International airline passengers today expect seamless travel options across the globe. However, cabotage prohibitions, restrictions on foreign ownership, and other practical limitations prevent any single carrier from serving directly every destination to which its passengers want to travel. As a result, the international air transportation system relies on cooperation and partnerships between carriers to provide such seamless service.

International airline joint ventures (JVs) are at the forefront of the current system. They allow U.S. and foreign airlines, which generally cannot merge under existing laws, to achieve a high level of economic integration that provides substantial public benefits. JVs currently are the most efficient means to link separate and complementary airline networks. For example, by linking their networks, Delta and its international

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**A Few Questions for . . .**

**Arjun Garg**

*In this issue, we feature Arjun Garg, FAA Chief Counsel.*

A&SL: Please share a little background about yourself. Where did you grow up; where did you go to school?

AG: I grew up in Potomac, Maryland, and attended St. Albans School in Washington, D.C. I received my undergraduate degree in economics from Princeton University and my law degree from Columbia Law School.

A&SL: What influences led you toward practicing law?

AG: My mother figured out way before I did that I would end up a lawyer, and told me as a teenager that it would be a good fit for me. She was right. The law appealed to me as a field in which to solve problems for clients who need help, think deeply about complex issues, and advocate for a position that is contested. I have gotten to do all of that, and along the way the matters I’ve handled have allowed me fascinating little peeks into all manner of interesting niches of our society—from air traffic controller training to organic food production to immigration enforcement, and many more. I love being a lawyer.

A&SL: What has been a memorable accomplishment during your legal career?

AG: In my office, I keep a framed copy of the judgment in the first case I won. Working pro bono, I represented a tenant who was sued by her landlord for over $4,000 in back rent and repairs. After counterclaiming for the
Hello all. Is it the end of the second quarter already? It must be, because we’ve got another great issue of "The Air & Space Lawyer" lined up for you, with a counterpoint on the antitrust immunity article from our last issue, an overview of DOT denials of petitions for rulemaking from FlyersRights.org, information on litigation of the Santa Monica Airport, and an interview with Arjun Garg, the new FAA Chief Counsel. We hope you enjoy it, but don’t stop there. We’re always looking for ideas for articles, interviews, and authors. Don’t be shy.

In other news, the Space Law Symposium and Drone Law Conference held in June were great successes. Planning for the Annual Meeting in Seattle in September is in full swing, and in December we’ll have another great Aviation and Space Finance Conference in New York—lots of opportunities to network, get CLE, and have fun. Also, the Strategic Plan Task Force will meet in July, so keep your eyes open for news about how we see the Forum over the next several years. If we’re not doing something you want or need, let us know or, even better, help us provide it.

It’s hard to believe that this is my last “Chair’s Message” for "The Air & Space Lawyer". Two years as the Chair of the Forum went by very quickly. And they were quite busy! We’ve been weathering the issues of the ABA, including budget cuts to the entities such as the Forum, and continue to work with the broader organization as it launches the New Membership Model. We’ve grown the offerings of the Forum with the addition of three new practice area committees (Airports; General, Business and Charter Aviation; and Aviation and Space Finance); an annual Drone Law Conference; and practice group breakout sessions during the Annual Meeting. Our more tech-savvy members have improved our footprint in social media and web pages for our practice area committees and run a Technology Café during the Annual Meeting to assist attendees with any technology issues they have. Engagement of members at all levels, from student and new lawyer to retirees, is fantastic, and we are fortunate to have so many engaged members.

During my tenure, I have been blessed with a great support system in our Governing Committee, Executive Committee, Chair-Elect, Committee Chairs, Liaisons, and, of course, Forum Manager Dawn Holiday, without whom the Forum would founder. Being Chair is a fun and challenging two years, and for those of you who have held this role, you know what I mean. I encourage members who have not yet had the opportunity to serve to consider it.

I wish all the best to my successor, Jennifer Trock, and I will end this message with my last exhortation in this venue to volunteer and get involved. Thanks again to my former boss who nudged me into involvement with the Forum. It sure has been fun!

Andrea J. Brantner
Chair, Forum on Air and Space Law
Editor’s Column

This issue is my first as Editor-in-Chief of The Air & Space Lawyer (A&SL). I follow in the footsteps of David Heffernan, who masterfully shepherded this publication for nine years. David, together with the A&SL editorial board and our dedicated ABA publications team, took a very good publication and made it even stronger, regularly delivering high-quality, substantive articles on a wide variety of topics facing aviation practitioners. Having been on the job now for just a few months, I can tell you it is no easy task. I have big shoes to fill! So, if you see David around Washington, D.C., or at the upcoming Annual Meeting of the Forum (September 12–13 in Seattle), take a moment to thank him for all he has done for A&SL and the Forum. He deserves your recognition.

Turning to this issue, our first cover article continues the debate about antitrust-immunized airline alliances by providing a counterpoint to Diana Moss’s article in the last issue. Contributed by Steven Seiden of Delta Air Lines, the author contends that U.S. consumers benefit from such immunized alliances and joint ventures, and that, contrary to Ms. Moss’s thesis, the DOT carefully takes into consideration potential adverse competitive factors and exercises appropriate oversight of airlines granted immunity to ensure continuation is consistent with statutory standards. The author discusses several empirical studies, including a recently released study commissioned by the DOT, and concludes that the weight of empirical evidence supports his position that immunized alliances continue to provide substantial consumer benefits that outweigh any harm. The author also responds to several of Ms. Moss’s recommendations to reform the DOT’s review and consideration of antitrust immunity applications and grants.

The second feature item is not an article, but an interview with new FAA Chief Counsel Arjun Garg. Mr. Garg was named Chief Counsel in February of this year. He brings to the FAA unique private practice and government experience. Learn about some of the experiences that helped shape his approach to the law and his role at the FAA in this excellent piece. A special thanks to editorial board member Jeff Klang for making this interview happen.

Our third article, by Robert Foster of Cozen O’Connor, provides a new look at the Trump administration’s regulatory reform efforts, anchored by a close look at three recent DOT orders. Those orders respond to petitions for rulemaking filed by consumer advocacy group FlyersRights.org. The article places those orders in the context of the administration’s broader regulatory reform process, looks at DOT regulatory and enforcement activity, and discusses the significance of the orders.

The final article, by longtime airport attorney Mária Nucci, who now is associated with Pennsylvania’s Allerton Bell, provides a detailed history of what is best described as the litigation “saga” concerning the unsuccessful efforts to close Santa Monica Municipal Airport (SMO). The author provides readers with the historical background necessary to understand the litigation that has dogged this airport for decades, summarizes much of that litigation, and discusses some of the lessons learned that other airports facing similar issues should consider.

I extend my deep appreciation to Kathy Yodice, our Managing Editor, who partnered with me in producing this issue. Kathy was instrumental in guiding the interview with Mr. Garg and Ms. Nucci’s article on SMO to fruition. Together, we hope to live up to the standards set by David Heffernan.

Before closing, I will make an unashamed plug for writing for The Air & Space Lawyer. As editors, the biggest challenge Kathy and I face is developing a pipeline of articles to publish. The aviation legal, regulatory, and policy field is broad and getting broader every day. Many issues concerning airports, airlines, consumers, international aviation, unmanned aerial systems, safety, security, preemption, and privacy are of interest to many practitioners—and are just the tip of the iceberg. If you would like to publish on an aviation-related topic, A&SL is a great place to do it. Please do not hesitate to contact Kathy or me if you would like to write an article.

Finally, a hearty congratulations to Andrea Brantner on a stellar term as our Forum Chair. Under your leadership, the Forum has prospered and grown. Thank you for your leadership and dedication to the Forum over the past two years. As you like to say, now it’s time for some fun!

David Berg
Editor-in-Chief

David Berg (airberg600@gmail.com) was general counsel of Airlines for America for 15 years before retiring in 2018. He was Chair of the Forum on Air and Space Law from 2003 to 2005. He resides in Las Vegas, Nevada.
President Trump made a splash in the early days of his administration when he introduced several executive orders (EOs) in an effort to implement a campaign promise of reducing the burden of federal regulation. EO 13,771, “Reducing Regulation and Controlling Regulatory Costs,” is the genesis of this effort. EO 13,771, which is widely known as the “2-for-1 Rule,” requires federal agencies to eliminate two rules for every new rule they issue.\(^1\)

This article reviews the Trump administration’s macro approach to regulatory reform, including trends in regulatory enforcement, through a wide lens. It then focuses on three recent Department of Transportation (DOT) orders that flesh out certain principles the DOT has identified as significant when determining whether to exercise its authority to regulate in the field of aviation consumer protection.

### Macro Trends in Trump Administration’s Regulatory Reform and Enforcement Policy

President Trump issued the 2-for-1 EO on January 30, 2017—only 10 days into his presidency. Such a move so early in his term underscores the importance of regulatory reform in the president’s overall agenda. This agenda is shepherded by the Office of Information and Regulatory Affairs (OIRA), which is a subagency of the Office of Management and Budget (OMB). OIRA is “the repository of expertise concerning regulatory issues.”\(^2\) As a result, OIRA is the central authority for the review of federal regulations across all agencies of the federal government.\(^3\)

The publication of Unified Agendas is one tool that OIRA uses to coordinate its regulatory reform efforts across the wide array of federal agencies. Unified Agendas are semiannual compilations of information about regulations under development by federal agencies and are historically published in the spring and fall. With each publication, the White House publicly conveys its regulatory policies to the nation. On October 1, 2018, OIRA published the “Fall 2018 Unified Agenda of Regulatory and Deregulatory Actions.”\(^4\) The Fall 2018 Unified Agenda “demonstrates this Administration’s ongoing commitment to fundamental regulatory reform and a reorientation toward reducing unnecessary regulatory burdens on the American people.”\(^5\) Thus, the administration’s plan for regulatory reform is twofold: (1) to reduce the total amount of regulations in the Federal Register, and (2) to reduce unnecessary regulatory burdens on industry by less frequent enforcement action.

