

# THE YALE LAW JOURNAL

JONATHAN LEWINSOHN

## Bailing Out Congress: An Assessment and Defense of the Air Transportation Safety and System Stabilization Act of 2001

**ABSTRACT.** This Note provides the first detailed account of the conception, impact, and success of the Air Transportation Safety and System Stabilization Act (ATSSSA) of 2001, an \$18 billion federal bailout of the airline industry passed eleven days after the terrorist attacks of September 11. The Note argues that, far from seeking to rehabilitate the commercial aviation industry, Congress hoped only to stabilize the airlines briefly and reassure the nation without severely distorting long-term market forces. In accomplishing this, the Note argues, the ATSSSA has established itself as a model of disaster-response legislation that can be turned to in the unfortunate event of future need.

**AUTHOR.** Yale Law School, J.D. expected 2006. Cornell University, College of Arts and Sciences, B.A. 2002. I would like to thank Professor Michael Levine for providing indispensable advice and for making himself constantly available. Thanks also to Elizabeth Berkowitz, Aron Ketchel, Mark Harrison, Erin Roeder, Gerald Lewinsohn, and David Zwillingner for their insightful comments.



## NOTE CONTENTS

INTRODUCTION	440
I. "CONGRESS: WE HAVE A PROBLEM"	446
A. Initial Response	447
B. A Bill Becomes a Law	449
1. Statistical Underpinnings	449
2. Theoretical Underpinnings	451
C. Anatomy of a Loss	458
1. Short-Term and Long-Term	458
2. Five Billion Dollars in Losses	459
3. Moving the Goalposts and Declaring Victory	464
4. Ten Billion Dollars in Loan Guarantees	465
II. THE ATSSSA IN ACTION	467
III. THE ATSSSA: IN SEARCH OF JUDGMENT	472
A. (Overcoming) The Anti-Bailout Presumption	473
1. Perverse Incentives	473
2. Efficiency	474
B. Comparative Analysis	479
1. Retrospective Comparison: Relative Results	479
2. Prospective Comparison	481
C. Monday Morning Quarterbacking the ATSSSA	483
1. Covert Options	483
2. Other Options	487
D. Outlines of a Model	488
CONCLUSION	490

**INTRODUCTION**

On September 11, 2001, almost immediately after receiving clearance to reenter the Capitol,<sup>1</sup> the United States Congress began the task of responding to the terrorist attacks. The first sessions were filled with tributes to the dead<sup>2</sup> and massive appropriations for rebuilding,<sup>3</sup> but by Friday, September 14, three days after the worst terrorist attack in the nation's history, the House of Representatives met late into the night to discuss one thing: whether to supply the commercial-aviation industry with the largest one-time corporate bailout in American history.<sup>4</sup>

Although the airlines were officially deregulated in 1978,<sup>5</sup> the industry continued to function as the "prodigal child" of the federal government.<sup>6</sup> This unusual, hybrid relationship emerged from the unique set of expectations facing the post-regulation industry. Even absent direct government control, consumers wanted airlines to operate with the "reliability of utilities, providing frequent flights on-time" to many destinations "at low cost and with cozy amenities."<sup>7</sup> At the same time, both Congress and the public expected the airlines to function as separate businesses in the public marketplace,<sup>8</sup> protecting workers' salaries, surviving on razor-thin margins, and facilitating

- 
1. See, e.g., John Lancaster & Helen Dewar, *Outraged Lawmakers Vow To Keep Hill Going*, WASH. POST, Sept. 12, 2001, at A21.
  2. See, e.g., 147 CONG. REC. E1635 (daily ed. Sept. 11, 2001) (statement of Rep. Coble).
  3. See Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-38, 115 Stat. 220 (2001) (appropriating \$40 billion in emergency aid).
  4. The savings and loan bailout has been spread out over the course of a number of years. See *infra* note 224. For a list of recent congressional bailouts, see Deborah Groban Olson, *Fair Exchange*, 15 CORNELL J.L. & PUB. POL'Y (forthcoming 2006). For more on Congress's deliberations, see Elizabeth Kolbert, *The Calculator: How Kenneth Feinberg Determines the Value of Three Thousand Lives*, NEW YORKER, Nov. 25, 2002, at 46.
  5. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).
  6. Edward Wong, *The Impossible Demands on America's Airlines*, N.Y. TIMES, June 16, 2002, § 4 (Week in Review), at 4.
  7. *Id.*
  8. As former airline executive Michael E. Levine remarked, "[w]hen I complain to my congressmen about the hotel industry, I get a polite letter saying they feel my pain. . . . Nobody introduces a bill to regulate the hotel industry. But on airlines, they threaten to hold hearings." *Id.* (internal quotation marks omitted).

economic activity. As a result, the deregulated industry was still monitored closely by the federal government.<sup>9</sup>

In the months before September 11, the airline industry<sup>10</sup> experienced particular difficulties due to the growth of low-cost carriers, decrease in business demand, and rich labor contracts negotiated during the 1990s boom. Unable to reduce excess capacity or abrogate labor agreements, the airlines approached Labor Day 2001 facing losses of between \$2<sup>11</sup> and \$3<sup>12</sup> billion. The government's response, however, was not sympathetic. Choosing to blame the industry's woes on management, Congress was concerned less with the carriers' financial position than with their treatment of passengers. As late as August 2001, Congress held "a series of hearings and threatened to approve a robust passenger rights bill despite industry lobbying efforts."<sup>13</sup> The prospect of a congressional bailout was simply inconceivable.

But all of this changed on September 11 when an industry that was already at the breaking point saw its "economic rubber band snapped."<sup>14</sup> Within hours of the attacks, the Federal Aviation Administration (FAA) issued the first ever national groundstop order requiring the shutdown of U.S. airspace.<sup>15</sup> With fixed costs upwards of 80%,<sup>16</sup> the airlines started hemorrhaging hundreds of

9. After terminating the Civil Aeronautics Board, Congress required the airlines to continue supplying monthly data to the Department of Transportation. See Bureau of Transp. Statistics, Dep't of Transp., About BTS, <http://www.bts.gov/about> (last visited Aug. 30, 2005).
10. Throughout this Note the term "airline industry" will primarily apply to the major, pre-deregulation hub-and-spoke carriers. I will make a distinction when factors affecting other players in the industry, such as low-cost or regional carriers, are relevant.
11. Scott McCartney et al., *Capital Flight: As Big Losses Widen, an Airline Shake-Up Appears Unavoidable*, WALL ST. J., Nov. 6, 2001, at A1 (citing UBS Warburg analyst Samuel Buttrick).
12. See James M. Higgins & Cristopher Kennedy, *Pondering the Imponderable: Short- and Longer-Term Thoughts on the Airlines* 3 (Credit Suisse First Boston, Equity Research Report, Sept. 14, 2001) (referring to the authors' prior forecast of a \$2.6 billion loss).
13. Daniel H. Rosenthal, Note, *Legal Turbulence: The Court's Misconstrual of the Airline Deregulation Act's Preemption Clause and the Effect on Passengers' Rights*, 51 DUKE L.J. 1857, 1858 (2002) (addressing the appropriate scope of passenger rights); see also James R. Asker, *Why Are Passengers So Angry at Carriers?*, AVIATION WK. & SPACE TECH., Oct. 25, 1999, at 50, 52 (assessing customer satisfaction with commercial aviation carriers).
14. Frank Lorenzo, *Airlines' Woes Didn't Start on Sept. 11*, WALL ST. J., Nov. 14, 2001, at A22.
15. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 25 (2004) [hereinafter 9/11 REPORT].
16. See *infra* note 136 and accompanying text.

millions of dollars per day,<sup>17</sup> leading to calls for government assistance even before planes were back in the sky. Industry lobbyists,<sup>18</sup> Wall Street analysts,<sup>19</sup> and national newspapers<sup>20</sup> all highlighted the industry's complex predicament: Insurance plans had been canceled or made significantly more expensive;<sup>21</sup> credit markets, unsure about the liability facing the airlines, had all but dried up;<sup>22</sup> airline workers were being laid off by the tens of thousands;<sup>23</sup> and the ripple effects were spreading across the "just-in-time" economy.<sup>24</sup> To make matters worse, airline equity values were poised to plunge once the markets reopened,<sup>25</sup> and a number of carriers were rumored to be headed for bankruptcy. In Congress, a consensus developed that the nation's airlines—a symbol of the flag<sup>26</sup>—could not be made victim to the terrorists. What emerged, only eleven days after the attacks, was the Air Transportation Safety and System Stabilization Act (ATSSSA) of 2001,<sup>27</sup> an \$18 billion<sup>28</sup> federal

---

17. See *infra* Subsection I.C.2.

18. See Scott McCartney et al., *Mayday Call: U.S. Airline Industry Faces Cash Crunch, Pleads for a Bailout*, WALL ST. J., Sept. 17, 2001, at A1; Scott Thurm et al., *Flight Ban Slows 'Just in Time' Factories*, WALL ST. J., Sept. 13, 2001, at B3.

19. See James M. Higgins & Christopher Kennedy, *Airlines: Latest Thinking on Outlook for Airlines 1* (Credit Suisse First Boston, Equity Research Report, Sept. 17, 2001); Raymond E. Neidl, *Airline CEO's Testify Before House Subcommittee on Aviation* (ABN Amro, Equity Research Report, Sept. 20, 2001).

20. See, e.g., Editorial, *Flying Unfriendly Skies*, WALL ST. J., Sept. 14, 2001, at A10 (supporting aid to the airlines); Editorial, *Rescuing the Airlines*, N.Y. TIMES, Sept. 19, 2001, at A26.

21. See, e.g., H.R. 2981, *To Preserve the Continued Viability of the United States Air Transportation System, Hearing Before the H. Comm. on Transp. and Infrastructure*, 107th Cong. 46-47 (Sept. 19, 2001) [hereinafter *House Hearings*].

22. See *infra* Part I.

23. See Scott McCartney et al., *Airlines To Lay Off Thousands as Bookings Plummet*, WALL ST. J., Sept. 20, 2001, at A3; Editorial, *No Time To Bail*, WALL ST. J., Sept. 19, 2001, at A20.

24. See Thurm et al., *supra* note 18. Just-in-time describes a production process in which inventory arrives just in time for it to be used in production. This allows manufacturers to save significant operational costs and to improve their working capital management.

25. See Scott McCartney et al., *Frightened Workers and Investors Buffet Airlines*, WALL ST. J., Sept. 18, 2001, at A3.

26. See John Newhouse, *A Reporter at Large: Air Wars*, NEW YORKER, Aug. 5, 1991, at 51.

27. ATSSSA, Pub. L. No. 107-42, 115 Stat. 230 (codified at 49 U.S.C. § 40,101 note (Supp. I 2001)).

28. This figure includes authorization for the President to allocate \$3 billion from the \$40 billion Emergency Supplemental Appropriations Act for use in improving aviation security. See Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-38, 115 Stat. 220, 221 (2001); ATSSSA § 501; see also 147 Cong. Rec. S9593 (daily ed. Sept. 21, 2001) (statement of Sen.

bailout that had been conceived, drafted, and signed amid a marked sense of crisis.

The Act, which was passed without amendment in both the Senate and House, sought to stabilize the airlines in a manner that distinguished between pre- and post-September 11 losses. While broad—including the establishment of a Victim Compensation Fund<sup>29</sup> and tax postponements<sup>30</sup>—it contained only four central terms: (1) \$5 billion in direct compensation to the airlines for all losses suffered in 2001 as a result of the terrorist attacks;<sup>31</sup> (2) the authorization of an additional \$10 billion in loan guarantees to be approved by the newly created Air Transportation Safety Board (ATSB) based on rules promulgated by the Office of Management and Budget (OMB);<sup>32</sup> (3) the capping of carrier liability for the September 11 attack and future terrorist attacks;<sup>33</sup> and (4) the government's assumption of substantial insurance costs and risks.<sup>34</sup> By mixing immediate cash assistance and liability relief with longer-term loan guarantees, Congress was able to act quickly without effectively re-regulating the industry.

The reactions to the Act were fast and, at times, furious. Major airlines feared that the OMB's standards for loans would be set too high, while labor leaders,<sup>35</sup> along with representatives from other affected industries,<sup>36</sup> denounced the Act for its exclusive focus on the carriers. Even members of Congress publicly speculated—as early as October 1, 2001—that the Act had been overly generous.<sup>37</sup> On the other side of the ledger, the *New York Times* applauded the Act's (apparent) recognition that government could be a catalyst for economic change, while the Air Transport Association (ATA) expressed gratification that the nation's airlines would not be allowed to become “the first

Boxer) (“I am particularly pleased with the language in this bill that commits \$3 billion of the \$40 billion in the emergency funding that we passed last week for airline security.”).

29. ATSSSA § 401.

30. *Id.* § 301.

31. *Id.* § 101(a)(2). The aid was distributed based on the lesser of direct losses or proportional August capacity, measured in available seat miles (ASMs). The Act did not make an allocation distinction between different types of carriers (e.g., regional, low-cost), save its reservation of \$500 million for cargo operations such as Airborne Express and FedEx. *See id.* § 103(b)(2)(B)(i).

32. *Id.* § 101(a)(1).

33. *Id.* § 408.

34. *Id.* § 201.

35. *See* Martha Brannigan et al., *U.S. Bailout Will Keep Airlines Flying Amid Downturn*, WALL ST. J., Sept. 24, 2001, at A3.

36. *See infra* note 106 and accompanying text.

37. *See* Tom Hamburger, *Senator Suggests Airline-Aid Package Needs To Be Altered*, WALL ST. J., Oct. 1, 2001, at A10.

economic casualty of this war."<sup>38</sup> The sheer enormity of the sums, combined with the responsibilities the Act imparted on the government, convinced both supporters and detractors alike that Congress would be taking a leading role in reviving the industry.

Nearly four years later, however, this conclusion is being drastically reconsidered. In the end, Congress disbursed \$4.6 billion in direct compensation to the airlines—\$400 million less than the statute authorized. The ATSB managed to extend \$1.56 billion in loan guarantees,<sup>39</sup> but rejected almost \$2 billion in requests, including applications from US Airways, United, and Vanguard that could have saved those carriers from bankruptcy.<sup>40</sup> The Board actively discouraged other applications by requiring bankruptcy-like concessions and steep compensation. Although the industry is no longer in danger of imminent collapse, it is still in a state of flux, with carriers at all cost levels facing margin pressures and significant losses.<sup>41</sup>

In light of these events, it is easy to deem the ATSSSA a failure, or at least a poor effort in comparison to previous congressional bailouts. After all, Chrysler, the most famous recipient of congressional-bailout funds,<sup>42</sup> returned to health in under three years, netting the federal government a profit of \$311 million.<sup>43</sup> But to assess the ATSSSA in such terms is to overlook the Act's unique circumstances and motivations. It is true that Congress was helping the airlines to redeploy capital in response to unanticipated business conditions, thus branding the Act a "bailout."<sup>44</sup> Yet its aim was never to ensure the indefinite survival of each carrier or to rehabilitate the nation's commercial aviation industry. Rather, as this Note will argue, Congress conceived of the Act as a public relations measure, designed to return the airlines to their pre-September 11 positions and prevent the spectacle of mass carrier bankruptcies immediately following the terrorist attacks. Unlike previous bailouts, which

---

38. Brannigan et al., *supra* note 35 (quoting Carol Hallet, President, ATA).

39. *The Financial Condition of the Airline Industry: Hearing Before the Subcomm. on Aviation of the H. Comm. on Transp. and Infrastructure*, 108th Cong. 206 (2004) (testimony of Michael Kestenbaum, Executive Director, ATSB) [hereinafter *Hearing on Financial Condition*].

40. US Airways's application was eventually approved. See Air Transp. Stabilization Bd., U.S. Dept. of the Treasury, Recent Activity, <http://www.ustreas.gov/offices/domestic-finance/atsb/recent-activity.shtml> (last visited Sept. 30, 2005).

41. See Gary Chase, *Hub Economics Vulnerable* 3 (Lehman Brothers, Equity Research Report, Oct. 1, 2004).

42. Chrysler Corporation Loan Guarantee Act of 1979, Pub. L. No. 96-185, 93 Stat. 1324 (1980) (codified at 15 U.S.C. §§ 1861-1875 (2000)).

