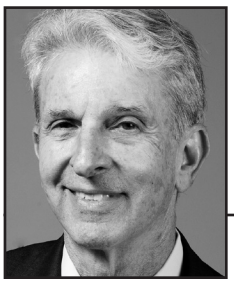
THE
AIR & SPACE LAWYER
AMERICAN BAR ASSOCIATION
VOLUME 26, NUMBER 2, 2013



The Case for an Enhanced and Updated International Air Transportation Policy

By Michael Goldman

May 1995 was a significant time for the United States and for U.S. aviation policy. On May 23, 1995, six years before 9/11, the United States suffered its first major terrorist attack—the bombing of the Murrah Federal Building in Oklahoma City—an event that was a turning point in President Clinton's first term. In aviation, the United States had just completed negotiation of Open Skies agreements with the Scandinavian countries following the breakthrough Open Skies Agreement with the Netherlands in 1992. May 1995 also was when the U.S. Department of Transportation (DOT) last issued

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Ginsberg v. Northwest: An Opportunity to Bring the Ninth Circuit into the Fold on ADA Preemption

By Roy Goldberg and Megan Grant

The Airline Deregulation Act (ADA) was intended to preempt state laws that regulate an airline's prices, routes, or services.[1] It applies not only to state agency enforcement actions but also to private causes of action arising under state law. Although many U.S. circuit courts of appeals have applied ADA preemption to immunize airlines from an array of state law claims, the Ninth Circuit has been an outlier, at times allowing disgruntled consumers to thwart congressional objectives and pursue state law claims relating to core airline functions and services that the ADA was intended to preempt. Moreover, these often insignificant and even frivolous claims may be pursued as class actions, causing the airlines to incur significant legal fees and related costs.

Help may be at hand. The U.S. Supreme Court

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THE AIR & SPACE LAWYER

Volume 26, Number 2, 2013

The Air & Space Lawyer (ISSN: 0747-7499) is published quarterly by the ABA Forum on Air and Space Law, 321 N. Clark Street, Chicago, IL 60654-7598, to inform members of developments in air and space law and to keep the membership apprised of the activities of the Forum.

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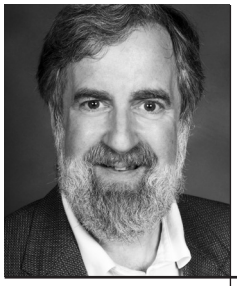


Chair's Message

As the new Chair of the ABA Forum on Air and Space Law, this is my first opportunity to share with you some thoughts on how the Forum can assist you in your work in the aviation and space industries. I am honored and excited to begin my two-year term as Chair. The Forum is truly the premier gathering place for all who participate in the dynamic, complex, and always interesting world of flight.

First, let me express the gratitude of the entire Forum to my predecessor, Steve Taylor. Steve has been untiring in his efforts on behalf of the Forum. His effective, yet calm leadership; his wise judgment; and his unstinting devotion to improving the Forum have led to two years of great programs, stellar publications, and increased membership.

In addition to Steve, many others contributed to the Forum's success, and it would take more space than I have available to mention and thank them all. But certain people must be singled out: Former Chair Renee Martin-Nagle, who continues to dedicate significant time and effort to planning programs and providing wise counsel; David Heffernan, who is primarily responsible for the great publication you are currently reading; and Dawn Holiday, our Forum Manager, without whom we would not be able to function.

I hope to see many of you at our 2013 Annual Conference in New York City on September 27–28. The Program Committee, led by Andrea Brantner of GECAS, has lined up an incredible array of industry luminaries, including Dave Barger, the CEO of JetBlue; Pat Foye, Executive Director of the Port Authority of New York and New Jersey; general counsels; government representatives; and business leaders. Our conference will be held at the beautiful Ritz-Carlton Battery Park Hotel. This will be an unmatched opportunity to share ideas, to learn, and to network. Simply put, if you are a lawyer working with aviation or space clients (and if you are reading this, you must be), you cannot afford to miss this meeting. If you have ever attended one of our meetings, you know the quality of our programs, the high caliber of the people who attend, and the networking opportunities we offer. If you have not, this is the time to start.

The Annual Conference will be the first of four programs we plan for the coming year. In December, we will once again present a one-day meeting in New York City devoted to finance issues. In February 2014, our annual legislative and regulatory Update Conference will be held in Washington, D.C. Then, in June, it will be time for our annual Space Law Symposium, also in Washington.

The Forum depends on the work of many volunteers. I encourage you to become involved in our activities, whether it is helping to plan meetings, contributing articles to *The Air & Space Lawyer*, or mentoring law students and new lawyers who want to work in our industry. Please contact me at rspan@steinbrecherspan.com or at 213-891-1400 if you would like to get involved or if you have comments or suggestions. I look forward to working with you.

Robert S. Span

Editor's Column

For this issue, which we present in conjunction with the Forum on Air & Space Law's Annual Conference, we have expanded our regular 24-page format to 28 pages to accommodate additional text as well as an extended interview with Jeff Shane, who was recently appointed General Counsel of IATA. Jeff's fascinating and candid responses to our questions are laced with insights and self-deprecating humor. We thank him for agreeing to participate.

Our first cover article, by Michael Goldman of Silverberg, Goldman & Bikoff, offers a policy road map for moving "beyond Open Skies." Mike argues that the White House must reinvigorate the drive toward further international aviation liberalization by issuing a new International Air Transportation Policy Statement (the current edition was issued in 1995). Mike offers a new agenda that would not only affirm the U.S. commitment to the Open Skies policy, but also push for intergovernmental exchanges of additional traffic rights, including passenger seventh-freedom rights. He also argues for greater liberalization of airline ownership and control rules, an updating of aviation competition policy, greater integration of trade and aviation agendas, and liberalization of travel visa, border entry, and security rules.

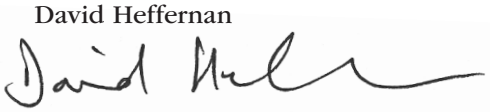
Our second article, by Roy Goldberg and Megan Grant of Sheppard Mullin, analyzes *Ginsberg v. Northwest Airlines*, a Ninth Circuit case in which the U.S. Supreme Court recently granted certiorari. At issue in the case is whether the airline's decision to terminate the plaintiff's membership in its frequent flyer program constituted a breach of contract and/or a violation of common-law principles such as good faith and fair dealing or whether such claims are subject to federal preemption. Roy and Megan argue that the case provides an overdue opportunity for the Supreme Court to "rein in" what Roy and Megan view as the Ninth Circuit's "outlier" position on the scope of federal preemption under the Airline Deregulation Act.

Next, Gerald Murphy and Steven Seiden of Crowell & Moring analyze the D.C. Circuit's recent decision in *Helicopter Association International v. FAA*. In that case, the court upheld an FAA rule establishing a mandatory flight path for helicopter traffic between New York City and Long Island. The case raised interesting questions about the FAA's authority to regulate air traffic for the purpose of noise abatement. Gerry and Steve, whose firm represented the Helicopter Association International in the litigation, argue that the D.C. Circuit's validation of an FAA rule that they believe was the product of political pressure rather than scientific evidence may inspire other communities (large and small) and their political leaders to seek similar regulatory relief from aviation noise. Until recently, the FAA generally eschewed the role of noise abatement regulator, but it is unclear to what extent the Long Island case reflects a change in the FAA's approach and (if so) where, how, and based on what criteria the FAA may exercise the authority that the D.C. Circuit affirmed.

Finally, Jeffrey Novota of Southwest Airlines casts a spotlight on the FAA's Voluntary Disclosure Reporting Programs (VDRPs) relating to the transportation of hazardous materials and argues that the FAA should expand these programs to apply to a wider range of hazardous materials regulations and air carrier activities. Jeff provides a compelling case that such reform would eliminate anomalous gaps in the scope of existing VDRPs and enhance aviation safety by making it easier for air carriers and their employees to report violations.

As always, please send your article ideas and comments on *The Air & Space Lawyer* to me at david.heffernan@wilmerhale.com.

David Heffernan



Editor-in-Chief

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Regulating Annoyance: FAA's North Shore Helicopter Route Final Rule

By Gerald F. Murphy and Steven J. Seiden

On July 12, 2013, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued a decision that arguably expands the power of the Federal Aviation Administration (FAA) to regulate noise and leaves unresolved questions as to FAA's obligations to comply with the Administrative Procedure Act (APA)[1] and Regulatory Flexibility Act (RFA)[2] when doing so. As a result of the court's holding in *Helicopter Ass'n International, Inc. v. FAA*,[3] it appears that the mere existence of noise complaints may now be sufficient to support an FAA rule altering air traffic patterns for purpose of noise abatement over residential areas outside of the airport environment.

On July 6, 2012, FAA issued the North Shore Helicopter Route Final Rule (the Rule),[4] requiring civil helicopters operating along the north shore of Long Island to utilize a route located approximately one mile offshore (the Route), the use of which had previously been voluntary. Helicopter operators carrying passengers between New York City and Long Island prefer the Route over other viable options to the south because it is consistently faster and less susceptible to weather delays. The Route was originally established in 2008 following a stakeholder meeting convened by Senator Charles Schumer and Representative Tim Bishop to address noise complaints stemming from helicopter operations along the north shore. As an outgrowth of that meeting, FAA published the then-voluntary Route in the Helicopter Route Chart for New York, effective May 8, 2008.[5]

Two years later, on May 26, 2010, in response to an unspecified number of noise-related complaints from nearby residents that were brought to FAA's attention by elected officials, the agency issued a notice of proposed rulemaking (the NPRM) that would *require* all civil helicopters operating along the north shore of Long Island to utilize the Route, subject to certain limited exceptions.[6]

The NPRM generated over 900 comments from interested individuals and organizations, provoking significant opposition from helicopter operators and trade associations, including the Helicopter Association International (HAI) and its affiliate member, the Eastern Regional Helicopter Council (ERHC); the Aircraft Owners and Pilots Association; the General Aviation Manufacturers Association; the National Air Transportation Association; and the National Business Aviation Association.[7] Chief among their concerns were the unjustified degradation of safety and efficiency in the surrounding airspace and burdensome costs to small businesses that would result from the Rule, as well as FAA's lack of supporting data.[8] Opponents of the proposal were also perplexed by the swiftness with which FAA moved toward rulemaking based exclusively on noise complaints and questioned the need to make the Route mandatory when an estimated 85 percent of operators were already using it voluntarily.[9]

But FAA was determined to move forward. Citing its mission to "protect and enhance public welfare by maximizing utilization of the existing route" and "thereby reduc[e] helicopter overflights and attendant noise disturbance over nearby communities,"[10] the agency finalized the Rule without change, making the Route mandatory for at least two years.[11] While deviations would be permitted when necessary for safety or weather reasons, or when transitioning to or from a point of landing, FAA warned that a "pattern of deviations would indicate that an operator was interested more in cutting short the route rather than any legitimate safety concerns" and that any violation of the Rule may result in a civil penalty or the suspension or revocation of the pilot's airman certificate.[12] The Rule went into effect on August 6, 2012, despite commenters' concerns regarding FAA's justification and methodology, as well as a congressional inquiry into charges of undue political influence on the rulemaking process.[13] FAA also finalized the Rule notwithstanding the agency's own findings that existing noise levels were far below those that would be normally deemed incompatible with residential use, its decision not to adhere to standard noise analysis methodology, its admission of uncertainty as to whether the Rule would have any actual impact on noise levels,[14] and without conducting a regulatory flexibility analysis.[15]

HAI's Petition for Review

On July 31, 2012, HAI petitioned for review of the Rule in the D.C. Circuit,[16] asserting that FAA had exceeded its statutory authority and that the agency's actions were arbitrary and capricious under both

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the APA and the RFA. HAI argued that FAA not only exceeded its authority by modifying air traffic procedures for general noise abatement purposes, but also because the agency did so solely on the basis of noise complaints and without safety justification. Moreover, HAI contended that, even assuming FAA had the underlying authority to adopt such a rule, its action was arbitrary and capricious under the APA because FAA failed to demonstrate that a noise problem actually existed or that the Rule would have the intended effect. Nor, according to HAI, did FAA adequately follow its established procedures for analyzing aircraft noise impacts. HAI also challenged the Rule under the RFA for FAA's failure to conduct a regulatory flexibility analysis, its reliance on incorrect fuel price data, and the agency's calculation as to the number of affected small businesses.

These arguments, however, never found traction with the D.C. Circuit. Giving unusually strong deference to the agency, the court held that FAA had interpreted its authority reasonably, FAA's finding of a noise problem was supported by substantial evidence, the Rule did not effect a change in long-standing agency policy, and FAA's unsupported or incorrect calculations regarding the Rule's impact on small business were insufficient to warrant remand.

