

**Note**

**Is It Time Congress Revisits the Laws Restricting  
Gambling at 35,000 Feet?**

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## INTRODUCTION

In tough economic times, federal and local governments examine laws to determine if laws unnecessarily prohibit the economy from prospering. The government will change tax laws, the Federal Reserve will alter lending interest rates, regulate the amount of currency in circulation, enforce additional restrictions on trade, or propose other similar laws.<sup>1</sup> The government's goal is to jump start the economy by changing current regulations to create increased cash flow by providing consumers with more disposable income or less expensive goods to purchase.<sup>2</sup> In a last ditch effort to save struggling industries, the government will provide taxpayer funds known as a bailout to these industries.<sup>3</sup>

Recently, the United States government has been doing many things to try to revive our struggling economy. The federal government has changed tax laws to provide taxpayers with more disposable income and provide incentives to taxpayers purchasing items such as new homes.<sup>4</sup> State governments are also revising laws. Delaware recently passed a controversial law that will allow sports betting and table games in casinos.<sup>5</sup> Although Delaware faced strong opposition, the state government passed the law in an effort to increase gambling revenue to remedy the estimated \$600 million state budget deficit for the upcoming fiscal year.<sup>6</sup> The federal government has also bailed out the financial industry with \$700 billion of taxpayer money and is currently looking at bailing out struggling domestic automobile manufactures.<sup>7</sup> If this happens, the next industry that may be asking for federal funding is the airline industry.<sup>8</sup> With the struggling economy, increasing fuel cost over the past several years, and enormous financial losses, many airlines are on the brink of going out of business.<sup>9</sup> These factors, coupled with fewer people traveling because of the economy results in continued shrinking profit margins

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1. The Recovery Act, [http://www.recovery.gov/About/Pages/The\\_Act.aspx](http://www.recovery.gov/About/Pages/The_Act.aspx) (last visited March 7, 2010).

2. *Bush seeks tax relief package to stimulate the economy, Airlines*, USA TODAY, Jan. 18, 2008, available at [http://www.usatoday.com/news/washington/2008-01-18-bush-economy\\_N.htm](http://www.usatoday.com/news/washington/2008-01-18-bush-economy_N.htm).

3. Martin Crutsinger, *Government to bail out Bear Sterns*, ABC News, Mar. 14, 2008, available at <http://abcnews.go.com/Business/Economy/story?id=4451673&page=1>.

4. The American Recovery and Reinvestment Act of 2009 Information Center, <http://www.irs.gov/newsroom/article/0,,id=204335,00.html> (last visited March 7, 2010).

5. *US Watch—Delaware: Sportsbetting Legalized in Bid to Close Budget Gap*, WALL ST. J. ABSTRACTS, May 15, 2009, at A5, 2009 WLNR 9342594 [hereinafter Sportsbetting].

6. *Id.*

7. *See United States: Senate approves to release 350 Billion Dollars of Bailout Package*, THAI PRESS REP., Jan. 19, 2009, 2009 WLNR 906265.

8. *See Cyrus Sanati, Airlines: Next Bailout Heading for Arrival?*, N.Y. TIMES, Apr. 21, 2009, available at <http://dealbook.blogs.nytimes.com/2009/04/21/airlines-next-bailout-heading-for-arrival/>.

9. *See id.*

for airlines. Shrinking profit margins means an increase in airfares or potential corporate turmoil, and since the airline industry is critical to the overall economy and national security, it is imperative the government address ways to bolster the industry.

A major way the aviation industry can increase revenue on domestic and international flights is if the government revisits a law implemented over a decade and a half ago.<sup>10</sup> Congress needs to reevaluate its decision to restrict gambling on airlines, not only for the struggling airline industry, but also because of the sheer changes in the country since the law's enactment fifteen years ago. Delaware realized it needed to be creative in this time of economic downturn, and likewise, it is time for the federal government to get creative and revisit the Gorton Amendment and the Johnson Act.<sup>11</sup> This paper will focus on the federal government's role in this process, however, state governments may also have a role in the regulation of gaming activity, especially domestically, and involving an aircraft traveling to or from a particular state.

It is important to review the basics of how we got to where we are before we can decide where to go in the future. It will be necessary to review gambling's history and the gaming laws impacting the transportation industry. After reviewing the nuts and bolts of the regulatory structure, we will move on to examine current gaming onboard common carriers, restrictions placed on the airlines, and a Department of Transportation ("DOT") study of video gambling on airlines. Finally, we will examine what, if anything has changed since the DOT's study, determine there is a need for another study, and if the government should lift the restriction on gambling onboard airlines.

#### PART I: WHAT IS GAMBLING?

For a game to be considered gambling, there are three requirements that must be met. The game must include: 1) consideration put up by the player, 2) in a game of chance, 3) for a prize.<sup>12</sup> Using a slot machine as an example, a player puts money into the machine (consideration) to play the machine. The machine has a random number generator over which the player has no control, but the player hopes he or she will get the correct combination of pictures or objects (a game of chance) to win money (prize). However, it is not always that simple to say that a game

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10. See generally 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, 414 (2000) (discussing the Gorton Amendment).

11. See generally Sportsbetting, *supra* note 5 (discussing legalization of sportsbetting).

12. PA. DEP'T OF REVENUE, PA PERS. INCOME TAX GUIDE CHAPTER 15: GAMBLING AND LOTTERY WINNINGS 2 (2010), available at [http://www.revenue.state.pa.us/portal/server.pt/community/revenue\\_home/10648](http://www.revenue.state.pa.us/portal/server.pt/community/revenue_home/10648) (last visit March 7, 2010).

found in a casino can be considered gambling. Games such as “Texas Hold’Em” have become mainstream in the past decade due to the dramatic increase in televised events as well as the ability to play the game outside of a casino.<sup>13</sup> Many professional poker players and people in general view poker as a game of skill, not a game of chance because there is skill involved in betting and “reading” an opponent.<sup>14</sup> But ultimately, if a poker hand is played to the end, there is an element of chance because of the probability of certain cards being in play.<sup>15</sup> So, is poker only gambling when a hand is played all the way to the end? Courts in a variety of states have ruled that if there is an element of skill, then the game, according to some state’s definitions of gambling, cannot be considered gambling.<sup>16</sup> The same is true in a number of foreign countries where the skill feature takes the game out of the definition of gambling.<sup>17</sup> As of April 2009, Pennsylvania, Colorado, and South Carolina have all ruled that poker is a game of skill.<sup>18</sup> However, not all jurisdictions are willing to agree.<sup>19</sup>

As is evident by the recent court splits, there is no bright line rule as to what games are considered gambling and what games are not.<sup>20</sup> No matter what side of the argument the game falls on, the history of gambling in the U.S. is well established.