43. See Robert B. Reich, *Bailout: A Comparative Study in Law and Industrial Structure*, 2 YALE J. ON REG. 163, 187 (1985).

44. See *id.* at 163.

were designed to overcome market dictates permanently, the ATSSSA was formulated to stabilize the industry only briefly and to reassure the nation without severely distorting the market forces that had been operating since deregulation.<sup>45</sup> The ATSSSA was thus more a symbolic salve than an industry savior, a prophylactic measure to avoid the possibility of a public relations calamity.

This Note, then, will assess the ATSSSA and explain why it was passed, how well it met its objectives, and whether it might serve as a template for the future. This is no idle academic exercise. In the event of future attacks, it is likely that the airlines, or a host of other industries, will come calling on Congress to provide immediate, lifesaving assistance. With the economy hanging in the balance, it should already be known whether a statute resembling the ATSSSA would provide a reliable, appropriate, and efficient response.<sup>46</sup>

Accordingly, Part I will study the genesis of the Act, tracking its development from the first discussion in the House the day after the attacks to its passage eleven days later. Looking closely—for the first time—at congressional debates, committee hearings, Wall Street reports, and newspaper editorials, this Note will attempt to capture Congress's understanding of the industry's predicament as well as the philosophy behind the Act's formulation. What emerges is a portrait of an Act designed to let the carriers tread water only until the period of national tragedy had passed. From this perspective, the industry's current predicament, including its multiple bankruptcies post-2001, is demonstrative of the Act's success rather than its failure.

After outlining Congress's approach to the Act, Part II will briefly examine the Act's immediate effects. This, in turn, will set the stage for the Note's final Part, which will assess both whether the ATSSSA was successful and whether it was the best available option given the political and economic circumstances. In answering these questions, I will compare the ATSSSA to previous congressional bailouts and argue that while federal assistance programs are often viewed negatively, they are typically the inevitable political response to

---

45. It could thus be said that Congress had two distinct yet interrelated goals: providing the airlines with a public boost without (too) seriously distorting the industry's long-term market forces.

46. Even without another terrorist attack, the airlines could find themselves in need of federal assistance in the near future. As of October 2004 the industry had an estimated \$31 billion in underfunded pension liabilities. A default on these plans could necessitate a congressional bailout of the Pension Benefit Guaranty Corporation. See GAO, NO. GAO-05-108T, PRIVATE PENSIONS: AIRLINE PLANS' UNDERFUNDING ILLUSTRATES BROADER PROBLEMS WITH THE DEFINED BENEFIT PENSION SYSTEM (2004) (testimony of David M. Walker, Comptroller General, before the Senate Committee on Commerce, Science, and Transportation).

specific social and economic circumstances. As such, bailouts should be judged by determining whether Congress chose the optimal tools for accomplishing its goals. In most cases, this will mean providing stability without significantly distorting free-market conditions. Viewed in this light, I maintain, the ATSSSA should be considered a legislative success.

### I. "CONGRESS: WE HAVE A PROBLEM"

On September 12, as the nation grappled with attacks, 460 normally busy airports were at a standstill with all 40,000 scheduled flights canceled for a second straight day.<sup>47</sup> Due to high fixed costs in labor, leases, and debt service, airlines typically need to fill more than 65% of their seats just to break even,<sup>48</sup> with the "presence or absence of just a few passengers on each flight [determining] the difference between profits and losses."<sup>49</sup> Inevitably, the absence of all passengers for the four-day groundstop translated into catastrophic losses.

Even more devastating, however, was the toll the attacks were expected to take on the airlines' longer-term prospects. Only the day after the attacks, Midway Airlines, a small regional carrier that had filed for Chapter 11 bankruptcy in August with the intention of reorganizing, ceased operations, noting: "We anticipated over the next few weeks there wasn't going to be much air travel. . . . We saw the handwriting on the wall."<sup>50</sup> On September 13, a Harris poll found that 39% of Americans planned to avoid flying over the next few months,<sup>51</sup> while a *Wall Street Journal/NBC News* survey showed that 67% of those responding were "somewhat or very worried about the risk of terrorism in connection with commercial air travel."<sup>52</sup>

The attacks also created a number of structural problems for the airline industry. The major carriers operate a hub-and-spoke system that allows travelers to journey between many cities by connecting through a central location. The system functions by flying a flock of planes into the hub at a

---

47. See Glenn Kessler & Don Phillips, *Air Travel System Grounded for First Time*, WASH. POST, Sept. 12, 2001, at A11 ("Officials said that on a normal day, there are about 4,000 to 5,000 flights in the air at a given time; there are 35,000 to 40,000 commercial flights a day in the United States.").

48. McCartney et al., *supra* note 18 ("In the best years, only 75% to 80% of seats are full.").

49. *Id.*

50. Michael J. McCarthy, *Airlines Expected To Post Sizable Losses After Attacks*, WALL ST. J., Sept. 13, 2001, at A3.

51. *Id.*

52. McCartney et al., *supra* note 18.

single time and then reorganizing passengers to turn around in a rush. As a result, travelers in Des Moines, Iowa are always only one stop away from Osaka, Japan. The system creates a true network<sup>53</sup> that provides business travelers with “go-anywhere, go-anytime convenience” and leisure travelers with lower fares than “could be charged in a less comprehensive system with a less differentiated price structure.”<sup>54</sup> For the hub-and-spoke system to function most efficiently, the airlines must be able to turn passengers around quickly, keeping planes on the ground for as little time as possible. In the days immediately following the terrorist attacks, however, it was clear that new security measures would preclude airlines from flying the “frenetic schedules of the past.”<sup>55</sup> To survive, the big airlines would need to identify new ways to run their hub-and-spoke systems efficiently, amid deep stock market losses and closed capital markets.

#### A. Initial Response

The newly minted “War Congress” responded swiftly to the airlines’ predicament. In the late evening of Friday, September 14, the House Committee on Transportation and Infrastructure and the Committee on Ways and Means sought unanimous consent to submit a bill to preserve the continued viability of the U.S. air transportation system.<sup>56</sup> As introduced by Representative Don Young of Alaska, Chairman of the House Transportation and Infrastructure Committee, House Bill 2891 was designed to avoid an imminent meltdown of the airline industry. Young went to great lengths to characterize the bill as a response to the government’s shutdown of the national airspace, painting the airlines as the unfortunate victim of the FAA’s national security directive. In a period marked by its decisive harmony, Representative Young’s challenge to his colleagues was unusually contentious and reflected the difficulties he was facing in overcoming Congress’s traditional hostility toward aiding the airlines:

[I]f my colleagues decide not to support this bill, then my colleagues suffer the facts, because my colleagues will not be able to fly. And I said,

- 
53. See Bradley H. Weidenhammer, Note, *Compatibility and Interconnection Pricing in the Airline Industry: A Proposal for Reform*, 114 YALE L.J. 405 (2004) (assessing the airline industry as a network).
54. Michael E. Levine, *Looking Back and Ahead: The Future of the U.S. Domestic Airline Industry 4* (2004) (unpublished manuscript, on file with author).
55. McCartney et al., *supra* note 18.
56. A Bill To Preserve the Continued Viability of the United States Air Transportation System, H.R. 2891, 107th Cong. (2001).

ride your horses, paddle your canoes, and go where you think you may go. But the airline industry, and I am the chairman of this committee, is in serious, serious trouble. . . . [T]his tragedy was not their doing. . . . And let me tell my colleagues, those that want to fly, fly; but do not do it just with wings from the airplanes, fly with yourself. Try flapping your arms; you are not going to get there. You are not going to get there.<sup>57</sup>

The bill that Young supported authorized the President to grant the airlines \$2.5 billion in immediate compensation for the groundstop order and \$12.5 billion in loan guarantees for a period up to six months.<sup>58</sup> It was backed by many in Congress “so that when financial markets open on Monday, airline stocks do not tank and airlines do not go under and . . . shut down forever.”<sup>59</sup>

Although it garnered significant support on the floor, House Bill 2891 was scuttled<sup>60</sup> because it sacrificed completeness for speed. By failing to address the airlines’ liability and insurance problems, it overlooked factors that could actually have grounded the carriers.<sup>61</sup> More importantly, its drafters did not take enough time to collect accurate information. For example, Representative James Oberstar, the transportation committee’s ranking member, commented on the floor—incorrectly—that the airlines would accumulate losses of up to \$5 billion over the weekend.<sup>62</sup> In reality, it took the industry most of the fourth quarter to rack up losses of that magnitude. Had House Bill 2891 become law, it would have required amendment almost immediately.

This does not mean, however, that the bill was not important to the development of the ATSSSA. While flawed, its near success reveals that only three days after the attacks a significant portion of the House had already

---

57. 147 CONG. REC. H5685 (daily ed. Sept. 14, 2001).

58. H.R. 2891 §§ 1(2)-(3), 3.

59. 147 CONG. REC. H5685 (daily ed. Sept. 14, 2001). What the bill’s supporters overlooked was that the Senate had already recessed until the following Wednesday, making it impossible for the bill to become law over the weekend.

60. The bill was never actually voted on because the Committee on Transportation and Infrastructure and the Committee on Ways and Means were seeking unanimous consent to bypass the normal hearing process and submit the bill for an immediate vote. See Rob Hotakainen & Sarah McKenzie, *House Rejects Oberstar Plan To Aid Airlines*, STAR TRIBUNE (Minneapolis, Minn.), Sept. 15, 2001, at A27.

61. The bill’s drafters also failed to provide a mechanism for government upside participation, in the form of warrants, which had been a staple of previous bailouts. Such provisions reimburse taxpayers for the risks incurred while also incentivizing companies to think carefully before relying on government loan guarantees.

62. 147 CONG. REC. H5685 (daily ed. Sept. 14, 2001).

accepted that the airline industry was in crisis, that this crisis was a direct result of the terrorist attacks, and that Congress had a responsibility to act.

### B. A Bill Becomes a Law

#### 1. Statistical Underpinnings

When Congress reconvened the following week to discuss the airlines' predicament in earnest, it found an industry in free fall.<sup>63</sup> On September 17, the first day of resumed trading, the Dow Jones Industrial Average lost 685 points, roughly 7% of its pre-attack value.<sup>64</sup> While significant, these losses paled in comparison to the 40% plunge in the American Stock Exchange (AMEX) Airline Index<sup>65</sup> and the performance of the individual carriers. At the closing bell, "Continental and US Airways, each with among the highest debt loads in the industry, [had] lost roughly 50% of their value."<sup>66</sup> American, United, Delta, and Northwest were down 37% to 45%, while America West, "where concerns about its cash position abound[ed]," plunged 65%. The market even turned sour on Southwest, selling the industry's star to a 24% loss.<sup>67</sup>

The market was reacting to an industry that was a shell of its former self. Although the groundstop order had been lifted by Friday, September 14, airlines were flying at 78%<sup>68</sup> of their pre-attack capacity with system-wide load factors—the percentage of seats filled—falling to below 40%.<sup>69</sup> New airline reservations were reportedly down by 50%,<sup>70</sup> and layoffs were widely expected

63. The fact that Congress slowed down the process and chose to spend a full nine days assessing the airlines' predicament does not mean that the ATSSSA's passage complied with the normal rigors of the legislative process. The failure of House Bill 2891 meant that the committees would actually hold hearings, yet as explained below, these sessions were often quick and highly scripted. In addition, the nearly unprecedented support for the Act—which eventually passed the Senate ninety-nine to one—along with the consensus that something needed to be done quickly, meant that the negotiating process could be seriously curtailed.

64. See Gretchen Morgenson, *Wall St. Reopens Six Days After Shutdown; Stocks Slide 7%, but Investors Resist Panic*, N.Y. TIMES, Sept. 18, 2001, at A1.

65. For more on the index see AMEX Airline Index (XAL), <http://www.analyzeindices.com/ind/airlines.htm> (last visited Oct. 8, 2005).

66. McCartney et al., *supra* note 25.

67. *Id.*

68. See *Airport Security: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 107th Cong. 14 (2001) (statement of Norman Y. Mineta, Secretary, Department of Transportation).

69. Martha Brannigan et al., *Car Sales, Air Travel Show Slight Pickup*, WALL ST. J., Sept. 25, 2001, at A2.

70. *Id.*

to exceed 100,000.<sup>71</sup> Realizing that its position had deteriorated even from the week before, the industry responded by “publicly pleading and privately lobbying for a congressional bailout.”<sup>72</sup> The intense effort, which included representatives from the unions,<sup>73</sup> the airlines,<sup>74</sup> and insurance companies,<sup>75</sup> focused on securing federal funds for groundstop compensation, loan guarantees, antitrust exemptions, tax rebates, and a terrorism-insurance program that would make the government the insurer of last resort. In a *Wall Street Journal* op-ed entitled *A Helping Hand for Airlines Isn't a 'Bailout,'* Robert L. Crandall, retired Chairman of American Airlines, argued that the airlines' tenuous predicament affected the entire economy because the industry employs “more than 1.1 million people, [has] payrolls of about \$250 billion and account[s], directly or indirectly, for about 10% of U.S. gross domestic product.”<sup>76</sup> Crandall then offered a concrete plan—“not a bailout”—for government assistance that mirrored much of what was being discussed on Capitol Hill.

While Congress was not willing to accept all of the industry's claims and suggestions, the lobbying effort succeeded in convincing legislators, even those House members who had opposed House Bill 2891, that the nation was facing the imminent demise of its commercial aviation network. Senator Kit Bond focused on the liability issue and consequent lack of access to capital, and warned that unless Congress acted “within a matter of days” the entire American economy could be “crippled.”<sup>77</sup> Senators Charles Grassley and Patrick Leahy argued that Congress could not compound the tragedy and “allow the terrorists to win” by allowing the industry to collapse.<sup>78</sup> Senator Pete Domenici explained that without “immediate financial assistance, many airlines face imminent bankruptcy,”<sup>79</sup> while Senator John McCain, usually a voice of tempered reason, remarked almost hysterically that “[i]f we do not move ahead with financial aid and liability protection, I believe that we will

---

71. See McCartney et al., *supra* note 18.

72. *Id.*

73. See Martha Brannigan et al., *Airline Workers Look to Congress for Aid*, WALL ST. J., Sept. 26, 2001, at A3.

74. See, e.g., McCartney et al., *supra* note 18; John D. McKinnon et al., *Airlines Lobby for Liability Relief After Insurance Firms Raise Premiums*, WALL ST. J., Sept. 21, 2001, at A4.

75. See McKinnon et al., *supra* note 74.

76. Robert L. Crandall, Op-Ed, *A Helping Hand for Airlines Isn't a 'Bailout,'* WALL ST. J., Sept. 18, 2001, at A22.

77. 147 CONG. REC. S9366 (Sept. 13, 2001).

78. *Id.* at S9594 (statement of Sen. Grassley); *id.* at S9599 (statement of Sen. Leahy).

79. *Id.* at S9597.

begin to see not just layoffs, but failures in the aviation industry.”<sup>80</sup> Even President Bush, who was faced with strong opposition to a bailout from the Chairman of the Federal Reserve<sup>81</sup> and Secretary of the Treasury,<sup>82</sup> announced that “[w]e will come together to . . . keep our airlines flying, with direct assistance during this emergency.”<sup>83</sup>

It was thus clear on the floor of Congress that “some kind of financial package [was] going to happen.”<sup>84</sup> The question remaining, and the one that had doomed House Bill 2891, was how to pass the aid that “the American people [were] rely[ing] on”<sup>85</sup> without recasting two decades of conventional free-market thinking. It would turn out to be a far more vexing theoretical problem than many in Congress had first supposed.

## 2. Theoretical Underpinnings

In today’s global economy, companies from across the world compete in a single marketplace. This implies that whereas measures of input cost, demand, and price were previously confined to individual domestic markets, international competitors must now compete within the same set of variables. If a company receives a government bailout, it either realizes an artificial shift in its marginal cost or an unexpected bump in its net worth. Either way, it can pursue strategies, such as price reductions, unavailable to other firms.

