

Law as Globalization's Gatekeeper:  
A Legal History of Fifth Freedom Rights

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Abstract:

Should an American airline flying from New York to London be permitted to also fly from London to Paris? Such a simple question is – and was – the most hotly contested issue both today and in 1944 when the foundational legal framework of international commercial aviation was being negotiated at the Chicago Convention. The Fifth Freedom of the Air permits an airline to fly between two foreign countries on a flight originating or ending in its home country. In 1944, some countries, such as the United States, argued that an American airline should be permitted to fly the London-Paris route citing both economic and humanitarian reasons in support. Other more protectionist-minded countries, such as the United Kingdom in 1944, were hesitant and thought only British and French airlines should be able to operate flights between London and Paris.

While fifth freedom rights were not widely adopted at the Chicago Convention, countries such as the United Kingdom soon after began to acquiesce to agreements that did permit fifth freedom rights. Why would these protectionist-minded nations make such a concession? The central argument of this paper is that these nations perceived the law as being able to function effectively as a gatekeeper of globalization. That is to say, the United Kingdom – and other nations for that matter, including the United States – viewed the law as not only necessary to permit globalization, but more importantly, as strong enough to effectively limit, or if necessary, reverse its effects. The debate over fifth freedom rights at the Chicago Convention and in the years immediately following offers insights into how government officials understood the power of law in controlling the effects of globalization, World War II’s impact on international commercial aviation, and the original purpose and intended effects of fifth freedom rights.

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*“There’s a battle being fought for our skies and most people don’t even realize it. Three airlines from two countries the size of South Carolina are trying to take over international commercial aviation.”*<sup>1</sup>

So begins an ominously toned fifteen-minute video Delta Air Lines released in June of 2017 to educate their employees on the current Open Skies<sup>2</sup> dispute between three Middle Eastern carriers from the United Arab Emirates and Qatar (“the Gulf carriers”) – Emirates, Qatar Airways, and Etihad Airways – and three carriers from the United States (“the legacy carriers”<sup>3</sup>) – Delta Air Lines, American Airlines, and United Airlines.<sup>4</sup> The video, complete with dramatic background music and a deep-voiced narrator, operates almost as a trailer for a horror movie. Delta warns its employees that their jobs are in peril due to the “insatiable appetite” of the subsidized Gulf carriers who are “propped up with wheelbarrows of government cash” and are nefariously “expand[ing] like a weed” in order to drive Delta and other American carriers out of business.<sup>5</sup> “They’re coming and we need to stand up,” Delta warns as it implores its 80,000 employees to forward these urgent concerns to Congress and the Trump White House.<sup>6</sup>

The video is only the latest development in what has escalated to become one of the nastiest industry disputes in recent memory. The Gulf carriers have enjoyed extraordinary growth over the last two decades (coinciding with their home countries’ growth) and have begun to expand into markets traditionally dominated by American carriers, such as the trans-Atlantic

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<sup>1</sup> *Delta Releases Full-Length Video Educating Employees on Gulf Carrier Subsidies*, DELTA AIR LINES NEWS HUB (June 28, 2017), <http://news.delta.com/delta-releases-full-length-video-educating-employees-gulf-carrier-subsidies> [hereinafter DELTA VIDEO].

<sup>2</sup> Open Skies agreements are bilateral or multilateral civil air service agreements that reduce or eliminate government interference in commercial decisions such as carriers’ decisions about capacity, routes, and pricing in international markets. See *Air Service/Open Skies Agreements*, UNITED STATES DEPARTMENT OF STATE, <https://www.state.gov/e/eb/tr/ata/>.

<sup>3</sup> These U.S. carriers are referred to as “legacy carriers” because they existed prior to the Airline Deregulation Act of 1978. When analyzing the U.S. domestic market, they are often contrasted with low-cost carriers, such as JetBlue Airways or Spirit Airlines that arose after deregulation.

<sup>4</sup> DELTA VIDEO, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

market between Europe and North America. The American carriers have cried foul, arguing the Gulf carriers are using unfair means, while the Gulf carriers contest these accusations and claim their only “sin” is offering a better service. Disputes between multi-national billion-dollar companies are rarely friendly, but this spat is notably bitter. Qatar Airways’ CEO admitted to opening a flight from Doha to Atlanta to “rub salt in Delta’s wounds,”<sup>7</sup> while Delta’s CEO declared “This is no longer a commercial issue; this is a personal issue.”<sup>8</sup> So what is this issue and how did it begin?

Answering this question requires going back to the time of the legal foundation of international commercial aviation, the Chicago Convention of 1944. The Convention laid out the legal framework for the industry that is still in place today, including the Freedoms of the Air.<sup>9</sup> The Fifth Freedom of the Air is the right for an airline to fly from its home-base country to another country and then on to a third country. For example, an American carrier could fly from New York (a city in its home-based country, i.e. the United States) to London and then on to Cairo under the fifth freedom right. The fifth freedom right permits an American carrier to fly the London-Cairo leg despite not being a British or Egyptian carrier.<sup>10</sup> Both in 1944 and today, some countries have been reluctant to permit such a scenario, instead preferring to limit the London-Cairo leg to only British and Egyptian carriers. As will be discussed, there are today – and were in 1944 – various reasons countries have been reluctant to adopt fifth freedom rights, but the most common reason is (and was) some form of economic protectionism. Open Skies

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<sup>7</sup> Phil W. Hudson, *Qatar Airways CEO Taunts Delta Air Lines*, ATLANTA BUSINESS CHRONICLE (Mar. 11, 2016), <https://www.bizjournals.com/atlanta/news/2016/03/11/qatar-airways-ceo-atlanta-route-would-rub-salt-in.html>.

<sup>8</sup> DELTA VIDEO, *supra* note 1.

<sup>9</sup> See ANNEX I for an explanation of each of the Nine Freedoms of the Air, including the Fifth Freedom.

<sup>10</sup> See e.g. Delta Air Lines flight DL 181, operated by Delta (as of May 2019) that carries passengers first from Honolulu, Hawaii to Tokyo, Japan and then from Tokyo to Manila, Philippines. The Fifth Freedom of the Air permits Delta, an American carrier, to fly the Tokyo to Manila leg, despite not being a Japanese or Philippine carrier.

agreements, such as the U.S.-Qatar (signed in 2001) and U.S.-U.A.E. (signed in 2002) bilateral agreements, are the international agreements that grant fifth freedom rights in addition to other terms that reduce government intervention.<sup>11</sup> In effect, they greatly liberalize international commercial aviation markets.

The controversy surrounding fifth freedom rights is not new. Then, as now, fifth freedom rights were the most hotly contested dispute during the 1944 Chicago Convention. The two opposing viewpoints were represented by the American delegation on one side and the British delegation on the other side. The United States advocated for fifth freedom rights as part of a push for greater free enterprise, while the United Kingdom sought a more protectionist approach and was against a general grant of fifth freedom rights. The U.S., which was emerging as a global superpower in the final days of World War II, was ready to expand international commercial aviation in order to take advantage of its burgeoning domestic industry. From the American perspective, civilian access to international air travel was viewed as not only economically beneficial, but also as an important development for a more unified, connected, and understanding world. In contrast, the U.K., devastated by the tribulations of war to a degree far more severe than the U.S., was hesitant to grant fifth freedom rights and thought a more modest approach was needed so its underdeveloped industry and fledging economy could have the opportunity to recover. The issue ultimately went unresolved at the Chicago Convention, but not long after, the U.S. was able to induce the U.K. and others to capitulate to their free enterprise ambitions. This raises the question: why would the U.K. concede on the issue of fifth freedom rights after resisting throughout the entire Chicago Convention?

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<sup>11</sup> See *Air Service/Open Skies Agreements*, *supra* note 2.

Previous legal and historical scholarship has not sought to address this question. Though there were a few journal articles written immediately following the Chicago Convention and a multitude of mainstream news stories recently written about the present day crisis, there has yet to be a piece that has sought to trace the development of fifth freedom rights, how they were historically understood, and the circumstances in which these international agreements were first negotiated. By analyzing the debates at the Chicago Convention, testimony at congressional hearings, and literature produced by the U.S. State Department, this paper seeks to illustrate the aspirations and fears of the negotiating countries and the legal and historical context in which these negotiations took place.

The central argument of this paper is that the U.K., and other protectionist-minded nations, acquiesced to fifth freedom rights because they perceived the law as being able to function effectively as a gatekeeper of globalization. That is to say, globalization – the increasing interdependence of economies as the result of the growing scale and speed in which capital, information, and technology can be exchanged – was not perceived as an external development that could at best be limited by international law.<sup>12</sup> Rather, the nations viewed the law as not only necessary to permit globalization, but more importantly, as strong enough to effectively limit, or if necessary, reverse it. Consequently, these countries did not view any concessions regarding fifth freedom rights as a move fraught with risk that would lead to permanent consequences that could not be undone. On the contrary, nations, such as the United Kingdom, were willing to “experiment” and make these concessions because they believed that the law could reverse any steps taken – and any subsequent ill effects – should free enterprise not

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<sup>12</sup> See generally, Gao Shangquan, *Economic Globalization: Trends, Risks and Risk Prevention*, CDP BACKGROUND PAPERS - UNITED NATIONS DEVELOPMENT POLICY AND ANALYSIS DIVISION DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS 1 (2000), [http://www.un.org/en/development/desa/policy/cdp/cdp\\_background\\_papers/bp2000\\_1.pdf](http://www.un.org/en/development/desa/policy/cdp/cdp_background_papers/bp2000_1.pdf).

live up to its expectations (i.e. actually benefit both countries). Indeed, there is clear evidence of nations, such as the United Kingdom, later acting upon this belief, such as withdrawing from international agreements that initially granted fifth freedom rights. There is even evidence to suggest that this belief – that the law could reverse the effects of globalization effectively – was not wholly inaccurate and that countries could use the law to secure the protectionist ends they sought despite having previously granted concessions, at least within the context of international commercial aviation.

Part I explains the present day issue regarding fifth freedom rights and defines the meaning of several key terms. Part II examines the history of the Chicago Convention of 1944 and the dispute over fifth freedom rights. In particular, Part II looks at how nations understood the purpose of fifth freedom rights, unveils the primary motivations of the parties involved in the negotiations, and describes the context in which these negotiations took place. Part III presents evidence that demonstrates that the U.K., and other nations, including the U.S., viewed the law as a gatekeeper of globalization, which made nations more willing to at least temporarily permit fifth freedom rights. Part III tracks how countries, particularly the U.S. and the U.K., used the law to expand and restrict fifth freedom rights over the next several decades. Part IV discusses whether this perception of the law as being able to control globalization was accurate, and it concludes by contrasting how fifth freedom rights were understood at the time of the Chicago Convention with how the Gulf carriers understand them today.

## **I. Present Day Fifth Freedom Dispute**

Throughout this current lobbying campaign, the U.S. legacy carriers have seemed particularly concerned about the government subsidies the Gulf carriers have received. While this emphasis on government subsidies may have been chosen for political reasons, the subsidies

are not actually the legacy carriers' main concern. Many airlines worldwide are heavily subsidized by their respective governments, yet none have elicited a similar reaction from the legacy carriers.<sup>13</sup> The World Trade Organization Agreement on Subsidies and Countervailing Measures ("SCM Agreement") does not apply to aviation.<sup>14</sup> The international legal agreement that does apply, the General Agreement on Trade in Services ("GATS"), explicitly excludes air transport systems.<sup>15</sup> This means that there are no global trade agreements that prohibit subsidies for international commercial aviation. Furthermore, given generous U.S. bankruptcy laws and other benefits, some claim that U.S. carriers themselves have received subsidies and other forms of government funding.<sup>16</sup>

Rather, the U.S. legacy carriers' real concern is a legal one derived from the Gulf carriers' use (or alleged misuse) of fifth freedom rights. There are nine "Freedoms of the Air," but only the first five have ever been formally recognized in any U.S. Open Skies agreement (*see* Annex I for all nine freedoms).<sup>17</sup> A visual representation of the first five freedoms from the International Civil Aviation Organization ("ICAO") is shown below:<sup>18</sup>

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<sup>13</sup> Ashley Nunes, *Government Airlines Subsidies...So What?*, FORBES (Nov. 17, 2016), <https://www.forbes.com/sites/realspin/2016/11/17/government-airline-subsidies-so-what/#4ce51bc71f5f>.

<sup>14</sup> *Emirates' Response to Claims Raised about State-Owned Airlines in Qatar and the United Arab Emirates*, EMIRATES, June 29, 2015 at 66-67, [http://content.emirates.com/downloads/ek/pdfs/openskies\\_rebuttal/EK\\_Response\\_Main.pdf](http://content.emirates.com/downloads/ek/pdfs/openskies_rebuttal/EK_Response_Main.pdf).

