LAW OF THE SLOT MACHINE

2011

Federal Law Issues – The Johnson Act & Cruise Ship Gaming Devices

In the 1940s, gambling devices were quite common despite local and state laws that prohibited the possession and use of such machines. In 1950, in an effort to crack down on organized crime and gambling, the U.S. Congress enacted the Johnson Act.

The Johnson Act is provided below:

Chapter 24 Transportation of Gambling Devices (15 USC Sections 1171 to 1178)

Section 1117 – 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.

15 USC 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.

15 USC 1173 Registration of manufacturers and dealers

(a) Activities requiring registration; contents of registration statement (1) It shall be unlawful for any person engaged in the business of manufacturing gambling devices, if the activities of such business in any way affect interstate or foreign commerce, to manufacture any gambling device during any calendar year, unless, after November 30 of the preceding calendar year, and before the date on which such device is manufactured, such person has registered with the Attorney General under this subsection, regardless of whether such device ever enters interstate or foreign commerce.

(2) It shall be unlawful for any person during any calendar year to engage in the business of repairing, reconditioning, buying, selling, leasing, using, or making

available for use by others any gambling device, if in such business he sells, ships, or delivers any such device knowing that it will be introduced into interstate or foreign commerce after the effective date of the Gambling Devices Act of 1962, unless, after November 30 of the preceding calendar year, and before the date such sale, shipment, or delivery occurs, such person has registered with the Attorney General under this subsection.

(3) It shall be unlawful for any person during any calendar year to engage in the business of repairing, reconditioning, buying, selling, leasing, using, or making available for use by others any gambling device, if in such business he buys or receives any such device knowing that it has been transported in interstate or foreign commerce after the effective date of the Gambling Devices Act of 1962, unless, after November 30, of the preceding calendar year and before the date on which he buys or receives such device, such person has registered with the Attorney General under this subsection.

(4) Each person who registers with the Attorney General pursuant to this subsection shall set forth in such registration (A) his name and each trade name under which he does business, (B) the address of each of his places of business in any State or possession of the United States, (C) the address of a place, in a State or possession of the United States in which such a place of business is located, where he will keep all records required to be kept by him by subsection (c) of this section, and (D) each activity described in paragraph (1), (2), or (3) of this subsection which he intends to engage in during the calendar year with respect to which such registration is made.

(b) Numbering of devices (1) Every manufacturer of a gambling device defined in paragraph (a)(1) or (a)(2) of section 1171 of this title shall number seriatim each such gambling device manufactured by him and permanently affix on each such device, so as to be clearly visible, such number, his name, and, if different, any trade name under which he does business, and the date of manufacture of such device.

(2) Every manufacturer of a gambling device defined in paragraph (a)(3) of section 1171 of this title shall, if the size of such device permits it, number seriatim each such gambling device manufactured by him and permanently affix on each such device, so as to be clearly visible, such number, his name, and, if different, any trade name under which he does business, and the date of manufacture of such device.

(c) Records; required information (1) Every person required to register under subsection (a) of this section for any calendar year shall, on and after the date of such registration or the first day of such year (whichever last occurs), maintain a record by calendar month for all periods thereafter in such year of -

(A) each gambling device manufactured, purchased, or otherwise acquired by him, (B) each gambling device owned or possessed by him or in his custody, and (C) each gambling device sold, delivered, or shipped by him in intrastate, interstate, or foreign commerce.

(2) Such record shall show -

(A) in the case of each such gambling device defined in paragraph (a)(1) or (a)(2) of section 1171 of this title, the information which is required to be affixed on such gambling device by subsection (b)(1) of this section; and (B) in the case of each such gambling device defined in paragraph (a)(3) of section 1171 of this title, the information required to be affixed on such gambling device by subsection (b)(2) of this section, or, if such gambling device does not have affixed on it any such information, its catalog listing, description, and, in the case of each such device owned or possessed by him or in his custody, its location.

Such record shall also show (i) in the case of any such gambling device described in paragraph (1)(A) of this subsection, the name and address of the person from whom such device was purchased or acquired and the name and address of the carrier; and (ii) in the case of any such gambling device described in paragraph (1)(C) of this subsection, the name and address of the buyer and consignee thereof and the name and address of the carrier.

(d) Retention of records Each record required to be maintained under this section shall be kept by the person required to make it at the place designated by him pursuant to subsection (a)(4)(C) of this section for a period of at least five years from the last day of the calendar month of the year with respect to which such record is required to be maintained.

(e) Dealing in, owning, possessing, or having custody of devices not marked or numbered; false entries in records (1) It shall be unlawful (A) for any person during any period in which he is required to be registered under subsection (a) of this section to sell, deliver, or ship in intrastate, interstate, or foreign commerce or own, possess, or have in his custody any gambling device which is not marked and numbered as required by subsection (b) of this section; or (B) for any person to remove, obliterate, or alter any mark or number on any gambling device required to be placed thereon by such subsection (b).

> (2) It shall be unlawful for any person knowingly to make or cause to be made, any false entry in any record required to be kept under this section.