As a result, a presumption has developed that “[a]s a general rule . . . government[s] should not intervene to bail out private enterprise.”<sup>86</sup> So

80. *Prepared Testimony of Senator John McCain Before the Senate Committee on Commerce, Science, and Transportation*, FED. NEWS SERVICE, Sept. 20, 2001; see also *Financial State of the Airline Industry: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 107th Cong. 2 (Sept. 20, 2001) (statement of Sen. McCain) [hereinafter *Senate Hearings*].
81. “It’s easy in a period like this to do things in haste that may not be right,” Mr. Greenspan said.” Michael Schroeder, *Greenspan Sees Weakness but Warns Against Haste*, WALL ST. J., Sept. 21, 2001, at A2.
82. “Treasury Secretary Paul O’Neill also repeated warnings against hasty federal bailouts of businesses flattened in the tragedy’s wake.” *Id.*
83. Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1350 (Sept. 20, 2001).
84. *Prepared Testimony of Senator Ernest F. Hollings Before the Senate Committee on Commerce, Science, and Transportation*, FED. NEWS SERVICE, Sept. 20, 2001; see also *Senate Hearings*, *supra* note 80, at 1 (statement of Sen. Hollings).
85. *Prepared Testimony of Senator Hollings*, *supra* note 84.
86. Cheryl D. Block, *Overt and Covert Bailouts: Developing a Public Bailout Policy*, 67 IND. L.J. 951, 990 (1992). Bailouts are economically unpopular because they distort free-market forces. This objection carries over to the political realm, but from a practical level, bailouts have trouble garnering congressional support because they tend to benefit some companies (i.e.,

ingrained was this anti-bailout, pro-market philosophy in the United States that two days after the attacks, while the House was already debating House Bill 2891, the Senate passed a Sense of the Senate Resolution condemning the Republic of Korea's "improper" and "massive" \$5 billion bailout of failed semiconductor giant Hynix.<sup>87</sup> To make matters worse, the government had long opposed direct financial assistance to the airline industry in particular, concluding during the 1991-1992 aviation downturn that a bailout "would probably do more harm than good to the competitive process."<sup>88</sup> It was within this historical and ideological context that Congress approached the bailout of the aviation industry.

The easy solution was simply to reimburse the airlines for their September 11 losses while being careful not to upset preexisting competitive conditions in the market. The problem, however, was that there was no obvious way to distinguish between the airlines' pre- and post-September 11 losses. As discussed above, before the terrorist attacks the major airlines were operating in a difficult financial environment, primarily due to the growth of low-cost carriers. When the airline industry was deregulated in 1978, it was believed that low-cost carriers would emerge to challenge the legacy carriers both regionally and on transcontinental flights. But the "dinosaurs"<sup>89</sup> did not give up that easily. As Professor Levine explains, the major carriers "proved surprisingly resourceful and resilient in the face of low cost, new entrant competition. Over

---

the constituents of some members of Congress) at the expense of others. Accordingly, because most members of Congress will be opposed to most bailouts, the implicit solution is to maintain a general anti-bailout ethos. The airlines were a rare case because they play a crucial role in the larger economy, yet it should be noted that representatives from the most affected areas were the first proponents of the Act. For example, as expressed by Rep. Neil Abercrombie of Hawaii on September 14, 2001:

I am here to tell Members that the State of Hawaii is at risk of bankruptcy if there is not confidence in the people of this country being able to fly. I am not trying to deal with hyperbole, I am not trying to deal in rhetorical flights, I am saying the basic, fundamental, fiscal facts of life for my State.

147 CONG. REC. H5685 (daily ed. Sept. 14, 2001).

87. Sense of the Senate Resolution Regarding the Republic of Korea's Improper Bailout of Hynix Semiconductor, 147 CONG. REC. S9456 (2001) (reporting the inclusion of the Senate Resolution supplemental amendments to an appropriations act). The bailout consisted of a \$2.3 billion debt-for-equity swap. The creditor banks participating in the bailout were either partially or wholly owned by the South Korean government. See Jack Robertson, *Hynix Refinancing Package May Trigger U.S. Response*, ELECTRONICS SUPPLY & MANUFACTURING, Sept. 20, 2001, <http://www.my-esm.com/story/OEG20010920S0083>.
88. Block, *supra* note 86, at 953 (quoting *Our Nation's Transportation and Core Infrastructure, Hearings Before the H. Comm. on Pub. Works and Transp.*, 102d Cong. 234 (Mar. 5, 1991) (statement of James B. Busey, Administrator, FAA)).
89. See Levine, *supra* note 54, at 3.

the years, they developed hub-and-spoke systems, frequent flyer programs, alliances, differentiated price structures, corporate discounts, travel agent incentive programs, revenue-management programs and computer reservations systems.”<sup>90</sup> These innovations enabled the legacy airlines to defeat two waves of low-cost-carrier entry in the early 1980s and 1990s.

Yet by the late 1990s and early 2000s, the legacy carriers’ stranglehold on the industry began to weaken as low-cost regional carriers like Southwest, JetBlue, Air Tran, Frontier, and Spirit started taking advantage of economic conditions to improve their competitiveness. This was more than a recession “price play,” for the legacy carriers had beaten back a similar wave of low-cost entrants during the 1991-1992 downturn.<sup>91</sup> Rather, the low-cost carriers were finally succeeding because the recession arrived in a period in which the Internet was enabling customers to search for cheaper fares efficiently. By 2001, even business travelers were comparing prices,<sup>92</sup> leading to a 41% drop in business demand between January and July.<sup>93</sup> Once customers were prepared to fly to Oakland and Baltimore on JetBlue rather than to San Francisco and Washington on United, the hub-and-spoke carriers had no choice but to match prices. Their cost structures, however, could not compete with those employed by the low-cost carriers,<sup>94</sup> which benefited from younger, monolithic fleets<sup>95</sup> and cheaper labor.<sup>96</sup> As a result, while the low-cost carriers were better positioned to excel in the market conditions of 2001, the legacy carriers—with their still-dominant market shares and economic clout—would benefit most from a bailout.

90. *Id.*

91. *Id.* at 4.

92. “[T]here is evidence that small regional carriers have been taking advantage of cutbacks by major carriers in the current market to attract business travelers, who have traditionally tended to give their business to the major airlines that operate hub-and-spoke operations.” Margaret M. Blair, *The Economics of Post-September 11 Financial Aid to Airlines*, 36. IND. L. REV. 367, 374 n.47 (2003).

93. See *House Hearings*, *supra* note 21, at 101 (statement of Susan Donofrio, Senior U.S. Airline Analyst, Deutsche Bank Alex. Brown).

94. See Micheline Maynard, *Airlines’ Woes May Be Worse in Coming Year*, N.Y. TIMES, Dec. 27, 2004, at A1 (“And as JetBlue, Southwest and other low-fare airlines keep a lid on prices, the big airlines cannot raise fares substantially to give themselves a cushion as they once might have done.”).

95. See Melanie Trotman & Scott McCartney, *Executive Flight: The Age of ‘Wal-Mart’ Airlines Crunches the Biggest Carriers*, WALL ST. J., June 18, 2002, at A1.

96. While labor costs at United and Delta exceeded 40% of revenue, low-cost carriers were only paying between 25% and 30%. *Id.* See also Chase, *supra* note 41, at 6 (noting the cost differentials between legacy and low-cost carriers).

The solution reached by Congress was to hinge the entire Act—including the emergency funds, loan guarantees, insurance, and liability cap—on the ephemeral concept of “direct September 11 losses.” This way, Congress could legitimately argue that it was merely returning all airlines—regardless of size—to the status quo ante, from which they would be forced to compete based on their business models.

But how could these “direct losses” be defined in a manner that did not undermine the entire project? Throughout the debate in both the Senate and the House, this question was answered by scores of members who justified the Act by emphasizing the need to compensate the airlines for the groundstop order (and related losses).<sup>97</sup> The premise was explained by Representative Mark Kennedy:

As a businessman who has a high degree of faith in the marketplace, I am not usually anxious to look at whether or not we should be supporting private industry. But, we as a government did ask you to shut down and stay shut down for four days. And this deserves our attention.<sup>98</sup>

While reasonable, it is far from certain that the government was obligated, legally or otherwise, to compensate the airlines for the groundstop.<sup>99</sup> A number of airlines actually grounded themselves before the FAA’s announcement,<sup>100</sup> and any attempt to fly, absent federal restriction, would not have generated significant revenue.<sup>101</sup> The argument also encounters difficulty from a constitutional “takings” standpoint, because the airlines would not have been able to demonstrate an economically viable use for the planes during the shut-down,<sup>102</sup> and the government never actually commandeered the fleet for public

97. See, e.g., 147 CONG. REC. S9366 (daily ed. Sept. 13, 2001) (statement of Sen. Bond); *id.* at S9590 (statement of Sen. Fitzgerald); *id.* at S9598 (daily ed. Sept. 21, 2001) (statement of Sen. Allen).

98. *House Hearings*, *supra* note 21, at 79.

99. Julie Kosterlitz, *What Would Darwin Think?*, 33 NAT’L J. 2994, 2995 (2001) (reporting the view of the Cato Institute’s William Niskanen that the government-ordered shutdown was a “taking” of private property and that the airlines were entitled to compensation).

100. 9/11 REPORT, *supra* note 15, at 24.

101. As noted by airline scholar Severin Borenstein, “If the government hadn’t grounded them, no one would have flown anyway . . . . To blame the federal government for the losses is clearly wrongheaded.” Kosterlitz, *supra* note 99, at 2995 (surveying economists’ reactions to the ATSSSA) (internal quotation marks omitted).

102. As noted by former Labor Secretary and bailout expert Robert Reich, “businesses routinely suffer when government exercises its police powers to safeguard the public, as when shops must close to allow firefighters to put out a nearby fire. Government doesn’t usually

use.<sup>103</sup> Indeed, under normal circumstances it is unlikely that the concept of groundstop compensation would have received congressional support. But desperately in need of a rationale to distinguish between pre- and post-September 11 losses, Congress saw the groundstop as a tangible basis upon which to frame the financial assistance.

The quandary, however, was that while this response neatly solved the “bailout” problem—distinguishing between pre- and post-September 11 losses—it created another, equally difficult, obstacle: The carriers were not the only entities that had suffered direct losses from the attacks. By midweek it became widely assumed by both management and unions that the airline layoff toll would exceed 100,000.<sup>104</sup> Many of these workers were let go under force majeure provisions that allowed the airlines to “cut costs quicker in an emergency, such as furloughing employees without notice or cutting fleets and pilot ranks below contractual minimums.”<sup>105</sup> Tens of thousands of airline workers were thus unemployed without benefits directly as a result of September 11. Other industries could also demonstrate direct losses from the attacks. By September 20, the American Society of Travel Agents estimated that its members had lost \$437 million in “commissions and fees, including the commissions they had to return to the airlines on canceled tickets.”<sup>106</sup> Beyond the agents, network television stations announced losses of \$700 million on 10,000 unaired commercials,<sup>107</sup> Boeing cut 30,000 workers after carriers refused delivery on thirty-eight planes,<sup>108</sup> and car manufacturers saw a steep increase in returns by rental agencies.<sup>109</sup> If the theory behind the ATSSSA was that Congress had an obligation to recreate the *ex ante* position, then why did this apply to carriers but not their workers or other ailing industries? For Congress to be able to aid the airlines under the guise of compensating for

---

compensate for ‘takings,’ other than those that involve an outright and permanent transfer of ownership.” See *id.* at 2995 (internal quotation marks omitted).

103. Susanna Dokupil, *Rethinking the Airline Bailout* (The Federalist Soc’y, National Security White Papers, 2003), <http://www.fed-soc.org/Publications/Terrorism/airlinebailout.htm> (last visited Sept. 30, 2005).
104. See, e.g., Martha Brannigan et al., *Airline Workers Look to Congress for Aid—Employees Decry the Use of Force Majeure Clause, After Huge Bailout Plan*, WALL ST. J., Sept. 26, 2001, at A3.
105. McCartney et al., *supra* note 11.
106. McCartney et al., *supra* note 23.
107. Jon E. Hilsenrath, *Terror’s Toll on the Economy*, WALL ST. J., Oct. 9, 2001, at B1.
108. J. Lynn Lunsford & Andy Pasztor, *Boeing May Cut as Many as 30,000 Workers*, WALL ST. J., Sept. 19, 2001, at A3.
109. See Hilsenrath, *supra* note 107. At the same time a number of sectors—such as greeting cards, cellular phones, and defense—benefited financially from the attacks.

direct losses, it needed to develop a philosophically sound argument for excluding others.

Congress responded by stressing the special relationship between the airlines and the attacks.<sup>110</sup> No other industry had seen its physical capital hijacked by terrorists and used to murder thousands of Americans. As such, the argument went, no other industry could make as cogent a claim that it deserved to be returned to its pre-attack position. Congress also distinguished the airline industry on account of its unique role in the national economy. As noted by Senator Jay Rockefeller, “the air transport industry is not just a huge business and employer, but it is also a critical element of our nation’s infrastructure” upon which much else depends.<sup>111</sup> Senator Kay Bailey Hutchison used this logic to argue that the Act actually benefited labor, explaining that “[w]hat we are doing today is trying to stabilize this industry to keep it on its feet in very tough times so we can minimize the layoffs.”<sup>112</sup> The airlines needed aid not simply to save the carriers, Congress argued, but because the failure of such an important industry would result in significantly more layoffs than those already contemplated. The question of how to protect workers and other industries could be addressed in the future,<sup>113</sup> but it was crucial to pass a bill immediately that ensured the continuation of commercial aviation.<sup>114</sup>

There were also less theoretical arguments behind Congress’s refusal to extend the ATSSSA to benefit airline workers and other industries. At first, many members of Congress, including most prominently Senator Bond,

110. Congress could have responded to this onslaught by hiding the aviation rescue in a comprehensive statute, as it had with the Lockheed bailout of 1971. See Emergency Loan Guarantee Act, Pub. L. No. 92-70, 85 Stat. 178 (1971). The Emergency Loan Guarantee Act on its face appeared to authorize federal loan guarantees to many struggling enterprises, but was written in a manner that practically excluded all applicants besides Lockheed. Using this method for the ATSSSA, however, would have undermined Congress’s ability to send a strong signal of support to the nation’s aviation industry. For a discussion of covert bailout options that Congress avoided on public relations grounds, see *infra* Subsection III.C.1.

111. See 147 CONG. REC. S9591 (daily ed. Sept. 21, 2001).

112. *Id.* at S9589.

113. See *id.* at S9592 (statement of Sen. Rockefeller) (“[The Act] does not address all the needs that this crisis has created. One important issue we will need to take up in short order is the plight of the nearly 100,000 airline workers who will lose their jobs . . . . We must also be prepared to look at the needs of related industries.”); see also *id.* at S9589 (statement of Sen. Bond) (“Let me be clear; if we delay passing this bill, as we attempt to craft a change or adjustment on assistance for laid-off employees, we risk causing a tremendous economic calamity.”).

114. On this basis, the House refused to alter the ATSSSA to provide benefits to furloughed workers, *id.* at H5915, or to companies in other industries with direct losses from the attacks. *Id.* at H5929 (statement of Rep. Christensen).

assumed that capping airline liability for September 11 and future attacks would be sufficient to allow the airlines to access market capital and hence remain viable.<sup>115</sup> Only once the losses from the groundstop order and the travel decline became evident did negotiations begin between the congressional committees, the Bush Administration, and the industry to supply loan guarantees<sup>116</sup> and (when the loss estimates grew again) direct compensation.

After passing a \$40 billion emergency appropriation package the week of the attack, which had grown in “2 days’ time from \$5 billion to \$20 billion to \$40 billion,”<sup>117</sup> many in Congress were reluctant to continue appropriating enormous sums. The airlines—which played a crucial role in the economy and had symbolic significance—would get the money necessary to make them viable, but the other affected parties would have to wait.

