

FAA “Captured?”
Is the Federal Aviation Administration Subject to “Capture” by the Aviation Industry?

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ABSTRACT

Among the missions of the Federal Aviation Administration (FAA) are the following: regulating civil aviation to promote safety and fulfill the requirements of national defense; and encouraging and developing civil aeronautics, including new aviation technology (FAA 2002). The conflict between missions has led to questions regarding potential “capture” of the FAA by the industry that it regulates and a possible compromise of its critical aviation safety role. This article examines the concept of “capture” as related to both private industry and government agencies and further explores both sides of the issue pertaining to possible “capture” of the FAA

INTRODUCTION

According to an FAA website, among the FAA’s major functions are the following: “Regulating civil aviation to promote safety and fulfill the requirements of national defense; and encouraging and developing civil aeronautics, including civil aviation technology” (www.faa.gov).

Over time many questions have been raised regarding a possible conflict between these two elements of the FAA mission. These questions surfaced during cases such as the May 11, 1996 fatal crash of a Valujet DC-9 that plunged into Florida’s everglades as the result of a fire caused by hazardous cargo being transported contrary to regulations. This accident occurred even though multiple safety-related problems had previously been reported about Valujet operations. In support of the carrier, FAA initially opted to allow Valujet to continue operation. This is one of several examples where safety may have been compromised by industry influence.

The aviation industry has remarkable power in affecting the FAA. It can bring pressure to bear on the FAA through direct Congressional or White House intervention, as well as through congressional committee staff. In addition, the FAA is very sensitive to the “alphabet groups” such as the Air Transport Association (ATA), the Aircraft Owners and Pilots Association (AOPA), the National Business Aviation Association (NBAA), the International Air Transport Association (IATA),

and the General Aviation Manufacturers Association (GAMA). These, and groups like them, can place enormous weight on the FAA to abrogate their safety mission or goals in favor of the industry.

Within government agencies, decision makers are frequently reluctant to publicly raise issues concerning specific goals due to the negative political consequences. By avoiding the issues, goals are more likely to be tentative or unclear and therefore subject to being determined by industry. Decision makers are less likely to be held accountable. This can result in the undermining of agency goals and subject the agency to capture by the very interests whose behavior the goals were established to regulate.

Many FAA critics cite FAA’s dual mission as an irreconcilable conflict that compromises aviation safety in favor of promoting the industry. One of the strongest critics of the FAA is former Department of Transportation Inspector General Mary Schiavo. Ms. Schiavo asserts that much of the FAA’s failure to act on safety matters can be blamed on its dual role, and often conflicting mandate to police the airlines for safety and to promote commercial aviation (Ignelzi, 1997).

Is she right or does FAA’s dual role force a kind of balance between an agency that might be prone to over regulation without a parallel check and balance system with the industry it regulates? Other governmental agencies and even private industry organizations with significant fiduciary or safety related

responsibility have shown that they are also vulnerable to pressure to ease regulatory or audit affect. The Food and Drug Administration, the Securities and Exchange Commission, the Occupational Safety and Health Administration and a number of private commercial industries such as big five audit firms are also subject to compromise for a variety of reasons including professional relationships, the lure of consulting revenue, or conflicting missions.

Although private industry and other government agencies share similarities and differences with FAA, all are subject to influence that requires maintaining a kind of balance. At what point do they go too far and cross the line? Has FAA lost that balance and become subject to “capture” by the industry it regulates?

“CAPTURE” DEFINED

The concept of “Capture” is based on the Stiglerian model of the demand for regulation rather than studying the behavior of legislators and others on the supply side of regulation. “Together with the work of Peltzman (1976), Stigler is credited with the development of the *capture theory of regulation* in which an interest group ‘captures’ the regulatory agency and bends regulation to its own interests” (www.humboldt.edu).

In another study of regulatory agencies, Marver Bernstein described a series of phases that constitute the life cycle of an agency. At first a new agency is full of enthusiasm for protecting the public interest; but as it matures the enthusiasm gives way to more realism about its role; until finally it either becomes a protector of the status quo or a captive of the interests it purports to serve.

