Federal Gaming Law

THE JOHNSON ACT AND CRUISE SHIPS

The statement that legalized casino gaming is one of the most highly regulated industries will find little dispute. States such as Nevada and New Jersey have developed comprehensive regulatory schemes that principally seek to achieve three goals. The first goal is to assure that casinos conduct gaming honestly.[1] The second goal is to prevent the infiltration of the industry by persons with criminal associations. The third goal is to assure that the state receives its just share of gaming taxes.[2] The achievement of these goals is dependent upon a comprehensive body of law that regulates almost every aspect of gaming.

In contrast, the gaming industry on the high seas is not operated under direct government control. No regulations govern these floating casinos, and any person can operate the casino regardless of suitability. A player has no governmental assurance that the casino is conducting the games honestly. The casino owner has no requirement to implement accounting controls and pays no gaming taxes.

Despite the absence of governmental controls, ship operators claim their casinos are honest.[3] The cruise ships assert that the casino is a small part of the leisure package offered on a cruise.[4] Therefore, the casinos have restricted betting limits to assure that patrons do not spoil their vacation by losing more than they can afford. Consistent with this philosophy, the cruise lines have individual company policy addressing areas such as internal controls, hiring practices, and conduct of the game.[5] Modified game rules account for the location of the ship on a moving body of water. These unique rules include the use of oversized dice and a limit on betting options.[6]

The concept of a floating gaming establishment is not unique to the cruise ship industry. American history shows a rich tradition of gaming aboard ships. The riverboats

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1 One of the avowed purposes of the Nevada Gaming Control Act recognizes that "the continued growth and success of the gaming industry is dependent upon public confidence and trust that licensed gaming is conducted honestly and competitively and that the gaming industry is free from criminal and corruptive elements." Nev. Rev. Stat. § 463.0129(1)(b) Likewise, under N.J. Stat. Ann. § 5:12-1(6) (West 1985), it is noted that "an integral and essential element of the regulation and control of such casino facilities by the state rests in the public confidence and trust in the credibility and integrity of the regulatory process and of casino operations."

2 In *Marshall v. Sawyer*, 301 F.2d 639, 648 (9th Cir. 1962) (Pope, J., concurring), it was acknowledged that Nevada "has gone to great lengths to protect its peculiar institution; and in doing so it has been mindful that he who stirs the devil's broth must need use a long spoon. For the whole of the State's system of licensing gambling establishments shows its preoccupation with the fear that the wrong kind of person may get control of these enterprises." These sentiments were also expressed in *Nevada Tax Comm'n. v. Hicks*, 73 Nev. 115, 119, 310 P.2d 852 (1957), where the Nevada Supreme Court noted, "Nevada gambling, if it is to succeed as a lawful enterprise, must be free from the criminal and corruptive taint acquired by gambling beyond our borders. If this is to be accomplished not only must the operation of gambling be carefully controlled, but the character and background of those who would engage in gambling in this state must be carefully scrutinized." These policies are also expressed in the New Jersey Casino Control Act, which states: "Continuity and stability in casino gaming operations cannot be achieved at the risk of permitting persons with unacceptable backgrounds and record of behavior to control casino gaming operations contrary to the vital law enforcement interest of the state." N.J. Stat. Ann. § 5:12-1(b)(15) (West Supp. 1986).

3 The Third Jurisdiction, GWB's Guide to Shipboard Gaming, 6 *Gaming and Wagering Business*, Vol. 6, Dec. 1985, at 32-33.

4 *Id*. at 33.

5 *Id*. at 32-33.

6 *Id.* These unique rules may include the use of different size dice tables and fewer betting options. Id.

of the Nineteenth Century were infamous as havens for the American gambler. In 1840, about 2,000 gamblers plied their trade on the Mississippi River between Louisville and New Orleans.[7]

In contrast to the riverboat, the voyages on the first cruise ships were conspicuous for the absence of gambling. Perhaps the first documented cruise was chronicled by Mark Twain in a book written in 1868 concerning the 1867 pleasure excursion of the "Quaker City" to Europe, the Holy Land, and Egypt. In his characteristic wit, Twain wrote:

> The pilgrim passengers played dominoes when too much Josephus or Robinson's Holy Land Researches, or book writing, made recreation necessary for dominoes is about as mild and sinless a game as any in the world perhaps, excepting always the ineffably insipid diversion they call playing at croquet, which is a game where you don't pocket any balls and don't carom on anything of any consequence, and when you are done nobody has to pay, and there are no cigars or drinks to saw off, and, consequently, there isn't any satisfaction whatever about it, they played dominoes till they were rested, and then they backguarded each other privately till prayer time.[8]

Casino gaming on cruise ships still is in its infancy. Over half of the cruise lines offer gaming on board their ships. These casinos are small in comparison to the casinos of Nevada and New Jersey. A typical cruise ship has about 70 slot machines and a small number of table games; all cruise ships combined have only about 6,000 machines. In contrast, the average major resort on the Las Vegas "Strip" has over 1,000 slot machines, and over 250,000 slot machines operate in Nevada alone.

Besides the traditional cruise ships, a smaller, but growing, market exists for the "cruise-to-nowhere" voyages. These are voyages on ships that depart and return to the same port. Typically, these ships cruise to international waters and then open their casinos. After a short voyage, they close the casino before entering territorial waters and returning to port.

The Johnson Act

In 1951, Congress passed the Johnson Act.[9] As first enacted,[10] the law contained two prohibitions that severely limited gaming aboard U.S. registered cruise ships. First, it generally prohibited the transportation of gaming devices into any state or possession of the United States from any place outside the state or possession. Before March 9, 1992, only three exceptions existed to this prohibition. First, the law did not apply if the state where the device was being transported enacted a specific exemption. Second, the law did not apply to devices designated for use at, and transported to, a legal and licensed gaming establishment. Finally, it did not apply if the state where the devices were being transported had a law making the devices legal.

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7 U.S. Dept. of Commerce, Commission on the Review of the National Policy Toward Gambling, Gambling in Perspective: *A Review of The Written History of Gambling and an Assessment of its Effect on Modern American Society,* (App. I) 23 (1976) [hereinafter "Gambling in Perspective"]. Unlike cruise ships, the riverboats operated within the jurisdiction of the United States.

8 *Id*. at 314-15.

9 Currently codified as 15 U.S.C. §§ 1171-1178.

10 *See* Chapter 5.

The Johnson Act also prohibited the possession and use of such devices in a United States possession or within the United States' maritime jurisdiction. Initially, there were no exceptions to this prohibition. Thus, gaming could only be conducted aboard vessels operating exclusively within the jurisdiction of a state that had legalized gambling on such vessels.

Text of the Johnson Act 15 U.S.C.

Sec. 1171. - Definitions

As used in this chapter -

(a) The term ''gambling device'' means -

(1) any so-called ''slot machine'' or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and

(A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or

(B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and

(A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or

(B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.

(b) The term ''State'' includes the District of Columbia, Puerto Rico, the Virgin Islands, and Guam.

(c) The term ''possession of the United States'' means any possession of the United States which is not named in subsection (b) of this section.

(d) The term ''interstate or foreign commerce'' means commerce

(1) between any State or possession of the United States and any place outside of such State or possession, or

(2) between points in the same State or possession of the United States but through any place outside thereof.

(e) The term ''intrastate commerce'' means commerce wholly within one State or possession of the United States.

(f) The term ''boundaries'' has the same meaning given that term in section 1301 of title 43

Section 1172. Transportation of gambling devices as unlawful; exceptions; authority of Federal Trade Commission

(a) General rule

It shall be unlawful knowingly to transport any gambling device to any place in a State or a possession of the United States from any place outside of such State or possession: Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section, nor shall this section apply to any gambling device used or designed for use at and transported to licensed gambling establishments where betting is legal under applicable State laws: Provided, further, That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.

(b) Authority of Federal Trade Commission

Nothing in this chapter shall be construed to interfere with or reduce the authority, or the existing interpretation of the authority, of the Federal Trade Commission under the Federal Trade Commission Act (15 U.S.C. 41 et. seq.).

(c) Exception

This section does not prohibit the transport of a gambling device to a place in a State or a possession of the United States on a vessel on a voyage, if -

(1) use of the gambling device on a portion of that voyage is, by reason of subsection (b) of section 1175 of this title, not a violation of that section; and

(2) the gambling device remains on board that vessel while in that State.

Cruise Ship Competitiveness Act

Cruise Ships

A major issue with the Johnson Act was resolved by the passage of legislation in 1992 called the "Cruise Ship Competitiveness Act." Before 1992, the federal government treated U.S.-flag and foreign-flag vessels differently for purposes of gambling enforcement.

The Department of Justice did not interpret the Johnson Act as applying to foreign-flag vessels. As a result, the American cruise industry has operated under a competitive disadvantage. Foreign-flag vessels could dock at a U.S. port with a casino (including gaming devices) on board, pick up American passengers, and operate the casino once the vessel reached international waters. U.S. flag vessels, however, were prohibited from doing so.

The Justice Department's interpretation produced predictable results. As of 1991, there were only two U.S.-registered cruise ships, and neither offered gaming. In contrast, about 80 foreign-flag cruise ships served U. S. ports.

On March 9, 1992, Congress amended the Johnson Act to place U.S. registered vessels on equal footing with foreign-flag vessels. Under the amended version of the Act, it is legal to transport, possess, and use gaming devices on any vessel voyaging outside the territorial jurisdiction of the United States if, while in the United States, the devices remain on board and are not available for use.

State and federal jurisdictions within state territorial waters are concurrent. Under the current version of the Johnson Act, the states retain the right to control gaming and gambling ships *within* their territorial waters. Thus, states can allow cruise ships to conduct gaming activities within their territorial waters, and can prohibit them from doing so. For example, Louisiana provides an exception to its general prohibition against gaming for commercial cruise ships.

In this age of U.S. riverboat gambling, the broad application to "the special maritime and territorial jurisdiction of the United States" created special consideration for the Great Lakes region of the United States. Another statute specifically includes the Great Lakes within this jurisdiction. Therefore, on its face, it appears that the Johnson Act would prohibit gambling on the Great Lakes, even those areas that are within state jurisdiction. This interpretation, however, is inconsistent with federal policy to support, not interfere with, the gambling policies of the various states. This ambiguity, however, was sufficient for the State of Indiana to request and receive a special exemption for the casino gambling ship on Lake Michigan.

Text of the Cruise Ship Competitiveness Act 15 U.S.C.

