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## COMMENT

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# THE POWER OF “PROPERTY”: THE FAA’S STATUTORY CREATION FOR SLOT ALLOCATION AT THE UNITED STATES’S BUSIEST AIRPORTS

### I. INTRODUCTION

In recent years, airport congestion has played a significant role in air carrier delays and cancellations for the American public.<sup>1</sup> Seemingly, air traffic delays would be less prevalent given the relatively vast amount of airspace that is capable of being occupied. However, airport infrastructure is a debilitating factor in the freedom of aircraft movement. Aircraft are limited by the ability to takeoff, land, and utilize terminal infrastructure at certain highly congested airports.<sup>2</sup> Ideally, every airport would have the capability to accommodate each aircraft desiring to use those facilities.<sup>3</sup> However, as air traffic continues to increase, it becomes more problematic to find runway, taxiway, and terminal infrastructure to accommodate the multitude of aircraft vying for the same airports.<sup>4</sup> In recent years, the most notorious airports for heavy congestion and associated delays have been the three largest New York airports: LaGuardia

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<sup>1</sup> Benjamin D. Williams, Comment, *Playing the Slots: The FAA Gambles with its Controversial Congestion Management Plan for New York’s Busiest Airports*, 74 J. AIR L. & COM. 437, 437 (2009).

<sup>2</sup> See, e.g., Michael E. Levine, *Airport Congestion: When Theory Meets Reality*, 26 YALE J. ON REG. 37, 44 (2009) (“Airport capacity is determined by the physical layout of the runways, taxiways, ramps and terminals; the weather; the mix of aircraft using the airport; and air traffic control (ATC) limits, if any.”) (citation omitted).

<sup>3</sup> Andrew B. Steinberg & James W. Tegtmeier, *Dealing with Airport Congestion: The Regulatory Challenge of Demand Management*, 19 AIR & SPACE LAW. (Am. Bar Ass’n), Winter 2005, at 1, 15 (“[A]lthough the best method to meet burgeoning demand is to match it with appropriate runway, taxiway, and airway capacity, sometimes this is not practicable in the short or long term.”).

<sup>4</sup> Levine, *supra* note 2, at 56 (noting that some airports have added capacity to accommodate demand, but typically, capacity at U.S. airports has not kept up with demand).

(“LGA”), John F. Kennedy International (“JFK”), and Newark Liberty International (“EWR”).<sup>5</sup> In fact, the overwhelming congestion at these three airports represents the backdrop to this paper.

In response to this overwhelming congestion issue, the Federal Aviation Administration (“FAA”) has been tasked with designing and implementing tools for managing airspace congestion.<sup>6</sup> One such tool implemented by the FAA is called a slot, commonly known as a “right to use a runway, or to take-off and land at an airport.”<sup>7</sup> Through the use of slots, the FAA limits the number of aircraft operations at a particular airport, thereby decreasing congestion.<sup>8</sup> A slot is an effective means of balancing an air carrier’s demand for access while remaining within capacity limitations of a particular airport.<sup>9</sup> In October 2008, the FAA announced a new slot auction plan to address congestion issues at JFK, LGA, and EWR.<sup>10</sup> The FAA’s proposed plan included a cap<sup>11</sup> on available slots and a requirement that airlines currently holding slots relinquish a designated number to the FAA – which would then be sold to the highest bidder at

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<sup>5</sup> SUSAN FLEMING, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-934T, NATIONAL AIRSPACE SYSTEM: DOT AND FAA ACTIONS WILL LIKELY HAVE A LIMITED EFFECT ON REDUCING DELAYS DURING SUMMER 2008 TRAVEL SEASON (2008) (“DOT data show that flight delays and cancellations have increased nationwide and especially in the New York region; however, the data provide an incomplete picture of the source of delay. Since 1998, the total number of flight delays and cancellations nationwide has increased 62 percent, while the number of scheduled operations has increased about 38 percent. Flight delays and cancellations in the New York region are even more pronounced. Specifically, since 1998, the number of flight delays and cancellations in the New York region has increased about 111 percent, while the number of operations has increased about 57 percent.”).

<sup>6</sup> See Williams, *supra* note 1, at 448.

<sup>7</sup> Erin Shea, Comment, *Analysis of the Proposed Hub Carrier “Slot” Preference at Chicago O’Hare*, 73 J. AIR L. & COM. 611, 611 (2008).

<sup>8</sup> Williams, *supra* note 1, at 439.

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

<sup>10</sup> See, e.g., Congestion Management Rule for LaGuardia Airport, 73 Fed. Reg. 60,574, (Oct. 10, 2008) (to be codified at 14 C.F.R. pt. 93) [hereinafter LGA Congestion Management Rule]; Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport, 73 Fed. Reg. 60,544, (Oct. 10, 2008) (to be codified at 14 C.F.R. pt. 93) [hereinafter JFK & EWR Congestion Management Rule].

<sup>11</sup> A “cap” is a limitation on the number of slots the FAA is willing to allocate. Williams, *supra* note 1, at 439.

auction.<sup>12</sup> The FAA's stated goal for the slot auction plan was to create a more efficient allocation of slots, provide opportunity to new entrants, and reduce congestion.<sup>13</sup> For reasons more thoroughly explained later in this paper,<sup>14</sup> the FAA's proposed congestion plan was met with strong opposition.<sup>15</sup> Understandably, air carriers, through their trade group Air Transport Association ("ATA"), were among the most adamant opponents of the FAA's slot auction plan.<sup>16</sup> ATA began by exhausting administrative remedies before the FAA's Office of Dispute Resolution for Acquisition ("ODRA").<sup>17</sup> Thereafter, ATA filed suit in the D.C. Circuit Court of Appeals against the FAA, asking the court to find the slot confiscation and auction plan "unlawful and [and should be] set aside because these actions are in excess of the FAA's statutory authority; constitute unauthorized regulatory action disguised as property management; [and] are contrary to express statutory limitations imposed by Congress."<sup>18</sup> In addi-

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<sup>12</sup> LGA Congestion Management Rule, *supra* note 10, at 60,585-86; JFK & EWR Congestion Management Rule, *supra* note 10, at 60,546-47.

<sup>13</sup> Williams, *supra* note 1, at 440 (citing FAA, 2009 NEW YORK SLOT AUCTIONS BIDDER SEMINAR 4 (Dec. 5, 2008), [http://www.faa.gov/about/office\\_org/headquarters\\_offices/aep/ny\\_auctions/](http://www.faa.gov/about/office_org/headquarters_offices/aep/ny_auctions/)).

<sup>14</sup> See *infra* Part IV.

<sup>15</sup> Madhu Unnikrishnan, *Airlines Ready Lawsuit Over FAA Slot Auction*, AVIATION WEEK, Aug. 7, 2008, [http://www.aviationweek.com/aw/generic/story\\_generic.jsp?channel=aviationdaily&id=news/SLOT08078.xml&headline=AirlinesReadyLawsuitOverFAASlotAuction](http://www.aviationweek.com/aw/generic/story_generic.jsp?channel=aviationdaily&id=news/SLOT08078.xml&headline=AirlinesReadyLawsuitOverFAASlotAuction).

