likely to be relatively limited. On the other hand, the classic “public interest” entities are invariably organized around broader and more diffuse interests in issues which, by their nature, have an inherently broad impact on large portions of the society, if not the society as a whole. While it is certainly possible that the perspectives of these public interest entities might enjoy inordinate attention (and might be ultimately detrimental to the “public interest”), they are much more likely, than those of industry representatives, to be “public-focused” perspectives of the kind that agencies are designed to factor into their decisions.

### *B. The Regulatory Consequences of Agency Capture*

As a general matter, the current debate seems to focus less on whether there is a phenomenon of hyper-influence by non-governmental entities of governmental decisions, than on how widespread that phenomenon is – on what kinds of entities are the

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agency decisions to light . . . . Public interest groups retain staff members who monitor and evaluate agency policies and lobbyists who bring adverse agency decisions to the attention of legislative committee staffs or even committee members. These groups also frequently file citizen suits challenging such decisions in court.

*Id.*

victims of this influence and what kinds are wielding it. If we assume the existence of at least some degree of “capture” of federal administrative agencies by their regulated communities (within the vast panoply of other similar versions of the same dynamic), we must next determine what regulatory consequences are likely to result from any particular instance of the phenomenon.

By definition, successful and long-standing (if not permanent) agency capture will result in regulation that provides *private* advantages to the regulated entities (presumably some kind of financial advantage in the case of regulated for-profit corporations) at the expense of a broadly defined *public* interest. Therefore, we would expect to see the promulgation of regulations, and/or the construction of enforcement mechanisms, which serve in some empirically observable sense to create a maintainable status quo where “private” interests are perpetually favored over “public” (again assuming that the two are actually at odds in any specific instance), or regulatory structures which all but ensure that the public interest will lose out to the competing private interest (or less extensive “public” interest) in an overwhelming majority of disputes.<sup>60</sup>

The phenomenon need not result in completely ineffective, or even obviously lax regulation to be viewed as a regulatory product of agency capture. The phenomenon will be identifiable, instead, when it can be shown that an agency makes a regulatory choice from among an array of possible alternatives because the choice provides advantageous results to a regulated, and dominating, private group, at the expense of a countervailing public interest that should have governed its decision. While it will often be difficult to isolate the phenomenon of agency capture and separate it from the myriad

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60. Wiley, *supra* note 28, at 725-26.

Government at virtually every level offers enormously lucrative potential benefits (such as price supports and entry-barrier protection against competition) to competing producers. Typically these government benefits are temptingly available. A relatively small number of incumbent competitors support such measure with intensity, while consumer opposition is diluted and widely distributed. Producers are thus able to act as an effective group far more frequently than their opposition. Government market intervention is therefore very often an *anticonsumer* effort to enlarge producers' share of social wealth. Compounding its anticonsumer redistributive character is the dead weight loss such market regulation usually creates; the high prices that follow from restricted output reduce both the absolute size of the economic pie and the relative size of the consumer's slice. In static terms, in short, such regulation tends to impose a cost on society as a whole in order to shift wealth from consumers to producers.

*Id.*

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other forces that impact the process of specific regulatory initiatives,<sup>61</sup> an analysis of some specific regulatory structures, and the context of their development and impact, should provide credible evidence of the hyper-influence of certain regulated entities.

Various scholars have sought to marshal such evidence in support of a specific capture conclusion. It has been argued, for example, that “the meat and poultry industries” have captured the U.S. Department of Agriculture (“USDA”) and the Food Safety and Inspection Service, resulting in insufficient meat regulations. These insufficient meat regulations have in turn created serious health risks to the American public. Specifically, Dion Casey observed that the proposal of a new USDA regulation that sought to diminish the instance of e-coli bacteria contamination in meat by requiring industry representatives to establish “Hazard Analysis and Critical Control Point” system was zealously opposed by the American Association of Meat Processors, based on the potential catastrophic economic impact such a rule would have on a large percentage of their member businesses.<sup>62</sup> Ultimately, the proposal was abandoned by the agency in the face of a combination of direct pressure from the affected groups, and pressure from Congress initiated by the affected groups.<sup>63</sup> Less than two years after the promulgation of the final, watered-down rule, the USDA was forced to recall more than twenty-five million pounds of ground meat so that it could be inspected for potential e-coli contamination.<sup>64</sup> Instead of the presence of the bacteria in the meat being either discovered, as a result of the originally

proposed procedures for processing, the contamination only became apparent when sixteen people were diagnosed with e-coli food poisoning in Colorado in 1997.<sup>65</sup>

Professor Mark Seidenfeld cites another example of a specific instance of agency capture, when he notes concerns raised about the Nuclear Regulatory Commission (“NRC”) and its relationship with its regulated community, and the impact of that relationship on its activities. He notes that given the limited genuine competition for new licenses for nuclear power plants, the NRC’s primary role is

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61. Professor Mashaw notes the difficulties in developing an “empirical record” of the specific regulatory impacts of agency capture. For a complete discussion of some recommendations for developing a “more detailed theory with determinative procedural implications for testing,” see Mashaw, *supra* note 33, at 118-24.

62. Casey, *supra* note 36, at \*6-7.

63. See Casey, *supra* note 36, at \*8.

64. See Casey, *supra* note 36, at \*10.

65. See Seidenfeld, *supra* note 11, at 464-65.

oversight of existing plants.<sup>66</sup> This exclusive role leaves the agency “especially prone to domination.”<sup>67</sup> Seidenfeld notes that:

there is little incentive for the NRC to require deliberation by staff members with varied perspectives. Staff members tend to have a common background in nuclear engineering and many come from the Navy nuclear program. This background instills in the NRC staff a common confidence in technology’s ability to overcome basic problems. In addition, political oversight is not likely to prevent interest group domination. Decisions not to enforce often are based on information to which the agency is privy that is protected from public disclosure. Moreover, the nuclear power industry contributes heavily to the campaigns of key congressional committee members, who have stymied efforts to beef-up agency monitoring and enforcement of rule violations. Not surprisingly, the NRC is perceived as an agency heavily beholden to the industry it regulates.<sup>68</sup>

In addition to these regulatory areas, Professor Timothy Lytton has argued that agency capture has had a significant impact on the regulatory supervision of the gun industry.<sup>69</sup> He notes that “decades of criticism by the gun industry and the NRA [National Rifle Association] have made the Bureau of Alcohol, Tobacco and Firearms, the federal agency responsible for promulgating and enforcing firearms regulations, reluctant to publish information unfavorable to gun manufacturers.”<sup>70</sup> He further notes that the agency’s criticisms have focused instead on limited and presumably exceptional cases of “irresponsible dealers.”<sup>71</sup>

Professor John Wiley also provided a discussion of the possible impact of agency capture on antitrust regulation, specifically in the area of “state action doctrine,” which immunizes certain anti-competitive acts by state governments from the impact of anti-trust restrictions.<sup>72</sup> He notes that courts that reviewed the development of these regulations were skeptical of the impact of the input of regulated entities on the ultimate formation of regulations, and have consequently shown a willingness to reject such regulatory forms:

As market regulation has become the target of increasing

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66. See Seidenfeld, *supra* note 11, at 464-65.

67. Seidenfeld, *supra* note 11, at 465.

68. Seidenfeld, *supra* note 11, at 465.

69. Timothy Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247 (2000).

70. *Id.* at 1253.

71. *Id.*

72. See Wiley, *supra* note 28, at 713.



criticism for being an instrument by which industry can exploit the public, judicial attitudes toward states' rights and regulation – once so neatly congruent – have collided. On eight occasions since *Parker*, the [Supreme] Court has shown a willingness to disregard the deference to states' rights that was the bedrock of *Parker's* reasoning. My argument is that the Court has done so in a largely unarticulated but historically understandable response to growing fears of regulatory capture.<sup>73</sup>

In addition to these examples of specific instances of the regulatory impact of agency capture,<sup>74</sup> Professor Wiley has noted that concerns about capture, and consequently about the negative impact of the regulatory decisions of suspect agencies on the public, served as part of the motivation for the deregulation of various activities including stock brokerage fees, bus transportation, cable television, natural gas, oil, telecommunications, broadcasting, banking, electric utilities, trucking, railroads, taxi service, and of most interest to this discussion, air passenger transport.<sup>75</sup>

While none of these studies provide conclusive proof of the specific instances of capture discussed, (nor do many even claim to do so) they all provide similar and compelling evidence of regulatory activity that is completely consistent with the phenomenon. In all of these cases, we are presented with an agency that is given the authority to regulate a certain activity or set of activities, and is consequently expected to have its regulatory decisions informed by its own articulation of the "public good." We then see evidence that the agency appears to be distracted from this public focus by the specific private interests of its regulated community, with its concentration shifting, instead, to these specific needs of the

73. See Wiley, *supra* note 28, at 728. Similar types of concerns about undue influence on agency decisionmakers were raised in litigation concerning regulations by the Federal Communications Commission of "subscription television" in the early 1970s. In *HBO v. FCC*, the D.C. Circuit addressed arguments from consumers and opposition industry representatives concerning the influence that the broadcast networks enjoyed with FCC regulators. See *HBO v. FCC*, 567 F.2d 9 (1977).

74. See also Seidenfeld, *supra* note 11, at 461 (discussing other specific instances of alleged agency capture).

Studies of agencies as diverse as the Tennessee Valley Authority, the Federal Maritime Commission, the Federal Communications Commission, and the Interstate Commerce Commission found evidence of capture. Although the studies may have overestimated the influence on agency staff of opportunities for jobs in regulated industries, they consistently found that agencies harbored biases in favor of focused interest groups affected by agency decisions.

*Id.*

75. See Wiley, *supra* note 28, at 726.

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dominant private interest. So, while no “smoking gun” has been provided, and some plausible alternative explanations for the regulatory choices remain, we are left with the strong (and justifiable) suspicion that safer meat, guns, power plants, and a myriad of other public goods have been systematically sacrificed to the various relevant private interests, most often the profit motives of the industry representatives that wield the hyper-influence within agencies, by an array of agencies charged with the responsibility to regulate and control those interests.

The question that the remainder of this Article will address is whether in the area of airline security there is similar compelling evidence that the FAA has lost its public focus and has focused undue attention on the private interests of its regulated community, providing supportive (if, again, not conclusive) evidence of the various allegations that it has been captured.

## II. AGENCY CAPTURE AND THE FAA

As noted above, it can be difficult to determine exactly which administrative entities might be suffering from the effects of agency capture, and exactly how extensive the impact of any such capture is at any given time. The mere accusation that an agency is subject to the hyper-influence of private interests is, of course, insufficient by itself to demonstrate that agency capture has occurred. Evidence that would provide conclusive proof of the phenomenon is difficult even to imagine, let alone gather. One is unlikely to see a presentation by a federal agency of an award for “most influential lobbying group of the year” or a memo from an agency official to a prominent industry representative thanking the representative for the useful instructions concerning the agency’s activities for the year, and requesting guidance for the year to come. Consequently, observers who have sought to identify and examine instances of agency capture have relied primarily on an analysis of the regulatory and enforcement structure that the agency has applied to its relevant industries in order to determine where such structures might favor the private interests of the regulated parties at the expense of the broader public interest.

Certainly, one instance of any agency action which can be demonstrated to have favored private interests above those of the public as a whole would be indicative of agency capture. But, such an action could also be motivated by any number of other factors (such as the agency’s honest miscalculation of the impact of the action, or other kinds of error). Evidence of repeated instances of decision-

making favoring private interests, however, or an identifiable trend of such decisions in a particular agency would provide a more sound basis for a conclusion that a private interest group has and continues to wield some kind of controlling influence on an agency. Acknowledgment of such a pattern or trend by another government body with some kind of relevant expertise would further support an agency capture conclusion.