Section 1175. Specific jurisdictions within which manufacturing, repairing, selling, possessing, etc., prohibited; exceptions

(a) General rule

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18, including on a vessel documented under chapter 121 of title 46 or documented under the laws of a foreign country.

(b) Exception

(1) In general

Except for a voyage or a segment of a voyage that begins and ends in the State of Hawaii, or as provided in paragraph (2), this section does not prohibit -

(A) the repair, transport, possession, or use of a gambling device on a vessel that is not within the boundaries of any State or possession of the United States;

(B) the transport or possession, on a voyage, of a gambling device on a vessel that is within the boundaries of any State or possession of the United States, if -

(i) use of the gambling device on a portion of that voyage is, by reason of subparagraph (A), not a violation of this section; and

(ii) the gambling device remains on board that vessel while the vessel is within the boundaries of that State or possession; or

(C) the repair, transport, possession, or use of a gambling device on a vessel on a voyage that begins in the State of Indiana and that does not leave the territorial jurisdiction of that State, including such a voyage on Lake Michigan.

(2) Application to certain voyages

(A) General rule

Paragraph (1)(A) does not apply to the repair or use of a gambling device on a vessel that is on a voyage or segment of a voyage described in subparagraph (B) of this paragraph if the State or possession of the United States in which the voyage or segment begins and ends has enacted a statute the terms of which prohibit that repair or use on that voyage or segment.

(B) Voyage and segment described

A voyage or segment of a voyage referred to in subparagraph (A) is a voyage or segment, respectively -

(i) that begins and ends in the same State or possession of the United States, and

(ii) during which the vessel does not make an intervening stop within the boundaries of another State or possession of the United States or a foreign country.

(C) Exclusion of certain voyages and segments

Except for a voyage or segment of a voyage that occurs within the boundaries of the State of Hawaii, a voyage or segment of a voyage is not described in subparagraph (B) if it includes or consists of a segment -

(i) that begins and ends in the same State;

(ii) that is part of a voyage to another State or to a foreign country; and

(iii) in which the vessel reaches the other State or foreign country within 3 days after leaving the State in which it begins.

(c) Exception for Alaska

(1) With respect to a vessel operating in Alaska, this section does not prohibit, nor may the State of Alaska make it a violation of law for there to occur, the repair, transport, possession, or use of any gambling device on board a vessel which provides sleeping accommodations for all of its passengers and that is on a voyage or segment of a voyage described in paragraph (2), except that such State may, within its boundaries -

(A) prohibit the use of a gambling device on a vessel while it is docked or anchored or while it is operating within 3 nautical miles of a port at which it is scheduled to call; and

(B) require the gambling devices to remain on board the vessel.

(2) A voyage referred to in paragraph (1) is a voyage that -

(A) includes a stop in Canada or in a State other than the State of Alaska;

(B) includes stops in at least 2 different ports situated in the State of Alaska; and

(C) is of at least 60 hours duration

Cruises-to-Nowhere

The 1992 amendments also addressed cruises-to-nowhere and voyages that embark and disembark at ports in the same state. The issue here is whether these ships can offer gambling devices to passengers after they have left state territorial waters. Simply, the use of gambling devices on these types of voyages would be illegal under federal law if the state passes a law prohibiting the use of gambling devices on board such voyages.[11] Therefore, a state can, under certain circumstances, control gaming that occurs in international waters. For example, Hawaii law prohibits gaming on voyages that begin and end in the state except on travel between the continental United States or a foreign country. This law would prohibit gaming on voyages between and among the islands even though a portion of these voyages occurs in international waters. The law would also prohibit a "cruise-to-nowhere" that begins and ends in Hawaii even if the vessel cruises for more than 24 hours, and provides meals and lodging for its passengers.

If the voyage does contain an intervening stop in another country or state, however, the state has no authority to regulate gaming that occurs outside its territorial waters. Thus, Hawaii law would not prohibit gaming activities on a ship operating between the continental United States (or a foreign country) and Hawaii, if the gambling facilities are closed while the ship is in Hawaiian waters.

This law was further clarified by amendments in 1996 that limited the states' rights to exclude gambling on segments of voyages that begin and end in the same state provided that the segment is part of a voyage to another state or a foreign country and the voyage reaches the foreign country or other State within three days after leaving the State in which such segment begins.[12]

The 1996 amendments also provided other exceptions to the Johnson Act. First, it exempted voyages that occur from the State of Indiana on Lake Michigan from the prohibitions of the Johnson Act provided that the ship does not leave the territorial jurisdiction of that state. It also excepted certain voyages to and from Alaska. To qualify, however, the ships must have sleeping accommodations and be on a voyage of at least 60 hours long and with two stops in Alaska and a stop in another state or in Canada. The State of Alaska, however, can prohibit the use of the gaming devices within three nautical miles of a scheduled port of call in Alaska.

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11 15 U.S.C. § 1175(b)(2).

12 P. L. 104-264, Title Xll, § 1222, 110 Stat. 3286, P. L. 104-324, Title Xl, § 1106, 110 Stat. 3967. This limitation, however, does not apply to voyages or segments of voyages in Hawaii.

The Johnson Act amendments attempted to provide a major incentive to invest in the American cruise ship industry. Gaming serves as a major source of entertainment on cruises, and gaming revenues can enhance the financial viability of a commercial venture. The amendments do not, however, permit unlimited shipboard gaming. Two significant limitations remain: Gambling Ship Act of 1949 (prohibiting vessels used principally for the operation of a gaming establishments) and state law.

Gambling Ship Act Of 1949

In 1949, Congress passed the Gambling Ship Act, which prohibited the operation of gambling ships that were either in territorial waters, owned by American citizens or residents, of American registry, or otherwise within the jurisdiction of the United States.[13]

This statute was not aimed toward the operation of cruise ships, but rather the operation of stationary barges located off both the eastern and western seaboards. The advent of these floating casinos occurred in 1926 when the barges appeared and were anchored off the coast near San Francisco for the ostensible purposes of fishing, recreation, and pleasure.[14] Passengers were carried to and from these ships in small speedboats.[15] Shortly after these ships appeared in Northern California, other ships appeared off the coast in Florida and Los Angeles.[16]

The ships were anchored about three miles off shore, and were brilliantly lit so as to be clearly visible to those on shore.[17] These ships could provide gaming accommodations to about 500-600 persons.[18] Ship owners extensively advertised and provided free entertainment and food on board.[19]

The operation of these ships was a continuing problem for state law enforcement officials who lacked jurisdiction over the ships. The end to the California coast and other stationary gambling ships occurred in 1948 after gambling ship legislation introduced by U.S. Senator William Knowland of California passed Congress. This legislation was codified as 18 U.S.C. § 1082.[20] In summary, the legislation made it illegal for a U.S. citizen or resident to own or operate a gambling ship or for gambling to be operated on a U.S. registered vessel.

Text of the Gambling Ship Act 18 U.S.C.

Sec. 1081. - Definitions

As used in this chapter:

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13 Robert Blakey and Kurland, Philip B., "The Development of the Federal Law of Gambling," 63 Cornell Law Review, 923, 958 (1979).

14 H.R. Rep. No. 1058, 72d Cong., 1st Sess. 3 (1932) (letter from Arthur J. Tyler, Commissioner of Navigation).

15 *Id.*

16 *Id.* at 9. The ships anchored off the coast of Florida had a short history. Those ships faced substantial competition from the elaborate casinos in Cuba and were forced out of business. Later, ships appeared off the coast of New Jersey. *Id.* at 3.

17 *Id.* at 16.

18 *Id.* at 13-15.

19 *Id.* at 21.

20 E. Cray, "High Rollers on the High Sea," California Lawyer, Vol. 2, 1982. at 51. *See* H.R. Rep. No. 1700, 80th Cong., 2d Sess. at 2 (1948).

The term ''gambling ship'' means a vessel used principally for the operation of one or more gambling establishments. Such term does not include a vessel with respect to gambling aboard such vessel beyond the territorial waters of the United States during a covered voyage (as defined in section 4472 of the Internal Revenue Code of 1986 as in effect on January 1, 1994).

The term ''gambling establishment'' means any common gaming or gambling establishment operated for the purpose of gaming or gambling, including accepting, recording, or registering bets, or carrying on a policy game or any other lottery, or playing any game of chance, for money or other thing of value.

The term ''vessel'' includes every kind of water and air craft or other contrivance used or capable of being used as a means of transportation on water, or on water and in the air, as well as any ship, boat, barge, or other water craft or any structure capable of floating on the water.

The term ''American vessel'' means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if such vessel is owned by, chartered to, or otherwise controlled by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State.

The term ''wire communication facility'' means any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission

Sec. 1082. - Gambling ships

(a) It shall be unlawful for any citizen or resident of the United States, or any other person who is on an American vessel or is otherwise under or within the jurisdiction of the United States, directly or indirectly -

(1) to set up, operate, or own or hold any interest in any gambling ship or any gambling establishment on any gambling ship; or

(2) in pursuance of the operation of any gambling establishment on any gambling ship, to conduct or deal any gambling game, or to conduct or operate any gambling device, or to induce, entice, solicit, or permit any person to bet or play at any such establishment,

if such gambling ship is on the high seas, or is an American vessel or otherwise under or within the jurisdiction of the United States, and is not within the jurisdiction of any State.

(b) Whoever violates the provisions of subsection (a) of this section shall be fined under this title or imprisoned not more than two years, or both.

(c) Whoever, being

(1) the owner of an American vessel, or

(2) the owner of any vessel under or within the jurisdiction of the United States, or

(3) the owner of any vessel and being an American citizen, shall use, or knowingly permit the use of, such vessel in violation of any provision of this section shall, in addition to any other penalties provided by this chapter, forfeit such vessel, together with her tackle, apparel, and furniture, to the United States

Sec. 1083. - Transportation between shore and ship; penalties

(a) It shall be unlawful to operate or use, or to permit the operation or use of, a vessel for the carriage or transportation, or for any part of the carriage or transportation, either directly or indirectly, of any passengers, for hire or otherwise, between a point or place within the United States and a gambling ship which is not within the jurisdiction of any State. This section does not apply to any carriage or transportation to or from a vessel in case of emergency involving the safety or protection of life or property.

(b) The Secretary of the Treasury shall prescribe necessary and reasonable rules and regulations to enforce this section and to prevent violations of its provisions.

