Playing the Slots: The FAA Gambles with Its Controversial Congestion Management Plan for New York's Busiest Airports

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PLAYING THE SLOTS: THE FAA GAMBLES WITH ITS CONTROVERSIAL CONGESTION MANAGEMENT PLAN FOR NEW YORK'S BUSIEST AIRPORTS

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"Whenever competition is feasible, it is, for all its imperfections, superior to regulation as a means of serving the public interest."

-Alfred E. Kahn, Airline economist, former chairperson of the Civil Aeronautics Board, and the architect of airline deregulation

I. INTRODUCTION

In 2007, air traffic control (ATC) delays and airspace congestion climbed to near-historic levels in the United States. 1 Scores of aircraft clogged the nation’s airways—even on good-weather days—and the flying public endured unprecedented delays and cancellations as a result.2 In total, nearly two million

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2 See, e.g., the JFK/EWR Plan, supra note 1, at 60,545 (providing background information on ATC delays in New York); see also Operating Limitations at New-
flights operated by large airlines experienced delays or cancellation. 3 Delays became so pronounced, and the associated onboard conditions so deplorable, some state legislatures attempted to enact "passenger bills of rights" laws that would force airlines to comply with certain safety and convenience requirements during protracted delays. 4 Air traffic delays particularly besieged the New York area, where the city's three busiest airports—LaGuardia (LGA), John F. Kennedy International (JFK), and Newark Liberty International (EWR) 5—became mired in virtual gridlock. 6,7 These delays arose principally from airline


4 See, e.g., Air Transp. Ass'n of Am., Inc. v. Cuomo, 520 F.3d 218, 220 (2d Cir. 2008). In the wake of unprecedented delays at New York City's major airports in particular—delays which caused some passengers to endure abominably harsh conditions onboard stranded aircraft (including going without food and water for several hours)—the legislature of New York enacted a passenger bill of rights designed to limit the most egregious effects of protracted airline delays. See id. The Second Circuit Court of Appeals held, however, that federal law preempted the legislation. Id. at 223.

5 For ease of reference, the three major New York airports are referred to herein by their respective International Air Transport Association (IATA) airport codes: LaGuardia as "LGA"; Kennedy as "JFK"; and Newark as "EWR."


7 The airspace congestion phenomenon extends beyond New York and even the United States. In a recent publication, the IATA, a global aviation trade organization, remarked:

Due to an imbalance between the demand for worldwide air transport and the availability of adequate airport facilities/infrastructure and airspace systems to meet such demand, the number of congested airports worldwide is growing. As a result, the airline industry is increasingly subjected to serious operational disruptions, with a significant number of delayed departures and arrivals, which result in significant economic penalties.

over-scheduling. When airline demand for certain airports exceeds the capacity limitations of those airports, logjam and delays are inevitable.

In response to the air traffic congestion problem and the resulting air traffic delays in the New York area, the Federal Aviation Administration (FAA) has devised a novel, yet controversial, congestion management plan. The overall scheme combines restrictions on the number of takeoffs and landings (i.e., “slots”) at the three New York airports with an inventive, market-based method for allocating those slots among airline carriers. A “slot” is “the operational authority to conduct one IFR landing or takeoff operation each day during a specific hour or thirty minute period at one of the High Density Traffic Airports.” A slot is a kind of reservation: carriers reserve a takeoff or landing at a particular airport at a particular time. To cope with the swell of increased aircraft operations in New York, and to better align those operations with airspace capacity limitations, the FAA routinely limits (or “caps”) the number of available slots at New York airports. By limiting the number of slots, the FAA eases congestion and reduces delays. Slot caps thus balance (seemingly unbridled) airline demand for airport access with the airports’ respective capacity limitations.

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8 Airline over-scheduling occurs when scheduled flights exceed airport and airspace capacity. See Wang et al., supra note 1, at 2.

9 See generally the JFK/EWR Plan, supra note 1 at 60,544; see also Congestion Management Rule for LaGuardia Airport, 73 Fed. Reg. 60,574, 60,576-77 (Oct. 10, 2008) [hereinafter the LGA Plan] (codified at 14 C.F.R. pt. 93, sub. pt. C). The FAA delineates its congestion management plans for the three New York airports in two separate rules: one rule, 14 C.F.R. §§ 93.161-73 (2008), addresses congestion management at both JFK and EWR. The second, 14 C.F.R. §§ 93.35-47 (2008), addresses congestion at LGA. The two rules are similar and employ the same basic market-based methodologies for congestion reduction. The LGA plan, unlike the JFK/EWR plan, however, involves a reduction in the current number of available slots. See infra notes 99-100 and accompanying text.


11 14 C.F.R. § 93.213(a)(2) (2008). EWR, JFK, and LGA are “high density traffic airports” for purposes of the “slot” definition. 14 C.F.R. § 93.123 (2008); see also the JFK/EWR Plan, supra note 1, at 60,546 (defining a slot for purposes of the FAA’s congestion management plan as “the right to land or depart during a 30-minute window”).

12 See, e.g., the EWR Limit Rule, supra note 2, at 29,554 (ordering a cap of eighty-one slots per hour at EWR); Operating Limitations at New York LaGuardia Airport; Notice of Order, 71 Fed. Reg. 77,854 (Dec. 27, 2006) (ordering a cap of seventy-five slots per hour at LGA). The FAA also caps slots at other high-density airports like Washington Reagan Airport and Chicago O’Hare.
Capping slots alone, however, yields an undesirable effect. The caps impose artificial limits on the number of flights into or out of an airport, which in turn discourages competition among the airlines already serving the capped airport. Incumbent carriers (i.e., those airlines currently possessing slots at a particular airport) monopolize the existing slots and thus preclude non-incumbent carriers (i.e., those carriers that do not currently operate at an airport, but that might wish to do so; also called, "new entrant" carriers) from entering the market. Therefore, to promote a competitive environment powered by market forces, and in order to afford opportunity to potential new entrant carriers, the FAA’s congestion management plan (in addition to capping the total number of slots at the three airports) also calls for some incumbent carriers to relinquish a handful of their slots so that the FAA can auction them to the highest bidder. The successful bidders then hold their slots as leases with defined expiration terms. After the leases expire, the slots are again put up for auction. The FAA designed this innovative plan with the following tripartite aim: to “[1] create a more efficient allocation of slots, [2] provide opportunities for new entry, and [3] reduce congestion.”

Announcement of the slot auction plan unleashed a torrent of staunch opposition from several airlines, the Port Authority of New York, and the Air Transport Association of America (ATA), a trade organization that represents the nation’s air carriers. An initial administrative protest from the carriers and the ATA was adjudicated before the FAA’s Office of Dispute Res-

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13 Hearing on Aviation Delays, supra note 3, at 3 (stating that “[s]traight caps without some mechanism to ensure an efficient allocation of scarce slot resources is not economically efficient and, therefore, not [a] preferred option”).

14 See generally Eileen M. Gleimer, Slot Regulation at High Density Airports: How Did We Get Here and Where Are We Going?, 61 J. AIR L. & COM. 877, 907-08 (1996) (discussing the economic disincentives among carriers to release valuable slots to their competitors).

15 See the JFK/EWR Plan, supra note 1, at 60,546-47; the LGA Plan, supra note 9, at 60,574; see also Press Release, FAA, Slot Auction (Dec. 4, 2008), available at http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=10346.

16 See the JFK/EWR Plan, supra note 1, at 60,547; the LGA Plan, supra note 9, at 60,577.


olution for Acquisition (ODRA), a dispute resolution agency charged with resolving acquisition-related disputes between the FAA and those bidding for FAA contracts. The plan also spooked Congress, inducing it to seek an opinion from the Government Accountability Office (GAO) on the legality of the auctions. On October 14, 2008, the ATA (later joined by several airlines and other entities) filed suit against the FAA seeking a declaration that the FAA's slot auction plans be found illegal because, among other reasons, they impermissibly exceed the FAA's statutory authority. The D.C. Circuit Court of Appeals recently stayed the FAA's plan pending final judgment in the case.

In light of these events, this comment will endeavor to illuminate the current airspace congestion dilemma in effort to contextualize the backdrop against which the slot auction plan is cast. Further, the comment will unravel the intricacies of the FAA's auction plan and will expound upon the brewing controversy between government agencies on the one hand, and the private transportation sector on the other. Finally, the comment will examine and evaluate the efficacy of the legal arguments on both sides of the slot-auction debate, centering principally on this enigmatic question: does the FAA possess the legal authority to implement its market-based slot allocation plan as a means to control airspace congestion?

19 See generally In re Air Transp. Ass'n of Am., Inc., Docket No. 08-ODRA-00452 (and series) (Sept. 30, 2008) (finding that the FAA is within its legal authority to conduct slot auctions).


II. THE GROWING AIR CONGESTION PROBLEM IN NEW YORK

In 2007, approximately thirty percent of U.S. domestic flights were either cancelled or delayed by more than fifteen minutes.\(^2\) Delays in the New York region were particularly grave: for LGA, JFK, and EWR combined, flights were generally delayed more often than the national average, and New York's flight cancellation rate was the worst in the nation.\(^2\) July of 2007 was particularly hard hit: forty-three percent of the arrivals into JFK and forty percent of the arrivals into LGA were late by more than fifteen minutes.\(^2\) To worsen matters, delays in New York reverberate nationwide because of an air traffic "spillover effect." Roughly one-third of the nation's commercial flights pass through New York's airspace every day.\(^2\) Thus, when delays occur in the New York area, the "spillover effect" foments a cascade of delays throughout the nation's entire airspace system.\(^2\)

Why is New York such a hotbed for air traffic delays? A 2007 study of New York air congestion coauthored by the Center for Air Transportation and Systems Research and the NASA Langley Research Center found that airline over-scheduling causes a sub-

\(^{23}\) WANG ET AL., supra note 1, at 1.