The Fall 2018 Unified Agenda provides insight into the administration’s efforts to advance what it sees as a deregulatory effort to eliminate “unnecessary and duplicative red tape” and to “develop[] common-sense regulatory policies . . . while minimizing costly, unnecessary burdens.”\(^6\) Neomi Rao, who was the administrator of OIRA from July 2017 until March 2019, summed up the administration’s overarching deregulatory goals in a Washington Post op-ed in the fall of 2018. There, Rao wrote:

> When reviewing regulations, we start with a simple question: What is the problem this regulation is trying to fix? Unless otherwise required by law, we move forward only when we can identify a serious problem or market failure that would be best addressed by federal regulation. These bipartisan principles were articulated by President Ronald Reagan and reaffirmed by President Bill Clinton, who recognized that “the private sector and private markets are the best engine for economic growth.”\(^7\)

Rao went on to state:

> The administration also aims to restore greater transparency and respect for the constitutional values of due process and fair notice. This includes limiting the improper use of guidance documents. Agencies should not impose new obligations on the public in a news release, blog post or speech, but instead must use statutory rulemaking procedures that provide public notice and an opportunity for comments.\(^8\)

Rao’s comments seek to give ammunition to President Trump’s two-pronged regulatory reform effort by positing that (1) reducing the number of regulations on industry and the associated economic burden on businesses and consumers will benefit society.
by driving employment, innovation, and efficiency while allowing market forces, absent a clear failure, to incentivize corporate and business conduct; and (2) enforcement efforts that exceed applicable regulations (i.e., enforcement based on agency guidance) go beyond the pale and should stop. Rao foreshadowed these points in an earlier op-ed for the Wall Street Journal. In that piece, the then administrator wrote that “[a]gencies are . . . expected to regulate only when explicitly authorized by law—and to follow proper procedures.”10 Further, Rao stated that if the federal government exercises authority to regulate a field, such regulation must be “necessary” and “the benefits of the regulation [must] justify its costs.”11

Thus, on a macro level, Rao’s comments and the Fall 2018 Unified Agenda underscore that President Trump’s regulatory reform initiative is premised on the belief that unnecessary regulatory enforcement (including enforcement that relies on informal guidance) must be stopped and that new regulations ought to be limited in order to allow market forces to incentivize conduct that appropriately protects consumer welfare.

Micro Trends in Trump Administration’s Regulatory Policy and DOT/FAA Enforcement

The president’s economics-driven 2-for-1 approach to regulatory reform is not a one-size-fits-all answer for reform across all regulated industries. This is particularly true of the aviation industry and the DOT, which regulates it. The DOT, including the Federal Aviation Administration (FAA), which “enacts dozens of regulations a month to require critical repairs on aircraft,” is known to prioritize safety over all other concerns when promulgating regulations.12 In other words, safety concerns rather than economic concerns often dictate the promulgation of aviation regulations.13 Thus, to some extent, the DOT and FAA will not contribute toward the administration’s plan to monetize the effects of regulatory reform. In fact, the White House “has acknowledged its calculations of savings from rolled-back regulations cited in public statements include only the cost to industry and others without taking into account benefits the rules produce, including lives saved.”14 In this regard, although the DOT and FAA may not promulgate regulations that promote a “dollars and cents” motive, the practical effect of these regulations may be priceless.15

Although safety-related aviation regulations may not fit neatly into the administration’s broader 2-for-1 policy on regulatory reform, EO 13,771 has had a direct effect on DOT consumer protection rulemaking and enforcement initiatives. Regarding the 2-for-1 Rule’s effects on the DOT, in 2017 the DOT canceled or froze all pending airline industry regulations as part of the administration’s efforts “to cut the burden of red tape” on the industry.16 The move was followed by the DOT’s publication of its “Notification of Regulatory Review” on October 2, 2017.17 As part of the Notification of Regulatory Review, the DOT invited the public to “provide input on existing rules and other agency actions that are good candidates for repeal, replacement, suspension, or modification.”18 The invitation for public comments resulted in over 2,000 contributions.

Additionally, on February 5, 2019, the DOT issued a “Notice of Review of Guidance” announcing it will review existing guidance documents “to evaluate their continued necessity and determine whether they need to be updated or revised.”19 As with the Notification of Regulatory Review, the DOT requested public comment on “existing guidance documents that are good candidates for repeal, replacement, or modification.”20 Comments were due on May 8, 2019.21 Tying into former Administrator Rao’s op-ed regarding the misplaced role of guidance as a substitute for formal rulemaking or catalyst for regulatory enforcement, the Notice of Review of Guidance stated that the DOT does not use guidance documents “as a substitute for rulemaking and does not use guidance documents to impose new requirements on entities outside the Executive Branch.”22 The Notice of Review of Guidance also echoes Rao’s economic concern that “in some instances, even non-binding guidance may spur cost-inducing actions by regulated entities.”23

Regarding the effects of EO 13,771 on DOT enforcement of the aviation industry, a summary of the DOT’s Aviation Consumer Protection Division’s (ACPD’s) cases against airlines and ticket agents shows that it issued 17 percent fewer consent orders in the first two full years of President Trump’s administration than it did during the last two full years of President Obama’s administration.24 In 2016, the last full year of President Obama’s presidency, the DOT exacted $4.7 million in fines against U.S. carriers. In 2017, the first year under the Trump administration, fines imposed by the DOT dropped to $2.7 million. And in 2018, DOT fines levied on U.S. air carriers dropped to $560,000.25 This represents an 88 percent drop in fines over a two-year period.26

This drop in consumer protection enforcement has led some consumer advocates to argue that the ACPD is asleep at the switch. In response, industry representatives have stated their appreciation that the administration has taken a more compliance-oriented approach.27 While both consumer advocates and the
aviation industry may argue their cases for the pros and cons of the current administration's approach to regulation as a whole, it is readily apparent that the Trump administration's generally applicable 2-for-1 Rule and willingness to rely on market forces to shape industry conduct has had a direct effect on the DOT's regulatory reform agenda.

That effect is on display in three recent DOT orders denying petitions by FlyersRights.org to address asserted gaps in the DOT's consumer protection rules. These orders illustrate the animating principles guiding the DOT as it continues to define the boundaries of its aviation consumer protection authority.28

**DOT's Consumer Protection Regulatory Reform Efforts as Illustrated by Three Denied FlyersRights.org Petitions**

The DOT recently denied three petitions to initiate rulemakings on various consumer protection issues proposed by FlyersRights.org,29 a not-for-profit consumer advocacy group.30 The DOT's decision to decline to propose new regulations is consistent with the Trump administration's efforts to reduce regulatory burdens on industry and rely on market forces to incentivize consumer-friendly competition.31 Although the DOT appeared to be sympathetic to consumer protection concerns raised by FlyersRights, it believes that existing regulations and enforcement authority address these concerns and provide adequate notice to, and protection of, consumers.

Common themes run throughout the DOT's responses to FlyersRights' petitions: (1) the DOT believes that consumers are sufficiently protected by its statutory authority under 49 U.S.C. § 41712 to prohibit airlines from engaging in various unfair or deceptive practices and unfair methods of competition; (2) the DOT believes that airlines' DOT-mandated customer service plans, contracts of carriage, and other commonly occurring carrier notices adequately inform consumers of their consumer rights; and (3) market conditions provide adequate incentive for carriers to avoid predatory or misleading business practices.

A summary of each of the petitions and the DOT's rationale for denying FlyersRights' requests follows.

**Petition for DOT to Regulate Change Fees in Foreign Air Transportation**

What FlyersRights requested. FlyersRights petitioned the DOT to regulate change and cancellation fees (change fees) in foreign air transportation. The petition noted that change fees have “progressively gone up” in recent years—rising from as little as $50 before 2000 to as much as $300 in 2013.32 FlyersRights requested that the DOT impose a $100 cap on international change fees and only allow higher fees where airlines can demonstrate an administrative cost to the airline greater than $100.33 The petition stated that the DOT has the “authority and obligations” under 49 U.S.C. §§ 41501 and 41509 to determine whether a “rate, fare, or charge” in the provision of foreign air transportation is unreasonable or unreasonably discriminatory.34

**DOT's decision.** Although federal law requires airlines offering foreign travel to file a tariff with the DOT describing prices and rules of travel, DOT regulations (14 C.F.R. part 293) exempt many carriers from this requirement. These exemptions were prompted by the growing liberalization of international air policy and open skies agreements, which guarantee carriers the right to set their own prices. The DOT stated that any regulation of change fees would be “inconsistent” with U.S. obligations under current open skies agreements.35 The DOT's order noted that change fee regulations are unnecessary because the DOT already has regulations that protect consumers regarding the disclosure of cancellation policies and/or change fees, including: 14 C.F.R. § 221.107(d) (direct notice of certain terms); 14 C.F.R. § 253.7 (direct notice of certain items); 14 C.F.R. § 259.5(b)(4)(24-hour post-reservation cancellation rule); 14 C.F.R. § 259.5(b)(9) (customer service plan disclosure of cancellation policies); 14 C.F.R. § 259.6 (posting of customer service plan on website); and 14 C.F.R. § 399.84(d) (disclosure of optional services).36 The DOT rejected arguments that it has authority under 49 U.S.C. §§ 41501 and 41509 to set universal international change fees, “even if [it] were inclined to do so.”37 Further, the DOT contended that regulatory interference with airline pricing structures, including change fees, could have “unintended consequences” for consumers that could result in higher base fares.38 Thus, the denial indicates that the DOT is not inclined to promulgate universal caps on international change fees because it already possesses authority under 49 U.S.C. § 41712 to protect consumers should carriers engage in “unfair or deceptive” business practices related to such fees.