For the operation or use of any vessel in violation of this section or of any rule or regulation issued hereunder, the owner or charterer of such vessel shall be subject to a civil penalty of $200 for each passenger carried or transported in violation of such provisions, and the master or other person in charge of such vessel shall be subject to a civil penalty of $300. Such penalty shall constitute a lien on such vessel, and proceedings to enforce such lien may be brought summarily by way of libel in any court of the United States having jurisdiction thereof. The Secretary of the Treasury may mitigate or remit any of the penalties provided by this section on such terms as he deems proper

Whether this federal law prohibits luxury ships that are centered on a casino presents another issue. A gambling vessel is a ship or other vessel capable of floating which is "used principally for the operation of one or more gambling establishments."[21] Certainty, the legislation was intended for “large scale commercial gambling.”

Unfortunately, the term “principally” is a vague and uncertain term.[22] At best, the term is synonymous with mainly or chiefly.[23] If “principally” can be described in economic terms as representing 50 percent or more of revenues, most cruise ships, even if they cater to gaming clientele, would probably not be considered principally gaming ships. Even some of the magnificent resorts along the Las Vegas “Strip” would not qualify as “principally” gaming establishments. In 1996, the resorts with gaming revenues of $1,000,000 or more located on the "Strip” generated only 52.9 percent of their revenues from gaming. The remaining revenues came from rooms, food, beverage, and other activities.

21 18 U.S.C. § 1081 (1961).
22 Sutton v. Hawkeye Casualty Co., 138 F.2d 781, 785 (6th Cir. 1943).
23 Hartford Accident & Indemnity Co. v. Casualty Underwriters, 130 F. Supp. 56, 58 (D. Mass. 1955).

A U.S. Attorney General Opinion from Texas may shed some light on the issue. The April 1991 Opinion, which has since been incorporated into the Criminal Rresource Manual of the U.S. Department of Justice, concluded that a vessel is presumed to be a gambling ship unless it "cruises for a minimum 24 hours with meals and lodging provided for all passengers or unless it docks in a foreign port." While this interpretation does not help to define the term "principally," it does illustrate the types of itineraries that may be prohibited under federal law. In the Attorney General's opinion, gaming activities are prohibited on most "cruises-to-nowhere," *i.e*. voyages where a ship leaves a U.S. port, permits its passengers to gamble while in international waters, and then returns to the same port.

The enactment of 18 U.S.C. § 1082, while accomplishing its purpose of banishing stationary gaming ships, has greater implications. This legislation impacts the development of the U.S. cruise ship Industry. Casino gaming on cruises is a relatively small part of the cruise package. Given its growth worldwide, however, gaming has assumed a greater importance, even to the extent that publicly traded gaming companies have entered into the market with opulent casinos on luxury cruise ships. For example, Caesars Palace operates a casino aboard the world-class cruise ship "Crystal Harmony."

Still, American companies or persons are limited in their ability to invest in such ventures by application of Section 1082. The law applies to three groups of persons: American citizens, American residents, and persons who are either on an American vessel or otherwise subject to the jurisdiction of the United States. The statute makes it unlawful to setup, operate, or own an interest in a gambling vessel, *i.e*. a vessel used principally for the operation of a casino. A "vessel" is every kind of water or aircraft capable of transportation or of floating on the water. The law only applies when the vessel is on the high seas, or an American vessel, or otherwise under or within the jurisdiction of the United States.

US Department of Justice

Criminal Resource Manual

2089 The Gambling Ship Act (18 U.S.C. § § 1081, et seq.)

> Section 1081 defines "gambling ship" to mean a vessel used principally for the operation of one or more gambling establishments.
>
> In making a prosecutorial determination whether a particular ship is a gambling ship within the meaning of this definition, it will be presumed that a ship which operates one or more gambling establishments on board is a "gambling ship," unless it cruises for a minimum of 24 hours with meals and lodging provided for all passengers, or unless it docks at a foreign port. The fact that the presumption applies or does not apply in a given situation, however, is not ultimately determinative of compliance with Section 1081, *et seq*., but merely provides guidance to United States Attorneys in exercising their prosecutorial discretion under the pertinent statutes.

In 1994, Congress amended this definition to further state that "[s]uch term does not include a vessel with respect to gambling aboard such vessel beyond the territorial waters of the United States during a covered voyage (as defined in section 4472 of the Internal Revenue Code of 1986 as in effect on January 1, 1994.)"

Section 4472 of Title 26 defines a "covered voyage" as the voyage of

> (i) a commercial passenger vessel which extends over [one] or more nights, or (ii) a commercial vessel transporting passengers engaged in gambling aboard the vessel beyond the territorial waters of the United States, during which passengers embark or disembark the vessel in the United States. Such term does not include any voyage on any vessel owned or operated by the United States, a State, or any agency or subdivision thereof.

The term "covered voyage" also does not include "a voyage by a passenger vessel [vessel having berth or stateroom accommodations for more than sixteen passengers] of less than [twelve] hours between [two] ports in the United States." This definition of a gambling ship severely limits the application of the Gambling Ship Act as many vessels will fall within the "covered voyage" exception.

Section 1082 prohibits operating a gambling ship, holding an interest in a gambling ship or a gambling establishment on a gambling ship, conducting a gambling game or gambling device at a gambling establishment on a gambling ship, or enticing or soliciting a person to bet or play at a gambling establishment on a gambling ship when the vessel is on the high seas or "otherwise under or within the jurisdiction of the United States, and is not within the jurisdiction of any State."

Section 1083 prohibits the operation of shuttle crafts, that is, vessels used to transport passengers between "a point or place within the United States and a gambling ship which is not within the jurisdiction of any State."

An explanation of this Act and related statutes applicable to cruise ship gambling is available from the Organized Crime and Racketeering Section in the Criminal Division.

Section 4472. Definitions

For purposes of this subchapter -

(1) Covered voyage

(A) In general

The term ''covered voyage'' means a voyage of -

(i) a commercial passenger vessel which extends over 1 or more nights, or

(ii) a commercial vessel transporting passengers engaged in gambling aboard the vessel beyond the territorial waters of the United States, during which passengers

embark or disembark the vessel in the United States. Such term shall not include any voyage on any vessel owned or operated by the United States, a State, or any agency or subdivision thereof.

(B) Exception for certain voyages on passenger vessels

The term ''covered voyage'' shall not include a voyage of a passenger vessel of less than 12 hours between 2 ports in the United States.

(2) Passenger vessel

The term ''passenger vessel'' means any vessel having berth or stateroom accommodations for more than 16 passengers.

Jurisdiction Based on American Citizenship

Of initial concern is the extent to which Section 1082 applies to American citizens or residents for violations that occur on the high seas. The United States can prescribe the conduct of its citizens beyond the territorial boundaries of the United States. This authority extends to regulating the conduct of American citizens on the high seas.[24] This issue was settled in the only reported case involving a prosecution for operation of a gaming ship. In *United States v. Black*,[25] the defendants, American citizens, operated a non-American vessel on a cruise from New York harbor into international waters and back to New York. Once in international waters, a group, known as "The Sons of Italy," conducted gaming activities in an area set aside by the ship's master.[26] The court held that the indictment was sufficient on the settled principle that citizenship alone is sufficient to confer jurisdiction upon the United States over extraterritorial acts.[27]

Jurisdiction Based on American Registry

A second jurisdictional issue is the ability of the federal government to assert jurisdiction over a ship with an American registry. Under settled law, the country of registry has the right to assert jurisdiction upon the fiction that a ship on the high seas is assimilated into the territory of the flag under which it flies.[28]

Jurisdiction Based on Presence in U.S. Waters

A third jurisdictional issue relates to the federal government's right to assert jurisdiction over ships of foreign registry and ownership. As early as 1887, the Supreme Court recognized the right of a country to exercise jurisdiction over a foreign vessel upon its entering an American port.[29] The territory, subject to the jurisdiction of the United States, includes "a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles."[30] Whether territorial jurisdiction

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24 *See, e.g.*, Blackmer v. United States, 284 U.S. 421 (1932).
25 United States v. Black, 291 F. Supp. 262 (S.D. NY 1968).
26 *Id.* at 264.
27 *Id.* at 266.
28 *See, e.g.*, United States v. Flores, 289 U.S. 137 (1933); United States v. Riker, 670 F.2d 987 (11th Cir. 1982); United States v. One (1) 43 Foot Sailing Vessel "Winds Will," 538 F.2d 694 (5th Cir. 1976).
29 Mali v. Keeper of the Common Jail of Hudson County, 120 U.S. 1, (1887).
30 Cunard SS. Co. v. Mellon, 262 U.S. 100, 122 (1923). The three nautical mile rule resulted from an executive order issued by President Washington to members of the executive branch. 1 Moore, Digest of International Law 702 (1906). *See, e.g.*, Heinzen, The Three Mile Limit: Preserving the Freedom of the Seas, 11 Stan. L. Rev. 597 (1959). One land

extends beyond three miles is unsettled. The area between three and twelve miles is considered the contiguous zone. International law recognizes a twelve-mile limit for revenue, customs, sanitation, immigration, and fishing rights.[31]

Adding further confusion was the passage of the Antiterrorism and Effective Death Penalty Act of 1996. This Act was intended to extend the jurisdiction of the federal government to fight international terrorism. One of its provisions, however, defines U.S. territorial jurisdiction for purposes of the Act to "12 nautical miles from the baselines of the United States, determined in accordance with international law." When cruise ship gambling was proposed out of New York City in 1997, a federal prosecutor from Brooklyn, New York issued an advisory letter that this Act required proposed cruise ship operators to travel twelve miles from shore before commencing any gambling activities. As a practical matter, this interpretation would have doomed the industry because the travel time would have made the voyages impractical for gambling purposes. The cruise industry, however, was able to convince the Federal District Court in Brooklyn that the three-mile, as opposed to the twelve-mile territorial limit should apply. This decision, however, was unpublished and not appealed.

Beyond the three or twelve mile territorial limits, the jurisdiction of the United States is limited to instances where the act is intended to produce detrimental effects within the United States.[32] For example, the Supreme Court has upheld the conviction of defendants who operated a British rum vessel some twenty-five miles off the coast of California because of their involvement in a continuous conspiracy operating contemporaneously within and without the United States.[33] This rationale could support the assertion of jurisdiction over a stationary gambling ship lying just outside the territorial jurisdiction of the United States regardless of the citizenship of its operators or the country of its registry.

Whether the United States can regulate the conduct of gaming on foreign-owned and registered cruise ships within its territorial waters is of limited significance. The only practical result is that the cruise ship operators wishing to comply with territorial law must wait until the ship is safely beyond territorial waters before opening the casino.[34]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CASINO VENTURES,

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mile equals .87 nautical miles. Thus, the three nautical mile limit is approximately 3.45 miles. United States v. State of California, 381 U.S. 139 (1965).