\(^{24}\) Id. For the three airports combined, only 71.5% of the flights departed on time, compared to a national average of 76.5%. Id. Only 62% of all New York flights arrived on time, compared to a national average of over 73%. Id. The flight cancellation rate for the New York area was 3.46%, compared to a national cancellation rate of only 2.16%. Id.


\(^{26}\) Hearing on Aviation Delays, supra note 3, at 2.

\(^{27}\) WANG ET AL., supra note 1, at 1. This is true principally because the nation's airspace system is highly integrated. Whalen et al., supra note 25, at 1. Aircraft transiting New York are of course scheduled to complete subsequent flights later in the day. An aircraft departing LGA for Dallas first thing in the morning may continue on to, for example, Los Angeles, then to Denver, then to Chicago (subsequent destinations are commonly referred to in the industry as "down-line cities"). Depending on the airline and aircraft type, it is common for aircraft to fly seven or more missions in a single day. Thus, when an aircraft transiting a New York airport becomes delayed, that delay will necessarily impact travelers scheduled for the later down-line segments too. In the example above, if the LGA-to-Dallas flight experiences a delay, down-line passengers such as those scheduled on the later Denver-Chicago segment will also experience delays, absent some intervening action by the carrier (like substituting a spare aircraft to cover the down-line segments). New York congestion thus affects the whole of the nation's airspace because of this spillover effect.
stantial number of New York's delays.\textsuperscript{28} That is, delays proliferate because airlines routinely schedule more air operations than New York airport capacity can handle.\textsuperscript{29} This practice is not uncommon. To be competitive in the popular New York market, airlines have incentive to schedule a large number of flights to and from the city.\textsuperscript{30} Having many daily flights (or "frequencies") between any two cities attracts consumers (particularly the business traveler), who benefit from the conveniences provided by a broad array of flight options.\textsuperscript{31} If a business meeting runs long (or finishes early), a business traveler can easily opt for a later (or earlier) flight, so long as the particular airline offers several flights a day in that market. Thus, high demand in any market, coupled with competition on the route among two or more carriers, creates impetus among airlines to schedule myriad flights during peak times.\textsuperscript{32} By offering an attractive assortment of options, the airlines can lure more travelers.\textsuperscript{33} To manage costs and keep capacity in line with demand, however, airlines schedule these flights on smaller aircraft.\textsuperscript{34} As a result, the number of individual flights increases, but without the expected concomitant increase in overall airline capacity.\textsuperscript{35} For example, from 1997 to 2007, the number of departures increased by thirty-five percent, but the total number of seats flying increased by only six percent.\textsuperscript{36}

Assuming demand in any market is reasonably finite (at least over the short run), in order for an airline to be able to offer

\textsuperscript{28} WANG ET AL., supra note 1, at 1.
\textsuperscript{29} Id.
\textsuperscript{30} See generally John Sabel, Airline—Airport Facilities Agreements: An Overview, 69 J. AIR L. \& COM. 769, 779 (2004) (noting that in order to "generate a profit from [their] revenues, [airlines] must schedule [their] flights so as to attract the greatest number of passengers").
\textsuperscript{31} See McCartney, supra note 6, at A1.
\textsuperscript{32} WANG ET AL., supra note 1, at 2.
\textsuperscript{33} See McCartney, supra note 6, at A1. A cursory examination of published airline schedules for key business markets provides evidence of this practice. For example, in January, 2009, Southwest Airlines alone offered twenty-nine daily weekday flights between Dallas and Houston, departing half-hourly. Southwest Airlines, http://www.southwest.com (last visited June 10, 2009); American Airlines offered twenty-one daily weekday flights between Dallas (both DFW and DAL) and Chicago. American Airlines, http://www.AA.com (last visited June 10, 2009). For the striking number of daily flights in a sampling of key New York markets, see infra notes 47–50 and accompanying text.
\textsuperscript{34} WANG ET AL., supra note 1, at 2; see also McCartney, supra note 6, at A1.
\textsuperscript{35} See Whalen et al., supra note 25, at 4–5.
\textsuperscript{36} Id. This result inheres in part from the proliferation of small, regional jet aircraft. Id. at 4.
several frequencies so that it makes its schedule more attractive to potential customers, it must deploy smaller aircraft in the market. Otherwise, the airline will risk over-saturating the market with too much capacity (a money-losing proposition). When the small-aircraft, high-frequency phenomenon is aggregated across several markets and several airlines, the result is indisputable: the inordinate number of aircraft competing for the same airports and airspace clogs the nation’s airspace arteries and overwhelms airport capacity. The small-aircraft, high-frequency business model may be attractive to consumers of air travel, but it also creates the kind of unprecedented gridlock New York experienced in 2007. In economic parlance, too many aircraft are competing for too few runways, and the same limited airspace. Thus, airport and airspace capacity becomes a “scarce resource.”

A simple hypothetical example illustrates this concept. Suppose demand between city “X” and New York is roughly 1,000 travelers per day. Assuming that only one airline serves the market, that airline can opt for a combination of aircraft type and number of daily flights that will move 1,000 travelers per day in that market. For example, the airline might offer two flights a day on 500-seat wide-body jets; five flights a day on mid-sized 200-seat jets; ten flights per day on 100-seat jets; twenty flights per day on 50-seat regional jets; or any combination of flights and seats that will closely match daily demand. The hypothetical airline, to attract the lion’s share of passengers, will aim to offer the widest selection of flights possible and will thus likely opt for a higher-frequency, smaller-aircraft combination. Introducing competition in the market complicates matters. When more than one carrier operates in the market, each car-

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37 See, e.g., McCartney, supra note 6, at A1 (noting the use of small aircraft in high-frequency markets); see also Whalen et al., supra note 25, at 4–5.
38 McCartney, supra note 6, at A1; see also Whalen et al., supra note 25, at 4–5.
39 See Whalen et al., supra note 25, at 4–5.
40 Id. at 1.
41 Limited, of course, by the types of equipment the airline operates within its fleet. For simplicity’s sake, the hypothetical example assumes the carrier has available to it a broad variety of aircraft fleet types.
42 All things being equal, the carrier would be discouraged from offering too few seats, lest it forfeit revenue-generating opportunities by offering inadequate supply to meet the demand. Similarly, the carrier is discouraged from offering too much supply in the market, since excess cost results from the inefficiency of flying empty seats. See generally Whalen et al., supra note 25, at 4–5.
43 Id. at 4, nn.6–7.
rier tries to compete effectively by offering its own attractive array of frequencies between city “X” and New York in the hope of luring more passengers from the finite demand pool than its competitor. The airlines must balance the offering of a wide selection of flights with the reality of flooding the market with excess capacity, since empty seats are often the death knell for airlines. The natural result, then, is that airlines deploy smaller aircraft several times per day between New York and city “X” rather than larger aircraft fewer times per day.

When aggregated across several markets and several airlines, the hypothetical illustration above bears itself out in the New York area. In 2007, airlines served each of the top twenty markets from New York with over twenty flights per day per market. For example, in the northeast corridor routes—a very popular business market—airlines offered a combined sixty-three daily flights between New York and Boston and forty-five daily flights between New York and Washington D.C.’s Reagan airport. That translates into approximately one flight every fifteen minutes between New York and Boston and one flight every twenty minutes between New York and Washington D.C.

Airlines scheduled sixty daily flights from New York airports to

44 Id. at 4–5; see also Wang et al., supra note 1, at 2. Fare sales, innovative scheduling, and other factors may of course stimulate demand, thereby increasing the size of the demand pool. For simplicity’s sake, however, the hypothetical example assumes a finite demand pool.

45 See Wang et al., supra note 1, at 2 (noting that airlines use smaller aircraft so that they can offer more frequencies in a market, thus maintaining “reasonable costs” by matching supply with demand).

46 Whalen et al., supra note 25, at 4–5. Evidence of carriers behaving in this manner can be seen by simply reviewing airline schedules. See supra note 33 and accompanying text. For an elaboration on the small-jet airline-scheduling phenomenon, see McCartney, supra note 6, at A1.

47 Wang et al., supra note 1, at 5.

48 The northeast corridor includes routes between New York (especially LGA, which is desirable because of its proximity to Manhattan) and both Boston Logan airport and Washington Reagan airport. Both Delta Airlines and US Airways offer “shuttle” service on these routes, with flights scheduled hourly in each market in each direction. See Delta Airlines, http://www.delta.com/help/faqs/delta_shuttle/ (last visited June 10, 2009); US Airways, http://www.usairways.com/awa/content/traveltools/intheair/shuttleinfo.aspx (last visited June 10, 2009). Other airlines, for example American Eagle (a subsidiary of AMR Corporation, the parent company of American Airlines, Inc.) also serve the northeast corridor markets. See, e.g., American Airlines, http://www.aa.com (last visited June 10, 2009).

49 Wang et al., supra note 1, at 5.

50 Assuming a typical travel day encompasses a fifteen-hour period from 6 a.m. to 9 p.m.
Chicago’s O’Hare and fifty-five daily flights from New York to Atlanta. Airlines deploy relatively small-gauge aircraft in many New York markets. For example, the average size aircraft used for LGA flights is 75 seats; for JFK, the average size aircraft is 114 seats. Combined, over one-third of the markets served from LGA and EWR airports are flown with regional aircraft of fifty seats or less. These smaller-sized jets, however, require “the same access to the same scarce airport facilities and air traffic network as do larger aircraft.”

With airlines encouraged to fly many frequencies using smaller aircraft, the unsurprising result is saturation of the New York airspace. In 2007, total “passenger trip delays” increased nationwide by twenty-nine percent over 2006, costing the economy $8.5 billion in lost productivity. Among the five airports with the highest number of passenger trip delays (that is, the airports with the worst record for delays), JFK, LGA, and EWR ranked first, third, and fourth respectively. Moreover, of

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51 Id.