(f) Authority of Federal Bureau of Investigation Agents of the Federal Bureau of Investigation shall, at any place designated pursuant to subsection (a)(4)(C) of this section by any person required to register by subsection (a) of this section, at all reasonable times, have access to and the right to copy any of the records required to be kept by this section, and, in case of refusal by any person registered under such subsection (a) to allow inspection and copying of such records, the United States district court for the district in which such place is located shall have jurisdiction to issue an order compelling production of such records for inspection or copying.

15 USC 1174 Labeling and marking of shipping packages

All gambling devices, and all packages containing any such, when shipped or transported shall be plainly and clearly labeled or marked so that the name and address of the shipper and of the consignee, and the nature of the article or the contents of the package may be readily ascertained on an inspection of the outside of the article or package.

15 USC 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.

15 USC 1178 Nonapplicability of chapter to certain machines and devices

None of the provisions of this chapter shall be construed to apply -

(1) to any machine or mechanical device designed and manufactured primarily for use at a racetrack in connection with parimutuel betting, (2) to any machine or mechanical device, such as a coin-operated bowling alley, shuffleboard, marble machine (a so-called pinball machine), or mechanical gun, which is not designed and manufactured primarily for use in connection with gambling, and (A) which when operated does not deliver, as a result of the application of an element of chance, any money or property, or (B) by the operation of which a person may not become entitled to receive, as the result of the application of an element of chance, any money or property, or (3) to any so-called claw, crane, or digger machine and similar devices which are not operated by coin, are actuated by a crank, and are designed and manufactured primarily for use at carnivals or county or State fairs.

DEFINITIONS OF A GAMBLING DEVICE

As originally enacted, the Johnson Act targeted only traditional slot machines. This changed when the law was amended in the 1960s crusade against organized crime to expand its coverage to all "gambling devices,"which now includes, in addition to traditional slots:

> *any other machine or mechanical device (including roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, . . . which when operated may deliver [or entitle a person to receive], as the result of the application of an element of chance, any money or property.*

This definition is expansive. Besides traditional slot machines, it includes electronic machines that offer video versions of poker, blackjack, keno, and slot and even pinball machines designed to record free play "credits" that could be converted to cash. The term also includes non-electronic devices used to determine the outcome of a wager like roulette wheels.

The Act's reach, however, is limited to mechanical and electronic devices. It does not include non-mechanical devices like pull-tab cards.

213 F.2d 918 (1954)

UNITED STATES v. TWELVE MIAMI DIGGER SLOT MACHINES.

No. 14576.

United States Court of Appeals Fifth Circuit.

June 25, 1954.

[213 F.2d 919]

Henry E. Petersen, Atty. Dept. of Justice, Washington, D. C., Chester H. Curtis, Asst. U. S. Atty.,

Clarksdale, Miss., Noel H. Malone, U. S. Atty., Aberdeen, Miss., for appellant.

Will A. Hickman, R. L. Smallwood, Jr., Chester L. Sumners, Oxford, Miss., for appellee.

Before BORAH and RUSSELL, Circuit Judges, and DAWKINS, District Judge.

BORAH, Circuit Judge.

On August 22, 1952, the United States filed a libel to forfeit twelve Miami Digger Slot Machines seized by Federal Bureau of Investigation agents from a building in Winona, Mississippi. The machines were transported from Florence, Alabama, to Winona, Mississippi, and were alleged to be gambling devices within the meaning of Section 1171,1 Title 15 U.S.C.A., that had been transported in interstate commerce in violation of Section 1172, Title 15 U.S. C.A., and therefore were subject to seizure and forfeiture under the provisions of Section 1177, Title 15 U.S.C.A.

Ernie G. Collins filed an answer and claim in the forfeiture proceedings denying that the machines were gambling machines and that he knowingly transported said machines in interstate commerce with the intent to violate the law.

When the present libel was filed there was pending in the same court criminal cause No. 8278 in which Collins was charged with transporting the same gambling devices in violation of Section 1172, supra. The defendant waived a jury in the criminal proceeding and by agreement the two causes were consolidated for trial. At the termination of the trial, the court below found the defendant not guilty on the criminal charge and dismissed the libel, finding that the twelve machines were gambling devices as defined by the statute but that Collins had not "knowingly" transported them within the meaning of Section 1172, supra. From this judgment of dismissal the United States has appealed.

Section 1172, supra, prohibits transportation of gambling devices in interstate commerce except to any state which exempts itself or its subdivision by state law,2 and § 1177 authorizes forfeiture

[213 F.2d 920]

of devices transported in violation of the Act.3 The court below held that the digger machines in suit were gambling devices and by the admission of claimant it affirmatively appears that the machines were transported in interstate commerce from Florence, Alabama, to Winona, Mississippi. Thus the only question for our determination is whether the court erred in holding that the gambling machines were not "knowingly" transported in interstate commerce. We think this question must be answered in the affirmative.