**Petition for DOT to Regulate How Carriers Provide Passengers Notice of Rights under Montreal Convention**

What FlyersRights requested. FlyersRights petitioned the DOT to dictate by regulation how carriers provide notice of passenger rights on international flights under the Montreal Convention.39 The Montreal Convention, among other things, limits carrier liability in the event of passenger delay, injury, or death, or the delay, damage, destruction, or pilferage of baggage, in international travel. The petition alleged that
The DOT regularly engages in unfair or deceptive business practices and unfair methods of competition because they have a "policy and practice of misinforming passengers by falsely alleging passengers have no compensation rights" under the Montreal Convention. As a result, the petitioners urged the DOT to require airlines to disclose Montreal Convention compensation rules in a "conspicuous plain language notice to passengers," including during the booking process, check-in, and delay situations. FlyersRights also argued that the DOT should require airlines to publish a consumer awareness "outline" that would inform consumers about their rights to delay-related compensation, instructions on how to apply for such compensation, a link to the full text of the Montreal Convention, information on limits of liability in U.S. dollars, and a "brochure" at every check-in desk used for international flights that expands on the information provided in the outline.

**DOT's decision.** The DOT relied on two bases in denying FlyersRights' petition. First, the DOT cited insufficient evidence that carriers are failing to fulfill their notice obligations under the Montreal Convention, or are otherwise attempting to "conceal" information regarding delay compensation. The DOT reviewed the contracts of carriage of "several major U.S. carriers" and determined that those documents provide "adequate notice" regarding compensation and the Montreal Convention. The DOT also noted that "many" U.S. carriers incorporate the relevant compensation information into airport signage and/or ticket notices. To reinforce its position that consumers are properly informed about their Montreal Convention rights, the DOT stated that it recently updated its own "Fly Rights" web page, which educates consumers about their rights. The DOT took into account that carriers provide necessary information via their contracts of carriage, advertising media, and/or disclosure on passengers' tickets such that there is insufficient "consumer confusion" on the matter to require a rulemaking on the issue. Second, the DOT relied on the premise that existing regulatory requirements and market conditions provide consumers with adequate notice of their compensation rights under the Montreal Convention.

**Petition for DOT to Require Airlines to Put Passengers on Next Available Flight in Case of Cancellation or Extended Delay**

What FlyersRights requested. FlyersRights petitioned the DOT to reinstate the "reciprocity rule," which would require airlines to place passengers on the next available flight (even if operated by another carrier) at no cost in the event of canceled or excessively delayed flights (two or more hours). The reciprocity rule existed prior to Congress's passage of the Airline Deregulation Act of 1978 and was enforced by the Civil Aeronautics Board (CAB). The Airline Deregulation Act phased out the government's control over fares and service and "allowed market forces to determine the price and level of domestic airline service in the United States." Since deregulation, and in the absence of a requirement to do so, few airlines guarantee that passengers will be accommodated on the flights of other carriers in the event of a cancellation or extended delay. FlyersRights' petition requested a new rule that would require air carriers to coordinate transportation for passengers on another carrier, without a stopover and within the same class of travel, at no additional cost, in the event of a cancellation or an excessive delay. FlyersRights further suggested that, if acceptable to the passenger, the carrier could offer a partial refund and transport the passenger in a lower class of service. FlyersRights argued that the regulation is needed to combat "predatory and anticompetitive" airline practices that are unfair and deceptive to consumers. The petition cites a significant recent increase in airline computer outages, which have left airlines unable to operate, thus leaving passengers "stranded" until the systems return online.

**DOT's decision.** The DOT determined that information provided to consumers by carriers and competitive market conditions sufficiently protect consumers in situations where they experience canceled or delayed flights, and additional regulations would not enhance those protections. The DOT reasoned that the type of harm alleged by FlyersRights regarding reaccommodation does not warrant the reintroduction of the reciprocity rule because it retains authority to enforce violations of "unfair or deceptive" business practices and methods of unfair competition pursuant to 49 U.S.C. § 41712. Further, the DOT's rules under 14 C.F.R. part 259 require carriers operating to, from, or within the United States to "adopt and adhere" to a customer service plan that must include provisions to mitigate passenger inconveniences resulting from canceled or delayed flights. The customer service plans, which must be posted on carriers' U.S.-marketed websites, can also be included in a carrier's contract of carriage. The DOT determined that although carriers may not "guarantee" reaccommodation, the "availability" of the information allows consumers to be informed in the event of a cancellation or an extended delay. The DOT also stated that tarnished brand image, bad publicity, and other negative impacts resulting from canceled or delayed operations
pose a “significant incentive” for airlines to reaccommodate affected passengers as quickly as possible. The DOT determined that its existing regulations and free market conditions properly serve to protect consumers in situations where they experience flight cancellations or extended delays. Specifically, 14 C.F.R. § 259.5 requires carriers to notify consumers of known delays, cancellations, and diversions (§ 259.5(b)(2)), notify consumers in a timely manner of changes in their travel itineraries (§ 259.5(b)(10)), and identify the services they provide to mitigate passenger inconveniences resulting from flight cancellations and misconnections (§ 259.5(b)(12)). Finally, the DOT posited that the proposed rule would be an “intrusion” into the operational and financial decisions of carriers and “contrary to a primary goal of deregulation.”

Conclusion
The rationale underlying the DOT’s decisions to deny the three FlyersRights petitions for the DOT to initiate certain rulemakings tracks the Trump administration’s overall regulatory reform agenda, which seeks to reduce regulation across the federal government and reduce unnecessary enforcement, in order to allow market forces to incentivize industry to adhere to those regulations that will remain in force.

Further, the DOT’s rationale appears to reflect an understanding that its authority to prevent unfair or deceptive business practices and unfair methods of competition is bounded by the policies and principles Congress identified as important when it passed the Airline Deregulation Act, including reliance on competitive market forces, in the first instance, to drive consumer welfare in the form of low prices, innovation, and a variety of services to meet the needs of consumers.

Endnotes
5. See Fall 2018 Unified Agenda of Regulatory and Deregulatory Actions, Off. MGMT. & BUDGET, https://www.reginfo.gov/public/do/eAgendaHistory (last visited June 10, 2019). The Spring 2019 Unified Agenda had not been published as of the writing of this article.
7. Id.
8. Id.
10. Id.
11. Id.
15. The DOT is on record as recognizing and reserving its duty to conduct rulemakings in situations involving “public safety, technical amendments, and where Congress has afforded the agency no discretion.” See FlyersRights. org, Response Denying Petition for Rulemaking, Docket No. DOT-OST-2016-0197, at 2 (Dep’t of Transp. Feb. 1, 2019).
16. Hugo Martin, Airlines Propose Long List of Rules to Kill or Revise as Part of Trump Deregulation Initiative, L.A. TIMES (Mar. 18, 2018), https://www.latimes.com/business/la-fi-trump-airline-rules-20180518-story.html. For example, two consumer-friendly rulemakings that were affected by the freeze include a rule that would have required airlines to (1) disclose baggage fees at the point of sale, and (2) report annually on revenue from add-on charges.
18. Id. at 45,750.
20. Id.
21. Public comments were originally due on April 8, 2019, but the DOT extended the deadline for comment until May 8, 2019. 84 Fed. Reg. 8579 (Mar. 8, 2019).
22. 84 Fed. Reg. at 1820.
23. Id.
enforcement-orders?term_node_tid_depth=All&items_per_page=All (last visited June 10, 2019).


27. McCartney, *supra* note 25. The article quotes John Breyault, a vice president of the National Consumers League, saying, “There doesn’t seem to be any meaningful enforcement going on. . . . The DOT under Secretary Chao seems to be even less willing to engage in serious consumer protection efforts than it did under President Obama’s watch, which is a pretty low bar.” This compares to an industry representative who is also quoted in the article as saying, “We’re thankful. . . . that [the DOT’s] philosophy isn’t to regulate every little thing.” *Id.*

28. The DOT predicates its authority to promulgate and enforce consumer protection regulations on 49 U.S.C. § 41712, which states: “On the initiative of the Secretary of Transportation . . . and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation.”

29. FlyersRights.org states that it is the largest airline passenger nonprofit organization, with over 60,000 members. See *About Us*, FlyersRights.org, https://flyersrights.org/about-us/ (last visited June 10, 2019).


33. *Id.* at 11–12.

34. *Id.* at 6.


36. *Id.* at 14 n.21.

37. *Id.* at 16. FlyersRights has petitioned the U.S. Court of Appeals for the District of Columbia Circuit to review the DOT’s decision. Flyers Rights Educ. Fund, Inc. v. DOT, No. 19-1070 (D.C. Cir. filed Mar. 21, 2019).