31 *Cf.* Convention on the Territorial Sea and Contiguous Zone, opened for signature April 29, 1948, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, art. 24 (establishes a twelve mile limit for contiguous zone and recognizes the competence of coastal States to "exercise the control necessary to … [p]revent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea."). A third zone, called an "exclusive economic zone," extends 200 miles from the coastline. This zone was created to both protect fishing rights and to enforce pollution laws.

32 *See, e.g.*, United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978).

33 Ford v. United States, 273 U.S. 593 (1927).

34 Shipboard Gaming, *supra* note 223, at 32. There may, however, be an exception for ships engaging in gaming activities beyond the three to twelve mile territorial limits for the primary purpose of evading the laws of the United States. *Cf.* United States v. Brennan, 394 F.2d 151 (2d Cir. 1968).

Plaintiff-Appellee,
v.
ROBERT M. STEWART, in his official No. 98-2653 capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, Attorney General,
Defendants-Appellants.

Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. (CA-98-1923-18-2)
Argued: May 7, 1999
Decided: July 6, 1999
Before WILKINSON, Chief Judge, NIEMEYER, Circuit Judge, and MOON, United States District Judge for the Western District of Virginia, sitting by designation.

OPINION
WILKINSON, Chief Judge:
Casino Ventures plans to offer gambling cruises from a port in South Carolina. Fearing prosecution, it brought suit seeking a declara- tion that state gambling laws prohibiting such cruises had been pre- empted by the Johnson Act, 15 U.S.C. § 1175. The district court found the state laws were preempted. Casino Ventures v. Stewart , 23 F. Supp. 2d 647, 649 (D.S.C. 1998). We reverse, holding that the Act does not preempt state regulatory authority over gambling. Thus South Carolina authorities remain free to enforce state criminal prohi- bitions against illicit gambling cruise activity.
I.
Casino Ventures seeks to operate a "day cruise" or "cruise to nowhere" business from a dock in South Carolina. The business would entail short cruises on ships that depart from and return to the same port in South Carolina without making any intervening stops. Once the ship is outside of the state's territorial waters, Casino Ven- tures would offer gambling to its passengers.
Casino Ventures fears that its cruise business will violate South Carolina criminal laws restricting gambling. State statutes have long prohibited the possession and use of certain gambling devices within South Carolina territory. In particular, Casino Ventures alleges that its business operations may violate South Carolina's ban on lotteries, S.C. Code Ann. §§ 16-19-10 to -30, its ban on unlawful games and betting, id. §§ 16-19-40, 16-19-130, and its ban on the possession and use of gaming tables and machines, id. §§ 12-21-2710, 12-21-2712, 16-19-50, 16-19-120. To allay this fear of criminal prosecution, Casino Ventures brought suit against Robert M. Stewart, Chief of the State Law Enforcement Division, and Charles M. Condon, Attorney General of South Caro- lina. Casino Ventures sought a declaration that South Carolina's gam- bling laws are preempted by federal law and an order enjoining the enforcement of those state laws. Specifically, it asserted that the 1992 amendments to the Johnson Act created a federal right to operate a gambling cruise to nowhere. Pub. L. 102-251, §202, 106 Stat. 60, 61-62 (1992).
The 1992 amendments altered the Johnson Act's general ban on maritime gambling. Prior to the amendments, it was"unlawful to manufacture, recondition, repair, sell,

transport, possess, or use any gambling device . . . within the special maritime" jurisdiction of the United States. 15 U.S.C.A. § 1175 (1990). The Justice Department, however, interpreted this prohibition not "to apply to foreign-flag ves- sels entering the United States." H.R. Rep. No. 102-357 (1991). The effect was that American flag vessels were restricted from offering gambling to their passengers while foreign flag vessels were free to do so. This put American flag vessels at a competitive disadvantage in the lucrative leisure cruise industry. See id.

Congress reacted to the disparity by amending the Johnson Act to make clear that it applied to vessels "documented under the laws of a foreign country." 15 U.S.C. § 1175(a). Additionally, Congress crafted exceptions to the Johnson Act's blanket restrictions related to gambling devices. First, section 1175 no longer restricts the transport and possession of gambling devices on vessels, provided that those devices are not used while the vessel is within the boundaries of a state or possession of the United States. Id. § 1175(b)(1)(A)-(B). Sec- ond, section 1175 no longer prohibits the repair and use of gambling devices outside of those boundaries, unless the ship is on a cruise to nowhere and the state in which that cruise "begins and ends has enacted a statute the terms of which prohibit that repair or use on that voyage." Id. § 1175(b)(1)(A), (b)(2).

After examining these amendments, the district court granted Casino Ventures' request for a declaratory judgment. First, the court held that the 1992 amendments created a federal right to operate day cruises, thereby preempting conflicting state laws. Casino Ventures , 23 F. Supp. 2d at 649. Second, the court noted that under section 1175 a state could defeat preemption if it "has enacted a statute the terms of which prohibit that repair or use" on cruises to nowhere. 15 U.S.C. § 1175(b)(2)(A). But it found that South Carolina's existing laws restricting gambling did not meet this statutory requirement because they were not passed after the 1992 amendments took effect. Casino Ventures , 23 F. Supp. 2d at 649-50. Thus, the district court declared that Casino Ventures could lawfully operate a cruise to nowhere busi- ness in South Carolina. Id. at 652. Stewart and Condon appeal. Because we hold that the district court's initial finding of federal pre- emption was erroneous, we reverse.[35]

II.

Although the Constitution plainly permits federal law to supplant state authority, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." Maryland v. Louisiana , 451 U.S. 725, 746 (1981); see also Worm v. American Cyanamid Co. , 970 F.2d 1301, 1305 (4th Cir. 1992). This presumption is at its zenith when federal law impinges upon core state police powers. States have long possessed primary responsibility in our federal system to protect the health, welfare, safety, and morals of their citizens. The Supreme Court has indicated "that when a State's exercise of its police power is challenged under the Supremacy Clause, `we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and

[35] By reversing on preemption grounds, we need not reach the district court's ruling that a state must reenact its laws against gambling in order to make it a federal crime to operate a gambling cruise to nowhere. See 15 U.S.C. § 1175(b)(2)(A).

manifest purpose of Congress.'" Ray v. Atlantic Richfield Co. , 435 U.S. 151, 157 (1978) (quoting Rice v. Santa Fe Elevator Corp. , 331 U.S. 218, 230 (1947)); see also Reid v. Colorado , 187 U.S. 137, 148 (1902). This "approach is consistent with both federalism concerns and the historic primacy of state regu- lation of matters of health and safety." Medtronic, Inc. v. Lohr , 518 U.S. 470, 485 (1996). The state laws at issue in this case restrict gambling within South Carolina. Because such restrictions are aimed at promoting the wel- fare, safety, and morals of South Carolinians, they represent a well-recognized exercise of state police power. Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico , 478 U.S. 328, 341 (1986). For this reason, respect for state prerogatives dictates a cautious preemp- tion analysis -- one which is reluctant to imply a broad ouster of state authority.

III.

Neither party contends that Congress has expressly preempted the state laws at issue here. Instead, Casino Ventures argues that state laws banning the use and possession of gambling devices on vessels have been impliedly preempted by federal law. Casino Ventures asserts that the 1992 amendments to the Johnson Act worked an implicit preemption of state laws, such as South Carolina's, that pro- hibit gambling voyages to nowhere.

We disagree. "The purpose of Congress is the ultimate touchstone" in a preemption case. Retail Clerks v. Schermerhorn , 375 U.S. 96, 103 (1963). That being so, state law is preempted"if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." Cipollone v. Liggett Group, Inc. , 505 U.S. 504, 516 (1992) (internal quotation marks omitted). Additionally, courts imply preemption if state law "actually conflicts with federal law, that is, when it is impos- sible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Silkwood v. Kerr-McGee Corp. , 464 U.S. 238, 248 (1984) (citation omitted); see also Worm , 970 F.2d at 1304.

A.

There is no basis for finding federal field preemption of South Car- olina's restrictions on gambling. Maritime matters and gambling are not fields subject to exclusive federal control. To the contrary, federal law in these fields respects both our system of dual sovereignty and the important regulatory interests of the states. As a general matter, "Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history." Romero v. International Terminal Operating Co. , 358 U.S. 354, 374 (1959).

This is also true of the regulation of gambling. Indeed, Congress has explicitly recognized the preeminent state interests in controlling gambling and has sought to extend, not curb, state police power in this field. Congress has done so by delegating to the states significant authority to shape applicable federal law. For example, it is a federal crime "to transport any gambling device to any place in a State." 15 U.S.C. § 1172(a). But such activity is not a federal crime if a state so chooses: each state may change the content of this federal law simply by "enact[ing] a law providing for the exemption of such State

from the provisions of this section." Id. Similarly, it is a federal crime for a person engaged in the business of betting to knowingly use wire communications to transmit bets interstate. 18 U.S.C. § 1084(a). But Congress has decided not to make that conduct illegal if both the transmitter and receiver of such information are located in states that have legalized such betting. Id. § 1084(b). In each case, Congress has acted in aid, not in derogation, of state regulatory authority.

Likewise, the combined field of maritime gambling leaves room for state regulation. In fact, Congress initially enacted the Johnson Act "to support the policy of those States which outlaw slot machines and similar gambling devices, by prohibiting use of the channels of interstate or foreign commerce for the shipment of such machines or devices into such States." H.R. Rep. No. 81-2769 (1950). In that sup- porting role, Congress expressly did not apply 15 U.S.C. § 1175 to state territorial waters. By its terms, section 1175 applies only to ves- sels "within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18." 15 U.S.C. § 1175(a). The special maritime jurisdiction of the United States spe- cifically excludes waters subject to the control of state authorities. 18 U.S.C. § 7(1) (special maritime jurisdiction includes the high seas and "any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State " (emphasis added)); see also United States v. Tanner , 471 F.2d 128, 141 (7th Cir. 1972) (noting that under 18 U.S.C.§ 7(1) "there can be no concurrent federal and state jurisdiction")); 2 Benedict on Admi- ralty § 112(a)[1] (7th rev. ed. 1998).[36]

Additionally, by enacting section 1175 Congress extended the reach of state police power beyond state territorial waters: that provi- sion permits states to change the content of federal law with respect to cruises to nowhere. Although the 1992 amendments to the Johnson Act generally permit the use of gambling devices on the high seas, they permit states to reverse course and opt to have cruising to nowhere remain a federal crime. 15 U.S.C. § 1175(a)-(b). Cruises to nowhere remain a federal crime if a state "has enacted a statute the terms of which prohibit" the use of gambling devices on such cruises. Id. § 1175(b)(2)(A).

