

2000

American Prohibitions against Gambling in International Aviation: An Analysis of the Gorton Amendment under the Law of the United States and International Law

Brian E. Foont

Recommended Citation

Brian E. Foont, *American Prohibitions against Gambling in International Aviation: An Analysis of the Gorton Amendment under the Law of the United States and International Law*, 65 J. AIR L. & COM. 409 (2000)

<https://scholar.smu.edu/jalc/vol65/iss2/8>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

AMERICAN PROHIBITIONS AGAINST GAMBLING IN INTERNATIONAL AVIATION: AN ANALYSIS OF THE GORTON AMENDMENT UNDER THE LAW OF THE UNITED STATES AND INTERNATIONAL LAW

BRIAN E. FOONT*

TABLE OF CONTENTS

I. INTRODUCTION.....	409
II. BACKGROUND.....	410
III. THE POST WORLD WAR II ERA	412
IV. CHANGING THE RULES	414
V. TREATIES UNDER AMERICAN LAW	419
VI. INTERACTION OF AMERICAN LAW, INTERNATIONAL LAW, AND THE GORTON AMENDMENT	422
VII. CONCLUSION.....	424

*"I wish flying had never been invented. The world has shrunk since the Wrights got into the air . . ."*¹

I. INTRODUCTION

INTERNATIONAL AIR transportation is a massive, multibillion dollar industry, transporting cargo and hundreds of millions of passengers to thousands of locations around the globe. While the domestic operations of airlines within a country are indisputably within the jurisdiction of that country, to facilitate international aviation, a harmonization of rules and regulations

* B.A., University of Rochester; J.D., American University Washington College of Law; Candidate for L.L.M. in International and Comparative Law, Georgetown University Law Center; Senior Counsel, US Airways, Inc. The views presented in this paper are those of the author and not necessarily those of the author's employer. I wish to express my appreciation to Professor Allan I. Mendelsohn and Professor Warren L. Dean for their counsel in preparing this article.

¹ WILLIAM MANCHESTER, *THE LAST LION: WINSTON SPENCER CHURCHILL-VISIONS OF GLORY 1874-1932* 11 (1983) (quoting Sir Winston Churchill).

is necessary to avoid conflicts. For example, what if Country *A* allowed the installation of a particular widget on each aircraft arriving at or departing Country *A*, and Country *B* banned the installation of that widget on aircraft flying into or out of Country *B*? Moreover, what if there were a treaty between Country *A* and Country *B* that prohibited Country *B* from adopting its regulation? This note analyzes that issue as presented by legislation in the United States, commonly known as the "Gorton Amendment," in which the United States prohibited both American and foreign air carriers from installing, transporting, operating, or permitting the use of any gambling device in foreign air transportation.²

The first section of this note provides a brief overview of the history of commercial aviation and the international legal structures that have accompanied its development and facilitated a needed level of uniformity of rules governing aviation around the world. The second section of this note describes those efforts and structures following World War II. The third section of this note addresses the issue of a country unilaterally changing the standards to which it holds foreign airlines in international operations. The fourth section reviews the treatment of treaties under American law. The fifth section compares the differing views of the Gorton Amendment under American and international law. Finally, this note concludes by suggesting that while the Gorton Amendment is valid under U.S. law, it was an ill-conceived and poorly implemented extraterritorial extension of U.S. regulatory jurisdiction, especially in the context of the international regime of international civil aviation.

II. BACKGROUND

In the years following the Wright Brothers' first mechanically powered flight in 1903,³ the aviation industry began to take form. The new found power to travel great distances in almost infinitely shorter periods than formerly possible was extremely attractive. Soon there were more destinations than any single airline could handle, clearly indicating the need for coordina-

² 49 U.S.C. § 41311 (1994). This article does not discuss the obvious inconsistency between the Gorton Amendment and the burgeoning of the gambling industry throughout the United States over the past few decades.

