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Elaine Vullman

ARTICLE

“Double Marginalization” and the Counter-Revolution Against Liberal Airline Competition

Hubert Horan
The Transportation Law Journal is a major professional publication in the field of transportation law, and is dedicated to maintaining its position as a valuable working tool for the practicing bar, government, and the academic community. It addresses both domestic and international developments of legal, regulatory, economic, and political interest in all modes of passenger and freight transportation—aviation/airports, passenger rail, transit, cycling, freight rail, motor carrier, maritime, aerospace, and pipelines, freight forwarders, and brokers.

The students of the University of Denver Sturm College of Law publish the Transportation Law Journal three times a year—summer, winter, and spring. Postage paid at Lincoln, Nebraska, and at additional mailing offices.

Correspondence should be addressed to Transportation Law Journal, University of Denver Sturm College of Law, 2255 E. Evans Avenue, Room 448, Denver, Colorado, 80208; (303) 871-6162, FAX (303) 871-06165. Email: tlj@law.du.edu. Advertising rates are available on request.

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The opinions expressed herein do not necessarily reflect the views of the Transportation Law Journal or the University of Denver.
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Dear Reader:

Volume 37 number 3 features one article and two student notes spanning emerging issues such as the constitutionality of body scanners as well as cruiseline and commercial pirate attacks. The fourth article addresses "double marginalization" and airline competition. The first piece is distinguished as the topic has garnered much recent media attention nationwide.

Mr. Andrew Welch, law student at the University of Denver Sturm College of Law, focuses on the implementation of body scanners at airports and the constitutionality of its use. The Transportation Law Journal is proud to publish one of the first pieces on this issue as it provides a historical and legal perspective on airport body scanners.

Our second and third pieces discuss yet another emerging issue: pirate attacks. Mr. Thaine Lennox-Gentle's article centers on how pirate attacks have affected commerical and cargo carriers; Ms. Elaine Vullmahn's student note examines the liability and implications of cruise line pirate attacks. The United Nations Security Council reported that although pirate attacks in 2010 have dropped since last year, the number of successful hijacks from pirate attacks has increased. Both articles focus on liability and accountability for such pirate attacks.

Our final piece addresses how the nature of airline competition has evolved. Mr. Hubert Horan has thirty years of experience in the airline industry, and, thereby, supports much of the article on his expansive personal knowledge of the trade. His insight and perspective are valuable as he speaks to the history of airline competition and the future of it.

This is the first issue for the 2010-2011 editorial staff, who worked diligently throughout the summer and fall semester to present this issue. Accordingly, it is my first issue as Editor-In-Chief and I would like to extend my gratitude specifically to two staff members, Greg Nielsen and Paul Schramm, for their relentless work on this publication.

We are proud to present Issue 37.3 and hope you find it as engaging as we did.

All the best,

Nicoal Chae Miller
2010-2011 Editor in Chief
TRANSPORTATION LAW JOURNAL

Volume 37 2010 No. 3

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Full-Body Scanners: Full Protection from Terrorist Attacks or Full-On Violation of the Constitution?

Andrew Welch*

"They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

Benjamin Franklin
Historical Review of Pennsylvania, 1759

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I. Introduction

In a post-9/11 world, it is hardly debatable that there must be some sort of security measures to “welcome” air travelers as they prepare to board commercial airplanes. After the 2009 Christmas Day bombing attempt aboard U.S.-bound Northwest flight 253, the Transportation Security Administration (“TSA”) announced plans to step up its use of state-of-the-art “advanced imaging technologies,” or full-body scanners.1 TSA has plans to make the advanced imaging technologies a “primary . . . rather than secondary . . . screening measure.”2 Currently, air travelers can be subjected to a millimeter wave or backscatter full-body x-ray search in more than fifty airports in the United States.3 In March 2010, TSA began deployment of 450 backscatter machines.4

This paper first discusses the historical context in which security screening became a necessity, including the birth of TSA. The paper then moves into its major focus, an examination of whether constitutional


4. Id.
prohibitions on unreasonable searches and seizures or the right to privacy protect air travelers from TSA's use of full-body scanners. The paper ends with a brief discussion of whether full-body scanners will deter terrorists and finally concludes that TSA's plan to make full-body scanners a primary screening measure is unconstitutional.

II. BRIEF AVIATION HISTORY

In 2009, U.S. carriers operated 8.8 million domestic and international flights.\(^5\) However, in 1903, the dream of flight was just beginning to be realized. Flight continues to captivate the human mind and probably has done so since the first bird was spotted floating effortlessly through the sky.\(^6\) The chase to accomplish the dream of flight started long before August 8, 1908,\(^7\) but on that special day Wilbur Wright completed his first public flight\(^8\) near France's Le Mans, Hunaudieres racetrack.\(^9\) That simple flight earned the Wright Brothers "first place in the history of flying machines."\(^10\)

Since that day, the airplane has improved dramatically. It affects the daily lives of billions by turning ordinary people into globe trotters and creating new industries, allowing the far corners of the globe to be opened to international commerce.\(^11\) Additionally, "[t]he frail contraption of wood, wire, and fabric [has] evolved into the definitive weapon of the century, a machine that redefined the way in which we fight our wars, and radically altered our traditional notions of what constitutes a battlefield and who qualifies as a combatant."\(^12\)

While some, such as novelist Herbert G. Wells (whose 1908 novel depicted German aerial vessels attacking New York\(^13\)), offered a dark vision of the fast-approaching air age, many others were not initially convinced of the airplane's potential military power.\(^14\) In March 1913, French General Ferdinand Foch—who would eventually be named Su-

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7. Id.
10. Id. (quoting THE LONDON TIMES, August 14, 1908).
11. Id. at 10-11.
12. Id. at 10.
13. Id. at 8-9 (citing H.G. WELLS, THE WAR IN THE AIR, AND PARTICULARLY HOW MR. BERT SMALLWAYS FARED WHILE IT LASTED (George Bell and Sons 1908)).
14. CROUCH, supra note 9, at 151.
prime Commander of the Allied armies during World War I—stated, "[a]viation is fine as a sport . . . as a weapon of war, it is worthless."15 After having observed test flights in 1908, Secretary of War Luke E. Wright stated, "[airplanes] are remarkable in that they represent the actual conquest of the air, but until they are further developed, I do not think they will be of much service from a military standpoint."16

After the start of World War I and after having seen the increased use of the airplane in warfare, a surprised Orville Wright commented in 1917 that "[w]hen my brother and I built the first man-carrying flying machine, we thought that we were introducing into the world an invention which would make further wars practically impossible."17 However, just a few short years later, the chief of the Engineers Directorate and commander of the French army's first aeronautical unit Colonel Pierre August Roques disagreed with General Foch and stated that the airplane was "as indispensable to armies as cannons or rifles."18

A. WARFARE, CRIMINALS, AND TERRORISTS: THE AIRPLANE AS A WEAPON

It didn’t take long for the airplane to become an indispensable part of warfare. “On October 5, 1914, Pilot Sgt. Joseph Franz and his observer, Quenault, of l’Aviation Militaire, brought down a German Taube with a forward-firing machine gun mounted on their Voisin pusher,19 scoring the first aerial victory in history."20 Fast forward to the skies above Pearl Harbor at 7:55 A.M., on the morning of Sunday, December 7, 1941.21 The Japanese conducted a surprise attack that would be remembered as the ‘Day of Infamy.’22 The Japanese successfully brought the United States into World War II with their airplanes: forty-nine bombers, forty torpedo bombers, fifty-one dive-bombers, and forty-three fighters.23

As aircraft technology advanced beyond the imagination of its early
creators, the airplane’s capabilities became more apparent to those seeking new weapons that could be used to “intimidate and terrorize.” In one dramatic moment, terrorists “can exert leverage out of all proportion to the small weapon [they] hold” by threatening to kill hundreds of people and destroying “a technological symbol of society.”

In the early 1920’s, “pillagers” used gunfire to force a French airplane down in the Spanish Sahara. They eventually took control of the aircraft and held it and its crew for ransom. The first recorded “hijacking” of an airplane was accomplished by Peruvian revolutionaries in 1931. The hijackers used the plane to drop anti-government pamphlets.

Upon walking into an airport in 1950, it was common to see air travelers purchasing flight insurance from coin-operated vending machines just before boarding their flights. On November 1, 1955, John Gilbert Graham planted a bomb on a United Airlines flight that his mother was on in hopes of collecting her life insurance. The bomb ended the lives of thirty-nine passengers and five crew members. Graham confessed to placing a timer and twenty-five sticks of dynamite in his mother’s suitcase. Ironically, because his mother’s suitcase exceeded the weight limit by thirty-seven pounds, she had paid a $27.82 surcharge to get it on the plane. It wouldn’t be until after the September 11, 2001 terrorist attacks, nearly forty-six years after Graham stashed explosives in his mother’s baggage, that Congress would mandate that all checked baggage be screened by an explosive detection system. While all passenger bags are currently being screened, not all air cargo is: TSA is still working on complying with a congressional mandate to screen 100 percent of cargo transported on passenger aircraft.

When it came time for United States Attorney Donald Kelley to charge Graham with blowing up the plane, Mr. Kelley was shocked to

25. Id.
26. Id. at 9-4 (citing R. CHAMBRE, HISTOIRE DE L'AVIATION 304-10 (1948)).
27. Id.
29. Id.
31. Id.
32. Id. at 12.
33. Id. at 66.
34. Id.
36. Id.
discover that there was no federal statute on the books that made it a crime to blow up an airplane. About eight months later in July 1956, President Eisenhower signed a bill providing for up to twenty years in prison for acts of aircraft sabotage not resulting in death, and the possibility of the death penalty for any person convicted of committing an act of aircraft sabotage that resulted in death.

As air travel increased, more deadly hijackings occurred. Between 1949 and 1985, 1,539 people were killed in eighty-seven aircraft bombings. During that same timeframe, there were a staggering “498 successful and 281 failed hijacking attempts worldwide.” In 1969, there were more than fifty hijackings or attempts made on U.S. operated airlines. January 1969 alone saw eight U.S. airliners hijacked to Cuba. In February 1969, the Federal Aviation Administration (“FAA”) was desperate to do something. Its Task Force on the Deterrence of Air Piracy recommended using profiling and constructed a hijacker profile from shared behavioral characteristics of past hijackers. “When used in conjunction with a FAA-developed magnetometer weapons screening device, the profile system offered a promising method of preventing potential hijackers from boarding aircraft.”

Despite the use of profiling techniques and the magnetometer screenings, the threat of hijackings continued. FAA realized that it had to do more, and in December 1972, it issued a “landmark emergency rule” that required U.S. air carriers to scan each passenger with a metal detector and inspect all carry-on baggage for dangerous items, beginning in January 1973. If a metal detector was not available, the rule required that a “physical search, or pat down,” be conducted and provided that anyone refusing to consent to the physical search would not be permitted to board the plane. In August 1974, President Nixon signed the Anti-
Hijacking Act of 1974 which, among other things, required the FAA to keep its new security screening procedures in place and allowed the FAA to use federal personnel to supplement law enforcement officers in airport security programs.48

On the morning of September 11, 2001, nineteen terrorists hijacked four U.S. domestic airplanes after having penetrated security at three major airports.49 Three of those planes were turned into jet-powered missiles that killed thousands, destroyed the World Trade Center in New York City, and damaged the Pentagon in Arlington, Virginia.50 Realizing the hijacker’s plans, the courageous passengers of United Flight 93—one of the four hijacked planes—fought back. At 10:03 A.M., their plane crashed in Stony Creek Township, Pennsylvania, killing all on board.51

At 9:04, one minute after United Flight 175 crashed into the south tower of the World Trade Center, FAA’s Boston Air Route Traffic Control Center stopped all air departures in its jurisdiction.52 Not long after, FAA decided that drastic measures were needed and, for the first time in U.S. aviation history, instated a national ground stop—banning takeoffs of all civilian aircraft regardless of destination.53 It was not until September 19 that the FAA lifted most restrictions on U.S. registered general aviation aircraft.54

B. The Creation Of The Federal Aviation Administration

The sensation of freedom and success undoubtedly felt by Wilber Wright during his first public flight in 1908 has since been undermined by numerous rules and regulations.55 The first significant legislation involving the airplane was the Air Mail Act of 1925.56 Not only did this legislation begin the contractual relationship between the Post Office and airlines to carry the mail, it “facilitated the creation of a profitable commercial airline industry, and airline companies such as Pan American Airways, Western Air Express, and Ford Air Transport Service began commercial passenger service.”57

48. Id. This was to become the Civil Aviation Security Service. Id.
49. Id.
50. Id.
51. Id. at 127.
52. Id.
53. Id.
54. Id. at 128.
56. See generally Kraus, supra note 42, at 1.
57. Id. Instead of insisting on cargo aircraft, the postmaster general spurred the passenger segment of commercial airlines by encouraging the airlines to use passenger aircraft to deliver the mail. Id.
At the urging of the aviation industry, President Calvin Coolidge signed the Air Commerce Act in 1926, which charged the Secretary of Commerce with licensing pilots, certifying aircraft, establishing airways, issuing and enforcing air traffic rules, fostering air commerce, and operating and maintaining aids to air navigation. Having been charged with the responsibility for aviation oversight, the Department of Commerce created the Aeronautics Branch, which began focusing on safety rulemaking. Wanting to take more control of the aviation industry after a series of midair collisions, Congress repealed the Air Commerce Act of 1926, along with other aviation related acts, and replaced it with the Federal Aviation Act.

C. THEEmergence OF THE Transportation Security AdminISTRATION

FAA would not be in charge of aviation security forever; after September 11, 2001, President George W. Bush signed the Aviation and Transportation Security Act into law. This created a new agency—the Transportation Security Administration (“TSA”) within the Department of Transportation—that would take over responsibility for aviation security. By the end of 2002, “passage of the Homeland Security Act (Public Law 107-296) brought TSA into the new Department of Homeland Security.”

Continuing in the legacy of the Aeronautics Branch, TSA has continued to focus the federal government’s eye on aviation security. Notwithstanding the fact that “over the past two decades the number of flight hours logged by air carriers has almost doubled and the number of departures has increased by 50 percent, the period ‘[b]etween 2001 and 2007, aviation witnessed one of its safest periods for scheduled air carriers.’” Years earlier in 1972, however,

[one airline executive expressed surprise that the screening procedures [then enacted] were so readily accepted. “It seems ironic...we find ourselves

58. Id. at 3.
59. Id.
60. Id. at 9. On August 23, 1958 the Federal Aviation Act was passed repealing the Air Commerce Act of 1926, the Civil Aeronautics Act of 1938, and the Airways Modernization Act of 1957. Id.
61. Id. This act created the Federal Aviation Administration. Id.
62. Id. at 129.
63. Id.
64. Id.
65. Id. at 147 (statistics from the National Transportation Safety Board).
66. Id. “Not counting the terrorist activities of September 11, 2001, there were only three fatal accidents in 2001; none in 2002; two in 2003; one in 2004; three in 2005; two in 2006; and none in 2007.” Id.
in a situation where each and every air traveler in the United states [sic] is treated as a suspect as soon as he enters an airline terminal. It would seem ironic to the citizen of 1937 that air travelers today not only submit willingly to searches of their person and carry on baggage, but actually laud the virtues of and need for such action.  

With TSA rolling out full-body scanners, one can only imagine what this airline executive, not to mention a citizen of 1937, would think of the security screening measures of today.

III. SECURITY SCREENING PROCEDURES AND THE FOURTH AMENDMENT

Responding to the increased hijackings of the day, FAA "mandated passenger profiling in the 1960s." If a passenger fit the profile—twenty-five characteristics compiled from historical data on known terrorists—only then was the passenger subjected to further scrutiny. However, FAA believed the practice was ineffective and abandoned profiling in 1972. Instead, FAA implemented X-ray searches of all carry-on luggage at global security checkpoints. The idea of profiling as a means of screening passengers did not come to the forefront again until TWA Flight 800 exploded soon after takeoff in 1996.

Shortly after the tragedy aboard TWA Flight 800, President Bill Clinton created the "White House Commission on Aviation Safety and Security"—commonly known as the "Gore Commission." Having been charged with "develop[ing] and recommend[ing] to the President a strategy designed to improve aviation safety and security, both domestically and internationally," the Gore Commission made several "recommendations including the revitalization and reformulation of passenger profiling from the 1960s." Northwest Airlines was the first to develop a computer passenger profiling system in 1996 under a grant from the FAA and "released the profiling software to other airlines through the FAA in 1997."

The government avoided calling the "Computer Assisted Passenger

68. Ravich, supra note 28, at 9.
69. Id. at 10. These characteristics were known as the "Anti-Air Hijack Profile."
70. Id. at 9-10.
71. Id. at 10.
72. Id.
73. Id. at 10-11. It was determined that TWA Flight 800, flying from New York, was brought down by a defective fuel tank, not terrorists. Id. at 10.
74. Id. at 10.
76. Id.
Prescreening System" ("CAPPS") a profiling system, but instead tried to sell it as a "management tool," whose goal was "not to pick a needle out of the haystack ... but to make the haystack smaller." While the government will not—and possibly more importantly cannot reveal—why a traveler would be identified by CAPPS as a potential threat, as a "selectee" of CAPPS, the traveler is "subject to secondary screening." Despite promises to modify the system, TSA abandoned CAPPS II in July 2004, amid growing opposition that was hard to ignore, especially after the United States General Accounting Office ("GAO") expressed privacy concerns.

After failing to garner public acceptance of both CAPPS and CAPPS II, TSA implemented the "Secure Flight" program in August 2004. This program, too, has met with opposition. While CAPPS and CAPPS II were criticized for spreading the net too wide and bearing too many "false positives" and "false negatives," TSA hoped that, by taking over the airlines' duty of checking government watch lists before a passenger is issued an airplane ticket, Secure Flight will "reduce the number of domestic airline passengers pulled aside for more rigorous screening while increasing the chance of catching known or suspected terrorists."

On September 19, 2005, Secure Flight was dealt a serious blow when...
the Secure Flight Working Group ("SFWG")—a panel of nine experts in security and privacy—and the Aviation Security Advisory Committee both refused to recommend the program to TSA. Despite these concerns, TSA’s Secure Flight Final Rule required, as of October 31, 2009, all airlines to request, collect, and transmit to TSA Secure Flight Passenger Data ("SFPD"). "Secure Flight is being phased in with each airline. Implementation with all domestic airlines is scheduled to be completed in the Spring of 2010 and international carriers by the end of 2010." To address SFWG’s concerns TSA has now posted on its website the goals of the program.

Collecting SFPD and sending it to a one-stop shop to compare it with government watch lists may be a better solution than having numerous private airlines, whose primary focus should be on safely flying the plane from point A to point B, do the checking. Not only may this be the most effective way by cutting the amount of personnel needed by numerous airlines down to just TSA personal, but it may also be the best way in regards to privacy issues for two reasons. First, the fewer people pouring over individuals’ records the better. Second, SFPD is information that, when requested by the government, can hardly be called an invasion of privacy. SFPD includes date of birth and gender, both of which are found on a Certificate of Live birth, which is usually kept by a state or local government agency.

A. STATE-OF-THE-ART ADVANCED IMAGING TECHNOLOGY

Regardless of whether the threats have become so great or the technology has advanced to such a degree (or both), “TSA began deploying state-of-the-art advanced imaging technologies in 2007.” TSA claims that, in only a matter of seconds, “[t]his technology can detect a wide range of threats to transportation security,” and will protect passengers and airline crews. TSA currently utilizes two types of imaging technol-

85. Id. at 24. SFWG’s primary concern was that TSA had not articulated specific goals for Secure Flight and had no way of knowing whether TSA’s goals were realistic, attainable, or how TSA would achieve them. Id.
86. Id.
87. TSA FAQ, supra note 81. SFPD consists of: name as it appears on government-issued I.D. when traveling, date of birth, gender, and a redress number (if applicable). Id.
88. Id.
89. Id. TSA articulates five goals for Secure Flight on its website: (1) “[i]dentify known and suspected terrorists,” (2) “[p]revent individuals on the No Fly List from boarding an aircraft,” (3) “[s]ubject individuals on the Selectee List to enhanced screening to determine if they are permitted to board an aircraft,” (4) “[f]acilitate passenger air travel,” and (5) “[p]rotect individuals’ privacy.” Id.
90. Imaging, supra note 3.
91. Id.
ogy: the backscatter and the millimeter wave machines. The millimeter wave full-body scanner produces "an image that resembles a fuzzy photo negative," a three-dimensional image of your naked body. If the backscatter full-body scanner is used instead, the TSA claims that it will produce a two-sided "image that resembles a chalk etching" of your naked body. Some have called this a "virtual strip search" or "nude" scanners.

The above image is an example of the millimeter wave technology.

92. Id.
94. Testimony, supra note 1, at 6.
95. Id.
96. Id.
98. TSA, How it Works, supra, note 94.
In addition to privacy concerns and concerns regarding the efficacy of full-body scanners, many have also expressed concerns that full-body scanners expose air travelers to radiation emitted from the machines. However, according to TSA, "[b]ackscatter technology projects low level X-ray beams over the body to create a reflection of the body displayed on the monitor." TSA also claims that "[m]illimeter wave technology bounces harmless electromagnetic waves off the body to create a black and white three-dimensional image." Regardless of how scientific and harmless TSA tries to make these machines sound, many commentators have called the screening technique highly invasive and a "virtual strip-search."

99. Id.
101. TSA How it Works, supra, note 94 (emphasis added).
102. Id. (emphasis added).
B. Fourth Amendment History and Its Application in Airports

Although Colonial residents could not imagine a "virtual strip search," or modern air travel, they were all too familiar with the abuses of personal privacy that transferred from Great Britain to the American Colonies. Having been subjected to general warrants and writs of assistance, the Founding Fathers had good reason to protect against such abuses in the Constitution.

The immediate object of the Fourth Amendment was to prohibit the general

104. This picture was taken August 11, 2010, by the author at the Denver International Airport. The words “All persons and property are subject to additional screening beyond this point” greet passengers just after some passengers have been searched by full-body scanners. The sign is probably ignored by most passengers, but it begs the question of when enough is enough. While this article will not discuss screening that occurs after passengers have gone through the security checkpoint to get into the airport, which is where the search by full-body scanners takes place, TSA has announced that they will begin randomly swabbing passengers hands and luggage in conjunction with Explosive Trace Detection technology used not only at the security checkpoint but also after they have passed through the security checkpoint in the boarding areas. Transp. Security Admin., TSA Expands Use of Explosive Trace Detection Technology at Airports Nationwide, February 17, 2010, available at http://www.tsa.gov/press/releases/2010/0217.shtml.


106. Id. at 15. General warrants and writs of assistance were both used in colonial times. General warrants “required no oath or affirmation to support their claims, no grounds explaining the basis of suspicion as to why someone had broken the law, and placed no limits on the locations to be searched or the objects which could be seized.” The general warrant was “limited to a single specific event that created the cause behind the search. Writs of assistance were similar, but . . . continued in operation until six months after the death of the sovereign under whom they were issued.” The Court of the Star Chamber was created to broaden the broad search and seizure powers of the government and approved of the King’s messengers’ practice of searching “any subject at any time, day or night, to enforce the laws . . .” Id. at 15-16.
warrants and writs of assistance that English judges had employed against the colonists [internal citations omitted]. That suggests, if anything, that founding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness. 107

Soon after declaring independence, eight states included protections against abusive searches and seizures in their state constitutions; five states proposed amendments to the United States Constitution providing similar protections during the ratification debates. 108 When all was said and done, the Fourth Amendment of the United States Constitution was sent to the states and ratified in 1791.109 The Fourth Amendment guarantees:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.110

The issue with advanced imaging technology is whether it infringes on the “right of people to be secure in their persons” from “unreasonable searches” in an airport setting. The threshold question is whether the Fourth Amendment is applicable in an airport setting. When one walks into an airport, he or she is typically greeted by long lines of people being herded barefoot through metal detectors and x-ray machines while their bags are also being screened. Congress has mandated that “[t]he Under Secretary of Transportation Security shall provide for the screening of all passengers and property,”111 and that “the screening shall take place before boarding and shall be carried out by a Federal Government employee.”112

The answer to whether the Fourth Amendment applies to security searches at airports is an easy one, thanks to the explicit wording in 49 U.S.C.S. § 44901113 calling for all passengers to be screened by federal government employees. Years before the statute was enacted, the United States Supreme Court, in Burdeau v. McDowel, made it clear that the Fourth Amendment “protection applies to government actions. . . . it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than government agen-

108. McINNIS, supra note 105, at 19.
109. Id. at 20.
110. U.S. CONST. amend. IV.
112. Id. (emphasis added).
113. Id.
The Fourth Amendment is needed more than ever to protect against unfettered airport security screening—the modern-day equivalent of a general warrant—where suspicion is not based on probable cause, where there is no sworn oath or affirmation, and where one’s body and luggage are subject to invasive searches.

As a general rule, in order to be considered reasonable under the Fourth Amendment, searches must be based on probable cause and “conducted pursuant to a judicially issued warrant.” Courts have managed to come up with numerous justifications to keep airport security screenings within the bounds of the Fourth Amendment. For example, courts have found airport searches reasonable where “exigent circumstances” exist, or when the right to be free from unreasonable searches has been waived, and courts have even distinguished airport searches as administrative searches. However, courts have found the “critical zone” or border theory most persuasive because an “airport, like the border crossing, is a critical zone in which special fourth amendment considerations apply.”

In United States v. Skipwith, the Fifth Circuit Court of Appeals applied the critical zone test. In 1971, unwilling to present identification and having met the FAA anti-hijacking profile, Lee Skipwith III was de...

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115. McINNIS, supra note 105, at 15.
116. DEMPSEY ET AL, supra note 24, at 9-34.; see Katz v. United States, 389 U.S. 347, 357 (1967) (stating, “Searches conducted without warrants have been held unlawful ‘notwithstanding facts unquestionably showing probable cause’ for the Constitution requires ‘that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . . Over and again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes,’ and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”) (internal citations omitted) (citing Wong Sun v. United States, 371 U.S. 471, 481-482 (U.S. 1963); U.S. v. Jeffers 342 U.S. 48, 51 (1951); Agnello v. United States, 269 U.S. 20, 33 (U.S. 1925)).
117. While this paper will not discuss exceptions to the warrant requirement imposed by the Fourth Amendment outside the context of airport searches, there are many United States Supreme Court cases that do discuss exceptions in various scenarios. See, e.g., United States v. Robinson, 414 U.S. 218, 224 (1973) (discussing warrantless searches incident to arrest); Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 310 (1967) (stating warrantless searches are justified if officers are in “hot pursuit”); Coolidge v. New Hampshire, 403 U.S. 443, 465, (1971) (declaring that “under certain circumstances the police may seize evidence in plain view without a warrant.”).
118. DEMPSEY ET AL, supra note 24, at 9-62.
119. See United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973); see also United States v. Herzbrun, 723 F.2d 773, 775 (11th Cir. 1984) (embracing tripartite analysis set forth in Skipwith); United States v. Albarado, 495 F.2d 799, 805 (2d Cir. 1974) (considering need for the search, ‘inefficiency’ of search, and intrusion on privacy interests).
120. United States v. Moreno, 475 F.2d 44, 51 (5th Cir. 1973).
121. Skipwith, 482 F.2d at 1274-77.
tained at the Eastern Airlines boarding gate at the Tampa International Airport and questioned by a deputy United States marshal.\(^{122}\) The court noted that Skipwith had not simply been stopped and frisked\(^ {123}\) by the marshal, but Skipwith had reported to the boarding area where "he knew or should have known all citizens were subject to being searched."\(^ {124}\) The court found that the airport search of Skipwith at the boarding gate was constitutional because

the standards for initiating a search of a person at the boarding gate should be no more stringent than those applied in border crossing situations. In the critical pre-boarding area where this search started, reasonableness does not require that officers search only those passengers who meet a profile or who manifest signs of nervousness or who otherwise appear suspicious.\(^ {125}\)

While endorsing the critical zone theory, the court set forth a three-part balancing test.\(^ {126}\) The court stated that while the dangers posed by air piracy were even greater than the dangers at border crossings, necessity alone does not make a non-probable-cause search reasonable.\(^ {127}\) "Reasonableness requires that the courts must weigh more than the necessity of the search in terms of possible harm to the public."\(^ {128}\) The court identified three factors in its balancing test: (1) public necessity, (2) efficacy of the search, and (3) degree of intrusion.\(^ {129}\)

C. THE TRIPARTITE TEST TO DETERMINE THE REASONABleness OF AIRPORT SEARCHES

Applying this test to TSA’s plan to implement advanced imaging technology,\(^ {130}\) the dangers posed by terrorists and other evil-doers makes factor one—public necessity—not even debatable.\(^ {131}\) There is no question that public safety calls for a thorough and effective screening pro-

\(^{122}\) Id. at 1273.