<sup>15</sup> *Id.*

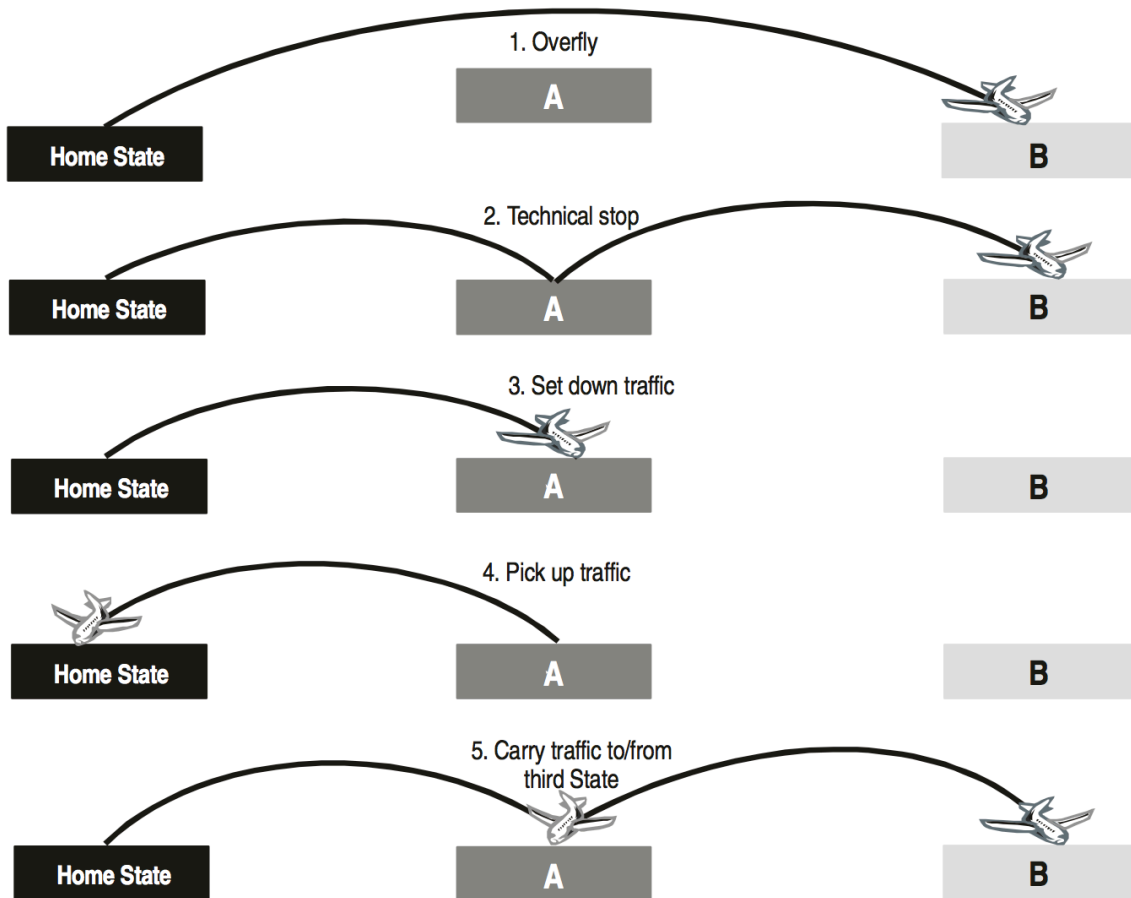
<sup>16</sup> Bill McGee, *How much do Taxpayers Support Airlines?*, USA TODAY (Sept. 2, 2015), <https://www.usatoday.com/story/travel/columnist/mcgee/2015/09/02/how-much-do-taxpayers-support-airlines/71568226/>.

<sup>17</sup> *Manual on the Regulation of International Air Transport – Doc. 9626*, International Civil Aviation Organization, 2d ed. (2004), 4.1-5 – 4.1-11, [https://www.icao.int/Meetings/atconf6/Documents/Doc%209626\\_en.pdf](https://www.icao.int/Meetings/atconf6/Documents/Doc%209626_en.pdf).

<sup>18</sup> *Id.*



Freedom	Description	Example
1 <sup>st</sup>	The right to fly over a foreign country without landing.	British carrier flying from London to Madrid over France without landing.
2 <sup>nd</sup>	The right to land in a foreign country for refueling or maintenance, but without embarking or disembarking passengers or cargo.	British carrier flying from London to Madrid and stopping in Paris only to refuel.
3 <sup>rd</sup>	The right to fly from one's country to a foreign country.	British carrier flying from London to Paris.
4 <sup>th</sup>	The right to fly from a foreign country to one's country.	British carrier flying from Paris to London.
5 <sup>th</sup>	The right to fly between two foreign countries on a flight originating or ending in one's own country.	British carrier flying from London to Madrid stops in Paris. Passengers/cargo may embark or disembark in Paris.



Open Skies agreements,<sup>19</sup> including the ones with Qatar and the U.A.E., generally allow for the first five freedoms.<sup>20</sup> On October 1, 2013, Emirates began operating a flight from Dubai to Milan to New York despite already offering a direct Dubai to New York service.<sup>21</sup> Prior to Emirates entering the market, only Italian and American carriers were flying the Milan-New York route.<sup>22</sup> A little more than a year after Emirates began this transatlantic service, the legacy carriers issued a fifty-five-page white paper to the White House and U.S. Departments of State, Transportation, and Commerce highlighting their concerns with the subsidies Gulf carriers had received and the negative impact the Milan-New York fifth freedom flight had on them in particular.<sup>23</sup>

Emirates' Milan-New York fifth freedom route served as the triggering event that spurred the legacy carriers into action, and the white paper set off the sequence of events that led to today's hostile and ever-escalating dispute. On several occasions throughout the paper, the legacy carriers blamed the Milan fifth freedom route for economic losses and identified it as a harbinger of what was to come if the Gulf carriers' expansion was left unchecked.<sup>24</sup> After sending the paper to the White House and the three Departments in January of 2015, the legacy carriers then began to increase the political pressure on the Obama Administration. On April 30, 2015, a bipartisan collection of 262 members of Congress sent a letter to then-Secretary of State

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<sup>19</sup> See *Air Service/Open Skies Agreements*, *supra* note 2.

<sup>20</sup> Suparna Reddy, *The Battle Lines in Open Skies*, COLUM. J. OF TRANSNATIONAL L., <http://jtl.columbia.edu/the-battle-lines-in-open-skies/>.

<sup>21</sup> Ben Mutzabaugh, *Emirates to Add New York JFK-Milan Nonstop*, USA TODAY (Apr. 18, 2013), <https://www.usatoday.com/story/todayinthesky/2013/04/08/emirates-airline-adds-first-route-between-usa-and-europe/2064113/>.

<sup>22</sup> *Id.*

<sup>23</sup> Jeffrey Dastin, *Exclusive: U.S. Airlines Disclose Details of Bookings Lost to Gulf Carriers*, REUTERS (Feb. 10, 2015), <https://www.reuters.com/article/us-airlines-competition-exclusive/exclusive-u-s-airlines-disclose-details-of-bookings-lost-to-gulf-carriers-idUSKBN0LF01W20150211>.

<sup>24</sup> *Restoring Open Skies: The Need to Address Subsidized Competition from State-Owned Airlines in Qatar and The UAE*, PARTNERSHIP FOR OPEN & FAIR SKIES (January 28, 2015) at 5, 49, 53, <http://www.openandfairskies.com/wp-content/themes/custom/media/White.Paper.pdf> [hereinafter "White Paper"].

John Kerry and then-Secretary of Transportation Anthony Foxx of the Obama Administration outlining these same concerns.<sup>25</sup> Today, there are more than 300 members of Congress who have written to support the legacy carriers.<sup>26</sup>

The legacy carriers argue that these fifth freedom flights violate the “spirit” of the Open Skies agreements.<sup>27</sup> There are other fifth freedom flights to the U.S. that the legacy carriers are not protesting, arguing instead that Emirates’ Milan to New York flight is different in kind.<sup>28</sup> For instance, they highlight that Emirates already had multiple direct Dubai to New York flights every day, which makes the Milan to New York flight more similar to a seventh-freedom<sup>29</sup> – something not permitted under the Open Skies agreement – than a fifth-freedom flight.<sup>30</sup> To clarify, a flight from Dubai to New York, with a necessary stop in Milan, is certainly permissible under the fifth freedom. A Milan-New York route flown by itself (i.e. not originating in Dubai) by Emirates, an Emirati airline, would be a seventh freedom flight. If direct Dubai-New York flights already exist, and a new Milan-New York route is created, nominally originating in Dubai, then is this Milan-New York route the final leg of a fifth freedom flight or a stand-alone seventh freedom flight, masquerading as a fifth freedom flight? An examination of the legal history of the original understanding of fifth freedom rights suggests the legacy carriers may in fact have a point.

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<sup>25</sup> Keith Laing, *262 House Lawmakers Side with Airlines in Open Skies Dispute*, THE HILL (Apr. 30, 2015), <http://thehill.com/policy/transportation/240722-262-house-lawmakers-side-with-airlines-in-open-skies-dispute>.

<sup>26</sup> *300 Members of Congress Voice Support for Enforcing Open Skies Agreements Against Gulf Carrier Subsidies*, PARTNERSHIP FOR OPEN & FAIR SKIES (2017), <http://www.openandfairskies.com/300-congressional-supporters/>.

<sup>27</sup> William Swelbar, *Violations of “Fair and Equal” Open Skies Agreements Threaten Large and Small American Communities and their Access to the Global Air Transportation Network*, PARTNERSHIP FOR OPEN & FAIR SKIES, <http://www.openandfairskies.com/wp-content/uploads/2015/07/Open-Skies-Violations-Threaten-American-Communities.pdf>.

<sup>28</sup> *Id.*

<sup>29</sup> A seventh freedom flight is a flight between two foreign nations. For example, an American carrier flying a route between London and Cairo that did not originate or end in an American city. See ANNEX I for an illustration.

<sup>30</sup> Ted Reed, *How is it that a Dubai-Based Carrier Gets to Fly an Airbus A380 Between Milan and New York?*, FORBES (Mar. 14, 2015), <https://www.forbes.com/sites/tedreed/2015/03/14/how-is-it-that-a-dubai-based-carrier-gets-to-fly-between-milan-and-new-york/#6036c52bab47>.

As part of his “America First” foreign policy, President Trump campaigned on the promise to strongly enforce international trade agreements and “crack down” on countries that violate these agreements.<sup>31</sup> President Trump’s election in November 2016 revitalized the legacy carriers’ political push to have the U.S. government request consultations with Qatar and the UAE to renegotiate new arrangements.<sup>32</sup> After showing a clip of President Trump promising to “stop foreign cheating,” Delta proclaims in its video, “This is the test case.”<sup>33</sup>

While Delta clearly is referring to the specific concern at hand, this dispute does in fact serve as a telling test case of a larger international political economy battle that the United States and the world have been undergoing since the end of World War II. On one side of the globalism debate, there are those who support free and open trade and frequently imply that a less restrictive, more prosperous economic future inevitably awaits.<sup>34</sup> On the other side, there are individuals negatively impacted by globalization who often employ emotional rhetoric to illustrate the acute pain they suffer at the expense of everyone else’s economic benefit.<sup>35</sup>

In January and May of 2018, the United States reached a tentative agreement with Qatar and the UAE, respectively.<sup>36</sup> In what was essentially a ceasefire, the United States openly supported Open Skies agreements and fifth freedom rights while Qatar and the UAE committed to more financial disclosure.<sup>37</sup> Most importantly, Qatar and the UAE confirmed they had no plans to further expand fifth-freedom routes, but there is nothing in the agreements prohibiting

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<sup>31</sup> *America First Foreign Policy*, THE WHITE HOUSE, <https://www.whitehouse.gov/america-first-foreign-policy>.

<sup>32</sup> White Paper, *supra* note 24, at 54.

<sup>33</sup> DELTA VIDEO, *supra* note 1.

<sup>34</sup> *The Benefits of International Trade*, U.S. CHAMBER OF COMMERCE, <https://www.uschamber.com/international/international-policy/benefits-international-trade>.

<sup>35</sup> *Trade, at What Price?*, THE ECONOMIST (April 2, 2016), <https://www.economist.com/news/united-states/21695855-americas-economy-benefits-hugely-trade-its-costs-have-been-amplified-policy>.

<sup>36</sup> Cathy Buyck, *U.S. and UAE Settle Long-running Open Skies Debate*, AIN Online (13 May 2018), <https://www.ainonline.com/aviation-news/air-transport/2018-05-13/us-and-uae-settle-long-running-open-skies-debate>.

<sup>37</sup> *Id.*

them from doing so in the future.<sup>38</sup> If (or more likely when) Qatar and/or the UAE decide to offer additional fifth-freedom routes, it is expected tensions between the legacy and Gulf carriers will escalate once again.