FAA's Authority to Regulate Noise

A threshold, but not dispositive, issue in this case was whether FAA has authority to promulgate new air traffic procedures based solely on noise complaints, particularly where the agency concedes from the outset that the noise levels at issue are well below those recognized to have a significant impact under federal noise standards.[17] Relying on its statutory authority to "protect[] individuals and property on the ground" under 49 U.S.C. § 40103(b)(2), and to "relieve and protect the public health and welfare from aircraft noise" through "regulations [the Administrator deems necessary] to control and abate aircraft noise" under 49 U.S.C. § 44715,[18] FAA asserted broad authority to "address noise stemming from aircraft overflights, aircraft operations in the airport environment and [to] set[] aircraft certification standards."[19] HAI, however, argued that FAA overstated its authority because neither statute expressly authorizes the agency to promulgate new air traffic procedures for general noise abatement purposes. The court nonetheless deferred to FAA's expansive characterization of the agency's authority to protect individuals on the ground, finding Section 40103 "broad enough to encompass protection from noise caused by aircraft. . . ."[20] To reach this conclusion, the court focused on the absence of any language prohibiting FAA from regulating noise rather than the lack of any affirmative authorization for it to do so—emphasizing that HAI "pointed to no express limitations on the FAA's general authority to protect individuals on the ground from aircraft, including the noise created by their operation."[21]

The court also cited FAA's reliance on three special air traffic rules issued over a 45-year period to support the agency's interpretation of Section "40103(b)(2) as encompassing protection from aircraft noise [and] reflect[ing] the FAA's long held understanding of its authority":[22] its 1968 special air traffic rule to protect the historic Oberlin College Conservatory of Music, its 1970 designation of a prohibited area near the George Washington home at Mt. Vernon, and its 1997 special flight rule temporarily banning commercial air tours over Rocky Mountain National Park.[23] HAI had argued that none of these agency actions constituted precedent for the Rule, characterizing all three as historical anomalies that occurred in unique circumstances where the agency's asserted authority went unchallenged and, further, that none was based on noise complaints.[24]

Having concluded that FAA acted within its authority under Section 40103 in promulgating the Rule, the court declined to address HAI's contention that FAA had also exceeded its Section 44715 authority.[25] Thus, the extent to which the agency may rely on Section 44715 as an independent source of authority to engage in general noise abatement regulation remains unresolved.

The court focused on the absence of any language prohibiting FAA from regulating noise.

HAI also argued that the Rule did not meet the "highest degree of safety" standard that applies to agency rulemakings,[26] and made reference to FAA's acknowledgment that "[w]hile the motivation for the final rule was unequivocally the concern about noise levels from helicopter flights, the rule expressly addressed the major safety issues that might result from the special air traffic rule it announced."[27] Yet, despite HAI's claim that making the Route mandatory unnecessarily created and failed to resolve several safety concerns insofar as doing so concentrates aircraft congestion and arguably creates a higher risk of accidents due to use by both eastbound and westbound helicopter traffic,[28] the D.C. Circuit adopted the agency's position that air safety need not be the primary goal of all FAA regulations, and concluded that "[s]o long as the FAA *balances* safety concerns appropriately, as it did here, its rulemaking decisions will not conflict with other statutory safety requirements."[29] The court also declined to address the parties' disagreement regarding the Rule's enforcement consequences. HAI had argued that making the Route mandatory would

have the chilling effect of penalizing pilot discretion, whereas FAA had asserted that the agency would not focus on individual deviations but rather on patterns thereof.[30]

Administrative Procedure Act

The thrust of HAI's challenge was that, even assuming FAA had the underlying authority to issue the Rule, the agency had not properly and lawfully exercised any such authority in this instance. The APA requires a court to "hold unlawful and set aside" agency action that is "arbitrary, capricious or an abuse of discretion."[31] For a rule to survive, an agency must have examined the relevant data and articulated a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made."[32] Accordingly, HAI asserted that the Rule was arbitrary and capricious because FAA failed to establish through substantial evidence that a problem exists, based the Rule entirely on noise complaints while disregarding legitimate safety concerns, and departed from well-established policy without reasoned analysis for doing so. Instead, according to HAI, FAA made a subjective determination—based solely on unsubstantiated noise complaints—that helicopter noise on the north shore had become sufficiently disruptive to warrant a formal regulatory response.

FAA concluded that "[w]hen people take the time to complain about helicopter noise . . . , there is a noise problem."

HAI further posited that FAA erred by failing to use the agency's expertise and analytical tools to ascertain the true impacts of helicopter operations along the north shore, thereby departing from FAA's standard practice and statutory obligations under the APA. For example, HAI pointed out that rather than collecting the best available data and processing it through the Integrated Noise Model (INM)[33] as the agency does for airspace route modifications in other contexts,[34] the only analysis of local noise levels referenced in the Rule was an environmental study of the Route conducted by the John A. Volpe National Transportation Center (the Volpe Study).[35] Based on the Volpe Study, which modeled noise from approximately 15,600 flight operations over 11 days around Memorial Day and July 4, 2011, FAA concluded that "existing levels of helicopter noise is [sic] below levels at which homes are significantly impacted."[36] HAI argued that this conclusion was especially significant because the measurements occurred on two of the busiest holiday weekends of the year, and thus were not representative of the typically lower flight volumes at most other times. HAI also stressed that, even with those "cherry-picked" measurement periods, the Volpe Study indicated that the noise levels complained of by north shore residents were below day-night level (DNL) 45 decibels, which is less than one-fourth the loudness at which properties normally become eligible for FAA noise-mitigation measures—or one-fourth the sound of normal television volume.[37] However, determined to resolve what it described as the community's "annoyance with helicopters flying over homes in northern Long Island,"[38] FAA concluded that "[w]hen people take the time to complain about helicopter noise to FAA and their elected officials, there is a noise problem."[39]

The court accepted FAA's conclusion as reasonable and found that HAI "had not met its burden to show that the FAA used an incorrect data analysis methodology,"[40] noting that the Rule's preamble explicitly referred to commenters' complaints that "the helicopter noise interferes with sleep, conversation, and outdoor activities."[41] And despite the fact that such claims were fundamentally inconsistent with FAA's own well-established standards for determining significant impacts and compatibility with residential use, the court noted the absence of any statutory or regulatory provision requiring that a minimum noise level must be reached before FAA can regulate the impact of aircraft noise on residential populations.[42] The court was also unmoved by HAI's assertion that the Volpe Study and other data the agency collected actually contradicted the accounts of excessive noise contained in the comments on which FAA primarily relied, reiterating that the agency's decision to make the Route mandatory "was based on its assessment of the numerous complaints it received, not on the study, per se."[43] Nor was the D.C. Circuit swayed by HAI's claim that a disproportionate number of the noise complaints flowed from a small number of households, with 85 percent of the noise complaints generated by only 10 individuals (and half of those from one household), instead adopting FAA's rebuttal that "this [information] 'cannot demonstrate these individuals are the only ones disturbed by the existing noise levels.'"[44]

In line with its acceptance of FAA's reliance on the three aforementioned historical special flight rules as evidence of its authority to issue the Rule, the court also recognized these examples as "three instances where [FAA] promulgated rules altering air traffic patterns for the purposes of reducing noise over particular sites" and rejected HAI's claim that the Rule reversed long-standing agency policy as a result.[45] Taking FAA's examples at face value, the court disregarded the fact that none of these special flight rules involved air traffic over a residential area or noise complaints and, moreover, that two of the rules did not actually alter existing air traffic patterns.[46] The court also pointed to FAA's reliance on a voluntary guidance document

referencing Section 40103 as further evidence of its authority to issue the Rule—which HAI argued had neither probative value nor legal weight because it merely encourages voluntary pilot conduct and does not impose noise-based airspace regulations.[47] Ultimately, the court found that FAA "acted in accordance with a long-standing, *if infrequently used*, interpretation of its authority under § 40103."[48]

Regulatory Flexibility Act

HAI also contended that FAA's decision to issue the Rule without preparing a regulatory flexibility analysis to evaluate the Rule's effect on small businesses was arbitrary and capricious. HAI challenged the agency's decision to move forward with the Rule despite HAI's and other commenters' serious concerns regarding unwarranted costs that the Rule would impose on small business aircraft operators and the lack of actual data to justify the Rule.[49]

By its express terms, the RFA is intended to ensure that the impact of federal regulations on small businesses is considered[50] by requiring agencies to prepare and make available for public comment an initial regulatory analysis of the impact of proposed rules.[51] Rather than preparing a regulatory flexibility analysis, FAA certified that the Rule would not have a significant economic impact on a substantial number of small businesses.[52] HAI argued that the agency's certification was flawed—seizing on FAA's admitted use of incorrect fuel data in determining that a regulatory analysis and assessment were not required.[53] HAI was especially critical of FAA's characterization of this mistake as a harmless error, particularly given the agency's revised calculations showing an increase in operator costs of hundreds of dollars per flight.[54] In response, FAA asserted that it "does not consider these corrections to be material" and that "any increase in cost to the operator would be passed along to, and absorbed by, the customer."[55] According to FAA, this so-called pass-through option supported the agency's decision not to conduct a regulatory flexibility analysis because "those helicopter operators who fly the northern route between Manhattan and the eastern end of Long Island are supplying what is essentially a boutique service for the wealthy."[56]

HAI argued that the agency's pass-through cost justification defeated the fundamental purpose of the RFA, which is "to require agencies to endeavor, 'consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses . . . *subject to regulation*.'"[57] In other words, FAA should not have been allowed to circumvent RFA's intended focus on the small businesses subject to the regulation without knowing whether they could reasonably pass through increased costs or whether those increased costs would place them at a competitive disadvantage.

HAI also argued that FAA underestimated the true number of affected small businesses and attacked its refusal to accept the estimate provided by ERHC.[58] FAA relied instead on unverified information regarding the number of members of ERHC that provide commercial operations, as well as what it described as "common knowledge."[59] In the NPRM, FAA assumed that only five small business entities would be affected by the Rule. But ERHC's comments contended that over 100 small business entities would be affected.[60] When finalizing the Rule, FAA concluded that "ERHC has 35 members who provide commercial operations," without further explanation.[61] HAI argued that this "hunting and picking" of data was arbitrary on its face.

Ultimately rejecting HAI's arguments, the court stated at the outset that its RFA review is "highly deferential [to the agency], 'particularly . . . with regard to an agency's predictive judgments about the likely economic effects of a rule.'"[62] With the tone set accordingly, the court accepted as "reasonable" FAA's pass-through justification that "the increase would be passed on to paying customers, based on the high value they place on their time," and described FAA's initial miscalculation of the fuel costs as "not significant in relation to the total cost of a helicopter flight, especially when compared with the cost of travel by rail or by car."[63] Likewise, the court gave short shrift to HAI's argument that FAA used an incorrect estimate of the number of small entities that would be affected by the Rule, focusing instead on the lack of evidence ERHC provided to support its figure.[64]

Conclusion

The D.C. Circuit's decision in this case will likely have far-reaching consequences for the helicopter industry and FAA, as well as for aircraft operations proximate to residential areas removed from the airport environment throughout the country. By endorsing FAA's statutory authority to alter air traffic patterns based solely on noise complaints—and holding that the agency may do so without performing rigorous scientific and safety analysis or adhering to its own well-established noise standards, the court may have expanded FAA's portfolio. While the agency has shown little, if any, historical appetite to engage in this type of general noise abatement regulation, it hinted at its willingness to do so in a policy statement issued just weeks after the Final Rule.[65] In any event, this decision may very well lead to a dramatic increase in requests from communities around the country—and their elected officials—for FAA to fix their self-identified noise problems.

One region in particular that may be affected in the near term is Southern California. Helicopter noise in the greater Los Angeles region has already prompted members of the California congressional delegation to ask the secretary of transportation to have FAA

address concerns about helicopter flights over homes, businesses, and landmarks.[66] But in contrast to the approach the agency took with respect to Long Island, FAA issued a report on May 31, 2013, recommending a voluntary approach to reduce the noise and safety risks of low-flying helicopters over neighborhoods across the Los Angeles basin, rather than government regulation.[67] It remains unclear how, if at all, the D.C. Circuit's decision in *Helicopter Ass'n International, Inc. v. FAA* might influence FAA's initial determination not to institute a rulemaking to address helicopter noise over Los Angeles. While the decision could potentially serve as a road map for the agency in the event it reverses course and decides to pursue a regulatory solution, it is more likely to have the effect of galvanizing community groups and their elected representatives in pushing FAA to take action.

If the effect of *Helicopter Ass'n International, Inc. v. FAA* is that FAA need only "rel[y] on a host of externally generated complaints from elected officials and commercial and private residents"[68] to justify general noise abatement regulations, the decision is likely to present FAA with some difficult questions. To the extent the Long Island example inspires other similarly situated communities to seek FAA action to address aircraft noise, how will the agency decide which projects to take on? What is the noise threshold FAA will use in determining whether a problem actually exists? Is the agency even required to conduct a noise analysis? Conversely, will the court's decision provide the aviation industry with an enhanced ability to challenge locally imposed noise restrictions on federal preemption grounds?[69] If the evolution of the Rule is any indication, these questions will be driven by politics, not science. FAA's recent acknowledgment of the "public pressures"[70] placed on the agency's noise mitigation efforts is especially noteworthy, as it foreshadows the possibility that FAA may soon be facing an "annoyance" of its own making.

If the evolution of the Rule is any indication, these questions will be driven by politics, not science.