³ See generally FRED HOWARD, WILBUR AND ORVILLE: A BIOGRAPHY OF THE WRIGHT BROTHERS (1987) (detailing the lives of the Wright Brothers and their accomplishments).

tion and regulation. As Winston Churchill suggested, the world had gotten smaller virtually over night.⁴

The first response to the growing international aviation industry came in 1919, the first year when international commercial aviation began in earnest.⁵ The Convention for the Regulation of Aerial Navigation of 1919 created the International Commission for Air Navigation (C.I.N.A.) as a permanent body under the League of Nations. Ironically, the United States, the industry's founder and world leader, was not a signatory to that convention—mainly because the Senate had voted against joining the League of Nations.⁶ Nevertheless, the United States did join the Pan American Convention on Commercial Aviation that adopted many features of C.I.N.A. The United States also became a signatory to the Convention for the Unification of Certain Rules Regarding International Air Transportation, better known as the Warsaw Convention, which was concluded ten years later in 1929.⁷

World War II proved the overwhelming significance of flight for the future. Its application for the postwar era seemed unlimited. Thus, in 1944, toward the end of World War II, many nations sent representatives to a conference on regulation of the air transport industry in Chicago, Illinois. The result of their efforts was the so-called Chicago Convention on International Civil Aviation.⁸ The Chicago Convention established the first two "Freedoms of the Air"—the right of innocent passage and the right to land for technical purposes without letting off or taking on passengers, e.g., for refueling.⁹ Part II of the Chicago

⁴ See MANCHESTER, *supra* note 1.

⁵ See RICHARD Y. CHUANG, *THE INTERNATIONAL AIR TRANSPORT ASSOCIATION: A CASE STUDY OF A QUASI-GOVERNMENTAL ORGANIZATION* 16 (1972).

⁶ See *id.* at 17; see also *THE COLUMBIA HISTORY OF THE WORLD 1005-06* (John A. Garraty & Peter Gay eds., 1972) (discussing America's internal reasons for not joining the League of Nations).

⁷ Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* October 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (entered into force Feb. 13, 1933) (entered into force for the United States Oct. 29, 1934) [hereinafter Warsaw Convention].

⁸ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 296 [hereinafter Chicago Convention].

⁹ See *id.* at 61 Stat. 1181-82, 15 U.N.T.S. at 298. The five freedoms are:

First Freedom—The right to fly over another country without landing.

Second Freedom—The right to make a landing for technical reasons (e.g. refuelling [sic]) in another country without picking up/setting down revenue traffic.

Convention established the International Civil Aviation Organization (ICAO), as an agency of the United Nations, and successor to C.I.N.A. under the League of Nations. Its purpose was to facilitate discussions and negotiations involving legal and technical issues of international aviation. Perhaps the most important task assigned to ICAO was to "[p]romote safety of flight in international air navigation."¹⁰ In pursuing that effort and the related tasks in the same article, the founders charged ICAO with establishing international standards for all aspects of international aviation, from international standards on markings on cargo to airport procedures. They were, however, unable to come to any resolutions regarding airline rates, acceptable levels of capacity, tariffs, and other commercial rules for scheduled operations.¹¹ Instead, they decided that the countries would decide these issues among themselves.¹²

III. THE POST WORLD WAR II ERA

In pursuing commercial aviation in the post World War II era, countries were essentially left to themselves to adopt bilateral agreements under which countries established the rules by which their airlines could operate flights into other countries. The United States, like most other countries, entered into many such agreements. Most contain a provision that provides for

Third Freedom—The right to carry revenue traffic from your own country (A) to the country (B) of your treaty partner.

Fourth Freedom—The right to carry traffic from country B back to your own country A.

Fifth Freedom—The right of an airline from country A to carry revenue traffic between country B and other countries such as C or D.

(This freedom cannot be used unless countries C or D also agree.)

RIGAS DOGANIS, *FLYING OFF COURSE: THE ECONOMICS OF INTERNATIONAL AIRLINES* app. A (2d ed. 1991). There is also a "*Sixth Freedom*" that allows "[t]he use by an airline of country A of two sets of third and fourth freedom rights to carry traffic between two other countries but using its base at A as a transit point." *Id.*; see also Jurgen Basedow, *Symposium on U.S.-E.C. Legal Relations: Airline Deregulation in the European Community—Its Background, Its Flaws, Its Consequences for E.C.-U.S. Relations*, 13 J. AIR L. & COM. 247, 248-250 (1994).

¹⁰ Chicago Convention, *supra* note 8, 61 Stat. at 1193, 15 U.N.T.S. at 326.

¹¹ Capacity is, in effect, the number of passengers and amount of cargo that airlines of one country can carry into another. Tariffs are the price of the "fares" for that transportation and their associated terms (not a tax on imports as in its more traditional definition).