## II. The Chicago Convention (1944)

### A. Background

In the winding months of World War II, delegates from fifty-four countries met in Chicago to establish an international framework for civil aviation and create a corresponding international institution able to handle the difficult technical, political, and economic problems the industry presented.<sup>39</sup> The Second World War served as a major catalyst in the development of the airplane as moving both people and cargo worldwide became necessary for the intercontinental war effort.<sup>40</sup> The United States alone produced 300,000 aircraft during the war.<sup>41</sup> Moreover, in contrast to most of Europe and East Asia that saw their factories and other manufacturing facilities destroyed, the United States' productive capacity was virtually untouched during the war, giving it a head start to continue to expand production after the fighting ended.<sup>42</sup> Lastly, while the war temporarily ended most international commercial flights, the U.S. domestic industry not only survived during the war years (due in part to both a geographically large market and almost no enemy attacks on domestic soil), but actually grew.<sup>43</sup> In 1947, U.S. airlines carried almost thirteen million passengers domestically that year.<sup>44</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> Helen Hart Jones, *Amending the Chicago Convention and its Technical Standards – Can Consent of all Member States be Eliminated?*, 16 J. AIR L. & COM. 185, 185 (1949).

<sup>40</sup> *The History of ICAO and the Chicago Convention*, INTERNATIONAL CIVIL AVIATION ORGANIZATION, <https://www.icao.int/about-icao/History/Pages/default.aspx> [hereinafter *The History of ICAO*].

<sup>41</sup> PAUL B. LARSEN, JOSEPH C. SWEENEY, & JOHN E. GILLICK, *AVIATION LAW: CASES, LAWS, AND RELATED SOURCES*, 25 (2d ed. 2012).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

By the summer of 1944, it had become apparent the Allies would defeat Nazi Germany,<sup>45</sup> and it also had become increasingly clear that they needed to have plans to establish a legal and institutional framework that could govern and regulate postwar civil aviation.<sup>46</sup> The Chicago Convention was actually the third of three major conferences organized by the Allies in 1944, all which were hosted by the United States.<sup>47</sup> In July, world leaders met at the Bretton Woods Conference to begin the process of creating the International Bank for Reconstruction and Development (now part of the World Bank) and the International Monetary Fund; from August to October, the framework of the United Nations was negotiated at the Dumbarton Oaks Conference; and the Chicago Convention took place from November to December.<sup>48</sup>

The United States, which held advantages both from its position as a world leader in commercial aviation before the war and from its position in World War II (i.e. an Allied power not having to fight on its own soil), initiated several studies in order to determine how to best convert the aviation industry, which had made significant advances during the war, to postwar civilian purposes.<sup>49</sup> After consultations with the other Allies, the United States extended invitations for the Convention on International Civil Aviation of 1944 (“Chicago Convention”) to fifty-five countries.<sup>50</sup> Despite the risk many of them faced in traveling to Chicago during wartime, 523 delegates from fifty-four states attended the Convention.<sup>51</sup> The Axis powers were

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<sup>45</sup> *Id.* at 37.

<sup>46</sup> *World War II and the Airlines*, SMITHSONIAN NATIONAL AIR AND SPACE MUSEUM <https://airandspace.si.edu/exhibitions/america-by-air/online/heyday/heyday01.cfm>.

<sup>47</sup> LARSEN, *supra* note 41, at 25.

<sup>48</sup> *Id.*

<sup>49</sup> *The History of ICAO*, *supra* note 40; LARSEN, *supra* note 41, at 37, 39.

<sup>50</sup> *The History of ICAO*, *supra* note 40.

<sup>51</sup> *Id.* The fifty-four countries to attend were Afghanistan, Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Ireland, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, the Philippines, Poland, Portugal, South Africa, Spain, Sweden, Switzerland, Syria, Thailand, Turkey, United Kingdom, United States of America, Uruguay, Venezuela, and Yugoslavia. See CONVENTION ON INTERNATIONAL CIVIL AVIATION (Dec. 7, 1944) [https://www.icao.int/publications/Documents/7300\\_orig.pdf](https://www.icao.int/publications/Documents/7300_orig.pdf); LARSEN, *supra* note 41, at 37.

not invited.<sup>52</sup> Of the fifty-four nations, among the most prominent included the United States and the United Kingdom which would espouse diametrically opposing views on fifth freedom rights. The Soviet Union withdrew at the last minute, though it was not clear why.<sup>53</sup> In fact, the Soviet Union withdrew from the conference with such short notice that their delegates did not actually learn of this decision until the first day of the conference when the hotel informed them their reservations had been cancelled and the Soviet delegates had to call their consul to discover why.<sup>54</sup>

### **B. Adolf Berle, Jr. and Early Successes at the Convention**

Adolf A. Berle, Jr., a former U.S. Assistant Secretary of State, was chairman of both the conference itself and the American Delegation.<sup>55</sup> Berle ambitiously outlined thirty different subjects he wanted the conference to cover, ranging from technical standards to customs procedures to creating an international agency for civil aviation.<sup>56</sup> Berle certainly seemed to be the best person, if anyone, to lead such an enormous task. He was one of the original members of President Franklin Roosevelt's "Brain Trust."<sup>57</sup> Described as having the "energy of a dynamo" and a "brilliant mind," the polyglot Columbia law professor by 1944 had already tackled banking, stock market, and railroad reform, graduated Harvard University at age eighteen and Harvard Law School at age twenty-one, and served as a delegate to the Paris Peace

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<sup>52</sup> LARSEN, *supra* note 41, at 37.

<sup>53</sup> Howard Osterhout, *A Review of the Recent Chicago International Air Conference*, 31 VA. L. REV. 376, 378-79 (1944-45).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 376.

<sup>56</sup> *Id.* at 379, 384-85.

<sup>57</sup> Albin Krebs, *Adolf A. Berle, Jr. Dies at Age 76*, THE NEW YORK TIMES (Feb. 19, 1971) <http://www.nytimes.com/1971/02/19/archives/adolf-a-berle-jr-dies-at-age-of-76-lawyer-economist-liberal-leader.html>.

Conference at age twenty-four.<sup>58</sup> Perhaps unsurprisingly, one report at the time went so far as to refer to the Chicago Conference as “Mr. Berle’s show.”<sup>59</sup>

At this time, the multilateral agreement still in force was the Convention Relating to the Regulation of Aerial Navigation (today known as the Paris Convention of 1919), which had been ratified by thirty-two nations by the time of the Chicago Convention.<sup>60</sup> Article 1 of Chapter I (“General Principles”) held that “The High contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory.”<sup>61</sup> This principle of air sovereignty meant that each individual state had complete discretion over permitting foreign aircraft to use its airspace over its territory, including colonies and territorial waters.<sup>62</sup>

Even though international airlines did not yet exist at the time of negotiations in 1919, the parties took care to establish ground rules to govern future international commercial flights.<sup>63</sup> In particular, Article 15 of the Paris Convention required that a country obtain the “consent” of each and every state that its aircraft flew over.<sup>64</sup> That is to say, if the United Kingdom wanted to operate a flight between London and Cairo, it would need to negotiate bilateral agreements not only with Egypt, but also with any country whose airspace it flew over, such as France, Switzerland, Italy, and Greece (if the flight followed a similar path to the one used by airlines today).<sup>65</sup> Consequently, though the default rules in place protected countries’ “air sovereignty,”

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<sup>58</sup> *Id.*; *Adolf Augustus Berle, Jr.*, COLUMBIA UNIVERSITY [http://c250.columbia.edu/c250\\_celebrates/remarkable\\_columbians/a\\_a\\_berle.html](http://c250.columbia.edu/c250_celebrates/remarkable_columbians/a_a_berle.html).

<sup>59</sup> Osterhout, *supra* note 53, at 377.

<sup>60</sup> *Convention for the Regulation of Aerial Navigation*, 17 AM. J. OF INT’L L. 4, Supplement: Official Documents, 195-212 (Oct., 1923) [hereinafter “*Paris Convention*”]; LARSEN, *supra* note 41, at 35.

<sup>61</sup> *Paris Convention*, *supra* note 60, at 198.

<sup>62</sup> Thomas Burke, *Influences Affecting International Aviation Policy*, 11 LAW & CONTEMP. PROB. 598, 604 (1945-46).

<sup>63</sup> LARSEN, *supra* note 41, at 36.

<sup>64</sup> *Id.* Article 15: “The establishment of international airways shall be subject to the consent of the states flown over.”

<sup>65</sup> See e.g. *Egypt Air Route Map (LHR-CAI)*, EGYPT AIR, <https://www.egyptair.com/routemap/earoutemap.aspx?lang=en>.



they also established a laborious process that required extensive negotiations every time a country wanted to add a new foreign destination for one of its carriers and thus burdened the expansion of international commercial aviation.<sup>66</sup>

By the time of the Chicago Convention, thirty-two nations had ratified the Paris Convention (which was only in force in times of peace); notably, the United States, despite being one of the original signatories, never ratified the agreement, likely due to the Convention's connection to the League of Nations.<sup>67</sup> To ameliorate the cumbersome system established by the Paris Convention, Berle sought to negotiate a multilateral treaty that would broadly grant first and second freedoms: the freedom to fly over a country's airspace and the freedom to stop for technical needs (e.g. refueling or maintenance). In contrast to bilateral agreements that had to be negotiated on a country-by-country basis, a multilateral agreement would permit any signatory party to fly over another signatory party's airspace without needing further negotiation and remove one of the main obstacles preventing the expansion of international commercial flights.<sup>68</sup> Most of the nations present recognized these concessions were overdue and viewed such a multilateral treaty as fundamental in a post-World War II world (perhaps explaining in part the Soviet Union's eleventh hour withdrawal).<sup>69</sup>

The International Air Transit Agreement, commonly referred to as the Two Freedoms Agreement, was a multilateral agreement in which all signatories recognized these two rights for all states party to the agreement.<sup>70</sup> The treaty entered into force on February 28, 1945 and thirty nations signed to make the treaty law initially; today the number is 131 states.<sup>71</sup> Given the non-

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<sup>66</sup> LARSEN, *supra* note 41, at 8, 36; Osterhout, *supra* note 53, at 382.

<sup>67</sup> LARSEN, *supra* note 41, at 36.

<sup>68</sup> Osterhout, *supra* note 53, at 379.

<sup>69</sup> *Id.*

<sup>70</sup> LARSEN, *supra* note 41, at 39.

<sup>71</sup> *International Air Services Transit Agreement Signed at Chicago On 7 December 1944*, INTERNATIONAL CIVIL AVIATION ORGANIZATION, [https://www.icao.int/secretariat/legal/List%20of%20Parties/Transit\\_EN.pdf](https://www.icao.int/secretariat/legal/List%20of%20Parties/Transit_EN.pdf).

existent status of international air freedoms prior to the Chicago Convention, a multilateral agreement signed by a majority of the nations present represented a major victory and was celebrated as such.<sup>72</sup> The thirty nations to sign comprised an area greater than half of the world and an overwhelming majority of the world's population.<sup>73</sup>

In addition to the Two Freedoms Agreement, a great amount of progress was made on a host of other issues such as customs, safety regulations, and uniformity of signals.<sup>74</sup> The Chicago Convention also established an international body for civil aviation: ICAO, the International Civil Aviation Organization, which became fully ratified and a specialized United Nations agency in 1947.<sup>75</sup> However, the most contentious issue still remained: the dispute over fifth freedom rights.<sup>76</sup> One side, led by the United States' delegation, sought a multilateral agreement which included third, fourth, and most controversially, fifth freedom rights.<sup>77</sup> The other side, led by the United Kingdom's delegation, resisted, arguing for more protection of local and regional carriers.<sup>78</sup>

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<sup>72</sup> Osterhout, *supra* note 53, at 377.

<sup>73</sup> *Blueprint for World Civil Aviation*, Pub. 2348 UNITED STATES DEPARTMENT OF STATE 9 (1945) <https://babel.hathitrust.org/cgi/pt?id=uiug.30112104132391;view=1up;seq=5> [hereinafter *Blueprint*].

This State Department pamphlet included four articles from four of the main diplomats that were part of the American delegation at the Chicago Convention: Adolf A. Berle, Jr., a former Assistant Secretary of State and then-United States Ambassador to Brazil, Stokeley W. Morgan, Chief of the Aviation Division, Office of Transport and Communication Policy of the Department of State, William A. M. Burden, Assistant Secretary of Commerce for Air, and Edward Warner, Vice Chairman of the Civil Aeronautics Board. Berle's article was printed in the March 1945 issue of *Harper's Magazine*. Morgan's article was delivered as an address before a conference of mayors in Miami, Florida, on January 2, 1945. Burden's article was in the March 1945 issue of *Atlantic Monthly*. Warner's article was in the April 1945 issue of *Foreign Affairs*.

<sup>74</sup> Osterhout, *supra* note 53, at 377-78.

<sup>75</sup> *Convention on International Civil Aviation - Doc 7300*, INTERNATIONAL CIVIL AVIATION ORGANIZATION, <https://www.icao.int/publications/Pages/doc7300.aspx>.

