

## **Aces & Boats**

### **As the Popularity of Cruise Ship Gambling Soars, Why Do the Airlines Remain Grounded?**

Jesse Witt\*

This note examines the sharp distinction in federal law which permits regulated gaming on all manners of nautical vessels yet denies similar privileges to the airlines. The note concludes that there is substantial justification for granting both foreign and domestic air carriers the right to offer gaming to their passengers on international flights.

#### I. BACKGROUND

On June 9, 1994, the United States Congress approved the Federal Aviation Administration Authorization Act.<sup>1</sup> Passed without debate<sup>2</sup> was a provision in the Act stating 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.”<sup>3</sup> Known as the “Gorton Amendment,” this provision has generated considerable

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\* University of Denver College of Law, J.D. candidate, 2001. Articles Editor, *TRANSP. L.J.*, 2000-01. University of California at Berkeley, A.B., astrophysics, 1996. Mr. Witt wishes to thank Professors Michael Klienman and Paul Stephen Dempsey for their assistance in this note’s preparation.

1. Pub. L. No. 103-305, 108 Stat. 1569 (1994).
2. 140 CONG. REC. 12,483 (1994).
3. Pub. L. No. 103-305, § 205(a)(1)(a), 108 Stat. 1569, 1583 (codified at 49 U.S.C. § 41311(a) (1996)).

consternation among foreign air carriers, who claim that it unlawfully subjects them to United States law even while they operate in their own airspace.<sup>4</sup>

The genesis for the Gorton Amendment, ironically, was a request for the Congress to relax its existing prohibition of in-flight gaming on domestic airlines.<sup>5</sup> Northwest Airlines had lobbied the Congress to permit gaming on international flights, arguing that domestic carriers would be at a competitive disadvantage with foreign carriers who planned to offer gaming to their passengers while in international airspace.<sup>6</sup> The technology was already available to offer a variety of recreational video game options at every passenger's seat, and adding the option to play for money would simply be a matter of installing proper software.<sup>7</sup> Businessmen such as Lee Iacocca argued that gaming and other in-flight entertainment would soon surpass ticket sales as the primary source of revenue.<sup>8</sup> Such seemed a very enticing proposition in light of the severely declining profits in international aviation.<sup>9</sup> The airlines further announced that they would use the additional revenue from gaming to help keep fares low.<sup>10</sup> The Congress, nonetheless, determined that the best way to level the playing field would be to expand the American restrictions to prohibit foreign carriers from offering gaming on any flights to or from the United States.<sup>11</sup>

## II. THE GORTON AMENDMENT

The Congress's decision to ban gaming on all international flights disregards established principles of international law. Although it is settled that the Congress may restrict the gaming activities of an American citizen anywhere on the globe,<sup>12</sup> the propriety of a law unilaterally passed by one state so as to restrict the conduct of a foreign individual in his home sovereignty is dubious.<sup>13</sup> Nonetheless, the Gorton Amendment is considered to be valid and enforceable against any air carrier wishing to

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4. Steven Grover, *Blackjack at Thirty Thousand Feet: America's Attempt to Enforce Its Ban on In-flight Gaming Extraterritorially*, 4 TEX. WESLEYAN L. REV. 231, 236 (1998).

5. Brian C. O'Donnell, *Gambling to be Competitive: The Gorton Amendment and International Law*, 16 DICK. J. INT'L L. 251, 253 (1997).

6. *Id.* at 258.

7. *Id.* at 254.

8. Julie Schmit, *Iacocca Bets In-Flight Gaming Will Take Off*, USA TODAY, Oct. 10, 1994, at 3B.

9. See Grover, *supra* note 4, at 246.

10. O'Donnell, *supra* note 5, at 256.

11. Grover, *supra* note 4, at 232.

12. See *United States v. Black*, 291 F. Supp. 262, 266 (S.D.N.Y. 1968) (holding that, prior to 1994 amendments, Gambling Ship Act, 18 U.S.C. § 1082(a) (1949), allowed for prosecution of Americans charged with gambling on high seas).