¹² See CHUANG, *supra* note 5, at IX (noting the failure of the Chicago Convention to establish economic regulations); ALAN P. DOBSON, *FLY IN THE FACE OF COMPETITION: THE POLICIES AND DIPLOMACY OF AIRLINE REGULATORY REFORM IN BRITAIN, THE USA AND THE EUROPEAN COMMUNITY 1968-1994* 19 (1995).

each party to recognize the certificates of airworthiness¹³ and licenses granted by the other party in a fashion that parallels Article 33 of the Chicago Convention, provided that the other country's standards meet at least the minimum standards established by ICAO. For example, the Civil Air Transport Agreement between the United States and Japan provides:

Certificates of airworthiness, certificates of competency and licenses issued or rendered valid by one Contracting Party, and still in force, shall be recognized as valid by the other Contracting Party for the purpose of operating the agreed services on the specified routes, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established pursuant to the Convention on International Civil Aviation. Each Contracting Party reserves the right, however, to refuse to recognize, for the purpose of flight above its own territory, certificates of competency and licenses granted to its own nationals by another State.¹⁴

At the same time, each such agreement also contains a provision that allows each country to regulate the admission into, navigation and operation within, and departure from its own airspace.¹⁵ The United States' Model Bilateral Air Transport Agreement, now commonly known as the "Open Skies Agreement," contains such a clause.¹⁶

The question that necessarily arises is what would happen if one of the parties to such an agreement sought to enforce a different standard that was more restrictive—or sought to pro-

¹³ "Airworthiness" as used in the aviation industry means more than just being capable of flight. It refers to an aircraft's conformance with its technical design combined with adherence to the maintenance program for that aircraft pursuant to applicable law.

¹⁴ Civil Air Transport Agreement, Aug. 11, 1952, U.S.—Japan, art. 7, 4 U.S.T. 1948, 1951-52.

¹⁵ See, e.g., *id.* at Art. 8(A). The Civil Air Transport Agreement provides: The laws and regulations of one Contracting Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of the airlines designated by the other Contracting Party, and shall be complied with by such aircraft upon entrance into or departure from or while within the territory of the first Contracting Party.

Civil Air Transport Agreement, *supra* note 14, 4 U.S.T. at 1952.

¹⁶ United States: Model Bilateral Air Transport Agreement, Mar. 20, 1995, art. 6(1), 35 I.L.M. 1479, 1485 [hereinafter Model Bilateral ATA].

hibit an aircraft configuration that otherwise met ICAO standards?

IV. CHANGING THE RULES

What if an ICAO standard allowed the installation and operation on an aircraft of ovens meeting particular standards to heat food (which they do), and Switzerland determined that airlines could not operate such ovens on flights operating into or out of Switzerland or while operating within Swiss airspace? Disputing Switzerland's right to prohibit the operation of such ovens on aircraft within its airspace would be difficult. After all, the Chicago Convention clearly states, "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."¹⁷ That, however, only answers part of the question. Could Switzerland prohibit the operation of the ovens before an aircraft reaches its airspace or after it left—or indeed, could Switzerland prohibit even their installation on any aircraft operating into, out of, or through its airspace?

On August 23, 1994, the United States essentially did just that when the Federal Aviation Administration Authorization Act of 1994 became law.¹⁸ Section 205 of that Act, commonly known as the "Gorton Amendment," provides in pertinent part that "[a]n air carrier or foreign air carrier may not install, transport, or operate, or permit the use of, any gambling device on board an aircraft in foreign air transportation."¹⁹ When Senator Slade Gorton (R-Wash.) introduced the amendment,²⁰ he stated that he intended to close a loophole in the law that prohibited American carriers from the same activities,²¹ but which did not apply

¹⁷ Chicago Convention, *supra* note 8, 61 Stat. at 1180, 15 U.N.T.S. at 296.

¹⁸ Pub. L. No. 103-305, 108 Stat. 1569 (1994).

¹⁹ 49 U.S.C. § 41311(a) (1994).

²⁰ Sen. Gorton introduced his amendment on June 9, 1994, as Amendment 1767 to the Federal Aviation Administration Authorization Act of 1994. See 140 CONG. REC. 12, 486 (1994).