## PART II: THE HISTORY OF GAMING THE UNITED STATES

The modern history of legalized gaming in the United States began with casino gambling in 1931 in Nevada.<sup>21</sup> Until the 1950’s, there was no real regulation of the gaming industry.<sup>22</sup> The federal government could not regulate the gaming industry because they did not have authority under the United States Constitution.<sup>23</sup> The Tenth Amendment states that any authority not expressly granted to the federal government is re-

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13. See Richard Sandomir, *Poker’s Popularity Doesn’t Appear Ready to Fold*, N.Y. TIMES, July 12, 2005, at D1, available at <http://query.nytimes.com/gst/fullpage.html?res=9C06E5DD1530F931A25754C0A9639C8B63&sec=&spon=>.

14. Celeste Biever, *Poker Skills Could Sway Gaming Laws*, NEW SCIENTIST, Apr. 6, 2009, available at <http://abcnews.go.com/Technology/story?id=7270357&page=1>.

15. See *id.*

16. Haley Hintze, *Poker Deemed Not ‘Gambling’ in Colorado Criminal Case*, Jan. 27, 2009, available at <http://www.pokernews.com/news/2009/01/poker-deemed-not-gambling-colorado-case-1032.htm>.

17. See generally, Biever *supra* note 14.

18. See Biever, *supra* note 14.

19. *Id.*

20. See generally *id.*

21. See Roger Dunstan, *Gambling in California*, CAL. RESEARCH BUREAU 1997, Chapter II at 7, available at <http://www.library.ca.gov/crb/97/03/Chapt2.html> (last visit March 7, 2010).

22. See generally *id.* at 7-8.

23. U.S. CONST. amend. X.

served for the states.<sup>24</sup> Therefore, the only way for the federal government to gain control of the gaming industry was to begin taxing casinos. Several senators introduced legislation to impose a 10% tax on gross gaming revenue of casinos.<sup>25</sup> This tax would have put casinos out of business because gross gaming revenue involves the amount the casino takes in from gaming before paying any winnings or costs of operation. In response to this proposed legislation, Senator McCarran from Nevada convinced the Senate reject the proposed tax law and permit Nevada to create a regulatory system to control the gaming industry.<sup>26</sup> In 1955, Nevada created the Nevada Gaming Control Board (“NGCB”) and the Nevada Gaming Commission (“NGC”).<sup>27</sup> The NGCB and NGC are the controlling bodies for all gaming in the state of Nevada, with the NGC having final authority.<sup>28</sup> Since then, the gaming industry has expanded dramatically because casinos are no longer just located in Nevada.

In the late 1970’s, Atlantic City, New Jersey became the second major U.S. jurisdiction allowing casino gaming.<sup>29</sup> Following *California v. Cabazon Band of Mission Indians*, decided by the U.S. Supreme Court, Congress passed the Indian Gaming Regulatory Act (“IGRA”) in 1988.<sup>30</sup> The decision in the case, as well as the passage of IGRA, allowed Native Americans to have their own casinos on tribal lands.<sup>31</sup> The National Indian Gaming Commission was created by IGRA to regulate most of the gaming operations on the tribal lands.<sup>32</sup> In 1991, Iowa was the first state to allow riverboat gaming.<sup>33</sup> Today, 48 out of 50 states in the U.S. allow some form of gaming.<sup>34</sup> The two states that do not allow gaming are Utah and Hawaii.<sup>35</sup> Each state regulates gambling activities within the framework of a number of different regulatory structures. Some states

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24. *Id.*

25. PBS, Las Vegas: An Unconventional History, [http://www.pbs.org/wgbh/amex/lasvegas/peopleevents/p\\_mccarran.html](http://www.pbs.org/wgbh/amex/lasvegas/peopleevents/p_mccarran.html) (last visit March 7, 2010).

26. Las Vegas Review Journal, <http://www.1st100.com/part2/mccarran.html> (last visit March 7, 2010).

27. RUSSELL R. ELLIOTT & WILLIAM D. ROWLEY, HISTORY OF NEVADA, 330 (University of Nebraska Press 2d ed. 1987) (1973).

28. Nevada Gaming Control Act, NEV. REV. STAT. § 463.150 (2010)

29. Kristen M. Campion, *Riverboats: Floating Our Way to a Brighter Future?*, 19 SETON HALL LEGIS. J. 564, 570-71 (1995).

30. Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 (2008); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

31. 25 U.S.C. § 2702 (1988); *Cabazon*, 480 U.S. at 221-22.

32. 25 U.S.C. §§ 2704-2706 (2009).

33. *Iowa Casinos*, American Casino Guide, <http://americancasinoguide.com/iowa.shtml> (last visited March 3, 2010).

34. Karen Peterson, *48 States Raking in Gambling Proceeds*, May 23, 2006, available at <http://www.stateline.org/live/details/story?contentId=114503>.

35. *Id.*

allow a number of types of gaming, while others have limited gaming.<sup>36</sup> Other states have dog or horse tracks, others have lotteries, or bingo, while other states have full gaming casinos.<sup>37</sup> Each state has the right to charge casinos different tax rates, have different minimum winning requirements, or any other regulation they deem necessary.<sup>38</sup> As a result, Nevada may tax their casinos at a different rate than New Jersey taxes their casinos.

Although gaming remains a state issue, the federal government has passed certain laws pertaining to gaming devices onboard common carriers under the Commerce Clause.<sup>39</sup>

### PART III: GAMING LAWS IN EFFECT IN THE UNITED STATES

There are three statutory frameworks currently in place that deal with gambling and gaming devices onboard common carriers. The three laws are: 1) The Gaming Ship Act of 1948, 2) the Gaming Device Act of 1968, and 3) Section 205 of the Federal Aviation Administration Act of 1994.

#### A: THE GAMING SHIP ACT OF 1948

The Gaming Ship Act states once a ship enters U.S. jurisdiction, it is illegal to gamble on the vessel.<sup>40</sup> When enacting this law, the government recognized that if a ship is outside U.S. territorial waters, the ships do not need to comply with laws of the country. The Act also prohibited gaming onboard any ship that was registered as a U.S. vessel, whether or not it was operated out of the U.S.<sup>41</sup> This is better known as “flying the flag” of the United States.<sup>42</sup> Prior to 1988, the U.S. recognized its territorial waters as anything within 3 nautical miles of the coastline.<sup>43</sup> However, in 1982 the United Nations held the Convention on the Law of the Sea.<sup>44</sup> The U.S. Senate approved the acceptance of the treaty that was estab-

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36. American Gaming Association, Industry Information Fact Sheets, General Information, [http://www.americangaming.org/Industry/factsheets/general\\_info\\_detail.cfv?id=15](http://www.americangaming.org/Industry/factsheets/general_info_detail.cfv?id=15) (last visit March 7, 2010).

37. *Id.*

38. Cornell Univ. Law School: *Gambling Law: An Overview*, <http://topics.law.cornell.edu/wex/Gambling> (last visited Feb. 22, 2010).

39. *Id.*

40. The Gaming Ship Act, 18 U.S.C. § 1082 (a) (1994).

41. *Id.*

42. 18 U.S.C. § 2280 (1996).