Conversely, private interests may be amply powerful so as to influence the regulatory agency to serve primarily the interests of those subject to the regulation—“in other words, the regulated group captures the regulators” (Kroszner, p.26).

Robert Monks and Nell Minow (1991) make the case that corporations actually thrive under regulatory control. In their book *Power and Accountability*, Monks and Minow assert “The ultimate commercial accomplishment is to

achieve regulation under law that is purported to be comprehensive and preempting and is administered by an agency that is in fact captive to the industry” (p. 131).

“CAPTURE” IN GOVERNMENTAL AGENCIES

The very nature of governmental organizations in the United States encourages the participation of business in the affairs of government. Political contributions, congressional action, White House action, and the actions of industry-led lobbying groups manifest this influence. Absent abuse, the process gives voice to citizens who might otherwise not be heard.

H.R. Mahood, in *Interest Groups In American National Politics, An Overview* (2000) describes the freedom to organize and act on behalf of the interests of groups of citizens as an enduring feature of our open, democratic system of government. He states: “Almost 1000 advisory committees exist within the various agencies today, giving their respective members or clientele groups a unique degree of access and/or voice in agency deliberations. These settings allow for hundreds of semiofficial associations to bring together congressional personnel, agency bureaucrats, possibly White House personnel, and group spokespersons. These formalized relationships, then, allow for the sharing and formalization of policy concerns” (p. 101).

He illustrates this with the Farm Bureau, which is an organization concerned with the Department of Agriculture’s farm policy, as are members of Congress on the agriculture committees. The same could be said of most federal, state, and local agencies including the FAA.

The very process that allows industry to influence Federal agencies such as the FAA and discourage them from being too aggressive in the industry-policing function may actually subject the agency to public scrutiny for being too lax and ultimately result in a kind of “capture” of the agency. When something does

go wrong, FAA is often criticized for “being in bed” with the aviation industry.

The FAA is not the only Federal organization subject to such criticism. Most, if not all, share the same potential for capture by the industry they regulate. The Nuclear Regulatory Commission (NRC) has been accused of an “unholy alliance” with the utility industry. In a 1996 newspaper article, a number of common bonds are listed that link the regulators with the regulated. The article detailed efforts that Shirley A. Jackson, chairwoman of the NRC, was making toward creating a more objective regulatory environment in the nuclear power industry (Remez & McIntire, 1996).

Another example of the conflicting environment that regulatory agencies face is detailed in a recent article about the Occupational Safety and Health Administration (OSHA). The article poses the following question: “Is it OSHA the regulator and enforcer, the agency that adopts complex new standards and cracks down on violations? Or is it OSHA the educator and partner of industry, the one that warns of hazards and helps employers avoid them?” (Korman, Kohn, Illia, Winston & Gunn, 2001)

A third example deals with the Food and Drug Administration (FDA). In a 1996 article, FDA was described as extending numerous olive branches to the industry it regulates. This included local grass roots meetings to hear industry complaints, allowing fuller scrutiny of its policies and behavior, seeking industry input on the way it trains its field investigators, working with the scientific community to speed the approval of new products, and other efforts to create harmony with the industry (Dickinson, 1996).

In another article, the conflict that Federal agencies face is described by Treasury Secretary Lawrence Summers in describing the conundrum faced by the Internal Revenue Service (IRS).

In a January (2000) speech to corporate accounting and tax officials Secretary Summers strongly argued against those who “have framed debates on IRS priorities around a trade-off between enforcement and customer service.” Summers answered those critics by saying: To

have effective tax administration, there must be both compliance and high-quality customer service (Barlas, 2000).

Secretary Summers’ speech not only describes the mission versus service tightrope that IRS walks, but that most or all other regulatory agencies must walk.

“CAPTURE” IN PRIVATE INDUSTRY

Similar to governmental organizations like the FAA, NRC, OSHA, FDA, and IRS, the audit industry is charged with the objective oversight of the financial health of its clients. This objectivity is called audit independence. Audit independence includes the notions of being unbiased, fair and impartial, and being intellectually honest (Carmichael, 1999).