In order to aid airlines without providing similar packages to others, Congress relied on an implicit fiction that tied the concept of direct losses to the peculiarity of the groundstop. In other words, not only was the groundstop used as the primary justification for reimbursing the airlines’ direct losses, but it also became a requirement for showing that compensable direct losses existed at all. This was not because the attacks did not directly affect other major segments of the economy. Industries from the automotive to the semiconductor were deeply injured on September 11,<sup>118</sup> yet Congress was both more confident about their viability and less concerned about their symbolism.

The ultimate goal of the ATSSSA was to avoid the symbolic cataclysm of multiple carriers declaring bankruptcy a short time after September 11. Although many, if not most, of the bankrupt carriers would remain flying during the process and either emerge or be purchased, Congress was not interested in the public spectacle of airline bankruptcies directly after those airlines were used in a terrorist attack. Accordingly, the ATSSSA was limited to the airlines, for symbolic and budgetary reasons, and confined to direct losses in order to comply—somewhat—with pervading economic thought.

---

115. *Id.* at S9366 (statement of Sen. Bond).

116. See Noam Scheiber, *The Airlines Sure Needed a Lift. Or Did They?*, WASH. POST, Jan. 13, 2002, at B2.

117. 147 CONG. REC. H5687 (daily ed. Sept. 14, 2001) (statement of Rep. Obey).

118. See Hilsenrath, *supra* note 107.

### C. Anatomy of a Loss

#### 1. Short-Term and Long-Term

Having arrived at a narrow philosophical justification for providing aid to the airlines,<sup>119</sup> Congress next needed to determine what mix of provisions would succeed in returning the industry to its *ex ante* position. To accomplish this without providing the airlines with too much aid, Congress needed to receive accurate information about the nature and magnitude of the losses from the Bush Administration's economic experts, industry leaders, and Wall Street.

From the standpoint of the finished ATSSSA, the most influential testimony was given by David M. Walker, the Comptroller General of the United States, who explained that the carriers were experiencing liquidity problems because the groundstop had created a sudden revenue shortfall that the capital markets were refusing to make up because of fears regarding the airlines' long-term viability.<sup>120</sup> By looking at the problem in two stages, Walker explained, Congress could supply the industry with a \$5 billion shot in the arm while waiting in the wings to provide loan guarantees should a return to the *ex ante* position require additional liquidity for some or all carriers. Because Congress's goal was to forestall airline bankruptcies only briefly, the deadline for applying for loan guarantees—Walker's "long-term"—was set at June 28, 2002, as far out as Congress was willing to tolerate.<sup>121</sup>

Walker's testimony also helped Congress recognize that while September 11 was a unique event, the procedures for the intervention could be copied from

119. It is important to note that there were some in Congress and the Bush Administration who conceived of the statute more broadly—as an opportunity to truly rehabilitate the industry. For example, Transportation Secretary Norman Mineta broke sharply from Treasury Secretary Paul O'Neill and Federal Reserve Chairman Alan Greenspan (not to mention most of Congress) by noting in testimony that "the task at hand . . . is to recognize that this key part of the economy of this country *requires new foundations . . .*" *Senate Hearings, supra* note 80, at 15 (statement of Norman Y. Mineta, Secretary, Department of Transportation) (emphasis added). His recommendations to Congress then included over \$8 billion in direct aid to the industry. The problem for proponents of this type of bailout—which would have done more than return carriers to their pre-September 11 positions—was that most members of Congress were uncomfortable with a process that would allow the federal government to choose specific winners and losers. See Letter from Senator Michael Enzi et al., to Mitch E. Daniels, Jr., Dir., Office of Mgmt. & Budget, Oct. 2, 2001, reprinted in News Release, Senator Michael Enzi, Enzi Urges Fair Allocation of Loans Under Airline Relief Package (Oct. 4, 2001), <http://enzi.senate.gov/fairall.htm> (illustrating the ATSSSA's philosophical underpinnings by denouncing the artificial selection of winners and losers).

120. *Senate Hearings, supra* note 80, at 20.

121. ATSSSA, § 101(c)(2)(b), 49 U.S.C. § 40,101 note (Supp. I 2001); OMB Air Carrier Guarantee Loan Program, 14 C.F.R. § 1300.16(a) (2005).

previous federal assistance efforts.<sup>122</sup> Specifically, Walker cautioned that loan guarantees should be made conditional on “various forms of collateral and equity to protect the federal interest,” and that a separate federal board should be established to review and grant them.<sup>123</sup> Both suggestions became part of the ATSSSA.

We will never know whether Walker’s suggestions directly influenced Congress, or, more likely, his (prepared) testimony reflected the negotiated position that had emerged from behind closed doors. But for a Congress seeking to provide liquidity to the airlines without setting a dangerous precedent or reversing deregulation, Walker’s two-step formula was perfect: It provided the opportunity to forestall immediate bankruptcies without necessarily upending market competitiveness.

## 2. *Five Billion Dollars in Losses*

As important as Walker’s testimony was to the eventual structure of the ATSSSA, the true star of the committee hearings was Leo Mullin, CEO of Delta Air Lines, acting as the representative for the ATA. Specifically, it was Mullin’s estimates, along with those provided by Wall Street analysts, that helped Congress determine the magnitude of the federal assistance. Throughout heavy questioning from both the House and Senate committees, Mullin stayed squarely on a message he knew would resonate: The aid we are requesting “is not a bailout” or “a business cycle problem.”<sup>124</sup> Rather, it is “a package designed solely to recover the damages associated with the heinous acts of September 11th.”<sup>125</sup> Mullin added that “without immediate financial support from the government, the future of aviation is threatened.”<sup>126</sup> After explaining that the industry had “virtually no private sources of capital,”<sup>127</sup> and that up to three bankruptcies could be expected within the next week,<sup>128</sup> Mullin

122. “We base our observations on . . . lessons learned from previous financial assistance efforts, including those directed to individual large corporations (such as the Chrysler Corporation and Lockheed Aircraft Corporation) as well as public entities, such as New York City.” *Senate Hearings*, *supra* note 80, at 19. Before the ATSSSA, Congress had not provided any direct aid to the airlines since the 1978 deregulation.

123. *Senate Hearings*, *supra* note 80, at 21, 22.

124. *House Hearings*, *supra* note 21, at 67.

125. *Id.* at 27.

126. *Senate Hearings*, *supra* note 80, at 41. Mullin defined “immediate” as no later than Friday, September 21. *House Hearings*, *supra* note 21, at 37.

127. *Senate Hearings*, *supra* note 80, at 41.

128. *See House Hearings*, *supra* note 21, at 37 (“I don’t think I am telling a tale out of school when I say at least three of our . . . major members of the ATA are on the brink with respect to

moved (finally) to associate actual numbers with the industry's plight. Because Mullin's testimony represented the industry's official request for aid, it is important to see it in its original, cumulative buildup:

[1] [W]e as an industry experienced roughly 4 days of near zero revenue while we continued to accumulate almost all expenses. Since the airline industry spends about \$340 million a day, their direct costs of the 4-day halt in operations was approximately 1.36 billion.

[2] Looking beyond those 4 days, we have used our actual numbers so far, as well as projections based on the disasters of Pan Am 103, and the implications of the Gulf War to estimate that revenues from September 15 to September 30 will likely reach only 40 percent of what we had expected prior to September 11. Based on that, estimated daily losses for the 4-day shutdown total 3.36 billion.

[3] Added together, those two numbers bring the September losses to \$4.7 billion.

[4] Adding 300 million for losses by cargo and other carriers not part of the ATA to the 4.7 billion number, we arrive at a cash infusion amount of \$5 billion for immediate term damage associated with September alone.<sup>129</sup>

The ATSSSA eventually awarded the airlines \$5 billion in direct aid, yet this does not mean that Mullin's estimates accurately reflected the airlines' financial predicament.

Looking first at the direct losses from the groundstop, Mullin derived his \$1.36 billion estimate from the industry's daily expenditures, reminding Congress that the FAA order halted all revenue while doing nothing to stop the accumulation of "almost all expenses." The problem with this is that the

---

their financial situations, and we certainly don't want to have to utilize the jurisdictions of the courts to settle these situations, thereby creating a further lack of confidence in an industry with these kinds of problems."); see also *Senate Hearings*, *supra* note 80, at 1 (statement of Sen. McCain) ("I believe that the airlines are in crisis and in desperate need of our help.").

129. *Senate Hearings*, *supra* note 80, at 42. Mullin repeated a nearly identical calculation for the House Committee on Transportation and Infrastructure. *House Hearings*, *supra* note 21, at 24.

industry was losing money heading into the attacks,<sup>130</sup> meaning that its daily revenues were already insufficient to cover its daily expenses. According to Wall Street research, published in the same period as Mullin's testimony, the industry's pre-attack daily gross revenue was between \$250 and \$275 million,<sup>131</sup> generating a daily loss – based on Mullin's daily cost estimate of \$340 million – of \$65 to \$90 million. Mullin knew that, at the very least, Congress was going to reimburse the airlines for their groundstop losses. By defining these losses on the basis of expenditures, Mullin was actually improving the airlines' position, helping them profit from the groundstop "compensation."

But the sleight of hand did not stop there. In introducing his calculations, Mullin noted that during the groundstop the industry continued to "accumulate *almost* all expenses."<sup>132</sup> Thus, he continued, "[s]ince the airline industry spends about \$340 million *a day*, their direct cost of the 4-day halt in operations was approximately 1.36 billion."<sup>133</sup> While Mullin was right to point out the industry's high fixed costs, "almost" cannot mean "all" in any rigorous accounting scheme. On September 17, Buckingham Research estimated that 55% of the industry's costs were fixed.<sup>134</sup> Applying this percentage to Mullin's \$340 million daily loss estimate yields daily fixed costs of approximately \$187 million. This brings the direct cost of the four-day halt in operations, under Mullin's formula, down from \$1.36 billion to \$748 million.

To be fair, it is possible that the Buckingham number reflects the fixed costs of a planned shutdown, ignoring the possibility that the airlines had already incurred some of the variable costs associated with canceled flights on September 11 and 12. In fact, in testimony before the House Committee on Transportation and Infrastructure, Raymond Neidl of ABN Amro and Susan Donofrio of Deutsche Bank estimated groundstop fixed costs to be 90%<sup>135</sup> and

130. See Raymond E. Neidl, *Airlines: Recent Developments Expected To Produce Large Industry Loss 2* (ABN Amro, Equity Research Report, Sept. 17, 2001).

131. Helene Becker, *Airline Industry Review: Probable Impact of Recent Terrorist Incidents on the Airlines 2* (The Buckingham Research Group, Equity Research Report, Sept. 17, 2001) (estimating \$250 million in daily revenue); Higgins & Kennedy, *supra* note 12, at 1 (estimating \$250-\$275 million in daily losses); Neidl, *supra* note 130, at 1 (estimating \$270 million in daily losses); see also *House Hearings*, *supra* note 21, at 101 (testimony of Susan Donofrio, Senior U.S. Airline Analyst, Deutsche Bank Alex. Brown) (estimating \$260 million in daily losses).

132. *Senate Hearings*, *supra* note 80, at 42 (emphasis added). Mullin repeated a nearly identical calculation for the House Committee on Transportation and Infrastructure. *House Hearings*, *supra* note 21, at 24.

133. *Senate Hearings*, *supra* note 80, at 42 (emphasis added).

134. See Becker, *supra* note 131, at 2.

135. *House Hearings*, *supra* note 21, at 105.

80%,<sup>136</sup> respectively. Applying the average of their estimates to Mullin's \$340 million in daily costs yields fixed costs of \$289 million per day. Spread over the four-day period, this implies cumulative losses \$204 million below Mullin's estimate.

There is also good reason to doubt Mullin's daily loss figure of \$340 million. On September 17, Neidl estimated that before the attacks the nine major carriers incurred \$274 million in daily total costs.<sup>137</sup> Because it is unlikely that the remaining low-cost and regional carriers would have incurred sufficient expenditures to increase the figure by 24% (i.e., to \$340 million), Mullin's calculation seems suspiciously high. Moreover, Mullin's figures are outright unbelievable when compared with Buckingham's estimate of \$245 million in daily costs.<sup>138</sup> Remember, because Mullin was equating "losses" with expenditures, it was in his interest to provide as high a cost basis as possible. Applying the fixed-cost estimate of 85% to the average of Neidl's (\$274 million), Buckingham's (\$245 million), and Mullin's (\$340 million) estimates produces a four-day "loss" of \$974 million, 28% below Mullin's final calculation.

Figure 1.  
COMPARATIVE SHUT-DOWN LOSSES (IN MILLIONS)

	MULLIN	BUCKINGHAM RESEARCH	NEIDL/ DONOFRIO	AUTHOR'S ANALYSIS
Daily Total Costs	\$340	\$245	\$274	\$286 (average)
Daily Fixed Costs	\$340	\$135	\$233	\$243
Fixed as a % of Total	100%	55%	85%	85% (Neidl/Donofrio)
Cumulative Costs	\$1360	\$539	\$932	\$974
Difference from Mullin	0.0%	(60.4)%	(31.5)%	(28.4)%

136. *Id.* at 101.

137. See Neidl, *supra* note 130, at 2.

138. See Becker, *supra* note 131, at 2 ("We further estimate that fixed costs are about 55% of total expenses or roughly \$130 million to \$140 million per day.").

Mullin's next task was to move from the groundstop to the rest of September, to demonstrate how the expected decrease in flying would affect the industry's bottom line. For this stage, Mullin could not simply ask for a reimbursement of all costs because the airlines were clearly generating revenue. Rather, he would need to ask Congress to make up the revenues that the airlines were losing due to the immediate drop in travel caused by the attacks. Relying on the Pan Am 103 disaster and the 1991 Gulf War for guidance, Mullin testified that revenues for the last sixteen days of the month would likely reach only 40% of pre-September 11 expectations,<sup>139</sup> costing the airlines \$3.36 billion. This implies normalized expected revenue of \$350 million per day.<sup>140</sup> As discussed above, however, Wall Street revenue estimates—which used the same disaster precedents—generally fell between \$250 and \$275 million per day. Spread over the month, this amounts to an overstatement of between \$1.2 and \$1.6 billion.

During the week following the attacks, most Wall Street analysts assumed that the terrorist strike would result in incremental losses of between \$2 and \$6 billion for the year.<sup>141</sup> Mullin got to \$4.7 billion in only nineteen days. Besides overstating revenue and fixed costs, Mullin also accomplished his “feat of estimation” by failing to build cost reductions into his September model, including the fuel savings the industry realized during the groundstop.<sup>142</sup> By contrast, in its own review of the ATA's numbers, the GAO estimated that the airlines saved \$575 million in September fuel<sup>143</sup> and other<sup>144</sup> expenses.

---

139. Mullin reached his expansive revenue shortfall estimate by inexplicably assuming that the 60% revenue decrease experienced from September 17-23 would be equaled, without improvement, during the second week after the attack (September 24-30). Revenue actually improved by nearly 10% the following week.

140. This figure equals 60% of \$5.6 billion in expected revenue from September 15-30. Divided over sixteen days, this amounts to \$350 million per day in expected revenues.

141. See, e.g., Samuel Buttrick, *Airline Industry Update 1* (UBS Warburg, Equity Research Report, Sept. 13, 2001); Higgins & Kennedy, *supra* note 12, at 3.

142. Mullin only admitted to this point after questioning from Representative Bob Menendez. *House Hearings, supra* note 21, at 46-47.

143. This came to \$175 million during the shutdown and \$144 million from September 15-30 due to a 20% decrease in capacity. See GAO, *FINANCIAL MANAGEMENT: ASSESSMENT OF THE AIRLINE INDUSTRY'S ESTIMATED LOSSES ARISING FROM THE EVENTS OF SEPTEMBER 11*, at 12-13 (2001) (responding to congressional request for analysis).

144. This consisted of \$256 million in landing fees, passenger services, commissions, and other variable costs. *Id.* at 12-13.

### 3. *Moving the Goalposts and Declaring Victory*

The reality is that hewing to Walker's delineation of short- and long-term estimates, Mullin must have felt pressure to associate the \$5 billion cash component with immediate-term losses. But the numbers were simply too inflated to be realistic. As a result, the Act's drafters applied Walker's "short-term" to both the direct losses suffered during the groundstop as well as the "incremental losses incurred beginning September 11, 2001, and ending December 31, 2001 . . . as a direct result of [the] attacks."<sup>145</sup> In so doing, they were preserving the demarcation between short- and long-term losses, and between direct aid and loan guarantees, while simply changing the exact definitions. They were also admitting the frailty of Mullin's estimates.

