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# FLIGHT CHECK: ARE AIR CARRIERS ANY CLOSER TO PROVIDING GAMBLING ON INTERNATIONAL FLIGHTS THAT LAND OR DEPART FROM THE UNITED STATES?

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## I. INTRODUCTION

**R**ECENTLY, THE DECISION by Ryanair to offer in-flight video gambling reignited the debate over this activity in the friendly skies.<sup>1</sup> More specifically, Ryanair plans to offer its passengers internet access to one of the world's largest online gambling sites through its in-flight entertainment system.<sup>2</sup> This electronic version follows its popular "Fly to Win" scratch cards that basically resemble a lottery.<sup>3</sup> According to Ryanair's management team, it expects to realize vast sums of revenue through passenger entertainment which it hopes will lead to a strategic advantage.<sup>4</sup> Thus, many commentators believe more of these types of actions by other foreign carriers will likely force Congress to take action at some time in the future to remove the current obstacles in the United States to allow gambling during

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<sup>1</sup> See I. Nelson Rose, *Casinos on Cruise Ships, Why Not on Airplanes?* 10 GAMING L. REV. 519 (2006). Ryanair places limitations on its in-flight gambling by only allowing citizens of the departure and arrival countries to participate. *Id.* at 519. Moreover, Ryanair operates regularly scheduled flights throughout Europe and North Africa but not the United States. See Ryanair, *Where We Fly*, <http://www.ryanair.com/site/EN/dests.php?flash=chk&pos=MYFLIGHT> (last visited Nov. 4, 2008).

<sup>2</sup> Simona Rabinovitch, *Chicken, Fish or Scratch-and-Win? A Flock of Airborne Peddlers Are Gearing Up to Sell You Anything and Everything*, GLOBE & MAIL, Jan. 6, 2007, at T3.

<sup>3</sup> See Rose, *supra* note 1, at 519.

<sup>4</sup> Ben Mutzabaugh, *Ryanair May Turn to In-flight Gambling and Free Airfares*, USA TODAY, Nov. 4, 2005, available at [http://www.usatoday.com/travel/flights/today/2005-11-04-sky-archiveoct03\\_x.htm](http://www.usatoday.com/travel/flights/today/2005-11-04-sky-archiveoct03_x.htm). The CEO of Ryanair explained that gambling is one of those areas the airline can use to subsidize its overall business in order to place pressure on its competitors who compete solely on airfares. *Id.*

international flights in order to create a level playing field for American airlines.<sup>5</sup>

The underlying cause for this disparity begins with the Federal Aviation Authorization Act of 1994, which places severe limitations on domestic and foreign air carriers' ability to conduct gambling on long-haul international flights and required a study to be conducted by the U.S. Department of Transportation (DOT).<sup>6</sup> This action set off numerous protests from sovereign nations that the United States was imposing its morals and ethics upon other countries and violating their bilateral treaties as well as international law.<sup>7</sup> With a blatant disregard for those concerns and a determination that the activity could be conducted safely while flying, the DOT's study concluded that the most prudent approach for the nation included a wait-and-see strategy to allow monitoring of foreign carriers' progress and experience before changing course in the United States.<sup>8</sup>

Since this exercise of jurisdiction by the U.S. government over foreign carriers may force those affected to take action, this article also considers various techniques available to those countries or airlines that consider challenging the American position against gambling on international flights. While a direct challenge to the ban in the U.S. court system lacks standing, a defendant may assert several defenses to an action by the Federal Aviation Administration (FAA) for violating either the gambling ban or the possession of such devices while in a U.S. territory.<sup>9</sup> On the other hand, an aggrieved country or foreign carrier may choose to solve this impasse with a diplomatic approach through bilateral talks, the International Court of Justice, or the World

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<sup>5</sup> See generally Christopher M. Carron, *Getting Lucky While a Mile High: Challenging the U.S. Extraterritorial Ban on In-Flight Gambling*, 12 GAMING L. REV. & ECON. 220 (2008); Andrew W. McCune & Alexis Andrews, *The Legality of Inflight Gaming: It's Up in the Air*, 2 GAMING L. REV. 361 (1998); Rose, *supra* note 1, at 520.

<sup>6</sup> Federal Aviation Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569. Often, this act is referred to as the Gorton Amendment because it was inserted by Senator Slade Gorton of Washington. Rose, *supra* note 1, at 519.

<sup>7</sup> See *id.* at 520.

<sup>8</sup> U.S. DEP'T OF TRANSP., REPORT TO THE CONGRESS: VIDEO GAMBLING IN FOREIGN AIR TRANSPORTATION 2 (1996), available at <http://ostpxweb.dot.gov/aviation/intav/gambling.pdf> [hereinafter U.S. DOT REPORT TO CONGRESS].

<sup>9</sup> See Carron, *supra* note 5, at 221; McCune & Andrews, *supra* note 5, at 369.

Trade Organization.<sup>10</sup> As a result, the last resort may include retaliatory acts against the United States, causing a trade war.<sup>11</sup>

Finally, the crash of Swiss Air Flight 111 and the passage of the Unlawful Internet Gambling Enforcement Act (UIGEA) present new challenges to in-flight gaming. This may require a further evaluation of their application to overturning the prohibition. While the Swiss Air accident seems like an unfortunate tragedy, one of the underlying causes for its demise led investigators to a faulty, in-flight entertainment system that delivered gambling activities to its passengers.<sup>12</sup> This FAA-approved system forced many to reconsider the then existing technology and whether gambling could be delivered safely during a flight.<sup>13</sup>

Similar to in-flight gaming, Congress passed the UIGEA to curb internet gambling.<sup>14</sup> Instead of determining the legality of internet gaming, this legislation concentrated on the payment systems used to collect wagers and pay out winnings to gamblers.<sup>15</sup> Furthermore, the Act requires the U.S. banking system to implement safeguards that prevent American citizens from participating in these legal, foreign gambling sites, which may be accessible while on an international flight.<sup>16</sup>

Hence, the complexities of overturning the U.S. ban on in-flight gambling are now more complicated than ever due to the layering of anti-gaming laws. While the ability to deliver the activity in a safe and secure manner always remains a priority, a challenge to the law preventing in-flight gaming now requires a

<sup>10</sup> See Carron, *supra* note 5, at 224–26. Many treaties call for the International Court of Justice or the World Trade Organization (WTO) to resolve trade disputes involving member nations. *Id.* One successful country convinced the WTO that the American ban on internet gaming was hypocritical; while the European Union effectively utilized noise restrictions on aircraft to bring the U.S. government to the negotiating table for another dispute. See, e.g., Brian E. Foont, Comment, *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, 418–19 (2000); Declan McCullagh, *WTO Slams U.S. Net-Gambling Ban*, CNET News, Apr. 7, 2005, [http://news.cnet.com/WTO-slams-U.S.-Net-gambling-ban/2100-1030\\_3-5658636.html](http://news.cnet.com/WTO-slams-U.S.-Net-gambling-ban/2100-1030_3-5658636.html).

<sup>11</sup> Jesse Witt, Comment, *Aces & Boats: As the Popularity of Cruise Ship Gambling Soars, Why Do the Airlines Remain Grounded?*, 28 TRANSP. L.J. 353, 357 (2001).

<sup>12</sup> Gary Stoller, *Doomed Plane's Gaming System Exposes Holes in FAA Oversight*, USA TODAY, Jan. 2, 2004, at 1B.

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

<sup>14</sup> See Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, § 802, 120 Stat. 1884 (codified at 31 U.S.C. §§ 5361–5367).

<sup>15</sup> *Id.* § 5364.

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

higher standard of safety due to the Swiss Air tragedy and an exception to the UIGEA's banking limitations. Therefore, an attack on the Gorton Amendment through the courts or by utilizing other means will be insufficient and will now require congressional action, at a minimum, to make gambling legal to Americans on international flights, whether the carrier is foreign or domestic.

## II. FEDERAL AVIATION AUTHORIZATION ACT OF 1994

Under the Gambling Devices Act of 1962, the government prohibited U.S.-flagged carriers from providing gambling on international flights.<sup>17</sup> Yet, foreign-flag carriers were exempt from this ban through an unintentional loophole in the law and could offer in-flight gambling.<sup>18</sup> As a result, Northwest Airlines attempted to create a level playing field with its foreign counterparts by seeking legislation that legalized in-flight gambling for all carriers on international routes in 1994.<sup>19</sup>

In a response led by vocal, anti-gaming activist Senator Slade Gorton of Washington, an amendment was introduced to the Federal Aviation Authorization Act of 1994 banning in-flight gaming even further than the existing laws.<sup>20</sup> This new proposition tried to create a level playing field by completely banning all gambling activities on both domestic and foreign airlines.<sup>21</sup> The amendment to the bill received acceptance by Congress without any debate.<sup>22</sup> The amendment stated: "An 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>23</sup> Thus, the law created two distinct exclusions: the inability of a carrier to provide in-flight gambling, and the incapacity to even have gaming devices on the aircraft while in the United States or its territories.<sup>24</sup>

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<sup>17</sup> See Gambling Devices Act of 1961, 15 U.S.C. §§ 1171–1178 (2000).