\(^{123}\) Id. at 1274; see also Terry v. Ohio, 392 U.S. 1, 27 (1968) (creating exception to warrant requirement in situations where a law enforcement officer would be allowed to “stop and frisk” someone without probable cause in search of a weapon if law enforcement officer had reasonable suspicion that he might be in danger).

\(^{124}\) Skipwith, 482 F.2d at 1274.

\(^{125}\) Id. at 1276.

\(^{126}\) Id. at 1275.

\(^{127}\) Id.

\(^{128}\) Id.

\(^{129}\) Id.; see also Herzbrun, 723 F.2d at 775 (embracing three part analysis set forth in Skipwith); Albarado, 495 F.2d at 805 (considering need for search, “inefficiency” of search, and intrusion on privacy interests).

\(^{130}\) Imaging, supra note 3.

\(^{131}\) See United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973) (concluding that deterring and preventing airplane hijackings is “unquestionably grave and urgent”), overruled by United States v. Aukai, 497 F.3d 955 (9th Cir. 2007); United States v. Hartwell, 296 F. Supp. 2d 596, 602 (E.D. Pa. 2003) (stating “[l]ittle controversy exists regarding the first two factors, public neces-
cess. However, we should be just as skeptical as the founding-era citizens were "of using the rules for search and seizure set by government actors as the index of reasonableness."132

The second factor—efficacy of the search—is much more controversial. In fact, a lawsuit filed July 2, 2010, by the Electronic Privacy Information Center ("EPIC")133 may eventually bring this issue before the United States Supreme Court. EPIC is arguing for the suspension of the deployment of the full-body scanners because it claims they violate the Privacy Act, the Administrative Procedure Act, the Religious Freedom Restoration Act, and the Fourth Amendment.134 EPIC specifically cited the invasive nature of the devices and TSA's disregard of public opinion.135 In its lawsuit, EPIC also stated that full-body scanners are "unlawful, invasive, and ineffective."136 The President of the EPIC previously testified before Congress asking it to halt the plan to deploy the full-body scanners.137

Under Skipwith, "virtual strip searches" that full-body scanners offer are not effective enough to be constitutional when compared to how invasive they are. While many, such as EPIC and the American Civil Liberties Union ("ACLU") are questioning whether the new security screening will be very effective,138 so too is the GAO.139,140 In a report released on March 17, 2010, the GAO stated "it remains unclear whether the AIT (advanced imaging technology) would have detected the weapon used in..."
the December 2009 [Christmas Day bombing attempt] incident.”

An argument is being made that terrorists can hide explosives by molding them against their body, putting them in body cavities, or placing them in folds of skin. This would make explosives and the like impossible to detect with a full-body scan. Rumors have even been reported that women suicide bombers, recruited by al-Qaeda, are having explosives inserted into their breasts using techniques similar to breast augmentation surgery. As the screening technology adapts so do the terrorists. This is not to say that it is a winless battle, but it makes it that much more imperative to ensure that law-abiding Americans are not subjected to humiliating, intrusive, and most importantly, unreasonable searches that in the end are not as effective at stopping terrorists as one might think. We must be very careful when asking citizens to trade their privacy in the hope for safety.

In 2009, CBS News reported that an al-Qaeda terrorist was able to smuggle a pound of high explosives (and the detonator) in his rectum, all in an attempt to assassinate Prince Mohammed Bin Nayef, head of Saudi Arabia’s counterterrorism operations. Luckily, the assassination attempt only left the victim slightly wounded. Before making his way to the prince, the “Trojan bomber” had avoided detection by airport secur-

141. A Nigerian national attempted to blow up Northwest Flight 253 from Amsterdam to Detroit on December 25, 2009. OFFICE OF THE PRESS SECRETARY, WHITE HOUSE, White House Review Summary Regarding 12/25/2009 Attempted Terrorist Attack, Jan. 7, 2010, available at http://www.whitehouse.gov/the-press-office/white-house-review-summary-regarding-12252009-attempted-terrorist-attack. The attempt failed and the plane landed safely after the terrorist had been restrained. Id. President Obama directed the Assistant to the President for Homeland Security and Counterterrorism to complete a complete review of the terrorist watchlisting system and required key departments and agencies provide input into the review. Id. While applauding the strides that have been made since September 11, 2001, the preliminary White House review blamed “human errors and a series of systematic breakdowns” for failing to stop the terrorist from boarding the plan to the United States. Id.

142. GAO also recognized that TSA has yet to complete a cost-benefit analysis and recommended that they do so. Testimony, supra note 1, at 10. GAO estimates increases in staff alone to cope with TSA’s plan to increase the use of advanced imaging technology as a primary search device could cost up to $2.4 billion over the plan’s expected service life. Id.


146. MacVicar, supra note 146.
It is unlikely that a full-body scanner would be any more effective in detecting the explosives. GAO reports that advanced imaging technology only performed as well as physical pat downs in operational tests.

Italy has found the same problems and says that the scanners actually take longer than a physical pat down. The Italian daily Corriere della Sera recently reported that after six months of testing, Italy will stop using full-body scanners at security checkpoints in airports. In fact, the scanners are already no longer in use at airports in Rome, Venice, and Palermo because the Italian government not only found them to be slow, but also to be ineffective for detecting weapons and explosives.

While the technology can see beneath clothing, the image produced by a full-body scanner does not reveal items beneath the surface of the skin. According to TSA’s website, the full-body scanner “detects metallic and non-metallic threats, including weapons, explosives and other items that a passenger is carrying on his/her person, without physical contact.” Some believe that the “carrying on” the person is not the same as “carrying in” the person, thereby making the new machines ineffective in detecting “Trojan” or “bosom” bombers.

Another problem with the machines’ efficacy could be the fact that their locations are published. TSA has published plans to deploy 450 full-body imagers by the end of 2010, with maps easily accessible on the TSA website of where these machines currently are and where they will be located. Terrorists can easily avoid the airports that contain this technology simply by looking at TSA’s website. Only time will tell if a successful argument can be made that giving legitimate air travelers who have been subjected to the electronic full-body search a false sense of security (when in fact the terrorists are avoiding airports that use full-body scanners) in and of itself makes the search unreasonable.

147. Id.
148. Testimony, supra note 1, at 9.
151. Id.; Italian Airport Security Axing Body Scanners, supra note 148.
152. Electronic Privacy Information Center, supra note 132.
154. American Civil Liberties Union, supra note 96.
155. Imaging, supra note 3.
156. Id.
The third and final prong\textsuperscript{157} of the test—degree of intrusion—could spell doom for airport virtual strip searches. The \textit{Skipwith} court recognized the intrusion of airport searches as “inconvenient and annoying, in some cases it may be embarrassing, and at times it can be incriminating.”\textsuperscript{158} However, it spent very little time discussing the intrusive nature of the searches and instead addressed the factors that it claimed made airport searches less offensive than in other contexts.\textsuperscript{159} The court stated that the search of Skipwith was not intrusive to the degree of unreasonableness because of the “almost complete absence of any stigma” of being searched at the airport, a known and designated search point.\textsuperscript{160}

Distinguishing airport searches from those conducted on “dark and lonely streets at night,” the court was confident that the “circumstances under which the airport search is conducted make it much less likely that abuses will occur.”\textsuperscript{161} The argument that there was no stigma attached to Skipwith’s search would not have held water had Skipwith been searched by a full-body scanner. Abuses and indiscretion are sure to follow a virtual strip search. One need only ask Rolando Negrin, a TSA worker at the Miami International Airport, about the stigma associated with being searched by the full-body scanners.\textsuperscript{162} Mr. Negrin finally snapped after being subjected to jokes about the size of his genitalia on a daily basis.\textsuperscript{163} The daily teasing started when Mr. Negrin stepped through a full-body scanner as part of a training exercise and his supervisor started to make fun of his genitalia, which was made visible by the machine.\textsuperscript{164} Because the search reveals intimate and private areas of one’s body, the stigma is inherent.

The court in \textit{Skipwith} focused on the fact that for one to be subjected to an airport search, one must go to the airport and voluntarily enter the boarding area where the searches are conducted.\textsuperscript{165} Accordingly, “the offensiveness of the screening process is somewhat mitigated” by this fact.\textsuperscript{166} At least two federal circuit courts of appeal disagree.\textsuperscript{167}

\textsuperscript{157} \textit{Skipwith}, 482 F.2d at 1275.
\textsuperscript{158} \textit{Id}.
\textsuperscript{159} \textit{Id.} at 1275-76.
\textsuperscript{160} \textit{Id}.
\textsuperscript{161} \textit{Id.} at 1276.
\textsuperscript{163} Shepard & Hamacher, supra note 161.
\textsuperscript{164} \textit{Id}.
\textsuperscript{165} \textit{Skipwith}, 482 F.2d at 1275-76.
\textsuperscript{166} \textit{Id}.
\textsuperscript{167} United States v. Kroll, 481 F.2d 884, 886 (8th Cir. 1973) see also \textit{Albarado}, 495 F.2d at
**United States v. Kroll**, the Eighth Circuit affirmed the district court’s order granting defendant’s motion to suppress evidence after having been subjected to a mandatory, warrantless search at the airport.¹⁶⁸ The defendant fit the airline’s terrorist profile and was required to pass through a magnetometer machine before being granted entry to his commercial flight.¹⁶⁹

The court rejected the government’s argument that the suppressed evidence should have come in because the defendant had consented to the search by attempting to board the plane.¹⁷⁰ The Eighth Circuit agreed with the district court that this act alone did not constitute consent in any meaningful sense . . . . Compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion; the government cannot be said to have established that the defendant freely and voluntarily consent[ed] to the search when to do otherwise would have meant foregoing the constitutional right to travel.¹⁷¹

Compelling travelers to submit to a virtual strip search before exercising their constitutionally guaranteed right to travel (especially when the search’s degree of intrusiveness is much greater than its efficacy) can hardly be called free and voluntary consent.

According to TSA, the use of full-body scanners is currently optional.¹⁷² However, passengers who refuse to submit to this search are required to submit to “an equal level of screening, including a physical pat-down.”¹⁷³ Thus, it is “optional” in that the sense that one has a choice between a rock and a hard place. This does not constitute consent when the other option is to submit to a physical pat-down or forfeit your flight all together. Additionally, the “option” to avoid the full-body scanners will not last very long. According to a GAO report, “TSA plans to procure and deploy 1,800 AITs by 2014 and use them as a primary screening measure.”¹⁷⁴ A primary screening measure is conducted on *all* airline passengers *before* they are allowed to board a commercial flight, as opposed to secondary screening, which occurs when a passenger trig-

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¹⁶⁸. Kroll, 481 F.2d at 887.
¹⁶⁹. *Id.* at 885.
¹⁷⁰. *Id.* at 886-87.
¹⁷³. noagendapdfs.org, *supra* note 152.
gers an alarm during primary screening and is then selected for additional screening.\footnote{175}

The United States Supreme Court has found that while the word “travel” is not found in the Constitution, it is nonetheless a constitutional right.\footnote{176} There is, however, an argument that traveling by plane is simply a mode of transportation and that the mode is not constitutionally protected. The Second Circuit has addressed the mode of transportation question, specifically as it applies to travel by plane.\footnote{177} It stated that consent, based on the mere fact that a passenger has notice of a mandatory search before being allowed to board an airplane, was analogous to the government announcing that all telephones would be tapped in order to counter an outbreak of political kidnappings.\footnote{178}

The court rejected the proposition that anyone using a telephone consented to a search, even if the public were aware of the government’s wiretapping plan and had the opportunity to avoid using the phone.\footnote{179}

It would not matter that other means of communication exist—carrier pigeons, two cans and a length of string; it is often a necessity of modern living to use a telephone. So also is it often a necessity to fly on a commercial airliner, and to force one to choose between that necessity and the exercise of a constitutional right is coercion in the constitutional sense.\footnote{180}

The court’s statement is truer today than when it was made in 1974.\footnote{181} Certainly the expectations of the twenty-first century dictate that a business person occasionally must be in New York City one day and in Los Angeles the next.

Considering other modes of transportation, the airplane is not only the fastest and cheapest way, but it is the only way to make it from New

\footnotesize{\textsuperscript{175}} Id.
\footnotesize{\textsuperscript{176}} See Saenz v. Roe, 526 U.S. 489, 498-99 (1999) (stating that “[t]he word ‘travel is not found in the text of the Constitution. Yet the constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.”); Shapiro v. Thompson, 394 U.S. 618 (1969) (viewing the right to travel as “fundamental” and triggering strict scrutiny of classifications impinging on that right that would otherwise receive rationality review), overruled in part by Edelman v. Jordan, 415 U.S. 651 (1974); United States v. Guest, 383 U.S. 745, 757 (1966) (stating “freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.”).
\footnotesize{\textsuperscript{177}} Albarado, 495 F.2d at 807.
\footnotesize{\textsuperscript{178}} Id.
\footnotesize{\textsuperscript{179}} Id.
\footnotesize{\textsuperscript{180}} Id.
\footnotesize{\textsuperscript{181}} According to the National Transportation Safety Board, an independent U.S. Federal agency charged by Congress with investigating every civil aviation accident in the United States, Americans feel the need to fly now more than ever. See Kraus, supra note 42, at 173. In 1978, four years after the Albarado court, there were 328 million enplanements—paying customers—in the United States. Id. In 2008 that had more than doubled to 776 million enplanements. Id. In 1978 there were 13,830 airports. Id. By 2008 there were 19,815. Id.
York City to Los Angeles in one day. A ticket from John F. Kennedy International Airport to Los Angeles International would cost around $149 and would take about six and half hours in the air.\footnote{182 Not including taxes, one-way coach ticket with a two-week notice. Delta.com, www.Delta.com (last visited April 6, 2010).} Taking the train would cost about $197, take sixty-seven and a half hours, and would require at least one train change.\footnote{183 Not including taxes, one-way adult ticket with a two-week notice, requires five-and-a-half-hour stop and train change in Chicago. Amtrak, www.amtrak.com (last visited April 6, 2010).} Another option would be to drive. Driving a car would take about forty-two and half hours\footnote{184 Hours calculated by Mapquest. Mapquest, www.mapquest.com (last visited April 6, 2010).} behind the wheel, cost about $358 in fuel,\footnote{185 Fuel cost calculated at twenty-five miles per gallon by Mapquest. Mapquest, www.mapquest.com (last visited April 6, 2010). Average gas price reported by AAA. AAA, http://www.fuelgaugereport.com (last visited Oct. 2, 2010).} and cost about $39.20 a day to rent the car.\footnote{186 Rental cost calculated with renting a car for three days to make the trip from JFK to LAX, pick-up at JFK and drop-off at LAX, pricing an economy car. Dollar Rental Car, www.dollar.com (last visited April, 6 2010).} It goes without saying that in the modern era, traveling by plane can sometimes be, effectively, the only way to travel—the definition of a necessity. It can hardly be said that one is willingly and freely consenting to a full-body search simply by attempting to board a plane, especially when flying may be the only way to get to one's destination.

Returning to the intrusive prong of the test, TSA boasts that there is no physical contact when submitting to the new screening technology, but that the millimeter wave full-body scanner produces “an image that resembles a fuzzy photo negative;”\footnote{187 Imaging, supra note 3.} a three-dimensional image of your naked body. If the backscatter full-body scanner is used instead, TSA claims that it will produce a two-sided\footnote{188 Testimony, supra note 1, at 6.} “image that resembles a chalk etching” of your naked body.\footnote{189 Id.} Some have called this a “virtual strip search”\footnote{190 Id.} or “nude” scanners.\footnote{191 Jeremy Barker, How Does It Work? Full Body Scanners, NATIONAL POST, Jan. 5, 2010, available at http://network.nationalpost.com/np/blogs/postedJarchive/2010/01/05/how-does-it-work-full-body-scanners.aspx. See also Jerome Tuccille, Airport Passengers Bare All for Nude Scanners, EXAMINER.COM, Oct. 20, 2010, http://www.examiner.com/civil-liberties-in-national/airport-passengers-bare-all-for-nude-scanners (last visited Apr. 6, 2010).} Unlike previous airport searches where
one simply walked through a magnetometer, the government’s search technique has become much more intrusive because air travelers are now being forced to allow Uncle Sam see them naked.

D. HAS THE AIRPORT SEARCH EVOLVED INTO A “VIRTUAL STRIP SEARCH”?

Similar to the full-body scanners, a “visual strip search” does not involve physical contact. A visual strip search does require one to remove one’s clothing, but full-body scanners make the physical removal of clothing unnecessary. Another difference is that “[t]he application of the Fourth Amendment to warrantless strip searches has been developed largely in cases involving such searches in prisons and in schools,” while the “virtual strip search” takes place in airports prior to boarding the airplane. And while both searches are highly invasive search techniques that reveal the subject’s sexual anatomy, TSA’s virtual strip search is not conducted pursuant to a warrant, let alone suspicion. In Reynolds v. City of Anchorage, a female police officer conducted a “visual strip search” where she instructed each person subject to the search to remove their clothing and undergarments and “bend over to allow a visual inspection of [their] rectal area.” “[The female police officer] never physically touched any [one] during the searches.”

Considering these circumstances, the Reynolds court quoted Bell v. Wolfish and determined that the reasonableness of a strip search requires the court to balance “the need for the particular search against the invasion of personal rights that the search entails.” Applying the Fourth Amendment to warrantless strip searches has largely been tested by cases involving such searches in prisons and schools. Despite the difference in settings, Reynolds and Bell are still instructive in the Fourth Amendment inquiry because the searches are similar and because airports are “unique places[s] fraught with security dangers,” like prisons

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193. Id.
194. Imaging, supra note 3; see also Testimony, supra note 1, at 5-6.
195. Reynolds, 379 F.3d at 362.
196. Id. at 361.
197. Id.
199. Reynolds, 379 F.3d at 364 (quoting Wolfish, 441 U.S. at 559).
200. Id. at 362.
201. The full-body scanners bounce x-ray or electromagnetic waves off of one’s body allowing a TSA agent to see beneath the clothing without having to remove the clothing of the person subject to the search. Testimony, supra note 1, at 5-6. There is no physical contact. Id. A “visual strip search” allows the searcher to visually inspect the subject of the search without clothing on. Reynolds, 379 F.3d at 361. There is no physical contact. Id.
Additionally, cases dealing with both the Fourth Amendment and strip searches focus on balancing "the need for the particular [strip] search against the invasion of personal rights that the search entails."\(^{203}\)

In balancing the needs for a search against the invasion of personal rights imposed by such a search, courts "must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."\(^{204}\) Strip searches have then been deemed reasonable in their "scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the [subject of the search] and the nature of the infraction."\(^{205}\)

First, the scope of the intrusion caused by full-body scanners is aimed at finding weapons and explosives. Second, the manner in which TSA conducts the searches appears to be straightforward. The subject of the search will walk into the "imaging portal," be asked to remain still while assuming different positions, all while the full-body scanner "creates an image of the passenger in real time." The manner in which the search is conducted seems to be minimally embarrassing, but that does not mean that the search is not—as the TSA agent at the Miami airport could testify. The image that is created and studied remotely by a Transportation Security Officer\(^{206}\) is highly personal. TSA claims that the image produced cannot be used for personal identification but the Department of Homeland’s Security Privacy Impact Assessment Update for TSA Whole Body Imaging report is quick to point out that the image quality is continually improving.\(^{207}\)

Third, the justification for full-body scanners is to keep the public safe and avoid another September 11th type attack. While this justification is laudable, the means seem to be a little too broad. The scanners will eventually be the primary search technique used to screen all commercial airline passengers regardless of the fact that the overwhelming majority of passengers are completely suspicionless. However, the September 11th attacks were carried out by only a small group of terrorists. Fourth, the search will end up being carried out in every airport that caters to those flying on commercial flights. Courts must then balance the

\(^{202}\) Reynolds, F.3d at 362 (quoting Wolfish, 441 U.S. at 559).
\(^{203}\) Id. (quoting Wolfish, 441 U.S. at 559).
\(^{204}\) Id. (quoting Wolfish, 441 U.S. at 559).
\(^{205}\) Id. at 363 (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).
\(^{207}\) Id.
above criteria against the need of the search, which, admittedly, is very high. However, considering that Uncle Sam is taking a photo of travelers' naked bodies, this invasion of personal rights is at an all-time high level. The questions remains, if this type of invasion of personal rights imposed by the search does not outweigh the need for the search, how far are we willing to allow our government to invade into our personal privacy.

Moving on to address the reasonableness aspect, TSA has adopted full-body scanners in an attempt to address holes in security that were exposed by the 2009 attempted Christmas Day Bomber.\(^\text{208}\) While this appears to be reasonably related to the objectives of the search, full-body scanners should still face scrutiny because they are inherently intrusive in addition to the fact that their use has not been qualified as to the age or sex of the subject.\(^\text{209}\) And as mentioned above, the government itself has doubts as to whether the full-body scanner would have been effective in spotting the Christmas Day Bomber—the whole reason for the step-up in plans to deploy full-body scanners.\(^\text{210}\) Additionally, the only infraction that those who are being subjected to the full-body scanners are guilty of—at least before the search—are showing up at the airport to exercise their constitutional right to travel.\(^\text{211}\)

E. THE RIGHT TO PRIVACY MEETS ADVANCED IMAGING TECHNOLOGY

Like the right to travel, the Constitution does not explicitly mention any right to privacy.\(^\text{212}\) Also like the right to travel, the United States Supreme Court has found that a right to privacy exists, and has used it to protect personal privacy against unlawful intrusion by the government.\(^\text{213}\) The right to privacy has been found to protect against unjustified government interference with personal decisions relating to education, marriage, procreation, contraception, family relationships, and child rearing.\(^\text{214}\)

Being broad enough to encompass a woman's reproductive decisions,\(^\text{215}\) it isn't a stretch of the imagination to believe that the right to privacy includes the right to keep an image of one's naked body from being scrutinized by an unknown federal employee in a remote area.

\(^\text{208}\) Testimony, supra note 1, at 1.
\(^\text{209}\) See Imaging, supra note 3.
\(^\text{210}\) Testimony, supra note 1, at 9.
\(^\text{211}\) See Albarado, 495 F.2d at 806-07.
\(^\text{213}\) Id.
\(^\text{214}\) Id. (citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)).
While claiming that the machines will not be used to store and send images, Homeland Security has admitted that they can store images.\textsuperscript{216} This only adds further questions and debate, including questions regarding whether these machines will violate other federal laws, such as laws against the sexual exploitation of children.\textsuperscript{217}

The two final prongs of the \textit{Wolfish} test seem to go hand in hand. The justification for initiating the full-body search is to keep explosives and other weapons off airplanes. The reason the search is conducted in an airport is because that is where people go to board the airplane. It appears to be clear from the statistics and cases already cited in this paper that the justification is more than reasonable. The location of the search actually takes place in two places. The first location of the search takes place in plain sight right out in the open space of the airport, where the subject of the search walks into the full-body scanner.\textsuperscript{218} But then the machine makes an \textit{unage} of the subject and transmits it to a transportation security officer ("TSO") in some remote location where the image is studied and searched for prohibited items.\textsuperscript{219}

To the \textit{Reynolds'} court, it was important to the reasonableness of the visual strip search that it was made in the "privacy" of a private room and in the presence of only one other person.\textsuperscript{220} Likewise, when the full-body scanner creates the naked image the search will be conducted in a private room.\textsuperscript{221} However, it will be in a secured and remote room that is off-limits to and away from the naked image's "owner." Essentially, the search isn't even conducted in the presence of the subject of the search: "the TSO will not be able to see the actual individual" and the individual will not be able to see the TSO.\textsuperscript{222} This seems to make the search even more intrusive because one never has any actual personal knowledge of what happens to that image. It is up to one's own imagination to picture what actually is going on when one's own naked image is being searched. Perhaps that is how the government is trying to address the right to privacy issue: how can one have a right to privacy when one is not even physically present when the intrusive aspect of the search is conducted?

However, the location of the full-body scanner is in the open for all to see.\textsuperscript{223} "Courts across the country are uniform in their condemnation

\textsuperscript{216} U.S. DEP'T OF HOMELAND SECURITY, supra note 205, at 7.
\textsuperscript{217} See 18 USCS § 2252(a) (2010) (containing laws against sexual exploitation and other abuses of children).
\textsuperscript{218} Imaging, supra note 3.
\textsuperscript{219} Id.
\textsuperscript{220} Reynolds, 379 F.3d at 365.
\textsuperscript{221} Imaging, supra note 3.
\textsuperscript{222} U.S. DEP'T OF HOMELAND SECURITY, supra note 205, at 5.
\textsuperscript{223} Imaging, supra note 3.
of intrusive searches performed in public."\textsuperscript{224} Albeit discussing strip searches conducted by police officers in a holding cell, at least one court has stated that a strip search is, as a matter of law, not reasonable when it is conducted "in an area exposed to the general view of persons known to be in the vicinity whether or not any actually viewed the search," and is an invasion of the right to privacy.\textsuperscript{225} Likewise, the full-body scanners will perform a search in a public area, but where the general public will not "actually view[] the search."\textsuperscript{226}

F. ALTERNATIVES TO THE FULL-BODY SCANNER

There are many other tactics that the government could use to screen and protect privacy rights. One is the possibility of reduced or eliminated government involvement. The "Registered Traveler" program is a privatized effort to develop profiling systems that operate on a voluntary basis.\textsuperscript{227} Under the Registered Traveler program, "Trusted Travelers" voluntarily submit biographical information, fingerprints, iris images, and pay a membership fee.\textsuperscript{228} After successfully passing a security threat assessment (conducted by TSA), a Trusted Traveler is able to bypass airport screening processes and head straight to a special screening lane.\textsuperscript{229} One of the problems with Registered Traveler is that only a few passengers are going to be Trusted Travelers.

While the Registered Traveler has limited government interferences, another option is to take the government out of the security screening business. Much like Hotwire, Travelocity, and other internet travel agencies set up flights now, a private business could connect airline passengers with smaller chartered planes to bypass TSA checkpoints all together. If purchasers of airline tickets were united in their purchasing power, passengers could ensure that the person next to them is not a terrorist by flying on a private chartered plane. Private companies could act as the middle-man and connect persons wanting to travel to particular destinations with other passengers wanting to go to that destination. Those wanting to get on to these smaller chartered planes could go through a private (as opposed to government mandated) thorough screening and background check before being allowed onto the plane.

While there may be problems with increased air traffic and other problems, a system could be worked out that would assure passengers that not only are they safe to fly, but so is the passenger next to them.

\textsuperscript{224} Campbell v. Miller, 499 F.3d 711, 719 (7th Cir. 2007).
\textsuperscript{225} Logan v. Shealy, 660 F.2d 1007, 1014 (4th Cir. 1981).
\textsuperscript{226} Id.
\textsuperscript{227} Ravich, supra note 28, at 25.
\textsuperscript{228} Id. at 25-26.
\textsuperscript{229} Id.
While “profiling” has acquired a strong negative connotation, another avenue in protecting our citizens may be to follow Israel’s lead when it comes to passenger screening. This paper does not focus on the pros and cons of adopting a behavioral profiling system such as Israel’s, but there is an “important, irrefutable, field-tested assertion: persons about to hijack an airplane and end their own lives behave differently than do other persons; these behavioral differences are subtle, but observable to the trained eye.” If someone were to trip the behavioral profile, that would give probable cause for TSA to do a more invasive search, something similar to a full-body scan. Unfortunately in this day and age, it appears that there will have to be some sort of trade off of privacy for safe skies. In the end, it would be better to voluntarily give up some privacy for a more secure flight than to be stripped naked by an Uncle Sam for only a false sense of security.

IV. AFTER ALL IS SAID AND DONE, ARE FULL-BODY SCANNERS A DETERRENT TO TERRORISTS?

According to a USA Today/Gallup (“Gallup”) poll conducted January 5-6, 2010, seventy-eight percent of participants approved of U.S. airports using full-body scanners on air travelers. How a respondent reacted to Gallup depended on his or her gender. At forty-one percent and twenty-six percent respectively, female air travelers were more likely to express discomfort than male travelers when asked if they would be comfortable with being personally subjected to the scan. Regardless of

230. Id. at 37.
232. Harris, supra note 230, at 942.
One method of airport security that is expected to be used more widely at U.S. airports is a full body scan of passengers as they go through the security checkpoint. The full body scan would show a graphic image of a person’s body underneath his or her clothes. The image would be viewed only by federal screeners in a separate, private room. Do you approve or disapprove of U.S. airports using the full body scan on airline passengers?
234. Results based on telephone interviews with 542 adults who had taken two or more flights in the past twelve months. Id. For results based on the sample of 542 adults who have taken two or more air trips in the past year, the maximum margin of error is ±5 percentage points. Id.
235. Id.
the disparity in comfort level among the genders, Gallop reports that respondents overwhelmingly believed that full body scans would deter or prevent terrorists from being able to carry out their attacks (eighty-four percent said scans would be effective in preventing terrorists from smuggling explosives or other dangerous items onto planes, and thirty-eight percent believe that full-body scans would be very effective).236

Despite the respondents' confidence that full-body scans would be effective at stopping terrorists, as noted above, the many departments that are within the federal government do not all share that confidence.237 GAO doubts that advanced image technologies, or full-body scanners, would have effectively prevented the attempted bombing of the Northwest flight on Christmas Day 2009.238 And also mentioned above, Italy, a United States' ally in the War on Terror, has already pulled the plug on the full-body scanner because it believes that they are not effective.239

As the threat of terrorists hiding explosives in body cavities, Trojan bombers or bosom bombers, becomes more of a reality, the current full-body scanners would not be effective because they can only spot things above the skin.240 Not being effective at stopping terrorists, the current full-body scanner would not be a deterrent to terrorists, and the federal government is in effect only screening law-abiding American citizens that have sacrificed their constitutional rights for a false sense of security.

