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## An Institutional Defense of Antitrust Immunity for International Airline Alliances

Gabriel S. Sanchez

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### Cover Page Footnote

Adjunct Professor of Law & One-time Senior Research Fellow, International Aviation Law Institute, DePaul University College of Law. The Author wishes to thank Jonah and Manuel Sanchez for their impeccable frequent visits to his office during the formation of this article.

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## AN INSTITUTIONAL DEFENSE OF ANTITRUST IMMUNITY FOR INTERNATIONAL AIRLINE ALLIANCES

*Gabriel S. Sanchez*<sup>+</sup>

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Although it may appear antiquated in the “post-deregulation” era, the concept of antitrust immunity for industrial sectors remains a hallmark of U.S. international aviation law and policy.<sup>1</sup> Following the protracted shutdown of the Civil Aeronautics Board (CAB) in the 1980s,<sup>2</sup> the Department of

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1. See PAUL L. JOSKOW, DEREGULATION: WHERE DO WE GO FROM HERE? 19–21, 45–46 (2009) (defending industrial deregulation in the face of the 2008 financial crisis). See generally Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998) (detailing the United States’ recent regulatory transformation away from creating agencies to regulate individual industries and discussing the Civil Aeronautics Board’s shutdown).

2. See Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (codified in scattered sections of Titles 5, 15, 16, 26, 29, and 49 U.S.C.); see also Paul Stephen Dempsey, *The Rise and Fall of the Civil Aeronautics Board—Opening Wide the Floodgates of Entry*, 11 TRANSP. L.J. 91, 93–95 (1979) (surveying the deregulation of the airline industry and the CAB’s eventual demise).

Transportation (DOT) assumed the CAB's authority to approve and immunize cooperative agreements between U.S. and foreign airlines.<sup>3</sup> Beginning in 1992, airlines sought immunity in order to form the first airline alliances—joint ventures that allow participants to behave like a single, merged entity and cooperate on business practices such as pricing, routes, branding, and consumer perquisite programs.<sup>4</sup> Since then, many of the world's leading airlines have coalesced into three global alliances: oneworld, SkyTeam, and Star. Each alliance has air transportation networks spanning the globe.<sup>5</sup> Under normal circumstances, these types of activities would be subject to public and private antitrust actions, likely on the theory that they constitute a restraint of trade or an attempt to monopolize international air routes.<sup>6</sup>

Unlike most global industries, airlines remain subject to treaty-based restrictions that limit their ability to access global capital markets and consummate cross-border mergers.<sup>7</sup> Although the particulars vary, these treaty-based restrictions are commonly reinforced by domestic legal codes that make the issuance of operating authority contingent on the “purity” of an airline's ownership profile.<sup>8</sup> The United States, for example, mandates that foreign nationals may hold no more than twenty-five percent of an airline's voting stock and requires the airline to remain under the “actual control” of American citizens.<sup>9</sup> As such, airlines are effectively barred from acquiring or establishing foreign subsidiaries that would allow them to create autonomous global-route networks while availing themselves to the efficiencies of consolidation.<sup>10</sup> To deliver the transnational services that modern consumers demand, airlines have relied on alliances as a “second-best” alternative within

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3. 49 U.S.C. §§ 41308–41309 (2006).

4. See, e.g., Order to Show Cause, *The Acquisition of Northwest Airlines by Wings Holdings, Inc.*, Docket No. 46371 (Dep't of Transp. Nov. 16, 1992), 1992 DOT Av. LEXIS 827 [hereinafter Northwest/KLM Order to Show Cause]; see also W. Robert Hand, Comment, *Continental Joins the (all)star Alliance: Antitrust Concerns with Airline Alliances and Open-Skies Treaties*, 33 HOUS. J. INT'L L. 641, 649 (2011) (discussing the Northwest/KLM alliance as the first of its kind).

5. See, e.g., Brian F. Havel & Gabriel S. Sanchez, *Restoring Global Aviation's "Cosmopolitan Mentalité"*, 29 B.U. INT'L L.J. 1, 37 (2011) (discussing the three main global alliances).

6. See EUR. COMM'N & U.S. DEP'T OF TRANSP., *TRANSATLANTIC AIRLINE ALLIANCES: COMPETITIVE ISSUES AND REGULATORY APPROACHES 5–7* (2010); see also Scott Kimpel, *Antitrust Considerations in International Airline Alliances*, 63 J. AIR L. & COM. 475, 479–83 (1997) (describing how DOJ authority, under the Sherman and Clayton Acts, relates to airline alliances).

7. See Brian F. Havel & Gabriel S. Sanchez, *The Emerging Lex Aviatica*, 42 GEO. J. INT'L L. 639, 642–53 (2011) (surveying international aviation's trade environment, including its attendant ownership and investment restrictions); see also *infra* notes 75, 86, 225 and accompanying text.

8. See Havel & Sanchez, *supra* note 7, at 640–41, 647–48.

9. See 49 U.S.C. §§ 40102(a)(15), 41101(a)(1), 41102(a) (2006).

10. See Hand, *supra* note 4, at 643–44.

a suboptimal regulatory order.<sup>11</sup> The DOT, in turn, has leveraged the commercial appeal of the alliance system into expanded foreign market opportunities for U.S. airlines by requiring the home countries of immunity-seeking carriers to first enter liberal aviation trade accords known as “Open Skies” agreements.<sup>12</sup> Though “Open Skies-for-Immunity” has never been an officially pronounced component of U.S. international aviation policy,<sup>13</sup> neither the DOT nor the Department of State (DOS)<sup>14</sup> has made significant attempts to hide their importance in facilitating U.S. aeropolitical relations.<sup>15</sup>

The reaction to immunized alliances has been mixed.<sup>16</sup> A recent joint report on transatlantic alliances sponsored by the DOT and its European Union (EU) counterpart took a generally positive view of the ventures, even though it called for further study into the alliances’ effects on competition.<sup>17</sup> Jeffrey Shane, a former DOT official who approved the first alliance application,<sup>18</sup> continues to defend the DOT’s immunization practices, primarily on policy grounds.<sup>19</sup> At the other end of the spectrum, the Department of Justice’s (DOJ) Antitrust Division has criticized antitrust immunity grants consistently, arguing there should be an automatic presumption against them.<sup>20</sup> Several consumer

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11. *See id.*

12. *See* Final Order, Defining “Open Skies,” Docket No. 48130, at 3–6 (Dep’t of Transp. Aug. 5, 1992), 1992 DOT Av. LEXIS 568 [hereinafter Defining “Open Skies”] (establishing the DOT’s official definition of “Open Skies”). The Open Skies template requires the removal of restrictions on routes, fares, and capacity between partners, though it retains the longstanding international restrictions on foreign ownership and control. *Id.*

13. *See* Statement of United States International Air Transportation Policy, 60 Fed. Reg. 21,841, 21,841 (May 3, 1995) (promoting “rel[iance] on the marketplace and unrestricted, fair competition to determine the variety, quality, and price of air service”).

14. The DOS is the other executive entity charged with conducting aviation negotiations with foreign partners. *See* 49 U.S.C. § 40105 (2006).

15. *See* Joint Application, All Nippon Airways Co., Ltd., Docket No. DOT-OST-2009-0350, at 6 n.9 (Dep’t of Transp. Dec. 23, 2009) [hereinafter ANA/Continental/United Application] (highlighting that U.S. aviation agreements with the Netherlands, Chile, Germany, France, Canada, Italy, and Japan were preconditioned on “favorable consideration of antitrust immunity applications” from their respective airlines).

16. *Compare infra* notes 17–19, *with infra* notes 20–21.

17. *See* EUR. COMM’N & U.S. DEP’T OF TRANSP., *supra* note 6, at 24–25.

18. Northwest/KLM Order to Show Cause, *supra* note 4, at 23.

19. *See* Warren L. Dean, Jr. & Jeffrey N. Shane, *Alliances, Immunity, and the Future of Aviation*, 22 AIR & SPACE LAW. 1, 17 (2010).

20. *See* J. Bruce McDonald, Deputy Assistant Attorney Gen., Competition in the Air, Remarks to the IATA Legal Symposium 2007, Istanbul, Turkey, at 7 (Feb. 12, 2007), *available at* <http://www.justice.gov/atr/public/speeches/222159.htm> (“DOJ believes there should be a presumption against immunity.”); *see also* Comments of the Department of Justice (Public Version), American Airlines, Inc., Docket No. OST-2008-0252, at 22–29 (Dep’t of Transp. Dec. 21, 2009) (highlighting the DOJ’s latest critiques of a major antitrust immunity application); William Gillespie & Oliver M. Richard, *Antitrust Immunity and International Airline Alliances* 20 (DOJ, Antitrust Div., Econ. Analysis Grp., Discussion Paper No. EAG-11-1, 2011), *available*

groups, non-alliance airlines, and labor organizations have shared in the DOJ's dissent.<sup>21</sup> Meanwhile, academic analysis of immunized alliances reveals nothing approaching consensus.<sup>22</sup> Professor Brian Havel and other legal scholars have been unimpressed with the DOT's quasi-legal reasoning, accusing the DOT of "slouching toward regulatory incoherence."<sup>23</sup> Others, like Hubert Horan, have focused on the DOT's perceived shoddy economic analysis of alliance applications and its betrayal of U.S. commitments to a deregulated aviation market.<sup>24</sup> Both lines of critique suggest a conceptual realignment of DOT immunization deliberations along economic or jurisprudential lines, but neither approach adequately addresses the institutional variables in play.<sup>25</sup> This Article intends to fill that lacuna.

Engaging the highly technical and jargon-laden economic quibbles over alliance benefits (or lack thereof) may have some academic purpose, but their relevance to the concrete debates over the future of the DOT's immunity powers is questionable. In lieu of adopting and defending any of the current arguments, this Article endeavors to circumvent the ideological stalemate by applying recent scholarly insight and the institutional advantages of executive agencies over the other branches to highlight their appropriateness in advancing the larger policy goals of liberalizing the international air-transport market.<sup>26</sup> In other words, antitrust immunity should be recognized as a

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at <http://www.justice.gov/atr/public/eag/267513.pdf> ("[A]ntitrust immunity is not reasonably necessary for alliance participants to deliver pricing efficiencies to connecting passengers.").

21. See, e.g., *The Financial State of the Airline Industry and the Implications of Consolidation: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 111th Cong. 23 (2010) (statement of Charles Leocha, Director of Consumer Travel Alliance); *id.* at 20–21 (statement of Robert Roach, Jr., General Vice President, International Association of Machinists and Aerospace Workers) (testifying against airline consolidations through merges and alliances); see also Answer of Virgin Atlantic Airways, American Airlines, Inc., Docket No. DOT-OST-2008-0252, at 1–7 (Dep't of Transp. May 18, 2009) (including Virgin Atlantic's objections to the oneworld Alliance immunity application, but noting that it did not oppose alliances in principle).

22. Compare, e.g., Volodymyr Bilotkach & Kai Hüschele, *Antitrust Immunity for Airline Alliances*, 7 J. COMP. L. & ECON. 335, 380 (2011) (arguing for a reassessment of antitrust immunity for alliances based on economic grounds), with Jan K. Brueckner et al., *Alliances, Codesharing, Antitrust Immunity, and International Airfares: Do Previous Patterns Persist?*, 7 J. COMP. L. & ECON. 573, 594–96 (2011) (finding that immunized alliances yield consumer-welfare benefits while rejecting the DOJ's antitrust immunity criticisms).

23. BRIAN F. HAVEL, *BEYOND OPEN SKIES: A NEW REGIME FOR INTERNATIONAL AVIATION* 297 (2009). Aside from slight reservations concerning some of his conclusions, Havel's analysis of alliances and the DOT's immunity powers is extremely thorough. See *id.* 198–208, 287–302.

24. See, e.g., Hubert Horan, "Double Marginalization" and the Counter-Revolution Against Liberal Airline Competition, 37 *TRANSP. L.J.* 251, 256–57, 259–60 (2010).

25. See *supra* notes 22–23 and accompanying text.

26. See Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 *U. CHI. L. REV.* 1613, 1649–50, 1679–81 (2009) [hereinafter Posner & Vermeule, *Crisis Governance*] (discussing institutional advantages held by

legitimate agency prerogative until the policy winds shift.<sup>27</sup> From this angle, it is not imperative that the DOT's immunization decisions accord with abstract standards of economic efficiency or satisfy highly conceptualized, legalist interpretations of the statutory language that undergirds the DOT's immunity powers.<sup>28</sup> This view may not satisfy antitrust immunity's more virulent critics, but their concerns ring hollow in the political realm. The congressional cloud that briefly hung over the immunization issue in 2009 has passed,<sup>29</sup> and the

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executive agencies to address crises); *see also* Adrian Vermeule, *Emergency Lawmaking After 9/11 and 7/7*, 75 U. CHI. L. REV. 1155, 1157, 1189–90 (2008) (advocating for increased deference to the executive branch during emergencies); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1101, 1105, 1144 (2009) [hereinafter Vermeule, *Schmittian Administrative Law*] (arguing that the actions of administrative agencies inevitably must be given some deference from judicial scrutiny). The main insights of these articles have been distilled into ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010) [hereinafter POSNER & VERMEULE, *EXECUTIVE UNBOUND*]. For an earlier application of their arguments to national security, *see* ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS* (2007) [hereinafter POSNER & VERMEULE, *TERROR*]. Much of the controversy over their work concerns their reliance on the work of Carl Schmitt, a political theorist and member of the Nazi Party. *See* Gene Healy, *Hail to the Tyrant*, AM. CONSERVATIVE, June 2011, at 38–39 (reviewing POSNER & VERMEULE, *EXECUTIVE UNBOUND*, *supra*); *see also* Harvey Mansfield, *Is the Imperial Presidency Inevitable?*, N.Y. TIMES, Mar. 13, 2011, at 12 (claiming that Posner and Vermeule neither need nor know the work of Carl Schmitt). Also insightful is Vermeule's solo work that focuses on judicial interpretation and institutional arrangements. *See* ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006) [hereinafter VERMEULE, *UNCERTAINTY*] (criticizing the application of hard legal rules in all circumstances of administrative action); *see also* ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* (2009) [hereinafter VERMEULE, *REASON*]. Although this author agrees with much of Posner and Vermeule's analysis, none of the contentions raised in this Article rely on their strong claim that “[w]e live in . . . an age after the separation of powers, and the legally constrained executive is now a historical curiosity.” POSNER & VERMEULE, *EXECUTIVE UNBOUND*, *supra*, at 4.