The uncontroverted evidence shows: that claimant was operating these machines in Florence, Alabama, on Saturday, September 22, 1951, in connection with a carnival known as the Gem City Shows; that claimant was aware of the passage of the Johnson Act (the statute under consideration) and that it prohibited the transportation of slot machines across state lines; that on the evening of September 22, 1951, claimant received a telephone call from a Mr. Parker who informed claimant that similar machines had been seized in North Carolina and that claimant should not set up his machines any more; that claimant made no effort to store the machines in Florence, Alabama, but packed up the machines and transported them to Columbus, Mississippi, on Sunday, September 23, 1951; that upon his arrival in Columbus, claimant set up his other concessions with the carnival but not the digger machines; that on September 25, 1951, and after first securing permission from Gentsch whom he had known for fifteen years he moved the machines to Winona, Mississippi, and stored them in Gentsch's barn where they were later seized by Federal Bureau of Investigation agents.

During the course of his testimony Collins stated that he thought all carnival games had been exempted from the operation of the Act but that when he received the telephone call from Parker a doubt arose in his mind. And because of this doubt he figured that as long as there was a dispute about operating the machines it would be a good idea to move them over to Gentsch's place and that he had no intention of setting them up in Mississippi or any other state until the question was settled.

The district judge construed the word "knowingly" in the statute to mean "intentionally violate the law." With this construction in mind he declared: "I think it is perfectly clear from the testimony that as soon as this man who is here accused, found out they were considered gambling machines and it was against the law to operate them or transport them in Interstate Commerce, he did not move them into the State of Mississippi or take them from Columbus, [213 F.2d 921] Mississippi, to Winona with any intention to violate the law or do anything in the world but to put them over there, in storage and await an authoritative decision, with no intention of doing anything in violation of any law. * * * I do not think there was any intention to operate these machines after this man found out they were considered to be violating the law if they were transported and operated." And in concluding that the defendant-claimant had not violated either the criminal or the civil law the district judge based his decision "not on the ground that these were not gambling machines and not on the ground that they were not actually transferred across a state line, but on the ground they were not transferred with intent to violate the law, but with the intention to keep within the law until the law could be clarified."

In our opinion, the district court committed reversible error in dismissing the libel. Its view of the applicable law was based upon the misconceived notion that the machines though gambling devices were not subject to forfeiture because claimant did not transport the machines across state lines with any intention of operating them. Whether or not complainant intended to operate the gambling devices in Mississippi is beside the point. The statute contains not one word about the operation of the devices after they have crossed the state line. Section 1172 provides that it shall be unlawful knowingly to transport any gambling device in interstate commerce, and, if this provision of the statute is violated § 1177 provides that the device shall be seized and forfeited to the United States. The issue here presents a question of statutory construction. The word "knowingly" plainly speaks its own meaning. As used in this statute the adverb "knowingly" qualifies both its adjacent verb and the full act thereafter described.4

The questions are: Did claimant know that he was transporting the machines in interstate commerce and did he know that the machines transported were gambling devices? The evidence is all one way and to the effect that claimant knowingly transported the twelve machines from Alabama to Mississippi and we think the evidence convincingly shows that claimant "knew" that the machines which he transported were gambling devices. Claimant had thirty-eight years of experience in the carnival business. He had used digger machines in his business for fifteen years and was familiar with their mechanism and mode of operation and knew that the machines were operated by the insertion of a coin. He knew of the passage of the Johnson Act and was under the impression that the Act had in some way been revised so as to exempt carnival games. However, he later learned that machines similar to the ones he was using had been seized by the Government in North Carolina and Parker from whom he had leased the machines told him not to operate the machines any more. Under these circumstances it is plain that claimant had full knowledge of all of the facts and circumstances that go to make up the fact that the machines were gambling devices. We think the evidence was not only sufficient but compels a finding that the gambling machines were knowingly5 transported in interstate commerce.

The judgment must be reversed, and the machines here involved must be ordered forfeited to the United States of America.

Reversed and remanded with directions to order forfeiture in accord herewith.

Notes:

1 The provisions of Title 15 U.S.C.A. § 1171, are: "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 machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property; * * *."

2 In pertinent part: "It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, 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. * * *" 64 Stat. 1134, 15 U.S.C.A. § 1172.

3 "Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this Act shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs law; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as applicable and not inconsistent with the provisions hereof: Provided, That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of gambling devices under this Act by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General." 64 Stat. 1135, 15 U.S. C.A. § 1177.

4 United States v. Clark, C.C., 37 F. 106, 107.

5 Cf. Federal Deposit Insurance Corporation v. Mason, 3 Cir., 115 F.2d 548, 550; U. S. v. Starkey, D.C., 52 F.Supp. 1.

Subassemblies

Subassemblies and "essential parts" associated with a gambling device are themselves gambling devices, as are ancillary devices "intended to be used in connection with any such machine . . . but which is not attached to any such machine

. . . as a constituent part."[1] Evidence that subassembly is intended to be placed ultimately in a gambling device is sufficient to sustain a violation under the Act even if the part could be used for non-gaming purposes.