13. Brian A. Foont, Comment, *American Prohibitions Against Gambling in International*

do business in American airspace, and similar laws have received favorable review in American courts.<sup>14</sup>

Fresh from his feuds with the Spokane and Colville Tribes over Indian casinos in Washington State,<sup>15</sup> Senator Slade Gorton (R-Wash.) advanced a bill in 1994 to close what he called “an unintended loophole in U.S. law” that prevented only American carriers from offering gaming.<sup>16</sup> Although his rhetoric embraced protectionist sentiments, Gorton correctly noted the disadvantage that domestic airlines faced.

[F]oreign carriers such as Virgin Atlantic and Singapore Airlines have already announced that they intend to provide in-flight gambling.

This development will put U.S. carriers at a significant competitive disadvantage. An aviation consulting firm has estimated that U.S.-flag carriers could lose \$680 million a year in revenues from international passengers who decide to travel on foreign-flag carriers in order to gamble.

This competitive inequity must be redressed. U.S.-flag carriers, which are trying to rebound after 4 straight years of being battered with staggering losses, should not be forced by discriminatory U.S. laws to endure such financial hardship.<sup>17</sup>

Unfortunately, rather than move to repeal the discriminatory laws, Gorton put forth an amendment that extended their effect to all carriers regardless of nationality.<sup>18</sup>

In fairness, Gorton seemed to be offering his bill as a temporary stopgap to forestall immediate losses by domestic airlines, and his amendment accordingly commissioned two studies to evaluate the seriousness of the risks that in-flight gaming posed.<sup>19</sup> However, despite a finding that the electronics of on-board gaming systems would not interfere with an airplane’s operation, the lack of data describing how passengers might behave subsequently led the Department of Transportation to withhold endorsement of in-flight gaming.<sup>20</sup> Nearly seven years after its passage, the Gorton Amendment remains law, and what may have been intended

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*Aviation: An Analysis of the Gorton Amendment Under the Law of the United States and International Law*, 65 J. AIR L. & COM. 409, 424 (2000).

14. *Id.* at 422; *accord* *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 43 S. Ct 504, 67 L. Ed. 894 (1923).

15. Jess Walter, *Gorton Wants Reno to Halt Casino Debut*, *SPOKANESMAN REV.*, Mar. 19, 1994 at B1.

16. 140 CONG. REC. 12,483 (1994).

17. *Id.*

18. *See* Federal Aviation Administration Authorization Act, Pub. L. 103-305 § 205(a)(1)(a), 108 Stat. 1069, 1583 (1994).

19. Federal Aviation Administration Authorization Act, § 205(b).

20. Grover, *supra* note 4, at 235-36 (citing U.S. Dept. of Transp., *Video Gambling In Foreign Air Transportation* 4 (unpublished report)).

as a mere stopgap now looms as a potential logjam for international relations.

In response to the enactment of the Gorton Amendment, ten major international airlines formed a group known as the International Airline Coalition on the Rule of Law.<sup>21</sup> According to the Coalition, the United States's attempt to ban in-flight gambling on foreign air carriers is an unjustified assertion of American jurisdiction over otherwise lawful conduct on foreign aircraft outside United States territory.<sup>22</sup> The Coalition's effort has subsequently been joined by a number of foreign governments and the European Union Commission.<sup>23</sup>

The Coalition's argument rests primarily on the body of treaties that have come to define international civil aviation law.<sup>24</sup> In particular, the Coalition relies<sup>25</sup> upon the Chicago Convention of 1944 by which "[t]he contracting states recognize that every State has complete and exclusive sovereignty over the airspace above its territory."<sup>26</sup> The Chicago Convention further requires that aircraft traveling over a foreign territory abide by the laws of that territory.<sup>27</sup> By its terms, the Chicago Convention clearly forbids a nation to extend its laws across the border of another signatory nation, but this is precisely the action of the Gorton Amendment with respect to gaming over the skies of other nations.<sup>28</sup>