27. *See* POSNER & VERMEULE, *TERROR*, *supra* note 26, at 5 (arguing for deference to administrative agencies); *see also* Posner & Vermeule, *Crisis Governance*, *supra* note 26, at 1681 (arguing for a continuation of deference to executive action).

28. *See* Vermeule, *Schmittian Administrative Law*, *supra* note 26, at 1105–06 (explaining why the application of hard legal standards is not always suitable for administrative agencies).

29. *See* H.R. 831, 111th Cong. (2009). Although this piece of legislation, which required antitrust immunity for alliances to sunset after three years from the time it was granted, failed to take-off on its own, it was eventually attached to several versions of the FAA Reauthorization Act. *Id.* § 1(e). Former Congressman James Oberstar, who served as Chairman of the House Transportation and Infrastructure Committee and was an outspoken critic of the alliance system, introduced the legislation. *See* James L. Oberstar, Chairman, Comm. on Transp. & Infrastructure, U.S. House of Representatives, Remarks to the International Aviation Club, Washington, D.C. (Mar. 23, 2009), *available at* <http://www.iacwashington.org/Resources/Documents/JamesOberStar/ACspeechMar09.pdf>. Current Transportation Chairman John Mica led Congress in striking the antitrust immunity reform provisions from the FAA Reauthorization Act of 2011. *See* Press Release, Transp. & Infrastructure Comm., House Transportation Leaders Introduce FAA Bill (Feb. 11, 2011), *available at* <http://transportation.house.gov/News/PRArticle.aspx?NewsID=1085>.

American public, which has paid aviation policy little notice since deregulation in the 1970s, has more pressing concerns in the wake of a debilitating depression.<sup>30</sup> Immunized airline alliances were born out of the sector's deficient trade framework; thus, those seeking an international aviation market predicated on pure free-market principles should redirect their reform efforts to the elimination of investment restrictions at the domestic and international levels.<sup>31</sup>

This Article proceeds in five parts. Part I surveys the DOT's international aviation trade policy and immunization authority while highlighting the DOT's institutional advantages over Congress in these areas. Part II provides further details on airline alliances, their need for antitrust immunity, and the DOT's statutory authority for granting such immunity. Part III examines two lines of criticism against the DOT's immunization powers and illuminates their shortcomings on institutional grounds. Keeping with institutional considerations, Part IV exposes a select number of antitrust immunity reform proposals as normatively unattractive. Part V concludes by looking beyond the need for immunity in a hypothetical globalized aviation marketplace.

## I. INSTITUTIONAL CONTEXT

### A. Institutional Make-up and Advantages

The DOT, established in 1967, is dedicated to “ensuring a fast, safe, efficient, accessible[,] and convenient transportation system that meets . . . vital national interests and enhances the quality of life of the American people.”<sup>32</sup> This entails monitoring and regulating the nation's transportation infrastructure, including road, rail, maritime, and aviation networks through subject-specific offices.<sup>33</sup> The DOT's Office of the Assistant Secretary for Aviation and International Affairs is responsible for external economic regulation,<sup>34</sup> such as providing operating licenses,<sup>35</sup> promulgating consumer-protection rules,<sup>36</sup> and granting access rights to foreign air

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30. See generally RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009) (characterizing the 2008 economic downturn as a depression and explaining its causes and effects).

31. See, e.g., Hand, *supra* note 4, at 644–45 (arguing that easing cross-border investments restrictions would eliminate the need for antitrust immunity).

32. *About DOT: What We Do*, DEP'T OF TRANSP., <http://www.dot.gov/about> (last updated Mar. 27, 2012).

33. *Our Agencies*, DEP'T OF TRANSP., <http://www.dot.gov/administrations> (last updated Sept. 29, 2012). The Federal Aviation Administration (FAA), one of these specific offices, regulates aviation safety. See 49 U.S.C. § 106 (2006).

34. See *Asst. Secretary of Aviation & International Affairs*, DEP'T OF TRANSP., <http://www.dot.gov/policy/assistant-secretary-aviation-international-affairs> (last updated Sept. 18, 2012).

35. 49 U.S.C. §§ 41101–41103 (2006).

36. 49 U.S.C. § 41712 (2006 & Supp. 2011).



carriers.<sup>37</sup> Unlike the DOT's predecessor, CAB, the DOT does not regulate airline rates, routes, and services comprehensively, nor is the DOT supposed to erect high barriers to entry in order to protect incumbents.<sup>38</sup> Further, the DOT lacks the CAB's antitrust authority over the domestic air-transport market, but it retains the power to immunize international inter-carrier arrangements, including airline alliance agreements.<sup>39</sup>

As an executive agency, the DOT operates within the orbit of the President's policy preferences.<sup>40</sup> As such, the DOT can reasonably be expected to respond to shifts in the political winds.<sup>41</sup> The DOT shares in the general institutional advantages that accrue to agencies by congressional consent. Namely, the DOT can set policy goals, issue rules and rulings, collect information, and interface with other agencies—executive or independent—to fulfill these various ends.<sup>42</sup> The legislative branch regulates the general contours of the DOT's powers, but the DOT has been delegated enough authority to move with the requisite speed and knowledge to handle fluctuating aviation-related matters.<sup>43</sup> The debatable “cost” of this flexibility is that the DOT, like the executive branch as a whole, may be subject to few express legal constraints, but political monitoring can occasionally constrain agency behavior.<sup>44</sup> Even if

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37. 49 U.S.C. § 41301–41304 (2006).

38. *Compare* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.), *with* Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (codified in scattered sections of Titles 5, 15, 16, 26, 29, and 49 U.S.C.). *See also* Daniel Petroski, *Airlines Response to the DTPA Section 1305 Preemption*, 56 J. AIR L. & COM. 125, 125–30 (1990) (explaining the history of the CAB).

39. *See* Petroski, *supra* note 38, at 125–30; *see also supra* notes 2–3 and accompanying text.

40. *See* POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 26, at 57 (noting that “recent empirical work suggests that the heads of independent agencies and executive agencies tend to have common preferences and beliefs, both aligned with those of the reigning president”).

41. *See id.*

42. Admittedly, sometimes this “interfacing” hits bumps in the road, particularly where institutional competence is disputed. *See* Stephen Labaton, *Cracking Down, Antitrust Chief Hits Resistance*, N.Y. TIMES, July 26, 2009, at A1 (discussing the behind-the-scenes conflict between the DOJ and DOT over antitrust immunity for airline alliances).

43. Perhaps the most dramatic example of agency action in recent memory was the FAA's unilateral decision to ground more than 4,000 flights within hours of the attacks on Sept. 11, 2001. *See* Alan Levin et al., *Part I: Terror Attacks Brought Drastic Decision: Clear the Skies*, USA TODAY, [http://usatoday30.usatoday.com/news/sept11/2002-08-11-clearskies\\_x.htm](http://usatoday30.usatoday.com/news/sept11/2002-08-11-clearskies_x.htm) (last visited Oct. 4, 2012).

44. Examples of political monitoring include congressional hearings, newspaper reports, television exposés, and online forums. *See* Michael E. Levine, *Why Weren't the Airlines Regulated?*, 23 YALE J. ON REG. 269, 273–74, 277–79, 281, 285, 287–88, 290 (2006) (explaining the concept of “slack” and the relative regulatory autonomy enjoyed by the DOT, while also recognizing the impact of “public agenda” issues and the pressure that they can place on DOT policy).

the claims of modern executive authority are exaggerated, that does not mean the DOT lacks a high degree of institutional autonomy.<sup>45</sup>

Professor Michael Levine, a former CAB attorney, argues that airline regulatory affairs have rarely been central in public discourse since the deregulation movement began in the 1970s.<sup>46</sup> It is *possible* that Congress could, at some point, become more involved, particularly if aviation affairs once again capture the public's attention. For instance, the string of high-profile airline failings induced by the September 11, 2001 terrorist attacks brought the U.S. government to the brink of re-regulating the airline industry.<sup>47</sup> More recently, in 2006, public outcry over a proposal that a United Arab Emirates-owned company would take control of several U.S. seaports<sup>48</sup> spurred Congress to block a DOT attempt to relax U.S. foreign-investment rules for airlines.<sup>49</sup> In both instances, however, congressional involvement proved fleeting and, with respect to the post-9/11 re-regulation scare, inconsequential in the long run.<sup>50</sup> As such, it appears safer to conceive of

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45. See *id.* at 287 (discussing the political forces that led to less regulation in the airline industry). Given that much of the DOT's administrative subject matter involves highly technical problems related to infrastructural issues that, for the most part, receive scant media attention and few headlines, its day-to-day regulatory behavior is seldom on the public's radar. Although some major industry shake-ups involving bankruptcies, mergers, and security have managed to receive a fair amount of attention over the years, none of these "attention grabbers" fall directly under DOT oversight.

46. See Levine, *supra* note 44, at 277–78, 285–86; see also *Webcast: A Conversation with Michael E. Levine*, INT'L AVIATION LAW INST., DEPAUL UNIV. COLL. OF LAW, [http://www.law.depaul.edu/centers\\_institutes/aviation\\_law/webcast.asp](http://www.law.depaul.edu/centers_institutes/aviation_law/webcast.asp) (last visited Sept. 9, 2012).

47. See Brian F. Havel & Michael G. Whitaker, *The Approach of Re-Regulation: The Airline Industry After September 11, 2001*, 20 ISSUES AVIATION L. & POL'Y 4101, 4105–15 (2004) (detailing the effects of the Air Transportation Safety and System Stabilization Act of 2001).

48. See Deborah M. Mostaghel, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 ALB. L. REV. 583, 606–07 (2007).

49. See Cornelia Woll, *Open Skies, Closed Markets: The Importance of Time in the Negotiation of International Air Transport 20–22* (July 25, 2009) (unpublished paper presented at the 104th Annual Meeting of the American Political Science Association held in September 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1450441](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1450441).

50. The 2001 Air Transportation Safety and System Stabilization Act expired without bringing the airlines under strict governmental control. See Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1974 (repealing much of Title 1 of the Stabilization Act dealing with aviation). Congress's assault on the DOT's investment gambit arguably remains effective insofar as the DOT has not attempted a similar move since. Conversely, the investment modification was intended to lure the European Union (EU) into a liberal air transport treaty and the EU solidified the deal in 2007 anyway, so a strong argument could be made that the legislative branch's intervention had no substantive impact on DOT policy. See Woll, *supra* note 49, at 2.

congressional constraints on the DOT's aviation portfolio as subject to vacillating public interests—a conclusion that is theoretically plausible.<sup>51</sup>

### B. *Advantages in International Aviation Policy*

Although the DOT's domestic regulatory power over air transport represents a decline from the heyday of the CAB, the DOT still wields considerable control over the external facets of U.S. aviation law and policy.<sup>52</sup> Under federal statute, the DOT—in cooperation with the DOS—is assigned the role of “develop[ing] a negotiating policy emphasizing the greatest degree of competition compatible with a well-functioning international air transportation system.”<sup>53</sup> Congress enumerates nine policy points for departments to consider.<sup>54</sup> All of them, however, are stated at a high level of generality and emanate from prior executive policy commitments.<sup>55</sup> For example, the first point—“strengthening the competitive position of air carriers to ensure at least equality [of opportunity] with foreign carriers”—is only accompanied by a request that U.S. airlines be able to “maintain and increase their profitability in foreign air transportation.”<sup>56</sup> Congress leaves it to the DOS and DOT to craft the particulars.<sup>57</sup> Moreover, the statute does not provide clear guidance on how much weight should be assigned to each point, nor does it prevent the DOT from developing additional policy terms broadly consistent with the statute.<sup>58</sup> To the extent that aviation policy must be formed with an eye toward

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51. Cf. Levine, *supra* note 44, at 295–97 (speculating on means to empirically verify the role public attention has played in U.S. aviation policy)

52. See 49 U.S.C. §§ 40101(e), 41301 (2006); see also *supra* notes 12–13.

53. 49 U.S.C. § 40101(e) (2006).

54. *Id.* § 40101(e)(1)–(9).

55. The statute's policy points were originally a part of the International Air Transportation Competition Act of 1979 that, in turn, was born out of the Airline Deregulation Act of 1978. Compare International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 2, 94 Stat. 35, with Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 3(a), 92 Stat. 1705, 1705–07 (codified as amended in scattered sections of 49 U.S.C.). See also Michael T. Pinto, *The International Air Transportation Competition Act of 1979*, 9 DENV. J. INT'L L. 261, 261 (1980). The deregulation agenda, including its liberalizing terms for domestic and international aviation, was first developed under the auspices of the CAB and its former Chairman, Alfred Kahn. See Paul Stephen Dempsey, *Turbulence in the “Open Skies”*: *The Deregulation of International Air Transport*, 15 TRANSP. L.J. 305, 325–27 (1987); see also *id.* at 329–42 (recounting the CAB and Carter Administration's pro-liberalization negotiating framework for international aviation).