Partially Assembled, Disassembled and Sanitized Devices

The purpose for which it was *originally* designed and manufactured, not its function at the time of seizure, determines whether a particular machine is subject to the Gambling Devices Act. Consequently, machines designed to function as gambling devices, but subsequently modified or "sanitized" to preclude gambling functions, remain gambling devices subject to the Act.[2]

Federal courts have not directly addressed whether partially assembled machines that could be finished either for non-gambling or gambling use are gambling devices subject to the Act. The one modern court to rule directly on the Act's applicability to inoperative, disassembled video poker machines indicated the determination of whether it is a gambling device centers on the manufacturer's intent at the time it designs and builds the machine, rather than the physical condition or actual use of the machine at the time of seizure.[3]

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1 15 U.S.C. ' 1171(a)(3); *United States v. Ansani*, 138 F. Supp. 451 (D. Ill. 1955); 240 F.2d 216 (6th Cir.), *cert. den*., 353 U.S. 936 (1957) (interstate transport of subassemblies violates Section 1172); *see also United States v. Two Quarter Fall Machines*, 767 F. Supp. 191 (E.D. Tenn. 1991) (even if machines were legally manufactured in Tennessee, where various parts were manufactured elsewhere, components shipped into state were gambling devices subject to forfeiture because of the interstate transportation).

2 *United States v. 19 Automatic Pay-Off Pin Ball Machines*, 113 F. Supp. 230 (D. La. 1953) (pinball machines that had been used for gambling purposes before payoff devices were removed remained subject to forfeiture under the Act); *see also United States v. 137 Draw Poker-Type Machines*, 606 F. Supp. 747 (N.D. Ohio 1984), *aff'd*, 765 F.2d 147 (6th Cir. 1985); *United States v. 24 Digger Merchandising Machines*, 202 F.2d 647 (8th Cir.), *cert. den*., 73 S. Ct. 1140 (1953); *United States v. Ansani*, 240 F.2d at 220; *United States v. Three (3) Trade Boosters*, 135 F. Supp. 24 (D. Pa. 1955).

3 *United States v. Two-Hundred-Ninety-Four Gambling Devices*, 731 F. Supp. 1246, 1248 (W.D. Pa. 1990).

Gambling Ship Act

18 USC 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.

18 USC 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."

UNITED STATES of America, Plaintiff-Appellant,
v.
ONE BIG SIX WHEEL, Defendant-Appellee.

No. 497, Docket 98-6028.

United States Court of Appeals,
Second Circuit.

Argued Oct. 23, 1998.
Decided Jan. 29, 1999.

Lauren Resnick, Assistant United States Attorney, Brooklyn, N.Y. (Zachary W. Carter, United States Attorney, Eastern District of New York; Susan Corkery, Assistant United States Attorney, on the brief), for Plaintiff-Appellant.

Gerard E. Harper, New York, N.Y. (Michael E. Gertzman, Roberto Finzi, Paul, Weiss, Rifkind, Wharton & Garrison, on the brief), for Defendant-Appellee.

Before: NEWMAN and JACOBS, Circuit Judges, and BURNS, District Judge. *

JACOBS, Circuit Judge:

The Gambling Ship Act, codified at 18 U.S.C. §§ 1081-1084 (1994), prohibits offshore gaming except on certain voyages beyond "the territorial waters of the United States." 18 U.S.C. § 1081; see 18 U.S.C. § 1082. This in rem civil forfeiture action, brought by the United States against a shipboard gambling device, requires us to decide whether the recent expansion of "federal criminal jurisdiction" from three to twelve

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nautical miles--by section 901(a) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, § 901(a), 110 Stat. 1214, 1317 (1996), reprinted in 18 U.S.C.A. § 7, Hist. & Stat. Notes (West Supp.1998)--has implicitly amended the Gambling Ship Act in such a way as to criminalize casino gambling (conducted on a so-called cruise-to-nowhere) between three and twelve nautical miles at sea.

The United States District Court for the Eastern District of New York (Ross, J.)--after carefully reviewing the wording of (i) the Gambling Ship Act, (ii) a provision of the Internal Revenue Code incorporated therein by reference, and (iii) the relevant tax regulation--invoked the rule of lenity and dismissed the government's complaint. We are sufficiently persuaded by the statutory language, and the district court's analysis of it, that we affirm on that basis without reliance on the last-resort rule of lenity.

BACKGROUND

The defendant in rem, Big Six Wheel, is a gambling device on board the Liberty I, a seagoing vessel owned and operated by Bay Casino, LLC. Bay Casino operates gambling cruises (cruises-to-nowhere) that embark from Sheepshead Bay in Brooklyn, New York and proceed more than three--but less than twelve--nautical miles from the coastline of the United States, to a spot at which the ship operates as a casino until the return voyage to Sheepshead Bay.

At one time, the Gambling Ship Act flatly prohibited gambling aboard American-flag vessels engaging in interstate and foreign commerce, anywhere. See 18 U.S.C.A. §§ 1081-1082 (West 1984). The existence of the cruise-to-nowhere industry depends upon a 1994 amendment to the Act, which created exceptions for vessels on certain cruises, defined by reference to a provision of the Internal Revenue Code as of 1994 that levies a tax on the gambling revenues of such cruises. See Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, § 320501, 108 Stat. 1796, 2114-15 (1994) (amending 18 U.S.C. § 1081). In 1994, the Internal Revenue Code defined such cruises as (inter alia) those that return within 24 hours to their port of embarkation and conduct gambling (subject to federal taxation) "beyond the territorial waters of the United States." 26 U.S.C. § 4472 (1994). Under the corresponding Internal Revenue regulation in effect in 1994, the territorial waters of the United States extended to three nautical miles. See 26 C.F.R. § 43.4472-1(e) (1994).