In order to test the various allegations that the FAA has been captured by the airline industry, this Article will provide a brief summary of the history of the agency. It will also review its portfolio and basic regulatory and enforcement structure, which relies extensively on the self-monitoring of regulated groups. It will also note the sharp criticism of the agency's record of regulating the safety of air travel by the National Transportation Safety Board, the government entity responsible for investigating airline accidents. Finally, it will summarize some of the concerns raised about the influence of the airline industry on FAA policy-making raised by courts over the past few decades. The combination of these factors will provide support for the argument that the FAA has consistently promoted the interests of the airline industry at the expense of the broader public interest, including airline safety and security.

#### A. *History and Regulatory Structure of the FAA*

The first federal regulations of non-military air travel in the United States came in the nascent days of aviation. The Air Commerce Act of 1926 vested regulatory authority over navigable airspace in the Department of Commerce, the President, the Department of Defense, and the various states.<sup>76</sup> In 1938, the Civil Aeronautics Act created the Civil Aeronautics Authority effectively consolidating this diffuse regulatory authority into one federal agency.<sup>77</sup> Two years

76. See Matthew J. Kelly, *Federal Preemption by the Airline Deregulation Act of 1978*, 49 CATH. U. L. REV. 873, 875-76 (2000) (discussing early federal aviation regulation).

77. See Jeffrey M. Jakubiak, *Maintaining Air Safety at Less Cost*, 6 CORNELL J.L. & PUB. POL'Y 421 (1997) (stating "although the Civil Aeronautics Act of 1938 fell short of openly declaring exclusive jurisdiction of the Federal Government over air transportation . . . there was very little left for the states to do in aviation except, perhaps, establish and maintain airports, and cooperate with the Federal Government."). See also Jeff Mosteller, *The Current and Future Climate of Airline Consolidation*, 64 J. AIR L. & COM. 575, 577 (1999) (discussing the motivations behind the passage of the 1938 Act).

Congress intended to protect the young industry from excessive competition while also maintaining a certain level of rivalry to promote efficiency. Congress chose to regulate the young industry after noting the pre-regulation rise of barons in the railroad industry. Regulation of the airline industry was designed to avoid the deleterious consequences of cutthroat and excessive competition, and thereby enhance economic stability, safety,

later, the Authority was divided into the Civil Aeronautics Board (“CAB”) and the Civil Aeronautics Administration (“CAA”), giving the former economic regulatory authority over things like airline fares and market entry, while the latter was authorized to promulgate regulations on airline safety.<sup>78</sup> In 1958, the Federal Aviation Act was signed into law reorganizing the former CAA into the new Federal Aviation Agency (“FAA”).<sup>79</sup> The CAB and the new FAA both had the status of “independent” regulatory agencies, with the former retaining the authority to regulate the economic consequences of civil aviation, while the latter was authorized to promulgate regulations concerning civil air safety.<sup>80</sup>

In 1966, the Transportation Act was enacted, creating the U.S. Department of Transportation, transferring the FAA under the auspices of the new Department, and consequently, the Executive Branch,<sup>81</sup> and creating “a comprehensive scheme of federal government regulation regarding interstate air transportation.”<sup>82</sup> The FAA retained its acronym (although “Agency” was changed to “Administration”) and its authority to regulate the safety of civil air travel.<sup>83</sup> However, the new statute provided a critical new imperative to the agency, to “foster air commerce.”<sup>84</sup> This additional imperative has had a profound impact on the development of the FAA and its administrative functions over the past four decades.

From its inception, the FAA was given the difficult task of balancing two interests which might be frequently, if not inherently, in conflict: the protection of airline safety on one hand, and the “fostering” of successful air commerce, and consequently, the promotion of airline profitability, on the other.<sup>85</sup> The complications

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and the sound growth and development of this young industry.

*Id.*

78. See Mosteller, *supra* note 77, at 424.

79. See ROBERT BURKHARDT, *THE FEDERAL AVIATION ADMINISTRATION* 25 (1967).

80. *Id.*

81. *Id.*

82. Donald J. Frenette, *Avoiding Preemption Under the Airline Deregulations Act*, 17 MISS. C. L. REV. 171, 173 (1996).

83. Burkhardt, *supra* note 79, at vii.

84. Frenette, *supra* note 82, at 173.

85.

[T]he FAA is not only faced with internal conflicts of interest, but it also creates conflicts of interest in airlines and in aircraft manufacturers. For example, the FAA is charged under the Federal Aviation Act with the often competing goals of promoting air safety and encouraging the development of civil aeronautics and air commerce.

Jakubiak, *supra* note 77, at 422.

created by this “dual mandate” have not escaped the attention of legal commentators, the mainstream media,<sup>86</sup> or former President Clinton’s Secretary of Transportation, Frederico Peña, who called on Congress to “reexamine the FAA’s ‘dual mandate.’” These concerns led to an amendment to the Transportation Act, which removed the “promoting” language, and provided more emphasis on safety. The new language, however, did not provide any structural changes to the FAA’s mandate, such as, removing some of the FAA’s existing authority and transferring it to another agency.<sup>87</sup> Indeed, the express intent of Congress concerning the amendment was to address the *public perception* that the FAA was insufficiently committed to strict regulation of the airlines, but not to change the scope of its authority or functions in any substantial way.<sup>88</sup>

The history of the FAA, like that of many regulatory agencies, has been marked by periods of regulatory zeal. More than twenty years of relatively strict regulatory oversight,<sup>89</sup> a period characterized by one expert as being defined by “a somewhat protectionist arrangement” between the CAB and the airlines,<sup>90</sup> was followed by

86. For an exemplary list of media discussions of the FAA’s “dual mandate,” see SUN SENTINEL, June 6, 1999, at G1; PITTSBURGH POST GAZETTE, Apr. 6, 1999, at A8; TIME MAG., Jan. 26, 1998, at 6; PEORIA J. STAR, June 30, 1996, at A6; AGENCE FRANCE-PRESSE, June 26, 1996; CHRISTIAN SCI. MONITOR, June 24, 1996, at 20.

87. See Lea Ann Carlisle, *The FAA v. the NTSB: Now that Congress has Addresses the Federal Aviation Administration’s “Dual Mandate,” Has the FAA Begun Living up to its Amended Purpose of Making Air Travel Safer, or Is the National Transportation Safety Board Still Doing its Job Alone?*, 66 J. Air L. & Com. 741, 755 (2001) (explaining the passage of the Federal Aviation Reauthorization Act of 1996).

On October 9, 1996 Congress passed Public Law 104-264, also known as the Federal Aviation Reauthorization Act of 1996, which addressed and amended various troublesome provisions of the statute governing the aviation industry. Basically, all this did was change the word from ‘promoting’ to ‘encouraging’ aviation, while inserting a few safety concerns.

*Id.*

88. Public Law 104-264 included a kind of disclaimer as to the intended impact of the provision:

We do not intend for the enactment of this provision to require any changes in the FAA’s current organization or functions. Instead, the provision is intended to address any public perceptions . . . that promotion of air commerce by the FAA could create a conflict with its safety . . . mandate.

Carlisle, *supra* note 87, at 756 (quoting Mary Schiavo, *Mary Schiavo’s Safety Wish List*, AIR SAFETY WK., May 18, 1998).

89. See H.R. REP. NO. 95-1211, at 1-2 (1978) (reprinted in U.S.C.C.A.N. 3737) (observing that airlines were “subject to extensive economic regulation by the CAB” and did not enjoy “the same control over basic operational decisions as management in other industries”).

90.

The CAB disfavored the demise of a major airline or the creation of a new airline. The CAB promoted this policy by “handicapping” the competition: it expected airlines to use some of their profits from lucrative routes to

the passage of the Airline Deregulation Act in 1978, which “significantly alter[ed] the regulatory atmosphere of the airline industry” that existed up to that time.<sup>91</sup> The provision sought to reconcile the inherent tensions in the FAA’s dual mission by seeking to “encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services and for other purposes.”<sup>92</sup> It also served to further complicate the FAA’s dual-role problem by transferring portions of the CAB’s authority over direct economic regulations of airlines to the FAA.

The FAA’s regulatory mandate and policy have been impacted by various factors during the past few decades. In addition to its dual mandate, the FAA has been impacted, perhaps most dramatically, by instances of airline fatalities and the resulting public and governmental reaction to them. For example, in response to the crash of TWA flight 800 off the coast of Long Island, which raised ultimately unsubstantiated concerns about the role of terrorism in the accident,<sup>93</sup> the FAA implemented several heightened safety measures<sup>94</sup> and organized a White House Commission on Aviation Safety and Security.<sup>95</sup> On February 12, 1997, forty-five days after it was convened, the Commission, chaired by then Vice-President Al Gore (known, as the “Gore Commission”) offered fifty-seven proposals for

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subsidize marginal routes while providing weaker airlines with enough routes to keep them from failing. This practice proved effective from promoting the policy as almost all major airlines survived the regulation period, and no new airlines were created.

Mosteller, *supra* note 77, at 577-78.

91. Frenette, *supra* note 82, at 174.

92. Frenette, *supra* note 82, at 174.

The theory behind the legislation was that air carriers would provide better services and lower fares for passengers through free entry into and expansion in the system, whereas the detailed regulatory procedures had restricted this in the past. The main expectations regarding deregulation of the airline industry included the following: (1) improved service to the public, (2) lower air fares, (3) higher profits for carriers, and (4) a more competitive commercial airline industry.

*Id.* (quoting ROBERT M. KAVE & ALLEN D. VOSE, AIR TRANSPORTATION 12-17 (10th ed. 1987)).

93. See Kenneth M. Mead, AVIATION SECURITY TECH., Oct. 11, 2001 (statement of Kenneth M. Mead, Inspector General U.S. Department of Transportation, before the House Committee on Transportation and Infrastructure Subcommittee on Aviation), available at 2001 WL 26187120.

94. See Robert W. Hahn, *The Economics of Airline Safety and Security: An Analysis of the White House Commission’s Recommendations*, 20 HARV. J.L. & PUB. POL’Y 791, 792 (1997).

95. *Id.*

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improvements to commercial aviation safety, and security.<sup>96</sup> These proposals included setting a national goal of reducing the airline accident rate by eighty percent within a decade and accelerating the development of the National Airspace Systems modernization. In addition, the Commission proposed thirty-one recommendations for tightening airport and airline security, notwithstanding its acknowledgment that “although the threat of terrorism is increasing, the danger of an individual becoming a victim of a terrorist attack – let alone an aircraft bombing – will doubtless remain very small.”<sup>97</sup>

Of these recommendations, seven had the most direct potential impact on the FAA and its regulatory portfolio,<sup>98</sup> including: requirements for airport vulnerability assessments; deployment of rigorous background checking systems for both passengers, airline and airport employees; deployment of existing but unused security technology and the expanded use of bomb sniffing dogs; establishment of a joint government-industry research and development program; certification of security screening companies and aggressive testing of screener systems and performance; providing key airline and airport personnel access to classified information; and implementing full bag-match requirements.<sup>99</sup> Immediately following the recommendations, the FAA began the process of promulgating regulations<sup>100</sup> to implement some of the recommendations and initiated studies or other preparatory activities in regard to others.<sup>101</sup>

As of September 11, 2001, however, most observers agreed that the agency had made little progress in implementing the new procedures,<sup>102</sup> and indeed, that “had those recommendations been

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96. *Id.*

97. *Id.* at 795-96 (quoting WHITE HOUSE COMM. ON AVIATION SAFETY AND SECURITY, FINAL REPORT TO PRESIDENT CLINTON 23 (1997)).

98. Various recommendations involved functions of the FBI and other law enforcement entities, or applied directly to private air carriers. See Hahn, *supra* note 94, at Table 1.

99. See *id.*

100. Indeed, there is an indication that the FAA was prepared to issue regulations implementing some of the Gore Commission recommendations during the week of September 17, 2001. See George Leopold, *FAA Security Regulations were in Motion*, ELECTRONIC ENGINEERING TIMES, Sept. 17, 2001, at 112.