<sup>16</sup> ATA is the trade group of the principal U.S. airlines. See *Membership*, AIR TRANSP. ASS'N, <http://www.airlines.org/about/membership/pages/membership.aspx> (last visited Aug. 27, 2010). ATA's members are as follows: ABX Air, Inc.; AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo; Atlas Air, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corp.; Hawaiian Airlines, Inc.; JetBlue Airways Corp.; Southwest Airlines, Co.; United Airlines, Inc.; UPS Airlines; and US Airways, Inc. *Id.*

<sup>17</sup> Protests of Air Transp. Ass'n, Nw. Airlines, Inc., Cont'l Airlines, Inc., US Airways Group, Inc., United Airlines, Inc., Delta Airlines Inc., Port Auth. of NY & NJ, & NY Aviation Mgmt. Ass'n Pursuant to SIR Posting 6996, FAA Order No. ODRA-08-475 (Sept. 30, 2008), available at [http://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/pol\\_adjudication/agc70/CaseFiles/view/docs/08\\_475fo.pdf](http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc70/CaseFiles/view/docs/08_475fo.pdf) (holding that the ATA lacked standing to challenge the auction). Additionally, the ODRA refused to reach the issue of whether the slots were property under the FAA's Acquisition Management System, and added that the issue could only be resolved by a federal court. *Id.*

<sup>18</sup> Petition for Review at 3, *Air Transp. Ass'n of Am., Inc. v. FAA*, No. 08-1331 (D.C. Cir. Oct. 14, 2008). Several other entities filed suit against the FAA and the action was consolidated in Petition for Review, *Air Transp. Ass'n of Am. v. FAA*, No. 08-1333 (D.C. Cir. Oct. 14, 2008).

tion, after the ODRRA ruling, Congress sought review of the FAA's proposed "capacity-enhancing initiatives and demand management policies" by the Government Accountability Office ("GAO").<sup>19</sup> However, before the D.C. Circuit Court had an opportunity to make a ruling on ATA's assertions,<sup>20</sup> the FAA rescinded the congestion management rules for LGA, JFK, and EWR leaving only speculation as to the court's determination on the legality of the FAA's slot confiscation and auction plan under a claim of agency "property."<sup>21</sup>

By exploring the history of congestion management in the United States and the legal foundation for the FAA's proposed plan to auction slots under a property right theory, this paper seeks to prove that the FAA does not possess the necessary legal authority to claim a property right in slots being utilized by incumbent air carriers. In short, this paper will coalesce the arguments made by ATA with a significant Supreme Court ruling to project a likely outcome in favor of ATA if the D.C. Circuit court had the opportunity to make a ruling. Part II will discuss the history of slots in the United States and their effectiveness as means of congestion management. Part III will introduce a significant Supreme Court ruling on property rights of a license in the hands of an issuing agency. Part IV will highlight ATA's arguments to the D.C. Court of Appeals and attempt to make a logical determination, considering factors illustrated in preceding sections of the paper, on the outcome of the FAA's claim to possess the authority to confiscate and auction slots under their property management regime. Finally, the paper will discuss a viable alternative to effectively utilizing existing airspace, which would fulfill the FAA's stated objectives while eliminating the need for a highly controversial slot allocation plan.

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<sup>19</sup> FLEMING, *supra* note 5, at 17.

<sup>20</sup> See *supra* note 18 and accompanying text.

<sup>21</sup> See Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport, 74 Fed. Reg. 52,134 (Oct. 9, 2009) (to be codified at 14 C.F.R. pt. 93); Congestion Management Rule for LaGuardia Airport, 74 Fed. Reg. 52,132 (Oct. 9, 2009) (to be codified at 14 C.F.R. pt. 93).

## II. HISTORY OF SLOTS AS AN EFFECTIVE MEANS OF CONGESTION MANAGEMENT IN THE UNITED STATES

The FAA defines a slot as “the operational authority to conduct one IFR landing or takeoff operation each day during a specific hour or 30 minute period.”<sup>22</sup> Slots are utilized at airports where aircraft demand is in excess of airport capacity.<sup>23</sup> In general, airports allocate slots on a first-come, first-served basis.<sup>24</sup> However, in 1968, the demand for airports such as JFK, LGA, and EWR was so great that the FAA was forced to implement a reservation system known as the “high-density rule” at these highly congested airports.<sup>25</sup>

### A. *The High-Density Rule: FAA’s Solution for Highly Congested Airports*

The “high-density rule” was initially adopted as a short-term solution for the burgeoning problem of congestion at certain highly congested airports.<sup>26</sup> In fact, the FAA insisted that the rule should not be viewed as a permanent solution.<sup>27</sup> However, in 1973, the FAA announced that the high-density rule would remain in effect for the foreseeable future.<sup>28</sup>

Other than designating three categories—scheduled air carriers, scheduled air taxis, and other aircraft operators—the high-density rule was vague as to how the slots would be allocated.<sup>29</sup> In response, air carriers formed Scheduling Committees to distribute the slots amongst themselves.<sup>30</sup> This system worked until the Airline Deregulation Act of 1978, when the Scheduling Committees – comprised of incumbent carriers – were asked to grant slots to low cost competitors.<sup>31</sup> The Sche-

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<sup>22</sup> 14 C.F.R. § 93.213(a)(2) (2010).

<sup>23</sup> See Levine, *supra* note 2, at 59.

<sup>24</sup> Robert Hardaway, *Economics of Airport Regulation*, 20 TRANSP. L.J. 47, 60 (1991).

<sup>25</sup> Shea, *supra* note 7, at 612-13.

<sup>26</sup> Steinberg & Tegtmeier, *supra* note 3, at 15.

<sup>27</sup> Shea, *supra* note 7, at 613.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 614.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

duling Committees resisted new entrants into the market in an effort to retain market share at these airports. To combat the inefficiencies of the Scheduling Committees, the FAA enhanced the high-density rule in 1985 with the “Buy-Sell Rule.”<sup>32</sup>

*B. Fine-Tuning of the High Density Rule: Expanding the Market with the Buy-Sell Rule*

The buy-sell rule made it possible for air-carriers and commuters to sell their slots at high-density airports.<sup>33</sup> In theory, it became possible for new entrants to buy an existing slot from a carrier; in turn, that carrier was forced to value the opportunity cost of holding an inefficient or underutilized slot versus selling to a competitor.<sup>34</sup> The unintended effect was that the buy-sell rule created a valuable asset for air carriers with slots and the ability to exclude other carriers from the market.<sup>35</sup> Although air carriers were now able to buy, sell, and trade their slots, the FAA insisted that there were no proprietary rights in the slots.<sup>36</sup> To the contrary, the FAA, in essence, created value in slots by creating a market where carriers could buy, sell, and trade these commodities for value. The buy-sell rule ushered in some significant changes to the high-density rule, the most significant of which were the “grandfather clause,” the lotteries for open slots, and the “use it or lose it” provision.<sup>37</sup>

1. Grandfather Clause

As part of the buy-sell rule, incumbent air carriers were allowed to retain permanent slots they held on December 16, 1985.<sup>38</sup> Of no surprise, those carriers that did not receive slots in the initial allocation protested that these “grandfathered slots” allowed incumbent carriers to unfairly prevent new en-

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<sup>32</sup> Steinberg & Tegtmeier, *supra* note 3, at 16.