56. 49 U.S.C. § 40101(e)(1).

57. *Id.* § 40101(e).

58. *Id.* This is unsurprising given that Congress possesses no particular competence over international aviation policy. Cf. POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 26, at 26 (observing “the relative lack of legislative expertise” and that Congress “lacks the raw information that [administrative] experts need to make assessments”). Further, Congress does not have the institutional structures to generate relevant information to the same degree that a transportation-savvy agency does. The DOT, for instance, has the Bureau of Transportation Statistics to compile and analyze multimodal transportation data. See *About BTS*, RES. & INNOVATION TECH. ADMIN., BUREAU OF TRANSP. STAT., <http://www.bts.gov/about/> (last

international political relations,<sup>59</sup> the DOS is well situated to blend its institutional advantages with those of the DOT to put muscle and flesh on the aviation policy bones left by Congress.<sup>60</sup>

Congress's assignment of negotiating authority to the DOS, *in consultation with* the DOT, further confirms this understanding, and it is in line with the DOT's articulated policy goals.<sup>61</sup> Though Congress vests itself, through the President, with the ability to send one representative from each house to observe international aviation negotiations,<sup>62</sup> it rarely does.<sup>63</sup> History has shown that Congress is willing to defer to the President's international trade policy choices, even with respect to far-reaching trade accords with economic and social consequences that exceed those of aviation agreements by significant magnitudes.<sup>64</sup> By and large, the development and execution of U.S. international aviation trade policy remains an executive prerogative carried out

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visited Sept. 10, 2012). With respect to international aviation in particular, the DOT has a dedicated division "[t]o coordinate, develop, and execute international aviation transportation policy." OFF. INT'L AVIATION, DEP'T OF TRANSP., <http://www.dot.gov/policy/aviation-policy/office-international-aviation> (last updated Aug. 30, 2012). Although Congress can rely on agency-produced information as well as direct agencies to generate particular types of information, this only shows that the legislative branch may possess an epistemic advantage over the judiciary, which is far more constrained in terms of informational access. See VERMEULE, REASON, *supra* note 26, at 1–9 (introducing arguments for why the legislative branch has an institutional advantage over the judiciary). Agencies remain on the "front lines" of their assigned subject matter; Congress appears later.

59. See Statement of United States International Air Transportation Policy, 60 Fed. Reg. 21,841, 21,843–84 (May 3, 1995) (surveying the international relations issues in play).

60. See *id.* at 21,845–46 (discussing the importance of transnational agreements and political pressure in effecting favorable agreements).

61. See *id.* § 40105(c). Although it is true that the DOT and DOS are directed to consult with aviation stakeholders, such as airports, airlines, and labor, "on broad policy goals and individual negotiations," the agencies are only required to do so "to the maximum extent practicable" or, in other words, at their discretion. *Id.*

62. See *id.* § 40105(d).

63. See, e.g., Derek Lick, Note, *More Turbulence Ahead: A Bumpy Ride During U.S.-Japanese Aviation Talks Exemplifies the Need for a Pragmatic Course in Future Aviation Negotiations*, 31 VAND. J. TRANSNAT'L L. 1207, 1267 (1998) (noting that, during negotiations between U.S. and Japanese airlines, Senator Jesse Helms "became so disturbed at the direction U.S. negotiators were going with the aviation talks that he sent staff members of the Senate Foreign Relations Committee to observe the August 1997 discussions").

64. For instance, U.S. accession to both the North American Free Trade Agreement and the World Trade Organization Agreement were secured through the "fast track" authority given to the President by Congress. See North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. §§ 3311–3473); see also Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified in scattered sections of 19 U.S.C.). Although the availability of fast-track, or "trade promotion," authority has lapsed under the Obama Administration, its longstanding role in U.S. international trade relations suggests that it will return when political temperaments concerning trade and globalization adjust to current worldwide economic circumstances. See generally Robert E. Baldwin, *U.S. Trade Policy Since 1934: An Uneven Path Toward Greater Trade Liberalization* (Nat'l Bureau of Econ. Research, Working Paper No. 15397, 2009), available at <http://www.nber.org/papers/w15397/>.

under the auspices of the DOS and DOT.<sup>65</sup> The policy space left by Congress allows the DOT to create an “Open Skies” negotiating template that seeks to remove many market access restrictions at the international level.<sup>66</sup> These accords have often come at the price of antitrust dispensations for foreign air carriers seeking to forge deeply integrated alliances with U.S. airlines.<sup>67</sup> Notably, Congress, has not taken an express position on this mode of exchange, choosing instead to monitor the matter at irregular intervals.<sup>68</sup>

Although few international aviation analysts quibble with the liberalization ethos of Open Skies,<sup>69</sup> some have questioned the wisdom of incorporating antitrust immunity into the agenda.<sup>70</sup> Despite these critiques, mainly academic in nature, Congress remains unmoved.<sup>71</sup> Interest groups’ concerns, such as those expressed by organized labor<sup>72</sup> and consumer watchdogs,<sup>73</sup> have also

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65. See *supra* notes 52–57 and accompanying text.

66. The DOT’s policy does not remove all market restrictions. For instance, Open Skies does not provide foreign investment opportunities or cabotage privileges such as the right of a foreign airline to serve domestic routes within another state’s territory. See generally Defining “Open Skies”, *supra* note 12. See also *Current Model Open Skies Agreement Text*, DEP’T OF STATE, at arts. 2–4 (Jan. 12, 2012), <http://www.state.gov/e/eb/rls/othr/ata/114866.htm>.

67. See *supra* notes 10–12 and accompanying text.

68. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-95-99, INTERNATIONAL AVIATION: AIRLINE ALLIANCES PRODUCE BENEFITS, BUT EFFECT ON COMPETITION UNCERTAIN 2 (1995); U.S. GEN. ACCOUNTING OFFICE, GAO/T-RCED-98-131, AVIATION COMPETITION: INTERNATIONAL AVIATION ALLIANCES AND THE INFLUENCE OF AIRLINE MARKETING PRACTICES 1 (1998); see also *International Aviation Alliances: Market Turmoil and the Future of Airline Competition: Hearing Before the Subcomm. on Antitrust, Business Rights, and Competition of the S. Comm. on the Judiciary*, 107th Cong. (Nov. 7, 2001); *supra* note 29 (discussing the failed attempt of former Congressman James Oberstar to reign in the DOT’s antitrust immunity powers).

69. See Xiaowen Fu et al., *Air Transport Liberalization and Its Impacts on Airline Competition and Air Passenger Traffic*, 49 TRANSP. J. 24, 25 (2010) (highlighting the impacts of liberalization on the international air markets); see also Anca Cristea & David Hummels, *Estimating the Gains from Liberalizing Services Trade: The Case of Passenger Aviation 6-7* (Sept. 2011) (unpublished manuscript) (discussing the link between Open Skies Agreements, price changes, and demand, and noting that strict regulation “discourag[ed] efficiency and innovation”), available at <http://econ.la.psu.edu/papers/Hummels91611.pdf>. Despite these benefits, the worldwide economic decline that began in 2008 has limited some of the projected gains from air transport liberalization. See, e.g., Dipasis Bhadra & Roger Schaufele, *Impact of U.S.-EU Open Aviation Area Treaty on U.S. Aviation: A Parametric Analysis with Simulation*, 48 TRANSP. RESEARCH FORUM 65, 67–72 (2009).

70. See, e.g., HAVEL, *supra* note 23, at 301–02; Horan, *supra* note 24, at 283–86.

71. See *supra* note 29 and accompanying text (describing a failed effort in Congress to limit the DOT’s authority to grant antitrust immunity).

72. See Bartholomew Sullivan, *Labor Unions Announce a Partnership to Counter Global Airline Alliances*, COM. APPEAL (Apr. 20, 2011, 5:20 PM), <http://www.commercialappeal.com/news/2011/apr/20/labor-unions-announce-partnership-counter-global-a/>.

73. See Charlie Leocha, *Airline Alliance Realities: Airlines Win, Consumers Lose*, CONSUMER TRAVELER (Mar. 26, 2009), <http://www.consumertraveler.com/today/airline-alliance-realities-airlines-win-consumers-lose/>.

been unsuccessful, perhaps because they failed to marshal strong public support. None of these objections, however, take to heart the institutional advantages the DOT possesses with respect to forming international aviation policy and executing that policy in cooperation with the DOS.<sup>74</sup> These objections miss the point: even though antitrust immunity for alliances may be “bad” or trading Open Skies-for-Immunity fails to comport with some abstract notion of how international aviation is “supposed” to work,<sup>75</sup> there is no ready-at-hand institutional alternative to the status quo.<sup>76</sup>

## II. THE WAYS AND MEANS OF ANTITRUST IMMUNITY

### A. Historical Background

Since the inception of international aviation’s modern legal regime in 1944,<sup>77</sup> airlines seeking foreign market access rights have been tethered to a series of domestic and international restrictions.<sup>78</sup> This framework requires airlines to remain “substantially owned” and “effectively controlled” by nationals of their home states (i.e., the state in which an airline is incorporated and has its principal place of business).<sup>79</sup> Although the exact meaning of the ownership/control criteria remains unclear,<sup>80</sup> particularly as a matter of international law,<sup>81</sup> the effect of this restrictive dyad is unambiguous: no single airline is legally permitted to develop an autonomous global-route network, whether through the acquisition of foreign airlines or the establishment of

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74. See *infra* Part IV (detailing the various complaints and proposed alternative paths to the current alliance-granting regime).

75. Distributional goals are at the heart of both labor and consumer-advocacy objections. Organized labor fears, perhaps rightly, that alliances allow U.S. airlines to outsource jobs by shifting international carriage to foreign airlines with lower cost structures. See Sullivan, *supra* note 72. Consumers who fear higher ticket prices and decreased service offerings are understandably suspicious that allied airlines are extracting economic rents through their cartel-like behavior. See Leocha, *supra* note 73.

76. See *infra* Part IV (raising and dismissing alternatives to the status quo).

77. See generally Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force Apr. 4, 1947). See also Brian F. Havel & Gabriel S. Sanchez, *Do We Need a New Chicago Convention?*, 11 ISSUES AVIATION L. & POL’Y 7, 10 (2011) (defending the current regime on pragmatic grounds).

78. See Havel & Sanchez, *supra* note 7, at 644–48.

79. *Id.* at 648–53.

80. The “control” criterion is, at best, ambiguous and lends itself to a case-by-case analysis of an airline’s management structure, contracts, and financial arrangements. See Recommended Decision of Administrative Law Judge, DHL Airways, Inc. (ASTAR), Docket No. OST-2002-13089-594, at 35–38 (Dep’t of Transp. Dec. 19, 2003), 2003 DOT Av. LEXIS 1086 (discussing the interpretation of “actual control” in U.S. administrative law).

81. This is because aviation agreements, unlike domestic legal codes, fail to provide a numeric benchmark for “ownership.” See, e.g., Air Transport Agreement, U.S.-EU, Apr. 30, 2007, 46 ILM 467. As in U.S. domestic law, “control” remains undefined. See *supra* note 80.

subsidiaries abroad.<sup>82</sup> For instance, Germany's Lufthansa cannot merge with United Airlines, because a German owned-and-controlled United would violate both U.S. domestic law *and* treaty commitments.<sup>83</sup> Major air-transport markets such as China and Russia could, under the terms of their air services agreements (ASAs) with the United States, revoke United's privilege to fly to and from their respective territories on the grounds that United is no longer owned-and-controlled by American citizens.<sup>84</sup> Because more than ninety percent of all extant ASAs feature "nationality clauses" of this sort,<sup>85</sup> it is nearly impossible for an international airline to have a foreign-ownership profile while successfully accessing lucrative markets.<sup>86</sup>

Against this backdrop, airlines have sought to circumvent ownership restrictions by forging alliances with foreign airlines that would allow them to create a global-route network while continuing to behave like a single, merged entity.<sup>87</sup> Although the earliest alliances that emerged in the early 1990s were bilateral in nature,<sup>88</sup> today's market landscape boasts three major global alliances—oneworld, SkyTeam, and Star—comprised of several large international airlines accompanied by a series of smaller, regional airlines.<sup>89</sup>

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82. See 49 U.S.C. §§ 40102(a)(15), 41101(a), 41102(a) (2006); see also *supra* notes 8–10 and accompanying text. The one notable exception to this situation is the European Union's formation of a common aviation market that allows *intra-EU* cross-border mergers such as Air France/KLM and British Airways/Iberia. See MARTIN STANILAND, *A EUROPE OF THE AIR? THE AIRLINE INDUSTRY AND EUROPEAN INTEGRATION* 267–68 (2008). One should be careful not to make too much of this, however, because the EU behaves at least as a single quasi-state for economic purposes. ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 92 (2009).

83. See Havel & Sanchez, *supra* note 7, at 640–41.

84. See Civil Air Transport Agreement, U.S.-China, arts. 3–4, Sept. 17, 1980, 33 U.S.T. 4559; see also Air Transport Agreement, U.S.-Rus., arts. 3–4, Jan. 14, 1994, KAV 3785, available at <http://www.state.gov/documents/organization/114333.pdf>. Though both agreements have been amended over the years, their ownership and control criteria remain in force.

