TRIAL BY FIRE VERSUS TRIAL BY JURY

Land Mines on the Administrative Path to Aviation Truth and Justice

Gary Linn Evans

COATS & EVANS, P.C.

2002 SMU Air Law Symposium

You make your living in aviation either flying aircraft or working on them. You enjoy the fruits of your labor only by reason of the license you are required to obtain and maintain from the Federal Aviation Administration (the "FAA"). For whatever reason, you have garnered the unwanted scrutiny of one of the FAA's many representatives charged with ensuring safety in air commerce. What follows is an experience that, win or lose, will likely never be forgotten, and one that may have catastrophic impact on your career and your pocketbook.[1]

For years the FAA and its representatives have from time to time engaged in perhaps unnecessarily adversarial relationships with certificate holders participating in various aviation activities. For those unwary or unlucky enough to become embroiled in a situation where the respondent's very livelihood may be at issue, the process begins with a single complainant (the FAA inspector, who may or may not be justified in making the original complaint, and whose purpose in doing so is almost never questioned), continues with a single arbiter of fact and law who may or not be prepared to address the pertinent issues presented, and is completed (for all intents and purposes) with the NTSB which may or may not address the facts of the underlying case. The inherent disparity between evidentiary findings of fact in "traditional" jurisprudence and the prototypical administrative proceeding is revealed when you consider that in many jurisdictions, including Texas, a plaintiff has a constitutionally guaranteed right to a jury as the trier of fact, even for minimal amounts in controversy, and yet those engaged in aviation as a livelihood are never entitled to a jury as a finder of fact even when significantly greater stakes are at issue.

Congress has become aware of and has reigned in the FAA when its representatives become overzealous. For example, Congress passed legislation the provided for the immediate appeal of an FAA Order for the emergency suspension of a certificate holder's certificate. While Congress'

objective was clear, the simple fact is that the NTSB has never overruled the FAA's finding that an emergency existed warranting immediate suspension of a certificate holder's privileges, even under circumstances seemingly tailor made for the remedy that Congress intended.

The result of the foregoing is that airmen[2] and technicians who become involved with the FAA in an administrative proceeding frequently express the sentiment that the playing field is far from level, and that they are confronted with an insurmountable burden of proof in proving their innocence, resulting in a juxtaposition where guilt is presumed until innocence is proven. Frequently, and unfortunately, such apprehensions are proven entirely correct, and the innocents are cast into the same lot as the guilty, with the same but undeserved effects upon their qualifications, livelihood, earnings potential, and overall employability in aviation. For those who choose to make their living in aviation, the aviation industry, including the FAA, owes them a system of jurisprudence reasonably calculated to ensure that cases will be won or lost on their merits, and not on suspect evidentiary conclusions that may dilute the perceived propriety of many proceedings. What follows is a look at several cases that illustrate some of the problems that may arise in the aviation administrative enforcement arena, and concludes with some suggestions for leveling a playing field that has become overwhelmingly biased towards the "home" team.

It should be noted initially that there is little that an airman can do to prevent the FAA from issuing as many "warning letters" or letters of investigation ("LOI") as it sees fit. It is the disposition of such inquiries that is significant. Such dispositions can vary from the FAA voluntarily withdrawing its initial inquiry, to a full fledged adversarial proceeding that begins with a hearing before a National Transportation Safety Board ("NTSB")[3] administrative law judge ("ALJ"), can then be appealed to the entire NTSB, and under very limited circumstances, can be appealed to the

United States Courts of Appeal. Frequently, and depending upon the nature of the FAA's inquiry, airmen and their counsel will seek an "informal conference" with the FAA, seeking to persuade the FAA that the case should not be pursued any further. If the airman is successful, the matter may be dropped completely, or may be completed with only a letter of warning. Under either scenario, this result represents a situation where airmen may escape the threat to their livelihood with the least investment in defense costs. Although the following vignette depicts a situation where the informal conference was successful, it also raises the question of whether the following matter should have been pursued by the FAA in any respect.

Case Study I: The Discrepancy that Did Not Exist

Preparations for the 0-dark thirty scheduled Part 121 flight, from Ontario, California to Portland, Oregon aboard a Boeing 757 (the "Boeing"), proceeded normally until the FAA Inspector (the "Inspector") arrived, who requested "jump seat" privileges.

Verifying the identity of the Inspector, the Captain queried him as to the purpose of his request, casually inquiring as to whether it was a "check ride," especially when the Inspector's name did not appear anywhere on the dispatch paperwork for the planned flight. The Inspector replied that "it is always a check ride," which turned out to be a portent of things to come. The Captain would normally be given ***some*** kind of indication that a check ride was forthcoming. Although many of the FAA's representatives are consummate professionals, this Inspector's demeanor was later described by the crew as "short, curt, and abrasive," unfamiliar with the planned operation, and that his attitude, for lack of a better description, was "weird."

Following an uneventful flight, which the crew described as featuring nothing but small talk with the Inspector, the flight arrived into the Portland area. Although previous flights had executed

visual approaches into Portland International Airport, there was a scattered layer of clouds that may have resulted in an inability to proceed under VFR (Visual Flight Rules) conditions all the way to the airport. Out of an abundance of caution, the crew elected to be vectored for the full VOR (Very High Frequency Omni Range Station) non-precision approach[4] to the runway in use, to preclude any possible complaint from the Inspector. The VOR approach was completed to a runway described as "damp," resulting in a very soft landing by the Captain.

The Boeing's speedbrake handle is normally positioned to the "detent" or "armed" position to automatically deploy the speedbrake following landing, and although in that position, automatic speedbrake deployment did not occur, which may have been due to the very smooth landing. This phenomena is known and planned for with respect to various Boeing aircraft, including the 757, and a number of conditions are required to occur for automatic speedbrake deployment, which will not take place if any of the required conditions are not present.[5] In any event, flight crews are trained to manually deploy the speedbrake if auto deployment does not occur for any reason. Following the landing in Portland, and even without automatic speedbrake deployment, the Captain was required to add power to exit the runway.

Once the Boeing was stopped, the Inspector began a litany of questions about the arrival, most of which made little sense. These included questions such as: "Why were missed approach procedures not followed," when the aircraft was at all times pertinent under positive radar control by Portland Approach; "Why was the aircraft descending over 1,000 feet per minute," on a VOR approach, when such a descent is not only good practice but in many cases required to arrive at the MDA (Minimum Descent Altitude) prior to the missed approach point; and "Why were you below the VASI (Visual Approach Slope Indicator) when you broke out [of the clouds]," when such an

aircraft position is perfectly normal for the VOR approach in use. While a full discussion of the foregoing comments and their inappropriateness to the operation in question is beyond the scope of this paper, suffice to say that the instrument arrival and the procedures used by the crew were perfectly normal in every respect.

Most importantly, the Inspector asked why the Captain did not "ground" the aircraft, meaning remove it from service, following the failure of the speedbrake to deploy automatically. Like the other normal operations, this aspect of the operation of the 757 was explained as well, including the fact that, had a malfunction of the speedbrake system in fact occurred, it would have been displayed on the aircraft's EICAS system (Engine Indication and Crew Alerting System).

The Inspector's "Spanish Inquisition," as it would eventually be described, prevented the Boeing's inbound crew from leaving the flight deck, prevented the outbound crew from beginning their duties, and delayed the scheduled outbound flight. The Inspector had apparently left the area around the gate, and the Captain and crew felt that this "unusual" encounter with the Inspector was at long last and fortunately concluded.