Section 1175 -- which expressly withdraws federal regulation from state territorial waters and permits states to determine the con- tent of federal law outside of those waters -- recognizes the vital state regulatory interests in gambling controls. From this we cannot con- clude that maritime gambling is a field "in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Hillsborough County v. Automated Med. Labs., Inc. , 471 U.S. 707, 713 (1985) (internal quotation marks omitted). The criminal regulation of gambling, even gambling taking place within the admiralty and maritime jurisdiction of the United States, is simply not a field over which Congress has sought exclusive regulatory authority and the displacement of state law.

B.

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[36] The special maritime jurisdiction of the United States does include some state territorial waters. See 18 U.S.C.§ 7(2) (including United States flag vessels on the St. Lawrence River, the Great Lakes, and on any waters connecting the Great Lakes). Those waters, however, are not at issue in this case.

Nor do we find that South Carolina's laws conflict with the federal statute at issue here. As noted, the plain language, structure, and pur- pose of section 1175 is completely at odds with preemption. That fed- eral enactment does not even apply to South Carolina's territorial waters -- it leaves regulation of those waters to the state. 15 U.S.C. § 1175(a); 18 U.S.C. § 7(1). This alone leads to the conclusion that state and federal laws are not in conflict. But the statute goes even further. It criminalizes gambling cruises to nowhere outside of a state's territorial waters if a state enacts a law banning them. 15 U.S.C. § 1175(b)(2). By permitting states to adjust the contours of federal law, section 1175 augments state authority. In fact, the entire theme of this statute is one of cooperative federalism and respect for dominant state interests. Nothing leads to the conclusion that federal law has supplanted South Carolina's regulatory authority over gam- bling.

Further, preemption was not an issue that Congress overlooked. The very statute at issue in this case contains an express provision preempting the gambling laws of Alaska on certain voyages. It states that

With respect to a vessel operating in Alaska, this section does not prohibit, nor may the State of Alaska make it a vio- lation of law for there to occur, the repair, transport, posses- sion, or use of any gambling device on board a vessel which provides sleeping accommodations for all of its passengers . . . .

15 U.S.C. § 1175(c)(1). This is strong evidence that Congress did not wish to extend preemption any further: "When Congress has consid- ered the issue of pre-emption and has included in the enacted legisla- tion a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legisla- tion." Cipollone , 505 U.S. at 517 (citation and internal quotation marks omitted); see also Freightliner Corp. v. Myrick , 514 U.S. 280, 287-89 (1995).

Moreover, this express exception would be unnecessary if Casino Ventures' reading of the statute were correct. Casino Ventures asserts that the statute not only legalizes as a matter of federal law, but also preempts states from criminalizing, the transport and possession of gambling devices on all vessels. But if this were so, there would be no need to add an exception explicitly forbidding Alaska from ban- ning transport and possession. If Casino Ventures' reading were cor- rect, states were already preempted from interfering with those activities. The Alaska exception only makes sense if states are not generally preempted from barring the possession and transportation of gambling devices within their territorial waters.

Finally, allowing states to make their own regulatory choices about gambling does not interfere with the purpose of the 1992 amend- ments. Before the amendments, foreign flag ships were permitted to offer gambling on the high seas while American vessels were forbid- den from doing so. By amending the Johnson Act, Congress sought to place all vessels on equal footing. Congress never suggested that it was legislating to remedy an inefficient patchwork of varied state laws. See 1 Thomas J. Schoenbaum, Admiralty and Maritime Law § 4-5 (2d ed. 1994); see also Pacific Merchant Shipping Ass'n v. Aubry , 918 F.2d 1409, 1422 (9th Cir. 1990). Instead, the amendments sought only to put an end to the discriminatory treatment of United States flag vessels under federal law.

The committee reports and floor statements speak only to this pur- pose. H.R. Rep. No. 102-357 (1991) ("The clear intent and purpose of this amendment to the Johnson Act is to allow those activities on U.S.-flag vessels to the same extent that they are currently allowed on foreign-flag vessels."); 138 Cong. Rec. H71 (daily ed. Jan. 28, 1992) (statement of Rep. Davis) (same); id. at H70 (statement of Rep. Jones) (The law "will enable our U.S. vessels to operate on a level playing field with foreign flag cruise ships with respect to gambling."). And Congress explicitly recognized that state laws regulating gambling would continue to operate. 138 Cong. Rec. H72 (daily ed. Jan. 28, 1992) (statement of Rep. Lent) ("This bill preserves the right of a coastal State to enact legislation that prohibits gambling on a vessel that operates from a port of that State even if the vessel sails from that port out into international waters and then returns to the same port."). Representative Lent made it clear that federal law was not ousting the authority of states to prohibit and regulate gambling. He noted that "The committee was aware that a number of coastal States do not want gambling on vessels in their waters and this legislation retains the right of States to continue to prohibit gambling." Id. For all of these reasons, we join those courts that have rejected the argument that 15 U.S.C. § 1175 preempts state laws prohibiting gam- bling and gambling devices. Padavan v. City of New York , 685 N.Y.S.2d 35, 35-36 (N.Y. App. Div. 1999) (rejecting the assertion that the 1992 amendments preempt local regulation); Butterworth v. Chances Casino Cruises, Inc. , 1997 WL 1068628, at *4 (M.D. Fla.) (holding that section 1175 does not completely preempt state gam- bling device laws). The lifting of federal restrictions on gambling out- side state territorial waters does not preempt state gambling prohibitions within those waters. States remain free to regulate gam- bling within their territorial waters.

IV.

Casino Ventures suggests that in amending the Johnson Act, Con- gress prohibited states from exercising their core police powers to ban gambling and gaming devices. We do not agree. States have long reg- ulated in this area. And state primacy here has only been reinforced by congressional enactments, including the one before us, which grant states significant control over the substance of federal criminal laws dealing with gambling. Far from expressing the required "clear and manifest" purpose to displace state authority, Congress has voiced a desire to retain and defer to state choices in this area. Implying pre- emption here would defeat, not advance, these federal objectives. For this reason, the judgment of the district court is hereby

REVERSED .

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

SOUTH CAROLINA STATE PORTS AUTHORITY,
Petitioner,
v.
FEDERAL MARITIME COMMISSION; UNITED STATESOF AMERICA, Respondents.

STATE OF MARYLAND; STATE OF ALABAMA; STATE OF ARKANSAS; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF IOWA; STATE OF LOUISIANA; STATE OF MAINE; STATE OF MISSISSIPPI; STATE OF MONTANA; STATE OF NEVADA; STATE OF NORTH CAROLINA; STATE OF NORTH DAKOTA; STATE OF OKLAHOMA; STATE OF OREGON; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF VIRGINIA; STATE OF WEST VIRGINIA; NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, Amici Curiae.

On Petition for Review of an Order of the Federal Maritime Commission. (No. 99-21)
Argued: January 22, 2001
Decided: March 12, 2001

OPINION

WILKINSON, Chief Judge:

This case requires us to decide whether a state's sovereign immunity protects it from being brought before a federal administrative tribunal by a private party. We hold that the state's immunity prevents such a suit or proceeding.

South Carolina Maritime Services, Inc. (Maritime Services), a cruise ship company, filed a complaint with the Federal Maritime Commission (FMC) against the South Carolina State Ports Authority (SCSPA). The suit sought reparations and injunctive relief for alleged violations of the Shipping Act of 1984, 46 U.S.C. app. S 1701 et seq. (1994). The FMC held that state sovereign immunity does not extend to private complaints filed before a federal agency. Because a state's sovereign immunity is not so fleeting as to depend upon the forum in which the state is sued, the judgment of the FMC is reversed and the case is remanded with directions to dismiss it.

I.

Maritime Services operates a cruise ship, the M/V TROPIC SEA. Passengers may gamble on board the ship while it is in international waters. The South Carolina State Ports Authority has a policy of refusing to berth ships whose primary purpose is gambling. The SCSPA allows some ships that permit gambling to berth, but only so long as gambling is not their primary purpose. The SCSPA refused to give the M/V TROPIC SEA a berthing space at the port of Charleston because it claimed the ship's primary purpose was to facilitate gambling.

Maritime Services, believing that it was being singled out for unfair treatment, filed a complaint with the FMC under the Shipping Act of 1984. The Shipping Act regulates the oceanborne foreign commerce of the United States. The Act prohibits discrimination by carriers and terminal operators and allows the FMC to regulate any agreement involving oceanborne foreign commerce. Id. SS 1701(1), 1703(a) & (b). Maritime Services alleged that the SCSPA, as a terminal operator, had violated the Shipping Act by unreasonably refusing to deal and by unreasonably preferring other cruise ship companies to the disadvantage of Maritime Services. Id.S 1709(b)(11) & (d)(3). The complaint asked for a cease and desist order, actual damages, interest, and attorney's fees.

The SCSPA's response raised, inter alia, the argument that South Carolina's sovereign immunity prohibits private parties from suing the SCSPA before a federal agency. In

support, the SCSPA noted that in Ristow v. South Carolina Ports Authority, 58 F.3d 1051 (4th Cir. 1995), this court held that the SCSPA is protected by South Carolina's sovereign immunity because it is an arm of the state. The ALJ agreed and dismissed the suit on sovereign immunity grounds. The FMC then reviewed the case on its own motion. In reversing the ALJ, the FMC held that sovereign immunity does not bar private suits against the states before federal agencies. The SCSPA now appeals.

II.

The doctrine of sovereign immunity predates the founding of our nation. See W. Blackstone, Commentaries on the Laws of England 234-35 (1765). And "[a]lthough the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified." Alden v. Maine, 527 U.S. 706, 715-16 (1999) (citing Chisholm v. Georgia , 2 U.S. (2 Dall.) 419, 434-35 (1793) (Iredell, J., dissenting)).

Notwithstanding the presumed universality of this doctrine, the Supreme Court held in 1793 that a private citizen of South Carolina could in fact sue the State of Georgia without its consent. Chisholm, 2 U.S. at 420. Justice Iredell dissented, contending that both before and after the adoption of the Constitution, the states maintained their sovereign right to be protected from suit without consent. Id. at 43536, 448, 449-50 (Iredell, J., dissenting). The decision in Chisholm "fell upon the country with a profound shock" and was quickly overruled by the Eleventh Amendment. Alden, 527 U.S. at 720, 722 (internal quotations omitted).