²¹ See *id.* at 12, 486-87. It is notable that in 1993, Northwest Airlines sought to have Congress amend the Gambling Devices Act of 1962 to legalize in-flight gambling for U.S. flagged air carriers. In contrast to the amendment to the law that allows gambling on board U.S. based cruise ships, the panel rejected the idea completely. See Julie Schmit, *Senate Panel Rejects Airline Gambling*, USA TODAY, Nov. 10, 1993, at 1B; Brian C. O'Donnell, *Gambling to Be Competitive: The Gorton Amendment and International Law*, 16 DICK. J. INT'L L. 251, 266-70 (1997) (comprehensively discussing the amendment to the Johnson Act allowing gambling aboard U.S. flagged cruise ships).

to foreign carriers—to create a level playing field where the United States would prohibit foreign carriers from offering in-flight gambling already prohibited on U.S. flagged carriers.²² Congress accepted it without debate.²³

The problem, however, is that the U.S. legislation not only prohibits gambling, but also the “installation” and “transportation” of gaming devices.²⁴ In response to the amendment, the Aviation Assembly, a group of civil aviation attachés in Washington, D.C.,²⁵ submitted a letter dated August 19, 1994, to the United States’ Department of State protesting the Gorton Amendment and claiming that it sought to improperly extend the jurisdiction of the United States to conduct aboard foreign aircraft when operated outside the United States’ territory.²⁶ The protest further stated:

For several decades it has been a central principle of the international civil aviation regime that one state cannot unilaterally impose its views on the manner in which airline flights of another state’s aircraft are conducted when outside the territory of the first state. The Governments deem Section 205 of the FAA Reauthorization Act [*sic*] to be an unprecedented intrusion on that principle and inconsistent with international law governing the jurisdiction of states over civil aviation matters.²⁷

Nothing in the Aviation Assembly’s protest concerned the domestic application of the Gorton Amendment, i.e., if foreign airlines installed such devices on aircraft operating from their

²² See Gambling Devices Act of 1962, 15 U.S.C. §§ 1171-1178 (1994).

²³ It is notable that the Gorton Amendment also directed the Federal Aviation Administration (FAA) to conduct a study on the safety and competitive impact of in-flight gambling. See 140 CONG. REC. 12, 486 (1994). That report was submitted in March 1996 titled as “Report to the Congress, Video Gambling in Foreign Air Transportation: Safety Effects, Competitive Consequences, Bilateral Issues & Legal Framework.” While that report provides an analysis of the commercial aspects of in-flight gambling, the portion of the report that addresses the international legal aspects of the issue is limited to half of page 52. There the FAA noted that the Gorton Amendment had “engendered formal diplomatic protests.” The FAA, however, does not discuss the legitimacy of those protests and simply concludes that any foreign country could pursue a remedy by submitting the dispute for arbitration.

²⁴ See 49 U.S.C. § 41311(a) (1994).

²⁵ The group is made up of embassies of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, The Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the European Commission.

²⁶ See Letter from the Aviation Assembly, to the United States’ Department of State (Aug. 19, 1994) (on file with the SMU Law Review Association).

²⁷ *Id.*

respective countries, they would have no difficulty, under their view of international law, with the United States prohibiting the operation of such devices while in American airspace—just as the Swiss (in our example above) could prohibit the operation of our fictional ovens within their airspace. The difficulty arises, first, from the prohibition of even having the devices installed, when doing so does not violate any airworthiness standards established by ICAO, and, second, from the application of the statute to foreign aircraft operating outside American airspace.²⁸

We are thus left with a situation in which the Chicago Convention and subsequent bilateral agreements obligate the United States to accept certificates of airworthiness of foreign aircraft by countries that are parties to those agreements, and to allow aircraft that so comply with those foreign standards to operate into and out of the United States. Yet the United States prohibits the installation of gambling devices on such aircraft and takes the position that the operation of such devices on flights into or out of the United States violates American law.

According to the Transportation Department at the Royal Netherlands Embassy, which coordinates the Aviation Assembly,²⁹ the United States never responded to the Assembly's protest.³⁰ At the same time, the states comprising the Assembly

²⁸ See Steven Grover, Comment, *Blackjack at Thirty Thousand Feet: America's Attempt to Enforce Its Ban on In-Flight Gambling Extraterritorially*, 4 TEX. WESLEYAN L. REV. 231, 238-40 (1998) (arguing that the Chicago Convention provides support for certain extraterritorial jurisdiction of the United States over aircraft). Your present author submits that Grover is incorrect in arguing that the international legal regime lends support to the legality of the Gorton Amendment under international law. He argues that because Article 1 of the Chicago Convention recognizes each country's sovereignty over its own airspace (*see supra* note 17 and accompanying text), any apparent infringement of international law or extraterritorial consequences are merely incidental to the exercise of that domestic sovereignty. While that is the same conclusion that your author reaches in this article in his analysis under American law, it does not follow properly under international law. Under international law, treaties are comparable to contracts, under which each party gives up something in exchange for something else, e.g., in a bilateral air transportation agreement, each party abdicates certain of its rights to not accept the airworthiness certificates of the other in exchange for the same in return. If Mr. Grover's reasoning were to follow, that mutual commitment is not truly binding, which is at odds with the concept of international treaties as binding agreements.