<sup>18</sup> *Id.* § 1172(a).

<sup>19</sup> Rose, *supra* note 1, at 519.

<sup>20</sup> *Id.* The author further explains that the Senator was later unsuccessful in his bid for reelection, partly due to supporters of gaming contributing heavily to the opposing candidate. *Id.*

<sup>21</sup> See 140 CONG. REC. H7116-02, H7118 (daily ed. Aug. 8, 1994) (statement of Rep. Oberstar).

<sup>22</sup> See *id.* H7120.

<sup>23</sup> 49 U.S.C. § 41311(a) (2000).

<sup>24</sup> *Id.*

Additionally, the amendment required the DOT to complete a study examining the safety and competitive implications of allowing gambling on commercial aircraft.<sup>25</sup> Meanwhile, foreign-flag carriers were forced to compete evenly with U.S.-flag carriers pending the findings and recommendations of the required study, which ignited huge protests from other sovereign nations.<sup>26</sup>

### A. THE LAW CHANGE

While many U.S. airlines have strongly opposed the prohibition of in-flight gambling, many foreign nations and their air carriers have been equally critical of the legislation.<sup>27</sup> In a diplomatic maneuver, the 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 notified the U.S. Department of State that Senator Gorton's amendment represented an infringement on each country's national sovereignty.<sup>28</sup> As a result, these governments may conclude that this ban on gaming while in non-U.S. territory is a direct violation of the principles behind international law and that it may risk the possibility of inciting retaliatory actions by foreign nations should the U.S. government choose not to amend the in-flight gambling ban.<sup>29</sup> Interestingly, the U.S. government never responded to the protest.<sup>30</sup>

Furthermore, many foreign carriers have sponsored independent legal reviews of the gaming ban with respect to interna-

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<sup>25</sup> Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 205(b), 108 Stat. 1569.

<sup>26</sup> See Rose, *supra* note 1, at 520.

<sup>27</sup> See generally Position Paper from British Airways PLC to The U.S. Dep't of Transp., Comments of British Airways PLC Regarding the Department of Transportation Study of Gaming on Commercial Aircraft (May 31, 1995) [hereinafter British Airways]; Position Paper from The Int'l Airline Coalition on the Rule of Law to The U.S. Dep't of Transp. (May 31, 1995) [hereinafter Int'l Airline Coalition]; Position Paper from Qantas Airways Ltd. to The U.S. Dep't of Transp., Comments of Qantas Airways Ltd. (June 1, 1995) [hereinafter Qantas Airways]; Position Paper from Royal Neth. Embassy, Office of Transp. to The U.S. Dep't of Transp. (May 24, 1995) [hereinafter Royal Neth. Embassy]; Position Paper from Virgin Atl. Airways Ltd. PLC to The U.S. Dep't of Transp., Statement of Position of Virgin Atlantic Airways, Ltd. (May 31, 1995) [hereinafter Virgin Atl.].

<sup>28</sup> Royal Neth. Embassy, *supra* note 27, at 1.

<sup>29</sup> See U.S. DOT REPORT TO CONGRESS, *supra* note 8, at 52.

<sup>30</sup> Foont, *supra* note 10, at 416.

tional air transportation laws.<sup>31</sup> Collectively, they believe that, while the U.S. government maintains jurisdiction over aircraft registered in its own country, it has no legal basis to enforce its laws on foreign carriers outside of U.S. territories regardless of their destination.<sup>32</sup>

The foundations for these opinions were developed from the Chicago Convention on International Civil Aviation of which the United States is a signatory.<sup>33</sup> In Article 1, the document establishes that: "[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."<sup>34</sup> Moreover, Article 11 provides:

Subject to the provisions of this Convention, the laws and regulations of a contracting State 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 all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.<sup>35</sup>

And with respect to the rules of the air, the first sentence in Article 12 stipulates:

Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force.<sup>36</sup>

Thus, the foreign carriers believe that foreign governments do not have powers to enforce their laws on a sovereign nation's aircraft while it is flying over international waters.<sup>37</sup>

In response, supporters of the Gorton Amendment counter that the foreign governments and carriers interpret Article 1

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<sup>31</sup> See British Airways, *supra* note 27, at 2; Int'l Airline Coalition, *supra* note 27, at 6; Qantas Airways, *supra* note 27, at 2; Virgin Atl., *supra* note 27, at 2.

<sup>32</sup> British Airways, *supra* note 27, at 2; Int'l Airline Coalition, *supra* note 27, at 6; Qantas Airways, *supra* note 27, at 2; Virgin Atl., *supra* note 27, at 2.

<sup>33</sup> Convention Between the United States and Other Governments Respecting International Civil Aviation, Dec. 7, 1944, 61 Stat. 80, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

<sup>34</sup> *Id.* art. 1.

<sup>35</sup> *Id.* art. 11.

<sup>36</sup> *Id.* art. 12.

<sup>37</sup> See generally British Airways, *supra* note 27; Int'l Airline Coalition, *supra* note 27; Qantas Airways, *supra* note 27; Royal Neth. Embassy, *supra* note 27; Virgin Atl., *supra* note 27.

"very narrowly."<sup>38</sup> They explain that the International Airline Coalition takes the position that the U.S. government does not have the right to impose its laws and regulations while a foreign-flagged aircraft travels outside U.S. territory and airspace.<sup>39</sup> However, the supporters of the U.S. action look at these treaties from a contracts perspective and argue that the foreign airline logic ignores the possibility that each country voluntarily accepts restrictions from the other nation when it allows its aircraft to enter U.S. territories and airspace.<sup>40</sup> Hence, foreign-flag carriers willingly choose to accept the prohibition against gambling equipment when they decide to fly to a U.S. destination.<sup>41</sup>

In addition, Article 6 of the Chicago Convention on International Civil Aviation provides "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."<sup>42</sup> Based on this provision, the supporters of the Gorton Amendment further assert that their interpretation is correct because this article enables signatories of the convention to dictate terms and conditions for flight into its sovereign territory and airspace.<sup>43</sup>

Accordingly, the legality of the Gorton Amendment and its ability to force airlines of foreign countries to follow the law of the United States is questionable at best.<sup>44</sup> While the United States maintains international treaties that allow aircraft from other nations to enter and land in its territories and airspace, the documents only set safety standards and are silent with respect to gambling.<sup>45</sup> Therefore, Congress most likely does not have the power to unilaterally change a treaty, but that leaves the aggrieved nations and their airlines in a position where retaliatory action serves as the main response for conduct they cannot accept.<sup>46</sup>

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<sup>38</sup> 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 (1998).

<sup>39</sup> *Id.* at 239; Brian C. O'Donnell, Comment, *Gambling to be Competitive: The Gorton Amendment and International Law*, 16 DICK. J. INT'L L. 251, 263 (1997).

<sup>40</sup> Grover, *supra* note 38, at 239.

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

<sup>42</sup> Chicago Convention, *supra* note 33, art. 6.

<sup>43</sup> Grover, *supra* note 38, at 239.

<sup>44</sup> See Rose, *supra* note 1, at 520.

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

<sup>46</sup> *Id.*

## B. THE DEPARTMENT OF TRANSPORTATION STUDY

In the study phase of the Gorton Amendment, the DOT asked the general public to comment on three specific topics related to gambling on commercial aircraft.<sup>47</sup> The first area embodied the safety implications of in-flight gambling including: payment methods, installation and operations aboard aircraft, and any residual effects on navigational equipment, passengers, or the flight crew.<sup>48</sup> The second item addressed the competitive consequences of maintaining, removing, or changing the existing restrictions on U.S.-flag carriers with relation to: foreign-flag carriers, code-sharing agreements, and fifth freedom markets.<sup>49</sup> Finally, the public was encouraged to express its opinions on whether gambling should be allowed on any international flight regardless of the carrier's flag.<sup>50</sup> Through this procedure, the DOT hoped to capture the sentiments and preferences of the public while formulating policy recommendations that protect the safety of all those who would be affected.

### 1. *Safety Implications: Payment Methods*

With the delivery and subsequent usage of individualized entertainment options to passengers, interaction amongst travelers during the time the aircraft is airborne became more complex.<sup>51</sup> One of the main concerns encompassing this area included the payment methodology effect on flight safety.<sup>52</sup> This facet was acknowledged very early in the product development stage as both manufacturers and airlines preferred a system that could collect debts and pay winnings with little or no impact on flight cabin staff, as well as provide adequate security for the users.<sup>53</sup> Specifically, the airlines wanted a cashless system to eliminate any possible performance of a cashiering function by flight attendants.<sup>54</sup> Therefore, with these constraints, the only feasible

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<sup>47</sup> Study of Gambling on Commercial Aircraft, 60 Fed. Reg. 21,845, 21,845-46 (May 3, 1995).