However, unbeknownst to the crew, the Inspector had lurked in the shadows until the crew had left, and then inquired of the outbound crew as to whether a logbook entry had been made regarding the alleged malfunction of the speedbrake system.

Months later, the Captain received an LOI from the Inspector, alleging that a mechanical malfunction had occurred on the flight in question, and that the Captain had failed to log the malfunction in the Boeing's maintenance log. The LOI was thereafter followed by a Notice of Proposed Certificate Action ("NPCA"), alleging that the Captain had violated 14 C.F.R. § 121.563 by not logging the alleged malfunction of the auto speedbrake system,[6] and indicating that the

Captain's Airline Transport Certificate should therefore be suspended for 21 days.[7]

Availing himself of one of the options presented by the FAA, the Captain elected to engage the FAA in an informal conference addressing the underlying events that gave rise to the proposed certificate action and accompanying sanction. The allegations brought forth by the FAA inspector involved in seeking to support the alleged malfunction would prove to be startling.

A thorough inquiry into the pertinent case law addressing the alleged regulatory violation revealed that only identifiable mechanical malfunctions had served to sustain such an alleged violation, and the Captain was prepared to argue both the facts of his case and the NTSB case law applied thereto.[8] As discussed herein, the alleged "malfunction" where the speed brake fails to deploy automatically during a very smooth landing is in fact a known operating characteristic of many Boeing aircraft that may be explained by many factors, and is typically not considered to be an anomaly let alone a mechanical malfunction. Even though the Captain believed that the FAA's complaint was the product of misdirected effort by the FAA inspector, he nevertheless exhibited an extremely professional approach to resolving this matter, presenting a demeanor throughout the informal conference that was as effective in addressing the FAA's complaint as his professionalism was in the conduct of normal flight operations.

Although the FAA's complaint originated in the Northwest Region, the informal conference took place in the Southwest Region. To the Captain's substantial benefit, and to the FAA's credit, the operations representative assisting regional counsel had experience with Boeing aircraft, and was familiar with the issues and system involved. Before the Captain even had an opportunity to complete the description of the events giving rise to the FAA's threatened suspension of his airman's certificate, the inquiry focused on whether there was any type of mechanical malfunction of the

speedbrake whatsoever. Once it was established that no malfunction was present, which would have been testified to by the Captain, the First Officer, the next flight crew, and supported by the fact that no mention of the speedbrake appeared in the Boeing's maintenance logs during years of operation, it became apparent that the FAA would be unable to support its claimed regulatory violation.

One aspect of the Captain's case remained troubling. During the informal conference, it became apparent that the FAA's operations representative was concerned about information contained in the file. It was ultimately revealed that the FAA's file contained the unsupported assertion that an EICAS message was received after landing in Portland annunciating a speedbrake malfunction. While this would normally indicate that there might be a problem with that system, the uncontroverted facts were that no such annunciation was ever received. Trying to be as gracious as these facts will allow, the assertion was at the very least inexplicable.

It does, however, illustrate a situation where a non-event gave rise to a threat to the Captain's Airline Transport Pilot certificate, and may have had further impact on the Captain's employability if the FAA was able to prove its case. The alleged § 121.563 violation could have easily expanded to include a logbook falsification charge, an offense that the FAA rightfully considers to be punishable by certificate revocation. One can only imagine the opportunities that may have been denied if the Captain had been forced to respond in the affirmative to those questions that appear on practically every pilot job application regarding whether the applicant had ever had his airman's certificate suspended or revoked.

The Captain's case could well have been decided by an ALJ, one who might have found the Inspector's contention regarding the EICAS annunciation to be credible. Once that alleged "fact" of the Captain's case was decided, it would likely not be subject to appellate review, not to mention

the financial resources that the Captain would be required to expend in assembling the many witnesses for the NTSB hearing who would refute the Inspector's claims.

The Captain's case, and the threat to his livelihood, began with the Inspector, who was wholly unfamiliar with the aircraft and the operations being conducted, and thankfully ended at one of the earliest stages on the administrative path to aviation truth and justice.

Case Study II: The Neighbor and the Cadet

The flight that gave rise to this vignette occurred on June 28, 1998, near Nokesville, Virginia. Cadet Will Canda ("Cadet Canda") was at that time the holder of a private pilot's certificate and a cadet at West Point.

On that date, Cadet Canda flew over his home accompanied by his brother Ben, who was also a certificated private pilot. The entire event giving rise to the FAA's ("Administrator's") complaint was also witnessed by Colonel William Canda ("Colonel Canda"), a Colonel in the United States Air Force and Ben and Will Canda's father, who was also their flight instructor. The flight in question took place over an area that was indisputably sparsely populated.

Based upon the thoroughly-controverted testimony of the Administrator's single percipient witness, one of the Canda's neighbors, who had a well-known reputation of complaining about aircraft in the area (the "Neighbor"), the ALJ concluded that Cadet Canda had operated his aircraft closer than 500 feet to any person, vessel, vehicle, or structure, that such operation violated 14 C.F.R. § 91.119 (c), and that such operation was careless, and thus in violation of 14 C.F.R. § 91.13 (a).

The Neighbor was the sole percipient witness to the event who testified favorably to the Administrator, the Neighbor repeatedly admitted that she was merely speculating as to the altitude

of the aircraft at any time during the event in question, the Neighbor ultimately repudiated all of the sworn testimony she had offered as to the alleged altitude of the aircraft, and yet the ALJ concluded that Cadet Canda had operated his aircraft closer than 500 feet to any person, vessel, vehicle, or structure.

During preparation for the hearing, it was revealed that the Administrator's lawyers worked literally for hours with the Neighbor to elucidate the "testimony" that was required to support the regulatory violation being sought. The Neighbor's pronounced reluctance to offer such testimony became a matter of record, as was the eventual repudiation of her prior testimony.

The following comments about the result of this administrative action ***are not*** based upon the credibility of the Administrator's single percipient witness. They are, however, comments based upon the inability of the Neighbor to offer more than mere speculation regarding the gravamen of the Administrator's complaint, and comments made on behalf of all certificate holders who are entitled to far more than the tenuous chain of surmise upon speculation upon conjecture upon inference upon hearsay upon supposition that was ultimately responsible for the ALJ concluding that Cadet Canda's privileges to exercise the rights of his certificate should be suspended. The fine line that separates the relaxed (and sometimes non-existent) rules of evidence[9] in an administrative proceeding from no standard of evidentiary reliability whatsoever has in this case been obliterated.

It is uncontroverted that the Neighbor was the sole percipient witness to the actual event in question who showed any inclination to offer support for the Administrator's complaint. During her testimony, the Neighbor initially and later repeatedly testified that she was reluctant to estimate in any manner the height of Cadet Canda's aircraft at any time during the flight. This reluctance did not apparently deter the Administrator from seeking the information it was required to marshal,

regardless of its probative value, in support of her complaint. While working with the Administrator's lawyers, the Neighbor was apparently requested to obtain information regarding the height of trees located upon her property. In doing so, the Neighbor queried a "tree specialist" who was allegedly familiar with her property. This "tree specialist," with no indication whatsoever of having visited the property or measuring the trees in question, informed the Neighbor that such trees were no more than 85 feet in height, based apparently upon the tree specialist's general familiarity with the area. This critical piece of information would ultimately form the first link in the tortured chain of logic and supposition utilized by the Neighbor in forming her reluctant estimate of the altitude of the aircraft sought by the Administrator.