²⁹ See *supra* note 25 and accompanying text.

³⁰ See *International Airline Coalition on the Rule of Law, Concerning the Extra-Territorial Aspect of Bill: Hearing on H.R. 969 Before the Subcomm. on Aviation of the House Comm. on Transportation*, 104th Cong., 2d Sess. (1996) (testimony of William Karas) (testimony regarding view of coalition of international carriers that exten-

have not pursued the matter, and no dispute has been raised under Chapter XVIII of the Chicago Convention which provides for settlements of disputes, arbitrations and appeals in Articles 84, 85 and 86, respectively.

The so-called "Hatch Amendment" has created a situation similar to that of the Gorton Amendment, but with far greater impact and reaction.³¹ Public Law 104-132, which concerns antiterrorism, became law in 1996. Included in that legislation was a provision introduced by Senator Orin Hatch (R-UT) that, with further modification, amended 49 U.S.C. § 44906 as shown here:

The Administrator of the Federal Aviation Administration shall continue in effect the requirement of section 129.25 of title 14, Code of Federal Regulations, that a foreign air carrier must adopt and use a security program approved by the Administrator. The Administrator ~~may~~ *shall not* approve a security program of a foreign air carrier under section 129.25 ~~only if the Administrator decides, or any successor regulation, unless the security program provides passengers of~~ *requires the foreign air carrier a level of protection similar to the level those passengers would receive under the security programs of in its operations to and from airports in the United States to adhere to the identical security measures that the Administrator requires air carriers serving the same airport. The airports to adhere to. The foregoing requirement shall not be interpreted to limit the ability of the Administrator shall require to impose additional security measures on a foreign air carrier to use procedures equivalent to those required of air carriers serving the same airport if or an air carrier when the Administrator decides-determines that the procedures are necessary to provide a level of protection similar to that provided passengers of the air carriers serving the same airport a specific threat warrants such additional measures.* The Administrator shall prescribe regulations to carry out this section.³²

sion of jurisdiction by the United States to activities occurring outside of the United States violates international law, testimony related to prohibition of smoking on aircraft destined for or departing from the United States and noting that diplomatic protests regarding the Gorton Amendment on similar grounds were given "short shrift").

³¹ See David Lord, *The 'Hatch Amendment'*, AVIATION SECURITY INTERNATIONAL: THE JOURNAL OF AIRPORT & AIRLINE SECURITY, April 1999, at 8 (describing the history of the Hatch Amendment and resulting issues and disputes).

³² The original text of Sen. Hatch's amendment reads as follows:

The Administrator of the Federal Aviation Administration shall continue in effect the requirement of section 129.25 of title 14, Code of Federal Regulations, that a foreign air carrier must adopt and use a security program approved by the Administrator. The

The effect of this provision is to require foreign carriers operating into the United States to apply the same security procedures that American carriers must apply. The obvious problem with this extraterritorial assertion of jurisdiction is similar to the problem with the Gorton Amendment, i.e., what if each country were to pass its own version of the Hatch Amendment? This is all the more troubling given that in most countries, airport and aircraft security are completely or mostly government functions, whereas in the United States pre-departure screening of passengers and most other airport-based aviation security responsibilities are obligations of airlines.³³ Foreign air carriers have vigorously protested the proposed FAA regulations designed to implement the Hatch Amendment, and they have yet to be adopted.³⁴

The United States, however, is not the only country to pass legislation that seemingly violates the international norms established by ICAO. On November 16, 1998, the Council of the European Union accepted Common Position (EC) No. 66/98 which adopts regulations on aircraft noise that are different from, and some claim contrary to, ICAO standards. These standards effectively exclude the operation and sale of certain aircraft which are predominantly of American manufacture—including those modified with “hush kits” to comply with updated ICAO noise standards—within and into Europe. These new regulations have severely diminished the resale value of large portions of certain aircraft flagged in the United States. A complete analysis of that matter is beyond the scope of this article.³⁵ However, it is important to note that following vigorous protests by the government of the United States, as well as by various participants of the international aviation industry, the

Administrator shall only approve a security program of a foreign air carrier under section 129.25, or any successor regulation, if the Administrator decides the security program provides passengers of the foreign air carrier a level of protection identical to the level those passengers would receive under the security programs of air carriers serving the same airport. The Administrator shall prescribe regulations to carry out this section.