<sup>48</sup> *Id.* at 21,846.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Position Paper from InterGame to The U.S. Dep't of Transp., Comments on Specific Questions in the Study of Gambling on Commercial Aircraft Pursuant to 49 U.S.C. 41311(b), at 4 (May 30, 1995) [hereinafter InterGame].

<sup>52</sup> See U.S. DOT REPORT TO CONGRESS, *supra* note 8, at 1.

<sup>53</sup> See InterGame, *supra* note 51, at 5.

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

methodologies included the use of smart or credit/charge cards.<sup>55</sup>

Some software developers suggested smart cards as a possible payment option, whereby passengers could purchase special gambling fare cards at the terminal prior to departure.<sup>56</sup> The card would be encoded with credits earned or lost and would allow the holder to cash it in at the terminal, return it to the airline for redemption, or save it for use on a future flight.<sup>57</sup> Hence, this method would remove the in-flight necessity to transact currency but would require the installation of extra equipment.

On the other hand, the Association of Flight Attendants pointed out that this system does not eliminate the potential for in-flight problems.<sup>58</sup> The Association believed that customer demand will eventually force airlines that select this system to provide for airborne purchases, and lost cards will create extra demands and burdens while in the air.<sup>59</sup> Therefore, the flight attendants predicted that the use of smart cards would encumber them with additional distribution, accounting, and corporate relations responsibilities and hinder their primary responsibility of monitoring passenger safety and well-being.<sup>60</sup>

Another method suggested and universally agreed to as the best system by all the manufacturers and airlines includes the use of credit/charge cards.<sup>61</sup> According to British Airways at the time of the study, "well over 90% of airline passengers carry one or more major credit cards."<sup>62</sup> In the mid 1990s, the two largest credit card companies (VISA and MasterCard) adopted new

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<sup>55</sup> *Id.*; Position Paper from Int'l Game Tech. to The U.S. Dep't of Transp., 5/3/95 Federal Register Notice Regarding The Effects of In-Flight Gaming on Commercial Airlines, at 2 (May 31, 1995) [hereinafter IGT].

<sup>56</sup> See InterGame, *supra* note 51, at 5.

<sup>57</sup> IGT, *supra* note 55, at 2.

<sup>58</sup> See Position Paper from the Ass'n of Flight Attendants to The U.S. Dep't of Transp., Study of Gambling on Commercial Aircraft, at 1 (May 31, 1995) [hereinafter Flight Attendants].

<sup>59</sup> *Id.* at 3.

<sup>60</sup> *Id.*

<sup>61</sup> See IGT, *supra* note 55, at 2; Position Paper from In-Flight Phone Corp. to The U.S. Dep't of Transp., Comments of In-Flight Phone Corporation (May 31, 1995) [hereinafter In-Flight Phone]; Position Paper from Interactive Entm't Ltd. to The U.S. Dep't of Transp., DOT 75-95—DOT Seeks Comments on Gambling Aboard Aircraft (May 30, 1995) [hereinafter Interactive Entm't]; InterGame, *supra* note 51, at 5; Position Paper from The Sports Network to The U.S. Dep't of Transp. (May 31, 1995) [hereinafter The Sports Network].

<sup>62</sup> British Airways, *supra* note 27, at 5.

procedures specifically to allow airline passengers to use their cards to purchase a plethora of in-flight services, including gaming options.<sup>63</sup> However, within these operating rules, the card companies also developed policies that required adherence to security safeguards and authorized usage while gambling.<sup>64</sup> These safeguards included:

- Transaction Ceilings: a maximum possible loss limit of \$350 per card, per flight; and a maximum possible winnings limit of ten times the amount wagered or up to \$3,500.<sup>65</sup>
- No On-Board Payouts: winnings must be credited directly to a cardholder's account.<sup>66</sup>
- Full Disclosure: the cardholder must receive notification of the terms and conditions as well as make an affirmative acknowledgement of the disclosure prior to the activation of the gaming program.<sup>67</sup>
- Passenger-Selected Limits: the cardholder must set a loss limit for the flight before the activation of the gaming program.<sup>68</sup>
- Dispute Management: the airlines and their flight crew are not allowed to resolve gaming disputes.<sup>69</sup>
- Blocking Capability: the card issuer must allow a specific cardholder to block gaming transactions on a specific card.<sup>70</sup>

With the credit card companies imposing these restrictions, British Airways believed the added limitations would assist in assuring that flight crew interaction with respect to gaming activities would be minimal.<sup>71</sup> With this methodology, the only time that flight attendants may be additionally troubled would be when a cardholder may request a receipt; but few passengers are expected to seek this option.<sup>72</sup> Further, the Association of Flight Attendants believed that this method "seems to be the least problematic."<sup>73</sup> Thus, with all of these safeguards to protect cur-

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<sup>63</sup> See Interactive Entm't, *supra* note 61, at 3; InterGame, *supra* note 51, at 6.

<sup>64</sup> See British Airways, *supra* note 27, at 5-6.

<sup>65</sup> *Id.* at 5.

<sup>66</sup> *Id.* at 5-6.

<sup>67</sup> *Id.* at 6.

<sup>68</sup> *Id.*

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

<sup>70</sup> *Id.* at 7.

<sup>71</sup> *Id.*

<sup>72</sup> InterGame, *supra* note 51, at 7.

<sup>73</sup> Flight Attendants, *supra* note 58, at 3.

rency transactions and safety, the credit/charge card process appears to be the system of choice.

## 2. *Safety Implications: Equipment*

Another area of concern with in-flight gambling is the safety issue related to the installation and operation of equipment aboard the aircraft.<sup>74</sup> The first experiment with gambling aboard an aircraft dates back to Singapore Airlines in 1981.<sup>75</sup> At that time, the airline placed six plastic slot machines at the rear of one of its Boeing 747 cabins that flew between Singapore and San Francisco.<sup>76</sup> After a two-month trial, the airline abandoned the project on the grounds that gambling “didn’t match the carrier’s business-oriented image.”<sup>77</sup> However, among the numerous issues, “[s]o many passengers lined up to play the machines at the rear of the plane that it affected the trim, or balance. Pilots had to use extra fuel to keep the aircraft level.”<sup>78</sup>

By 1995, the application of in-flight gaming developed as a natural extension through the use of computer software programs that augment the already certified and installed entertainment systems on most aircraft in service.<sup>79</sup> The addition of gambling to the physical characteristics of an aircraft was simply the presence of computer code in the existing entertainment system and did not introduce any new or questionable equipment to the flight environment.<sup>80</sup> Any airborne entertainment provisions, including gambling, by virtue of its approval from the proper authorities, did not have any significant effect on the operation of the entertainment system, nor did it hinder the aircraft or its navigational instruments from properly performing their functions.<sup>81</sup>

In its study, the DOT found that the introduction of gambling to the in-flight environment would not pose additional harm to

<sup>74</sup> U.S. DOT REPORT TO CONGRESS, *supra* note 8, at 1.

<sup>75</sup> Fred Gebhart, *High Fliers for High Stakes*, INT’L HERALD TRIB., Oct. 9, 1995, available at <http://www.ihl.com/articles/1995/10/09/gamble.php>.

<sup>76</sup> *For Airline Boredom, Plastic Slot Machines*, N.Y. TIMES, Aug. 26, 1981, available at <http://query.nytimes.com/gst/fullpage.html?res=9802E7D8123BF935A1575BC0A967948260>.

<sup>77</sup> Gebhart, *supra* note 75.

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

<sup>79</sup> See IGT, *supra* note 55, at 2; In-Flight Phone, *supra* note 61, at 2; Interactive Entm’t, *supra* note 61, at 2; InterGame, *supra* note 51, at 3.

<sup>80</sup> Interactive Entm’t, *supra* note 61, at 2.