<sup>33</sup> Shea, *supra* note 7, at 616.

<sup>34</sup> Levine, *supra* note 2, at 58.

<sup>35</sup> Steinberg & Tegtmeier, *supra* note 3, at 16.

<sup>36</sup> 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, 891 (1996).

<sup>37</sup> Shea, *supra* note 7, at 616.

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

trants into a high-density market by simply utilizing slots that were initially allocated to them free of charge.<sup>39</sup> The actual effect of creating value in slots retained under the grandfather clause may have been contrary to the FAA's intended effect.<sup>40</sup> After all, the FAA continued to maintain that slots were only a right to use rather than being property of the air carrier, but these air carriers now had the opportunity to leverage slots for payment, trade, or exclusion of competitors.

## 2. Lotteries

To counteract the discord over the grandfather clause, the FAA implemented a lottery system for excess slots.<sup>41</sup> In theory, the pool of slots available for lottery would be comprised of a one-time five percent withdrawal from incumbent airlines,<sup>42</sup> excess slots derived from increases in air traffic control capacity, and any slots gained through the use or lose provision.<sup>43</sup> The FAA mandated slots during peak hours be contributed so new entrants and limited incumbents<sup>44</sup> would have access to these times.<sup>45</sup> However, other than the initial one-time withdrawal, the lottery system was seldom utilized because incumbent air carriers sought to protect these valuable slots and chose not to relinquish them to a competing carrier. Instead, the air carriers

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<sup>39</sup> *Id.* The transportation department defended the grandfather clauses by stating that these initial benefits were necessary to establish the buy-sell system. *Id.* Furthermore, the grandfather clause was recognition of a carriers investment in personnel, equipment, and resources. *Id.* at 616-17.

<sup>40</sup> See Steinberg & Tegtmeier, *supra* note 3, at 16 ("The collateral effect was to create a valuable asset (though not *property*, according to FAA regulations) for the air carriers holding grandfathered authority and to exclude other air carriers from effectively competing in certain city-pairs.").

<sup>41</sup> Shea, *supra* note 7, at 617.

<sup>42</sup> Gleimer, *supra* note 36, at 890-91. The five percent lottery did not allow for withdrawal from limited incumbents. *Id.* at 890. JFK was exempted because of the large presence of international carriers. *Id.* Commuter slots were excluded because of the historical success of commuter scheduling committees accommodating new entrants. *Id.* Also, the FAA allowed carriers the opportunity to identify slots to be withdrawn. *Id.* at 891.

<sup>43</sup> *Id.* at 889-90.

<sup>44</sup> Shea, *supra* note 7, at 617 (stating that limited incumbents are those air-carriers with a relatively limited amount of slots at a particular airport).

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

chose to hold excess slots rather than voluntarily relinquish them.

### 3. Use It or Lose It

The third mechanism employed by the buy-sell rule was the “use it or lose it” provision.<sup>46</sup> Initially, the FAA required air carriers to utilize their slots sixty-five percent of the time but later increased this to an eighty percent minimum usage.<sup>47</sup> The FAA had hopes that underutilized slots would be freed up for new entrants.<sup>48</sup> To the contrary, no market slots developed because the FAA, invariably, created a valuable asset in the slots.<sup>49</sup> Moreover, because of this new-found value in slots, the carriers devised ways to side-step the established minimum usage requirement set forth by the FAA.<sup>50</sup> Through the use of short-term leasing, the incumbent carriers maintained possession and control of slots and charged exorbitant rates for the lease.<sup>51</sup> While new entrants were able to gain access to the airports, the access came at a great expense and only for a short-term basis.<sup>52</sup> In reality, “[o]utright sales of slots were relatively infrequent and rarely reached the numbers necessary to initiate service. Major air carriers had every reason to hold onto the slots they were awarded . . . .”<sup>53</sup>

#### *C. Congress Responds to the High-Density and Buy-Sell Rules*

With criticism growing that the buy-sell rule was only benefiting the large carriers and continuing to exclude small carri-

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<sup>46</sup> Gleimer, *supra* note 36, at 889.

<sup>47</sup> Shea, *supra* note 7, at 617.

<sup>48</sup> Gleimer, *supra* note 36, at 889.

<sup>49</sup> Steinberg & Tegtmeier, *supra* note 3, at 16.

<sup>50</sup> John Sabel, *Airline – Airport Facilities Agreements: An Overview*, 69 J. AIR L. & COM. 769, 780 (2004) (quoting Gleimer, *supra* note 36, at 889) (“[A]irlines in possession of the slots leased them to competitors, on a short-term basis, ‘to meet the minimum use requirement since the leasing mechanism also limits the competitor’s ability to gain a permanent foothold at the airport.’”).

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

<sup>52</sup> *Id.*

<sup>53</sup> Steinberg & Tegtmeier, *supra* note 3, at 16.

ers, Congress decided to take action with a review of the airline industry and the high-density rule.<sup>54</sup>

In 1993, Congress created the Airline Commission to investigate, study, and make recommendations about the health and competitiveness of the airline industry.<sup>55</sup> Following the conclusion of multiple hearings, the Airline Commission recommended the FAA review operations at high-density airports by either removing or increasing the artificial limits to the highest practicable level, while remaining consistent with safety.<sup>56</sup>

In 1994, Congress implemented the FAA Reauthorization Act<sup>57</sup> which directed the Secretary of Transportation to conduct a study on the high-density rule and report the findings to Congress.<sup>58</sup> In addition, the Act authorized the Secretary of Transportation to allow for certain slot exemptions for new entrants at high-density airports.<sup>59</sup> Nevertheless, these exemptions for new entrant carriers proved to be an extremely high standard with very few exemptions granted.<sup>60</sup> In 1996, the GAO delivered a report to Congress that criticized the few exemptions granted to new entrants at high-density airports.<sup>61</sup> The Department of Transportation ("DOT") responded by stating that it would no longer use the narrow guidelines to grant exemptions to new entrant carriers.<sup>62</sup> The DOT further elaborated that it would grant exemptions to any carrier that maintained a potential to offer a low fare option at these highly congested airports.<sup>63</sup>

Finally, by 2000, amidst looming Congressional concern that the high-density and buy-sell rules were unfairly favoring the incumbent carriers, Congress passed the Wendell H. Ford Aviation Investment Reform Act for the 21st Century, which

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<sup>54</sup> Shea, *supra* note 7, at 620.

<sup>55</sup> Gleimer, *supra* note 36, at 912 n.144.

<sup>56</sup> *Id.* at 912.

<sup>57</sup> *Id.* at 913.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 914.

<sup>60</sup> Shea, *supra* note 7, at 620.

<sup>61</sup> *Id.* at 620-21.

<sup>62</sup> *Id.* at 621.