V. CONCLUSION

The Wright Brothers believed that their flying machine would bring the end of all wars, but over the years, and especially after World War II and September 11, 2001, airline travel requires intrusive searches before one can even enjoy the exhilaration that comes with flying. Keeping in mind that it is the Constitution that protects the American public from unreasonable searches and protects the right to travel and the right to privacy, it behooves us to never allow terrorists to strip us of those protections out of fear. Fear can cause the government to be less effective in its search for the real enemy and more intrusive into the lives of the governed. The fear that the Christmas Day Bomber of 2009 caused has spurred TSA to roll out the full-body scanners with an eye to use them as a primary search measure. While it is unclear whether these machines would have been effective in preventing the bomber from boarding the

236. Id.
237. Testimony, supra note 1, at 9.
238. Id.
239. Italian Airport Security Axing Body Scanners, supra note 148; see also Italy to Abandon Airport Body Scanners, supra note 149.
240. Imaging, supra note 3.
plane, it is clear that we have become desensitized to our freedoms slipping away when the government can virtually strip away our clothing before allowing us to exercise the constitutional right of boarding a plane.

Finally, the need for some type of security screening at airports cannot be emphasized enough; however, the government needs to find a solution that will be more effective at spotting terrorists, more of a deterrent to terrorists, less intrusive of the American citizenry, and more respectful of the right to privacy. While there are many that believe the Fourth Amendment has been so weakened by its numerous exceptions to the point that it could not possibly be of any protection in an airport scenario, this paper has found enough strength in the Fourth Amendment that the end result should be that subjecting millions of suspicionless, law-abiding American citizens to questionably effective "virtual strip searches" before boarding a commercial flight is not constitutional.
Piracy, Sea Robbery, and Terrorism: Enforcing Laws to Deter Ransom Payments and Hijacking

Thaine Lennox-Gentle*

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I. INTRODUCTION

In the middle of November 2008, supertanker Sirius Star was captured by Somali pirates approximately 450 nautical miles off the coast of Kenya. The pirates held the ship, cargo and crew for two months, initially demanding $25 million in ransom from the Saudi ship owner. Over time the pirates eventually settled for $3 million, delivered in cash by parachute drop. After the pirates verified and divided the ransom, they left the ship and allowed the Sirius Star to sail into safe waters. By capturing this large vessel far outside of the Gulf of Aden, the Somali pirates demonstrated they were committed to continuing their piratical regime in addition to expanding their territory.

Although piracy is not limited to the navigable waters off the Somali coast, the area has had more successful recent attacks than any other region on earth. The success of these attacks is due in large part to the

3. Id.
4. Id. (photograph)
number of years the pirates have been operating in addition to the nature of the ships and cargos they hijack.

Since 1995, former fishermen from Somalia have perfected the technique of boarding ships without causing extensive damage to a vessel, cargo, or crew. The entire operation was treated like a business transaction, where hostages were treated well (i.e. not harmed) in exchange for a guaranteed ransom payment from a grateful ship owner or insurer. However, according to recent reports, events have become increasingly violent as the attacks against ships over the past five years have grown.

Conversely, Asian countries saw a drop of 26% in both attempted and successful hijackings between 2004 and 2008. Among other things, this drop has been attributed to the implementation of cooperative arrangements between countries that allow for the simple and easy exchange of information, an expansive definition of piracy, and constant

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8. Id. at 6.
reporting on recent pirate attacks or attempts.10

This paper will focus on U.S. and international laws that address piracy and present several alternatives, or combinations of alternatives, that may help combat the unlawful attacks on a global level. Like all good policies, an ounce of prevention is worth a pound of cure. By negatively affecting the proportionality of the pirate “risk v. reward” ratio, a nation can protect itself from becoming an easy pirate target. Moreover, by enforcing current laws against terrorism, the U.S. may use its existing policy to encourage local ship owners and insurers to find alternative means to paying ransoms to pirates. Using this combination of law and policy will force carriers, owners, and insurers to create a comprehensive strategy for preventing piracy while allowing them lawful access to a government’s military force in the event of an unforeseen attack. Before addressing the legal consequences of combating piracy and sea robbery, it is important to understand its history, the law, and definitions used in U.S. and international maritime law.

II. A HISTORY OF PIRACY AND SEA ROBBERY

The terms piracy and sea robbery have evolved over the history of maritime law to have different meanings based primarily on the location of an aggressive act upon a vessel. Initially, it was stated that piracy was mere sea robbery, without giving full credit to the negative effects that piracy had on international trade, commerce, and a nation’s navy.11 And, although piracy began as the random robbery of ships, especially of those engaged in commerce, it was not until piracy was sanctioned by nations in the middle ages before it elicited the complete disdain of most states.12 By better understanding the basic history of piracy, it becomes clear why the location of a piratical act is important to its definition.

Piracy has existed in some form or other since the beginning of maritime commerce.13 In their earliest history, pirates would attack a vessel, seize anything of value, and even torture or murder the crew.14 In addition to these depraved acts, early pirates engaged in instances of maritime kidnapping and ransom. One of the more famous instances of kidnapping occurred in 75 B.C. when Julius Caesar’s ship was attacked by pirates.15 The pirates, noticing that the young Caesar was a wealthy man,
demanded 20 talents ransom for his release.\textsuperscript{16} Upon hearing of the low ransom demand, Caesar laughed and suggested that he was worth at least 50 talents.\textsuperscript{17} When Caesar was eventually released he brought all of his captors to justice by crucifixion.

Later, specifically during the 16th century, pirates were used by nations to add to the strength and effectiveness of their naval resources.\textsuperscript{18} Known as privateers, these “pirates” were authorized by a nation to act on its behalf by “letters of mark.”\textsuperscript{19} The primary goals of these privateers were to bleed another country’s resources, to train new naval captains before battle officially began, and, in some instances, even to provoke war.\textsuperscript{20} Working under these letters of mark allowed pirates to engage in terrorist acts for the first time under the legal sanction of a controlling nation. Queen Elizabeth herself believed that the use of such state-sponsored terrorism was an “ideal way to strike one’s enemy and hide the blade.”\textsuperscript{21}

At the end of the Spanish wars, England and Spain found no need to use privateers in furtherance of war.\textsuperscript{22} In an act of good faith, King James I revoked all letters of mark and outlawed piracy in any form.\textsuperscript{23} This act resulted in hundreds of unemployed privateers to then seek full-time employment as pirates.\textsuperscript{24} No longer with a country to call their own, these pirates focused their efforts against all nations indiscriminately and raced to build their barbaric reputations to become the most ferocious.\textsuperscript{25,26} By 1856, most of the world’s maritime powers united to sign the Declaration of Paris that abolished piracy in all forms, including privateering and any state sponsorship of piracy.\textsuperscript{27}

After the signing of the Declaration of Paris, it was generally accepted that piracy was a much more serious crime than the simple act of robbery at sea. Pirates acting on their own behalf, without the political motivation of a controlling nation, were considered to be engaging in acts of “maritime terrorism.”\textsuperscript{28} Considering that acts of terrorism were condemned by most nations, pirates were classified in most international
laws as "hostes humani generis," or the "enemy of all mankind." By identifying pirates as those who were "at war" against all of civilization, the law would provide for any nation attacked by pirates to exercise universal jurisdiction over them. Typically, pirates are brought to justice under the jurisdiction of the nation who captures, and in turn takes responsibility for, the pirates. However, in accordance with the concept of universal jurisdiction, this responsibility could be asserted by any nation in the interest of justice.

III. DEFINING MODERN PIRACY

Although piracy is considered a crime against society, the United Nations Convention on the Law of the Sea ("UNCLOS") and U.S. maritime law have narrow definitions of what constitutes piracy. This narrow interpretation is in large part due to the restrictive language contained in the laws themselves. Specifically, the language of Article 101 of UNCLOS, and 18 U.S.C. § 1651, limit piratical acts to those occurring on the "high seas." Only those areas outside a nation's territorial waters are considered the high seas. Under UNCLOS, nations have the right to establish the breadth of their territorial waters not exceeding twelve nautical miles from their coastline. As a consequence, if a possible "piratical" act occurs in any nation's territorial waters the act may only qualify as sea robbery. This territorial limit distinguishing piracy from sea robbery, could be attributed to the sordid history of the effects of privateering and the heinous nature of attacking a ship while on the high seas far from the safety of any port.

In contrast to the definitions of piracy set forth under U.S. and U.N. law, the International Maritime Bureau ("IMB") has classified piracy and sea robbery together: "An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with

30. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES - UNIVERSAL JURISDICTION TO DEFINE AND PUNISH CERTAIN OFFENSES § 404 (2010) ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy . . . even where none of the bases of jurisdiction indicated in Sec. 402 is present.").
33. BLACK'S LAW DICTIONARY (9th ed. 2009) (seas, high seas: "The seas or oceans beyond the jurisdiction of any country. Under traditional international law, the high seas began 3 miles from the coast; today the distance is generally accepted as 12 miles.").
34. See UNCLOS, supra note 31, art. 3.
the apparent intent or capability to use force in furtherance of that act."\textsuperscript{35} Expanding the UNCLOS and U.S. definitions of piratical acts into a single definition allows the IMB to gather important data on existing credible threats regardless of arbitrary territorial sea boundaries. Once this information is assembled, the organization can easily identify high-threat areas, issue warnings to carriers, and possibly prevent future attacks in those regions. This important task, of acting as a central organization in compiling information on worldwide maritime attacks, is one reason the IMB was created.\textsuperscript{36}

For the purposes of this paper, the term "piracy" will be used in accordance with the definitions set forth under United Nations ("U.N.") and U.S. law. In examining the recent surge in piracy, data will be used from all attacks, as compiled by the IMB, to better understand the locations of "hot spots" and identify an appropriate course of action for dealing with known pirates.

**IV. Legal Strategies for Dealing with Piracy**

In addition to defining modern piracy, the nature of modern pirates must be better understood in order to formulate an effective plan for dealing with them. From recent acts of piracy off the Somali coast, it is evident that there are at least two classes of modern day pirate.

One class includes poor fishermen (especially of Somalia), who have had their waters exploited by foreign commercial fishing, turning to a life of piracy as a way to supplement their meager existence.\textsuperscript{37} These fishermen-pirates board ships with the intent of stealing personal belongings from the crew or anything of liquid value from the vessel. They do not intend to hijack the ship, kidnap the crew, or demand a ransom. In most instances, these pirates use their own fishing boats or homemade skiffs to launch attacks on opportune vessels.\textsuperscript{38}

The other class of pirate is an organized, armed, and motivated group of career-pirates with the skills and support required to coerce larger rewards.\textsuperscript{39} In most cases, these career-pirates operate further from the Somali coast, near the Seychelles and in the Gulf of Aden. By employing the use of a "mother ship," these pirate crews can quickly launch an attack on a vessel by deploying small speed-boats to chase a vessel once it has been targeted.\textsuperscript{40} After a show of force by the strategic use of

\textsuperscript{35} IMB Annual Report 2009, supra note 5, at 3.
\textsuperscript{36} Id. at 2.
\textsuperscript{37} PIRATE TACTICS, supra note 6, at 2.
\textsuperscript{38} See generally PIRATE TACTICS, supra note 6 (showing pirate attack tactics).
\textsuperscript{40} PIRATE TACTICS, supra note 6, at 2.
AK-47's and RPG's, the career-pirate crew will board a ship with the intent of hijacking the vessel, kidnapping the crew, and holding them both for ransom.\(^{41}\) These career-pirates have developed the infrastructure necessary to coordinate ransom drops, anchor a ship, and procure large amounts of weapons. In 2008, the yearly worldwide costs associated with these career-pirates were estimated between $13 and $16 billion.\(^{42}\) In order to better combat piracy, a comprehensive approach must be established to deal with both types of pirate. Several countries have implemented successful strategies for dealing with a majority of pirate attacks that are commensurate with both international and local law. One strategy includes the use of preventative measures as a primary objective. Included among these measures is the use of an information center for reporting piracy and promulgating defensive tactics in preventing an attack. Another strategy is to form cooperative agreements between neighboring countries to allow for the quick administration of justice when pirates are captured. Finally, a group of nations may form a well-armed task force of naval vessels that are able to deploy in quick response to a pirate attack or neutralize a pending threat. These strategies used in concert may tend to reduce the overall number of piratical attacks, but without incorporating an approach for eliminating ransom payments they may do little to deter piracy altogether.

Historically, pirates were put to death for their crimes. Taking pirates aboard a ship and holding them indefinitely for the remainder of a ship's voyage was considered dangerous, so the only feasible alternative was to put them to death.\(^{43}\) Currently, under U.S. law, if pirates are captured they should be imprisoned for life.\(^{44}\) Under international law, if a pirate vessel is captured it is the province of the courts of the state that seized the pirate vessel to impose penalties.\(^{45}\) Although these laws provide certain legal consequences to piratical acts, they neglect to take into account the current real world issues of a more global economy. Many countries fail to exercise their own laws in dealing with piracy for fear of political retaliation, the imposition of economic or legal sanctions, or becoming a target for maritime terrorism.\(^{46}\)

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41. Id.
45. See UNCLOS, supra note 31, art. 105.
In lieu of exercising punitive measures in accordance with a nation's laws or international law, countries have decided to work on piracy prevention as their main goal. Although this approach fails to address the root of the problem, in dealing directly with the pirates themselves, it has the effect of eliciting positive political endorsements and few, if any, condemnations from the remainder of the world. In the Gulf of Aden, local governments have provided pamphlets on avoiding pirate attacks, best management practices for carriers and ship owners to deter piracy, and an information sharing center to keep ships informed of current or suspected pirate activity in the region. These measures have contributed to an overall reduction in piracy in the region, but have forced pirate attacks further from the coast in an area southeast of the Gulf of Aden. A better alternative to simple deterrence methods is to combat piracy directly with the agreement of neighboring countries.

Asia is one such region to enact a multi-national cooperative agreement on combating piracy. The agreement is known as the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, or “ReCAAP” for short. Among other things, ReCAAP adopted the UNCLOS definition of piracy, but has expanded the duties of member countries. Specifically, the agreement states that members should make every effort to arrest pirates, seize their ships, and rescue victims of pirate attacks. Moreover, the agreement provides for the simple sharing of information on recent attacks, or attempts, to a regional information sharing center. From this center, statistics, data, and information alerts are sent expeditiously among all of the contracting parties (member states). By being better informed, ships can modify their routes to avoid target areas, travel in larger and safer groups of ships (known as group transit), and recognize possible threats before they can attack. As a direct result of the implementation of ReCAAP, instances of piracy have dramatically declined in the Asian region.


50. Id. art. 3.

51. Id. art. 4.

52. Id. art. 7.

53. David Tran, ReCAAP Success in Asia Prompts Call for Expansion, GLOBMARITIME.
Recently, on April 1st and 2nd, 2010, two different ships of the United States Navy had encounters with pirate vessels off the coast of Somalia. The first incident occurred near the Seychelles, approximately 1,000 nautical miles off the coast of Somalia, where a pirate vessel fired upon the USS Nicholas, a Navy guided-missile frigate. Responding to the aggression, the USS Nicholas returned fire, sunk the pirate vessel, and captured the pirates' mother ship with several pirates still aboard. The second incident occurred 300 miles northwest of the Seychelles, where pirates attempted to hijack a commercial vessel, but were intercepted by the USS Farragut, another guided-missile destroyer. The USS Farragut proceeded to sink the pirates' mother ship and then detained eleven suspected pirates from their skiffs. Each of these incidents involved intervention from U.S. Naval vessels belonging to the Combined Task Force 151 (“CTF 151”).


56. Id.
58. Id.
59. Id.
As described on their website, the “CTF 151 is a multinational task force established in January 2009 to conduct counter piracy operations under a mission-based mandate throughout the Combined Maritime Forces (CMF) area of responsibility to actively deter, disrupt, and suppress piracy in order to protect global maritime security and secure freedom of navigation for the benefit of all nations.” From these recent encounters with pirates, it is clear that the CMF has developed a uniquely effective manner of dealing with piracy that is commensurate with both U.N. and U.S. maritime law.

V. MODERN INSURANCE AGAINST MODERN PIRACY

In addition to the aforementioned strategies for dealing with pirate attacks, the policy of paying ransoms must be addressed to negatively affect the “risk v. reward” ratio for a career-pirate. Only when pirate ransoms are not paid as a matter of law, will the motivation of these pirates to attack innocent vessels cease altogether. Most of these ransoms are paid by maritime insurance companies as part of their traditional coverage.62 However, the recent surge in piracy has resulted in a surge of additional insurance premium sales to carriers who engage in commerce through the Gulf of Aden and along the Somali coast.63 By continuing to make ransom payments, the insurance companies are implicitly encouraging future pirate attacks on commercial vessels while they continue to sell additional coverage at a premium to carriers.

Since the dramatic increase in piracy, especially along the Somali coast and the Gulf of Aden, maritime insurers have benefitted from increased premiums and sales of additional riders to compensate for gaps in current insurance provisions.64 Specifically, Lloyd’s of London (“Lloyd’s”), saw an increase in their 2009 marine premiums of more than 20% compared to the previous year.65 This increase could be partly attributed to carriers, ship-owners, and cargo-owners who seek to add other forms of cover to protect themselves from the consequences of pirate at-

64. See id.
65. Id. (showing the increase resulted in a benefit of approximately $2.42 billion for Lloyds).
tacks and hijacking. Or, it could be attributed to the fact that Lloyd’s itself has designated the Gulf of Aden as a high risk zone for piracy thereby requiring additional insurance premiums. In either event, the insurance industry has benefitted from the sale of additional premiums.

In addition to designating the Gulf of Aden as a high risk area, Lloyd’s decided to offer new insurance policies to tackle the “loss of earnings” problem that accompanies a pirate hijacking. According to Lloyd’s, the typical hijacked vessel is held for an average period of two months before it is released. During this time period, a charterer may be paying for a vessel that it has no control over, a ship-owner may be forced to suffer the financial consequences of cancelled contracts, while a cargo-owner may suffer a similar fate. Although the act of piracy itself is listed as a peril that is covered under the International Hull Clauses (“IHCs”), these clauses do not provide cover for loss of earnings and are typically limited to physical harm or damage. Lloyd’s added their new “loss of earnings” coverage as an available additional policy in December of 2008.

Lloyd’s also offers Kidnap and Ransom (“K&R”) coverage to address the costs associated with delivering ransom payments and coordinating the delivery with the pirates. Even though traditional marine policies cover the cost of ransom, Lloyd’s estimates that this cost is only 25% to 30% of the entire costs associated with the hijacking. Working with the pirates, setting up payment terms and delivery, rescuing any hostages held, and arranging security for the ransom delivery team are all costs that greatly exceed the cost of the ransom. The demand for a policy that covered a ship-owner from the associated costs of a pirate attack at the moment when the vessel was seized allowed Lloyd’s to cre-

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68. Id.
69. Id.
73. Id.
74. Id.
ate this additional K&R coverage.75

These new insurance policies provided by Lloyd's and other underwriters, are designed to address the growing demand of ship-owners and carriers who cannot afford to take alternate routes through more peaceful waters to complete their shipments.76 Moreover, the carriers are becoming increasingly fearful of shipping along the Somali coast without some type of limit to their liability. The fact is that these insurance policies do nothing to deter piracy in the region. In fact, by allowing carriers, ship-owners, and charterers to pay ransoms without the fear of legal recourse, the international community is essentially encouraging piracy to continue. By being complicit in allowing piracy to continue on the high seas, insurance companies will be deterred from paying ransoms if they are held to criminal penalties. The United States has codified several criminal laws dealing with piratical acts and addresses the penalties for those who provide material support to such criminals.77 These laws may be found in the anti-terrorism section of the U.S. Code.

VI. ANTI-TERRORISM LAWS AND PIRACY

Under United States law, specifically Title 18 U.S.C. § 2332b, certain acts that transcend national boundaries are identified as Federal Crimes of Terrorism.78 These acts include the following: (1) conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country; (2) hostage taking; (3) violence against maritime navigation; and (4) providing material support to terrorists.79 The reason these four acts have been separated for consideration is they are all common to any Somali career-pirate encounter where a ship and its crew are hijacked in exchange for a ransom. Addressing each section individually will clarify which law, or combinations of law, may be usefully applied to deter the payment of ransoms to pirates.

It is important to note that section 2332b of the United States Code includes a provision that defines a Federal Crime of Terrorism as an offense that “is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”80 Although the attack against the USS Cole, in October 2000, can be defined as an act of terrorism, by attempting to influence or affect the conduct of government by intimidation or coercion, it is difficult to draw

75. Id.
a parallel to most modern day pirates.\textsuperscript{81} It has been suggested that terrorism is motivated by politics, while piracy is motivated by money.\textsuperscript{82} Additionally, it is theorized that most Somali pirates began their lucrative careers in response to the foreign exploitation of the fishing waters off their coastline.\textsuperscript{83} As discussed above, at least two types of pirates are attacking ships off the coast of Somalia and the Gulf of Aden, but the link between piracy and political motivation is tenuous.\textsuperscript{84} Regardless, several of the piratical acts themselves may be defined as acts of terrorism as described below.

1. 18 U.S.C. § 956 – CONSPIRACY TO KILL, KIDNAP, MAIM, OR INJURE PERSONS OR DAMAGE PROPERTY IN A FOREIGN COUNTRY.

The language of this section reads as follows:

Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be punished as provided in subsection (a)(2).\textsuperscript{85}

It is evident from the language in this section that if a person falls under the jurisdiction of the United States and commits any of the listed offenses abroad (ordinarily outside U.S. jurisdiction), those offenses will be treated as if they were committed within the jurisdiction of the United States. It has already been stated that pirates are “hostes humani generis,” or enemies of mankind, and as a result the United States may exercise universal jurisdiction over them.\textsuperscript{86} Because pirates engage in acts that have resulted in the death and kidnapping of their hostages, they will be subject to the effect of this universal jurisdiction.\textsuperscript{87} Therefore, the crimes committed by the pirates on these occasions would be considered as federal acts of terrorism under this section of U.S. law.

2. 18 U.S.C. § 1203 – HOSTAGE TAKING

The pertinent language of this section reads as follows:

\begin{itemize}
  \item \textsuperscript{81} See Perl & O’Rourke, supra note 46, at 2.
  \item \textsuperscript{82} Apostolis & Knott, supra note 9, at 2.
  \item \textsuperscript{83} Ishaan Tharoor, How Somalia’s Fishermen Became Pirates, TIME, Apr. 18, 2009, http://www.time.com/time/world/article/0,8599,1892376,00.html.
  \item \textsuperscript{84} Pirate Tactics, supra note 6, at 2.
  \item \textsuperscript{86} See United States v. Smith, 18 U.S. 153, 156 (1820).
  \item \textsuperscript{87} See IMB Annual Report 2009, supra note 5, at 12.
\end{itemize}
Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.\textsuperscript{88}

This law only applies to U.S. nationals who are being held hostage, captors who are found in the U.S., or if the U.S. government is the governmental organization being compelled to act.\textsuperscript{89} By limiting this law to at least one of the three categories listed above, the United States ensures that it has an interest in applying its law in accordance with its jurisdictional limitations. However, in a maritime case, the jurisdictional boundaries become somewhat expansive. For instance, if a U.S. ship and its crew is held hostage by pirates who are aboard the U.S. vessel, according to maritime law and convention, they would be found within the jurisdiction of the United States. This scenario, and proper use of 18 U.S.C. § 1203, would not require the ship's crew to be U.S. nationals, because the offenders (the pirates) are found in U.S. territory (aboard the ship). Conversely, if pirates hijacked another country's vessel, but took a U.S. national as a hostage, they too would fall under a successful application of this law. In any of these instances, the United States would find the acts of piracy to commensurate with a federal act of terrorism.


This section includes language defining specific acts that qualify as violence against maritime navigation. As it relates to piracy and sea robbery, the most important subsections are listed below. Section 2280(a)(1) states that any person who unlawfully and intentionally:

- (A) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;
- (B) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship;
- (E) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if such act is likely to endanger the safe navigation of a ship;
- (G) injures or kills any person in connection with the commission or the attempted commission of any of the offenses set forth in subparagraphs (A) through (F); or
- (H) attempts or conspires to do any act prohibited under subparagraphs (A)

This law was clearly drafted with the safe navigation of ships as its primary concern. Consequently, it is difficult to think of any instance of piracy, hijacking, or forceful and illegal boarding where a ship’s safety would not be negatively affected. Moreover, several hijacked ships have contained hazardous cargo, such as crude oil, military weapons, and industrial chemicals. Among other things, the safe navigation of these ships is paramount in preventing environmental and maritime disasters. Because, in every instance of piracy at sea, the safe navigation of the vessel is endangered, the act of hijacking a ship would qualify as a federal act of terrorism.

4. 18 U.S.C. § 2339A – PROVIDING MATERIAL SUPPORT TO TERRORISTS

Finally, this section of Title 18 addresses those who provide material support to terrorists, the punishments available, and the types of crimes that constitute terrorist acts. The language of section 2339A(a) is as follows:

(a) Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section . . . 956, . . . , 1203, . . . , 2280, . . . , or any offense listed in section 2332b (g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

From the language of the law, this section recognizes sections 956, 1203, and 2280 (described above) as federal acts of terrorism. All of these sections address acts that occur during a pirate attack or kidnapping. Furthermore, this section defines material support as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities.” Typically, when a vessel has been seized by pirates they demand a ransom from the ship-owner, carrier, or insurer. This ransom cost is usually paid, in the form of cash (currency),

by a carrier’s marine policy. Therefore, under 18 U.S.C. § 2339A(a), an insurer that makes such ransom payment to pirates is also providing material support to terrorists and violating U.S. law.

The punishment for violating 18 U.S.C. § 2339A allows for monetary fine or jail time depending on the circumstances. An insurance company may insist that a small fine is reasonable when compared to the immense cost of a lost ship and cargo as a result of pirate action. However, the insurer could still be subject to the penalty of 15 years in a federal prison (or for life if someone dies as a result of the piracy).

This law acts as a deterrent to those who may otherwise pay pirate ransoms. It should not be used to affect current contracts or negotiations where the lives of people, who have depended on the traditional marine policy ransom payment, are at stake. However, any future marine insurance policies must not contain provisions for the paying of ransoms, and the future insured entity should be made aware that such provisions are against U.S. law. Implementing a “no pay” policy for pirate ransoms will dramatically affect the “risk v. reward” ratio, thereby eliminating the reward (cash payments) for hijacking vessels. However, eliminating the payment of ransoms is not itself enough in combating piracy on a global level.

5. COMBATING PIRACY ON A GLOBAL SCALE

Although the anti-terrorism laws discussed in this paper could be used to deter ransom payments by U.S. companies and insurers, the number of United States ships being attacked by pirates is extremely low. Over the past five years, only twenty three attacks have been made against U.S. ships, four of which occurred last year. As a consequence, the United States has never paid a ransom to pirates in exchange for the release of a ship. However, these criminal penalties could be levied against the agent of a ransom paying entity if that agent resides or operates inside the jurisdiction of the United States. Irrespective of ransom payments, the United States has found a more successful manner in dealing with piracy that has its roots in old maritime law.