<sup>76</sup> Richard Kermit Waldo, *Sequels to the Chicago Aviation Conference*, 11 L. & CONTEMP. PROB. 603, 623 (1945).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

**C. Unresolved Issues at the Convention: The Fifth Freedom Rights Dispute  
Between the United States and the United Kingdom**

The United States' position can be understood primarily as a matter of economic concern and secondarily as a matter of principle. First and foremost, the United States argued that fifth freedom rights were absolutely necessary for long international flights to be financially feasible.<sup>79</sup> The American delegates at the conference argued that without fifth freedom rights, the United States would be restricted to flying internationally to only a few countries across the Atlantic and the top half of South America.<sup>80</sup> In the words of William Burden, United States Assistant Secretary of Commerce for Air: "It would probably be impossible, if such a rule were applied [i.e. the British proposal], for a United States line to operate on a business basis beyond Western Europe, or in South America, beyond Rio de Janeiro and Lima."<sup>81</sup>

For example, take the Pan American Airways route in 1944 from New York to Buenos Aires. By the time the plane reached Rio de Janeiro after several stops, only thirty percent of its original traffic from New York remained; by the time it reached its final destination of Buenos Aires, the percentage of original traffic dropped to fifteen percent.<sup>82</sup> The infrequent (if not non-existent) routes under this type of system would mean "the number of trips...of long routes would be so low as to make the service unattractive to the traveler and uneconomical for the operator."<sup>83</sup> However, if passengers could be picked up along the way, the plane could still remain somewhat full and earn enough revenue to justify the longer routes. Without fifth freedom rights, a country's geographic location and technological development essentially

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<sup>79</sup> *Id.*

<sup>80</sup> *Blueprint, supra* note 73, at 20.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

determined the extent its carriers could engage in international air travel. With fifth freedom rights, American carriers departing from the United States could reach distant cities such as Cairo and Calcutta.<sup>84</sup>

Not only did the U.S. view its carriers ferrying citizens to faraway lands as economically beneficial, the U.S. also perceived international air travel as an important development for a more unified, connected, and understanding world. The official view of the United States going into the Chicago Convention was that “worldwide development of civil aviation is a powerful force for world unity and world peace.”<sup>85</sup> Berle wrote soon after the Convention that the world “needs the greatest dividend which air commerce can bring: a steady, unifying, close contact between nations.”<sup>86</sup> The United States had supporters, including notably many of the Latin American countries that benefited from fifth freedom flights and realized flights to and from the United States were unlikely to reach their nations without this legal arrangement.<sup>87</sup> In an effort to highlight other groups besides American businesses that were likely to benefit, the American delegation repeatedly emphasized during and after the Chicago Convention that consumers and the international community were also just as likely to reap rewards.<sup>88</sup> “The American dream,” in the words of Edward Warner, Vice Chair of the Civil Aeronautics Board, was for the “bright promise” of a growing international air industry to result in “more and easier intercontinental travel, better acquainted and friendlier peoples, and higher standards of living – to be realized in full only through the freest possible expansion.”<sup>89</sup> For parties negotiating while the Second

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<sup>84</sup> *Id.* at 12. A plane from New York to Cairo at this time would require stops in London, Paris, Geneva, and Rome. Without fifth freedom rights, a full plane departing from New York would arrive with an estimated two or three passengers by the time it reached Cairo.

<sup>85</sup> *Id.* at 7.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 13.

<sup>88</sup> *Id.* at 33.

<sup>89</sup> *Id.*

World War was still being fought, it is perhaps not surprising that the delegates appealed to arguments that their position could be a step toward preventing World War III.

Admittedly, there was a self-awareness within the United States that their free enterprise aspirations could not be ignored even with their sweeping, lofty language of world unity and peace. Thomas Burke, a former U.S. State Department official, wrote in 1949, “It would be the height of naïveté to contend that the United States desires an ‘open sky’ primarily to improve the welfare of mankind.”<sup>90</sup> Writing in the *Atlantic Monthly* just a few months after the Chicago Convention, Assistant Secretary Burden admitted that the United States was motivated by “self-interest and idealism,” but that “the importance of free communication and transport to the world lends moral support to the present American position.”<sup>91</sup> In other words, there was no hiding that the American delegation’s position conveniently aligned with the position of American business. As contemporary congressional testimony will show, American airlines wielded considerable political influence in the 1940s. Nonetheless, the two motivations – economic benefit for American business and a greater national interest in consumer well-being and international peace – were not necessarily mutually exclusive. Rather, the American delegation genuinely believed that both ends could be attained by the same means, without having to prioritize one over the other.

The American delegation felt it was unfair that the United States should be punished for its advantages in the aviation industry – advantages it held the decade prior to World War II.<sup>92</sup> Further, while some characterized the reversal of the United States’ historically protectionist economic policy as blatantly opportunistic, U.S. delegate members were quick to note that Great

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<sup>90</sup> Burke, *supra* note 62, at 602.

<sup>91</sup> *Blueprint*, *supra* note 73, at 19.

<sup>92</sup> *Id.* at 18.

Britain “long identified with the gospel of free trade and freedom of the seas, apparently forgot her bold assaults on mercantilism in the nineteenth century” when asking for significant restrictions in air travel.<sup>93</sup> That is to say, each side accused the other of conveniently switching its position on free trade now that the tables had turned, with the U.S. holding the dominant industry position over the U.K.

Around this time, the United States held a similar position in other contexts besides aviation that an interconnected economy and the free movement of people and goods would lead to prosperity and unity. Perhaps most notably, in 1948, under the Marshall Plan, the United States provided extraordinary economic relief to Western Europe.<sup>94</sup> In addition to humanitarian impulses, part of the rationale was that it would provide political stability in Europe and serve as a “stimulant to the U.S. economy by establishing markets for American goods.”<sup>95</sup> A few years later, when advocating for a national highway system in February of 1955, President Dwight Eisenhower said, “Our unity as a nation [depends on] individual and commercial movement over a vast system of interconnected highways crisscrossing the country and joining at our national borders with friendly neighbors to the north and south.”<sup>96</sup> In each instance, the U.S. perspective was that free enterprise could simultaneously benefit businesses and individuals, as well as create a more stable and peaceful world.

The United Kingdom, on the other hand, had serious concerns about their weakened economic position because of World War II.<sup>97</sup> After two world wars, the U.K. had suffered over

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<sup>93</sup> *Id.* at 19.

<sup>94</sup> *Marshall Plan, 1948* | *Office of the Historian*, U.S. DEP’T OF STATE, <https://history.state.gov/milestones/1945-1952/marshall-plan>.

<sup>95</sup> *Id.*

<sup>96</sup> Richard F. Weingoff, *The Greatest Decade 1956-1966: Celebrating the 50<sup>th</sup> Anniversary of the Eisenhower Interstate System*, U.S. DEP’T OF TRANSPORTATION (June 27, 2017) <https://www.fhwa.dot.gov/infrastructure/50interstate.cfm>.

<sup>97</sup> Burke, *supra* note 62, at 607.

a million casualties<sup>98</sup> and had a national debt that was 200 percent of its Gross Domestic Product (“GDP”) (including borrowing \$4.3 billion – almost \$60 billion in today’s dollars – from the United States in 1945).<sup>99</sup> Edward Warner of the American delegation wrote, “To Britons who in the past five years have seen one third of their homes blasted by missiles from the sky – and to the other peoples of Europe also – the airplane has more often seemed a curse than a boon.”<sup>100</sup> Not only did the war give the British and others a less rosy perception of the power of the airplane, it also left the United Kingdom at a severe disadvantage compared to the United States, which, with the exception of Pearl Harbor, largely did not see the destruction of World War II reach its soil.

Just a few months after the Convention, Warner reported in *Foreign Affairs*:

“It seems to be a common belief in Britain that in the long run one or two nations which possess well-established aircraft industries and other advantages will dominate the world’s air routes. Britain fears that the United States will enter the competition with so long a lead over the rest of the field as to make the contest an almost hopeless one; and there is an occasional intimation that the advantageous American position is due solely to our good fortune in being far removed from the battle fronts or the plunging V-2, and to our production of such great numbers of transport aircraft during the war.”<sup>101</sup>

The United Kingdom’s concern was one primarily of timing. The U.K.’s fear was not so much that the British aviation industry would never be able to compete with American carriers; rather, the concern was that if the relatively nascent international commercial aviation market were permitted to expand immediately following the conclusion of World War II, the U.S. would

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<sup>98</sup> *Deaths in the First and Second World Wars*, THE UNITED KINGDOM NATIONAL ARCHIVES, <http://www.nationalarchives.gov.uk/help-with-your-research/research-guides/deaths-first-and-second-world-wars/>.

<sup>99</sup> *Britain Finally Pays off WWII Debt*, POLITICS.CO.UK, <http://www.politics.co.uk/news/2006/12/29/britain-finally-pays-off-wwii-debt>.

<sup>100</sup> *Blueprint*, *supra* note 73, at 33.

<sup>101</sup> *Id.*

enjoy such a head start that it could establish a dominant position that would remain even once the U.K. recovered from the war.

Nor was the U.K. alone in their preference for a more protectionist approach; of the fifty-four governments represented at the Chicago Convention, forty-five decided to not join a multilateral agreement guaranteeing fifth freedom rights.<sup>102</sup> The British delegation raised a number of concerns during the conference, including: unfair business practices, governments subsidizing largely empty aircraft, wanting a “fair share” of international air traffic, and the concern that as “war-ravaged nations” they were hopelessly behind the United States and might never catch up and adequately compete with the U.S.<sup>103</sup> While there was broader agreement with some of these points, such as prohibiting unfair business practices, there was sharp disagreement over when – or even whether – the underdeveloped countries would be able to compete in the global market. Unsurprisingly, the “have-nots,” such as the U.K., adopted a more pessimistic view while the “haves,” namely the U.S., insisted a more optimistic future lay ahead. The United States argued that in the short- and long-term, infrequent long-haul flights, even if made financially feasible by fifth freedom rights, could never compete with local services operating on a much more consistent basis.<sup>104</sup> The American delegation also believed that many of these European concerns would be resolved as the world returned back to “normal” following the end of the war.<sup>105</sup>

At this time, most European airlines were operated as government monopolies, so heavy restrictions on international air travel was entirely consistent with the European understanding of

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<sup>102</sup> Burke, *supra* note 62, at 608.

<sup>103</sup> *Blueprint*, *supra* note 73, at 19.

<sup>104</sup> *Id.* at 20.

<sup>105</sup> *Id.* at 23.



the civil aviation market.<sup>106</sup> The U.K. also argued that fifth freedom rights would disproportionately hurt smaller markets who might not be able to sustain an industry large enough to compete on the global scale.<sup>107</sup> The United States countered by saying not only did fifth freedom rights actually benefit small countries since they could carry traffic other than their own small populations (and a majority of the small countries at the Chicago Convention did support fifth freedom rights), but that the British delegation's plan actually made it impossible for a small country to ever become a significant carrier of the world's air traffic.<sup>108</sup> Though unsuccessful, these arguments were attempts to alleviate British concerns that a small handful of mega-airlines from one or two nations might preclude local carriers from finding a market share in their own home markets.

Legally, the American delegation also made arguments that reflected that they too perceived the law as a type of gatekeeper of globalization. For instance, William Burden noted that "all privileges were granted on a provisional basis terminable on a year's notice."<sup>109</sup> In other words, if the U.K. decided that fifth freedom rights did not work out as expected, they could always undo the previously made concessions. Moreover, fifth freedom rights were only granted for "reasonably direct routes from the homeland" and the "legitimate purpose of international air transport is to connect one's home country with the other nations of the world."<sup>110</sup> That meant the United States and other powerful countries could not dominate markets in which they had no affiliation (e.g. the Asia-Oceania market).

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<sup>106</sup> *Id.* at 19.

<sup>107</sup> *Id.* at 20.

<sup>108</sup> *Id.* at 21.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

The American delegation also addressed the role technological developments might play in alleviating the U.K.'s concerns. The U.S. suggested that fifth freedom rights were likely to become less and less necessary as technology improved. Stokeley Morgan, who was Chief of the Aviation Division of the State Department and Secretary General of the American delegation, wrote, "The air traffic centers of the future will not be coastal cities as such or inland cities as such, but those which economic considerations dictate."<sup>111</sup> Here, Morgan was suggesting that as the maximum range of planes increased with technological advancements, airlines would not choose exclusively coastal cities simply because they were the only ones that could be reached. Rather, airlines would choose a city, even if it was deep inland (e.g. Chicago), based on whether it presented the most economic sense. Morgan continued: "So we should see the great airlines of the future taking off from many inland as well as coastal cities on direct routes to foreign cities all over the world."<sup>112</sup>

Though the U.S. may have been the stronger power, the U.K. arguably had the better bargaining position since the U.K. supported the status quo. The multilateral agreements the United States sought were affirmative steps that needed to be successfully voted upon in order to be implemented. If the two sides could not reach an agreement, the status quo persisted, and, in effect, the U.K.'s position won out. For example, the United States sought a multilateral agreement for fifth freedom rights while the alternative was separate country-by-country negotiations and bilateral agreements where each nation had at least some leverage.<sup>113</sup> The British delegation did offer a few proposals, but each required any international agreements to be controlled either by an international commission (e.g. an international equivalent to the

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<sup>111</sup> *Id.* at 16.