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

the physical safety of an aircraft or its passengers.<sup>82</sup> The study explained that within the foreseeable future, enhancements to the entertainment systems would not provide a basis for extra concern.<sup>83</sup>

Furthermore, the FAA certification requirements received a review.<sup>84</sup> The DOT determined that the agency's process, which examines numerous technical issues, allows for a system's safe installation and operation aboard an aircraft.<sup>85</sup> The DOT also noted that the widespread installation of electronic entertainment systems might further benefit aviation safety.<sup>86</sup> Fiber optic networks, which were already FAA certified as safe, weight reducing, and non-electromagnetic emitting, would likely provide the basis for the next generation of entertainment systems.<sup>87</sup>

Thus, from a technical perspective, the DOT study concluded that the gaming activities aboard any aircraft pose no adverse effects to the primary purpose of transportation.<sup>88</sup>

### 3. *Safety Implications: Behavioral Risks*

While technical concerns are not a threat to safety, other questions still remain surrounding the behavioral risks.<sup>89</sup> The airlines and system manufacturers have made every attempt to keep the system non-obtrusive and individualized.<sup>90</sup> The passengers received immediate access to "help menus" which provide guidance through an interactive process to start the gaming mode.<sup>91</sup> From these designs and the use of credit/charge cards, the software developers predicted that any assistance requested or volunteered from a crewmember should be negligible.<sup>92</sup>

Furthermore, the addition of gambling to the in-flight environment will not elicit reactions that are significantly different from those reactions elicited by entertainment systems already available.<sup>93</sup> The cabin environment already receives a wide vari-

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<sup>82</sup> See U.S. DOT REPORT TO CONGRESS, *supra* note 8, at 31.

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

<sup>84</sup> *Id.*

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

<sup>86</sup> *Id.* at 35.

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

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

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

<sup>90</sup> See generally In-Flight Phone, *supra* note 61, at 3; Interactive Entm't, *supra* note 61, at 2; The Sports Network, *supra* note 61, at 2-3.

<sup>91</sup> The Sports Network, *supra* note 61, at 4.

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

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

ety of physical and emotional responses, since each passenger uses the systems for different types of entertainment purposes.<sup>94</sup> However, the reactions from gambling should be no different from those already found on in-flight video games, from a passenger's own personal computer, or from a hand-held video game system that was brought on-board.<sup>95</sup> Also, the small stakes restrictions will limit the wagering to an entertainment-only option on long international flights and will not appeal to serious gamblers.<sup>96</sup> Therefore, according to the proponents of gambling on aircraft, the extension of in-flight entertainment into "low stakes" wagering should not create any significant changes in passenger behaviors.<sup>97</sup>

In contrast, many people are skeptical of the claims made by the airlines and the entertainment system manufacturers.<sup>98</sup> These groups allege that frustrated, irrational, and losing gamblers will behave disruptively and hamper the flight attendants from properly performing their safety responsibilities.<sup>99</sup> Similarly, the interaction between gamblers and non-participants is a paramount issue and is one of the main reasons that the Association of Flight Attendants has vocally opposed the addition of in-flight gaming.<sup>100</sup> The attendants believe gambling would require greater reseating needs and would increase the number of violent incidents while an aircraft is in transit.<sup>101</sup> Also, new training for the flight crew would be necessary to handle the new behavioral occurrences.<sup>102</sup> Since the union has already seen an increase in the number of incidents of interference, assault, threats, and intimidation towards flight attendants by passengers, it strongly feels that the risks do outweigh the benefits.<sup>103</sup> From these opinions, the questionable behavior associated with

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<sup>94</sup> InterGame, *supra* note 51, at 4–5.

<sup>95</sup> Interactive Entm't, *supra* note 61, at 2.

<sup>96</sup> British Airways, *supra* note 27, at 1.

<sup>97</sup> InterGame, *supra* note 51, at 5.

<sup>98</sup> See generally Flight Attendants, *supra* note 58; Position Paper from The Nat'l Council on Problem Gambling, Inc. to The U.S. Dep't of Transp., Comments on Gambling Aboard Aircraft (May 26, 1995) [hereinafter Nat'l Council on Problem Gambling].

<sup>99</sup> Flight Attendants, *supra* note 58, at 2; Nat'l Council on Problem Gambling, *supra* note 98, at 4.

<sup>100</sup> See Flight Attendants, *supra* note 58, at 4.

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

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 5.

gambling provides a reasonable belief that a threat to in-flight safety may exist.<sup>104</sup>

According to the DOT's report to Congress, the already existing FAA regulations could minimize the behavioral risks in conjunction with proper design enhancements of the in-flight entertainment systems.<sup>105</sup> As of the time of the report, the FAA flight crew training required instruction on customer dissatisfaction, aberrant behavior, and any other conduct that threatens the safety of the aircraft or its passengers.<sup>106</sup> Therefore, the likely behavioral problems encountered by flight attendants should not be characteristically different from those covered in the training requirements.<sup>107</sup>

Besides the design features incorporated into the entertainment systems like individualization, cashless transactions, and selective disable functions appeared to assist in limiting behavioral risks.<sup>108</sup> Yet, due to the lack of historical data with in-flight gambling, the DOT could not dismiss the possibility that new problems may manifest as a result of the addition of gaming to the airborne environment.<sup>109</sup> Hence, the DOT concluded that it should monitor the results of foreign air carriers and recommend policy changes as data becomes available in the future, and any formal rulemaking should codify the self-imposed software safeguards already in place.<sup>110</sup>

#### 4. *Competitive Implications*

While the airlines and manufacturers explain that in-flight gaming is a natural progression, they also contend that the current ban will continue to adversely affect U.S. carriers in the market place.<sup>111</sup> Because most entertainment systems levy fees for the usage of their movies, stereo programs, video games, shopping, telephone, and fax services, the absence of gambling to this product mix will lessen the U.S. airline industry's ability to access a large source of revenue.<sup>112</sup> Since foreign carriers will

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<sup>104</sup> See *id.* at 4; Nat'l Council on Problem Gambling, *supra* note 98, at 2.

<sup>105</sup> See U.S. DOT REPORT TO CONGRESS, *supra* note 8, at 37.

<sup>106</sup> 14 C.F.R. § 121.421 (1995).

<sup>107</sup> See U.S. DOT REPORT TO CONGRESS, *supra* note 8, at 36.

<sup>108</sup> *Id.* at 37.

<sup>109</sup> *Id.* at 36.

<sup>110</sup> *Id.* at 37.

<sup>111</sup> See IGT, *supra* note 55, at 2; In-Flight Phone, *supra* note 61, at 6; Interactive Entm't, *supra* note 61, at 4-5; InterGame, *supra* note 51, at 7-8; The Sports Network, *supra* note 61, at 5.

<sup>112</sup> IGT, *supra* note 55, at 2; InterGame, *supra* note 51, at 8.

be able to provide widespread gaming on non-U.S. routes and apply the receipts to operational costs, the competitive implications of not tapping this continuous revenue stream may affect more than in-flight entertainment.<sup>113</sup> Consequently, the industry asserts that the current legislation is unable to perform its intended goal of "leveling the playing field," but rather it has provided the foreign air carriers a greater advantage over the U.S. airlines.<sup>114</sup>

As of the time of the study, the software developers forecasted that the receipts produced through gaming activities during international flights will be a significant portion of the total revenue generated by the entertainment systems.<sup>115</sup> InterGame, one of the software developers, estimated the contribution from gambling to be in the range of forty percent to seventy percent of the total revenue earned.<sup>116</sup>

Similarly, Ladenburg Thalmann & Company completed studies predicting entertainment system revenues.<sup>117</sup> It forecasted cash flows of \$1 million for wide body aircraft without gaming and an extra \$1 million with its addition.<sup>118</sup> The study predicted that when all 2,000 aircraft already in international service in 1995 become fully equipped with entertainment systems that include gaming, the airlines could potentially generate approximately \$2 billion annually in revenues.<sup>119</sup> Moreover, it also anticipated that this number will increase by another \$3 billion with the addition of 3,000 more aircraft by the year 2010.<sup>120</sup> Therefore, according to these industry predictions, significant economic harm would occur to U.S. carriers while they are forced to sit on the sidelines.<sup>121</sup>

Most international carriers fly only a small portion of their routes to the United States and can offer gambling on their domestic and non-U.S. international flights.<sup>122</sup> In 1995, the acquisition cost for a complete interactive entertainment system on a wide body aircraft averaged about \$2 million with recurring

<sup>113</sup> IGT, *supra* note 55, at 2.

<sup>114</sup> InterGame, *supra* note 51, at 7.

<sup>115</sup> See IGT, *supra* note 55, at 2; InterGame, *supra* note 51, at 8.

<sup>116</sup> InterGame, *supra* note 51, at 8.

<sup>117</sup> IGT, *supra* note 55, at 2.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See Interactive Entm't, *supra* note 61, at 4.

costs of approximately \$200,000 to \$400,000 per year.<sup>123</sup> These foreign airlines can apply the additional revenue from gaming to help offset the operational costs, upgrade/installation of systems, or reduce ticket prices on routes of their choice.<sup>124</sup> In contrast, U.S. carriers may not be able to afford and maintain these entertainment systems without the additional capital from gambling.<sup>125</sup> Hence, this would allow foreign carriers the opportunity to provide low cost, high quality international service that U.S. airlines would have difficulty matching.<sup>126</sup>

Furthermore, on fifth freedom market flights, the disadvantage levied against the U.S. carriers will become even greater.<sup>127</sup> Fifth freedom market flights consist of those routes between two sovereign nations that receive service by a third country's airline.<sup>128</sup> This service usually happens as an extension of a flight originating in the carrier's home country and is subject to the bilateral agreements of all governments and airlines competing on the particular route.<sup>129</sup> U.S. airlines will still remain restricted, despite competing against foreign carriers that may

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<sup>123</sup> Interview with Dr. Samuel Prum, President & COO, Hughes Avicom Int'l, in Pomona, Cal. (Apr. 2, 1996); *see also* U.S. DOT REPORT TO CONGRESS, *supra* note 8, at 50.