101. See Hahn, *supra* note 94, at Table 1.

102.

The FAA has failed to carry out the major recommendations regarding aviation security. Our commission required ‘that the Secretary of Transportation report publicly each year on the implementation status of these recommendations.’ There has been no report since 1998. The Transportation Department’s inspector general has repeatedly commented

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implemented within the spirit and intent of the commission, the plans to attack on September 11 might have been detected well before they occurred.”<sup>103</sup> Specifically, some argue, quicker implementation of passenger and airport employee screening recommendations<sup>104</sup> might have identified the September 11 hijackers as potentially dangerous, or identified possible accomplices working for airlines or airports.<sup>105</sup> Furthermore, no progress had apparently been made by September 11 in the development of certification and evaluation procedures for security screening companies employed by airlines to provide airport security checks.<sup>106</sup>

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on the FAA’s inadequacies in background checks and airport access controls . . . . The TWA 800 accident was indeed tragic, so much so that it produced a presidential commission. But once that tragedy was ruled an accident – not a terrorist attack – the sense of urgency passed. The FAA returned to business as usual, the commission’s recommendations on security all but ignored.

General John Michael Loh (ret.), *Viewpoint*, AVIATION WK. & SPACE TECH., Oct. 8, 2001.

103. *Id.* (“Few of the recommendations have been fully put into practice. The remainder have either not been implemented at all, or only partially, and with no significant impact on security.”).

104. For criticism of the Gore Commission recommendations, specifically those involving background checks and screening of passengers, see Michael J. AuBuchon, *Choosing How Safe is Enough: Increased AntiTerrorist Federal Activity and its Effect on the General Public and the Airport/Airline Industry*, 64 J. AIR L. & COM. 891, 901-02 (1999).

Attacks on the Gore Commission’s recommendation have come from several fronts. One such front includes scholars concerned about the constitutional problems associated with the use of state-of-the-art bomb-screening technology. Invasion of privacy issues have surfaced because some of the bomb-screener’s enable the operator to see through a person’s clothing to his or her naked body.

The Gore Commission’s recommended use of passenger profiling perhaps gives rise to the most heated constitutional debate . . . . Other privacy interests could be violated through passenger profiling, such as the right not to have a criminal record exposed to nongovernment aviation personnel. Moreover, the use of profiles can potentially single out an individual in a discriminatory manner; for example, a profile would be discriminatory if it unfoundedly singled out Arab or Muslim Americans as a group likely to pose a terrorist threat.

*Id.*

105. See AVIATION WK. & SPACE TECH., Oct. 8, 2001, at 94. See also NPR: *All Things Considered*, Oct. 5, 2001 (recapping Jerry Kavar, Senior Analyst at the Rand Corporation and former Gore Committee member, noting that one of the major flaws in airline security “is the failure of the government at large to integrate the law enforcement information together and pass it to the FAA, which could then pass it to the airlines. The government simply failed to implement the recommendations of the commission.”), available at 2001 WL 9436693.

106. AVIATION WK. & SPACE TECH., *supra* note 105. See also Mike McAndrew, *Many Security Suggestions Put on Shelf*, Herald AM., Sept. 23, 2001, at A9.

The FAA still allows airlines to hire private security firms that pay workers barely above minimum wage to screen passengers and luggage for weapons; screener turnover is 100% to 400% at some airports; and screener training remains below the standards in many foreign countries, according to the



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Others contend that there is a direct connection between the failure to implement the recommendations of the Gore Commission, and the influence of the air travel industry over both Congress and the FAA.<sup>107</sup> Noting the consistent animosity on the part of air industry lobbyists to any regulatory change that might affect profits, one industry observer noted that industry influence played a role in muting the impact of the Gore Commission's recommendations:

For example, according to a report by Public Citizen, the commission's recommendation that the background of all airport employees be checked for criminal records was opposed by the industry because it would create administrative and financial burdens. Even Gore himself backed down on his commission's insistence that all bags be matched to passengers on all flights. The day after he wrote the ATA [Air Transportation Association] about his change of heart, campaign contributions started to pour in from the airlines to various Democratic Party committees at double their previous pace.<sup>108</sup>

### B. The "Dual Mandate"

The FAA's dual mandate, to the extent that its vestiges have survived the cosmetic amendment to the language of its enabling act, creates fertile ground for the development of agency capture. Indeed, it could be argued that the agency is obliged by the "promotional" half of its mandate to take the interests, and presumably, therefore, the expressly communicated concerns, of the airline industry into account far more than most agencies are required to do, and that some form of agency capture was all but preordained when Congress gave the agency its role in 1958. Various observers have noted that:

These conflicting purposes are an obvious problem once one realizes that for every proposed safety regulation, the FAA must weigh the cost of implementation and determine if it is worth the financial strain on the airlines. More often than not, the FAA decided the change was not worth the financial cost . . . .<sup>109</sup>

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U.S. General Accounting Office.

*Id.*

107. See generally Hahn, *supra* note 94.

108. Micah L. Sifry, *Boodle & Airline Security*, THE NATION, Oct. 29, 2001, at 5-6.

109. Carlisle, *supra* note 87, at 741. Indeed, if one were looking for a real culprit in any "capture" scenario involving the FAA, it might be reasonable to begin here, with Congress, and the structural limitations it has placed on any attempts the agency might want to make to challenge the private interests of its regulated community. *Id.* But the broader influence of the airline industry (or other intersected parties) on the process of legislation, although referenced below, is not the main focus of this article, which seeks instead to determine what role such

One salient apparent consequence of the FAA's dual mandate has been its extensive reliance on the private entities it regulates. These entities play a significant role in monitoring industry activities, from airplane construction, to airline safety, to airport and airplane security. Such a structure allows the specific mechanisms for the enforcement of safety regulations to be determined by the regulated parties, which in turn, allows them to make decisions regarding these mechanisms that will enhance their profitability. While this delegation of authority certainly results in additional costs for the private entities (for example, hiring of private inspectors and contract employees for airport security), the costs are in the exclusive control of the companies, and are not imposed upon them in the form of taxes or fees by a government bureaucracy obliged to find some way to pay for the performance its obligations.

Agency use, or even reliance, on this kind of "audited" self-regulation by private parties is widespread, and is insufficient on its own to demonstrate an instance of agency capture. But, as will be discussed more fully below, a regulatory regime that relies almost exclusively on self-regulation provides an ample opportunity for hyper-influence by regulated parties. In addition, an agency's continued reliance on self-regulation even in the face of repeated indications that the system is an ineffective regulatory device strongly suggests that something other than the public interest is being served by the continued use of the regime.<sup>110</sup>

In 1984, in the case of *United States v. S.A. Empresa de Viacao Arerea Rio Grandense (Varig Airlines)*,<sup>111</sup> a group of family members of passengers killed in a 1973 crash of a Boeing 707 jet<sup>112</sup> and the airline brought a federal tort action against the CAB (the predecessor agency of the FAA) in which the plaintiffs challenged the effectiveness of a regulatory scheme that relied heavily on self-regulation. In this case, a fire had started on the Varig jet during a flight. Although the pilot managed to land the plane successfully, 124 of the 135 passengers suffocated or were poisoned to death by toxic gas.<sup>113</sup> The fire apparently started in the towel disposal area of

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influence has at the agency level, even within the complex parameters that Congress has provided for the FAA. *Id.*

110. See Stephen J. Hedges et al., *What's Wrong with the FAA? The FAA is Supposed to Police Commercial Aviation, But the Agency Still Refuses to Act Like a Tough Cop on the Beat*, U.S. NEWS & WORLD REP., June 26, 1995, at 29-30 (noting how FAA regulations frequently go unenforced).

111. 467 U.S. 797 (1984).

112. See *id.* at 800.

113. *Id.*

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the lavatory.<sup>114</sup>

In 1958, the CAB had reviewed the specifications for the 707 and had approved the design as meeting the applicable “minimum safety standards” pursuant to the Aviation Act.<sup>115</sup> The plaintiffs argued that the CAB had erred in making this safety determination. Specifically, they argued that applicable air safety regulations required that trash cans be made of fire-resistant materials and be able to contain fires. The CAB had been negligent, according to the plaintiffs, when it inspected the 707 and issued a certificate stating that it complied with the fire protection standards.<sup>116</sup>

The district court granted the United States’ motion to dismiss the case, but the court of appeals reversed, holding that the CAB could be found liable in tort for its inspection errors.<sup>117</sup> Ultimately, however, the Supreme Court held that the actions of the agency were covered by the discretionary function exception to the Federal Tort Claims Act (“FTCA”), based, in a large part, on the extensive freedom that had been given to the agency by Congress to carry out its regulatory mission, and the fact that the agency had chosen, within the boundaries of this discretion, to leave much of the responsibility for safety inspection to the private parties it regulated.<sup>118</sup>

After reviewing the Aviation Act, the Supreme Court concluded that while Congress had required the FAA to take certain specific steps to ensure air safety, it had also granted the Secretary of Transportation “discretion to prescribe reasonable rules and regulations governing the inspection of aircraft including the manner in which such inspections should be made.”<sup>119</sup> Congress had made it clear that the FAA was not the only body responsible for monitoring the safety of planes – that “air carriers themselves retained certain responsibilities to promote the public interest in air safety and the duty to perform their services with the highest degree of safety.”<sup>120</sup> The plaintiffs had based their allegation of negligence

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114. *Id.* at 798.

115. *Id.* at 800.

116. *Id.* at 801.

117. *See S.A. Empresa de Viacao Arerea Rio Grandense*, 467 U.S. at 798.

118. *See id.*

119. *Id.* at 804.

120. *Id.*

[T]he FAA has promulgated a comprehensive set of regulations delineating the minimum safety standards with which the designers and manufactures of aircraft must comply before marketing their products . . . FAA employees or their representatives evaluate materials submitted by aircraft manufactures

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on both the “spot-checking” safety review system, and the implementation of that system.<sup>121</sup> But while the court held that the discretionary function exception to the FTCA applied to shield the United States from liability in the case, it said nothing about how a different system, which relied more on direct government inspection, might have affected the crash at issue in this case, or the safety of American air travel in general.

In another case involving the predecessor to the FAA, *Moss v. CAB*,<sup>122</sup> the D.C. Circuit addressed more directly the relationship between the agency’s dual mandate and its specific regulatory decisions and the phenomenon of agency capture. In addressing a claim filed by thirty-two members of Congress alleging that the CAB excluded public comments when it approved airfare increases proposed by the airlines, the court noted that the case presented:

[t]he recurring question which has plagued public regulation of the industry: whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect.<sup>123</sup>

The court noted that after finding that the new rates proposed by the airlines “might be unjust or unreasonable and ordering an investigation, the Board went on . . . to point out that, because of the need for revenue which the carriers had shown, the Board would ‘be disposed to grant an increase . . . .’”<sup>124</sup> In discussing the Board’s ultimate approval of the rates, the court discussed both the airline influence with the CAB, and the fact that the “Board concededly took this action after closed session with carrier representatives, without statutory public hearing and, according to petitioners, without reference to the rate-making standards of the statute.”<sup>125</sup>

In addition, the court noted that the authorizing statute cannot reasonably be read to allow “the Board to deal only with the carriers and disregard the other factors, such as the traveling public’s interest in the lowest possible fair and high standards of service, which are also enumerated in the Act as rate-making criteria.”<sup>126</sup> Expanding on this point, the court stated that:

to determine whether the manufacturer has satisfied these regulatory requirements

*Id.* at 805.

121. *See id.* at 815.

122. 430 F.2d 891 (D.C. Cir. 1970).

123. *Id.* at 893.

124. *Id.* at 896.

125. *Id.* at 900.