Also similar to governmental organizations, auditors walk a tightrope between objective financial analysis and providing lucrative services to clients. Because clients are impressed with the integrity, objectivity and quality of the services provided by their CPA’s, they also want them to provide many non-audit functions. Their tightrope consists of the ethical dilemma of serving the expanding needs of their clients against the requirements of auditor independence (Colson, 2001).

However, as recent events have shown, auditors have apparently been “captured” by clients with the temptation of profits from other services. The largest and most distinguished audit firms have been besmirched by apparent compromise of auditor independence. In 2000, nearly half of the partners at Pricewaterhousecoopers (PwC) —a total of 1,301— reported at least one violation of the law, with the average being five. In the wake of this disclosure, PwC established a fund of \$2.5 million to create an internal education program in settlement of charges levied by the SEC (Barlas, 2000).

In another case involving a Big 5 accounting firm, Deloitte and Touche’s impartiality was challenged by the Minnesota attorney general’s office in the fact that Allina Health System paid the accounting firm \$17 million in consulting fees in 1999. While both firms stood by its audit, the appearance is clear that a compromise of audit objectivity is

possible or probable (Galloro, 2001).

One of the most recent and most publicized cases of compromise of audit independence is Arthur Andersen's relationship with Enron. In this case, Andersen not only performed corporate audits that found the now bankrupt corporation solvent, but helped to create some of the controversial off-the-books partnerships that obscured Enron's true financial status (Berger, 2002).

Although the audit industry has been receiving most of the attention in recent months, there are a number of other industries similarly subject to "capture."

"CAPTURE" OF THE FEDERAL AVIATION ADMINISTRATION

While FAA and other Federal regulatory agencies do not have the financial motivations to compromise their mission standards, they are often pressured by negative press coverage, lobbying groups, the Congress, and the White House to be kinder and gentler to those whom they regulate. In addition, the politically appointed heads of those agencies often come from the industries that they regulate. The political pressures and the industry relationships push those agencies in the direction of the interests of the regulated firms. As a result, the differently motivated, but similar capture of agencies by the industries they regulate result in a dynamic similar to the Enron/Andersen relationship.

The *Public Citizen, Congress Watch* (2002) published a report entitled "Delay, Dilute and Discard: How the Airline Industry and FAA Have Stymied Aviation Security Recommendations." In that report they cite a number of reasons why the FAA should not have been allowed to manage aviation security. Their rationale included the following statistics: The top nine airlines in 2000 and their trade association, the Air Transport Association (ATA), employed 210 lobbyists, including 108 lobbyists with "revolving door" connections. (They worked in Congress or another branch of the federal government prior to being hired by the airlines.) Of these lobbyists, 10 were former members of Congress. Two held cabinet positions as secretary of the U.S. Department of

Transportation (DOT), which oversees the FAA. Another three held senior positions at the FAA. Fifteen lobbyists employed by the airlines in 2000 have worked in the White House...The coziness between the industry and FAA is manifest in the fact that three FAA administrators, the top post in the agency, have come from the industry (www.citizen.org/congress/regulations, p. 2).

The Center for Public Integrity recently conducted a study of FAA and its role as a regulator of the airline industry in which they described an "incestuous" relationship between the two. They also note that industry rather than FAA or Congress sets airline safety standards.

The National Transportation Safety Board (NTSB) in general, and Mary Schiavo in particular, has frequently chided FAA for failure to take timely action on their recommendations pertaining to such issues as: "bogus" parts installed on aircraft, implementation of new seating arrangements for enhancement of survival and the practice of allowing airlines to pay the cost of training FAA Flight Inspectors which might affect enforcement actions.

In a special report by the Association of the Bar of the City of New York Aeronautics Committee in March 2002, the FAA was again taken to task on its relationship with ValuJet. The airline began service in October 1993. Between 1993 and 1996, the FAA investigated the airline 21 different times. Investigators found ValuJet flying with mandatory equipment broken. In addition, FAA cited ValuJet pilots for making routinely bad cockpit decisions. By March of 1996, the airline's internal reports showed a number of problems including eight engine shutdowns during flights, and twenty-eight problems with landing gear. At the same time, the FAA was holding ValuJet up as a "poster child" for deregulation, citing its lower fares and rapid growth. The New York Bar suggested that FAA was caught up in its mandate to promote as well as regulate the airline industry (Aviation Today, 2002).