43. Andrew Rosenthal, *Reagan Extends Territorial Waters to 12 Miles*, N.Y. TIMES, Dec. 12, 1988, available at <http://www.nytimes.com/1988/12/29/us/reagan-extends-territorial-waters-to-12-miles.html>.

44. Oceans and Law of the Sea, *The United Nations Convention on the Laws of the Sea*, [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm) (last visited Feb. 22, 2010).

lished at the convention.<sup>45</sup> In 1988, President Reagan proclaimed that the territorial waters of the U.S. had been expanded to anything within 12 nautical miles from the coastline.<sup>46</sup> The U.S. was the 105th nation to proclaim the 12 nautical mile limit under the treaty.<sup>47</sup> Therefore, a vessel now has to be at least 12 nautical miles from the United States' coastline to commence gaming activities.

B: THE GAMBLING DEVICE ACT OF 1962 (A.K.A.,  
THE JOHNSON ACT)

The Gambling Device Act, better know as The Johnson Act, states in section 1175(a) of the Act that it is “unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of title 18 . . . or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18. . . , including on a vessel documented under chapter 121 of title 46 . . . or documented under the laws of a foreign country.”<sup>48</sup> Thus, it prohibits domestic common carriers from not only offering gaming, but also from transporting any gaming devices.

1. *What Is A Gambling Device?*

According to the Johnson Act, a gambling device means any “slot machine” or “any other machine or mechanical device. . . designed and manufactured primarily for use in connection with gambling, and which when operated may deliver, as the result of the application of an element of chance, any money or property, or. . . a person may become entitled to . . . money or property. . . .”<sup>49</sup> In addition to slot machines, this would also include video gaming machines, roulette wheels, and bingo equipment.<sup>50</sup> The definition of a gambling device is so broad that it could conceivably cover most, if not all, things needed to play a game of chance.

2. *What Areas Of Transportation Does The Johnson Act Impact?*

Most areas of transportation have been able to obtain waivers from the Act. Trucks transporting gaming devices from the manufacturing site

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45. Oceans and Law of the Sea, *Chronological List of Ratifications*, [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm) [hereinafter Chronological List of Ratification] (last visited Feb. 22, 2010).

46. Rosenthal, *supra* note 43.

47. *Id.*

48. The Gambling Device Act, 15 U.S.C. § 1775(a) (2010).

49. *Id.* at § 1171(a) (2010).

50. *See id.*

to casinos can apply for a waiver of the Johnson Act.<sup>51</sup> This waiver must be applied for yearly, and must be kept in the cab of the truck during the transport of gaming devices.<sup>52</sup> Cruise ships may also obtain a waiver from the Johnson Act.<sup>53</sup> Cruise ships are permitted to have gaming devices aboard the vessel when they are in the United States' jurisdiction so long as the gaming devices are not available to be played while the vessel is in U.S. territorial waters.<sup>54</sup> The Gaming Device Act was amended in 1992 to permit gambling aboard U.S.-flagged ships, but only when they were outside of U.S. territorial water.<sup>55</sup> This amendment was implemented to eliminate the competitive advantage foreign-flagged ships had by being allowed to offer gambling aboard their vessels.

Two years after the amendment to the Johnson Act, Congress passed another amendment to eliminate any possible competitive advantage a foreign airline might obtain by offering gaming because domestic airlines had not obtained a waiver of the Act.<sup>56</sup>

### 3. *Section 205 of the FAA Authorization Act of 1994 (A.K.A. The Gorton Amendment)*

Section 205 of the Federal Aviation Administration Authorization Act of 1994 is more commonly known as The Gorton Amendment.<sup>57</sup> Section 205 prohibits an "air carrier or foreign air carrier" from installing, transporting, operating, or permitting the use of any gambling device on board an aircraft in foreign air transportation.<sup>58</sup> The purpose of this section was to eliminate any competitive advantage foreign aircrafts coming to and from the United States could have, if they were to offer gaming to their passengers.

## PART IV: CRUISE SHIP GAMBLING

Prior to the amendment passed in 1992, the only cruise ships allowed to offer gaming were foreign vessels in international waters.<sup>59</sup> These foreign vessels were allowed to dock in U.S. ports, but were not allowed to

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51. U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, *Information Regarding the Gambling Devices Act of 1962*, 1, available at <http://www.justice.gov/criminal/oeo/docs/gamblingvc-1962.pdf>.

52. *Id.* at 2.

53. *See id.*

54. S.C. CODE ANN. §3-11-320 (2009)

55. S. 1191, 114th Sess. (S.C. 2002).

56. *See* U.S. DEP'T OF TRANSP., VIDEO GAMBLING IN FOREIGN AIR TRANSPORTATION, 1 (March 1996), available at <http://ostpxweb.dot.gov/aviation/intav/gambling.pdf> [hereinafter Video Gambling].

57. *See* Federal Aviation Administration Authorization Act of 1994, Pub. L. No. § 205, 108 Stat. 1569 (1994).

58. 49 U.S.C. § 41311(a) (2010).

59. 18 U.S.C. § 1082 (1949).



offer gaming when they were within U.S. jurisdiction.<sup>60</sup> After the amendment to the Johnson Act in 1992, all domestic and foreign cruise ships were allowed to offer gaming onboard their vessels once in international water.<sup>61</sup> The method that cruise ships offer for gaming onboard their vessel is fairly simple. When the vessel was within 12 nautical miles of the U.S. coastline, the gaming devices onboard the ship were disabled.<sup>62</sup> The more common description of the devices is to say they were “dark.”<sup>63</sup> Once the vessel was past the U.S. territorial waters, the cruise ships would turn on all gaming devices.<sup>64</sup>

Since these vessels are not within U.S. jurisdiction or any of their territories, the cruise ships are not bound by any of its laws regarding gaming. For the cruise ships, this means the government cannot tax gaming revenue because it was earned outside of U.S. jurisdiction.<sup>65</sup> More importantly, no state or regulatory body enforces any gaming laws on the cruise ships, so cruise ships can set their own winning percentages on slot machines and payout rates for other games.<sup>66</sup> This means the consumers of the gaming services onboard the vessel do not have the assurance that the cruise ship is treating them fairly. For example, a cruise ship could set a slot machines pay out rate to be 20%, which, in its most basic form, means the player will only win 20% of their money back over a certain period of time. However, if that same player goes to a regulated gaming jurisdiction, most jurisdictions require certain minimum slot payouts.<sup>67</sup> For example, Colorado requires that a slot machine must have a minimum slot machine payout of no less than eighty percent.<sup>68</sup> Therefore, without a regulatory structure, consumers can be taken advantage of when gambling aboard a cruise ship. This is mitigated to some extent by the competitive nature of the cruise industry because cruise ship casinos are judged against other cruise ship casinos, and therefore must be competitive in the market place.<sup>69</sup> To take advantage of the current state of

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60. *See id.*

61. *See id.*

62. John Tipton, Professor, University of Denver Sturm College of Law, Gaming Law Spring 2009 (Feb. 19, 2009).

63. *Id.*

64. *Id.*

65. Foreign Earned Income Tax Exclusion, <http://www.irs.gov/businesses/article/0,,id=182017,00.html> (last visited March 8, 2010).