<sup>63</sup> *Id.*

ordered a phase out of the high-density rule at LGA and JFK.<sup>64</sup> Despite the Congressional mandate to eliminate the high-density rule, the FAA remained concerned with traffic at LGA and continued to propose slot restrictions.<sup>65</sup> With the high-density rule being phased out, the FAA made an attempt to gain Congressional approval of market-based solutions for slot allocation.<sup>66</sup> In the proposal, the FAA admitted that it “currently does not have the statutory authority to assess market-clearing charges for a landing or departure authorization.”<sup>67</sup> However, the FAA failed to gain approval from Congress and was forced to rely on its statutory powers to issue temporary slot capping at LGA, EWR, and JFK.<sup>68</sup>

*D. FAA’s Congestion Management Solution after the High-Density Rule*

The temporary slot capping, imposed by the FAA after the high-density rule, was still being criticized by many as excluding competition and forcing prices higher.<sup>69</sup> Demand at these airports continued to increase, as economic woes forced air carriers to fly smaller capacity aircrafts in order to offer more flexible options to consumers and remain competitive.<sup>70</sup> By 2008, in desperation to find a long-term solution for congestion and allow new entrants into the market, the FAA announced a controversial market-based solution for reducing air traffic.<sup>71</sup> What the FAA proposed was to continue capping slots under its regulatory authority<sup>72</sup> and to withdraw a limited number of slots from incumbent airline to be auctioned to the highest bidder.<sup>73</sup> Need-

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<sup>64</sup> Williams, *supra* note 1, at 449.

<sup>65</sup> *Id.* at 449-50.

<sup>66</sup> Congestion Management Rule for LaGuardia Airport, 71 Fed. Reg. 51,360, (Aug. 29, 2006) (to be codified at 14 C.F.R. pt. 93) [hereinafter LGA Congestion Management Rule 2006].

<sup>67</sup> *Id.* at 51,362.

<sup>68</sup> Williams, *supra* note 1, at 450.

<sup>69</sup> *See id.* at 451.

<sup>70</sup> Steinberg & Tegtmeier, *supra* note 3, at 16.

<sup>71</sup> *See, e.g.*, LGA Congestion Management Rule, *supra* note 10; JFK & EWR Congestion Management Rule, *supra* note 10.

<sup>72</sup> 49 U.S.C. § 40103(b) (2007); LGA Congestion Management Rule, *supra* note 10, at 60,574; JFK & EWR Congestion Management Rule, *supra* note 10, at 60,544.

<sup>73</sup> JFK & EWR Congestion Management Rule, *supra* note 10, at 60,547.

less to say, the withdrawal and auctioning of slots from incumbent carriers garnered much criticism from those interested parties.<sup>74</sup>

### 1. How the FAA's Slot Auction Plan Would Operate

Under the FAA's proposed plan, they would take existing slots from incumbent carriers on a percentage basis of slots held after a pre-determined cap. Specifically, at JFK and EWR, the FAA sought to withdraw ten percent of the incumbent carrier's slots, over twenty slots.<sup>75</sup> In other words, incumbent carriers at these two New York airports would keep their first twenty slots, and, after twenty, carriers retained only ninety percent of their slots.<sup>76</sup> The original twenty slots, not subject to withdrawal, would be retained by carriers as lease agreements for ten years.<sup>77</sup> In addition, the withdrawn slots would be auctioned off to the highest bidder over a five-year period.<sup>78</sup> The proposed plan for LGA was slightly different. Instead of the ninety percent retention of slots like the plan for JFK and EWR, incumbent carriers at LGA would only retain eighty-five percent of their slots over twenty.<sup>79</sup> The FAA planned to retire one-third of the fifteen percent relinquished by LGA carriers and auction the remaining two-thirds.<sup>80</sup> Out of the three New York airports, LGA was the only airport that the FAA intended to retire slots. The LGA plan would limit the number of hourly flights to seventy-one, instead of the current seventy-five.<sup>81</sup> The FAA's

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<sup>74</sup> See *supra* note 18, and accompanying text.

<sup>75</sup> JFK & EWR Congestion Management Rule, *supra* note 10, at 60,546-47.

<sup>76</sup> *Id.* at 60,547.

<sup>77</sup> *Id.* ("Ninety percent of each carrier's slots above its baseline operations will be assigned to the carrier in a lease terminating March 30, 2019. The remaining 10 percent will be designated as limited slots and have shorter leases. Each carrier will identify half of the specific slots that will become its limited slots, and the FAA will select the remaining half.")

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

<sup>79</sup> LGA Congestion Management Rule, *supra* note 10, at 60,576 ("[A]pproximately 85 percent of the total number of slots currently in use at the airport will be 'grandfathered' to carriers . . .").

<sup>80</sup> *Id.* at 60,577.

<sup>81</sup> *Id.* at 60,576; see also Steinberg & Tegtmeier, *supra* note 3, at 17 (noting that LGA is "served by two 7,000-foot runways and 78 commercial passenger gates that are situated on a mere 680 acres. The airport is bordered on three sides by waterways . . . to

claimed initiative was to create more efficient slot allocations, provide opportunities for new entry, and reduce congestion.<sup>82</sup> The FAA suggested this objective would be achieved by capping slots and auctioning off a number of carrier's existing slots,<sup>83</sup> but, aside from retiring a small percentage of slots at LGA, congestion would not be alleviated because there would be the same number of slots being used, with the only difference being that different air carriers would have the opportunity to bid on and utilize those slots.

At LGA, the retiring of slots would help with the FAA's claimed objective of reducing congestion. To the contrary, at JFK and EWR, the FAA's plan merely sought to redistribute the wealth, if you will. Instead of allowing a market-based distribution plan, such as the high-density and buy-sell rule, the FAA wanted to force incumbent carriers to relinquish slots and accept new entrants into a highly congested and competitive market. But, does the FAA have the legal authority to impose the taking of existing slots and auction those slots to the highest bidder?

## 2. FAA's Proposed Legal Foundation for Implementing the Auction Plan

Arguably, the most controversial aspect of the FAA's congestion management plan was that it lacked the legal foundation to implement the auction plan. In fact, in a 2006 proposal for a congestion management plan at LGA, the FAA explicitly made the following comment regarding the extent of its legislative authority:

The FAA is committed to ensuring that excessive delays and congestion do not return at LaGuardia after the HDR expires. The FAA and OST are evaluating appropriate market-based mechanisms, such as auctions or congestion pricing, for allo-

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accommodate larger aircraft, the Port Authority of New York and New Jersey extended each of the runways over the water . . .").

<sup>82</sup> Williams, *supra* note 1, at 440 (citing FAA, 2009 NEW YORK SLOT AUCTIONS BIDDER SEMINAR 4 (Dec. 5, 2008), [http://www.faa.gov/about/office\\_org/headquarters\\_offices/aep/ny\\_auctions/](http://www.faa.gov/about/office_org/headquarters_offices/aep/ny_auctions/)).

<sup>83</sup> *Id.* at 454.

cating capacity at LaGuardia over the long-term. The FAA currently does not have full legislative authority to employ such mechanisms at LaGuardia or at other airports . . . .<sup>84</sup>

Moreover, restrictions on FAA spending prevent it from using appropriated funds to implement any regulation that would create aviation user fees not specifically authorized by law. However, despite the FAA's previous assertions that there is no "property" interest in slots and the acknowledged lack of explicit approval to create new aviation user fees, the FAA now claimed to have found the statutory approval under their property management authority to auction slots at congested airports.<sup>85</sup> To make this work, the FAA creatively construed authority by combining its regulatory authority and transaction authority to evade Congress' clear prohibition against creating new aviation users fees. First, the FAA used its authority under 49 U.S.C. § 40103(b)<sup>86</sup> to cap slots at JFK, EWR, and LGA. Second, the FAA comingled 49 U.S.C. § 106 and 49 U.S.C. § 40110 to contrive transactional authority.<sup>87</sup> Here's how the FAA construed these statutory provisions: First, the FAA claimed property interest in the slots under 49 U.S.C. § 106(n) which allows the "[administrator] to acquire (by purchase, lease, condemnation, or otherwise), construct, improve, repair, operate, and maintain . . . real and personal property (including office space and patents), or any interest therein . . . ."<sup>88</sup> Second, the FAA combined 49 U.S.C. § 106(l)(6) which says, "[t]he Administrator is authorized to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be neces-

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<sup>84</sup> LGA Congestion Management Rule 2006, *supra* note 66, at 51,363.