The problem, however, was that not everyone in Congress picked up on this last-minute switch and therefore continued to assume that the \$5 billion was being applied to the industry's September losses alone. This is significant because while the confusion was understandable, the size of the loan-guarantee package depended on projected liquidity needs that were calculated based on the sufficiency of the \$5 billion. The confusion pervaded the entire Congress. As Senator Carl Levin explained only minutes before he voted in favor of the Act: "This legislation provides an immediate \$5 billion cash infusion to stop the immediate hemorrhaging of the airline industry *and to cover their losses for the month of September.*"<sup>146</sup> Senator Hutchison, one of the Act's chief proponents, was similarly ill-informed, noting on the same day that "[w]hat this bill does is have \$5 billion in immediate assistance to the carriers based on their actual losses for the grounded airplane time they have had."<sup>147</sup> In an even more confused conversation, Senator Peter Fitzgerald assured Senator John Corzine that the Act enabled the Administration to demand warrants from airlines whose compensation exceeded their groundstop losses.<sup>148</sup> If such a provision existed, it would have made the Act hopelessly contradictory, because the \$5 billion was specifically allocated to cover losses from the groundstop through the end of the year.

Why the confusion? Why did members of Congress not recognize that the bill they were about to vote on allocated \$5 billion for losses incurred through the end of 2001? Certainly, the days after September 11 were hectic, and a number of bills were passed without adequate congressional consideration. Yet

---

<sup>145</sup>. ATSSSA, § 101(a)(2)(B), 49 U.S.C. § 40,101 note (Supp. I 2001).

<sup>146</sup>. 147 CONG. REC. S9595 (daily ed. Sept. 21, 2001) (emphasis added).

<sup>147</sup>. *Id.* at S9590.

<sup>148</sup>. *Id.*

based on a review of the *Congressional Record*, I believe that the confusion actually reveals something important about the Act's formulation.

At the time the Act was passed, the airlines were hemorrhaging cash from both the groundstop and the steep decrease in demand. It was generally believed that up to three airlines could run out of cash within a week, and Congress was eager to avoid the message such failures would send so soon after the terrorist attacks. Thus, in consultation with the President and industry representatives, Congress determined that short-term bankruptcies could be avoided by an immediate infusion of \$5 billion.<sup>149</sup> When it became clear, based on Wall Street's analysis of the ATA's numbers, that the full \$5 billion could not be assigned to September, Congress extended the date until the end of the year. In essence, the Act was manufactured backwards, with the amount that the government was willing to spend decided first and its justification hammered out later. Not willing to lower the \$5 billion in grants that had emerged from negotiations, the congressional drafters moved the goalposts and declared victory. Their colleagues, having only seen old versions of the Act, simply missed the last minute switch.

#### 4. *Ten Billion Dollars in Loan Guarantees*

As important as the \$5 billion grant was to the industry, it was only half the story. With consumer demand expected to lag with the new War on Terror, the airlines also needed Congress to provide loan guarantees to ensure liquidity once the grants were depleted. In other words, Congress needed an economic justification for step two of Walker's demarcation. Once again, the ATA turned to Mullin, who readily supplied a (highly suspect) number:

[1] [W]e assumed the traffic for fourth quarter would grow to 60 percent of the previous expectations, to 75 percent of expectations by the end of the first quarter 2002, and to 85 percent of expectations by the end of the second quarter of 2002 . . . .

[2] Prior to the events of September 11, the industry had forecast an aggregate cash balance on June 30, 2002 of positive 8.5 billion. With these revenue assumptions, our new estimates now indicate instead a negative \$15.5 billion cash balance.

---

<sup>149</sup>. See Scheiber, *supra* note 116.

[3] Thus, the events of September 11 are forecast to have a negative \$24 billion impact on the industry's cash position.

[4] Now none of us knows precisely [what will happen] in the upcoming period. These estimates pertain to a situation that has never occurred.

[5] Hence, we also ran these same numbers in an optimistic and pessimistic mode. Optimistically, the swing in cash balance could run just under 18 billion . . . or pessimistically as high as 33 billion.<sup>150</sup>

In this stage Mullin could no longer define losses as expenditures, as he had with the \$340 million, because the airlines were asking to be compensated for lost revenues. Even then his long-term cash analysis<sup>151</sup> was problematic on both ends: It overstated likely revenue contraction and understated cost reductions. The primary problem was that Mullin was using a generally static model. Although a review conducted by the GAO in October 2001 projected \$397 million in personnel-related savings from November through the end of the year,<sup>152</sup> Mullin's numbers did not start factoring in layoff savings until 2002. This despite the fact that by September 17 many airlines had already begun to use force majeure clauses to quickly, and relatively inexpensively, fire tens of thousands of workers.<sup>153</sup>

The revenue numbers, particularly for the remainder of 2001, were also problematic. Mullin told Congress that the loan guarantees were needed to (partially) offset an expected 40% decline in fourth quarter revenue, but the ATA adjusted this projection down to a more realistic 25% in its October submission to the GAO.<sup>154</sup> Mullin's testimony had inexplicably focused retrospectively on demand numbers the week after the attack instead of concentrating on the "rebuild curve."<sup>155</sup> As UBS's Samuel Buttrick noted in his assessment of Mullin's numbers, "[w]hile we continue to believe that this is a highly improbable forecast, if it is (even remotely) correct, the current package

---

150. *Senate Hearings*, *supra* note 80, at 42. Mullin repeated a nearly identical calculation for the House Committee on Transportation and Infrastructure. See *House Hearings*, *supra* note 21, at 21.

151. Cash shortfall is particularly relevant in the capital-intensive and fiercely competitive aviation industry. This is especially true when bankruptcy is looming.

152. GAO, *supra* note 143, at 12-13.

153. See *supra* note 105 and accompanying text.

154. GAO, *supra* note 143, at 10-11.

155. *Id.*

only directly addresses a fraction of the loss. *If the industry forecast is correct, there will still be multiple bankruptcies . . .*”<sup>156</sup>

Assuming that Congress did not completely distrust the ATA’s loss estimates, Buttrick’s observation provides insight into the Act’s purpose. As will be discussed in Part III, the classical goal of a bailout is to utilize government funds to avoid bankruptcy. Such a decision is made based on a variety of social and political pressures. Yet, as Buttrick explained, the ATSSSA was never given the teeth to truly stave off bankruptcies (regardless of whose numbers you believed). Rather, by infusing the carriers with enough cash to make it through 2001, Congress was merely postponing the inevitable for a more palatable political climate. The ATSSSA was thus designed to allow all carriers to tread water until the period of national tragedy had passed, at which point they would be judged based on their market performance and their importance to the economy.

## II. THE ATSSSA IN ACTION

The passage of the Act partially lifted the cloud that had been gathering over the commercial aviation industry. Instead of filing for bankruptcy en masse, the carriers—after providing the Treasury Department with capacity and loss statistics—received \$5 billion in direct aid while preserving the opportunity to access \$10 billion in loan guarantees.<sup>157</sup> On the insurance and liability fronts, the Act established the Victim Compensation Fund, capped tort awards related to the attacks,<sup>158</sup> and made the federal government the industry’s primary insurer.<sup>159</sup> Nevertheless, many in the industry and on Wall Street remained uncertain. The ATA released a statement expressing gratitude that “our nation’s airlines will not become the first economic casualty of this war,”<sup>160</sup> but followed soon thereafter with the warning that “[w]e’re looking at

156. Samuel Buttrick, *Airlines: Federal Aid Package* 1 (UBS Warburg, Equity Research Report, Sept. 24, 2001) (emphasis added).

157. Before receiving aid, all carriers were required to submit statistics detailing their ASMs for the month of August 2001, as well as their estimated “direct losses” from the September 11 attacks. See ATSSSA § 103(b)(2)(A)(ii), 49 U.S.C. § 40,101 note (Supp. I 2001). The GAO initially held back 50% of the funding until more concrete, actual losses could be demonstrated. When this initial disbursement turned out to be overstated, the GAO demanded refunds. See *infra* note 267.

158. See Elizabeth N. Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL’Y REV. (forthcoming 2005).

159. See *supra* note 34 and accompanying text.

160. Brannigan, *supra* note 35 (quoting Carol Hallet, President, ATA).

losses so huge, so scary, that it wouldn't [be a] surprise . . . if there are bankruptcies in spite of the government stabilization award."<sup>161</sup> While the bailout money was staving off imminent bankruptcies—as designed—and specific carriers were emerging as stars, it was becoming clear that “things [would] never be the same.”<sup>162</sup> By the middle of November, after the crash of American Flight 587, industry stock prices were down 38% since 9/11, with large carriers losing 46% of their value.<sup>163</sup>

The biggest problem was that the pre-September 11 cost structures, which were already causing problems in August, were inoperable in the new demand environment. US Airways saved \$15 million by renegotiating hotel rates for its crews, but still lost over \$1.4 billion in the second half of 2001. American “quit stocking magazines on its planes and cut out caviar for first-class international travelers,”<sup>164</sup> only to see \$1.3 billion in red ink build during the same period. To make matters worse, Congress's delay in passing the Aviation Security Act was imperiling any resurgence in consumer confidence, and unions—still smarting from their exclusion from the ATSSSA—were not showing signs of cooperation.

In the end, eight of the fourteen major carriers were compensated based on actual losses, theoretically providing full compensation for the terrorist attack.<sup>165</sup> Nevertheless, even after receiving \$4.6 billion in government funds, the industry lost an additional \$3 billion in 2001.<sup>166</sup> Fourth quarter and 2001

161. Anthony L. Velocci, Jr., *Wall Street's Outlook for Airlines Sobering*, AVIATION WK. & SPACE TECH., Nov. 19, 2001, at 63 (quoting David Swierenga, Chief Economist, ATA).

162. Raymond E. Neidl, *Things Will Never Be the Same 1* (ABN Amro, Equity Research Report, Oct. 12, 2001) (“Long-term, permanent changes will have to be made in the way carriers are managed and in the cost structure and salary expectations of the industry's highly skilled workforce. The world has changed after September 11, and the airlines and its employees will have to adjust or perish . . .”). *But see* Glenn Engel, *End of the World as We Know It? Perhaps Not 1* (Goldman Sachs, Equity Research Report, Oct. 12, 2001).

163. My industry index is equally weighted and includes Alaska Airlines (ALK), American (AMR), America West (AWA), Continental (CAL), Delta (DAL), Northwest (NWAC), Southwest (LUV), and United (UALAQ). The large carriers index is also equally weighted and excludes Alaska Airlines (ALK) and Southwest (LUV). Jonathan Lewinsohn, Database of Post-9/11 Airline Stock Prices (last updated Oct. 7, 2005) (on file with author).

164. McCartney et al., *supra* note 11.

165. GAO, AVIATION ASSISTANCE: INFORMATION ON PAYMENTS MADE UNDER THE DISASTER RELIEF AND INSURANCE REIMBURSEMENT PROGRAMS 27 (2003) (providing an overview of ATSSSA implementation).

166. *See* AIR TRANSPORT ASS'N, STATE OF THE U.S. AIRLINE INDUSTRY: A REPORT ON RECENT TRENDS FOR U.S. AIR CARRIERS, at i (2002) (predicting that total losses were “likely to exceed \$7 billion”). *But see* Raymond E. Neidl, *Summary: Q401 and 2001 Results—A Year To Forget 1* (ABN Amro, Equity Research Report, Feb. 4, 2002) (“For the fourth quarter the

capacity were down 15% and 3.5% respectively,<sup>167</sup> due to the parking of 350 planes.<sup>168</sup> Despite this precipitous drop in capacity, load factors fell to 71.3%, with the break-even load figure rising to a record 77%.<sup>169</sup> For the year, the industry recognized savings by laying off 80,300 airline employees,<sup>170</sup> 20,000 fewer than predicted, but saw labor costs per employee nearly double the compounded annual growth rate of the previous fourteen years.<sup>171</sup> Indeed, average airline salaries remained 53% higher than the national mean.<sup>172</sup>

The \$5 billion successfully forestalled bankruptcies during 2001, but it was clear that a number of airlines would be filing in the year ahead. It was time for the second part of the ATSSSA to kick in, with troubled airlines being forced to justify why their predicaments were related to September 11 and how their survival—outside of bankruptcy—was “necessary . . . [to] maintaining a safe, efficient, and viable commercial aviation system in the United States.”<sup>173</sup>

The problem was that such demonstrations were difficult to make. Congress had ceded rulemaking responsibility for the loan guarantees to the notoriously tight-fisted OMB director Mitch Daniels, who only three days after the attacks “sent a memo to agency heads, pushing them to hold the line on disaster-related costs wherever possible.”<sup>174</sup> Daniels did not disappoint, developing rules that favored only those carriers that could demonstrate both their importance to the economy and their ability to cut costs significantly.<sup>175</sup> Congress then complemented Daniels’s fiscal conservatism by stacking the ATSB with representatives from the Federal Reserve and the Treasury Department, two agencies that had fiercely opposed the bailout.<sup>176</sup> The going would not be easy.

---

industry had a loss of \$3 billion and for the full year the industry had a net loss of \$6 billion, which was the largest loss ever.”).

167. See AIR TRANSPORT ASS’N, *supra* note 166, at 3.

168. *Id.*

169. *Id.*

170. *Id.* at 6 (noting that this was 14% of the workforce).

171. *Id.* at 5. Labor costs per employee reached \$73,000 in 2001, up from \$68,700 in 2000.

172. *Id.* at 6.

173. ATSSSA, § 102(c)(1)(C), 49 U.S.C. § 40,101 note (Supp. I 2001) (providing standards for ATSB review of loan guarantee applications).

174. John D. McKinnon & Jim VandeHei, *Bush To Unveil Aid Package for Airlines*, WALL ST. J., Sept. 20, 2001, at A3.

175. OMB Air Carrier Guarantee Loan Program, 14 C.F.R. § 1300.10(a)(3), (b) (2005).

176. The third representative was from the more airline-friendly Transportation Department. Most of the Board’s loan-guarantee rejections came in 2-1 votes. See Air Transp. Stabilization Bd., U.S. Treasury, Meeting Minutes, <http://www.ustreas.gov/offices/>

America West, a hybrid low-cost/hub-and-spoke carrier, overcame the odds to receive the first loan guarantee in December 2001, largely because its relatively inexpensive labor contracts and aircraft leases gave it little to gain from reorganization in bankruptcy.<sup>177</sup> As time went on, however, the ATSB got tougher. By the next month, applications arrived from small regional carriers Vanguard, Evergreen, National, Spirit, and Frontier, but the ATSB did not feel that their survival was crucial to preserving the national aviation system.<sup>178</sup> The major carriers, fearing the concessions the ATSB would demand in return for loans, employed creative techniques to secure privately backed financing.<sup>179</sup> Things were so slow at the ATSB that its executive director resigned, complaining that he had “relatively little to do” and noting that “[t]he need for the program is probably not as critical as some people might have thought it would have been early on.”<sup>180</sup> Ultimately, as market conditions worsened midway through 2002, the pace did pick up, although it never reached the magnitude expected by some in Congress.

In the end,<sup>181</sup> the Board issued six loan guarantees, totaling \$1.56 billion, in support of \$1.74 billion in loans. Some were more successful than others. Frontier Air was awarded a loan guarantee that it repaid in full in December 2003, netting the government a profit on its investment. US Airways, on the other hand, the recipient of a \$900 million guarantee, filed for bankruptcy twice in as many years, and has now merged with America West in the hopes of transforming itself into a competitive low-cost carrier.<sup>182</sup> United, which was rejected by the ATSB before it filed for bankruptcy, requested a loan guarantee

---

domestic-finance/atsb/minutes (last visited Sept. 1, 2005) (collecting transcripts of Board meetings since November 2001).