The Eleventh Amendment provides that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although the literal text of the Amendment speaks only to suits filed by citizens of one state against another state, the Supreme Court held in Hans v. Louisiana, 134 U.S. 1, 21 (1890), that sovereign immunity barred a citizen from suing his own state without consent. This is because the principle of sovereign immunity derives not just from the Eleventh Amendment, but from the structure and background principles of the Constitution. Hans, 134 U.S. at 11-12. It is with these background principles in mind that the Supreme Court decided two recent cases concerning state sovereign immunity: Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), and Alden v. Maine, 527 U.S. 706 (1999). These two decisions provide significant guidance on how to resolve the underlying dispute.

A.

The Seminole Tribe case involved the Indian Gaming Regulation Act (IGRA), 25 U.S.C. S 2710(d), enacted under the Indian Commerce Clause. U.S. Const. art. I, S 8, cl. 3. Pursuant to the IGRA, the Seminole Tribe of Florida asked a federal district court to order the State of Florida to negotiate with the Tribe in good faith.

The Supreme Court affirmed the dismissal of the Tribe's suit, holding that Congress could not, in the exercise of its Article I powers, abrogate a state's sovereign immunity in federal court. 517 U.S. at 73. According to the Court, "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as

to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government." Seminole Tribe, 517 U.S. at 72. Moreover, "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." Id. Noting that "[t]he Eleventh Amendment restricts the judicial power under Article III," the Supreme Court explained that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." Id. at 72-73.

In reaching its decision, the Supreme Court held that the sovereign immunity principle is sufficiently strong that it transcends the literal text of the Eleventh Amendment and applies regardless of the type of relief sought. The Court noted that the Eleventh Amendment does not stand "`so much for what it says, but for the presupposition . . . which it confirms.'" Id. at 54. (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)). The presupposition is that "each State is a sovereign entity in our federal system" and that "`it is inherent in the nature of sovereignty not to be amenable to the suit of an individual'" without consent. Id. (quoting The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton)). Thus the Eleventh Amendment merely confirmed, rather than established, the structural principle of state sovereign immunity. Accordingly, the Court concluded that the "`States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.'" Id. at 68 (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934)).

With respect to the type of relief sought, Seminole Tribe held that the doctrine of sovereign immunity applies even if the suit against the state seeks no damages but only requests injunctive relief. According to the Court, "the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity." Id. at 58. This is because the "Eleventh Amendment does not exist solely in order to preven[t] federal-court judgments that must be paid out of a State's treasury, it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." Id. (alteration in original) (internal quotations and citations omitted). Accordingly, the fact that the IGRA only authorized prospective injunctive relief was of no moment in determining the scope of Congress' abrogation authority.

B.

Alden v. Maine is the other recent sovereign immunity decision that informs our inquiry. A group of probation officers filed suit in federal court against the State of Maine. The officers alleged that the state had violated the Fair Labor Standards Act of 1938 (FLSA). Alden, 527 U.S. at 711. While that suit was pending, Seminole Tribe was decided and the federal complaint was dismissed. Id. at 712. The probation officers then filed the same action in state court because the FLSA authorized private state court actions against the states, regardless of consent. Id.

Just as Seminole Tribe held that state sovereign immunity transcends the type of relief sought, Alden held that the sovereign immunity of the states transcends the forum in which the state is sued. Thus, the Court held that sovereign immunity bars suits in state courts just as it does in federal courts. According to the Supreme Court, "the powers

delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." Id.

Alden explained clearly why state sovereign immunity applies regardless of the forum in which the private action is prosecuted. According to the Court, "[p]rivate suits against nonconsenting States . . . present the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties, regardless of the forum." Id. at 749 (internal quotations and citations omitted). Compounding the harm is the fact that "[n]ot only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf." Id. Accordingly, Alden recognized that whether a state is entitled to sovereign immunity "does not turn on the forum in which the suits [are] prosecuted." Id. at 733. Rather, sovereign immunity applies whenever a private individual attempts to sue a nonconsenting state. Id.

In explicating this holding, Alden also reaffirmed the Seminole Tribe principle that state sovereign immunity extends beyond the text of the Eleventh Amendment. According to the Court,"[t]o rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism" that has been rejected "since the discredited decision in Chisholm." Id. at 730 (citing Seminole Tribe, 517 U.S. at 68). In determining that sovereign immunity protected states from suits in their own courts, the Court found it irrelevant"that the Eleventh Amendment by its terms limits only `t]he Judicial power of the United States.'" Id. (alteration in original). Rather, Alden recognized that state sovereign immunity is an overarching principle of the Constitution. Id. at 713.

Instead of focusing on the literal terms of the Eleventh Amendment, the Court looked at the historical underpinnings of the doctrine of sovereign immunity. This historical inquiry yielded Alden's conclusion that sovereign immunity bars any private suit against a nonconsenting sovereign. "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." Id. at 715. As Alexander Hamilton explained: "`It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.'" Id. at 716-17 (quoting The Federalist No. 81). Indeed, the antiquity of the doctrine is such that the Supreme Court found it "so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted." Hans, 134 U.S. at 16.

Moreover, it is equally well established that sovereign immunity bars not just lawsuits filed in courts of law, but rather all proceedings against a non-consenting sovereign. Thus, the Court noted the "`presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution -anomalous and unheard of when the constitution was adopted.'" Alden, 527 U.S. at 727 (quoting Hans, 134 U.S. at 18). This language, referring to "proceedings or suits," makes it clear that certain proceedings, while not suits, are nevertheless barred by the doctrine of

sovereign immunity. Alden cautioned, however, that the defense of sovereign immunity "does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." Id. at 754-55. Rather, the "States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design." Id. at 755.

Alden outlined six exceptions to the doctrine of sovereign immunity. First, sovereign immunity does not bar a suit where the state has given consent. Second, states remain subject to suits brought by the Federal Government or by other states. Third, Congress retains the power to abrogate the sovereign immunity of the states pursuant to the Fourteenth Amendment's Section 5 enforcement power. Fourth, sovereign immunity does not bar private suits against municipal corporations or other lesser governmental entities. Fifth is the Ex parte Young exception, 209 U.S. 123 (1908), which allows certain private suits against state officers if the suit seeks only injunctive or declaratory relief to remedy an ongoing violation of law. Sixth, state officers may be sued for money damages in their individual capacity, so long as the relief is sought from the officer personally. Alden, 527 U.S. at 755-57.

C.

Seminole Tribe and Alden make clear that state sovereign immunity, while not absolute, is among the Constitution's foremost principles. This constitutional commitment to dual sovereignty is no radical idea. As the Supreme Court has repeatedly explained, embedded in the structure of the Constitution is the principle that a private party may not file a complaint against an unconsenting state. With these lessons firmly in mind, we turn to the merits of the claim before us.

III.

The FMC and the United States argue that despite Seminole Tribe and Alden, sovereign immunity for the South Carolina State Ports Authority is inappropriate in this case. They posit two primary reasons for the SCSPA's lack of sovereign immunity. First, they contend that the FMC is not a court and thus does not exercise the judicial power of the United States. Second, they argue that the proceeding in front of the FMC is not a lawsuit. We address each contention in turn.

A.

The respondents FMC and the United States first assert that sovereign immunity does not apply in agency actions because agencies do not exercise the judicial power of the United States. See U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed . . . ."). Since the FMC is an agency operating under the Executive Branch, and not a court, they argue that sovereign immunity is inapplicable in this case. They point out that the agency has no independent enforcement power.

The FMC and the United States contrast the powers exercised by the FMC here with the authority exercised by the Tax Court in Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991). In Freytag, the Supreme Court held that the Tax Court, an Article I entity, "exercises its judicial power in much the same way as the federal district courts exercise theirs." Id. at 891. Because the Tax Court is "an adjudicative body" that can, inter alia, subpoena witnesses, order production of documents, administer oaths, grant certain injunctive relief, order the Secretary of the Treasury to refund an overpayment,

and punish contempts by fine or imprisonment, the Tax Court is a Court of Law despite being part of the Executive Branch. Id. Thus, "[b]y resolving those disputes" between taxpayers and the Government, "the court exercises a portion of the judicial power of the United States." Id.

The FMC and the United States argue that the differences between the Tax Court and the adjudicative authority of the FMC make it clear that only the former is a court. The Tax Court, unlike the FMC, can enforce its orders. 46 U.S.C. app. S 1713(c) (Attorney General may seek enforcement by the district court of a subpoena issued by the FMC); id. S 1712(e) (Attorney General may seek recovery in district court of civil penalties assessed by the FMC). Moreover, the Tax Court only decides cases, whereas the FMC also exercises executive, legislative, and administrative responsibilities. Finally, respondents point out that while the Tax Court does not make political decisions, the FMC does.

Whether the FMC is exercising the judicial power as outlined in Freytag, however, is irrelevant to the disposition of this case. The central lesson from Freytag is that adjudication by adversarial proceedings can exist outside the context of Article III. Freytag, 501 U.S. at 889; accord id. (Congress has "wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals"); id. at 910 (Scalia, J., concurring) ("It is true that Congress may commit the sorts of matters administrative law judges and other executive adjudicators now handle to Article III courts -just as some of the matters now in Article III courts could instead be committed to executive adjudicators."). The precise limits of what does or does not constitute a court under Freytag are less important than the overarching principle Freytag establishes-Article I tribunals may exercise the judicial power of the United States.

If Article I courts can indeed exercise the judicial power, it would seem anomalous to limit state sovereign immunity strictly to an Article III proceeding. Alden in fact confirms that state sovereign immunity "is not directly related to the scope of the judicial power established by Article III." Alden, 527 U.S. at 730. Rather, it is a "separate and distinct structural principle" that"inheres in the system of federalism established by the Constitution." Id. And the Court has held that Congress can abrogate a state's sovereign immunity "only if there is `compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design." Id. at 731 (quoting Blatchford, 501 U.S. at 781).

No "compelling evidence" exists. To the contrary, Alden demonstrates that the founding generation understood the Constitution "to preserve the States' traditional immunity from private suits." 527 U.S. at 724. It was the spectre of private suits against the states that mattered to the founders, not the forums in which those suits might happen to be brought. At the time of ratification, the states were concerned about private citizens filing complaints against them without their consent. They understood that being subjected to such proceedings would affront a "fundamental aspect of[their] sovereignty." Id. at 713.