A comprehensive newspaper article from the Seattle Times in 1995, primarily about the certification process on the Boeing 777, captures the critique of the FAA and raises an important question. The article suggests there is a wary consensus that the FAA stands aside

while the industry charges ahead. The article raises the question whether FAA is standing so far away that it can no longer tell when something goes wrong and the safety of airplanes is compromised. The article concludes with some questions about why aviation safety is relatively very good. Is FAA lucky or good? (McDermott, 1995) We suggest that the FAA is very good at what it does, in spite of its legion of critics.

FAA CAPTURE: THE REST OF THE STORY

While there is significant risk in a process as complex as the regulatory aspect of federal government, a system of checks and balances has evolved which certainly does not leave the opposite viewpoint voiceless. Even though industry and the alphabet groups reign in on federal agencies and their regulatory powers, there are similar checks and balances from an entire web of special interest groups whose expressed purpose is to “government watch” and/or promote their specific brand of dissent pertaining to corporate activities as well as opposing special interest groups. Many of those groups have the full cooperation of the media and their own special interest groups lobbying Congress as well, such that a case could be made that we have not only achieved a protective balance against the corporate capture of our regulatory agencies, but perhaps have on occasion swung the pendulum too far in failing to give credit to an agency with an outstanding safety record.

Keith Hill, Consultant, FAA Designated Engineering Representative for Level A software, Seattle, Washington, offered his comments on aspects of Mary Schiavo’s book *Flying Blind, Flying Safe*. While acknowledging that there is room for improvement in the FAA, he pointed out a number of factual errors in Mary Schiavo’s book and refutes the notion that the FAA is accountable for all failures related to air travel or that more government regulations and/or more rigorous inspections are a panacea for whatever ails the industry. He argues that the tough position FAA must maintain in making decisions that affect safety while keeping in mind the impact to

the industry does not compare to NTSB which has no restrictions and can make recommendations and take the FAA to task without regard for cost or other installation implications and when the preponderance of the evidence is that the incremental benefit is far smaller than the cost. He also cites examples of unbalanced reporting filled with misinformation from *Computer Weekly* regarding such issues as ...the Boeing decision to use common Ada source code compiled to three different microprocessors for the Primary Flight Computer software. The original plan was to use source code in three different languages. It is generally recognized that there are advantages and disadvantages for each of these two design approaches. After extended study and much discussion, Boeing concluded that the single language approach was the better choice. Interestingly, by making the decision when they did, short term costs to Boeing actually increased. The *Computer Weekly* quoted ‘experts’ who stated that Boeing “defied the principles” relating to dissimilar redundancy and that wording has carried over into *Flying Blind, Flying Safe*.

He further stated that Designated Engineering Representatives are involved in all certification-related meetings and he has never seen evidence that FAA gave way on significant issues. In fact, he described them as rather acrimonious and far from being cozy between FAA and Boeing.

A careful look at the FAA record throughout its history, of course, clearly reveals one of the safest records of any transportation mode to date. An examination of air carrier accidents alone, which is the most highly visible and frequently most criticized, reveals interesting data. The agency most critical of the FAA publishes on their web site *Table 2. Accidents and Accident Rates by NTSB Classification, 1982 through 2000, for U.S. Air Carriers Operating under 14 CFR 121* (www.nts.gov). In that table they classify accidents of carriers in four categories by “major,” “serious,” “injury” and “damage.” “Major” is defined as an accident in which any of three conditions is met: (a) a part 121 aircraft was destroyed, or (b) there were multiple fatalities, or (c) there was one fatality and a Part