The United States, under 18 U.S.C. § 1651, has defined the punishment for piracy as follows: “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”

94. See Surge in Piracy Prompts Demand for K&R Cover, supra note 72.
98. See King, supra note 66, at 3.
definition of "high seas" has been explored and can mean any area outside of a nation's territorial waters. But, the statute makes reference to the crime of piracy defined by the "law of nations."100 As used in the statute, the law of nations is a collection of common law that has been compiled over time to shape current laws in the international community. In the landmark case known as "The Antelope," the law of nations was recognized as "a collection of rules deduced from natural reason, as that is interpreted by those who adopt them, and resting in usage, or established by compact, for regulating the intercourse of nations with each other."101 In evaluating this statement, the law of nations can be interpreted to mean the current definition of piracy as used in U.S. and U.N. law, specifically Article 101 of UNCLOS.102

In recent history, the United States has successfully intercepted several pirate attacks against U.S. vessels.103 In each case, the U.S. Navy locates the pirate ship, and if fired upon, immediately returns fire disabling the craft. Then the pirates are detained, and either held for prosecution in the U.S. or given to Kenya, where the authorities have agreed to aid in bringing the offenders to justice.104 Recently, the overburdened Kenyan courts have refused to accept any more piracy cases. As a result, pirates captured by U.S. ships will be taken to the home port of a naval vessel and tried in a U.S. Federal Court.

In capturing or disabling the pirates' ship and detaining the pirate crew for the administration of justice, the United States is in conformance with the law of nations and international law. Not only has this standard operating procedure prevented the possibility of a hijacked crew and vessel in many cases, but it also serves as a reminder to future pirates to avoid hijacking U.S. ships.

In addition to implementing a "no pay" policy to ransom demands, countries may actively cooperate in mutual agreements or task forces to take action against terrorists. This type of cooperative agreement is promulgated in Asia through ReCAAP, in the Horn of Africa through the Maritime Security Centre Horn of Africa ("MSCHOA"), and through the CMF in Bahrain.105 These informational centers and task forces allow for nations to pool their resources and act as a single entity in combating piracy. Finally, the International Chamber of Commerce, through the IMB, acts as a single-source of piracy information and report-

100. Id.
102. See UNCLOS, supra note 31, art. 101.
103. Emanuel, supra note 54, at 1.
105. See Best Management Practices, supra note 47.
ing worldwide. With increased cooperation among the nations, the IMB should be able to quickly compile credible threats of piracy and disseminate the information instantaneously to its members.

Through cooperative international laws, a comprehensive policy of prevention, an aggressive plan for dealing directly with pirate attacks, and by enforcing a “no pay” policy for the ransom of pirates, the world may increase the reliability of its maritime commerce while curbing piracy altogether.

Determining the Potential Liability of a Cruise Line for the Injuries Or Death of Their Passengers as a Result of a Pirate Attack

Elaine Vullmahn*

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Conclusion: RCC and RCI Should Reassess Their Current Cruise Offerings

**Abstract**

This Article examines Royal Caribbean Cruise Ltd.’s, the owner of the Royal Caribbean International brand, and Royal Caribbean Interna-
tional's potential liability to passengers who are injured or die during a pirate attack upon the *Brilliance of the Seas* while on a 14-night Middle East cruise. The Article is primarily concerned with the risks of the Royal Caribbean cruise that is currently scheduled to depart from Barcelona, Spain on January 10, 2011, and terminate at Dubai, United Arab Emirates, on January 24, 2011. The itinerary for this particular cruise indicates that there will be four ports of call offered along the voyage. These ports of call include: Alexandria, Egypt; Suez Canal, Egypt; Al'Aqabah, Jordan; and Safaga, Egypt. This cruise is attractive because of the exotic ports of call and because there will be a total of nine days of at sea travel.

The Article provides a framework and analysis for understanding the risks that the *Brilliance of the Seas*, its crew, and passengers will likely face along their voyage. The Article also discusses the legal challenges Royal Caribbean Cruise Ltd. and Royal Caribbean International could face if a cause of action is brought against them. The Background section surveys piracy in the Middle East waterways and its effect on the transportation industry and on tourism. This section also explains how the *Brilliance of the Seas* Cruise/CruiseTour Ticket Contract (the Passenger Ticket) outlines the relationship among Royal Caribbean Cruise Ltd., its Royal Caribbean International brand, and passengers of the *Brilliance of the Seas*. The Analysis section examines reasons why Royal Caribbean Cruise Ltd. and Royal Caribbean International could be held liable for passenger injuries or death. This section also suggests ways in which Royal Caribbean Cruise Ltd. and Royal Caribbean International could protect passengers on the *Brilliance of the Seas* from potential serious injury or death due to a pirate attack while preserving the quality of their product and name.

**INTRODUCTION: PASSENGERS CAN BE MISLED TO BELIEVE IT IS SAFE TO CRUISE IN THE MIDDLE EAST**

You and your loved one have coordinated your schedules and are looking forward to spending two weeks far, far away from work and the daily grind of everyday life. The two of you have decided to take a cruise that will afford you the opportunity to rekindle your relationship as well as the opportunity to catch up on some much needed rest and relaxation. Your travel agent suggested a variety of cruise companies and itineraries. There was much to consider, including: the ports of call, food, entertainment, accommodations, and quality of service each had to offer. The decision was made to book a cruise on one of the Royal Caribbean International1 ("RCI") cruise ships. This Line recently launched an ad

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campaign to promote how its ships and environment are designed to allow guests to feel like citizens on a “Nation of Why Not.” Advertisements explain that the choice is totally up to passengers whether they want to “go out and see, do and be more than they had ever thought possible,” or to do nothing at all.

You have booked a 14-night Middle East Cruise that is scheduled to depart from Barcelona, Spain on January 10, 2011, and terminate at Dubai, United Arab Emirates, on January 24, 2011. The itinerary for the ship, Brilliance of the Seas, indicates that there will be four ports of call offered along the voyage. These ports of call include: Alexandria, Egypt; Suez Canal, Egypt; Al’Aqabah, Jordan; and Safaga, Egypt. This cruise was the most attractive option because of the exotic ports of call and because there will be a total of nine days of at sea travel.

Similar to probably many of the other individuals that booked this particular cruise, you have given little to no consideration to the likelihood that this cruise ship could be attacked by pirates. Besides, the thought of pirates conjures up images from childhood tales of a man with a wooden leg, hook, and parrot named Polly. You vaguely remember hearing about an incident with an Italian cruise ship a year ago off the coast of Africa. However, you easily reason that was an anomalous situation as no other attacks have made the top headlines recently. In addition, as an American passenger, you perceive a sense of safety by choosing a global cruise line like RCI and expect that if it were not safe to

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5. Id.

6. Id.

7. Id.

8. ASSOCIATED PRESS, Italian Cruise Ship Fires on Somali Pirates, FOX NEWS NETWORK, LLC (Apr. 26, 2009), available at http://www.foxnews.com/story/0,2933,517955,00.html (“An Italian cruise ship with 1,500 people on board fended off a pirate attack far off the coast of Somalia when its Israeli private security forces exchanged fire with the bandits and drove them away. False None of the roughly 1,000 passengers and 500 crew members were hurt.”).
travel to the Middle East, RCI would discontinue offering cruises to this destination. But what if things do not go as expected and the ship is attacked while sailing in the Gulf of Aden? Would it be possible to recover if you or your loved one were injured or died during a pirate attack?

This paper examines Royal Caribbean Cruise Ltd.’s (“RCC”), the owner of the RCI brand, and RCI’s potential liability to passengers who are injured or die during a pirate attack upon the Brilliance of the Seas while on the 14-night Middle East cruise. The Background section surveys piracy in the Middle East waterways and its effect on the transportation industry and on tourism. This section also explains how the Brilliance of the Seas’ Cruise/CruiseTour Ticket Contract (the “Passenger Ticket”) outlines the relationship among RCC, its RCI brand, and passengers of the Brilliance of the Seas. The Analysis section examines reasons why RCC and RCI could be held liable for passenger injuries or death. This section also suggests ways in which RCC and RCI could protect passengers on the Brilliance of the Seas from potential serious injury or death due to a pirate attack while preserving the quality of their product and name. The concluding section sets forth some final thoughts.

BACKGROUND: PIRACY IS A RISK CARGO AND PASSENGER VESSELS MUST CONSIDER

This section introduces how piracy poses a real threat to cruise ships and passengers traveling through the Gulf of Aden today. Part I presents an overview of how rampant pirate attacks and attempted attacks have become over the last couple of years off the coast of Somalia. While many nations have deployed naval resources to patrol the Gulf of Aden and surrounding waters, this area continues to be deemed hazardous for vessels and to travel throughout. Part II details the Bureau of Consular Affairs’ travel advisors, which warns American citizens about the risks of traveling through the Gulf of Aden and to Middle Eastern countries, such as the Brilliance of the Seas destination point, the United Arab Emirates. Part III describes how the Passenger Ticket establishes the duty and level of responsibility owed by RCC and RCI to passengers of Brilliance of the Seas.

I. PIRACY CONTINUES TO PLAGUE THE GULF OF ADEN

Vessels that travel through the Gulf of Aden are at risk of being

attacked by pirates. Over the last couple of years, the waters off Somalia have been a hotbed for pirate activity.\textsuperscript{11} Despite international efforts to guard vessels from being hijacked and held for ransom along with their passengers, an alarming number of actual and attempted attacks continue to occur.\textsuperscript{12}

The ICC Commercial Crime Services, which is an organization based in the United Kingdom and affiliated with the International Chamber of Commerce, strives to combat “all forms of commercial crime.”\textsuperscript{13} As a part of its mission, this organization has undertaken to collect and track incidents of piracy around the world.\textsuperscript{14} From the information it has obtained, the ICC Commercial Crime Services developed interactive piracy maps of the world for the years 2005 through 2009 and a live interactive piracy map of the world for 2010 on its website.\textsuperscript{15} Anyone with access to the internet, can view, zoom in/out, and click on red, yellow, and blue markers to read abbreviated summaries or connect to full length reports of actual pirate attacks, attempted pirate attacks, and identified suspicious looking vessels.\textsuperscript{16}

In 2008, when RCC and RCI were contemplating and negotiating arrangements for the \textit{Brilliance of the Seas} to offer cruises to the Middle East, there was great concern among many businesses and cargo carriers


16. \textit{Id.}
about the risk of pirate attacks in that area.\textsuperscript{17} It is evident from the ICC Commercial Crime Services 2008 live piracy map\textsuperscript{18} that their apprehension of voyaging through the Gulf of Aden was well-founded. Publicized statistics also revealed that “111 ships were attacked by pirates in the Gulf of Aden in 2008, a 200 percent increase over 2007.”\textsuperscript{19} Out of the 111 ships, “forty-two of those ships were held for ransom, and 889 crew members were taken hostage.”\textsuperscript{20} “Most ransom demands were between $1 million and $4 million per ship.”\textsuperscript{21}

For economic reasons, many businesses and carriers have accepted the risk of a pirate attack and continue to ship goods through this dangerous zone.\textsuperscript{22} From a logistic standpoint, the Gulf of Aden remains “one of the world’s busiest shipping lanes”\textsuperscript{23} because it is a substantial advantage for vessels to travel through the Suez Canal instead of around Africa.\textsuperscript{24} The continued escalation of pirate attacks, however, has had a real impact on the transportation industry.\textsuperscript{25}

“After a rash of pirate attacks in 2008, the international community rushed a flotilla of naval ships into the waters off the Horn of Africa in an effort to protect international shipping passing through the Gulf of

\textsuperscript{17} Gitanjali Bakshi, \textit{Blue Gold: Somalian Pirates in the Gulf of Aden}, STRATEGIC FORESIGHT GRP. (Oct. 2008), http://www.strategiforesight.com/blue_gold.htm (discussing the drastic increase in pirate activity off the coasts of Somalia, with a reported 76 pirate attacks in 2008, causing many shipping companies to use different shipping routes, such as sailing around the Cape of Good Hope).


\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} Maritime Admin., United States Dep’t of Transp., \textit{Economic Impact of Piracy in the Gulf of Aden on Global Trade}, MAR. ADMIN., http://www.marad.dot.gov/documents/HOA_Economic%20Impact%20of%20Piracy.pdf (last visited Oct. 10, 2010) (discussing the economic impact on shipping companies due to pirate attacks in the Gulf of Aden; for “high value consumer goods or items needed for just-in-time manufacturing, the added delay [of sailing around the Cape of Good Hope] is unacceptable to the shipper . . . .,” despite increases in costs such as security, insurance premiums and fuel).

\textsuperscript{23} \textit{WORLDATLAS.COM}, supra note 11.

\textsuperscript{24} Peter Sands, \textit{Need for Rethinking about When to Sail around the Cape of Good Hope}, BIMCO (Apr. 23, 2010), https://www.bimco.org/Member/Reports/Shipping_Market_Analysis/2010/04/23_Need_for_rethinking.aspx (discussing the drastic increase in costs from increased fuel consumption, extra capacity requirements and increased insurance premiums resulting from sailing around the Cape of Good Hope as opposed to traveling through the Suez Canal).

Lt. Cmdr. Corey Baker, a spokesman for the U.S. 5th Fleet, headquartered in Bahrain, told USA TODAY in an interview in May of 2010 that "[t]he pirates are becoming more brazen." Somalia "remains chaotic and even a large naval flotilla has struggled to provide security over the 1.1 million square miles of ocean they patrol."

Many carriers find that traveling through the Gulf of Aden is becoming cost prohibitive despite the savings in overall voyage distance. "Shipping insurance rate increases - with premiums rising by at least tenfold, by some accounts - are primarily due to the increase in risk as the number of piracy incidents has spiked considerably since 2008." In 2010, concerns over increased insurance expenses, ransom payments, risk to the lives of crew, and destruction of cargo continue to have a substantial impact on the transportation industry.

The ICC Commercial Crime 2010 live piracy map illustrates that piracy remains rampant in and near the Gulf of Aden. Red and yellow markers on the 2010 live piracy map indicate that in each of the first six months of 2010 there have been actual and attempted attacks on vessels.

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27. Id.
28. Id.
31. See Gitanjali Bakshi, Blue Gold: Somalian Pirates in the Gulf of Aden, Strategic Foresight Group (Oct. 2008), http://www.strategicforesight.com/blue_gold.htm (discussing potential costs associated with lost cargo, ransom payment, and refusal of firms to ship through the Gulf of Aden); See also, Stephanie Nall, The Costs of Piracy Are Passed Along, America.gov (Jun. 1, 2009), http://www.america.gov/st/peacesec-english/2009/May/20090529160944bereheltek0.8213159.html (explaining that shipping carrier Maersk has added surcharges for voyages through the Gulf of Aden); See also Peter Sand, Need for Rethinking about When to Sail around the Cape of Good Hope, BIMCO, (Apr. 23, 2010), https://www.bimco.org/Members/Reports/Shipping_Market_Analysis/2010/04/23_Need_for_rethinking.aspx (reasserting that travel through the Gulf of Aden is cost effective; acknowledges ransom payments contribute to increased travel expenses; discussing dangers to crew safety).
sels traveling through this waterway. For many carriers, these risks and rising costs have become too great and they are opting to sail around Africa instead of through the Suez Canal and the Gulf of Aden. Depending on the success of the Xuelong, in the near future, carriers may even have the option to consider transporting goods through the Arctic.


II. THE BUREAU OF CONSULAR AFFAIRS WARNS U.S. TRAVELERS ABOUT THE RISKS OF TRAVELING THROUGH THE GULF OF ADEN AND TO MIDDLE EAST COUNTRIES

Savvy travelers, and those interested in booking RCI’s 14-night Middle East cruise, can access the Travel.State.Gov website to obtain relevant information. The website is a service of The Bureau of Consular Affairs. The mission of this Bureau “is to protect the lives and interests of American citizens abroad.” This service provides essential information for any American citizen considering domestic or international travel. There are links to Country Specific Information, Travel Alerts, and Travel Warnings as well as a link to a page dedicated to International Maritime Piracy.

The Bureau of Consular Affairs recommends starting with the Country Specific Information as “[t]his is a good place to start learning about where you are going.” Noteworthy information such as “the location of the U.S. embassy and any consular offices; whether you need a visa; crime and security information; health and medical conditions; drug penalties; and localized hotspots” are available for every country of the world. The Country Specific Information for the United Arab Emirates, which is the destination point for the Brilliance of the Seas 14-night Middle East cruise, for example, was last updated on December 17, 2009. At the present time, it is communicated under the Safety and Security heading that “U.S. citizens in the United Arab Emirates should exercise a high level of security awareness.” This warning was made because the “Department of State remains concerned about the global threat of terrorism, including the possibility of terrorist attacks against U.S. citizens and interests in the Persian Gulf and Arabian Peninsula.”

As of July 2010, the Bureau of Consular Affairs has neither issued an
official Travel Alert\textsuperscript{46} nor an official Travel Warning\textsuperscript{47} specifically for the United Arab Emirates or for any of the other countries where the Brilli­
ance of the Seas is scheduled to stop during the 14-night cruise.\textsuperscript{48} However, the Bureau of Consular Affairs has issued Travel Warnings for countries that the Brilli­
ance of the Seas would be traveling near.\textsuperscript{49} These travel warnings and the date they were initially posted includes: Eritrea (9/24/2010), Iran (3/23/2010), Saudi Arabia (2/18/2010), Somalia (12/31/2009), Sudan (10/1/2010), and Yemen (2/25/2010).\textsuperscript{50} World events, eco­
nomic times, and religious and political unrest are only a sampling of the unstable and changing world that drives the formal travel alerts and warnings officially issued.

According to the International Maritime Piracy website, the “num­
ber of pirate attacks in the Gulf of Aden has risen significantly” and “[i]n some instances attacks have occurred as far as 300 nautical miles out in international waters.”\textsuperscript{51} This website also reports “[m]ost of the attacks in the Gulf of Aden have been directed against cargo vessels” and “[a]ttacks on cruise ships are rare but do occur.”\textsuperscript{52} The Department of State acknowledged knowing of two actual and one attempted attack made on cruise ships during 2008, but was “unaware of any injuries or fatalities involving American citizens resulting from these attacks.”\textsuperscript{53} De­
spite this fact, since December 31, 2009, the Bureau of Consular Affairs has urged U.S. citizens in its Somalia Travel Warning "to use extreme caution when sailing near the coast of Somalia."54 The webpage further indicates that "[i]f transit around the Horn of Africa is necessary, it is strongly recommended that vessels travel in convoys, and maintain good communications contact at all times."55


The Passenger Ticket is a key document. It is mostly acquainted with the rite of voyage as it enables an individual to embark and disembark a cruise ship. Its purpose, however, extends past this fundamental entitlement. This document also delineates the terms and conditions of a contract made between the passenger56 and the carrier.57 Courts strictly enforce Passenger Ticket provisions including those that set forth within what time frame a cause of action must be brought against the carrier.58

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55. Id.

"'Passenger' or 'Guest' or 'Your' means persons traveling under this Ticket Contract and persons in their care, together with their respective heirs and representatives. 'Passenger' shall include the plural and the use of the masculine shall include the feminine.").
57. Id. (Section 2(b) stating that "'Carrier' shall include: (i) Vessel, or any substituted ship; (ii) the Vessel's Operator; and (iii) with respect to the RCT Land Tour Portion of any CruiseTour, Royal Celebrity Tours Inc. ('RTG') together with the owners, managers, characters, affiliates, successors and assigns of the entities identified in subsections (i), (ii), and (iii) of this sentence. Carrier also shall include the officers, directors, employees, agents, crew or pilots of the entities identified in the preceding sentence. The exclusions or limitations of liability of Carrier set forth in provisions of this Ticket Contract, as well as all rights, defenses or immunities set forth herein, shall also apply to and be for the benefit of agents, independent contractors, concessionaries and suppliers of Carrier, as well as owners and operators of all shoreside properties at which the Vessel of the Transport may call, as well as owners, designers, installers, suppliers and manufacturers of the Vessel or Transport, or any component parts of either, together with the employees and servants of each of the foregoing, and/or any launes, craft or facilities of any kind belonging to or provided by any of the parties identified in this paragraph.").
where litigation must be commenced, and under what conditions the carrier might be held liable for passenger injuries. Courts are not persuaded by claims that the terms are in a language not understood by a passenger or are too microscopic to be read.

From RCC and RCI's perspective, the Passenger Ticket is an essential document. A constant and common travel problem experienced by cruise passengers is having been injured while aboard a cruise ship. Physical injuries often occur when passengers slip, trip, and fall as a result of unsure footing due to the movement of the ship or because of slippery surfaces. Other events that have lead to litigation include injuries sustained from flying coconuts, stray golf balls, and discharging shotgun shells. Pirates have fired upon cruise ships traveling through the Gulf of Aden. At this time no passengers have been injured, or died, as a result of pirate attacks, so there have been no causes of action for recovery.

59. Hughes, 2003 WL 1740460, at * 1; Chapman v. Norwegian Cruise Line Ltd., No. 01 C 50004, 2001 WL 910102 at *2 (N.D.Ill. Jul. 6, 2001) (stating that "[a] forum selection clause is enforceable unless (1) the incorporation of the clause was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court; or (3) enforcement . . . would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision.").

60. Paredes v. Princess Cruises, Inc., 1 F. Supp. 2d 87, 90 (D. Mass. 1998) (enforcing the time limitations written in the English language in a cruise passenger ticket despite the fact the passenger was unable to read English).


62. Pratt v. Silversea Cruises, Ltd., No. C 05-0693, 2005 WL 1656891, at * 1 (N.D.Cal. Mar. 31, 2003) (An 83-year old woman alleged that she "suffered a broken hip, a torn ACL in her right knee, and severe ankle injuries when she fell on a cruise ship enroute from San Diego to San Francisco."); Carnival Corp. v. Amato, 840 So.2d 1088, 1088 (Fla.App. 3 Dist. 2003) ("Injured vacationer brought action against cruise line for injuries sustained when he fell down a flight of stairs on cruise ship.").


64. McDonough v. Celebrity Cruises, Inc., 64 F.Supp.2d 259, 261 (S.D.N.Y. 1999) (cruise passenger was struck on the head by rum-filled coconut).


The terms and conditions of the Passenger Ticket governing RCI’s 14-night Middle East cruise on the Brilliance of the Seas is available on RCI’s website. The currently available PDF includes the Passenger Ticket that is applicable to both those who booked a cruise on the Brilliance of the Seas prior to, on, and after April 20, 2008. For the purposes of this comment it will be assumed that the terms and conditions of the Passenger Ticket for those who booked on or after April 20, 2008 are relevant for determining the responsibilities and liabilities RCC and RCI have to passengers of the Brilliance of the Seas.

In the event that the Brilliance of the Seas is attacked and passengers are injured or die, passengers seeking recovery must refer to the Passenger Ticket and take note of the sections pertaining to the commencement of claims, forum selection, and limitations of liability. In accordance with Section 10(a), Notice of Claims and Commencement of Suit or Arbitration; Security, notice must be given to the carrier and an action for personal injury or death must be commenced within six months of the date of the injury or death. Irrespective of where the passengers’ native state or country might be, passengers are also obligated under Section 9(a), Forum Selection Clause For All Lawsuits; Class Action Waiver, to bring a cause of action “before the United States District Court for the Southern District of Florida Located in Miami-Dade County.” In order for passengers to proceed and prevail, they must establish that RCC and/or RCI may be held liable for their injury or death.

Section 11(a), Limitations of Liability, describes the duties and responsibilities RCC and RCI owe to passengers of the Brilliance of the Seas:

“CARRIER SHALL NOT BE LIABLE FOR INJURY, DEATH, ILLNESS, DAMAGE, DELAY OR OTHER LOSS TO PERSON OR PROPERTY, OR ANY OTHER CLAIM BY ANY PASSENGER CAUSED BY ACT OF GOD, WAR, TERRORISM, CIVIL COMMOTION, LABOR TROUBLE, GOVERNMENT INTERFERENCE, PERILS OF THE SEA, FIRE, THEFTS OR ANY OTHER CAUSE BEYOND CARRIER’S REASONABLE CONTROL, OR ANY ACT NOT SHOWN TO BE CAUSED BY CARRIER’S NEGLIGENCE.”

The author highlighted and italicized three key portions of this section which will be analyzed in greater detail in the following section.

69. Id.
70. Id. § 10a.
71. Id. § 9a.
72. Id. § 11a.
ANALYSIS: RCC AND RCI MAY BE HELD LIABLE FOR PASSENGER INJURIES RESULTING FROM A PIRATE ATTACK ON THE BRILLIANCE OF THE SEAS WHILE IT TRAVELS THROUGH PIRATE PRONE AREAS

“This is your Captain speaking. I am instructing all passengers to return to their cabins immediately. This is not a test – the ship is under attack by pirates!”

This is one announcement that cruise passengers do not normally expect to hear over their ship’s intercom system. Passengers on a Brilliance of the Seas cruise, however, may hear such an announcement. Pirates have become more aggressive in their attempts to seize vessels and passengers for the hefty ransoms they are paid. Despite the danger to the Brilliance of the Seas, its crew, and its passengers, RCC and RCI have persisted in their endeavors to expand international operations and offer cruises to the Middle East.

RCC and RCI may be held liable for passenger injuries or death in the event that the Brilliance of the Seas is attacked by pirates during the 14-night Middle East cruise. RCC and RCI do not include the necessary wording in the Brilliance of the Seas’ Passenger Ticket to limit their liability for such an incident. RCC and RCI, whom have control over the Brilliance of the Seas, have also disregarded travel warnings and alerts concerning voyaging through the Gulf of Aden and continue to offer cruises through these waters. RCC and RCI should consider whether it is prudent to continue to offer cruises through pirate prone areas. If RCC and RCI remain unpersuaded to alter the schedule of the Brilliance of the Seas, they should at least consider safety measures that can be utilized to safeguard the Brilliance of the Seas and its passengers from harm.

I. UNDER THE TERMS OF SECTION 11(A) RCC AND RCI MAY BE HELD LIABLE FOR PASSENGER INJURIES OR DEATH SUSTAINED DURING A PIRATE ATTACK UPON THE BRILLIANCE OF THE SEAS

RCC and its RCI brand are not confined to only offering cruises in the Middle East. These cruise lines function at a global level and are well positioned to provide cruises to exotic destinations around the world, which are much less risky than the Middle East. RCC and RCI chose to expand and to continue to offer cruises to the Middle East despite numerous warnings and alerts against such action. In the event that those risks materialize and a passenger is injured or killed in a pirate attack on the Brilliance of the Seas, it is likely that RCC and RCI will be held accountable.
A. The Brilliance of the Seas Passenger Ticket Does Not Limit RCC and RCI's Liability Due to a Pirate Attack

In order for RCC and RCI to limit their liability for passenger injuries or death during an actual, or attempted, pirate attack upon the Brilliance of the Seas, the term “pirate attack” or “piracy” has to be included within the text of the Passenger Ticket. It would be appropriate to include one or both of these terms within Section 11(a), Limitations of Liability. However, RCC and RCI have failed to include either term anywhere within the text of the Passenger Ticket.73

The only term that has any real potential of being confused with and perhaps argued by RCC and RCI as encompassing piracy is the term “terrorism.”74 While the term “terrorism” is included in Section 11(a), its inclusion should still be insufficient and ineffective in protecting RCC and RCI from liability. Piracy and terrorism have material characteristic differences as well as separate legal definitions and punishments.

1. An Attack Upon the Brilliance of the Seas by Somalian Pirates in the Gulf of Aden Should Not Be Classified as an Act of Terrorism

Terrorism is a separate and distinct concept from piracy. The United States Congress has promulgated laws regarding Terrorism under Title 18, Crimes and Criminal Procedure, of the United States Code and more specifically within Chapter 113B, Terrorism.75 Congress has distinguished international terrorism from domestic terrorism as well. According to 18 U.S.C. §2331, these terms are defined as follows:

(1) the term “international terrorism” means activities that—
(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
(B) appear to be intended—
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and . . .
(5) the term “domestic terrorism” means activities that—
(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

73. See Ticket Contract for Brilliance of the Seas, supra note 69, § 11a.
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(B) appear to be intended—
   (i) to intimidate or coerce a civilian population;
   (ii) to influence the policy of a government by intimidation or coercion;
   (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
   (C) occur primarily within the territorial jurisdiction of the United States.

Sections within this Chapter further specify punishments for specific acts of terrorism such as the use of weapons of mass destruction, bombing places of public use (including government facilities, public transportation systems, and infrastructure facilities), using missile systems to destroy aircraft, and using/dispersing radiological devices.

It is important to note that nowhere within the definition of either international or domestic terrorism is it mentioned that terrorist acts tend to occur on the high seas. In fact, none of the other sections pertaining to terrorism specify the high seas as a location where specific types of terrorist acts tend to occur either. While the high seas have not been made a part of this criminal section, it is a distinguishing and critical component of the United States Code sections pertaining to piracy.

The United Nations Ad Hoc Committee is currently drafting the United Nation's Comprehensive Convention on International Terrorism. The final definition of what constitutes an act of terrorism has not yet been finalized. At present, the working definition of an act of terrorism is:

   [A] person's unlawfully and intentionally causing or threatening to cause violence by means of firearms, weapons, explosives, [or] any lethal devices or

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76. 18 U.S.C. § 2331 (2001) ("'International terrorism' means activities that . . . involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State . . . [that] . . . appear to be intended . . . to intimidate or coerce a civilian population; . . . influence the policy of a government by intimidation or coercion . . . or . . . affect the conduct of a government by mass destruction, assassination, or kidnapping; and . . . occur primarily outside the territorial jurisdiction of the United States." Id. § 1. "'Domestic terrorism' means activities . . . [equal to that of "international terrorism," but] . . . occur primarily within the territorial jurisdiction of the United States." Id. § 5.).