85. See Council for Trade in Services, *Quantitative Air Services Agreements Review (QUASAR): Part B: Preliminary Results*, at 33, ¶ 61, S/C/W/270/Add.1 (Nov. 30, 2006).

86. However, some states are exhibiting greater tolerance for foreign investment in their national airlines while enforcement of nationality clauses wanes. See Havel & Sanchez, *supra* note 7, at 654–58 (discussing selective U.S. waivers to nationality clause violations, the creation of a unified EU aviation market, and airline lobbying efforts to erode nationality clauses); see also Havel & Sanchez, *supra* note 5, at 26–28 (discussing the potential for relaxed ownership restrictions in the context of Canada/EU aviation relations). The cold truth still remains that these restrictions could be invoked at any time and thus far have successfully dissuaded major cross-border mergers from taking place. See, e.g., Havel & Sanchez, *supra* note 7, at 653–54 (explaining how the United States invoked nationality rules to prevent a proposed airline merger).

87. Northwest/KLM Order to Show Cause, *supra* note 4, at 4; Order to Show Cause, United Airlines, Inc. and Deutsche Lufthansa, A.G., Docket No. OST-96-1116, at 1 (Dep't of Transp. May 9, 1996), 1996 DOT Av. LEXIS 300 [hereinafter *United/Lufthansa Order to Show Cause*]; Volodymyr Bilotkach & Kai Hüscherlath, *Airlines Alliances and Antitrust Policy: The Role of Efficiencies*, 21 J. AIR TRANSP. MGMT. 76, 78 (2012).

88. See, e.g., Northwest/KLM Order to Show Cause, *supra* note 4, at 4; United/Lufthansa Order to Show Cause, *supra* note 87, at 1 (Dep't of Transp. May 9, 1996).

89. See Bilotkach & Hüscherlath, *supra* note 87, at 76.

For example, the Star Alliance—anchored by United Airlines and Lufthansa—has twenty-seven members, including Air Canada, Singapore Airlines, and Japan’s All Nippon Airways.<sup>90</sup> Though not every member is integrated into the alliance with full antitrust immunity, the main actors are.<sup>91</sup> Immunized airlines are allowed to structure their commercial operations as if they are a single, merged entity, including abandoning routes where the members once competed.<sup>92</sup> Each of the big three global alliances share with its members a common marketing scheme and pool its consumer perquisite programs, such as frequent flyer miles and airport lounge access.<sup>93</sup> More controversially, alliance members are, in accordance with marching orders implied by the DOT,<sup>94</sup> committed to “metal neutrality,” “an industry term meaning that the partners in an alliance are indifferent as to which operates the ‘metal’ (aircraft) when they jointly market services.”<sup>95</sup> Thus, instead of metal-neutral alliance members divvying up their revenues based on the amount of carriage each conducts, an alliance member can be compensated for performing no service at all.<sup>96</sup>

Unsurprisingly, alliances raise competition concerns to varying degrees depending on the regulatory culture of the concerned states and the extent to which the airlines have been able to “sell” the consumer benefits.<sup>97</sup> Further,

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90. See *Member Airlines*, STAR ALLIANCE [http://www.staralliance.com/en/about/member\\_airlines/](http://www.staralliance.com/en/about/member_airlines/) (last visited Sept. 13, 2012).

91. Bill Poling, *Star Alliance Gets Continental and Antitrust Immunity*, TRAVEL WKLY. (July 10, 2009), <http://www.travelweekly.com/Travel-News/Airline-News/Star-Alliance-gets-Continental-and-antitrust-immunity/>.

92. A base-level aspect of alliance integration is the practice of code-sharing, whereby alliance partners place their identifier codes on the same flight, regardless of which airline provides the carriage. Under this practice, United Airlines can sell seats on flights between Washington, D.C., and Madrid, Spain, with its identification code on the ticket while Irish airline Aer Lingus uses its aircraft and crew to provide the actual service. See Press Release, United Airlines, United Airlines, Aer Lingus Announce Codeshare and Frequent Flyer Cooperation (Apr. 8, 2008), available at <http://www.reuters.com/article/2008/04/08/idUS108695+08-Apr-2008+PRN20080408>.

93. Havel & Sanchez, *supra* note 5, at 37.

94. Though the term has only recently appeared on DOT decisions, the existence of “metal neutrality” in a heavily integrated alliance agreement now appears to be an established requirement for antitrust immunity. See, e.g., Order, Air Canada, Docket No. DOT-OST-2008-0234, at 4, 10 (Dep’t of Transp. Nov. 14, 2011); Show Cause Order, Delta Airlines, Inc., Docket No. DOT-OST-2009-0155, at 2 n.4 (Dep’t of Transp. May 10, 2011), 2011 DOT Av. LEXIS 223; see also Bilotkach & Hüscherlath, *supra* note 87, at 80–81 (providing a more detailed explication of the metal-neutral concept).

95. Show Cause Order, American Airlines, Inc., Docket No. DOT-OST-2008-0252, at 4 n.6 (Dep’t of Transp. Feb. 13, 2010), 2010 DOT Av. LEXIS 136 [hereinafter *oneworld Alliance Order*].

96. See Bilotkach & Hüscherlath, *supra* note 87, at 80–81.

97. See *oneworld Alliance Order*, *supra* note 95, at 2–3 (summarizing concerns over immunizing the oneworld Alliance but finding the benefits great enough to warrant antitrust immunity).



every major industrial and post-industrial economy has competition or antitrust rules that frown upon the type of cartelization in which alliances engage.<sup>98</sup> In the United States, the Sherman and Clayton Acts are intended to function as a bulwark against typical alliance behavior insofar as the Sherman Act prohibits “[e]very contract, combination . . . , or conspiracy in restraint of trade or commerce,”<sup>99</sup> while the Clayton Act targets the acquisition of monopoly power through mergers.<sup>100</sup> Presumably, the existence of these statutes, along with the matrix of public and private interests in seeing them vigorously enforced against commercial entities, should have converged to strangle alliances.<sup>101</sup> But, because of the aviation industry’s unique regulatory history, allied airlines can supplicate the DOT to shield them from antitrust exposure.<sup>102</sup>

Without getting bogged down in the details of aviation’s *ancien régime*, it is necessary to note that the CAB enjoyed many privileges before the policy revolution that prompted deregulation in the 1970s<sup>103</sup> and the termination of the CAB in 1984.<sup>104</sup> These included monitoring, approving, and, if needed, immunizing all airline mergers and inter-carrier commercial agreements without direct recourse from U.S. antitrust statutes.<sup>105</sup> Because cross-border mergers and acquisitions were prohibited under domestic and international law, the CAB primarily directed international regulatory authority to approve transnational price-fixing schemes brokered by the industry’s global trade group, the International Air Transport Association (IATA).<sup>106</sup> Alliances were not yet on the radar.<sup>107</sup> The Airline Deregulation Act of 1978 slightly modified

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98. See TONY A. FREYER, *ANTITRUST AND GLOBAL CAPITALISM: 1930-2004*, at 1–7 (2006) (introducing an explanation of the reason for and the extent of global antitrust rules).

99. 15 U.S.C. § 1 (2006).

100. See 15 U.S.C. §§ 12–27 (2006) (described as “[a]n Act to protect trade and commerce against unlawful restraints and monopolies”).

101. But see Jerry L. Beane, *The Antitrust Implications of Airline Deregulation*, 45 J. AIR L. & COM. 1001, 1001–04 (1980) (noting that “[c]ompetition was a secondary consideration in the economic regulation of the aviation industry”).

102. See *id.* at 1001–03 (explaining how deregulation led to the demise of automatic antitrust immunity); see also *supra* note 32 and accompanying text (describing the primary mission of the DOT, which does not include antitrust management).

103. See Beane, *supra* note 101, at 1001.

104. See Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (codified in scattered sections of Titles 5, 15, 16, 26, 29, and 49 U.S.C.).

105. See Beane, *supra* note 101, at 1008, 1011 (describing privileges afforded to the CAB to immunize airline agreements from antitrust liability before deregulation).

106. See Brian F. Havel & Gabriel S. Sanchez, *International Air Transport Association*, in *HANDBOOK OF TRANSNATIONAL ECONOMIC GOVERNANCE REGIMES* 755, 756–60 (Christian Tietje & Alan Brouder eds., 2009).

107. See James Reitzes & Diana Moss, *Airline Alliances and Systems Competition*, 45 HOUSE. L. REV. 293, 303–04 (2008) (examining the history of antitrust immunity and airline alliances, which attracted greater scrutiny in the years following the DOT’s first grant of immunity in 1992).

the CAB's antitrust powers.<sup>108</sup> After 1984, Congress transferred these powers to the DOT before this authority, with respect to *domestic aviation*, expired in 1989.<sup>109</sup> Today, U.S. airlines remain subject to antitrust statutes with respect to domestic transactions like the 2010 Continental/United Airlines merger,<sup>110</sup> predatory pricing, and other allegedly anticompetitive behavior.<sup>111</sup> With respect to the *international arena*, however, Congress allowed the DOT to retain the old CAB powers<sup>112</sup> because the global aviation marketplace remained a heavily regulated environment. The marketplace remained heavily regulated due to the aforementioned restrictions on foreign airline ownership<sup>113</sup> and the unwillingness of states to grant open-market access rights to foreign airlines.<sup>114</sup> Despite the steady erosion of these market-access barriers over the past twenty years, nationality restrictions remain at the forefront of airline alliance apologetics for antitrust immunity.<sup>115</sup>

That is only part of the story. From the inception of the first airline alliance in 1992—a joint venture between the extinct Northwest Airlines and Dutch flag carrier KLM—U.S. aviation policymakers saw an opportunity to use immunity grants as a coin of exchange in pursuit of Open Skies agreements with foreign governments.<sup>116</sup> Although these agreements initially offered only “sympathetic consideration” for immunity applications from alliances comprised of carriers from states that had signed-on to the Open Skies template,<sup>117</sup> Open Skies-for-Immunity quickly became the new order of the day.<sup>118</sup> Indeed, the DOT's immunization quasi-jurisprudence now confirms

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108. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 30(a), 92 Stat. 1705, 1731 (codified as amended at 49 U.S.C. § 1378 (2006)) (allowing the Board to exempt a specific transaction from antitrust laws if it was “required in the public interest”).

109. See Civil Aeronautics Board Sunset Act of 1984 § 3 (transferring authority to the DOT and sunseting that authority in 1989); see also Dean & Shane, *supra* note 19, at 18.

110. See Press Release, Dep't of Justice, United Airlines and Cont'l Airlines Transfer Assets to Southwest Airlines in Response to Dep't of Justice's Antitrust Concerns (Aug. 27, 2010), available at <http://www.justice.gov/opa/pr/2010/August/10-at-974.html>.

111. See Gustavo Mathias Alves Pinto, *Competition and Predation in the Airline Industry*, 74 J. AIR L. & COM. 3, 5–9 (2009) (detailing the main allegations of predatory behavior in the airline industry).

112. Civil Aeronautics Board Sunset Act of 1984 § 9(f); see also Dean & Shane, *supra* note 19, at 18.

113. See *supra* note 78 and accompanying text.

114. See Havel & Sanchez, *supra* note 77, at 8.

115. *Id.*

116. See Reitzes & Moss, *supra* note 107, at 304–05.

117. See, e.g., Northwest/KLM Order, *supra* note 4, at 1, 3 (quoting the 1992 Memorandum of Consultations between the United States and the Netherlands); Order Granting Approval and Antitrust Immunity for an Alliance Expansion Agreement, United Air Lines, Inc., Docket No. OST-2003-14202, at 1–2 & n.5 (Dep't of Transp. May 14, 2003), 2003 DOT Av. LEXIS 357 [hereinafter United/Asiana Order] (citing the Memorandum of Consultations between the United States and the Republic of Korea).

118. See Defining “Open Skies”, *supra* note 12; see also Dean & Shane, *supra* note 19, at 17.

that an Open Skies agreement is *conditio sine qua non* for antitrust immunity, while alliance applications themselves do not hide the fact that “no immunity” means “no Open Skies.”<sup>119</sup> This reality has not sat well with a handful of stakeholders and academics, all of whom have argued that the DOT is bound to statutory rules that dictate the terms under which immunization may be offered.<sup>120</sup>

### B. Legal Framework

The statutory rules governing antitrust immunity grants have arguably played an ambiguous role in DOT decision-making.<sup>121</sup> Under a two-step framework, the DOT is required first to approve or deny an alliance agreement between U.S. airlines and one or more foreign air carriers and, second, to determine whether or not to extend antitrust immunity to an approved agreement.<sup>122</sup> Although the DOT may, *without* antitrust immunity, approve alliance arrangements with foreign airlines from states that have not signed an Open Skies agreement, these airlines are unable to take advantage of the standard menu of alliance activities without risking an antitrust lawsuit.<sup>123</sup> Thus, those airlines seeking high-octane alliance benefits seek both approval and immunity when submitting their petitions to the DOT.<sup>124</sup> Even then, the DOT can choose to offer approval without immunity, but such instances are rare and can be remedied through a subsequent petition.<sup>125</sup> The typical scenario involves the approval dog wagging its immunity tail without much incident.<sup>126</sup>

More formally, under 49 U.S.C. § 41309, which governs the first step, the DOT is directed to approve an alliance so long as the “cooperative arrangement” is “not adverse to the public interest” nor in violation of other

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119. See, e.g., ANA/Continental/United Application, *supra* note 15, at 6 n.9 (stating that in the recent U.S.-Japan negotiations, “the Japanese delegation unambiguously communicated that U.S. approval of [the ANA/Continental/United] Joint Application [for antitrust immunity] on terms acceptable to the Japanese government is a condition precedent to the entry into force of Open Skies”); Havel & Sanchez, *supra* note 5, at 37.