Sen. Am. No. 1233 (Hatch) to S. 735, 104th Cong. (1995), *published in* CON. REC. at S7794 (June 6, 1995).

³³ See 14 C.F.R. pt. 107-108 (1999).

³⁴ See Lord, *supra* note 31.

³⁵ Compare Benedicte Claes, *Aircraft Noise Regulation in the European Union: The Hushkit Problem*, 65 J. AIR L. & COM. 329 (2000) (presenting the European views of the issue), with Troy A. Rolf, *International Aircraft Noise Certification*, 65 J. AIR L. & COM. 383 (2000) (presenting the American views of the issue).

European Union postponed the application of its regulations for one year to give the parties an opportunity to resolve the dispute diplomatically.³⁶

It is also notable that in response—or more likely retaliation³⁷—the United States House of Representatives passed a bill on March 3, 1999, which remains pending in the Senate, that would require the Secretary of Transportation to prohibit the operation of all supersonic transport aircraft that do not comply with current ICAO noise standards to or from any airport in the United States in the event that the European Union's Common Position is adopted as a final regulation.³⁸ Such an action would only affect the Concorde, the supersonic aircraft used in commercial operations by Air France and British Airways.³⁹ It is significant, however, that such an action by the United States would not violate any ICAO standards because the Concorde—which does not comply with ICAO noise standards—is only permitted to operate in and out of the United States pursuant to a waiver of the noise regulations for those aircraft.⁴⁰

V. TREATIES UNDER AMERICAN LAW

The United States Constitution mentions treaties in several places, but perhaps most important is Article VI, Section 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.⁴¹

³⁶ This matter remains the subject of a dispute under Department of Transportation Docket Number OST-1999-5011 titled "Northwest Airlines, Inc.—Complaint Against the Council of the European Union and the Governments of the 15 EU Member States."

³⁷ See 143 CONG. REC. E187-88 (daily ed. Feb. 10, 1999) (statement of Rep. Oberstar).

³⁸ H.R. 661, 106th Cong. (1999) (introduced Feb. 10, 1999 by Rep. James L. Oberstar (D-MN)).

³⁹ See *U.S. Could Ban Concorde if Europe Bans Hush-Kitted Planes*, Environment News Service (March 3, 1999) <<http://www.ens.lycos.com/ens/mar99/1999L-03-03-03.html>>.

⁴⁰ See 14 C.F.R. §§ 36 and 91.817-821 (1999).

⁴¹ U.S. CONST. art. VI, § 2. The other references to treaties are as follows: U.S. CONST. art. I, § 10 (restricting the rights of the States to enter treaties); U.S. CONST. art. II, § 2 (authorizing the President, with the advice and consent of two-thirds of the senate, to enter treaties); and U.S. CONST. art. III, § 2 (extending the authority of the judiciary to cover treaties).

The U.S. Constitution created a new principle of international law, namely, that unless the text of a treaty requires separate legislative action to effect its terms, it may be "self-executing."⁴² In practice, this means that courts in the United States regard treaties in the same fashion as statutes under American law.

Because treaties are treated in a manner comparable to statutes, the Supreme Court has also held that they are subject to the statutes that Congress may pass for their "enforcement, modification, or repeal."⁴³ Moreover, the Supreme Court has held:

By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.⁴⁴

For example, if there were a treaty between the United States and another country allowing that country's citizens relief from certain U.S. taxes, the United States could pass a statute to the contrary, which—by the rule of later-in-time rules—would override the treaty, just as the treaty overrode the tax statute from which it provided relief.⁴⁵

Moreover, the Supreme Court has clearly established that it is within the power of Congress to establish jurisdiction as it sees

⁴² See *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). Chief Justice Marshall wrote:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.

Id. at 313-14.

⁴³ See *Head Money Cases*, 112 U.S. 580, 599 (1884).

⁴⁴ *Whitney v. Robertson*, 124 U.S. 190, 194 (1887).