66. Cruise Casinos, Cruise Ship Casino Rules and Regulation, <http://www.cruise-casinos.com/rules.htm> (last visited Feb. 24, 2010) [hereinafter Cruise Ship Rules].

67. Slots 2000, Slots Payout, <http://www.slots2000.com/payback.php> (last visited Feb. 24, 2010).

68. COLO. DEP'T OF REVENUE, UNDERSTANDING SLOT MACHINES, <http://www.colorado.gov/cs/Satellite/Rev-Gaming/RGM/1213781235400> (last visited Feb. 24, 2010).

69. *See generally* Jesse Witt, *Aces & Boats: As the Popularity of Cruise Ship Gambling Soars, Why to the Airlines Remain Grounded?*, 28 *TRANSP. L. J.* 353, 359 (2001); Cruise Ship

the law, some companies offer “cruises to nowhere,” which are trips on a vessel from a U.S. port to a point outside of the territorial waters for the sole purpose of gambling.<sup>70</sup>

The current laws and regulations applicable to cruise ships are the basis for dealing with the issues when it comes to the possibility of gambling onboard an aircraft.

#### PART V: GAMBLING ON AIRLINES

Since airlines have not been granted a waiver of the Johnson Act, and the Gorton Amendment is a clear prohibition of gaming aboard airlines, it is not possible for an airline to offer gaming on a domestic flight in the U.S. or an international flight with U.S. origin, termination or transition.<sup>71</sup> Flights that are exclusively outside the U.S. are not restricted from offering in-flight gaming to their passengers by U.S. law, but may be restricted by the laws by which those flights are governed.<sup>72</sup> With these restrictions, not many airlines have attempted to offer in-flight gaming.

##### A. INTERNATIONAL FLIGHTS

One airline that tried to offer in-flight gaming was Singapore Airlines. Singapore Airlines installed slot machines at the rear of planes that did not travel in or out of the United States.<sup>73</sup> However, instillation caused serious safety issues. Since more people moved to the back of the plane to play the slot machines, the plane’s weight ratio was thrown off balance.<sup>74</sup> To adjust for the additional weight in the rear of the plane, the aircraft was forced to carry more fuel, meaning an increase in operating expenses for the aircraft.<sup>75</sup> Ultimately, Singapore Airlines decided it was not worth the extra costs and risks to operate slot machines.<sup>76</sup> Although foreign airlines have tried to offer gaming, domestic airlines have not.

##### B: DOMESTIC FLIGHTS

The Johnson Act and Gorton Amendment make it illegal for any

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Rules, *supra* note 66; ICCL Gambling Guidelines Policy Statement, [www.hollandamerica.com/assets/cruise-vacation-onboard/iccl\\_gaming\\_rules.pdf](http://www.hollandamerica.com/assets/cruise-vacation-onboard/iccl_gaming_rules.pdf) (last visited Feb. 22, 2010).

70. See *Gambling on “cruises to nowhere,”* MARINE LOG, Sept. 1, 2001, available at <http://www.allbusiness.com/legal/819527-1.html>.

71. See 49 U.S.C. § 41311 (2003); 15 U.S.C. § 1175 (2006).

72. See *Video Gambling*, *supra* note 56, at 38-39.

73. Fred Gebhart, *High Fliers for High Stakes*, N.Y. TIMES, Oct. 9, 1995, available at <http://www.nytimes.com/1995/10/09/news/09ihtgamble.html?scp=1&sq=singapore%20airline%20slot%20machine&st=cse>.

74. *Id.*

75. *Id.*

76. See *id.*

domestic flight or any flight to or from the United States to offer in-flight gaming.<sup>77</sup> On its face, a law that regulates, restricts, or allows gambling on a totally intra-state airline could be held constitutionally invalid because the Tenth Amendment of the U.S. Constitution states that a power not expressly given to the federal government is reserved for the states.<sup>78</sup> This constitutional argument has been upheld since land based gambling became prevalent in the early 1900's.<sup>79</sup> However, the Airline Deregulation Act of 1978 ("ADA") expressly pre-empts the states from enacting or enforcing "any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier"False"<sup>80</sup> According to the U.S. Supreme Court in *Morales v. TWA*, the government considers in-flight entertainment as a service, a term used to describe gambling for years.<sup>81</sup> Since gambling is viewed to be "entertainment" under the ADA, a federal law, the ADA preempts the states' historical police power over gambling. Therefore the Johnson Act prohibits gaming on domestic flights and the Gorton Amendment restricts gaming on flights to and from the United States.<sup>82</sup> As part of the Gorton Amendment, the Secretary of Transportation was required to do a study of in-flight video gaming on foreign flights.<sup>83</sup>

#### PART VI: THE DEPARTMENT OF TRANSPORTATION STUDY

The DOT conducted the study required by the Gorton Amendment.<sup>84</sup> In this study, the DOT based its report on three different aspects. The DOT studied the risks involved, the competitive advantages for foreign competitors, and the consumer reaction to in-flight entertainment.<sup>85</sup>

#### A: TECHNICAL RISKS

When the DOT examined the risks involved with in-flight gaming, they looked not only at the technical risks, but also the behavioral risks. First, the DOT studied whether video gaming devices would have a technical risk to the airplane's electrical controls.<sup>86</sup> The FAA studied whether

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77. 15 U.S.C. § 1175 (2006); 49 U.S.C. § 41311(2003).

78. U.S. CONST. amend. X.

79. See generally Kermit L. Hall, *Tenth Amendment*, Oxford Companion to the Supreme Court of the United States (2005), <http://www.encyclopedia.com/doc/1O184-TenthAmendment.html> (last visit March 7, 2010).

80. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 105(a)(1), 92 Stat. 1705 (1978).

81. See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 424 (1992).

82. 15 U.S.C. § 1175 (2006); 49 U.S.C. § 41311(2003).

83. Pub. L. No. 103-305, § 205(b), 108 Stat. 1583 (1994).

84. Video Gambling, *supra* note 56, at 1-2.

85. *Id.* at 4-5.

86. *Id.* at 31.

implementation of television screens for in-flight entertainment purposes would create a risk to the airplane and its controls.<sup>87</sup> The FAA determined the monitors that were to be installed would not create any electromagnetic interference with an airplane's sensitive instrumentation.<sup>88</sup> The FAA further determined the weight of the monitors, as well as the software needed, would not create any risks for the airplane.<sup>89</sup> The FAA concluded the monitors and systems presented in the study would have been cleared for use inside a commercial aircraft.<sup>90</sup> Next, the DOT looked at the possible behavioral risks associated with in-flight gaming.