77. 18 U.S.C. § 2332a (2004) ("[Violators] shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life.").


79. Id. § 2332g (2004) (stating violators of this section subject to a maximum $2,000,000 fine and minimum prison sentence of 25 years, or $2,000,000 fine and life imprisonment if death results from a violation of this statute).

80. Id. § 2332h (stating violators of this section to a maximum $2,000,000 fine and minimum prison sentence of 25 years; life imprisonment if death results from a violation of this statute).

dangerous substances, which results, or is likely to result, in death or serious bodily injury to a person, a group of persons or serious damage to property — whether for public use, a State or Government facility, a public transportation system or an infrastructure facility.\textsuperscript{82}

Under the current working definition, “[a]ct[s] of terrorism also include such person’s attempt to commit such an offense, participate as an accomplice in the commission of such an offense, or in organizing or directing others to commit such an offense, or in contributing to the commission of such an offense.”\textsuperscript{83}

It should be similarly noted that the United Nation’s current working definition of acts of terrorism does not include the term high seas. While this definition is subject to change, there is no indication in its current state that the performance of this crime on any type of body of water is essential to the definition of what constitutes terrorism. While the term “high seas” has not been included in the current definition of terrorism, it is a central component of the United Nation’s definition of piracy.

Overall, the actions of Somalian pirates do not conform to the definition of terrorism as it is understood in the United States or as currently defined by the United Nations. Despite the real threat of being attacked by pirates, many cargo and passenger vessels remain committed to their plans to continue to sail through the Gulf of Aden. In addition, Somali pirates’ actions have had little to no political intimidation value on the United States or other nations. To the contrary, the international community has joined in cooperation to eliminate piracy in this area and prevent commercial disruption.\textsuperscript{84} An attack upon a vessel for the purpose of plundering it and/or holding the vessel and its passengers hostage does not constitute as an act of terrorism. Therefore, an attack by Somali pirates upon the Brilliance of the Sea should not be deemed as an act of terrorism.

2. An Attack By Somalian Pirates Upon the Brilliance of the Seas in the Gulf of Aden Should Be Classified as a Pirate Attack

Article 1 of the United States Constitution grants Congress the authority “to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.”\textsuperscript{85} Congress has elected to utilize this power and has promulgated laws regarding piracy under Title

\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{85} In re Charge to Grand Jury-Treason & Piracy, 30 F. Cas. 1049, 1049 (C.C.D. Mass. 1861) (No. 18:277).
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18, Crimes and Criminal Procedure, of the United States Code, and more specifically within Chapter 81, Piracy and Privaterring. According to 18 U.S.C. §1651, “[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”86 Sections within this chapter further specify punishments for specific piracy acts such as conversion of a vessel,87 plundering a vessel,88 acts of alien pirates,89 and robbery by pirates on shore.90

Courts within the United States understand piracy as “a forcible depredation upon property on the high seas without lawful authority, done animo furandi; that is, as defined in this connection, in a spirit and intention of universal hostility.”91 Consequently, “[p]irates are generally described as sea-robbers”92 and “are deemed ‘hostes humani generis,’ enemies of mankind, warring against the human race.”93 “A pirate is said to be one who roves the sea in an armed vessel, without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet.”94 Judge Sprague eloquently wrote how “[t]he ocean is the common highway of nations, over which every government has criminal jurisdiction.”95 He further stated that “pirates are highwaymen of the sea, and all civilized [sic] nations have a common interest, and are under a moral obligation, to arrest and suppress them; and the constitution . . . enables the United States to perform this duty, as one of the family of nations.”96

The international community has come to a similar agreement as to what constitutes piracy and the actions that all nations should take to suppress such crime. The 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention of the Law of the Seas defined piracy as consisting of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

86. 18 U.S.C. § 1651 (West 1948).
89. 18 U.S.C. § 1653 (West 1948).
92. In re Charge to Grand Jury-Treason, 30 F. Cas. at 1049.
93. Id.
94. Baker, 24 F. Cas. at 965.
95. In re Charge to Grand Jury-Treason & Piracy, 30 F. Cas. at 1049.
96. Id. at 1049.
(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).97

This definition is broad enough to cover both actual and attempted pirate attacks. It was also the consensus of both of these Conventions that all nations should “cooperate to the fullest possible extent in the repression of piracy on the high seas.”98 Consequently, both Conventions included Articles that addressed repossession of seized property, apprehension of pirates, and the adjudication of piracy.99

The actions of Somalian pirates constitute acts of piracy within the understanding of the laws of the United States and the international community. Somalian pirates are private non-state actors that utilize their own private boats to commit illegal acts on the high seas. They have become known for their aggressive tactics to seize vessels, its passengers, and its cargo in order to hold them hostage for large ransoms. Even though the international community has worked, and continues to work, jointly to detect and prevent pirate attacks, such criminal activity has not been eradicated. Vessels that voyage through the Gulf of Aden and the surrounding waters must remain vigilant and take precautions to protect themselves against being attacked and taken hostage by pirates. Should Somalian pirates seize, or attempt to attack the Brilliance of the Seas during its voyage through the Gulf of Aden, their actions should be held as acts of piracy. As piracy is separate and distinct from “terrorism,” RCC and RCI may be held liable for all passenger injuries or deaths occurring as a result of such an incident.

B. RCC AND RCI HAVE REASONABLE CONTROL OVER THE BRILLIANCE OF THE SEA AND ITS DESTINATIONS

In accordance with the Brilliance of the Seas’ Passenger Ticket, RCC and RCI may be “liable for injury, death, illness, damage, delay or other loss to person or property” for causes that are within the carriers reasona-

98. LOS Convention, supra note 98, art. 101; High Seas Convention, supra note 98, art. 14.
99. See LOS Convention, supra note 98, art. 105; See also High Seas Convention, supra note 98, art. 19.
While neither RCC nor RCI own the *Brilliance of the Seas*, they do have the authority over this vessel. Additionally, both RCC and RCI have the power to control where this ship sails and makes port.  

In 2002, RCC entered into a 25 year operating lease for the *Brilliance of the Seas*. RCC wanted to add this ship to its RCI fleet as it is "considered one of the most elegant cruise ships in the world." The ships most stunning features include "an open Centrum with 10-deck high windows and ocean-facing glass elevators." The adult passengers onboard can enjoy "multiple restaurants, lounges and discos throughout the ship, and world-class gaming in the Casino Royale." This ship was also designed to be family friendly as it includes a nine-hole mini-golf course, the iconic rock wall, a sports court, the Adventure Beach water slide, and self-leveling pool tables.

Under the terms of the lease agreement, the lessor may "cancel the lease at years 10 and 18." Based on current circumstances, RCC fully expects that this lease will reach maturity. Therefore, as of December 31, 2009, RCC reported that it planned to continue to operate this vessel along with 21 other ships under the RCI brand name.

RCI offers cruise packages on the *Brilliance of the Seas* that complement its overall business strategy. RCI has strategically positioned itself to serve both the upper end of the contemporary and premium segments of the cruise vacation industry. To meet the interests of the premium segment, which tends to be comprised of guests who enjoy traveling and are more affluent, RCI offers cruises that extend from 7 to 14 nights.

RCI also "offers a variety of itineraries to destinations worldwide, including Alaska, Asia, Australia, Bermuda, Canada, the Caribbean, Europe, Hawaii, Latin America, the Middle East, the Panama Canal, and New

100. Ticket Contract for Brilliance of the Seas, supra note 69, § 11a.
102. *ROYAL CARIBBEAN INT’L*, Annual (Form 10-K), at page 12 (Feb. 23, 2010).
105. Id.
106. Id.
107. Id.
109. Id.
111. *ROYAL CARIBBEAN INT’L*, Annual (Form 10-K), at page 1 (Dec. 31, 2009).
112. Id.
Zealand.”

In January 2010, as a part of their international expansion efforts, RCI added sailings from Dubai. Currently, while the Brilliance of the Seas and several other RCI ships operate in Europe, the Brilliance of the Seas is the only RCI vessel that operates in the Middle East. Due to this unique placement, RCI scheduled the Brilliance of the Seas to make several voyages between Barcelona, Spain and Dubai, United Arab Emirates in the future. This enables passengers the opportunity to book a 14-night, 16-night or 18-night cruise that offers a blend of exotic ports of call and restful days of at sea travel.

C. RCC AND RCI NEGLIGENTLY MADE ARRANGEMENTS FOR THE BRILLIANCE OF THE SEAS TO PROVIDE CRUISES THROUGH PIRATE PRONE AREAS

Under the Brilliance of the Seas’ Passenger Ticket, RCC and RCI may be “liable for injury, death, illness, damage, delay or other loss to person or property” for any act shown to be caused by the carrier’s negligence. During 2008, 2009, and 2010 both RCC and RCI knew, or should have known, they were placing many passengers in harms way by offering cruises to the Middle East. There were numerous indications that Somali pirates were becoming more brazen in their attacks and that cruise ships, similar to cargo vessels, would be at risk if they sailed through the Gulf of Aden. RCC and RCI did not waver from their efforts over these three years because of motivation to continuously increase profit and expand operations. Today, they continue to disregard sailing warnings and travel advisories against traversing on the very course scheduled as part of the 14-night Middle East cruise and several future cruises offered to/from the Middle East.
1. RCC and RCI Created a Presence in the Middle East During 2008
   Despite the Risk of Pirate Attacks

On October 13, 2008, RCC announced in a press release that RCI was expanding its presence in the Middle East.\(^{123}\) Michael Bayley, Senior Vice President, International, RCC, remarked on how “Dubai is a dynamic and thriving city that shows great growth potential.”\(^{124}\) He also explained how deploying the Brilliance of the Seas to this region the company would be building on its brand “reputation for introducing revolutionary cruise experiences.”\(^{125}\) Rama Rebbapragada, Regional Vice President, International Sales and Marketing, RCC, also commented on how pleased RCC was by this new arrangement and how their 2008 sales exceeded their target for the Middle East region.\(^{126}\)

On December 1, 2008, there was a flurry of reports by major news agencies around the world that pirates attacked the Oceania Cruises’ Nautica when it sailed through the Gulf of Aden.\(^{127}\) Tim Rubacky, a spokesman for Oceania, said that at the time of the incident the “Nautica was in an area patrolled by international anti-piracy task forces when two small skiffs appeared to try to intercept it.”\(^{128}\) “One of the smaller craft[s],” explained Mr. Rubacky, “closed to within 300 yards and fired eight rifle shots at the cruise ship.”\(^{129}\) This prompted the Nautica to take “evasive measures” and to accelerate “to its full speed of 23 knots or 27 mph.”\(^{130}\) Mr. Rubacky further reported that the “Nautica escaped without damage or injury to its 684 passengers and 400 crew.”\(^{131}\)


\(^{124}\) Id.

\(^{125}\) Id.

\(^{126}\) Id.


\(^{129}\) Id.

\(^{130}\) Id.

\(^{131}\) Id.
Despite the attack on the Nautica, RCC continued to support and endorse RCI’s efforts to boost its commercial growth by expanding its array of destinations.\(^{132}\) RCC announced in its Form 10-K, for the fiscal year ended December 31, 2008, that the Brilliance of the Seas would “remain in Europe year round throughout 2009,” and then would “begin offering sailings from Dubai starting in January 2010.”\(^{133}\) This Form 10-K also included an acknowledgment by RCC that “[e]vents such as terrorist and pirate attacks, war, and other hostilities and the resulting political instability, [and] travel restrictions” posed a risk to profitability and to its ability to retain qualified crew.\(^{134}\) While RCC understood the business risks of pirate attacks, it appears to have misunderstood or have disregarded the risk of passenger injury or death.

2. RCC and RCI Made Strategic Alliances and Promoted Its Middle East Cruises During 2009 Despite the Continued Threat of Pirate Attacks

On April 26, 2009, news that pirates attacked an Italian cruise ship was reported around the world.\(^{135}\) The MSC Melody “came under attack when it was 200 miles north of the Seychelles and 600 miles off the Somali coast.”\(^{136}\) Cmdr. Ciro Pinto explained how “six men in a small white speed boat approached the MSC Melody and opened fire Saturday night, but retreated after the Israeli security officers aboard the cruise ship returned fire.”\(^{137}\) In order to stop the pirates from climbing up over the sides of the vessel, Cmdr. Pinto said, “pistols were handed out to security staff and they opened fire on the pirates . . . we even sprayed them with water with the firehose [sic].”\(^{138}\) During the ordeal, passengers stayed inside their cabins.\(^{139}\) MSC Cruises, owner of the MSC Melody, an-


\(^{133}\) Royal Caribbean Int’l, Annual (Form 10-K), at page 9 (Dec. 31, 2008).

\(^{134}\) Royal Caribbean Int’l, Annual (Form 10-K), at page 22 (Dec. 31, 2008).


\(^{136}\) Nyambura-Mwaura, supra note 136.

\(^{137}\) Italian Cruise Ship Fires on Somali Pirates, supra note 136.

\(^{138}\) Nyambura-Mwaura, supra note 136.

\(^{139}\) Id.
nounced after the attack that "[n]one of the roughly 1,000 passengers and 500 crew members were hurt."\textsuperscript{140} The \textit{MSC Melody}, however, "was slightly damaged by firing from the pirates."\textsuperscript{141}

Despite this attack and growing fears over piracy in the Gulf of Aden, RCC continued to promote and support RCI's international expansion and development of its Middle East cruise offerings. On May 4, 2009, RCC made a press release announcing the formation of an agreement between RCI and DUBAILAND, which is a member of Tatweer.\textsuperscript{142} This press release described how RCI "will feature DUBAILAND's key live attractions in their shore excursion programs, while DUBAILAND will actively promote Royal Caribbean's Dubai cruises through their global agency network."\textsuperscript{143}

RCC reiterated in its December 31, 2009, Form 10-K, that "[e]vents such as terrorist attacks, war, and other hostilities and the resulting political instability, [and] travel restrictions" pose a risk to profitability and to its ability to retain qualified crew.\textsuperscript{144} RCC did not justify or elaborate in their Form 10-K why it or RCI would, despite these risks, proceed with offering cruises that included passage through the Suez Canal and Gulf of Aden. RCC also failed to disclose the danger attributable to the \textit{Brilliance of the Seas}, its crew, and its passengers embarking on a cruise scheduled to sail to/from the United Arab Emirates.

3. \textbf{RCC and RCI Continue to Offer Cruises to the Middle East During 2010 and Beyond Despite the Risk of Pirate Attacks}

"Helen Beck, Regional Director, International Representative, Europe, Middle East, Africa, commented, 'The Gulf region is a very popular destination with visitors from all over the world, and as cruises consistently offer significant value for money, we have seen considerable interest in this exciting way of visiting the Middle East.'"\textsuperscript{145} RCI discovered that its Middle East cruises "were particularly popular with British and


\textsuperscript{141} Id.


\textsuperscript{143} Id.

\textsuperscript{144} \textit{Form 10-K for the fiscal year ended December 31, 2009}, ROYAL CARIBBEAN INT'L, at 22, available at search engine "Form 10-K for the fiscal year ended December 31, 2009."

Irish passengers.\textsuperscript{146} It also found that “about 10 percent of the passengers on the sailings are American.”\textsuperscript{147}

Due to the popularity of the Dubai-based cruises, RCI announced in June 2010, that it planned to expand its presence in the Middle East.\textsuperscript{148} RCI “will offer a longer season of cruises and new itineraries in the region out of Dubai on the 2,501-passenger \textit{Brilliance of the Seas} for the winter season of 2011-2012.\textsuperscript{149} When the \textit{Brilliance of the Seas} returns to Dubai in November 2011, RCI is planning to offer “an increased range of itineraries including longer cruises up to 12- and even 18-nights.”\textsuperscript{150}

RCI wants those who have not been to the Middle East, but are interested in booking a cruise to an exotic place like the United Arab Emirates, to know they are sure to be “dazzled” when they arrive.\textsuperscript{151} RCI created a webpage that presents highlights of the area, describes places that might be of interest, and explains what to pack.\textsuperscript{152} RCI anticipated that after reading through this webpage some viewers may be interested in finding out when sailings will be offered. Thus, RCI has placed a button on this webpage that viewers can click to have a quick search run on future RCI sailings to this area.\textsuperscript{153} It should be noted that RCI’s Dubai/Emirate webpage does not provide any travel warnings or discuss the risk that pirates while voyaging in the Middle East could attack the \textit{Brilliance of the Seas}.

II. RCC AND RCI SHOULD TAKE MEASURES TO MITIGATE THE RISK OF HARM TO PASSENGERS

RCI and its RCI brand have attained the status of being reputable global leaders in the cruise industry. These firms have a proven track record of generating profits and expanding operations. In order to retain that position, RCC and RCI should include passenger security among its core business vision objectives.\textsuperscript{154} Pirate attacks can pose significant risks

\begin{footnotesize}

\textsuperscript{147} Id.

\textsuperscript{148} Id.


\textsuperscript{150} Ammari, \textit{supra} note 146.


\textsuperscript{152} Id.

\textsuperscript{153} Id.

to the integrity of the *Brilliance of the Seas* and the health and safety of its crew and passengers. Costly litigation and claims arising out of pirate attacks can also affect RCC and RCI’s bottom line and its investors. Thus, RCC and RCI should strive to strategically limit its exposure to litigation and to not jeopardize the safety of its passengers.

A. RCC AND RCI MAY NOT BE ABLE TO CONTRACT OUT OF LIABILITY FOR HARM ARISING OUT OF A PIRATE ATTACK

On its face it would seem that RCC and RCI could avoid having to compensate passengers for injuries sustained during a pirate attack while aboard the *Brilliance of the Seas* by simply revising the language within the Passenger Ticket. Currently, Passenger Ticket provisions include mitigation of liability for injuries arising out of particular events such as acts of God,\(^{155}\) perils of the sea,\(^{156}\) labor trouble, and fire.\(^{157}\) These events all share a common characteristic: RCC and RCI have absolute no control over their occurrence. As a result, RCC and RCI can prepare for, but are not going to be fully able to predict when they might occur.

It could be argued that even though RCC and RCI do not have direct control over Somalian pirates, RCC and RCI have reasonable control over the likelihood that the *Brilliance of the Seas* is attacked. The *Brilliance of the Seas* is an attractive floating target ripe for attack as soon as it crosses through the Suez Canal. First, RCC and RCI have not contracted for a security escort to travel with the *Brilliance of the Seas* or for security personnel to be aboard the *Brilliance of the Seas*.\(^{158}\) As such, there is a greater possibility that a pirate attack would be successful. Second, as the *Brilliance of the Seas* is a luxurious vessel, it could surely be held for a hefty ransom. Further, the cruise ship’s passengers are probably affluent and thus could also be held until significant payments were made for their release. Consequently, there is great motivation for pirates to attack the *Brilliance of the Seas*.

RCC and RCI’s legal team more than likely have not overlooked the possibility of including the term “pirate attack” into Section 11(a) of the *Brilliance of the Seas*’ Passenger Ticket. At present, inserting this term in and among the other situations in which RCC and RCI disclaim liability


is likely to be ineffective. RCC and RCI would probably have to reposition the *Brilliance of the Seas* so that it would no longer voyage through the Gulf of Aden or heed pirate advisories before they could mitigate their liability.

B. RCC AND RCI CAN CANCEL, DEVIATE, OR SUBSTITUTE THE *BRILLIANCE OF THE SEAS’ ITINERARY*

The courts have acknowledged that the primary reason travelers select certain cruises is because of their scheduled ports of call.\(^{159}\) Indeed, RCI’s 14-night Middle East cruise offers an exceptional itinerary.\(^{160}\) There is a perfect blend of opportunity to disembark the cruise ship to explore exotic cities in foreign countries and to relax on board while the ship sails to its next destination.\(^{161}\) Even though RCC and RCI would not want to disappoint travelers who have or are considering booking one of the available Middle East cruises, it would be prudent of RCC and RCI to consider canceling, deviating, or substituting the *Brilliance of the Seas’* itinerary because of the threat of a pirate attack.

RCC and RCI have reserved the right to take this course of action. Section 6 of the *Brilliance of the Seas’* Passenger Ticket describes the circumstances and conditions upon which RCC and RCI may utilize one or more of these options.\(^{162}\) Occasions have arisen where RCI and Celeb-

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159. Doe v. Celebrity Cruises, Inc. 394 F.3d 891, 900-01 (11th Cir. 2004).


162. ROYAL CARIBBEAN INT’L, Cruise/CruiseTour Ticket Contract – Royal Brilliance of the Seas CTC Effective To Those Who Booked On Or After 4/20/08, http://www.royalcaribbean.com/content/en_US/pdf/CTC_BR_Only.pdf (last visited Jun. 27, 2010) ("Carrier may for any reason at any time and without prior notice, cancel, advance, postpone or deviate from any scheduled sailing, port of call, destination, lodging or any activity on or off the Vessel, or substitute another vessel or port of call, destination, lodging or activity. Carrier shall not be liable for any claim whatsoever by Passenger, including but not limited to loss, compensation or refund, by reason of such cancellation, advancement, postponement, substitution or deviation. By way of example, and not limitation, Carrier may, without liability, deviate from any scheduled sailing and may otherwise land Passenger and her property at any port if Carrier believes that the voyage or any Passenger or property may be hindered or adversely affected as a result of hostilities, blockages, prevailing weather conditions, labor conflicts, strikes onboard or ashore, breakdown of Vessel, congestion, docking difficulties, medical or life saving emergencies or any other cause whatsoever. Carrier shall have the right to comply with any orders, recommendations, or directions whatsoever given by any governmental entity or by persons purporting to act with such authority and such compliance shall not be deemed a breach of this Agreement entitling the Passenger to assert any claim for liability, compensation or refund.").
rity Cruises, which is another brand of RCC, have opted to cancel or adjust the itinerary of certain cruises. For example, in September of 2004, RCI announced that it would modify the itineraries of its ships destined for the Caribbean first due to the threat of, and then due to the destruction caused by Hurricane Frances.\textsuperscript{163} Celebrity Cruises has also canceled cruises because of urgently needed vessel repair and maintenance.\textsuperscript{164}

Certainly the most effective way to prevent the \textit{Brilliance of the Seas}, its crew, and its passengers from harm due to pirate attacks would be to cancel all cruises scheduled to voyage through the Gulf of Aden. At the very least RCC and RCI should assess current risks and determine the level of risk of passenger injury or death they are willing to accept. When the conditions in the Gulf of Aden exceed that acceptable threshold, RCC and RCI should modify their cruise itineraries. Likewise, the Captain of the \textit{Brilliance of the Seas} should be granted the freedom to exercise such authority if the need should arise.

C. RCC AND RCI CAN CONTRACT FOR SECURITY ESCORT AND/OR SECURITY PRESENCE ON THE BRILLIANCE OF THE SEAS

It would be sensible for RCC and RCI to consider implementing counter-pirate measures in the event they decided to continue to offer cruises that include sailings through the Gulf of Aden. RCC and RCI may, for instance, hire security personnel to ride aboard the \textit{Brilliance of the Seas} from the point the cruise ship passes through the Suez Canal until it reaches its destination point at the United Arab Emirates. Onboard security personnel proved to be invaluable to the \textit{MSC Melody} when it was attacked by Somalian pirates.\textsuperscript{165} When pirates opened fire and tried to board the Italian cruise ship, its on-board security forces re-

\begin{footnotesize}
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\item 165. \textit{Italian Cruise Ship Fires on Somali Pirates}, supra note 136.
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taliated. The head of MSC Cruises stated, after an attack was made on the MSC Melody, that “MSC Cruises hired the Israelis because they were the best trained security agents.”

Additionally, RCC and RCI may consider contracting with a security escort provider to accompany the Brilliance of the Seas when it sails from the Suez Canal to the United Arab Emirates. “Ordinarily, cruise ships travel at the speed of 21 to 24 knots per hour, but a high-speed cruise ship can go as fast as 30 knots or more.” There was an instance where “pirates opened fire on a U.S.-operated ship carrying hundreds of tourists on a month long [sic] cruise from Rome to Singapore, but the cruise liner was able to outrun the pirates.” Cruise ships that are not able to maneuver as easily or reach a high rate of speed could greatly benefit from traveling in a convoy or being escorted by a vessel capable of fending off pirates. There are a number of reputable security firms offering such services.

RCC and RCI should not rely solely on the presence of navy flotillas presently patrolling the Gulf of Aden and surrounding waters. Piracy remains a significant problem even with the international effort to combat it because it is nearly impossible to provide complete protection “over the 1.1 million square miles of ocean.” As such, RCC and RCI should be proactive in their efforts to manage the threat of a pirate attack against the Brilliance of the Seas.

**CONCLUSION:** RCC AND RCI SHOULD REASSESS THEIR CURRENT CRUISE OFFERINGS

A cruise is an attractive, and often affordable, option for those looking for a hassle-free escape. A cruise ship is literally a floating resort that can offer a variety of services while sailing to various ports of call. Along with the overall experience, cruise lines tailor their vacations to be fam-

166. Id.
167. Id.
169. Italian Cruise Ship Fires on Somali Pirates, supra note 136.
ily-friendly as well as capable of meeting the demands of the most discriminate traveler.

While aboard, passengers place their trust in the cruise line and their staff. It is unlikely that passengers question the safety of their itinerary or suspect the threat of a pirate attack because it is expected that they will be protected from such foreseen dangers. Given the recent events in the Middle East waterways, passengers need to take some responsibility to research the areas they desire to visit and to gain an understanding of the risks they may face.

RCC and RCI are taking a huge gamble by continuing to offer cruises that sail through the Gulf of Aden. As they should be aware of the dangers vessels face when voyaging in the Middle East, RCC and RCI would likely be held accountable and required to compensate passengers for injuries, or death, that occur due to a pirate attack. RCC and RCI should be promoted by the statistics on pirate attacks and the current state of affairs to reassess the *Brilliance of the Seas* itinerary. They, however, have declined to cancel or modify the *Brilliance of the Seas*’ current schedule. So perhaps the next time the *Brilliance of the Seas* embarks on a Middle East cruise, instead of shouting “Bon Voyage,” there should be shouts of “Bonne Chance!”
“Double Marginalization” and the Counter-Revolution Against Liberal Airline Competition

Hubert Horan*

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SUMMARY/ABSTRACT:

In the last decade, the U.S Department of Transportation (DOT) has abandoned its previously liberal, market-oriented policies towards international airline competition. While the policies of the 1980s and 1990s were designed to maximize industry competitive dynamics so consumers could benefit from ongoing improvements in price and efficiency levels, recent DOT policies have sought to reduce competition and entrench the position of the largest carriers. These policies have already led to the consolidation of twenty-six previously independent transatlantic airlines into three collusive alliances that would be virtually immune from future competitive challenges; in 2009, the DOT initiated a process that could see twenty-three previously independent transpacific airlines consolidated into those three same collusive alliances. While the DOT proactively used “Open Skies” treaty negotiations in the 1990s to undermine the ability of governments to reduce consumer welfare through artificial competitive barriers, recent “Open Skies” negotiations with the EU and Japan reestablished that private, bilateral discussions between large legacy airlines and government officials could dramatically restructure international airline competition in favor of those established legacy carriers. While the DOT used antitrust immunity in the 1990s as a tool that allowed small competitors such as KLM and Northwest to offer consumers improved schedules and lower prices in previously underserved niche markets, since 2003 the DOT has used antitrust immunity to enhance the market power of the largest incumbents, leading to pricing shifts that appear to have created multi-billion dollar annual consumer welfare losses.

The abandonment of consumer welfare-based airline antitrust policies and the sudden shift to unprecedented levels of international airline concentration was made possible by the DOT’s evisceration of traditional antitrust immunity evidentiary standards. The DOT’s recent immunity grants to members of the Star, Skyteam and Oneworld alliances were based on willful non-enforcement of the Clayton Act market power test and the Horizontal Merger Guidelines’ requirement that applicants present verifiable, case-specific evidence of public benefits in order to meet
the 49 U.S.C. § 41308(b) stipulation that immunity be required by the public interest. The DOT has supplants the need for verifiable, case-specific evidence with a series of arbitrary “rules” that ensure that almost any antitrust immunity proposal will be found to automatically produce public benefits without any risks of creating market power. The most important of these is “double marginalization,” a rule which asserts that every time an immunity grant reduces international competition, consumer prices in certain connecting markets automatically fall fifteen to twenty-five percent, regardless of actual market or competitive conditions.