More practically, the states "`were heavily indebted as a result of the Revolutionary War. They were vitally interested in the question whether the creation of a new federal sovereign, with courts of its own, would automatically subject them, like lower English

lords, to suits in the courts of the "higher" sovereign.'" Id. at 716 (quoting Nevada v. Hall, 440 U.S. 410, 418 (1979)). "It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money damages." Alden, 527 U.S. at 750. In order to ensure passage of the Constitution, "[t]he leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity." Id. at 716; accord id. at 716-18 (citing founders such as Hamilton, Madison, and Marshall). The lesson from "the Constitution's structure, its history, and the authoritative interpretations" by the Supreme Court is unmistakable-an adversarial proceeding against a non-consenting state by a private party triggers sovereign immunity. Id. at 713.

The United States nevertheless asserts that the federal government can create Article I tribunals by which it can subject unconsenting states to proceedings by private parties. But would the founders have countenanced a system by which Congress could have avoided all the strictures of sovereign immunity by creating different tribunals where state sovereign immunity was completely inapplicable? To ask the question is to answer it. The states' concerns with affronts to their dignity and to the possibility of having to answer for their war debts would not disappear because the forum magically changed from an Article III court to an Article I tribunal. And while the coordinate branches of the federal government have the broadest latitude in organizing themselves as they see fit, they cannot employ an administrative structure that allows an end-run around the Constitution. Sovereign immunity is not so hollow a concept as to prohibit proceedings in certain fora like a federal or state court while at the same time permitting a similar proceeding to take place under the auspices of a legislative court or an agency adjudication. Dual sovereignty posits a relationship of mutual respect between Congress and the states. It is not consistent with that relationship for Congress to subject an unconsenting sovereign to the coercive club of private actions regardless of the forum. See id. at 733 ("The logic" of sovereign immunity decisions like Seminole Tribe "does not turn on the forum in which the suits were prosecuted.").

Alden makes clear that any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states would not have passed muster at the time of the Constitution's passage nor after the ratification of the Eleventh Amendment. Such an adjudication is equally as invalid today, whether the forum be a state court, a federal court, or a federal administrative agency.

B.

The FMC and the United States also insist that sovereign immunity does not apply because the Article I proceeding in this case is not a "suit in law or equity." U.S. Const. amend. XI. Rather, they argue that the administrative adjudication is merely a form of regulation, in which political appointees attempt to effectuate the intent of a statute. The structure of the administrative proceeding, however, belies this point. Whether the proceeding is formally called an administrative action, a lawsuit, or an adjudication does not matter. The fundamental fact, which respondents cannot escape, is that this proceeding requires an impartial federal officer to adjudicate a dispute brought by a private party against an unconsenting state.

It is important to examine the precise nature of this proceeding, and to describe what it is really like. The Shipping Act sets forth a regime by which "any person" may bring a formal "complaint alleging a violation" of the Act. 46 U.S.C. app. S 1710(a). The complaint may ask for "reparation for any injury caused to the complainant." Id. The party named in the complaint must either "satisfy[it] or answer it in writing." Id. S 1710(b). The Act then mandates that if the complaint is not satisfied (i.e., settled), "the Commission shall investigate it in an appropriate manner and make an appropriate order." Id. (emphasis added). The Commission, "upon complaint or upon its own motion, may" also investigate "any conduct or agreement that it believes may be in violation of" the Act. Id. S 1710(c).

The Act also provides that in "investigations and adjudicatory proceedings," any party may utilize "depositions, written interrogatories, and discovery procedures." Id. S 1711(a). To the extent practicable, the rules for these proceedings "shall be in conformity with the rules applicable in civil proceedings in the district courts of the United States." Id. The FMC may also use the subpoena power to "compel the attendance of witnesses and the production of books, papers, documents, and other evidence." Id. If a party does not comply with a nonreparation order or with a subpoena, the Attorney General of the United States "may seek enforcement by a United States district court having jurisdiction over the parties." Id. S 1713(c). If the Commission orders reparation, "the person to whom the award was made may seek enforcement of the order in a United States district court having jurisdiction over the parties." Id. S 1713(d)(1).

When a party files a formal complaint under 46 U.S.C. app. S 1710(a), the investigation takes the form of an adjudication. See 46 C.F.R. S 502.61 (2000). ALJs are the presiding officers for the initial adjudication. Id. S 502.223. The ALJ"designated to hear a case shall have authority" to, inter alia, "sign and issue subpenas [sic]", "take or cause depositions to be taken," "delineate the scope of a proceeding," "hear and rule upon motions," "administer oaths and affirmations," "examine witnesses," "rule upon offers of proof," "act upon petitions to intervene," "hear oral argument at the close of testimony,""fix the time for filing briefs, motions, and other documents," and "dispose of any other matter that normally and properly arises in the course of the proceedings." Id. S 502.147. Parties may, inter alia, depose witnesses, id. S 502.203; submit interrogatories, id. S 502.205; and submit requests for admission from opposing parties, id. S 502.207. The FMC reviews the ALJ's decision if a party requests an appeal or on the Commission's own initiative. Id. S 502.227.

The proceeding thus walks, talks, and squawks very much like a lawsuit. Its placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication. The FMC and the United States argue, however, that despite the fact that the ALJ adjudicates the "case," id. S 502.147, and that the filing of a complaint necessarily "commence[s]" a "proceeding," id. S 502.61, the adjudication is in reality merely a form of regulation. The FMC and the United States contend that the agency simply uses adjudication as a means of implementing policy. The proceeding in their view is nothing more than an investigation of the merits of the claim. Indeed, they point out that the statute itself speaks in terms of "investigation." 46 U.S.C. app. S 1710(b).

The FMC and the United States further maintain that the fact that only three commissioners of the FMC may come from the same party confirms that the agency's judicial function is only a means to implement its legislative objectives.

The adjudication, however, is just that -an adjudication. An impartial officer presides in an adversarial proceeding to determine the rights and responsibilities of different parties. It is true that the commissioners may review the ALJ's decision. Nevertheless, this review is still impartial. See 5 U.S.C.S 554(d) (requiring separation of functions between adjudication and prosecution in administrative hearings); 46 C.F.R. S 502.224 ("The separation of functions as required by 5 U.S.C. S 554(d) shall be observed in proceedings" under the Shipping Act). Moreover, the ALJ issues subpoenas, authorizes depositions, hears witnesses, and otherwise conducts the proceedings in a judicious manner. Administrative law judges are what the name says they are -judges.

Indeed, the Supreme Court has recognized that ALJs are judges who decide cases. In Butz v. Economou, 438 U.S. 478, 511-14 (1978), the Court extended absolute judicial immunity to ALJs precisely because ALJs perform judicial acts. The Court held that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages." Butz, 438 U.S. at 512-13. So as to leave no doubt, the Court noted that the "conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court." Id. at 513. It did not matter that the ALJs were "employees of the Executive Branch." Id. at 511. "Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." Id.

The ALJ is thus not merely an alternate means of policy implementation. Rather, "the role of the modern federal hearing examiner or administrative law judge . . . is `functionally comparable' to that of a judge." Id. at 513. Like the situation in Butz, the judges and commissioners in the FMC independently judge the evidence before them. As the Butz Court stated, "the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." Id. Although Article I adjudication undoubtedly differs from Article III adjudication, "federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process." Id. (citing certain requirements of the Administrative Procedure Act, 5 U.S.C. SS 554-557).

The FMC and the United States maintain, however, that the agency adjudication is merely an empty shell because the agency itself has no enforcement power. Only the Attorney General, they emphasize, has the discretion to enforce the FMC's non-reparation orders in district court. 46 U.S.C. app. S 1713(c). This argument, however, downplays the significance of the agency's own proceeding. The FMC and the United States ignore the fact that the Commission must hear all complaints filed with it. Id. S 1710(b). The Attorney General's discretion at the back end of the process simply does not help the unconsenting state up front. See Seminole Tribe, 517 U.S. at 58. Moreover, it is difficult to believe that the agency adjudication is so meaningless as to permit a

private party to subject an unconsenting state to agency proceedings because of the adjudication's very emptiness.

It is true that under the Act, a state may choose to ignore a subpoena, an order, or a judgment. 46 U.S.C. app. S 1713(c). Yet a judgment or a subpoena against a state is a powerful thing, if not legally, then certainly politically. All parties, and certainly political entities such as states, have an interest in avoiding the stigma that attaches even to an unenforceable default judgment. Moreover, a state offends an agency that has plenary jurisdiction over its ports at its own peril. Indeed, the FMC may fine a state up to $25,000 per day for failure to comply with a Commission order. Id. S 1712(a). And the United States, through the Attorney General, can enforce these penalties in federal district court. Id. S 1712(e) (district court shall enforce the order unless it is "not regularly made or duly entered"). Furthermore, the ALJ could order (although not force) the state to be available for depositions, to answer interrogatories, and to produce documents. That the state may choose not to comply with the order does not change the fact that the state has already suffered an indignity to its sovereignty. See Alden, 527 U.S. at 713. The proverbial egg has already been broken.

Furthermore, the idea that a state would explicitly ignore any order of the federal government does not do justice to our system of federalism. State officers, no less than federal ones, take an oath to support and defend the Constitution and the laws of the United States. Id. at 715. The Supremacy Clause, of course, makes it clear that state officials have a duty to obey and enforce those same laws. See, e.g., Testa v. Katt, 330 U.S. 386, 391 (1947) ("[T]he Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people."). In short, we cannot base our opinion on the lack of FMC enforcement power because doing so would assume that state officers are unwilling on their own to obey an order of the United States. While enforcement power may be relevant to deciding whether a legislative court possesses the "judicial power" under Article III and Freytag, the question of whether sovereign immunity applies depends only on whether a private party can subject an unconsenting state to an adversarial proceeding. The Shipping Act, as well as Supreme Court decisions interpreting the role of administrative judges, underscores the fact that sovereign immunity applies to this agency adjudication.*[37]

IV.

A.

[37] The United States also contends that the Supreme Court's "public rights" doctrine negates the suggestion that an agency adjudication is a judicial action. Invoking the public rights doctrine, however, does not change the fact that a private party simply cannot commence an adversarial proceeding against an unconsenting state. Moreover, even in the public rights context the Supreme Court has been skeptical of allowing Article I tribunals to exceed the constitutional jurisdiction of Article III courts. See Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion); Glidden v. Zdanok, 370 U.S. 530, 544-52 (1962); Crowell v. Benson, 285 U.S. 22 (1932); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828). Because an Article III court would not have jurisdiction due to state sovereign immunity, these and other cases suggest that sovereign immunity would also bar Congress from permitting a federal agency to force a state to defend a claim against a private party. Thus, even in the absence of Alden, sovereign immunity would likely bar the FMC from adjudicating Maritime Service's complaint against the SCSPA.