<sup>112</sup> *Id.*

<sup>113</sup> Osterhout, *supra* note 53 at 382.

American Civil Aeronautics Authority at the time) and/or a formula that would put restrictions on rates, capacity, and types of traffic.<sup>114</sup> Morgan, in an address less than a month after the Chicago Convention, complained there was “a very apparent desire to offset American skill and efficiency by arbitrary restriction which would give an artificial equality – a desire to put handicap weight on the American entry, so to speak.”<sup>115</sup>

While the United States had the upper hand in terms of economic and diplomatic power, the United Kingdom had its own leverage given that its position was in essence the status quo and it could prevent any progress. The U.K. position’s allowed it to control when, if any, progress was made in liberalizing international commercial aviation. As will be expounded upon later, the view that the law vis-à-vis these international agreements controlled the extent to which globalization could develop and could reverse any missteps if necessary, allowed the U.K. to wait and determine when they would be willing to make any concessions and what those concessions might look like. On the other side, though the United States wielded considerable power, the U.S. was at the mercy of the United Kingdom and other nations as to whether the law would be changed to permit a free enterprise system. Moreover, the lack of urgency from the British delegation to reach an agreement, and the frustration of the American delegation due to the inability to reach one, further shows that neither side viewed free enterprise or globalization as inevitable. Not only was the status quo an option, it was going to be *the* option if new legal agreements were not reached.

Members of the U.S. delegation certainly expressed frustrations with the difficulties of getting other countries to welcome fifth freedom rights. While pleased that the Two Freedoms agreement passed, the American delegates admitted there was little value in having the right to

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<sup>114</sup> *Blueprint, supra* note 73, at 10, 31; *see* LARSEN, *supra* note 41, at 38.

<sup>115</sup> *Blueprint, supra* note 73, at 10.

fly over someone's airspace if a country did not have an aircraft with the range to reach that distance directly.<sup>116</sup> That is to say, even if American carriers had the right to fly over say Australian airspace, if they were technologically unable to reach Australia without stopping multiple times, then the first freedom right granted was not of much value. The delegates were perhaps even more frustrated that their economic argument that long-haul flights were economically infeasible without fifth freedom rights was generally conceded by the end of the convention, and yet an agreement still could not be reached.<sup>117</sup>

It was not just the American delegation that was frustrated by the inability to reach a deal. Some in the United States were frustrated with the delegates themselves for not being able to work around these concerns. In 1949, Thomas Burke wrote, "Many serious students of international relations feel that the Chicago Conference failed mainly because the American delegation lacked the sure instinct and vision to neutralize in some degree the frank concern of many nations regarding the over-powering superiority of American air transport enterprises."<sup>118</sup> Even a few years after the Convention, the State Department was still having difficulty persuading other countries of the benefits of fifth freedom rights, a fact it lamented in its report to the newly formed ICAO.<sup>119</sup>

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<sup>116</sup> *Id.* at 14.

<sup>117</sup> *Id.* at 32.

<sup>118</sup> Burke, *supra* note 62, at 608. Burke continued his frustrations writing:

"Once again we are confronted with an attempt to rationalize an international problem on the notably fallacious and dangerous theory that since the 'open sky' principle would conform to the requirements of the United States, it should be acceptable to the rest of the world-regardless of any political or economic incompatibilities that may exist. This line of reasoning is usually accompanied by carefully chosen slogans concerning human progress and liberty, which have the effect of putting the nations that would oppose it in the position of being literally anti-social. The natural concomitant of such tactics is friction, which in the long run produces nothing better than angry and unsatisfactory compromises."

<sup>119</sup> *International Civil Aviation (1945-1948) Report of the Representative of the United States of America to the International Civil Aviation Organization*, Pub. 3131 U.S. DEP'T OF STATE 17 (May 1948).

#### **D. The Fifth Freedom Rights Dispute within the United States**

While the American delegation was consistent in its positions both during and after the Chicago Convention,<sup>120</sup> there were divisions within the United States among other stakeholders, such as Congress and American carriers. Many of these concerns were similar to the United Kingdom's concerns: competitive disadvantages (e.g. more expensive labor in the United States compared to other countries) preventing American carriers from operating in their own markets and the belief that multilateral agreements gave up too much leverage. Simply put, there was not unanimity within the United States as to whether fifth freedom rights were beneficial to the country.

The delegates for the United States had little patience for these criticisms publicly, but when before Congress, they were required to give these concerns more weight. Writing a few months after the convention, William Burden explained that “a small segment of informed American opinion, led by Pan American Airways,” resisted a multilateral agreement that included fifth freedom rights.<sup>121</sup> Chief among their concerns was that the aviation industry would follow the path of the international shipping industry in which cheaper foreign labor would lead to a significant competitive disadvantage for U.S. carriers.<sup>122</sup> Burden dismissed these concerns noting that foreign labor wage rates for the highly-skilled labor needed for aviation were similar to American wage rates.<sup>123</sup> Still, if this were true, even in direct bilateral negotiations (as Pan American Airways sought) as opposed to a multilateral agreement, it would

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<sup>120</sup> See generally *Blueprint*, *supra* note 73; LARSEN, *supra* note 41, at 37-39.

<sup>121</sup> *Blueprint*, *supra* note 73, at 18.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 19.

be highly unlikely that foreign countries would allow U.S. carriers to fly to their lands without permitting them to fly to the U.S., so the same issues would remain.<sup>124</sup>

Stokeley Morgan also addressed this minority view that the U.S. should engage in “power politics” and not concede anything until negotiating at every step of the way with each individual country.<sup>125</sup> First, he noted that the American delegation at the Chicago Convention was advised not just by government officials, but also American airlines and manufacturers who supported the delegation’s position during the conference.<sup>126</sup> Second, Morgan dismissed the idea that some form of cunning negotiation could obtain landing rights in a foreign country without reciprocally allowing foreign carriers to fly to the U.S. as “unrealistic in the extreme.”<sup>127</sup> Despite the small support for this minority view, Morgan said he nonetheless expected similar arguments to be made along these lines in the future.<sup>128</sup>

One reason is that this minority view had supporters within the United States Senate. Most notably was Senator Owen Brewster of Maine whose colleagues and delegates referred to him rather pejoratively as the “spokesman for Pan American Airways in the United States Senate.”<sup>129</sup> In one hearing, Senator Brewster and Senator Josiah Bailey of North Carolina critically questioned Welch Pogue, then-Chairman of the Civil Aeronautics Board; all three men were members of the U.S. delegation at the Chicago Convention.<sup>130</sup> Senator Bailey was adamantly against fifth freedom rights both during and after the Convention, referring to them as

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 14.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 5. Other less flattering titles included “the kept boy of Pan Am.” See DARWIN PORTER, HOWARD HUGHES: HELL’S ANGEL 701, (1st ed. 2005).

<sup>130</sup> Osterhout, *supra* note 53, at 383.

a “wretched policy.”<sup>131</sup> Senator Brewster commented that the lack of economic control over foreign fifth freedom flights to the U.S. led many to “fear that it would mean practical destruction of our American international aviation.”<sup>132</sup> Senator Bailey echoed these concerns, complaining:

“Mr. Pogue stated by way of interpreting this fifth freedom that the foreign nation could come here and pick up passengers and carry them to any other foreign nation... Well, I question very seriously whether that is predicated in the law, and I question very seriously whether that is not a wretched policy. I can see where the American foreign air transportation commerce could be shot to pieces under it... I am afraid they put the foreign nation’s transport companies on a parity with the American companies, and they get local trade to St. Louis, get the trade to Chicago, go wherever they please – any foreign nation.”<sup>133</sup>

In many ways, these fears of foreign competition mirror the same concerns the British delegation and other nations had during the convention, an observation that did not go by Senator Bailey unnoticed.<sup>134</sup>

The United States and the United Kingdom finally reached a bilateral agreement about a year later in Bermuda (“Bermuda I”) when the U.S. persuaded the U.K. of the necessity of fifth freedom rights in order for long-haul flights to be economically feasible.<sup>135</sup> In a hearing again featuring Senators Bailey and Brewster as well as Pogue, the State Department’s Office of Transport and Communications Policy Director, George Baker, explained the details of the

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<sup>131</sup> *Hearing on Executive A – A Convention on International Civil Aviation*, Hearing before Sen. Comm. on Foreign Relations, 79th Cong. 1st Sess. 38 (Feb. & Mar. 1945) [hereinafter *Convention Hearing*].

<sup>132</sup> *Id.* at 41.

<sup>133</sup> *Id.* at 38.

<sup>134</sup> Senator Bailey noted,

“I just stated that Great Britain wished to go to economic control. I think another reason is, Great Britain does not wish to come into these freedoms, here, these five. She does not intend that American planes shall land in Great Britain and take up passengers and go right to Paris or to Rome, or to leave Rome and stop in Great Britain to take up passengers and come here. She is never going to do that. I do not blame her at all. She will not sign these five freedoms in my judgment. Now I gathered that from talking with British delegates and from the general atmosphere.”

*Convention Hearing*, *supra* note 131, at 39.

<sup>135</sup> *Hearing on S. 1814 – A Bill to Amend the Civil Aeronautics Act of 1938, As Amended*, Hearing before Sen. Comm. on Commerce, 79th Cong. 2d Sess. 6 (Feb. & Mar. 1946) [hereinafter *Bermuda Hearing*].

agreement to the Senate Commerce Committee.<sup>136</sup> Of chief concern for the Senators was how good of a deal the United States was able to secure with Bermuda I.<sup>137</sup> Baker and others argued that the United States secured a great deal, receiving more destination points than the U.K. did.<sup>138</sup> When negotiating the deal, the American delegation relied on the input of a variety of American stakeholders, including U.S. carriers, such as American Airlines, Trans World Airlines, and Pan American Airways, to ensure that U.S. business had a voice and agreed that they were getting a good bargain.<sup>139</sup>

Perhaps surprisingly, the U.K., after holding out for over a year since the Chicago Convention, made a number of concessions. For a long time, the U.K. found the differing continental political configurations of Europe and North America to be inequitable when it came to reciprocal rights. The U.K. did not find it fair that the U.S. could fly from European state to European state (i.e. foreign country to foreign country, a fifth freedom right), yet European carriers could not fly from state to state within the United States (which made up most of the North American market) as that constituted cabotage (flying in between two points within a foreign country – something not permitted by fifth freedom rights, only by eighth and ninth freedom rights).<sup>140</sup> Eventually the United Kingdom conceded the point, recognizing the American geographic advantage was an unchangeable reality.<sup>141</sup> Baker highlighted this point during his testimony: “We have more to gain by this fifth freedom business than we have to lose, since as I say, in Europe we can pick them up and set them down as fill in, but they can’t within

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<sup>136</sup> *Id.* at 1.

<sup>137</sup> *Id.* at 32.

<sup>138</sup> *Id.* at 25.

<sup>139</sup> *Id.* at 26, 128-29. (Baker testified, “I don’t know what we would have done without the advice from these three companies during the discussions. Two of the domestic operators, who are also overseas operators, were present and in consultation with us, and they agreed that it was desirable. They were American and TWA.”). Pan American Airways also participated in the negotiations.

<sup>140</sup> *Id.* at 26.

<sup>141</sup> *Id.*



the United States.”<sup>142</sup> Despite all of these concessions, many Senators, including Senator Brewster, openly questioned whether Bermuda I was an adequate deal for the United States and its airlines.<sup>143</sup>

### **III. Using the Law to Control the Skies and the Market**

#### **A. Bermuda I (1946) – Expanding Fifth Freedom Rights**

Bermuda I was a “remarkable” success story less than two years removed from failed negotiations in Chicago.<sup>144</sup> In the year after World War II, the U.S. and the U.K. began to compete for the quickly growing trans-Atlantic market comprised mostly of wealthy tourists and business travelers.<sup>145</sup> In exchange for fifth freedom rights and no restrictions on frequency or capacity (i.e. how many flights a carrier could operate and how full those planes had to be), the U.S. compromised by permitting the regulation of international rates (i.e. fares).<sup>146</sup> President Harry Truman issued a statement shortly after Bermuda I was signed in which he declared the agreement “a very important forward step.”<sup>147</sup> In the same vein as the American delegation at the Chicago Convention, he cited both economic and humanitarian reasons as among the benefits of the agreement.<sup>148</sup>

Likewise, officials from the American delegation were quite excited to have reached what they viewed to be a considerably favorable agreement after several weeks of negotiation in

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<sup>142</sup> *Id.* at 32.

<sup>143</sup> *Id.* at 76.

<sup>144</sup> LARSEN, *supra* note 41, at 266.

<sup>145</sup> *Id.* at 27.

<sup>146</sup> *Id.* at 266.

<sup>147</sup> *Bermuda Hearing*, *supra* note 135, at 84-85.