This paper describes the process by which the DOT has used rules such as “double marginalization” to eviscerate traditional antitrust evidentiary standards, and argues that none of the post-2003 consolidation of international aviation would have been possible if the traditional public benefits or market power tests and the traditional evidentiary standards had been enforced. The dispute over evidentiary standards surfaced in late 2009 when the Antitrust Division of the U.S. Department of Justice (DOJ) objected to the DOT having rubber-stamped the Star/Continental applicants’ unsubstantiated benefit claims. The DOT emphatically rejected the DOJ’s objections as an inappropriate interference with the DOT’s aviation policy and bilateral negotiation prerogatives, a position that was more fully articulated in a recent Dean and Shane Air and Space Lawyer commentary, which claimed that all recent DOT decisions were fully consistent with longstanding pro-consumer, pro-competitive policies, and attacked the DOJ and Congressional critics of the DOT’s antitrust approach as hostile to the interests of the US airline industry. This paper argues that the policies favoring extreme concentration and the effort to render the public benefits and Clayton Act tests meaningless reflect a major policy shift towards more active governmental management of airline industry structure, and represent a counter-revolution against the liberal airline competition policies of the 1990s.

I. EVIDENCE JUSTIFYING ATI GRANTS: “COPY/PASTE” AS ANTITRUST JURISPRUDENCE

Airlines applying to the DOT for antitrust immunity (ATI) must meet the strict section 41308 “required by the public interest” standard and prove that immunity “is necessary . . . to achieve important public benefits” that “cannot be achieved by reasonably available alternatives that are materially less anticompetitive.” The burden of proof for public benefits rests with the applicants, and the Horizontal Merger Guidelines

defines the evidentiary standards that efficiency claims used to meet the public benefits test must meet:

[The applicants must] substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.

Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means.3

Since ATI eliminates competition in the same manner that a full merger would, immunity cannot be granted unless the DOT conducts a Clayton Act test of whether ATI would create or increase market power.4 The Antitrust Guidelines and the Horizontal Merger Guidelines define these standards, including the need for evidence demonstrating the absence of risk that it could "harm[ ] competition by increasing the ability or incentive . . . to raise price or reduce output" in any relevant market5 and evidence that markets are fully contestable, so that "entry would be timely, likely, and sufficient in its magnitude and scope to deter and counteract the competitive effects of concern."6

ATI evidentiary standards became a public controversy in mid-2009 when the DOJ identified numerous instances where the DOT's Show Cause Order in the Star/Continental Application for antitrust immunity failed to support its findings with the "detailed and fact-intensive analysis" demanded by these evidentiary standards, including:

- "[T]he Applicants . . . made no showing that such entry [that could curb any anti-competitive abuse] would be timely, likely, or sufficient . . . ."7
- "[t]he [DOT] Order contains no analysis of the competitive effects of

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6. HORIZONTAL MERGER GUIDELINES, supra note 4, at 28.
immmunizing the non-transatlantic international operations of Continental and United;"8

- "[t]he Applicants have failed to show that nonstop entry would prevent fare increases by Continental and its immunized Star ATI partners in overlap transatlantic markets;"9

- "DOT cites the Applicants' assertion that the A++ 'integrated' venture will enable its participants to 'pool resources to achieve substantial efficiencies and cost savings.' . . . In DOJ's view, it is not sufficient, however, merely to point towards claimed benefits; rather the Applicants need to demonstrate that immunity is necessary to achieve them. In this regard, the Applicants fall short;"10

- "[t]he Applicants present no evidence however, that customers will receive quantitatively or qualitatively different service if Continental receives antitrust immunity . . . compared to what would be provided if Continental merely interacted with the level of cooperation expected of any member of the broader, non-immunized Star Alliance;"11

- "[t]he Applicants also suggest, without evidentiary support, that consumers benefit from competition between alliances, particularly immunized alliances;"12

- "[t]he Applicants overemphasize the likelihood that immunity for the proposed alliance will substantially reduce double marginalization [extra markups imposed on joint fares]. . . . In fact using 2005-2008 data, DOJ has found that connecting fares offered by non-immunized alliances for transatlantic routes are no more expensive than fares offered by immunized alliances;"13

- "[t]he analysis underlying DOT's conclusions on carve outs is unclear. The Order declines to carve out the overlap transborder routes in which Continental and the Star ATI members currently compete on a nonstop basis, without citing evidence from the record describing the public benefits likely to result from coordination on these routes. . . . [T]he Order cites no evidence to support revoking the [Frankfurt-Chicago/Washington] carve outs beyond the Applicants own self-serving statements. The Applicants do not provide specific evidence or quantification of diminished efficiencies or consumer value, even though Star members have long operated carve outs imposed as part of prior immunity grants;"14

- "DOT dismisses concerns about the scope of the immunity on the grounds that the other Star partners have had global immunity with each other for many years. Therefore DOT concludes that it 'has enough information to analyze the alliance plans' and that restricting the scope here would unfairly disadvantage Continental. . . . DOT does not cite the 'other information' it relies upon to analyze the alliance plans, nor does it

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8. Id. at 18.
9. Id. at 25.
10. Id. at 29-30.
11. Id. at 30.
12. Id. at 33.
13. Id. at 35-36.
14. Id. at 37, 39.
explain how Continental, or more significantly, consumers, would be harmed by the lack of global immunity.\footnote{15}

The Star/Continental cases brought to light an irreconcilable gap between the DOT and DOJ approaches to airline antitrust jurisprudence.\footnote{16} In Star/Continental, the DOT had not required the applicants to present verifiable, case-specific evidence, and did not undertake an independent, objective evaluation of the applicant’s claims.\footnote{17} In fact the DOT Show Cause “finding” that immunity would create public benefits consisted of nothing more than a verbatim repetition of the claims in the application.\footnote{18} The DOT’s public benefits methodology was literally nothing more than “copy and paste.” The DOT’s approach had been no more rigorous on the other major ATI cases of the past decade. But until the Star/Continental\footnote{19} and Oneworld cases\footnote{20} in 2009, no outside parties had ever commented as to whether these approaches were consistent with the law or established review standards.

The DOT attacked the DOJ evidentiary concerns in its Final Order as an inappropriate attempt to undermine its international aviation policies:

Were we to suddenly change our antitrust immunity and public interest approach, as DOJ suggests, the credibility of the U.S. government with its international aviation partners would be significantly compromised and our ability not only to reach new Open-Skies agreements but also to maintain those agreements that we have already achieved would be undermined.\footnote{21}

\footnote{15} Id. at 41 n.109.

\footnote{16} See generally The Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703, 1703-1705 (1984). The Act divided airline antitrust responsibilities between the DOT and the DOJ, giving the CAB’s authority to exempt international airlines from the antitrust laws (under certain conditions) to the DOT, but giving the DOJ authority over all mergers between US airlines. While the DOT has final authority, the DOJ is required to comment on all airline ATI cases, just as the DOJ is required to solicit DOT input on airline merger cases.


\footnote{18} Id. at 15-16.

\footnote{19} See id. at 6 (summarizing comments made by outside parties).

\footnote{20} See Oneworld Show Cause Order, supra note 3, at 7-8 (summarizing comments made by outside parties).

\footnote{21} Star/Continental Final Order, supra note 18, at 11.
The DOT made no attempt to justify or explain the evidentiary approaches that the DOJ criticized, and only made minor concessions to the separate DOJ argument that overlapping, nonstop routes which would lose competition should be carved out of the final immunity grant. Press reports suggested a heated dispute between the two departments that echoed these competing “antitrust evidentiary standards” versus “international aviation competition policy” positions, a debate that required mediation from President Obama’s chief economic adviser, Lawrence H. Summers. Filings in the OneWorld case use more measured language but the gap between the underlying antitrust approaches has not diminished.

II. “ANTITRUST EVIDENTIARY STANDARDS” VERSUS “THE FUTURE OF GLOBAL AVIATION”

In a recent commentary in the American Bar Association’s Air and Space Lawyer, Warren Dean and Jeff Shane presented a fuller articulation of the “aviation policy” side of this dispute. The Dean and Shane commentary directly echoes the DOT’s response to the DOJ’s Star/Continental criticism, claiming an unbreakable link between the DOT’s role in negotiating aviation treaties with foreign countries and its role in enforcing US antitrust laws, and defending the DOT’s jurisdiction over airline ATI cases. Dean and Shane point out that the current jurisdictional arrangements this linkage facilitated were the negotiations of the 1990s treaties: “If the U.S. government was to attempt through diplomacy to move its aviation trading partners coherently toward a more market-based and pro-competitive regime, it was essential that the antitrust exemption authority be vested in the agency primarily responsible for the development of U.S. international aviation policy.” They portray the dispute as a rearguard action led by the DOJ and certain Members of Congress against the liberal regime initiated by the original 1990s “Open Skies” treaties. In Dean and Shane’s view the DOJ and others

22. See id. at 18-21.
26. See id. at 18.
27. Id. The question is whether the DOT is still using its international ATI authority to create a “more market-based and pro-competitive regime” as it did in the 1990’s.
critical of recent ATI decisions were undermining what has been “a major aviation policy success story” because of their “outright hostility” to the interests of the US airline industry which had blinded them to the many “benefits” created by immunized alliances.29

Dean and Shane reframe the discussion away from the lax versus rigorous evidentiary standards question posed by the DOJ by claiming that the DOT’s pro-alliance agenda is critical to the future of aviation.30 They describe the 1992 U.S.-Netherlands “Open Skies” Agreement and the resulting Northwest/KLM alliance31 as “the template for a major transformation of international aviation” and claim that the resulting “confluence of Open Skies agreements, alliances and ATI has spawned a fundamental reinvention of the global air transport industry,” and even assert that “the emergence of alliances—and particularly immunized alliances—arguably has represented the most important development in the industry since the introduction of jet aircraft.”32 Even though the DOJ’s comments were strictly limited to evidentiary standards and said absolutely nothing about any of the DOT policies Dean and Shane favor, they feel that the DOJ’s comments threaten this “more efficient and competitive global aviation system” and the outcome of the DOT-DOJ dispute “will have profound implications for the future of commercial aviation.”33

Dean and Shane do not directly acknowledge any of the DOJ’s specific Star/Continental evidentiary concerns, but they assert that whatever objections the DOJ might have had are wrong because the DOT findings fully satisfied both the public benefits and the Clayton Act market power tests.34 Thus, the two parties have used the same legal requirements and the same case evidence to reach exactly opposite conclusions— the DOJ said that the DOT’s findings were hopelessly deficient while Dean and Shane say that the DOT’s findings in Star/Continental were completely consistent with the law, and ATI could not have been granted in these cases unless these tests had been properly administered.35 In order to

29. See Dean & Shane, supra note 26, at 1, 17.
30. See id. at 18-19.
32. Dean & Shane, supra note 26, at 17-18.
33. Id. at 17.
34. See id. at 19-20.
35. Star/Continental DOJ Comments, supra note 8, at 29-30; Dean & Shane, supra note 26, at 19 (“ATI will be awarded only where the applicants can demonstrate that the public benefits likely to flow from the alliance will be significant - in keeping with the positive effects DOT described in its 1999 and 2000 reports - and that those benefits would not materialize without a grant of ATI”).
make sense of the competing views about industry consolidation and the future of global aviation, it is necessary to explain these opposite and incompatible views about the case evidence required to show significant public benefits and the market power needed to sustain anti-competitive pricing.

III. "Aviation Policy Driven Bilaterals" Versus "Bilateral Driven Aviation Policy"

Dean and Shane’s paper does not define the DOT’s specific international aviation policy objectives that are being threatened by the DOJ and others, aside from these general references to the promotion of immunized alliances. There are no references to post-1999 DOT policy analysis of the virtues of increasing the size and market share of immunized alliances beyond their 1999 levels as these do not exist. They argue that the DOT’s policies and its ATI decisions “have been a major public policy success story for consumers, global airline competition, and the airline industry itself;” although the article does not cite any post-1999 evidence of consumer/competitive benefits, or any significant industry service or productivity gains.36

The DOT policy objective at stake is the use of ATI to consolidate previously independent international airlines into three collusive alliances, a policy radically different from what the DOT was pursuing when it approved Northwest/KLM in the mid 1990s. Dean and Shane cite “DOT’s savvy administration of its power to confer ATI”37 as a major policy accomplishment, but are unwilling to openly admit that current ATI policy is designed to reduce competition, or to openly defend the new policy on the basis of evidence that the risks of reduced competition are fully offset by tangible consumer benefits. In fact, Dean and Shane are unwilling to admit that there has been any change in the DOT’s international aviation competition policy despite the obvious contradiction between the DOT’s current policy of active government intervention (via ATI) to massively reduce the number of international competitors, and the 1990s “market-based and pro-competitive regime” that they used as justification for an “aviation policy” driven approach to antitrust enforcement.38

Dean and Shane’s defense of the linkage between the DOT’s anti-trust and bilateral negotiation authorities attempts to reverse the horse

36. Dean & Shane, supra note 26, at 21. The only objective (but pre-1999) evidence cited by Dean and Shane are DOT reviews of the mid 90’s impacts of the original ATI grants. Id. at 19 n.27.
37. Id. at 21.
38. Id. at 18. The impacts of recent ATI decisions on concentration will be documented in section 5.
and the car. In the 1990s, the DOT’s bilateral negotiations were a means of implementing its “market-based” competition policies, policies that were grounded in traditional antitrust logic based on consumer welfare and industry efficiency, and closely aligned with the domestic competition policies enshrined in the Airline Deregulation Act.\textsuperscript{39} Today, the DOT is conducting bilateral negotiations about the future structure of the international airline industry with other governments and the large incumbent carriers, and then tailoring antitrust findings to support those agreements.\textsuperscript{40} Dean and Shane argue that competition (antitrust) decisions should be totally deferential to industry structure decisions reached during those private negotiations, even when those “policies” are not market-based, are not aligned with the consumer welfare/industry efficiency logic that is the basis of the Airline Deregulation Act, and cannot be justified on the basis of the objectives and benefits of 1990s aviation competition policies.\textsuperscript{41}

Dean and Shane are advocating a fundamental shift from the mid-1990s approach - what could be termed “aviation competition policy driven bilaterals” - to “bilateral driven aviation competition policies,” the opposite of the mid-1990s approach.\textsuperscript{42} The large intercontinental alliance carriers such as United or Air France would naturally favor “bilateral driven competition policies” since they are ideally positioned to influence the officials responsible for these bilaterals and often participate directly in the bilateral negotiation process. The “aviation competition policy driven bilaterals” approach of the 1990s made the interests of the large intercontinental carriers subsidiary to broader issues of consumer welfare and overall industry efficiency.

IV. “BILATERAL DRIVEN ANTITRUST ENFORCEMENT” VERSUS “EVIDENCE DRIVEN ANTITRUST ENFORCEMENT”

The “antitrust evidentiary standards” counterargument that will be presented in the balance of this paper is that the DOT has radically redefined the traditional evidentiary standards, hollowing them out to the extent that almost any ATI/consolidation proposal being discussed by the

\textsuperscript{39} See U.S. Dep’t of Transp. Office of Hearings Competitive Mktg. of Air Transp., Docket No. 36595, Order 82-12-85 at 131 (Dep’t of Transp. Dec. 16, 1982) (“In enacting the Airline Deregulation Act, Congress directed that control of the air transportation system be returned to the marketplace. We have consistently held that a part of the return to market control is exposure of participants to the antitrust laws, as that exposure exists in unregulated industries.”).

\textsuperscript{40} This was the approach that the liberal Open Skies regimes were designed to eliminate. See Clifford Winston & Steven Morrison, Evolution of the Airline Industry 147-50 (1995); Jeffrey N. Shane, Under Sec’y for Policy, U.S. Dep’t of Transp., Air Transport Liberalization: Ideal and Ordeal 11-12 (Dec. 8, 2005).

\textsuperscript{41} See Dean & Shane supra note 26, at 19.

\textsuperscript{42} See id. at 21.
industry will automatically be found to produce significant public benefits and to pose no risk of anti-competitive pricing. Just as Dean and Shane have no post-1999 evidence supporting their policy preferences, none of the recent ATI applicants have presented any post-1999 evidence of actual public benefits, or the actual absence of market power.\footnote{See, e.g., American Airlines-British Airways-Iberia-Finnair-Royal Jordanian Joint Application for Antitrust Immunity, Docket No. OST-2008-0252, Application (Dep't of Transp. Aug. 15, 2008) [hereinafter OneWorld ATI Application]; Joint Application to Amend Order 2007-2-16 under 49 U.S.C. §§ 41308 and 41309 so as to Approve and Confer Antitrust Immunity, Docket No. OST-2008-0234, Application (Dep't of Transp. July 23, 2008) [hereinafter Star/Continental ATI Application].}

The traditional need for verifiable, case-specific evidence of public benefits has been nullified by a DOT position that ATI applications automatically create approximately fifteen to twenty-five percent in price reductions in connecting markets, in each and every case irrespective of market or competitive conditions.\footnote{See OneWorld Show Cause Order supra note 3, at 31, Ex. JA-19 (citing to Jan K. Brueckner & W. Tom Whalen, The Price Effects of International Airline Alliances, 43 J.L. & ECON. 503, 503-45 (2000) (estimating an average 25% fare reduction in antitrust-immune alliances generally and an average 15% fare reduction in antitrust-immune alliances for “behind-the-gateway” markets)); Jan K. Brueckner, International Airfares in the Age of Alliances: The Effects of Codesharing and Antitrust Immunity, 85 REV. ECON. STAT. 105 (2003) (estimating a seventeen to thirty percent reduction effect in interline airfares from airline cooperation); W. Tom Whalen, A Panel Data Analysis of Code Sharing, Antitrust Immunity, and Open Skies Treaties in International Aviation Markets, 30 REV. OF INDUS. ORG. 39, 39-61 (2007)).} This position is based on a theory of structural barriers to efficient pricing known as “double marginalization,” a theory supported by a single study prepared by a paid advocate for one of the ATI applicants, and based solely (like Dean and Shane’s policy arguments) on pre-1999 data.\footnote{See generally Jan K. Brueckner & W. Tom Whalen, The Price Effects of International Airline Alliances, 43 J.L. & ECON. 503, 503-45 (2000).} The DOT has based all public benefits findings on this position, has simply ignored evidence that the logic and evidence underlying the rule is deeply flawed, and has ignored all recent evidence contradicting the rule.\footnote{The DOJ presented original statistical analysis contradicting the Brueckner and Whalen findings using 2005-2008 data in one case and updated 2008 data in another. Star/Continental DOJ Comments supra note 8, at 49; Joint Application of American Airlines, British Airways, Iberia, Finnair, Royal Jordanian under 49 U.S.C. §§ 41308 and 41309 for Approval of and Antitrust Immunity for Alliance Agreements, Docket No. OST-2008-0252, Comments of the Dep’t of Justice at 26-27 (Dep’t of Transp. Dec. 21, 2009) (public version).} The DOT also based its public benefit findings on a second rule establishing that claims the applicants will benefit from a grant of ATI can be accepted as proof of significant “public” benefits, even when the applicants have not documented or quantified the claims, and even where there is no evidence that overall consumer welfare or industry efficiency actually improved.\footnote{See OneWorld Show Cause Order supra note 3, at 30-31.} The DOT has abandoned the traditional need for pricing, entry barrier, and market contestability in making public benefit findings.

\[\text{2010] "Double Marginalization" 261}\]
ability evidence showing that ATI grants meet the Clayton Act market power test, because of a third arbitrary rule that market power cannot exist in any broadly defined market that has three competitors and an “Open Skies” treaty.48

By gutting, but not formally eliminating, the public benefit test of 49 U.S.C. § 41308(b) and the market power test of the Clayton Act, the DOT maintains the superficial appearance of following the law, while establishing a process whereby ATI and consolidation proposals can be approved much more rapidly. Because applicants no longer need to present verifiable, case/market-specific evidence, almost any plausible ATI proposal would automatically meet the redefined standards, and opponents cannot challenge applications based on case/market-specific evidence. As a result, both the DOJ and Dean and Shane can cite the same public benefits and market power requirements and reach completely opposite conclusions about the legitimacy of the DOT’s recent ATI findings. Dean and Shane favor the DOT rules gutting these evidentiary standards because they favor much greater consolidation among international airlines, and recognize that the “aviation policy” objective of vastly increased consolidation could not be implemented under traditional standards.49 However, Dean and Shane are unwilling to openly acknowledge that the DOT’s pro-consolidation decisions depend on these new rules or that the DOJ and the other parties they attack in their article might have reasonable legal objections to the DOT’s rules independent of any opinions about aviation policies or specific consolidation proposals.50

While “double marginalization” may seem like an arcane rule, it has already had a bigger impact on airline competition than anything that has occurred since the 1944 Chicago Convention established today’s legal framework for international aviation. A brief review of the historical development of collusive (immunized) alliances and their impact on North Atlantic competition will provide some useful context for the subsequent discussion of how the DOT’s recent ATI evidentiary rules were critical to the recent increases in industry concentration.

V. THE ECONOMICS OF INTERCONTINENTAL ALLIANCES

The economics and competitive dynamics of intercontinental airline markets are markedly different from shorter-haul domestic and regional

48. See Star/Continental Show Cause Order, supra note 18, at 2; OneWorld Show Cause Order supra note 3, at 3.
49. See Dean & Shane, supra note 26, at 20-21.
50. See Star/Continental DOJ Comments, supra note 8, at 8. As discussed in section 1, the DOJ’s comments in the Star/Continental case were strictly focused on the DOT’s failure to support its findings with evidence that met Horizontal Merger Guidelines standards; the DOJ did not offer any comments about the general merits of alliances or any DOT aviation policies.
markets. All of the “aviation competition policy” and antitrust issues in these cases strictly apply to the intercontinental sector, which accounts for over half of the entire global aviation business. Any discussion of those issues must recognize that because of both natural and artificial barriers, it is much more difficult for “market forces” to discipline competitors and spur productivity in intercontinental markets.

Domestic/regional (narrow-body) carriers focus on much smaller market segments, and the “low cost” (LCC) models that dominate those markets are highly flexible, require relatively little startup capital, and can operate small networks efficiently. Intercontinental carriers have huge initial startup costs and require very large scale operations, including large fleets of wide-bodies, global marketing capabilities, and a very large hub-based route network in order to feed passengers onto and between those wide-body aircraft. Since these hubs must be in very large cities with a strong local demand for intercontinental travel, new entry into this sector has been entirely limited in recent decades to airlines based in newly developing economies in East Asia and the Persian Gulf. These natural barriers are augmented by other totally artificial entry barriers established by governments in order to protect incumbent intercontinental airlines. Most governments around the world have established highly liberal entry and pricing rules for domestic and regional markets, but actively intervene to rig market rules to protect the airline(s) serving as their “national champion” in intercontinental markets.

51. Intercontinental markets are defined as city pairs more than 3000 miles apart. In almost all cases, intercontinental service involves the use of long-haul, wide-body aircraft, although passengers often connect to these aircraft from short-haul, narrow-body aircraft that also carry domestic/regional passengers. Domestic/regional markets include “international” (cross-border) service operated on the same basis as domestic services (for example intra-EU, USA to Canada/Caribbean).

52. Only four of the traditional network airlines currently operating intercontinental services entered long-haul markets within the last fifteen years (Qatar, Etihad (UAE), Jet Airways (India) and BMI (UK)), while only two large network carriers exited intercontinental markets in that period (TWA, Canadian). The handful of today’s small, non-network carriers that first entered intercontinental markets in the last fifteen years (mostly leisure carriers such as Blue Panorama (Italy), Monarch (UK), and Air Tahiti Nui) was offset by the exit of other small non-network carriers (mostly flag carriers of small countries such as Olympic (Greece), JAT (Yugoslavia), and Tarom (Romania)). In several other cases there was a one-for-one replacement of national carriers providing longhaul service (Swiss for Swissair, TAM for Varig (Brazil), Aerosvit for Air Ukraine, and Conviviasa for VIASA (Venezuela)) that had no impact on the overall competitiveness of intercontinental markets.


Because of these natural and artificial barriers, intercontinental markets are not contestable. As shown in figure 1, there has been no growth in the number of intercontinental competitors in thirty years, even though this is the most profitable and fastest growing part of global aviation; all of the dynamic industry growth and increased competition observed in recent decades has been strictly limited to domestic and regional (narrow-body) markets. All of the recent merger and immunity cases since 2003 are designed to increase consolidation within these already non-contestable intercontinental markets, and would have no impact on the over 700 airlines serving the forty-five percent of global demand in short-haul markets. “Industry consolidation” advocates, following a process described in the balance of this section, are attempting to rationalize most of the 100 airlines serving the fifty-five percent of global demand in intercontinental markets into just three global alliance groups.

Table 1

<table>
<thead>
<tr>
<th>Aviation Sector</th>
<th>% of RPMs/Revenue</th>
<th>% of Enplanements</th>
<th>Business Models</th>
<th>Entry Barriers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intercontinental (long-haul/wide-body)</td>
<td>55%</td>
<td>30%</td>
<td>Strictly via mega-hubs (JFK, ORD, FRA, CDG, HKG, SIN, etc)</td>
<td>Huge - need large fleet of wide-bodies plus hubs with short-haul feed, plus many government restrictions.</td>
</tr>
<tr>
<td>Domestic/Regional (short-haul/narrow-body)</td>
<td>45%</td>
<td>70%</td>
<td>Various models possible, mostly “low cost” and point-to-point.</td>
<td>Generally very low - vast majority of markets have open entry/pricing.</td>
</tr>
</tbody>
</table>

55. Traffic data in Table 1 is from a proprietary database created by the author from raw data published in Int’l Air Transp. Ass’n, 52 WORLD AIR TRANSP. STATISTICS (2008) (on file with author) [hereinafter WORLD AIR TRANSP. STATISTICS (2008)].

56. See Hubert Horan, If Consolidation Occurs, It Would Reverse Decades of Airline History, AIRLINES INT’L, Jan. 2009, at 58. See also William Swan, Misunderstandings About Airline Growth, 13 J. OF AIR TRANSP. MGMT 3, 3-4 (2007). Swan reached a similar “industry consolidation is a myth” conclusion based on data showing growth in aggregate market demand and service levels had been achieved without any major increases in Herfindahl market concentration indexes. However, this analysis did not look at competitive entry/exit data, and thus would not have captured the enormous differences shown in figure 1 between the competitive dynamics of long-haul markets (where both entry and exit is extremely rare, and the net growth in the number of competitors is close to zero) and short-haul markets (with high levels of both entry and exit, and strong net growth in the number of competitors). See infra note 59.

57. See WORLD AIR TRANSP. STATISTICS (2008), supra note 56.
The two types of alliances between intercontinental airlines have totally different economic and competitive characteristics, although Dean and Shane and most other observers discuss the benefits of "alliances" as if these distinctions did not exist.\(^{59}\) Non-immunized "Branded Alliances" operate globally and emphasize products such as frequent flyer reciprocity, codesharing, common terminal and lounge facilities, and other forms of mutually beneficial interline cooperation that existed long before the current alliance structures were developed.\(^{60}\) "Collusive Alliances" were first introduced in 1992, and are currently only found on the North Atlantic.\(^{61}\) Since their members have antitrust immunity to collude on pricing

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58. Data in the graph is from a proprietary database of all historical passenger airlines operating under unique aircraft operator certificates. Data includes all airlines operating aircraft with at least 50 seats and all airlines operating at least 15 smaller aircraft. The data does not reflect any reduced competition due to ATI; for example United and Lufthansa are counted as fully independent airlines (on file with author).

59. See Dean & Shane, supra note 26, at 17-18.

60. Star/Continental DOJ Comments, supra note 8, at 3-5.

61. The comments in this section are based on my experience developing the original Northwes/KLM alliance network that has served as the template for all subsequent North Atlantic alliances. This includes various internal market studies conducted that were used to better understand the competitive impacts of the initial alliance schedules and to justify further expansion of alliance operations. I also worked on the Swissair-Sabena-Delta alliance from the Euro-
and capacity, the Collusive Alliances require careful antitrust scrutiny while the Branded Alliances do not.

<table>
<thead>
<tr>
<th>Branded Alliances — Global scope</th>
<th>Collusive Alliances — Limited to North Atlantic</th>
<th>Start Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Global Excellence (Delta)</td>
<td>KL-led alliance (Northwest)</td>
<td>1992 (x)</td>
</tr>
<tr>
<td>Star (United, USAirways, Continental)</td>
<td>SR-led alliance (Delta, later American)</td>
<td>1995 (x)</td>
</tr>
<tr>
<td>One World (American)</td>
<td>LH-led alliance (United, USAirways, Continental)</td>
<td>1997</td>
</tr>
<tr>
<td>Skyteam (Delta, Northwest)</td>
<td>AF-led alliance (Delta, Northwest)</td>
<td>2000</td>
</tr>
<tr>
<td>(x) defunct</td>
<td>BA-led alliance (American) (U.S. members listed in parentheses)</td>
<td>2010</td>
</tr>
</tbody>
</table>

Table 2

The original Collusive Alliances developed in response to unique North Atlantic market conditions that are not found in any other intercontinental market. In the early 1990s, seventy percent of the traffic on the North Atlantic was in city pairs that had good single-carrier schedules and a full range of discount fares. This included not only the nonstop service operated in large “gateway” markets, but one-stop online service via large hubs on both sides of the Atlantic.