Endnotes

1. 5 U.S.C. §§ 551 et seq.
2. Id. §§ 604 et seq.
3. No. 12-1335 (D.C. Cir. July 12, 2013) (D.C. Circuit Decision).
4. The New York North Shore Helicopter Route, Final Rule, 77 Fed. Reg. 39,911 (July 6, 2012) (Final Rule).
5. Id. at 39,912.
6. The New York North Shore Helicopter Route, Notice of Proposed Rulemaking, 75 Fed. Reg. 29,471 (May 26, 2010) (Proposed Rule).
7. See Docket, New York North Shore Helicopter Route, FAA-2010-0302-0857, http://www.regulations.gov/#!docketDetail;D=FAA-2010-0302.
8. See, e.g., Comments of ERHC, FAA-2010-0302-0857 (June 25, 2010).
9. Several trade associations requested extensions of the 30-day comment period but were denied. Final Rule, 77 Fed. Reg. at 39,917.
10. Id. at 39,911.
11. The Rule is subject to a two-year sunset date, at which point it will be amended or allowed to lapse if FAA determines it does not adequately address the problem. Id. at 39,912.
12. Id. at 39,918.
13. See Letter from Rep. John L. Mica, Chair, House Comm. on Transp. & Infrastructure, and Rep. Thomas E. Petri, Chair, House Subcomm. on Aviation, to Michael Huerta, FAA Acting Admin. (July 30, 2012) (on file with author).
14. See Final Rule, 77 Fed. Reg. at 39,916.
15. See id. at 39,919.
16. Petition for Review, Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335 (D.C. Cir. July 31, 2012).
17. See Final Rule, 77 Fed. Reg. at 39,916.
18. See id. at 39,911.
19. Id. at 39,917.
20. Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335, at 6 (D.C. Cir. July 12, 2013) (noting that FAA prescribed new air traffic regulations in response to the noise complaints and that "[n]oise, at certain levels, has long been considered an actionable nuisance because of its impediment to the use and enjoyment of property").
21. Id. The court applied its traditional two-step analysis in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), to determine whether FAA's statutory construction was permissible, citing the Supreme Court's recent decision in City of Arlington, Texas v. FCC, 133 S. Ct. 1863 (2013), for the proposition that the court's "deference . . . extends to the agency's interpretation of statutory ambiguity that concerns the scope of the agency's jurisdiction." D.C. Circuit Decision at 5–6.
22. D.C. Circuit Decision at 8. See also Final Rule, 77 Fed. Reg. at 39,917, n.11.
23. Final Rule, 77 Fed. Reg. at 39,917, n.11.
24. The Oberlin College example involved a small, rural airport that had yet to become operational. For Rocky Mountain National Park, there were no air tours overflying the park at that time, so the ban did not modify airspace routes or pose any safety issues. The Mt. Vernon special flight rule, meanwhile, involved an airport in an area of unique historical significance and did not appear to implicate any safety concerns. Final Reply Brief for Petitioner at 17–18, Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335 (D.C. Cir. Feb. 4, 2013) (citations omitted) (HAI Reply Br.).
25. HAI had argued that while Section 44715 permits the

agency to promulgate regulations to address noise, it does so only in the context of aircraft certification standards and the agency's existing regulations support that interpretation.

26. See HAI Reply Br., supra note 24, at 12 (citing City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973)).

27. Brief of the Fed. Aviation Admin. at 40, Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335 (D.C. Cir. Feb. 4, 2013) (FAA Br.). HAI also highlighted that pilots are now recommended to fly the Route with a one-quarter-mile right offset in order to avoid oncoming traffic along a route that has no geographic boundaries even though much of the helicopter fleet is not equipped with navigation equipment capable of such precision. Final Opening Brief for Petitioner at 28–29, Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335 (D.C. Cir. Feb. 4, 2013) (citing Comments of the ERHC, supra note 8, at 7).

28. Final Rule, 77 Fed. Reg. at 39,915.

29. Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335, at 7 (D.C. Cir. July 12, 2013) (emphasis in original).

30. FAA Br., supra note 27, at 43.

31. 5 U.S.C. § 706(2)(A).

32. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

33. See Integrated Noise Model (INM), FAA (May 31, 2013), http://www.faa.gov/about/office_org/headquarters_offices/apl/research/models/inm_model/. The court summarily dismissed HAI's criticism of FAA for failing to use the INM, stating simply that "HAI ventures unsuccessfully into areas of agency expertise."

34. See 14 C.F.R. pts. 150, 161.

35. The New York North Shore Helicopter Route, Final Rule, 77 Fed. Reg. 39,911, 39,914 (July 6, 2012).

36. Id. at 39,916. Under federal guidelines, residential land uses are considered compatible with noise levels below day-night level (DNL) 65 dB. Id. at 39,916, n.7.

37. See id. (citing John A. Volpe Nat'l Transp. Sys. Ctr., Long Island North Shore Helicopter Route Environmental Study [3] n.1 (internal citations omitted)).

38. Id. at 39,913.

39. FAA Br., supra note 27, at 34. HAI responded that it is FAA's burden to justify the Rule by substantial evidence, not a commenter's duty to refute it. See HAI Reply Br., supra note 24, at 5 (citing Safe Extensions, Inc. v. FAA, 509 F.3d 593, 600–01 (D.C. Cir. 2007)).

40. Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335, at 12 (D.C. Cir. July 12, 2013).

41. Id. at 10 (quoting Final Rule, 77 Fed. Reg. at 39,913). The court found that "FAA could reasonably accept these comments from individual members of the public, which are different than [an] unsubstantiated factual statement of the agency employee in Safe Extensions, 509 F.3d at 595, as empirical data of a noise problem." Id.

42. Id. at 11.

43. Id. at 12–13.

44. Id. (quoting Final Rule, 77 Fed. Reg. at 39,914).

45. Id. at 13.

46. See id.; supra note 24.

47. Compare Letter from Edward Himmelfarb, Att'y for Respondent FAA, to Mark J. Langer, Clerk, D.C. Circuit, Helicopter Ass'n Int'l, Inc., No. 12-1335 (D.C. Cir. May 13, 2013) (citing 49 U.S.C. § 40103 and enclosing FAA Advisory Circular, AC No. 91-36D, Visual Flight Rules (VFR) Flight Near Noise-Sensitive Areas (Sept. 17, 2004)), with Letter from J. Michael Klise, Counsel for Petitioner HAI, to Mark J. Langer, Clerk, D.C. Circuit, Helicopter Ass'n Int'l, Inc., No. 12-1335 (D.C. Cir. May 20, 2013).

48. D.C. Circuit Decision at 15 (emphasis added).

49. See The New York North Shore Helicopter Route, Notice of Proposed Rulemaking, 75 Fed. Reg. 29,471, 29,473 (May 26, 2010); Final Rule, 77 Fed. Reg. at 39,919–20.

50. 5 U.S.C. § 601 note.

51. Id. § 603.

52. Proposed Rule, 75 Fed. Reg. at 29,473; Final Rule, 77 Fed. Reg. at 39,919–20.

53. FAA Br., supra note 27, at 47–48 & n.15 (acknowledging that the fuel prices used by the agency were understated by more than 50 percent).

54. Id. at 46.

55. Id. at 13, n.1.

56. Id. at 46.

57. Mid-Tex Elec. Coop., Inc. v. FERC, 773 F.2d 327, 342 (D.C. Cir. 1985) (quoting the Regulatory Flexibility Act, Pub. L. No. 96-354, § 2, 94 Stat. 1164, 1165)) (emphasis added by court).

58. See The New York North Shore Helicopter Route, Final Rule, 77 Fed. Reg. 39,911, 39,919 (July 6, 2012).

59. FAA Br., supra note 27, at 44.

60. Comments of the ERHC, supra note 8, at 16.

61. Final Rule, 77 Fed. Reg. at 39,919.

62. Helicopter Ass'n Int'l, Inc. v. FAA, No. 12-1335, at 14 (D.C. Cir. July 12, 2013) (quoting Nat'l Tel. Coop. Ass'n v. FCC, 563 F.3d 536, 541 (D.C. Cir. 2009)).

63. Id. at 15.

64. Id. at 16.

65. Aviation Environmental and Energy Policy Statement, 77 Fed. Reg. 43,137, 43,138–39 (July 23, 2012). FAA stated that additional research is needed to "gain[] a more nuanced and multifaceted understanding of noise impacts, given community concerns with aircraft noise and public pressures to mitigate noise at levels lower than current Federal guidelines." Id.

66. See Letter from Rep. Henry A. Waxman et al. to Ray LaHood, Sec'y, U.S. Dep't of Transp. (May 23, 2012), http://waxman.house.gov/sites/waxman.house.gov/files/Letter_LaHood_05.23.12.pdf.

67. See FAA, Report on the Los Angeles Helicopter Noise Initiative (May 31, 2013). The report notes that "the Long Island rule has been challenged" and that the case is "pending for decision." Id.

68. D.C. Circuit Decision at 9–10.

69. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).

70. Aviation Environmental and Energy Policy Statement, 77 Fed. Reg. at 43,138–39.

The FAA's Hazmat Voluntary Reporting Program: A Dilemma for Air Carriers

By Jeffrey Novota

Hazardous materials, commonly referred to as "Hazmat," are substances or materials that the secretary of transportation has determined to be capable of posing a substantial risk to health, safety, and property when transported in commerce. The term includes hazardous substances, hazardous wastes, marine pollutants, elevated-temperature materials, and other materials that meet defining criteria for hazardous classes.[1] Approximately one million daily movements, or 2.2 billion tons per year, of regulated Hazmat occur by plane, train, truck, and vessel.[2]

The FAA's primary method of enforcing the Hazmat regulations is through the imposition of civil penalties, which can range up to $175,000 per violation.

The purpose of the U.S. Department of Transportation's Hazardous Materials Program, including the associated regulations, is to identify and manage the risks of transporting hazardous materials in commerce.[3] The U.S. Department of Transportation (DOT) is home to several modal agencies that regulate Hazmat transportation, including the Federal Aviation Administration (FAA), which regulates Hazmat shipments by air. The FAA's oversight encompasses requirements pertaining to Hazmat reporting, training, stowage, marking, and packaging. These regulations apply not only to air carriers but also to shippers, including businesses and individuals. The FAA offers incentives for air carriers to voluntarily disclose instances of regulatory noncompliance. Under the agency's Voluntary Disclosure Reporting Programs (VDRPs), the FAA forgoes legal enforcement action, and withholds the public release of qualifying disclosures and corrective actions when specific criteria are met. While the FAA has implemented a VDRP specifically for Hazmat violations, it is limited to only one of several parts of the Code of Federal Regulations applicable to Hazmat. The narrow scope of the Hazmat VDRP has resulted in legal dilemmas for carriers, inhibits the sharing of critical safety information, and creates difficulties for organizations attempting to develop a comprehensive, systematic approach to safety management. The FAA should reconsider the limitations of the Hazmat VDRP and expand its scope to cover a wider array of Hazmat regulations.

This article provides an overview of the FAA's Hazmat regulations and enforcement program, and the VDRPs. It then analyzes the VDRPs' operation in the context of Hazmat hypotheticals involving air carriers, thereby demonstrating how the programs create incentive problems for air carriers. The article concludes with an explanation of how VDRPs are consistent with the development of effective safety management systems and argues for expanding the scope of the Hazmat VDRP.

Hazmat Regulations and FAA Enforcement

The Hazmat regulations applicable to the transport of Hazmat by air are contained in 14 C.F.R. Parts 171, 172, 173, and 175. Part 171 generally specifies the individuals and activities to which the Hazmat regulations apply, sets forth criteria associated with offering and accepting Hazmat, describes instances requiring immediate notification to the FAA, and provides authorization and conditions for the use of international standards and regulations. Parts 172 and 173 principally address packaging requirements, shipping descriptions and classifications, and training requirements. Part 175 is primarily aimed at air carriers and includes regulations pertaining to the loading, unloading, and handling of Hazmat; training requirements for employees who handle Hazmat; Hazmat notices required to be displayed to the public; and instances in which the filing of a discrepancy report with the FAA is required.

The FAA's primary method of enforcing the Hazmat regulations is through the imposition of civil penalties, which can range up to $175,000 per violation.[4] Civil penalties associated with Hazmat violations are often higher than for other regulatory violations. This is not necessarily attributable to any inherent risk posed by transportation of the hazardous materials, but rather because a single act or omission can form the basis for eight or more separate regulatory violations under the FAA's enforcement regime. The cumulative penalty

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can quickly soar, causing financial distress to often unsuspecting companies. In addition to imposing civil penalties, the FAA typically issues a press release for proposed penalties of $50,000 or greater, which can cause substantial damage to a company's brand and reputation.

While the extent to which the FAA has exercised Hazmat oversight has varied over the years, recent statistics suggest an aggressive enforcement approach. The average civil penalty paid to the FAA for alleged Hazmat violations was approximately $61,000 in 2012.[5] The FAA collected more than $41.7 million in civil penalties from 2008 through 2012,[6] but the total amount the FAA initially sought was significantly higher because the agency typically settles enforcement cases, loses some cases in adjudication, and withdraws other cases.

FAA's VDRPs

In an effort to promote safety, reduce the FAA's enforcement case workload, and create incentives for compliance, the FAA introduced the original VDRP in May 1998.[7] The program initially applied to "maintenance, flight operations, anti-drug and alcohol misuse prevention programs, and security functions of the certificate holder's organization, the security functions of indirect air carriers and foreign air carriers, and to the manufacturing functions of the production approval holder's organization" but not activities governed by the Hazmat regulations.[8] The program, which has been modified and updated, provides protection from FAA civil penalty action when the regulated entity detects a violation, promptly discloses it, and takes prompt corrective action to ensure that the violation ceases and does not recur.

The FAA promoted the program by declaring that aviation safety is well served by incentives that encourage companies to "identify and correct [their] own instances of noncompliance and to invest more resources into efforts to preclude their recurrence" without fear of enforcement activity.[9] Although the FAA continues to view the use of civil penalties as an effective tool to foster regulatory compliance, the VDRP's adoption was an acknowledgment that safety is enhanced by also offering regulated entities positive, nonpunitive incentives to share information and work cooperatively with the agency.