<sup>148</sup> *Id.* at 85 (“That the two governments desire to foster and encourage the widest possible distribution of the benefits of air travel for the general good of mankind at the cheapest rates consistent with sound economic principles, and to stimulate international air travel as a means of promoting friendly understanding and good will among peoples and insuring as well the many indirect benefits of this new form of transportation to the common welfare of both countries.”).

Bermuda.<sup>149</sup> For context, Welch Pogue compared current American dominance in the aviation industry to that of Britain’s former dominance of the sea.<sup>150</sup> Pogue pressed before the Senate Commerce Committee that “we felt that we had to give a lot of weight to this new opportunity to develop international air routes and long-haul routes when we were so strategically situated to develop them quickly.”<sup>151</sup>

Among other provisions, Bermuda I did not limit the frequency in which either country could operate international routes. The American delegation “felt that this [was] in a high degree beneficial to the United States.”<sup>152</sup> Moreover, “It was won from the British only after an intensive struggle and very reluctantly acquiesced in by them.”<sup>153</sup> The British delegation wanted the frequencies split evenly with each country receiving 50 percent of the traffic.<sup>154</sup> However, the American side insisted that since there were more American carriers than British ones prepared to offer trans-Atlantic service and more traveling passengers in the United States, an even division would be unfair.<sup>155</sup> Part of the reason the U.S. secured this concession was that the U.S. dropped its longstanding opposition to regulated international fares.<sup>156</sup>

Even with this compromise, it certainly raises the question: how did the United States get the U.K. to acquiesce less than two years after being unable to do so in Chicago? After all, the United Kingdom strongly rejected any “five freedoms” agreement, but the bilateral Bermuda I agreement “[gave] the same thing” to the United States.<sup>157</sup> With the fifth freedom rights

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<sup>149</sup> *Id.* at 81-82.

<sup>150</sup> *Id.* at 81 (“So you come to a point now where we are trying, believing that we have air operators who are very competent and who have the only tradition there is in the field, as the British used to have it on the seas, but we have it in the air—who are eager to get this opportunity to develop the business.”).

<sup>151</sup> *Id.* at 82.

<sup>152</sup> *Id.* at 126.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 127.

<sup>155</sup> *Id.*

<sup>156</sup> LARSEN, *supra* note 41, at 266.

<sup>157</sup> *Bermuda Hearing*, *supra* note 135, at 146.

Bermuda I granted, American carriers could now carry passengers from cities in the United States to London or Edinburgh and then on to other European cities, such as Paris, Rome, or Berlin.<sup>158</sup>

One factor contributing to the Chicago Convention impasse was the stark difference in perspective between the United States and the United Kingdom in the final days of World War II, with the U.S. enjoying a more optimistic outlook and the U.K. not even yet beginning to recover from the suffering inflicted upon it during the war.<sup>159</sup> For instance, in the United States, Wendell Willkie, the failed 1940 Republican presidential candidate, wrote *One World* in 1943, in which he argued for international cooperation and the creation of international legal bodies such as the United Nations.<sup>160</sup> Selling over 1.5 million copies in four months, *One World* “became the greatest nonfiction bestseller to date in U.S. publishing history.”<sup>161</sup> By 1945, law review articles were referring to policies that were “in the direction of Wendell Willkie’s *One World*” suggesting not only was the work well known, but also that the neoliberal thesis he supported was as well.<sup>162</sup> In rejecting isolationism, Willkie strongly advocated for international democratic institutions (such as the eventual United Nations) and believed that this new postwar order of integrated states could lead to stability and prosperity.<sup>163</sup>

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<sup>158</sup> *Id.*

<sup>159</sup> One commentator at the time phrased it as a battle between “the English modified *cartel ideology* and the American principle of *free enterprise*, in which the Americans... finally won out.” Osterhout, *supra* note 53, at 377.

<sup>160</sup> Laura A. Stengrim, *One World: Wendell Willkie’s Rhetoric of Globalism in the World War II*, 21 MICH. ST. UNIV. PRES. 201, 201 (2018).

<sup>161</sup> DAVID REYNOLDS, FROM WORLD WAR TO COLD WAR: CHURCHILL, ROOSEVELT AND THE INTERNATIONAL HISTORY OF THE 1940S, 301 (2006). *One World* also echoed the idea that international commercial aviation would lead to peace. Reynolds wrote: “In his book the Republican presidential candidate of 1940 argued that air travel had abolished distance and that all people had to live together in the interests of peace. America’s task was to eschew isolationism and imperialism and set an example of international cooperation in a world ripe for U.S. leadership.” *Id.*

<sup>162</sup> Osterhout, *supra* note 53, at 377.

<sup>163</sup> REYNOLDS, *supra* note 161, at 301.

Notwithstanding a few Senators' harsh questioning of the American delegates, the war generally proved to the American public and government officials that they could rely upon "expertise directed and funded by the federal government."<sup>164</sup> Indeed, professional-government partnership successes such as the Manhattan Project and the development of radar and penicillin (not to mention low unemployment after the Great Depression) "convinced many Americans that experts could solve large problems."<sup>165</sup> American scientists were involved with both air and space research before, during, and after the war, leading to American domination in the industry.<sup>166</sup> Confident in its own government, the United States pushed for greater free enterprise, seeking new international agreements that lowered barriers to trade and eliminated discriminatory economic treatment among nations.<sup>167</sup>

However, despite all of the optimism at home, "nothing frightened American policymakers more" in the months following World War II "than the economic plight and social strife that the war had bequeathed" to Europe and East Asia.<sup>168</sup> Equally alarming (at least from the American perspective), nations around the world, including the United Kingdom, seemed to be losing faith in capitalism and free trade.<sup>169</sup> In 1945, membership in communist parties in Belgium, Greece, Italy, and Czechoslovakia had grown at least tenfold since the start of the war.<sup>170</sup> Even in the United Kingdom, the Labour Party won the July 1945 election, ousted Winston Churchill, and supported the nationalization of various industries.<sup>171</sup> As British

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<sup>164</sup> BRIAN BALOGH, *THE ASSOCIATIONAL STATE: AMERICAN GOVERNANCE IN THE TWENTIETH CENTURY*, 130 (2015).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* LARSEN, *supra* note 41 at 24-25.

<sup>167</sup> Jan J. Michalek, *WTO: A New World Economic Order*, 5 *POL. Q. INT'L AFF.* 47, 47-48 (1996).

<sup>168</sup> MELVYN P. LEFFLER, *FOR THE SOUL OF MANKIND: THE UNITED STATES, THE SOVIET UNION, AND THE COLD WAR*, 58 (1st ed. 2007).

<sup>169</sup> *Id.* at 58-59.

<sup>170</sup> *Id.* at 59.

<sup>171</sup> *Id.*

historian A.J.P. Taylor summarized: “Nobody in Europe believes in the American way of life—that is, in private enterprise. [They] want Socialism.”<sup>172</sup> U.S. Secretary of State Dean Acheson commented on Europeans: “They have suffered so much and they believe so deeply that the governments can take some action which will alleviate their sufferings, that they will demand that the whole business of state control and state interference shall be pushed further and further.”<sup>173</sup>

Despite these “fundamental differences” in the economic and political conditions of the U.S. and the U.K. and their opposing regulatory philosophies, the two nations were able to reach an agreement.<sup>174</sup> Other nations, aware of the negotiations and that the two countries’ main bargaining points had not changed, were surprised such a sweeping deal was reached.<sup>175</sup> But despite seemingly large barriers, the U.S. and the U.K. recognized that both nations stood to benefit greatly if they could negotiate an agreement for one of the most lucrative markets in international commercial aviation, the trans-Atlantic market.<sup>176</sup> Moreover, American carriers had been itching to increase the frequency of their flights to London, which were restricted under pre-war bilateral treaties.<sup>177</sup> The U.K. also was motivated to reach a deal after Pan American announced in the fall of 1945 its intention to cut its trans-Atlantic fares considerably, a move that would hurt British carriers.<sup>178</sup> With both countries facing pressure from their respective domestic industries to reach a deal, the U.S. conceded on the issue of fare control, while the U.K. conceded on the issues of fifth freedom rights and frequency and capacity restrictions.<sup>179</sup>

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> LARSEN, *supra* note 41, at 266.

<sup>175</sup> Barry R. Diamond, *The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements*, 41 J. AIR L. & COM. 419, 444 (1975).

<sup>176</sup> *Id.* at 443; LARSEN, *supra* note 41 at 266.

<sup>177</sup> P.P.C. Haanappel, *Bilateral Air Transport Agreements – 1913-1980*, 5 MD. J. OF INT’L L. 241, 246-47 (1980).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*; LARSEN, *supra* note 41 at 26.

As with the Chicago Convention, despite the United States appearing to be in the position to benefit most from these agreements, major American stakeholders continued to strongly protest any concessions. Pan American drafted a letter to George Baker, head of the American delegation for the Bermuda negotiations, in February of 1946.<sup>180</sup> After thanking the delegation for the opportunity to participate in negotiations, Pan American proceeded to reiterate its main concerns.<sup>181</sup> First and foremost, Pan Am wanted additional protection from “low wage” foreign airlines.<sup>182</sup> Second, the airline reaffirmed its disagreement with the U.S. Government’s position that competition in international markets among American carriers was fine even though many other governments were supporting monopolies (and low-wage foreign monopolies at that).<sup>183</sup>

The aforementioned Senate defender of Pan American, Senator Brewster, raised similar concerns of low-wage foreign carriers hurting American carriers,<sup>184</sup> and whether the United States, as a matter of principle, should negotiate a bilateral treatment with the United Kingdom after the U.K. would not “play ball with us [i.e. the United States]” by refusing to sign a five freedoms agreements.<sup>185</sup> Though the delegates were sympathetic to the latter concern, the line of questioning for that issue was ultimately dropped.<sup>186</sup> Senator Brewster also questioned whether the “only limitation of the Chicago agreement” was that fifth freedom flights must follow “reasonably direct” routes.<sup>187</sup> After some initial confusion, the testifying delegates confirmed that what constituted “reasonable” was up to “the discretion of the granting country.”<sup>188</sup> Senator Brewster also raised a relatively polemic hypothetical as to whether the five freedoms agreement

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<sup>180</sup> *Bermuda Hearing*, *supra* note 135, at 128.

<sup>181</sup> *Id.* at 128-29.

<sup>182</sup> *Id.* at 129.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 123-24.

<sup>185</sup> *Id.* at 98, 123-24.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 83, 147.

<sup>188</sup> *Id.* at 148.

might lead to a situation where “50 Russian planes might fly into Pearl Harbor every morning with an atomic bomb.”<sup>189</sup> The delegation sidestepped the controversial question by noting that all of the agreements being discussed and negotiated were for commercial, i.e. non-military, aviation.<sup>190</sup>

With the exception of the atomic bomb hypothetical, the three main concerns of Senator Brewster (i.e. low-wage foreign carriers, Bermuda I’s connection to any five freedoms agreements the U.S. had signed, and ambiguity to “reasonably direct”) were all interconnected. If the U.S. made concessions in Bermuda I to the U.K. in terms of cities that British carriers could fly to, there may be an expectation from countries which agreed to the U.S. fifth freedom demands earlier that they would at a minimum receive similar rights.<sup>191</sup> As Senator Brewster put it: “I would think that we would be, as Americans, in a very homely position if, under a bilateral agreement [e.g. Bermuda I] we gave rights which we did not accord to those who have swallowed whole our whole theories of freedom of the air [e.g. the Netherlands, which signed a “five freedoms” agreement].”<sup>192</sup> Senator Brewster’s fear was that low-wage foreign carriers from countries that had agreed to “five freedoms” agreements with the U.S. might try to add a many flights to the U.S. by stretching what could be considered a “reasonably direct” fifth freedom route and, in effect, drive American carriers out of American markets.<sup>193</sup> Put differently, did Bermuda I open the door for non-British foreign low-wage carriers to use fifth freedom flights to flood the American international market with low fares and bankrupt American carriers?

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<sup>189</sup> *Id.* at 147.

<sup>190</sup> *Id.* at 148.

<sup>191</sup> *Id.* at 98.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 98, 123-24.

Building off of Senator Brewster’s worries, Senator Magnuson asked the following hypothetical:

“I share some of the fears, then, that Senator Brewster has been talking about. Suppose one of the parties to the Chicago agreement [i.e. the five freedoms agreement] refuses to negotiate a bilateral, but they are still within the Chicago agreement, and they say, ‘Well we want to try and develop air transportation,’ and they decide—I don’t say that this will happen but it could happen—to fly into this country at unconscionable rates, just as low as they can, to develop their line and foster good will, what power would the CAB have to handle that situation?”<sup>194</sup>

Pogue replied that, at least at that point in 1946, the U.S. had the lowest fares in the entire world, which explained, in part, why American carriers stood to benefit so much, despite concerns over foreign monopolies.<sup>195</sup> However, should such a situation arise, Pogue was confident the State Department could raise the issue with the offending country and resolve the matter.<sup>196</sup>

Unsatisfied with that response, Senator Magnuson continued to pressure Pogue: “Assume that fails?” Pogue responded that the U.S. could terminate that agreement within a year “for any cause.”<sup>197</sup> A few moments later to satisfy the Committee’s concerns, Pogue again emphasized that “we are not faced with a situation that is incurable within a fairly short time.”<sup>198</sup> George Baker agreed and affirmed Pogue’s statements that withdrawing from the agreements was an available option, remarking, “I would take it for granted that under the Chicago air transport agreement if we didn’t like it we would withdraw from it or cancel.”<sup>199</sup> That is to say, the risk was low for the United States and any party to the agreement. The United States had reason to believe it would benefit tremendously given the current state of the international market;

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<sup>194</sup> *Id.* at 123.