121 aircraft was substantially damaged. “Serious” was classified as an accident, in which there was one fatality without substantial damage to a Part 121 aircraft, or there was one serious injury and a Part 121 aircraft was substantially damaged. The “injury” and “damage” categories involved no fatalities. In 1982 there were three major accidents and four serious accidents with 7.040 million aircraft hours flown. Each year since 1982 the number of hours flown increased, with the exception of 1991 (when there was a slight drop from the previous year), yet the highest number of major accidents that occurred in any given year was eight in 1985 and 1989, respectively. In 2000 there were three major accidents and three serious accidents (one less serious accident than in 1982) while the number of aircraft hours flown more than doubled to 18,040. The year 1998 saw the safest year with zero “major” accidents and three serious accidents. Granted, one fatality is one too many, but transportation by any other means involves risk of fatality also and the aviation industry’s record is clearly well above the others. Logic would seem to indicate that if the Agency has truly been a captive of the industry it regulates, that record would have imploded upon itself long ago rather than continue to indicate a drop in the number of major and serious accidents per hours flown. Something must be working. Yet its critics persist in assigning terms like “tombstone” to the agency, implying that it only takes action after a fatal crash, and every year its critics predict that next year is the year airplanes will fall from the sky in record numbers.

CONCLUSIONS AND RECOMMENDATIONS

Noll and Owen (as cited in Mahood, 2000) argue that while “capture theories have enjoyed currency among some journalists and scholars, more recent studies raise doubts about their validity” (2000, p.23). Chubb (as cited in Mahood, 2000) states the capture theories may be too simplistic since public agencies all differ significantly in structure, congressional mandate and oversight, public support and other characteristics. The clientele of those agencies also vary in size, organizational structure, career

personnel and culture that affect their willingness to be influenced by outside forces. Agencies undergo cycles of activism and quiescence. All of these factors create a much more complex picture than that postulated by the capture theory. Mahood postulates that capture theories “simply do not provide sufficient data and appreciation of interest group – agency interactions over time” (p. 23).

The definition of “capture” in itself is unclear in that it implies a level of control of the regulatory process by an industry such as aviation that would indicate a drop rather than an improvement in safety in spite of doubling the amount of miles flown. Still another fallacy in the definition of “capture” is the concept that interest groups ‘capture’ the regulatory agency and bend regulations to their own interests. Is that not a part of the original checks and balances built into the Federal Aviation Administration’s dual assignment by Congress to allow industry to protect an overzealous bureaucracy from regulating an industry out of business by providing input into the regulatory process and bending regulations to protect their own interest?

Since change is the name of the game in organizations and today’s winners may be tomorrow’s losers, especially in highly volatile ones like the FAA, a longitudinal study over an extended period of time could provide valuable insight into whether or not the agency’s regulatory responsibilities have truly been “captured” by the industry it regulates or whether perhaps the checks and balances are keeping the system in better balance than we suspect. Perhaps the FAA’s conflicting safety and industry mandate as assigned by Congress is the problem or perhaps it is not. Perhaps it is functioning better than current media reports lead the public to believe and we are just moving through one of those pluralistic periods where the voices of activism are commanding more attention than the Agency, and the system of checks and balances is working as it should to counter the power of a large and powerful industry. Either way, the seriousness of the issue mandates further and more objective consideration than the constant parade of charges against an agency and an industry with a proud history.

One of the most important analysis tools in business is the breakeven point where revenue is just enough to cover expenses. Using the breakeven point analogy, perhaps an exploration should be conducted of the system in place regarding what point and at what level the FAA can absorb new responsibilities and stay above the acceptable “breakeven point” in terms of carrying out its conflicting responsibilities. For example, how long can FAA continue to absorb new responsibilities such as the recent addition of new law enforcement responsibilities before it crosses that line or breakeven point and really does lose the ability to maintain the balance between safety and security and industry needs, thus jeopardizing safety such that the aviation safety record topples? Has Congress already crossed that line not only with the FAA but with other agencies such as the Immigration and Naturalization Service that made headlines recently for extending a student visa to one of the terrorists six months after that terrorist flew an airplane into the World Trade Center? Is the “capture” related to bad congressional decision-making in their efforts to “capture” votes from a segment of society rather than an Agency’s attempt to work within its mission and the resources assigned by a congress bending to interest groups?

The aviation industry is a volatile industry with a proud history of technological development that blazed the trail for this country’s technological development throughout most of the last century. It has been founded and nurtured through cyclical times yet managed to maintain the highest standards throughout much of its history; its volatility is well established; and its high visibility subjects it to constant public scrutiny, as well it should be. Regardless of current media opinion, it deserves an objective look at current charges that challenge that history.

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