<sup>85</sup> *See infra* note 86 and accompanying text.

<sup>86</sup> 49 U.S.C. § 40103(b) (2007).

Use of airspace.--(1) The Administrator of the Federal Aviation Administration shall 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. The Administrator may modify or revoke an assignment when required in the public interest.

*Id.*

<sup>87</sup> LGA Congestion Management Rule, *supra* note 10, at 60,577; JFK & EWR Congestion Management Rule, *supra* note 10, at 60,547.

<sup>88</sup> *See* 49 U.S.C. § 106(n)(1)(A) (2007).

sary to carry out the functions of the Administrator . . . .” and 49 U.S.C. § 40110 which says, “the Administrator of the Federal Aviation Administration . . . may dispose of an interest in property for adequate compensation . . . .”<sup>89</sup> Under this unique construction of statutory power, the FAA claimed to have the right to cap the number of slots and lease additional slots through the auction mechanism.<sup>90</sup>

However, in order for this theory to work, slots have to qualify as “property” in the hands of the FAA. This debate is a significant problem for the FAA because they are forced to overcome the fact that they have previously maintained that a slot is not “property”; and as will be more fully discussed below, the Supreme Court has held that a license to use is not property in the hands of the issuing agency.<sup>91</sup> Obviously, without the slot being deemed “property,” the FAA’s plan was clearly beyond the scope of its statutory authority.

It is this paper’s contention, along with many opponents of the FAA’s slot auction plan, that the FAA improperly construed two statutory provisions to fit its needs in order to implement the plan. The FAA improperly concluded that slots are “property” within the meaning of their property management authority in 49 U.S.C. §§ 106(n) and 106(l)(6). As will be evident in the following section, the Supreme Court has made clear that no such property interest exists when a license to use rests in the hands of the issuing agency, in this case, the FAA.

### III. THE FAA’S PROPERTY IN SLOTS: CONTRARY TO *UNITED STATES v. CLEVELAND*

#### *A. Background and Procedural History*

In 1997, petitioner, Charles W. Cleveland, was convicted in the United States District Court for the Eastern District of Louisiana for, *inter alia*, two counts of mail fraud.<sup>92</sup> The charges

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<sup>89</sup> 49 U.S.C. § 106(l)(6) (2007); 49 U.S.C. § 40110(a)(2) (2007).

<sup>90</sup> See *supra* note 88 and accompanying text.

<sup>91</sup> See *infra* Part III.

<sup>92</sup> *United States v. Bankston*, 182 F.3d 296 (5th Cir. 1999), *aff’g* *United States v. Cleveland*, 951 F. Supp. 1249 (E.D. La. 1997), *rev’d*, 531 U.S. 12 (2000). Cleveland, an attorney for Fred Goodson, assisted Goodson in the completion of an application to oper-

against Cleveland stemmed from F.B.I. surveillance on unrelated matters.<sup>93</sup> As a result, the government charged Cleveland with defrauding state regulators by obtaining a video poker license for a business in which he failed to reveal the true owners identity; thereby, Cleveland had violated 18 U.S.C. § 1341 in the initial video poker license application and three subsequent renewals mailed to the state.<sup>94</sup> Before trial commenced in the District Court, Cleveland moved to dismiss the counts of mail fraud because the alleged fraud did not deprive the state of "property" under 18 U.S.C. § 1341.<sup>95</sup> The District Court denied Cleveland's motion, asserting "licenses constitute property even before they are issued."<sup>96</sup>

On appeal to the Fifth Circuit, Cleveland raised the property issue once more.<sup>97</sup> Again, the court dismissed Cleveland's claim that Louisiana had no "property" interest in a video poker license.<sup>98</sup> The Fifth Circuit affirmed the District Court's ruling predicated on a prior decision by that court, which was contrary to Cleveland's "property" argument.<sup>99</sup> Aggrieved, Cleveland

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ate a video poker business at his Louisiana truck stops. *Id.* at 302. The initial application listed Goodson's children as having complete ownership of TSG, Ltd., the partnership created to operate gambling in the truck stops. *Id.* In addition, the subsequent renewal applications, in 1993, 1994, and 1995, failed to list any additional owners in TSG, Ltd. *Id.*

<sup>93</sup> *Id.* at 303. In 1994, the F.B.I. was investigating corruption amongst Louisiana state legislators. *Id.* at 302-03. While recording one of the Congressmen of interest, Goodson discussed, in detail, his truck stop and video poker business. *Id.* at 303. As a result, of these conversations, the F.B.I. charged Goodson, Cleveland, and other parties, alleging that they had participated in a scheme to defraud state regulators in obtaining video poker licenses. *Id.*

<sup>94</sup> *Id.* Specifically, the government alleged defendants had fraudulently concealed the true owners of the company when they obtained a gaming license for TSG, Ltd. in 1992 and renewed in 1993, 1994, and 1995. *Id.* at 302-03. The government believed the men were motivated to conceal their identity to avoid inquiry under the state's suitability test for receiving a license to operate a video poker business license. *Id.* As penance for their ownership concealment, the government concluded that Cleveland and Goodson had forfeited their property interest in TSG, Ltd. *Id.*

<sup>95</sup> The statute provides, in relevant part, "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or **property** by means of false or fraudulent pretenses, representations, or promises . . . shall be fined under this title or imprisoned not more than 20 years, or both." 18 U.S.C. § 1341 (2007) (emphasis added).

<sup>96</sup> *Cleveland*, 951 F. Supp. at 1261.

<sup>97</sup> *Bankston*, 182 F.3d at 309.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

sought review by the Supreme Court on whether a license was property in the hands of the Louisiana Gaming office.

The Supreme Court granted certiorari to make a determination on whether or not a license, specifically a video poker license, constituted “property” while in the hands of the licensor.<sup>100</sup>

### *B. Opinion of the Court*

As stated by the Court, the question presented was whether “a government regulator parts with ‘property’ when it issues a license.”<sup>101</sup> In answering this question, the Court found dispositive the fact that “the State’s core concern [was] *regulatory*.”<sup>102</sup> Moreover, the Court concluded that Louisiana’s state statute regarding video poker machines was a “typical regulatory program” which disallowed private actors from engaging in these pursuits without official authorization.<sup>103</sup> The State of Louisiana argued two reasons why they have a property interest in the video poker licenses.<sup>104</sup> First, the State receives a substantial sum of money in exchange for each license and its incremental renewal.<sup>105</sup> Second, the State controls the issuance, renewal, suspension, and revocation.<sup>106</sup>

Conceding that substantial sums of money are at stake in the video poker industry, the Court went on to say, “[i]t is hardly evident, however, why these tolls should make video poker licenses ‘property’ in the hands of the State.”<sup>107</sup> Furthermore, “[licenses] entitle the State to collect a processing fee from applicants for new licenses. Were an entitlement of this order sufficient to establish a state property right, one could scarcely avoid the conclusion that States have property rights in any license or permit requiring an upfront fee . . . .”<sup>108</sup> In short, the

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<sup>100</sup> *Cleveland v. United States*, 531 U.S. 12, 18 (2000).