For years following introduction of the original VDRP, the FAA did not indicate why the program did not extend to Hazmat regulations.[10] Eventually, acknowledging air carriers' pleas and recognizing the safety benefits realized from the initial VDRP, the FAA's Hazmat Division issued a draft Advisory Circular in April 2004 establishing an air carrier VDRP for Hazmat, which went into effect on January 1, 2006. As with the FAA's original VDRP, the FAA agreed to issue a letter of correction, rather than initiating enforcement action, for covered instances of noncompliance voluntarily disclosed under the terms of the program.[11]

The original VDRP and the Hazmat VDRP consist of several common elements. The first element is notification to the FAA of the apparent violation. The initial notification should be submitted on a timely basis (within 24 hours in most cases) and before the FAA learns of the apparent violation through other means. The FAA will review the submission and issue a response accepting the report, returning it for editing, or rejecting it for invalidity. Following acceptance of the initial notification, the disclosing party is required to submit a detailed written report containing several basic components, including a description of the apparent violation, immediate action(s) taken to terminate the noncompliance, an explanation of why the apparent violation was inadvertent, and a description of the proposed comprehensive fix.

A principal difference between the original VDRP and the Hazmat VDRP is that the original VDRP requires a written report within 10 working days from the date of initial disclosure, and if a proposed comprehensive fix is not fully developed at such time, a subsequent report is required within 30 working days detailing the comprehensive fix. In contrast, the Hazmat VDRP requires the submission of a single report within 30 working days.

The average civil penalty paid to the FAA for alleged Hazmat violations was approximately $61,000 in 2012.

The FAA reviews the written report, concurs with or recommends changes to the comprehensive fix, and collaborates with the regulated entity to advance the comprehensive fix. As the comprehensive fix is implemented, the FAA will assess and monitor the corrective efforts and management's awareness of such efforts. If, during this period, the FAA determines the steps taken are inconsistent with the comprehensive fix as documented and corrections are not forthcoming, the FAA may choose to reject the disclosure and initiate enforcement action. On the other hand, if all elements of the comprehensive fix are satisfied, the FAA will make a final assessment closing the matter.[12]

Limitations of Hazmat VDRP

The Hazmat VDRP is limited in scope. It only applies to violations of 49 C.F.R. Part 175, which covers certain Hazmat reporting, training, acceptance, loading, unloading, handling, and stowage requirements, among others, and is applicable to air carriers, indirect air carriers, and freight forwarders and their

flight and nonflight employees, agents, subsidiary, and contract personnel (including cargo, passenger and baggage acceptance, handling, loading, and unloading personnel). The Hazmat VDRP notably excludes application of the program to violations of 49 C.F.R. Parts 171, 172, and 173, or to violations of Title 14 of the Code of Federal Regulations.[13] This broad exclusion poses problems for air carriers.

Many air carriers transport their own Hazmat—lithium batteries, chemicals, ignition devices, and other hazardous materials required for maintenance and operational purposes—on company aircraft. An airline is uniquely deemed both the carrier and the shipper in such cases, and, therefore, may be simultaneously subject to regulations contained in Parts 171, 172, and 173, in addition to Part 175.

Consider the following scenario: An airline's maintenance department needs to replace seats on an aircraft scheduled for maintenance in Los Angeles. The airline has several seats in stock at its Seattle maintenance facility. The maintenance department instructs its personnel to ship the seats from Seattle to Los Angeles. A technician prepares the seats for shipment, completes the paperwork, and arranges for the seats to be placed in the cargo hold of the company's next flight to Los Angeles. Due to an unintentional and inadvertent oversight, the technician fails to recognize that the seats are equipped with emergency life vests. Each emergency life vest contains a small detonation device (commonly referred to as a "squib") used to ensure quick inflation of the vest. Under Part 172, the squibs are categorized as Hazmat, yet are shipped to Los Angeles without the requisite labeling, declaration, or packaging. An employee unloading the cargo in Los Angeles identifies the oversight and notifies company management.

The FAA's exclusion of Parts 171, 172, and 173 from the Hazmat VDRP arguably creates an incentive for carriers to disregard the reporting requirement.

In this example, the airline served as the carrier by transporting the seats (including the life vests with the squibs installed) from Seattle to Los Angeles. Pursuant to 49 C.F.R. § 171.16(a)(4), the airline must submit a Hazardous Materials Incident Report to the DOT within 30 days of discovery of the undeclared Hazmat. As with any large organization, airlines experience internal miscommunication and administrative errors. If the carrier inadvertently misses the 30-day reporting deadline, there is no opportunity to disclose the noncompliance under the current Hazmat VDRP because 49 C.F.R. Part 171 is expressly excluded. Instead, the airline must choose between two undesirable alternatives: (1) submit the report late or (2) refrain from notifying the government of the incident.

The first alternative opens the door for the FAA to take enforcement action for failure to meet the 30-day reporting deadline. More onerous, however, is that during the course of the investigation, the FAA will likely learn of the facts surrounding the event and cite the carrier for violating a host of regulations applicable to both carriers and shippers under Parts 172 and 173. The potential for ballooning penalties renders the second alternative a tempting choice for the airline. Since 30 days have lapsed and the carrier arguably no longer has an affirmative regulatory obligation to report the event, the carrier may decide it has nothing to lose by not notifying the government.

On the other hand, if the discovery is reported within 30 days in accordance with Section 171.16, the airline is faced with a different set of concerns. Similar to the previous example in which the carrier submits its report after the 30-day window has lapsed, the carrier could face enforcement action for violations of Parts 172 and 173. While the carrier may choose to report noncompliance with Part 175 under the Hazmat VDRP prior to submitting the Hazardous Material Incident Report, no similar opportunity is afforded to the carrier for Parts 172 and 173 violations.

The current structure of the Hazmat VDRP creates another set of incentive problems at the individual employee level. For example, the technician in Seattle realizes, while the aircraft is in transit to Los Angeles, that he failed to properly prepare the shipment in accordance with the Hazmat regulations. Rather than expose the company to possible enforcement action for his mistake or risk facing company disciplinary action, the technician may refrain from disclosing his error and hope the Hazmat remains undetected. As a result, the noncompliance and any risks remain undetected and neither the company nor the FAA will have the benefit of conducting a root cause and trend analysis. More importantly, the carrier will lose the opportunity to use the event as a learning scenario to develop a comprehensive fix to prevent recurrences.

The asymmetry within the Hazmat VDRP puts air carriers in an undesirable position because they must report the events and then brace for potential enforcement action, which may entail civil penalties, negative publicity, and, in serious cases, certificate action. The FAA's exclusion of Parts 171, 172, and 173 from the Hazmat VDRP arguably creates a powerful, distorting incentive for carriers to disregard the reporting requirement in the hope of avoiding an investigation or other scrutiny from the FAA. However, carriers electing to disregard the reporting requirement run the risk of the FAA subsequently discovering the event and citing the carrier for a willful violation with

potentially severe consequences—in addition to other violations arising from the event. In the circumstances, some may view this as a worthwhile risk.

The FAA, at a minimum, should reevaluate the current Hazmat VDRP to encompass a broader array of Hazmat requirements. In doing so, the FAA will achieve consistency with other voluntary disclosure programs, and, more importantly, foster safe operating practices.

The Benefits of Expanding the FAA's VDRP

The rationale behind the FAA's express exclusion of Parts 171, 172, and 173 from the Hazmat VDRP is not clear. One plausible explanation is that the FAA failed to consider that air carriers regularly ship their own goods and materials, and, therefore, are routinely subject to regulations applicable to both carriers and shippers.[14] Another plausible explanation is that the FAA may have wanted to keep air carriers who act as shippers on the same playing field as any other shipper subject to the Hazmat regulations. After all, one may ask, why should air carriers have the ability to avoid enforcement action through a VDRP while other shippers are not afforded a similar opportunity?

In any case, the FAA should acknowledge the dissonance and tensions created by the current structure of the Hazmat VDRP. Unlike other shippers of Hazmat, virtually all aspects of air carriers' operations are subject to FAA regulation and oversight and air carriers may avail themselves of a VDRP for the vast majority of those regulatory requirements.

Yet—for reasons unknown—air carriers are not offered positive incentives to voluntarily report and correct self-identified Hazmat regulatory noncompliance but, instead, are required to essentially "self-incriminate" by virtue of the mandatory reporting obligations. It is difficult to reconcile this extreme result on the one hand, while the FAA professes that "[a]viation safety today is about looking ahead" and stresses the importance of an open reporting culture.[15]

A recent study examined how participation in voluntary disclosure programs affects the behavior of regulators and regulated entities. It revealed that, on average, entities that committed to voluntary disclosure programs experienced a decline in abnormal events, and that regulators reduced their scrutiny of participating entities.[16] If the Hazmat VDRP is extended to include Parts 171, 172, and 173, the regulatory threats perceived by air carriers are likely to be eased and employees will be more willing to volunteer information relating to suspected or known noncompliance, which would lead to improvements in aviation safety. This approach would be more consistent with the FAA's premise that "open sharing of apparent violations and a cooperative as well as an advisory approach to solving problems will enhance and promote aviation safety."[17] It would also bring consistency to the FAA's treatment of various regulated domains affecting aviation safety, including aircraft maintenance, flight operations, substance abuse, and security. Indeed, expansion of the program is also likely to reduce the FAA's enforcement case workload and allocate enforcement resources more effectively—results that should be attractive to the FAA as budgets continue to shrink.

Moreover, expansion of the Hazmat VDRP would advance the objectives of a Safety Management System (SMS). An SMS is a comprehensive, process-oriented approach to managing safety throughout an organization and includes an organization-wide safety policy; formal methods for identifying hazards and controlling and continually assessing risk; and promotion of a safety culture. SMS stresses not only compliance with technical standards but increased emphasis on the overall safety performance of the organization.

On November 5, 2010, the FAA proposed regulations that would require Part 121 air carriers to develop and implement an SMS.[18] Under this proposal, the FAA would require each air carrier to develop an SMS that includes the four SMS components set forth in ICAO Annex 6: Safety Policy, Safety Risk Management, Safety Assurance, and Safety Promotion. Safety Policy establishes senior management's commitment to continually improve safety and defines the methods, processes, and organizational structure needed to meet safety goals. Safety Risk Management determines the need for, and adequacy of, new or revised risk controls based on the assessment of acceptable risk. Safety Assurance evaluates the continued effectiveness of implemented risk control strategies and supports the identification of new hazards. The fourth component, Safety Promotion, includes training, communication, and other actions to create a positive safety culture within all levels of the workforce.[19]

The FAA should acknowledge the dissonance and tensions created by the current structure of the Hazmat VDRP.

An effective SMS depends on an open reporting culture, and voluntary safety programs are critical building blocks of the system, particularly the Safety Assurance component. The FAA has indicated that operators should utilize these programs—including the VDRP—to collect and analyze safety data to implement corrective actions to address safety shortfalls, and thereby satisfy a number of SMS requirements.[20] Furthermore, the FAA maintains that data gathered during investigation of the event that is voluntarily disclosed and subsequent development of a comprehensive fix and schedule

of implementation should be integrated into the data analysis, assessment, and validation processes of the carrier's SMS Safety Assurance processes.[21]

The FAA has yet to issue the final SMS rule or provide an anticipated effective date, but if the agency intends to move forward with the rule and conform to ICAO's international standards, expanding the breadth of the Hazmat VDRP is necessary and appropriate.

Conclusion

VDRPs have significantly contributed to an impressive aviation safety record in the United States, including improvements to training as well as enhanced operational and maintenance procedures. The FAA continues to acknowledge the benefits associated with open reporting cultures by encouraging the use of voluntary disclosure programs and initiating rulemaking that would require carriers to implement an SMS. Now is the time for the FAA to recognize that expansion of the Hazmat voluntary disclosure program to include Parts 171, 172, and 173 would be a simple, logical, and inexpensive means to promote compliance and advance the safety of the traveling public.

Expansion of the Hazmat voluntary disclosure program to include Parts 171, 172, and 173 would promote compliance and advance the safety of the traveling public.

Endnotes

1. 49 C.F.R. § 171.8.

2. Pipeline & Hazardous Materials Safety Admin., Transportation of Hazardous Materials 2009–2010, Biennial Report to Congress Under Title 49 of the United States Code and USA PATRIOT Improvement and Reauthorization Act of 2005, at 3 (2011).

3. The Hazardous Materials Program was established in 1974 by statute. See generally Risk Management, Pipeline & Hazardous Materials Safety Admin., http://www.phmsa.dot.gov/hazmat/risk.

4. 49 C.F.R § 107.329. Criminal penalties can range from $250,000 to $500,000 and imprisonment up to 10 years per violation. See id. § 107.333.

5. Quarterly Enforcement Reports, Fed. Aviation Admin., http://www.faa.gov/about/office_org/headquarters_offices/agc/operations/agc300/reports/Quarters/.

6. Compliance and Enforcement, Fed. Aviation Admin., http://www.faa.gov/about/office_org/headquarters_offices/ash/ash_programs/hazmat/compliance_enforcement/.

7. FAA, Voluntary Disclosure Reporting Program, Advisory Circular 00-58 (May 4, 1998).

8. Id.

9. Id.

10. Indeed, the FAA may have believed such a program was not necessary because carriers already have an affirmative regulatory obligation to report discrepancies involving Hazmat shipments to the FAA as soon as practicable. See 49 C.F.R. § 175.31.