With no information or evidence in the record whatsoever regarding the ***actual*** height of the trees on her property, the Neighbor would eventually opine that the aircraft was no more than two and one-half the height of such trees. The Neighbor, despite obvious encouragement by the Administrator's lawyers, originally thought that her trees were ". . . probably about a [sic] 100 to 200 feet". The Neighbor also originally commented that she simply did not know the height of the aircraft. She further testified that she could not even visualize the measurement of the height of the aircraft, and very clearly *did not know* the height of the aircraft.

Next, after perceiving the aircraft to be "below" the trees enveloping her property, the Neighbor once again "guessed" at the height of the aircraft during a third observed flight in the area. Observing the aircraft to be below the trees surrounding her property, the Neighbor admitted that she could give no approximation of the height of the aircraft.

Following her extensive preparation with the Administrator's lawyers (fully three hours on the day before the hearing, the Neighbor made similar guesses as to the height of various trees on

her property. This methodology was revealed to be the inaccurate method that it was by the Neighbor's own admission that her initial estimates resulted in a calculation of 58 feet for the trees on her property. From any perspective, these various "estimates", and the admitted inconsistencies therewith, reveal that any estimate by the Neighbor of the height of such trees was mere speculation, speculation that was ultimately relied upon by the Administrator and the ALJ. The record of the hearing reflected that the Neighbor's own estimates varied from 58 to 200 feet.

The Neighbor was a lay witness with no aviation expertise whatsoever. The Neighbor admitted that on at least one of the flights in question, she was attempting to ascertain the height of the aircraft devoid of any reference points. She candidly admitted that she was not good at such estimation. The Neighbor admitted the fact that she was required to look through her trees to view an aircraft operating at 1000 ft. in the vicinity of her property, and admitted that aircraft operating at different heights would appear the same from her perspective. Despite the Neighbor's obvious inability to muster anything other than mere guesswork as to the height of the aircraft during the event in question, she essentially repudiated all of her previous attempts at estimating the altitude of the aircraft, and placed into the record a retraction thereof.

The Administrator, following the extensive "preparation" that took place on the day before the hearing, realized that the Neighbor had not engaged in any estimation of the aircraft's altitude whatsoever during the full year following the event in question. So, on the evening before the hearing, the Neighbor performed her own admittedly "very archaic mode of measurement" by attaching a piece of paper to a tree in her yard, and purportedly conducted a "visual exercise" at that time. The suggestion that any witness could have possibly conducted any such estimation on August 3, 1999, regarding events that actually transpired on June 21, 1998, was beyond preposterous.

In contrast, Cadet Canda provided clear, positive, direct, and credible testimony by fact witness Ben Canda, and fact witness Colonel Canda, both of whom observed the flight in question, both of whom have aviation expertise, and both of whom testified to the safe, competent, and legal operation of the aircraft during the flight in question.

As if to add layer upon layer of purported evidence lacking any probative value whatsoever, the Administrator also sought to introduce testimony of the investigating FAA inspector and her accomplice as to the alleged height of the aircraft during the flights in question. It was undisputed that neither individual personally observed the flight in question, and that neither individual was therefore even remotely capable of testifying as to the alleged altitude of the aircraft at any time.

The entire case, as observed by the ALJ, purportedly ". . . rises and falls on the testimony of [the Neighbor]." It is probably infrequently seen that such a witness offers testimony so clearly encouraged by the Administrator and her lawyers, only to ultimately repudiate the same testimony so offered. The Neighbor showed nothing but abject reluctance to testify to any estimated altitude of Cadet Canda's aircraft during the event in question, and did so only after repeated cajoling by the Administrator's lawyers.

What this case reveals, amongst other issues, is that the FAA was wholly unconcerned about conducting a proper investigation into the allegations against Cadet Canda. Instead, it waited for months and eventually for over one full year before it took the presumptively necessary step of asking the Neighbor to make an estimation of any kind regarding the altitude of the aircraft. On the eve of the hearing, the Neighbor finally performed her "estimate" as apparently requested by the Administrator. One can only imagine the difficulty the Neighbor was confronted with in attempting to comply with such a request, although the accuracy of her many "results" was made a matter of

record. What the Neighbor's "testimony" amounted to then, instead of the reasonably anticipated factual account of such a percipient witness, was in actuality a convoluted mix of fact and impermissible expert testimony encouraged by the Administrator in her attempt to assemble the information she so desperately required to prevail in this proceeding.

Under any evidentiary standard, certificate holders generally, and Cadet Canda specifically, are entitled to far more than the lackadaisical investigation performed by the FAA into the facts and circumstances of this case, and are entitled to far more than the tenuous chain of surmise, speculation, conjecture, inference, hearsay, and supposition that formed the basis for the ALJ to conclude that Cadet Canda's aircraft was operated closer than 500 feet to any person, vessel, vehicle, or structure. The "testimony" offered by the Neighbor was startling in its lack of trustworthiness. The overwhelming lack of probative value from the Neighbor's testimony as to the altitude of the aircraft, left no doubt that the ALJ had *no credible evidence whatsoever* upon which to base any finding of fact regarding Canda's altitude during the flight in question, other than the sworn factual testimony of Cadet Canda and his witnesses.

In this case, the ALJ reduced the suspension sought by the FAA from 60 to 45 days, found that Cadet Canda's operation of the aircraft was careless and reckless, but also found that the aircraft could have been landed safely in the event of an emergency. Curiously, the ALJ made no reference to the Neighbor's ability to estimate the height of Cadet Canda's aircraft, and instead chose to rely upon the Neighbor's perceptions that the aircraft could be seen through the trees on the property, that the aircraft flew directly overhead, and that the registration number could be seen, all of which stood precisely for no proposition as to the height of the aircraft during the flights in question. The ALJ also seemed to place great stock in a finding that the Neighbor found the aircraft to be "loud."

With no authority upon which to appeal the ALJ's findings of fact, Cadet Canda had little hope to appeal the suspension of his airman's certificate, which was upheld by the NTSB. Would a trier of fact normally conclude in good conscience that the Administrator had met her burden of proof with respect to the height of the aircraft? Would any airman like to be presented with these "facts" and risk their future employability and/or livelihood upon the Neighbor's demonstrated bias against aircraft being operated in the area?[10]

Case Study III: The Emergency From the Past

The Gold Seal Flight Instructor owned one of the largest flight schools in Texas.

The Flight Instructor was aghast to find out that the FAA had requested that she submit to reexamination of her flight instructor's certificate. The FAA's basis for requesting the reexamination was the failure of one of the Flight Instructor's students on a check ride and the failure of another on an oral exam. No accidents, incidents or alleged Federal Aviation Regulation violations were alleged. When the FAA could not annunciate any specific failing on the part of the Flight Instructor which it believed to be related to the students' performances, the Flight Instructor respectfully declined the request for reexamination.

Even though the failures had occurred more than six months previously, the FAA ordered the emergency revocation of the Flight Instructor's certificate because she failed to submit to the reexamination of her certificate. The Flight Instructor challenged the emergency order with the newly-created right to appeal such an order immediately to an NTSB ALJ and then to the NTSB, although the NTSB would eventually opine that such an appeal was not permitted. The ALJ found that the FAA was warranted in treating the certificate action as an emergency, after considering only the facts alleged in the FAA's order and assuming those facts to be true. The Flight Instructor was

forced to submit to reexamination with the FAA before she could continue to provide instruction to her students. In this situation, the FAA issued an emergency order in connection with events that transpired many months before.[11] As any flight instructor might wish to consider, the NTSB found that even the failure of a single student would justify the reexamination of a flight instructor, noting that:

> . . . a student pilot's failure on a flight test might be attributable to the performance of his or her instructor. That nexus would, we think, be enough to justify a re-examination request of a flight instructor for even one failure of only one of his or her students because the student would not have been able to take the test without the instructor's written endorsement that he or she was ready (i.e. prepared) to take and pass it. ***A failure therefore inevitably calls in question the validity of the sign off, or the adequacy of the instruction underlying it, notwithstanding the myriad other factors that either actually, or could have, caused or contributed to the unsuccessful performance***.