52 Seventy-five seats is roughly equivalent to a larger-end regional jet such as the Canadair 700 or the Embraer E-170, both of which are commonly operated by regional carriers in seventy-seat configurations. See, e.g., Embraer, http://www.embraercommercialjets.com.br/english/content/ejets/emb_170.asp (last visited June 10, 2009). By contrast, a mid-sized jet like the Boeing 737 commonly operates in passenger configurations with 120–140 seats. Boeing, http://www.boeing.com/commercial/737family/pf/pf_101050-140.html (last visited June 10, 2009).

53 Id.

54 Id.

55 Whalen et al., supra note 25, at 5.

56 Interestingly, the FAA initially considered promulgating a rule that would require “up-gauging” of aircraft for New York flights. See Congestion Management Rule for LaGuardia Airport: Supplemental Notice of Proposed Rulemaking, 73 Fed. Reg. 20,846, 20,847 (Apr. 17, 2008). “Up-gauging” is an industry term that refers to using larger aircraft (i.e., larger-gauge aircraft) in place of smaller-gauge aircraft. This results in fewer total flights, but without a decrease in overall capacity. The reduction in flights eases congestion. Carriers responded unfavorably to the up-gauging proposal, however, and the FAA abandoned that plan in favor of the current auction scheme. Id. at 20,848–49.

57 “Passenger trip delay” is a delay “experienced by passengers at the time of arrival at the gate at the intended destination airport. The delay is computed relative to the scheduled arrival time published on the original airline ticket . . .” and includes air travel disruptions resulting from delayed flights, cancelled flights, rescheduling a passenger after she is denied boarding on an oversold flight, and a delay resulting from an en route diversion. LANCE SHERRY & GEORGE DONOHUE, U.S. AIRLINE PASSENGER TRIP DELAY REPORT (2007) 3 (2008), http://catsr.ite.gmu.edu/pubs/AirlinePaxTripDelayReport2007.pdf.

58 Id. at 5.

59 Id. at 9–10.
all U.S. airports, JFK and LGA experienced the largest increase in trip delays year over year. Due to the spillover effect, New York delays sparked further delays in “down-line” cities, and the summer of 2007 “became the second worst on record nationally for flight delays.”

Congestion-related delays in the New York area became so pronounced that the FAA designated both JFK and EWR airports as IATA Level 3 Coordinated Airports. A “Level 3” designation means that air carriers must periodically submit to the FAA their proposed schedules at the affected airport, and then the FAA and the carriers work together to resolve whatever scheduling concerns arise from the proposed schedules.

Based on proposals from carriers seeking to increase their operations during peak hours, the FAA convened a meeting with the carriers and subsequently issued an order capping JFK operations at eighty-one slots per hour. The FAA allocated those slots according to agreements reached among the carriers at the scheduling meeting. Concerned about rising congestion at EWR, the FAA employed the same procedures for that airport; however, the carriers failed to reach the required slot-allocation agreement.

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60 Id. (from 2006 to 2007). Passenger trip delays for both airports increased by an average of over seven minutes. Id.

61 See supra note 27 and accompanying text.

62 Id.

63 Bidder Seminar, supra note 17; see also the JFK/EWR Plan, supra note 1, at 60,545. Moreover, there is some speculation that the delays reported by the DOT are understated. See Whalen et al., supra note 25, at 5-6. Airlines can (and do) manipulate the delay statistics by artificially extending their arrival schedules so that—even in the event an aircraft is delayed—it can still arrive within fifteen minutes (the DOT cut-off period for mandatory delay reporting by airlines) of its (artificially scheduled) arrival time. Id. at 5. For example, in 1998, flights between Dallas and LGA were scheduled at an average of 200 minutes (3:20) in duration. Id. at 6. In 2007, however, the same flights were scheduled at an average of 211 minutes (3:31), a more than five percent increase in scheduled time. Id. This artificial schedule padding increases the probability that the airline will arrive “on time.”

64 The JFK/EWR Plan, supra note 1, at 60,545. For a discussion on IATA classification codes and their effects, see Int’l Air Transp. Ass’n Scheduling Guidelines, supra note 7, at 3.

65 The JFK/EWR Plan, supra note 1, at 60,545 n.3.

66 Id. at 60,545.

67 Id. Allocation by agreement is not uncommon and has been widely employed by the FAA in the past. See Gleimer, supra note 14, at 880-82.

68 Slot caps were already in effect at LGA airport. The LGA Plan, supra note 9, at 60,575.

69 The JFK/EWR Plan, supra note 1, at 60,545-56.
As public outrage over increased delays in the New York area grew, President Bush ordered the Secretary of Transportation to commission a report outlining potential solutions. Secretary Mary Peters thus authorized the formation of the New York Aviation Rulemaking Committee (NYARC) "to help the [DOT] and the FAA explore available options for congestion management and [to determine] how changes to current policy at all three . . . airports would affect the airlines and the airports." After considering the findings of the NYARC report and the comments offered in response to the FAA's proposed congestion management plans, the FAA in October 2008 issued proposed rules to create a long-term solution addressing New York-area congestion.

III. THE FAA'S MARKET-BASED SOLUTION: THE SLOT AUCTION PLAN

A. BRIEF HISTORY OF THE FAA'S APPROACH TO CONGESTION MANAGEMENT

Using slots as a tool for managing airspace congestion is not new. From 1969 to 2006, the FAA managed congestion at particular airports and during particular times of day according to the "High Density Rule" (HDR). The FAA allocated slots principally based upon agreements struck among carriers at scheduling meetings, which the carriers participated in pursuant to a grant of antitrust immunity. After deregulation in 1978, airline operations proliferated and demand for access to high-density airports increased. By 1985, in an effort to accommodate

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71 See Wald & Bailey, supra note 70, at A1.
72 The LGA Plan, supra note 9, at 60,576.
73 The NYARC consisted of members from every major U.S. air carrier as well as some foreign carriers, passenger groups, and the Port Authorities of New York and New Jersey. See, e.g., the JFK/EWR Plan, supra note 1, at 60,545.
74 Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport, 73 Fed. Reg. 29,626 (May 21, 2008). This notice of proposed rulemaking ultimately became the final JFK/EWR Plan.
76 See, e.g., the LGA Plan, supra note 9, at 60,574 (discussing the FAA's history of congestion management and slot allocation).
77 The GAO Opinion, supra note 20, at 4.
the increased demand at those airports, the FAA created "more permanent" slot-allocation procedures by using a "reverse lottery" to withdraw up to five percent of slots from the carriers holding them, thereby creating a pool of unused slots for new entrant carriers to use.\textsuperscript{78} Those slots were reallocated by a second lottery in which new entrant carriers or "limited incumbents"\textsuperscript{79} bid on the five percent of slots created by the reverse lottery.\textsuperscript{80} As part of the total congestion management package at HDR airports, the FAA also allowed those carriers holding slots to sell or lease them to other carriers on a secondary market.\textsuperscript{81} At the time, the FAA declined to use a slot auction procedure to assign slots because it feared that "legislation would be required for the collection and disposition of the proceeds [from the auction]."\textsuperscript{82} Apparently, the FAA's plan in 1986 to withdraw slots from incumbents and reallocate them by lottery was not opposed with litigation.\textsuperscript{83}

By 2000, growing Congressional concern that the HDR stifled competition by unfairly favoring incumbent carriers \textsuperscript{84} motivated Congress to order a phase-out of the HDR at LGA and JFK.\textsuperscript{85} The FAA remained concerned about New York-area air traffic congestion, however, and continued to propose hourly

\textsuperscript{78} The LGA Plan, supra note 9, at 60,574 (citing High Density Traffic Airports; Slot Allocation and Transfer Methods, 50 Fed. Reg. 52,180, 52,195 (Dec. 20, 1985)). At the time, the FAA provided that "[s]lots do not represent a property right but represent only an operating privilege subject to absolute FAA control." High Density Traffic Airports; Slot Allocation and Transfer Methods, 50 Fed. Reg. 52,180, 52,197 (Dec. 20, 1985) [hereinafter the HDR Slot Allocation Rule]. Thus, per the rule, the FAA could withdraw slots in its discretion.

\textsuperscript{79} Limited incumbents were those carriers that held less than eight slots at the subject airport. Special Slot Withdrawal and Reallocation Procedures, 51 Fed. Reg. 8632, 8632 (Mar. 12, 1986). The FAA did not allow those carriers with more than eight slots to bid in the second lottery on the theory that simply reshuffling slots between those carriers that already held a significant number would not advance the intent of the reallocation plan: namely, to give new entrant carriers access to the high-density airports, thereby promoting competition among several carriers. Id.

\textsuperscript{80} Id.

\textsuperscript{81} See the LGA Plan, supra note 9, at 60,574–75.

\textsuperscript{82} The HDR Slot Allocation Rule, supra note 78, at 52,183.

\textsuperscript{83} It is not likely that a challenge to the plan would have prevailed in any event, given the holding in Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309 (8th Cir. 1981) just five years earlier. The Northwest Airlines case is treated in greater detail herein. See discussion infra Part IV. B.

\textsuperscript{84} See, e.g., the GAO Opinion, supra note 20, at 5d n.12 (citing H.R. Rep. No. 103-240, at 29 (1993)).