<sup>195</sup> *Id.* at 124.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 125.



however, if that did not prove to be true over time, the United States could always retain the right to remove previously granted fifth freedom rights.

Not only did these termination clauses permit countries to withdraw from a treaty, which are typically irrevocable,<sup>200</sup> they also demonstrate that the law was perceived to be able to reverse, or at least limit, any effects of globalization. If globalization was viewed as a development that could not be backtracked once unleashed, then these opt-out clauses would be of little value. The American delegates testifying before Congress seemed unfazed in suggesting that these termination clauses served as a sufficient safeguard, and the Senators questioning them appeared more concerned about whether these termination clauses existed – not doubting whether they would be effective if necessary.<sup>201</sup>

Conversely, many frustrated American delegates believed that without corresponding international legal agreements permitting free enterprise, any potential benefits of globalization might not be realized. While Burden hoped free trade would expand following the Chicago Convention, barring newly negotiated bilateral or multilateral agreements, that expansion could not happen.<sup>202</sup> Additionally, there were concerns that at any moment (given adequate notice) the free enterprise gains negotiated could be taken away if the law changed.<sup>203</sup> States were allowed to “experiment” in granting different privileges and were permitted to withdraw any of the privileges granted via one of the Chicago agreements with six-months’ notice.<sup>204</sup> The disputes during the Senate hearings reveal that even the United States, the country at the time slated to

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<sup>200</sup> Lea Brilmayer & Isasias Yemane Tesfalidet, *Treaty Denunciation and “Withdrawal” from Customary International Law: An Erroneous Analogy with Dangerous Consequences*, 120 YALE L.J. ONLINE 217 (2011), <http://yalelawjournal.org/forum/treaty-denunciation-and-qwithdrawalq-from-customary-international-law-an-erroneous-analogy-with-dangerous-consequences>.

<sup>201</sup> *Bermuda Hearing*, *supra* note 135, at 124-25.

<sup>202</sup> *Blueprint*, *supra* note 73, at 23 (“Many bilateral agreements will still be necessary to begin post-war air transport operations.”).

<sup>203</sup> *Convention Hearing*, *supra* note 131, at 102.

<sup>204</sup> Harry A. Bowen, *Chicago International Civil Aviation Conference*, 13 GEO. WASH. L. REV. 308, 312 (1944-45).

benefit most from globalization, was divided about whether the country should enter into these international agreements.<sup>205</sup>

The diplomats of the American delegation routinely referred to their aspirations for a more globalized and prosperous world. Burden argued that the “real test of the success of Chicago will be whether the small but immensely significant area of freedom to trade expands.”<sup>206</sup> Berle argued that under these new agreements, “steadily, the sky is becoming open.”<sup>207</sup> The delegation emphasized the positives of the increasing and unifying contact between peoples and nations.<sup>208</sup> The *London Times*, despite the position of the British delegation, advocated that the Chicago Convention should seek to achieve “the fullest and freest exploitation of the new power of flight with its untold benefits to all the world.”<sup>209</sup> These quotes indicate people believed it was the Convention and other legal agreements – rather than technological, cultural, or social changes – that primarily controlled whether the new benefits of international commercial aviation would be realized. These debates also demonstrate that the U.S., the United Kingdom, and other countries believed that the law could serve as an effective gatekeeper of globalization. These beliefs were acted upon later by the U.K. with the Bermuda II agreement, which sought to undo many of the concessions granted under Bermuda I.

### **B. Bermuda II (1977) – Restricting Fifth Freedom Rights**

Over the next three decades, the United Kingdom became increasingly alarmed by the enormous growth of American carriers, and particularly their success in penetrating international air markets, including the trans-Atlantic market.<sup>210</sup> By 1975, legal commentators were

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<sup>205</sup> *Convention Hearing, supra* note 131, at 39.

<sup>206</sup> *Blueprint, supra* note 73, at 23.

<sup>207</sup> *Id.* at 9.

<sup>208</sup> *Id.* at 7, 33.

<sup>209</sup> Burke, *supra* note 61, at 602.

<sup>210</sup> LARSEN, *supra* note 41, at 266.

concluding that Bermuda I (at that time, still just called “Bermuda”) was “poised on the brink of either fundamental change or desuetude.”<sup>211</sup> In 1976, the United Kingdom unilaterally terminated Bermuda I, exercising its right to withdraw from an agreement it viewed as not restrictive enough on fifth freedom rights, among other issues.<sup>212</sup> A year later, the U.S. and the U.K. renegotiated an agreement to limit and reduce many of the concessions the U.K. had first made in 1946 with Bermuda I.<sup>213</sup> “Bermuda II,” as the new agreement was called, was significantly more restrictive than its predecessor, Bermuda I.<sup>214</sup> Among other provisions, Bermuda II restricted the number of U.S. airports that could have flights to the London Heathrow airport, put restrictions on how many flights from the U.S. could serve Heathrow, and severely restricted fifth freedom rights, most notably limiting the rights of U.S. airlines to carry traffic from London to Europe.<sup>215</sup>

From the United States’ perspective, Bermuda II was viewed as a major policy setback and hostile to competitive markets.<sup>216</sup> If the goal of the United Kingdom was to reverse the effect of globalization, or at least limit it, withdrawing from Bermuda I and negotiating Bermuda II seemed largely successful. Under Bermuda I, the United States enjoyed a 60 percent share of the U.S.-U.K. market, but under Bermuda II, those numbers flipped and it was the United Kingdom who enjoyed a 60 percent share of the U.S.-U.K. market.<sup>217</sup> Among the heavy restrictions included: “American Airlines [was] not allowed to serve Heathrow from its primary hub in

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<sup>211</sup> Diamond, *supra* note 175, at 495.

<sup>212</sup> Robert R. Gray, *The Impact of Bermuda II on Future Bilateral Agreements*, 3 AIR L. 17, 17 (1978).

<sup>213</sup> *Id.*

<sup>214</sup> *Air Service Agreements Between the United Kingdom and the United States*, SELECT COMMITTEE ON ENVIRONMENT, TRANSPORT AND REGIONAL AFFAIRS – EIGHTEENTH REPORT (Prepared Aug. 15, 2000).

<sup>215</sup> *International Aviation Relations*, Hearing before Subcommittee on Aviation of the Sen. Comm. on Commerce, Science, and Transportation 104th Cong. 2d Sess. 72 (Mar. 14, 1996) [hereinafter *Aviation Subcommittee Hearing*]; DAWNA L. RHOADES, *EVOLUTION OF INTERNATIONAL AVIATION* 96 (3d ed. 2016).

<sup>216</sup> RHOADES, *supra* note 215, at 96.

<sup>217</sup> *Aviation Subcommittee Hearing*, *supra* note 215, at 72.

Dallas; United [was] limited to one roundtrip flight a day between its primary hub at O’Hare [Chicago] and Heathrow; and Continental, Delta, Northwest, and TWA [were] not allowed to serve Heathrow at all.”<sup>218</sup> The goals of the Chicago Convention – to increase passenger traffic and expand international markets – were effectively and directly undermined under Bermuda II. As one legal commentator said at the time, “In effect, the British had gone back to their original 1946 position.”<sup>219</sup>

Consequently, the 1940s congressional debates over the termination clauses appear to have been accurate. The United Kingdom, in this case, perceived that fifth freedom rights were not assisting its carriers. Insofar that the U.K. successfully withdrew unilaterally, reduced foreign competition, and regained its market share, the law “worked” as expected. That is to say, the termination clause had its intended effect. The debates in the 1940s both at the Chicago Convention and in congressional hearings that presumed these termination clauses would be sufficient to undo not only the agreements, but also any ill effects, turned out to be an accurate assumption. Bermuda II demonstrated that a country could use the law to welcome globalization, observe its effects, and then subsequently use the law at a later date to effectively reverse both the original agreement, and most importantly, the economic effects of the agreement. Technological advances in the aviation industry did not make the effects of globalization inevitable or irreversible, at least in the context of international commercial aviation. What had been done could be undone, and the mechanism to make this reversal possible was the law.

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

### C. Open Skies (1992-2019) – Expanding Fifth Freedom Rights Once Again...at Least for Now

If the 1970s demonstrated cases of the law limiting and reversing trends of globalization, the 1990s and 2000s were an example of international law expanding globalization. Despite the significant setback that was Bermuda II, the United States actually continued to negotiate with great success increasingly liberal bilateral agreements with other countries around the world, such as with Israel and the Netherlands in 1978, only a year removed from Bermuda II.<sup>220</sup> In 1983, the U.S. cut back on some of Bermuda II's restrictions for cargo carriers.<sup>221</sup> However, the most significant breakthrough was the development of Open Skies agreements which permit up to and including fifth and sixth freedom rights.<sup>222</sup>

The first Open Skies agreement was signed in 1992 between the United States and the Netherlands.<sup>223</sup> Bermuda II was again renegotiated in 1995 to ease some of its restrictions, and both the United States and the United Kingdom subsequently saw an expansion of air services, passenger traffic, and other economic benefits.<sup>224</sup> In 2007, the U.S. successfully negotiated a multilateral Open Skies agreement with the European Community and its member states, finally fulfilling a goal the U.S. first sought in 1944.<sup>225</sup>

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<sup>220</sup> LARSEN, *supra* note 41, at 267.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* Sixth freedom rights are just a variation of fifth freedom rights. Instead of a carrier departing from its home country to two subsequent foreign stops (e.g. an American carrier traveling from New York to London to Paris), the carrier departs from a foreign stop, arrives in its home country, and then travels to a second foreign stop (e.g. an American carrier traveling from London to New York to Mexico City).

<sup>223</sup> *Id.*

<sup>224</sup> Charles A. Hunnicutt, *U.S.–E.U. Second Stage Air Transport Agreement: Toward an Open Aviation Area*, 39 GA. J. INT'L & COMP. L. 663, 673 (2011).

<sup>225</sup> *Air Service/Open Skies Agreements*, *supra* note 2.

Open Skies agreements have been shown to add \$4 billion in annual economic gains for consumers, increase air traffic, and support and create jobs.<sup>226</sup> The U.S. State Department calls them “pro-consumer, pro-competition, and pro-growth.”<sup>227</sup> One economic study in 2006 found that after two countries liberalized their international air market, they typically saw traffic growth between 12 percent and 35 percent in subsequent years.<sup>228</sup> The study also estimated that the creation of the Single European Aviation Market in 1993 led to traffic growth rates double of what they were prior to the agreement.<sup>229</sup> Lastly, the study estimated that full liberalization of the U.S.-U.K. market could generate over 100,000 new jobs and collectively grow their GDPs by almost \$8 billion.<sup>230</sup>

That said, even this same study that highlighted the economic benefits of liberalizing the international aviation market lamented the role of international legal agreements in frustrating these free enterprise efforts: “Despite today’s trend toward global markets, free trade, the internet, and the economic integration of entire continents, one of the most globalized, technology-intensive industries remains encumbered by rules that stifle competition and prevent airlines, communities, passengers, and shippers from benefiting to the fullest.”<sup>231</sup> The report continued: “‘Bilateral air service agreements’ (‘ASAs’) that continue to govern much of world trade in aviation define the terms under which airlines will link their two home territories. These ASAs often frustrate market growth, force users to pay a price premium, and create a series of vested interests.”<sup>232</sup>

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<sup>226</sup> *Open Skies Partnerships: Expanding the Benefits of Freer Commercial Aviation*, U.S. DEP’T OF STATE, <https://www.state.gov/e/eb/rls/fs/2017/267131.htm>.

<sup>227</sup> *Id.*

<sup>228</sup> *The Economic Impact of Air Service Liberalization*, INTERVISTAS CONSULTING, INC. (2006), [http://www.intervistas.com/downloads/Economic\\_Impact\\_of\\_Air\\_Service\\_Liberalization\\_Final\\_Report.pdf](http://www.intervistas.com/downloads/Economic_Impact_of_Air_Service_Liberalization_Final_Report.pdf).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

On the one hand, these are examples of globalization, and even though the frustrations from the cited economic report suggest liberalization is clearly not assured going forward, one might try to argue that they are potentially evidence of inevitability. However, it took over half a century after the Chicago Convention for the first multilateral Open Skies agreement to be reached – essentially what the United States first proposed back in 1944 – suggesting such a development was hardly inevitable. In fact, the U.S. has only entered into two multilateral Open Skies agreements,<sup>233</sup> and given “Brexit,” the one with the European Union may be affected.<sup>234</sup>

The 1970s and the 1990s demonstrate that the United States and the United Kingdom attempted to use the law, specifically international legal agreements, to intentionally expand or reverse the trends of globalization, at least within the aviation context. There is evidence to suggest that, in many ways, these attempts to expand and restrict globalization and its effects were successful. Moreover, these actions demonstrate that these countries were acting on the belief that the law could control globalization – opting out of or negotiating international agreements as they saw necessary.