177. The Phoenix-based airline also had a powerful political backer in Arizona Senator John McCain, the ranking member of the Senate Commerce, Science, and Transportation Committee.
178. See Air Transp. Stabilization Bd., *supra* note 176. Some applications were eventually granted conditional approvals.
179. See Editorial, *Flying Without Bailouts*, WALL ST. J., Aug. 12, 2002, at A10 (noting that “airlines have raised \$11 billion since September 11, not a dime of it from the government”).
180. Stephen Power, *Head of Program To Assist Airlines Resigns from Post*, WALL ST. J., May 1, 2002, at D3 (quoting Joseph P. Adams) (internal quotation marks omitted).
181. Although the deadline for submitting loan-guarantee applications was June 28, 2002, the ATSB continues to accept amended applications from the fifteen carriers that made the original cutoff.
182. See Dan Fitzpatrick, *The ‘New’ US Airways Hopes Its Ticker Symbol Will Be a Sign of Things To Come*, POST-GAZETTE.COM (Pittsburgh, Pa.), Aug. 10, 2005, <http://www.post-gazette.com/pg/05222/551199.stm> (noting that the merged company chose “LCC,” or low-cost carrier, as its stock ticker symbol).

to help it emerge, but was denied because the steps it had taken in bankruptcy made it likely that it would succeed without government help.<sup>183</sup>

The work of the ATSB has had little effect on the airlines' stock market performance. As of October 7, 2005, share prices of legacy carriers are down 77% since August 10, 2001, 73% since markets reopened on September 17, 2001, and 49% since the passage of the ATSSSA.<sup>184</sup> The "big six" airlines alone—American, United, Delta, Continental, Northwest and US Airways—lost over \$9 billion in 2004,<sup>185</sup> and the outlook going forward is not optimistic.<sup>186</sup> In fact, as geopolitical unrest exerts pressure on world petroleum markets and increased competition erodes margins at all levels of the industry, not even the low-cost carriers have been able to protect their profitability. As a result, JetBlue and Southwest are trading near their 52-week lows. These factors have coalesced into a general perception that by forestalling a badly needed shakeout in the industry, the ATSSSA might "actually have made matters worse."<sup>187</sup> Even after receiving billions in government aid, the industry is on the brink. How much worse could it possibly have been?

While not unreasonable, especially based on recent performance, this conclusion overlooks a number of problems. First, it does not adequately consider the precarious national climate in the days following September 11. The spectacle of carrier bankruptcies arising immediately after hijacked airplanes had killed thousands of Americans would have dampened consumer confidence, further imperiling the airlines' demand outlook. It would also have sent an ominous signal that the government wished to avoid.

More importantly, simply because the airline industry has continued to struggle does not mean that the ATSSSA exacerbated its problems. As noted above, the OMB and the ATSB ensured that the loan guarantees were carefully rationed, with credit being denied to a number of the weakest carriers. It is

183. See Letter from Michael Kestenbaum, Executive Dir., ASTB, to Frederic F. Brace, Executive Vice President & CFO, United Air Lines (June 28, 2004), available at <http://www.ustreas.gov/press/releases/js1753.htm>.

184. This legacy-carrier index is equally weighted and includes American (AMR), America West (AWA), Continental (CAL), Delta (DAL), Northwest (NWAC), and United (UALAQ). See Lewinsohn, *supra* note 163.

185. See Loren Farrar & Perry Flint, *Legacy of Losses*, AIR TRANSP. WORLD, March 2005, at 53.

186. Most recently, both Delta and Northwest, carriers that had been relatively healthy enough in 2002 to avoid applying for ATSB assistance, were forced to seek bankruptcy protection, citing rising fuel costs. See Chris Isidore, *Delta, Northwest File for Bankruptcy*, CNN/MONEY, Sept. 15, 2005, [http://money.cnn.com/2005/09/14/news/fortunes500/bankruptcy\\_airlines/index.htm](http://money.cnn.com/2005/09/14/news/fortunes500/bankruptcy_airlines/index.htm).

187. Micheline Maynard, *Airline Bailout Fails To Do the Job, Some Experts Say*, N.Y. TIMES, May 14, 2004, at C2.

doubtful that the \$5 billion in aid would have been sufficient to provide a permanent cushion to failing airlines.

To brand the ATSSSA a failure is to tell an incomplete story. Thus far, this Note has provided the first detailed analysis of the ATSSSA's conception, passage, and implementation. Assessing this process in a vacuum, however, makes it difficult to understand the Act's significance or to criticize its results. By upsetting the status quo, Congress was making an explicit statement about the industry's predicament that can only be fully grasped in relation to Congress's past behavior and legitimate alternatives. To truly assess the ATSSSA requires evaluating the legislation through both normative (was it good?) and comparative (was it the best option?) lenses.

### III. THE ATSSSA: IN SEARCH OF JUDGMENT

The final Part of this Note will assess the ATSSSA by considering comparative and efficiency theories, and evaluating the Act in light of other possible options. This is not merely an academic exercise. As noted by Representative Brian Kerns, in the event of additional attacks it is likely that the airlines will be back for aid,<sup>188</sup> making it practically important to determine whether the ATSSSA provides a workable model for future legislation.

As I argue below, bailouts are often the inevitable political response to specific social and economic circumstances.<sup>189</sup> As such, bailouts should be assessed by determining whether Congress enacted the best possible statute in light of the political realities. But what metrics can be relied upon in making this determination? What constitutes an ideal bailout? To (partially) answer these questions, I will use this final Part as an opportunity to appraise the ATSSSA and, in so doing, outline the contours of a model that can be used to assess bailouts more broadly. Bailouts represent a temporary disruption of free-market forces, yet this does not mean that they cannot comply with basic notions of efficiency.<sup>190</sup> At the very least, bailouts should avoid creating perverse incentives and should be consciously structured in a manner that least

---

188. See *House Hearings*, *supra* note 21, at 73 (statement of Rep. Kerns).

189. A similar conclusion has been applied to government regulation of the banking industry and global bailouts of sovereign nations, but never to domestic corporate bailouts by the federal government. See Jonathan R. Macey, *The False Promise of De-Regulation in Banking* 9 (Yale Law Sch. Faculty Scholarship Series, Paper No. 2, 2005), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1001&context=yale/fss>; see also Llewellyn H. Rockwell, Jr., *Financial Socialism*, THE FREE MARKET, Nov. 1998, at 4.

190. The success of a bailout often depends on how temporary the disruption is. See *infra* Section III.A.

distorts market forces. Congress should also publicly articulate the reasons for its intervention to make clear that similar largesse will not necessarily be available in the future (even in similar circumstances). Finally, where possible, bailouts should be centered on actual congressional handouts—of funds or loan guarantees—rather than covert options such as tax or antitrust suspensions. This way, it will be harder for bailouts to be passed, more difficult for relatively healthy industries or companies to lobby for congressional support, and less likely that “emergency loopholes” will remain in place for the long term.

To show how the ATSSSA meets these standards and to argue for their importance in assessing bailouts more generally, I will apply the traditional economic arguments levied against bailouts to the ATSSSA, showing where they fall short and offering normative defenses for the Act’s passage. What emerges is a portrait of an Act that was designed to meet a symbolic objective, but that also satisfies a number of efficiency criteria. Having provided justification for the Act, I will then compare the ATSSSA to other recent bailouts, both in form and results, to determine what factors usually induce the government to rescue companies or industries. This analysis will allow me to evaluate the claim made by many in Congress and the industry that the ATSSSA should not be considered a bailout. It will also reveal the problems associated with comparative bailout assessments—what I call the “relative results” model—and show the advantages offered by the assessment criteria outlined above. From there, I will examine alternative constructions that Congress might have considered, determining whether Congress made the right choices given the political realities.

The ATSSSA is not a perfect statute. Yet its ability to stabilize an industry in crisis without recasting traditional market principles or affirmatively determining industry winners and losers makes it an important example for the future.

#### A. *(Overcoming) The Anti-Bailout Presumption*

##### 1. *Perverse Incentives*

Whenever the government provides assistance to a failing enterprise or industry it encounters the criticism that by rewarding failure it is promoting bad decisionmaking.<sup>191</sup> The thinking runs like this: Knowing the availability of government assistance, future managers might be influenced to take liberties without internalizing potential risks. This critique is based on the concept of

---

191. See Kosterlitz, *supra* note 99, at 2994.

“moral hazard” and is one of the strongest arguments against government intervention.

But its application to the ATSSSA is problematic. As exhibited consistently in the committee hearings, the airline executives knew that the ATSSSA was a response to the unanticipated terrorist attacks, and the groundstop in particular.<sup>192</sup> The Act does not stand for the proposition that the government will rescue the airlines in the event of general economic catastrophe or even another attack. If anything, its limited scope incentivizes airline executives to internalize risk, because Congress has little interest in providing continuous aid to the industry. Nowhere was this more obvious than in early 2002 when, amid deteriorating market conditions, an ATA call for a second bailout, including tax breaks and government assumption of security costs,<sup>193</sup> was met with outright hostility<sup>194</sup> as the congressional perception of the industry returned to its pre-attack lows.<sup>195</sup>

It is also unfair to conclude that the ATSSSA provided only negative incentives. By disbursing aid to the airlines, the government was forestalling the possibility of bankruptcy, allowing investors to shed some of their risk, and promoting the type of investment necessary for the long-term viability of the industry.<sup>196</sup>

## 2. Efficiency

Another (normative) critique leveled against bailouts in general is that they sacrifice economic efficiency for the sake of social goals, thereby limiting society's wealth.<sup>197</sup> This criticism can be easily applied to the ATSSSA, because its primary purpose was to avoid sending negative signals during a period of

192. *Id.* at 2995.

193. Martha Brannigan, *As Their Losses Mount, Airlines Lobby Government for More Aid*, WALL ST. J., Sept. 23, 2002, at A1.

194. *See id.* (quoting ATSSSA supporter Representative John Mica: “There won’t be a direct bailout, period. That’s not in the cards.” (internal quotation marks omitted)).

195. *See* Stephen Power & Susan Carey, *U.S. Turns Down United’s Request for Loan Help—Carrier Moves Closer to Chapter 11, Lacking \$1.8 Billion Guarantee*, WALL ST. J., Dec. 5, 2002, at A1 (quoting a senior Bush Administration official as noting: “The public has little sympathy for an industry that’s been bailed out as often as the airline industry has.” (internal quotation marks omitted)); *see also supra* note 13 and accompanying text.

196. Similar principles are involved when the government allows deductions to investors in oil and gas exploration or seeks to reduce the capital gains tax. For more information, see KENNETH J. ARROW, *ESSAYS IN THE THEORY OF RISK-BEARING* 135 (1971).

197. *See, e.g.,* Daniel J. Gifford, *Antitrust and Trade Issues: Similarities, Differences, and Relationships*, 44 DEPAUL L. REV. 1049, 1071 (1995); Kosterlitz, *supra* note 99.

national trauma. In general, a mature approach to bailouts would recognize that when the government upsets the status quo it is consciously—and normatively—choosing social and distributive objectives over pure efficiency. Yet, because it is a common objection, it is important to show why social objectives—especially those sought by the ATSSSA—are not always mutually exclusive from efficiency.

It is not hard to see why economists tend to look unfavorably at bailouts.<sup>198</sup> Conventional wisdom holds that an efficient allocation of resources can only be realized by the free market, where decisions are based on merit, price, quality, performance, and prospects rather than politics or social agendas.<sup>199</sup> To most economic commentators, a political reaction to a crisis will inevitably be shortsighted—“driven by short-run pressures rather than long-run principles.”<sup>200</sup> Moreover, bailouts tend to benefit the politically powerful at the expense of others, and create a culture of moral hazard where imprudent risks are implicitly promoted.<sup>201</sup> We have already seen how Congress managed to avoid the promotion of moral hazard by tying the ATSSSA bailout to the airlines’ role in the attacks, insisting on the reimbursement of only “direct losses,” and refusing to seriously distort long-term competitive conditions. A similar argument can now be made regarding the Act’s purported inefficiency.

Although it occasionally operates under the political radar,<sup>202</sup> the government routinely intervenes in the economy not only to accomplish social objectives but also to smooth out results for the long term. The success of these interventions “depends upon a host of variables which in the aggregate determine whether the threatened industry . . . is likely (subsequent to—and because of—the intervention) to achieve a level of efficiency which will enable it to prosper in the future.”<sup>203</sup> The terrorist attacks artificially and temporarily compressed the demand for air travel, creating a glut of capitalized capacity that might have forced many carriers into bankruptcy. Although under normal circumstances debtor-in-possession financing would have been available to help the strongest airlines emerge, the dearth of available capital in the immediate aftermath of the attacks would likely have led to more liquidations

198. See Kosterlitz, *supra* note 99.

199. See, e.g., Blair, *supra* note 92, at 370 (noting that “private sector businesses will allocate resources efficiently in response to prices determined in free markets”).

200. Charles W. Calomiris, *The IMF’s Imprudent Role as Lender of Last Resort*, CATO J., Winter 1998, at 275.

201. *Id.* at 276.

202. For a discussion of the public’s understanding of the government’s intervention in the purportedly “free market,” see *infra* note 237 and accompanying text.

203. Gifford, *supra* note 197, at 1074.

(Chapter 7) than reorganizations (Chapter 11). By giving the airlines cash with which to fund their overcapacity, the government was preserving the possibility that the airlines could survive to supply a normalized market at a profit. Had the government allowed the airlines to fail,<sup>204</sup> capacity would have had to be rebuilt once consumer preferences normalized—surely an inefficient result.<sup>205</sup>

This answer is also helpful in responding to those critics who argue that the ATSSSA would have been more efficient had it been limited to loan guarantees. Bailouts are almost always an alternative to bankruptcy, a political response designed to reach a solution outside the court-supervised reorganization process. Yet as explained by Professor Reich in his seminal study of government assistance programs,<sup>206</sup> most bailouts actually come to resemble bankruptcies in all but name. Due to the terms of the loan guarantees—which were the cornerstone of the Chrysler, Lockheed, New York City, and Continental Bank bailouts—the bailed-out companies were “refinanced and reorganized, assets were redeployed,” and cash was generated through partial liquidations.<sup>207</sup> In all cases, the enterprises were substantially downsized and emerged from their bailouts with leaner balance sheets and improved operational efficiency. Professor Reich dubs this bailout-induced process “slow bankruptcy,” designed for instances where “given the size and importance of these companies to their economies, bankruptcy would release vast resources far more quickly than the market could absorb them.”<sup>208</sup> In other words, while the entities involved all needed to be drastically downsized, bankruptcy would have worked too quickly and with too much market disruption. Free-market advocates in Congress generally supported these endeavors because the assistance was seen as a means of slowing down the inevitable shrinkage of the enterprise, not as a permanent subsidy.

The foundation of the ATSSSA, however, was just such a (\$5 billion) permanent subsidy, the type “generally . . . provided to individuals and businesses that suffer dramatic losses from natural disasters such as hurricanes, tornadoes, and floods.”<sup>209</sup> Because most carriers did not take advantage of the

---

204. The efficiency justifications that follow mostly accept the congressional view that, absent aid, a host of carriers would have failed in the weeks following the attacks.

205. This conclusion hinges on a near-term to medium-term capacity recovery. At a certain point, cost-of-capital considerations would warrant the liquidation and subsequent rebuilding of capacity.

206. Reich, *supra* note 43.

207. *See id.* at 188.

208. *Id.* at 196.

209. Block, *supra* note 86, at 956.

loan guarantees, they were never forced to grant concessions to the ATSB and hence never experienced the efficiency-enhancing quasi-bankruptcy described by Professor Reich.

Yet once again, these arguments take a shortsighted view of efficiency. Due to the magnitude of the groundstop losses, a number of airlines needed cash, rather than just additional credit, to avoid filing for bankruptcy in the days and weeks following September 11. Not only would these filings have sent a devastating signal, they would have led to highly inefficient bankruptcy proceedings.<sup>210</sup> The bankruptcy courts would have been forced to approach each company's predicament independently, comparing each carrier's capacity and outlook to its particular liabilities. With the long-term revenue picture clouded by the attacks, this might have necessitated more concessions or liquidations than the normalized market would demand. The \$5 billion ATSSSA subsidy offered a centralized solution that could delay bankruptcy until a time when demand outlook would be more realistic.<sup>211</sup> This, in turn, could allow the bankruptcy courts to orchestrate a more efficient adjustment in capacity than they might have in late 2001.