126. *Id.*

In any case, ignoring the general public's interest in order to better serve the carriers is not the proper response to the difficulties supposedly created by an outdated or unwieldy statutory procedure. After all, there is more to rate-making than providing carriers with sufficient revenue to meet their obligation to their creditors and their stockholders . . . . We fully recognized that a carrier's exigent economic circumstances at times will make it necessary for the Board to act on the basis of incomplete data. But we emphatically reject any intimation by the Board that its responsibilities to the carriers are more important than its responsibilities to the public. Board action must always comply with the procedural requirements of the statute and must always be based on any assessment of the relevant available data, with due consideration given to all the factors enumerated in the statute, which factors taken together make up the public interest.<sup>127</sup>

Based on its conclusion about the role played by the air carriers in the rate approval process, and failure of the Board to properly balance its interest in ensuring the profitability of the airline industry with its broader interest in public access to affordable and high-quality service, the court remanded the determination back to the Board for further proceedings and required that the statutory provisions for public notice and participation be followed.<sup>128</sup>

In addition to federal courts, other outside observers have consistently noted the negative impact of the FAA's dual mandate on its policy decisions and on its mission to protect the "public interest." The National Transportation Safety Board, the most persistent of these government observers of the agency, has repeatedly raised these concerns over the past few decades.

### C. *The FAA and the Public Interest*

#### 1. *The NTSB vs. the FAA*

The National Transportation Safety Board (NTSB) is an independent investigatory agency created in 1967 to investigate civil aviation accidents in the United States.<sup>129</sup> Somewhat surprisingly, given the FAA's mandate to regulate airline safety, the NTSB is not affiliated with the FAA or the Department of Transportation.<sup>130</sup> Indeed, the two entities have a notably adversarial relationship

127. *Id.* at 901-02.

128. *Moss*, 430 F.2d at 902. See also *United States v. CAB*, 511 F.2d 1315 (1975).

129. See Carlisle, *supra* note 87, at 756.

130. See *id.* at 756.

characterized by a frequent reluctance on the part of the FAA to accept and implement safety recommendations made by the NTSB arising out of its investigation of accidents or near accidents. This reluctance invariably was born not from a dispute over the efficacy of the proposed changes, but over their cost of implementation.

From 1967 to 1999, the NTSB, in the course of its ongoing investigation of transportation accidents, issued 11,161 safety recommendations — 3,703 of these were air safety recommendations made to the FAA.<sup>131</sup> While the FAA had a relatively high rate of acceptance of these recommendations (83.2 percent), the instances where the agency failed to implement recommended changes, and perhaps more importantly, the reasons generally given for the failure to implement, suggest strong influence over its regulatory policy on the part of the airline industry, and the promotion of the private interests of the industry at the possible expense of the broad public interest in airline safety.<sup>132</sup>

One example of an unheeded recommendation by the NTSB, and its unfortunate consequences, is the NTSB's 1975 admonition that commercial airlines be equipped with smoke detectors.<sup>133</sup> In 1984, a fire in a lavatory in an Air Canada jet flying over Kentucky resulted in the deaths of twenty-three passengers, and in the agency's belated acceptance of an earlier NTSB recommendation that smoke detectors be required in all new planes.<sup>134</sup> When the NTSB made a related recommendation in 1988 that a similar requirement should be applied to older model planes currently in use for commercial aviation, the FAA failed to require the installation.<sup>135</sup> The 1996 crash of a ValuJet plane in the Florida Everglades was caused by a fire that apparently started in the cargo hold, and about which the flight crew seemed to have no warning. In its post-investigation report, the NTSB reiterated its strong concern that "a fire should not be allowed to persist in any state of intensity in an airplane without the knowledge of the flight crew."<sup>136</sup> The FAA's decision to reject both of the NTSB's initial smoke detector recommendations was determined by a congressional investigation to have resulted from the agency's

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131. *Id.* at 758-59.

132. Various observers of aviation law and commerce have suggested that the FAA too often undervalues the concern for protecting human life in comparison to airline industry profits, and that by "rejecting NTSB recommendations, the FAA has repeatedly weighed economics over safety concerns." *Id.* at 746.

133. *Id.*

134. *Id.*

135. Carlisle, *supra* note 87, at 746.

136. *Id.* at 755.

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belief that “the gain in safety would not justify the cost of requiring all aircraft to install such systems.”<sup>137</sup>

Various examples of a similar pattern of response to NTSB recommendations, in which the FAA first rejects an NTSB recommendation only to later implement it in the wake of a deadly accident, have been cited over the past few decades. Most examples, involve de-icing procedures, radar and lighting on runways, and design flaws in aircraft (specifically, the McDonnell Douglas MD-11 and its “slat” design).<sup>138</sup> In all of these instances the reason given by the FAA for the rejection of the prior safety recommendation was the conclusion that the benefit of additional safety procedures was outweighed by the cost of their implementation.<sup>139</sup>

As a result of these and other instances of FAA reluctance to implement possible solutions for identifiable safety threats, the NTSB has included FAA regulatory reluctance in its causation analysis of various airline accidents. In its report on a Com Air flight crash in Covington, Kentucky, the NTSB listed as some of the causes of the accident:

The Federal Aviation Administration’s failure to establish adequate aircraft certification standards for flight in icing conditions, the FAA’s failure to ensure that a[n] FAA-approved procedure for the accident airplane’s de-ice system operation was implemented by U.S.-based carriers, and the FAA’s failure to require the establishment of adequate minimum airspeeds for icing conditions, which led to the loss of control when the airplane accumulated a thin, rough accretion of ice on its lifting surfaces.<sup>140</sup>

In the aftermath of the ValuJet disaster, the NTSB noted the

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137. *Id.* at 755. For a discussion of the practical economic impact and other consequences of additional airline safety requirements, see Hahn, *supra* note 94, at 793.

Each measure to improve safety and security can increase the direct costs to travelers, cause delays and inconvenience, infringe on civil liberties, increase taxpayer costs, and even increase fatalities. For example, using high-tech machines may detect some explosives in checked luggage, but the devices are costly and far from foolproof. Requiring airlines to match each bag to a passenger may reduce the threat of a ‘drop-and-run’ terrorist tactic, but it could cause lengthy delays and inconvenience. Using computer background checks to identify suspected terrorists could enhance security at a reasonable cost, but it would also curtail individual freedoms. Mandating child safety seats will secure infants during air travel, but the higher costs could lead to an increase in automobile travel and highway fatalities.

*Id.*

138. Carlisle, *supra* note 87, at 746-50.

139. *Id.*

140. *Id.* at 747-48 (quoting Nat’l Transp. Safety Bd., Safety Recommendation A-98-88 through -106, at 1).

crucial role that a smoke detector, which it had recommended in the DC-9 eight years earlier, might have played in avoiding the accident, which killed 110 individuals. This report, along with the agency's disturbing history of regulation of the initially successful airline company,<sup>141</sup> led the FAA Administrator to acknowledge that "yes, we bear some responsibility in this case."<sup>142</sup>

The unavoidable public concern produced by official government acknowledgments of the critical deficiencies of another government entity brought extensive public attention to potential problems with the FAA and its role in protecting airline safety even before the ValuJet crash. In preparation for a 1995 article discussing the effectiveness of FAA air safety regulations, U.S. News and World Report performed a three-month examination of the agency's enforcement activities, focusing on four areas in particular: (1) certification of new airplanes, (2) pilot fatigue, (3) use of unapproved parts in airline repair, and (4) safety inspections.<sup>143</sup> In the course of its investigation, the magazine identified significant criticisms of the agency's safety enforcement record by the NTSB. Addressing a rash of airline accidents in 1994 — one accident in particular that involved a pilot who had been dismissed by one airline based on concerns about his ability to handle pressure situations, only to be hired soon thereafter by another carrier — the article notes that:

In that case, the federal investigators place some of the responsibility on the FAA. The agency had been urged to impose stricter screening requirements on pilots; FAA officers declined to do so. In a total of five crashes last year, the NTSB indicated that the FAA had fallen short, either failing to enforce its own rules or siding with airlines to oppose what many pilots and passengers considered sensible reform.<sup>144</sup>

Specific instances of FAA regulatory activity which raised the concerns of both the NTSB, and officials within the agency itself, and

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141. See Carlisle, *supra* note 87, at 752-55 (discussing the FAA's failure to respond to repeated instances of safety violations by the fast-growing airline, including hundreds of emergency landings, overshooting of runways, landing gear mishaps, engine explosions, communication breakdowns between airplanes and air traffic control, sudden depressurization during flight, and the use of duct tape to fix certain spots on planes). Carlisle also points out the FAA's initial attempts after the accident to argue that "all airlines were safe, and that there was nothing wrong with ValuJet." *Id.* at 754.

142. Carlisle, *supra* note 87, at 754 (quoting MARY SCHIAVO, *FLYING BLIND, FLYING SAFE* 45 (1998)).

143. Hedges, *supra* note 110, at 29.

144. *Id.*



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which support the argument that agency decisions were invariably motivated more by the goal of promoting airline profitability than by safety concerns, include its exemption of Boeing's new wide-body 777 from otherwise required tests of engine thrust reversers.<sup>145</sup> The FAA also failed to enforce "routine" rules concerning pilot flying time,<sup>146</sup> to reassign FAA safety inspectors after apparent complaints from airlines about the performance of their duties,<sup>147</sup> and to require flight approval for several airlines with long histories of safety and other violations.<sup>148</sup>

145. *See id.*

The FAA also certified the plane just days after resolving engineers' concerns about the possibility of dangerous vibrations on the plane's two massive turbine engines. The issue was settled without certain tests that FAA engineers had requested. Indeed, Boeing submitted data from earlier tests.

*Id.*

146. *See id.* ("Pilots routinely report falling asleep in the cockpit and making mistakes while landing, taking off and navigating their planes."). Apparently, concerns about the thrust reversers were not identified randomly. *Id.*

The 777 was still a concept in the computer when a Boeing 767 flown by Australian-based Lauda Air fell from the sky near Bangkok, Thailand, in 1991, killing all 223 people aboard. The Lauda 767 crashed because one of the plane's thrust reversers deployed inadvertently 15 minutes after takeoff, sending the plane into a dive.

*See* Hedges, *supra* note 110, at 31. Ultimately, top FAA officials overruled FAA engineers who objected to Boeing's proposals for how the new 777's thrust reversers could be approved without a flight test, and the agency approved the plane for commercial use. *Id.*

147. *See id.*

One inspector was transferred after she reported that five pilots flying for Alaska Airlines had falsified training records. After a brief lapse, the pilots were all allowed to keep flying . . . . In dozens of interviews, inspectors say . . . their superiors often prevent them from doing their jobs. In 1993, May Rose Diefenderfer found herself at the center of such a storm. The FAA's principal operations inspector for Alaska Airlines, she had discovered that five of its top pilots, including the vice president of flight operations, were flying without current training or had falsified training records. Not trusting her supervisor, Diefenderfer contacted the FAA's security branch. An investigation confirmed her suspicions. But when Diefenderfer's bosses found out about the case, they reassigned her. A former airline pilot with more than 4,000 hours in DC-9's, Diefenderfer was transferred to a desk job answering public document requests. She got her old post back – after threatening to sue. But the FAA chose not to follow her recommendation FAA guidelines. Instead of revoking the pilots' licenses, FAA supervisors let four of them fly as copilots and, after a year, as captains. Only the vice president's pilot certificate was suspended – for three months.