120. See Dean & Shane, *supra* note 19, at 20; see also *infra* Part III.A–B (discussing additional critiques).

121. See *infra* notes 181–83 (surveying Havel’s critique that the DOT has failed to follow the statutes that underlie its antitrust immunity powers).

122. See Dean & Shane, *supra* note 19, at 18–19; see also Gillespie & Richard, *supra* note 20, at 5–6 (explaining that an alliance may be granted without a grant of antitrust immunity).

123. See Hand, *supra* note 4, at 656.

124. See Dean & Shane, *supra* note 19, at 21.

125. See, e.g., Order to Show Cause, Alitalia-Linee Aeree Italiane-S.P.A., Docket No. OST-2004-19214, at 2 (Dep’t of Transp. Dec. 22, 2005), 2005 DOT Av. LEXIS 820 [hereinafter SkyTeam I Order] (granting SkyTeam approval but no antitrust immunity). *But see* Show Cause Order, Alitalia-Linee Aeree Italiane-S.p.A., Order to Show Cause, Docket No. OST-2007-28644, at 1 (Dep’t of Transp. Apr. 9, 2008) [hereinafter Skyteam II Order] (granting SkyTeam’s revised application for antitrust immunity).

126. See Dean & Shane, *supra* note 19, at 19.

statutory criteria related to airline operating fitness.<sup>127</sup> This requires the DOT to question whether the proposed alliance would “substantially reduce[] or eliminate[] competition,”<sup>128</sup> and, if so, whether “the agreement . . . is necessary to meet a serious transportation need or to achieve important public benefits including international comity and foreign policy considerations.”<sup>129</sup> Further, the DOT must determine whether “the transportation need cannot be met or those benefits cannot be achieved by reasonably available alternatives that are materially less anticompetitive.”<sup>130</sup> Because all alliances, by their nature, “substantially reduce[] or eliminate[] competition,” the DOT has never been able to dispense with an ostensibly full-bodied approval analysis.<sup>131</sup>

Approval, however, does not mean immunization. The DOT is purportedly restricted to granting antitrust immunity only “to the extent necessary to allow the [airlines] to proceed with the [alliance] transaction,” and only if the DOT “decides it is required by the public interest.”<sup>132</sup> Though past DOT decisions have reinforced the idea that applicant airlines must make a “strong showing” that their arrangement is in the “public interest” and would not go forward *but for* immunization,<sup>133</sup> they are far from bastions of clarity. For instance, although the term “public interest” appears in both the approval and immunization statutory steps, and the DOT claims to have “always recognized that the public interest standard [for antitrust immunity] is a much more stringent standard than [the alliance approval] public interest standard,”<sup>134</sup> there is no avoiding the term’s vagueness or the DOT’s discretionary use, or lack, of stringency.<sup>135</sup> Moreover, the idea that the DOT, an external observer,

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127. 49 U.S.C. § 41309(b) (2006); *see also* Gillespie & Richard, *supra* note 20, at 5.

128. This language is from the Clayton Act. *See* 49 U.S.C. § 41309(b)(1) (2006); *see also* Order, Air Canada, DOT-OST-2008-0234, at 5 (Dep’t of Transp. Nov. 14, 2011), 2011 DOT Av. LEXIS 492 [hereinafter Order Joining Brussels Airlines to the Star Alliance] (discussing the Clayton Act and its application).

129. 49 U.S.C. § 41309(b)(1)(A).

130. *Id.* § 41309(b)(1)(B).

131. *Id.* § 41309(b)(1)(A); *see also* Reitzes & Moss, *supra* note 107, at 307 (describing the benefits of immunized alliances but noting their ability to negatively affect competition).

132. 49 U.S.C. § 41308(b) (2006). With respect to limiting the scope of antitrust immunity, the DOT may, at its discretion, “carve out” certain international air routes from an immunity grant, though it appears to be drifting away from that practice. *See* oneworld Alliance Order, *supra* note 95, at 25–26 (citing economic data to justify not carving out routes from the 2010 oneworld Alliance application). In addition to carve-outs, the DOT may order alliance members to surrender some of their take-off and landing rights (“slots”) at congested airports in order to attract new entrants. *See id.* at 26.

133. *See, e.g.*, United/Lufthansa Order to Show Cause, *supra* note 87, at 15–16.

134. SkyTeam I Order, *supra* note 125, at 32.

135. *Compare* Order Joining Brussels Airlines to the Star Alliance, *supra* note 128, at 9 (weighing enhanced competition, cost efficiencies, and new airline routes when granting antitrust immunity), *with* SkyTeam I Order, *supra* note 125, at 34 (deciding that efficiency from the combination of previously approved alliance agreements was not a sufficient public benefit for a broad grant of antitrust immunity).

has been enough insight to know with absolute certainty whether an alliance transaction will go forward with or without immunity borders on the ludicrous. Given the antitrust risks involved with an alliance, coupled with the stiff statutory penalties, it is difficult to imagine a consortium of airlines proceeding to engage in routine alliance behavior without immunization.<sup>136</sup>

As noted, in addition to these statutory criteria, it is “established policy . . . [that] the existence of an ‘open-skies’ framework [between the U.S. and foreign airlines’ homelands] is a necessary predicate to [the DOT’s] consideration of requests for antitrust immunity.”<sup>137</sup> So, too, is “metal neutral[ity].”<sup>138</sup> Moreover, although industry stakeholders and government officials are permitted to submit filings during the alliance application process, the DOT is not required by law to consult with any other agency, including antitrust officials at the DOJ.<sup>139</sup> This means that, legally, the DOT possesses plenipotentiary powers over alliance approval and immunization even though it is not authorized to handle competition law and policy generally.<sup>140</sup> Further, because no DOT alliance immunity decision has been appealed to federal court, there is no clear jurisprudence clarifying or constraining these immunization powers.<sup>141</sup> Certain older decisions, handed down during the CAB’s reign over airline antitrust affairs, may be construed to inform the nature of DOT immunization authority today,<sup>142</sup> but they appear to have no effect on DOT decisions in practice.<sup>143</sup>

### III. TWO LINES OF CRITIQUE

Considering the strength of the DOT’s antitrust immunity powers and the apparent absence of legal checks on its institutional authority, it should come as no surprise that twenty years’ worth of immunity grants have raised the

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136. See 15 U.S.C. §§ 1–2 (2006) (making a Sherman Act violation punishable by up to ten years in prison, a \$100 million fine, or both).

137. oneworld Alliance Order, *supra* note 95, at 3.

138. *Id.* at 5 & n.14.

139. See 49 U.S.C. § 41309(b) (2006) (granting the DOT sole authority to approve a proposed airline alliance). *But see id.* § 41309(c) (requiring the DOT to give the DOS and the Attorney General notice and an opportunity to comment on all applications).

140. See RICHARD A. POSNER, *ANTITRUST LAW* 43–44 (2d ed. 2001) (discussing the DOJ and FTC’s roles in enforcing the Sherman and Clayton Antitrust Acts).

141. *But see* *Republic Airlines, Inc. v. Civil Aeronautics Bd.*, 756 F.3d 1304, 1318 (8th Cir. 1985) (applying a rational basis test when reviewing an antitrust exemption issued by the now-defunct CAB).

142. See Comments of the Department of Justice on the Show Cause Order (Public Version), Air Canada, Docket No. OST-2008-0234, at 12–13 (Dep’t of Transp. Jun. 26, 2009) [hereinafter DOJ Comments on Star Alliance Show Cause Order] (citing *Republic Airlines*, 756 F.2d at 1317).

143. See, e.g., Final Order, Air Canada, Docket No. OST-2008-0234, at 7–10 (Dep’t of Transp. Jul. 10, 2009) [hereinafter Star Alliance Final Order] (rejecting the DOJ’s suggestions to deny an amended application requesting immunity); see also DOJ Comments on Star Alliance Show Cause Order, *supra* note 142.

hackles of certain stakeholders and academics,<sup>144</sup> nor should there be any shock that the DOJ, the government's primary competition law enforcer, has routinely expressed its disapproval of alliance immunization.<sup>145</sup> Although interest group objections help reveal the extent to which the alliance system has reorganized the international aviation market and clarify whom the winners and losers are within the framework, they are of ancillary relevance here.<sup>146</sup> Special interest lobbying has been unsuccessful in guiding the DOT's regulatory hand and spurring lawmakers to reform the immunization statutes.<sup>147</sup> There are two distinct, yet interrelated, trajectories of complaints against the DOT's immunization grants: economic and legalist. Because these two concerns carry the potential to inform public discourse on the future of antitrust immunity for alliances and have been areas of focus for academic critics,<sup>148</sup> they warrant specified treatment. They are both, however, ultimately irrelevant on institutional grounds.<sup>149</sup>

#### A. Ersatz Economics?

The economic literature on airline alliances is as vast as it is contentious, allowing both alliance supporters and critics to claim the empirical high ground in debates concerning immunity grants.<sup>150</sup> The standard theoretical defense of immunized alliances is that they provide unprecedented network benefits to consumers, allowing consumers living in relatively small aviation markets to access thousands of destinations worldwide.<sup>151</sup> Even though the formation of

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144. See, e.g., Hand, *supra* note 4, at 658–62 (criticizing the DOT's grant of antitrust immunity for the Star Alliance's A++ alliance agreement).

145. See, e.g., DOJ Comments on Star Alliance Show Cause Order, *supra* note 142, at 1 (arguing that laws granting antitrust immunity “should be strongly disfavored”).

146. See *supra* notes 73–74 and accompanying text.

147. See, e.g., Star Alliance Final Order, *supra* note 143, at 23 (rejecting the Interactive Travel Services Association and American Society of Travel Agents' objection that granting alliance immunization would harm travel agents).

148. These academic critiques are, at best, incomplete and, at worst, haphazard. This could be said of almost any attempt by academics to set and direct public policy. See, e.g., RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE 166 (2001) (“[T]he public is sometimes misled by a public intellectual.”); THOMAS SOWELL, INTELLECTUALS AND SOCIETY 282–83 (2009) (noting that public intellectuals may attempt to use “blatant examples of illogic” to support their claims).

149. See *infra* Part IV.

150. See, e.g., Reitzes & Moss, *supra* note 107, at 305 (noting that immunity grants can lead to “lower airfares . . . because alliance partners can coordinate pricing and share revenue” but “[t]his may eliminate competition among alliance members on the same gateway-to-gateway routes”).

151. Cf. Michael E. Levine, *Airline Alliances and Systems Competition: Antitrust Policy Toward Airlines and the Department of Justice Guidelines*, 45 HOUS. L. REV. 333, 335–39 (2008) (explaining that the main way to build networks is by developing a “fortress hub . . . designed to offer frequent, cost-effective service to travelers who value[] frequent and convenient service in markets too small to support service on a stand alone basis”).

those networks may remove competition on certain route segments, the benefits of the whole outweigh the losses to the parts.<sup>152</sup>

Moreover, reductions in competition *within* a given alliance are allegedly offset by competition *between* alliances, even if they use distinct routing plans to move consumers from their starting point to their destination. For instance, a passenger traveling from Grand Rapids, Michigan, to Frankfurt, Germany, may be routed by the Star Alliance from Grand Rapids to United's hub at Chicago O'Hare.<sup>153</sup> From there, the passenger would be placed on a Lufthansa flight bound out of Chicago for Frankfurt.<sup>154</sup> SkyTeam—anchored by Delta Air Lines and Air France/KLM—may route the same passenger through Delta's Detroit hub and onward to Frankfurt on a flight operated by KLM.<sup>155</sup> The passenger's choice over which alliance to use will be informed by the usual array of preference factors, including cost, travel times, and perquisites. A passenger who regularly travels on United Airlines for U.S. domestic air service may opt to go with the Star Alliance because his or her entire journey—including the portion flown by Lufthansa—will contribute reward miles.<sup>156</sup> Whether inter-alliance competition is sufficient to keep prices in check and service offerings high remains a matter of debate.<sup>157</sup> The emergence of non-allied global carriers like Emirates, which uses its super-hub in Dubai as a swivel point from which to move passengers between Europe and points in Asia and Africa, may act as additional discipline on alliance fares and services.<sup>158</sup>

According to some of the alliances' and the DOT's economic critics, this is all beside the point because the DOT fails to follow not only the economic tests implied in the statutory criteria for alliance approval and immunization

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152. *Cf. id.* at 335 (“Networks are very valuable to some time- and transaction-cost-sensitive customers who are willing to pay a lot to use them and . . . offer benefits through joint production and price discrimination to price-sensitive customers”).

153. *See* Bilotkach & Hüschele, *supra* note 87, at 77 (explaining code-sharing and noting that the current Star Alliance includes the United Airlines-Lufthansa partnership).

154. *See id.*

155. *See id.* (explaining how the SkyTeam alliance evolved from the Delta Airlines-Air France partnership).

156. *See id.* (noting that the “sharing of customer loyalty (i.e., frequent flyer) programs [among airline alliance members] is very common”).

157. *See* Reitzes & Moss, *supra* note 107, at 328 (2008) (concluding that “empirical analysis raises questions as to whether immunized alliances are continuing to deliver unequivocal benefits to consumers”).