\textsuperscript{85} See 49 U.S.C. §§ 41715–16 (2000 & Supp. IV 2005). There was no need to address the HDR at EWR because the FAA had already suspended the slot pro-
slot restrictions at LGA.\textsuperscript{86} While the FAA referred abstractly to its desire to inaugurate a market-based approach to slot allocation, it ultimately concluded that it lacked the requisite Congressional authority to do so.\textsuperscript{87} When the FAA was unable to secure express Congressional authority, and as the HDR phase-out began to create system overload in New York, the FAA issued temporary slot capping orders for LGA, EWR, and JFK.\textsuperscript{88} Although these slot caps averted a complete airspace congestion emergency, they were, by their terms, only a temporary solution.\textsuperscript{89}

Slot caps alone, however, address only one side of the congestion equation. While caps may provide relief at overtaxed airports, they do not create a wholly satisfactory remedy because caps advance anticompetitive practices and artificially drive up airfares.\textsuperscript{90} Caps necessarily create a situation in which one carrier is allowed to use a scarce resource to the exclusion of all others. To simply allocate slots according to historical carrier operations at the three airports necessarily means that new entrant carriers are barred from entering the market (in any meaningful way) unless an incumbent carrier independently decides to relinquish slots. Thus, flight caps alone lock potential competitors out of the New York market\textsuperscript{91} and create perverse incentives for incumbent carriers to hold slots just to prevent


\textsuperscript{87} See Congestion Management Rule for LaGuardia Airport, \textit{supra} note 86, at 51,362 (noting that, despite its desire to use a market-based approach to slot allocations at LGA, “the FAA currently does not have the statutory authority to assess market-clearing charges for a [slot]”).


\textsuperscript{89} See, \textit{e.g.}, Order Limiting Scheduled Operations at John F. Kennedy International Airport, 73 Fed. Reg. 3510, 3510 (Jan. 18, 2008) (“This Order establishes a temporary limitation on the number of scheduled operations at [JFK].”).

\textsuperscript{90} See, \textit{e.g.}, \textsc{Staff of the Bureau of Economics of the Federal Trade Commission, Notice No. 08-04, In the Matter of Congestion Management Rule for LaGuardia Airport} 4 (2008), \url{http://www.ftc.gov/os/2008/06/V080015comment.pdf} (noting that “[r]elieving congestion alone does not necessarily accomplish an optimal outcome; ideally the allocation should be efficient.”). The report also notes that using non-market based slot allocation methods, such as allocation via administrative assignment, is undesirable because it is “likely inefficient.” \textit{Id.} at 5.

\textsuperscript{91} See Press Release, FAA, \textit{supra} note 15.
their competitors from acquiring them. 92 Therefore, capping slots, absent some other offsetting action, produces as its unintentional byproduct higher airfares, an anticompetitive environment, and opportunities for predation. According to the DOT, “airfares at capped airports run [eleven] to [fifteen] percent higher” than at non-capped airports. 93 Incumbent airlines generally approve of caps at airports they already serve since caps artificially protect their market share while reducing opportunities for new competitors to enter. 94 Incumbent carrier support for caps (alone) at the New York-area airports “makes sense, because limited competition makes [the incumbent carriers] more profitable and protects them from new entrants that might want to compete by offering lower fares.” 95 A system of “straight caps,” then, counters competition, facilitates predation, and generally encourages economic inefficiency—all of which combine to provide fertile ground for higher fares at capped airports. 96

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92 See Gleimer, supra note 14, at 907–08. This practice is known as “slot hoarding.” See infra note 96 and accompanying text.

93 Press Release, Dept’t of Transp., U.S. Transportation Secretary Mary E. Peters Announces $89 Million Commitment to Capacity Improvements at JFK International Airport, Releases Final Rules to Improve Service, Keep Fares Competitive at New York’s 3 Capped Airports (Oct. 9, 2008) [hereinafter DOT Press Release], http://www.dot.gov/affairs/dot15008.htm. The DOT is not the only governmental organization to recognize this. On the contrary, the GAO, which opposes the slot-auction plan, has concluded, “airports [served by fewer carriers] tend to have higher airfares than airports with more competition from airlines.” U.S. GEN. ACCOUNTING OFFICE, GAO/01-518T, AVIATION COMPETITION: CHALLENGES IN ENHANCING COMPETITION IN DOMINATED MARKETS 2 (2001).


95 Id.

96 Id. (referring to the DEPARTMENT OF TRANSPORTATION, LOW COST AIRLINE SERVICE REVOLUTION, (1996), http://ostpxweb.dot.gov/aviation/Data/lowcostrevol.pdf). The report discusses types of anticompetitive and predatory behavior among carriers. “Slot hoarding” is one example of airline predation and occurs when a carrier uses very small aircraft in insubstantial markets to the exclusion of potential new entrant carriers that would prefer to use those same slots for higher-demand, more competitive routes. The slot-hoarding carrier technically uses the slot so as not to forfeit it, but only as a means to bar its competitors from entering the market. See DEPARTMENT OF TRANSPORTATION, LOW COST AIRLINE SERVICE REVOLUTION at 31; see also Gleimer, supra note 14, at 908–10. Another example of predation occurs when carriers artificially increase their operations in advance of an FAA rule imposing slot caps. This way, the carriers enlarge their
While slot capping may not be a new congestion management technique, auctioning slots to the highest bidder is. In keeping with its stated goal of reducing air congestion in New York’s airspace, but to avoid the anticompetitive ill effects that slot caps provoke, the FAA has now proposed a novel, two-pronged market-based solution for reducing New York air traffic down to manageable, delay-free levels.

II. THE MECHANICS OF THE FAA’S CONTROVERSIAL SLOT AUCTION PLAN

The FAA’s slot auction plan espouses the following approach. First, relying on its regulatory authority as codified in 49 U.S.C. § 40103(b) (2000) (§ 40103(b)), the FAA will continue to cap slots at each of the three airports. Caps for both JFK and EWR are set at eighty-one slots per hour. Slots at LGA are capped at seventy-one per hour from 6 a.m. to 9:59 p.m. To thwart the undesirable anticompetitive byproduct, the FAA proposes a second prong in its congestion management plan: a limited number of slots will be withdrawn from the incumbent carriers and then auctioned to the highest bidder in a way that ensures “the New York aviation market [remains] open to new services that [will] promote competitive fares” despite the limited number of slots available. This second prong of the FAA’s plan has stirred considerable consternation among the many interested parties.

The mechanics of the second prong work as follows: as part of the auction, most of the existing slots at all three airports will be “grandfathered” to their original (i.e., current) owners. This will allow incumbent carriers to retain the vast majority of the slots they already operate. In this way, the auction plan avoids causing financial harm to those carriers that have made substan-

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98 The JFK/EWR Plan, supra note 1, at 60,544; the LGA Plan, supra note 9, at 60,576.
99 The JFK/EWR Plan, supra note 1, at 60,546.
100 The LGA Plan, supra note 9, at 60,576. The LGA slot cap restrictions represent a four-slot decrease in daily slots versus the current cap of seventy-five. DOT Press Release, supra note 93. Those four slots are considered “retired.” Id.
101 Id.
102 See, e.g., The LGA Plan, supra note 9, at 60,576.
tial capital investments at one or more of the New York airports by allowing those carriers to retain the majority of their slots through the "grandfather" mechanism. 103 Carriers will hold these slots (called "common slots") as lease agreements for ten years. 104 At JFK and EWR, each carrier will retain one hundred percent of its current slots up to twenty, plus ninety percent of all of its slots over twenty. 105 The FAA will then auction those slots withdrawn from eligible carriers (initially called "limited slots") to successful bidders over a staggered five-year period. 106 Those slots awarded through the withdrawal-and-auction process will have shorter leases. 107 Once the limited slots are auctioned and leased to the highest bidder, they then become "unrestricted" slots. The unrestricted slots, unlike common and limited slots, will not be subject to withdrawal by the FAA, but will instead expire at the end of the specified lease term. 108 At LGA, the plan works similarly, however the FAA will simultaneously retire a small number of slots in order to bring flight oper-

103 Many carriers have invested significant sums in airport facility improvements (e.g., terminal and gate improvements). Hearing on Aviation Delays, supra note 3, at 11. For example, American Airlines opened a new terminal at JFK in August 2007, a project costing more than $1.3 billion. See Mayor Bloomberg Launches “Just Ask The Locals,” A Campaign to Welcome and Thank Visitors From Around the World, AMERICAN AIRLINES UPDATE, Sept. 2007, http://www.americanairlines.jp/content/images/jp/ta/pdf/UPDATE_ENG_Sep_2007.pdf. Thus, a significant loss of slots by American at JFK would almost certainly result in a lower return on its capital improvement investments at the airport. Some recognition of a carrier’s historical slot rights at a particular airport is therefore warranted. Notably, the FAA’s auction plan accounts for this reality by requiring incumbent carriers to forfeit only a very small number of their slots.

104 See, e.g., the LGA Plan, supra note 9, at 60,576–77. Carriers will hold their common slots just as they do today: those slots will be subject to an eighty percent usage requirement (known as the “use-or-lose” rule), and the FAA can cancel or withdraw common slots, as it has in other instances, for operational need or if “the FAA determine[s] the cap at the airport is too high.” See id. at 60,577.

105 The JFK/EWR Plan, supra note 1, at 60,546–47. Those carriers with twenty slots or less will not be required to relinquish any. Id.

106 See FAA, LIMITED SLOT ALLOCATION, 6-23 (Dec. 4, 2008), http://www.faa.gov/about/office_org/headquarters_offices/aep/ny_auctions/media/limited_slot_allocation.pdf. Not all “limited slots” will be subject to the auction process at once. Pursuant to the FAA’s plan, incumbent carriers will return their limited slots on a specified schedule ranging from zero to four years. For instance, if the carrier’s particular limited slot is assigned a reversion factor of “0,” it reverts to the FAA and is auctioned off immediately. If, on the other hand, the slot is assigned a factor of “4,” the carrier continues to hold and use the slot for the next four years, at which time the slot reverts to the FAA and is then auctioned. See STAFF OF THE BUREAU OF ECONOMICS, supra note 90, at 3.