<sup>101</sup> *Id.* at 20.

<sup>102</sup> *Id.* (emphasis in original).

<sup>103</sup> *Id.* at 21.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 21-22.

<sup>107</sup> *Id.* at 22.

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

Court rejected Louisiana's contention because their argument was unconvincing as to why fee generation made licenses "property" of the State.

In addition, the Court addressed the second argument that the retention of control over the issuance, renewal, suspension, and revocation grants the State a "property" interest. The State argued that their right of control gave them a "property" interest in the video poker licenses.<sup>109</sup> To the contrary, the Court responded, "these intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate."<sup>110</sup> In further analysis, the Court went on to compare the State's interest in video poker licenses to the federal government's interest in an unissued patent.<sup>111</sup> The government's interest in an unissued patent is the right of sovereign control, not a property interest.<sup>112</sup>

Similarly, Louisiana compared its licensing power to a franchisor's right to select its franchisees.<sup>113</sup> The Court rejected this argument by concluding that this theory implies that the State is in the video poker business and could have chosen to run the business if they had not found suitable franchisees.<sup>114</sup> A franchisor's right to select a franchisee is derivative of a brand name or business that it may sell on the open market.<sup>115</sup> Conversely, Louisiana's authority to select video poker licensees rests on sovereignty to exclude applicants that it deems unsuitable and this right to exclude is not appropriately labeled "property."<sup>116</sup> Furthermore, Louisiana, unlike a typical business venture, had no labor or capital at risk of loss through its licensing scheme.<sup>117</sup>

The Court made it abundantly clear that it refused to give anything but the strictest of interpretations of "property" without the express consent of Congress by saying, "it is appropriate, before we choose the harsher alternative, to require that Con-

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<sup>109</sup> *Id.* at 23.

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

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 23-24.

<sup>113</sup> *Id.* at 24.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

gress should have spoken in language that is clear and definite.”<sup>118</sup> In conclusion, the Court rejected all of the State’s arguments that there was a “property” interest in a license while in the hands of the governing agency.<sup>119</sup>

Admittedly, on a cursory reading of *Cleveland*, it is easy to conclude the Court’s decision is only applicable to “property” within the meaning of the fraud statute. However, upon further review, there are many similarities in the Court’s reasoning for denying Louisiana’s claimed interest in the video poker licenses and the FAA’s claim of property interest in air carrier’s slots.

Foremost, the FAA’s mission, like Louisiana’s in *Cleveland*, is regulatory in nature.<sup>120</sup> The FAA’s mission is to ensure a safe and efficient system of air travel, not a commercial enterprise that is in the business of selling slot licenses to air carriers.<sup>121</sup> Furthermore, much like the state of Louisiana has the authority to issue a right to use a video poker license, the FAA has a similar objective with slots. The FAA allows the air carrier to use a slot so that the carrier may design and implement a structure that efficiently allows for the carriage of passengers. *Cleveland* is illustrative of the Court’s view of property in the hands of a regulatory agency. The Court was emphatic in its conclusion that, absent specific Congressional approval, “property” should be defined in its strictest sense. Moreover, at least in the context of the mail fraud statute, the Court felt compelled to conclude that the licenses were not property in the hands of the issuing agency. Although these facts concentrated on the fraud statute, the principles are not too far astray from the FAA’s issuance of slots as an air carrier’s license to use a specific thirty minute window for takeoff and landing.

*Cleveland* represents a serious shortcoming for proponents of the FAA’s slot auction plan. As stated, in order for the FAA to reclaim slots from incumbent carriers, the FAA has to retain

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<sup>118</sup> *Id.* at 25 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)).

<sup>119</sup> *Id.* at 26-27.

<sup>120</sup> See *supra* text accompanying note 102.

<sup>121</sup> Federal Aviation Administration Mission, <http://www.faa.gov/about/Mission/> (last visited Feb. 18, 2011) (“Our continuing mission is to provide the safest, most efficient aerospace system in the world.”).

a property interest in the slots. Conversely, when reading *Cleveland*, the Court is explicitly clear that licenses are not property in the hands of the issuing agency. As will be more fully explored in section IV, ATA hinged the majority of its property analysis argument on the analysis in *Cleveland*.

#### IV. ATA'S DETERMINATION AND A PROSPECTIVE LOOK AT THE LEGALITY OF SLOT AUCTIONS

The legality of the slot auction plan was a serious concern for Congress. To address this concern, Congress commissioned the GAO to inquire as to the legality of the FAA slot auction plan.<sup>122</sup> The GAO reported: "We conclude that FAA currently lacks authority to auction arrival and departure slots, and thus also lacks authority to retain and use auction proceeds."<sup>123</sup> The GAO report went on to add: "For the first time since it began regulating U.S. navigable airspace nearly 40 years ago, FAA now asserts that it may assign the use of that airspace using its general property management authority."<sup>124</sup> In response to the GAO's opinion and undeterred resolve of the FAA, several air carriers filed suit through the ATA seeking a stay of the plan until the legality to implement could be determined.

##### A. ATA's Argument

The ATA filed suit in the Federal Court of Appeals for the D.C. Circuit seeking the FAA's slot auction and confiscation plans be held unlawful.<sup>125</sup> The ATA asserted that the rule was in excess of the FAA's statutory authority, constituted unauthorized regulatory action disguised as property management, was contrary to statutory limitations imposed by Congress, violated the Anti-Deficiency Act, was contrary to constitutional power,

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<sup>122</sup> Letter from Gary L. Keplinger, Gen. Counsel, U.S. Gov't Accountability Office, to James L. Oberstar, et. al., Chairman, Comm. on Transp. & Infrastructure (Sept. 30, 2008), <http://www.gao.gov/decisions/other/316796.pdf>.

<sup>123</sup> *Id.* at 2.