Historically, the standard of review for re-examination requests had previously been, "whether the certificate holder has been involved in a matter, ***such as an aircraft accident or incident***, in which lack of competence could have been a factor . . . ."[12] The NTSB deleted the most important part of this standard of review for re-examination by upholding re-examination where there was no aircraft accident or incident, there was no alleged regulatory violation, and where the examinee was not even personally involved in the flight test. With this holding, the NTSB decided to ignore uncontroverted expert testimony that oral and flight test failures can be caused by any number of factors unrelated to an instructor's competence, and instead upheld re-examination despite no evidence whatsoever that the instructor caused or contributed to the student's failure. In effect, the NTSB acknowledge that it was further abdicating its statutory responsibility to oversee the FAA's enforcement function: ". . . the fact that the request here involves a flight instructor . . .

counsels less . . . scrutiny of a decision by the Administrator."

Would an arbiter of fact normally conclude that such a single student failure would be a legitimate basis to invoke its emergency powers and revoke any flight instructor's ability to make a living? Probably not.

Agency Problems and Attempted Solutions

As discussed herein, *supra*, Congress has become aware of deficiencies within administrative agencies such as the FAA, and implemented corrective legislation. These corrective measure sometimes arise when suspect proceedings generate unwanted publicity.

In an aviation context, this occurred in 1993, when the FAA initiated emergency proceedings revoking the medical certificate held by famed fighter pilot, test pilot and air show star R.A. "Bob" Hoover. The FAA's basis for this action was the opinion of two FAA employees that one of Hoover's air show routines looked a little hesitant. This eventually led to the FAA obtaining an amorphous diagnosis of questionable basis that Hoover suffered a "cognitive deficit." Armed with this definitive diagnosis, the FAA ordered the emergency revocation of Hoover's medical certificate. The significance of the FAA's designation of an enforcement action as an emergency is that the resulting order is immediately effective. Thus, while a normal FAA order is automatically stayed until the certificate holder has had an opportunity to exercise all appellate remedies, Hoover's medical was revoked immediately upon the issuance of the FAA's order. The supposed procedural safeguard against abuse of the emergency designation by the FAA is an extremely accelerated appellate timetable which the certificate holder, the FAA and the NTSB must all follow. As a practical matter, in cases involving highly technical subject matter requiring expert testimony, the accelerated timetable is more of a hindrance to the certificate holder than a benefit.

Hoover's appeal of the emergency order was initially successful. The NTSB administrative law judge, who is supposed be the sole trier of fact issues under the administrative scheme, sustained Hoover's challenge of the revocation and ordered Hoover's medical certificate reinstated. The FAA then appealed the ALJ's order to the full NTSB, which reversed the ALJ and upheld the FAA's original order.[13] Hoover's subsequent appeals to the United States Court of Appeals and the Supreme Court were unsuccessful.

Hoover's case touched off a fire storm of controversy in the aviation community and became a rallying point to illustrate the FAA's apparently increasing tendency to classify routine enforcement actions as emergencies in order to avail themselves of the procedural advantages described above. After receiving intensive pressure from organizations such as the Aircraft Owners & Pilots Association, Congress enacted 49 U.S.C. § 44709(e), known colloquially as "the Hoover bill". The new law provided:

> A person affected by the immediate effectiveness of the Administrator's order . . . may petition for a review by the Board, under procedures promulgated by the Board, of the Administrator's determination that an emergency exists . . . If the Board finds that an emergency does not exist that requires the immediate application of the order in the interest of safety in air commerce or air transportation, the order shall be stayed...

The NTSB thereafter effectively eviscerated Congress' answer to the FAA's perceived abuse of its emergency power by promulgating rules that all but insured that the FAA would always prevail in any Hoover bill challenge. Specifically, the NTSB decreed that:

> The chief judge [ALJ] . . . shall dispose of the petition . . ., finding whether the Administrator abused . . . her discretion in determining that there exists an emergency requiring the order to be immediately effective, ***based on the acts and omissions alleged in the Administrator's order, assuming the truth of such factual allegations***.[14]

[emphasis added, maniacal laughter suppressed]. As if assuming all facts alleged by the FAA to be true and refusing to consider any facts not alleged by the FAA didn't give the FAA enough of a procedural advantage, the NTSB also decide that there would be no review permitted of the ALJ's determination whether an emergency actually existed.[15] As an ironic footnote to the Hoover saga, the tremendous political pressure brought to bear in the wake of the FAA's revocation of Hoover's medical not only led to Congress' passage of the Hoover bill, but a few years after the Supreme Court denied Hoover's petition for certiorari, the FAA reversed itself and returned Hoover's medical to him. Since then, Hoover has again thrilled hundreds of thousands of air show fans at air shows around the country. However, presumably due to the foregoing subsequent "interpretation" of Congress' intent by the NTSB, airmen, as of the writing of this paper, were batting exactly 0 for all attempts, meaning that no airman to date had successfully challenged the FAA's determination that an emergency existed calling for the emergency suspension or revocation of an airman's certificate. Perhaps Congress was approaching the problem from the wrong end of the horse, as once again initial "factual" determinations inexorably determine the path such proceedings will eventually follow.

The United States Constitution, the Jury, and Administrative Proceedings

Article III of the United States Constitution governs the "judicial Power of the United States."[16] However, the Constitution only establishes the Supreme Court.[17] The Constitution gives Congress the power to create other Courts.[18] The Seventh Amendment to the United States Constitution guarantees to citizens suing or being sued in the federal courts the right to a jury trial in "suits at common law." This has been interpreted to include cases arising under statutes that did not exist at common law if the statute provides rights and remedies analogous to those that existed

at common law.[19] The Seventh Amendment also requires a jury when a case includes both legal and equitable issues.[20]

While the Constitution does not address the modern concept of the administrative agency, the power of Congress to establish judicial or quasi-judicial bodies outside of the constraints of Article III apparently has never been doubted.[21] Both administrative agencies and other examples of "legislative courts," are usually justified under the Necessary and Proper Clause, which empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution [its powers under the Constitution]."[22]

Administrative agencies are the most significant example of legislative courts.[23] Agencies have many other functions besides the adjudicative function, which distinguishes them from other kinds of legislative courts.[24] Agencies implement and administer statutory and benefit programs by making rules that implement and clarify the statutes, and by enforcing the statutes and the rules through administrative adjudication.[25] Federal agencies handle some 350,000 cases every year, compared to only 240,000 cases filed every year in federal courts.[26] "When agencies adjudicate matters, they do not employ juries; indeed, agencies are supposed to bring expertise to the matter, and that expertise is inconsistent with the use of lay decision makers."[27] Agency adjudication is conducted by administrative law judges, who are typically employees of the agency.[28]

One of America's core principles is that executive, legislative, and judicial power should rest in separate bodies of government.[29] The legislative, executive, and judicial functions are described in separate articles of the Constitution.[30] "This structure stems from a belief among the founders that concentration of all three functions of government in the same hands leads to tyranny."[31]