107 The JFK/EWR Plan, supra note 1, at 60,547.

108 Id.
ations per hour down to seventy-one from the current seventy-five. \footnote{109}{The LGA Plan, supra note 9, at 60,576.} At LGA, each carrier will retain one hundred percent of its slots up to twenty, plus approximately eighty-five percent of slots over twenty. \footnote{110}{Id. at 60,576–77.} Of the remaining fifteen percent, the FAA will retire one-third and reallocate by auction the remaining two-thirds over a five-year period. \footnote{111}{Id. at 60,577.} According to the FAA, the combination of capping the New York area airports (to bring aircraft operations in line with airport/airspace capability) coupled with the auction of a limited number of slots, will both ease air traffic congestion and foster (or at least not impair) competition. \footnote{112}{See Bidder Seminar, supra note 17, at 4.}

The FAA recognizes that it lacks express regulatory authority to reallocate slots by auction. \footnote{113}{Congestion Management Rule for LaGuardia Airport, supra note 56, at 20,852 (noting that the “FAA continues to believe that it cannot rely on a market-based allocation method under a purely regulatory approach . . . ”).} This is primarily because an appropriations rider imposing restrictions on FAA spending provides that “none of [the FAA’s appropriations] funds . . . shall be available for the [FAA] to finalize or implement any regulation that would promulgate new aviation user fees not specifically authorized by law . . . .” \footnote{114}{Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2379 (2007) (emphasis added).} Thus, the rider prevents the FAA from engaging in expenditures that would construct new aviation user fees, and so the FAA must look to other authority to conduct the auctions. \footnote{115}{But see, DOJ Letter, supra note 97, at 2–5 (opining that proceeds from the slot auction plan would not constitute new aviation user fees because, among other reasons, there is no correlation between the amount an airline bids for a slot and the cost to the FAA to provide ATC services to the user. As such, proceeds from the auction would not meet the established legal definition of “user fees.”).} The agency finds this alternate authority in a unique combination of its regulatory power on the one hand, and its property-disposal powers on the other. According to the FAA, its authority to auction slots rests on a unique “bifurcated approach:” (1) the FAA first uses its regulatory authority granted by § 40103(b)—as it has done in the past and without meaningful opposition—to institute the slot caps at the New York airports, but (2) relies on its transaction authority to reallocate slots
by auction. The FAA derives its transaction authority from 49 U.S.C. §§ 106 (2000) and 40110 (2000 & Supp. V 2005) (hereinafter, “§ 106” and “§ 40110” respectively). Specifically, the FAA relies on § 106(n), which allows the agency to construct or acquire “such other real and personal property (including office space and patents)” as the FAA Administrator may deem necessary. Thus, when the FAA creates a slot, it “constructs” intangible property in accordance with § 106(n). Then, under a combination of § 106(l)(6)—which allows the FAA “to enter into and perform . . . leases . . . or other transactions as may be necessary to carry out the functions of [the FAA]”—and § 40110(a)(2)—which authorizes the FAA to “dispose of an interest in property for adequate consideration”—the FAA proposes to lease its newly constructed property (i.e., the slots) to the carrier that bids the highest for that contract. Therefore, according to the FAA’s theory, its power to cap slots and its power to construct and lease property coalesce to form the basis of its total grant of authority to conduct the auction.

Notably, the FAA does not consider its auction plan a permanent solution to the air traffic congestion problems, but instead calls it a temporary measure. The ultimate, longer-term goal is to increase air capacity in the New York area by expanding airport facilities and by launching other capital improvements. For example, the DOT recently signed a “Letter of Intent” to invest millions of dollars at JFK to increase the airport’s capacity by, for example, constructing new high-speed runway exit taxiways. The slot caps at the area airports are thus temporary.

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116 The JFK/EWR Plan, supra note 1, at 60,547–48; the LGA Plan, supra note 9, at 60,577–79.
117 The JFK/EWR Plan, supra note 1, at 60,547; the LGA Plan, supra note 9, at 60,577–79.
121 See the JFK/EWR Plan, supra note 1, at 60,547; the LGA Plan, supra note 9, at 60,577.
122 DOT Press Release, supra note 93.
123 Id. (noting that “[t]he best way to cut record airline delays nationwide is to expand the limited capacity at New York’s airport[s]”). Since building new airport infrastructure and overhauling the airspace system take time, however, the capping and slot-auction plan is designed to reduce delays and ease congestion until the infrastructure improvements can be built. Id.
124 Id. High-speed exit taxiways allow landing aircraft to clear active runways more quickly, which in turn allows those aircraft in the queue for landing to land
measures put into place "until the capacity improvements can come on line." 125

C. AIR CARRIERS AND OTHER INSTITUTIONS PROTEST THE SLOT AUCTION PLAN

Perhaps unsurprisingly, several air carriers protested the FAA's proposed plan, both directly and through the ATA. 126 The protestors raise three principal arguments. First, the ATA asserts that the FAA's bifurcated approach is misguided and that the FAA untentably stretches to discover statutory authority where none exists. 127 Necessarily incorporated into this argument are two implicit threshold questions: (1) whether or not slots are property (so that they can be leased pursuant to the FAA's property management authority), and (2) even if they are, whether the FAA possesses any interest to dispose. 128 Only if a slot is property in which the FAA has an interest can the FAA dispose of that interest (via lease) pursuant to its property management powers. 129 Secondly, the ATA argues that the FAA's interpretation of its own authority proves too much. If slots are indeed a form of property, then confiscating those slots constitutes a Fifth Amendment "taking" and thus offends constitutionally guaranteed due process requirements. 130 Third, the ATA asserts that the FAA's plan does not create the efficient use of airspace, but instead "distorts the operation of market forces

more quickly and without the need for holding patterns or for greater spacing between other landing aircraft. See id.

125 Id.


127 See ATA's Comments Concerning JFK/EWR, supra note 126, at 6–10.

128 Id. at 11–13.

129 Id. at 11.

130 Id. at 18–19; see also U.S. Const. amend. V.
and constricts competition—by forcing unwilling sellers to transfer slots they would prefer to retain . . . ."\[131\]

D. THE ATA AND OTHER INTERESTED PARTIES FILE SUIT

The FAA and those opposing the slot auctions have been unable to reach a satisfactory resolution. Given that the FAA decided to proceed with its plan even in the face of the GAO's opinion letter,\[132\] the ATA and other interested parties filed suit in the Federal Court of Appeals for the D.C. Circuit.\[133\] The court has issued a temporary stay barring the FAA from proceeding with the auctions; however, the case is still in its embryonic stages.\[134\] The court no doubt faces a formidable task. Central to the thrust of the case is this thorny issue: whether the FAA's proposed slot auction plan represents a legitimate exercise of its legal authority.

IV. IS THE SLOT AUCTION PLAN LEGAL?

A. AN IMMEDIATE SOLUTION IS REQUIRED

Before addressing the legal merits of the FAA's plan, we must begin from the premise that a solution to the congestion problem is not only warranted, but critical. There can be little doubt that the congestion crisis in New York requires an immediate solution. With rising delays, the spillover effect,\[135\] and worsening passenger conditions associated with the delays, the need for

\[131\] ATA's Comments Concerning JFK/EWR, supra note 126, at 24. The ATA and the airlines set out a variety of alternative theories to support their position that the slot auction is illegal including, for example, that the auction constitutes a new and impermissible tax on air carriers and that the auction plan violates the Anti-Deficiency Act. Because this comment focuses on the FAA's legal authority for commencing the auction, the alternative arguments urged by the ATA are not addressed herein.

\[132\] See, e.g., the JFK/EWR Plan, supra note 1, at 60,546 (the FAA opines that the slot auction plans "represent novel legal issues upon which reasonable people, and agencies, acting in good faith, have disagreed. The FAA disagrees with the GAO conclusions and has decided to proceed" with the adoption of the EWR/JFK and LGA plans).

\[133\] See, e.g., Petition for Review, Air Transp. Ass'n of Am., Inc. v. FAA, No. 08-1331 (D.C. Cir. Oct. 14, 2008). Other entities also filed suit against the FAA including, for example, the Port Authority for New York and several airlines. By order of the court, the several suits were consolidated on December 12, 2008. Order to Consolidate Cases, Air Transp. Ass'n of Am., Inc. v. FAA, Case No. 08-1333 (D.C. Cir. Oct. 14, 2008) (on file with the author).


\[135\] See supra note 27 and accompanying text.
a quick fix is beyond peradventure. Apart from the obvious detrimental impact on the individual traveler,\textsuperscript{136} air traffic delays cost the nation's economy between $8.5 billion and $40 billion annually.\textsuperscript{137}

Absent a market-based solution, airlines are not likely to restrain themselves when it comes to capacity management.\textsuperscript{138} Moreover, as we have seen, slot caps alone, without a concomitant market-based allocation method, encourage anticompetitive behavior and increase airfares.\textsuperscript{139} Thus, governmental action is not only warranted, but necessary. The FAA, as the agency designated and authorized to control the nation's airspace, is the right entity to intervene.

Underpinning this quandary, then, is the implicit acceptance of the need for some solution to the congestion problem in New York. In light of the current economic recession in the U.S., which has dampened the demand for air travel and impacted carriers' revenue streams, many carriers have reduced, or will soon reduce, scheduled flights and will draw down capacity by retiring older aircraft and by delaying delivery of new ones.\textsuperscript{140} Because of the capacity draw down, congestion in the New York area, and the nation's airspace generally, may not be as pressing a problem as it was in the summer of 2007. However, in light of the cyclical nature of the airline industry, any industry downturn

\textsuperscript{136} Impacted travelers include those flying into or out of the New York area, as well as those travelers impacted by "down-line" delays caused by the spillover effect. See supra note 27 and accompanying text.

\textsuperscript{137} The cost ranges vary depending on the source and depth of the analysis, though all estimates peg the cost in the billions-of-dollars range. Compare, SHERRY & DONOHUE, supra note 57, at 5 (estimating the annual cost of delays at $8.5 billion) with Outlook for Summer Air Travel, supra note 94 (citing study by the Senate Joint Economic Committee which estimates the annual cost at $40 billion).