Likewise, the Geneva Convention on the High Seas of 1958 ruled that the high seas and their superincumbent airspaces are not subject to the sovereignty of any nation.<sup>29</sup> When an aircraft flies over areas of undetermined sovereignty, it is subject only to the jurisdiction of its own state of registry or nationality.<sup>30</sup> Again, the Gorton Amendment's attempt to extend American jurisdiction over foreign planes in international airspace is directly contrary to treaty.<sup>31</sup>

The fallout from this dispute may become severe. The European Union and the United States House of Representatives recently traded noise restriction proposals that would have effectively prohibited American- and European- manufactured planes from entering the other's re-

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21. *Id.* at 236.

22. *Id.*

23. O'Donnell, *supra* note 5, at 260.

24. Grover, *supra* note 4, at 238.

25. *Id.*

26. *Id.* (citing Convention on International Civil Aviation Art. I, Dec. 7, 1944, 61 Stat. 80, T.I.A.S. No. 1591, 15 U.N.T.S. 295).

27. *Id.*

28. *See id.* at 239.

29. O'Donnell, *supra* note 5, at 262.

30. *Id.* at 262-63.

31. *See id.* at 264.

spective airspace.<sup>32</sup> One can readily envision a situation in which rival nations begin passing restrictive and protectionist laws purporting to exercise jurisdiction over another sovereign's aircraft. In such an environment, the cooperative spirit under which the international civil aviation industry has flourished could quickly die out.<sup>33</sup>

Given the substantial questions about the United States' authority to effectuate the Gorton Amendment and the wisdom of pursuing such a course of action at all, one must consider very carefully whether such provisions are necessary. Although gaming aboard airplanes has never seen widespread use, the maritime industry provides some analogous data about the profits and pitfalls to be expected.

### III. FACED WITH THE SAME QUESTION IN 1991, CONGRESS ACTED TO LEGALIZE SHIPBOARD CASINOS

Preceding passage of the Gorton Amendment by several years was a similar lobbying effort undertaken by the American cruise ship industry.<sup>34</sup> Domestic cruise lines, restricted by the same law which forbid transport of gaming equipment on airplanes,<sup>35</sup> had found themselves unable to compete with foreign-flagged vessels that offered shipboard casinos.<sup>36</sup> Taking the exact opposite approach as it would subsequently follow with the airlines, however, the Congress amended the law in 1991 to permit ships sailing under American flag to offer gambling in international waters.<sup>37</sup> This change did not abrogate the prohibition on "cruises to nowhere" or floating casinos,<sup>38</sup> which remained illegal under the Gambling Ship Act.<sup>39</sup> However, in 1994—the same year in which it passed the Gorton Amendment—the Congress acted to except vessels beyond the territorial waters of the United States during any "voyage of . . . a commercial vessel transporting passengers engaged in gambling aboard the vessel beyond the territorial waters of the United States, during which passengers embark or disembark the vessel in the United States."<sup>40</sup>

Throughout this process, riverboat casinos have remained free from the federal laws proscribing transport of gaming equipment, provided that they remain at all times on waters subject to the control of state

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32. Foont, *supra* note 13, at 418.

33. See Grover, *supra* note 4, at 244-45.

34. O'Donnell, *supra* note 5, at 267.

35. 15 U.S.C. § 1175 (1951).

36. O'Donnell, *supra* note 5, at 267.

37. *Id.*

38. H.R. REP. NO. 102-357, at 4 (1991).

39. 18 U.S.C. §§ 1081-1083 (1949).