<sup>124</sup> In-Flight Phone, *supra* note 61, at 6.

<sup>125</sup> *See* InterGame, *supra* note 51, at 7.

<sup>126</sup> Interactive Entm't, *supra* note 61, at 4-5.

<sup>127</sup> *Id.* at 5.

<sup>128</sup> *See* Foont, *supra* note 10, at 425 n.9. The author further explains in Note 9 that there are six freedoms:

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

Second Freedom—The right to make a landing for technical reasons . . . in another country without picking-up/setting down revenue traffic.

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.)

There is also a "Sixth Freedom" that allows the 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.*

<sup>129</sup> *See id.*

provide gaming.<sup>130</sup> Therefore, a potential inequity in service and price will provide another avenue of injury to U.S.-flagged carriers.<sup>131</sup>

In a similar issue, Qantas Airways questioned the enforceability of the U.S. restrictions on code sharing agreements.<sup>132</sup> Code sharing agreements are the prior arrangement by two non-competing airlines to pool their resources and provide specific services with each airline issuing its own tickets for a single flight. During these flights, the logistics necessary to determine the eligibility for each passenger would not be cost effective.<sup>133</sup> Thus, the current legislation only provides further confusion and deprivation to loyal American passengers.

### 5. *The Analysis*

Listening to these and other opinions, the DOT analyzed the current impact of the gambling prohibition on U.S. airlines.<sup>134</sup> In its study, the DOT developed three scenarios: (1) no change to the current law, (2) lift the ban on foreign carriers only, or (3) repeal the law prohibiting gambling on international flights for all carriers.<sup>135</sup> The analysis assumed all foreign carriers will provide gaming on both Pacific and Atlantic flights.<sup>136</sup> In addition, Yankelovich Partners, Inc., under the DOT's direction, performed a survey of current passengers.<sup>137</sup> These results were used heavily as a representative sample of the public's preferences.<sup>138</sup> After assessing the possible situations from the survey, the Yankelovich study concluded that only four percent of passengers considered entertainment possibilities as a criterion for changing to a foreign carrier.<sup>139</sup> However, the U.S. airlines stood to lose an estimated \$490 million in revenue due to the absence of gambling on their flights.<sup>140</sup> Therefore, the DOT ascertained that entertainment systems will be installed on U.S. aircraft regardless of the gaming prohibition.<sup>141</sup>

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<sup>130</sup> See Interactive Entm't, *supra* note 61, at 5.

<sup>131</sup> *Id.*

<sup>132</sup> Qantas Airways, *supra* note 27, at 4.

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

<sup>134</sup> See U.S. DOT REPORT TO CONGRESS, *supra* note 8, at 38.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 29.

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

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

<sup>139</sup> *Id.* at 38.

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

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

Furthermore, the DOT attempted to determine what economic impact the three scenarios would have on U.S. airlines.<sup>142</sup> The first conclusion found it highly unlikely that a significant change in passenger market share would occur due to the presence of gambling or lack thereof.<sup>143</sup> Also, the DOT approximated that eighteen percent of all international passengers would take advantage of gambling opportunities, which was estimated to deprive U.S. airlines of approximately \$592 million per year in revenue.<sup>144</sup> Thus, U.S. airlines could potentially face a diverse set of strategies on competitive routes by foreign carriers as a result of the huge capital access differences.<sup>145</sup>

Similarly, fifth freedom markets posed an even greater disparity for U.S. carriers where worldwide hubs support air traffic to many American cities.<sup>146</sup> As a result, the DOT anticipated U.S. airlines will shift a greater volume of international operations to foreign code sharing partners.<sup>147</sup> With these possible outcomes imminent, the DOT recognized that "the current gambling ban may not provide a level competitive playing field for U.S. airlines."<sup>148</sup>

## 6. *The Conclusion*

Until the Gorton Amendment, no country in the history of aviation ever tried to regulate another nation's aircraft outside its own territorial airspace.<sup>149</sup> Likewise, no country can effectively and legally enforce its maritime laws on ships sailing over the high seas.<sup>150</sup> In its position paper, the International Airline Coalition on the Rule of Law tied the noted international law expert Gerhard von Glahn's comments on the attributes of a sailing ship through international waters to that of an aircraft.<sup>151</sup> Thereby, the coalition concluded that "conduct over the high seas would be governed by rules issued pursuant to the quasi-territorial jurisdiction of the state of registration rather than the extra-territorial rules of some other state."<sup>152</sup>

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

<sup>143</sup> *Id.* at 38-39.

<sup>144</sup> *Id.* at 39.

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

<sup>146</sup> *Id.* at 42.

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

<sup>148</sup> *Id.* at 5.

<sup>149</sup> Int'l Airline Coalition, *supra* note 27, at 11-12.

<sup>150</sup> *Id.* at 12.

<sup>151</sup> *Id.* at 13.

<sup>152</sup> *Id.* at 13-14.

In a related legal issue, the United States has numerous air service agreements with various foreign nations. In one specific case, Virgin Atlantic Airways pointed out that a comparable version of Article 11 of the Chicago Convention is included in Bermuda 2, the latest bilateral agreement between the United States and the United Kingdom.<sup>153</sup> Virgin asserted that this inclusion prevents the United States from mandating any prohibition of gaming on a U.K.-registered aircraft while it is flying over the United Kingdom, international airspace, or a third country.<sup>154</sup> As a result, the U.S. government may have lost its rights to enforce the gambling prohibition on foreign-flagged carriers by virtue of its ratification of the Chicago Convention and its decision to participate in formal agreements with other nations.<sup>155</sup>

Consequently, the DOT did not overlook these legal issues in its study. It recognized that the Department of State received formal diplomatic protests from other nations regarding the U.S. government's authority to regulate foreign carriers in non-American territories.<sup>156</sup> The DOT also conceded that with respect to bilateral agreements, there will be jurisdictional questions, enforcement difficulties, and potential retaliatory acts.<sup>157</sup> Moreover, it concluded that by allowing gambling on all carriers, many of the concerns outlined by the foreign governments and airlines would be removed.<sup>158</sup> Nevertheless, the overall recommendation by the DOT to Congress did not indicate that these factors received consideration.

Furthermore, the DOT legal analysis focused on what regulation, if any, should receive consideration if the U.S. government permits in-flight gaming.<sup>159</sup> At the time of the report, the Department of Justice registered and regulated all gambling devices, and each state administered its own legislation encompassing the integrity and operations of such equipment.<sup>160</sup> In addition, federal law overrode a state's ability to govern the price, route, or service of an airline.<sup>161</sup> Therefore, the

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<sup>153</sup> Virgin Atl., *supra* note 27, at 8.

<sup>154</sup> *Id.* at 9.

<sup>155</sup> *Id.* at 7, 9.

<sup>156</sup> U.S. DOT REPORT TO CONGRESS, *supra* note 8, at 27.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 51.

<sup>159</sup> *Id.* at 3.

<sup>160</sup> *Id.* at 51.

<sup>161</sup> 49 U.S.C. § 41713(4)(A) (2000).

DOT indicated that any decision to allow gaming must provide guidance as to which government agencies will enforce the operational, logistical, and integral aspects of in-flight gambling.<sup>162</sup>

Additionally, the DOT believed that the airlines will use satellites or air-to-ground communications to verify credit cards in connection with gambling.<sup>163</sup> Unfortunately, this premise would require greater review and direction of the relevant communication legislations to this new application.<sup>164</sup> Thus, the DOT concluded that from a regulatory aspect, there is no clear path on how, who, or what regulation will offer guidance should the government allow gambling during international flights.<sup>165</sup>

### III. STRATEGIES FOR CHANGING THE ANTI-GAMBLING POLICY IN AVIATION

While the DOT seemed unwilling to make recommendations that will allow gambling on international flights with a U.S. connection, some foreign governments or airlines that remain interested in gambling on international routes may choose to force a change in U.S. law and policy. These parties may choose any of three distinct approaches: (1) attempting to get the Gorton Amendment overturned via the courts, (2) seeking a more diplomatic international solution, or (3) utilizing other tactics. Several commentators determined that political pressure from American airlines due to competitiveness issues whereby the carriers with flights outside the reach of the Gorton Amendment subsidize the entire fleet and force competitive disadvantages, other nations responding in the form of retaliatory regulations against U.S. flagged carriers, or an international judicial resolution will ultimately pressure Congress to change the current policy.<sup>166</sup>

#### A. OVERTURNING THE GORTON AMENDMENT THROUGH THE COURTS

For the courts to get involved and overturn the amendment, a certain chain of events must occur, followed by three different challenges to the law's validity by the defendant airline. First, the FAA must commence an action against a carrier that in-

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<sup>162</sup> U.S. DOT REPORT TO CONGRESS, *supra* note 8, at 6.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 3.