11. FAA, Voluntary Disclosure Reporting Program—Hazardous Materials, Advisory Circular 121-37 (Jan. 31, 2006).

12. See generally FAA, Voluntary Disclosure Reporting Program, Advisory Circular 00-58A (Apr. 29, 2009). See also FAA Advisory Circular 121-37, supra note 11.

13. FAA Advisory Circular 121-37, supra note 11. Various sections of Title 14 are covered by the FAA's original voluntary disclosure program. See generally FAA, Voluntary Disclosure Reporting Program, Advisory Circular 00-58B (Apr. 29, 2009).

14. 49 C.F.R. Part 175, which is covered by the current program, expressly applies to the transportation of hazardous material in commerce aboard aircraft. On the other hand, Part 173 applies specifically to shippers, and while parts 171 and 172 may be applied to carriers, in practice they are most applicable to shippers.

15. Fact Sheet—Aviation Voluntary Reporting Programs, Fed. Aviation Admin. (Mar. 5, 2013), http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14373&omniRss=fact_sheetsAoc&cid=103_F_S.

16. Michael F. Toffel & Jodi L. Short, Coming Clean and Cleaning Up: Does Voluntary Self-Reporting Indicate Effective Self-Policing?, 54 J. L. & Econ., No. 3, 609-649, (Aug. 2011).

17. Advisory Circular 00-58B, supra note 13.

18. Fed. Aviation Admin., Safety Management Systems for Part 121 Certificate Holders, 75 Fed. Reg. 68,224, 68,245 (Nov. 5, 2010).

19. Safety Management Program, Fed. Aviation Admin. (Nov. 12, 2009), http://www.faa.gov/about/initiatives/sms/explained/components/.

20. FAA, Safety Management Systems for Aviation Service Providers, Advisory Circular 120-92NPRM, app. 6, at 3 (Nov. 3, 2010).

21. Id. at 8.

An Enhanced and Updated International Air Transportation Policy

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its International Air Transportation Policy Statement (the International Policy Statement or 1995 Policy Statement).[1]

Now, almost 20 years later, it is time for the United States to enhance and update the International Policy Statement—at the White House level this time—to address twenty-first century international aviation objectives on a government-wide basis. Such a new International Policy Statement should:

- Affirm the U.S. commitment to Open Skies for all aviation partners;
- Identify "Beyond Open Skies" goals and strategies that can be better advanced on a government-wide basis; and
- Support the Obama administration's national tourism strategy goal to increase international visitors from 62 million in 2011 to over 100 million by 2021.[2]

As DOT stated in 1995, "our overall goal continues to be to foster safe, affordable, convenient and efficient air service for consumers."[3] That goal is even more exigent in 2013.

The 1995 Policy Statement

Since the last International Policy Statement was issued in May 1995, fundamental changes have occurred in international aviation:

- The United States has promoted Open Skies as a core policy objective and secured more than 100 Open Skies agreements, including the landmark U.S.-EU Open Skies Agreement.
- The airline industry has experienced significant consolidation—both in the United States and internationally; there could soon be just three (Delta, United, and a potentially merged American/US Airways, with Southwest as a fourth) major U.S. carriers.
- The traumatic events of 9/11 gave rise to pervasive post-9/11 U.S. aviation security rules as well as restrictions on foreign visitor entry and visa issuance procedures.
- More recently, the Obama administration has increased its emphasis on foreign tourism to the United States as an important source of jobs and economic growth, with a goal to welcome 100 million foreign visitors annually by 2021.[4]

The 1995 International Policy Statement, despite being nearly 20 years old, remains relatively progressive, but narrowly focused on what can be accomplished by just two government agencies: DOT and the State Department. Nevertheless, in some respects, the 1995 Policy Statement has held up well over time. Its "Plan of Action" sets out a number of worthy U.S. government initiatives. It calls for inviting foreign countries to enter into open aviation agreements; it seeks changes in U.S. airline ownership laws if needed to obtain more liberal agreements; it seeks to establish stronger relationships with other U.S. government agencies that promote U.S. trade and business interests; and it proposes using transitional and sectorial agreements to achieve Open Skies goals with aviation partners on an incremental basis if needed.[5] The problem is that the 1995 Policy Statement was based on an assessment of an international aviation marketplace that has changed radically since 1995. It has about as much in common with twenty-first century international aviation as propeller-powered DC-3s, Pan Am or TWA, and Bermuda II.

It is time for the U.S. to enhance and update the International Policy Statement to address 21st century international aviation objectives on a government-wide basis.

In May 1995, the United States had negotiated only its sixth Open Skies agreement, whereas today the United States has over 100 such agreements.[6] The historic U.S.-EU Open Skies Agreement was still more than a decade away. The predominant form of inter-airline cooperation referenced in the International Policy Statement was codesharing; the prospect of antitrust-immunized alliances and metal-neutral joint ventures (JVs) was never even discussed. Nor were the now-ubiquitous global alliances—Star, oneworld, and SkyTeam—even mentioned in the 1995 Policy Statement.[7]

After almost 20 years, it is time to update the 1995 International Policy Statement to reflect the international aviation marketplace in the second decade of the twenty-first century and to articulate a new set of U.S. policy objectives in the international aviation arena. This is a radically changed marketplace that features the consolidation of the number of international airlines both in the United States and overseas. Significantly, the number of major U.S. carriers that operate international scheduled passenger service on a global basis has been reduced through mergers and bankruptcy to Delta Air Lines, United Airlines, and a (possibly) merged American Airlines/US Airways. The

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United States' major international markets—the transatlantic and transpacific routes—are now dominated by competition among a handful of metal-neutral, antitrust-immunized JVs between U.S. carriers and their foreign partners. The same consolidation has occurred overseas: European carriers have consolidated around three airline groups led by Air France/KLM, Lufthansa, and International Airlines Group (British Airways/Iberia); Latin American carriers are dominated by the LATAM combination of LAN and TAM and Avianca-TACA. This global picture would not be complete without taking note of the rise of the three Gulf carriers—Emirates, Qatar, and Etihad—and their global networks, which offer global connections via their Persian Gulf hubs.

Many of the world's international carriers, including the major U.S. international airlines, now belong to one of the three globally branded alliances (Star, SkyTeam, and oneworld) that, by linking individual airline networks with codesharing, frequent flyer programs, airport lounge access privileges, and antitrust-immunized alliances, have created something approaching seamless global networks that arguably benefit consumers but raise competitive concerns, while changing the face of international air service.

Many contemporary international aviation issues cannot be resolved in traditional bilateral aviation negotiations.

Finally, many contemporary international aviation issues cannot be resolved in traditional bilateral aviation negotiations. The list includes such traditional issues as airline investment liberalization and night curfews as well as a number of international aviation issues that have gained prominence since 9/11: aviation security, visa issuance procedures, border entry facilitation, customs processing, and greenhouse gas regulation, to name a few. To address these and other important issues, the White House should issue an updated International Policy Statement that involves not just DOT and the State Department, but also critical Department of Homeland Security (DHS) subagencies (Customs and Border Protection (CBP) and the Transportation Security Administration (TSA)), the Department of Commerce's tourism and service industries promotion offices, and the Office of the U.S. Trade Representative (USTR).

Elements of an Updated International Policy Statement

This enhanced and updated U.S. International Air Transportation Policy Statement, which addresses international aviation objectives on a government-wide basis, should include the following key elements:

Reaffirm Open Skies Commitment

First and foremost, the United States should reaffirm its commitment to Open Skies agreements with all aviation partners, whether negotiated on a bilateral or multilateral basis. The United States should seek to conclude model-form Open Skies agreements[8] with the key remaining non–Open Skies partners: China, Russia, Hong Kong, Vietnam, Mexico, and the rest of Latin America. In addition, the United States should support efforts to develop multilateral agreements consistent with Open Skies principles. The MALIAT agreement[9] was an excellent first effort, but the United States should attempt similar efforts with the nations of the Caribbean Basin and elsewhere when circumstances permit.

Defining the "Beyond Open Skies" Agenda

Next, the United States should identify a "Beyond Open Skies" agenda to enhance the goals and strategies set forth in the 1995 International Policy Statement. This new agenda should not be limited to what can be achieved in traditional bilateral aviation negotiations.

- The United States should go beyond the U.S. Open Skies Model and seek to expand the definition of Open Skies: liberality in terms of third-, fourth-, fifth-, and sixth-freedom traffic rights is no longer enough. Specifically, the United States should negotiate additional Open Skies agreements, either on a bilateral or multilateral basis, with reciprocal cargo and passenger seventh-freedom rights. "Passenger 7ths" may someday be as valuable to U.S. passenger carriers as "cargo 7ths" are for FedEx and UPS today. The United States' aviation leadership requires it to expand the definition of Open Skies and to champion more "open market" concepts, even when not fully embraced by some stakeholders.
- The United States should reaffirm the 1995 Policy Statement's commitment to seek to liberalize airline investment opportunities on a reciprocal basis, with the goal of facilitating the flow of capital and allowing the emergence of truly global airlines. This potentially includes the acquisition of foreign carriers by U.S. citizens and U.S. carriers by foreign persons, including non-U.S. airlines.[10] Specifically, the United States should be an advocate of airline investment liberalization not just in the context of aviation negotiations, but in new intergovernmental fora such as the broad U.S.-EU Transatlantic Trade and Investment Partnership (TTIP) negotiations, which are now under way. In the broader U.S.-EU trade agreement context, the United States may be able to achieve airline investment

liberalization that has eluded the industry in the narrow aviation context so far.

- Also on the investment liberalization issue, the United States, whether by bilateral or multilateral agreement, should allow licensed airlines of U.S. Open Skies partners to serve the United States so long as they are licensed by, and owned and controlled by the nationals of, Open Skies partners, provided U.S. airlines receive reciprocal treatment in those countries in terms of both ownership and control. With Open Skies partners, the United States should no longer insist on the "Bermuda I" national ownership and effective control standard.[11]
- When the United States encounters roadblocks in traditional aviation bilateral negotiations, it should consider using trade negotiations and other mechanisms to address aviation-related issues that are not readily resolved in air service–specific fora (e.g., customs processing, overflights, night curfews, airline investment liberalization). For example, the United States could use the U.S.-EU TTIP negotiations to address airline investment liberalization and World Trade Organization (WTO) Doha Round negotiations to resolve customs processing issues.
- The Obama administration also should review U.S. international aviation competition policy for the new, post–Open Skies world. This review should consider whether antitrust-immunized alliances, including the immunized metal-neutral JVs, are producing the consumer benefits promised, and whether state-owned foreign airlines are engaged in unfair competitive practices on routes to and from the United States. Remedies should include those available to USTR under trade agreements, as well as those traditionally used by DOT under the International Air Transportation Fair Competitive Practices Act (IATFCPA).[12]
- Finally, the United States should reaffirm its commitment to addressing the impact of aviation greenhouse gases (GHGs) on climate change on a global basis through multilateral fora, rather than unilaterally by individual states. U.S. support is essential to enabling the ICAO process to produce a global agreement on GHGs as quickly as possible.

Coordination with National Travel and Tourism Goals

A third worthy objective of an updated International Policy Statement should be to achieve greater coordination with U.S. travel and tourism policies and goals. The United States should use its Open Skies agreement and consultation processes—and other negotiating channels—to expand travel and tourism by easing visa requirements, speeding international visitors through border entry, and harmonizing aviation security rules. A government-wide approach that involves not just DOT and the State Department's aviation negotiators, but also such DHS components as TSA and CBP, the State Department's Visa Services Office, and the Commerce Department's tourism promotion agency, in policy coordination and execution would be an integral part of the updated Policy Statement.

Tourism represents $1.4 trillion in economic output and supported 7.5 million U.S. jobs in 2011.[13] Every 33 overseas visitors create one new U.S. job; international tourists spent $168 billion in the United States in 2012.[14] In the conduct of negotiations and consultation with bilateral parties, the United States should look for opportunities to facilitate international visitor travel by all means.

U.S. visa issuance delays deter foreign tourism. Post-9/11, the U.S. government implemented visa programs that restrict foreign visitor travel to the United States in the name of national security while denying the State Department the resources to facilitate the efficient processing of visa applications. The Obama administration's National Travel & Tourism Strategy cited limited visa access and enhanced border security as barriers to expanding foreign tourism revenues.[15]

Open Skies aviation consultations can provide a process for identifying and reaching ad hoc solutions to visa issuance bottlenecks.

Under an updated Policy Statement, the United States should use bilateral aviation negotiations and consultations, and other negotiating channels, to improve the visa issuance process as a means of promoting and facilitating tourism. Open Skies aviation consultations can provide a process for identifying and reaching ad hoc solutions to visa issuance bottlenecks.

Recognizing that foreign visitors from such key emerging tourist markets as China, Brazil, India, Colombia, and Hong Kong still require visas, the United States should use the Open Skies process to improve opportunities for foreign partner participation in the Visa Waiver Program (VWP), which allows foreign visitors from certain countries to enter the United States without a visa for up to 90 days.