Nevertheless, Congress may constitute a legislative court to bring a greater efficiency to the

adjudication of certain matters than an Article III court provides, or, as described above, they may allow the use of expert decision makers, in order to increase not only efficiency but also accuracy.[32] Congress can also create legislative courts because it desires to keep control over its regulatory programs in the legislative or executive branch of government, although that motivation, "is less legitimate given the separation of powers principle that underlies our form of government."[33] Regulatory schemes often have a significant political component, and it is understandable that Congress would prefer to maintain political control over regulation in order to ensure that the regulatory program will be carried out.[34] Legislative courts, including administrative agencies, can be controlled to some degree by the political appointment power.[35]

By contrast, the Constitutional values underlying the Seventh Amendment right to trial by jury include the value of an independent decision maker, protection against abuse of power by governmental and other institutional authorities, introduction of community values into the judicial process, checking the bureaucratization of the judiciary, legitimizing judicial decisions, and educating the citizenry.[36]

Article III of the Constitution makes the federal judiciary independent of political pressure that could be exerted by the legislative and executive branches of government and by the people.[37] "The jury, by contrast, is designed to be independent not only of the political branches, but even of the judicial branch."[38] Juries participate directly in important governmental decision making in a unique example of participatory, rather than representative, democracy.[39] Jury service is unique in that citizens can be compelled to serve on juries, while other forms of political participation are voluntary.[40] Because juries often use a consensus decision rule rather than the majority rule found in our other political institutions, citizens must come together and deliberate until they reach a

verdict.[41] This characteristic of the jury process requires jurors to listen to differing views and to search for common ground among diverse participants and thus injects community values into the decision making process.[42] Jury decisions can reflect how a community expects its citizens to conduct themselves.[43]

In considering the right to trial by jury in the context of administrative agencies, courts have generally upheld the legislative denial of trial by juries in front of administrative agencies. Perhaps because administrative agencies play such a large role in modern America, the judicial justification for this denial is the public rights doctrine, along with the balancing test that has evolved from it.[44] Pursuant to the public rights doctrine, Congress may assign the adjudication of regulatory and public benefit matters to non-Article III adjudicators such as administrative agencies.[45] The balancing test allows administrative agencies to adjudicate a variety of private rights.[46] While these doctrines were developed to justify non-Article III adjudication rather than jury-less adjudication, the Supreme Court has also permitted jury-less adjudication in administrative agencies.[47] Supreme Court review of these issues focuses not on whether Congress can provide for jury-less adjudication, but whether Congress can provide for non-Article III adjudication.[48] If Congress can permit non-Article III adjudication, the Supreme Court usually permits such adjudication without a jury.[49]

In *Curtis v. Loether*, the court considered whether a jury trial was constitutionally required in an Article III court when Congress created a statutory right that had not existed at common law.[50] The Supreme Court decided that "the Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."[51] In order to decide whether the first requirement has been met, the Court developed a two-part test for deciding whether a statute

created legal rights and remedies: (1) find a common law or equitable action that is analogous to the statutory action; (2) if the analogous action was one at common law rather than in equity, a jury trial is appropriate.[52]

"While the Court has always approved of jury-less adjudication in administrative agencies, the rationale for such adjudication has been difficult to pin down."[53] At one point, the Court simply assumed that the Seventh Amendment was inapplicable if Congress could properly provide for administrative adjudication.[54] Later, the Court ruled that fact-finding by and administrative agency did not involve a suit at common law, but instead was a statutory proceeding.[55] The Supreme Court then asserted that jury trials may be incompatible with agency adjudication founded on expert, rather than amateur, decision making.[56]

The Supreme Court has held that, " . . . the Article III and Seventh Amendment analyses are the same, so that if the public rights doctrine or the balancing test allows Congress to assign a matter to a non-Article III court, it can do so without providing for a jury."[57] Supreme Court precedent is not entirely consistent with that statement.[58]

While Article III of the Constitution guarantees a criminal jury trial, the Constitution originally did not mention civil juries at all.[59] During the ratification debates, opponents of the Constitution feared that the failure to guarantee a civil jury meant that the civil jury was abolished. Proponents of the Constitution, on the other hand, argued that the civil jury was not abolished, but that Congress would have the flexibility to provide for a civil jury or not, as it saw fit. But because the civil jury in colonial America had served as a buffer against the excesses of the king, the absence of a civil jury guarantee was a major sticking point during the ratification debates. The result was that the right to a civil jury became part of the Bill of Rights. This history suggests that the Seventh

Amendment was born of an unwillingness to trust Congress to do the right thing with respect to the right to a civil jury trial and is therefore an independent check on Congress's powers to determine the mode of adjudication.[60] Conversely, nothing in Congress's power to create courts suggests that Congress has power to abrogate the right to a jury trial.[61] The Seventh Amendment is a constitutional right and Congress has no power to abrogate such rights.[62] "Indeed, it is the duty of the Supreme Court to protect such rights against challenges from the political branches of government."[63] The Supreme Court's opinions suggest that the Seventh Amendment can be abrogated whenever Congress convinces the Court that it is more expeditious to do so.[64] As summarized by Professor Sward:

> Citizen participation and deliberation cannot be preserved by allowing legislative courts to adjudicate matters without a jury. Furthermore, the solution that courts and commentators generally propose for reconciling agency adjudication with the requirements of Article III is review of agency action in an Article III court. Even if Article III review is a satisfactory means of preserving Article III values, that solution simply does not vindicate the unique Seventh Amendment values: if jury-less adjudication is used in the first instance, jury-less review in Article III courts does nothing to protect citizen participation and deliberation.[65]

Texas Addresses the Issue - "Don't Mess With Texas"[66]

State courts have struggled with these issues as well.[67] In 1993, the Supreme Court of Texas was confronted with a challenge to civil penalties and the Texas Constitution's protections of trial by jury.[68] Although a number of other issues were presented in this case based upon environmental issues, the resulting majority opinion by Justice Cornyn resulted in concurring and dissenting opinions by Justices Gammage, Doggett, and Spector.

The Texas Association of Business ("TAB") filed suit, alleging in part that civil penalties imposed by administrative agencies in Texas violated the open courts and jury trial provisions of the Texas Constitution.[69] Initially, the Court observed that trial by jury cannot be claimed in an inquiry

that is non-judicial in its character, or with respect to proceedings before an administrative board.[70] The Court then noted that even if a right to a jury is denied before an administrative agency, the dispositive question [in Texas] is whether a trial de novo and the corresponding right to a jury trial is constitutionally required upon judicial review of the agency's decision.[71] Article I, section 15 of the Texas Constitution preserves a right to trial by jury for those actions, or analogous actions, tried to a jury at the time the constitution of 1876 was adopted. A jury trial is not mandated by this provision for any other judicial proceeding.[72] The Court had previously held that a suit for civil penalties for violation of an injunction issued pursuant to the Texas Deceptive Trade Practices Act was analogous to the common law action for debt, tried to a jury at the time our constitution was adopted, and therefore held that the right to a jury trial for that action remained inviolate.[73] The Court further observed, however, that in certain types of adversary proceedings the constitutional right to a jury trial does not attach. Among the proceedings the Court referred to were appeals from administrative decisions.[74] The Court concluded that agencies' assessments of environmental penalties are not actions, or analogous actions, to those tried to a jury at the time the constitution of 1876 was adopted, and further noted that to hold such Texas environmental statutes and regulations promulgated in the late 1960s to merely parrot common law and statutory rights triable to a jury in 1876 would turn a blind eye to the emergence of the modern administrative state and its profound impact on legal and social order . . . [r]egulatory schemes . . . were designed to balance mounting environmental concerns with Texas' economic vitality. In 1876 no governmental schemes akin to those existed, and the Court concluded that the contested proceedings were not analogous to any action tried to a jury in 1876. The Court ultimately held that no right to a jury trial attaches to appeals from administrative adjudications under the environmental statutes and regulations at issue.[75]