#### B: BEHAVIORAL RISKS

The Association of Flight Attendants ("AFA") and other parties expressed concern over possible behavioral issues associated with in-flight gaming.<sup>91</sup> To determine whether there would be an increase in behavioral risk, the DOT examined the FAA-approved security training courses that all crewmembers must complete yearly.<sup>92</sup> The DOT determined crewmembers would be already trained to deal with any behavioral risks that could arise due to in-flight gaming according to the current training requirements.<sup>93</sup> However, the DOT also assumed behavioral risks that are associated with problem gambling would increase the risk.<sup>94</sup> The DOT would not give a definite answer since there had never been in-flight gaming and no actual evidence could be evaluated. In the end, the DOT assumed there would be an increase in behavioral risk due to the nature of gambling.<sup>95</sup>

After studying the risks involved with in-flight gaming, the DOT studied the possible competitive advantages foreign airlines would have if they were not restricted from providing in-flight gaming.

#### C: POSSIBLE COMPETITIVE ADVANTAGES FOR FOREIGN AIRLINES

The DOT examined the competitive advantage the foreign air carriers would have over domestic carriers if foreign air carriers were allowed to offer in-flight gaming.<sup>96</sup> Since the Johnson Act prohibits the transportation of any gaming devices without a waiver, domestic airlines cannot

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87. *See id.* at 33.

88. *See id.* at 34.

89. Video Gambling, *supra* note 56, at 34.

90. *Id.*

91. *Id.* at 35.

92. *Id.* at 36.

93. *Id.*

94. Video Gambling, *supra* note 56, at 37.

95. *Id.*

96. *Id.* at 38.

have gaming devices onboard their aircrafts. Airlines are not only restricted from operating such gaming devices, but also from merely having them onboard.<sup>97</sup> When the Gorton Amendment was presented in Congress, Congress considered the possibility of lifting the restriction on the domestic aviation industry.<sup>98</sup> However, Congress decided not to lift the application of the Johnson Act from domestic airlines and proceeded with the Gorton Amendment.<sup>99</sup> Therefore, the DOT was required to examine the competitive advantages non-domestic airlines would have over domestic airlines if they were allowed to offer in-flight gaming.<sup>100</sup>

The DOT estimated in-flight gaming around the world would generate approximately \$592 million of revenue per year for the airline industry.<sup>101</sup> Foreign airlines traveling to and from the U.S. would generate \$112 million of revenue.<sup>102</sup> In 1996, this translated to \$1 million of gaming revenue per aircraft per year.<sup>103</sup> The DOT also estimated that U.S. airlines, if given the opportunity to offer in-flight gaming, would generate \$225 million of net gaming revenue per year.<sup>104</sup> At the time the study was conducted, this amounted to about 13 percent income generated from international flights by major U.S. airlines.<sup>105</sup> The DOT also estimated that, if it was available, video gambling would be used by 18 percent of all passengers.<sup>106</sup> Even with the potential revenue for the airline industry, Congress was unwilling to allow domestic airlines to offer in-flight gaming.<sup>107</sup> Since the government did not want to further harm the domestic airline industry, it created the Gorton Amendment to eliminate any potential competitive advantage in favor of foreign airlines.<sup>108</sup> After considering the potential competitive advantage for foreign airlines, the DOT concluded its research by studying consumer reaction to possible in-flight entertainment.

#### D: CONSUMER REACTION TO POSSIBLE IN-FLIGHT ENTERTAINMENT

Finally, the DOT studied consumer reaction to the possibility of in-flight gaming as a form of entertainment.<sup>109</sup> The DOT hired Yankelovich

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97. 15 U.S.C. § 1175(a) (2006).

98. Video Gambling, *supra* note 56, at 1.

99. *Id.*

100. *Id.* at 1-2.

101. *Id.* at 39.

102. *Id.*

103. Video, Gambling, *supra* note 56, at 48.

104. *Id.*

105. *Id.* at 39.

106. *Id.*

107. Witt, *supra* note 69, at 353-54.

108. *Id.* at 354.

109. Video Gambling, *supra* note 56, at 15, 19-25.

Partners Inc., a marketing firm to conduct, a survey of consumer reactions to various types of in-flight entertainment including gaming.<sup>110</sup> Yankelovich polled 394 people about the possibility of in-flight entertainment.<sup>111</sup> 196 people, or just less than half, were asked about their thoughts and reactions to in-flight entertainment such as on-demand movies, shopping, and fax, but without mention of video gambling.<sup>112</sup> The other half, 198 people were asked about the same questions, but the description also included video gambling.<sup>113</sup> Of those polled, 92% thought in-flight entertainment that included gambling was a fair to excellent idea.<sup>114</sup> Only 8% of respondents said it was a bad idea or did not respond to the question.<sup>115</sup> 94% of those polled thought in-flight entertainment without gambling was a fair to excellent idea.<sup>116</sup> Only 6% of respondents thought in-flight entertainment without gambling was a bad idea or did not respond, meaning only a 2% increase in the opposition of in-flight entertainment with gambling as compared to in-flight entertainment without gambling.<sup>117</sup> On the basis of the minimal difference, the DOT concluded flights without video gambling was a better solution. At the study's conclusion, Congress decided not to amend the Act, and the Gorton Amendment remained in the FAA Act.<sup>118</sup> However, there always is an opportunity to test the strength and validity of the laws in place, and this case is no exception.

#### PART VII: HAVE CASINOS OR AIRLINES CONSIDERED GAMBLING IN THE AIR?

Even though the law prohibits an airline from transporting gaming devices, one wonders if a casino or airline has considered providing gaming in the air. However, many casinos question the legality of providing gaming on an airplane.<sup>119</sup> After reading the laws, one would assume the same thing. However, due to the canons of statutory interpretation, many enacted laws are subject to debate.

#### A: POSSIBLE INTERPRETIVE APPROACHES TO THE LAWS

In order to comply with laws such as the Johnson Act and Gorton

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110. *Id.* at 19.

111. *Id.*

112. *Id.* at 20.

113. *Id.*

114. Video Gambling, *supra* note 56, at 22.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 2.

119. Liz Benston, *Baccarat in the Sky*, THE LAS VEGAS SUN, Feb 23, 2008, available at <http://www.lasvegassun.com/news/2008/feb/23/baccarat-sky/>.

Amendment when seeking to provide gaming on aircraft, one must look at the statutory construction and interpretation. The first statutory interpretation issue is the definition of the term “gaming device.” Does this include all table games like craps, blackjack, etc? As it was discussed earlier, gaming device could include everything needed to perform a game of chance. The second statutory interpretation issue deals with the definition of a game. As it was discussed prior, certain games such as poker can be considered to be games of skill, not chance. The third, and probably most interesting interpretive issue, is the meaning of the term “air carrier.” Does the Amendment apply to chartered or private aircraft? A brief look at the government’s definition of “air carrier” shows exactly how complex this issue can be.