\textsuperscript{138} See Whalen et al., supra note 25, at 1; see also Congestion Management Rule for LaGuardia Airport, supra note 56, at 20,847 (noting that the FAA experimented with lifting the slot caps at JFK in January 2007. Once the FAA removed the caps, airline over-scheduling caused a "system overload" at JFK, contributing in part to the summer 2007 congestion debacle.).

\textsuperscript{139} See supra notes 90–96 and accompanying text.

is certainly only temporary.\textsuperscript{141} Even assuming that air traffic decreases considerably overall, it is nevertheless likely that “most congested airports, particularly in the New York/New Jersey region, will not see a significant reduction.”\textsuperscript{142} As such, despite the notion that current airline capacity in New York may have lessened year over year, the congestion crisis in New York, if abated at all, no doubt requires continued attention.\textsuperscript{143}

B. THE FAA PROPERLY RELIES ON ITS COMBINED REGULATORY AND PROPERTY MANAGEMENT AUTHORITY TO QUELL A PRESSING PROBLEM

The FAA’s slot auction plan constitutes a noble, bull-by-the-horns effort to quell a pressing problem. The FAA’s attempts to protect the delay-weary public are heartening. Admittedly, its bifurcated approach is concededly novel. As one might expect, novelty usually stirs controversy in legal matters, and the FAA’s interpretation of its legal authority presents no exception. Upon consideration and analysis, however, while airline resistance is understandable, the slot auction plan does not represent an untenable or unreasonable interpretation of the FAA’s total grant of authority. On the contrary, as we shall see, Congress’s grant of power to the FAA was meant to broadly address problems just like the one presented here.

From the outset, however, we must address a glaring peculiarity: the FAA has itself publicly stated that it lacks the power to implement a slot auction scheme. As recently as 2006, the FAA explained that “legislation would be necessary to employ market-based approaches such as auctions . . . because the FAA currently does not have the statutory authority to assess market-clearing charges for a [slot].”\textsuperscript{144} The FAA, though, has explained that it made those previous statements solely in view of

\textsuperscript{141} Current Situation and Future Outlook of U.S. Commercial Airline Industry: Hearing Before the Subcomm. on Aviation of the H. Comm. on Transp. and Infrastructure, 109th Cong. 17 (2005) (statement of Steven A. Morrison, Professor and Chair, Department of Economics, Northeastern University) (noting that the airline industry has always been cyclical “because the demand for air travel is sensitive to the level of economic activity”).

\textsuperscript{142} See Outlook for Summer Air Travel, supra note 94, at 1. Even if New York airports experience a lessening of congestion in the short run, the cyclical nature of the industry means that congestion will likely exceed 2007 levels in the future. Id. at 1–2.

\textsuperscript{143} See generally Whalen et al., supra note 25, at 7.

\textsuperscript{144} Congestion Management Rule for LaGuardia Airport, supra note 86, at 51,362; see also id. at 51,363 (“The FAA currently does not have full legislative
§ 40103 and without consideration of its property disposition powers. After further consideration, the FAA has recanted its former statements in favor of its latest approach. Therefore, despite the FAA’s previous position on the matter, this comment will evaluate the efficacy of the agency’s most recent position, and concludes that the FAA is empowered to implement the slot auction scheme.

To begin with, when an agency is charged with administering a statute, that agency’s construction of the statute is entitled to substantial deference. Thus, a reviewing court must start from the premise that the FAA’s interpretation of its own authority under its proposed bifurcated approach is correct, unless there are “compelling indications” that the agency’s interpretation is wrong. Pursuant to § 40103, the U.S. Government maintains exclusive sovereignty over the nation’s airspace, and the FAA has broad authority to manage that airspace. Specifically, the FAA Administrator possesses the power to “develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.” Importantly, under § 40101(a)(6), Congress has unequivocally underscored the importance of market-based solutions and competitive forces with respect to air transportation. In carrying out her duties, the Secretary of Transportation (who has ultimate responsibility for the FAA) is required to place “maximum reliance on competitive market forces and on actual and potential competition.” The FAA’s broad authority, however, is concededly not unbridled. Its regulatory power is constrained by the appropriations rider prohibiting it from imposing new}

authority to employ [auctions] . . . . Consequently, we are seeking the legislative authority to conduct auctions . . . ."

145 See the JFK/EWR Plan, supra note 1, at 60,548.
146 Id. (noting that when the FAA made prior statements concerning its lack of authority to implement market-based mechanisms like slot auctions, it was referring specifically and only to its power under § 40103 and was not addressing its authority to dispose of property under §§ 106(l) and (n)).
147 Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309, 1315 (8th Cir. 1981) (citing Frontier Airlines, Inc. v. CAB, 621 F.2d 369, 372 (10th Cir. 1980)).
148 See id.
150 See Northwest Airlines, 645 F.2d at 1315; see also the JFK/EWR Plan, supra note 1, at 60,544.
153 Id. (emphasis added).
aviation user fees.\textsuperscript{154} Even so, it is clear that the FAA possesses authority to take action of some sort, and indeed, it has successfully done so in the past even over the objection of air carriers.\textsuperscript{155}

In \textit{Northwest Airlines v. Goldschmidt}, Northwest contested the FAA's authority to allocate slots at Washington D.C.'s National Airport (National).\textsuperscript{156} The FAA had proposed slot controls at the airport because of "severe congestion, resulting in numerous and substantial delays." \textsuperscript{157} Until 1980, air carriers serving National determined, by agreement among themselves, how they would divvy up available slots.\textsuperscript{158} In October 1980, however, the carriers were unable to reach an accord principally because a new entrant carrier, New York Air, wanted to begin competing in the lucrative New York-Washington shuttle market by offering several flights during peak times of the day.\textsuperscript{159} Because the carriers could not arrive at a mutual agreement that would include making room for the new entrant, the FAA—after seeking public comments and suggestions on a proper allocation method—issued a rule distributing slots among all carriers according to a formula based on each carrier's previous months' allocations.\textsuperscript{160} The FAA required National's incumbent carriers to yield or move a number of their slots in order to make room for New York Air.\textsuperscript{161} Northwest,\textsuperscript{162} employing arguments strikingly similar to those made in the current slot-auction matter, challenged the FAA's plan outright by contending that the agency "ha[d] no statutory authority to allocate slots among carriers."\textsuperscript{163} The

\textsuperscript{154} Consolidated Appropriations Act of 2008, \textit{supra} note 114.
\textsuperscript{155} \textit{See generally} \textit{Northwest Airlines}, 645 F.2d 1309.
\textsuperscript{156} \textit{Id.} at 1311.
\textsuperscript{157} \textit{Id.} at 1312.
\textsuperscript{158} \textit{Id.} The carriers were able to coordinate schedules and agree on slot allocation because of a grant of antitrust immunity from the then-existing Civil Aeronautics Board. \textit{Id.}
\textsuperscript{159} \textit{Id.} at 1312–13. In order to compete effectively against the shuttle product of the incumbent carrier, Eastern Airlines, New York Air sought twenty slots, or ten take-offs and landings per day. \textit{Id.} at 1313.
\textsuperscript{160} \textit{Id.} at 1313.
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} Several other carriers joined in the suit, including for example, Pan American World Airways, Delta Airlines, and American Airlines. \textit{Id.} at 1311 n.1.
\textsuperscript{163} \textit{Id.} at 1313. Northwest unsuccessfully challenged the FAA's actions on other grounds too. \textit{See id.} Those alternative grounds are beyond the scope of this comment.
FAA defended on the grounds that 49 U.S.C. § 1348(a)\textsuperscript{164} allowed the FAA to, among other things, "formulate policy with respect to the use of the navigable airspace . . . under such terms, conditions, and limitations as [it] may deem necessary . . . ."\textsuperscript{165} The FAA argued that § 1348(a) clearly endowed the FAA with authority to allocate slots at National.\textsuperscript{166} New York Air was thus able to enter the National market pursuant to the FAA's slot allocation scheme.\textsuperscript{167}

The court recognized that the FAA has "responsibility and authority not only for aviation safety but also for airspace management."\textsuperscript{168} Thus, held the court, the FAA possessed the power to allocate the slots in the manner it proposed, including withdrawing slots from incumbent carriers and reallocating them to the new entrant carrier.\textsuperscript{169} In light of *Northwest Airlines*, it is obvious that the FAA possesses clear authority to implement some sort of slot allocation system. The question that remains, then, is this: if the FAA possesses general authority to withdraw and allocate slots, can it do so using a market-based auction program? The answer is an unequivocal yes.

As discussed above, because the FAA, as it concedes, lacks the regulatory authority to auction slots,\textsuperscript{170} it relies on its property management authority to conduct the auction.\textsuperscript{171} Thus, if the FAA's argument is to pass muster with a reviewing court, the FAA must demonstrate a crucial predicate: it must prove that slots are "property" within the meaning of §§ 106(1)(6) and 106(n), the FAA's property management provisions. The FAA has stated previously that "[s]lots do not represent a property right but represent an operating privilege subject to absolute

\textsuperscript{164} 49 U.S.C. § 1348(a) preceded the current 49 U.S.C. § 40103—the same statute that the FAA currently cites as part of its authority to implement the auction plan. The language of the former statute and that of the current one are similar, and there is no substantive difference between the two. See 49 U.S.C. § 40103 (2000).

\textsuperscript{165} *Northwest Airlines*, 645 F.2d at 1315 (citing 49 U.S.C. § 1348(a)).

\textsuperscript{166} Id.

\textsuperscript{167} Ultimately New York Air was awarded eighteen slots. Special Federal Aviation Regulation; Temporary Allocation of IFR Reservations [slots] at Washington National Airport, 45 Fed. Reg. 72,637 (Nov. 3, 1980).

\textsuperscript{168} *Northwest Airlines*, 645 F.2d at 1316.

\textsuperscript{169} See *id*.