In August 1997, the United States Attorney for the Eastern District of New York notified Bay Casino that its operations were in violation of the Gambling Ship Act because its ships were not cruising twelve nautical miles to sea before opening the casino. The United States Attorney cited section 901(a) of AEDPA, which provides:

The Congress declares that all the territorial sea of the United States, as defined by Presidential Proclamation 5928 of December 27, 1988 [extending U.S. territorial sea to twelve nautical miles [1]], for purposes of Federal criminal jurisdiction is part of the United States, subject to its sovereignty, and is within the special maritime and territorial jurisdiction of the United States for the purposes of title 18, United States Code [this title].

18 U.S.C.A. § 7, Hist. & Stat. Note (West Supp.1998) (first alteration and footnote added). Bay Casino, which disputed the United States Attorney's reading of the Gambling Ship Act, nevertheless attempted to comply with the twelve-mile limit, but suffered significant revenue loss because many patrons were unwilling to invest the incremental travel time (without gambling) to and from the twelve-mile limit.

Bay Casino commenced a federal action seeking declaratory relief construing the Act,

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and an injunction restraining the United States from interfering with its gambling cruises. At the district court's suggestion, the parties recast their dispute as a civil forfeiture proceeding by the United States against the defendant in rem, Big Six Wheel. Immediately after the government filed its forfeiture complaint, Bay Casino moved to dismiss. The district court granted Bay Casino's motion on December 3, 1997. See United States v. One Big Six Wheel, 987 F.Supp. 169, 182 (E.D.N.Y.1997). The government appeals.

DISCUSSION

The district court concluded that AEDPA had an uncertain effect on the Gambling Ship Act's exception for vessels aboard which gambling takes place beyond three nautical miles, and therefore applied the rule of lenity. See id. at 178-82. We are sufficiently convinced by the district court's statutory analysis, however, that we find resort to the rule of lenity unnecessary. See United States v. Hescorp, Heavy Equip. Sales Corp., 801 F.2d 70, 77 (2d Cir.1986) ("[The rule of lenity] is a doctrine of last resort, to be used only after the traditional means of interpreting authoritative texts have failed to dispel any ambiguities."); see also United States v. Turkette, 452 U.S. 576, 587 n. 10, 101 S.Ct. 2524, 2531 n. 10, 69 L.Ed.2d 246 (1981); United States v. Culbert, 435 U.S. 371, 379, 98 S.Ct. 1112, 1116-17, 55 L.Ed.2d 349 (1978).

A

The Gambling Ship Act criminalizes the operation of gambling ships. See 18 U.S.C. § 1082. But the term "gambling ship" is defined to exclude ships that operate casinos on certain cruises, which are in turn defined by reference to a revenue statute (as that revenue statute was worded on a specified date):

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).

18 U.S.C. § 1081. Thus a "covered voyage" is one that is made subject to taxation in the Internal Revenue Code and (reciprocally) not covered by the criminal statute, which expressly defines a gambling ship to exclude a vessel on a covered voyage. On January 1, 1994 (and today), the section of the Internal Revenue Code cross-referenced in 18 U.S.C. § 1081 defined a "covered voyage" as follows:

The term "covered voyage" means that 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.

26 U.S.C. § 4472(1)(A) (emphasis added). The emphasized portion of this statute defines a "covered voyage" in terms of travel "beyond the territorial waters of the United States," which (according to the United States) is now twelve nautical miles. However, the Gambling Ship Act cross-references this section of the revenue code "as in effect on January 1, 1994." As of that date (and to the present), the term "territorial waters" was defined as three nautical miles in the applicable regulation promulgated by the Internal Revenue Service:

Territorial waters. For purposes of sections 4471 and 4472, the territorial waters of the United States are those waters within the international boundary line between the United States and any contiguous foreign country or within 3 nautical miles (3.45 statute miles) from low tide on the coastline. No inference is intended as to the extent of the territorial limits for other tax purposes.

26 C.F.R. § 43.4472-1(e) (1994 & 1998) (emphasis added).

Therefore, a "covered voyage" under 26 U.S.C. § 4472(1)(A) (and the regulation promulgated thereunder) includes "that voyage

of ... a commercial vessel transporting passengers engaged in gambling aboard the vessel" beyond three nautical miles from the U.S. coastline "during which passengers embark or disembark the vessel in the United States." 26 U.S.C. § 4472(1)(A). By virtue of the cross-reference to 26 U.S.C. § 4472 in the 1994 amendment to the Gambling Ship Act, 18 U.S.C. § 1081, a "covered voyage" for purposes of the Gambling Ship Act is a "covered voyage" as defined in 26 U.S.C. § 4472 as in effect on January 1, 1994. See Lorillard v. Pons, 434 U.S. 575, 581, 98 S.Ct. 866, 870, 55 L.Ed.2d 40 (1978) ("[W]here ... Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the [administrative] interpretation given to the incorporated law, at least insofar as it affects the new statute."); see also Hassett v. Welch, 303 U.S. 303, 312-14, 58 S.Ct. 559, 564-65, 82 L.Ed. 858 (1938). Liberty I--a commercial vessel transporting passengers who engage in gambling beyond three nautical miles from low tide on the U.S. coastline (from which Liberty I embarks and to which it returns)--is engaged in covered voyages, and is therefore not a gambling ship.