40. *Id.* at 4.

41. *Id.*

42. *Id.* at 14.


45. *Id.*

46. *Id.*

47. *Id.* at 2.

48. *Id.* at 1.

49. *Id.*


51. The CAB was disestablished on January 1, 1985, as a result of the Airline Deregulation Act of 1978, Pub. L. No. 95-504 (Oct. 24, 1978). Thereafter, the remaining functions of the CAB were transferred to the DOT.


54. *Id.*

55. *Id.* at 2–4.

56. *Id.* at 4.


58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

Every Unhappy Airport: Santa Monica and the Municipal Airport Conundrum

By Mária Zulick Nucci

Happy families are all alike; every unhappy family is unhappy in its own way.
—Leo Tolstoy, Anna Karenina

The first line of Tolstoy’s venerable classic presages the modern aviation cliché, “When you’ve seen one airport, you’ve seen one airport.” This article focuses on one airport: Santa Monica Municipal Airport (SMO or Airport), which for more than 50 years has been the focus of intense legal and political battles over its very existence. The SMO saga epitomizes the dilemma of maintaining the viability of municipal airports notwithstanding local interest in converting airport premises to nonaviation uses.

The legal, historical, and litigation background of SMO spans decades and involves the City of Santa Monica (City), tenants, users, and neighbors—in short, the “unhappy family.” The Airport’s proponents argue that federal law supports its continued operation, point out that the nation’s safe and efficient air transportation infrastructure relies on its availability, and cite its local economic benefits in opposing the City’s desire to close the Airport for nonaviation development. The City and the Airport’s opponents in the community argue that the Airport poses unacceptable noise, pollution, and ground safety risks in an urban and residential area.

Despite a February 1, 2017, consent decree,¹ which was expected to finally resolve the myriad legal battles involving the Airport, litigation continues. This article will review the history of the SMO legal saga and its impact on similar disputes involving other airports.

SMO’s Early Development

SMO started as a landing strip in 1917, and in 1919 became Clover Field. Shortly thereafter, Douglas Aircraft Company began producing civilian and military aircraft there. The City first acquired the land that is now part of the Airport in 1926, changed Clover Field’s name to Santa Monica Airport in 1927, and acquired additional adjacent parcels through 1941.²

In May 1941, President Franklin D. Roosevelt issued Presidential Proclamation 2487, declaring an “unlimited national emergency” requiring “military, naval, air, and civilian . . . readiness to repel any and all acts or threats of aggression.”³ In response, in December 1941, the City entered into two leases with the United States: (1) a “runway lease” for 86 acres in the northerly part of the Airport, including the runways, for a term lasting until 12 months after the expiration of Proclamation 2487; and (2) a “golf course lease” for 83 acres to the south, for a term lasting until June 1943 with an option to extend on an annual basis to June 1947. Douglas Aircraft Company built planes for the war effort, including the Douglas XB-19, then the largest bomber built for the Army Air Corps. Given the City’s size and the Airport’s use at that time, neighbors were comparatively few, but during the war the community’s population increased rapidly.

In 1944 and 1945, the City and the federal government executed supplements to the runway and golf course leases, respectively. The supplements provided for construction of a new runway, and the United States agreed to convey such improvements to the City. The golf course lease term also was extended to 12 months after the termination of Proclamation 2487. In April 1945, the United States acquired 20 acres of residential property to the west of the Airport; according to the City, this was accomplished by condemnation and purchase using City funds.⁴ Under additional supplements to the leases, entered into on July 15, 1946, the federal government was relieved of its obligations to maintain the Airport and pay rent, but did not surrender its leaseholds; rather, the City agreed to operate the Airport under a right of entry.

In 1948, the City and the United States, through the former War Assets Administration and pursuant to the Surplus Property Act,⁵ entered into an instrument of transfer by which the United States surrendered to the City its remaining Airport leaseholds, some easements, improvements, and personal property, subject to certain terms that were to run with the land. First, the land, improvements, and other items transferred to the City were to be used for public airport purposes. Second, the City was not to use, lease, sell, salvage, or dispose of any transferred property for nonairport use without federal consent. The instrument of transfer was recorded as a quitclaim deed. In 1949, the United States also quitclaimed to the City its interest in the 20 acres it had purchased with City funds. In 1952, President Harry S. Truman terminated Proclamation 2487.

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The Closure Movement Develops
In the 1950s, general aviation grew at SMO, largely due to military pilots returning to the area after serving in World War II and the Korean conflict. In addition, commercial airlines were expanding, and pilot training at SMO reached an all-time high. Outside the Airport, the City’s size and demographics shifted in the post-war decades from that of a small resort community to a higher-income suburb of Los Angeles.6

The City first considered closing the Airport at a City Council hearing on January 10, 1962. In conjunction with that hearing, the City Attorney issued an important opinion letter stating that the 1948 instrument of transfer and certain federal contracts prevented the City from closing the Airport.

Legal disputes over aircraft operations and noise, and then over local efforts to regulate them, began with Nestle v. City of Santa Monica,7 an inverse condemnation noise action brought by Airport neighbors, followed by Stagg v. Municipal Court,8 which was an operator’s challenge to the City’s imposition of a nighttime curfew. The City revisited the closure issue in 1970 and 1971, but the Federal Aviation Administration (FAA) opposed closure, citing the United States’ investment in the Airport and its place in the national air transportation system. The FAA also noted the 1962 opinion letter, which advised that, under the instrument of transfer, the City must maintain the Airport as an airport.

In 1974, the Airport Neighbors Forum, consisting of “representatives of local airport neighborhoods and interested in aviation,”9 was formed to advocate for noise mitigation. In 1975, in response to community complaints, the City Council (1) imposed a curfew, (2) imposed a maximum single-event noise level of 100dB, and (3) banned certain low approaches on weekends, helicopter training, and all jet traffic, with fines for jet landings and takeoffs.10 In the 1980s, the Santa Monica Airport Association and other SMO users and supporters challenged these restrictions on federal preemption grounds. The U.S. District Court for the Central District of California, however, rejected the plaintiffs’ preemption argument, ruling that because municipal control of airports was not totally preempted, reasonable, nondiscriminatory controls were valid.11 The first two impositions plus the bans on low weekend approaches and helicopter training did not violate federal grant agreement or lease terms, the Federal Aviation Act,12 or the equal protection and commerce clauses.13 However, the court struck the jet ban and fine ordinances on the basis that they violated those constitutional clauses.14

The closure effort gained momentum in the 1980s. The City conducted an economic impact study, which concluded that the municipality would generate more revenue from closing the airport for commercial redevelopment. In 1981, the City Council adopted Resolution No. 6296, which provided for closing the Airport as soon as legally possible. On January 31, 1984, in an attempt to resolve the closure issue, the FAA and the City entered into the Santa Monica Airport Agreement (1984 Agreement), which required operation of the Airport until July 1, 2015, but did not specifically address its fate thereafter.15 The City Council, meanwhile, sought to ban Category C and D aircraft16 from the Airport due to their size and speed. The FAA challenged that action, and the U.S. Court of Appeals for the District of Columbia Circuit struck down the City’s ban.17

Recent Litigation over Closing SMO
In a 2013 complaint18 filed in the Central District of California, the City sought authority under the federal Quiet Title Act19 to reclaim control of the Airport. The City argued that the FAA’s requirement that the City operate SMO in perpetuity constituted a constructive confiscation of the City’s property and a Fifth Amendment taking. It contended that the United States never owned SMO so that the 1948 instrument of transfer and quitclaim deed were invalid, and that the related requirement to maintain the property as an Airport prevented the City from exercising its sovereign power over SMO as well as its police power to protect the public and serve community needs. The City also argued that just compensation was not available to redress the harm it suffered and that the FAA’s requirement to operate SMO in perpetuity was a “commandeer[ing]” of City property in violation of the Tenth Amendment. Finally, the City claimed that the FAA’s position violated the City’s Fifth Amendment substantive due process rights. The FAA moved to dismiss, arguing primarily that the City’s action was time-barred under the applicable statute of limitations.20

The National Business Aviation Association (NBAA) and the Aircraft Owners and Pilots Association (AOPA) filed an amici curiae brief supporting the FAA’s dismissal motion, citing SMO’s significance to their members in the congested Southern California airspace and to the national air transportation infrastructure.21

The district court dismissed the City’s complaint, ruling that the Quiet Title Act request was time-barred. The court reasoned that as early as 1948, when the instrument of transfer was executed, the City had notice of the federal government’s interest in the Airport. The Quiet Title Act claim was dismissed with prejudice; the court dismissed the City’s remaining claims without prejudice.22

The City appealed. In an unpublished decision, the
A private pilot filed a pro se action to end after

While the litigation was pending, Santa Monica voters approved a measure providing that if SMO closed, the land could only be used for parks, open space, recreational, educational, and/or cultural purposes, absent a public vote.24

The City’s quiet title action and its reversal and remand began a new series of administrative and judicial actions over SMO’s closure. In 2014, the NBAA, the AOPA, and airport tenants and users filed a “part 16 complaint”25 with the FAA against the City regarding the City’s position that under the 1984 Agreement its Airport Improvement Program (AIP) grant obligations26 ended after July 1, 2015.27 In response, the FAA issued a director’s determination that the City’s grant assurance obligations remained effective until August 27, 2023.28 The FAA’s final decision upheld that determination.29