158. Despite its strong competition position, Emirates has launched an extensive public campaign against the alliance system and antitrust immunity in the name of enhancing global airline competition. *See* EMIRATES, AVIATION AT THE CROSSROADS: SAFEGUARDING CONSUMER CHOICE (2011), available at [http://www.emirates.com/zm/english/images/Aviation\\_at\\_the\\_crossroads\\_Aug11%5B1%5D-tem530-713620.pdf](http://www.emirates.com/zm/english/images/Aviation_at_the_crossroads_Aug11%5B1%5D-tem530-713620.pdf) (stating, “[g]overnments should investigate and, if appropriate, intervene to stop alliance activities aimed at thwarting independent competitors”).

but also U.S. antitrust policy writ large.<sup>159</sup> Hubert Horan bases his complaints on the fact that the statutory language for alliance approval echoes of language found in the Clayton Act, which leads him to assert that the DOJ/FTC *Antitrust Guidelines for Collaborations Amongst Competitors* and *Horizontal Merger Guidelines* provide the controlling tests that the DOT should apply when evaluating alliance applications.<sup>160</sup> Horan conveniently ignores, however, that neither set of guidelines has the force of law. Moreover, Horan fails to cite a single statute, regulation, or decision mandating the DOT to incorporate these documents into its immunization decisions.<sup>161</sup> Horan—who is not an attorney<sup>162</sup>—largely repeats the DOJ’s arguments from their opposition to the Star Alliance’s immunity application.<sup>163</sup> The DOT, however, is under no legal obligation to adhere to the DOJ’s opinions, no matter how cogently reasoned or well footnoted.<sup>164</sup> At most, the DOJ’s comments, like Horan’s own regularly filed objections to antitrust immunity grants,<sup>165</sup> provide food for

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159. Cf. Horan, *supra* note 24, at 252–53 (alleging that DOT immunity grants “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”); Reitzes & Moss, *supra* note 107, at 327–28 (questioning whether the DOT’s attempt to promote inter-alliance competition through its immunity grants has provided “sufficient competitive benefits”).

160. See Horan, *supra* note 24, at 254 (noting that the *Antitrust Guidelines* and *Horizontal Merger Guidelines* define the standards to be used in determining whether immunity can be granted).

161. See *id.* (failing to provide any law *requiring* the DOT to incorporate the *Antitrust Guidelines* in its decision-making).

162. *Bio/Experience*, HUBERT HORAN AVIATION, [http://horanaviation.com/Bio\\_Experience.html](http://horanaviation.com/Bio_Experience.html) (last visited Sept. 15, 2012).

163. See DOJ Comments on Star Alliance Show Cause Order, *supra* note 142, at 12–13 (noting “an application for immunity must . . . make a ‘strong showing’ that, from the standpoint of public interest, the predicted value of antitrust immunity is greater than the proven value of the normal antitrust regime”). The DOT expressly rejected this attempt in its final decision. See Star Alliance Final Order, *supra* note 143, at 10 (holding that “[w]hile DOJ has suggested that less anticompetitive measures are available and that immunity does not benefit consumers, we are not persuaded to alter our fundamental initial assessment of the Joint Applicants’ request”).

164. See, e.g. Gillespie & Richard, *supra* note 20, at 1 (recognizing that the “DOT has the statutory authority to approve and immunize from U.S. antitrust laws agreements relating to international air transportation”).

165. See, e.g., Supplemental Comments of Hubert Horan, American Airlines, Docket No. DOT-OST-2008-0252, at 20 (Dep’t of Transp. Jan. 8, 2010) [hereinafter Horan oneworld Supplemental Comments] (opposing the oneworld Alliance on the grounds that it failed to carry its burden of proof in “requesting exemption from . . . antitrust laws”); Comments of Hubert Horan on the Department of Justice Public Comments of 26 June 2009, Air Canada, Docket No. OST-2008-0234 (Dep’t of Transp. Jul. 3, 2009) [hereinafter Horan Comments to DOJ’s Star Alliance Comments] (opposing the Star Alliance on the grounds that it provided insufficient evidence to substantiate a claim for immunity).



thought to DOT regulators. Their analytical force, however, cannot compensate for their legal irrelevance.<sup>166</sup>

Additionally, Horan, along with economists Volodymyr Bilotkach and Kai Hüsichelrath, are vexed that DOT antitrust immunity decisions do not align with U.S. antitrust policy goals.<sup>167</sup> But why should that matter? Antitrust immunity, on its face, is a statutory exception to the contemporary legal ethos that “[t]he antitrust laws are intended to protect competition, not competitors.”<sup>168</sup> It is difficult to imagine how immunity can ever interface with an antitrust policy that is supposed to be “vigorous”<sup>169</sup> while “promot[ing] a narrow but well-defined goal—namely, long-run efficiency” upheld by “condemn[ing] conduct likely to result in diminished industrial output and increased market prices.”<sup>170</sup> Short of eliminating the DOT’s authority to grant antitrust immunity for airline alliances altogether,<sup>171</sup> even fresh limitations on DOT immunization powers would likely still provide *some* latitude for the DOT to place alliances beyond the reach of U.S. antitrust law.<sup>172</sup> The DOT’s critics may welcome modest reform over no reform, but they fail to account for the cost of limiting the DOT’s larger international aviation policy goals. The economic critics, who are hardly uniform in the force and depth of their objections,<sup>173</sup> are institutionally walled-off from the “front line” air-services negotiations conducted jointly by the DOT and the DOS.<sup>174</sup> The economic critics’ implied suggestion that abstract concepts of economic efficiency fueled

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166. See, e.g. Gillespie & Richard, *supra* note 20, at 1 (noting that Congress vested the DOT with statutory authority to grant antitrust immunity for airline alliances).

167. See Bilotkach & Hüsichelrath, *supra* note 87, at 77–78, 81–82; Horan, *supra* note 24, at 253–62 (criticizing, among other things, the DOT for “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” to streamline the approval process while only “maintain[ing] the superficial appearance of following the law”).

168. *Levine v. Cent. Fla. Med. Affiliates*, 72 F.3d 1538, 1551 (11th Cir. 1996).

169. See Christine A. Varney, Assistant Attorney Gen., *Vigorously Enforcing the Antitrust Laws: Development at the Division*, Remarks as Prepared for the Chamber of Commerce, Washington, D.C., at 3 (June 24, 2011), <http://www.justice.gov/atr/public/speeches/272536.pdf> (recalling her pledge “to engage in vigorous enforcement of the antitrust laws”).

170. Alan Devlin, *Antitrust in an Era of Market Failure*, 33 HARV. J.L. & PUB. POL’Y 557, 565 (2010).

171. Eliminating the DOT’s authority to grant antitrust immunity is supported by some critics. See, e.g., Horan, *supra* note 24, at 291 (suggesting that “Congress should consider shifting international antitrust authority to DOJ”).

172. Cf. 49 U.S.C. §§ 41308–41309 (2006) (affording significant discretion to the DOT to grant antitrust immunity).

173. Compare, e.g., DOJ Comments on the Star Alliance Show Cause Order, *supra* note 142, with Horan Comments to DOJ’s Star Alliance Comments, *supra* note 165, at 2 (criticizing the DOJ for “materially understat[ing] the problem” with respect to the DOT’s economic analysis).

174. See 49 U.S.C. § 40105 (2006).

by contentious theories<sup>175</sup> ought to govern DOT decision-making appears to be a bridge too far.

It is not that Horan, Bilotkach, and Hüsichelrath, or the antitrust economists employed by the DOJ are furnishing bad analytics or that the DOT's alliance rulings are paragons of good economics, but that the DOT's custody of immunization powers should not depend on the economic integrity of its decisions. Congress must take the unlikely step of placing explicit economic concepts and their attendant methodologies into the approval and immunity statutes before economic critiques of the DOT's decisions become relevant.<sup>176</sup> Considering the absence of any clear political will for imposing such radical specificity into a congressional grant of customarily open-ended administrative power, the economic critics will have to remain content to air their grievances in academic publications and DOT administrative dockets.<sup>177</sup>

### B. Lackluster Legality?

Another line of attack against the DOT's antitrust immunity decisions is the legalist critique. As exemplified by Brian Havel's review of the Northwest/KLM and American Airlines/British Airways (AA/BA) applications,<sup>178</sup> the DOT's rulings are subjected to legalistic review for compliance with the DOT's underlying statutory authority. Elements of policy come into play because the DOT is expected to balance its pro-liberalization international aviation goals with the general contours of U.S. competition policy.<sup>179</sup> Whether that balancing act is indeed part of the DOT's mission statement can be left to the side for the time being. With respect to the DOT's quasi-legal analysis of immunity applications, Havel chides the DOT for allowing Northwestern/KLM and AA/BA to "pass[] the immunization test" for "explicitly political reasons—in nomine open skies."<sup>180</sup> In the case of Northwestern/KLM, which rode the coattails of the 1992 U.S./Netherlands Open Skies agreement, the DOT, according to Havel, dispensed with the statutory requirements that it "assess[] either transportation needs or public benefits, as well as the unavailability of any materially less anticompetitive alternative to meet those needs or benefits[.]"<sup>181</sup> In AA/BA, instead of

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175. See JOSEPH A. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 976–77 (Elizabeth Boody Schumpeter ed., 1994).

176. See H.R. 831, 111th Cong. (2009) (providing an example of legislation that would have limited the DOT's discretion by requiring a more in-depth economic analysis); see also *supra* note 29.

177. See, e.g. Horan oneworld Supplemental Comments, *supra* note 165, at 3; Horan, *supra* note 24, at 253.

178. See HAVEL, *supra* note 23, at 287–93.

179. See *id.* at 293–97; see also Hand, *supra* note 4, at 664–66 (providing an additional policy-heavy critique).

180. HAVEL, *supra* note 23, at 294.

181. *Id.* at 292.

allegedly dropping portions of the statutory test, the DOT conflated the statutory steps for approval and immunization, and imposed a “new [market] entry standard” on the application in order to induce the United Kingdom to create a de facto Open Skies agreement with the United States by opening up access to the heavily protected London Heathrow Airport.<sup>182</sup> As to the question of whether the DOT’s legal chicanery was justified in its search for Open Skies, Havel’s attitude is decidedly cool.<sup>183</sup>

Havel’s observations, from a strictly legalist perspective, are not without merit, though their import in the realm of DOT international aviation policy is questionable.<sup>184</sup> Like the aforementioned economic critiques, the legalist approach is too conceptual to be useful. Though Havel does not offer an explicit theory of antitrust immunity jurisprudence,<sup>185</sup> his criticisms betray an academic/lawyer-held belief that the DOT or any administrative agency should be tightly constrained by its underlying statutes.<sup>186</sup> The reality is that these statutes are often open-ended and subject to mixed judicial oversight of variable intensity.<sup>187</sup> Alliance antitrust immunity, thus far, has not been subject to judicial review.<sup>188</sup>

Perhaps Havel would prefer, like Horan and the DOJ, for immunity rulings to resemble mainstream U.S. antitrust analysis, with recourse not just to economists’ theoretical toolkits, but to the jurisprudence of federal courts as well.<sup>189</sup> Or perhaps he wants a higher degree of consistency than exemplified by the Northwest/KLM and AA/BA decisions.<sup>190</sup> Either way, it is unclear if

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182. *See id.* at 291–92.

183. *See id.* at 291–92, 301–02.

184. *See, e.g.*, 49 U.S.C. § 41309(b)(1)(A)–(B) (providing an exception allowing alliances and alliance negotiations that would reduce competition when necessary for “international comity and foreign policy considerations”); *see also* Dean & Shane, *supra* note 19, at 17–18 (noting that authority to approve and immunize agreements related to international aviation was preserved and transferred to the DOT from the CAB—a decision Congress made “predicated on a recognition that competition in international aviation is closely related to, and often a product of, the bilateral negotiation process,” making it essential that the antitrust exemption authority be “vested in the agency primarily responsible for the development of U.S. international aviation policy”).

185. *See generally* HAVEL, *supra* note 23 (noting in the introduction that a “recurrent theme” of the book is that air transport should look to “tangible commercial opportunities” rather than its “historical preoccupation with abstract legal categories”).

186. *Cf. id.* at 253–78 (surveying various arguments against deregulation and stating that deregulation failed to deliver lower prices and increase services for consumers); *see also* POSNER, *supra* note 82, at 16–19 (discussing the factors behind legalism in the United States).

187. *See* POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 26, at 84–112; POSNER & VERMEULE, TERROR, *supra* note 26, at 15–59 (examining judicial deference to the executive branch in times of emergency).

188. *See infra* Part IV.B.

189. *See* RICHARD A. POSNER, ANTITRUST 46 (2d ed. 2001) (describing the historical ebb and flow of antitrust cases filed in federal courts).