The United States has now expanded the VWP to cover 37 countries, including South Korea, Taiwan, and some Eastern Europe countries.[16] For visitors from non-VWP countries, however, including the three largest emerging markets—Brazil, China, and India—U.S. visas have historically been difficult for business and

tourist visitors alike to obtain. In the past, there had been long wait times for mandatory in-person interviews at U.S. consulates. (These wait times averaged 70 to 100 days in China, and up to two months in Brazil, according to U.S. travel officials.) Moreover, the United States had no consulates outside the largest foreign cities: five consulates in all of China; five in India; and four in Brazil. In 2012, the Obama administration dramatically reduced the visa wait times in China and Brazil by adding new consulate staff and waiving the visa interview requirement for certain groups of visa applicants. New consulates were announced for Belo Horizonte and Porto Alegre in Brazil, and Wuhan and Shenyang in China.[17]

China exemplifies the challenge. In 2010, 1,254,000 Americans traveled to China,[18] but only 802,000 Chinese visited the United States (this increased to one million Chinese visitors in 2011, or roughly one-tenth of 1 percent of the Chinese population of 1.33 billion).[19] Without easy access to a travel visa, the number of Chinese visitors to the United States, while growing, remains small. Chinese airlines have little incentive to ramp up use of existing unused frequencies; nor do U.S. carriers, which also have unused frequencies available for China-U.S. flights under the existing bilateral air services agreement. With Chinese visitors spending an estimated average of $6,000 per visit, doubling Chinese visitors to the United States would be worth another $6.0 billion annually to the U.S. economy. That is a substantial loss to the U.S. economy, given that total foreign visitor spending (as noted) was $168 billion in 2012.[20]

Bilateral aviation negotiations and consultations should include improving airports' processes to speed foreign visitors' entry at U.S. airports and U.S. citizen entry abroad.

Negotiation of reciprocal visa waiver procedures could address this problem, potentially eliminating the need for citizens from Brazil, China, and India to obtain tourist or business visas to visit the United States, with reciprocal access to those countries for U.S. citizens. If a country cannot qualify for VWP status because it cannot meet U.S. statutory prerequisites, the United States should negotiate arrangements and procedures that will allow the country to qualify for VWP entry once statutory thresholds are met. The United States could also negotiate for improved and more convenient consulate facilities and longer-duration visas with those countries whose citizens still require an individual visa. Open Skies agreement negotiations and consultations can provide a mechanism for exploring the need for reciprocal obligations on these important visa issues; formal agreements could then be concluded by the State Department with the appropriate agency of the foreign government.

Border entry facilitation at U.S. and foreign airports is another bottleneck. CBP wait times at our airports are lengthening as a result of the increased numbers of international arrivals by air and the CBP furloughs and overtime reductions caused by the sequester. A recent White House report stated that, for fiscal year 2011, 25 percent of the 95 million arriving passengers and crew waited more than 30 minutes and the average wait time was almost 23 minutes.[21] This means that over 23 million people waited for over 30 minutes to clear CBP processing at U.S. gateway airports. For summer peak periods at many airports, the percentage of travelers waiting more than 30 minutes is much higher.

A recent survey by U.S. Travel (the travel industry trade association) of foreign visitors from the six largest U.S. visitor markets found that 43 percent of travelers would recommend avoiding the United States because of lengthy CBP wait times and unfriendly service by CBP officers at U.S. arrival airports.[22]

Recently, as a result of the sequester that took effect on March 1, 2013, wait times at some U.S. airports increased dramatically as CBP was forced to reduce inspector overtime. Miami International Airport (MIA) reported CBP wait times of one to two hours on some busy days, while Lufthansa reported its passengers at New York's JFK International Airport (JFK) had experienced wait times exceeding two hours.[23]

CBP processing times are longer for foreign visitors than U.S. citizens due to the need to photograph and fingerprint each foreign visitor and the more extensive security check required. Most foreign visitors are also ineligible to use the Global Entry kiosks that allow qualified passengers to speed through CBP processing without contact with a CBP officer.

Under an updated Policy Statement, bilateral aviation negotiations and consultations, whether conducted under the Open Skies aviation umbrella or directly by DHS with a foreign government's customs and immigration authorities, should include improving U.S. and foreign airports' processes to speed foreign visitors' entry at U.S. airports and U.S. citizen entry abroad.

- The United States could use bilateral aviation consultations to facilitate negotiation of Global Entry reciprocity agreements with aviation partners to expedite the airport entry process for U.S. and foreign travelers, consistent with national security requirements. These reciprocal trusted traveler programs, which the U.S. government has negotiated with the Netherlands, Korea, Canada, and Germany, allow foreign visitors (as well as returning U.S. citizens) to use

self-service kiosks located in the airport arrival area to complete CBP processing when arriving in the United States, and allow U.S. citizens to use similar automated systems when entering these foreign countries on flights from the United States.[24] The negotiation of reciprocal Global Entry agreements with all of the United States' other major travel partners should be a natural next step.

- The United States should also consider expanding use of preclearance procedures at foreign airports where possible without negatively affecting U.S. airports or distorting airline competition. Preclearance is now limited to Canadian airports, Dublin and Shannon, and some Caribbean points.[25] An expansion of preclearance locations would reduce long CBP processing lines at U.S. airports and make it easier for "pre-cleared" passengers to make connecting flights at U.S. airports. This, however, must be accomplished without diverting CBP resources from stressed U.S. airports, and without favoring some foreign departure gateway airports over others.

International aviation security harmonization should be a priority. The panoply of post-9/11 aviation security measures raises two concerns: (1) the need to eliminate redundant security measures that have become less effective and (2) the need to streamline measures that duplicate those of bilateral aviation partners. Aviation security measures must not make U.S. international travel so burdensome that they discourage foreign visitors.

Again, an updated Policy Statement should encourage Open Skies aviation negotiations or TSA negotiations with its foreign aviation security counterparts to facilitate a greater harmonization of aviation security rules that will expedite security processing. These may include one-stop security for international connecting passengers that enables visitors to interior U.S. cities screened at foreign departure airports to avoid rescreening by TSA in the United States, and possible expansion of Pre Check or other trusted traveler screening programs, on a reciprocal basis, to cover vetted noncitizen travelers where feasible.

Under an updated International Policy Statement that is coordinated at the White House level, negotiations and consultations—whether conducted under the Open Skies umbrella or directly by TSA—could provide a means to advance aviation security convergence measures and common international standards for security procedures and equipment. For example, for flights between the United States and the EU, a common set of "one-stop" aviation security screening procedures could be implemented at airports on both sides of the Atlantic, based on common certification standards for security-related equipment at airports. Inconsistent procedures, such as removal of shoes in the United States but not in Europe, and the duplicative screening of transatlantic passengers at both European departure and U.S. arrival airports could be eliminated under such a U.S.-EU agreement.

The "Beyond Open Skies" Objections

Some may argue that these travel and tourism facilitation issues have no place in an International Policy Statement because they require the participation of U.S. government agencies that do not generally participate in bilateral aviation negotiations and/or are issues better addressed in security or visa-specific negotiations. But that is precisely the point: these agencies should be included in Open Skies negotiations under an updated and government-wide International Policy Statement.

There is nothing sacrosanct about limiting Open Skies aviation negotiations to DOT and State Department officials and issues within the purview of those two agencies. In recent aviation negotiations, officials from the DHS and TSA, Commerce, and Justice (as well as the FAA) have joined the official U.S. delegation. Moreover, Open Skies agreements (particularly the U.S.-EU Open Skies Agreement) address issues that are beyond DOT's traditional "turf," such as environmental issues, aviation security, and exemptions from customs duties and taxes. Indeed, the U.S.-EU Open Skies Agreement provides for Joint Committee biannual meetings that recently have been devoted to the EU's emissions trading scheme and its application to U.S. air carriers. With an International Policy Statement, coordinated at the White House level, there would be full participation of all relevant agencies in policy formulation and in deciding which negotiation channel offers the best opportunity for achieving U.S. goals.

There is nothing sacrosanct about limiting Open Skies aviation negotiations to DOT and State Department officials.

Conclusion

The Obama administration should develop an updated and enhanced U.S. International Policy Statement, to be issued at the White House level, that renews the U.S. Open Skies commitment, establishes a government-wide "Beyond Open Skies" agenda, and supports the administration's travel and tourism promotion goals.

A "Beyond Open Skies" agenda should include, among other elements, expanded seventh-freedom traffic rights, reciprocal airline investment liberalization (secured as part

of the U.S.-EU TTIP negotiations if possible), waiver of Bermuda I ownership and effective control standards with Open Skies partners on a reciprocal basis, and the review of our Open Skies–era competition policies to address twenty-first century needs.

Finally, under the updated Policy Statement, the United States should use Open Skies negotiations and consultations, as well as other U.S.–foreign country negotiation channels, to address post-9/11 policies that undercut U.S. travel and tourism promotion goals: (1) expediting visa issuance with reciprocal visa waiver programs and simplified visa issuance procedures, (2) improving border entry facilitation by reducing wait times with expanded Global Entry reciprocity agreements, and (3) achieving harmonized aviation security standards and convergence of security measures between bilateral partners. With an updated International Policy Statement, the U.S. government will be able to use Open Skies aviation agreements and consultations—and other bilateral and multilateral negotiations—to assure the continued vitality of the U.S. airline industry, the growth of U.S. international traffic, and the jobs and tourism revenues that flow from increased levels of foreign nationals visiting the United States.

The U.S. should use Open Skies negotiations and consultations to address post-9/11 policies that undercut U.S. travel and tourism promotion goals.

Endnotes

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4. National Travel & Tourism Strategy, *supra* note 2, at 4.

5. 1995 Policy Statement, 60 Fed. Reg. at 21,844–45.

6. Open Skies Partners, Bureau of Econ. & Bus. Affairs, U.S. Dep't of State (May 30, 2013), http://www.state.gov/e/eb/rls/othr/ata/114805.htm.

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8. *Current Model Open Skies Agreement Text*, Bureau of Econ. & Bus. Affairs, U.S. Dep't of State (Jan. 12, 2012), http://www.state.gov/e/eb/rls/othr/ata/114866.htm.

9. Multilateral Agreement on the Liberalization of International Air Transportation, May 1, 2001, http://www.state.gov/e/eb/rls/othr/ata/114302.htm. The parties to the MALIAT Agreement are the United States, Brunei, Chile, New Zealand, and Singapore.

10. This, of course, would require congressional action to amend the provisions of Title 49 of the U.S. Code governing air carrier citizenship, specifically 49 U.S.C. §§ 40102(a)(15) and 41101 et seq.

11. Under the 1946 U.S.-UK Air Services Agreement, known as Bermuda I, which became the U.S. post-war aviation bilateral agreement standard, the United States could reject a foreign airline's application for authority to serve the United States if not satisfied that substantial ownership and effective control of such airline was vested in nationals of the other country that entered into the agreement. Such rights were reciprocal under the agreement.

12. 49 U.S.C. § 41310.

13. U.S. Dep't of State & U.S. Dep't of Homeland Sec., Executive Order 13597: Improvements to Visa Processing and Foreign Visitor Processing, 180-Day Progress Report 1 (Aug. 2012), http://www.whitehouse.gov/sites/default/files/docs/eo_13597_180_day_report_final.pdf [hereinafter, 2012 Progress Report]; Press Release, White House, White House Releases New Travel and Tourism Progress Report (Sept. 19, 2012), http://www.whitehouse.gov/the-press-office/2012/09/19/white-house-releases-new-travel-and-tourism-progress-report.

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22. Bill Poling, *Airport Entry Still a Hassle for Foreign Visitors, Says U.S. Travel*, Travel Weekly (Mar. 19, 2013), http://www.travelweekly.com/Travel-News/Government/Airport-customs-still-a-hassle-for-foreign-visitors-says-US-Travel/.

23. Patricia Mazzei, *Federal Budget Cuts Lead to Customs Delays, Missed Flights at MIA*, Miami Herald (Mar. 19, 2013), http://www.miamiherald.com/2013/03/19/3295059/federal-budget-cuts-lead-to-customs.html; Andrew Compart, *Airlines Worry About Sequestration's Effect on Airport Customs Lines*, Aviation Daily, Apr. 2, 2013, at 4; *see also* Scott McCartney, *The Summer of Long Customs Waits*, Wall St. J. (June 12, 2013), http://online.wsj.com/article/SB10001424127887323734304578541432566205480.html (reporting on three-hour Customs clearance wait times at MIA and that, at JFK, "wait times can routinely be more than twice as long as last year in some terminals").

24. 2012 Progress Report, *supra* note 13, at 11.

25. In April 2013, DHS announced a controversial agreement to expand preclearance to Abu Dhabi. Josh Hicks, *DHS Plans for Customs Pre-clearance in Abu Dhabi Raises Concerns*, Wash. Post (Apr. 19, 2013), http://www.washingtonpost.com/blogs/federal-eye/wp/2013/04/19/dhs-plan-for-abu-dhabi-customs-pre-clearance-raises-concerns/.

Ginsberg v. Northwest: The Ninth Circuit and ADA Preemption

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recently granted certiorari to review a Ninth Circuit decision, *Ginsberg v. Northwest Airlines, Inc.*, that, if left undisturbed, would allow claims for breach of the implied covenant of good faith and fair dealing unencumbered by ADA preemption even where the claims are wholly at odds with the express contractual terms agreed to by the parties. Hopefully the Court will use this opportunity to rein in the Ninth Circuit—for good.

Ginsberg arises from Northwest Airlines' decision to terminate the membership of a customer (Ginsberg) in the airline's WorldPerks frequent flier program.[2] The terms and conditions of the WorldPerks program granted Northwest discretion to remove individuals from the program for any improper conduct "as determined by Northwest in its sole judgment."[3] Northwest determined that Ginsberg's persistent complaining about his treatment by the airline supported termination of his membership in the frequent flyer program.

Unhappy with the consequences of his having complained too much, Ginsberg resorted to yet further complaining—this time by filing suit in the Southern District of California. Ginsberg claimed that Northwest's actions amounted to breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation.[4]

The district court dismissed all of Ginsberg's claims, holding that the ADA preempted them as relating to airline prices and services. Ginsberg appealed only the district court's conclusion that the ADA preempts a claim for breach of the implied covenant of good faith and fair dealing. All of Ginsberg's other claims remained dismissed.