⁴⁵ See MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 85-94 (2d ed. 1993) (analyzing the standing of treaties under the law of the United States).

fit—even if doing so extends the jurisdiction of the United States to areas outside the territory of the United States. The Supreme Court reviewed a situation in which this type of conflict arose in *Cunard S.S. Co. v. Mellon*.⁴⁶ In *Cunard*, a number of ship owners challenged the application of the National Prohibition Act⁴⁷ that implemented the Eighteenth Amendment to the U.S. Constitution on prohibition. In response to that statute, the United States adopted three rules in succession. The first rule allowed the carriage of liquor by vessels arriving at port in the United States provided that they were maintained under seal and not removed while in port.⁴⁸ In January 1920, that rule was modified to allow the use of liquors by the crew on board the ship.⁴⁹ In October 1922, the Attorney General issued a new interpretation that effectively held that the importation of liquor into the United States on any vessel, and even transporting liquor on a foreign flagged vessel in the waters of the United States, was unlawful.⁵⁰ *Cunard* and ten other appellants challenged the application of the law on grounds that it was being applied in an *ultra vires* fashion in that it sought to apply beyond the scope of the statute and, indeed, beyond the jurisdiction of the United States.⁵¹ The Court, citing Chief Justice Marshall's opinion from *The Schooner Exchange v. McFaddon & Others*,⁵² held that the jurisdiction of a nation within its own territory is absolute and cannot be limited except as that country imposes on itself.⁵³

Thus, at least during Prohibition in the 1920s in the United States, it was perfectly permissible under American law for the United States to impose a prohibition policy on foreign ships operating in, into, or out of American waters—even when that policy was contrary to what the Court acknowledged was (a) historically common practice in shipping, (b) the law of some ships' home countries that required the boarding and provision of liquor, and (c) customary international law.⁵⁴ In essence, the Court established that the authority of the American govern-

⁴⁶ 262 U.S. 100 (1923).

⁴⁷ 41 Stat. 305 (1919), *repealed by* U.S. CONST. amend. XXI.

⁴⁸ *See Cunard*, 262 U.S. at 120.

⁴⁹ *See id.* at 120-21.

⁵⁰ *See id.*

⁵¹ *See id.* at 103.

⁵² 11 U.S. (7 Cranch) 116, 136 (1812).

⁵³ *See Cunard*, 262 U.S. at 124-27.

⁵⁴ *See id.* at 129-31.

ment over the air, water, and territory of the United States is truly absolute, and any offense to customary international law or incidental extraterritorial impact was within Congress' authority.⁵⁵

VI. INTERACTION OF AMERICAN LAW, INTERNATIONAL LAW, AND THE GORTON AMENDMENT

Clearly the view of treaties under American law and under international law are different. American law essentially establishes treaties as "gentlemen's agreements" where there are few, if any, consequences of violation that may be pursued effectively in the domestic judicial system.⁵⁶ In contrast, under international law, treaties are viewed as binding "contracts." A contract, however, is an enforceable agreement,⁵⁷ i.e., in the event either or both parties breach their duties, they may look to a third party—generally a court and/or government—with the authority to enforce the agreement and/or provide a remedy. Given that there is no "super court" to enforce treaties with binding jurisdiction and the ability to enforce its rulings over the countries of the world, it appears that the American view is not un-

⁵⁵ It is notable that the supremacy of the national government over international law or treaties, as established by the Supreme Court of the United States, is not unique to the United States. This has been vividly demonstrated by various members of the European Union whose courts have had an opportunity to rule on this subject. In each case, those courts have gone to some lengths to establish that in some form or another, their domestic laws are supreme over European Union law, and anything to the contrary is permitted only at the will of those countries' legislatures. See GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW*, ch. 6 (1993) (regarding the reception of European Community law in each member state of the European Community).

⁵⁶ It is notable, however, that without statutory authority, the FAA cannot impose a standard on foreign air carriers that exceeds ICAO standards and the FAA may be enjoined from such action just as any party can seek a remedy against a federal agency when it acts outside its delegated authority. See WALTER GELLHORN ET AL., *ADMINISTRATIVE LAW: CASES AND COMMENTS* 66 (8th ed. 1987); see also *British Caledonian Airways Ltd. v. Bond*, 665 F.2d 1153 (D.C. Cir. 1981) (holding that Special Federal Aviation Regulations (SFAR) 40, which prohibited the operation of foreign flagged McDonnell Douglas DC-10s in U.S. airspace when the same prohibition had been imposed on U.S. flagged aircraft under different procedures, was beyond the FAA's authority because the Chicago Convention, which was the law of the land, only required compliance with ICAO standards, and such compliance was not in question). In short, the FAA could not override a statute or a treaty with a regulation. See also Stephen D. McCreary, *The Chicago Convention: Article 33 and the SFAR 40 Episode*, 54 J. AIR L. & COM. 721, 727-35 (1989) (discussing *British Caledonian Airways*).