190. *Compare* Northwest/KLM Order to Show Cause, *supra* note 4, at 11–12, with Order to Show Cause, U.S.-U.K. Alliance Case, Docket No. OST-2001-11029, at 35 (Dep’t of Transp. Jan. 25, 2002), 2002 DOT Av. LEXIS 27. Though AA/BA initially failed to win antitrust immunity

deontological fidelity to a thick conception of the rule of law is warranted where the DOT must view the alliance applications through the lens of overarching international aviation policy goals.<sup>191</sup> Moreover, it is unlikely that those States that have entered Open Skies-for-Immunity bargains will let the United States withdraw its half of the transaction on jurisprudential grounds.<sup>192</sup> Antitrust immunity is part of the package of payoffs that leaves signatory States believing they are better off ex post Open Skies than ex ante the agreement.<sup>193</sup> The aspirational norms of legalist theory have no place in the pragmatist realm of aeropolitical relations.<sup>194</sup>

#### IV. AGAINST INSTITUTIONALLY INSENSITIVE REFORM

The terms of the debate concerning antitrust immunity for alliances are primarily set by academic critiques, though interest groups<sup>195</sup> and interagency conflict<sup>196</sup> contributes to the antipathy against the DOT's immunization powers and practices. Missing from all of these criticisms is an appreciation for the DOT's institutional capacities—capacities that have been aided and abetted by Congress's generally laissez-faire approach to U.S. international aviation trade and the role of antitrust immunity in fulfilling the DOT's pro-liberalization policy goals.<sup>197</sup> Because the DOT, like other agencies, has distinct advantages over the legislative branch with respect to generating information and responding to changing circumstances in international civil aviation it is unsurprising that Congress has opted to defer to the DOT's policy judgments

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because of the United Kingdom's unwillingness to enter into an Open Skies agreement with the United States and relax its historic entrance restrictions at London's Heathrow Airport, the airlines were immunized in 2010 following the completion of a comprehensive Open Skies accord with all twenty-seven members of the European Union. See oneworld Alliance Order, *supra* note 95; see also Harriet Oswald Hill, Comment, *Bermuda II: The British Revolution of 1976*, 44 J. AIR L. & COM. 111, 116–20 (1978) (discussing the historically stormy U.S./U.K. aeropolitical relations that prompted the closure of Heathrow to all but two U.S. airlines).

191. See 49 U.S.C. § 41309(b)(1)(A) (2006) (enumerating “international comity and foreign policy consideration” as an important public benefit that the DOT must consider).

192. See, e.g., Dep't of State, *U.S.-Colombia Memorandum of Consultations* (Nov. 8–11, 2010), available at <http://www.state.gov/documents/organization/151588.pdf> (highlighting the importance that the Colombian delegation placed on antitrust immunity in the context of Open Skies agreements); John Hughes, *Japan Requires Antitrust Immunity to Complete 'Open Skies' Deal*, BLOOMBERG (Dec. 15, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=asAQYqyinmTg>.

193. In international law circles, this pragmatic constraint is referred to as “International Paretianism.” See ERIC A. POSNER & DAVID WEISBACH, *CLIMATE CHANGE JUSTICE* 6 (2010); see also Brian F. Havel & Gabriel S. Sanchez, *Toward a Global Aviation Emissions Agreement*, 36 HARV. ENVTL. L. REV. 351 (2012) (applying the International Paretian principle to international aviation law).

194. See Havel & Sanchez, *supra* note 5, at 15–16 (summarizing aviation's longstanding zero-sum trade regime).

195. See *supra* notes 73–76 and accompanying text.

196. See Labaton, *supra* note 42, at A1.

197. See *supra* notes 54–58, 66 and accompanying text.

rather than attempt to micro-manage them.<sup>198</sup> Despite this, the possibility of congressional intervention is never fully obviated, as evidenced by a short-lived 2009 proposal to curb alliance immunization.<sup>199</sup> If, at some point in the future, Congress, with strong public support, revisits this issue, then it is critical that such deliberations not take place in splendid isolation from institutional realities.<sup>200</sup>

There are a select number of possible reforms to the DOT's antitrust immunity powers that flow logically from the two main lines of criticism—economic and legalistic—but, on the basis of the DOT's institutional advantages, none of them are normatively attractive. Although *some reform* may be politically appropriate in the future, it is unclear what those reforms would look like and whether trading institutional advantages for political capital is worth it.<sup>201</sup>

#### A. *Amplified Congressional Oversight*

The first possible track of reform is for Congress to step in and scrutinize immunity applications with greater vigor. This move may very well go hand-in-hand with increased congressional involvement in aviation trade policy generally. Regardless to which setting Congress turns the oversight knob,<sup>202</sup> it is unclear what effect further rounds of hearings and reports would have on DOT immunity decisions. From an immunity critic's perspective, the best scenario is that the congressional spotlight brings the requisite public attention necessary to furnish a mandate for more ambitious reform measures.<sup>203</sup> But this suggestion puts the cart before the horse because it expects robust congressional action *before* a concentrated public cry for such

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198. See *supra* notes 58–60, 62–63 and accompanying text.

199. See *supra* note 29 (discussing Congressman Oberstar's failed attempt to confine the DOT's antitrust authority).

200. See Levine, *supra* note 44, at 272–74, 280 (providing reasons for why it is inefficient for the airline industry to respond to the public interest: it is costly and time-consuming to formulate, the interests change over time, and “public interest” in general is “not verifiable, but only arguable”).

201. This Article offers no arguments that Congress should ignore popular support for revising, or even terminating, the DOT's antitrust immunization authority on the basis of abstract principles (e.g., the “morality” of maintaining U.S. international commitments), or concrete realities (e.g., the economic cost of losing Open Skies partners). These considerations seem academic in nature; freighting them with the sort of supervening efficacy that would place them over-and-above the will of the electorate may satisfy ivory tower gnostics, but always at the price of removing a significant check on governmental power. Cf. POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 26, at 113–53 (discussing political constraints on the President and agencies).

202. A scale that is unlikely to ever go to “11.” See THIS IS SPINAL TAP (Embassy Pictures 1984).

203. See Dean & Shane, *supra* note 19, at 17 (describing a Senate hearing in which questions about whether the DOT was the appropriate agency to have the authority to grant antitrust immunity “approach[ed] outright hostility”).

action. There is no guarantee that hearings or reports will dislodge the public's general apathy toward aviation regulatory affairs, specifically alliance immunization. Considering none of Congress's past attempts to keep tabs on alliance immunization yielded any groundswell for reform,<sup>204</sup> repeating the process is likely a waste of time and resources. Further, Congress has not been shy about delegating broad trade policy powers to the executive branch, nor providing its imprimatur to far-reaching trade accords with nominal oversight and few legislative objections.<sup>205</sup> In the aviation trade realm, Congress has had a de minimis role to play.<sup>206</sup> Even if a greater degree of oversight is desirable on legalist grounds,<sup>207</sup> its emergence in the aviation trade seems highly unlikely.

Institutionally speaking, Congress is not well adapted to quick, decisive action—the sort that has proven necessary in the international aviation arena.<sup>208</sup> For instance, the DOT hit the accelerator in 2010 on two consolidated immunization applications featuring Japanese airlines ANA and JAL in order to deliver an Open Skies agreement with Japan.<sup>209</sup> Enhanced congressional oversight would have slowed the process and perhaps compromised the agreement with Japan.<sup>210</sup> Moreover, U.S. aeropolitical relations should not be taken in isolation from other international policy concerns; the executive branch remains better situated than Congress to calculate the role of aviation trade in the matrix of U.S. foreign relations.<sup>211</sup> To

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204. See *supra* note 68 (listing earlier, irregular attempts by Congress to review antitrust immunity).

205. See *supra* note 64 and accompanying text. This does not mean, however, that these agreements did not raise the hackles of interest groups such as organized labor. See James Shoch, *Contesting Globalization: Organized Labor, NAFTA, and the 1997 and 1998 Fast-Track Fights*, 28 POL. & SOC'Y 119, 123–28 (2000).

206. See *supra* note 58 and accompanying text.

207. See POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 26, at 7–10 (describing and critiquing legalist objections to strong executive authority including executive agencies).

208. Cf. Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 509–10 (2011) (explaining the judiciary's historical deference to the executive branch on foreign affairs matters because, compared to Congress and the judiciary, which is “slow and decentralized,” the executive branch has “secrecy, speed[,] and decisiveness”).

209. See Horan, *supra* note 24, at 287–88 (criticizing the DOT for agreeing to take six months on alliance applications which, in the past, have taken up to 19 months to conclude); see also Final Order, U.S.-Japan Alliance Case, Docket No. DOT-OST-2010-0059 (Dep't of Transp. Nov. 10, 2010), 2010 DOT Av. LEXIS 483. The U.S./Japan Open Skies agreement entered into force three days after the close of ANA and JAL's immunization proceedings. See Air Transport Agreement, U.S.-Japan, Oct. 25, 2010, 2010 U.S.T. LEXIS 82 (entered into force Nov. 13, 2010).

210. See POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 26, at 8–10.

211. See Abebe & Posner, *supra* note 208, at 535–38. Indeed, the EU has expressly stated that enhanced aviation trade relations are “a key factor in promoting productive co-operation between countries.” See *A Community Aviation Policy Towards Its Neighbours*, at 2, para. 2, COM (2004) 74 final (Feb. 9, 2004). For an account of how aviation trade relations can be used as a building block toward an incremental climate-change treaty, see Havel & Sanchez, *supra* note 193.

urge Congress directly into the international field risks needlessly upsetting a foreign-relations governmental structure that, arguably, has no viable competitors.<sup>212</sup>

### *B. Expanded Judicial Review*

A second possible track that could meet the concerns of immunization critics is inaugurating federal judicial review of alliance application decisions. Under this approach, the judiciary would require the DOT to align its economic review of antitrust applications with federal antitrust jurisprudence. Another possibility would be for the judiciary to compel the DOT to be more mindful of the statutory language that grants its immunization powers. Even though it is uncertain if a court would find fault with the present body of DOT decisions, it is unclear whether “hard look” review of immunization rulings is desirable.<sup>213</sup> Compared to agencies, the judiciary’s tools for generating relevant information that bears on dynamic institutional determinations, such as furnishing antitrust immunity to fulfill international aviation trade policy goals, is lacking.<sup>214</sup> Like the legislative branch, including federal courts in the process could draw a cloud of uncertainty over each application, which may curtail the DOT’s aviation trade policy agenda.<sup>215</sup> Finally, considering Congress’s telling silence on the matter of swapping Open Skies-for-Immunity and that the legislative branch is at least better poised politically than the courts to monitor or curtail the DOT’s immunization powers,<sup>216</sup> judicial intervention has scant qualities to recommend it for such a task.<sup>217</sup>

### *C. Interagency Power Sharing*

Another route that facially overcomes the institutional limitations of Congress and the courts would be to expand competence over alliance antitrust

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212. See, e.g., Abebe & Posner, *supra* note 208, at 528–33, 539–44 (providing a powerful criticism of an alternative institutional model that would put the judiciary at the forefront of U.S. foreign affairs).

213. This is particularly true given the courts’ willingness to defer to agency decisions and apply weak review to the executive branch. See POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 26, at 84–112; cf. POSNER & VERMEULE, TERROR, *supra* note 26, at 15–59 (examining judicial deference to the executive branch in times of emergency). Recall, “foreign policy considerations” can serve as a basis for green-lighting an alliance to the immunization step. See 49 U.S.C. § 41309 (2006) (governing the “approval” step in antitrust immunity determinations).

214. See POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 26, at 29 (“[T]he gap between the executive and the judiciary, in information and expertise, is even wider than between the executive and Congress.”); see also VERMEULE, UNCERTAINTY, *supra* note 26, at 111–12 (describing the informational defects of courts); cf. *id.* at 214–15 (examining the costs and benefits of agency interpretation when compared to courts).

215. See *supra* notes 213–14 and accompanying text.

216. See U.S. CONST. arts. I, III (stating that the legislature is elected and federal judges are appointed).

217. See Abebe & Posner, *supra* note 208, at 529–33.

immunization to other agencies, such as the DOJ.<sup>218</sup> The DOJ is already vested with some antitrust authority over airline mergers and other antitrust-related activities.<sup>219</sup> As the main agency critic of DOT immunization decisions, there is no doubt that the DOJ possesses the institutional incentive to take custody of immunization proceedings and to apply its antitrust determinations to alliance applications.<sup>220</sup> Additionally, because of the DOJ's longstanding role in federal antitrust law and policy, it is better positioned institutionally to furnish appropriate antitrust review over alliance applications.<sup>221</sup> This argument rests too heavily on the flawed assumption that standard federal antitrust analysis, with its economic elements,<sup>222</sup> is an appropriate component of immunization proceedings or U.S. international aviation policy. As discussed, international aviation operates within a web of bilateral agreements that impose restrictions on foreign investment.<sup>223</sup> U.S. airlines in particular are restricted from accessing global capital markets and consummating cross-border mergers that would allow creation of autonomous global-route networks.<sup>224</sup> If the international aviation industry was able to "do[] business like any other business,"<sup>225</sup> then the DOJ would be authorized to review potential mergers to ensure their consistency with federal antitrust law. Considering the regulated nature of the international air-transport market, however, the DOJ's "business-as-usual" antitrust review lacks weight.<sup>226</sup>

Tied to this low view of DOJ institutional relevance in immunity proceedings is the stark reality that the DOJ is not an instrument of U.S. international aviation policy like the DOT.<sup>227</sup> Whatever virtues the DOJ

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218. Any number of other agencies could be proposed, but only one is considered here in order to ease the exposition. More importantly, each new agency that is added would only serve to complicate immunization proceedings and inject uncertainty into the process. Because uncertainty could harm U.S. aeropolitical relations, it should be avoided.

219. See J. Bruce McDonald, Deputy Assistant Attorney Gen., *Competition in the Air*, Remarks to the IATA Legal Symposium 2007, Istanbul, Turkey (Feb. 12, 2007), transcript available at <http://www.justice.gov/atr/public/speeches/222159.htm> ("The DOJ Antitrust Division is responsible for enforcing the federal antitrust laws" and has "the authority to review any particular proposed merger worldwide to determine if it may lessen competition in the U.S. markets.").

220. See Star Alliance Final Order, *supra* note 143 (acknowledging and addressing the DOJ's comments against the proposed immunity).

221. See POSNER, *supra* note 189, at 43–44 (explaining the DOJ's role in enforcing the Sherman Act).

222. See *id.* at 79–93.

223. See *supra* notes 7–8 and accompanying text.

224. See *supra* note 12 and accompanying text (explaining the "Open Skies" agreements that the United States requires its airlines to use to create alliances).