The original three mid-1990s Collusive Alliances (Northwest/KLM, Delta/Swissair/Sabena and United/Lufthansa) succeeded by providing a

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62. See Horan Oneworld Comments, supra note 62.
63. See id.
64. Id.
65. Id.
66. Id.
high-quality online-equivalent service to the other thirty percent of the market, which had poor service and much higher fares—hundreds of city pairs linking U.S. Interior Cities to European Interior Cities such as St. Louis-Brussels or Milwaukee-Munich. The initial growth and profitability of the original three Collusive Alliances was based on a clear competitive advantage over traditional interline services in this important “double connect” market segment, just as other airlines had clear competitive advantage because of superior schedules in other nonstop and “single connect” market segments.67 The benefits derived from these competitive advantages had been fully exhausted by the end of the 1990s as they had fully captured the traffic previously served by interline connections.68 The volume of passengers using alliance “double connect” services also began to shrink because of the dramatic growth of superior nonstop and single connect services that resulted from normal industry capacity growth.69

Despite the clear success of the original mid-1990s Collusive Alliances, airlines made no attempt to introduce them to transpacific markets or elsewhere in the following fifteen years because the underlying “double connect” competitive advantage versus interline service in San Diego-Stuttgart type markets did not exist elsewhere.70 North American and European traffic is highly dispersed among dozens of large secondary cities, but Asian, South Pacific and South American traffic is not, so “double connect” alliance services are of little value to consumers. Transpacific airlines cannot justify alliance development and management expenses on the basis of increased revenues from Cleveland-Chiang Mai or Baltimore-Busan type markets.

It should be emphasized that the central antitrust and industry structure question here is consolidation, not alliances. The original growth of immunized alliances occurred in the 1990s under highly competitive market conditions. The original Northwest/KLM alliance combined two carriers with four percent shares of the transatlantic market into a single competitor with an eight percent share.71 In 2001, after the alliance net-

67. Id.
68. Id. at 9.
69. DOT Form 41 schedule T100 data compiled by the author show that the number of transatlantic nonstop flights doubled between the summer of 1991 and the summer of 2001, increasing from 168 to 323 per day, a seven percent compound annual growth rate (on file with author).
70. DOT DB1A data compiled by the author show that less than two percent of all transpacific traffic is in O&D markets that do not have online (single carrier) service, compared to the thirty percent of transatlantic traffic when immunized alliances were first introduced in the 1990s (on file with author).
71. Percentages based on DOT Form 41 schedule T100 seat capacity data compiled by the author (on file with author).
works were fully mature, the largest collusive alliance had only eighteen percent of the market, and the three collusive alliances combined had only a forty-two percent market share.\textsuperscript{72} Upon approval of the Oneworld ATI application the market share of the three collusive alliances will have risen from forty-two to ninety-two percent, and can be expected to increase further since it is unlikely that carriers with market shares of five percent or less could survive independently.\textsuperscript{73}

<table>
<thead>
<tr>
<th>Year</th>
<th>Top 3 Concentration of US-Continental Europe market (40 million annual pax)</th>
<th>Top 3 Concentration of total North Atlantic market (55 million annual pax)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>41%</td>
<td>42%</td>
</tr>
<tr>
<td>1995</td>
<td>47%</td>
<td>42%</td>
</tr>
<tr>
<td>1997</td>
<td>55%</td>
<td>45%</td>
</tr>
<tr>
<td>1999</td>
<td>56%</td>
<td>47%</td>
</tr>
<tr>
<td>2001</td>
<td>61%</td>
<td>47%</td>
</tr>
<tr>
<td>2003</td>
<td>67%</td>
<td>54%</td>
</tr>
<tr>
<td>2005</td>
<td>85%</td>
<td>68%</td>
</tr>
<tr>
<td>2007</td>
<td>88%</td>
<td>66%</td>
</tr>
<tr>
<td>2009</td>
<td>98%</td>
<td>92%</td>
</tr>
<tr>
<td>2011</td>
<td>98%</td>
<td>98%</td>
</tr>
</tbody>
</table>

Thus alliance development and industry consolidation on the North Atlantic must be broken into distinct pre-and post 2003 phases.\textsuperscript{75} The high levels of concentration that could potentially help sustain anti-competitive behavior have only arisen in the last couple years, although the movement towards radical consolidation began in 2003, when Air France bid to acquire KLM. This eliminated the major source of price competition between European intercontinental hubs, eliminated the possibility that Northwest Airlines could survive independently,\textsuperscript{76} and reduced the

\textsuperscript{72} Percentages based on DOT Form 41 schedule T100 seat capacity data compiled by the author (on file with author).

\textsuperscript{73} Seat share using DOT Form 41 Schedule T100 data compiled by the author (on file with author); 2009 shares assumes approval of Oneworld application; 2011 shares assumes other small network airlines cannot survive independently and are absorbed into the three large collusive groups. USAirways became a full member of the Star Alliance in 2004, and codeshares actively with other Star members. Although it has not applied for antitrust immunity, USAirways is not considered independent of the other immunized Star members as they have strong incentives not to undercut prices on overlapping routes, and DOT would readily grant full immunity if they applied for it. Similarly, the Northwest/KLM alliance is not considered independent of the Delta/Air France alliance in the four years between the Air France/KLM merger and the DOT’s formal approval of combined Skyteam immunity.

\textsuperscript{74} See DOT Form 41 Schedule T100 data, supra note 74 (on file with author).

\textsuperscript{75} See generally S.C. Morrish & R.T. Hamilton, Airline alliances - Who Benefits?, 8 AIR TRANSP. MGMT’ T. L.J. 401 (2002) (summarizing the academic literature on pre-2003 alliance development). The summarized literature tends to conflate branded and collusive alliances, and generally fails to consider the competitive network advantages that are critical to the marketplace impacts of alliances.

\textsuperscript{76} The contract governing Northwest’s alliance with KLM would not have been renewed past its 2012 expiration, as Delta had exclusive rights to be Air France’s US alliance partner. The separate Northwest/KLM and Delta/Air France alliances continued to operate until 2009 but were not independent price competitors. Delta was able to acquire Northwest without any cash
number of meaningful competitors serving the forty million annual passengers in the US-Continental Europe market from three to two. The formal DOT ATI applications that formalized the increase to a ninety-two percent concentration were filed between 2004 and 2008. As will be discussed in section 10, those same airlines have already begun petitioning governments to permit the consolidation of twenty three previously independent transpacific competitors into those same three collusive alliance groups.

VI. Gutting the Public Benefits Test (I): Establish a Rule That Prices Fall Whenever Competition Is Reduced

The biggest and most important claim in the recent Oneworld case was that immediately following a grant of immunity, prices would immediately fall $257 per ticket in all connecting markets currently served on an interline basis by the applicants, creating an annual $92 million consumer benefit. This is from the “elimination of double markups on codeshare segments” that Dean and Shane cite, or “double marginalization” as it is called in the ATI cases. This is the biggest single factor behind the DOT’s antitrust jurisprudence, and the biggest single economic justification for intercontinental airline consolidation. If the DOT

77. Number of annual passengers in the U.S.-Continental Europe market based on DOT Form 41 Schedule T100 data compiled by the author (on file with author).


79. Oneworld ATI Application supra note 44, at 7, 24, Ex. JA-13, Ex. JA-17, Ex. JA-19 (on file with the author). The ticket amounts are redacted from the public version of the application.

80. Dean & Shane, supra note 26, at 19.

81. Oneworld Show Cause Order, supra note 3, at 5, 5 n.14, 30.
could not accept Oneworld’s claim that ATI would eliminate $92 million in “double marginalization” burdens on consumers, the applicants would not have been able to demonstrate the significant public benefits needed to meet “required by the public interest” standard of 49 U.S.C. § 41308(b). The entire question of whether recent ATI grants have actually generated significant public benefits, hinges on whether you believe, as Dean and Shane and the DOT do, that “double marginalization” automatically drives $200-$300 fare reductions for connecting traffic, regardless of market conditions. The alleged efficiency gain from eliminating the “double marginalization” on connecting tickets is comparable to eliminating all of the airline wage and salary costs associated with those tickets.

The entire “double marginalization” claim is based on a single 2000 journal article by Brueckner and Whalen; Brueckner (the principal author) was at the time and throughout the past decade served as a paid advocate for United Airlines. ATI applicants and consolidation advocates claim that “double marginalization” has been documented in the economic literature, but this literature is nothing more than follow-up pieces by Brueckner and Whalen making the exact same points as the

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82. OneWorld ATI Application supra note 44, at 7, 24, Ex. JA-13, Ex. JA-19.
83. See Dean & Shane, supra note 26, at 19; OneWorld Show Cause Order, supra note 3, at 5, 5 n.14, 30.
86. See OneWorld Show Cause Order, supra note 3, at 5, 5 n.14, 30; See Daniel M. Kasper & Darin Lee, Why Antitrust Immunity Benefits Consumers, CPI ANTITRUST CHRONICLE, Sept. 2009, at 1, available at https://www.competitionpolicyinternational.com/sep-091 (A piece written by paid advocates for American Airlines claiming that “virtually every peer-reviewed academic study of immunized international alliances has concluded that, as a result of eliminating carriers’ incentives to impose successive markups on fares for connecting tickets (the so called ‘double marginalization’ problem), alliances have led to lower fares and expanded output.”). However,
original article; no other published original research has ever documented the existence of “double marginalization.” The original 2000 paper describes a cross-section regression of 1997 transatlantic fares in alliance and non-alliance markets. Brueckner (2003) repeated the original regression using 1999 data, which better identified the actual operator of codeshared flights; Whalen (2007) estimated slightly smaller impacts using a regression of eleven year (1990-2000) panel data instead of cross-section data from a single point in time. These three regressions found fifteen to twenty-five percent lower fares in markets served by immunized alliances compared to markets served by traditional interline service or non-immunized codesharing.

It is not surprising that a statistical analysis of the 1990’s transatlantic

no peer reviewed articles written by anyone but Brueckner and Whalen have presented any original research on this question.


88. See Morrish, supra note 76 (summarizing the pre-Brueckner/Whalen academic literature on airline alliance impacts). None of this academic literature found evidence of any alliance benefits from the elimination of “double marginalization” or any other “structural negative externalities.” See also A. Jorge Padilla et al., An Economic Analysis of the Efficiencies from the Creation of the Proposed Pacific Joint Venture, Docket No. OST-2010-0059, at App. A (Dep’t of Transp. 2010). The Padilla paper is a paid advocacy work supporting a United Airlines ATI application, prepared by the consulting firm LECKG. Padilla reprints the Morrish-Hamilton list of alliance studies, adding the Brueckner/Whalen papers and papers by five other authors, none of which had found independent evidence of any alliance benefits from the elimination of “double marginalization” or any other “structural negative externalities.” Four of these studies examine only non-immunized domestic U.S. or intra-E.U. alliances and are thus irrelevant to the Brueckner/Whalen thesis about immunized intercontinental alliances. The fifth is a paid advocacy study commissioned by American Airlines in support of the OneWorld application that focuses on pricing impacts from reduced competition in nonstop markets. The Padilla/LECG survey excludes the recent research cited infra at note 106, which finds evidence that post-1999 alliances had harmed consumers.


91. The results of the three statistical analysis are summarized at Horan OneWorld comments, supra note 62, at 6. Smaller (about fifteen percent) price reductions are alleged to occur when airlines that codeshare without immunity are granted ATI, whereas larger (about twenty-five percent) price reductions are alleged to occur when non-codeshared interline itineraries are converted to immunized codeshares. OneWorld could not identify codeshare versus non-codeshare distinctions among its actual 2008 interline passengers, and thus its $92 million annual public benefit claim assumed the smaller (fifteen percent) codeshare to ATI price reduction.
market identified consumer benefits; fares fell eight percent in the 1990s while capacity grew fifty-four percent. But Brueckner and Whalen made no attempt to isolate the impacts ATI might have on fares from the impacts of favorable supply/demand conditions or other important competitive and productivity factors, and improperly attributed all of the observed variation to "cooperative pricing" among alliance partners. Brueckner's and Whalen's papers do not mention any other factors that might have influenced pricing, and fail to demonstrate that their statistical analysis had isolated alliance impacts from other possible causes.

The consumer benefits directly attributable to the original 1990s alliances were only found in the thirty percent of the market previously limited to traditional interline service and had been fully exhausted by the end of the decade. This was the "double connect" market impact described earlier, which was called the "Alliance Network Effect" in the 1999/2000 DOT studies that Dean and Shane quote, but this was not huge compared to the overall benefits transatlantic consumers realized in the 1990s. When DOT and ATI applicants use the Brueckner and Whalen regression coefficients to calculate alliance public benefits, they are assuming that none of the observed mid-1990s consumer benefits were due to market liberalization, supply/demand conditions, or carrier

92. Data from Schedules P12 and T100 of DOT Form 41, as compiled by the author for the same time period covered by the Brueckner and Whalen regressions, supra notes 90, 91 (on file with author).

93. These factors include market liberalization in Europe, increased transatlantic competition following the original "Open Skies" treaties, and major carrier productivity gains from a variety of sources including the privatization of British Airways, the recently integrated Air France-UTA-Air Inter hub in Paris, and the widespread introduction of 767 and A330 aircraft.

94. Brueckner & Whalen, supra note 90, at 504-06.


96. See Horan Oneworld Comments, supra note 62, at 7-9.

97. Dean and Shane, supra note 26, at 19. The 1999/2000 DOT studies correctly focus on the specific competitive network advantage created by the original mid-1990s alliances, but overstate the consumer benefits by failing to clearly distinguish between benefits created by capacity growth and other general factors, and benefits specifically attributable to alliance schedule and pricing coordination. See generally Jong-Hun Park & Anming Zhang, An Empirical Analysis of Global Airline Alliances: Cases in North Atlantic Markets, 16 REV. OF INDUS. ORG. 367, 382-83 (2000) (estimating smaller alliance consumer benefits but failing to clearly distinguish between immunized and non-immunized alliances).
productivity; they are assuming that 2010 market conditions are identical in every respect to 1995 market conditions.

As problematic as the regressions may be, the central antitrust problem is the “double marginalization” theory that Brueckner and Whalen put forward to explain the observed 1990s pricing/alliance correlations. Under this “double marginalization” theory, none of the benefits created by alliances have anything to do with the superior service Northwest/KLM offered in double connect markets or their competitive advantage versus poorly coordinated interline connections. They attribute all consumer benefits to a “structural negative externality” that forces carriers to set interline prices that are suboptimal from the standpoint of both joint efficiency and market competitiveness. “Double marginalization” theory claims that if American and Iberia currently offer a joint fare from Madrid to Seattle, they will do so by separately “marking up” the separate Madrid-Chicago and Chicago-Seattle segment prorates without ever consulting one another as to what the resulting fare will be or considering whether that fare would be competitive against the Madrid-Seattle fares charged by others. “Double marginalization” is defined as a market failure, an insurmountable physical barrier to efficiency found in every airline’s interline pricing function resulting in interline fares that are approximately fifteen to twenty five percent higher than ATI (or single carrier) fares in each and every case, regardless of market or competitive conditions or carrier productivity. Under this theory, the only ways to reduce the structurally higher costs of interline pricing are merger or full immunity to collude on prices. Thus, granting ATI automatically and immediately reduces these fares approximately fifteen to twenty five percent every time competition is reduced. Not under certain market conditions or if specific productivity gains were achieved, but huge consumer benefits follow automatically from each and every ATI grant organized along Northwest/KLM lines, just as night automatically follows day.

This theory is completely indefensible. “Double marginalization” does not exist, never existed, and has absolutely nothing to do with the

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99. See Brueckner & Whalen papers, supra note 99.

100. See Brueckner & Whalen papers, supra note 99. The regression results showing smaller impacts in codeshare markets contradicts the theory; if carriers actually set interline fares in this manner the “double markups” should be identical in codeshare and non-codeshare cases.
actual legitimate benefits of immunized alliances. The “double marginalization” theory was created out of whole cloth—nothing in Brueckner and Whalen’s statistical analysis supports this theory of interline pricing behavior, nor had they conducted any research on how airline interline pricing actually functions.\textsuperscript{101} The theory not only ignores the possibility that favorable supply/demand and efficiency conditions influenced 1990s transatlantic prices but denies the existence of competitive network advantages and disadvantages, and explicitly assumes interline prices cannot be set at rational, revenue-maximizing levels. There are no insurmountable structural barriers to rational, efficient interline pricing; carriers can readily optimize interline pricing and traffic using “fare buckets” within revenue management system.\textsuperscript{102} All of the observed limitations to interline pricing that Brueckner and Whalen improperly attribute to structural pricing barriers can be readily explained by rational, profit-maximizing behavior.\textsuperscript{103} Even though interline fares are widely used by hundreds of airlines across the globe, none of these airlines has ever made any effort to correct the irrational pricing behavior that allegedly increases all interline prices fifteen to twenty-five percent above efficiency-maximizing levels.\textsuperscript{104} No one independent of the DOT or the ATI applicants has ever claimed that “double marginalization” exists, and no other research ever produced findings supporting the Brueckner and Whalen theories. A number of researchers have found that ATI is no longer generating any

\textsuperscript{101} See Brueckner and Whalen, supra note 86.

\textsuperscript{102} Horan OneWorld Comments, supra note 62, at 12-15. Brueckner and Whalen incorrectly assume that airlines set interline fares with respect to the marginal operating costs of the flight legs involved; “double marginalization” is assumed to be the pricing “markups” above marginal cost. These costs are entirely “fixed” in the very-short-term time frame in which airline pricing decisions are actually taken; if airline prices were set with respect to marginal costs one would have seen enormous pricing volatility tracking fuel cost volatility in recent years.

\textsuperscript{103} Id. at 15-16. Short-haul domestic/regional carriers will rationally refuse interline fare arrangements with long-haul carriers unless their share of the joint fare reflects the much higher per-mile cost of short-haul flights, and exceeds what they could earn from the lowest discount fares in the local market. Long-haul carriers will rationally refuse interline fare arrangements if the fare split with the short-haul carriers reduces their portion of the joint fare below a level they could earn from alternate discount long-haul fares. The “structural negative externality” that is the heart of the Bruckner and Whalen paper is, in fact, the rational behavior of airlines refusing tickets with lower revenue yields in favor of tickets with higher revenue yields.

\textsuperscript{104} The claim that interline fares are artificially set fifteen to twenty-five percent above rational, joint-profit-maximizing levels because of double marginalization was first published in 2000. Brueckner & Whalen, supra note 86. If this claim were credible, there would be evidence of airlines seeking to find ways to minimize or eliminate the fifteen to twenty-five percent double marginalization penalty (via less complex means than immunized global alliances) in the past decade, because according to the theory any reductions in interline fares would increase profits. The double marginalization claim not only assumes that undocumented “structural negative externalities” led to irrational interline pricing practices, but assumes that carriers irrationally did nothing to mitigate unprofitable pricing practices once the “problem” had been identified in research commissioned by a major international airline.
consumer price benefits (much less the fifteen to twenty-five percent benefits claimed here), there is no evidence that any of the recent Star and Skyteam ATI grants generated any “double marginalization” consumer benefits in any connecting markets, and several studies have found evidence that consumers now pay higher fares in ATI markets than non-ATI markets.\(^{105}\)

The DOT has converted “double marginalization” from a theory in one isolated paper, to an established antitrust rule that cannot be challenged on the basis of facts or logic. In the OneWorld case, the DOT explicitly rejected a detailed challenge to “double marginalization,” even though it acknowledged DOJ comments that the link between “double marginalization” benefits and ATI had never been proven, did not dispute any of the observed flaws in the theory, and was unwilling to openly defend any of the logic or analysis on which the theory is based.\(^{106}\) It nonetheless accepted the OneWorld applicants’ $92 million annual consumer benefit claim solely on the basis of the Brueckner and Whalen theory.\(^{107}\) Unquestioning acceptance of “double marginalization” is critical to Dean and Shane and other industry consolidation advocates because it establishes the automatic rule that each and every ATI application between network airlines will generate large public benefits and thus nullifies the Horizontal Merger Guidelines requirement for verifiable, case-specific evidence. If ATI automatically generates fifteen to twenty-five percent price reductions in any alliance structured along Northwest/KLM lines, regardless of market/competitive conditions or carrier productivity, then there is no need to produce case-specific evidence regarding the current marketplace or the actual pricing behavior or efficiency of the applicants. The DOT even rejected the claim that the OneWorld applicants had failed to demonstrate that the traffic base that they claimed would benefit from the $92 million savings were actually paying, as they claimed, fares $257 higher than comparable alliance or online traffic, or that these markets had any of the characteristics of the ones where


\(^{106}\) OneWorld Show Cause Order, \textit{supra} note 3, at 30-32.

\(^{107}\) OneWorld ATI Application, \textit{supra} note 44, at 24, Ex. JA-17; \textit{Id.} at 9, 32.
Brueckner and Whalen allegedly found the original 1990s “double marginalization” impacts.108

By establishing “double marginalization” as a settled antitrust rule, the DOT creates the superficial appearance that it is conducting a public benefits evaluation, when they have actually rendered the public benefits standard completely meaningless. “Double marginalization” - a rule that implicitly says that consumers benefit whenever competition is eliminated regardless of marketplace conditions - is inconsistent with any marketplace/economics-focused antitrust approach. But this approach is fully compatible with the “bilateral driven aviation policy” approach that Dean and Shane favor, where the antitrust regulator has extremely broad discretion over rules and evidentiary requirements.

VII. GUTTING THE PUBLIC BENEFITS TEST (II)—ELIMINATE THE “PUBLIC” PART OF PUBLIC BENEFITS

Dean and Shane’s central claim is that ATI has only been awarded once it has been objectively demonstrated that the public benefits will be of significant magnitude.109 But they fail to provide any evidence that DOT benefit findings have been objectively demonstrated and further undermine their credibility by citing the exact list of public benefits that DOT “copy/pasted” from the Star/Continental application.110 The listed claims are more reflective of a marketing press release than a serious analysis of competitive economics but can nonetheless help illustrate other steps DOT has taken to render the public benefits test meaningless:

- an expanded network serving many new cities;
- new online service, including both new routes and expanded capacity on existing routes;
- enhanced service options such as more routings, reduced travel times, expanded nonstop service in selected markets, new fare products, and integrated corporate contracting and travel agency incentives;
- enhanced competition due to the addition of a major new gateway, the elimination of multiple markups on code-share segments, and more vigorous competition between alliances;
- cost efficiencies;
- strengthened financial positions for the participating carriers; and
- substantial economic benefits to communities.111

Dean and Shane acknowledge that public benefits must be demon-

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108. See Oneworld Show Cause Order, supra note 3 at 9, 30-32; Oneworld ATI Application, supra note 44 at 24, Ex. JA-17 (data on file with author). The ticket amounts are redacted in the public version of the application.
109. Dean and Shane, supra note 26, at 19-20.
110. Id. at 19.
111. Id. at 19 (quoting Star/Continental Show Cause Order, supra note 18, at 18-19).
strably "significant," but without quantitative data there is no way to demonstrate "significance."112 Significant public benefits in an airline ATI case would naturally occur in the form of observable price or capacity benefits. Northwest/KLM and the other original 1990s alliances clearly led to lower prices in certain markets and some increased transatlantic capacity.113 If "improved schedule timings" or "increased efficiency" are actually significant, they would translate into price and capacity benefits. "Increased efficiency" is not a legitimate public benefit unless the gains allow the carrier to profitably expand or reduce prices, or to sustain capacity that would have been liquidated absent the efficiency gains. Despite abundant sources of industry data, none of the Star and Skyteam cases quantify any of the alleged benefits, and Oneworld only quantified two benefits and only did so because of the DOJ’s evidentiary criticisms in the Continental/Star Alliance case.114 Those two claims were the $92 million pricing benefit discussed above, based on the Brueckner and Whalen theory, and a $45 million benefit claim from increased nonstop service.115

In accepting the Oneworld $45 million nonstop benefit claim and the "network expansion" claims in prior cases, DOT willfully violated the Horizontal Merger Guidelines requirement that it must have evidence that the public benefits are highly likely to be realized and that it cannot accept claims that are "vague or speculative or otherwise cannot be verified by reasonable means" or are not clearly based on the grant of immunity.116 The Oneworld applicants did not agree to actually operate increased service—they merely suggested the possibility that they might add flights.117 Since approval of ATI does not obligate them to actually do so, these claims (or certainly some large portion of them) are purely speculative. The claim included new service on the Dallas-Fort Worth-Madrid route, which has been operated in the past without immunity, and was withdrawn when the recent economic recession began.118 The DOT rejected Virgin Atlantic and DOJ arguments that this public benefit claim was illegitimate because restoration of this flight would have likely occurred without ATI.119 There is no evidence on the record that any of the prior Star and Skyteam ATI approvals were directly responsible for net increases in transatlantic service that actually created material benefits

112. Id. at 19.
115. Oneworld ATI Application, supra note 44, at 24, Ex. JA-17.
117. Oneworld ATI Application, supra note 44, at 24-25.
118. Id. at 24.
119. Oneworld Show Cause Order, supra note 3, at 31.
for consumers. Network expansion is one of the easiest benefit claims to document and quantify, and the ongoing lack of evidence that meets *Horizontal Merger Guidelines* standards suggests that the claims are fundamentally deficient.

As with "double marginalization," the list of alleged Continental/Star benefits that Dean and Shane quote\(^\text{120}\) reflect DOT's desire to render the public benefit standard of 49 U.S.C. § 41308(b) completely meaningless by establishing an arbitrary rule that each any and every ATI application would meet. This DOT rule establishes that an applicant's assertion that it will benefit from a grant of ATI fully satisfies the "public benefits" standard of 49 U.S.C. § 41308(b), without requiring any evidence that consumers in general did not suffer because of offsetting detriments in other markets. The fact that platinum status members of United's frequent flyer program can now occasionally get first class upgrades on Continental flights does not mean that ATI created a benefit for the overall public in the form of more generous frequent flyer awards, but under the DOT's rule ATI has created "public benefits" as long as one United frequent flyer benefits. When Continental joined Star Alliance it created an expanded (Star) network with increased (Star) gateways, increased online (Star) service, expanded (Star) routing options, expanded (Star) corporate and frequent flyer programs, created some (intra-Star) cost efficiencies, and strengthened (Star) financial performance, even though all of these "benefits" were merely shifts to Star markets from other markets.\(^\text{121}\) Every ATI application between network airlines with some degree of network overlap could claim the exact same "public benefits" (even the implausible merger of the Star, Skyteam and Oneworld alliances into a monopoly transatlantic collusive group) and is contrary to the notion that antitrust decisions should maximize consumer or overall economic welfare. As with "double marginalization" this automatically met rule eliminates the need for applicants to present any verifiable evidence about actual market, competitive or productivity impacts specific to their case, and thus eliminates the possibility that consolidation applications can be challenged on the basis of case/market specific evidence.

\(^{120}\) See generally Dean & Shane, *supra* note 26, at 19 (discussing public benefits produced by the award of antitrust immunity to the Star alliance).

\(^{121}\) *Id.*
VIII. GUTTING THE CLAYTON ACT MARKET POWER TEST—EVALUATE ANTI-COMPETITIVE PRICING RISKS WITHOUT ANY EVIDENCE ABOUT PRICING OR ENTRY BARRIERS OR MARKET CONTESTABILITY

Dean and Shane correctly note that ATI cannot be granted unless they meet the Clayton Act test showing that the application would not increase market power. As the DOT explained in the original Northwest/KLM case, the Clayton Act test requires the Department to consider whether the alliance agreements are likely to substantively reduce competition so that any of the applicants would be able to charge supra-competitive prices or reduce service below competitive levels. To determine whether an alliance or comparable transaction is likely to violate the Clayton Act standard the department considers whether the transaction is likely to create or enhance "market power," which is defined as the ability to profitably maintain prices above competitive levels for a significant period of time or to reduce output and service quality below competitive levels:

"To determine whether a proposed alliance is likely to create or enhance market power, we primarily consider whether the alliance would significantly increase concentration in relevant markets, whether the alliance raises concern about potential competitive effects in light of other factors, and whether entry into the market would be timely, likely, and sufficient either to deter or to counteract a proposed alliance's potential for harm." 