Although the Court stated that it should not be misunderstood to say that the legislature may abrogate the right to trial by jury in any case by delegating duties to an administrative agency, it reaffirmed what it held almost a half century ago in concluding that certain judicial functions, including fact finding, may be delegated constitutionally by the legislature to administrative agencies in furtherance of the preservation and conservation of the state's natural resources.[76] That decision was based on article XVI, section 59(a) of the Texas Constitution, which provides in relevant part: "The conservation and development of all the natural resources of this State . . . and the preservation and conservation of all such natural resources . . . are each and all . . . public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto."[77] By the use of the broad language used in Article XVI, Section 59(a), the Court stated that the "Legislature is authorized to enact such laws as are necessary to carry out the purposes for which such constitutional amendment was adopted."[78]

However, the foregoing analysis resulted in a spirited dissent by Justice Doggett, that mirrors many of the concerns described herein, *supra*. First identifying those elements of the majority's opinions that would impact Texas' already questionable environmental quality, Justice Doggett turned to concerns regarding the right to trial by jury:

> This major blow to our environment is matched only by the threat to our system of justice lurking in the arcane language of today's opinion. Hidden within its lengthy legal mumbo-jumbo is an unprecedented blow to our jury system. The constitutional right of trial by jury, already suffering at the hands of this majority, is no longer inviolate; it may be abrogated at any time . . . . The drafters of our Texas Constitution realized something that the majority has long ceased to appreciate -- ordinary Texans can make an extraordinary contribution to our system of justice. The more their collective voice expressed in a jury verdict is disregarded, the more new barriers are contrived to shut them out of our system of justice, the less justice that system will offer.[79]

Justice Doggett was not immune to the evolution of the administrative state, but recommended that only narrowest of exceptions be permitted.

> The harm caused to our environment by today's writing is equalled only by the severe blow struck against our fundamental right of trial by jury. In holding that TAB and its members have no right to a jury trial, the majority employs an analysis that has far-reaching ramifications. While I recognize the need to accommodate the evolution of the administrative state, the history of this important guarantee mandates that only the narrowest of exceptions be permitted.

Recognizing the long history of right to trial by jury in Texas, including being described as "that palladium of civil liberty, and only safe guarantee for the life, liberty, and property of the citizen,"[80] Texas courts had previously held that:

> It is fundamental to our system of justice and the intention and policy of the law to permit all persons to have a trial by jury of disputed fact issues essential for a determination of [their rights]. The right of trial by jury is a valuable right which should be guarded jealously by all state courts.[81]

Although Justice Doggett would eventually agree that the plaintiffs would not be entitled to a jury trial in the instant case because the state was enforcing public environmental regulations through administrative penalties, he continued to characterize the majority opinion as a threat to a critical state constitutional guarantee.[82] Summarizing concerns that apply equally to those exposed to the administrative system utilized by the FAA and the NTSB, Justice Doggett observed:

> The right to trial by jury is a critical state constitutional guarantee. Denigrating my concern with protecting this liberty, the majority dismisses my writing as "trumpeting." The trumpet call has sounded from the very earliest days of our Republic, heralding our right to trial by jury, a clarion to our citizens to shout out to preserve their heritage against attack. It demands that any intrusion on this right be narrow in scope, clearly-announced and thoughtfully considered. The majority's refusal to define with certainty its erosion of the right to trial by jury sounds a weak and shaky chord, reflecting a lack of commitment to this fundamental guarantee. Attempting to let the strong note drown the weak, the majority seeks to hide its equivocation by reference to my conclusion that a jury trial is not required under these anti-pollution statutes . . .[83]

Over one hundred and fifty years ago, the framers of the Texas Constitution sought to protect the right to a jury trial even in cases involving equity, unlike many sister states,[84] and suggested, in a statement eerily prescient of the current ALJ system:

> It is a dangerous principle to trust too much power in the hands of one man. Would it not be better to trust a power of this nature in the hands of twelve men, than to confide it to the breast of one?[85]

The sole arbiter of fact in an FAA enforcement proceeding, however well intentioned, simply cannot substitute for the counsel provided by the jury, and although trial results are often times ascribed to problems with the jury system, commentators have concluded that " . . . the civil jury system is valuable and works well. . . It is [not] 'broken,' and therefore it need not be 'fixed.' The jury system is a proven, effective, an[d] important means of resolving civil disputes."[86] Surely the issues presented in the typical aviation enforcement case cannot be considered so complex that a jury could not determine the factual issues before the tribunal.[87] Justice Doggett expressed concerns that may typify the experience that airmen have at the hands of the current ALJ system:

> Instead of walking into a courthouse, where a jury is guaranteed, citizens may be detoured to an administrative agency, to explain their problems to bureaucrats not directly answerable to the community.[88]

Conclusion

The FAA and the NTSB both employ many dedicated, principled professionals that illustrate the best aspirational goals of the policies and theories behind administrative adjudication. Unfortunately, not everyone involved in the system fits this description. Furthermore, all too often intelligent, dedicated professionals in both agencies become mired in bureaucratic inertia which increasingly favors the FAA, often times with apparent disregard for the underlying facts.

Results-based opinions designed to yield a ruling in favor of the FAA in one case become precedent, further diminishing procedural and substantive legal safeguards for ***all*** airmen. This trend is exacerbated when applied in tandem with rules of practice that not only feature "relaxed" rules of evidence, but ultimately disregard traditional evidentiary safeguards with the result that the tribunal can rely upon alleged evidence that would normally not make it past the courthouse door.

Conversely, where precedent supports an airman, it is all too easy for the NTSB to disregard it in order to encourage FAA success. Congress' efforts to remedy the ever steepening playing field in the appeal of ALJ decisions, such as the Hoover Bill, are easily muted through administrative and procedural rules that make such efforts at reform all but meaningless. Perhaps airmen's best hope for safeguarding traditional notions of due process and fair play in protecting his or her certificate would be introducing the time honored concept of the jury as an arbiter of fact in FAA enforcement and civil penalty actions, which might help ensure a fair and accurate determination of facts upon which a case may be tried and appealed. Although the implementation of such a plan would not be without significant expense, many of those who have experienced the current system are especially cognizant that mere expedience is no justification when your livelihood is at stake.

Gary Linn Evans[89]

1. The title of this paper was inspired by trials devised over the years by those in power who determined the ordeals to be suffered by those accused of various transgressions, frequently involving fire and/or water. The often fatal outcome determined the guilt or innocence of the accused. For example, and with water the medium used in baptism, the water would accept the accused, proving his innocence when drowned, or would reject the accused, proving guilt. Sources consulted in connection with this paper were not entirely clear as to how fire was utilized, but it seemed a far more appropriate medium to be referred to herein. Whatever the ordeal of choice, the end result to the accused was the same. Any similarities between the foregoing historical methods and participation in administrative proceedings before the FAA and/or the NTSB is purely coincidental.

2. I intend no gender bias by the use of this term; "airperson" just did not sound right. This paper will refer to all such persons operating by reason of a license from the FAA as "airmen" or "airman."

3. For rules related to the NTSB generally and proceedings related thereto, see generally 49 U.S.C. § 44709, and 49 C.F.R. Part 821.