In another part 16 complaint, several Airport users, individuals, and business tenants alleged that the City was unlawfully “squeezing” rates and charges, imposing “burdensome operational and lease restrictions,” and engaging in revenue diversion, all as part of its plan to close SMO.30 Atlantic Aviation, a fixed-base operator (FBO), alleged that its lease had expired June 30, 2015, without offer of a new lease. It contended that the City was seeking to take over FBO services and limit fuel sales and other services as part of a plan to close SMO in violation of the City’s federal obligations.31 Justice Aviation, a flight school and aircraft rental business, filed its own part 16 complaint, also alleging that its lease had expired June 30, 2015, and that the City was not offering or negotiating new leases with aeronautical tenants.32 Justice Aviation also filed a complaint in federal court, setting forth essentially the same allegations and claims.33 American Flyers, which operated a flight school and provided hangar and tie-down rentals and self-fueling, challenged the City’s 30-day notice to vacate as violating FAA grant assurances 22 and 23, which require airports to operate for the benefit of the public, without exclusive rights. American Flyers also alleged that the City had violated the 1948 instrument of transfer.34

With these complaints pending, the FAA and the City, on January 30, 2017, entered into the stipulation and order/consent decree and settlement agreement in the quiet title action. Its stated purpose was to “resolve any and all claims of the City arising from the events giving rise to the allegations described in the Complaint . . . and in certain other proceedings between the parties.”35 The settlement agreement provided that the City would operate SMO until December 31, 2028, unless the parties agreed to an earlier closure date, and maintain the runway at 3,500 feet (having planned to shorten it from 4,973 feet in order to reduce jet traffic). The City “may exercise its proprietary exclusive right to provide aeronautical services,” including fuel, and may request enhanced flight curfews from the FAA; it must provide leases for FBOs and aeronautical service providers on reasonable terms, as required by federal law.36 On February 1, 2017, the Central District of California entered the stipulation with the settlement agreement as a formal consent decree.

Stakeholders from opposing sides of the debate objected to the consent decree—to date without success. For example, the district court dismissed a challenge based on California’s 1953 Brown Act, the California Constitution, and the Santa Monica City Charter, alleging violations of open meeting laws, the City’s conduct of a Saturday Council session, and discrepancies in or changes to the City’s posted notices of the meeting.37 A private pilot filed a pro se action to invalidate the settlement and reverse the then planned construction to shorten the runway, but that action was dismissed. The NBAA and other aviation groups and businesses petitioned for review of the settlement agreement under the Administrative Procedure Act in the D.C. Circuit. The court of appeals, however, found the settlement agreement to be integral to the consent decree, which was reviewable only in the Ninth Circuit, and denied the parties’ petition.38

Still pending, the NBAA and other parties challenged the FAA’s action in D.C. federal district court as violating multiple federal laws and in excess of its authority.

Other Airports Also Face Existential Challenges

Other municipal, general, and business aviation airports face challenges arising from community objections to noise and fears of pollution and accidents, and from a desire to develop or redevelop airport property to make a facility “as self-sustaining as possible”39 while also creating jobs and increasing revenue.

East Hampton Airport (HTO), in the Town of East Hampton, New York (Town), has been the subject of disputes that resemble the SMO saga. The U.S. Court of Appeals for the Second Circuit found that access

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restrictions imposed by the Town violated the Airport Noise and Capacity Act of 1990, which preempts local laws regarding airport noise and access. In response, after the U.S. Supreme Court denied certiorari, the Town commenced a part 161 study, including consideration of closing HTO. It also has a dedicated website, “East Hampton Proposed Legislation Documents,” providing links to legal and other documents relating to the borough’s noise relief efforts.

The City of Detroit conducted a study of Coleman A. Young Municipal Airport to evaluate closure for nonaviation reuse, leading to concerns that the published report had been significantly redacted, including removing the names of key stakeholders and industry groups.

The City Council of Banning, California, voted to close Banning Municipal Airport, recognizing that the process could take years.

The Reno-Tahoe Airport Authority entered into a 50-year agreement with a real estate development firm for Reno-Stead Airport, the latest step in a long-running effort to develop that facility despite challenges of access, water rights, infrastructure, and community noise and safety concerns, and issues associated with the National Championship Air Races (NCAR), commonly known as the Reno Air Races.

Recently, privately owned Marlboro Airport, in Massachusetts, which is almost a century old, was sold to a developer for conversion into an industrial park.

On the positive side for airports, the City of Newport Beach and Orange County, California, settled their litigation with the FAA over the SoCal Metroplex project, which redesigned the airspace and flight paths for several airports in Southern California, as it affected John Wayne Airport. Long Beach Airport is proceeding with a redevelopment and improvement plan, including the goal of making it an airport leader in sustainability, and Glacier Park International Airport is the subject of a master plan process for expansion and development, given its growth.

The owners of some of these airports were able to act without significant, if any, opposition, whether to develop and expand the facility or close and redevelop it; others, as best exemplified in East Hampton, continue to face substantial opposition and possibly further litigation. All of them may take from Santa Monica’s experience the importance of thorough legal research and analysis of federal law applicable to airports, particularly where grant assurances and the duration of those obligations are involved, and the scope of federal authority over airports in relation to allowable local control. They should also see the importance of careful, precise drafting, not only of agreements but also of ordinances, rules and regulations, correspondence, and public outreach materials. In conjunction, and perhaps most importantly, they should keep aware of changes in population density and demographics in their surrounding communities—particularly as they might relate to changes in airport operations and use—as these affect perceptions of, and hence attitudes toward, the airport and, in turn, risks of potential administrative and judicial actions. The extensive administrative and judicial records in the various SMO disputes should be studied, as a valuable tutorial on these topics.

Conclusion
Uncertainty over the fate of SMO persists. The consent decree does not require the City to close SMO in 2028, but only to operate it until then. Given the legal principles that can be distilled from the complex litigation history at SMO, Airport supporters should work to elect City officials supportive of SMO and educate the community about its direct and indirect benefits to the community. An economic impact study would be a strong step, as would a study of whether any continuing noise problems derive not from SMO but from other neighboring airports, particularly in light of FAA NextGen and SoCal Metroplex changes to commercial operations and flight paths.

One airport is indeed one airport, each with its own historical, operational, demographic, and political realities, which might lead communities to seek further airport development—or closure and redevelopment. Owners of airports for which closure is contemplated should weigh the merits of not accepting AIP or other federal funds. They should also assess whether they can reimburse previously received funds if it would relieve them of a federal obligation to keep an airport open. Such efforts could well face challenges by airport supporters, as has occurred at SMO. The SMO past and continuing experience should be closely studied, as it is instructive for many other small, general, and business aviation airports, to reduce their risk of becoming another unhappy family.

Endnotes
2. For a history of SMO, including archival photographs, see https://www.smgov.net/Departments/Airport/History.aspx. See also Order Granting Defendants’ Motion


5. 49 U.S.C. §§ 47151 et seq.


7. 496 P.2d 480 (Cal. 1972).

8. 82 Cal. Rptr. 578 (Ct. App. 1969).


10. See Santa Monica Airport Ass’n v. City of Santa Monica, 481 F. Supp. 927 (C.D. Cal. 1979), aff’d, 659 F.2d 100 (9th Cir. 1981). Douglas Aircraft Company left SMO in 1975, to consolidate its operations at Long Beach Airport.

11. Santa Monica Airport Ass’n, 481 F. Supp. at 932.


14. Santa Monica Airport Ass’n, 481 F. Supp. at 943–45 (striking on constitutional grounds ban on jet traffic because jets are not necessarily noisier than propeller craft).


16. Category C aircraft travel at speeds between 121 and 140 knots; Category D aircraft between 141 and 165 knots. See 14 C.F.R. § 97.3.

17. City of Santa Monica v. FAA, 631 F.3d 550 (D.C. Cir. 2011) (concluding that the FAA did not act arbitrarily or capriciously in deciding that the ordinance violated the grant assurance against unjust economic discrimination); see also Stephen Brice, Ties That Bind: FAA Enforcement of Grant Assurances—The Santa Monica Airport Case, 25 AIR & SPACE L. no. 1, 2012, at 9 (discussing this case).


22. Order Granting Defendants’ Motion to Dismiss, supra note 2.


25. 14 C.F.R. pt. 16 (providing for formal administrative complaints about airport sponsor noncompliance with grant assurances); see Complaints about Airport Compliance, FAA, https://www.faa.gov/airports/airport_compliance/complaints/ (last modified June 3, 2019).


35. Stipulation and Order/Consent Decree, supra note 1, at 1.
36. *Id.* at 10–11.
42. 49 C.F.R. pt. 161. This part governs the process for developing FAA-approved agreements for noise and access restrictions on aircraft, noise description methods, and land uses in the airport noise study area. Noncompliance can affect eligibility for grant funding and for approval of passenger facility charge (PFC) collections.
47. Truckee Meadows Reg’l Planning Agency, Regional Planning Commission Agenda (May 10, 2017), http://www.tmrpa.org/files/meetings/2017/17-05-10%20RPC%20Final%20Packet.pdf. Reno-Stead Airport leases and other contracts typically provide that the lessee or other user will relinquish operational use of common areas during airport closure for these events, and cooperate with the FAA and Reno Air Racing Association for special aircraft ingress and egress, without compensation or rent reduction.
52. The Santa Monica Airport Association is working for the Airport’s continuance as an airport. See *SMO’s Future, Santa Monica Airport Ass’n*, http://www.santamonicaairport.info/smos_future (last visited June 10, 2019).
Defending ATI

continued from page 1

Partners offer their customers attractive offerings (in terms of price, schedule, and efficiency) across a much larger global network with nearly the same efficiency as a single carrier.