⁵⁷ See BLACK'S LAW DICTIONARY 322 (6th ed. 1990).

realistic.⁵⁸ On the other hand, arbitration proceedings have frequently been used to vindicate treaty rights, and arbitral decisions are generally respected by the parties to the arbitration.

Under American law, and particularly in light of the Supreme Court's holding in *Cunard*, it seems indisputable that the Gorton Amendment is legal and enforceable under American law. In essence, when the United States Senate adopted the various bilateral agreements on international civil aviation to which the United States is a party, those agreements became like statutes, just as the Chicago Convention did.

On August 23, 1994, when the Gorton Amendment became law as part of the Federal Aviation Administration Authorization Act of 1994, Congress effectively amended those "statutes" with the substance of the Gorton Amendment. These "amendments," however, are clearly viewed by the other party to each of those agreements as a violation (or at least an anticipatory breach) of the terms of those agreements—or perhaps a repudiation of their terms (although no country stopped operating flights to the United States in protest of the Gorton Amendment).

While it appears that the Gorton Amendment added a condition to the bilateral international civil aviation agreements already in place, as noted above, statutes and treaties stand on the same footing under the U.S. Constitution, with last in time taking precedence. We must therefore ask if the converse is true, i.e., do bilateral air transport agreements with the language on mutual recognition of certifications of airworthiness⁵⁹ and granting the privileges specified in those treaties override the Gorton Amendment if they were agreed upon post-Gorton Amendment and if they grant those privileges without imposing the condition of the Gorton Amendment? If this is the case, then the countries with which the United States entered Open Skies agreements after August 23, 1994 would presumably not be subject to the restrictions of the Gorton Amendment.⁶⁰

⁵⁸ It would seem that, while the member states of the European Union were all included in the group that filed the diplomatic protest against the Gorton Amendment, they take a similar view of treaties. See *supra* notes 35 and 37 and accompanying text.

⁵⁹ See *supra* note 15 and accompanying quote.

⁶⁰ See Model Bilateral ATA, *supra* note 16. The countries that entered Open Skies agreements or had them pending after August 23, 1994 include Austria, Belgium, Czech Republic, Denmark, Finland, Germany, Iceland, Jordan, Luxembourg, Norway, Sweden, and Switzerland. Only the Open Skies agreement with the Netherlands predates the Gorton Amendment.

VII. CONCLUSION

While it is true that the Gorton Amendment is valid U.S. law, and while it also possible (although more speculative) that adoption of subsequent bilateral international civil aviation agreements has overridden the Gorton Amendment for certain countries, it remains very troublesome that the United States unilaterally passed the Gorton Amendment without any debate about its international consequences. In 1944, the countries that participated in the Chicago Convention established a framework for an ordered international civil aviation "community." Those who framed and adopted that convention must have understood that without such cooperation each country would be free to establish its own—possibly self-serving—standards. They must have equally understood the potential conflicts that could arise, as well as the resources needed to ensure compliance with each country's different standards. They must have likewise understood that allowing different standards would hinder the growth of, and continued cooperation within, the industry.

In passing the Gorton Amendment—particularly without debate—and, perhaps more importantly, without consulting its allies and trading partners, the United States weakened the confidence that those allies and trading partners should have in their dealings with the United States. It is important that the United States remain cognizant—perhaps more than any other country involved in aviation—that the very nature of the aviation industry demands international cooperation; setting a precedent that the United States deems itself free to change the rules at its will cannot help but be met, sooner or later, with comparable actions by other countries⁶¹—possibly even in retaliation.⁶²

It is perhaps regrettable that the Aviation Assembly did not choose to test the legality of the Gorton Amendment under international law and the Chicago Convention. An action under Chapter XVIII of the Chicago Convention might well have concluded that, whatever may be the legitimacy of the Gorton

⁶¹ See, e.g., *supra* notes 35 and 36 and accompanying text (regarding the European Union's rules on noise regulation that some claim are contrary to ICAO rules).

⁶² See, e.g., *supra* notes 37 through 40 and accompanying text (regarding the possibility of the United States prohibiting the operation of the Concorde into the United States if the European Union unilaterally adopts aircraft noise regulations that the United States considers to be contrary to ICAO standards).

Amendment under U.S. domestic law, a different standard prevails under the Chicago Convention and international law—one which fosters needed coordination and cooperation over attempts by countries to unilaterally impose their views on others.



Articles