B

The government argues that the Gambling Ship Act incorporates by reference the Internal Revenue Code's definition of a "covered voyage," but does not look to the Internal Revenue Code to determine the extent of the nation's "territorial waters," a term used in both statutes. Instead, the government argues that the term "territorial waters" in both statutes has been affected by section 901(a) of AEDPA, as set forth supra. We disagree.

The wording of § 1081 does not on its face show whether the phrase "as defined in section 4472 of the Internal Revenue Code of 1986 as in effect on January 1, 1994" modifies only the phrase "covered voyage" (as the government argues), or whether (as Bay Casino argues) it modifies the larger phrase "gambling aboard such vessel beyond the territorial waters of the United States during a covered voyage." 18 U.S.C. § 1081 (emphasis added). The government has a point. One definition of a covered voyage in § 4472(1)(A) does not reference territorial waters at all ("that voyage of--(i) a commercial passenger vessel which extends over 1 or more nights," 26 U.S.C. § 4472(1)(A)(i)). At the same time, however, it is clear enough that (i) a vessel on a "covered voyage" within the meaning of § 4472(1)(A) as of January 1, 1994 is not a gambling ship, (ii) the other definition of a covered voyage in § 4472(1)(A) looks to whether a voyage is within the territorial waters, see 26 U.S.C. § 4472(1)(A)(ii); and (iii) on January 1, 1994, that distance was three nautical miles, see 26 C.F.R. § 43.4472-1(e).

The government contends that section 901(a) of AEDPA implicitly amended the Gambling Ship Act by extending the territorial waters, so that Liberty I was operating as a gambling ship even though it was on a covered voyage for revenue purposes. The government claims too much for AEDPA. Section 901(a) references Presidential Proclamation 5928, which in 1988 extended the United States territorial waters to twelve nautical miles for the limited purpose of conforming to the territorial limits then permitted by international law. However, the Proclamation explicitly limits its application by declaring that "[n]othing in this Proclamation ... extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom...." 43 U.S.C.A. § 1331 (West Supp.1998).

Section 901(a) alters United States boundaries, but not for all purposes. Although the increment of territorial waters is made "part of the United States," this occurs solely "for purposes of Federal

criminal jurisdiction." 18 U.S.C.A. § 7, Hist. & Stat. Note. Although that same increment is implemented "for the purposes of title 18," that measure is itself limited to "the special maritime and territorial jurisdiction of the United States." Id. Therefore, section 901 is jurisdiction defining. As the district court observed, to infer more would be to "read the phrase 'for purposes of Federal criminal jurisdiction' out of the statute." One Big Six Wheel, 987 F.Supp. at 175.

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Thus, as the district court further observed, the government's argument ignores the "real distinctions between a jurisdictional element of a crime and a substantive element. The distinction important in this case is that a jurisdictional element does not define the essence of what constitutes a criminal offense, and does not contribute to the culpability of the proscribed conduct." Id. (emphasis in original).

As the history of the Gambling Ship Act demonstrates, offshore gambling is not conduct malum per se (like money laundering, narcotics distribution, etc.). There is no indication that Congress now intends to prohibit shipboard casinos to the full extent of the nation's territorial reach. The 1994 amendment to § 1081 effected a narrowing of the previously absolute prohibition. And the term "territorial waters" used therein is not coextensive with the extent of the nation's criminal jurisdiction; rather, it specifies geographically where a certain kind of offshore gambling is a criminal activity and where it is licit. However one expands the territory in which one's conduct might be proscribed as an offense against the United States, that territorial expansion does not criminalize offshore gambling that the Gambling Ship Act itself does not forbid.

Further, as the district court opinion notes, the government's argument leads to an inherent conflict between the terms "territorial waters" and "covered voyage," such that a gambling cruise could travel three nautical miles to constitute a covered voyage under the Internal Revenue Code, but would have to travel twelve nautical miles to avoid criminal liability under the Gambling Ship Act. See id. at 178. But there is nothing in the plain language of AEDPA that indicates an intention to abolish the covered voyage exception in 18 U.S.C. § 1081 or to amend 26 U.S.C. § 4472 or 26 C.F.R. § 43.4472-1(e). See Morton v. Mancari, 417 U.S. 535, 550-551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); Greene v. United States, 79 F.3d 1348, 1355 (2d Cir.1996) ("When two statutes are in conflict, that statute which addresses the matter at issue in specific terms controls over a statute which addresses the issue in general terms, unless Congress has manifested a contrary aim.") (citing American Land Title Ass'n v. Clarke, 968 F.2d 150, 157 (2d Cir.1992)). Given the plain language of AEDPA and the Gambling Ship Act, we read both terms consistently. For purposes of the Gambling Ship Act, until Congress says otherwise, the "territorial waters" extend three nautical miles from the U.S. coastline.