<sup>166</sup> See generally McCune & Andrews, *supra* note 5; Rose, *supra* note 1.

cludes a violation of the law for operating a gaming system on a flight to or from the United States or its territories.<sup>167</sup> When this occurs, the defendant airline may then question the law on the grounds that it violates treaty obligations, that it defies the general principles of international law, and/or that Congress overstepped its authority under the *U.S. Constitution*.<sup>168</sup>

Under the first option of challenging the law because it violates a treaty, the U.S. Supreme Court already settled this issue by disallowing court intervention where a conflict occurs between a congressional act and a treaty.<sup>169</sup> The court explained that these types of situations are better resolved when left to international negotiations.<sup>170</sup> Hence, this type of challenge appears less likely to succeed unless there is a Supreme Court reversal of opinion.

Likewise, a foreign carrier's attempt to use the Gorton Amendment's violation of international law as a defense in U.S. courts will also fail. When a conflict occurs regarding territorial authority and another nation's quasi-territorial jurisdiction, the order of precedence usually begins with the territorial jurisdiction followed by quasi-territorial rule over personal sovereignty.<sup>171</sup> In effect, one country may not apply its laws in the territory of another nation without consent, and if that occurs, then the state being violated may protest and possibly seek reparations from the country trying to assert authority.<sup>172</sup> However, the precedent for resolving conflicts between international law and U.S. statutes requires that "[f]ederal courts must give effect to a valid, unambiguous congressional mandate, even if such effect would conflict with another nation's law or violate international law."<sup>173</sup> Therefore, commentators conclude the lack of ambiguity in the Gorton Amendment coupled with ample case precedent will most likely require a U.S. court to uphold the

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<sup>167</sup> 49 U.S.C. § 41311(a) (2000). The FAA commencing the legal action presupposes that an airline chooses to fly into a U.S. territory either having allowed gambling prior to or during entry or simply transports such equipment without prior authorization. *Id.*

<sup>168</sup> See Carron, *supra* note 5, at 221; McCune & Andrews, *supra* note 5, at 369.

<sup>169</sup> *Edye v. Robertson*, 112 U.S. 580, 588 (1884).

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

<sup>171</sup> Carron, *supra* note 5, at 222; McCune & Andrews, *supra* note 5, at 369.

<sup>172</sup> Carron, *supra* note 5, at 222; McCune & Andrews, *supra* note 5, at 369.

<sup>173</sup> *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 495 (D.C. Cir. 1984).

gambling prohibition despite breaching another nation's sovereignty under international law.<sup>174</sup>

Finally, the last defense to an FAA action includes a U.S. constitutional challenge that Congress exceeded its authority when it included foreign carriers in the gambling ban.<sup>175</sup> Here, the court will look to the Commerce Clause of the *U.S. Constitution*, Supreme Court precedent where Congress received the authority to regulate commerce with foreign nations, and the inclusion of territories beyond the United States within its enforcement jurisdiction. Thus, finding a court willing to overturn the Gorton Amendment on the basis of a constitutional challenge seems extremely improbable since gambling on an international flight completely affects interstate and international commerce.

### B. THE DIPLOMATIC APPROACH

As explained earlier, the courts prefer a diplomatic approach to most effectively solve these types of conflicts.<sup>176</sup> As such, the effectiveness of bilateral discussions between countries, the International Court of Justice in The Hague, and the World Trade Organization present possible solutions within this framework.<sup>177</sup>

Under the bilateral discussions approach, each country attempts to resolve the dispute through direct conversations regarding the subject matter. In this case, upon the passage of the Gorton Amendment, the embassies of numerous countries and the European Commission immediately notified the U.S. Department of State that the prohibition against gambling and the incapacity to have such devices on an aircraft infringed upon each nation's sovereignty.<sup>178</sup>

Furthermore, Virgin Atlantic Airways tried to explain to the U.S. government that the latest bilateral agreement with the United Kingdom invoked the same language used in the Chicago Convention.<sup>179</sup> However, the only response to these protests came from Transportation Secretary Federico Peña who insisted that for the benefit of U.S. carriers, the integrity of the bilateral agreements must remain protected and that "[w]e

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<sup>174</sup> Carron, *supra* note 5, at 222; McCune & Andrews, *supra* note 5, at 371.

<sup>175</sup> U.S. CONST. art. I, § 8, cl. 3; Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

<sup>176</sup> See *Edye v. Robertson*, 112 U.S. 580, 588 (1884).

<sup>177</sup> See Carron, *supra* note 5, at 224-26.

<sup>178</sup> See generally Royal Neth. Embassy, *supra* note 27.

<sup>179</sup> Virgin Atl., *supra* note 27, at 8.

abide by our agreements, and we expect our trading partners to do the same.”<sup>180</sup>

Moreover, one commentator pointed out that the Open Skies Agreement only allows the prohibition of gambling when an aircraft enters U.S. territories; and due to its ratification after the Gorton Amendment, it should supersede the 1994 interpretations.<sup>181</sup> Thus, the actions by Congress appeared to contradict the policies espoused by senior members of the executive branch and leave few options for negotiating an amicable settlement.

In contrast, the International Court of Justice in The Hague was established by the United Nations “to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.”<sup>182</sup> Its jurisdiction includes resolving treaties and conventions that specifically call on it to provide resolutions for disputes.<sup>183</sup> While this may provide a proper venue due to the language in the Chicago Convention or because the parties recognize its jurisdiction, the United States withdrew its recognition of the court’s authority as binding and only accepted it on an informal basis.<sup>184</sup> Further, the U.S. Supreme Court held that a decision from the International Court of Justice is persuasive but not binding authority in the American justice system.<sup>185</sup> Therefore, any country trying to nullify the Gorton Amendment due to an improper extension of jurisdiction by the U.S. government will face difficulties from the compliance perspective.

Finally, the World Trade Organization (WTO) provides a forum for a nation wishing to overturn the Gorton Amendment to get withdrawal from the U.S. government regarding the inability of foreign-flagged carriers to allow gambling on airlines in territories outside of American jurisdiction. As an organization designed to facilitate trade amongst its members and provide

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<sup>180</sup> *DOT Threatens Chile With Retaliation Over American Dispute*, AVIATION DAILY, Nov. 10, 1993, at 221.

<sup>181</sup> Carron, *supra* note 5, at 223–24.

<sup>182</sup> International Court of Justice, The Court, <http://www.icj-cij.org/court/index.php?p1=1> (last visited Aug. 27, 2008).

<sup>183</sup> Statute of the International Court of Justice, 1945 I.C.J. Acts & Docs. 36 (July 28).

<sup>184</sup> See Carron, *supra* note 5, at 225. The author further explains that the United States still might be forced in to the International Court of Justice through the seventy treaties that specifically use it for dispute resolution. *Id.*

<sup>185</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 333–34 (2006).

dispute resolution through compulsory compliance, the WTO convenes an adversarial hearing in front of an impartial panel of experts to determine if an impermissible act occurred.<sup>186</sup> When the WTO renders a final decision and the offending member fails to comply with it, the aggrieved nation may seek compensation.<sup>187</sup> However, should the parties end up in a position where neither country can agree on the compensation, the aggrieved nation "may retaliate by suspending trade concessions."<sup>188</sup>

An example of this type of action recently occurred in the context of gaming when the small Caribbean nations of Antigua and Barbuda filed free-trade disputes against the U.S. government.<sup>189</sup> The complaints alleged a violation of the 1994 General Agreement on Trade in Services treaty.<sup>190</sup> More specifically, the countries explained that American gambling restrictions were illegal because they prohibited offshore casino and sports gambling while allowing domestic wagering on horseracing, fantasy sports, and lotteries.<sup>191</sup>

Despite the U.S. arguments that the restrictions became necessary "to protect 'public morals and public order,'" the Antigua viewpoint prevailed.<sup>192</sup> Even though an appeals court reduced the ruling, the United States must now either forbid all forms of gaming or face trade sanctions approved by the WTO.<sup>193</sup> Antigua already requested the right to copy and export U.S. made CDs, DVDs, and other similar intellectual property if no financial solution becomes acceptable.<sup>194</sup> Moreover, many other countries including the European Union, which represents twenty-seven different nations, view this as an opportunity to stop discrimination against legal activities in their own country

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<sup>186</sup> Mark L. Movsesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons From the History of Supreme Court Review*, 20 MICH. J. INT'L L. 775, 778 (1999).