*Id.*

148. *See id.*

In 1990, the FAA let the owner of Northeast Jet, an executive jet service in Allentown, Pa., resume charter service just 20 months after yanking the carrier's operating certificate. Two years later, the owner and two FAA inspectors were indicted on charges related to falsified Northeast Jet records. In Miami last month, the FAA let Arrow Air, a cargo hauler that also did passenger charters, resume flying after it agreed to a \$1.5 million fine for

Each of these instances provide evidence not merely of agency laxity or insufficient diligence, but of an agency structure that gives substantial weight to the economic impact of regulatory activities on the regulated parties in comparison to other factors. Indeed, the FAA's approval process for a new wide-body airline that proved to produce substantial profits for two of the most influential members of its regulatory community, and the failure to consistently enforce pilot time restrictions,<sup>149</sup> certainly provide strong circumstantial evidence of extensive influence of, if not capture, by this community. Furthermore, the allegations of reassignment of inspectors because they were too critical of airlines, and the approval of the commercial flight of airlines that had demonstrated histories of safety violations (particularly under circumstances where agency officials have allegedly been involved in falsification of documentation), if true, of course, would provide something more akin to direct evidence of hyper-influence, if not, again, capture itself. Although these instances do not provide the imaginary "smoking-gun" correspondence between agency and controlling private entity, they raise very serious questions, as demonstrated by comments from FAA inspectors, who,

say they frequently encounter pressure from supervisors, and from the FAA's Washington headquarters, when they question the safety of a plane, a pilot, repairs or training methods. 'If we try to ground an airplane belonging to a major airline, we know that the airline's CEO is going to pick up the phone and call,' says one inspector, assigned to an airline in Texas. 'It is almost a given.'<sup>150</sup>

Some version of this argument appears to have convinced many officials of the NTSB not only of problems in FAA's safety regulation, but of the fact that those problems are directly related to the undue influence wielded at the agency by the airline industry.<sup>151</sup>

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thousands of airworthiness violations.

*Id.*

149. See Hedges, *supra* note 110, at 33-34.

One big change the FAA faces today is the phenomenal growth of commuter and regional airlines. In the past five years, such airlines have grown by 50 percent, carrying more than 57 million people in 1994. Controlling costs for smaller airlines is often a matter of life and death. They do that through longer hours for crews and low pay. The former raises a key safety concern: pilot fatigue.

*Id.*

150. *Id.*

151. As the relationship between the FAA and the NTSB was articulated in an editorial in the *Washington Post*:

FAA Chief David R. Hinson's response to questions about the FAA's safety oversight is too glib: 'When we say an airline is safe to fly, it is safe to fly.'

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2. *Other Indicia of Regulatory Effectiveness*

Another possible source of empirical data concerning the effectiveness of the FAA in fulfilling its role as regulator of the nation's air travel is its record of ensuring compliance by its regulatory community with applicable regulations. Perhaps even more illuminating would be data concerning how the agency responded when it became clear that its regulations were not being properly enforced.

Much of the FAA's actual regulatory function involves monitoring and inspection of airlines and airports to determine whether both entities are fulfilling their extensive security responsibilities. The available data demonstrate that FAA inspections routinely uncover dangerous levels of non-compliance and ineffectiveness that can only be characterized as catastrophic. However, no significant changes, either in the nature of the authority given to the air travel industry for ensuring security or in the regulations or regulatory structure of the agency, have resulted from these realizations. This phenomenon provides further support for the conclusion that effective regulation within the airline industry in promotion of the public interest is less of a priority for the FAA than ensuring that the industry be provided with an atmosphere where it can thrive financially. While delegation of authority for self-regulation to private parties is not in and of itself an indication of favoring private interests over public ones, the continued reliance on such a structure, even when it becomes clear that it is ineffective, does suggest a strong preference for private control (and the private benefits that flow from it) at the expense of effective regulatory enforcement.

The Inspector General of the Department of Transportation performs periodic inspections and tests to evaluate the level of compliance by air carriers and airports with FAA safety and security regulations. Between December 1998 and May 1999, the Inspector General's office conducted approximately 173 tests at eight U.S. airports focusing on compliance with security provisions. During these tests, the investigators gained unauthorized access to either the

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There is no gray area.' What kind of area is it that has prompted the National Transportation Safety Board to raise questions over the years about the FAA's response to pressures from airlines? For example, when the board recommended that better smoke detection devices and extinguisher systems be mandatory in certain cargo compartments, what was the response? Too costly. Too costly for what? For devices that might save lives? Or too costly for some airlines to support? Along these lines, why is one official charter function of the FAA to promote air travel?

*The FAA Should Inspect Itself*, WASH. POST, May 23, 1996, at A20.

airplanes or secured areas of airports 117 times.<sup>152</sup> Various methods were effectively used to circumvent security screening and other barriers, including “piggybacking” (following authorized personnel into restricted areas), which resulted in a stunning success rate of 71 successful incursions out of 75 attempts.<sup>153</sup> Other methods included riding on elevators, walking through unlocked doors or gates, and driving through unguarded vehicle gates.<sup>154</sup> Once they gained access to secured areas, investigators were able to gain unauthorized access to the airplanes of 35 different air carriers.<sup>155</sup>

In its post-investigation report, the Inspector General’s office identified three causes for the nearly complete failure of the security structure: (1) the ineffective implementation of security procedures by airport operators and air carriers; (2) insufficient training of security personnel; and (3) the failure of the FAA to impose an effective oversight program.<sup>156</sup> Specifically, with regard to the FAA, the report concluded that the agency’s annual testing of airport access control systems was insufficient. The deficiencies identified included the failure to test all of the different aspects of the security system and the failure to give appropriate emphasis to the most likely threats.<sup>157</sup>

Indeed, the investigation demonstrated that the agency had failed to provide significant oversight over what it knew to be the most common instance of security breach – the “piggybacking” phenomenon. At two airports, investigators found that tests to determine the extent of the piggybacking problem were only performed eight times in two years, that no such tests were performed at six other airports over the same period, and that at one airport, no piggybacking tests had been performed for more than eight years.<sup>158</sup>

There is no indication that this report by the Inspector General resulted in any measurable change in the FAA’s regulatory activities or its regulatory structure. While one might assume that the report would have led the FAA to mandate a reduction in the level of authority given to airports and airlines to manage their own security, some new specific requirements for those security procedures, or

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152. Teresa Anderson, *Airport Security Fails Test*, SECURITY MGMT., Feb. 2000, at 73.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *See* Anderson, *supra* note 152, at 73.

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some new standards for the training of security personnel, the air security regulations of the FAA at the time of the September 11 attacks continued to rely almost exclusively on the private entities to plan and implement their own security regimes. The regulations provided almost no specific requirements for these private security programs, and there have been no new standards issued for the training of security employees.

The absence of a significant or comprehensive response to what must be viewed as evidence of the complete ineffectiveness of the nation's air security system in 1999 could be indicative of various factors, including excessive agency apathy or incompetence.<sup>159</sup> But it also clearly suggests that the FAA was more interested in retaining the existing system of air security than in taking the proper steps to ensure that it was actually effective. Although such steps — including additional inspections, new regulations, new requirements for security procedures and training — would have provided undeniable benefits to the public's interest in safe air travel, equally undeniable costs to the airline industry in the form of additional outlays for security procedures and additional obligations created by new regulations would have followed. The FAA's response here provides additional support for the conclusion that the private interests of the airline industry had, at least by 1999, overtaken public policy concerns as the primary motivating imperative at the FAA. Indeed, it appears that, prior to September 11, the airline industry and its congressional lobbying apparatus (most notably the Air Transport Association) "fought against any takeover of airport security because they didn't want to have to pay more for it and because they did not want potential passengers scared off by longer lines or fear of hijacking."<sup>160</sup>

This phenomenon of apparently lax regulatory oversight could be reasonably ascribed to various factors other than agency capture,

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159. Numerous press reports and additional government investigations provide further evidence of the ineffectiveness of the nation's air security procedures prior to 1999. One *New York Times* report noted that in 1978 the FAA "found that screeners failed to detect guns and pipe bombs 13 percent of the time in compliance tests, while in 1987 the agency found that screeners missed 20 percent of the time. Since then, the agency has stopped releasing figures." Micah Sifey, *Boodle & Airline Security*, THE NATION, Oct. 29, 2001 (page numbers unavailable).

160. *Id.*

[T]he vulnerability of our airports can be traced, in part, to the role of the airline industry in lobbying year after year against any federal takeover of airport security and its insistence on contracting the work out to low-bidding companies that often pay little more than the minimum wage to the people who check passengers' luggage and X-ray their handbags.

*Id.*

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including inefficiency, inattention, incompetence, or inertia. It is this complexity of possible explanations that makes a conclusive diagnosis of capture difficult in any instance. But it does provide strong and compelling evidence that at least one of the reasonable explanations for the FAA's continued reliance on an apparently ineffective self-regulation mechanism is that the agency was the victim of capture.

### III. THE CURRENT FAA SECURITY REGULATIONS AND THE ROLE THEY PLAYED IN THE SEPTEMBER 11 HIJACKINGS

The next question to be considered is whether any specific regulatory consequences of the apparent hyper-influence of the regulated community on the FAA can be identified. The specific focus of this section is the agency's regulation of air security, and whether the apparent capture phenomenon at the FAA resulted in a security structure that did not provide adequate protection of the public interest and may have played at least some role in creating the atmosphere that allowed for the tragic events of September 11.

#### A. *FAA Airport and Airline Security Regulations*

The specific requirements and procedures for airline and airport security are found in the implementing statutes for the U. S. Department of Transportation, currently codified at 49 U.S.C. Chapter 449. The provision provides, generally, that the FAA will have the ultimate responsibility for promulgating regulations to ensure air travel security, but that the most basic requirement for implementing such regulations will be left up to the regulated entities.<sup>161</sup>

The statute provides the specific parameters of the FAA's responsibilities for regulating air travel security, namely that the agency must "prescribe regulations to protect passengers and property on [a commercial] aircraft . . . against an act of criminal

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161.

The Administrator of the Federal Aviation Administration shall prescribe regulations requiring screening of all passengers and property that will be carried in a cabin of an aircraft in air transportation [and that] the screening must take place before boarding and be carried out by a weapon-detecting facility or procedure under or operated by an employee or agent of an air carrier . . . .

49 U.S.C. § 44901(a) (1994). The statute states that the FAA must issue regulations that require air carriers to "refuse to transport" passengers or property of passengers who do not consent to such weapon-detection screenings of the property of such passengers. *See id.*

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violence or aircraft piracy,”<sup>162</sup> and in a clear expression of the agency’s dual mandate, “consider whether a proposed regulation is consistent with (A) protecting passengers; and (B) the public interest in promoting air transportation and intrastate air transportation.”<sup>163</sup> The statute also states that the FAA, “to the maximum extent practicable” will require “a uniform procedure for searching and detaining passengers.”<sup>164</sup>

The statute then proceeds, however, to significantly undermine the stated requirement for “uniform procedures” by allowing for different specific security programs to be implemented by every airport. The statute states that:

The Administrator shall prescribe regulations [pursuant to the “uniform procedures” requirements of the previous section] that require each operator of an airport regularly serving an air carrier holding a certificate issued by the Secretary of Transportation to establish an air transportation security program that provides a law enforcement presence and capability at each of those airports that is adequate to ensure the safety of passengers.<sup>165</sup>

This portion of the statute authorizes airport operators to “use the services of qualified State, local and private law enforcement personnel,” but recognizes the possibility of the involvement of federal officials in airport security only when the Administrator determines that “not enough qualified State, local, and private law enforcement personnel are available to carry out” the security requirements.<sup>166</sup>

The Administrator is obliged to approve an airport security program as long as it incorporates specific information concerning how the operator intends to carry out the security requirements imposed by Section 107 of Title 14 of the Code of Federal Regulations,<sup>167</sup> and “the method the airport operator will use to monitor and audit the tenant’s compliance with the security requirements.”<sup>168</sup> Consequently, the statute contemplates not only that the ultimate responsibility for ensuring air travel safety will be

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162. 49 U.S.C. § 44903(b) (1994).

163. 49 U.S.C. § 44903(b)(2) (1994).

164. 49 U.S.C. § 44903(b)(3) (1994).

165. 49 U.S.C. § 44903(c)(1) (1994).