#### B: LEGAL DEFINITION OF “AIR CARRIER”

There are varying definitions of air carriers between the U.S. Code and the Code of Federal Regulations. In 49 U.S.C.A. § 40102, air carrier is defined as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.”<sup>120</sup> The definition under the Code differs slightly from the definition in the Federal Regulations. Under 14 C.F.R. § 119.21, “[e]ach person who conducts airplane operations as a commercial operator engaged in intrastate common carriage of persons or property for compensation or hire in air commerce, or as a direct air carrier” must be certified under Part 121 of the Federal Aviation Regulations.<sup>121</sup> Likewise, pursuant to 14 C.F.R. § 119.23, “[e]ach person who conducts operations when common carriage is not involved with airplanes having a passenger-seat configuration of 20 seats or more, excluding each crewmember seat, or a payload capacity of 6,000 pounds or more” must be certified under Part 125 of the Federal Aviation Regulations.<sup>122</sup> Finally, “[e]ach person who conducts rotorcraft operations for compensation or hire” must be certified under Part 135 of the Federal Aviation Regulations.<sup>123</sup>

The different definitions of the term might tempt someone to test the Gorton Amendment’s meaning of “Air Carrier.”

#### 1. *Would There Be A Challenge To The Definition Of “Air Carrier”?*

There has been speculation that casinos have considered purchasing an aircraft and creating a casino onboard.<sup>124</sup> This aircraft would travel

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120. 49 U.S.C. § 40102 (2008).

121. 14 C.F.R. § 119.21 (1997).

122. 14 C.F.R. § 119.23 (2005).

123. *Id.* at § 119.25.

124. Early Vegas, *Gambling on Airplanes?*, Feb. 24, 2008, <http://www.earlyvegas.com/news/gambling-on-airplanes/>. (last visited Feb. 22, 2010).

around the world and transport high profile clients.<sup>125</sup> The casino would provide numerous types of in-flight gaming during the trip from the client's location to the casino.<sup>126</sup> Even if a favorable interpretation exists, it appears to be risky and expensive to test out the legislation.

However, foreign airlines and their owning countries may have international law arguments regarding the Gorton Amendment's reach. They could argue the Gorton Amendment oversteps the U.S. government's regulatory authority. Before any legal debates arise, the government should consider doing a new study, not just for foreign airlines, but also domestic airlines.

#### PART VIII: WHY SHOULD THERE BE A NEW STUDY?

The Gorton Amendment was enacted in 1994 and the DOT's study concluded in 1996. Congress has not revisited the issue of gambling on airlines in 15 years. Since amendment was enacted and the study completed, many things have happened that changed the landscape of the airline industry. In 2009, the airline industry is struggling, as is the U.S. economy. As airlines struggled with rising fuel costs and a shrinking profit margin, the industry started to become worse. Many of the major airlines 15 years ago are now bankrupt or have merged with another airline due to the economics of the industry. However, despite the poor economic situation facing the airline industry, airlines continue to move forward with many technological advances.<sup>127</sup>

##### A. TECHNOLOGY 15 YEARS LATER

When the Gorton Amendment became law 15 years ago, technological issues and feasibility of in-flight gaming were realistic concerns for the DOT. However, a decade and a half later, these issues seem no longer relevant because of technological advances. The 1996 DOT study expressed concern of technical risks, as well as the lack of technology such as electronic entertainment devices. Today, it has become standard for airlines to have in-flight entertainment devices located on seatbacks.<sup>128</sup> These in-flight entertainment systems offer everything from music to on-demand movies and satellite television. Some airlines have even begun to offer wireless Internet on their aircrafts.<sup>129</sup> The DOT also expressed concerns about the plausibility of an air-to-ground communication net-

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125. *Id.*

126. *See id.*

127. *See Dolls, high-tech screens hint at airline entertainment to come*, USA TODAY, Sept. 14, 2003, available at <http://www.usatoday.com/travel/news/2003/09/15-air-entertainment.htm>.

128. James A. Martin, *In-Flight Entertainment Update*, PC WORLD, Aug. 2, 2007, available at [http://www.pcworld.com/article/135128/inflight\\_entertainment\\_update.html](http://www.pcworld.com/article/135128/inflight_entertainment_update.html).

129. Alana Semuels, *In-flight wireless Internet to expand to hundreds of American Airlines*



work that would be necessary to handle transactions.<sup>130</sup> Today, most major airlines accept credit cards to pay for meals, alcoholic beverages, and in-flight entertainment.<sup>131</sup> The air-to-ground communication systems that the DOT expressed doubts about have been implemented in today's airline industry, and technological issues recognized in the study have been conquered.

The type of systems needed for in-flight gaming have taken even greater strides forward. Today, handheld video gaming devices have been developed.<sup>132</sup> These devices allow a person to use a portable gaming device wherever they are located. The NGCB conducted BETA testing on this device, and has recently approved the use of these devices.<sup>133</sup> The development of these gaming devices makes the initial capital expenditure concerns for airlines at a minimum. Airlines reluctant to install monitors or purchase aircrafts equipped with the video devices in the seatbacks would have the option of using these handheld devices. This is just one example of how the gaming landscape has changed since the Gorton Amendment.

#### B. GAMING LANDSCAPE 15 YEARS LATER

In 1998, two years after the DOT study, consumer spending on Commercial Casino Gaming was \$19.7 billion.<sup>134</sup> In 2007, the consumer spending on casino gaming has almost doubled, totaling \$34.13 billion.<sup>135</sup> Casino gaming has become even more popular following the Gorton Amendment. The question is whether this increased popularity would translate into an increased interest for in-flight gaming.

In 2008, a public opinion survey was taken to determine consumers' favorite casino games.<sup>136</sup> Slot machines lead the way with 56% followed by blackjack at 24%.<sup>137</sup> This suggests that the easiest casino games for software developers to create for in-flight gaming would be blackjack and

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*planes*, L.A. TIMES BLOG, March 30, 2009, available at <http://latimesblogs.latimes.com/technology/2009/03/airplanesinflightwireless.html>.

130. See Video Gambling, *supra* note 56, at 8.

131. Lisa Rogak, *Many Airlines Now Accepting Plastic for In-Flight Purchases*, CreditCards.com, Aug. 4, 2008, <http://www.creditcards.com/credit-card-news/credit-cards-airlines-in-flight-purchases-1273.php> (last visited Feb. 22, 2010).

132. redOrbit, *Diamond I Unveils GS2 Wireless Handheld Gaming Unit*, [http://www.redorbit.com/news/entertainment/580852/diamond\\_i\\_unveils\\_gs2\\_wireless\\_handheld\\_gaming\\_unit/index.html](http://www.redorbit.com/news/entertainment/580852/diamond_i_unveils_gs2_wireless_handheld_gaming_unit/index.html) (last visited Feb. 13, 2010).

133. *Id.*

134. AM. GAMING ASS'N, 2008 STATE OF STATES: THE AGA SURVEY OF CASINO ENTERTAINMENT 7 (2008), available at [http://www.americangaming.org/assets/files/aga\\_2008\\_sos.pdf](http://www.americangaming.org/assets/files/aga_2008_sos.pdf) [hereinafter State of the States].