4. Non-precision meaning only that the standard instrument approach procedure did not provide for an electronic glide slope. See generally 49 U.S.C. 106 (g) § 40113, 44701; 14 C.F.R. § 1.1.

5. For example, the Boeing 757 pilot's operating handbook notes that all of the following conditions must be met for automatic speedbrake deployment: hydraulic pressure to both landing gear truck tilt actuators; both truck tilt sensors detect a no tilt condition (airplane on the ground); and both thrust levers are at idle.

6. The regulation in question reads in full: Reporting mechanical irregularities. The pilot in command shall ensure that all mechanical irregularities occurring during flight time are entered in the maintenance log of the airplane at the end of that flight time. Before each flight the pilot in command shall ascertain the status of each irregularity entered in the log at the end of the preceding flight. [Doc. No. 17897, 45 FR 41594, June 19, 1980, as amended by Amdt. 121- 179, 47 FR 33390, Aug. 2, 1982]

7. For the source of the FAA's administrative powers see 49 U.S.C. §§ 44701 *et. seq.* This case also cannot overemphasize the proper use of the FAA Aviation Safety Report, colloquially referred to as the "NASA" report. The timely submission of such a report entitles the airman to a waiver of any proposed penalty, subject to certain conditions and restrictions. Although airmen are limited to the number of times that they may benefit from the waiver of sanction, the number of NASA reports that may be submitted is unlimited. Although some air carrier pilots submit NASA forms for ***every*** flight, this may be considered by some to be somewhat extreme.

8. For an example of a case where a malfunction was corrected prior to departure, and then reported at the conclusion of the flight, for which the FAA sought administrative penalties against the airman, please see *Administrator v. Lambert*, NTSB Order EA-3852 (1993) (noting

that the airman complied with the purpose of 14 C.F.R. § 121.563, and that punishing the respondent in a situation where a malfunction was corrected prior to flight is illogical and does not promote safety). Compare this to the instant case where no malfunction was presented.

9. *See* 49 C.F.R. § 821.38, which provides in full: (a) Every party shall have the right to present a case-in-chief or defense by oral or documentary evidence, to submit evidence in rebuttal, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Hearsay evidence (including hearsay within hearsay where there are acceptable circumstantial indicia of trustworthiness) is admissible. (b) All material and relevant evidence should be admitted, but a law judge may exclude unduly repetitious evidence pursuant to 5 U.S.C. 556(d) (Administrative Procedure). Any evidence that is offered and excluded may be described (via an "offer of proof"), and that description should be made a part of the record. [59 FR 59048, Nov. 15, 1994, as amended at 65 FR 42639, July 11, 2000]. The foregoing relaxed rules of evidence and the full import that this has on such administrative proceedings is beyond the scope of this paper, although it certainly has the ability to compound the problems described herein.

10. The latitude/longitude and global positioning coordinates for the Neighbor's house are available upon request if any of the readers would be inclined to examine the area in question; preferably in either a 20 series Learjet or other aircraft utilizing the General Electric CJ610 engine, or perhaps piston-engined aircraft with augmenter exhaust tubes instead of mufflers.

11. Even though the NTSB found the newly created right to appeal not applicable, note how that particular treatment came to exist along with other unsuccessful outcomes of such determinations as to whether an emergency exists.

12. *See FAA v. Wang*, NTSB Order No. EA-3264 (1991).

13. *See FAA v. Hoover*, NTSB Order No. EA-4094 (1994).

14. 49 C.F.R. § 821.54(e).

15. *See FAA v. Arizona Avionics, Inc.*, NTSB Order No. EA-4861.

16. Professor Ellen Sward of the University of Kansas published an excellent and very comprehensive article on the Constitutional issues and common law development of the power of Congress to create courts and administrative adjudicative entities, contrasted with the Seventh Amendment right to trial by jury. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037 (1999). This article provided a wealth of information and research leads on the prospective right to and benefit from juries in administrative proceedings.

17. U.S. Const. art. III, 1; *see also* Sward, 77 N.C. L. REV. at 1039.

18. *Id.; see* id. art. I, 8, cl. 9; *see also* Sward, 77 N.C. L. REV. at 1039.

19. *See Curtis v. Loether*, 415 U.S. 189, 195 (1974).

20. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508 (1959).

21. Sward, 77 N.C. L. REV. at 1040.

22. U.S. Const. art. I, 8, cl. 18; *see also* Sward, 77 N.C. L. REV. at 1040.

23. Sward, 77 N.C. L. REV. at 1044.

24. *Id.*

25. *Id*.; *see also* the Administrative Procedure Act, 5 U.S.C. 551-706 (1994).

26. Sward, 77 N.C. L. REV. at 1044.

27. *Id*.; *see also* Louis L. Jaffe, Judicial Control of Administrative Action 90 (1965) (stating that "the concept of expertise on which the administrative agency rests is not consistent with the use by it of a jury as fact finder").

28. Sward, 77 N.C. L. REV. at 1044.

29. Sward, 77 N.C. L. REV. at 1050; *see also* THE FEDERALIST, Nos. 47, 51 (James Madison).

30. Sward, 77 N.C. L. REV. at 1050 (observing that "Article I describes the legislative power, Article II describes the executive power, and Article III describes the judicial power").

31. Sward, 77 N.C. L. REV. at 1050; *see also* THE FEDERALIST No. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961) (noting that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the ***very definition*** of tyranny") (emphasis added).

32. Sward, 77 N.C. L. REV. at 1052.

33. Sward, 77 N.C. L. REV. at 1044.

34. Sward, 77 N.C. L. REV. at 1056.

35. *Id*.

36. Sward, 77 N.C. L. REV. at 1056-57; *see also* Report from an American Bar Association/Brookings Symposium, *Charting a Future for the Civil Jury System* 8-11 (1992) [hereinafter ABA/Brookings Report].

37. Sward, 77 N.C. L. REV. at 1057.

38. *Id*.

39. Sward, 77 N.C. L. REV. at 1059.

40. Sward, 77 N.C. L. REV. at 1060; *see also* 28 U.S.C. 1866(g) (1994) (providing that persons failing to respond to a federal jury summons may be fined or imprisoned or both).

41. Sward, 77 N.C. L. REV. at 1060-61.

42. Sward, 77 N.C. L. REV. at 1061.

43. *Id*.

44. Sward, 77 N.C. L. REV. at 1063.

45. *Id*.

46. *Id*.

47. *Id*.

48. *Id*.

49. *Id*.

50. *Id*. at 1090; *see Curtis v. Loether*, 415 U.S. 189, 189-190 (1974).

51. *Id*.

52. Sward, 77 N.C. L. REV. at 1090; *see*, *e.g.*, *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry,* 494 U.S. 558, 565, 573-74 (1990)*; Tull v. United States,* 481 U.S. 412, 417 (1987).

53. Sward, 77 N.C. L. REV. at 1092.

54. *Id*.; *see also Block v. Hirsh,* 256 U.S. 135, 158 (1921).

55. Sward, 77 N.C. L. REV. at 1092; *see NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 48-49 (1937).

56. Sward, 77 N.C. L. REV. at 1092; *see Pernell v. Southall Realty,* 416 U.S. 363, 382-83 (1974).

57. Sward, 77 N.C. L. REV. at 1098; *see also Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 53-54 (1989).

58. Sward, 77 N.C. L. REV. at 1098.

59. Sward, 77 N.C. L. REV. at 1101.

60. *Id*. at 1101-1102.

61. *Id*. at 1101-1102.

62. *Id*. at 1104.