166. *Id.* (“When deciding whether additional personnel are needed, the Administrator shall consider the number of passengers boarded in the airport, the extent of anticipated risk of criminal violence or aircraft piracy at the airport or to the air carrier aircraft operation at the airport . . .”).

167. 49 U.S.C. § 44903(c)(2)(A)(i) (1994).

168. 49 U.S.C. § 44903(c)(2)(A)(ii) (1994).

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delegated from the FAA to airport operators, but that it will indeed be delegated again from the operators to their “tenants” – the airlines themselves, who may delegate the actual daily responsibility further to their permanent or contract employees.<sup>169</sup> This structure sets up at least two additional tiers of “self-regulation” outside of the direct oversight of the FAA.

In addition to its responsibility for review and approval of airport security programs, the FAA, along with the FBI, is given the responsibility to “assess current and potential threats to the domestic air transportation system.”<sup>170</sup> In furtherance of that responsibility, the FAA and the FBI need to “carry out periodic threat and vulnerability assessments on security at each airport that is part of the domestic air transportation system.”<sup>171</sup>

Finally, the authorizing legislation provides that the FAA promulgate regulations requiring “that an employment investigation, including a criminal history record check, shall be conducted . . . of each individual employed in, or applying for, a position in which the individual has unescorted access” to aircraft or secured areas of an airport.<sup>172</sup>

In the penalties portion of the legislation, the statute provides for penalties for various violations of air travel security provisions. Section 46505 provides that:

An individual shall be fined [and/or] imprisoned . . . (1) when on, or attempting to get on, an aircraft in, or intended for operation in, air transportation or intrastate air transportation, has on or about the individual or the property of the individual a concealed dangerous weapon that is or would be accessible to the individual in flight; (2) has placed, attempted to place, or attempted to have placed a loaded firearm on that aircraft in property not accessible to passengers in flight; or (3) has on or about the individual, or has placed, attempted to place, or attempted to have placed on that

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169.

[T]he airport operator may not be found in violation [of this provision] when the airport operator demonstrates that the tenant or an employee, permittee, or invitee of the tenant is responsible for the violation and that the airport operator has complied with all measures in its security program for securing compliance with its security program by the tenant.

49 U.S.C. 44903(c) (2) (B) (1994).

170. 49 U.S.C. § 44904 (1994).

171. *Id.*

172. 49 U.S.C. § 44936(a) (1994). The provision also lists various crimes that will disqualify an individual for relevant employment. See 49 U.S.C. § 44936(b) (1) (B) (1994).



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aircraft, an explosive or incendiary device.<sup>173</sup>

Left out of the specific security requirements in the statute, and consequently left to the FAA to articulate in its regulations, is a specific definition of what is considered to be a “dangerous weapon” pursuant to Section 46505, or any other specific requirements regarding minimum standards that various airport security programs must meet.

The FAA’s regulations promulgating the security requirements of Chapter 449 are found in 14 C.F.R. Parts 107 and 108. Part 107 deals directly with “airport” security, while Part 108 focuses on security of “aircraft operators.” In general, pursuant to both parts, and matching the structure contemplated by the authorizing legislation, the FAA allows for significant levels of self-monitoring and planning on the part of both the airlines and airport authorities in the course of developing their “security programs” and other safety and security procedures.

Indeed, the remarkably brief part 107 provides little additional specification of exactly what must be included in the airport security program. Sections 107.101 and 107.103 are the central provisions providing the requirements for airport security programs. Mirroring the requirements of Chapter 449, section 107.101 provides that no airport may be operated without a security plan that “provides for the safety and security of persons and property on an aircraft operating in air transportation or intrastate air transportation against an act of criminal violence, aircraft piracy, and the introduction of deadly or dangerous weapons, explosives, or incendiary onto an aircraft.”<sup>174</sup> Section 107.101 then provides for minimal requirements for security plans of airports servicing “scheduled passenger or public chartered passenger operations with an aircraft having a passenger seating configuration of more than 60 seats.”<sup>175</sup> Recordkeeping requirements and procedures for disclosure of information are included within the section. However, the regulations provide no other specific requirements for what must be included in an airport security program.<sup>176</sup>

In addition to requiring the development of the security program,

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173. 49 U.S.C. § 46505(b) (1994).

174. 14 C.F.R. § 107.101(a)(1) (2001).

175. These requirements include the following: (1) a description of the secured areas; (2) a description of the air operations areas, detailing the exact boundaries; (3) a description of the security identification display areas; and (4) a description of sterile areas. *See* 14 C.F.R. § 107.103(a)(1)-(21) (2001). *See also* 14 C.F.R. § 108.101(a)(1) (2001) (describing requirements based on the size of aircraft).

176. *See* 14 C.F.R. § 107.103(a)-(d) (2001).

the regulations detail specific “control functions” that must be performed by the airport operator, including: controlling access to air operations areas by implementing methods for restricting such access;<sup>177</sup> controlling the movement of people and vehicles within the areas; and detecting any unauthorized penetration of such areas.<sup>178</sup> The regulations require the airport operators to provide sufficient law enforcement personnel to support the security program and the passenger screening system.<sup>179</sup> As a general matter, airport operators are expected to use state, local, or private law enforcement personnel to perform these security functions. But the regulations also allow for airport officials to request that the FAA authorize the deployment of federal security officers when other kinds of officers are not “available in sufficient numbers.”<sup>180</sup>

The regulations, pursuant again to the specific parameters of the statutory mandate, provide rules for regulating the movement of individuals in airports. They provide that no individual may be allowed to enter a restricted area in an airport without submitting to a “screening of his or her person and accessible property.”<sup>181</sup> Also, that no person in such an area (other than a law enforcement official) may have “an explosive, incendiary, or deadly or dangerous weapon on or about the individual’s person or accessible property.” There is nothing in Part 107 of Title 14, however, that provides a specific list of “deadly” or “dangerous” weapons, or even provides the parameters for making such a determination. Yet, the FAA has, on occasion, provided direct statements as to what meets the definition of “dangerous weapons” in the form of agency guidelines sent directly to airport operators,<sup>182</sup> or in the discussions of proposed

177. See 14 C.F.R. § 107.14 (2001) (providing that the airport operator must submit to the FAA a proposed system for limiting access to restricted areas that “shall ensure that only those persons authorized to have access to secured areas by the airport operator’s security program are able to obtain that access and shall specifically provide a means to ensure that such access is denied immediately at the access point or points to individual whose authority to have access changes”).

178. See 14 C.F.R. § 107.203 (2001).

179. See 14 C.F.R. § 107.215 (2001).

180. See 14 C.F.R. § 107.219 (2001).

181. 14 C.F.R. § 108.201(c) (2001).

182. For example, the following guideline was sent by the FAA in 1973, and was cited as an indication of the agency’s policy by the U.S. Third Circuit Court of Appeals. See *United States v. Margraf*, 493 F.2d 1206, 1207 (3d Cir. 1974). The FAA guidelines are as follows:

The following guidelines are furnished to airport operators, air carriers, law enforcement personnel, and others involved in preboard screening of passengers in making a reasonable determination of what property in possession of a passenger should be considered as a weapon or dangerous object.

rules published in the Federal Register,<sup>183</sup> resulting in the restriction, for example, of knives of more than four inches.<sup>184</sup> But, the agency has also indicated that ultimate determinations about what constitutes a dangerous weapon are “subjective,” and further that it is the “airline’s responsibility to determine what they will allow.”<sup>185</sup> The FAA has already altered this stance following the September 11 attacks, issuing a uniform rule through its website, press releases, and directives to airports and airlines<sup>186</sup> that “no knives or cutting instruments of any size or material will be allowed in the aircraft cabin.”<sup>187</sup>

FIREARMS — Including starter pistols, compressed air or BB guns and flare pistols.

KNIVES — All sabres, swords, hunting knives, and such other knives considered illegal by local law.

BLUDGEONS — Blackjacks, billy clubs, or similar instruments.

OTHER DEVICES OR OBJECTS — Even though not commonly thought of as a dangerous weapon but the possession of which supports the reasonable presumption that it could be used as weapons, such as ice picks, straight razors, elongated scissors, and the like. Any questionable device or object to include toy or dummy weapons or grenades should be treated as a dangerous article.

The following objects should also be prohibited in the interest of air security:

EXPLOSIVES/AMMUNITION — All types of explosives, ammunition, incendiaries, and fireworks whether commercially manufactured, homemade, or any combination of components to produce the same.

GASES AND CHEMICAL AGENTS — All tear gas, mace, and similar chemicals and gases whether in pistol, pen, canister, or other container.

In those instances where an undeclared firearm or other obviously dangerous weapon is discovered concealed in a carry-on bag or on the person of a passenger, appropriate law enforcement authorities must be notified. ATA and AOCI requested to pass information through their channels.

*Id.* at 1207 n.1.

183. See, e.g., Transportation of Hazardous Material: Miscellaneous Amendments, 62 *Fed. Reg.* 50,222, 50,222 (1997) (codified at 49 C.F.R. pt. 172, 173, 175, 177, 178, 180) (defining “deadly or dangerous weapons” to include mace, pepper spray, tear gas and other “disabling or incapacitating . . . chemicals or gases”).

184. See Ricardo Alonso-Zaldivar, ‘72 FAA Policy Permitted Pocketknives, L.A. TIMES, Sept. 15, 2001, at A20.

The Federal Aviation Administration forbids ‘deadly’ or ‘dangerous’ articles in airline cabins, but until this week’s devastating hijackings, knives with blades less than 4 inches long were considered neither. The 4-inch rule dates back to 1972, when the FAA first ordered airlines to screen passengers for weapons to thwart a worldwide wave of hijackings.

*Id.*

185. See CIVIL AVIATION SEC., FED. AVIATION ADMIN., PASSENGER INFORMATION: FREQUENTLY ASKED QUESTIONS (last visited Jan. 21, 2002), available at <http://cas.faa.gov/faq.html>.

186. See U.S. DEPT. TRANSPORTATION, FACT SHEET, Nov. 19, 2001 (stating that knives found during security screening, including kirpans, will be confiscated, and a ground security officer and/or law enforcement coordinator may be notified).

187. PRESS RELEASE, FEDERAL AVIATION ADMINISTRATION, FAA ADVISES AIR

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Part 108 of 14 C.F.R. regulates the security activities of the airlines.<sup>188</sup> Much like the structure and substantive requirements of Part 107 (which relate to airports), this section requires that air carriers take the primary direct responsibility for the development and implementation of security procedures. The regulations require that air carriers “adopt and carry out a security program”<sup>189</sup> that meets the same basic requirements that apply to the security programs of airport operators.<sup>190</sup> The regulations require air carriers to use FAA-approved procedures, detailed in their security program, to screen all passengers, and to refuse to transport any person who does not consent to search pursuant to these screening procedures,<sup>191</sup> or to prevent any person from having “a deadly or dangerous weapon, either concealed or unconcealed, accessible to him or her while aboard an airplane.”<sup>192</sup>

Indeed, the primary responsibility for screening airline passengers (as opposed to other individuals at airports) rests with the air carriers, not the airport operators.<sup>193</sup> Air carriers are required to prevent any passenger from placing any explosive, incendiary or loaded firearm in checked baggage.<sup>194</sup> While the provision does

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TRAVELERS ON AIRPORT AIRLINE SECURITY MEASURES (Oct. 8, 2001), available at <http://www.faa.gov/apa/pr/pr.cfm?id=1435>. See *Hearing on Aviation Security Following the Terrorists Attacks on September 11, Before the Subcommittee on Aviation of the House Committee on Transportation & Infrastructure*, 107th Cong. (2001) (statements of Jane F. Garvey, Administrator, Federal Aviation Administration).

Knives or other dangerous objects may no longer be sold or used in the sterile terminal areas — those areas beyond the security checkpoints. Similarly, all cutting instruments, including knives, scissors, and razor blades, plastic or otherwise, are banned from carry-on luggage.