135. *Id.*

136. *Id.* at 37.

137. *Id.*

slots, since many of the slot machines and poker machines in casinos are software and video based, and that most popular games would most likely be offered on in-flight gaming devices. However, there are still major concerns with the country's attitude towards gambling.

American perception of gambling has always been at the forefront of discussions, especially in the DOT study. In the past 10 years, there has been no change in public perception. About 15% of people believe gambling is not acceptable or didn't respond both in 1999 and 2008.<sup>138</sup> This means that 85% of people believe gambling is acceptable form of entertainment. However, problem gambling continues to be a topic of discussion among those who are a part of the anti-gambling backlash.<sup>139</sup>

Problem gambling was a topic of discussion in the DOT study, as well as when Congress was implementing the restrictions. The AFA believed behavioral risks would increase with problem gamblers. A recent study conducted by the National Council on Problem Gambling shows that up to 4% of Americans suffer from moderate (problem gambling) to severe (pathological gambling) forms of disordered gambling.<sup>140</sup> Comparing the number of problem gamblers to the number of alcoholics in the U.S., about 8 million Americans are considered dependent on alcohol or are alcoholics.<sup>141</sup> However, the government and the flight attendants provide alcohol to passengers on flights. One solution certain jurisdictions and casinos have implemented is to set limits on the amount of money a player can wager in attempt to reduce the risk of problem gaming.<sup>142</sup>

When the Gorton Amendment was being debated in Congress, many airlines stated they would set a maximum limit on gaming losses of around \$200.<sup>143</sup> Thus, when the DOT conducted their study, they used this hypothetical "limited gaming" scenario.<sup>144</sup> It was not clear to the DOT what the consumer reaction would actually be to a limit placed on their losses. However, 15 years later, American attitude toward responsible gaming shows significant numbers that support low-stakes gaming. In a recent American Gaming Association survey of casinos, 84% of people

138. State of the States, *supra* note 133, at 40.

139. Video Gambling, *supra* note 56, at 12-13.

140. Nat'l Council on Problem Gambling, *FAQs on Problem Gamblers*, <http://www.ncpgambling.org/i4a/pages/Index.cfm?pageID=3315> (last visited Feb. 22, 2010).

141. Alcoholics Info, *Statistics on Alcoholics*, [http://www.alcoholics-info.com/Alcoholic\\_Behavior\\_Statistics.html](http://www.alcoholics-info.com/Alcoholic_Behavior_Statistics.html) (last visited Feb. 13, 2010).

142. William C. Lhotka, *Gambling Supporters Want End to Missouri's Loss Limit \$500 Cap Lets Illinois, Kansas Make Inroads, They Say*, ST. LOUIS POST-DISPATCH, Jan. 20, 1997, at 01A, available at 1997 WLNR 886171.

143. Video Gambling, *supra* note 56, at 9.

144. *Id.* at 9, 45-46.

said they always set a budget before they started gambling.<sup>145</sup> The study also showed that 75% of people set their budgets for under \$200.<sup>146</sup> This study shows that the possibility of a low limit in-flight gaming system would be appropriate for most consumers gambling habits. Besides studying the social issues involved, it is imperative to examine potential economic benefits of changing gaming laws.

### C. POSSIBLE TAX DOLLARS

The government could lift the restriction in exchange for taxing the net gaming revenue. In 1996, the possible net gaming revenue for all domestic and foreign air travel to, from, and within the United States was estimated at \$225 million.<sup>147</sup> In today's dollars, if the government taxed the net revenue from gaming at a rate of 20%, there would be a minimum increase of \$70 million per year in tax revenue. In the grand scheme of things, \$70 million appears to be a minimal cost after the government spent \$800 billion on the financial industry, but there is more than the tax revenue. Airlines would also have a significant increase in revenue from the gaming revenue. This could translate to an economically healthier airline industry, stabilization in the cost of air travel, and an overall increase in tourism.

With a struggling economy and industries that are in even worse shape, Congress should look at all possibilities to jump-start the economy and all of the struggling industries. The DOT's study 13 years ago estimated \$225 million of net gaming revenue for domestic airlines, if they were permitted to offer in-flight gaming.<sup>148</sup> Several airlines have stated they could dramatically decrease fares and possibly even offer free flights if they could to offer video gaming on their aircrafts.<sup>149</sup> The airline industry would obviously benefit, but so too would passengers. In tough economic times, with airlines charging for checked bags, the cost of travel is too much for most families. Therefore, tourism is reduced and the popular travel locations are losing business.<sup>150</sup> Thus, everyone could benefit by allowing airlines to offer the same services cruise ships have offered for decades.

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145. State of the States, *supra* note 133, at 38.

146. *Id.*

147. Video Gambling, *supra* note 56, at 46-48.

148. *Id.*

149. Michael Harrison, *Onboard Gambling May Lead to Free Flights on Ryanair*, INDEPENDENT (UK), Nov. 3, 2005, at 13, available at 2005 WLNR 17753854.

150. *Individual Economic Troubles Pose Largest Threat to Florida Tourism*, US FED. NEWS, Sept. 4, 2008, available at 2008 WLNR 16823410.

PART IX: WHY PERMIT GAMING ON CRUISE SHIPS,  
BUT NOT AIRLINES?

Congress acted arbitrarily by placing restrictions on airlines providing onboard gambling, but allowing cruise ships to do that exact thing. In 1948, the federal government recognized that once a common carrier, i.e. cruise ship, travels to international waters, the common carrier is outside of U.S. jurisdiction.<sup>151</sup> Congress realized that it could not compel vessels to abide by the laws of the country once in international waters. Therefore, cruise ships are allowed to offer gambling once they are in international waters. They were granted a waiver from the Johnson Act, allowing them to dock in a U.S. port with gaming devices. The government realized that foreign-flagged ships had a competitive advantage by offering gaming onboard. The Johnson Act was amended in 1992 to allow U.S.-flagged ships to offer gaming once in international waters.<sup>152</sup> However, when the competitive advantage issue arose concerning airlines, the government's reaction was completely different.

Airlines were never granted a waiver of the Johnson Act like cruise ships and other common carriers were given. Therefore, U.S. airlines could not transport any gaming device or offer gaming onboard any flight. This meant that even when a flight was over international waters, clearly out of U.S. jurisdiction, they could not offer gaming because they weren't allowed to even have gaming devices onboard the aircraft when in U.S. territory. Two years after realizing U.S. ships should be permitted to offer gaming in international waters where there was no jurisdiction, Congress passed the complete opposite law for airlines.<sup>153</sup> In 1994, Congress passed the Gorton Amendment, which restricted any foreign airline from having gaming devices aboard their aircrafts when in U.S. territory. By allowing cruise ships to do the exact thing they are restricting airlines from doing, Congress has created double standard.