The prior edition of The Air & Space Lawyer featured a cover story entitled “Alliances and Antitrust Immunity: Why Domestic Airline Competition Matters” by the American Antitrust Institute (AAI). The author argues that antitrust immunity (ATI) policy is out of date and requires reform. We disagree. In this article, we review the continuum of international airlines cooperation, outline the legal and policy framework for ATI, discuss the empirical evidence and practical examples that demonstrate the consumer benefits, and respond to recent criticisms that have been leveled by AAI and others. We offer a fact-based defense of why ATI is just as beneficial to the traveling public today as it was in the 1990s when the U.S. Department of Transportation (DOT) first used it to encourage restricted-entry countries to open their borders to aviation. We also highlight the DOT’s oversight over existing alliances and its review of new applications for ATI.

The Continuum of Airline Cooperation

International carriers have entered into a variety of agreements to augment the scope of their own networks. These arrangements range from basic cooperation such as “interlining” (agreements to carry passengers across two or more carriers on the same itinerary), to “codesharing” (agreements whereby carriers place their marketing code on a flight operated by another carrier), and closer coordination via alliances, to the most integrated form, a JV partnership sharing revenue or profits.

Under a “metal-neutral” JV agreement, the partner carriers share incremental revenues (and, in some cases, profits and losses) derived from the services offered on covered routes, which causes the carriers to be indifferent as to which of them collects the revenue or operates the aircraft on those routes. That is, the JV partners effectively function as a single airline on the routes and activities within the scope of their cooperation. As such, they can be more efficient when they structure their joint network and schedule.

The cooperation creates substantial consumer benefits. In addition to providing more destinations to customers with an integrated network, JV partners work closely together to provide an enhanced passenger experience for customers, including better airport connections through co-located gates, reciprocal frequent flier programs and lounge access, coordinated customer-facing technology like mobile ticketing and check-in, and more seamless baggage handling.

Two decades of published research by economists, including the most recent studies, has established that each successive level of integration in an alliance yields greater benefits, including increased frequencies and cities served, more convenient service options, increased interalliance competition, and lower fares.

The Legal and Policy Framework for ATI

The legal predicate for the delivery of these substantial consumer benefits is the DOT’s authority to grant ATI to U.S. air carriers and their foreign partners, allowing them to implement agreements that the DOT concludes are in the public interest. When granted, ATI allows airlines to jointly coordinate and manage key activities, including pricing, scheduling, networks, revenue management, frequent flyer programs, sales, marketing, and other forms of cooperation, without risk of liability under U.S. antitrust laws.

The modern era of immunized airline partnerships began with the signing of the Open Skies Agreement between the United States and the Netherlands. That agreement paved the way for the first ATI application, in 1992, between Northwest Airlines and KLM. The DOT granted the partnership ATI, recognizing the competitive and consumer benefits that the coordinated partnership could provide. Following the grant of ATI, the carriers jointly introduced new flights and expanded capacity, leading to better service and lower prices for travelers. The success of the Northwest-KLM alliance propelled a wave of open skies agreements, alliances, and ATI grants that have revolutionized the global air transport industry.

In Questioning ATI, AAI Proposes a Solution in Search of a Problem

The title of the AAI article “Alliances and Antitrust Immunity: Why Domestic Airline Competition Matters” is incontrovertible—airline competition matters, of course. Unfortunately, the balance of the article lacks a solid empirical foundation. Specifically, the piece relies on rhetorical concerns about the competitive conditions in both domestic and international markets.

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to argue that the "policy surrounding ATI is ripe for reconsideration." The article's criticism misses the mark.

AAI's assertions are largely unsubstantiated; they rely on speculative theories of consumer harm and rhetoric rather than on empirical research. AAI contends that ATI "raises troubling questions" and that "ATI has a profound impact on competition and consumer welfare in international and domestic markets." We agree that ATI has had a profound impact on consumer welfare, but as discussed below, that impact has been overwhelmingly positive. Empirical studies conducted by economists have found that the increased cooperation enabled by immunized JVs leads to lower fares, increased traffic, and enhanced connectivity.

Empirical Analysis Strongly Supports ATI as a Tool to Drive Network Expansion, Lower Prices, and Enhance Service

JVs have created enormous benefits for global travelers, including lower prices, new cities served, increased capacity, and more convenient service options. The DOT has documented the extensive benefits antitrust-immunized alliances create for the traveling public:

• "Antitrust immunity is well suited to enable carriers to achieve merger-like efficiencies and deliver benefits that would not otherwise be possible."  
• "Past experience with other integrated and immunized alliances . . . shows that benefits from new direct routes, increased frequencies, greater capacity on hub-to-hub and other routes linking the airlines' networks, and associated increases in passenger volumes may be expected to develop over time as synergies from the integrated joint venture are facilitated."  

Likewise, two decades of published research confirms these benefits. For example, a 2011 study concluded that greater cooperation among airlines generally resulted in lower fares:

Overall, the results show that airline cooperation reduces the fares for interline passengers below the levels paid by passengers using traditional service, where cooperation is absent. In addition, the results show that incremental increases in cooperation, where codesharing or antitrust immunity is added to basic alliance service, yield incremental reductions in the fare . . . .

The most recent, comprehensive study of international cooperation among airlines in 2017 analyzed passenger, capacity, and fare data over nearly two decades and concluded:

"[M]etal neutral" joint ventures (JVs) lead to substantially larger fare reductions, similar to those associated with online service in which a single carrier serves the entire connecting itinerary. For nonstop passengers we find that the formation of an ATI orJV between two or more airlines serving a route does not generate higher fares. Finally, we find that ATIs and JVs are associated with increased segment traffic and net entry on routes. Our results collectively demonstrate that, on the whole, ATI grants—particularly when coupled with the formation of JVs—have been strongly procompetitive, generating lower fares on connecting routes and increased traffic on segments served by multiple alliance partners, with no associated increase in nonstop fares where partner airlines overlap operations.

Despite the robust benefits generated by ATI-enabled joint cooperation, AAI and other critics claim that immunized airline JVs harm competition. They speculate, generally, that consolidation in the industry coupled with granting ATI to the U.S. network carriers and their foreign partners harms consumers. The relevant practical evidence and related empirical studies demonstrate that this premise is incorrect.

For instance, AAI cites studies, including most notably a study by William Gillespie and Oliver Richard (2012), to support its theory that "cooperation under alliance agreements can enhance incentives to collude on price on parallel transatlantic routes, resulting in higher fares unless there are offsetting efficiency gains." The truth is exactly the opposite. Travelers to Europe, for example, have a range of choices among carriers, including on many new entrants and low-cost carriers (LCCs) such as Norwegian Air Shuttle. The objective data contradicts the claim that fares are higher because of JVs. In fact, the most recent economic analysis of the topic found that international JVs have lowered prices, not raised them.

The Gillespie and Richard study is an outlier that has been contradicted by numerous empirical studies. For example, Jan Brueckner and Tom Whalen (2000) analyzed DOT data from 1997 and found that alliance fares were 15–18 percent lower than non-alliance fares. Brueckner’s 2003 study, analyzing data from 1999, found that codesharing (without immunity) lowered fares by 8–17 percent, but that codesharing plus immunity lowered fares by 17–30 percent (vis-à-vis traditional interline fares). A subsequent
study by Whalen (2007) analyzed panel data for the period 1990–2000 and found substantial fare savings (approximately 20 percent) arising from immunized alliances vis-à-vis nonalliance interline fares, but that codesharing alone only achieved half of those savings (approximately 9 percent).16 As noted, most recently, Robert Calzaretta et al. (2017) found that international JVs have led to fares on connecting routes that are, on average, approximately 8 percent lower than fares on otherwise similar codeshare or interline itineraries.17 None of these studies are refuted in the AAI article. Adding to the weight of empirical research supporting the benefits of JVs, a recent study commissioned by the DOT, released in early May 2019, validated the general findings of the 2017 Calzaretta study and related papers, concluding that “alliances are likely to be beneficial on balance” and that “the upside of alliances dominates the downside.”18

Delta’s Immunized JVs Have Delivered Substantial Consumer Benefits

The public benefits generated by Delta and its European alliance partners provide an example of how airline JVs generate substantial consumer benefits through metal neutrality.

SkyTeam JV

The Northwest-KLM JV was the prototype for the alliances that exist today and has long been recognized as enabling far greater expansion of capacity in markets between the United States and Europe than would ever have been commercially feasible in the absence of the connection of the carriers’ complementary networks.

The current Delta-Air France KLM JV has generated similar public benefits. For example, the combined capacity of the JV partners on four of the key trunk routes in the SkyTeam JV (Minneapolis–Paris, Atlanta–Amsterdam, Detroit–Paris, and Atlanta–Paris) more than doubled between 2009 and 2017.19 Moreover, increased demand following the implementation of the JV enabled the carriers to double the number of daily roundtrips between Atlanta and Amsterdam, from two to four. In addition to expanding capacity on several hub-to-hub routes, the JV has enabled Delta and Air France KLM to initiate new nonstop service on several transatlantic routes to regional cities, including Portland–Amsterdam (2008), Salt Lake City–Paris (2008), Salt Lake City–Amsterdam (2015), and Raleigh/Durham–Paris (2016). Overall, average daily seats from Paris to Delta’s hubs grew by more than 50 percent between 2009 and 2017. In May 2018, Delta began service between Indianapolis and Paris, and the JV partners recently announced new nonstop Delta service from Los Angeles to Paris and Amsterdam.