63. *Id*.

64. *Id*.

65. *Id*. at 1107.

66. This slogan was included by Justice Doggett in his dissent in *Texas Association of Business v. Texas Air Control Board and Texas Water Commission*, 852 S.W.2d 440 (Tex. 1993).

67. This section is included to further illustrate the tension that arises when determining the adjudication of rights in an administrative context, but does not suggest that state constitutional issues would necessarily impact federally preempted fields such as air commerce and regulation and enforcement related thereto. There are also significant differences between the Texas Constitution and the United States Constitution with regard to their guarantees of trial by jury. Nevertheless, the problems revealed are quite similar.

68. *See Texas Association of Business,*852 S.W.2d 440 (Tex. 1993).

69. *Id*. at 442. By way of background, the Court noted: "An overview of the regulatory scheme enacted by the legislature and these agencies is essential to an understanding of this case. In 1967, the Texas Legislature enacted the Clean Air Act of Texas. Clean Air Act of Texas, 60th Leg., R.S., ch. 727, 1967 Tex. Gen. Laws 1941. The Clean Air Act was designed to safeguard the state's air resources without compromising the economic development of the state. *Id.* at § 1. The Act created the Texas Air Control Board and granted it the authority to promulgate regulations to accomplish the Act's goals. *Id.* at § 4(A)(2)(a). In the event the Air Control Board determined that a violation of its regulations had occurred, it was authorized to enforce those regulations in district court. Upon a judicial determination that a violation of the Air Control Board's regulations had occurred, two cumulative remedies were available, injunctive relief to prohibit further violations and assessment of a fine ranging from $ 50 to $ 1,000 for each day the violations persisted. *Id.* at § 12(B)."

"In 1969, the Texas Legislature enacted the Solid Waste Disposal Act. Solid Waste Disposal Act, 61st Leg., R.S., ch. 405, 1969 Tex. Gen. Laws 1320. The express purpose for this legislation was to protect public health and welfare by regulating the "collection, handling, storage, and disposal of solid waste." *Id.* at § 1. The Texas Water Quality Board was designated the primary agency to effectuate the Disposal Act's purpose. *Id.* at § 4(f). Like the Air Control Board, the Water Quality Board was authorized to enforce its rules and regulations in state district court. The Solid Waste Disposal Act provided the same remedies as the Clean Air Act. *See id.* at § 8(c)."

"In the last of the relevant statutory enactments, in 1969, the Texas Legislature

promulgated a revised version of the Water Quality Act. Water Quality Act - Revision, 61st Leg., R.S., ch. 760, 1969 Tex. Gen. Laws 2229. By that Act, the Water Quality Board was given the power to develop a statewide water quality plan, to perform research and investigations, and to adopt rules and issue orders necessary to effectuate the Act's purposes. *Id.* at § 3.01-3.10. The Water Quality Act provided the same remedies as the Solid Waste Management Act and the Clean Air Act. *See id.* at § 4.02."

Only the jury trial issues of this case are discussed herein.

70. *Id*. at 450 (citing *Middleton v. Texas Power & Light Co.,* 108 Tex. 96, 185 S.W. 556, 561-62 (Tex. 1916)).

71. *Id*. *See also Cockrill v. Cox*, 65 Tex. 669, 674 (1886)(holding that "[t]he right of jury trial remains inviolate, though denied in the court of first instance [in civil cases], if the right to appeal and the jury trial on appeal are secured.")(bracketed language in original).

72. *See e.g.*, *State v. Credit Bureau of Laredo*, 530 S.W.2d 288, 291 (Tex. 1975); *White v. White*, 108 Tex. 570, 196 S.W. 508 (1917); *Hatten v. City of Houston*, 373 S.W.2d 525 (Tex. Civ. App.—Houston 1963, *writ ref'd n.r.e.*); *Hickman v. Smith*, 238 S.W.2d 838 (Tex. Civ. App.—Austin 1951, *writ ref'd*).

73. *State v. Credit Bureau of Laredo*, 530 S.W.2d 288, 293 (Tex. 1975).

74. *Id*. (citing *State v. De Silva*, 105 Tex. 95, 145 S.W. 330 (1912), and *Texas Liquor Control Bd. v. Jones*, 112 S.W.2d 227 (Tex. Civ. App.—Houston 1963, *writ ref'd n.r.e.*)).

75. *Texas Association of Business*, 852 S.W.2d at 451.

76. *Corzelius v. Harrell,* 143 Tex. 509, 186 S.W.2d 961 (1945).

77. Tex. Const. art. XVI, § 59(a).

78. *Corzelius,* 186 S.W.2d at 964.

79. *Texas Association of Business*, 852 S.W.2d at 453.

80. *Id*. at 459, citing The Declaration of Independence of the Republic of Texas (1836), *reprinted in* Tex. Const. app. 519, 520 (Vernon 1955).

81. *Id*., citing *Steenland v. Texas Commerce Bank Nat'l Ass'n,* 648 S.W.2d 387, 391 (Tex. App.—Tyler 1983, *writ ref'd n.r.e.*); *see also Lopez v. Lopez*, 691 S.W.2d 95, 97 (Tex. App.—Austin 1985, *no writ*) (holding that trial by jury should be granted zealously by all the courts of this state).

82. *Id*. at 466-467.

83. *Id*. at 467.

84. *Id*. at 460, citing the Tex. Const. art. I, § 12 (1845) (retaining identical language from 1836 provision).

85. William F. Weeks, *Debates of the Texas Convention* 268 (1846).

86. *See* The Brookings Institution, Charting a Future for the Civil Jury System 2 (1992).

87. Research shows . . . that the opportunity exists for meaningful [juror] participation in a wide range of adjudicatory and regulatory proceedings . . . . To the extent that juries encounter difficulties, these difficulties often vex judges as well . . . The full potential of lay participation in adjudication has not been realized. Joe Cecil, Valerie Hans, and Elizabeth Wiggins, *Citizen Comprehension of Difficult Issues: Lessons From Civil Jury Trials*, 40 AM. U. L. REV. 727, 773-74 (1991).

88. *Texas Association of Business*, 852 S.W.2d at 453.

89. Gary L. Evans is a trial/aviation attorney with the law firm of Coats & Evans, P.C., located in the Houston suburb of The Woodlands, Texas, approximately twenty miles northwest of George Bush Intercontinental Airport. Mr. Evans is a native of Columbus, Ohio. He received a Bachelor of Science degree in Aeroscience from Ohio State University, and a Masters in Business Administration, with distinction, from Illinois Benedictine College. Mr. Evans received his Juris Doctorate from South Texas College of Law where he achieved the Order of the Lytae, Dean's List, and was a member of the South Texas Law Review. Mr. Evans is an Airline Transport Pilot with over 11,500 hours of flight experience, including over 9,500 hours in turbojets, a Certified Flight Instructor— Instrument, and Ground Instructor Advanced Instruments. His flight training includes the Ohio State University Flight Curriculum, American Airlines Flight Academy, United Airlines Cockpit Resource Management School, and Flight Safety International. He is type rated in the Cessna Citation 500/650, Lear Jet, and Boeing 737. Coats & Evans' practice includes aviation law, defense and commercial trial law, aviation and other transactional work, and administrative proceedings involving the Federal Aviation Administration and the National Transportation Safety Board (at least it did before this paper was published). The author wishes to express his sincere appreciation for his colleague Drew Coats' able assistance with this article. Mr. Coats is an aircraft owner and pilot with a wife and two children, one of which is a beautifully restored Cessna 172.