A three-judge panel of the Ninth Circuit reversed with regard to Ginsberg's claim for breach of the implied covenant of good faith and fair dealing, stating:

> The purpose, history, and language of the ADA, along with Supreme Court and Ninth Circuit precedent, lead us to conclude that the ADA does not preempt a contract claim based on the doctrine of good faith and fair dealing.[5]

The Ninth Circuit's decision in *Ginsberg* is in direct conflict with Supreme Court and other circuit precedent. It creates an unfounded exception that can swallow the rule by permitting disgruntled consumers to pursue cases against airlines merely by claiming that the airline breached an implied covenant to exercise good faith and engage in fair dealing in its treatment of customers—a standard that is inherently vague and ambiguous in the context of airline-customer relations. If an airline gives itself the contractual right to take a certain action solely within its unilateral discretion, that should end the matter. The airline should not have to find itself sued for allegedly failing to exercise such unilateral discretion in good faith.

If an airline gives itself the contractual right to take a certain action solely within its unilateral discretion, that should end the matter.

This article reviews federal preemption of claims against airlines in the context of the Ninth Circuit's decision in *Ginsberg*, examines both Supreme Court and circuit court analysis of the ADA's preemption provisions, describes the areas of conflict with Ninth Circuit law, and discusses the implications of the Ninth Circuit's approach on the airline industry. The article concludes that the Ninth Circuit's position diverges substantially from the Supreme Court's interpretation of ADA preemption law as well as from statutory policy, and that the Supreme Court should bring the Ninth

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Circuit's jurisprudence into accord with the prevailing (and correct) interpretation of federal law.

Preemption of State Law Claims Against Airlines

Steeped in the belief that market forces most compellingly encourage airlines to provide the products consumers desire at the best possible rates, federal law regarding airline operations reflects a largely hands-off approach to the industry's regulation. Since airline deregulation, the overarching government policy has been to encourage, develop, and maintain an air transportation system relying on competition "to provide efficiency, innovation, and low prices."[6]

Strengthening these goals and ensuring that "the states would not undo federal deregulation with regulation of their own,"[7] the ADA's express preemption provision prohibits states and any state entities from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier" that provides air transportation.[8] By removing the burden of implementing 50 unique policies and procedures to conduct business within the jurisdiction of each individual state, the ADA enables airlines to conduct their interstate businesses in a largely uniform manner throughout the country.

Preemption provides a large safe harbor protecting airlines from interstate or federal-state statutory idiosyncrasies.

Despite the clear deregulatory mandate contained in the ADA, the Supreme Court has needed to interpret and enforce the ADA's preemption directive. The Court's precedents broadly hold that preemption precludes claims based on all state laws "having a connection with or reference to airline [prices], routes, or services" because the wording of the preemption provision is deliberately expansive and should therefore be broadly construed.[9] Thus, preemption provides a large safe harbor protecting airlines from interstate or federal-state statutory idiosyncrasies that airlines would be required to navigate in the absence of federal preemption of state law claims.

Although the federal law and rationale behind airline preemption are clear, certain aspects of the preemption doctrine have become murky as applied by some courts. However, the rule regarding whether a claim will be preempted under the ADA remains: generally, a claim must (1) involve enactment or enforcement of a state law, regulation, or other provision having the force and effect of law and (2) relate to a price, route, or service of an air carrier.[10]

Lack of Preemption in *Ginsberg*

The Ninth Circuit's holding in *Ginsberg*—which enables a passenger to sue for breach of the implied covenant of good faith and fair dealing—implicates both elements of the preemption test and adds further uncertainty to the bodies of law that have developed surrounding ADA preemption.

The roots of *Ginsberg* lie in the seminal case *American Airlines, Inc. v. Wolens*, where the Supreme Court held that "the ADA's preemption prescription bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves."[11] In other words, if an airline expressly promises to do something, and fails to do it, then the claim for breach of that promise may not be preempted by the ADA.

Wolens involved a challenge to American Airlines' modifications of its frequent flyer program. The Court allowed the breach of contract claim to proceed because American had expressly made certain representations regarding its program that the plaintiffs claimed were being breached.[12]

Ginsberg argued that *Wolens* allowed his claim for breach of the implied covenant of good faith and fair dealing because the cause of action pertained only to the terms of the agreement between him and Northwest, without implicating law or policy that states create and enforce. The *Wolens* Court determined that, to be subject to ADA preemption, a contractual term must refer to "binding standards of conduct that operate irrespective of any private agreement."[13] However, binding standards of conduct *that the parties choose to impose upon themselves* are enforceable because agreements freely made are "based on the needs perceived by the contracting parties at the time" the agreement is made.[14]

In light of *Wolens*, the allegations in *Ginsberg* required the court to address whether a claim for breach of the implied covenant of good faith and fair dealing constituted a binding standard of conduct independent of the airline's contract. The Ninth Circuit had already extended *Wolens* to breach of implied covenant of good faith and fair dealing claims in prior cases because—according to the Ninth Circuit—such claims were "too tenuously connected to airline regulation to trigger preemption"[15] and Congress's only purpose in the passage of the ADA was to prevent state interference with deregulation, which is not implicated in the implied covenant claim.[16]

The Ninth Circuit went further in *Ginsberg* and determined that claims for breach of the implied covenant of good faith and fair dealing *categorically* do not trigger ADA preemption.[17] According to the court, such contract claims present no material risk of nonuniform adjudication, and, in deciding to enter into economic arrangements with third parties, airlines had the ability and the sophistication to take into consideration

the conditions under state and local law by which they would have to abide as a byproduct of their bargains.[18]

On the second prong of the preemption test—requiring that a claim relate to prices, routes, or services—Ginsberg argued that frequent flyer programs fall into none of the categories to which preemption applies. Although the district court held that the claim related to both prices and services, the Ninth Circuit determined that the legislative history of the ADA indicates the "relating to" language was not intended to create a broad scope for the preemption provision and that allowing the claim to proceed, though it may have implications for airline costs and fares, would not have the effect of regulating the airline's pricing structure.[19]

The Ninth Circuit decision did not even address why it apparently believed that the district court's determination that the claim related to airline services was incorrect. In a prior version of the opinion that was later withdrawn, the panel limited the applicability of "service" to its relation to "rates" and "routes," arguing that any broader interpretation of "service" undermines the "context of its use" and results in virtually unlimited preemption.[20] The court also followed the Ninth Circuit's en banc decision in *Charas v. Trans World Airlines* that the term "service" did not include so-called fringe benefits having nothing to do with schedules, origins, destinations, cargo, or mail[21] and that, therefore, frequent flyer programs did not constitute services under *Charas*. The court did not acknowledge the fact that "*Charas*'s approach . . . is inconsistent with" the Supreme Court's decision in *Rowe v. New Hampshire Motor Transport Association* (discussed below).[22]

Because of its finding that Ginsberg's claim was not related to prices or services in a sufficiently direct and substantial manner, the Ninth Circuit held that the claim against Northwest was not preempted by the ADA.

Ginsberg Diverges from Supreme Court Precedent

The Ninth Circuit's holding in *Ginsberg* is contrary to the ADA because it allows a claim clearly intended to override an express contractual term and cannot be reconciled with *Wolens*. Under *Wolens*, whether a claim for breach of contract may proceed turns on the distinction between what the state dictated and what the airline expressly chose to undertake.[23] No state laws or policies external to the airline's bargains may enlarge or enhance the terms of an airline's bargain.[24] Instead, a party must prove that "an airline dishonored a term the airline itself stipulated."[25] Northwest told Ginsberg he could lose his World Perks privileges whenever Northwest deemed that to be in Northwest's interests. Ginsberg cannot undo that bargain by making a claim for breach of the implied covenant.

The Ninth Circuit's holding that frequent flyer program claims are not preempted because they bear no real relationship to airline prices and services also conflicts with the fact that in *Wolens*, the Court found that claims regarding frequent flyer programs clearly relate to airline prices and services.[26] The Court recognized there that changes to the frequent flyer program affect rates (i.e., prices) in the form of mileage credits, free tickets, and upgrades, and services in the form of flight access and class-of-service upgrades.[27] These benefits were sufficient to bring frequent flyer programs within the preemption provision under either the "rates" (now "prices") or "services" category of the ADA.

Further, *Wolens* does not provide support for the Ninth Circuit's interpretation of "service" as it distinguished between fringe and nonfringe benefits: the *Wolens* Court held that such separation of matters essential to and unessential to airline operations was untenable.[28] In *Wolens*, the Court argued that its prior decision in *Morales* was concerned only with whether the claim was related to rates, routes, or services and not with determining how centrally the claim would implicate these aspects of airline operations.[29] The Ninth Circuit's fringe distinction created the same kind of separation using only a slightly different characterization, which is unacceptable under *Wolens*.

The Ninth Circuit's holding in *Ginsberg* is contrary to the ADA because it allows a claim clearly intended to override an express contractual term.

Moreover, the limited definition of "services" in *Charas* is no longer good law in light of the subsequent decision of the U.S. Supreme Court in *Rowe v. New Hampshire Motor Transport Association*,[30] which dealt with the term "services" and its use in a statute to be interpreted in the same manner as the ADA. The Supreme Court underscored that preemption should apply if application of state law will require the provision of services that are significantly different from what the market dictates.[31]

Rowe involved a Maine statute that forbade anyone other than a licensed tobacco retailer to accept an order for a delivery of tobacco, required tobacco delivery services to use recipient-verification services, and prohibited knowing transportation of tobacco unless either sender or receiver has a license.[32] Several transport carrier associations brought suit claiming that federal law deregulating trucking preempted the state statute.[33]

In striking down the Maine law, the Supreme Court relied on its ADA preemption decisions to determine that the law improperly encroached on an area subject to federal preemption. The Court reasoned that, although federal laws may not preempt state laws only tenuously related to pricing and services, "if federal law preempts state regulation of the details of an air

carrier's frequent flyer program, a program that primarily promotes carriage, it must preempt state regulation of the essential details of a motor carrier's system for picking up, sorting, and carrying goods—essential details of the carriage itself."[34] A contrary ruling would have allowed states to develop a range of regulations hampering the efficiency of interstate delivery systems.

The Court held that Maine's statute interfered sufficiently with the services provided by the trucking industry to qualify for preemption even though the statute only regulated one kind of carrier service. The Court's determination in *Rowe* strongly indicated that regulation of a single aspect of a carrier's service is sufficient to constitute regulation of a service under federal preemption law.

Ginsberg Conflicts with Other Courts' Rulings

The Ninth Circuit's ruling in *Ginsberg* also conflicts with a variety of decisions from other circuits as well as those of lower federal courts. Most importantly, the Ninth Circuit's case law leading up to and including *Ginsberg* fosters a circuit split among courts that have considered ADA preemption.

The Ninth Circuit's approach reflects an outlier view that other circuits have found untenable.

The Seventh Circuit has held that, though enforcement of private contracts may not amount to an enactment or enforcement of any law, some state-law principles of contract law might be preempted "to the extent they seek to effectuate the state's public policies, rather than the intent of the parties" so long as such claims relate to airline rates, routes, or services.[35]

Importantly, the Seventh Circuit more loosely construes the concept of state enforcement, preserving the policy of a broad scope for preemption and following the spirit of *Wolens*. Moreover, the Fifth Circuit expressly disagrees with Ninth Circuit precedent, concluding that a state tort claim for overbooking, which the Ninth Circuit allowed to proceed in one of its cases, clearly relates to airline services and is preempted under the ADA.[36]

In addition, the Eleventh Circuit, which considered the scope of ADA preemption after the divergence between circuits had begun to develop, explicitly rejected the Ninth Circuit's reasoning, following the broader reading of ADA preemption by the Seventh and Fifth Circuits.[37]

The Ninth Circuit's approach reflects an outlier view that other circuits have found untenable. Allowing the discrepancy between circuits to continue opens airlines to different kinds of suits in different jurisdictions depending on a particular circuit's narrow or broad reading of preemption. This is one of the outcomes that ADA preemption was designed to avoid.

The circuits also diverge from the Ninth Circuit's holding that claims for breach of the implied covenant of good faith and fair dealing are exempt from preemption. The First Circuit has found an implied covenant of good faith claim preempted by the ADA because implied contract provisions are not found in the parties' agreements and allowing such claims would invite litigants "to skirt the implied right of action doctrine."[38] The court's reasoning indicates that imposing state policies on airlines would be improper no matter the form in which such policies are embodied.

The Eighth Circuit has also found that "claims that are enlarged or enhanced, and indeed, are dependent upon, Missouri state laws and polices" are preempted and that it does not matter whether these claims depend on state statutory or common law.[39] Though neither of these circuits goes so far as to hold implied covenant of good faith and fair dealing claims preempted in all cases, their decisions show that that, at the very least, a complete and thorough examination of the claim and its imposition of state policy on the airlines is warranted before such a claim may be allowed to proceed.