Today, U.S. carriers are calling into question the United States’ Open Skies agreements with Qatar and the United Arab Emirates. If the United States terminated the agreements, to a large extent globalization trends would not only be stopped, but in many ways reversed. Passenger traffic between the two countries would be expected to fall and prices likely would rise.<sup>235</sup> Assuming that cargo rights also fell with passenger rights, there would be a significant

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<sup>233</sup> *Air Service/Open Skies Agreements*, *supra* note 2.

<sup>234</sup> Lisa O’Carroll, *U.S. Airlines ‘Very Concerned’ over Aviation Regulations Post-Brexit*, THE GUARDIAN (Sept. 20, 2017), <https://www.theguardian.com/politics/2017/sep/20/us-airlines-aviation-regulations-post-brexit-open-skies-agreement-eu>.

<sup>235</sup> Andrew Restuccia & Michael Grunwald, *Trump Rethinking Aviation Agreements with Gulf Countries*, POLITICO (July 12, 2017), <https://www.politico.com/story/2017/07/12/trump-aviation-gulf-countries-240426>.

drop in trade relations between the two countries.<sup>236</sup> There might be additional retaliatory measures from the United Arab Emirates or Qatar.<sup>237</sup> As in 1977 with Bermuda II, it seems that a change in international law even today could limit, if not reverse, the trends of globalization.

The Obama Administration held informal talks regarding the Gulf carriers fifth freedom flights dispute.<sup>238</sup> Ultimately, those talks did not result in any action on the part of the U.S. and the agreements were unaffected.<sup>239</sup> In 2018, the U.S. reached agreements with Qatar and the UAE that temporarily paused hostilities.<sup>240</sup> The two Gulf states reported they had no plans to add fifth freedom routes, but they are not bound in any way from changing their mind in the future.<sup>241</sup> The Open Skies agreements remain in force.<sup>242</sup> If, or more likely when, the UAE and/or Qatar decide to expand fifth freedom routes, the legacy carriers are expected to cry foul once again and pressure the U.S. government to take stronger steps to protect them. Whether these stronger steps include a moratorium on any additional fifth freedom flights to the U.S., formal consultations under Article 13 of the Open Skies agreements, or even termination under Article 15 of the Open Skies agreements, remains to be seen.<sup>243</sup> As in 1944 and in 1977 and now today, the law was and is viewed as the medium that will control the degree of globalization, and if the U.S. finds its position unsatisfactory, changing the legal agreements could be its next step.

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<sup>236</sup> Michael Sasso & Mary Schlangenhein, *U.S. Defenders of Gulf Airlines Press Tillerson on Open Skies Deals*, BLOOMBERG POLITICS (Aug. 1, 2017), <https://www.bloomberg.com/news/articles/2017-08-01/u-s-defenders-of-gulf-airlines-are-said-to-press-tillerson>.

<sup>237</sup> Terry Maxon, *Four U.S. Airlines Side with Gulf Carriers, against American Airlines, Delta Air Lines and United Airlines in Open Skies Battle*, THE DALLAS MORNING NEWS (Aug. 3, 2015), <https://www.dallasnews.com/business/airlines/2015/08/03/four-u-s-airlines-side-with-gulf-carriers-against-american-airlines-delta-air-lines-and-united-airlines-in-open-skies-battle>.

<sup>238</sup> Brianna Gurciullo & Andrew Restuccia, *Trump Administration won't Penalize Mideast Airlines – Yet*, POLITICO, (Dec. 12, 2017), <https://www.politico.com/story/2017/12/12/trump-mideast-airlines-delay-penalties-218797>.

<sup>239</sup> *Id.*

<sup>240</sup> Cathy Buyck, *U.S. and UAE Settle Long-running Open Skies Debate*, AIN Online (13 May 2018), <https://www.ainonline.com/aviation-news/air-transport/2018-05-13/us-and-uae-settle-long-running-open-skies-debate>.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*



#### IV. Conclusion

Examining the legal history of fifth freedom rights has shed further light on the context in which these rights were first negotiated, demonstrating that countries believed (and had reason to believe) the law could effectively control globalization and its effects, and revealing that the original purpose and intended effect of fifth freedom rights was to make international commercial aviation financially feasible. Understanding the debates around fifth freedom rights both today and over the past seventy-five years provides insights into the relationship between law, economics, technology, domestic politics, and international relations.

First and foremost, despite policymakers' best efforts and (hopefully) genuine concerns about world unity and peace, national economic concerns were always the primary factor for all countries involved and continue to be. One legal commentator in 1960 noted "The Chicago Conference is a classical demonstration of the postulate that nations, no matter how enlightened, are not capable of understanding and comprehending anything beyond their own national interest."<sup>244</sup> Whether it was the United Kingdom seeking protectionist policies or the United States seeking unrestricted free enterprise, the main motivation was whether the nation was getting the best deal it could get. Articles written around time of the Chicago Convention and congressional testimony all suggest American diplomats during and after World War II did genuinely believe international civil aviation would contribute toward a sharing of cultures, economic prosperity, and peace. However, they were clearly frustrated by a lack of opportunity to capitalize on the United States' newfound position as a world leader both generally and in the field of commercial aviation, specifically. Furthermore, while both sides were motivated out of economic concerns, both sides also viewed the law as vital to securing these economic aims.

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<sup>244</sup> Diamond, *supra* note 175, at 442 (citing Jones, *The Equation of Aviation Policy*, 27 J. AIR L. & COM. 221, 234 (1960)).

Second, the law was perceived as having a real, tangible effect on the international commercial aviation market. Both sides seemed to understand the law as serving as a type of gatekeeper for globalization. That is to say, for the United States and others seeking unrestricted free enterprise, an international legal agreement authorizing fifth freedom rights, among others, was necessary for globalization to occur. Similarly, the United Kingdom and other nations seeking protectionist policies did not seem to view globalization as an external reality that could at best be delayed; rather, their approach was to have the law define and limit the extent to which globalization occurred.

Moreover, the right of countries to exit from these agreements if they did not work out as desired is further evidence that these countries did not believe entering into these agreements was about to unlock the floodgates of globalization of which there was no turning back. Rather, states thought they could test these new agreements and if they felt their country was falling behind, they had the safeguard of always opting out and returning to their original position prior to the agreements. The United States did not view these opt-out clauses as meaningless concessions. On the contrary, there was concern, if not frustration, that any routes and developments achieved via the agreements were not permanent since a state could leave at any time as long as it gave the requisite notice. At the same time, other stakeholders in the United States, including members of Congress, found these safeguards as vital for the same reasons as the United Kingdom. These perceptions appear to have been fairly accurate after the U.K. withdrew from Bermuda I unilaterally and then successfully negotiated Bermuda II that limited foreign competition and increased its market share in the trans-Atlantic market. By renegotiating the governing legal agreements, the U.K. not only terminated Bermuda I, but also reversed many of its globalizing effects.

Lastly, fifth freedom rights were originally intended to make it financially feasible for carriers to reach foreign lands they could not otherwise reach without multiple stops. The idea was that fifth freedom rights would only apply to through-traffic so any intermediate stops had to follow a “reasonably direct” route from the departure city to the final destination. Emirates’ Dubai-Milan-New York fifth freedom flight follows a reasonable route, although it will be interesting to see to what extent Emirates will push the boundaries of what constitutes a reasonable route if it chooses to add more fifth freedom flights in the future. For example, Emirates has already added a Dubai-Athens-New York fifth freedom flight and was looking to add more fifth freedom transatlantic flights via Budapest, Hungary.<sup>245</sup>

The most incriminating piece of evidence against Emirates is that it chose to begin operating the Dubai-Milan-New York flight *after* already having several Dubai-New York flights nonstop. As these freedoms were originally understood, fifth freedom rights were a means of overcoming technological limitations in order to provide intercontinental air travel.<sup>246</sup> As technology improved and the maximum range of aircraft increased, the delegates at the Chicago Convention believed the need for fifth freedom rights would be reduced.<sup>247</sup> American delegates believed that as the range of airlines improved technologically, non-direct routes would become less and less necessary.<sup>248</sup> If there were fewer non-direct routes, then there would be less of a need for fifth freedom rights. After all, the primary purpose fifth freedom rights were initially proposed and advocated for was to make non-direct flights financially feasible because planes needed to make relatively frequent stops due to technological limitations. Furthermore,

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<sup>245</sup> Deena Kamel & Michael Sasso, *Emirates Stokes Ire of U.S. Airlines with Flights Through Greece*, BLOOMBERG (Jan. 23, 2017) <https://www.bloomberg.com/news/articles/2017-01-23/greece-gets-year-round-u-s-flights-for-first-time-since-crisis>.

<sup>246</sup> *Blueprint*, *supra* note 73, at 16.

<sup>247</sup> *Id.* (“So we should see the great airliners of the future taking off from many inland as well as coastal cities on direct routes to foreign cities all over the world.”).

<sup>248</sup> *Id.*

this argument was made to alleviate the United Kingdom's concerns that fifth freedom rights would be used by a few mega-carriers to dominate faraway markets.<sup>249</sup> It would not be unreasonable to notice parallels between the hypothetical the U.K. feared and the situation U.S. legacy carriers now face with the Gulf carriers entering the trans-Atlantic market.

By having a Dubai-New York flight nonstop for years (and continuing to operate multiple direct flights every day), Emirates demonstrated the ability to reach North America without needing to stop to refuel and enough passenger traffic to make these direct flights profitable. Seventh freedom rights – the right to fly between two foreign nations – are still barred in the Open Skies agreements with the UAE and Qatar (and in any Open Skies agreement for that matter). In creating a Milan to New York leg that did not need to exist, is Emirates in effect operating a seventh freedom flight merely masked as a fifth freedom? This is a question ultimately for U.S. policymakers and stakeholders to resolve, but this application of fifth freedom rights would have been unrecognizable to the delegates at the Chicago Convention.

Fifth freedom rights remain a hotly contested issue. In 1944, termination clauses and the belief that the law could reverse the effects of globalization made states more likely to make some concessions and experiment with liberalization. When the agreements led to unintended results, countries did unilaterally withdraw, as seen with the United Kingdom withdrawing from Bermuda I in 1976. There is evidence to suggest that such a move was largely successful for the U.K in reversing the effects of globalization. How the United States will use this history and the legal options available to it remains to be seen. However, if there is one idea that both sides can agree upon, it is that the law, via these international agreements, will control the development of international commercial aviation and its corresponding economic, globalizing effects.

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<sup>249</sup> *Id.*

## Annex I

The following chart outlines the nine Freedoms of the Air. The first five were adopted in the United States' Open Skies agreements with Qatar and the UAE. The last four freedoms (i.e. sixth through ninth) are characterized as “so-called” freedoms because only the first five freedoms have been officially recognized by international treaty.<sup>250</sup> A visual illustration of the nine freedoms is provided on the following page.

<b>Freedom</b>	<b>Description</b>	<b>Example</b>
1 <sup>st</sup>	The right to fly over a foreign country without landing.	British carrier flying from London to Madrid over France without landing.
2 <sup>nd</sup>	The right to land in a foreign country for refueling or maintenance, but without embarking or disembarking passengers or cargo.	British carrier flying from London to Madrid and stopping in Paris only to refuel.
3 <sup>rd</sup>	The right to fly from one's country to a foreign country.	British carrier flying from London to Paris.
4 <sup>th</sup>	The right to fly from a foreign country to one's country.	British carrier flying from Paris to London.
5 <sup>th</sup>	The right to fly between two foreign countries on a flight originating or ending in one's own country.	British carrier flying from London to Singapore stops in Dubai. Passengers/cargo may embark or disembark in Dubai.
6 <sup>th</sup>	The right to fly from one foreign country to another while stopping in one's own country.	British carrier flying Paris to New York stops in London. Passengers/cargo may embark or disembark in London.
7 <sup>th</sup>	The right to fly between two foreign countries without stopping in one's own country.	British carrier flying from Paris to New York.
8 <sup>th</sup>	The right to fly within a foreign country on a flight originating or ending in one's own country.	British carrier flying from London to New York to Phoenix.
9 <sup>th</sup>	The right to fly within a foreign country without stopping in one's own country.	British carrier flying from New York to Phoenix.

<sup>250</sup> *Freedoms of the Air*, INTERNATIONAL CIVIL AVIATION ORGANIZATION, <https://www.icao.int/Pages/freedomsAir.aspx>.