The addition of capacity on hub-to-hub routes is enabled primarily by the increase in passengers connecting to/from points behind and beyond the hubs.

Source: OAG 2017. Notes: Destinations in North and South America served by Delta from Atlanta; destinations in Europe, Africa, Middle East, and Asia served by Air France from Paris. Transatlantic region includes Europe, Africa, Middle East, and the Indian Subcontinent (Bangladesh, Nepal, Maldives, India, Pakistan, and Sri Lanka).
of Delta and Air France KLM (see fig. 1), but local passengers traveling on the hub-to-hub routes also benefit greatly from the JV because of the high frequency of service that the partner carriers provide. In many instances, the frequency of nonstop service far exceeds what local demand would otherwise warrant. For example, in 2017, Atlanta–Amsterdam generated an average of only 107 local bookings per day, and Atlanta–Paris generated an average of only 147 local bookings per day.20 Notwithstanding the modest level of local demand, Delta-Air France KLM offers four daily combined roundtrips on each route, with over 1,200 bookings.21 Moreover, through coordinated JV planning, the flights are scheduled throughout the afternoon and evening, offering passengers four distinct flight time options and connections.22

**Delta-Virgin Atlantic**

The Delta-Virgin Atlantic JV has generated similar substantial public benefits.23 For example, the JV led Delta and Virgin Atlantic to introduce new nonstop service on 10 transatlantic routes:

- London Heathrow (LHR) to Philadelphia, Portland, Seattle, and Salt Lake City;
- New York John F. Kennedy (JFK) to Manchester, Edinburgh, and Glasgow;
- Boston to Manchester;
- San Francisco to Manchester; and
- Orlando to Belfast.24

As a result of these new flights, combined Delta-Virgin Atlantic seats increased by nearly 12 percent on U.S.–U.K. routes.25 Likewise, the JV allowed Delta and Virgin Atlantic to retime their flights to offer more convenient scheduling. Prior to the JV, a number of the Delta and Virgin Atlantic flights between LHR and JFK left at similar times. Today, during the peak summer season, passengers can choose among eight different flight times on the carriers throughout the day.

**Responses to AAI’s Theories on Competition and ATI**

Despite the empirical and tangible evidence affirming the consumer benefits of ATI generally, AAI and others continue to challenge the DOT’s framework and process for reviewing applications and express skepticism about the claimed benefits. Provided below is a distillation of AAI’s arguments, followed by replies.

**Competition and Consumer Choice**

**AAI.** AAI claims that “U.S. alliance gateways are highly concentrated, limiting choice behind and beyond the gateway,” and that “high concentration at [these] alliance gateways means less competition from other carriers and less choice for consumers.”26

**Response.** The U.S. airline industry is fiercely competitive. Airline expansion, new entry, and LCC growth have increased competition. Mergers and restructuring have also helped stabilize the industry, allowing existing airlines to buy new aircraft, update their fleets,

![LCC Growth in Hub Cities](image)

**Source:** U.S. DOT DB1B FYE 2018Q3. **Notes:** LCC/ULCC includes LCCs, ULCCs, and other low-fare carriers. LCCs include Southwest Airlines, AirTran Airways, ATA Airlines, Vanguard Airlines, Sun Country Airlines, JetBlue Airways, and Virgin America. ULCCs include Frontier, Spirit, and Allegiant. Other low-fare carriers include Alaska Airlines, Midwest Airlines, Hawaiian Airlines, PAAir, Airaccessor, and National Airlines. Airports in major metropolitan areas are grouped: Chicago (ORD, MDW); Dallas (DFW, DAL); Houston (IAH, HOI); Los Angeles (LAX, LGB, BUR); Miami (MIA, FLL); New York (EWR, JFK, LGA); and San Francisco (SFO, OAK).
and improve airport facilities. Overall, consumers have seen improvements in fares, service options, aircraft quality, and product innovation.

During the past 20 years, LCCs and smaller carriers like JetBlue, Southwest, Alaska, Frontier, Allegiant, Hawaiian, Spirit, and Sun Country have expanded greatly. Since 2000, such carriers grew by 120 percent. By 2017, they accounted for nearly half of all domestic passengers.

The major U.S. network carriers have not prevented the rapid expansion of smaller carriers and LCCs at network carriers’ hub cities. These carriers’ shares of domestic origin and destination (O&D) passengers in “hub” cities like Atlanta, Chicago, Dallas/Ft. Worth, Denver, Los Angeles, New York/Newark, San Francisco, and Washington, D.C., have increased substantially (see fig. 2). Fares are near historic lows. In 2018, the average domestic air fare was $350—the lowest inflation-adjusted annual fare in 24 years of air fare records, and 15 percent lower than fares in 2014. The combination of low fares, better networks, strong operating performance, and service enhancements has resulted in the highest rates of airline customer satisfaction in two decades. The 2018 airline quality score for the nine largest U.S. airlines was the best in the 29-year history of the rating, and the industry’s score has improved each year for the past four years. AAI’s unsupported assertion to the “deteriorating quality of air service” lacks merit.

Entry Barriers

AAI. AAI asserts that key transatlantic routes are “intensely concentrated, limiting entry by smaller, non-allied carriers.”

Response. The most recent statistics show that competition on transatlantic routes has intensified—not diminished—in recent years. For example, in the five years since the Delta-Virgin Atlantic JV was implemented, LCC and nonaligned carrier seat share on the North Atlantic has grown from 11 percent in 2013 to 19 percent in 2019. Indeed, other carriers serving transatlantic routes have steadily increased, with a corresponding reduction in the overall shares of Star, SkyTeam, and oneworld JVs. Collectively, those JVs accounted for 72 percent of the seats between Europe and North America in 2018, almost 8 percent less than the 80 percent they had in 2015. Moreover, the gains have occurred in the context of a substantial increase in overall supply. For example, between July 2012 and July 2018, the number of overall airline seats on routes between Europe and North America increased by 45 percent. AAI’s allegations of barriers to entry are not borne out by the facts.

Investment in Foreign Carriers

AAI. AAI argues that U.S. carriers are expanding their investments in foreign carriers to “gain control over decisions to enter U.S. markets,” implying that the rationale for these investments is to reduce competitive expansion in the United States.

Response. Delta’s investments in its partner airlines have corresponded with significant growth—not contraction—in their service to U.S. markets. As detailed above, since Delta invested in Virgin Atlantic, it has expanded service to the United States, adding flights and launching new services to both stimulate and meet demand.

DOT’s Approach to Granting ATI

AAI. AAI describes the DOT’s historical approach to granting ATI as too “lenient.”

Response. The DOT conducts in-depth reviews of proposed JV agreements and the competitive aviation environments within their scope. The typical DOT review period for ATI applications is now 12–24 months, and often involves multiple evidentiary requests and extensive public discourse involving competing carriers and third parties. Applicants must demonstrate substantial consumer benefits and that there is no substantial reduction in competition.

The DOT actively monitors existing ATI grants and regularly reviews immunized JVs to ensure that the partners are pursuing and achieving the commitments and consumer and competitive benefits promised. Scrutiny has increased over time. Since 2009, for example, the DOT has required all JVs to submit annual reports detailing the status of their immunized cooperation and describing the related consumer benefits.

Responses to AAI’s Policy Recommendations

The AAI piece closes with a list of recommendations for how the DOT should change its oversight of immunized alliances. None of these recommendations has merit when analyzed in context.

Mandatory “Sunset” Provisions

AAI. AAI suggests that the DOT should frame an ATI policy that “more proactively responds to changes in competition conditions in U.S. markets by subjecting grants of ATI to sunset provisions.”

Response. ATI conditions requiring the unwinding of JVs after an arbitrary period of time would be highly disruptive and diminish the beneficial investment incentives that JVs create. Many of the benefits generated by JVs depend upon the ability and willingness of the participants to invest in the future, which
they have substantially reduced incentive to do so if the future is uncertain. The DOT has authority to review its ATI grants at any time, which it exercises rigorously and regularly. The DOT’s existing authority is sufficient to address changes in market conditions.

**Five-Year Term Limit**

**AAI.** AAI asks the DOT to conduct periodic, five-year reviews of grants of ATI.

**Response.** Annual review by the DOT already occurs, making this suggestion superfluous. To the extent that it was de novo review, the uncertainty would diminish the incentives of the JV partners to invest, and the related cost and uncertainty would be wasteful.

**Challenge Claimed ATI Benefits**

**AAI.** AAI recommends that the DOT should “look skeptically at arguments that ATI creates benefits for consumers in behind-gateway and beyond-gateway markets and require carriers to demonstrate that ATI has benefited consumers.”

**Response.** That analysis is exactly what the DOT does by requiring carriers to demonstrate public benefits. Connectivity has been, and will continue to be, a central focus of the DOT’s public benefits and competition analysis in ATI decisions. AAI has provided no compelling reason for the DOT to doubt the demonstrated consumer benefits of immunized JVs.

**Ease of Entry**

**AAI.** AAI advocates that the DOT should make ease of entry by nonalliance carriers a primary consideration in reviewing existing and prospective grants of ATI.