40. Violent Crime Control & Law Enforcement Act of 1994, Pub. L. 103-322 § 320501, 108 Stat. 1796, 2114 (codified as amended at 26 U.S.C. § 4472(1)(A)(ii) (2000 Supp.)).

authorities.<sup>41</sup> The Gambling Ship Act, likewise, has always contained an express exemption for vessels remaining at all times within the jurisdiction of one state.<sup>42</sup>

There is no clear explanation for why the Congress has taken such different tacks with respect to gaming in the two complementary industries of airlines and cruise ships, but perhaps the answer lies simply in the fact that airline gaming is unexplored territory. Gambling on ships and riverboats, by contrast, has been advocated as a continuation of American nautical history.<sup>43</sup> This has in some cases been underscored by a statutory requirement that the vessels replicate historic paddlewheelers as nearly as practicable.<sup>44</sup> On land, similar rationales have mandated that casinos built in historic mining communities conform to Nineteenth Century architecture.<sup>45</sup>

This is not to say that a return to gaming on ships has come without controversy. Whether certain unseaworthy barges hosting casinos are to be deemed "vessels" under admiralty jurisprudence has been the subject of much recent attention.<sup>46</sup> In one case, the Firth Circuit upheld a ruling that a barge with only decorative instrumentation and a false paddlewheel was not a "vessel" so as to permit a seaman's claim under the Jones Act.<sup>47</sup> Cruise ships and functional riverboats clearly do fall within maritime jurisdiction, however.<sup>48</sup>

In another noteworthy case, New York Mayor Rudolph Giuliani attempted to curtail operation of a casino ship sailing daily from Brooklyn by pressuring the United States Attorney to claim an expansion of the United States' territorial seas based on the Antiterrorism and Effective Death Penalty Act of 1996,<sup>49</sup> which had extended federal criminal jurisdiction from three to twelve miles offshore.<sup>50</sup> This move achieved the

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41. See *Casino Ventures v. Stewart*, 183 F.3d 307, 311 (4th Cir. 1999).

42. 18 U.S.C. § 1082(a)(2) (1949).

43. See Lori Chapman, *Riverboat Gambling in the Great Lakes Region: A Pot of Gold at the End of the Rainbow or Merely "Fool's Gold?"* 26 U. TOL. L. REV. 387, 391 (1995).

44. See LA. REV. STAT. § 27:44(23)(d)-(e) (2001 Supp.).

45. See COLO. CONST. art. 18, § 9(3)(b).

46. E.g. Steven E. Psareliss, Daniel A. Tadros, and James R. Holmes, *Bet Your Lien and Roll the Dice: Maritime Liens and Riverboat Gambling*, 6 U.S.F. MAR. L.J. 49 (1993); Richard J. McLaughlin, *Floating Casinos, Personal Injury and Death Claims, and Admiralty Jurisdiction*, 64 MISS. L.J. 439 (1995); Nancy L. Hengen, *Riverboat Gaming and The Jones Act*, A.L.I.-A.B.A. 211 (1998).

47. *Pavone v. Miss. Riverboat Amusement Corp.*, 52 F.3d 560, 565 (5th Cir. 1995).

48. Psareliss et al., *supra* note 46, at 66.

49. Pub. L. 104-132, Title IX, § 901(a), 110 Stat. 1317, (1996).

50. Robert M. Jarvis, *Gambling Ships: The Antiterrorism and Effective Death Penalty Act of 1996 Does Not Extend the Territorial Sea of the United States for Purposes of the Gambling Ship Act*. *United States v. One Big Six Wheel*, 987 F. Supp. 169, 1998 AMC 934 (E.D.N.Y. 1997), 29 J. MAR. L. & COM. 449, 449-50 (1998).

desired result of increasing travel time to the point where gaming on the ship was no longer profitable.<sup>51</sup> The Second Circuit however, rejected the argument that the extension of jurisdiction for a narrowly defined purposed could be extrapolated to an expansion of the United States's territorial sea.<sup>52</sup> Interestingly, after losing in the courts, Giuliani immediately reversed his position and proposed *expanding* gambling in New York Harbor by constructing a huge casino on Governors Island.<sup>53</sup>

#### IV. CRUISE SHIP CASINOS HAVE SHOWN THAT GAMING INCREASES REVENUE & PASSENGER ENJOYMENT

The relaxation of gaming prohibitions has brought substantial revenues for the American cruise ship industry.<sup>54</sup> The operator of a shipboard casino typically enjoys a high profit margin on most card games, and a modest bank of shipboard slot machines can generate hundreds of thousands of dollars monthly.<sup>55</sup> One estimate calculates that American air carriers could reap gross revenues of \$300 million annually from in-flight gaming while incurring operating expenses of only \$75 million.<sup>56</sup> In fact, after losing most of its passenger market to the airlines in the 1960s, the installation of casinos and other resort-like attractions have helped move the cruise ship industry "from moribund to muscle-bound" in recent years.<sup>57</sup>