<sup>124</sup> *Id.*

<sup>125</sup> Petition for Review, *supra* note 18, at 3.

and was arbitrary and capricious with respect to the substantial evidence required by law.<sup>126</sup>

The crux of ATA's argument concentrated on the interpretation of slots and whether slots can be property interests of the FAA.<sup>127</sup> ATA argued that the assignment of slots is merely regulatory licensing instead of property management because the FAA has no property interest in the slots.<sup>128</sup> Likewise, ATA believed the FAA's plan was firmly at odds with the Supreme Court's decision in *Cleveland*, where the Court held there was no property interest in a license when held by the issuing agency.<sup>129</sup> Similarly, ATA pointed to the conclusion reached by the GAO that the FAA did not possess the authority to implement its new slot auction mechanism, and ATA relied on the fact that the FAA had consistently maintained that there were no property interests in slots, until now.<sup>130</sup>

In ATA's motion for stay, it argued that the current method of slot "capping" was sufficient to maintain the FAA's regulatory objective of maintaining a safe and efficient air space system.<sup>131</sup> ATA seized on the fact that the FAA has always maintained that they lack the "statutory authority to assess market-clearing charges for a landing or departure authorization."<sup>132</sup> Similarly, the lack of specific Congressional approval was symbolic of the Federal Communications Commission's struggle in which it endured a similar issue with respect to its broadcast spectrum.<sup>133</sup> In that case, Congress responded by giving the FCC explicit authority to auction those rights through a competitive bidding system.<sup>134</sup> Drawing from these conclusions, ATA asserted that the FAA premised this Rule on a "newly minted

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<sup>126</sup> *Id.*

<sup>127</sup> Motion of Air Transp. Ass'n of Am. for Stay of Slot Auction Rules at 1-3, Port Auth. of N.Y. v. FAA, Nos. 08-1329, 08-1331, 08-1332, 08-1333 (D.C. Cir. Nov. 4, 2008).

<sup>128</sup> *Id.* at 2.

<sup>129</sup> *Id.*; see also *supra* Part III (noting the Supreme Court held in *Cleveland* that licenses are not property in the hands of the issuing agency.)

<sup>130</sup> Motion for Stay, *supra* note 127, at 2.

<sup>131</sup> See *id.* at 4; see also *supra* note 121, and accompanying text.

<sup>132</sup> Motion for Stay, *supra* note 127, at 5 (quoting LGA Congestion Management Rule 2006, *supra* note 66, at 51,360) (internal quotation marks omitted).

<sup>133</sup> *Id.* at 6.

<sup>134</sup> *Id.*

legal theory" and authority to procure and auction slots "has no basis in law or logic."<sup>135</sup>

Furthermore, relying heavily on the GAO's opinion, ATA argued that slots are nothing more than a "regulatory license," much like the video poker licenses at issue in *Cleveland*.<sup>136</sup> Once a license is issued, it becomes property in the hands of the air carrier.<sup>137</sup> Although these slots become licenses in the hands of the air carrier, ATA asserted that the Supreme Court's holding in *Cleveland* eliminated the FAA's proposition that they maintain a property interest in the slots once they are issued, and, under 49 U.S.C. § 106(n), the FAA may only lease real or personal property that it has "acquire[d] . . . constructe[d], improve[d], repair[ed], operate[d], [or] maintain[ed]."<sup>138</sup> In short, the FAA lacked a property interest in an air carrier's slots; therefore, there was no statutory provision that would allow them to seize a carrier's slots under their property management regime.<sup>139</sup>

In addition, ATA's public policy contentions were that air carriers would suffer "irreparable harm" if they were forced to relinquish a number of their slots to the FAA, and consumers would be adversely affected by these actions.<sup>140</sup> If the air carriers were unsuccessful in reacquiring the lost slots at auction, flights would have to be cancelled and ticket prices refunded.<sup>141</sup> This would not only harm the air carrier by losing, potentially, profitable flights, it would cause inconvenience and financial harm to consumers forced to re-schedule their ticket on another air carrier or be forced to fly at an inconvenient time on the same air carrier.<sup>142</sup> Also, air carriers would have been forced into the precarious position of not knowing whether to continue selling seats on these flights and refund the money if the slots

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<sup>135</sup> *Id.* at 6-7.

<sup>136</sup> *Id.* at 8.

<sup>137</sup> *Id.* at 8; see also *In re Gull Air, Inc.*, 890 F.2d 1255, 1263-64 (1st Cir. 1989) (holding that air carriers do have a limited proprietary interest in their allocated slots).

<sup>138</sup> Motion for Stay, *supra* note 127, at 9; see also 49 U.S.C. § 106(n)(1)(A) (2007) (authorizing the acquisition of property by the FAA).

<sup>139</sup> Motion for Stay, *supra* note 127, at 10.

<sup>140</sup> *Id.* at 13.

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

<sup>142</sup> *Id.* at 13-14.

are not reacquired or discontinue selling seats and lose revenue.<sup>143</sup> These disruptions would force air carriers to invest significant amounts of time and monetary resources to develop a schedule to meet the loss of these slots since so many flights are dependent on connections through these three airports.<sup>144</sup>

### *B. The FAA “Responds” to ATA*

Under strong opposition to the slot auction plan, the FAA unexpectedly rescinded its slot auction proposal, thereby eliminating the need for the D.C. Court of Appeals action.<sup>145</sup> Unfortunately, the court did not have an opportunity to respond to ATA’s well-reasoned contentions. Now, speculation ensues as to how the court would have ruled on ATA’s claims. For the foreseeable future, the FAA will continue to rely on slot capping as its primary regulatory action.

### *C. Shaping the Future*

With the issue being rescinded by the FAA, there were no definitive answers regarding the legality of the slot auction plan. Clearly, there are issues with delays at highly congested airports. Moreover, these airports play such an integral role in the air carrier system that a delay at one of these airports can cause a ripple effect amongst the entire air traffic control system. Therefore, delays at these airports most certainly have or will have an impact on the majority of air travelers in the years to come. So, what can be done? As illustrated above, the FAA’s role is one of safety and efficiency.<sup>146</sup> Therefore, if the FAA seeks to regulate safety and efficiency, it can do so through the current statutory structure of capping flight operations at these highly congested airports.<sup>147</sup> Until Congress expressly mandates a statutory avenue for the FAA to manage the slot auction mar-

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<sup>143</sup> *Id.* at 13.

<sup>144</sup> *Id.* at 15-16 (“Every flight cancelled due to a slot confiscation will have serious adverse ripple effects on the carriers’ route networks and schedules – impairing their ability to ‘feed’ traffic to other flights, causing high fixed-cost resources . . .”).

<sup>145</sup> *See supra* text accompanying note 21.

<sup>146</sup> *See supra* note 121 and accompanying text.

<sup>147</sup> *See supra* text accompanying note 121.

ket-based allocation, the FAA is forced to rely on these traditional capping mechanisms.

Additionally, why should incumbent air carriers be forced out of a market share that was originally allocated to them, because the FAA wants to promote competition? Understandably, competition is good for the consumer. However, air carriers have significant investment in personnel, equipment, terminals, and other assets that should not be overshadowed by attempts to promote competition. These carriers have built entire route schedules around slots times at these highly congested airports, and many of them need these slots to remain competitive. Now, the FAA feels compelled to make room for market entrants to increase competition. It would be understandable if the FAA was attempting to reduce the number of slots at all three airports in order to reduce congestion, but, this is not the case. Aside from a few slots at LGA, the FAA plans to keep the existing number of slots; instead, they want to simply redistribute the slot holders. The rationale behind this plan is fundamentally opposed to the purpose of having separation between the DOT and the FAA.

The FAA's objectives have colluded with the goals of the DOT. One of the DOT's primary objectives is to "consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity . . . availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices."<sup>148</sup> However, in the Federal Aviation Act of 1958, the FAA was formed to be a distinct entity from the DOT in order to ensure the separation of safety and economic oversight.<sup>149</sup> To the contrary, it seems as if FAA is now concerned with promoting the DOT fundamentals by ensuring economic benefits rather than focusing on maintaining air safety and efficiency. To this end, traditional capping of slots is sufficient to

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<sup>148</sup> 49 U.S.C. § 40101(a)(4) (2007).