A. ALLOWING FOREIGN FLIGHTS TO GAMBLE

If airlines that were traveling to and from the United States were allowed to offer in-flight gaming, they would operate very similarly to cruise ships. While flights are still in the jurisdiction of the United States, the gaming devices would be "dark." Devices are turned dark so the airlines and their passengers don't violate U.S. laws. Once a flight is past U.S. jurisdiction, the gaming devices would then be turned on, enabling passengers to gamble.

Simply repealing the Gorton Amendment and granting a waiver of

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151. 18 U.S.C. § 1081 (1949).

152. S. 1191, 114th Sess. (S.C. 2002).

153. 49 U.S.C. § 41311(a) (2003).

the Johnson Act to airlines would legalize gambling on airlines. However, regulating the gaming on board airlines is not as simple.

#### PART X: POSSIBLE DIFFICULTIES ALLOWING IN-FLIGHT GAMING

The DOT report raised concern of the regulatory issues involved.<sup>154</sup> The study questioned who would regulate in-flight gaming if Congress were to lift the restriction on all flights. If the airlines were allowed to offer in-flight gaming, there are many regulatory issues to be decided. As noted earlier, each state regulates and taxes gaming pursuant to their state law. If gaming were allowed on domestic flights, there could possibly be as many as 48 different regulatory structures. So, if the government were to allow in-flight gaming, there is no doubt that there would need to be one governing body. However, it is questionable whether the states would allow the federal government to be the sole regulator of gaming on airlines. For example, if there were domestic in-flight gaming, there would need to be a restriction on gaming on flights to Utah and Hawaii, the two states which do not allow gaming. This issue would arise due to the prior legislative acts of certain states concerning the sale of alcohol on airlines.

States control liquor licenses that are granted to the airlines. In a recent state action, New Mexico denied Frontier Airlines a liquor license.<sup>155</sup> With the denial of the liquor license, Frontier could not serve alcohol on flights into New Mexico, and New Mexico also ordered US Airways to discontinue the service of alcohol on in-bound flights.<sup>156</sup> US Airways has filed a lawsuit against New Mexico in U.S. District Court challenging this restriction.<sup>157</sup> If in-flight gaming were allowed on flights domestically, there is a strong probability that Utah and Hawaii would desire similar restrictions as New Mexico has in the U.S. Airways action. Other than regulatory issues, there are also issues with taxing net gaming revenue.

#### A: TAXATION OF GAMING REVENUE

States would be unlikely to relinquish regulatory control and permit the federal government to regulate gaming on airlines without compensation. States would most likely wish to have rights to tax net gaming revenue. Each state could equally share in lump sum of tax dollars from all airline gaming, or they could each individually tax revenue. Most likely,

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154. Video Gambling, *supra* note 56, at 51-58.

155. Tom Sharpe, *State Alcohol Authority Faces Test*, SANTA FE NEW MEXICAN, Dec. 12, 2007, at A1, available at 2007 WLNR 24603487.

156. Kiera Hay, *Airline Suing N.M. Over Booze*, ALBUQUERQUE JOURNAL, Dec. 12, 2007, at A1, available at 2007 WLNR 24528390.

157. *Id.*

states would tax revenue on in-flight gaming that occurred on flights into and within their borders. However, there are major jurisdictional issues involved. For guidance, we can examine a similar situation of airline taxation. Wisconsin and Georgia and others tax alcoholic beverage sales within the state on flights.<sup>158</sup> However, major difficulties might arise when determining where the sale was actually made. With this possible trouble, the best option would be for all states to share in a percentage of the tax on gaming revenue.

### 1. *Taxation In International Waters*

For taxing flights to and from the U.S., there is more of precedent to follow. Regardless of a decision to repeal the domestic in-flight gaming restriction, if the government removes the restriction on all international flights (i.e. repealing the Gorton Amendment), the taxing jurisdiction issue has been answered by cruise ship gaming. Once a cruise ship is in international waters, the federal and state governments of the U.S. have no taxing jurisdiction over gaming revenue.<sup>159</sup> The State of Florida's Department of Revenue ("DOR") challenged this jurisdictional restriction when they sued New Sea Escape Cruises, LTD. for tax owed on gaming revenue earned while in international waters.<sup>160</sup> The Florida DOR argued that because the vessel ports in Florida, the state has the right to tax the revenue under Florida law.<sup>161</sup> The Supreme Court determined that Florida did not have the right to any portion of the gaming revenue earned in international waters because international water is outside of Florida and U.S. jurisdiction.<sup>162</sup> Therefore, if an airline is allowed to operate gaming devices when they enter international waters, federal and state governments have no legal right to tax the gaming revenue earned.

As you can see, the U.S. would not directly benefit from lifting the Gorton Amendment without also allowing domestic airlines to offer gaming. There is no direct benefit because the government would receive nothing directly from gaming on airlines in international waters. However, there would be a potential indirect benefit to the economy with the increased cash flow and the possible resurgence of the airline industry.

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158. See Georgia Tax Form ATT-131, available at [https://etax.dor.ga.gov/alcohol/alc\\_forms.aspx](https://etax.dor.ga.gov/alcohol/alc_forms.aspx) (last visit March 7, 2010), Wisconsin Tax Form AB-154, available at <http://www.revenue.wi.gov/forms/excise/index-b.html> (last visit March 7, 2010).

159. Foreign Earned Income Tax Exclusion, <http://www.irs.gov/businesses/article/0,,id=182017,00.html> (last visited March 8, 2010).

160. Florida Dep't of Revenue v. New Sea Escape Cruises, Ltd., 894 So. 2d 954, 956 (Fla. 2005).

161. *Id.* at 957-58.

162. *Id.* at 962-63.

CONCLUSION

With the airline industry struggling to stay afloat and the domestic economy in a recession, the government should look into the laws prohibiting gaming on domestic and foreign aircrafts. It has been 15 years since Congress has last contemplated the prospects of in-flight video gaming. Technology has dramatically increased and the issues that concerned Congress with allowing in-flight gaming have subsided. At a minimum, the DOT should conduct a new study to see if current restrictions are justified. The major issues supporting the decision have been nullified by technology and time.

If the government looks entirely at direct benefits received from repealing the Gorton Amendment alone, it would not make sense for the government to repeal the amendment. If the amendment were repealed, the U.S. would have no legal right to tax any of the gaming revenue. Therefore, there is no direct economic benefit for the government to just allow foreign flights to offer in-flight gaming. However, if Congress focuses on the indirect benefit to the U.S. economy via increased revenue for domestic airlines, then there would be a reason to repeal the Gorton Amendment. Alternatively, Congress could lift the ban on all in-flight gaming, international and domestic. If the government were to lift the restriction on all in-flight gaming, there would be substantial direct economic benefits for not only the airline industry, but also for the government, the economy, and taxpayers. Congress should consider conducting a new study and discuss restrictions on in-flight gaming because of the potential benefits if the laws were repealed.