The recreational draw of gaming, therefore, should not be underestimated. One official has noted that shipboard casinos not only run neck-and-neck with bars as the leading source of shipboard revenues, but that they also constitute an expected part of the cruise experience for many passengers.<sup>58</sup> Virgin-Atlantic has, in fact, stated that it intends to offer gaming only as added entertainment for its passengers, not as a source of increased revenue.<sup>59</sup> At Virgin-Atlantic's Heathrow Airport departure lounge today, passengers can already play blackjack for frequent flier points instead of cash.<sup>60</sup>

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51. *Id.* at 453.

52. *United States v. One Big Six Wheel*, 166 F.3d 498, 501 (2d Cir. 1999).

53. *Jarvis*, *supra* note 50, at 456.

54. Bill Ordine, *Shipboard Gambling Has Its Differences*, PHIL INQ., OCT. 1, 2000, at L10.

55. Brook Hill Snow, *Gamblers Are in Luck on Cruise Ships*, ORLANDO SENTINEL, Feb. 23, 1992, at H4.

56. Mead Jennings, *Aces High / In-Flight Gaming on Airlines*, AIRLINE BUS., July 1, 1996, at 56.

57. Mark Roberts, *Floating Fantasy*, ECONOMIST, Jan. 10, 1998, at S14.

58. Ordine, *supra* note 54, at L10.

59. Jennings, *supra* note 56, at 56.

60. Adam W. Keats, *In-Flight Gaming Opposed*, LAS VEGAS REV. J., July 3, 1994, at 13E.

## V. THE AIRLINES COULD AVOID MOST NEGATIVE ASPECTS OF LEGAL GAMING

Critics of expanded gaming point to economic models that show casinos taking more from communities than they return.<sup>61</sup> Truthfully, casinos can function as a vehicle to move funds from losing players to the casino ownership, to the winning players, and to the state.<sup>62</sup> Oftentimes, this equates to an overall loss to the local community, particularly where the casino has substantial foreign ownership interests.<sup>63</sup> However, it seems highly unlikely that the microeconomic phenomenon of a casino ship taking money out of the community where it docks<sup>64</sup> would reappear in the decentralized world of the international air passenger.

More importantly, if in-flight gaming is realized, most industry proponents have indicated that losses would be limited to a per-flight maximum of a few hundred dollars.<sup>65</sup> British Airways hopes to implement such a system but would set higher limits in first-class than in coach.<sup>66</sup> In this manner, the airlines can reduce the likelihood that a passenger will lose more than she can afford.

The airlines would also do well to require passengers to enable or disable the gambling functions at the time of ticket purchase. Although this could reduce spontaneous use of the systems, it would also give problem gamblers a chance to exclude themselves from temptation in advance.<sup>67</sup>

Another common means of diminishing the negative impact of gaming on a new forum is to limit the maximum bet that a player may wager on any one hand or play.<sup>68</sup> Statutory limits of this type are ubiquitous where legislators first seek to introduce legal gaming<sup>69</sup> and would likely surface as part of any initial proposal to permit in-flight gaming. However, one must wonder whether restricting how much a player can bet at

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61. E.g. John Warren Kindt, *The Negative Impacts of Legalized Gambling on Businesses*, 4 U. MIAMI BUS. L.J. 93, 93 (1994).

62. Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 MISS. L.J. 291, 329 (1995).

63. *Id.*

64. *See id.* at 330.

65. E.g. David Flaum, *Harrah's Part of In-Flight Gambling Company*, COM. APPEAL, Sept. 13, 1998, at C1; James Weir, *Singapore Airlines in \$500M Upgrade*, DOMINION, Sept. 4, 1998, at 14; Ralph Schoenstein, *You Can Bet Gambling Is Attractive to US Airlines*, SAN DIEGO UNION TRIB., Sept. 7, 1997, at F1.