CONCLUSION

For the aforementioned reasons, we affirm the district court's dismissal of the civil forfeiture action.

27 F.3d 137

1995 A.M.C. 111

UNITED STATES of America, Plaintiff-Appellee,
v.
Tommy D. MONTFORD, Gregory Adamavich and Daniel Adamavich,
Defendants-Appellants.

No. 93-7094.

United States Court of Appeals,
Fifth Circuit.

July 14, 1994.

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W. Eugene Henry, Biloxi, MS (Court-appointed), for G. Adamavich.

R. Wayne Woodall, Gulfport, MS, Daniel Adamavich, Oxford, WI, Lindsay C. Patterson, Jackson, MS (Court-appointed), for D. Adamavich.

Chester D. Nicholson, Gulfport, MS (Court-appointed), for Montford.

Richard T. Starrett, Peter H. Barrett, Asst. U.S. Attys., George Phillips, U.S. Atty., Jackson, MS, for appellee.

Appeals from the United States District Court for the Southern District of Mississippi.

Before REAVLEY, JONES and BENAVIDES, Circuit Judges.

REAVLEY, Circuit Judge:

In this appeal we address whether gambling boat excursions a few miles offshore to avoid the reach of state law are in "foreign commerce" for purposes of certain federal criminal statutes. We conclude that such travels do not amount to foreign commerce, and therefore reverse appellants'

convictions.

BACKGROUND

The Europa Jet, an American owned, Bahamian flagged vessel, operated as a "cruise to nowhere" gambling ship out of Gulfport, Mississippi. The ship offered its passengers casino gambling. It would travel briefly beyond three miles offshore on each excursion in order to avoid the reach of Mississippi state law. During these gambling trips the vessel never docked at a foreign port or ventured anywhere close to the territorial waters of a foreign country.

The government contended through indictment and trial that appellants Tommy Montford, Gregory Adamavich and Daniel Adamavich were bookies who took illegal bets on football games that were communicated onshore through the use of a cellular phone aboard the Europa Jet. Montford and Gregory Adamavich worked on the vessel, solicited bets from others on the vessel, and then communicated onshore with the cellular phone. Daniel Adamavich received some of these calls and engaged in a bookmaking operation at an onshore site in Mississippi. The three appellants and two other defendants were indicted on various counts of conspiring to violate and violating 18 U.S.C. Secs. 1084 and 1952(a)(3). Each appellant was convicted on some counts.

DISCUSSION

"When a federally created crime involves an area traditionally left to the domain of the states, the jurisdictional authority of the United States becomes a crucial part of the proof.... [I]t has been uniformly held that the basis for federal jurisdiction is an essential element of the offense." United States v. McRary, 665 F.2d 674, 678-79 (5th Cir. Unit B), cert. denied, 456 U.S. 1011, 102 S.Ct. 2306, 73 L.Ed.2d 1307 (1982). Hence, a violation of the Travel Act, 18 U.S.C. Sec. 1952, requires travel in interstate or foreign commerce or use of a facility in interstate or foreign commerce. [1] Similarly, an essential element of 18 U.S.C. Sec. 1084 is

the transmission of bets or wagers in interstate or foreign commerce. [2] The government makes no argument that the cellular phone calls from the Europa Jet to onshore sites in Mississippi involved interstate commerce. [3] The jury was only instructed on foreign commerce. [4] The case turns, therefore, on whether the vessel travelled in foreign commerce. We cannot uphold a conviction "when the jury is instructed on only one jurisdictional ground which is contradicted by the evidence." McRary, 665 F.2d at 680.

The parties here disagree on whether the vessel ever entered international waters, [5] and appellants argue that there was no proof that the calls were made while the vessel was past the three-mile mark. Our decision does not turn on these issues. Instead, we hold that a "cruise to nowhere," where the vessel has no contact whatsoever with a foreign country or waters within the jurisdiction of a foreign country, and where indeed no such contact is intended, does not involve foreign commerce.

We begin our analysis by looking to relevant statutes. 18 U.S.C. Sec. 10 provides: "The term 'foreign commerce,' as used in this title, includes commerce with a foreign country." Of course this statute does not end our inquiry, since it does not state that foreign commerce is limited exclusively to commerce with a foreign country. The current Sec. 10 consolidated and recodified prior provisions

of Title 18. "Section 10 first appeared in the 1948 recodification of Title 18 ... and the Revisor's Notes to that section state that it 'consolidates into one section identical definitions contained sections 408, 408b, 414(a) and 419a(b)....' " United States v. Goldberg, 830 F.2d 459, 467-68 (3d Cir.1987) (Sloviter, J., dissenting in part). In these prior provisions "interstate or foreign commerce" was consistently defined to include "transportation from one State, Territory or the District of Columbia to another State, Territory, or the District of Columbia, or to a foreign country; or from a foreign country to any State, Territory, or the District of Columbia." Id. at 468; McRary, 665 F.2d 674. These prior definitions further suggest that Congress intended foreign commerce to mean travel to or from, or at least some form of

contact with, a foreign state. See Goldberg, 830 F.2d at 468 ("The Revisor's Notes refer to 'slight improvements in style' in the recodified version. However, there is no indication that Congress intended to broaden the definitions of 'foreign commerce'...."); McRary, 665 F.2d at 678 n. 6 ("Section 2 of the Lindbergh law was apparently consolidated into 18 U.S.C. Sec. 10, which was enacted in 1948 to combine the scattered definitions of interstate and foreign commerce. The mere consolidation by the 1948 Revisors, of course, is not evidence of a change in legislative intent.").