225. See Havel & Sanchez, *supra* note 7, at 660. This shibboleth has been used by the global air transport industry's representative trade group, IATA, in its efforts to combat nationality restrictions on airline ownership. *Id.*

226. See Star Alliance Final Order, *supra* note 143.

227. 49 U.S.C. §§ 41308–41309 (2006).



possesses in the antitrust realm are offset by its ignorance in international aviation affairs.<sup>228</sup> Even where the DOT may lack relevant information necessary to conduct international trade negotiations, the DOS—by congressional grant—shares guardianship in the matter.<sup>229</sup> What, possibly, can the DOJ add to the equation? There is no evidence that the executive branch has contemplated including the DOJ directly in antitrust immunity and external aviation affairs.<sup>230</sup> The Obama Administration's behind-the-scenes resource deployment in 2009, which halted the political knife fighting that broke out between the DOJ and the DOT over antitrust immunity, can be seen as a victory for the DOT.<sup>231</sup> In the end, the DOT was not compelled to acquiesce to DOJ demands to limit the scope of immunity that the DOT provided to the oneworld and Star alliances.<sup>232</sup> Perhaps room could be made for adding international aviation trade to the DOJ's responsibilities, but that is unlikely to come to fruition in a world where the DOT and the DOS have already exhibited their ability to perform external aviation functions competently.<sup>233</sup>

#### *D. Statutory Limitations*

A final track to consider is the general possibility of Congress altering the underlying statutory authority for antitrust immunity in order to limit its scope or duration. A proposal was advanced in 2009, but it fizzled due to congressional inaction.<sup>234</sup> The bill, if enacted, would have sunsetted antitrust immunity for any alliance three years after it was issued or renewed, but left open the possibility of a fresh grant of immunity following a new immunization proceeding.<sup>235</sup> This approach ignores the reality that alliance integration agreements are complex, costly, and not easily unwound.<sup>236</sup> The

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228. See, e.g., Horan Comments to DOJ's Star Alliance Comments, *supra* note 165, at 2–3, 7.

229. See 49 U.S.C. § 40105 (2006).

230. See, e.g., *supra* notes 2–3 and accompanying text.

231. See Labaton, *supra* note 42, at A1.

232. See oneworld Alliance Order, *supra* note 95; see also Star Alliance Final Order, *supra* note 143.

233. Naturally, there is always room to quibble with certain aspects of DOT activity at the international level. Such gripes lose traction, however, when they are unaccompanied by alternative courses of action that are feasible. See, e.g., HAVEL, *supra* note 23, at 559–62 (calling for international competition law enforcement for the airline industry despite the nonexistence of such rules for any other sector).

234. See *supra* note 29.

235. See H.R. 831, 111th Cong. § 1(e) (2009). The legislative proposal also instructed the U.S. Government Accountability Office to conduct a thorough review of the DOT's immunization grants with an eye toward evaluating, among other things, whether immunization determinations should accord with federal antitrust law and whether the DOT's immunity powers should be modified. See *id.* § 1(b).

236. See BIRGIT KLEYMANN & HANNU SERISTÖ, MANAGING STRATEGIC AIRLINE ALLIANCES 15, 97–98 (2004) (discussing the complexity of airline alliances and the difficulty of changing or leaving those already in existence).

looming threat of immunization expiration would, in all likelihood, have a chilling effect on all but the most superficial joint ventures.<sup>237</sup> Another problem is that a mandatory sunset provision could fray U.S. aviation trade ties and place U.S. Open Skies agreements in jeopardy.<sup>238</sup> Further, the requirement that the DOT perpetually review immunization grants wastes departmental resources, particularly if there are no changes in the aeropolitical realm that warrant re-examining their terms. If an Open Skies partner-State failed to abide by the terms of a treaty, the DOT could revoke an immunization grant to the offending State's airlines. But, absent international fall-out, the type of protracted review that commonly accompanies alliance applications appears unnecessary on policy grounds.<sup>239</sup>

Regardless of what arbitrary term limit for antitrust immunity is proffered, in the end such legislative proposals only distract from the big-picture issue of why alliances are forged. Although the United States has used the promise of alliances, secured through a grant of antitrust immunity, to entice States into Open Skies agreements, the alliances themselves would lose their central justification for existing if the airlines could replicate alliance benefits through global investment opportunities.<sup>240</sup>

#### V. MOVING BEYOND ANTITRUST IMMUNITY

Under the current international aviation regime, airline alliances deliver the worldwide network benefits and consumer perquisites of authentically globalized airlines.<sup>241</sup> Alliances' commercial activities are facilitated by the liberalized operating environment created by Open Skies agreements—agreements that have helped sweep once-prominent aviation trade elements such as capacity limits, pricing controls, and route restrictions into the dustbin of economic history.<sup>242</sup> But neither Open Skies nor any U.S.

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237. For example, a modification that would extend the sunset provision to ten years might be more palatable from the airlines' and foreign governments' perspectives, though given the fact that such an elongated stability period would do little to change the status quo, it is difficult to imagine congressional critics of antitrust immunity investing their time in enacting such loose terms.

238. The absence of guaranteed, longstanding immunization for their respective airlines might dissuade States from committing to such international legal agreements. *See supra* notes 194–95 and accompanying text.

239. “Commonly” does not mean “always.” In the case of Japan, the DOT “fast tracked” its alliance review in order to secure an Open Skies agreement. *See supra* note 210 and accompanying text. Presumably, the DOT could “fast track” all alliance applications that come up for review. Doing so might run the risk of decaying the sheen of legality that protects the DOT's immunization decisions from further derision.

240. *See Havel & Sanchez, supra* note 5, at 11–15.

241. *See Levine, supra* note 151, at 335–38.

242. *Compare* BRIAN F. HAVEL, *IN SEARCH OF OPEN SKIES: LAW AND POLICY FOR A NEW ERA IN INTERNATIONAL AVIATION* 21–23 (1997), *with* HAVEL, *supra* note 23, at 13, 318–19 (demonstrating a shift in legal/policy prescriptions from promoting Open Skies to looking toward the next generation of even more liberal aviation trade agreements).

free trade agreement has delivered reciprocal investment rights in airlines.<sup>243</sup> The United States may be constrained from repealing its own inward investment ceiling by the nationality restrictions found in most air-service agreements.<sup>244</sup> This excuse loses force because the United States possesses one of the largest aviation markets in the world and has set the tempo for global aviation policy for over sixty years.<sup>245</sup> A realignment of U.S. international aviation trade policy to liberal aviation agreements, which would swap antitrust immunity for investment rights, would send a strong signal to the international community that the days of immunized alliances are waning and that a *novus ordo* for global air services is on the horizon.<sup>246</sup> Even though immunized alliances may be necessary in the interval between the advent of a new trade regime and the realization of a globalized aviation marketplace, alliances' imminent extinction should be enough to quell the complaints of stakeholders and academics surveyed in this Article.<sup>247</sup>

All of this is exponentially easier said than done. That some of the DOT's most vocal critics rabidly resist the idea of relaxing U.S. foreign investment restrictions in airlines is no small irony. The same Congressman who proposed sunseting alliance antitrust immunity in 2009 also championed several legislative initiatives to strengthen the U.S.'s citizen-purity test for airline ownership.<sup>248</sup> Organized labor has also opposed foreign ownership, mainly on protectionist grounds.<sup>249</sup> Further, issues of national security are implicated, though the United States has administrative measures in place to review and block unsavory investments.<sup>250</sup> These factors, coupled with the public's

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243. See, e.g., North American Free Trade Agreement, U.S.-Can.-Mex., art. 1201(2)(b), Dec. 17, 1992, 32 I.L.M. 289 (1993) (excluding air services from coverage); see also, e.g., Free Trade Agreement, U.S.-Austl., art. 10.1(4)(c), May 18, 2004, 118 Stat. 919 (limiting coverage to "aircraft repair and maintenance services during which an aircraft is withdrawn from service" and "specialty air services," e.g., aerial mapping, surveying photography, advertising, etc.).

244. See 49 U.S.C. §§ 40102(a)(15), 41101(a)(1), 41102(a) (2006) (requiring that the DOT only issue transportation certifications of airlines to U.S. citizens and defining U.S. citizen to include corporations with less than twenty-five percent foreign ownership).

245. The U.S. convened the International Civil Aviation Conference on Nov. 1, 1944, which led to the Chicago Convention. See Havel & Sanchez, *supra* note 5, at 4.

246. See *id.* at 3-4; see also Havel & Sanchez, *supra* note 7, at 669-70.

247. See, e.g., EMIRATES, *supra* note 158, at 2; HAVEL, *supra* note 23; Bilotkach & Hüsichelrath, *supra* note 87, at 76-78; Horan, *supra* note 24, at 253-62, 283-86; Reitzes & Moss, *supra* note 107, at 326-27.

248. See FAA Reauthorization Act of 2007, H.R. 2881, 110th Cong. § 801 (2007) (not enacted); see also FAA Reauthorization Act of 2009, H.R. 915, 111st Cong. § 801 (2009) (not enacted). The provision, introduced by former Congressman Oberstar, would have required "citizens of the United States [to] control all matters pertaining to the business and structure of [a U.S.] air carrier, including operational matters such as marketing, branding, fleet composition, route selection, pricing, and labor relations." H.R. 915 § 801; H.R. 2881 § 801. Under current federal law, "actual control" is undefined. See 49 U.S.C. § 40102(a)(15)(C) (2006).

249. See Havel & Sanchez, *supra* note 7, at 669 n.133.

250. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-320, FOREIGN INVESTMENT: LAWS AND POLICIES OF REGULATING FOREIGN INVESTMENT IN 10 COUNTRIES.

indifference toward aviation trade and regulatory issues, militate against the immediate possibility of substantial reform to U.S. investment rules in particular and the global air-services-trade regime as a whole.<sup>251</sup> The DOT is capable of relaxing its review of foreign capital infusions in U.S. airlines,<sup>252</sup> but too brazen a defiance of a federal statute could incite a congressional versus executive battle that could do more harm than good.<sup>253</sup> The DOT, at the very least, would be unable to deliver a firm commitment to U.S. aviation powers concerning investment rights until the legislative branch acts.<sup>254</sup> Meanwhile, the apparent need for the alliances and Open Skies-for-Immunity remains a fixed reality in U.S. international aviation trade policy.

## VI. CONCLUSION

Antitrust immunity undoubtedly rings strange to ears tuned to the triumphant hymn of deregulation that once resounded in Washington, think tanks,<sup>255</sup> and academia,<sup>256</sup> but it retains considerable purchase in the restricted confines of the international aviation market. Revising, if not altogether eliminating, the DOT's power to award antitrust immunity has been suggested by various camps, including industry stakeholders and academics, but their arguments have failed to take proper account of institutional variables thus far.<sup>257</sup> Specifically, they have erred in not fully appreciating the institutional advantages the DOT, as an executive agency, possesses with respect to

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The Foreign Investment and National Security Act of 2007 allows a cross-departmental consortium of federal agencies labeled the Committee on Foreign Investment in the United States (CFIUS) to investigate any foreign acquisition of a U.S. carrier and impose conditions mitigating any potential security risks. Pub. L. No. 110-49, § 2(b)(2), 121 Stat. 246, 248-49 (2007) (codified as amended at 50 U.S.C. § 2170 (Supp. IV 2011)); *see also* Joseph Mamounas, *Controlling Foreign Ownership of U.S. Strategic Assets: The Challenge of Maintaining National Security in a Globalized and Oil Dependent World*, 13 L. & BUS. REV. AMS. 381, 395-96 (2007) (discussing the potential application of FINSAs to the airline industry).

251. *See* Levine, *supra* note 44, at 273-74.

252. This could potentially occur when political tempers are not aflame with xenophobia. *See supra* notes 48-49 and accompanying text.

253. For instance, Congress may, without considering the full array of consequences, take budgetary or statutory action against the DOT in order to reassert its legislative dominance, though perhaps only if there is significant public support for it to do so. To the extent that the DOT possesses what Michael Levine refers to as "slack"—political indifference that "shields regulators from scrutiny or influence,"—the DOT may have enough latitude to circumvent the statutory language, at least for a time. *See* Levine, *supra* note 44, at 273.

254. *See id.*

255. *See, e.g.,* About, AM. ENTERPRISE INST., <http://www.aei.org/about> (last visited Sept. 15, 2012).

256. *See, e.g.,* JOHN VAN OVERTVELDT, THE CHICAGO SCHOOL: HOW THE UNIVERSITY OF CHICAGO ASSEMBLED THE THINKERS WHO REVOLUTIONIZED ECONOMICS AND BUSINESS 197-238, 287-322 (2007) (covering free market principles and supporting "limited government").

257. *See supra* notes 171-75 and accompanying text.

developing and executing international aviation trade policy.<sup>258</sup> As such, their critiques place too much emphasis on the DOT meeting some higher-level concept of legality or economic efficiency and too little on the hard truth that the alternative frameworks flowing from their critiques are institutionally precarious and thus normatively unattractive.<sup>259</sup> Perhaps, at some point down the road, more thoughtful reflection will be given to how immunization grants can be arranged to meet one or more higher-level concepts while still successfully maintaining U.S. policy agendas such as Open Skies. Until then or, better yet, until the United States works to move aviation's trade regime out of the dark ages, the DOT's antitrust immunization authority should be left alone.

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258. *Supra* notes 171–75 and accompanying text.

259. *Compare supra* Part III.A–B, *with supra* Part III.C–D.