**Response.** New entry is—and always has been—a central tenet of the DOT’s ATI analysis when evaluating a new application, just as open skies has always been an absolute prerequisite to the grant of ATI. But the implication by AAI and other critics that the government should routinely redistribute the network assets of one carrier to another as the price of allowing carriers to build pro-competitive JVs is contrary to free-market principles, and ignores the hard work and investment committed by the JV carriers over many years to build a network attractive to consumers.

**Interalliance Competition**

**AAI.** AAI proposes that the DOT should reject arguments that alliances require ATI because they need to compete in the “alliance market.”

**Response.** Global alliances compete fiercely against each other, resulting in better service and lower prices. The empirical evidence demonstrates that the alliances offer substantial benefits to consumers; it makes no sense to suggest that the DOT should not promote competition among them.

**Conclusion**

Overall, the critiques by AAI and other opponents of ATI policy ring hollow. The empirical evidence—reflected both in the economic literature and the real-world experiences of international network carriers—have demonstrated that ATI-enabled JVs have generated and continue to generate substantial consumer benefits. Unless and until there are major changes in the legal framework in which global air carriers operate, these JVs remain the most efficient—and currently only—way for airlines to provide their customers with seamless service throughout the world.

**Endnotes**


2. An alliance is an agreement between two or more airlines designed to link their route networks and coordinate on specified activities, such as marketing and sales, coordination of airport operations, and frequent flyer programs.

3. “ATI” can be misleading, as it could suggest something pejorative. And JVs should be called “virtual mergers” because they allow merger-like activity in light of the restrictions that prohibit foreign ownership of airlines. But, for the sake of consistency, we will continue to use the term “ATI.”

4. Moss, supra note 1, at 12.

5. Id. at 16.


12. Moss, supra note 1, at 13.

13. Calzaretta et al., supra note 9.


16. W. Tom Whalen, **A Panel Data Analysis of Codesharing, Antitrust Immunity, and Open Skies Treaties in International Aviation Markets**, 30 REV. INDUS. ORG. 39 (2007). The empirical work on alliances continued into the next decade. In 2011, Brueckner et al. examined...
U.S.-international airfares using panel data from 1998 to 2009. They found that codesharing reduces fares by approximately 3.6 percent relative to traditional interlining, that alliances reduce fares by an additional 2.7 percent (beyond codesharing), and that immunized JVs reduce fares by an additional 4.9 percent (beyond codesharing and alliances). Moreover, this study also found that "online" fares (i.e., those offered by a single carrier and which immunized JVs attempt to mimic) were less expensive than immunized alliance fares absent a JV. See Brueckner et al., supra note 8.

17. Calzaretta et al., supra note 9.

18. Jan K. Brueckner & Ethan Singer, Pricing by International Airline Alliances: A Retrospective Study Using Supplementary Foreign-Carrier Fare Data 2, 38 (Feb. 2019), http://www.socsci.uci.edu/~jkbrueck/DOT_study.pdf. While this study did observe a nominal effect on certain overlapping, gateway-to-gateway JV routes, the effect was limited to select regions, fare classes, and time periods.

19. It is noteworthy that two of these four routes (Detroit–Paris and Atlanta–Amsterdam) were identified in the Gillespie and Richard study as routes where "recent grants of antitrust immunity have reduced the number of competitors in trans-Atlantic routes." See Gillespie & Richard, supra note 11. However, the JV carriers have grown average daily seats relative to pre-recession levels (i.e., 2008) by 6.5 percent between Detroit and Paris and by 131 percent between Atlanta and Amsterdam.

20. Data from Marketing Information Data Tapes (MIDT), 2017 full year.

21. Data from Official Airline Guide (OAG) and Diio.

22. On Wednesday, March 5, 2008 (pre-JV), Delta's flight from ATL–AMS departed at 17:35 while KLM's departed at 17:20. On Wednesday, March 7, 2018, the JV's four ATL–AMS flights departed at 15:55, 17:36, 20:28, and 22:25. Data from OAG.


24. Data from OAG.

25. This calculation compares average daily seats in 2017 and 2012, using OAG data for July of each year.

26. Moss, supra note 1, at 15.

27. For example, Delta has invested more than $7 billion in airport infrastructure projects since 2006, and will be involved in an additional $12 billion worth of projects in the coming years, including improvements at several of its key hubs such as Atlanta, Los Angeles, New York, Salt Lake City, and Seattle. Liz Savadelis, Delta, Los Angeles World Airports Prepare for Construction of $1.86 Billion Delta Sky Way at LAX, Delta News Hub (May 31, 2018), https://news.delta.com/delta-los-angeles-world-airports-prepare-construction-186-billion-delta-sky-way-lax.

28. Data from DOT Airline Origin and Destination Survey (DB1B).

29. Data from DOT DB1B.

30. Annual and Fourth-Quarter 2018 Air Fare Data, BUREAU TRANSP. STAT. (Apr. 16, 2019), https://www.bts.gov/topics/airlines-and-airports/annual-and-fourth-quarter-2018-air-fare-data. The decline in fares holds true even when luggage and change fees are included. Average domestic fares including these fees declined by over 20 percent from 2000 to 2017. Note: Bag and change fees based on carriers' domestic bag and change fee totals from DOT Form 41 divided by total O&D passengers from DOT DB1B data.


32. Moss, supra note 1, at 1.

33. Id. at 14.

34. Data from OAG.


36. Moss, supra note 1, at 1.

37. Id. at 13.

38. See, e.g., Delta Air Lines, Inc. et al., DOT Order No. 2016-12-13, at 32 (Dec. 14, 2016) (Docket No. DOT-OST-2015-0070) (directing Delta and Aeromexico to submit annual progress reports to the DOT's Office of Aviation Analysis, beginning one year from the effective date of ATI and continuing each year thereafter).


40. Id.

41. Id.

42. Id.

43. Id.
landlord's housing code violations, I tried the case and won a judgment of $607 in favor of my client, the tenant. These dollar amounts were not small for her. Having started out as a defendant facing devastating liability, she walked away with an award. That case has stuck with me as a model of how much my work can mean for my clients, and for the kind of result that I aim to provide.

A&SL: You started your legal career as a law clerk to a U.S. district court judge. Why did you choose that path and what was it like to work for a federal judge?

AG: As a law student, I heard often that being a law clerk is the best job you can ever have as a lawyer. That's held true for me so far in my career, even as I've been fortunate to go on to other wonderful experiences. (I note that my predecessor as FAA Chief Counsel promised me that this would be the best job I ever have—we shall see!) A law clerk gets the opportunity to develop writing and analytic skills under a jurist's supervision, while learning various areas of the law and experiencing what makes an advocate persuasive. I benefited greatly from watching the example set by the judge for whom I clerked, and since then he has been a mentor with whom I remain close.

A&SL: You also served as a trial attorney at the U.S. Department of Justice? What kind of work did you do there?

AG: At the U.S. Department of Justice, I defended against challenges to federal government policies, programs, and decisions in civil litigation brought under the Constitution, Administrative Procedure Act, Freedom of Information Act, Title VII, and other federal statutes in courts nationwide. I worked with a wide variety of client federal agencies, including the FAA. Especially as a litigator, that job was among the best experiences one could have as preparation to go in-house at a federal agency. And it gave me an abiding appreciation for the talent and dedication of government lawyers. I greatly respect the public service that they provide.

A&SL: You were most recently the Chief Counsel of the Federal Transit Administration, one of the FAA's sister agencies within the U.S. Department of Transportation. What led you to take the FAA Chief Counsel job?

AG: I was very happy serving at the Federal Transit Administration, but moving over to the FAA was an opportunity that I couldn’t pass up. The FAA’s stewardship of the National Airspace System is a crucial driver of the American economy and an everyday feature of American life—and also, let’s just be honest, aviation is cool. I wanted to be part of it. I knew also that I would

get to continue to work with the many great colleagues I had come to know from already having been serving in the U.S. Department of Transportation.

A&SL: What are the biggest challenges for the FAA today, and what do you hope to accomplish at the FAA?

AG: The central challenge for the FAA always will be safety. That is the core of the FAA's mission. In service to that mission, my goal is to help the United States remain the gold standard in aviation safety. That means supporting continuous safety improvement. It also means keeping to the highest standard of safety while integrating an array of oncoming, technology-driven developments—such as unmanned aircraft systems (UAS), commercial space, supersonic, and continued NextGen modernization—that keep the United States at the forefront in innovating to use airspace efficiently. The lawyers of the FAA play a vital role in supporting all of these endeavors.

A&SL: What advice would you give to a young lawyer or law student interested in pursuing an aviation-related legal career?

AG: To be a great aviation lawyer, you need to understand your aviation client’s work. That advice goes for lawyers in any field, but it’s especially true in aviation. More than other areas in which I’ve practiced, aviation is a highly technical subject in which delivering effective legal counsel for clients often depends upon having some familiarity with the technical issues and a willingness to drill down into details.

A&SL: Are there any opportunities you would highlight for young lawyers or law students looking to embark on a career in the federal government as an aviation lawyer?

AG: Law students are invited to apply for an internship with the FAA’s Office of the Chief Counsel. For new law graduates and recent law graduates completing judicial clerkships or fellowships, the U.S. Department of Transportation’s Honors Attorney Program provides a two-year opportunity to rotate through various areas of the Department, including the FAA. Veterans of the Honors Attorney Program have frequently gone on to enjoy stellar careers across the Department’s various legal offices. Details about internships and the Honors Attorney Program are available online.

A&SL: What’s your passion when you’re not at work?

AG: Outside of work, my passion is my family. I devote most of my free time to my wife and our three-year-old daughter.
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