Additionally, other lower courts have noted the circuit split and sided against the Ninth Circuit. The Northern District of Illinois recently noted the direct conflict between *Ginsberg* and Seventh Circuit law in their interpretations of whether a contract claim can relate to price depending on the facts alleged.[40] The Western District of Washington, meanwhile, denied a breach of contract claim for a refund of a baggage fee because the claim employed "external state law to enlarge an existing agreement regarding baggage transport," and allowing such a claim to proceed would frustrate the ADA by allowing inconsistency in substantive state law theories of liability to interfere with the uniform operation of airlines.[41]

Implications of Following *Ginsberg*

Allowing *Ginsberg* to stand would be contrary to the ADA and clear judicial precedent. Instead of only allowing state law claims of breach of contract to proceed, the categorical exception to preemption for breach of the implied covenant of good faith and fair dealing would provide litigants a road map as to how to circumvent ADA preemption. As long as the complaint includes a claim for breach of the implied covenant, the case may move forward—including as a class action, which would be very expensive for the airline to defend.

The Ninth Circuit exception would inflict an enormous burden on airlines because they would be required to consider their treatment of customers through a variety of state law lenses. Meeting these varying burdens would drain airline resources and expose airlines to claims varying from state to state that arise out of contracts containing exactly the same language.

The *Ginsberg* loophole undermines an airline's ability to efficiently, innovatively, and cost-effectively provide services to consumers. In dedicating their limited time and resources to develop policies and contract terms that provide protections from the varieties of implied claims that could potentially arise from the various state laws, airlines would be required to redirect resources away from providing the goods and services that consumers most value.

Aligning the Ninth Circuit with the Other Circuits

The Supreme Court correctly granted certiorari to hear *Ginsberg* on appeal. The ADA is supposed to protect airlines from broad categories of state law claims that would vary from state to state and impose potentially enormous burdens on airlines. The Supreme Court's case law supports this broad ADA preemption protection with a narrow exception that allows state courts to bind airlines by the contract terms they voluntarily adopt.

The Ninth Circuit's case law, in contrast, exposes airlines to claims that may be implied under state law doctrine, inhibiting the ADA from effecting its stated goal of limited state law claims to which airlines are exposed. Further, the Ninth Circuit has continued to chart its own trajectory despite clear indications in both the Supreme Court and other circuits that its view of preemption is erroneous. Additionally, the Ninth Circuit's idiosyncratic interpretation of ADA preemption threatens to undermine airlines' ability to focus on the quality of services they provide and to meet market demands.

In conclusion, the Supreme Court should reject the Ninth Circuit's overly narrow view of ADA preemption. *Ginsberg* stands for an untenable principle: that airline-consumer agreements are not confined to what was actually agreed upon, but rather a dissatisfied consumer can drag the airline into an expensive court battle merely by contending that the airline's actions were lacking in good faith.

Endnotes

1. Airline Deregulation Act (ADA), Pub. L. No. 95-504, 92 Stat. 1705 (1978) (amending § 105(a) of the Federal Aviation Act of 1958), revised by Pub. L. No. 103-272, 108 Stat. 745 (1994) (codified as amended at 49 U.S.C. § 41713).

2. Nw. Airlines, Inc. v. Ginsberg, No. 12-462 (pet. granted May 20, 2013).

3. Petition for Writ of Certiorari at 5, Ginsberg v. Nw. Airlines, Inc., 695 F.3d 873 (2012) (No. 12-462) (quoting the General Terms and Conditions of Northwest's WorldPerks program).

4. Ginsberg v. Nw. Airlines, Inc., 695 F.3d 873, 875 (9th Cir. 2012).

5. *Id*. at 874.

6. 49 U.S.C. § 40101(a)(12).

7. Morales v. Trans World Airlines, 504 U.S. 374, 378 (1992).

8. 49 U.S.C. § 41713(b).

9. *Morales*, 504 U.S. at 384.

10. Respondent's Brief in Opposition at 9, Ginsberg v. Nw., Inc., 695 F.3d 873 (2012) (No. 12-462).

11. 513 U.S. 219, 222 (1995).

12. *Id*. at 233.

13. *Id*. at 229 n.5.

14. *Id*. at 230.

15. West v. Nw. Airlines, Inc., 995 F.2d 148, 151 (9th Cir. 1993).

16. Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1261 (9th Cir. 1998).

17. Ginsberg v. Nw. Airlines, Inc., 695 F.3d 873, 880 (9th Cir. 2012).

18. *Id*.

19. *Id*. at 881.

20. Ginsberg v. Nw. Airlines, Inc., 653 F.3d 1033, 1042 (9th Cir. 2011), *op. withdrawn by and substituted op. at* 695 F.3d 873 (9th Cir. 2012).

21. 160 F.3d at 1261.

22. Air Transp. Ass'n v. Cuomo, 520 F.3d 218, 224 (2d Cir. 2008); Nat'l Fed. of the Blind v. United Air Lines, Inc., No. C10-04816, 2011 WL 1544524, at *5 (N.D. Cal. Apr. 25, 2008) ("While *Charas* defined service narrowly, *Rowe* put forth a more expansive view.").

23. Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 233 (1995).

24. *Id*.

25. *Id*. at 232–33.

26. *Id*. at 226.

27. *Id*.

28. *Id*.

29. *Id*.

30. 552 U.S. 364, 370 (2007).

31. *Id*. at 372.

32. *Id*. at 368–69.

33. *Id*. at 369.

34. *Id*. at 373.

35. Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1432 n.8 (7th Cir. 1996).

36. Hodges v. Delta Airlines, Inc., 44 F.3d 334, 339–40 (5th Cir. 1995).

37. Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1256–57 (11th Cir. 2003).

38. Buck v. Am. Airlines, Inc., 476 F.3d 29, 37 (1st Cir. 2007).

39. Data Mfg., Inc. v. UPS, 557 F.3d 849, 853 (8th Cir. 2009).

40. Newman v. Spirit Airlines, Inc., No. 12-2897, 2012 WL 3134422, at *3–4 (N.D. Ill. July 27, 2012).

41. Schultz v. United Airlines, Inc., 797 F. Supp. 2d 1103, 1106 (W.D. Wash. 2011).

A Few Questions for… Jeffrey Shane

In this issue, we feature Jeffrey Shane, IATA's General Counsel.

A&SL: Please share a little background about yourself.

I was born in Manhattan, the eldest of three siblings, and grew up there, in Brooklyn, and on Long Island. I started college majoring in engineering—I was always attracted to math and science—but then got seduced by the liberal arts and philosophy. In law school, my favorite subject, ironically, was regulation.

A&SL: You have spent a considerable portion of your career in government; please tell us about your experiences in public service.

My first job was with the old Federal Power Commission, where I worked on natural gas pipeline rate cases. After two years there, I heard that the Department of Transportation (DOT) was looking for attorneys. I wanted to learn some new things so I applied and got hired as a DOT trial lawyer. I handled a lot of cases. It was fun. I also worked closely with the Department of Justice (DOJ) on environmental litigation—America was still building the interstates and we had a huge docket of cases—and so I became an environmental lawyer as well. Eventually, I was made Special Assistant to the General Counsel for Environmental Law.

I left that job to travel for a while in Africa. I backpacked around for the better part of a year strictly on the cheap. Then I kicked around Europe for a couple of months. When I finally returned to Washington, I went to work for the Environmental Law Institute. After a year or so, I went to Bangkok as part of a UN environmental project. I spent the next three years traveling all over Asia, working with environmental agencies. It was gratifying work and I met some amazing people.

When I returned to Washington, I rejoined DOT as Assistant General Counsel for International Law. My office typically had a lawyer on U.S. aviation delegations, and so I had to learn what that was all about.

After four years, I was transferred to DOT's policy office and promoted to Deputy Assistant Secretary. After two more years, I moved to the State Department to run the Transportation Affairs Office, which meant that I frequently chaired U.S. aviation delegations. After four years there, I received my first political appointment—this was during the first Bush administration in 1989. Secretary Samuel Skinner selected me to be what was then called Assistant Secretary for Policy and International Affairs. I practiced law during the two Clinton terms and then returned again to DOT in the George W. Bush administration as Under Secretary for Policy. I served in that role for nearly seven years, then returned again to private practice.

A&SL: What were your biggest accomplishments during your time in federal service?

Actually, I remember the screwups more vividly than the successes, although there's a lot that I'm proud to have worked on. Probably the most consequential was helping to nudge U.S. aviation policy from the liberal approach pioneered during the Carter administration to our current Open Skies policy. But, of course, that wouldn't have been possible without the incredible support delivered by the most experienced international aviation policy team on the planet, led by Paul Gretch, Mary Street, Susan McDermott, and many others. It was just a blessing to have been able to work with professionals of that caliber for so long. Even with that support, however, Open Skies never would have been possible without the political courage of my two bosses during the first Bush administration, Secretaries Samuel Skinner and Andrew Card. It's easy to forget, now that Open Skies is a default policy in so much of the world, what a heavy lift it was, politically, back in the early 1990s. I'm also proud that we were able to facilitate the first antitrust-immunized airline alliance on my watch. The conventional wisdom would have been to say no to antitrust immunity. We said yes, and the result has been nothing less than a transformation of international air services worldwide.

But there are many other things with which I'm happy to have been associated. The memos that set forth the case for NextGen were written in my office in 2003 and 2004 following a lot of meetings with stakeholders pleading for such a project. Again, however, if FAA Administrator Marion Blakey and DOT Secretary Norman Mineta hadn't had the vision and determination to take the concept further, it never would have been launched. My only regret is that it is taking so long to complete.

More than what you might call "accomplishments," however, my fondest memories are of the extraordinary experiences one can have in public service. I

loved my time as a litigator—particularly some of my appellate arguments. Another favorite memory is of having been the lawyer on the U.S. delegation that negotiated with China for 12 weeks in 1980 to resume scheduled air services between our two countries after a 30-year interruption. I also loved chairing our aviation delegations for a time—being able to represent your country in that setting is a very special privilege. But I'd probably have to say that the premier professional experience of my life was serving as President of the 2007 ICAO Assembly. We had delegations from 179 member states and more than 40 NGOs in that vast hall—around 1,500 people from around the world all thinking about the same issues. The meeting lasted for the better part of two weeks, and I was on a cloud for months thereafter.

A&SL: You said there were also some "screwups" as well. Can you provide a few examples?

Don't get me started! There was the live TV interview I did outdoors in July 1983. It was 95 degrees in the shade and I was standing in front of the Capitol under quartz lights that made it even hotter. The interview was about air safety and began with footage of some awful crashes that had occurred over the previous year. I was nervous enough about the interview—my first on TV—but by the time the reporter got around to asking me if it was safe to fly, I was utterly bathed in sweat. It no longer mattered what I said. It was just horrible.

On another occasion, I made the mistake of speculating out loud, during some informal remarks to a small group, about why President Reagan had ordered DOJ to terminate its antitrust investigation of British Airways and others after bargain-fare Laker Airways had been driven from the transatlantic market. The White House had issued an order forbidding anyone from talking about it except DOJ. I said maybe it was because Prime Minister Thatcher had called Reagan and threatened to renounce Bermuda II, the U.S.-U.K. aviation agreement. I had forgotten to ask if there were any reporters in the room. The front-page headline in the *Journal of Commerce* the next morning said something like: "Reagan Bows to Thatcher Threat." I really don't know how I survived that one.

A&SL: As the DOT and the FAA struggle through the effects of sequestration, what advice would you offer?

First, I was in complete disagreement with the critics who said the FAA was manipulating the sequester to exacerbate the pain. They simply wouldn't do that. There just wasn't the wherewithal to live within the sequester without the furloughs until Congress plundered Airport Improvement Program funds to hire the controllers back. Still, the lesson is that the FAA and DOT simply have to bang the table harder in the future to make sure that, even when Congress and the White House have decided to punt on a budget, they don't allow air transportation to be sacrificed. It's too important an economic driver, and the money involved would have been a rounding error. There was just no excuse for it. On the other hand, I wasn't there and, of course, have no idea what really happened.

Beyond that, I hope the debacle renews the debate about whether ATC should be in the FAA—or in the government at all. If the Clinton administration had been successful in creating USATS, air traffic control would have been unaffected by the sequester. Indeed, we'd have a fully operational NextGen system by now. We badly need to take up that debate again.

A&SL: How did you come to join IATA?

A number of considerations came up. First, I knew IATA well and liked the organization and its people. Second, I'd never been a general counsel before and thought if I could talk them into hiring me, it would make for an interesting change in direction. Finally, we have two young daughters and wanted to expose them to a different culture. Montreal satisfied that aspiration.

A&SL: What are the biggest challenges for IATA today, and what do you hope to accomplish as general counsel?

There are internal and external challenges. Internally, [IATA Director General and CEO] Tony Tyler has launched a major reorganization that will push a lot of autonomy out to our regional offices around the world. That will be a good thing for our member airlines, but it comes with a risk management challenge. Our people have to comply with a lot of rules—economic sanctions, antibribery statutes, competition law, privacy protection, money laundering—and we need to ensure that everybody understands his or her obligations.

Externally the challenge is delivering meaningful improvements for our member airlines through our standard-setting activities, through the spreading of best practices across a great many business activities, and in terms of our advocacy before courts and regulators of fair, rational, and consistent treatment of airlines wherever they operate. IATA's lawyers play a pivotal role in all of these areas. I want IATA's legal department to be recognized as an important and authoritative voice within the international aviation law community, and thus to be a powerful advocate on behalf of the industry.

A&SL: This will be your third time living outside the United States. How do you like living in Montreal?

I love the city. It has about 5,000 restaurants; it's impossible to live there and not become a foodie. There are always loads of cultural things happening. I'm pleased that my daughters will be fluent in French even if their Daddy isn't. There's great skiing in the Laurentians, just an hour's drive from downtown. I've always had a fondness for Canada. We're really excited to be living there.

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