\textsuperscript{170} See Congestion Management Rule for LaGuardia Airport, *supra* note 56, at 20,852.

\textsuperscript{171} See generally discussion *supra* Part III.B.
FAA control."\textsuperscript{172} For example, in \textit{In re Gull Air, Inc.,}\textsuperscript{173} the FAA argued that it possessed the authority to withdraw LGA slots from a bankrupt airline that was no longer using them.\textsuperscript{174} The airline protested, arguing that the slots had become property of the bankrupt carrier's estate, and thus that the Bankruptcy Code's automatic stay provisions barred the FAA from seizing the slots.\textsuperscript{175} The FAA contended that the slots were "not property of the carrier to which they are allocated . . . ."\textsuperscript{176} The court, recognizing a split among courts that had previously addressed the issue, held that slots used by a carrier do become property of the carrier's estate in bankruptcy. \textsuperscript{177} Other courts reviewing this issue have held similarly.\textsuperscript{178} Slots, in fact, are actively treated as property by the airlines themselves, which commonly sublease and sell them for consideration, use them as forms of collateral, \textsuperscript{179} and report them as assets in financial statements.\textsuperscript{180} Thus, slots are unequivocally a form of property. Importantly, slots issued under previous FAA orders, although property in the hands of the carriers, nonetheless contain signif-

\textsuperscript{172} \textit{In re McClain Airlines, Inc.}, 80 B.R. 175, 178 (Bankr. D. Ariz. 1987) (citing 14 C.F.R. § 93.223) (emphasis added). The FAA in its latest slot auction plan, however, recognizes that auctioned slots grant a property interest to the successful bidder since the auctioned slots will be leased. \textit{See, e.g., the LGA Plan, supra} note 9, at 60,578 ("slots are an intangible form of property that may be leased.").

\textsuperscript{173} 890 F.2d 1255 (1st Cir. 1989).

\textsuperscript{174} Id. at 1256–57.

\textsuperscript{175} Id. at 1257.

\textsuperscript{176} Id. at 1258.

\textsuperscript{177} Id. at 1259–60. The court noted that the ability of carriers to buy and sell slots on a secondary market gave them the characteristics of traditional property. \textit{Id.} at 1260. The court, however, determined that since Gull Air's slots had expired under their own terms, they could no longer be considered the carrier's (or the estate's) property. \textit{Id.} at 1260–61.

\textsuperscript{178} \textit{See In re McClain Airlines, 80 B.R. 175, 178 (Bankr. D. Ariz. 1987); Am. Cent. Airlines, Inc. v. O'Hare Reg'l Carrier Scheduling Comm., 52 B.R. 567, 570–71 (Bankr. N.D. Iowa 1985).}

\textsuperscript{179} \textit{See the JFK/EWR Plan, supra} note 1, at 60,549; \textit{see also} Gleimer, \textit{supra} note 14, at 902–07.

cant restrictions, and the FAA often imposes conditions that, if unfulfilled, will lead to slot withdrawal or reversion.\(^{181}\)

The fact that slots may be property in the hands of carriers, however, does not necessarily mean that they are property in the FAA’s hands, just as the GAO urged in its legal opinion to Congress on the slot auction issue.\(^{182}\) Rather, the GAO concluded—with scant analysis to support its conclusion—that slots constitute licenses to use the nation’s airspace system.\(^{183}\) Having perfunctorily concluded that slots are licenses, the GAO then relied on *Cleveland v. United States*\(^{184}\) for the proposition that licenses are not property while in the hands of the issuing agency.\(^{185}\) In *Cleveland*, the FBI charged a gaming entrepreneur with multiple counts of money laundering, racketeering, and conspiracy after the FBI discovered the entrepreneur “participated in a scheme to bribe state legislators to vote in a manner favorable to the video poker industry.”\(^{186}\) To support these charges, the government relied on 18 U.S.C. § 1341 (2000) (§ 1341)—a mail fraud statute—that, among other things, prohibits the use of the mails to defraud others.\(^{187}\) The question presented in *Cleveland*, as stated by the court, was “whether, for purposes of the federal mail fraud statute, a government regulator parts with ‘property’ when it issues a [federal] license.”\(^{188}\) The court held that “§ 1341 does not reach fraud in obtaining a state or municipal license of the kind here involved, for such a license is not ‘property’ in the government regulator’s hands.”\(^{189}\) The court reached this conclusion in part by finding that a state-issued video poker license represented an exercise of state police powers, akin to licenses to transport and sell alcoholic beverages or to sell corporate stock.

\(^{181}\) See, e.g., Operating Limitations at New York LaGuardia Airport; Notice of Order, 71 Fed. Reg. 77,854, 77,858–60 (Dec. 27, 2006) (requiring that carriers must use their LGA slots eighty percent of the time or else the slots would be subject to withdrawal by the FAA). The usage requirement is known informally as the “use-or-lose” rule. *In re Gull Air*, 890 F.2d at 1261. Slots also, by their terms, revert to the FAA at the expiration of the rule that created or allocated them. Operating Limitations at New York LaGuardia Airport, 71 Fed. Reg. at 77,860 (“When the final Order expires, any [slots held by carriers at LGA] will revert to the FAA for reallocation . . . .”).

\(^{182}\) See the GAO Opinion, *supra* note 20, at 10–11.

\(^{183}\) Id. at 11.

\(^{184}\) 531 U.S. 12 (2000).

\(^{185}\) See the GAO Opinion, *supra* note 20, at 11.

\(^{186}\) *Cleveland*, 531 U.S. at 16.

\(^{187}\) Id. at 16–17 (referring to, and quoting, 18 U.S.C. § 1341 (2000)).

\(^{188}\) Id. at 20 (emphasis added).

\(^{189}\) Id. (emphasis added).
The court noted that to import "traditional concepts of property" into its reading of § 1341 would transform a "wide range of conduct traditionally regulated by state and local authorities" into new "federal criminal jurisdiction." The court, in unusual perfervid tone, noted that if a state-issued license conferred a property right in the state, "one could scarcely avoid the conclusion that States have property rights in any license or permit requiring an upfront fee, including drivers' licenses, medical licenses, and fishing and hunting licenses." Finally, the court found the word "property" to be ambiguous as used within § 1341, and because the case involved a criminal defendant, the court was bound to resolve the ambiguity "in favor of lenity."

With respect to the slot auctions, Cleveland is clearly inapposite and easily distinguishable. In the first place, the GAO cites no authority for its unsupported, but essential predicate that slots constitute licenses by the FAA. Whether slots—which the FAA will allocate via leaseholds under its plan—are licenses similar to the gaming permits at issue is Cleveland is doubtful. Unlike a license to drive, sell alcohol, sell stock, hunt, fish, or operate video gaming devices, slot leases are freely transferable among carriers, and the transferability does not depend on FAA approval. Thus, the GAO's legal argument—which unsoundly assumes as its premise that slots are licenses and not leases—begins on unsteady footing. Moreover, Cleveland—a criminal case—concerned itself with the proprietary interest of a state in licenses it issued pursuant to state legislation in exercise of state police powers. The FAA slot auction program, on the

190 See id. at 21.
191 Id. at 24 (emphasis added).
192 Id. at 22; see also, the GAO Opinion, supra note 20, at 11.
193 Cleveland, 531 U.S. at 25 (citing Rewis v. United States, 401 U.S. 808, 812 (1971)).
194 See generally the GAO Opinion, supra note 20.
195 In the proposed slot-lease contract itself, the FAA endeavors to grant a possessor interest in the designated airspace at the time specified in the lease. See generally Proposed Lease Agreement Between Federal Aviation Administration (FAA) and [blank in which the carrier's name is to be added], http://www.airlines.org/government/CourtFilings/ (follow the "ATA Petition on Slot Auctions" hyperlink; then follow the "ATA Petition for Review, Exhibit 1: Notice of Slot Lease Auction" hyperlink). Leases, by their terms, expire in five-year increments. Id. at 1.
196 Id. at 3 ("Nothing shall prohibit lessee from selling or subleasing the [slot] Lease in secondary markets or using the lease as collateral; provided, however, that the FAA receives notice" of the sale or sublease).
197 Cleveland, 531 U.S. at 22.
other hand, concerns a federal agency and that agency's interpretation of a federal statute that, by its terms, grants the agency the exclusive right and the broad authority to manage federal airspace. Unlike the issue in Cleveland, there is no danger that the slot auction scheme will wrest power from the state or local authorities in favor of federal jurisdiction. The Supreme Court's implicit concerns in Cleveland—concerns about disturbing the fragile balance of power between federal and state government—are thus inapplicable in the instant matter. With respect to the nation's airspace system, the federal government already, by statute, possesses complete sovereignty over that domain.198

In addition, the Supreme Court in Cleveland carefully circumscribed its opinion, confining its interpretation of the word “property” to the mail fraud statute specifically—a statute that imposes criminal liability on those who violate its terms.199 Thus, the Court's restrictive reading of the word “property” for purposes of § 1341 is hardly transferable to any interpretations of “property” as used in § 106. One must look to the legislative history of the FAA's property management authority, rather than a criminal mail fraud statute, for guidance in construing the meaning of “property” as it relates to the FAA's authority.200 That legislative history reveals that in 1996 Congress intended to reform and revolutionize the FAA in such a way as to "create incentives for the agency to make necessary improvements in the performance of the nation's air traffic control (ATC) system."201 The Senate Committee on Commerce, Science, and Transportation presciently presaged the current strain on the air traffic system when it noted "the demand for air transportation services will increase dramatically over the next several years, while available resources will not be adequate to meet demand."202 Thus, noted the Committee, "the focus must now be on enacting legislation to make comprehensive changes in how the FAA conducts its business and to remedy inefficiencies within the organization and its ATC system."203 In specific reference to the FAA's property man-