*Id.*

188. 14 C.F.R. § 108.1 (2001) (prescribing aviation security rules governing the procedures of aircraft operators).

189. 14 C.F.R. § 108.101 (2001).

190. See 14 C.F.R. § 108.103 (2001) (requiring that each air carrier safety program “[p]rovide for the safety of person and property traveling on flights provided by the aircraft operator against acts of criminal violence and air piracy, and the introduction of explosives, incendiaries, or deadly or dangerous weapons aboard an aircraft”). The provision requires that these security programs be approved by the FAA, and that they include the procedures that will be used to meet the requirements set out in the remainder of Part 108. See 14 C.F.R. § 108.105 (2001). The regulations also provide similar procedures for the amendment and approval of security programs. See *id.*

191. See 14 C.F.R. § 108.201 (2001) (stating that “[e]ach aircraft operator shall deny entry into a sterile area and shall refuse to transport any person who does not consent to a search or inspection of his or her person in accordance with the screening system prescribed in this section”).

192. 14 C.F.R. § 108.201 (2001).

193. See 14 C.F.R. §§ 108.201, 108.203 (2001) (noting that the aircraft operator shall be the one who denies entry and refuses to transport such persons).

194. See 14 C.F.R. § 108.203 (2001).

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provide some detailed description of various kinds of firearms and the different procedures required for them, it does not, just as Part 107 does not, provide for a specific definition of what constitutes a deadly or dangerous weapon.<sup>195</sup>

The only part of the regulations that specifically addresses procedures for preventing hijackings provides for the designation of the pilot of any given flight as the "Inflight Security Coordinator." This pilot is required to "carry out the Inflight Security Coordinator duties specified in the certificate holder's approved security program." There are no uniform FAA regulations that specifically address either the prevention of hijacking, or the management of a hijacking incident once it occurs,<sup>196</sup> with the sole exception of the requirement that the air carrier notify federal and state authorities immediately "upon receiving information that an act or suspected act of air piracy has been committed."<sup>197</sup> Any such specifics are left to the individual air carriers and their individual security programs.

The regulations provide relatively detailed standards for the qualifications of individuals employed by air carriers to perform the security functions set out in Part 108. The air carrier must ensure that all security personnel understand as much of the air carriers security program as is required by their job description, and that a Ground Security Coordinator will review all security function and immediately initiate "corrective action for each instance of noncompliance" with Part 108, the security program, or any FAA security directives. The regulations also require that no individual can be employed by an air carrier to perform screening functions unless that person has a high school diploma (or equivalent), and the visual and physical skills necessary to perform assigned functions: the ability to read, speak, and write English well enough to carry out written and oral instructions; read credentials and airline tickets; provide direction to and understand English-speaking passengers; and write reports as well as keep written security records.<sup>198</sup> These employees must also complete any specialized training required by the air carriers security program.<sup>199</sup>

The provisions also include criminal background check

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195. See 14 C.F.R. § 108.203 (2001) (stating, for example, that "a loaded firearm means a firearm which has a live round of ammunition, or any component thereof in the chamber or cylinder or in a magazine inserted in the firearm:").

196. See 14 C.F.R. § 108.303 (2001) (providing specific instructions in the regulations for how pilots should handle bomb threats).

197. 14 C.F.R. § 108.303(d) (2001).

198. See 14 C.F.R. § 108.213(a) (setting standards for aircraft operator employees).

199. 14 C.F.R. § 108.213(a) (4) (2001).

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requirements for air carrier security employees similar to those required of airport employees, and for periodic re-evaluation of screening personnel by the Ground Security Coordinator.<sup>200</sup> The regulations require that air carriers allow Federal Air Marshals “in the number and manner specified by the [FAA] Administrator, on each scheduled passenger operations and public charter passenger operation” specified by the FAA.<sup>201</sup>

*B. From Hijacking to Hijacking: Agency Capture and the Failure of Air Security*

The FAA’s air security regulatory structure is both exemplary of, and consistent with, the theory that the agency is the victim of excessive influence from its primary regulated body, the airline industry. While the regulations focus on the broad requirement of public safety, they seem to be designed to enhance, as much as possible, the control that airline and airport interests will have on any specific requirements that are implemented. The two main features of this regulatory structure — the delegation of authority to airlines and airports to make and enforce their own security programs and the lack of significant specific requirements for what must be included in these programs — provide substantial advantages to the private interests of the regulated industry at the expense of the public interest in avoiding the kind of tragedy that occurred on September 11.

When assessing the relative capture status of an agency, the primary question is whether the regulatory acts or structure of the agency serve to promote the private interest of the capturing entity at the expense of the public, particularly in comparison to other reasonable alternative acts or structures that might have provided better protection of the public at the expense of the private interest. The FAA airport and airline security regulations are the product of the dominant regulatory culture of the agency — the delegation of extensive authority to private entities to self-regulate. The alternative to this structure, specifically in regard to airport and airline regulations, would be for the agency to promulgate specific requirements for the airports and airline to follow, to develop some reasonable review structure to ensure that the entities were adhering to the regulations, and, perhaps, to provide for the use of federal officials, or other law enforcement “professionals” to implement the

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200. 14 C.F.R. § 108.213(d) (2001).

201. 14 C.F.R. § 108.223(b) (2001).

security regimes.

But, even if there were reasons independent of the benefits to the private interest of the airlines that militated toward preserving the FAA's self-regulation structure, information in the form of the agency's own audits of the nation's airline security system should have demonstrated, long before September 11, that some changes were necessary — either severe consequences for security lapses and/or even more extensive audit procedures — to properly serve the public interest in making airlines as free as possible from the threat of hijacking.

Given the remarkably “low-tech” nature of the September 11 hijackings, it is difficult to make a direct causal link between any specific FAA regulation, or absence of a regulation, and the criminal acts. Depending on the validity of the press reports concerning the weapons that were used on September 11, the hijackers were either able to smuggle restricted weapons past various check points in at least three different cities, or the weapons they used were not prohibited by the applicable regulatory definitions.<sup>202</sup> Either way, the regulatory choices of the FAA are relevant to an analysis of these events. If restricted weapons were smuggled onto the airplanes, then the effectiveness of the screening procedures would be at issue, and/or if the weapons used were not restricted, the choice not to provide a specific definition of “deadly” weapons would be critical.

Consequently, the aspects of the FAA regulatory regime that are most relevant to an analysis of these events appear to be the following: (1) the delegation of nearly unbounded authority to airports and air carriers to come up with their own security plans; (2) the authorization for these parties to sub-delegate this authority again to private contractors; (3) the lack of any significant requirements for the qualifications or training of these subcontractors; and (4) the lack of uniform specific definitions of what constitutes a “dangerous” weapon that cannot be transported onto an airplane. Again, the question here is whether these regulations, particularly when compared to the regulatory alternatives that were not chosen, can be reasonably viewed as unduly protective of an identifiable private interest at the expense of a public one, and therefore, indicative of the airline industry's capture of the FAA. If alternative regulatory regimes or decisions can be identified that would have provided

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202. See, e.g., Michael A. Hiltzik et al., *How did Hijackers Get Past Airport Security?*, L.A. TIMES, Sept. 23, 2001, at A1 (describing how the hijackers slid through loopholes in airport security, and the possibility that the box cutters either went undetected or were not prohibited onboard the airlines).

objectively better air security, and the only negative consequence of these alternatives would have been to significantly undermine the private interest of the airline companies, then the argument in favor of capture remains strong.

A structure that relies heavily on the airlines not only to promulgate their own safety procedures might seem to be contrary to the financial interest of the airline. Nonetheless, the structure actually ensures that the companies involved will have the vital ability to control their security expenditures, and determine how the expenditures are likely to change over time. If the FAA were to promulgate one security plan to be implemented by all airports and airlines (or at least, one set of essential security procedures that must be in each plan), that plan might include provisions that would either be expensive to implement or unnecessary from the perspective of one airline; or group of airlines. One obvious example is that the FAA might require that law enforcement professionals be used at all airports to perform security checks. Assuming such professionals would be paid substantially higher salaries than the contract employees, who at least possess a high school equivalency which the regulations allow for and the airlines apparently use, the lack of a uniform requirement makes it much easier for the airlines to meet the security requirements while spending less money. In addition, assuming that professionals trained in law enforcement techniques would, in the aggregate, provide a more effective security service, this provides a clear instance where the FAA has apparently favored the private interest of the air industry over the broader interest of the public.

This is not to say that the airlines or airports are not concerned with safety, or that they would always favor more lenient FAA security regulations. Indeed, as the post September 11 world has demonstrated, security lapses can be as, or even more, devastating to corporate bottom lines than expensive and intrusive government regulation. The point is that, given a choice between a structure that involves the imposition of requirements from a central authority and one that allows for each individual entity to determine these requirements, private individual entities will invariably prefer the freedom to choose their own structure and to alter that structure as they see fit over time. The lack of requirements for screening personnel is just one of the many industry-friendly consequences of the FAA's dominant regulatory philosophy — the delegation of substantial self-regulating authority to its industry.

In the wake of the September 11 attacks, it was suggested in various corners of the mainstream media that the airlines might actually want



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to turn the responsibility for airline security over to the federal government, and, specifically, that they might want federal officials to screen passengers at airports.<sup>203</sup> While one could imagine how the tragic and costly events might have shifted industry perceptions of the importance of security, one might also imagine that the airlines could stand to save money if, for example, one federal security system for all airports and airlines was implemented, and federal or other government security officials were installed to monitor such a plan. Such a structure would nonetheless, in the long run, undermine the private interests of the airline industry because it would take away the vital factor that is key to profit generation — control over the costs of doing business.

While any number of structures could be envisioned, it is likely that any federally supervised or manned security system in airports would not be provided by the United States as a gratuity to the industry and the traveling public. Some sort of revenue stream would almost certainly fund any such service with its source in the airline industry, either a tax on tickets or on the industry itself (that would likely be passed on to ticket-buyers in the form of higher ticket prices). So, while such a plan would not likely bankrupt the airlines and the airport authorities, it would not provide a financial windfall either. Therefore, there would be little, if any, incentive to replace the current system which, again, allows for almost unfettered control of security costs in the hands of the air industry, with a plan that would create financial uncertainty and no profit opportunities, and negative financial consequences at worst.

It could be argued that the airlines might favor a federally run security plan because of the shield to future liability exposure it could provide (no longer responsible for security screening, the airlines would not be subject to lawsuits in the future by the victims of security lapses). But such concerns seem to have little, if any, impact on the relative hostility that industry representatives have for increased regulatory oversight or requirements. Even assuming that stricter regulations might lessen the likelihood of problems, mistakes,

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203. See Carol Eisenberg et al., *Terrorist Attacks; 'System Failed Miserably,'* NEWSDAY, Sept. 16, 2001, at N9 (reporting that the airline industry's trade group, the Air Transportation Association of America, called for the federal government to take over the passenger screening process, expand the air marshal program, and deploy uniformed armed guards in airports). The Air Transportation Association of America stated that "recent events demand a change" in passing aviation security responsibilities on the industry. *Id.* See also Lauren Terrazzano & Sylvia Adcock, *Airline Industry Blocked Many Security Proposals,* MILWAUKEE J. SENTINEL, Sept. 21, 2001, at 1D (quoting Michael Wascum of the Air Transportation Association, as saying that airliners never wanted to be in the security screening business). "It was delegated to us by the federal government. We are not law enforcement agencies." *Id.*

or injuries, and result in fewer lawsuits and diminished liability exposure, private entities generally prefer to factor that potential exposure into a cost-benefit analysis, and to reject additional regulatory requirements if their aggregate cost, which is certain and immediate, exceeds the likely cost of responding to future liability claims that might never arise, and whose cost can be spread out over time in the form of annuities and other long-term payment mechanisms.