<sup>187</sup> *Id.*

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

<sup>189</sup> Paul Blustein, *Against All Odds: Antigua Besting U.S. in Internet Gambling Case at WTO*, WASH. POST, Aug. 4, 2006, at D1.

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

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

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

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*; Jim Abrams, *Dispute Between US and WTO Over Internet Gambling Could Cost the U.S. Billions*, INT'L HERALD TRIB., NOV. 19, 2007, available at <http://www.ihl.com/articles/ap/2007/11/19/business/NA-FIN-US-Internet-Gambling.php>.

that international law deems permissible.<sup>195</sup> Thus, one commentator views the WTO as the most effective opportunity for another nation to force the U.S. government to stop imposing its will outside its territorial jurisdiction.<sup>196</sup>

### C. RETALIATORY ACTS

This questionable action by the U.S. government of placing gambling restrictions over foreign-flagged carriers while outside American territories may leave other nations with no other option but to take retaliatory actions. One commentator explained that this type of behavior is easily foreseeable from a nation wishing to challenge the U.S. government by passing its own restrictive laws that force U.S.-flagged carriers to comply with its moral, ethical, and competitive values when the aircraft enters its own territory.<sup>197</sup> Another commentator analogized the U.S. action as, "if France enacted a law regulating that only wine could be served on flights to or from its country in the interest of political, competitive, and moral concerns, one would surely expect Congress to question whether France had jurisdiction under international law to enforce such a law."<sup>198</sup>

In fact, the U.S. government considered this approach in the past when it did not agree with foreign legislation.<sup>199</sup> In March of 1998, the European Union's Executive Commission put forward a proposal to require all aircraft entering its airspace to adhere to specific noise requirements.<sup>200</sup> The U.S. government explained that this action would disallow 700 freighter aircraft equipped with hush kits from entering European territories and would also harm American aircraft engine makers like Pratt & Whitney.<sup>201</sup>

In response to the perceived threat, Representative James Oberstar introduced House Bill 661 which required the Secretary of Transportation to disallow any flights to or from a U.S.

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<sup>195</sup> Paul Ames, *European Union Launches Investigation into US Internet Gambling Laws*, INT'L HERALD TRIB., Mar. 10, 2008, available at <http://www.ihl.com/articles/ap/2008/03/10/europe/EU-US-Internet-Gambling.php>.

<sup>196</sup> See Carron, *supra* note 5, at 226.

<sup>197</sup> Witt, *supra* note 11, at 357.

<sup>198</sup> See Grover, *supra* note 38, at 244.

<sup>199</sup> Bruce Barnard, *U.S. Response Urged for Hush Kit Legislation*, J. COM., Mar. 14, 2000, at 15.

<sup>200</sup> *EU Defends New Aircraft Noise Rules Against U.S. Criticism*, ASSOCIATED PRESS, Dec. 11, 1998, <http://www.highbeam.com/doc/1P1-19427833.html>.

<sup>201</sup> Bruce Barnard, *EU Makes Another Attempt to Resolve Hush-Kit Controversy*, J. COM., Mar. 30, 2000, at 8.

airport of any supersonic passenger aircraft that did not meet international standards in the event the European Union adopted its proposed noise restrictions.<sup>202</sup> While the bill passed the House of Representatives, the Senate sent it to the Committee on Commerce where it still remains in the pending category.<sup>203</sup> Ultimately, most of the governments in the European Union found a common middle ground with American interests, and the United States did not resort to retaliatory acts despite a very costly battle in the interim.<sup>204</sup> Hence, the U.S. government can dictate to the world that it must behave by its morals and standards, but creates a major backlash when other countries try to do the same.

#### IV. RECENT IMPEDIMENTS

In considering the strategies for overturning the prohibition on in-flight gambling, several developments since the passage of the Gorton Amendment deserve an examination since they may prove as obstacles to lifting the ban. First, the impact of the tragic events concerning the crash of Swiss Air Flight 111 received consideration because the aircraft involved was one of a few in the world that received FAA approval to allow in-flight gambling via its entertainment system.<sup>205</sup> Second, Congress enacted the UIGEA as a means to stop legal internet gambling from other countries via restrictions on the banking system.<sup>206</sup> With the new capabilities of in-flight entertainment systems, the road to allowing gambling on international flights will encounter difficulties in receiving regulatory certification and in overcoming the new limitations placed on banking transactions.

##### A. SWISS AIR FLIGHT 111

On September 2, 1998, Swiss Air Flight 111 crashed into the Atlantic Ocean near St. Margaret's Bay, Nova Scotia, during its

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<sup>202</sup> H.R. 661, 106th Cong. (1999) (introduced Feb. 10, 1999 by Rep. James Oberstar).

<sup>203</sup> Govtrack.us, Congress, Legislation, <http://govtrack.us/congress/bill.xpd?bill=h106-661> (last visited Feb. 23, 2009). This legislation only affected the Concorde, which made its last flight on November 26, 2003. Jill Lawless, *Final Concorde Flies to Retirement in Western England*, ASSOCIATED PRESS, Nov. 26, 2003, <http://www.highbeam.com/doc/1P1-87764709.html>.

<sup>204</sup> *U.S. Drops Complaint Against 14 EU Nations Over Aircraft Noise*, ASSOCIATED PRESS, June 13, 2002, <http://www.highbeam.com/doc/1P1-53616460.html>.

<sup>205</sup> See Stoller, *supra* note 12, at 1B.

<sup>206</sup> Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, § 802, 120 Stat. 884 (codified at 31 U.S.C. §§ 5361-5367).

flight from Geneva to New York killing all 229 people aboard.<sup>207</sup> The unique aspect of this flight was that the aircraft represented a limited number of airplanes that received approval by the FAA to operate an in-flight entertainment system that among other services delivered computer casino games that took wagers via credit card.<sup>208</sup>

Swiss Air began operating the system, developed by Interactive Flight Technologies, on January 26, 1998, which was followed by Lauda Air of Austria later in the same year using one by the InterGame Company.<sup>209</sup> In addition, Singapore, British Airways, and Qantas began testing systems by the same manufacturers for use on their aircraft at a later date.<sup>210</sup>

However, almost immediately after installation, Swiss Air announced its disappointment with the system.<sup>211</sup> Surprisingly, the first sign of trouble occurred on the financial front where it reported that only fifty passengers between the March report and the maiden flight actually gambled the limit of \$200, and that the entire gaming revenue was "significantly less" than anticipated.<sup>212</sup> Then, technical problems began appearing with the overheating of electronic boxes under the passenger seats during flight.<sup>213</sup> Some industry observers explained that the heat problem occurred as a result of the large, video screens coupled with a system that needed tremendous amounts of power from the aircraft's electrical system.<sup>214</sup>

Alitalia tried the Interactive Flight Technologies system in 1998 as well.<sup>215</sup> However, Alitalia removed the system from its aircraft after the airline determined the system was poor because it made the passenger accommodations too uncomfortable by raising the cabin temperature, lowering the reliability of its operation, and requiring the need to replace three to five computer processing units from under the seats each flight.<sup>216</sup>

After the Flight 111 crash, both the FAA and Canadian aviation officials immediately began investigating the in-flight en-

<sup>207</sup> Stoller, *supra* note 12, at 1B.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*; Ralph Schoenstein, *Making Friendly Wagers in the Sky*, N.Y. TIMES, July 6, 1997, at 5.

<sup>210</sup> Schoenstein, *supra* note 209, at 5.

<sup>211</sup> Stoller, *supra* note 12, at 1B.

<sup>212</sup> *Id.*

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

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

tainment system for starting a fire about fifty-three minutes after take-off.<sup>217</sup> Only fifteen minutes later, the electrical systems malfunctioned followed by the crash six and one half minutes afterward.<sup>218</sup> Based on this tragedy, Swiss Air voluntarily disconnected the systems three weeks later while the Swiss Federal Office of Civil Aviation revoked its certification of the equipment.<sup>219</sup> The FAA revoked its certification as well and banned the use of the Interactive Flight Technologies system one year later.<sup>220</sup>

Based on this accident, the ability to deliver safe gambling functions via an in-flight entertainment system received a serious blow. Prior to this accident, the DOT study concluded that the technology did not pose a risk to the primary purpose of transportation.<sup>221</sup> However, this incident showed that the technology had not progressed enough to nullify the risks of delivering gambling through an in-flight entertainment system. Thus, because the Interactive Flight Technologies system failed, any subsequent applications to provide equivalent service aboard an aircraft will be subject to a heightened standard of review.