199 Cleveland, 531 U.S. at 25.
201 Id. (emphasis added).
202 Id. at 2 (emphasis added).
203 Id.
agement authority, the Committee declared that the then-new provisions would "provide broad, general authority for the [FAA] to enter into contracts, leases . . ." and other agreements "to carry out the functions of the FAA."204 The Committee intended that the new provisions would grant "broad authority" to the FAA to "acquire, construct, improve, repair, and maintain air traffic control . . . facilities . . . as well as other real and personal property."205 There is no indication that Congress meant to in any way constrain the FAA's property management authority or that it used the word "property" in a restrictive or atypical sense. On the contrary, as noted above, the legislative history reveals that Congress bestowed substantial, broad authority upon the FAA to combat inefficiencies within the air traffic network. 206

Finally, unlike Cleveland's state-issued video poker licenses, the national airspace is already considered public property.207 In accordance with § 40103, the FAA alone is the sole entity authorized to orchestrate movement within that navigable airspace.208 Thus, when the FAA creates a slot for purposes of movement through the airspace (recognized as a property interest by the courts), it "constructs" a property interest in the airspace system by conferring the exclusive right of access (to a body of public property) at a particular point in time.209 This is a far cry from granting a license to operate video poker machines. The latter does not grant a leasehold or access to a body of existing public property, but rather authorizes its holder to conduct an activity under the rigors of state supervision.210 In this regard, video poker licenses are more akin to patents, which do not become property of the licensee until the government issues the patent.211 While the federal government may have no property in-

204 Id. at 23 (encouraging the FAA to use its authority to enter into contracts and favorably underscoring the potential revenue that the FAA may be able to claim as a result). Notably, one of the FAA's principal functions is to manage the nation's airspace. § 40103.
205 Id. at 24.
206 Id. at 1.
207 United States v. Causby, 328 U.S. 256, 261 (1946); Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1217-18 (Fed. Cir. 2005).
209 See 49 U.S.C. § 106(n)(1) (2000) (granting the FAA the right to construct real or personal property, or any interest in such property).
211 Id. at 23-24.
terest in an unissued patent, the same cannot be said of the nation's navigable airspace.

Moreover, even if slots are licenses, they would be licenses to use the nation's navigable airspace. As noted, Congress has already declared, and the courts have thus recognized, that the FAA possesses exclusive sovereignty over the airspace and is charged with its control and efficient management. Thus, the FAA maintains some property interest in the slots even if it does not own them outright, because only the FAA has the authority to assign the use of airspace and because slots, by their terms, revert to FAA control under certain, stated conditions. As such, the FAA possesses the right to part with a portion of that interest under § 40110(a)(2) because that section does not require the FAA actually own the property it disposes of, but merely that it possess an interest in such property.

C. A Withdawal of Slots Does Not Constitute a Taking

If slots are indeed property, then can the FAA confiscate them without compensating the carriers? In short, does the FAA's auction plan constitute a Fifth Amendment taking? Even though, as we have seen, slots are a form of intangible property, the FAA's withdrawal of a small portion of the slots currently held by incumbent carriers is not a taking under the Fifth Amendment. Citing the Takings Clause, the ATA and the airlines argue that the portion of the FAA's plan that requires incumbent carriers to relinquish slots for the auction is in effect a "taking" of the airlines' property without the required just compensation. Because, according to the ATA, the slot confiscation plan serves no public use, the ATA concludes that the Fifth Amendment bars the FAA from withdrawing slots from the incumbent carriers. It is true that an impermissible "taking" occurs "where government requires an owner to suffer a

212 See § 40103.
213 Id.; see also the JFK/EWR Plan, supra note 1, at 60,549 (FAA discussing its theory that it has a property interest in the slots).
214 See, e.g., supra note 174 and accompanying text.
216 See, e.g., ATA's Comments Concerning LGA, supra note 126, at 18–19 (arguing that the FAA's plan to confiscate a limited number of slots constitutes a taking).
217 Id.
218 Id. at 19, n.50 (citing Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542–43 (2005)).
permanent physical invasion" of property, where government regulations "completely deprive an owner of 'all economically beneficial use' of her property," or where the factors in *Penn Central Transportation Company v. New York City*\(^{219}\) are met. \(^{220}\) The carriers, however, confuse (or perhaps purposefully obscure) a property interest taken by the government through regulatory action with a property interest that naturally expires by its own terms.

An airline's interest in slots, after all, is but a "limited interest encumbered by conditions that the FAA impose[s] in its regulations."\(^{221}\) Thus, slots are encumbered by terms that subject them to revocation or withdrawal by the FAA in certain circumstances. For example, because an FAA order conferring slots is always effective only until the FAA issues a new order that supersedes the old one, carriers' property interests in their slots expire when the order granting those slots expires.\(^{222}\) The FAA also grants slots subject to the use-or-lose rule, in which case a carrier's underutilization of a slot will cause its forfeiture.\(^{223}\) Moreover, courts have affirmed the FAA's right to withdraw slots generally. In *Northwest Airlines*, the carrier protested the FAA's plan to withdraw slots from incumbent carriers and reallocate them to a new entrant carrier.\(^{224}\) Over Northwest's objection, the court held that the FAA possessed the authority to reclaim and redistribute existing slots.\(^{225}\) Similarly, the FAA's 1986 plan to employ a reverse lottery to withdraw slots from the incumbent carriers was unchallenged.\(^{226}\)


\(^{220}\) Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005) (internal citations omitted). *Penn Central* does not establish a "set formula" for determining whether a regulatory taking has occurred, but instead articulates several factors, such as the regulation's economic impact and the degree to which the property owner's rights are infringed. *Id.* at 538-39.

\(^{221}\) *In re Gull Air, Inc.*, 890 F.2d 1255, 1260 (1st Cir. 1989).

\(^{222}\) Operating Limitations at New York LaGuardia Airport, *supra* note 12, at 77,860 ("When the final Order expires, any [slots held by carriers at LGA] will revert to the FAA for reallocation . . . .").

\(^{223}\) *See supra* note 174 and accompanying text (noting that slots are revocable when a carrier violates the "use-or-lose" rule).

\(^{224}\) Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309, 1311-13 (8th Cir. 1981); *see also supra* notes 151-62 and accompanying text.

\(^{225}\) *Northwest Airlines*, 645 F.2d at 1315. In *Northwest Airlines*, whether the FAA's withdrawal of slots constituted a taking was not apparently raised by Northwest; however, the case's holding demonstrates the FAA's broad authority to withdraw slots.

\(^{226}\) *See supra* notes 78-83 and accompanying text.
Therefore, when the FAA issued its previous slot capping and allocation orders for carriers serving the New York airports, those carriers that received slot authorizations took their interests subject to losing them.227 This is precisely why the court in *Gull Air* ultimately found that the airline's slots, though property, were nonetheless not part of the bankruptcy estate. Since Gull Air's slots expired, by their terms, after a period of non-use, the carrier's property interest in those slots also expired, and the slots reverted to the FAA.228 Thus, in the instant matter, the FAA's withdrawal of a portion of the incumbent carriers' slots cannot constitute a taking. The slot withdrawal neither represents a permanent invasion of the owner's property nor deprives the owner of all economically beneficial use. Carriers that enter into slot authorization agreements with the FAA have always done so at the risk that they will lose those authorizations either at the expiration of the authorization, if they violate the authorization's terms or conditions, or sooner if the FAA issues a superseding order.229 If a carrier's interest in a slot is withdrawn by the FAA under these scenarios, then that withdrawal cannot be a Fifth Amendment taking. When property reverts according to the express provisions of the instrument conveying the interest, that reversion is no more a taking than "there would be in the eleventh year of a ten year lease." 230

V. CONCLUSION

The FAA's slot auction plan is a rational, market-based method of fairly allocating a scarce resource. The plan skillfully combines the right amount of market-based principles and competition-promoting methods to effectively, if only temporarily, control the airspace congestion exigency facing New York. Given the reality of today's air travel system—and the overcrowding of New York airspace specifically—government action is necessary to provide safe and efficient air access to New York.

227 *See, e.g.*, the LGA Plan, *supra* note 9, at 60,580–81; *see also In re Gull Air, Inc.*, 890 F.2d 1255, 1260–61 (1st Cir. 1989) (recognizing that although a slot confers a property interest to the airline, such interest can expire by its own terms).

228 *Gull Air*, 890 F.2d at 1260–61.

229 *See* the JFK/EWR Plan, *supra* note 1, at 60,551; *see also* the LGA Plan, *supra* note 9, at 60,580–81. Note that the FAA has historically not been so heavy-handed as to forcibly take slot authorizations from carriers that hold them. As one carrier noted, it has held its New York slots "more or less continuously" for 40 years. *Id.* (citing the comments of US Airways).

230 *See* the LGA Plan, *supra* note 9, at 60,581.
A well-conceived congestion management plan fits the bill. Congestion management, however, should not come at the expense of competition, nor should it induce prohibitively high airfares. The FAA has shown care and great diligence in ensuring that such undesirables do not come to bear. The auction plan, while an admittedly novel use of its authority, is nevertheless legal under the current provisions of the FAA’s property management power. The fact that airlines hope to avoid paying for what was previously allocated to them for free is understandable, particularly in today’s frosty economic climate. However, the public’s interest in safe, reliable travel to and from New York, in a manner that does not create artificially high airfares or an anticompetitive landscape, must prevail. If the courts find that the FAA lacks the authority to implement its slot-auction scheme, then Congress should begin work immediately to bestow express authority upon the FAA to conduct the auctions. The FAA and the DOT should, in turn, continue airspace infrastructural improvements that will, in time, increase air traffic capacity in the New York area and reduce or eliminate the need for controversial slot capping and allocation. In the absence of a sensible fix to the current congestion crisis plaguing the airspace, however, the problem is a brimming cauldron which will soon enough reach another boiling point—as it did in the summer of 2007—and the travel-weary public will again suffer the stinging brunt of the consequences.