Our holding that state sovereign immunity applies to agency adjudications does not end the inquiry. The Supreme Court has identified six exceptions to the doctrine of state sovereign immunity. See supra Section II.B. We address each in turn.

1.

The first exception to sovereign immunity is when the state gives its consent to suit. See, e.g., Alden, 527 U.S. at 755. This exception, of course, permits a state to redress the grievances of the complainant. However, it does so in a way that allows states to decide whether they want to be subject to a particular suit or class of suits. South Carolina has not given its consent to this lawsuit. It has not passed any law evincing an intent to be sued by a private party in these cases. Nor has it acquiesced to being sued in this particular case. Consequently, the consent exception does not apply to the case at bar.

2.

The second exception is for cases brought against a state by the United States or by other states. See, e.g., id. at 755-56; Principality of Monaco, 292 U.S. at 328. A suit "commenced and prosecuted against a State in the name of the United States . .. differs in kind from the suit of an individual" in that the former was specifically contemplated in the design and framework of the Constitution. Alden, 527 U.S. at 755. Suits brought by the United States require the exercise of political responsibility. Id. at 756. They are less prone to be carried out solely to advance the agenda of a single individual. Id. Purely private suits, by contrast, lack this political constraint. The FMC and the United States argue that the discretion exercised by the Attorney General in deciding to enforce a Commission order transforms a proceeding by a private party into a discretionary action by the government. We disagree.

As previously discussed, the agency must hear all claims filed under 46 U.S.C. app. S 1710(a). It also has the ability to investigate cases upon its own motion, or upon the filing of a complaint. Id. S 1710(c). Indeed, under the Shipping Act and many other acts, the federal government may investigate a claim and simply bring a complaint in its own name. See, e.g., Kimel v. Florida Board of Regents, 528 U.S. 62, 78 (2000) (an agency can bring an action against a state under the ADEA even though a private individual cannot do so); see also EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (agency brings suit against state under the ADEA); EEOC v. State of Illinois, 69 F.3d 167, 168 (7th Cir. 1995) (agency brings action against state on behalf of school teachers); Reich v. Alabama Dep't of Cons. & Nat. Resources, 28 F.3d 1076, 1078 (11th Cir. 1994) (Secretary of Labor brings action against state agency under the FLSA). In those cases, however, the named party would be the federal government, not a private party. This is not such a case. Here, a private party filed a complaint against an unconsenting state. The FMC had no choice but to adjudicate this dispute. The federal government must exercise "political responsibility for each suit prosecuted against a State." Alden, 527 U.S. at 756 (emphasis added). This responsibility was lacking in the case at bar. Consequently, the complaint was not brought by the federal government.

3.

The third exception to state sovereign immunity is for cases brought pursuant to Congress' enforcement power under Section Five of the Fourteenth Amendment. See Fitzpatrick v. Bitzer, 427 U.S. 445, 453 (1976); see also Board of Tr. of the Univ. of Alabama v. Garrett, 531 U.S. ___, No. 99-1240 slip op. at 6 (Feb. 21, 2001). The Fourteenth Amendment "required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution" and "fundamentally altered the balance of state and federal power." Alden, 527 U.S. at 756 (internal quotation marks omitted). Respondents do not contest that the Shipping Act was enacted pursuant to Congress' Article I powers, as opposed to Congress' Section Five power. Thus, this exception does not apply to the case at bar.

4.

The fourth exception is for suits brought against lesser entities like municipal corporations that are not an arm of the state. See Alden, 527 U.S. at 756. The South Carolina State Ports Authority is indisputably an arm of the state itself. Ristow, 58 F.3d at 1053 ("[T]he Ports Authority, from an Eleventh Amendment perspective, is the alter ego of the State of South Carolina."). Consequently, this exception is inapplicable.

5.

The fifth exception to sovereign immunity is that in certain circumstances a private party may sue state officers in their official capacity to prevent ongoing violations of the law. See Ex parte Young, 209 U.S. at 123; see also Seminole Tribe, 517 U.S. at 73. This exception is irrelevant to the case at bar, as the private party brought the complaint for both legal and equitable relief against the State Ports Authority itself.

6.

Finally, sovereign immunity does not prevent an individual from suing state officers in their individual capacity for ultra vires conduct fairly attributable to the officers themselves. Alden, 527 U.S. at 757. This exception is likewise inapplicable to the instant case.

B.

The FMC and its amicus urge us to create another exception to sovereign immunity, however. They argue that the federal interest in uniform regulation of maritime matters is sufficient reason to deny the states sovereign immunity over matters in front of the FMC. They argue that the Constitution itself, as well as Supreme Court cases, recognize the important federal interest in maintaining"a uniformity of regulation for maritime commerce." United States v. Locke, 529 U.S. 89, 108 (2000). In effect, the FMC and its amicus would have us hold that South Carolina consented to suits in matters affecting maritime commerce when it ratified the Constitution.

The Supreme Court in Seminole Tribe made clear that a strong federal interest in a particular subject matter cannot determine the application of sovereign immunity to a lawsuit. Indeed, the Seminole Tribe Court declared that "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government." Seminole Tribe, 517 U.S. at 72. Seminole Tribe itself involved just such a matter -the Constitution gives Congress exclusive control over the regulation of Indian commerce. Id. Nevertheless, "[e]ven when the Constitution vests in

Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states." Id. Likewise, the fact that the Constitution assigns the federal government a primary role in the regulation of maritime commerce does not mean that Congress can authorize a private party to bring a complaint against an unconsenting state. Once sovereign immunity applies, the only exceptions are those recognized in Alden.

The federal government of course retains broad powers to regulate maritime matters. The FMC can bring a complaint in its own name. 46 U.S.C. app. S 1710(c). The FMC can, inter alia, bring suit in district court to enjoin conduct in violation of the Act. Id. S 1710(h). The FMC can investigate alleged violations of the Act upon its own initiative or upon information supplied by a private party. Id. S 1710(c). The FMC may issue a cease and desist order if its investigation uncovers a violation of the Act. Id. S 1713. "Whoever" violates the Act or an FMC order "is liable to the United States for a civil penalty." Id. S 1712(a). Marine terminal operators like the South Carolina State Ports Authority must "establish, observe, and enforce just and reasonable regulations and practices . . . ." Id. S 1709(d)(1). The FMC can issue rules and regulations necessary to carry out the provisions of the Act. Id. S 1716. Indeed, if Congress so chose it could regulate all matters affecting ocean-borne commerce. U.S. Const. art. I., S 8, cl. 3; United States v. Lopez, 514 U.S. 549, 558 (1995) (Commerce Clause allows direct regulation of the channels of interstate commerce).

These and other methods show that disallowing private suits against unconsenting states will not vitiate the strong federal interest in regulating maritime commerce. The fact that sovereign immunity applies to private proceedings means only that the federal government, not a private party, must vindicate the federal interest when a state is involved. If the FMC needs more resources to ensure compliance by state agencies, Congress may of course authorize additional funds. This process ensures that any federal interest is protected in a politically accountable manner.

The FMC nevertheless argues that exempting states from having to respond to private complaints would give public maritime operators a competitive advantage over private maritime facilities. But we are not deciding this case based on maritime efficiencies or economic advantage. Rather, it is the structure of the Constitution that we are enforcing. If sovereign immunity confers upon state ports authorities some advantages that private ports authorities do not have, it is for the fundamental reason that the Constitution treats states differently. States are not just "mere prefectures or corporations." Alden, 527 U.S. at 758. They are sovereign entities which by definition have certain advantages that private actors do not have. Any competitive advantage that a state might have is not enough to justify treating states in a different manner than the Constitution specifies. Moreover, in this case it is unclear whether the states will be at a competitive advantage. The federal government retains numerous enforcement powers and under the Supremacy Clause state officers must follow the Constitution and laws of the United States.

In short, the federal government itself may "deem the case of sufficient importance to take action against the State." Alden, 527 U.S. at 759-60. "Congress has ample means to

ensure compliance with valid federal laws, but it must respect the sovereignty of the States." Id. at 758. What Congress simply cannot do under its Article I power is subject an unconsenting state to an adversarial proceeding brought by a private party.

V.

Sovereign immunity is not some outdated concept, an ancient appendage to the Constitution itself. Rather, respect for state sovereignty enables the states to best fulfill their continuing roles and responsibilities within our federal system. Sovereign immunity applies to proceedings brought in any forum by a private party against a non-consenting state. The history, the text, and the structure of the Constitution confirm that under its Article I powers, Congress cannot authorize private parties to haul unconsenting states before the adjudicative apparatus of federal agencies and commissions.

"The founding generation thought it `neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" Alden, 527 U.S. at 748 (quoting In re Ayers, 123 U.S. 443, 505 (1887)). To hold otherwise would destroy the delicate equilibrium that is dual sovereignty.

For the foregoing reasons, the judgment of the Federal Maritime Commission is reversed and the case is remanded with directions to dismiss it.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS

		States With No Opt Out Statute but has a General Gaming Prohibition Against Possession of Gambling Devices		***Specific Opt Out***	
Cruise to Nowhere		**Foreign-owned and operated**	**US-owned and operated**	**Foreign-owned and operated**	**U.S. -owned and operated**
	Federal	Legal 1175(b)(1) 1082/1081/4472	Legal 1175(b)(1) 1082/1081/4472	Illegal 1175(b)(2)(a)	Illegal 1175(b)(2)(a)
	State	Illegal? Casino Ventures	Illegal? Casino Ventures	Illegal 1175(b)(2)(a)	Illegal 1175(b)(2)(a)
International Cruises from/to U.S. Ports		**Foreign**	**US**	**Foreign**	**US**
	Federal	Legal	Legal	Legal (no opt out) 1175(b)(2)(c)	Legal (no opt out) 1175(b)(2)(c)
	State	Illegal? DoJ Opinion	Illegal? Casino Ventures	Legal (No Opt Out)	Legal (No Opt Out)
International Non-U.S. to Non-U.S.		**Foreign**	**US**	**Foreign**	**US**
	Federal	Legal	Illegal (for US owned)? 1082 DoJ Guidelines	N/A	N/A
	State	No Jurisdiction	No Jurisdiction	N/A	N/A