66. Jennings, *supra* note 56, at 56.

67. Cf. Amy S. Rosenberg, *Help for Addicts: Gamblers Soon Can Ban Selves From Casinos*, SALT LAKE TRIB., Aug. 11, 2000, at A1.

68. Blaine Harden & Anne Swardson, *You Bet! It's the New, \$482 Billion Pastime; Legal Wagers Up 2800 Percent Since 1974 Series*, WASH. POST., Mar. 3, 1996 at A1.

69. E.g. IOWA CODE ANN. § 99F.4(4) (1991) (maximum wager provision subsequently deleted by 1994 Iowa Acts 1021); COLO. CONST. Art. XVIII § 9(4)(b).



a time truly helps control her overall losses. Adjusting her bet up or down as cards leave the deck is one of the few ways that a player can offset the house's advantage.<sup>70</sup> By wagering more after unfavorable cards have been played (and vice-versa), the player can increase her chances of finishing ahead.<sup>71</sup> A priori, restrictions on the amount a player can bet will necessarily limit her resources and bolster the house's advantage.<sup>72</sup> Although the player may stand to lose less money on any given play, she can also expect to lose more money overall. Thus, despite the initial appeal of a limited wager, the wisdom of such a tool must be considered very carefully.

#### VI. PROPER PROCEDURES CAN MINIMIZE FLIGHT ATTENDANTS' INCONVENIENCE

The discussion of in-flight gaming has also prompted flight attendants to raise concerns about having to handle irate gamblers in addition to their existing tasks.<sup>73</sup> Such is a particularly important need in light of increasing reports of "air rage."<sup>74</sup> Unlike the huge staffs employed by cruise ship casinos,<sup>75</sup> flight attendants would likely be charged with supervising any gaming on airplanes.<sup>76</sup>

In recognition of these concerns, the airlines have proposed systems that should curtail significant incidents. No cash would be involved, as all transactions would utilize credit cards.<sup>77</sup> The gaming systems would provide their own online technical assistance,<sup>78</sup> and polarized screens and headphones would minimize the need to relocate minors or others who might object to a neighboring passenger's gaming.<sup>79</sup> Once properly established, these procedures should minimize flight attendants' involvement with the gaming systems altogether and allow them to concentrate on their principle duties.

#### VII. CONCLUSION

In an effort to sell the behemoth A3XX jet, Airbus Industrie recently began a series of ads depicting its planes as virtual cruise ships in

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70. See *Campione v. Amadar of New Jersey, Inc.*, 714 A.2d 299, 301 (N.J. 1998).

71. See *id.*

72. See *id.*

73. Keats, *supra* note 60, at 13E.

74. Eric Brazil, *AIR RAGE / Berserk passenger tries to crash British 747*, SAN FRANCISCO CHRON., Dec. 29, 2000, at A1.

75. Psareliss, *supra* note 46, at 71.

76. Keats, *supra* note 60, at 13E.

77. Grover, *supra* note 4, at 245.

78. *Id.*

79. *Id.*

the sky, complete with onboard casinos.<sup>80</sup> While such a vision may never be realized, the prospect of electronic gaming at passengers' seats is an inevitable reality. The question is how far the United States will strain international relations before it concedes to withdraw its attempt to foist American societal views on unwilling foreign entities. In light of the airline industry's need for an injection of capital, the tenuous nature of the Gorton Amendment under international law, the enormous success of casinos on cruise ships, and the existence of adequate means to control the negative effects of gaming, the Congress should give immediate and careful consideration to repealing the prohibition on in-flight gaming for all carriers.

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80. Jeff Cole & Daniel Michaels, *Airbus's Cruise Ship in the Sky: Ads for Huge A3XX Envision Casinos and Restaurants, But Airlines See More Seats*, WALL ST. J., Aug. 30, 2000.