We do not mean to suggest that Congress could not criminalize the conduct in question if it chose to do so. We note that the general provisions of Title 18 include a separate statute defining the "special maritime and territorial jurisdiction of the United States." 18 U.S.C. Sec. 7 defines that term to include:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof ... when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

* * * * * *

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

Several federal criminal statutes cover acts within the special maritime and admiralty jurisdiction of the United States. E.g. 18 U.S.C. Secs. 81 (arson), 113 (assault), 1111 (murder). The criminal statutes under which appellants were convicted, 18 U.S.C. Secs. 1952 and 1084, do not contain such a jurisdictional basis.

The Lindbergh law covers kidnapping occurring both in foreign commerce and within the special maritime and territorial jurisdiction of the United States. 18 U.S.C. Sec. 1201(a)(1), (2). In McRary, we held that a kidnapping which involved an abduction on the high seas and transportation of the victim to Cuba did not involve foreign commerce. Our holding states "that the foreign commerce jurisdictional basis mandates that the kidnapping take place in the United States and that the victim be subsequently transported to a foreign State." McRary, 665 at 678. Later, in United States v. De La Rosa, 911 F.2d 985 (5th Cir.1990), we held that the foreign commerce jurisdictional basis of the kidnapping statute is sufficiently broad to cover an abduction in a foreign country and subsequent transportation to the United States. Id. at 989 (1990). We similarly held, in Londos v. United States, 240 F.2d 1 (5th Cir.1957), that transportation of a counterfeit security from a foreign country to the United States was transportation in foreign commerce under 18 U.S.C. Sec. 2314. While none of these cases are controlling here, they all support our conclusion that foreign commerce requires some form of contact with a foreign state.

Fifth Pattern Jury Instruction 1.38, followed by the district court in its charge, provides: "Foreign commerce means commerce or travel between any part of the United States and any place outside the United States." [6] While one of our own pattern jury instructions certainly should be treated as persuasive authority, we believe that this definition is too broad when applied to our case, based on the discussion above.

Convictions REVERSED and acquittals ordered.

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1 Criminal liability under Sec. 1952 "requires proof of (1) travel in interstate or foreign commerce, (2) specific intent to promote, manage, establish, carry on, or distribute the proceeds of 'unlawful activity,' and (3) knowing and willful commission of an act in furtherance of that intent after the act

of travel." United States v. Abadie, 879 F.2d 1260, 1266 (5th Cir.), cert. denied, 493 U.S. 1005, 110 S.Ct. 569, 107 L.Ed.2d 563 (1989).

2 The elements of the offense are set out in Sec. 1084(a), which by its terms provides:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more that $10,000 or imprisoned not more than two years, or both.

3 The government obtained convictions under three counts of the indictment. Count 2, the Sec. 1084 count, only alleged foreign commerce, as did Count 3, the Travel Act count. Count 1, the conspiracy count, generally alleged both interstate and foreign commerce; however, all of the specific factual allegations in this count, including the alleged overt acts, were tied to cellular phone calls made on the Europa Jet during return trips from Gulfport, Mississippi to "International Waters" and back to Gulfport, which Count 1 characterized "use of cellular telephone facilities aboard the M/V Europa Jet while the vessel was engaged in foreign commerce...."

4 The jury was instructed that it could find a defendant guilty under Count 1 only if it found, inter alia, the use of "a wire communication facility for transmission in foreign commerce...." Similarly, the jury was instructed that it must find foreign commerce in order to convict under Counts 2 and 3. Foreign commerce was defined in the charge; interstate commerce was never defined.

5 The Europa Jet would travel briefly beyond the three-mile mark on each cruise. It did not travel beyond the twelve-mile mark. Historically, the territorial jurisdiction of the United States extends for three miles from the shore. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 692 n. 8, 109 S.Ct. 683, 692 n. 8, 102 L.Ed.2d 818 (1989); McRary, 665 F.2d at 676-67 & n. 4. McRary, decided in 1982, concluded that while a "contiguous zone" extends from three to twelve miles from shore, the waters beyond the three-mile territorial limit are part of the high seas. Id. Appellants argue that in December of 1988 President Reagan issued a proclamation extending the territorial sea of the United States to twelve miles from shore. Presidential Proclamation No. 5928, 3 C.F.R. 547 (1988). Hence, they contend that the Europa Jet never left the United States. The government argues that the proclamation extended the territorial sea only for foreign policy purposes, pointing out that the proclamation states that nothing in it "extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom...."

6 This particular instruction, unlike many of our other pattern jury instructions, cites no authority.