<sup>149</sup> See Spencer H. Bromberg, *Public Space Travel--2005: A Legal Odyssey into the Current Regulatory Environment for United States Space Adventurers Pioneering the Final Frontier*, 70 J. AIR L. & COM. 639, 648-49 (2005) ("As the jet age approached, mid-air collisions increased, prompting the passage of the Federal Aviation Act of 1958[,] . . . which established the [FAA].").

achieve congestion goals, and the FAA, clearly, has this authority to continue capping slots under 49 U.S.C. § 40103(b).<sup>150</sup> Instead, in addition to congestion reduction, the FAA seeks the auction plan to create a more efficient allocation of slots and the opportunity for new entry.<sup>151</sup>

Furthermore, ATA's public policy arguments are, seemingly, sound projections of the impact on the consumer. While competition may foster reduced fares for some passengers, the reduction in capacity associated with the elimination of incumbent air carrier's slots will have a negative impact on other consumers. For example, a consumer that is loyal to a particular carrier or resides in a city where the carrier has a "hub," will have fewer available options on that particular air carrier when traveling to a city affected by the slot auction rule, thereby inconveniencing that consumer. Similarly, those air carriers that have formed alliances with other carriers will not be able to offer flexible options to ensure loyal consumers a seamless connection on an alliance carrier.

ATA delivered a strong argument for preventing the slot auction rule to take effect. The most convincing authority ATA used was the Supreme Court's decision in *Cleveland*.<sup>152</sup> This decision was integral to ATA's argument. The parallels between the Court's position on licenses not being property in the hands of the issuing agency, and slots in the hands of the FAA are strikingly similar. Likewise, by utilizing specific areas of three separate statutes, the FAA gave the appearance that they were attempting to "piece-meal" a legal foundation to suit their needs, rather than allowing Congress to specifically authorize slot auctions – like the FCC's broadband spectrum auctions.

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<sup>150</sup> 49 U.S.C. § 40103(b)(1) (2007) ("The Administrator of the Federal Aviation Administration shall 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.").

<sup>151</sup> See *supra* text accompanying note 13.

<sup>152</sup> See *supra* Part III.

## V. TECHNOLOGY: A VIABLE ALTERNATIVE TO LEGAL REMEDIES

In the absence of express congressional approval to implement such a slot allocation plan, how should the FAA concentrate its efforts to implement a long-term solution for alleviating airport congestion? Unlike the construction of additional airport infrastructure, such as runways, taxiways, and terminal buildings at airports that are already space-limited, technological advancements do not require the space commitment associated with construction of infrastructure. In essence, by upgrading to a GPS based system, the FAA would be utilizing existing airspace to a greater level of efficiency and creating closer, but safer, parameters for existing aircraft to operate.

One such technological advancement already being designed by the FAA is called Next Generation Air Transportation System or NextGen.<sup>153</sup> NextGen will reform the current air traffic control system from ground based radar to a satellite based system.<sup>154</sup> The current ground based system requires additional safety margins to accommodate for inaccuracies in the system.<sup>155</sup> These increased safety margins require air traffic controllers to space aircraft further apart, translating into underutilized airspace.<sup>156</sup> In contrast, the new satellite based system will allow air traffic controllers to direct aircraft more efficiently through the nation's airspace by providing air traffic

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<sup>153</sup> Federal Aviation Administration Fact Sheet—NextGen, [http://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsid=8145](http://www.faa.gov/news/fact_sheets/news_story.cfm?newsid=8145) (last visited Feb. 16, 2011) ("NextGen is a wide ranging transformation of the entire national air transportation system . . . to meet future demands and avoid gridlock in the sky and in the airports. It moves away from legacy ground based technologies to a new and more dynamic satellite based technology.").

<sup>154</sup> Federal Aviation Administration Air Traffic NextGen Briefing, [http://www.faa.gov/air\\_traffic/briefing/](http://www.faa.gov/air_traffic/briefing/) (last visited Feb. 16, 2011) ("NextGen, will transform the national airspace system from one that is based on ground radars to one that uses satellite technology.").

<sup>155</sup> Barbara S. Peterson, *End of Flight Delays? FAA's GPS Fix Could Bust Sky Gridlock*, POPULAR MECHANICS, (Aug. 2007), available at [http://www.popularmechanics.com/science/air\\_space/4219569.html](http://www.popularmechanics.com/science/air_space/4219569.html) ("With today's radar, it can take up to 36 seconds to get an accurate read on a plane's position -- a long time for an aircraft flying 500 mph. So safety buffers err on the conservative side . . .").

<sup>156</sup> *Id.* ("The minimum distance between planes is 5 miles horizontally and about 3 miles on landing and approach. The result is inefficient use of airports and airspace.").

controllers with real-time information, thus eliminating the delays associated with the ground based system.<sup>157</sup> The FAA touts NextGen as being designed to “improve airport surface movements, reduce spacing and separation requirements, and better manage the overall flows into and out of busy metropolitan airspace.”<sup>158</sup>

Moreover, the system will essentially pay for itself when comparing lost revenues associated with the current system. The FAA candidly admits that the absence of new technology will cost the U.S. economy \$22 billion annually by the year 2022.<sup>159</sup> Given these staggering figures, seemingly, financial prudence, in addition to alleviating congestion issues, would mandate the utmost priority to ensure that this satellite based system is implemented in a timely manner.

## VI. CONCLUSION

Admittedly, the congestion issues across the country are a looming problem for all airline passengers. However, congestion can be managed under the FAA’s current statutory powers to cap slots at highly congested airports. Given the nature of the FAA’s mission – to promote safety – separate from the DOT’s mission of economic competition, the FAA should continue capping slots as a means of managing congestion. Until Congress specifically gives statutory power to auction slots, the FAA’s proposed plan is misguided. Further, as ATA adduces, the FAA should not have succeeded had the D.C. Circuit Court had the opportunity to rule. In speculation, maybe the FAA suspected that its proposed plan would be invalidated and sought refuge

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<sup>157</sup> Federal Aviation Administration Air Traffic NextGen Briefing, *supra* note 154 (“While radars require aircraft to fly over their physical locations on the ground, satellite-technology will allow controllers to guide aircraft in more direct routes through the nation’s airspace.”); *see also* Peterson, *supra* note 155 (“NextGen is designed to change all that by providing air traffic controllers and pilots with much more accurate and detailed real-time information, which will help keep aircraft safely separated in the sky and on runways.”).

<sup>158</sup> FAA Fact Sheet—NextGen, *supra* note 153.

<sup>159</sup> *Id.* (“By 2022, we estimate that this failure would cost the U.S. economy \$22 billion annually in lost economic activity. . . . Even as early as 2015 our simulation shows that without some of the initial elements of NextGen we will experience delays far greater than . . . today.”).

in rescission of its proposal, thereby ending the need for further litigation. Given the current statutory regime, it is not likely the FAA will find regulatory power for its slot auction plan anytime in the near future. However, if the FAA continues dedicating resources to exploring the modernization of antiquated air traffic control systems, these technological advancements will cure much of the inefficiency in the current system, thereby creating an avenue for new-entrant air carriers to gain market access.

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