Thus, while the ATSSSA did not automatically trigger the reorganization of the industry, as previous bailouts had, its combination of subsidy and bailout kept open two possibilities: (1) "Normal" bankruptcy filings after the \$5 billion ran out, presumably in a period of greater clarity, or (2) "slow-bankruptcy" through the loan guarantees, as mandated by the ATSB. Either way, market underperformers would be forced to reorganize—by cutting costs—in order to survive.

It should also be noted that, if one accepts the importance of the airline industry to the national economy, then the ATSSSA might even be considered Pareto or Kaldor-Hicks efficient. Redistributive choices, such as bailouts, usually result in winners and losers. A redistribution is Pareto efficient, however, when it manages to create winners by enlarging the pie rather than making some people (losers) worse off.<sup>212</sup> Kaldor-Hicks efficiency modifies this

210. The ATSSSA was passed as a public relations measure—to ensure that no airlines filed for bankruptcy in the period immediately following the attacks. That it also satisfies a number of efficiency criteria is simply a testament to the success of its construction.

211. One could still argue, however, that the \$5 billion was too generous and the goal might have been accomplished with less direct aid.

212. "In contrast, a situation is Pareto optimal if no such changes can be made; that is, there is no way to make one person better off without causing some other person to be worse off." Block, *supra* note 86, at 1000. The theory of Pareto Efficiency was first developed in VILFREDO PARETO, *COURS D'ECONOMIE POLITIQUE* (1896), reprinted in *SOCIOLOGICAL WRITINGS* 97 (S. E. Finer ed., Derick Mirfin trans., 1966).

notion by defining efficient outcomes as those where the winners could theoretically compensate the losers.

It is easy to see how the ATSSSA might be able to meet these efficiency criteria. While tax assets are redistributed from the general coffers to the airlines, the commercial aviation network is saved to benefit many other economic actors, thereby (re-)enlarging the shrunken post-September 11 “pie.” As explained by Representative Steven LaTourette during committee hearings:

Those who block this legislation are shortsighted. It is not just the airlines and [their] jobs on the line. There are thousands who build supplies, service and support the industry who are suffering, from Boeing, GE, Pratt and Whitney to the small machine shop, the repair stations and even the King Nut Company in Solon, Ohio that puts the peanuts in the bags that you get when you get on the plane.<sup>213</sup>

The industries benefiting from the survival of the airlines could easily have compensated those made worse off by the ATSSSA (e.g., nonflying taxpayers). The trick was first to believe that the airlines would actually fail without aid, and then to ensure that the redistributed funds did not exceed the benefit accrued to society as a whole.

Finally, the ATSSSA’s efficiency can also be justified on account of the externalities produced by a functioning commercial aviation industry. An externality exists when “the costs of producing a good or the benefits from consuming a good spill over to individuals who are not producing or consuming the good.”<sup>214</sup> When the externalities produced by a specific failing industry rise to the status of a public good, then efficiency might be enhanced by taxing the public at large to support its bailout.<sup>215</sup> Professor Blair argues that it is possible to see each route in the air transportation system—each spoke, so to speak—as producing valuable externalities.<sup>216</sup> This argument encounters difficulties when applied to a single airline, which can fail without imperiling the network, but when faced with the possibility of mass carrier failure, as the

---

213. *House Hearings*, *supra* note 21, at 11.

214. Blair, *supra* note 92, at 371 n.33 (quoting JOHN B. TAYLOR, *PRINCIPLES OF MICROECONOMICS* 516 (Denise Clinton ed., 1995)).

215. *See id.* at 371 (“Economists generally agree that efficiency can be enhanced by taxing citizens to provide government subsidies for public goods and for other goods or activities that have positive externalities.” (internal quotation marks omitted)).

216. *Id.* at 374.

ATSSSA Congress believed it was, it is easy to see how \$15 billion might actually be a small price to pay to conserve network ubiquity.<sup>217</sup>

As the ATSSSA recedes in time we will be able to gauge the mathematical success of these efficiency arguments more accurately. Yet what is certain even now is that it would be foolish to write off the Act as presumptively inefficient. More to the point, it would also be unfortunate to dismiss the ATSSSA on normative grounds. The Act ameliorated an inevitably bad situation. Some action – either public or private – was needed to avoid the symbolic catastrophe of mass bankruptcies immediately following the attacks and, as just discussed, the Act can be justified on account of its incentives, efficiencies, and externalities. Whether the ATSSSA was the best possible response, creating, for example, the optimal incentives or efficiencies, is a separate question, to which this Note now turns.

## B. Comparative Analysis

### 1. Retrospective Comparison: Relative Results

One way to determine the ATSSSA's success is to compare the airlines' post-bailout performance with that of the other firms, industries, and municipalities that have previously received federal relief from financial distress. As highlighted throughout this Note, the government has had significant recent experience in this area, and at first glance, the ATSSSA has problems measuring up. Although Chrysler once again experienced problems in the early 1990s, culminating in its "merger" with Daimler-Benz,<sup>218</sup> it took only two years after federal intervention for the company to swing from a \$300 million loss to a \$700 million profit.<sup>219</sup> More importantly, "Chrysler was able to generate sufficient cash to retire the entire \$1.2 billion in guaranteed indebtedness . . . approximately two years in advance of the scheduled repayment and seven years ahead of the time when repayment would have

---

<sup>217</sup> Professor Blair also raises the possibility that the aviation industry's huge fixed costs might brand it a natural monopoly. *Id.* at 373-74. As such, she argues, the ATSSSA may have been efficient because it ensured the use of the expensive, underutilized capacity. *See id.* at 373. This conclusion, however, is likely incorrect, because capacity utilization could have been more efficiently increased by offering subsidies to travelers.

<sup>218</sup> Although executives from both companies deemed the transaction a "merger of equals," it was for all intents and purposes the acquisition of Chrysler by the German automotive giant. *See* BILL VLASIC & BRADLEY A. STERTZ, TAKEN FOR A RIDE: HOW DAIMLER-BENZ DROVE OFF WITH CHRYSLER (2001).

<sup>219</sup> Reich, *supra* note 43, at 186.

been required.”<sup>220</sup> This translated into a significant profit for the government. Lockheed<sup>221</sup> and the City of New York,<sup>222</sup> other high-profile bailout recipients, also rebounded quickly, repaying their debts without calling on the federal guarantees and covering the government’s administrative costs.

Of course, not all government bailouts are as successful as Chrysler, Lockheed, and New York, and many end up involving substantial government expenditures. Yet in most instances, such programs are funded from revenue sources (somehow) related to the bailout recipients. For example, when regulators supply funds to failing banks, they use special insurance pools under the federal deposit insurance system that are not generated from general tax revenues.<sup>223</sup> In 1989, the government followed this path to bail out the savings and loan industry,<sup>224</sup> using the general treasury only once funds from thrift-related sources were depleted.<sup>225</sup> A similar scheme involving the Airport and Airways Trust Fund, which contained a surplus of more than \$12 billion on September 11, was proposed for the funding of the ATSSSA but was never able to gain traction.<sup>226</sup>

Thus, by the standard of competitive results, the ATSSSA does not immediately emerge as a successful use of government funds. The airline industry is still reeling, shareholders have been left largely undiluted,<sup>227</sup> and the

---

220. Block, *supra* note 86, at 963 n.43 (quoting CHRYSLER CORP. LOAN GUARANTEE BD., REPORT TO CONGRESS: OCT. 1, 1982 TO SEPT. 30, 1983, at 2).

221. See Emergency Loan Guarantee Act, Pub. L. No. 92-70, 85 Stat. 178 (1971) (codified at 15 U.S.C. § 1841 (2000)). On its face, this Act appeared to authorize federal loan guarantees to many struggling enterprises, but it was written in a manner that practically excluded all applicants besides Lockheed.

222. See New York City Loan Guarantee Act of 1978, Pub. L. No. 95-339, 92 Stat. 460 (loan authority terminated June 30, 1982); New York City Seasonal Financing Act of 1975, Pub. L. No. 94-143, 89 Stat. 797 (loan authority terminated June 30, 1978).

223. Block, *supra* note 86, at 963.

224. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified as amended at 18 U.S.C. § 1811 (2000)).

225. “[F]unds for the bailout were to come [first] from sale of assets taken from banks in receivership, the sale of nonvoting capital stock to Federal Home Loan Banks, assessments against certain savings and loan banks, and the issuance of obligations.” Block, *supra* note 86, at 964.

226. See Crandall, *supra* note 76.

227. In many instances the disbursement of bailout funds is conditioned on the wipeout of shareholders, which allows the government to recoup its investment with an initial public offering. See, e.g., 147 CONG. REC. S9590 (daily ed. Sept. 21, 2001) (statement of Sen. Fitzgerald).

government is on the hook for significant loan guarantees.<sup>228</sup> Yet, to a certain extent, this is exactly the outcome the ATSSSA's drafters anticipated. Before September 11, there was a general perception that a shakeup—involving multiple bankruptcies—was needed in the airline industry. Without the ATSSSA, the terrorist attacks would have immediately hastened this process, creating an unpalatable symbol of American frailty. As I argued in Part I, the ATSSSA was not aimed at nursing the airlines to health in the manner of the Chrysler, Lockheed, and New York City bailouts. It was about temporary stabilization, with the government interfering with markets only to the extent necessary to avoid bankruptcies in the months following the attacks. Accordingly, the industry's current predicament—including its multiple bankruptcies post-2001—demonstrates the Act's success.

This counterintuitive conclusion shows the futility of judging a bailout based on comparative “results.” Almost by definition, bailouts are reactions to unique circumstances. The recipients of such funds are usually facing different challenges, with their relative successes relating back to their independent starting points. Any profit, or loss, can only attain meaning based upon the initial costs incurred and the problem avoided. Accordingly, in judging the ATSSSA it might be more appropriate to assess bailouts prospectively to determine the factors that usually precipitate their use and extract objective principles for determining their success.

## 2. *Prospective Comparison*

A bailout becomes possible, i.e., it reaches its first step, once its proponents are successful in framing their corporate problem in the language of national interest. A bailout has occurred when government assistance protects managers and investors while preserving the enterprise as a going concern.<sup>229</sup> To reach the conclusion of step one, however, and to then ensure that it materializes as a bailout (step two), requires passing a number of social and economic tests.

As explained by Professor Reich, government assistance is usually awarded to companies facing drastic cash shortages. Requests are most successful when they come amid particularly turbulent economic conditions and can be presented as exceptional.<sup>230</sup> An entity seeking aid must demonstrate that (1) its

---

228. *Hearing on Financial Condition*, *supra* note 39, at 107 (testimony of Michael Kestenbaum, Executive Director, ATSB) (“[T]here is always a risk of eventual defaults given the challenges the industry continues to face.”).

229. *See* Block, *supra* note 86, at 961.

230. When discussing the Chrysler bailout, which was much more controversial at the time than the ATSSSA, Representative Jim Wright, the House Majority Leader, warned that that a

liquidity difficulties are threatening its existence; (2) bankruptcy would produce certain undesirable consequences; and (3) due to its “bigness,” liquidation would severely distress the economic health of entire regions.<sup>231</sup> Such a three-pronged showing forces legislators, especially those from the affected areas, “to choose between responding to the fears of its citizens by bailing out [the] collapsing giant[], or, alternatively, adhering to the precepts of private enterprise and declining pleas for government rescue.”<sup>232</sup> The choice is usually fairly easy (especially in election years). Due to their size, Chrysler, Lockheed, and New York City were able to claim that their problems amounted to national calamity while also marshaling the political capital to gain support from the executive and legislative branches.

In this sense, the ATSSSA is the typical congressional bailout: The immediate lack of cash, the sense of calamity, the fear that the national economy could come unhinged, and the “bigness” of the industry made it certain that some sort of congressional aid would follow. In fact, the seamless way in which the ATSSSA fits with previous congressional bailouts—in circumstances rather than results—infuses the Act with a certain sense of inevitability. The idea that markets represent the most efficient use of social resources and are the key to maximizing wealth is central to our national ethos. But as explained by Professor Gifford “[t]hese powerful attributes of free markets and free trade become mythologized . . . when their operational characteristics are suppressed in an exclusive focus upon their general results.”<sup>233</sup> Like Europeans,<sup>234</sup> Americans are not comfortable with untrammelled markets;<sup>235</sup> they are simply more attached to the idea. Thus, the same economic philosophy that gives us free trade also identifies concepts such

---

Chrysler bankruptcy would cost the federal government between \$14 and \$15 billion and plunge the nation into a full-scale recession. As we saw above, many in Congress made similarly apocalyptic statements regarding the airlines. See Reich, *supra* note 43, at 191-92.

231. See WALTER LIPPMANN, *THE GOOD SOCIETY* 224 (1936) (discussing the notion of “bigness” and the “tragedies of semi-obsolete corporate leviathans that are unable to live and unable to die”); Walter Adams & James W. Brock, *Corporate Size and the Bailout Factor*, 21 J. ECON. ISSUES 61 (1987).
232. Walter Adams & James W. Brock, *Antitrust, Ideology, and the Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257, 270 (1995). In fact, the success of large enterprises in attracting congressional aid has led many to the conclusion that the “government bailout dilemma illustrates the manner in which corporate giantism radically changes the essential nature of political and economic systems.” *Id.* at 269.
233. Gifford, *supra* note 197, at 1054.
234. See H. W. de Jong, *European Capitalism: Between Freedom and Social Justice*, 10 REV. OF INDUS. ORG. 399 (1995).
235. See Russell K. Osgood, *The Ages and Themes of Income Taxation: Savings and Investment*, 68 CORNELL L. REV. 521, 550-51 (1983).

as illegal concentrations of capital, the free-rider problem, strategic behavior, and predatory pricing.<sup>236</sup> The problem caused by the terrorist attacks is just another category of disturbance likely to attract congressional bailout funds.

This realization leads to two immediate conclusions. The first is: Due to the pervasiveness of the free enterprise ethos, bailouts will only emerge at the last minute, accomplished ad hoc, usually by indirect means such as tax credits or loan guarantees. This way, the system can function as people truly want (ideologically) without forcing policymakers to demythologize the free market.<sup>237</sup> The second conclusion is that, given the right set of factors, a government bailout should be considered the rule rather than the exception. As such, the way to assess the eventual congressional action is to consider what alternatives (e.g., tax relief versus direct compensation) might have done a better job of responding to the political realities. In the case of the ATSSSA, we should judge Congress by asking whether the ATSSSA forestalled near-term bankruptcies in the manner least offensive to the long-term functioning of the free market.

### C. *Monday Morning Quarterbacking the ATSSSA*

#### 1. *Covert Options*

The ATSSSA's drafters tried to develop a bill that would enhance the liquidity position of the nation's carriers and avert a symbolic meltdown of the commercial aviation industry without seriously distorting long-term market forces or making it easy for other industries to lobby for similar aid. To accomplish these goals, they had a number of options, each of which came with its own risks, rewards, and consequences.

One of the earliest proposals offered by the industry<sup>238</sup> and Wall Street<sup>239</sup> was the short-term suspension of the carriers' \$48 billion tax liability.<sup>240</sup> While the specific proposals differed, the industry sought a one-year suspension of the 4.4-cent-per-gallon tax on jet fuel, amounting to \$1 billion, as well as the

---

236. See generally MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 15, 9-32 (1962) (noting that "[t]he existence of a free market does not of course eliminate the need for government").