The post-September 11 circumstances could produce an even more important indirect incentive for the airlines to seek federal involvement — particularly visible and obvious federal involvement — in security screening. After the terrorist attacks, American commercial aviation was grounded for two and a half days. Even when planes began to fly again, there was a dramatic decrease in passengers, with the ridership still down as much as forty percent as of early November. Indications are that much of the reluctance to fly stems from concerns about air security.<sup>204</sup> An obvious and extensive federal presence could alleviate some of these fears, and consequently bring passengers back. But even if airlines see federal involvement as a useful short-term response to the current public perceptions, it is unlikely that they would see such involvement as a viable long-term approach. Presumably, security fears will diminish over time, and as the public's confidence in air travel increases, the benefit provided by federal involvement in screening will diminish in comparison to the additional costs that such involvement produces. Indeed, the impressive increase in airline passengers since the attacks, even without additional federal involvement in security, might convince airline officials that even the short-term boost in confidence from a heightened federal presence might not be necessary.

In addition to delegating primary oversight functions to the airlines and the airports, the FAA's security regulations provide few specific requirements for how security is to be implemented at airports and on airplanes. The agency might have followed its basic regulatory philosophy of significant delegation of authority, but still provided a set of specific requirements that must be part of any security program devised by an airport or an air carrier. The regulations could have, for example, specified experience and/or training requirements of employees involved in airport screening as opposed to going so far as to mandate the use of federal officials at

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204. Chris A. Courogen, *Travel Business Rises But Trails Last Year's Pace*, SUNDAY PATRIOT-NEWS HARRISBURG, Nov. 4, 2001, at J05.

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each airport. Again, as it must be assumed that additional training and experience would only enhance the effectiveness of these employees, the broad public interest appears again to have been discounted.

Perhaps the most surprising gap in the FAA's regulatory structure is the lack of specific regulatory definitions as to what weapons are too dangerous to allow on airplanes, and/or the agency conclusion that knives did not pose enough of a threat for hijacking or other criminal acts in the air to justify their restriction. The regulations provide no specific list of restricted weapons (other than some discussion of the proper treatment of various different types of firearms) and those definitions which have been provided to airports and airlines in the form of specific agency directives failed to address the potential impact that even a small knife in the hands of a criminal on an airplane might have.

Again, to assess the impact of agency capture on this regulatory choice — here, the decision not to provide a detailed list of dangerous weapons that would have included any and all knives — one must compare the public benefits and private costs of any alternative regulatory decision to the one that was chosen. The impact of this kind of specific requirement would be the same as the general impact of any centrally mandated requirement discussed above, the imposition of a cost that the private entity could not control. In this instance, the impact of providing a list of restricted items, and of adding items that otherwise would not be restricted to this list, would require a more extensive and costly screening process. Baggage and individuals would have to be searched more closely, and presumably, more skill and expertise would be required to ensure that relatively small, perhaps even non-metal, devices were not transported onto planes.

In addition, the inclusion of specific types of weapons or items as precluded would have made airport screening failures easier to conclusively identify, making it easier for oversight inspectors to definitively criticize the screening functions in particular airports. In the absence of a detailed list of precluded devices, or at least with a far less extensive list than could be provided, the air carriers will be in a much better position to defend supposed lapses in their screening procedures by arguing that they met the requirements of the relatively vague preclusions, and that any specific "weapon" that made it through screening was not sufficiently "dangerous" in their estimation to require that it be kept off an airplane. Like any other industry, the next best thing to no regulatory requirements enforced from on high, would be relatively vague requirements that allow for

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significant wiggle room.

One of the many impacts of the September 11 attacks appears to be a renewed focus on the deficiencies in the FAA's regulation of airport security. Indeed, the immediate aftermath of the attacks has seen new calls to take the security responsibilities away from the FAA as a result of some of the obvious impact of its dual mandate and its inherent consequences for diffusion of agency security concerns and focus.<sup>205</sup> As one member of the Gore Commission stated after the September 11 attacks: "The wrong people regulate airport security. The FAA is incompetent because it's an agency that promotes aviation commerce and security. It's a conflict."<sup>206</sup>

### C. *The Future of the FAA and Air Security*

On October 11, 2001, the U.S. Senate unanimously passed a bill (S. 1447) that sought to overhaul the nation's airport security regulations and procedures. In the "Findings" section of the provision, the Senate noted that the attacks of September 11 required "the United States to change fundamentally the way it approaches the task of ensuring the safety and security of the civil air transportation system" and that the "existing fragmentation of responsibility of that safety and security among government agencies and between government and nongovernmental entities is inefficient and unacceptable."<sup>207</sup>

Pursuant to a recommendation from the General Accounting Office ("GAO"), the bill called for the transfer of all security functions at United States airports to federal government personnel.<sup>208</sup> The language provided that the Attorney General, in

205. See Mead, *supra* note 93 (statement of Kenneth M. Mead, Inspector General U.S. Department of Transportation, before the House Committee on Transportation and Infrastructure Subcommittee on Aviation).

The deployment and use of security technology will require short-term and long-term actions. As we testified in a prior hearing before this Subcommittee, given the scope and complexity of the security challenge as we now know it, we believe the time has come to consider the option of vesting governance of the program and responsibility for the provision of security in one Federal organization. This entity should have security as its primary and central focus, profession, and mission. The federal organization would be responsible for purchasing, deploying and using the equipment to screen passengers, employees (anyone with access to the aircraft), carryon baggage, checked baggage, and cargo.

*Id.* See also Mike McAndrew, *Many Security Suggestions Put on Shelf*, HERALD AM., Sept. 23, 2001, at A9 (quoting Kathleen Flynn, a member of the Gore Commission, stating that "the oversight for security should be taken away from the FAA").

206. *Id.* (quoting Kathleen Flynn).

207. S. 1447, 107th Cong. § 101(3)-(4) (2001).

208. S. 1447, 107th Cong. § 101(5) (2001).

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consultation with the Secretary of Transportation, must provide for the screening of all passengers, mail, cargo, and baggage before it may go onboard a commercial airline.<sup>209</sup> The provision also requires that the Attorney General establish a program for the hiring and training of federal officials who will carry out these screening functions, and create standards for background checks of those considered.<sup>210</sup>

The bill delegated for specific responsibility to the Deputy Secretary of Transportation to coordinate the security related functions of the FAA, the Department of Justice and other government entities with relevant responsibilities.<sup>211</sup> In addition, the bill called for the creation of an "Aviation Security Coordination Council" to be chaired by the Secretary of Transportation or his designee, which would "work with the intelligence community to coordinate intelligence, security, and criminal enforcement activities affecting the safety and security of aviation at all United States airports . . . ." <sup>212</sup> The bill also included specific new regulations for securing the doors to the flight deck,<sup>213</sup> deploying air marshals,<sup>214</sup> and enhancing anti-hijacking training for flight crews.<sup>215</sup>

On November 2, 2001, after a long and heated debate, the U.S. House of Representatives passed its version of an airport security bill, which contained many provisions that were identical to the Senate version, including the creation of an Aviation Security Coordinating Council; the enhancement of flight deck security; and the anti-hijacking training for airline personnel.<sup>216</sup> The House version of the bill contained two crucial differences, however. First, while the House bill acknowledged the conclusion of the GAO that "security functions and security personnel at United States airports should become a Federal government responsibility," it did not actually require the use of federal officials to perform airport security functions. It required, instead, that the Secretary of Transportation

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209. S. 1447, 107th Cong. § 108 (2001).

210. S. 1447, 107th Cong. § 109 (2001).

211. S. 1447, 107th Cong. § 102(d) (2001).

212. S. 1447, 107th Cong. § 103 (2001) (providing that individuals designated as members of the Committee include the Attorney General, the Secretary of Defense, the Secretary of the Treasury, and the Director of the Central Intelligence Agency).

213. S. 1447, 107th Cong. § 104 (2001) (prohibiting access to the flight deck by unauthorized personnel during a flight, requiring that the flight deck door be "strengthened," and mandating that the door from the cabin be locked (and a key given only to flight personnel)).

214. S. 1447, 107th Cong. § 105 (2001).

215. S. 1447, 107th Cong. § 107 (2001).

216. H.R. 2951, 107th Cong. § 4, 5, 8 (2001).

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“establish an air transportation security program at each airport,” and that in carrying out these programs, the Administrator *may* use qualified State, local or private law enforcement personnel, FAA personnel, or other federal personnel.<sup>217</sup> In addition, the House bill provided for no allocation of new air security responsibility to the Department of Justice or any other arm of the federal government outside the Department of Transportation and the FAA, as compared to the Senate Bill’s provision for extensive new Department of Justice involvement in air security.

On November 16, House and Senate conferees reached a compromise which included the Senate bill’s requirement for federal screeners, but limited their required use to only two years, allowing airports to “opt out” of the federal system at that time.<sup>218</sup> More significantly, the compromise bill provided for a new semi-independent agency partially under the authority of the Department of Transportation, entitled the Transportation Security Administration (“TSA”). The bill gave the new agency oversight authority over the screening activities of federal officials, and the authority to promulgate regulations concerning the safety and security of commercial air traffic and other forms of domestic transportation without the consent of the Department of Transportation or other executive branch agencies.<sup>219</sup> This compromise bill was signed into law by President Bush on November 19, 2001.

The final version of the airline security legislation has two main advantages over both the pre-September 11 structure and either of the two initial proposals from the House and Senate. First, it creates a new agency and shifts at least some of the air security responsibilities of the FAA to that new agency. Second, it vests that authority in an agency with oversight responsibility over a wide array of industries, thereby diversifying the agency’s regulated community, and consequently, reducing the likelihood of successful hyper-influence by one organized interest group.

While the question of whether the baggage screeners would be federal was apparently the key stumbling block for the House and Senate, and was certainly the issue that garnered the most public attention, the crucial issue in the review and potential overhaul of air security regulation is not whether private or federal screening officials are used at American airports, but whether the procedures

217. H.R. 2951, 107th Cong. § 7 (2001).

218. CQ DAILY MONITOR, Nov. 19, 2001, at 3.

219. *Id.*

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that the screeners implement are sufficient, and the screeners are sufficiently trained and experienced to implement them. The presence of well-trained, experienced, and highly motivated officials will not produce a detailed, stringent, and closely monitored security system where one does not otherwise exist. If federal officials are used to perform security screening, but no specific requirements for screening are implemented, or there is insufficient ongoing evaluation of the adherence to these requirements, the presence of these officials would be expected to have little or no impact on air security.

While the new air security bill does not ensure the development of a sufficiently stringent air security system in this country, it does make such a development more likely by changing the entity where these regulations will be developed, and consequently, the dynamics inherent in that development.

#### CONCLUSION

The evidence cited and discussed in this Article is insufficient to provide *conclusive* proof that the FAA, and its obligation to ensure the safety of air travelers, and the nation as a whole, have been compromised by the phenomenon of agency capture. But it is more than sufficient to demonstrate that the FAA, given its dual mandate and apparent susceptibility to influence, is the wrong entity to be making and enforcing air security requirements in this country. The public interest in air security is crucial not only to the tens of millions of air travelers every year, but, as the events of September 11 demonstrate, to everyone on the ground as well. Although the impact of air security regulations on the profitability of the airline industry must be considered at some level — perhaps as one of many factors considered by the Secretary of Transportation and ultimately the President — the body that has the primary obligation for determining what provisions and enforcement mechanisms will make air travel safe should not be concerned with anything other than relevant safety concerns.

The FAA demonstrates all the signs of an agency that has allowed private pressure to undermine its public responsibility, and its regulations are tragically deficient as a result. Responsibility for air security is too important to entrust to such an entity, and the decision to shift that responsibility to a new governmental body with an exclusive mandate, with no obligation to promote anything other than the safety of the nation and its people, is a wise and prudent choice.