Dean and Shane defend recent ATI grants on the basis that the DOT found no threat of market power but ignore the fact that none of the DOT's ATI decisions in the past decade included a Clayton Act test that actually presented or analyzed any pricing data or any evidence of the

122. Dean & Shane, supra note 26, at 19 (citing to Clayton Act, supra note 5).
123. Joint Application of Northwest Airlines and KLM Royal Dutch Airlines for Approval and Antitrust Immunity of an Agreement Pursuant to Sections 412 and 414 of the Federal Aviation Act, as Amended, Docket No. 48342, Order 92-11-27 at 13 (Dep't of Transp. Nov. 16, 1992) ("In determining whether the proposed transaction would violate the antitrust laws, we will apply the standard Clayton Act test used in examining whether mergers will substantially reduce competition in any relevant market. The ... test requires us to consider whether the Agreement will substantially reduce competition by eliminating actual or potential competition between Northwest and KLM so that they would be able to raise prices above competitive levels or reduce service below competitive levels.").
124. Joint Application of American Airlines, Inc., Lan Airlines, S.A., and Lan Peru, S.A. for Antitrust Immunity, Docket No. OST-2004-19964, Order 2005-10-8 at 8 (Dep't of Transp. Oct. 13, 2005) ("To determine whether an alliance or comparable transaction is likely to violate the Clayton Act standard, the Department considers whether the transaction is likely to create or enhance “market power,” defined as the ability to profitably maintain prices above competitive levels for a significant period of time or to reduce output and service quality below competitive levels").
125. Id.
future market contestability needed to eliminate the risk of supra-competitive prices.\textsuperscript{126} A complete Clayton Act test cannot be laid out here, but several simple data points can illustrate the serious possibility that anti-competitive “market power” has already emerged on the North Atlantic, and that the DOT’s failure to conduct legitimate Clayton Act tests is a serious abdication of its legal responsibility.\textsuperscript{127}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure4.png}
\caption{North Atlantic Passenger Fares Have Risen 3X Faster Than Domestic Fares since radical consolidation began in 2003}
\end{figure}

Increased North Atlantic concentration has already increased prices towards supra-competitive levels. From deregulation until 2003, North Atlantic price trends closely tracked domestic price trends.\textsuperscript{129} From 2003 onward, a totally new pattern emerged, with North Atlantic fares rising three times faster than domestic fares.\textsuperscript{130} This fundamental shift in pricing behavior exactly tracks the move towards extreme North Atlantic concentration, which started when Air France bought KLM, previously

\begin{itemize}
\item \textsuperscript{126} See, e.g. Oneworld Show Cause Order, \textit{supra} note 3, at 18-20 (considering only briefly airport slot barriers on a handful of large nonstop routes at London Heathrow airport, the only time the DOT analyzed any evidence of entry barriers in any ATI case.)
\item \textsuperscript{128} Data in the graph is total Domestic and Atlantic entity totals for all US carriers are from DOT Form 41 as compiled by the author. Passenger revenue data are from Schedule P12, and the segment passengers data are from Schedule T100. Transatlantic revenue figures for non-US carriers are not publicly available, but since US flag carriers serve the identical markets with comparable schedules and capacity, the aggregate US carrier Atlantic unit revenue data shown in the graph should very closely track aggregate market levels. Capacity comparison is total Domestic and Atlantic entity seat capacity for all US and non-US carriers from Schedule T100 (on file with author).
\item \textsuperscript{129} \textit{Proposed United-Continental Merger Comments}, \textit{supra} note 128.
\item \textsuperscript{130} Id. at 3;
\end{itemize}
the largest single driver of price competition in European long-haul network markets. The market power already created by consolidation is much worse than the simple Atlantic/Domestic fare comparison suggests. Under normal, healthy competitive conditions, airline fares are highly responsive to changes in capacity. Domestic fares increased fifteen percent since 2003 because the industry did not add capacity. When Atlantic capacity spiked in the late 1990s, average fares fell, even though this was the peak of the dot-com era. But the market power created on the Atlantic in recent years meant normal supply/demand relationships would not work. Atlantic fares increased forty-six percent since 2003, even through capacity also increased forty-five percent.

If 2008 capacity levels were operated under pre-2003 competition levels, 2008 Atlantic unit revenues might well been thirty to forty percent lower than observed, suggesting an annual consumer welfare loss due to increased market power of $9 to $12 billion. Counterfactual historical analyses such as this are a bit complicated; but even if one arbitrarily assumes that only half or less of the observed pricing shift is due to market power, consumer welfare losses have already been staggeringly large:

<table>
<thead>
<tr>
<th>2008 Consumer Welfare</th>
<th>5% $1.5 billion</th>
</tr>
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<tbody>
<tr>
<td>Loss if increased</td>
<td>10% $3.0 billion</td>
</tr>
<tr>
<td>North Atlantic Market Power</td>
<td>15% $4.5 billion</td>
</tr>
<tr>
<td>increased fares by:</td>
<td></td>
</tr>
<tr>
<td>20% $6.0 billion</td>
<td></td>
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<tr>
<td>20% $7.5 billion</td>
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A legitimate Clayton Act “market power/market contestability” analysis would also note that

—There are serious risks that the observed anti-competitive pricing trend will worsen after independent competition from Continental,

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131. Id. at 2-3.
132. Id. at 2.
133. Id.
134. The total 2008 North Atlantic revenue base is conservatively assumed to be $30 billion, based on DOT Form 41 data compiled by the author. U.S. carrier Atlantic passenger revenue of $15,058 million, and a forty-six percent U.S. carrier share of combined total available seat miles. This estimate does not include non-passenger revenue or the portion of transatlantic ticket revenue flown on domestic U.S. or intra-EU connecting flights that would not be categorized as Atlantic revenue in Form 41 (on file with author).
135. A more detailed analysis would likely show relatively large consumer welfare losses in the connecting U.S.-Continental Europe markets where the duopoly of the Lufthansa and Air France-led collusive alliances have had an eighty-five percent share for over five years, and smaller welfare losses in other market categories. Some marginal, higher-cost capacity would have been withdrawn in a more competitive environment, although the increased competition may have driven industry productivity improvements, and share shifts favoring more efficient carriers. Lower fares would have also stimulated demand growth.
Iberia, Finnair and American is eliminated and concentration increases from sixty-five to eighty percent to ninety to ninety-five percent. Price competition in isolated large nonstop O&Ds must be evaluated separately, but figure 3 reasonably reflects the concentration in Continental Europe connecting markets, which account for the vast majority of North Atlantic traffic.

—As discussed in section 5, North Atlantic markets are not contestable. There is no possibility that future entry would be “timely, likely and sufficient either to deter or to counteract” anti-competitive behavior by the three dominant Collusive Alliances. A new entrant would require a major hub, tens of billions of dollars in new fleet investment and expensive access to highly constrained airports. The last successful entry on the North Atlantic was twenty three years ago.\(^\text{136}\)

—Basic network airline economics create serious risks of cartel conditions in these markets—the three dominant Collusive Alliances would rationally match oligopoly capacity cuts and price increases because more aggressive competition could never displace existing hubs or capture significant market share.

—None of the increased concentration since 2003 is due to efficient airlines displacing inefficient ones or other “market forces;” it is strictly due to the artificial process of large airlines petitioning governments for reduced competition.\(^\text{137}\)

Instead of Clayton Act tests based on case specific evidence of pricing behavior and market contestability, the DOT’s findings are based on an arbitrary rule that assumes that consumer welfare in international airline markets is not threatened as long as at least three competitors operate under an “Open Skies” treaty, which is presumed to automatically protect consumers from the threat of market power.\(^\text{138}\) Even though the EU-US Open Skies has facilitated increased concentration in a market that has not seen successful new entry in twenty-three years, the DOT simply asserts that the treaty “enhances competition and promotes new entry” and there is “no basis upon which the Joint Applicants could, as a result of this transaction, impose and sustain supra-competitive prices or

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\(^{136}\) The last new entrant on the North Atlantic to successfully sustain a market position with at least one percent market share was Piedmont Airlines (now US Airways) which began Charlotte-London Gatwick service in 1987. See 2 New Air Routes to Britain Approved, LEXINGTON HERALD-LEADER, Apr. 24, 1987, at B2 (discussing federal approval of Piedmont Airlines to commence service between Charlotte, N.C. and London).

\(^{137}\) See generally Dean & Shane, supra note 26, at 19.

\(^{138}\) See One world Show Cause Order, supra note 3, at 3 (“Under our established policy, the existence of an “open-skies” framework is a necessary predicate to our consideration of requests for antitrust immunity”); Star/Continental Show Cause Order, supra note 18 at 2 (“Under the Department’s established policy, the existence of an “open-skies” regulatory framework is a necessary predicate to our consideration of requests for antitrust immunity”).
reduce service levels below competitive levels," Since collusive alliances automatically create consumer benefits, the DOT claims reducing competition via ATI actually benefits consumers by enhancing "inter-alliance competition." Since the protection of airline consumer welfare only requires three serious competitors, the DOT's competitive "analysis" has been wholly limited to simple market share snapshots showing that no highly aggregated market groups (i.e. U.S. - Germany, the overall North Atlantic) are currently dominated by any one of these three competitors. Despite the huge increases in market concentration shown in Figure 3, the DOT has approved ATI on the basis that it will "not materially alter the current competitive landscape or increase overall market share to any significant degree." 

As with the rules establishing public benefits on the basis of "double marginalization" and undocumented private carrier benefits, these rules render the Clayton Act test completely meaningless, since no ATI application (other than a merger between the three collusive alliances) would ever be found to create risks of supra-competitive pricing or otherwise threaten consumer welfare. Under these rules, ATI applicants would have no need to present verifiable, case-specific evidence that immunity would not create market power, and other interested parties would be unable to challenge applications on the basis of case/market-specific evidence of entry barriers, non-contestable markets or the supra-competitive prices.

IX. BREAKING THE LINK BETWEEN "OPEN SKIES" AND LIBERAL MARKET COMPETITION.

As Dean and Shane note, the 1990s "Open Skies" treaties were designed to supplant mercantilist bilateral treaties such as the U.S.-U.K. "Bermuda II" treaty, whereby international airline markets were manipulated through backroom negotiations between the large incumbent carriers and government bureaucrats, with results heavily biased in favor of the short-term interests of those incumbent airlines. By eliminating many of the entry and pricing barriers that the bilateral negotiators

139. Star/Continental Show Cause Order, supra note 18, at 17.
140. Oneworld Show Cause Order, supra note 3, at 28 ("The enhanced inter-alliance competition is beneficial for consumers across many markets, in particular the hundreds of transatlantic markets in which the applicants become more competitive as a direct result of the alliance").
141. See Id. at 13-17; Star/Continental Show Cause Order, supra note 18, at 8 tbl.1.
142. Star/Continental Show Cause Order, supra note 18, at 7-8 ("The transaction does not materially alter the current competitive landscape or increase overall market share to any significant degree").
had previously used to distort or rig market outcomes, the U.S. Government’s 1990s “Open Skies” policy and the European Union’s 1990s market liberalization policies established maximization of aggregate consumer welfare and industry efficiency as the central objectives of international aviation policy.\(^{144}\) They sought to establish the policy that airline winners and losers should be determined by consumers and investors, and the role of government should be limited to ensuring a level and fully competitive playing field. While one can criticize the shortcomings of specific regulatory and policy decisions, the overall benefits of these liberal policies can be measured using objective evidence of increased service, lower prices, carrier productivity and the like.

The reversal of this liberal “hands-off” approach began when the E.U. shifted to a more interventionist, pro-consolidation policy a decade ago, favoring the interests of the large E.U. “national champions,” Lufthansa, Air France and British Airways, the leaders of the three Collusive Alliances that the EU expected to dominate a consolidated industry. The E.U. proactively supported the Air France/KLM merger that reduced the number of intercontinental network competitors in Continental Europe from three to two, but blocked a Ryanair-Aer Lingus merger that would have exposed the transatlantic routes of three “national champions” to aggressive price competition from Europe’s lowest-cost operator.\(^{145}\) The E.U. openly advocated “industry consolidation” and proactively supported combinations such as Air France-ALitalia, Lufthansa-Austrian and British Airways-Iberia.\(^{146}\) The E.U. delayed a U.S. “Open Skies” treaty for five years with demands that the U.S. change its national ownership laws so that the three E.U. carriers could fully control their U.S. alliance partners, and this was a major E.U. demand during the recent Phase II treaty negotiations.\(^{147}\)

\(^{144}\) See Defining Open Skies, supra note 29, at 3.

\(^{145}\) See Horan, supra note 55, at 7.

\(^{146}\) Id.

\(^{147}\) See Hubert Horan, The EU-US Open Access Area: How to Realise the Radical Vision, 70 AVIATION STRATEGY 1 (2003) (a detailed assessment of the prospects for major international aeropolitical liberalization); Hubert Horan, Airline Consolidation: Myth and Reality, 109 AVIATION STRATEGY 2 (2006) (an evaluation of airline mergers in the US, Europe and China, and the general trend towards consolidation); Hubert Horan, The New EU-US Treaty and the Intercontinental Airline Consolidation Battle, 113 AVIATION STRATEGY 1, 4-6 (2007); Allan I. Mendelsohn, The USA and the EU-Aviation Relations: An Impasse or an Opportunity, 29 AIR & SPACE LAW. 263, 264 (Nov. 2004). While the US and EU shared similar views about the use of ATI in industry consolidation, the EU took a more aggressive position on allowing direct foreign ownership and control. In the phase I negotiations, the EU argued that allowing full financial and management mergers between E.U. and U.S. carriers would generate €18bn in incremental revenue (more than the combined revenue of Northwest and Southwest) and 80,000 new jobs (more than the combined employment of Delta and Continental). The current twenty-five percent limit on foreign ownership of US airlines cannot be amended by treaty, only by an Act of Congress. The failure of the Phase II negotiations to produce major concessions on foreign ownership of US
While the DOT never became an open, public advocate of intercontinental consolidation, by 2003 it had clearly abandoned the 1990s “hands-off” policies and shifted to an internal view that international airline industry structure should be proactively managed through bilateral discussions between government officials and the large Legacy airlines. As noted earlier, the DOT has not produced any policy statements or analysis supporting either the general merits of vastly increased market concentration, or the specific merits of supporting claims such as “double marginalization” or “inter-alliance competition.” However this anti-liberal shift can be reasonably inferred from the ATI findings discussed above, and from recent bilateral treaty results. While the State Department achieved several pro-consumer gains in the final treaty, E.U.-U.S. “Open Skies” is a major departure from the 1990s treaties as it is designed to facilitate increased consolidation, not increased competition, and it is designed to increase governmental influence over industry structure, not to increase the influence of consumers and investors.

Carriers have publicly claimed that DOT informally promised approval of the current ATI applications during the treaty negotiations as a *quid pro quo* for E.U. approval of open entry in the U.K. and Spanish markets without the ownership and control provisions the E.U. had demanded. In the treaty the DOT agreed to align its airline antitrust rules and processes with E.U. rules and procedures, a requirement fully consistent with the “bilateral driven antitrust enforcement” approach advocated by Dean and Shane, and completely inconsistent with the view that the DOT is a neutral antitrust regulator obligated to follow the *Horizontal Merger Guidelines* and other traditional evidentiary requirements in deciding ATI cases.

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150. See Joint Application to Amend Order 2007-2-16, Docket No. OST-2008-0234, Response of the Joint Applicants to Comments of the Dep’t of Justice at 8 (Dep’t of Transp. July 6, 2009) (“Our nation’s trading partners, both present and future, have relied on, and will rely on, the continued availability of ATI as the cornerstone of U.S. aviation policy. For example, the U.S.-EU Agreement negotiations included a Memorandum of Consultations that specifically promised prompt action on applications for expanded immunity such as that sought by the Joint Applicants here . . . Thus the Memorandum of Consultations is an acknowledgement of the aeropolitical reality that open skies and ATI are integrally linked and essentially refutes the DOJ’s position that the Joint Application is not linked to open skies benefits. DOJ would have the Department renego on that promise.”) (footnote omitted).

151. See U.S.-E.U. Open Skies Treaty, supra note 151; Dean & Shane, supra note 26, at 18; Button, supra note 150, at 64; *Horizontal Merger Guidelines*, supra note 4.
X. THE NEW US-JAPAN BILATERAL—FURTHER CORRUPTING "OPEN SKIES" AND FURTHER ENTRENCHING "BILATERAL DRIVEN ANTITRUST ENFORCEMENT"

The new U.S.-Japan treaty completes the breakdown of the historical link between "Open Skies" and liberal market competition. While all past "Open Skies" treaties required fully open and equal market access for all carriers, the new treaty maintains strict Japanese government control over slots at Tokyo's airports, including a provision that U.S. carrier access to the new runway capacity at Haneda Airport should be strictly limited to four flights that must depart between midnight and 6:45 am. 152 Instead of reducing governmental ability to distort airline competition or dictate industry structure, the new treaty was specifically designed to facilitate massive taxpayer subsidies to Japan Air Lines (JAL), and the consolidation of the four transpacific carriers with large Tokyo operations into two larger collusive groups that would threaten the survival of smaller competitors. 153 The 1990s treaties clearly weakened the ability of European governments to distort and rig aviation markets, but the new Japan treaty does absolutely nothing to weaken the Japanese government's control over aviation competition—control far greater than any European government ever had. The large carriers and the DOT clearly intend to pursue the same consolidation of transpacific aviation into the same three Collusive Alliances that now control the North Atlantic. While the early "Open Skies" treaties with the Netherlands and Switzerland were designed to pressure countries like Germany and France to liberalize aviation markets, the Japan "Open Skies" treaty is designed to


153. At the time the U.S.-Japan treaty was signed, multiple press reports in Japan and the U.S. indicated that JAL management and the Japanese Ministry of Transport strongly favored combining (via ATI) the large JAL and Delta/Northwest Tokyo hub operations. See, e.g., JAL Likely to Choose Delta Over American, REUTERS, Dec. 18, 2009; U.S., Japan Eye 'Open Skies'; but Competition Between American and Delta for JAL Could Derail Negotiations, USA TODAY, Dec. 8, 2009, at 4B; American, Partners Offer $1.1 Billion to JAL, ASSOCIATED PRESS, Dec. 3, 2009. This move (along with ATI for United, Continental and ANA) would have established a top two concentration level of ninety percent in the US-Japan market and made it extraordinarily difficult for American Airlines to remain a viable competitor. Shane served as a paid advocate on behalf of Delta's efforts to achieve immunity with JAL. American, Partners Offer $1.1 Billion to JAL, ASSOCIATED PRESS, Dec. 3, 2009. Although this plan was not implemented after subsequent management changes at JAL, DOT would have been fully aware when they signed the treaty that it could directly lead to a massive increase in market concentration. See American Flies High as JAL Stays Put, DALLAS MORNING NEWS, Feb. 10, 2010, at D1 (describing JAL decision to reject Delta merger after changes in management). Earlier in my career, I was responsible for Northwest's international network, including its large hub at Tokyo Narita, and am highly familiar with the economics of transpacific operations, and competition in the U.S.-Japan market.
pressure other Asian countries to eliminate competition from their hubs and carriers, and consolidate into groups led by the collusive alliance networks based at Tokyo.

Just as the words “double marginalization” automatically establish the “fact” of significant public benefits, the Japan treaty demonstrates the DOT rule that a treaty including the words “Open Skies” automatically establishes the “fact” of market contestability, which eliminates the need to examine any verifiable, case-specific evidence about market power. This rule will speed the process of industry consolidation on the Pacific since ATI applicants will not need to produce evidence, and applications cannot be challenged on the basis of evidence that huge artificial barriers to competition actually exist in the Japanese market.

More importantly for this discussion, the DOT agreed to provisions in the new Japan treaty that were specifically designed to entrench its evisceration of ATI evidentiary standards, and to thwart the ability of the DOJ or other parties to demand reviews of Pacific ATI applications based on market-specific data. JAL entered bankruptcy protection on January 19th and filed for ATI with American Airlines on February 12th. Under traditional evidentiary standards, ATI could not be granted without data as to the exact routes and capacity the alliance would operate, since there is no way to evaluate competitive issues or public benefits without knowledge of capacity levels and other specific changes that would occur as a result of ATI. It would also be impossible to evaluate ATI applications without hard data about public subsidies for JAL that could seriously distort competition. But none of these things can be known with any certainty until a JAL reorganization plan is financed and approved, a process that could take several years.

156. Press reports at the time the U.S.-Japan treaty was signed suggested the possibility of taxpayer subsidies to JAL as large as JPY800 billion ($8.8 billion). See, e.g., Anthony Rowley, Possible Lifeline Boosts JAL Shares; Airline Seeking Funds from Government-Backed Turnaround Agency, THE BUSINESS TIMES SINGAPORE, Oct. 30, 2009 (Asian Pacific News).
157. The United Air Lines' reorganization required three years under a well established and highly transparent U.S. airline bankruptcy process, with which creditors were highly familiar, and was free of any direct political interference. See Friendlier skies: Airline's Leaving Bankruptcy with Less Baggage, Brighter Future, CEO Tilton Says, CHICAGO SUN-TIMES, Feb. 1, 2006, at 67. No Japanese company the size of JAL has ever undergone this type of bankruptcy restructuring. JAL's indebtedness is far greater than United Air Lines' indebtedness was, and the JAL bankruptcy is a major political issue in Japan. United Delays Debt Repayments; Desperate Airline Offers Mechanics Revised Wage Concession Package, SAN FRANCISCO CHRONICLE, Dec. 3, 2002, at B1 (noting United debts of $920 million at bankruptcy filing); JAL Heads for Bankruptcy with
Nonetheless, the DOT specifically promised that ATI approvals and all other treaty implementation requirements would be in place by October 2010.\footnote{158} The One world ATI application will have required nineteen months of review, even though the DOT has nearly twenty years of experience analyzing the impact of antitrust immunity on North Atlantic competitive issues.\footnote{159} Even though it has never considered Japan/transpacific industry structure issues before, and the Japanese market includes a range of problematic competitive issues not found in any European markets, the DOT is clearly confident that it can fully review both the JAL/American Airlines and the parallel United/Continental/All Nippon ATI application in six months.\footnote{160} This clearly signals that DOT has no intention of conducting an objective antitrust evaluation, and merely intends to rubber-stamp the two applications, a signal reinforced by the fact that neither application includes any substantive evidence regarding public benefits or market power risks.\footnote{161} With the artificial six month deadline, if DOJ or other parties demand a more rigorous evaluation, DOT can blame them for creating a major diplomatic row with the Japanese.

XI. THE COUNTER-REVOLUTION AGAINST LIBERAL AIRLINE COMPETITION

Dean and Shane’s article recites the successes of the DOT’s highly liberal aviation policies in the 1990s in order to incorrectly imply that their ATI agenda is driven by the same market-oriented, consumer-welfare maximizing thinking as was behind domestic deregulation and the original “Open Skies” treaties.\footnote{162} The extreme consolidation of the North Atlantic and the impending consolidation of the Pacific are not only totally inconsistent with those past policy, but represents a counter-revolution against the liberal competitive policies of the 1980s and 1990s, and Dean and Shane are acting as advocates for the counter-revolutionaries. The post-2000 consolidation movement is not trying to update competi-

\footnote{159} The first North Atlantic ATI application (Northwest-KLM) was filed in 1992. See NW/KLM Show Cause Order supra note 124, at 1.
\footnote{160} See Horan, supra note 128, at 14.
\footnote{162} Dean & Shane, supra note 26, at 17, 19.
tion policy in light of observable marketplace or economic changes, but they are trying to reestablish the pre-deregulation world of governmentally managed competition, where international aviation was exempt from normal antitrust rules, and where the large incumbent carriers could privately lobby bureaucrats to rig markets so they could exploit market power that reduced both consumer welfare and long-term industry efficiency. If Dean and Shane seriously believe that consolidation around just three global competitors is the “future of aviation” and beneficial to consumers, they should argue their case openly, and they should be arguing for the repeal of the Airline Deregulation Act so that domestic consumers may enjoy the same benefits. If the DOT believes that recent alliances proposed in ATI applications really create significant public benefits without unduly increasing market power, they should be willing to accept the DOJ’s challenge, and provide evidence that meets Horizontal Merger Guidelines standards.

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<th>Transatlantic competition:</th>
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<td>Consolidation of twenty-six independent</td>
<td>Consolidation of twenty-seven</td>
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<td>British Airways-led collusive alliance</td>
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<td>Twenty-one competitors</td>
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Table 4.163

The DOT’s “aviation policy” - the consolidation of all of the major international carriers into three collusive groups - is driving an extraordinary transformation of the industry’s structure, one that will dwarf all of the competitive changes since deregulation. Radical consolidation is a

163. Horan, supra note 128, Ex. 5 at 7.
fundamentally anti-market agenda, as the resulting changes are not based on returns to capital from efficiency/productivity gains. The consolidation that began in 1993 and accelerated dramatically after 2003 resulted from large carriers petitioning governments for reduced competition; not from efficient carriers displacing inefficient ones or similar “market forces.” The E.U.’s “national champion” policy explicitly uses alliances to prop up unprofitable flag carriers such as Alitalia, Austrian, SAS and LOT, and the Japanese government clearly believes that ATI-facilitated reductions in competition would help JAL survive.\(^{164}\) Despite aggressive pro-consolidation publicity campaigns, private investors have been totally unwilling to risk their capital on any of the major airline combinations of the last five years,\(^{165}\) since the capital markets know that there are no significant economic synergies to be exploited, and that the vast majority of airline mergers have been financial and competitive disasters.\(^{166}\) This type of artificial consolidation entrenches old-line legacy companies, could distort domestic competition,\(^{167}\) and reduces pressures to innovate and improve productivity.

This counter-revolution depends on “double marginalization” and the other arbitrary rules that the DOT has used to render the public benefits and market power test meaningless, and the counter-revolution would collapse if ATI applicants were required to use verifiable, case-specific evidence. As the original 1990s alliances demonstrated, traditional evidentiary standards are not an obstacle to consolidation proposals that generate legitimate economic synergies and consumer benefits without creating undo market power. But the post-2003 radical consoli-


\(^{165}\) The Delta-Northwest merger was a stock swap with no outside financing. See *Delta, Northwest shareholders give green light to merger*, CHICAGO TRIBUNE, Sep. 26, 2008, at C5. The USAirways-America West combination was a bankruptcy reorganization combining two airlines that would have otherwise liquidated. See Micheline Maynard, *US Airways and America West Plan to Merge*, N.Y. TIMES, May 20, 2005, at C1. Widely discussed mergers such as United-Continental and British Airways-Iberia could not find willing investors, even during the greatest financial bubble in world history.

\(^{166}\) See Horan, *supra* note 128, at 10. The only mergers between large airlines since the 1970s where acquisition and implementation costs were clearly justified by efficiency/productivity gains were ones creating large hubs (TWA-Ozark at St. Louis, Northwest-Republic at Minneapolis, Air France-Air Inter-UTA at Paris) or mergers implemented as part of a major bankruptcy restructuring (US Airways-America West, Lufthansa-Swiss).

\(^{167}\) Carriers such as Delta and Lufthansa are less efficient producers in many domestic (and intra-EU) markets compared to carriers such as Airtran or Easyjet; the risk is that they would use supra-competitive intercontinental profits to distort competition against those lower cost carriers in shorthaul markets.
dation around three globally collusive alliances rests on a foundation of the willfully false claims embedded in "double marginalization." All recent consolidation totally depends on the DOT's insistence that fares automatically fall fifteen to twenty-five percent whenever ATI grants reduce competition regardless of market/competitive conditions, that 100% of transatlantic consumer welfare gains in the 1990s were due to ATI (and none of the gains were due to carrier productivity or favorable supply/demand conditions), and that a single study of 1990s transatlantic price changes sponsored by ATI applicants can be used to predict price changes twenty years later in any market anywhere on the globe.\textsuperscript{168} By ruling that "double marginalization" and the other arbitrary rules are settled, unchallengeable fact, DOT expects to accelerate approval of the Japan and subsequent ATI cases and gives airlines an extremely low cost way to create market power and supra-competitive profits worldwide.

Aside from the impact on airline industry structure and consumer welfare, the counter-revolution replaces the concept of the DOT as an impartial enforcer of the antitrust laws with airline antitrust enforcement based on private, negotiations between the DOT, the large incumbent airlines, and other governments. Replacing "evidence driven antitrust enforcement" with "bilateral (or policy) driven antitrust enforcement" gives the DOT much more regulatory power and discretion than Congress ever intended, and greatly increases the risk of regulatory capture by the parties the DOT is supposed to be regulating. In the 1990s the DOT creatively used its combined antitrust and bilateral negotiation roles to significantly liberalize international airline markets. If the DOT is unwilling to abandon "double marginalization" and the counter-revolution against liberal competition, then perhaps Congress should consider shifting international antitrust authority to the DOJ, as it did for domestic aviation.

\textsuperscript{168} See Horan, supra note 128, at 12.
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