237. See Gifford, *supra* note 197, at 1054.

238. See Crandall, *supra* note 76.

239. See Higgins & Kennedy, *supra* note 19, at 1.

240. Neidl, *supra* note 19, at 2 (noting that this sum consisted of \$30 billion in excise taxes and \$18 billion in peripheral taxes).

rebate of \$7 billion in annual ticket and cargo taxes.<sup>241</sup> This tax-based solution would have supplied the airlines with instant liquidity in an efficient and administratively simple manner. It would also have been consistent with precedent, because entire bailouts, such as that of the Penn Central Railroad, have centered on tax subsidies.<sup>242</sup>

This reasoning ultimately led Congress to include a modest two-month tax extension in the ATSSSA,<sup>243</sup> but it was not enough to make tax subsidies the cornerstone of the Act. By the time the ATSSSA was passed, Amtrak,<sup>244</sup> the Post Office,<sup>245</sup> and the steel industry<sup>246</sup> had officially requested federal assistance. Once the precedent of tax relief was set with the airlines, it would have been too easy for these industries to find congressional support for their own rebates. Big grants, on the other hand, are much harder to get passed and tend to require all of the factors discussed above such as cash shortage and “bigness.” If a tax-based solution had been used to respond to the airlines’ predicament it might have opened the floodgates, distorting a host of markets outside of commercial aviation.

A similar rationale was used to dismiss a popular proposal that would have temporarily relaxed two specific antitrust restrictions. Facing a glut of capacity along with political pressure to continue flying to the regional airports utilized by many members of Congress, the airlines requested limited antitrust immunity to collectively coordinate service reductions.<sup>247</sup> Like the tax subsidies, there was precedent for this request. In 1970, Congress—citing the “public interest”—had allowed newspapers to enter into joint operating arrangements in order to “maintain[] a newspaper press . . . in all parts of the United States.”<sup>248</sup>

---

241. See Jim VandeHei & John D. McKinnon, *Aftermath: Securing Air Travel: Airlines Will Get Bailout, but Not All of Their Requests*, WALL ST. J., Sept. 19, 2001, at A9.

242. Specifically, these bailouts have included the liberalization of the net-operating-loss carry-forward rules affecting the company. See Osgood, *supra* note 235, at 549.

243. ATSSSA, § 301(a)(1), 49 U.S.C. § 40,101 note (Supp. I 2001) (creating an extension subject to the approval of the Secretary of the Treasury).

244. Editorial, *Free Riders*, WALL ST. J., Oct. 2, 2001, at A18.

245. See Nicholas Kulish, *Questions of Security: Postal Service Seeks \$5 Billion Bailout for Attacks’ Fallout*, WALL ST. J., Nov. 9, 2001, at A8.

246. See Helene Cooper et al., *Bailout Request Stirs Industrial-Policy Issue: Bush Is Leery of Slippery Slope in Steel-Sector Bid*, WALL ST. J., Dec. 6, 2001, at A2.

247. See John D. McKinnon et al., *U.S. Moves Toward Aid Pool of \$40 Billion*, WALL ST. J., Sept. 14, 2001, at A3.

248. Newspaper Preservation Act, Pub. L. No. 91-353, § 2, 84 Stat. 466, 466 (1970) (codified at 15 U.S.C. § 1801 (2000)).

In addition to the request for collective action, the airlines also asked for an easing of merger restrictions. Just six weeks before the attacks, the Justice Department had blocked a proposed merger between US Airways and United out of fear that it would hurt consumers in the Northeast where the two airlines share a dominant market position.<sup>249</sup> Now, after the attacks had imperiled the industry, the carriers hoped that the “failing firm defense”—authorizing mergers despite their anticompetitive effects—would be codified in the ATSSSA. The Justice Department has historically employed this major exception to antitrust law due to the “suffering of employees, shareholders, and others who would be affected by a firm’s collapse.”<sup>250</sup> Surely, the airlines argued, the social disruption that would accompany airline liquidations merited just such an easing of antitrust restrictions.

In the end, however, Congress had no choice but to reject both antitrust approaches. A less restrictive merger-review process would have done little to solve the airlines’ problems; any pro forma company would still have been saddled with the crippling debt and labor costs which were at the root of the industry’s struggles.<sup>251</sup> For once, airlines could not easily merge their way out of trouble. The proposal to allow limited collaboration was more strategically sound, as it would have enabled the airlines to reduce capacity without blindly eliminating all service to certain regional airports. Yet once such a suspension was granted, it would have been hard to stop the airlines from collaborating to give single carriers virtual monopolies on certain routes. Fearing what this would do to prices, Congress chose instead to allocate \$120 million to the Essential Air Service (EAS),<sup>252</sup> and to give the Treasury Secretary authority to require carriers to “to maintain scheduled air service to any point served by that carrier before September 11, 2001.”<sup>253</sup> This was not necessarily the most efficient solution, and in fact, it did little to stop the process of carrier

249. See Jayne O’Donnell, *United, US Airways Call Off Merger*, USATODAY.COM, July 27, 2001, <http://www.usatoday.com/money/biztravel/2001-07-27-justice-department.htm>.

250. Block, *supra* note 86, at 971. An earlier version of the guidelines specifically explained that “when the elements of the defense are satisfied, there is a conclusive presumption that the anticompetitive dangers associated with the merger are outweighed by the income losses to creditors, stockholders, and communities associated with the failure of the firm.” DOJ Merger Guidelines, 47 Fed. Reg. 28,493, 28,502 n.54 (June 30, 1982).

251. In fact, it is likely that a merger would actually exacerbate the tensions between labor and management, making it even harder for the newly formed company to control costs.

252. ATSSSA, § 105(a)-(b), 49 U.S.C. § 40,101 note (Supp. I 2001).

253. *Id.* § 105(c)(1). EAS was put into place at the time of deregulation to guarantee that small communities maintained a minimal level of scheduled air service. The Department of Transportation currently subsidizes commuter airlines to serve approximately 140 rural communities across the country that otherwise would not receive any scheduled air service.

retrenchment that had begun in 2000,<sup>254</sup> but Congress was not eager to see where the slippery slope of temporary suspensions of law would take it.

Beyond tax and antitrust changes, the industry lobbied for a number of other passive exemptions, including relief from collective bargaining restraints, incentives to ground older aircraft, and a safety net for displaced workers.<sup>255</sup> All of these requests, along with the antitrust and tax proposals, would have amounted to what is known as a covert bailout: an assistance plan that provides relief from compliance with burdensome regulations.<sup>256</sup> U.S. industries regularly lobby for such “bailouts,”<sup>257</sup> which usually avoid the type of attention that accompanies overt cash assistance.

In the case of the ATSSSA, however, Congress was not interested in a covert response. More than wanting to make it difficult for other industries to follow the airlines, Congress was hoping to use the ATSSSA to publicly pronounce the nation’s support for commercial aviation. If the discussion of previous bailouts reveals anything, it is that when the political factors coalesce to make a bailout likely, Congress is usually trying to accomplish a panoply of social objectives. A covert ATSSSA could not have been as easily linked to the groundstop, and would not have bred the type of confidence in the industry that comes from disbursement of cash.<sup>258</sup> Congress did not want to end deregulation or even protect struggling carriers from the difficulties of bankruptcy. It simply wanted to postpone carrier bankruptcy filings past the immediate fallout from the attacks and the upcoming war in Afghanistan. By accomplishing this, without severely distorting the industry or allowing other companies to receive similar handouts, Congress succeeded in choosing options that diffused the crisis without simultaneously contributing to another.

---

254. See Maynard, *supra* note 94 (noting that “[o]ne-third of the nation’s 609 airports offering daily flights are served by just one airline”).

255. *House Hearings, supra* note 21, at 106-08 (statement of Scott Gibson, Senior Vice President, Simat Helliessen & Eichner, Inc., International Air Transport Consultancy).

256. See Block, *supra* note 86, at 968 (contrasting overt and covert bailouts).

257. See *id.* at 969-73 (providing examples of covert bailouts).

258. Over and over, members of Congress speaking in support of the Act referenced its role in restoring consumer confidence in the commercial aviation system. See, e.g., 147 CONG. REC. S9597 (Sept. 21, 2001) (statement of Sen. Domenici) (“These loans will also restore the confidence of the private capital markets, which are unwilling to lend the airlines.”); *id.* at S9603 (statement of Sen. Enzi) (“The provisions of this bill are designed to restore the confidence of airline customers and industry investors.”). While it is unlikely that the Act was able to influence the long-term demand for airline travel, Congress was hoping that its provisions would be a first step, along with new security provisions, toward demonstrating that things would return to normal in the nation’s skies.

## 2. *Other Options*

The success of the Act notwithstanding, it is important to point out briefly areas where Congress could have done things differently without sacrificing its symbolic objectives. The biggest oversight was the Act's failure to secure private sector concessions from Wall Street and organized labor. By postponing carrier bankruptcies and providing cash for the airlines to use in servicing debt, Congress was doing a considerable service for both equity and debt investors. As noted by Harry Pinson, an airline investment banker testifying before the Senate Commerce Committee, Wall Street stood to gain considerably from an airline revival:

We, in our industry, are eager to get back to the business of financing this industry . . . . It is our livelihood. The rebuilding of this industry will generate terrific investment opportunities which will attract the capital necessary to fund the future of this industry and eventually supplant the aid you are considering.<sup>259</sup>

Before agreeing to supply loan guarantees to Chrysler, Treasury Secretary G. William Miller insisted that the plan include large financial concessions from its lenders.<sup>260</sup> Why? Because even the temporary postponement of bankruptcy provides investors with a cost-of-capital advantage. Instead of hoping that the cash and loan guarantees would reopen the capital markets, Congress should have required the airlines to negotiate specific concessions with Wall Street that would have allowed the airlines to fund operations in the near-term without worrying about default. Based on Pinson's analysis above, it is unlikely that Wall Street would have rejected these requirements.

The issue of labor concessions was more complicated, because the unions and their congressional backers already believed the ATSSSA to be anti-worker. The truth, however, is that most laws affecting the airline industry work strongly in the reverse. The ATSSSA was never meant to radically overhaul the carrier-labor relationship (or anything for that matter), but Congress would have been wise to use the opportunity to bring labor costs in line with operational realities.<sup>261</sup> After all, labor concessions were a crucial precondition to the Chrysler bailout, even though the contracts enjoyed by Chrysler's workers were also the result of poor management decisions.

---

<sup>259</sup> *Id.* at S9582 (statement of Harry Pinson, Managing Director, Credit Suisse First Boston).

<sup>260</sup> Reich, *supra* note 43, at 182.

<sup>261</sup> Even before September 11, a proposal was floating in Congress to subject impasses in airline collective bargaining to binding arbitration. See Airline Labor Dispute Resolution Act, S. 1327, 107th Cong. (2001).

Working on the margins, Congress could have tinkered with the Railway Labor Act of 1926<sup>262</sup> and § 1113 of the Bankruptcy Code,<sup>263</sup> or it might have considered establishing a more radical arbitration requirement. This certainly would have broadened the Act's monolithic focus on direct attack costs; however, the groundstop itself would not have been as catastrophic had labor costs been less prohibitive.

Congress also should have developed a more equitable system for allocating the \$5 billion in direct aid. Under the terms of the Act, carriers were entitled to the lesser of their documented September 11 losses or their proportional August capacity, measured in available-seat-miles (ASMs).<sup>264</sup> Seventy-nine percent of carriers were compensated using the ASM metric,<sup>265</sup> which benefited the high-capacity, low-yield legacy airlines that had been flying with empty seats before September 11. During the days leading up to the passage of the Act, the large hub-and-spoke airlines, using the platform of the ATA, pressured their smaller peers to present a united front before Congress. Accordingly, when questioned by the House, John Kelly, President and CEO of Alaska Airlines, testified that ASMs were "the fairest way to allocate the money."<sup>266</sup> By using ASMs, however, Congress was compensating the legacy carriers for their overcapacity and penalizing the far more efficient high-yield, low-cost carriers. In an act that was based on making up for direct losses, compensation should have been about revenue replacement. This could have been easily accomplished by using the airlines' quarterly statements to derive their relative capacities. The unified front orchestrated by the major airlines stopped Congress from truly considering the problem and thus undermined an act otherwise focused on efficiency and real losses.

#### D. *Outlines of a Model*

In this final Part, I have tried to provide a normative and comparative assessment of the ATSSSA that responds to the Act's critics by exhibiting its

---

262. 45 U.S.C. §§ 151-188 (2000). The Railway Labor Act applies only to the railroad and airline industries and, in the event of strike, forces workers and management into a collective bargaining process so as not to disrupt service. If talks fail, the National Mediation Board can require that both parties enter a thirty-day "cooling off" period. See Wong, *supra* note 6.

263. 11 U.S.C. § 1113 (2000).

264. For a breakdown of what each carrier actually received, see U.S. Dept. of Transp., Office of Pub. Affairs, Carrier Payments, <http://www.dot.gov/affairs/carrierpayments.htm> (last visited Sept. 1, 2005).

265. GAO, *supra* note 165, at 27.

266. *House Hearings, supra* note 21, at 58.

efficiency and demonstrating the general optimality of its structure. In the process, however, I have sketched the broad outline of a model that can be used to assess future statutes. Successful bailouts, like the ATSSSA, are structured in a manner least distortive to the free market and in line with general goals of market efficiency. They are accompanied by clear congressional explanations and contain overt provisions that are not easily duplicated or prolonged. They should be assessed by examining their political circumstances, keeping in mind their symbolic objectives, and determining whether Congress might have been able to respond in a more efficient, less distortive manner.

It is of course true that this model views bailouts as politically inevitable (to a certain extent), and works to expose the frailty of an approach that condemns bailouts entirely. By approaching bailouts in this manner, however, I am not trying to excuse congressional actions that unnecessarily compromise free markets and distort the competitive nature of the global economy. In fact, the lesson to take from this analysis of the ATSSSA is that almost all of Congress's actions reflected the goal of restoring the ex ante position with minimal market distortion. The \$5 billion was disbursed quickly, in order to stem imminent bankruptcy filings, yet was subjected to an exacting GAO review of each carrier's claimed losses.<sup>267</sup> Congress went to similar lengths to ensure that the loan guarantees would be limited to cases of necessity by delegating rulemaking authority to the tight-fisted OMB director and stacking the ATSB with members from the Federal Reserve and the Treasury Department. Thus, by illustrating the economic efficiency of the largely symbolic ATSSSA, I am cautioning future congressional drafters to keep both attributes in mind when approaching bailouts.

My appraisal of the ATSSSA also questions the usefulness of bailout assessments that concentrate on relative results. As I explained, the social and economic circumstances surrounding bailout recipients are often similar, but the congressional goals are not always equally matched. For the Chrysler bailout to succeed (i.e., for it to respond to the political realities), the company needed to fully regain its footing and continue employing thousands of (unionized) workers. By contrast, the ATSSSA's success is marked by the continued struggles of the industry even after its temporary reprieve. Not all comparisons, however, are equally irrelevant. While September 11 was a unique event, Congress wisely recognized that many of the ATSSSA's provisions, most notably the loan guarantees, could be culled from previous federal assistance

---

<sup>267</sup> When this initial disbursement turned out to be overstated, the GAO demanded refunds, forcing US Airways to actually book an additional \$11 million in paper losses for the fourth quarter. See Susan Carey & Melanie Trotman, *Northwest, US Airways Continue Industry's Losing Streak*, WALL ST. J., Jan. 18, 2002, at B6.

efforts. Comparisons are thus highly valuable in structuring bailouts, as well as in determining what action is called for in particular circumstances. The limitation, the one my model attempts to remedy, is in using comparative financial results to assess the relative success of a bailout.

That this discussion suggests an optimal model for assessing bailouts in general is an indication of the ATSSSA's success. That said, developing a standardized assessment tool for statutes that respond to extraordinary circumstances is an exercise fraught with peril.

## **CONCLUSION**

This Note has endeavored to provide the first detailed assessment and defense of the ATSSSA by reviewing the discussions that led to the Act, its philosophical basis, its implementation, and finally its influence on the industry.

The ATSSSA was passed in a fluid, chaotic environment where normal political and economic considerations were upended by doomsday scenarios. In the tumultuous days following the terrorist attacks, industry forecasts were nothing more than blind estimates, with the only available comparisons—the Gulf War and Pan Am 103—offering little guidance. The ATSSSA emerged as a way to stabilize the airlines just long enough for the country to once again become comfortable with the sometimes brutal functioning of market forces. In that regard, it was a considerable achievement that can be referenced in the unfortunate event of future need.