#### B. THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT

Another impediment to gambling in-flight will come from the UIGEA. In October 2006, President Bush signed the Safe Port Act to address concerns related to Homeland Security, which also included the UIGEA.<sup>222</sup> Due to its lack of success in stopping individual gamblers over the internet, the government decided to try something different by stopping those responsible for enabling the online casinos to collect losses or pay out winnings.<sup>223</sup>

Essentially, the UIGEA seeks to stop the flow of funds from U.S. gamblers to internet casinos. The legislation makes it a felony for a person engaged in the business of betting or wagering to knowingly accept money in connection with unlawful gambling and is punishable by up to five years in prison.<sup>224</sup> Moreo-

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<sup>217</sup> *Id.*

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

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

<sup>220</sup> *Id.*

<sup>221</sup> See U.S. DOT REPORT TO CONGRESS, *supra* note 8, at 35.

<sup>222</sup> See Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, § 802, 120 Stat. 1884 (codified at 31 U.S.C. §§ 5361-5367).

<sup>223</sup> 31 U.S.C. § 5363 (2006).

<sup>224</sup> *Id.* § 5366.

ver, federal regulators are required to draft regulations designed to compel financial institutions to identify and block restricted gambling transactions; otherwise they face civil penalties.<sup>225</sup>

Basically, in order to prevent “unlawful internet gambling,” the UIGEA forces financial institutions to choose between either creating their own policies and procedures or complying with the established policy for a designated payment system.<sup>226</sup> Under the Federal Reserve Board’s proposed rules, institutions that participate in card systems and money transmitting businesses must identify and block impermissible transactions.<sup>227</sup>

One method the financial institutions may follow could be similar to the one that ten banks voluntarily chose to follow in an agreement with the State of New York in 2003 to block in-

<sup>225</sup> *Id.* § 5364.

<sup>226</sup> *Id.* The Federal Reserve Board’s proposed rules list five “designated payment systems”:

1. Automated Clearing House System

The ACH system is a funds transfer system, primarily governed by the rules and guidelines published by NACHA, that provides for the clearing and settlement of batched electronic entries for participating financial institutions. . . .

2. Card Systems

Card systems are systems for clearing and settling transactions in which credit cards, debit cards, pre-paid cards, or stored value products are used to purchase goods or services or to obtain a cash advance. . . .

3. Check Collection Systems

A check collection system is an interbank system for collecting, presenting, returning, and settling checks or an intrabank system for settling checks deposited and drawn on the same bank. . . .

4. Money Transmitting Businesses

A money transmitting business is a person (other than a depository institution) that engages as a business in the transmission of funds, including any person that engages as a business in an informal money transfer system or any network of people that engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system. . . .

5. Wire Transfer Systems

A wire transfer system is a system through which the sender of a payment transmits an unconditional order to a bank to pay a fixed or determinable amount of money to a beneficiary upon receipt (or on a day stated in the order) by electronic or other means through a network, between banks, or on the books of a bank.

Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. 56,680, 56,683–85 (Oct. 1, 2007) (to be codified at 12 C.F.R. pt. 233)).

<sup>227</sup> *See id.* at 56,683–85.

ternet gambling.<sup>228</sup> The banks stop the transactions using traditional merchant codes for identification and blocking business from certain organizations identified with internet gambling activities.<sup>229</sup> Each credit card transaction includes an electronic authorization file, which provides a unique code for every merchant and transaction.<sup>230</sup> By examining each code, the authorizing institution may determine the type of transaction as well as the requestor for approval.<sup>231</sup>

Thus, in-flight gambling on international flights faces a new hurdle depending on the strategy employed by the airline. If the carrier chooses to use the same approach as Ryanair where the in-flight entertainment system simply connects to a specific online gambling site,<sup>232</sup> then those persons using credit cards supplied by U.S. financial institutions will most likely have their credit card transactions blocked. Moreover, this may cause those affected passengers to behave disruptively while in flight.<sup>233</sup>

Alternatively, a carrier may choose to directly deliver gambling to passengers over the in-flight entertainment system contained on the aircraft.<sup>234</sup> Utilizing this method may cause financial institutions to consider the airline a provider of unlawful gambling activities and block all of its transactions due to a single aspect of the business model. This could also create situations where the passengers become unruly while in the air due to an action outside the control of the carrier.<sup>235</sup> However, the biggest threat includes the possibility of the airline losing non-gaming transactions. This may strike directly at an airline's revenue through its ticket sales and leave passengers choosing alternative carriers to avoid the hassles created by the financial institutions in their UIGEA compliance.

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<sup>228</sup> See Press Release, Office of the N.Y. State Attorney Gen., Ten Banks End Online Gambling With Credit Cards: Spitzer Hails Establishment of New Banking Industry Standard (Feb. 11, 2003), [http://www.oag.state.ny.us/media\\_center/2003/feb/feb11b\\_03.html](http://www.oag.state.ny.us/media_center/2003/feb/feb11b_03.html).

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

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

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

<sup>232</sup> See Rabinovitch, *supra* note 2, at T3.

<sup>233</sup> See Flight Attendants, *supra* note 58, at 3; Nat'l Council on Problem Gambling, *supra* note 98, at 2.

<sup>234</sup> See generally IGT, *supra* note 55, at 1; In-Flight Phone, *supra* note 61, at 2; Interactive Entm't, *supra* note 61, at 2; InterGame, *supra* note 51, at 6.

<sup>235</sup> See Flight Attendants, *supra* note 58, at 3; Nat'l Council on Problem Gambling, *supra* note 98, at 2.

Hence, the UIGEA, due to its provisions that force financial institutions to act in a law enforcement capacity, may also impact any attempts to overturn the prohibition of in-flight gambling on international routes.

## V. CONCLUSION

Since the passage of the Gorton Amendment in 1994, it does not appear that air carriers are any closer to allowing gambling on international flights. The DOT's recommendation in 1996 to not take any action was disappointing despite the repeated determinations that the primary goal of transportation could safely coexist with such activity during international flights. The DOT categorically concluded that all implications like the payment methods, equipment installation and operation, and behavioral risks from in-flight gambling to the primary purpose of transportation could be achieved safely but chose to not take a political stand on this controversial issue.

With respect to payment methods, the consensus at the time of the DOT study established credit cards as the least problematic choice by airlines, system manufacturers, and flight attendants.<sup>236</sup> However, the passage of the UIGEA probably altered that viewpoint since those payment options that rely on the financial institutions must overcome the new obstacle. As a result, determining a payment method for airlines with passengers who mostly carry U.S.-issued credit cards would now create another reason for utilizing smartcards unless Congress modifies the UIGEA as well.

From an equipment perspective, Swiss Air Flight 111 showed the tragic consequences of not thoroughly testing and scrutinizing an in-flight entertainment system prior to implementation.<sup>237</sup> While the DOT report noted the addition of gaming to the flight environment poses very few technical risks, the Swiss Air accident uncovered major flaws in the FAA inspection and approval procedures whereby a system came to commercial use without adequate testing and questionable installation.<sup>238</sup> At this time, ten years of technological improvements have occurred since the crash. These include the use of lighter weight and stronger materials that use less space. Hence, Swiss Air Flight 111 might have set a much higher standard for safety with

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<sup>236</sup> See generally *supra* notes 51–73 and accompanying text.

<sup>237</sup> See Stoller, *supra* note 12, at 1B.

<sup>238</sup> *Id.*

regard to in-flight entertainment systems, but ten additional years of continuous advancements in technology make that level easier to achieve.

Until the Swiss Air tragedy and the passage of the UIGEA, overturning the gambling ban on international flights would only require a court ruling or removal of the Gorton Amendment by Congress. Moreover, the success of Antigua at the WTO with regards to online wagering shows that many countries maintain great amounts of leverage against the United States, but do not know the full extent of their powers. Any country with an urge to either assert its national sovereignty or desire to lessen the fiscal constraints on its national carriers by allowing gambling might challenge the American government at the WTO in the same manner as Antigua to force the issue on situations where its aircraft wish to offer this activity outside the U.S. jurisdiction. However, the new layers of anti-gambling legislation have placed additional hurdles on using credit cards in the event a challenge succeeded.

If anything, the U.S. policy is indirectly moving further away from allowing gambling on international flights due to events and actions that seem on the surface to pose no threat to the activity in the context of aviation but their underlying basis leads our direction further towards the viewpoints of anti-gaming advocates. The air carriers who wish to provide gambling activities on international flights that land or depart from the United States or its territories will need to either persuade or force Congress to act in order to create legislation that addresses these various new impediments and sets forth a new direction that provides a safe and efficient system for those airlines wishing to offer the activity while traveling in the air between countries.

Therefore, depending on the impact of the gambling offerings outside the United States on foreign airlines, Congress may ultimately feel pressured to allow all international flights with an American landing or departure point the opportunity to provide the activity in order to keep U.S. carriers competitive in the marketplace.

# **Case Notes**

